

Law 454

Conflicts

Robertson

- I. Choice of Law
- II. Jurisdiction
- III. Enforcement of Foreign Judgments

Stages in the Choice of Law Process

1. Characterization: what is the legal issue (tort, contract, etc.)?
↓
2. Selection of Choice of Law Rule(s): if action brought in AB, AB choice of law governs
↓
3. Application of the Choice of Law Rule(s): AB rules on tort = place where tort is committed
↓
4. Proof of Foreign Law (if the *Lex Causae* (law that governs the issue) is not the *Lex Fori* (law of the forum))
↓
5. Application of the *Lex Causae*: foreign law must be proved, if it governs

Note: Sometimes different laws may govern different aspects of the claim (i.e. quantum of damages may be governed by a different jurisdiction)

Example: H domiciled in ON, asset (house = immovable asset) in AB

1. **Characterization:** succession
2. **Immovable** = governed by location where prop is situated (AB)
3. Application of **AB rules** (skip Stage 4)
4. AB law governs = **AB Intestate Succession Act**

Characterization Summary

Succession:

- a) Movable = governed by domicile
- b) Immovable = governed by location where asset is situated
 - A mortgage may be considered a movable asset under property law or an immovable asset for conflict purposes (**Hogg**)

Validity of marriage:

- a) Essential validity (i.e. capacity) = governed by domicile
- b) Formal validity (i.e. parental consent) = governed by place marriage occurred

Substantive vs. procedural issues/statutes:

- a) Substantive = if *lex causae* applies, relevant statutes must be applied
 - **Limitations** (**Tofofon**, but see **Limitation Statutes Amendment Act**)
 - **Contract:** governed by place contract was created or choice of law clause (**T.D. Bank v. Martin**)
 - **Tort:** governed by the place the tort occurred
 - **Creditors' remedies** are usually substantive (**German Savings Bank** but see **AB Treasury Branches**)
 - Presumptions of **succession** (**Re Cohn**)
 - **Validity of security interest** / intangible property (**Canada Deposit Insurance**)
 - **Entitlement to damages**
 - **Pre-judgment interest** (**Somers v. Fournier**)
- b) Procedural = if *lex fori* applies, relevant statutes must be applied
 - **Remedies** (**Phrantzes v. Argenti**)
 - **Statute of Frauds** (**Leroux v. Brown**)
 - Law of **evidence** (**Re Cohn**)
 - **Priority of security interest** (**Canada Deposit Insurance**)
 - **Assessment of damages** (amount receivable)
 - **Cap on pecuniary damages** (**Somers v. Fournier**)
 - **Entitlement to costs** (**Somers v. Fournier**)

Chapter 1: Characterization

A. General

Hypo: First cousins domiciled in AB under 18 want to marry. Under AB law, under 18 must have parents' consent. They elope to Seattle where they do not need parents' consent but the state also does not allow first cousins to marry

Stages:

1. **Characterization:** validity of marriage (essential and formal validity)
 - (a) Issue of parental consent = matter of formal validity (governed by law of the place where individuals got married)
 - (b) Issue of whether first cousins can marry = matter of essential validity (domicile)

Issue (a) – Formal Validity

2. **Choice of law:** governed by law of the place of marriage
3. **Where they got married:** Seattle ∴ WA law governs, AB's requirement of parental consent is irrelevant
4. **Proof of Foreign Law:** need proof of WA law, court applies the law and finds that the marriage is not void
5. **Outcome:** *lex causae* is foreign law; do not need consent = marriage is formally valid

Issue (b) – Essential Validity

2. **Choice of law:** governed by domicile of individuals
3. **Location:** parties domiciled in AB
4. **Proof of law:** AB law does not need to be proved; under *AB Marriage Act*, first cousins can marry
5. **Outcome:** marriage is essentially valid and formally valid

Note: Marriage would not be valid under AB or WA law alone, but valid under these circumstances

- Characterization of the issue may effect the outcome
- Can also sue somewhere else to influence outcome

Example: contract instead of tort characterization may allow one to sue where one is normally barred (i.e. Quebec does not allow actions for tort for a motor vehicle accident)

1) Characterization:

- 1) Characterization is the first step in process
- 2) General rule: courts use its own law to characterize issue (*lex fori*)
- 3) Exception: *lex situs* (for immovable and movable property) (**Hogg**)
- 4) Courts are not bound to own laws when characterizing for conflicts purposes

Hogg v. Provincial Tax Commission (1941 Sask QB) **Movable/immovable**

• Mortgages over land situated in BC; deceased was domiciled in Sask, prop was in BC; could be movable prop (domicile) or immovable prop (where prop was situated)

Issue: What law governs mortgages? If Sask, subject to Sask tax

Held: Considered immovable prop for conflict purposes = governed by BC law

- 1) “[W]hether certain property is movable or immovable must be determined by the law of the country where it is situated”
- 2) Under property law, a mortgage is treated as personal property, even though it may be a mortgage over real property. However, the court characterizes this matter for conflicts purposes and does not have to follow the characterization of domestic law. The mere fact that a law is characterized in a certain way for domestic purposes does not mean the court will use the same characterization for conflicts purposes

Ratio: Succession to moveable property is governed by the deceased’s domicile, succession of immovable property is governed by the location of the property

2) Important distinctions

- 1) **Domestic v. Conflicts:** When characterizing an issue, courts must use conflict of law concepts and not purely domestic ones
- 2) **Procedural issues (*lex fori*) v. substantive issue (*lex causae*)**

- 3) **Immovable and movable** (instead of real and personal, as domestic law would characterize property): just b/c property is characterized as personal, does not mean it should be characterized as movable

3) Applicability of statutes

- 1) Sometimes courts have to characterize issues to determine whether a statute applies
- 2) Even if foreign law governs the case (foreign law is the *lex causae*), any law in the foreign law that is procedural will not apply, but AB law will govern procedure exclusively
- 3) Sometimes there is a statute that one side wants to apply while other side does not; **issue of a substantive statute versus procedural statute may effect the outcome (*Pouliot*)**

Pouliot v. Cloutier (1944 SCC) **Use of statutes**

• H and W domiciled in New Hampshire when they got married; later settled in Quebec and became domiciled there. When H died, all of his property was in Quebec = Quebec law governed succession to his estate (for movables and immovables). W argued that Quebec law did not apply and relied on a NH statute to claim a major part of the estate (as matrimonial prop, which is governed by the law of place of domicile when getting married)

Issue (characterization): Is it matrimonial property or succession of property? Court must examine NH statute

Held: Upon looking at statute, court found that it was equivalent to family relief legislation (the idea that if you disinherit one’s dependants, those dependants can apply to the court to have that varied). As the statute did not deal with matrimonial property, NH statute did not apply

Ratio: Courts may look to applicable statutes to characterize a legal issue

B. Substantive Law or Procedural Rules

1) “One of the... truths of every system of private international law is that a distinction must be made between substance and procedure, between right and remedy. The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the law of the forum” (*Cheshire and North=s Private International Law*)

2) **Procedure is governed by *lex fori*** (i.e. assessment of damages of incident that occurred elsewhere)

- If any part of the foreign law touches upon procedure, it is ignored

T.D. Bank v. Martin (1985 Sask QB) Modern: procedural or substantive

• Mortgage docs signed in BC; K is expressly governed by BC law = matter governed by BC law

▪ **K signed in BC = action governed by BC law**

• Δs defaulted on mortgage after moving to Sask; π sued Δ in Sask based on contract, relying on a personal covenant in mortgage which would make π liable for the deficiency (which is not covered by the equity of the house)

• Δ relied on Sask statutes to prevent π's action:

1. Under *Land Contracts Action Act*, π did not seek leave = nullity
2. Under *Limitation of Civil Rights Act*, π cannot sue on personal covenant after foreclosure = bank cannot sue on personal covenant

▪ Δ argued that these statutes were procedural and must be applied

Issue: Are the statutes procedural or substantive?

Held: Statutes were substantive = do not apply

- 1) Traditional approach stresses on the wording of the statute and language as being procedural or substantive – distinction between right (substantive) and remedy (procedural)
- 2) However, court emphasized on the effect of characterization on the expectations of the parties = BC law governed, as everything was connected to BC and expectations was that rights and liabilities would be governed by BC law
- 3) Underlying policy (closest connection and LE) would be destroyed if courts decided to change that. As all conflicts rules have a policy justification, courts should not defeat the legitimate expectations of the parties and ignore the underlying policy reasons
- 4) Law may be procedural for purely domestic purposes and this does not mean it will be characterized as procedural for conflict purposes: “[One] must not [automatically] characterize a law of Saskatchewan as procedural in the conflict of laws, even though it may be so characterized for some domestic purpose. Procedure and substance are not clear-cut categories...”

Ratio: In determining whether a statute is substantive or procedural, courts may use two approaches:

1. Look to the wording of the statute and language (traditional approach)
2. Consider the effect of characterization on the expectations of the parties; must consider underlying policy reasons
 - If a procedural statute from the place of action is found to be applicable, it must be applied

Horseshoe Club v. Bath (1997 B.C.S.C.) Traditional: procedural or substantive

• Δ ran up a gambling debt of \$487 K at a Vegas casino. Upon returning to BC, the casino sued him in BC for the debt. Δ conceded that the gambling debt was governed by Nevada as it is a K debt, but that under BC debt is unenforceable

▪ Δ relied on BC's *Gaming Act*, which states that “all Contracts or Agreements... by way of gaming or wagering, shall be null and void” and that no suit shall be brought for recovering money

Issue: Is the statute procedural or substantive?

Held: Statute is substantive, as it relates to a right (null and void) not a remedy ∴ debt is enforceable

- 1) “The legislation certainly appears... to be substantive. It provides that all gaming contracts are null and void and... relates primarily to a right, not a remedy”
- 2) The section is ambiguously worded, however the preclusion of a language does not render a statute procedural

Ratio: The traditional approach to determining whether a statute is procedural or substantive looks to wording/language

Tolofson v. Jensen (1994 SCC) Limitation periods are substantive / governed by where tort is committed

• Action in BC, Δ relied on Sask *Limitations Statute* (1 year, “no action shall be brought against a person”), π argued limitation periods are procedural, therefore Sask statute did not apply

Issue: Is the statute procedural or substantive?

Held: Limitation periods are substantive – the law that governs the tort action is where the tort is committed

- 1) English law traditionally gave deference to the law of the forum; SCC proposed a change
- 2) “Right/remedy” distinction makes no sense – “mystical”
- 3) Look to consequences of procedure, not just language of statute
- 4) What is the consequence of interpreting limitation periods as procedural? Forum shopping (should be discouraged)

Ratio: As limitation periods are substantive, they are governed by where the tort is committed

Note: *Tolofson* left unanswered...

- Does this apply to tort claims or all claims? Later cases indicate all claims
- Certain types of limitation periods will continue to be procedural = governed by law of the forum (i.e. filing certain documents, etc.)
- Assessment of damages, traditionally seen as procedural – accident in CA, action in AB, damages would be procedural and governed by law of AB – why?

Post-Tolofson: AB legislation reversed effect of *Tolofson* via **s. 12/Limitations Act**
12. The limitations law of [Alberta] shall be applied whenever a remedial order is sought in this Province, notwithstanding that... the claim will be adjudicated under the substantive law of another jurisdiction.

Castillo v. Castillo (2004 ABCA) Both limitation periods apply (but see Limitation Statutes Amendment)

- Motor vehicle accident in CA between H and W who live in AB
 - In AB, one spouse sued other – action commenced 1 day before the 2 year limitation period; however, limitation in CA had already expired (1 year)
- Issue:** Whose limitation period applied?
- Δ : *Tolofson* = limitation periods are substantive, governed by where the tort was committed
 - π : statute says that if one sues in AB, limitation period of AB applies
- Held:** Action was time barred
- 1) s. 12 does not overrule *Tolofson*, unless it expressly says so
 - 2) CA retained test in *Tolofson* and suggested a two step process: (1) π must satisfy that π has action under law that governs the action, (2) then apply s. 12/AB Limitations Act – in other words, both limitation periods apply
 - 3) π was time-barred in CA, so had no cause of action
- Note:** Robertson disagrees with outcome: if not time-barred in CA, but time-barred in AB, Δ would still have won as Δ could rely on s. 12
- Δ gets the best of both worlds – what justification did legislature intend?
 - Case resulted in action against lawyer for professional negligence
- Post-Castillo: Limitation Statutes Amendment Act (2007)** codified *Castillo* and rewrote s. 12:
- s. 12(1) limitation period applies to any action commenced in AB; (2) If foreign limitation is shorter, then shorter limitation period applies

Castillo v. Castillo (2005 SCC)

- Issue 1:** Was CA correct in interpreting s. 12? **Held:** Yes
- Issue 2:** Does the legislature of AB have juris to enact a statute that affects rights created outside AB?
- Action was unconstitutional according to Bastarache: “If Alberta can treat limitation periods as procedural, then it can prescribe limitation periods for all actions proceeding before the Alberta courts without ever running afoul of the Constitution... To allow Alberta to treat limitation periods as procedural is... to allow it to circumvent the... meaningful connection test. The effect would be to allow Alberta to legislate extra-territorially. [T]he question of whether limitation periods are procedural or substantive is not something the province can decide.”
 - “The effects of limitation periods were made clear in *Tolofson*: they cancel the substantive rights of plaintiffs to bring the suit, and they vest a right in defendants to be free from suit. This is the reality Alberta cannot ignore.”
- Note:** If the facts were reversed (i.e. CA had 2 year limitation period and AB had 1), π would not have been time barred as s. 12 is still unconstitutional – cannot take away rights that are vested in π by foreign law
- Robertson: why does the π have rights in CA? CA law applies b/c AB

conflict rules apply – does not makes sense if legislature can change conflict rules to affect rights outside AB

3) Provisions that limit creditors remedies are usually considered substantive

- Condition of sales contracts: creditor can seize the chattel or sue for debt, but cannot do both

German Savings Bank v. Tetrault (1904 Que S.C.) Creditor remedies = substantive

- Action brought in Quebec based on mortgage over land in N.Y. (NY = *lex causae*)
 - NY statute stated that the mortgagee cannot sue for deficiency after foreclosure
 - Δ relied on NY statute by arguing that it is a substantive statute that is part of the foreign law and should be applied; π argued that this is procedural / can be ignored
- Issue:** Was the law substantive or procedural?
- Held:** Substantive, not procedural
- Although this went against NY *Civil Code of Procedure*, court likely did not want the bank to get away with this
- Ratio:** Creditor remedies are considered substantive

AB Treasury Branches v. Granoff (1984 BCCA) Creditor remedy may be procedural (B.C.)

- Chattel mortgage executed with AB, governed by AB, Δ moved to BC and defaulted; π seized chattels and sued in BC
 - BC Statute says you cannot do both
- Issue:** Is the statute procedural or substantive? If substantive, does not apply, but if procedural, must apply
- Held:** Procedural statute
- 1) In applying the traditional approach, majority stressed the wording / language of the statute
 - 2) The statute allowed recovery beyond recovering the actual chattel
- Minority:** Found statute to be substantive by applying the modern approach and looking to effect of characterizing a statute as substantive (intent of parties and domestic purposes)

Leroux v. Brown (1852 Eng. Ct. of Common Pleas) Statute of Frauds = procedural

- Contract in France, governed by French law, action brought in U.K.
 - In U.K., K is not enforceable if it does not comply with *Statute of Frauds (SF)*
- Issue:** Is SF procedural or substantive?
- Ratio:** SF is procedural, not substantive
- Note:** Robertson doubts outcome would be the same today (case is outdated)

4) **Law of evidence is usually procedural** – governed by AB Rules of Evidence if action is in AB

Re Cohn (1945 Eng. Ct. Ch. Div.) Presumptions of succession = substantive

• Mother (T) and daughter died under circumstances making it impossible to determine who died first; German law (*lex causae*) governed succession, but action brought in U.K.

• Under U.K. law, older predeceases younger (same for Canada); under German law, deceased persons died simultaneously; if daughter's estate could claim estate, must prove mother died first

Issue: Is T's will governed by German (substantive) or U.K. law (procedural), where action was brought (succession matter)?

Held: This is not an evidentiary presumption, but a presumption related to the law of succession = substantive

- 1) Presumption determines a substantive fact (the order of death)
- 2) The issue is governed by German law, hence daughter's estate loses

Ratio: Presumptions of succession are not evidentiary presumptions and are considered substantive

5) **Remedies are considered a procedural matter** = the law of the forum governs remedies (*Phrantzes v. Argenti*)

- A remedy that is unavailable in law of forum cannot be granted, even if it is available under foreign law
- **Example:** π hires nanny in Quebec (enters into contract for personal services), but nanny quits and goes to AB; π sues in AB, proves breach of contract; if π wants specific performance, this cannot be granted in AB, even if it is available in Quebec

Phrantzes v. Argenti (1960 Eng. QB) Law of the forum determines remedy

• Case between father and daughter, citizens of Greece. D married in England; under Greek law, F must give dowry. D sued in England and court accepted π 's right to dowry under Greek law = F was in breach. Under Greek law, D entitled to an order compelling F to enter into K of dowry with husband (not order of \$)

Issue: Remedy = procedural or substantive?

Held: Procedural as law of the forum determines remedy

- 1) As the Greek remedy does not exist in English law, the court could not order F to enter into K
- 2) Normally could give damages, but that would be giving π something she is not entitled to under Greek law \therefore nothing can be done
- 3) "[I]f the... remedies here is so different from that in Greece as to make the right sought to be enforced a different right, that right would not... be

enforced in this country"

- 4) "[E]ven if the court granted a declaration and embarked on the necessary inquiry as to the extent of the dowry, it could do no more than order payment of the amount found to be appropriate and payment thereof to the plaintiff"

Ratio: The law of the forum determines remedy

Khalij Commercial Bank v. Woods (1985 Ont. H.C.) Courts have some discretion to reduce debt in foreign law

• Δ ran up overdraft with bank; under law of Dubai, creditor could obtain pre-judgment of imprisonment of debtors, so Δ left Dubai

• π sued in Ont., debt is governed by law of Dubai; π argued under law of Dubai, court has discretion not to award full amount of the debt, therefore, if Ont. were to grant judgment of full amount, then that would be giving π something they are not entitled to (relied on *Phrantzes*)

Held: Δ 's defence failed as the remedy in the foreign place must be very different to justify its use. Δ ordered to pay everything but was spared from imprisonment

- 1) "[W]here the remedy required by a foreign substantive right is so radically different from remedies available in the *lex fori*, the forum court may refuse to grant the foreign substantive right"
- 2) Court gave a very narrow interpretation of *Phrantzes* where the foreign remedy is substantively different

Ratio: Courts have discretion to reduce the debt in foreign law if the substantive rights are not radically different from the domestic law

6) **Validity of security interest is substantive** (law of the place where the property is situated) (*Canada Deposit Insurance*)

- Priority is matter of procedure

Canada Deposit Insurance v. Canada Commercial Bank (1994 ABQB)

Validity of security interest = substantive

• Δ granted a security right over a property in California to π . When Δ went under, π tried to enforce its security but they had failed to perfect the security, as they have not registered it with the proper authority in CA, as required under CA law

Issue: Did CA law apply – substantive (statute applied) or procedural (did not apply)?

Held: Substantive = CA law governed validity of security interest (where intangible prop was located)

- 1) There is a distinction between validity and priority; **priority is a matter of procedure** and is therefore governed by AB law; validity is substantive and is governed by CA law
- 2) If CA law said that if one doesn't register security and security is not valid,

it is a substantive law and the security interest is not valid; however, if the requirement of registration effects priority in the line only (and not the validity), that is a question of remedy = procedural matter (CA law would not govern)

Ratio: Validity of security interest is a substantive matter

Comment: Robertson disagrees with outcome since everything was Canadian except the piece of property; this should be a clear cut case to use the modern approach and look to the intent of the parties

Note: *False conflict* describes several situations:

1. When the laws of either places are the same and it does not matter whose law applies – unnecessary to go through choice of law process
2. Where the outcome would be the same, even if the two laws are different (one side may argue against using conflict of law rules, as case will arrive at contrary outcome in both countries)
3. Where there is no legitimate interest or expectation of seeing own law applied (argued in *CDI* but failed)
 - Canada: legitimate expectations of the parties
 - U.S.: emphasis is on legit interests of parties and state (i.e. does the state have an interest in applying its own law); argument raised that there is no LE and Canadian law should apply, as dispute was between Canadian banks and only connection was that some prop was in CA
 - Traditional conflicts rules apply → intangible movable = CA law applied

7) **Damages:** entitlement (substantive) and amount receivable (procedural)

- **Entitlement to damages** = **substantive** issue determined by the place of event
- **How much** = **procedural**, determined by law of forum
- **Cap on pecuniary damages** = **procedural** (*Somers v. Fournier*)
- Not clear cut when a particular head of damage is available in substantive law, but not available in law of forum (i.e. π entitled to punitive damages in CA, but under AB law, π would not get punitive damages – how does the court determine the amount when AB law would give \$0?)
- **Entitlement to costs** = **procedural** (*Somers v. Fournier*)
- **Pre-judgment interest** = **substantive** (*Somers v. Fournier*)

Somers v. Fournier (2002 Ont. CA) **Cap on non-pecuniary damages** = **procedural**

• Auto accident, matter of non-pecuniary damages

Issue 1: Non-pecuniary damages cap (pain/suffering) = procedural or substantive?

- Canada's current cap: \$300 K

- Is the cap substantive (would not apply) or procedural (applies)?

Held: The cap is treated as a procedural matter and the *lex fori* is applied

- “[T]he cap is a judicially imposed limit or restriction on liability for non-pecuniary damages. It is... developed... to avoid excessive and unpredictable damages awards concerning non-pecuniary losses and the corresponding burden on society which follows from such awards... [T]he policy considerations which support the goal of avoiding such awards... favour characterization of the cap as a matter of procedural law”
- The judicially imposed cap does not affect entitlement to non-pecuniary damages—it only caps the amount π can receive

Issue 2: Entitlement to costs are a matter of procedure

Issue 3: Pre-judgment interest is a substantive matter

- Under *Prejudgment Interest Act*, interest runs from time of accident – entitlement and amount is not procedural – look to foreign law

8) **Note on interpretation:**

- **Characterization:** whether a statute is procedural or substantive determines whether it statute applies
- **Statutory interpretation:** however, a court can arrive at a conclusion by statutory interpretation (instead of characterization) (*TD v Martin*)
- Justification: consider false conflict concept → no legitimate interest of governing something in another province

Chapter 2: Domicile

- 1) Sometimes choice of law is determined by a person's domicile
- 2) **Presumption:** all jurisdictions attach great importance to one's “personal law” = law to which one has a strong connection (particularly relating to matters of status (family law) and property law (succession))
- 3) CL jurisdictions look to domicile; civil law jurisdictions look to nationality
 - Domicile has also been used in jurisdiction matters (i.e. family law)
- 4) **Definition of domicile:** one's “permanent home”
 1. Everyone has a domicile; one can never be without a domicile
 2. One can only have one domicile at any given time
 3. Domicile is governed by law of the forum (i.e. if a youth of 18 moves to BC from AB, not yet majority in BC (19 years) but has reached majority in AB → AB court would say the person is domiciled in BC, but BC court would not come to the same conclusion as the person is a minor)
- 5) **Types of domicile:** origin, dependence, choice
 1. **Origin:** imposed by law when one is born

2. **Dependence:** imposed by law on those who lack capacity to acquire domicile of choice
3. **Choice:** acquired by a capable person residing in a legal unit (i.e. a federal jurisdiction = province or state) with the intention of remaining indefinitely

6) Domicile is determined by law of the forum

A. Domicile of Origin

1) **Origin:** imposed by law when one is born

- When a person is born, the law imposes domicile of origin (DO), subject to certain exceptions (**Udny**)
- DO never changes and in certain circumstances it can be revived (i.e. if a person abandons their domicile of choice and does not acquire a new one immediately)

Udny v. Udny (1869 HL) Domicile of origin

• Case concerned succession of movable prop

Issue: Where was person domiciled?

Ratio: The law imposes the domicile of origin upon a person according to certain rules

- 1) Domicile of origin of a **legitimate child:** domicile of its father had at date of birth
- 2) **Illegitimate child:** domicile of its mother at time of birth
- 3) **Post-humous child** (i.e. father died at time of birth): mother's domicile
- 4) **Foundling** (i.e. child found after birth, parents unknown): where it is found (modern equivalent: when child's parents are both dead)
- 5) **Legitimated child** (illegitimate at birth, but subsequently becomes legitimate): deemed to have always been legitimate and so takes the father's domicile (**AB Legitimacy Act, s. 1(1)**: retroactive section) – probably at time of birth, not legitimization
- 6) **Adoption:** deemed to have been born to the adopting parents in lawful wedlock (**s. 72/Child Welfare Act**); domicile of origin could change if child is born with one origin and subsequently adopted by same-sex parents

B. Domicile of Dependence

1) **Domicile of dependence (DD)** is imposed on those who lack legal capacity to acquire domicile of choice (DC):

1. Married women (at CL)
2. Children under age of majority
3. Mentally incompetent people

2) **Married woman:**

- CL: married women are incapable of acquiring DC; takes husband's domicile
- As H's domicile changes, so does W's; if they separate and H acquires foreign domicile, W acquires that domicile even if she never moved
- Early legislation: can only divorce in place of domicile

Davies v. Davies (1985 ABQB) Moving away from traditional CL position

• H domiciled in Ont., W was in AB; W applied for nullity action (declare marriage void) in AB

• Note distinction between void (having always been void; W does not take domicile) and voidable (valid until declared void)

Issue: Did AB court have jurisdiction to hear issue of nullity (dependent upon whether W was domiciled in AB)

Held: AB court followed Ont legislation and found AB court could hear issue

- 1) According to CL, W was domiciled in Ont
- 2) However, under Ont law, W did not take domicile of H; W is free to have her own domicile
- 3) Flaw in reasoning: ignores fact that domicile is determined by *lex fori* – court should not have applied foreign legislation

Note: Decision is wrong, but understandable how court came to conclusion

- **s. 15/Charter issue:** potential constitutional challenge, but does it really apply to common law?
- Many provinces have legislation that have abolished the rule

Exam: Note that at CL, woman does take H's domicile, cannot be challenged under s. 15

Family Law Act (2005) (p. 50)

104(1) Unless another enactment provides otherwise, a person has a legal personality that is independent, separate and distinct from that of the person's spouse.

(2) A married person shall be recognized as having legal capacity for all purposes and in all respects as if he or she were an unmarried person and, in particular, has the same right of action in tort against his or her spouse as if they were not married.

(3) Subsections (1) and (2) operate to make the same law apply, and apply equally, to married men and married women and to remove any difference in it resulting from any common law rule or doctrine.

3) **Children under the age of majority:** rules determining DD, same as DO

- a) **Legitimate child:** F's domicile
- b) **Illegitimate child:** M's domicile
- c) **Legitimate, but F is dead:** M's domicile

- d) **If both parents are dead:** answer is unclear but child's domicile probably freezes and continues until age of majority
- e) **If parents separate:** F's domicile
 - Even if custody is awarded to M, at CL, child continues to take F's DD
 - DD continues until majority, but exception: at CL, a young woman under 18 who gets married takes H's domicile (if H is also under minor, W takes father-in-law's domicile)
 - Only times when DO and DD change: legitimization and adoption

4) Mentally incompetent people

- Test of mental capacity is task specific
- If an adult becomes mentally incompetent, domicile freezes (subject to legislation which allows guardian to change domicile)
- If born mentally incompetent or rendered incompetent before reaching majority, DD continues after reaching age of majority
- If a person regains capacity, ability to acquire a domicile of choice

5) **Termination of DD:** when a dependency comes to an end, DD deemed to continue as DC until DD is abandoned (**Harrison v. Harrison**)

- **Example:** H + W in AB, H plans to remain in AB indefinitely, W plans to move to NF if H dies first, H does die first; W's DC is not abandoned until W reaches NF, AB domicile abandoned as soon as she leaves AB, DO applies when travelling between provinces

Harrison v. Harrison (1952 Eng. Ct. Fam. D.) **DD is deemed to continue upon reaching age of majority**

- H's DO was England, remained in England when he was 18 and his parents moved to Australia (England's age of majority was 21)
- H moved to NZ, not married, and decided to settle permanently in NZ; as he was still under 21, DD in Australia at the time
- H went to England for a temporary purpose, turned 21, and W then petitioned for divorce in England

Issue: Did the court have jurisdiction to hear case? At time W petitioned for divorce, was her husband domicile in England?

Held: Domicile of origin revived = England

- 1) At 21, H had capacity to acquire DC; Australia is deemed to continue; but he was not in Australia and no intention, deemed domicile of Australia is abandoned
- 2) Had not acquired a domicile of choice in NZ – must set foot there

Ratio: Domicile of dependence is deemed to continue upon reaching age of

majority; need intention and residence / physical presence to establish domicile of choice

6) When the **Family Law Act** came into effect on Oct 1, 2005, what effect did this make on the status quo?

- a) W's DD continues as a deemed DC until it is abandoned; although some jurisdictions (i.e. England) had provision incorporating CL rule, AB legis is silent → look to CL = DD continues as DC
 - **Example:** H and W have domicile of origin in Que, moved to AB and acquire AB domicile, H wants to stay in AB, but W wants to move back to Que; DD disappeared on Oct 1, 2005, but W had not yet acquired a DC of Que, so DD deemed to continue as DC until it is abandoned
- b) Legislation is not expressly retroactive and therefore does not change events prior to Oct 1, 2005 – does not change a person's domicile prior to date of legislation
 - **Example:** as succession of movable prop is governed by domicile at death, if W died before 2005, CL rule would apply and W's domicile = H's domicile

C. Domicile of Choice

1. Acquisition

1) Need three things to coincide in order to acquire DC:

1. Capacity
2. Residence in a legal unit
3. Intention of staying there indefinitely

2) **Residence:** can mean many things, usually mere physical presence (**White**)

3) Approaches to domicile of choice:

- a) **Traditional position:** requires physical presence + intention (**White**)
- b) One may acquire residence in a place if necessary intention is established, even if presence/status is illegal (**Jablonowski**)
- c) One cannot acquire DC if residence is illegal and the person lacks intention (**Puttick**)
- d) **Modern approach:** illegal residence does not prevent one from acquiring a DC (**Mark**)

White v. Tennant (1888 W. Va. Ct. App.) **Physical presence + intention**

- H + W decided to move from W. Va to PA; H moved first with belongings and returned to W. Va for W; a few days later, H and W moved to PA, W became ill upon arrival, so H + W went to W. Va for treatment, but H got typhoid and died
- Issue:** Where was H domiciled?

Held: H had acquired DC of Pa

- 1) On first visit to PA, H did not acquire DC at that point
- 2) When H and W arrived together, acquired DC of PA
- 3) Suggested that more than physical presence for residence is needed, but other scholars focus on intention – first time lacked intention (present intention, not future intention), but had intention the second time
- 4) Residence means mere physical presence

Ratio: Domicile of choice may be formed by physical presence and present intention to remain there indefinitely

Jablonowski v. Jablonowski (1972 Ont. HC) May acquire DC if necessary intention is established

• J did not renew PR status after moving from Canada and later returns

Issue: Can one acquire DC if residence is illegal?

Held: Yes

- 1) Note in **Divorce Act**: requires domicile in “Canada”, even though generally one must be domiciled in a province
- 2) “A person who resides in a country from which he is liable to be deported may lack the *animus manendi* because his residence is precarious. But if in fact he forms the necessary intention, he acquires a domicile of choice”

Ratio: One may acquire residence in a place if necessary intention is established, even if presence/status is illegal

Puttick v. Attorney General (1979 Eng. Ct. Fam.D.) Illegal residence and lack of intention = cannot acquire DC

• Woman participated in terrorist organization and was on the run; when she was in England, got married to an Englishman for the sole purpose of staying in England

Issue: Did she acquire a DC in England?

Held: No

- 1) She lacked intention: “[S]he was a woman on the run, and... if at any time she had realised... that detection and arrest was imminent, she would have left England at once for a safer land...”
- 2) If residence is illegal, one **cannot acquire DC**: “It has been held that a domicile of choice cannot be acquired by illegal residence. The reason for this rule is that a court cannot allow a person to acquire a domicile in defiance of the law which that court itself administers”

Ratio: One cannot acquire DC if residence is illegal and the person lacks intention

Mark v. Mark (2005 HL) Illegal residence does not prevent one from acquiring a DC

Issue: Can one acquire DC if residence is illegal?

Held: Yes, one can acquire DC even if residence is illegal

- 1) HL rejected *Dicey and Morris*; illegality goes to necessary intention, does

not prevent one from acquiring DC

- 2) Lord Hope: “[I]llegality is relevant to the question whether the person intended to reside in a country with the intention of remaining there indefinitely, but not to the question whether the person is present here. Evidence that the person intended to reside there indefinitely despite the illegality would need to be carefully scrutinised. But the question whether a person is physically present in the country is not affected... by the question whether he has entered the country legally or illegally”

Ratio: Illegal residence does not prevent one from acquiring a DC = person may have necessary residence for domicile; the unlawful nature of the residence is relevant to question of intention

Recall: **Canada Commercial Bank** case where the bank argued false conflict

- Baroness Hale in this case stated: “[u]nlike some of the purposes for which habitual residence may be important, the State has no particular interest one way or another. Indeed, insofar as it does have an interest, [it is probably better to accept] that those who intend to remain here permanently have acquired a domicile here, whatever their immigration status” – consider legitimate interest of the state

4) What does it mean to have an intention to remain indefinitely?

- Intention can be inferred by looking at all the circumstances surrounding the person’s life (**Re Fuld**)
- Evidence must establish that the person intended to remain indefinitely (**Ramsay v. Liverpool Royal Infirmary**)

Re Fuld (No. 3) (1968 Eng. Ct. Prob. D.) Circumstances and details in determining intention

Ratio: There is no circumstance or detail too trivial that should be left out of consideration re: change of domicile

Ramsay v. Liverpool Royal Infirmary (1930 HL) Evidence must establish intention to remain indefinitely

• Succession case: G was born in Scotland (DO) and at 45, moved to England where he lived for the rest of his life (never returned to Scotland); on record, “Never want to set foot in Glasgow again” and specifically requested to be buried in England, had holograph will (handwritten) giving money to charities – holograph wills were valid in Scotland, not in England

Issue: Where was G domiciled?

Held: Evidence did not establish G’s intention to remain in England; domiciled in Scotland (Robertson: difficult to understand, considering the evidence)

- 1) Acquisition of domicile of choice requires an active decision and G’s life was one of “inaction”

- 2) G never formed intention
- 3) Always a reason why domicile is an issue—in this case, court wanted to find that the charities were valid
- 4) In considering declarations of intent, look to circumstances, purpose of declaration, etc. – note that the declarations may be self-serving

5) Establishing intention (*I.R.C. v. Bullock*):

1. Need substantial possibility that the contingency will occur;
2. Contingency must not be too vague or indefinite;
3. Must be evidence that the person really did intend to move if the contingency occurred
 - “I intend to remain in AB for good, unless I win the lotto; then I will move away” – chances are too remote to establish domicile
 - “Intend to remain in AB, unless I get fed up, then I will move back to Scotland” – too vague
 - “Intend to be here, but at retirement, I may return to Scotland” – intention is too vague

I.R.C. v. Bullock (1976 Eng. CA) **Establishing intention: substantial possibility and non-vague contingency**

• B domiciled in NS, arrived in England with intention of moving back to NS; tried to persuade wife to move back, but W wanted to stay there for good; B decides he will remain in England, but if W predeceases, he will move back to NS – this was a contingency preventing him from acquiring domicile in England

Issue: Where was B domiciled?

Held: Domiciled in Nova Scotia

- 1) W’s death is not too remote
- 2) W’s death not too vague
- 3) Circumstances/evidence corroborates his intention to follow through with plan, i.e. he read only Canadian papers, did not vote in U.K. elections, kept Canadian passport, owned Canadian property, etc.

Ratio: Contingency affecting choice of domicile must not be too remote or vague

Re Furse (1980 Eng. Ch. D.) **Insufficient corroboration = cannot establish DC**

• F intended to come to England and remain there unless “unable to lead an active life on a farm”

Issue: Where was F domiciled?

Held: F acquired domicile of England

- 1) Contingency is too vague/indefinite (“Unable to lead an active life”)
- 2) Insufficient corroboration to show F’s intention

Osvath-Latkoczy v. Osvath-Latkoczy (1959 SCC) **Contingency too remote = cannot establish DC**

• Divorce case: H moved from Hungary to Ontario; when asked if he would move back to Hungary if Russians moved out, H answered yes

Issue: Did Ont. Court have jurisdiction? Depended on whether H was domiciled in Ontario

Held: H was domiciled in Ontario, contingency that prevented him from acquiring DC of Ontario was held to be too remote a possibility

Gunn v. Gunn (1956 Sask CA) **Intention to remain somewhere indefinitely is relevant to DC**

• Divorce case: G’s domicile of origin was Man, moved to Sask to find a job, said yes when asked if he would move to another province if employer asked him

• Trial: G was not domiciled in Sask

Issue: Did Sask court have jurisdiction?

Held: Yes, G domiciled in Sask

- 1) “That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home.”
- 2) Despite evidence that he was willing to move if asked to do so, no evidence that that would happen – may or may not happen; G simply answered the question honestly to something that may not even happen
- 3) Distinguish from *Bullock*: B was actively planning to move back
- 4) *Puttick* case: P did not acquire domicile of choice b/c at any point P believed authorities were on to her, she would have moved away – is this more like *Bullock* or *Gunn*? In *Puttick*, it was likely she was actively planning to move

Ratio: Issue of intention to remain somewhere indefinitely is relevant to DC, rather than involuntary residence imposed by employment

6) Domicile of choice usually has to be voluntary (*Gunn v. Gunn*)

- Soldier stationed abroad may be considered involuntary residence
- Should be a matter of intention to be somewhere indefinitely: if person acquires necessary intention, despite initial “involuntary residence”, may acquire domicile of choice
- What about moving for health reasons? Probably not acquiring domicile; should not confuse motive with intention – question is not why you are moving, but whether you intend to remain indefinitely

2. Abandonment

- 1) One must abandon intention to remain and one's residence in order to abandon DC
 - Both must be abandoned at the same time
 - "A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently or indefinitely, and not otherwise" (*I.R.C. v. Duchess of Portland*)
- 2) **Abandoning intention**: as soon as one forms intention to move away
- 3) **Abandoning residence**: as soon as one has crossed the border and no longer has physical presence in that province

I.R.C. v. Duchess of Portland (1982 Eng. Ct. Ch. D.) **New DC requires abandoning intention and residence**

- Duchess married and moved to England, acquired DD in England; legislation later abolished DD = DD is deemed DC until abandoned
- In 1982, D had DC of England, but intended to move back to Quebec (abandoned intention of staying in England); on many occasions, D visited Quebec, but every time with the intention of returning to England; D argued that when she set foot outside of England, she lost English domicile

Issue: Where was D domiciled?

Held: D was domiciled in England

- 1) Court rejected the argument; every time she left she had intention of returning to England
- 2) D did not give up residence in England → she was domiciled in England
- 3) Unlike acquisition of DC, abandonment there is an overlap between intention and residence; abandoning residence requires more than setting foot outside jurisdiction
- 4) Question was did D's domicile of Quebec revive when she left England? Court answered no

Ratio: Abandoning residence requires more than setting foot outside jurisdiction; requires intention to establish DC elsewhere and abandonment of residence at the same time

- 4) When DC is abandoned w/o acquiring a new DC, domicile of origin revives
 - **Example:** H and W domiciled in Quebec, decide to move to AB for 2 years, plan to return to Quebec = have not lost Quebec domicile; couple have a child (DD = Quebec) but after a few months, parents decide to stay in AB – child's DD changes to AB; child lives in AB for 90 years, decides to move to NF on 90th b-day, dies in Ont during transit, domiciled in Que as DO revives → succession governed by Quebec
 - **U.S. approach:** continuation of DC, rather than reviving DO to fill gap; allows connection with DC

Chapter 3: Domestic Relations

A. Marriage

- Three issues: (1) **Formal validity** (requirements of process); (2) **Essential validity** (capacity, age requirement, who can get married, who can marry, same-sex marriage, etc.); (3) **Recognition**

1. Formal Validity

1) **Marriage Act:**

- Contains examples of formal validity in Alberta
- **s. 3:** may only be married by certain persons in AB
- **s. 9:** requires marriage license, which is valid for a few months
- **s. 10:** requires 2 witnesses

Berthiaume v. Destous (1930 PC) **Formal validity governed by place of marriage**

- Couple from Que married in France, failed to comply with civil formalities of France; did religious ceremony w/o civil certificate of marriage

Issue: Was the marriage valid (whose law determines validity)?

Held: Invalid, as certificate requirement is a matter of formal validity; governed by place of marriage (France)

- "[Marriage \odot putting aside the question of capacity \odot is regulated by the place of the act]. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding, if conducted in the place of the parties= domicile, would be considered a good marriage"

Ratio: Re: formal validity, if the marriage is valid in the law of the place, then it will be valid anywhere – if not, it is not valid anywhere; this rule only applies to formal validity

- Issues of formal validity are governed by the law of the place marriage occurred

Apt v. Apt (1947 Eng. CA) **Method of consent = formal validity matter**

Issue: Can one be married via proxy (question of essential validity or formal validity)?

Held: English court drew a distinction between the fact of consent and the method of giving consent

- 1) Fact of consent relate to issues of capacity (essential validity) (i.e. minor,

intoxication, etc.)

- 2) Method of conveying consent relates to formal validity, which includes marriage by proxy = governed by the law of the place of marriage
- 3) s. 10/**Marriage Act**: in AB, cannot have marriage by proxy

Ratio: Whether one can marry by proxy is a matter of formal validity, which is to be governed by the place of the marriage

2) **Requirement of parental consent:** distinction between age of consent to marriage (capacity = essential validity issue) and age at which one needs parents consent to get married (formal validity)

- Question of age of consent: **issue of capacity = essential validity, governed by place of domicile**
- Age before one does not need consent: ss. 19-22 (*parental consent*) provides that if one is under 18, need parents' consent before getting married, subject to exceptions – if parents consent is not present, marriage is void; **consent = matter of formal validity, governed by the place of marriage (*Ogden v. Ogden*)**
- Narrow circumstances in which an exception will apply to the general rule re: formalities (***Hassan v. Hassan***)
- *Essays on the Conflict of Laws* criticizes ***Ogden v. Ogden*** which says parental consent in marriage is a matter of formal validity, governed by place of marriage – however, this case represents Canadian law

Hassan v. Hassan (2006 ABQB) **Exception requiring compliance with formal requirements of marriage**

• Marriage took place in AB, but did not comply with *Marriage Act* (no license, person who married them was not qualified, both sent agent to get married)

Issue: Valid marriage?

Held: Marriage was void, but court noted exceptions:

- 1) “It appears that a marriage that does not comply with the *lex loci celebrationis* in terms of formality may be recognized as a valid common law marriage: (a) where it is impossible to conform to the local form of marriage, or (b) where the parties have not submitted to the local law”
- 2) Neither exception applied in this case; parties did intend to submit to AB law and not impossible to comply with formalities

Note: Sometimes legislation may look like they are dealing with formalities, but are essentially dealing with capacity:

- **Capacity under CL:** minimum age to consent to marriage is 12 for girls, 14 for boys

- **s. 9/*Marriage Act*:** cannot get marriage w/o marriage license (formal validity); **s. 17/*Marriage Act*:** cannot get a marriage license until one is 16 (essential validity)

2. Essential Validity

Brook v. Brook (1891) **Ante-nuptial and matrimonial home theories**

• Both parties were domiciled in England and English law did not permit marriage between a man and his sister-in-law; they went to Denmark to get married, where the law permitted their marriage

Issue: Was this marriage valid? Whose law governs?

Held: As English law governed, marriage invalid

- 1) Law of the place of marriage governs formality; law of the place of domicile governs essential validity
- 2) “[Although] forms of entering into the contract of marriage are to be regulated by the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated”
- 3) Two theories as to whose law governs capacity:
 - a) **Ante-nuptial domicile:** each parties' capacity to marry is governed by the domicile they had immediately before marriage, i.e. if man domiciled in Que and woman in AB, respective provinces determine each party's domicile
 - b) **Matrimonial home theory:** capacity is governed by ante-nuptial domicile unless at time they got married, they intended to establish matrimonial home elsewhere and did so in reasonable time after marriage – if so, then intended matrimonial home governs, i.e. man from Que, W from AB, intend to settle in Ont, ∴ Ont law governs

Frew v. Reed (1969 BCSC) **Parental consent = formal validity; capacity = essential validity**

• First cousins were domiciled in BC, married in WA, but WA did not allow first cousins to marry

Issue: Validity of marriage?

Held: Marriage was valid

- 1) Parental consent: formal validity, governed by place of marriage; WA allowed marriage w/o consent
- 2) Marrying one's first-cousin: governed by domicile, allowed in AB

Canada v. Narwal (1990 FCA) Canadian approach to mat home theory

• Marriage occurred in England; man domiciled in India, woman domiciled in a Canadian province; man was the brother of the woman's ex-husband

Issue: Valid marriage?

Held: Valid marriage

- 1) Under Indian law, marriage was void, unless validated by custom
- 2) FCA stated that the validity of marriage was not governed by Indian law, but governed by the intended matrimonial home theory = Canada, where there is no prohibition against marrying one's brother-in-law
- 3) Case extends the theory that even if the matrimonial home was not established in Canada:
 - a) At time of the marriage when parties formed intent, there must be a reasonable chance that they would be able to fulfil intent
 - b) If they failed to do so, the failure must not be due to own inaction or fault
- 4) "[Although] Narwal [was] not established in Canada, [the parties] always had the mutual intention from the time of their marriage to establish their home in Canada. This was not... an intention that had no practical possibility of becoming a reality. There was... a reasonable probability at the time of the marriage that, with his wife already a resident of Canada, Narwal would be landed here within a reasonable time and thus be able, with her, to establish a matrimonial home for themselves and their Canadian-born child... The fact that the couple has not yet established a home here is not due to any lack of interest or effort on their part but is, rather, due to their inability to convince the Canadian authorities of the merit of the application"

Ratio: In applying the matrimonial home theory, consider:

- 1) Intent
- 2) Whether it is realistic to want to establish a home in that place
- 3) Whether the failure to do so was due to circumstances beyond one's control

Wilkinson v. Kitinger (2006 H.C.J. Fam.D.) Same-sex marriage = essential validity matter

• Same sex marriage in BC, parties domiciled in England

Issue: Validity of marriage

Held: Not a valid marriage (but a valid civil partnership)

- Question of whether someone can marry someone of the same sex is a matter of essential validity governed by domicile
- "[T]here is abundant authority that an English court will decline to recognise or apply what might otherwise be an appropriate foreign rule of law, when to do so would be against English public policy... English public policy in the matter is demonstrated by [the *Matrimonial Causes Act*]..."

Ratio: Even if a marriage is governed by foreign law, a court may still refuse to recognize it if it is contrary to public policy

Note re discretion of courts: courts will not apply a foreign law or foreign incapacity if to do so it would offend fundamental public policy, for example:

- A foreign court has discretion to recognize an interracial marriage, even if it is not valid in the couple's domicile
- A foreign court may recognize a same-sex marriage on grounds of discrimination, even if it is not accepted in the couple's domicile (consider fundamental values in the *Charter*)

3. Recognition

Hyde v. Hyde (1866 Eng. Divorce Ct.) Definition of marriage

Court's definition of marriage:

- 1) AB law follows the rule that says a marriage "[t]he voluntary union for life of one man and one woman, to the exclusion of all others"
- 2) Crystallization of public policy
- 3) Even if a marriage is essentially valid, there are reasons for courts not to recognize a marriage; broader public policy may be applied (*Cheni v. Cheni*)

Ratio: Even if foreign marriage is valid elsewhere, if it does not fit definition of marriage, a court can refuse to recognize the marriage or exercise jurisdiction / grant matrimonial relief

Note on bigamy and polygamy: "To the exclusion of all others" applies

- **Bigamy:** having more than one wife/husband (illegal)
- **Polygamy** ("the practice of multiple marriage"): refers to the legal right to have more than one spouse at the same time; Canadian courts will not recognize a polygamist marriage as it does not meet definition, but it is allowed in some jurisdictions
- In determining whether a marriage should be recognized in Canada, look to whether the foreign law permits more than one spouse (i.e. polygamy), and if so, it is not a valid marriage in Canada. To determine whose law decides if a marriage is polygamous, apply **Re Quon**

Cheni v. Cheni (1965 Eng. Divorce Ct.) Must be very offensive to overrule marriage that is valid in foreign juris

• Marriage was formally valid (according to place of celebration), essentially valid (same place), met definition of *Hyde v. Hyde*; however, issue of public policy arose as parties were uncle and niece

Issue: Was this offensive to public policy?

Held: Not offensive to public policy

- “[T]he true test [is] whether the marriage is so offensive to recognise and give effect to the proper foreign law. In deciding that question the court will seek to exercise common sense, good manners and a reasonable tolerance... On the contrary, I must have regard to this particular marriage, which valid by the religious law of the parties= common faith and by the municipal law of their common domicile, has stood unquestioned for 35 years”

Ratio: Although courts have discretion in rejecting a foreign rule, courts should hesitate before declaring something as offensive and should only do so in exceptional circumstances – rule must be so offensive to the fabric of Canadian society that it cannot be valid

Re Quon (1969 Alta. S.C.) Determining polygamy

• Case involved marriage in China where men had legal right to concubines (not equivalent to a spouse); Chinese law did not recognize this as polygamy

Issue: Was this a polygamist arrangement?

Held: Unnecessary to decide on the point; court assumed that arrangement was polygamous

- 1) Although form of marriage is governed by the local law of the place of celebration, courts will look to (1) the law of that place where the marriage occurred, (2) legal rights the law gives parties and (3) the rights under our law and consider whether the *lex fori* considers that to be polygamy
- 2) Although *Hyde* indicates that if the marriage doesn't meet the definition, Canadian courts will not take jurisdiction, it is only for the purpose of granting matrimonial relief; for all other purposes the marriage will be treated as valid and recognized as such for things like succession and wills
- 3) Polygamist marriage can convert into a monogamous marriage; if a marriage is potentially polygamist and H acquires domicile in a place that does not permit polygamy, that has the effect of converting the polygamist marriage to a monogamous

Note: Unnecessary for court to decide whether marriage was polygamist as it was a family relief case, not a matrimonial case – *Hyde v. Hyde* did not apply

B. Divorce

1. Jurisdiction

Issues: When does a court have jurisdiction to recognize a foreign divorce?

Divorce Act, s. 3(1)

A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding. Based on ordinary residence

Wrixon v. Wrixon (1982 ABQB) Ordinary residence

• W petitioned for divorce in 1982, had lived all her life in AB, except for 18 month period where she was in Hawaii before returning three months before petitioning (she was away for an “extended vacation”, during the time which she had no accommodation, but had furniture in storage in AB, intending to return)

Issue: Was W ordinarily resident in AB?

Held: Due to the length of absence, W was not ordinarily resident in AB

- 1) “It cannot be said that in the 12 months immediately preceding presentation of the petition, the petitioner in the settled routine of her life regularly, normally or customarily lived in Alberta”
- 2) Length of residence is not determinative

Engle v. Carswell (1992 N.W.S.C.) Factors other than length of residence

• Pilot had two residences; summer in NWT, 5 months in CA

Issue: Was E ordinarily resident in NWT?

Held: Yes, he was ordinarily resident in the NWT during the relevant period (possible to be ordinarily resident in more than one place)

- Court looked to other details other than just length of residence, i.e. where he kept his house and finances (NWT)

Alexiou v. Alexiou (1996 ABQB) Determining ordinary residence

• Chronology from Feb 1995 – April 1996: (1) H arrived in Canada from Greece on a temp visa, intended to make AB his home; (2) he got a job, (3) applied for landed immigrant status, (4) returned to Greece to get wife/children, (5) immigration status granted, (6) filed divorce petition

Issue: Did the court have jurisdiction?

Held: Although court had jurisdiction, QB declined to exercise jurisdiction as it felt AB was not the appropriate forum

- 1) “I am satisfied... [that] Alexiou was ordinarily resident in Alberta... He had purchased a home, brought his family from Greece, obtained employment and established a social life, all of which are consistent with his stated intention to remain in Canada”
- 2) As soon as A arrived, he acquired DC, but he was not ordinarily resident as soon as he set foot – acquired over a period of time through acts consistent with intention (at the latest, had to have established ordinary residence by 04/1996)
- 3) Court looked to the evidence to corroborate intention

Ratio: Ordinary residence it is not immediate; something gained over time and is best assessed retroactively

Note: A court has inherent right to decline jurisdiction if they feel they are not the appropriate forum

2. Recognition

- 1) Although there are a number of statutory and CL rules that regulate the circumstances in which AB can recognize a foreign divorce, a divorce only has to fit within one rule of recognition to be valid
- 2) Courts are not generally concerned with grounds for divorce; concerned with the foreign court's jurisdiction

Divorce Act, s. 21

22(1) A divorce granted... pursuant to a law of a country or subdivision of a country other than Canada... shall be recognized for all purposes of determining the marital status in Canada of any person, if either former spouse was ordinarily resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for the divorce.

- AB will recognize foreign divorce if either spouse is ordinarily resident in foreign jurisdiction for a year
- If the divorce was granted before June 1, 1986, then rule does not apply
- Only applies to foreign (non-Canadian) divorces and uses subdivisions of countries (i.e. states)

(2) A divorce granted after July 1, 1968, pursuant to a law of a country or subdivision of a country other than Canada... on the basis of the domicile of the wife in that country or subdivision [is] determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for all purposes of determining the marital status in Canada of any person

- If divorce is granted on bases of jurisdiction, then W's domicile is determined as through she were single
- This section applies to divorces between July 1, 1968, and May 31, 1986
- The purpose is to mirror the old rules of the old *Divorce Act* that was based on domicile

(3) Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act

- If cannot fit in above 2 subsections, turn to CL

3) Common law rules

i. ***Le Mesurier*** (1895 PC): courts will recognize foreign divorce as valid if

- 1) Both parties were domiciled in that place at time of filing the divorce
- 2) "The first is the principle established in the case of *Le Mesurier*... that recognition will be afforded to a jurisdiction at the commencement of the proceedings for divorce"
- 3) With legislation, probably can be read as either party's domicile

ii. ***Armitage*** (1906 PC): courts will recognize a foreign divorce as valid if

- 1) The divorce (at time of filing) is recognized as valid in place of domicile (H's domicile)
- 2) This applies even if the actual proceedings are in a different country (as the husband is domiciled in X and X recognizes the divorce)

iii. ***Schwebel v. Ungar*** (1963 Ont. CA): foreign divorce is recognized as valid if

- It is valid by the law of the domicile acquired immediately after the divorce by the party seeking recognition

• H + W domiciled in Hungary, move to Israel, en route to Italy got divorced through process of gett (recognized as valid by law of Israel, but not Hungary); question of validity of divorce arose in Ont, as W married someone from Ontario who brought proceedings that 2nd marriage was void

Issue: Could the 1st divorce be recognized as valid?

Held: Although *Le Mesurier* would apply and not *Armitage*, SCC held this was a valid divorce b/c it was recognized as valid where parties subsequently became domiciled

Note: Unanswered question re how soon does one have to be domiciled? Consider analogy to matrimonial home theory of domicile – at time parties got divorced, they had intended to establish matrimonial home in Israel

- If this shows up in an exam, argue that case is limited to its facts

iv. ***Travers v. Holley*** (1953 Eng. C.A.): a foreign divorce will be recognized

- 1) If facts had occurred in own jurisdiction, courts would have recognized the divorce
- 2) This has been interpreted as either under our current rules or under the rules back then
 - **Example:** H + W domiciled in AB, divorce in CA in 1980 after more than 1 year there, ss. 22(1) and (2) would not apply; *Armitage* does not apply (is this divorce recognized in the place of domicile?), *Travers* would apply (if these facts were reversed, i.e. divorce occurred in AB and H + W domiciled in CA, AB court would recognize jurisdiction)
 - After June 1, 1986: *Travers v. Holley* rendered redundant due to s. 22(1)/*Divorce Act* – if one of the parties had been ordinarily resident in CA, then divorce is valid
- 3) The rule is based in reciprocity; it would be contrary for the courts to refuse recognizing something that they themselves recognize

v. ***Indyka v. Indyka*** (1969 HL): extension of *Travers* and adds R&S test

- 1) **Extension of *Travers*:** rule applies whether one uses divorce rules as they existed at time of divorce or now
- 2) **Real and substantial connection test:** courts will recognize a foreign divorce if both parties had a R&S connection with the place at the time the divorce was granted; look to factors such as length of residence, employment, nationality, ownership of property, etc. (U.K. approach is liberal)

Indyka v. Indyka (1969 HL) Real and substantial connection

- H acquired domicile in Eng., W stayed in Czech and applied for divorce in there
- Held:** Divorce was valid according to real and substantial connection test
- HL could have applied *Travers* and found divorce was valid, but instead HL created R&S test

Ratio: If either spouse has a R&S connection with the place of the divorce at the time of the divorce petition, the court will recognize the divorce as valid

Kish v. Director of Vital Statistics (1973 ABSC) R&S test applied

- Couple domiciled in and were citizens of Hungary; H left wife to go to Canada and acquired domicile in Canada, W remained in Hungary; H got divorce in Hungary, applied for marriage license in Canada, but was refused b/c of validity of divorce

Held: There was a real and substantial connection through a variety of factors

- *Indyka* test applied: "There was in fact a real connection with Hungary, the wife still being there. The marriage had been performed there when both parties were resident, domiciled citizens of that country. The Hungarian court did not find its jurisdiction through any flimsy residential means. [No evidence that] the husband went to Hungary for any fraudulent or improper reasons for the purpose of obtaining a divorce that he could not get in Alberta"

Bate v. Bate (1978 Ont. H. Ct.) Diverse factors to interpret R&S connection

- H + W were married in Las Vegas, later H claimed marriage was invalid as W was already married; W said she was already divorced (facts indicated that she had lived in LV for 6 weeks before getting 1st divorce)

Held: CL grounds not satisfied; divorce did not occur in place in domicile;

- 1) *Travers* would not have applied
- 2) *Indyka* would not either: "While case law has interpreted this to mean many diverse factors from residence, employment, nationality, citizenship and holding of property, nevertheless the substantial connection must exist in fact. I have found that the petitioner went to Las Vegas solely for the purpose of obtaining a divorce. I have also found that while she was in Nevada she was not permanently employed. She did not attempt to obtain a work visa or a sponsor. She did not take out American citizenship, I must therefore conclude that she did not have a real and substantial connection with the granting jurisdiction"

Keresztessy v. Keresztessy (1976 Ont. H. Ct. J.) R&S connection may be lost

- Couple were domiciled in Ontario, did not return to Hungary; after 18 years in Ont, H applied for a divorce from Hungarian court via mail (w/o physically going back to Hungary)

Held: R&S connection to Hungary was not established, notwithstanding they had been married, lived there for some time, and they were Hungarian citizens

Ratio: R&S connection can be lost; mere fact that one is a citizen and one got married there may not be enough

Edward v. Edward Estate (1985 Sask. Unified Fam. Ct.) R&S connection: quickie divorce

Issue: Did H have a R&S connection to California?

- "From all of the facts set out above, including the fact that [the husband] looked for work in California in 1953 and 1954, and that he was born in California and that his parents lived there, one must conclude that he had a substantial connection with that state and that he was not there... for a 'quickie divorce'"

Ratio: Consider whether party was in jurisdiction to apply for a "quickie divorce"

4) Court's refusal to recognize a foreign divorce

- a) Under CL, even if a divorce was non-judicial divorce (not involving legal proceedings), courts will recognize it
- b) Under **s. 22/Divorce Act**, statutory recognition requires judicial proceedings ("tribunal or other authority...")
- c) However, sometimes even where a divorce is formally and essentially valid, courts have discretion to refuse recognition even if one of the rules has been satisfied; scope of discretion is unclear:
 - **U.K. approach (*Indyka*)**: broad discretion for refusal, including whether the court believes the divorce offends substantial justice, was obtained by fraud, or was "genuine according to our notions of divorce," i.e. "incompatibility of temperament" (problem: this is contrary to the basic tenant of divorce jurisdiction, where the issue is jurisdiction/connection to the foreign jurisdiction and not merit)
 - **Canadian approach (*Powell*)**: narrow discretion for refusal; requires fraud going to the jurisdiction or a denial of natural justice

Powell v. Cockburn (1976 SCC) Canada's scope of discretion

Ratio: Courts have residual discretion to refuse recognition of divorce if there is a denial of natural justice or fraud, i.e. fraud going to jurisdiction, where one spouse lies about how long they have been separated in order to get divorce

- *Indyka* test (mentioned in *Bate*): "[T]he *Indyka* rule can perhaps be stated in this way: a foreign divorce will be recognized where there exists some real and substantial connection between the petitioner or the respondent and the granting jurisdiction. This is subject to the existing requirement that a decree should not be obtained by fraud, should not involve grave

injustice, should not offend against the forum's concept of substantial justice, or that there should not otherwise be a denial of natural justice. In addition... [t]he decree must be a 'genuine divorce'"

C. Legitimacy

- 1) Whose law determines whether one is legitimate?
 - Many jurisdictions have legislation that removes distinction
- 2) **Domicile of origin (DO) determines legitimacy (Re MacDonald)**
 - However, DO also depends on whether one is legitimate or illegitimate
- 3) **Subsequent marriage of parents** have effect of legitimizing the child; both *lex fori* and foreign law determines legitimization of the child
 - **Example:** M + F domiciled in France, acquire DC of AB, then get married – both French and AB law apply
- 4) **Public acknowledgment of paternity:** in some countries, if F publicly acknowledges he is the father, child will be legitimized

Re MacDonald (1964 SCC) Look to substance

• T (domicile in Ont.) left movable prop in a will to "issue" of a grandson (DO in Mexico); in Ont., "issue" did not include illegitimate children; the grandson had a child "out of wedlock" (that was publicly acknowledged)

Issue: Was the child "legitimate" according to Ont. law (such that she could get part of the estate)?

- 1) Court looked to Mexican law to see if child was legitimate; although she was considered illegitimate in Mexico, illegitimate children have all the same rights that legitimate children have under Ont. Law
- 2) Court looked behind the label of illegitimacy and focused on whether in substance the child had the same rights, capacities, and obligations

Ratio: In determining whether a child is legitimate, look to law in DO and consider whether in substance the rights / obligations in DO are afforded in own jurisdiction

Note: Analogy to determining whether a marriage is polygamous, i.e. in *Quan*, court did not ask if Chinese laws considered arrangement to be polygamous, but looked to husband's rights and applied the *lex fori* to determine whether the "marriage" was polygamous

Re Grove (1888 Eng. C.A.) Legitimization by marriage must be recognized in order to legitimize

Ratio: In order for a child to be legitimated by subsequent marriage of parents, father must be domiciled in place that recognizes legitimization by marriage (1) at the time of the birth and (2) at the time of marriage

Re Luck (1940 Eng. CA) Paternal acknowledgement legitimizes

Ratio: In order for a child to be recognized as legitimate, F must be domiciled in a place that recognizes this form of legitimization (1) at time of the child's birth and (2) at the time of the acknowledgment

Legitimacy Act, RSA 2000

- If foreign country does not recognize legitimization, can look to

Legitimacy Act

1(1) "If... after the birth of a person, the person's parents have intermarried or intermarry, the person is legitimate from birth for all purposes of the law of Alberta" – this section can be interpreted as dealing with conflict situations and replacing *Re Grove* → simply look to law of AB (however, tough argument as *Castillo* states that legislation should not be interpreted as changing choice of law rules unless expressly stated)

4 "[I]f... a person is born of parents who enter into a marriage that is void, the person is legitimate from birth for all the purposes of the law of Alberta if: (a) the marriage was registered or recorded in substantial compliance with the law of the place where it was entered into, and (b) either of the parties reasonably believed that the marriage was valid" – if one parent reasonably believed the marriage was valid, child is legitimate, i.e. even if the law of another juris find a person illegitimate, AB law may find person to be legitimate if situation meets s. 4

D. Custody

1) **Custody issues:** jurisdiction and recognition/enforcement

- When will an AB court have juris to determine custody of child?
- When will an AB court enforce a foreign custody order?
- Overlap between juris and recognition; existence of foreign custody order may lead AB court to not exercising juris

2) **Context:** assuming there is no existing custody order outside AB and this is not a child abduction case, then AB court will have juris in three situations:

- a) If child is physically present in AB
- b) If child is ordinarily domiciled in AB
- c) If child has a real and sufficient connection to AB

3) **Forum conveniens:** there is an inherent discretion for courts to decline jurisdiction (*Alexiou*), if it feels that some other forum is more appropriate

- **Paramount factor:** whether it is in the best interests of the child for the case to be heard in AB

Thomson v. Thomson (1994 SCC) Interim order for custody

• An interim custody order was granted in Scotland to M including provision that child could not be removed from Scotland until termination of order; M took child to

Manitoba and F tried to get child back; M had all custody rights, so difficult to show breach of custody rights as F did not have custody rights

Held: Scottish courts still had custody rights and therefore the removal was a breach of custody rights of interim order

- Principle only applies only to interim orders
- Can also argue that the court continues to have custody rights as long as court can vary order (bit of a stretch)

K.J.S. v. M.T. (1999 N.S. Fam. Ct.) Custody ancillary to divorce

Issue: If custody of child has been raised as an ancillary issue to divorce, does the court have juris?

- 1) **s. 3/Divorce Act:** if either spouse has been ordinarily resident and court has juris to determine validity of divorce, court has juris to hear custody claim
- 2) Also, if child is physically present in AB, court will have juris
- 3) **Parens patriae:** court has juris to determine issue relating to child

Legislation

a) Foreign custody orders cannot be enforced under CL; requires legislation

- **Example:** H + W lived in CA, divorce in CA, custody granted to W who stays in CA, H moves to AB and retains rights of access; while child is in AB, H brings action for custody of child – AB court would not have juris to enforce a new custody order according to *EPECOA*

b) **Extra Provincial Enforcement of Custody Orders Act**, R.S.A. 2000

- “Child” is defined as under 18
- **s. 2/EPECOA (Enforcement):** courts must enforce foreign custody orders unless the child at time of the order was made did not have R&S connection to juris
- **s. 4/EPECOA (Extraordinary power of court):** “[W]hen a court is satisfied that a child would suffer serious harm if the child [stayed in] custody of the [person in the custody order], the court may at any time vary the custody order or make any other order... it considers necessary” – **section to be interpreted narrowly**
 - “The... purpose of the Act is to apply the real and substantial connection test to determine where custody shall be decided. If... s. 4 charges a court to assess the long-term effect of a custody order as though that order is not subject to further review from time to time at the place where the children have a real and substantial connection, then the harm hearing becomes indistinguishable from a fitness hearing” (***Knight v. Knight***, 1998 ABQB)
 - Parent seeking custody should go before foreign court to make argument of best interests
- **s. 3/EPECOA (Variation of custody orders):** court has power to vary order if parent can show child (1) no longer has R&S connection to where order was granted and (2) has a R&S connection with AB or all the affected parties reside in AB

- R&S connection determined by various factors from **Indyka** test: not a “closest” connection test, but a R&S test; child can have a R&S connection to more than one juris

Knight v. Knight (1998 ABQB / 1999 ABCA) R&S connection

- M + F lived in Alabama, M went to AB with child, parties got divorced in Ala, F took child back to Ala; Ala court granted custody to F with extensive access rights to M during holidays; F then moved to S. Dakota
- During summer of 1998, child visited M in AB where parents agreed to let child to stay there until end of summer; during that time, M applied to AB court for custody order (child was not abducted, so only **s. 2/EPECOA** applied)

Issue: Did child have a R&S connection to AB (otherwise, AB court must enforce foreign order)?

Held: R&S connection to AB found

- 1) Child lost R&S connection to Ala, had R&S connection with S. Dakota + AB
- 2) Facts: since 1995, child had visited AB for extended visits, lived in AB since April, enrolled in kindergarten there, mother was resident in AB for many years and was a Canadian citizen
- 3) Emphasis on **Indyka** factor: where parent is resident

CA majority: Question of whether child has R&S connection is a question of fact; no evidence that QB judge made an overriding error, appeal dismissed

CA dissent: AB is not the most appropriate forum to determine the best interests of the child

- “The child has lived with his father in one state or another since 1995. If there is to be a motion to vary, the child’s welfare is best served in the forum that has optimum access to relevant evidence about the child and family. It would be folly to prefer the *situs* where the child just happens to be because the non-custodial parent, in exercising access in the jurisdiction in which she resides, seizes the moment to bring a motion there to coincide with the custodial parent’s move from one jurisdiction to another. It seems to me that forum shopping of that sort is a recipe for havoc and must be firmly rejected”

c) **International Child Abduction Act**, R.S.A. 2000

- Statute gives effect to *Hague Convention* on child abduction
- “Child” is defined as under age of 16
- **Art. 1 (Objective):** purpose to “(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States”
- **Art. 12 (Duty of court):** “Where a child has been wrongfully removed or retained... at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the

wrongful removal or retention, the authority concerned (AB court) shall order the return of the child forthwith”... “even where the proceedings have been commenced after the expiration of the period of one year... [the court] shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment”

- **Art. 3 (Removal or retention):** “The removal or the retention of a child is to be considered wrongful where (a) it is in breach of rights of custody attributed to a person... either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone...”
- **Wrongful removal:** where a foreign court grants custody to W but H physically takes child from W’s juris
- **Wrongful retention:** where H has access rights and does not return child at end of agreed period which the child is to stay with him

E. Matrimonial Property

1) Issue of Jurisdiction: Matrimonial Property Act

Application by spouse

3(1) A spouse may apply to the Court for a matrimonial property order only if

(a) the habitual residence of both spouses is in Alberta, whether or not the spouses are living together,

(b) the last joint habitual residence of the spouses was in Alberta, or

(c) the spouses have not established a joint habitual residence since the time of marriage but the habitual residence of each of them at the time of marriage was in Alberta

(2) Notwithstanding subsection (1), if a statement of claim for divorce is issued under the *Divorce Act (Canada)* in Alberta, the plaintiff or the defendant may apply for a matrimonial property order

- Principle of *forum conveniens* applies if court feels another forum is more appropriate

2) Issue of Choice of Law:

- Relates to characterization of the issue
- Choice of law may relate to incidence of marriage (domicile at time of marriage), property rights (movable and immovable prop), or contract law (matrimonial agreement; “The validity of a marriage contract or settlement, like the validity of an ordinary commercial contract, depends in general on the proper law of the contract” (*Dacey and Morris*))

▪ Steps in determining choice of law in relation to choice of law:

(1) Is this a matrimonial property action (e.g. as opposed to constructive trust in UE)?

(2) Is there a marriage/pre-nuptial agreement?

(3) If no marriage agreement, then may be a property issue (movable (*lex domicilii*) vs. immovable (*lex situs*))

(4) Has CL been impliedly changed by AB statute (which is silent on the matter)?

Tezcan v. Tezcan (1990 BCCA) Statute does not alter CL

Held: No implied contract, legislation has not changed CL, therefore CL rules apply – rights over land governed by province

- 1) Statute did not change the way matrimonial prop rights are characterized
- 2) Legislation does not vest prop rights in spouses; merely deals with distribution of assets
- 3) “[The] validity, interpretation and effect of a marriage contract or settlement are governed in general by the proper law of the contract”

Note: Court noted different arguments relating to different characterizations of matrimonial property

Chapter 4: Contracts

A. Express Selection of Proper Law

1) What is the proper law of the contract (choice of law = COL)?

a) **Express** (in contract): the system of law by which the parties intended the contract be governed; or

b) **Implied** (in contract): the system of law where the transaction has the closest connection

2) Although the proper law governs some aspects of the contract, it does not govern all aspects

3) Note distinction between substance and procedure

Vita Food Products v. Unus Shipping Co. (1939 PC) Overriding COL

1) “[W]here there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy”

2) “Connection with English law is not as a matter of principle essential”

- Reasons for choosing proper law: provides certainty, may be chosen b/c one party may have advantage (party w/ bargaining power), use of a sophisticated system of law, etc.

3) Rare for a court to say chosen law is not bona fide, illegal, or contrary to pp

Ratio: Choice of law will be upheld unless it is illegal (although this is unclear by whose law), contrary to public policy, or not in good faith

- The intention to use this place should be bona fide and express
- Choosing a juris that neither party has a real connection to raises suspicion

Golden Acres v. Queensland Estates (1969 Aust. S.C. Queensland) Bone fide selection

• A real estate contract took place in Queensland, but the person involved didn't have a Queensland license; the law there said that if a person does not have a license then he cannot sue to enforce the agreement; in order to get around this, the parties agreed to use the law of HK

Issue: Was this a *bona fide* choice of proper law of the contract?

Held: No, the selection of HK law was made in bad faith; even if there was a connection to HK, this was not enough to warrant getting around Queensland laws

- 1) Statute made it illegal to do so and although choice of law was Hong Kong, it was struck down
- 2) “[T]he attempted selection of this law was for no other purpose than to avoid the operation of the Queensland law... I conclude that the purported selection of the Hong Kong law was not a *bona fide* selection”

Ratio: If parties choose one law as the proper law to avoid another law, selection is considered a bad faith choice – this weighs in favour of striking down the choice of law, but not determinative

BHP Petroleum Pty. Ltd. v. Oil Basins Ltd. (1985 Aust. S.C. Victoria) Do not always need connection

• Disagreement among parties, choice of law was NY although they had no connection

Held: Valid/reasonable choice of law clause

- “It is... clear that on the facts... the contract has no connection with... New York at all, and has a great deal of connection both in fact and in law with... the State of Victoria... There are of course instances in which the courts have refused to allow a choice of law by the parties to operate, but these instances are all cases in which the parties have sought by their choice of law to avoid the operation of a fiscal or policy provision of the law which would otherwise apply to the contract...”

Ratio: Parties do not always have to have a connection with the place chosen

- There must be evidence that the parties are trying to avoid fiscal or policy provisions of the laws in the obvious place in order for courts to override the choice of law
- The mere fact that parties do not have a connection to choice of law does not make it bad faith; demonstrating a close connection is not always necessary, but the more connection there is, the more likely the court will uphold that choice (“good faith”)

Bank of Montreal v. Snoxell (1982 ABQB) Connection reflects good faith

• “The parties cannot make a pretence of contracting under one law in order to validate an agreement that clearly has its closest connection with another law... [T]he guarantee was signed in Alberta and the guarantor is a resident within this province, the creditor and the principal debtor carry on business in British Columbia, and it is there that the primary debt which the defendant guaranteed was incurred. ... [T]he contract had a close connection with the jurisdiction selected by the parties so as to warrant labelling their choice as *bona fides*”

• “This contract shall be construed in accordance with the laws of the Province of British Columbia” – not an ideal way to word a choice of law clause; should be “this contract shall be governed by the laws of the Province of Alberta”

Ratio: If parties choose place with connection, most likely viewed as a good faith choice

Note: distinguish COL from **choice of jurisdiction/forum:**

- Choice of law = whose law will govern the contract
- Choice of juris = which court has jurisdiction (“courts of AB have jurisdiction”); sometimes known as “exclusive jurisdiction” clauses
- Examples of COL clauses: p. 180

B. No Express Selection

• If there is no express choice, courts will look to all the factors / circumstances of the case to determine whose law has the closest connection with the transaction (***Imperial Life Assurance***)

Imperial Life Assurance v. Colmenares (1967 SCC) Factors in determining closest connection

Issue: Whether Ontario or Cuba had the closest connection

- 1) **Factors to consider:** residence, language, currency used, where contract was signed, performance, nationality, where parties carry on business, technical legal terms, choice of jurisdiction, etc.
- 2) If factors are almost even, court may identify certain factors that carry more weight than others
- 3) Important factors identified: applications and the policies were prepared in an Ontario common, standard form (most important factor) and evidence showed actual decision to “go on the risk” was not made in Cuba
- 4) Presumption of importance of factor may be rebutted, i.e. maritime law, where ship is registered

Note: Sometimes may be obvious that one place is favoured, but often it is not clear – importance of choosing the law to avoid uncertainty

The Al Wahab (1983 HL) Place of contract not so important

Ratio: Re place of contract, in these days of “modern technology”, the place of contract has less importance in determining the proper law of the contract

- May not necessarily be important as a factor in determining closest connection

Offshore International v. Banco Central (1976 Eng. Ct. Q.B.) Reasonable business person test

Ratio: If factors are evenly balanced, court will apply the reasonable business person test – what would a RBP have chosen?

- May not necessarily help, but could assist in determination

Herman v. Alberta (Public Trustee) (2002 ABQB)

- Crash of aircraft from AB to Sask; crash killed 2 and injured 3 over Sask border
- No express choice or contract; merely a receipt

Issue: What is the proper law of the contract?

Held: Re contract action: AB was the proper law as AB had the closest connection with the contract

- 1) **Factors:** pilot and other occupants were all resident in AB with exception of one person, charter co was registered in AB, place of business in AB and nowhere else, contract was entered into in AB, and performed partly in AB (money paid in AB, flew out of AB, maintenance of plane in AB, etc.)
- 2) However: “the location of the breach of contract was not a circumstance existing at the time the contract was made and thus is irrelevant... The location of injury, while relevant to the proper law of the tort, cannot affect the law that is meant to govern the contract, as this would allow the proper law to shift over time”
- 3) As F’s children undertook to repay him, all three were party to the contract

Ratio: In the absence of an express choice of law clause, look at the factors as they existed at the time the contract was made

C. Statutory Choice of Law Rules

Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce (SCC)

Statutory choice of law

- Cheques written by CIBC, an Ee in NY forged the payee’s signature (fraud)

Issue: Was the bank liable for this? Depended on whose law governed the cheque – if Canadian law, then Federal juris applied and bank would be liable, but not if NY law applied

- 1) Look to *Bills of Exchange Act*: liability of bank depends on whether it was an inland bill or foreign bill
- 2) Bill was not an inland bill; therefore NY law governed and bank was not liable

- 3) Court arrived at conclusion: in determining whether the bank’s liability was governed by Canadian law or NY, look to *Bills of Exchange Act* to determine the type of bill, if it is a foreign bill, foreign law governed

Ratio: There are certain limited instances where an act will replace the CL and this was one of them

Note: Why did court apply a Canadian statute? For certain types of contracts, there are statutory choice of law clauses that must be applied:

- **Examples:** *Insurance Act, PPSA, International Sale of Goods Act*, etc. indicate certain choice of law rules
- Always ask what type of act might govern the transaction and confirm whether the statute overrides CL re choice of law clause

International Conventions Implementation Act

• *International Sale of Goods Act*: how to know there is a statute that replaces CL rules?

- Anything about nature of action, place, parties involved that might attract a piece of legislation that might apply (i.e. limitations period)
- **Examples:** for an insurance contract, look to IA; PPS agreement, look to PPSA

D. Illegality

1) **Illegality:** relevance of the K being unenforceable under certain laws

2) **Proper Law**

- Proper law governs the validity of the K
- If a K is unenforceable according to its proper law, then it is unenforceable

3) **Exceptions:** see *A Simplified Approach to Applying Conflict of Law Rules to Determine Whether a Contract is Valid and Enforceable* (below)

4) **Lex Fori:** what relevance, if any, does the fact that the *lex fori* renders a K unenforceable?

Ross v. McMullen (1971 AB S.C.) Proper law of K

- K for splitting real estate commission; one party was not licensed to deal with real estate in AB

- According to AB *Real Estate Agent Licensing Act*, K was unenforceable

Issue: Was the K enforceable?

Held: AB was the proper law of the K – so K was unenforceable

- 1) Even if AB was not the proper law, K was still unenforceable because it offended a statute of the forum
- 2) This is the *lex fori* and a matter of public policy; if the K is illegal in AB, no matter what law the parties intended – it is still unenforceable in AB

- 3) Statement is misleading to suggest that a K unenforceable in the *lex fori* is necessarily unenforceable – only where it offends fundamental public policy to the forum will courts will refuse to enforce it

Block Bros. v. Mollard (1981 BCCA) Offends fundamental public policy

- Facts almost identical to *Ross*: π sued in BC to recover commission but he was not licensed in BC and the land was in BC

Held: Proper law of K was AB and so it was enforceable because it is only fundamental public policy that can render the K unenforceable – narrows *Ross*

- 1) Only where the enforcement of K offends fundamental public policy of the forum (contrary to our essential justice and morality), will courts refuse to enforce it
- 2) Court should give careful consideration before deciding something is unenforceable

Boardwalk Regency Corp. v. Maalouf (1992 Ont CA) Emphasis on fundamental public policy

- Action in Ont. to enforce a judgment for recovering for a gambling debt from NJ
- Δ argued that he shouldn't have to pay b/c gaming Ks are illegal in ON

Held: K enforceable, nothing offensive about enforcing the debt

- 1) Only where the K offends fundamental public policy of the forum where it will not be enforced
- 2) It cannot be every statutory prohibition which raises this offence/defence
- 3) Mere fact that the K offends a statute in the forum is not reason in itself to refuse enforcing the K
- 4) Different conclusions from this decision: (1) Ont. legislation did not reflect public policy; or (2) Ont. legislation should not be interpreted to apply to NJ Ks but only to ON Ks (statutory interpretation)

Note: Courts should take into account the consequences of characterizing its own laws as procedural – if there is any doubt, then legislation should be characterized as substantive rather than procedural

Notes:

- There is often more than one way to arrive at the same result (concluding this K was enforceable): via (1) conflict of law rules, (2) statutory interpretation (*TD Bank v. Martin*)
- If a K is unenforceable by the *lex fori*, that provision of the *lex fori* is characterized as procedure and K is unenforceable; court will always apply its own procedural laws and if those procedural laws render K unenforceable – it's unenforceable, regardless of what the proper law says

Ralli Brothers v. Compania Naviera (1920 Eng CA) Illegality by Place of Performance

Issue: What is the consequence if the performance of K is illegal under the law of the place of performance?

Held: K will be invalid if the performance of it is unlawful under law of the country where the K is to be performed (Dicey)

- 1) Principle of comity: courts will not force one party to do something that is illegal in the place of performance
- 2) If performance of K is illegal/unlawful, courts will refuse to enforce it

Note: Important to understand – illegality vs. unenforceability

Gillespie Management Corp. v. Terrace Properties (1989 BCCA) Part performance

- Gillespie (BC co.) entered into K with Δ to manage apartment buildings in WA; proper law of the K = BC

- K was unlawful in WA b/c π was not licensed to deal with real estate in WA

Held: Applying *Ralli Brothers*, K was unenforceable

- 1) *Ralli Bros* rule applies to part performance
 - K was not performed exclusively in WA – partly also in BC
 - However, part of K was performed in WA = constitutes partial performance and is caught by *Ralli Bros* rule
- 2) Where the performance is only incidental to the performance of the K, principle will not apply
- 3) Here, the performance in WA was not merely incidental to the K – but was a significant part of the K

E. Capacity

1) Capacity to enter into K governed by proper law of K

- **Example:** 18 year old, domicile in BC, enters into a K to buy a car in AB but changes his mind and wants to get out of the K by arguing that he is not an adult under BC law (based on domicile) \therefore K is invalid – argument would fail as: (1) even if no express clause in favour of AB, AB has closest connection, and (2) K entered into in AB, delivery, performance, payment – all in AB

Charron v. Montreal Trust Co. (1958 Ont CA) Capacity to enter contract governed by proper law of K

Held: Capacity to enter into a K is not governed by the law of the domicile, as it is with Ks of marriage

Ratio: For commercial Ks, capacity is governed by the proper law of the K

F. Formal Validity

- Formal validity (i.e. whether K must be witnessed, etc.) is governed either by proper law or the place of the K
 - K is formally valid if it complies with the formalities of either law or the place of the K

Kenton Natural Resources Corp. v. Burkinshaw (1983 Eng QB)

- π made \$50 K deposit to buy some oil leases but did not receive leases or deposit back. π sued in AB because that was where the guarantee was executed but Δ argued that K did not comply with *Guarantee Acknowledgement Act* under AB law
 - K was made in AB = place of K; K was governed by the law of TN = proper law
- Issue:** Was the K formally valid?

Held: Yes, proper law of K was TN b/c that is where the closest ties were to K – agreement complied with TN formality laws, so it was valid

- 1) Formal validity is governed either by the proper law or the place of the K
- 2) “Either” = K is formally valid if it complies with the formality of the proper law or the place of the K
- 3) Even though K did not comply with the place of the K (AB), as long as it complied with the proper law (TN) then it is enforceable

G. Review

Summary of Contract Rules

- K is unenforceable if it is illegal and unenforceable by its proper law
- Mere fact that a K is illegal by the *lex fori* does not make it unenforceable; but if it is shown that its enforcement would offend the fundamental public policy of the forum, then it will not be enforced
- If the statute of the *lex fori* which renders the K illegal is characterized as procedural, the K will not be enforced (as the court will apply its own procedure)
- A K that is illegal in the place of the K is nevertheless enforceable; but note that it could be enforceable for other reasons, but this alone is not enough (**Vita Foods**)

A Simplified Approach to Applying Conflict of Law Rules to Determine Whether a Contract is Valid and Enforceable

1. What is the proper law of the contract?

- (a) Is there a statute of the *lex fori* (e.g. the *Bills of Exchange Act*) which governs the determination of the proper law?
If yes, apply the statute; if no, then:

- (b) If there is an express choice of law clause in the K, apply the clause unless it is contrary to public policy, illegal or not *bona fide*;
- (c) If there is no choice of law clause or if the clause is contrary to public policy, illegal or not *bona fide*, apply the closest connection test.

2. Is there any statutory or common law rule in the proper law which, if applied, would make the contract invalid or unenforceable?

If yes, the contract is unenforceable unless:

- (a) the rule can be characterized as procedural, in which case the rule does not apply and the contract is enforceable (assuming that the proper law is not also the *lex fori*) – foreign law that is procedural will not apply, *lex fori* that is procedural will apply; or
- (b) the rule can be characterized as relating to the formalities of execution, in which case the K is enforceable if it has complied with the formalities of execution required by the *lex loci contractus* (“law of the place where the contract is made”), or
- (c) application of the rule would offend fundamental public policy of the forum.

3. Is there any statutory or common law rule in the *lex fori* which, if applied, would make the contract invalid or unenforceable and which can be characterized as procedural?

If yes, the contract is unenforceable.

4. Would the enforcement of the contract be contrary to fundamental public policy of the forum?

If yes, the contract is unenforceable.

5. Is the performance of the contract illegal under the law of the place of performance?

If yes, the contract is unenforceable.

Review problem analysis:

1. What is the proper law? Ohio

- (a) Is there a statute in AB that tells you what the proper law is? No (assume)
- (b) Is there an express choice of law clause? No, K contains none
- (c) What is the K’s closest connection – AB or Ohio?
 - i. AB = K was signed there, Jane’s parents = parties to the K live in AB
 - However, place of the K is not as significant as it use to be
 - ii. Ohio = performance of K is in Ohio, subject matter of K is in Ohio, other party to K carries on business in Ohio, currency is in Ohio (USD)
 - Note: the fact that the standard form used for the K was from Ohio – that is an important factor (*Colmenares*)
 - iii. Proper law = Ohio

2. Is there any provision in Ohio law that renders this K unenforceable? Yes

- (a) Ohio law requires every written K to be witnessed in order for it to be enforceable
- (b) Unless K fits into the 3 exceptions, it will be found unenforceable
 - i. Exception (a) can apply – provision of Ohio law is procedural and therefore should be ignored
 - Witness requirement deals with formal validity
 - ii. Exception (b) can apply – K does not have to comply with the formalities of the proper law as long as it complies with the place of where the K was entered into
 - Place the K was made = AB (where it was signed)

3. See above exception

4. No, the enforcement would not be contrary to public policy
5. Is the performance of the K illegal in the place of the performance?
 - (a) School is not accredited → offence to run an unaccredited school
 - i. *Ralli Brothers* = performance is illegal in the place of performance, therefore K is unenforceable
 - ii. <\$10,000 → issue of remedy/damages – school can argue that this type of provision is procedural b/c it caps what you can claim; as a result, AB court does not have to apply this provision

Chapter 5: Torts

A. Choice of Laws

- 1) Tort action = a tort committed somewhere other than in the forum
- 2) ***Tolofson v. Jensen***: leading case re whose law governs the action?
 - Canadian law prior to *Tolofson* = acceptance of English law which lead to dissatisfaction by academic writers and trial judges re the state of the law; expectation that SCC would change the law
 - Prior to *Tolofson*, in order to succeed in an action based on a tort committed somewhere else, π had to prove 2 things or else would be unsuccessful:
 - (1) Δ 's conduct was actionable under the *lex fori* if it had occurred here; and
 - (2) Δ 's conduct was not justifiable under the law of the place where the event occurred (*lex loci*)
 - Not justifiable = either actionable under civil law or was a criminal or quasi-criminal offence

Tolofson v. Jensen (1994 SCC) **Justification for traditional rule**

Held: Tort should be governed by the place the tort was committed

- Justification for changes (La Forest J)
 - 1) Law that requires Δ 's conduct to be actionable gives too much importance to the *lex fori*
 - Principles of territoriality = courts should be hesitant to apply law to events that occur outside of AB
 - Constitutional underpinnings to that justification
 - 2) Applying the law of the place of the tort is in line with people's expectations (questionable justification)
 - People have a legitimate expectation, that if an action occurs in Sask., Sask. law will govern
 - 3) Need for certainty – subject to limited exceptions, the law is clear
 - People need to know in advance, whose law will govern in tortious actions
 - La Forest does acknowledge possible exceptions to this rule – but the

general rule is clear that the need for certainty dictates – that tort claim is governed by the place the tort is committed

- However, the price one pays for that certainty may be unfairness if the place where the tort occurs is fortuitous, i.e. skiing at Sunshine – BC vs. Alberta law – is this sensible?

3) Exceptions to *Tolofson*:

- Some have argued that there are no exceptions for inter-provincial torts (torts committed in another province, not another country)
- ***Brill v. Korpaach Estate*** (1997 ABCA): “[T]here is... much to lose in creating an exception to the *lex loci delicti* in relation to domestic litigation... the court [takes] a strong position by limiting exceptions to the new law. The door is closed, though perhaps not locked [suggests there are circumstances that permit exceptions even where tort has been committed elsewhere]
- ***Bezan v. Vander Hooff*** (2004 ABCA) suggests that the door is closed and locked

Hanlan v. Sernesky (1998 Ont. CA) **Exception to *Tolofson* where rule would result in injustice**

- Accident in Minnesota, action in Ont., driver/passenger from Ont.; but for the place of the accident, no connection to Minnesota
- Minnesota law did not give an independent cause of action to the family members of injured person; Ont. permitted cause of action for family members

Issue: Could Ont. law apply?

Held: Ontario law could apply

- 1) “In accordance with *Tolofson*, we are satisfied that the motions judge had a discretion to apply the *lex fori* in circumstances where the *lex loci delicti* rule would work an injustice”
- 2) Factors considered: (1) parties were both resident in Ontario; (2) contract of insurance was issued in Ontario; (3) no connection with Minnesota other than that it was the place of the accident; (4) although the accident occurred in Minnesota, the consequences to members of the injured plaintiff's family were directly felt in Ontario; and (5) the uncontradicted evidence before him was that claims of this nature are not permitted under Minnesota law

Note: Court considered prejudice to π

Wong v. Lee (2002 Ont. CA) Unjust to apply the foreign law

- Accident occurred in NY, all parties resident in Ont., car registered/insured in Ont.
- Damages available were significantly less under Ont. law than NY law – Δ argued for the exception (that Ont. law should apply) although entitlement to damages is substantive matter (NY law)

Issue: Should the exception apply?

Held: Δ 's argument was rejected; not an appropriate case for an exception

- 1) Exception should be narrowed; does not apply simply because parties are connected to law of the forum – must be unjust to apply the foreign law
- 2) “It is not mere differences in public policy that can ground the exception to the general rule of *lex loci delicti*; the exception is only available in circumstances where the application of the general rule would give rise to an injustice. Every difference in the laws of the two forums is going to benefit one side or the other and be perceived as unjust to the one not benefiting”
- 3) “[A]s an example, the type of injustice the court sought to remedy in *Hanlan* was the unavailability to an Ontario plaintiff of a complete category of claim or cause of action according to the *lex fori*”
- 4) Meaning of injustice may depend on whether person is π or Δ – leads to difficult exception to make out

Discussion:

Somers v. Fournier (2002 Ont. CA): see earlier section

Castillo v. Castillo (2005 SCC): recall that s. 12 does not overrule *Tolofson*; π argued injustice as π was denied a complete cause of action due to shorter limitation period in CA, but court rejected the claim

Brill v. Korpaach Estate (1997 ABCA) Difficult to argue injustice

- MVA in Sask prior to *Tolofson*; filed a SOC in AB within the limitation period
- *Tolofson* decision was decided part way through and decision was ordered to be retroactive as it was clarifying CL (deemed to have been like that all along)

Held: Argument that the impact of the damage continued to exist in AB – rejected

Bezan v. Vander Hooft (2004 ABCA) Law of juris = where tort occurred

- Auto accident in Sask, π was AB resident, injured by driver from NF; action commenced in AB, π argued Sask law should not apply
- CA did not refer to FAA (no damages as π had no claim); CA should have noted that family members' claim was dependent

Held: “The law of the jurisdiction where the tort occurs is to govern. While exceptions may be possible in international accidents, *Tolofson* and... cases such as *Brill* make it clear that no such exception exists in relation to inter-provincial motor vehicle accidents” – exceptions may exist if tort was committed in another country

B. Place of the Tort: Where is the tort committed?

Moran v. Pyle National (1973 SCC) Place of tort

- π in Sask was electrocuted while removing a light bulb manufactured by Δ -co based in Ont

Held: Tort was committed in Sask

- 1) The court considered whether it was reasonably foreseeable that the product would be used that way and also if there was a real and substantial connection to the forum
- 2) Damage is the essential ingredient of negligence (not actionable without proof of damage)

Ratio: The place where the tort is committed is where all the elements of the tort have come into play

Note: Distinction between where the tort was committed for purposes of jurisdiction and for purposes of choice of law – cannot necessarily apply principles in jurisdiction context to choice of law context

1) *Tolofson*: “From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems [obvious that] the law to be applied in torts is the law of the place where the activity occurred, i.e. the *lex loci delicti*” – ambiguous

Leonard v. Houle (1997 Ont. CA) Where the accident occurred; damage is essential

- Ont. and Que police were sued for negligence for continuing high-speed chase that started in Ont and ended in Quebec, where accident occurred
- Que law does not permit claims for auto accidents; π argued that the tort was committed in Ontario (where activity occurred)

Held: Argument rejected; accident occurred in Que

- 1) “[T]he wrong occurred in Québec because the injury occurred there. The plaintiffs are not suing because the Ottawa police breached their duty when they commenced a chase while they were in Ontario, nor are they suing because the Ottawa police failed to adequately warn the Québec police authorities of the ongoing chase. They are suing because [the π] was injured in the resulting car accident in the Québec”
- 2) Injury/damage is an essential element in negligence

Brill (same analysis): “When the negligence of a defendant causes injury to the plaintiff, it is that injury which is the genesis of all damage. Damages, such as the loss of future wages, flow from the injury and the fact that they arise in a different province does not change the place where the tort occurs. In both *Jensen* and this case, the place of the tort and the injury was Sask”

2) In order to identify place of tort, analyze the damage:

- Examine the elements of the tort and ask when did this cause of action come into being? When was the last essential element in place?

3) If issue raised, usually related to auto accidents, although torts like misrepresentation or defamation may not be clear re: place of tort

- **Misrepresentation:** place of tort is not where Δ made the representation, but where the misrepresentation is relied upon (**Barclay=s Bank case**)
- **Defamation:** requires (1) defamatory statement, (2) reference to π , and (3) published/communicated to third party; although defamatory statement may be published in multiple places, the place of tort is where the effects of the defamation are felt / where damage is done (where damage occurs, where the person's reputation is centred) (**Tolofson**)

4) **Fatality cases:**

- Two causes of action: (1) benefit of deceased's estate under SAA (actual loss suffered by deceased between time of accident and death), and (2) action for benefit of dependents of deceased; claim for bereavement, loss of support, etc. under FAA
- **Example:** F and B are residents of AB on holiday in Que, auto accident was caused by F's negligence, B is seriously injured, hospitalized in Montreal, transferred to hospital in AB where he dies – claims under SAA by estate and under FAA by family would fail as (1) under Que law, no claims; (2) estate and dependents would not be able to demonstrate AB law applied:

Survival of Actions Act

2. A cause of action vested in a person who dies after January 1, 1979 survives for the benefit of the person=s estate

- Deceased's action is derivative
- Must ask if deceased had an action at the time he died – answer is no, under Quebec law

Fatal Accidents Act

2. When the death of a person has been caused by a wrongful act, neglect or default that would, if death had not ensued, have entitled the injured party to maintain an action and recover damages, in each case the person who would have been liable if death had not ensued is liable to an action for damages notwithstanding the death of the party injured

- Action is independent claim by the family, not derivative

- Precondition is that deceased would have had a claim had he not died – conclusion is that B could not have claimed, as action governed by Que
- Does not matter that B died in AB

C. Other Causes of Action

1) Issues re whether a claim is a tort:

- a) Cases where courts say something is not a tort claim and *Tolofson* does not apply
- b) Where courts say this is a tort claim, but particular issue is not a tort issue and not governed by *Tolofson*
- c) Cases where π circumvents the rule in *Tolofson* by characterizing the claim as something besides a tort

2) Possible for π to frame complaint as a contract matter; recall **Herman** case where π argued AB law applied as heads of damages were more generous than under Sask (see below)

- Characterized action as breach of contract to overcome *Tolofson* = AB was proper law of the contract
- *Central Trust* case (SCC): if another action exists, π is entitled to make claim for both actions

3) Some distinct issues may not be governed by law of the place of the tort, i.e. procedural / substantive distinction

▪ **Example re exemption clauses:**

- A rents a car in BC and gets into an accident, claims the car was not road worthy, and sues Avis in negligence for providing A with poor car
 - 1) If there was an exemption clause (even for negligence) that was valid under BC law but choice of law clause is in favour of Ont. (head office), under Ont. law, clause is void
 - 2) If Avis claims under BC law ruled and exemption clause was valid, A may claim that exemption clause is a contracts issue governed by the proper law of the contract (Ont.)

Schroen Estate v. Wawanesa Mutual Insurance Co. (1996 ABQB)

Characterization of K

- AB resident killed in auto accident in Louisiana; as negligent driver was under-insured, π turned to own IC under SEF-44
- SEF: "In determining the amount an eligible claimant is legally entitled to recover from the inadequately insured motorist, issues of quantum shall be decided in accordance with the law of the province governing the policy (AB) and issues of liability shall be decided in accordance with the law of the place where the accident occurred (Louisiana)" – IC argued that they were not bound by Louisiana's court of assessment, as action against IC was not a tort action, but a contract action

Issue: Was IN entitled to do so and whose law governs SEF-44?

Held: No, as claim it was a contract claim governed by AB, not a torts claim

- 1) Since there is a K, the choice of law rules stated in K must be applied; so the negligence of the driver went under Louisiana law, but the quantum of the damage went by AB law
- 2) “While the Louisiana Court as the tort court made findings of quantum which are clearly applicable... those findings are not enforceable under the SEF 44 contract as against the defendant SEF 44 insurer... because it is not the tort action (Louisiana) but the SEF contract (Alberta)... The SEF contract... provides that issues of quantum will be dealt with in accordance with the law of the province governing the policy; i.e. Alberta”

Thai v. Dao (1998 Ont. S.C.) Characterization of K

• π was injured due to negligence of own car and an unidentified car in Que; made SEF claim that was a contract claim, not a tort claim, so not governed by Que – Ont. permits motor vehicle actions (whereas Que didn’t)

Issue: Was this a contracts claim?

Held: No, it was a torts claim

- 1) Governed by law of Ontario, but also governed by terms of the contract
- 2) “[I]f the insured is involved in an accident with an unidentified car, the insurer will pay such amounts as the insured has a legal right to recover from the owner or driver of that unidentified car, nothing more, nothing less... [T]his language... imports the requirement that one must go to the law of the place of accident in order to ascertain whether the insured in fact had a legal right to recover damages from the putative negligent parties”
- 3) May claim under own IC what π could have claimed from unidentified driver, which would be nothing b/c there is no claim in Que

Herman v. Alberta (Public Trustee) (2002 ABQB) Substantive/procedural distinction

- Recall light-aircraft case
- **SAA:** used to be that under AB law, one’s estate could claim for future earnings under SAA, but this was changed by legis
- **AB FAA:** although AB Act provided bereavement damages (\$45 K), it defined a beneficiary as a “child”, not “grandchild”
- **Sask FAA:** defines “child” to include “grandchildren” – more beneficial to π
- π argued that heads of damages are substantive (governed by Sask law) – must turn to Sask law to determine who is entitled to bereavement (children and grandchildren), then turn to AB law (procedural) to determine quantum (\$45 K)

Held: Argument was rejected

- 1) Acknowledged rule to look to place of tort to determine heads of damages and forum to determine how much

- 2) “[Court rejects] the argument that if Sask tort law were applied, the Sask definition of child (which includes grandchildren) should be applied to the assessment of damages in... the Alberta *Fatal Accidents Act*... [which] is a code... that creates new rights of recovery that extend beyond the pecuniary limits generally imposed under fatal accidents legislation and is clearly intended to apply only to the minor sons and daughters of a deceased”

D. Review

- 1) Characterize matter as a torts claim; governed by place of tort = Nevada
- 2) Head of damage of loss of future earnings = governed by law of Nevada; s. 2/SAA: derivative claim governed by law of Nevada, no matter where person died
- 3) Entitlement governed by Nevada; quantum is procedural = AB, therefore cap of \$5 K (from Nevada) does not apply
- 4) Limitations: s. 12/*Limitation Act, Castillo*, barred under Nevada law (1 year) where the tort was committed

Chapter 6: Succession

A. Testate Succession

Re Berchtold (1923 Eng Ct.) Distinction between movables/immovables

- Land on trust placed on sale; land on trust is treated as personal prop
- Held:** Re characterizing prop for conflicts purposes, law adopts distinction between movables and immovables
- 1) Domestic purposes: even if prop is characterized as real/personal, does not change movable/immovable analysis
 - 2) Movable governed by the place of the domicile
 - 3) Immovable governed by the place in which prop is located

Wills Act

- Codification of testate succession
- **Land/immovables (s. 39(2)):** [T]he manner and [formal validity] of making a will, and its [essential] validity... so far as it relates to an interest in land, are governed by the law of the place where the land is situated
 - **Exception (s. 43):** When the value of a thing that is movable consists mainly or entirely in its use in connection with a particular parcel of land... succession to an interest in the thing, under a will or on an intestacy, is governed by the law of the place where the land is situated
 - Such a thing is treated as an immovable, rather than a movable or a fixture; its main value is in connection with the piece of land
- **Movables (s. 39(3)):** [T]he manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in movables, are governed by the law of the place where the testator was domiciled at the time of the testator's death

- Appears to be different from **CL re capacity to make will**: immovables = *lex situs*, movables: governed by the domicile at the time person makes a will
- **Formal validity/capacity to make will (s. 40**: expands CL re formal validity): As regards the manner and formalities of making a will, so far as it relates to an interest in movables, a will made either within or outside Alberta is valid and admissible to probate if it is made in accordance with the law in force at the time of its making in the place where

- the will was made
- the testator was domiciled when the will was made, or
- the testator had the testator's domicile of origin

- For movables, can look to four places; if valid under any of those, will is formally valid
- Possible to have a will that is valid for just movables and not immovables, and vice versa

• **International wills**: ss. 44-48/*Will Act*

Revocation of a will – whose law governs?

1) Marriage of T will revoke a will

- All CL juris provides that if a T subsequently get married, the marriage has the effect of revoking the will
- Not the same in civil juris, therefore conflicts issue may arise as to whether a marriage revokes a will

2) Divorce: some provinces say that a divorce will revoke a will (i.e. Ont.) to the extent that it includes a bequest to a former spouse

Allison Estate v. Allison (1998 BCCA) Incident of marriage

- T made will while domiciled in Que, got married in Que, moved to BC, died there
 - Estate mainly had movable prop – succession to estate governed by law of BC; BC law also said that subsequent marriage revokes will
 - Beneficiaries argued characterization of a marriage issue (family law) that is governed by domicile at the time of the marriage (rather than a succession issue)
- Held**: Issue was an incident of marriage, governed by place of the domicile
- *Davies v. Davies*: rule can be applied to immovable prop (domicile at time of marriage)

Re Canada Trust Co. and Sachs (1990 Ont. SC) Divorce revokes will/gift to spouse

- T domiciled in Que, land in Ont, had will, got divorced and died
 - Ont. law indicated that a divorce revokes a will; Que says otherwise
 - If one adopts *Allison*, could characterized case as an incident of divorce – governed by domicile at time of divorce = Que
- Held**: Court considered it a succession issue

- Immovable prop is governed by law of Ontario, divorce revokes will, and so land could not be passed on to wife

Ratio: In CL juris, a divorce revokes a will

B. Intestate Succession

Intestate Succession Act

- Spousal preferred share
 - Surviving spouse receives the first (preferred) share of estate and rest is distributed = \$40K
 - One child, then rest of balance split between spouse and child
 - If more than one child, spouse gets 1/3 and the rest goes to children
- Amount of preferred share is different from province to province: moveables and immovables problem

Re Collens (1986 Eng. Ct.) Intestate Succession

- C died intestate domiciled in Trinidad; wife settled claim in Trinidad (\$1 m), then made claim in Eng for preferred share (first \$5 K)

Held: Court reluctantly granted her the share she was entitled to under the *Intestate Succession Act*

Sinclair v. Brown (1898 Ont. S.C.) Intestate Succession

- T died intestate in IL and the widow took the IL share; she then went to ON to get her share of the immovables

Held: Court allowed surviving spouse to claim both shares; D died in IL, spouse got preferred share from IL (movables) and Ont. (immovables)

- Newer cases refuse to allow surviving spouse to “double-dip” to full extent, although allowed a certain amount

Thom Estate v. Thom (1987 Man QB) Variation of preferred share

- H died domiciled in Sask, W received preferred share in Sask (\$40 K + 1/3 residue); H owned immovables in Man, so W applied to Man court for preferred share under Man law (\$50 K + 1/2 residue)

Issue: Was W entitled to receive both shares?

Held: As W received \$40 K + 1/3 residue from Sask, only entitled to \$10 K (\$50 – \$40 K = \$10 K) + 1/2 residue from Man

- 1) Court focused on lump sum received in Sask, not the residue
- 2) Rejected argument by Δ: entire estate should be governed by law of domicile including immovable prop – π would have received \$40 K plus 1/3 of entire estate

Ratio: Where the court feels it is unequal / unfair to allow the spouse to claim twice for the preferred share, the court may top up the lower amount to match the

higher amount

Note: Difficult to understand if \$100 K in each province; W would receive \$40 K + 20 K (\$60 K); Man would allow \$50 K + \$25 K (\$75 K) – W would have already received more than \$50 K from Sask

Vak Estate v. Dukelow (1994 Ont. SC) Highest preferential share

- Manitoba uses concept of “habitual residence” at death, rather than domicile
- W died domiciled in Man, land in Ont, survived by H and son
- Man: \$50K + 1/2 movable residue, Ont: \$75 K preferred share, but land was worth \$42 K; H claimed entire Ont. estate

Issue: Was he entitled to entire estate in Ontario?

Held: No, court deducted Ont. share from lump sum already received (citing *Thom*)

- 1) Already received \$50 K from Manitoba, so H only entitled to lump sum of \$25 from Ont.; residue divided according to Man law (1/2 share)
- 2) Calculating residue: “[A]ssets [whether] movables or immovables, should be assembled under the administrator=s umbrella, and after setting aside the highest preferential share permitted under the respective jurisdictions where the assets are located, the residue of the estate be divided by the applicable law of the deceased=s usual or habitual place of residence”
- 3) Look to the two laws and ask which is the larger lump sum (Ont = \$75 K), then take out lump sum and apply the law of domicile to the entire estate of movables and immovables (Man law)

Spectrum:

- 1) Spouse entitled to all preferred shares including residue (*Collens*)
- 2) Spouse entitled to all shares but not entitled to full amount of lump sum; reduce by lump sum already received (*Thom*); spouse entitled to larger share, but residue is governed by traditional rules (movables/immovables)
- 3) Spouse entitled to larger lump sum, but residue is governed entirely by domicile (*Vak*)
- 4) Ignore *lex situs*; entire estate whether movable or immovable should be governed by the law of the domicile

Review Problems

1) Tom dies intestate domiciled in Ontario, survived by his wife, Jane, and one child. He has moveable property in Ontario valued at \$40,000 and immoveable property in Alberta valued at \$40,000. Assume that the law of Alberta and the law of Ontario both provide for a spousal preferred share of \$40,000 on intestacy. Under the law of both provinces, the balance of the estate is divided equally between the surviving spouse and the child. How much of Tom=s estate is Jane entitled to claim?

- Appears laws are the same, no conflict

- However, could argue that Ont. law only governs the movables, \$40 K and AB law only governed immovables, combined: J is entitled to everything – this argument has succeeded

2) In 1970 Morag, domiciled in Scotland, inherits her grandfather=s farm in Alberta. In 1972 Morag executes a will leaving the farm to her sister in Edmonton. In 1975 Morag marries Hamish and they remain domiciled in Scotland until Morag=s untimely death in 1983. Morag=s only will is the one made in 1972. Morag=s sister seeks your advice as to her rights under Morag=s will. The law of Alberta provides that a will is revoked on the marriage of the testator. The law of Scotland has no such provision.

- Issue: not governed by law of place of the prop, but governed by domicile
- Sister can receive the farm, as will was not revoked by marriage

Chapter 7: Proof of Foreign Law

1) Main principle: foreign law (law of any other juris except for AB) is a matter of fact, not law

2) Foreign law is not a fact within judicial knowledge of the judge – a judge cannot take judicial notice of foreign law

3) Foreign law must be pleaded & proven (by expert opinion on foreign law)

- **Example:** MVA in Que, Δ must plead that incident is governed by Que law and that it does not apply, then prove it with evidence
 - a) Δ must bring in qualified expert on foreign law: if expert brings in texts or cases/statutes, judge is entitled to review the materials – however, cannot simply hand over case law w/o expert opinion
 - b) As the issue is a question of fact, court is not bound by previous decisions of fact
 - c) Judge must accept expert=s evidence, unless opinion is patently absurd
 - d) If foreign law is not proved, it is presumed to be the same as law of the forum

Traders Realty Ltd. v. Sibley (1980 ABQB) Foreign law = question of fact

• π applied for summary judgment for action on personal covenant on mortgage, Δ relied on AB *Law of Property Act* stating there is no action; π argued it did not apply as mortgage was governed by Ont. law (proper law of the contract), but failed to prove what Ont. law says (that Ont. permits action)

Held: As π failed to prove evidence, presumption that Ont. law was the same as *lex fori* = AB

- 1) Foreign law is a question of fact. It is presumed to be the same as the *lex fori*, here Alberta, in the absence of evidence to the contrary
- 2) In response to π=s attempt to bring in Ont. case law to argue that Ont. law applied, court said: “[T]he plaintiff attempts to prove@ what the Ontario law is by reference to [case law]. A fact cannot be proved by reference to another unrelated decision between different parties where a fact was either admitted or found. The confusion lies in approaching the foreign law

as a matter of law rather than as a matter of fact.”

The Mercury Bell (1986 FCA) General vs local application

- Individual crew members that were part of a union on a ship sued on a collective agreement (issue: lack of privity)
- Relations between a ship and her crew were governed by the law of the ship's registry = law of Liberia
- No evidence of law of Liberia shown = Canadian law was applicable; court looked to Canadian statute and found that although Ees could not sue on a collective K, there was an exception if the K contained a no-strike clause or arbitration clause = Ees could sue
- However, there was no arbitration clause

Issue: Could the court presume that the laws are the same?

Held: As case was of a general nature, court could presume the law of Liberia had the same provision in their legislation; however, as the Canadian provision that stated that one cannot sue w/o arbitration clause was considered a localized provision → only provisions of current Canadian law (which had some degree of universal application) were applied in favour of Ees

- 1) Court noted distinction between: (1) statutory provisions of general character which have a degree of universality vs (2) statutory provisions that have a localized nature
- 2) General character: foreign law is presumed to be the same as own law
- 3) Local character: if not caught by the same presumption, foreign law not presumed to have the same provisions
- 4) The recognition of and right to enforce a collective agreement was found to have the requisite degree of universality; the statutory requirements for binding arbitration and no-strike clauses were found to be peculiar to Canadian circumstances and were therefore not applicable

Ratio: Presumption from *Traders Realty* is applicable to statutes but only those that of a general or universal application; localized statutes are restricted to the particular jurisdiction and it is not fair to presume these are found in the foreign law

Judicature Act

- **s. 12:** When in a proceeding in the Court the law of any (Canadian) province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta
 - Exception to rule that judges cannot take judicial notice of foreign law
 - Wide discretion for judge to take judicial notice of law in same manner of any AB law; open to judge to disagree with evidence

O=Donovan v. Dussault (1973 ABCA) s. 12/Judicature Act

- Action on guarantee (governed by law of Sask); Δ argued guarantee is unenforceable as it does not comply with AB *Guarantees Acknowledgment Act*

Held: Although guarantee was governed by Sask law, no evidence that it was governed by Sask act or evidence that Sask had such an act

- 1) Instead of applying presumption, court exercised discretion under s. 12 and took judicial notice that Sask did not have same act
- 2) Where no evidence of the foreign law is presented to prove it is different than the *lex fori*, the judge has discretion whether to use s. 12; where the issue is less complex it is also easier to get judge to take notice under s. 12

RBC v. Neher (1985 ABCA) Denial of s. 12 application

• Mortgage governed by BC law; π -bank sued Δ on agreement in AB; π sought to prove that BC law did not restrict rights over land and attempted to prove BC law by handing the judge copies of the statute and relied on s. 12/*Judicature Act*, asking judge to take judicial notice

Held: Request denied

- 1) “The difficulty... with the utilization of s. 12 in today=s world is that, although it is Δ present@ legislation, it goes back to much simpler days. [T]his court has enough of a problem wrestling with Alberta legislation without trying to wrestle with the legislation of other provinces.... I have enough mental discomfort trying to interpret Alberta legislation without expanding the scope of my endeavours to include foreign legislation”
- 2) “The plaintiff is a bank. It undoubtedly has resident solicitors in BC. It could have easily proved the laws of British Columbia on the defence in issue” – bank should know better; little excuse for having to rely on s. 12

Note: This was a summary judgment; claim was not dismissed and π had chance to bring necessary evidence at trial

Associates Capital Services v. Multi Geophysical Services (1986 ABQB)

Adjournment to get proof

• π failed to prove law of Colorado, realized mistake and applied for leave and adjournment to get proof of the foreign law

Held: Application granted

Ratio: If one fails to lead expert evidence (law of another country), may be possible to reopen the case

Pettkus v. Becker (1981 SCC) Foreign law must be raised in original pleadings for SCC consideration

• If a case brought to SCC, justices deemed to know everything about every province’s laws

Held: The SCC does not take judicial notice of the law of another province unless that law has been pleaded in the first instance

- 1) “It is arguable that the laws of Province of Quebec, and not those of Ontario, should govern the rights of the parties. This point was not

pleaded, nor was it addressed by Court or counsel in any of the earlier proceedings... This Court... does not take judicial notice of the law of another Province unless that law has been pleaded in the first instance”

- 2) An issue of foreign law is no longer an issue of fact but an issue of law when faced with SCC

Chapter 8: Refusal to Apply Foreign Law

• When courts will not apply foreign laws:

- 1) Foreign penal laws
- 2) Foreign revenue laws (directly or indirectly)
- 3) Public policy

A. Foreign Penal Laws

Huntington v. Attril (1893 PC) Penal laws

• Action by creditor-co- π against Δ -director, governed by NY law

• Basis of action: NY statute which imposes personal liability on directors

• Action was successful in NY, π attempted to enforce judgment in Ont., but Δ argued NY law was penal and should not be enforced in Ont.

Held: Enforcement of judgment against Δ

- 1) Court recognized general rule but explained that rule is not concerned with a law that is harsh or punitive, but a law which is in the nature of suit in favour/benefit of foreign state
- 2) Penal laws are territorial and limited to those states, i.e. criminal fines or legislation that seizes person’s assets for benefit of state, etc. would not be applied in view of general rule on foreign penal laws

B. Foreign Revenue Laws

U.S.A. v. Harden (1963 SCC) Foreign tax laws will not be upheld

• U.S. gov’t got judgment against H, H moved to BC and gov’t sued H in BC to enforce tax judgment

• π did not take issue with general rules: (i) that a foreign state is precluded from suing in the country for taxes due under the law of the foreign state, and (ii) that in a foreign judgment there is no merger of the original cause of action

Held: Judgment could not be enforced in BC

- 1) Court rejected π ’s argument that gov’t was not suing for collection, but suing for enforcement
- 2) Court looked to substance, not form; rejected argument that this was not an action for unpaid taxes, but enforcement of a negotiated agreement between gov’t and Δ
- 3) “[T]he argument that the claim asserted is simply for the performance of an agreement, made for good consideration, to pay a stated sum of money must also fail. We are concerned not with form but with substance, and if

it can properly be said that the respondent made an agreement it was simply an agreement to pay taxes which by the laws of the foreign state she was obliged to pay”

Dubois v. Stringam (1992 ABCA) Direct or indirect enforcement foreign tax laws

- Estate case: D died domiciled in AZ, will left AB farm to niece (N); N made an order to have prop transferred, but executor stated that there is U.S. state tax were applicable, so could not transfer property – instead must sell and pay balance to N
- Expert evidence showed that under AZ executor could be personally liable for unpaid taxes

Held: Property should be transferred to beneficiary

- 1) Courts will not directly or indirectly enforce foreign revenue laws
- 2) If court were to do what executor requested, court would indirectly be enforcing AZ tax law
- 3) In *Harden*, gov’t tried to get judgment in favour of state; here it is the executor, but it does not matter who the parties are – ask: in substance, would court be enforcing foreign tax laws? If yes, court cannot grant order of executor

Weir v. Lohr (1967 Man QB) Rule does not apply to inter-provincial cases

- Sask gov’t tried to make a claim from Manitoba for medical bills of a Sask resident

Held: Between Canadian provinces, the *foreign State, foreign tax, foreign revenue* rule is rejected

- 1) Court rejected arguments that: (1) even though MB calls it a tax, the court is not bound by how the foreign jurisdiction characterizes it; (2) it is not a tax, but it is Sask trying to recover ∴ the rule didn’t apply inter-provincially
- 2) “[T]o apply the *foreign state, foreign tax, foreign revenue* rule as between sister Provinces of Canada is... an excellent illustration of the evils of mechanical jurisprudence”
- 3) The fact that the legislation calls it a tax is not determinative

Note: Consider AB *Personal Income Tax Act* which expressly gets around the rule

Alberta Personal Income Tax Act

- Academic question arises due to s. 67/AB *Personal Income Tax Act*
 - **67(1)** A judgment of a superior court of an agreeing province or territory under that province=s or territory=s income tax statute... may be enforced in the manner provided for in the *Reciprocal Enforcement of Judgments Act* and is deemed to be a judgment to which that Act applies [Does not say province of Man can sue tax payer in AB, but if Man court gets judgment against AB resident, can come to AB to enforce judgment]
 - **(2)** For the purposes of subsection (1), when a judgment of a superior court of an agreeing province or territory is sought to be registered under the

Reciprocal Enforcement of Judgments Act, the judgment must be registered even if it is established that one or more of the provisions of section 2(6) of that Act apply [Removes defences to enforcement – if it is a tax judgment, may register and enforce judgment]

C. Public Policy

1) “English Courts will not enforce or recognize a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition... would be inconsistent with the fundamental public policy of English law”

- **Dicey & Morris:** rule is invoked in the most exceptional circumstances – general exercise of tolerance, i.e. enforcing gambling debt does not offend FPP (***Boardwalk Regency***), uncle and niece’s marriage in Egypt was recognized (***Cheni***), interracial marriage would probably be recognized, etc.
- **Key issue:** does the application of foreign law in this particular case offend FPP?
- **Example:** “[I]f a foreign law permitted a bachelor aged 50 to adopt a spinster aged 17, the courts might hesitate to award the custody of the girl to her adoptive father: but that is no reason for not allowing her to succeed to his property as his Achild@ on his death intestate. Public policy in such cases is not absolute but relative”

Wende v. Strachwitz Estate (Official Administrator of) (1998 BCSC) Contrary to FPP

- In late 1930s, Germany enacted law prohibiting relationships between those whose age gap was too large; law was subsequently repealed
- 1930s: Aristocrat at 64 started a relationship with 25 year old woman
- 1950s: As Count considered himself unable to marry a woman not of noble birth, he adopted his lover (to allow cohabitation) – recognized under German law
- Issue:** For purposes of succession, could BC court recognize adoption as lawful?
- Held:** No, it offended FPP, adoption was not recognized
 - 1) “It will only be under very rare circumstances that a foreign adoption will not be recognized in British Columbia. This is one of those occasions”
 - 2) “Without deciding the question whether of this motive also violates public policy... it is clear that there should not be recognition of a foreign adoption where the primary purpose of that adoption was to allow a man and woman living as husband and wife to adopt so that a Afather@ and Adaughter@ could then continue to live as husband and wife. That concept is so foreign to British Columbia public policy that this German adoption should not be recognized in British Columbia”

Ratio: Adoption for the purpose of allowing a man and woman to live as husband and wife is contrary to FPP and will not be recognized under Canadian law

2) *Renvoi* (does not exist in Canadian law): process by which a court adopts the rules of a foreign juris with respect to any conflict of laws that arise

- If the foreign law's conflicts rules point elsewhere, how much of the foreign law applies?
- **Example:** if a person dies domiciled in France (movables governed by France), how much of French law applies? Should only French succession laws apply or also French choice of law rules? If latter, under French COL rules → succession is not governed by domicile, but by nationality

Vladi v. Vladi (1987 N.S.S.C.) Charter as evidence of FPP

- Matrimonial property dispute
- Under NS *Matrimonial Property Act*, governed by couple's last common habitual residence (W. Germany); under German law, W entitled to 1/2 prop, H argued that the COL rules of Germany apply, which say that it is governed by nationality = Iran
- W: even if Iranian law applied, it would offend FPP

Held: Application of law would offend FPP, *Charter* accepted as evidence of our FPP

- 1) "[T]he defendant... submits that the present case involves a mild form of *renvoi*... In response... the plaintiff [has] presented a... submission based on... the [*Charter*]. ... I am satisfied on [the] grounds... that... [the] implementation of Iranian law by *renvoi* should be rejected.... I will not give effect to Iranian matrimonial law because it is archaic and repugnant to ideas of substantial justice in this province"
- 2) Court merely concludes that applying Iranian law would offend FPP
- 3) Open to counsel to use *Charter* to support argument that foreign law should not apply

Ratio: The *Charter* may be considered as evidence of FPP; laws that are "archaic and repugnant to ideas of substantial justice" will not be enforced

Chapter 9: Jurisdiction

1) **Jurisdiction:** power of the court to entertain the action

- a) Juris over subject matter
- b) Juris over defendant

2) **Key date:** when statement of claim is served on the Δ

Note: This section will not look at matrimonial cases (as they were covered earlier)

A. Personal Service

1) **Physically in AB:** AB courts will have juris if Δ was physically present in AB when Δ is served with SOC (does not matter how temporary or fleeting)

Butkovsky v. Donahue (1984 BCSC) Physical presence in AB

• MVA case; Δ was π's daughter, who lived in CA; π lived in BC; Δ facilitated commencement of action by traveling to BC

Held: A person can come to the province to be served voluntarily but cannot be tricked into it

- 1) This can be done for MVA insurance claims
- 2) Although there is an argument that Δ breached duty to IC, the collaboration doesn't render the act bad – did not affect juris of court over Δ

Ratio: "If a defendant is properly served... while he is in this country, albeit on a short visit, the plaintiff is prima facie entitled to continue the proceedings to the end. He has validly invoked the jurisdiction of the Queen's courts; and he is entitled to require those courts to proceed to adjudicate upon his claim"

2) When court will not have juris:

- If π kidnapped Δ and brought to AB
- If Δ was deceived into coming to AB and served

3) AB court does not necessarily have exclusive juris

- Sometimes parallel actions among same parties in different juris can proceed

4) Court has discretion to decline jurisdiction

Charron v. La Banque Provinciale du Canada (1936 Ont. H.J.) Corp Δ – place of business

Issue: What is the rule for corporate Δs?

Held: If corp has place of business in AB and is served, AB has jurisdiction

- 1) Need not be a HQ – just need a place of business
- 2) *Business Corporations Act*: relevant provisions

Kroetsch v. Domnik (1985 ABQB) Corp Δ – agent

Held: Even if corp does not have a place of business but has an agent, then service on agent establishes juris of AB court

B. Service Ex Juris

1) **Service ex juris:** service outside juris

2) **Alberta Rules of Court**

- R 30 will be changed in New Rules, but case law will continue to be relevant

- Under present R 30, AB requires one to make application to court to serve outside province (New Rules (NR) removes requirement)

3) In light of R 30, before commencing action, relevant to ask is AB the best place to sue Δ?

- Never assume that AB is the best or most appropriate place to sue
- Ask which forum is the better one for the action
- Remember procedural issues are governed by the forum – sometimes procedural issues include the distribution of damages

4) Application for *Service Ex Juris*

- Rule 30: grounds are exhaustive; if cannot fit within this list then one is not entitled to the order
- The power to grant *service ex juris* should be used *sparingly*

5) Court's discretion

- Even if π fits in R. 30, court still has discretion to refuse the order
- Power of discretion is based on the assessment of whether AB is the most appropriate forum to hear the action (ultimate question to determine whether order will be granted)
- Onus rests on π/applicant to satisfy the court that AB is the most appropriate forum

6) **Old Rule 30:** Service outside of Alberta of any document... or of notice thereof, may be allowed by the Court whenever:

- R. 30(f) = K has been entered into in AB
- R. 30(g) = there has been a breach of K within AB
- R. 30(h) = a tort was committed within AB; where the injury occurs
- R. 30(j) = a person out of Alberta is a necessary or proper party to an action properly brought against another person served within AB
- The same principles in determining which law applies is not necessarily the same principles in determining which jurisdiction applies (see *Lieu v. Nazarec*)

Lieu v. Nazarec (2006 ABQB) **R&S test in exercising court's discretion**

• MVA accident in Ont; both πs lived in AB and commenced action in AB; Δ was not in AB so πs needed order of *service ex juris* and relied on R. 30(h), arguing that despite the accident occurring in Ont, AB was the best place to hear the action

Issue: Which forum should hear the action?

Held: Alberta, place of the action

- 1) Even though choice of law rules stated that the law of the place where the tort was committed will govern the action, it does not necessarily mean that it is also the place where the action should be heard
- 2) For the purposes of jurisdiction, must have regard to the real and

substantial connection test in exercising the court's discretion in determining whether the tort should be heard in AB

- 3) Court found that case could be heard in AB for the purposes of jurisdiction due to a R&S connection

Mercantile Bank of Canada v. Hearsay Transport (1976 ABSC) **Necessary party**

• π attempted to use R. 30(j) to sue a debtor who resided in AB and some other guarantors who reside elsewhere

Held: Order refused; court was not satisfied that BC afforded a Δ more convenient and appropriate for... the action and for securing the ends of justice@

- 1) If the person is either a necessary party or a proper party to the action brought in AB, then they may obtain order for *service ex juris*; guarantors can go under a separate action but it is easier to combine it
- 2) If the guarantor lives outside of AB and the Δ lives in AB, then the guarantor is a proper party to the action and one may obtain the order under R. 30(j)
- 3) Re: *service ex juris*: (1) it is discretionary; (2) any doubt should be resolved in favour of the foreigner; (3) it should be used sparingly; (4) the substance of the whole matter must be looked at; (5) it is important that no such service be permitted unless it is both within the letter and the spirit of the applicable rule; (6) the court must decide which is the *forum conveniens*, which does not necessarily mean the convenience of the respective parties

Ratio: Court has final discretion in issuing the order for *service ex-juris* and can withhold it if it feels AB is not the most appropriate place

- Each case turns on its own facts

Kroll Associates Inc. v. Calvi (1998 ABQB) **Must fall under R. 30 to get service ex juris – unless land in AB and R&S connection**

• π sued Δs (Mrs. Calvi and son) in AB to enforce a NY judgment; π applied for *service ex juris* from AB court to serve Δs in Que where they resided, relying on R. 30(a) and (b) which may apply to land that is situated in AB

- Even though the action did not involve land in AB but and this was a judgment from NY, π intended to enforce the action against the land that Δ owned in AB

Issue: Whether Kroll should be granted an order allowing *service ex juris*

Held: Order granted; although claim did not fit within R. 30, AB was the most appropriate place b/c that is where \$ was situated; no point in suing Δs in Que

- Even though the remedy related to the land in AB, it is not enough to bring it within R. 30(a)
- The subject matter must be AB land in order for this rule to apply

Talbot v. Pan Ocean Oil Corp (1977 ABCA) Affidavit must accompany application for service ex juris

Held: Rule 31 says that one must have an affidavit to apply for service *ex juris*

- 1) If the affidavit is insufficient, cannot go away and modify it and come back and try it under a different master
- 2) Must get it right the first time or correct it; if you do correct it, *res judicata* (“matter already judged”) will not apply

Patel v. Friesen (2002 ABQB) Poor affidavit evidence = denied application

• π applied for service *ex juris*

Held: Application denied because accompanying affidavit was insufficient; strict approach to the affidavit

- 1) Court noted that many applications are rejected as inadequate and listed examples of poor affidavit evidence
- 2) Ontario: π may serve and if Δ does not like choice of forum, can challenge it; NRs will follow Ontario’s example

6) NR. 11.22: removes requirement to apply for the order but still need grounds to serve outside the province

- Only one ground for *service ex juris* = must have real and substantial connection (to AB)
- Lists cases where a R&S connection is *presumed* to exist, i.e. claim relates to land in AB; claim relates to torts committed in AB, etc.
- Grounds are rebuttable; open for Δ to rebut presumptions
- As grounds are taken from R. 30, presumed that case law relating to R. 30 will apply

C. Jurisdiction by Submission

1) **Submission by conduct:** if Δ pleads to merits of the case and files SOD = Δ submits to jurisdiction of the court

- **Counter-claim by the Δ** = submitting to juris
- **Arguing that AB is not the most appropriate forum** = submitting to juris
- **Application by Δ for security for costs**, requiring π to post securities = submission to juris

2) **Submission by agreement:** jurisdiction clause or forum selection clause in a K (or “exclusive jurisdiction”)

3) Why does it matter?

- a) *Service ex juris*: “in which the parties thereto agree that the courts of Alberta shall have jurisdiction to entertain any action in respect of the contract”;
- b) Where juris clause is an “exclusive jurisdiction” clause;
- c) Can affect the enforcement of foreign judgment

4) **s. 2(6)/Reciprocal Enforcement of Judgments Act:** “No order for registration shall be made if it is shown by the judgment debtor to the Court that... (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court”

- Normally a foreign entity cannot enforce judgment on person who is not normally resident in that place, but if there is a contractual clause that indicates submission to foreign juris, the party cannot use defence

1. Submission by Conduct

Roglass Consultants v. Kennedy (1984 BCCA) Attempt to defend = submission by conduct

- π s sued Δ s in Ontario, Δ s lived in BC was served *ex juris*
- After time for filing SOD expired, Δ sent letter to π s and Ont. court saying they intended to defend; clerk refused to file
- π received default judgment and went to BC to enforce judgment – was this enforceable?

Issue: Did Δ submit to jurisdiction of Ont court?

Held: Conduct constituted submission to the court even though the document was rejected as SOD

Fulford v. Reid (1996 Man QB) Intention to defend \neq Attempt to defend

- Defamation action: Ont. action against Δ in Manitoba
- Δ prepared own SOD and mailed it to π ’s lawyer who filed it; SOD was struck out for failure to comply with affidavit reqs
- π received default judgment and tried to enforce it in Manitoba

Issue: Did Δ submit to jurisdiction of Ont. court by sending the SOD to π ’s lawyer?

Held: No, in *Roglass*, there was an unsuccessful attempt to file the SOD, but here, π ’s lawyer filed it

- Requires an attempt to defend; does not need to be a successful attempt

Ratio: An attempt to defend may constitute a submission to a court’s juris

- Mere intention to defend does not constitute a submission

Esdale v. Bank of Ottawa (1920 ABSC) Application for annulment ≠ submission

- Δ attempted to set aside a default judgment in Ont. (required to show reasonable defence and reasons for not defending in time); Δ's application was successful

- π tried to enforce judgment in AB

Held: No, Δ did not submit to juris

- 1) “[T]he plaintiff=s claim rests entirely upon the default judgment. Before it was signed the defendant had done nothing whatever to show any intention of submitting to the Court=s jurisdiction. I fail to see [that] his subsequent conduct should be held to indicate a willingness to submit... when it was for the express purpose of annulling it”
- 2) Again, intent to defend is not an submission

Ratio: If purpose of application is to annul the action, that is not a submission to the jurisdiction

Note: Argument that Δ took active steps to defend; took first step to get order set aside

1) Application to protest jurisdiction is not a submission to the court

(Dovenmuehle)

- Recall R. 30: π may apply to court to serve *ex juris* (Ont.); no action has been commenced
- If π's application is unsuccessful, Δ takes no part in proceedings, and if π gets default judgment and tries to enforce it in Ont., enforceability depends on whether Δ submitted to juris

2) Arguing that AB is not the most appropriate forum and order should be set aside = submission to the court (**Henry v. Geoprosco**)

- Although Δ may rely on argument that even if one of the paras is satisfied, AB has discretion to refuse jurisdiction, this argument constitutes a submission; basically, Δ agrees that court has juris but invites court to decline juris

3) Submission must be voluntary; courts have held certain circumstances may show that Δ's submission to court was not voluntary

- **Examples:** injunction to seize Δ's assets, Δ served with that notice must apply to set aside
- Not a voluntary submission → circumstances forced them
- Application by Δ should be made w/o prejudice to Δ's argument against court's juris

Alberta Rules of Court, s. 27

27. A defendant before delivering a defence may apply to the Court to set aside the service of the statement of claim upon him, to discharge or set aside the order authorizing such service or to set aside the statement of claim, on the ground of irregularity or otherwise, and the application shall not be deemed to be a submission to the jurisdiction of the Court

- Rule applies to setting aside service *ex juris* and court's exercise of discretion to set aside judgment
- Rule changes Eng. CL: would not constitute a submission to AB juris
- Could lead one into false sense of security (see **Henry**) as it is the law of the place the judgment is enforced decides whether or not Δ's actions constituted a submission to the jurisdiction

Henry v. Geoprosco International (1979 Eng CA) Invitation to court to exercise discretion = submission

- Δ in Eng unsuccessfully applied in AB for *service ex juris* set aside and for the court to decline to exercise jurisdiction

Held: Judgment enforceable in England

- 1) Question of whether Δ submitted the juris is governed by the place of where the judgment was made
- 2) “[S]ince the defendants had voluntarily appeared before the Canadian court to invite it not to exercise the discretion which it possessed under its own law to allow service out of the jurisdiction of... Alberta, [they were] bound by the judgment”

Dovenmuehle v. Rocca Group (1981 NBCA) Protesting jurisdiction ≠ submission

- Enforcement of Illinois judgment in NB

Issue: Did Δ submit to juris of Illinois court?

Held: Governed by NB law = not a submission to IL law

- “[T]he Act must be interpreted as would any other NB statute.... I think there can be no doubt that, as a matter of New Brunswick law,... the motion made by [the Δ] in the Illinois Court cannot be said to have been made without protest as contemplated by that section of the Act”
- **SCC:** “I cannot see how anyone can fairly say that a man has voluntarily submitted to the juris of a court when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference... does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no juris?”

Ratio: Δ's application to protest jurisdiction is not a submission to the court

Becker v. Peers (1990 ABQB) Must submit to foreign juris to enforce foreign judgment in AB

- Action in AB to enforce judgment from Hawaii

Issue: Did Δ submit to juris of Hawaii?

Held: As the foreign court did not have jurisdiction over Δ and purchase of land in Hawaii not sufficient to give jurisdiction (under AB law), Δ did not submit to juris = judgment unenforceable

- 1) According to law of Hawaii, deemed to submit to juris of their courts if one has land in Hawaii
- 2) However, in attempt to prove foreign law, all π did was produce a photocopied page from a text book – rejected as proof of foreign law
- 3) “[T]he said photocopy is completely worthless as evidence, but even if it was accepted as proof of the local Hawaiian law, it would not help the plaintiff on this application, which is not governed by local Hawaiian law... he did not submit to the jurisdiction of the Hawaiian court in any way recognized by our conflict of law rules”

Catalyst Research v. Medtronic (1982 FCA) Application for security costs

Held: An application by Δ for security for costs, requiring π to post securities, constitutes a submission to juris

2. Submission by Agreement

Gyonyor v. Sanjenko (1971 ABSC) Submission by agreement must be express

- Δ lived in AB, involved in MVA in Montana
- Δ was sued in Montana, took no part in proceedings, π brought judgment to AB, arguing that Δ submitted to juris by telling police that he would be willing to return to Montana if there was an inquest

Held: Argument rejected, Δ did not submit

Ratio: Submission by agreement must be express

Toronto-Dominion Bank v. Tymchak (1988 Sask QB) Submission via K

- K between bank and client
- Clause: “This guarantee shall be construed in accordance with the laws of... AB and in any action... the undersigned... shall be estopped from denying the same; any judgment recovered in the courts of such province... shall be binding on him”

Held: Constituted a submission to the juris; parties accepted the authority of foreign court

Ratio: Consent to a clause that specifies that a judgment shall be governed by a province = submission to that province

Z.I. Pompey Industrie v. ECU-Line N.V. (2003 SCC) Exclusive juris clause, strong cause test

- Delivery of cargo from Belgium to Que, cargo was damaged, π s sued Δ s in Canada despite clause

• Clause: “The contract evidenced... is governed by the law of Belgium, and any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Antwerp and no other Courts”

Held:

- 1) Approach where π sues in breach of exclusive jurisdiction clause = strong cause approach
 - **Presumption** that the clause should be enforced and proceedings should be stayed unless π can prove strong cause of π being able to sue in breach of agreement
 - **Rationale:** parties should be held to their own agreements unless π can prove a strong reason otherwise, reasons of certainty, freedom of K, etc.
- 2) “Once the court is satisfied that a validly concluded bill of lading... binds the parties, the court must grant the stay unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause. In exercising its discretion, the court should take into account all of the circumstances of the particular case”
- 3) **Steps:**
 - a) **Validity of clause:** before getting to strong cause test, the court must determine whether the clause is valid – validity is based on fairness test: “Issues respecting an alleged fundamental breach of contract... should generally be determined under the law and by the court chosen by the parties in the [contract].”
 - b) **“Strong cause” test:** “[O]nce it is determined that the bill of lading otherwise binds the parties (for instance, that the bill of lading as it relates to jurisdiction does not offend public policy, was not the product of fraud or of grossly uneven bargaining positions), constitutes an inquiry into questions such as the convenience of the parties, fairness between the parties and the interests of justice, not of the substantive legal issues underlying the dispute”

Volkswagen Canada v. Auto Haus Frohlich (1986 ABCA) Look to reasonableness of clause

- π sued Δ in AB, not Ontario
- Clause: “... consent to the jurisdiction of the Courts of Ontario, which Courts shall have exclusive jurisdiction over any dispute of any kind arising out of or in connection with this Agreement”

Held: Strong cause required

- 1) "Strong" reason: strength of burden on π
- 2) "[T]he court should honour terms of that sort and give effect to them unless the balance of convenience massively favours an opposite conclusion"
- 3) Open to court to look to why clause was inserted in agreement
 - Look to how reasonable the clause is and why it was in agreement in determining whether π has satisfied the requirement of strong cause – if only reason was to make it difficult for π to sue, helps to prove strong cause

Ledingham v. Martindale (1984 ABCA) Concurrent juris

- Clause: "Each of the parties... hereby attorns to the jurisdiction of the courts in the province of British Columbia"
 - Not an exclusive juris clause, merely confers to BC law
- Issue:** Should the court's approach be different?
- Held:** Yes, there may be concurrent juris (whereas π sues in breach if there is an exclusive juris clause)
- Juris clause is one factor that court will take into account in determining the most appropriate forum

Naccarato v. Brio Beverages Inc. (1998 ABQB) Onus on π to show strong cause

- Clause: "This Agreement will be construed in accordance with the laws prevailing in British Columbia and any proceeding in respect of this Agreement will be commenced and maintained in the Court of appropriate jurisdiction in the County of Vancouver, British Columbia"
- Issue:** Was this is an exclusive juris clause?
- Held:** Yes, it was; onus on π to show strong reason to sue elsewhere
- 1) Best way: use the word "exclusive"
 - 2) But this case shows that a juris clause can still be exclusive w/o use of the word or language
 - 3) π discharged the onus as π had two causes of action: sued former Er for constructive dismissal and breach of incentive stock option agreement; Δ did not say exclusive juris applied to dismissal – as π could continue with first action in AB, did not make sense to sever the case

D. Forum Conveniens

- **Forum conveniens:** inherent discretion court has to decline juris
 - Heavily influenced by English law
 - In the past, courts were very reluctant to decline juris, particularly in Eng courts (strong belief in own legal system, suspicion of other systems)

United Oilseed Products Ltd. v. Royal Bank (1988 ABCA) Most suitable forum / Onus of proof

- π (AB) was deciding whether to do business with customer in Ont, so requested its bank (RB) to provide info on Ont. co
- π relied on info that the customer was credit-worthy, turned out to be false, π lost money, and sued for negligent misrepresentation; Δ -bank applied to have action stayed and applied for Ont. court to hear case

Held: Δ 's application succeeded

- 1) "The test to be applied in all cases where there is an issue of determining the appropriate forum is that of forum conveniens, the forum which is more suitable for the ends of justice" (*Forum conveniens*: note term is misleading b/c it is not about convenience but about appropriateness)
- 2) Onus of proof on Δ : "Where a forum possesses jurisdiction over a defendant, as of right, the defendant must show that there is another available forum which is clearly or distinctly more suitable"
- 3) Onus of proof on π (even if it is Δ 's application): "Where the jurisdiction does not exist as of right, the same burden rests on the party seeking to establish jurisdiction (typically service *ex juris*)"
- 4) "While the overall burden is as stated, the party alleging an advantage or disadvantage must establish it."
 - *McShannon*: test so as not to deprive π of a legitimate personal or judicial advantage; this is based on the fact that usually forum shopping gives rise to an advantage and a stay of proceedings would be a disadvantage – 2 part test: (a) onus is on Δ to show that there is another forum where justice can be done at considerably less cost, (b) the stay must not deprive π of a legitimate personal or juridical advantage that would be available to him in this court
 - *Spiliada*: as the *McShannon* test made it impossible to be satisfied, in reference to *Spiliada*, the court modified the test to keep the 1st part but altered the 2nd part to be one factor of a few to consider (not determinative)
- 5) Where *forum conveniens* arises:
 - a) Δ is served in AB, also known as jurisdiction as of right over Δ ; Δ may apply to court for stay of proceedings, claiming AB is not the most appropriate forum and court should stay proceedings;
 - b) Δ is outside of province and π must apply for service *ex juris*; overriding consideration is whether AB is the most appropriate forum
 - c) Test is the same in both: which forum is the most appropriate forum

Note: Exception to points 2 & 3 – if there is an exclusive jurisdiction clause, onus rests on π to show strong cause

Amchem Products Inc. v. British Columbia (W.C.B.) (1993 SCC) No special weight on juridical advantages

- Facts below

Held: SCC adopted *Spiliada* case

- 1) “[T]here is no reason... 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” – suggests that no special weight should be given to advantage/disadvantage debate
- 2) “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... those advantages will be available”

Quia v. Sweet (1995 ABQB) Convenience

- Accident on boat occurred in BC, caused 5 people to sue – 3 lived in AB, other 2 were co. owners who lived in BC
- Witnesses to the accident (other people in the boat) were residents in AB and costs (i.e. hospital charges) incurred in AB
- Δ applied for proceedings to be held in BC instead of AB

Held: Due to location of the witnesses, AB was considered the more appropriate forum

Ratio: In weighing issue of convenience, look to where the evidence/witnesses are located

Barclay=s Bank PCL v. Inc. Incorporated (1999 ABQB) Factors for forum conveniens

- “Bank error in your favour” case; \$310 K was erroneously placed in Δ-corp’s account by π-bank; application made by Δ that AB was not the *forum conveniens*
- Issues:** Did the court have juris over Δ? (Yes, served in AB, juris as of right) Should court decline juris? (Yes)
- Held:** AB was not the most appropriate forum but Cayman Islands deemed to be so; action against the Wells stayed
- 1) Court was “satisfied the Defendants have shown that Cayman Islands is clearly or distinctly a more suitable forum to conduct the action... Cayman Islands has the most real and substantial connection with the lawsuit and is the forum more suitable for the ends of justice. The lawsuit has a minimal connection with Alberta other than the presence in the jurisdiction of

Wells, which is fortuitous”

- 2) Factors considered: bank was registered in Cayman Islands, loss occurred there, most of the witnesses were there, difficulty to prove foreign law in AB court, etc.

Note: Chapter 10 issue – whether AB action barred by fact that π had previously sued in Cayman Islands?

- Loss of juridical advantage argument (if action is stayed and bank is forced to sue in Cayman Islands, any judgment will not be enforceable in AB and bank is losing a juridical advantage of collecting from Δ): argument is probably wrong, as there is a R&S connection
- However, court dealt with argument: “[T]his case does not have a real and substantial connection to Alberta and therefore Barclay=s does not have a legitimate claim to the advantages that the Alberta forum would provide. It is not unjust to deprive Barclay=s of the juridical advantage of proceeding in Alberta as Barclay=s could not have had a reasonable expectation that in the event of litigation arising out of the transaction those advantages would be available”

Note on *Somji v. Somji*: “I conclude that... Tanzania presently faces significant governance issues which include, in the words of the national web site found at www.tanzania.go.tz/governance.html, a financial mismanagement; corruption; poor accountability; an overloaded and inefficient legal system; ambivalence in sanctioning the fundamental human rights; erosion of meritocracy in public service; tax evasion and unnecessary bureaucratic procedures@” – little difficulty for π to show that Tanzania was not the appropriate forum

Paterson v. Hamilton (ABCA) Context of application / avoidance of severance

- π sued a corp Δ and other Δs, alleging fraud, conspiracy, etc. in AB
 - Δ-corp was an AB corp, served in AB, so court had juris as of right; individual Δs were outside AB, based on tort in AB and were proper parties
 - Corp-Δ applied for stay of proceedings, arguing Colorado was the most appropriate forum, individual Δs applied to have *service ex juris* set aside
- Issue:** Could the Δs succeed in their applications?

Held: No, court refused Δs’ applications

- 1) Depends on the context: *service ex juris* = π has onus, within AB = Δ has onus
- 2) **Corp issue:** As AB and Colorado were both fairly balanced in factors, court concluded that since onus rested on Δ-corp but Δ failed to discharge onus, so application to stay was dismissed
- 3) **Individual Δs:** although π failed to prove that AB was more appropriate, it

- did not make sense to sever the action – Δ’s application declined
- 4) Seems to have relation to order of the application; maybe should be a concern of splitting the application...

E. Restraining Foreign Proceedings

Amchem Products Inc. v. British Columbia (W.C.B.) (1993 SCC) **Anti-suit injunction**

Background: this is not a *forum conveniens* case; dealt with an application to restrain proceedings = anti-suit injunction; note that the trend nowadays is that it is easier to get a stay of proceedings based on *forum conveniens*, but this is not true in certain jurisdictions (i.e. Texas, which does not recognize this, so easy to establish that Texas has *juris*)

- Injuries were suffered by number of people that worked in asbestos industries (claimants), most claimants lived in BC, had claimed from BC workers comp, and decided to sue U.S. companies that had manufactured and supplied the products in TX; most cos had little or no connection to Texas, but TX took *juris*

- π had advantages in Texas: strict liability, generous punitive damages, right to jury trial; Δ: high stakes litigation

- Δ applied to TX court for stay of proceedings which was unsuccessful; before jury trial, Δ applied to BC court for an anti-suit injunction (ordering BC residents to discontinue action in Texas) – this order was not made to the TX court

- As BC claimants had notice, they applied for an anti-anti-suit injunction; corp applied *ex parte* for an anti-anti-anti-suit injunction

Issue: In what circumstances is it appropriate to grant this type of injunction?

Held: Proceeding should continue in TX; key principles to obtaining an anti-suit injunction...

- 1) A domestic court (BC court) should not entertain an application for an injunction unless the applicant has already applied unsuccessfully for a stay of proceedings
- 2) Steps: (1) Δ must apply to foreign court and if unsuccessful, party can apply to domestic court; (2) domestic court will consider: (a) Was the foreign court’s decision reasonable? (b) If not, is it appropriate to issue the injunction?
- 3) Test: domestic court should then ask if there is any reasonable basis for the foreign court that that court was the most appropriate forum; if yes, injunction will be refused (almost like an appellate standard of review)
 - “If, applying the principles relating to *forum non conveniens* outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions”

- 4) Even if the court concludes that there is no reasonable basis, the court must ask would it be unjust to deprive the π to sue in the foreign court? Did π have a legitimate expectation? Consider the extent of the connection and the loss of advantage

Genra Canada Investments v. Lehndorff United (1995 ABCA) **Anti-suit injunction principles**

- Dispute between parties: π sued Δ in AB, Δ sued π in Ont, π applied for stay of proceedings, Ont. court refused

- π-AB applied to AB for injunction restraining Δ’s action in Ont.

Held: Injunction granted at trial, affirmed in CA

- 1) Ont court was unreasonable in concluding that Ont. was the appropriate forum
- 2) QB: “The purpose of that comment is not to imply or suggest that the considerations involved in an anti-suit injunction application are other than those enunciated... in *Amchem*, but on the other hand might suggest different considerations having regard to the similarity between such Canadian Provincial Courts” – perhaps suggesting principles may be slightly different when dealing with another province as opposed to another country

Dissent: “On consideration of all of those factors, I would... not have made the order made [the Ont. judge]. Nevertheless, I cannot say that his balancing of the various factors in the case was so palpably inadequate as to be unreasonable. I would, therefore, have allowed the appeal”

- Consider whether foreign court’s decision is palpably unreasonable

F. Absence of Jurisdiction

- When a court will not have *juris*...
 - Foreign immovable prop
 - Foreign partnerships, administrators
 - Crown and state immunity

1. Foreign Immovable Property

1) **Foreign immovable prop** (*Jeske*): a court has no *juris* to determine ownership of foreign land, make orders for easement or possession, or consider trespass action

2) Exceptions

- Rule does not apply where there is a contract or equity running between the parties, i.e. if A agrees to rent to B, and B stops paying rent, then A can sue B in foreign court claiming non-payment of rent

as it is an action based in K; likely that A could sue B *ex juris* under R. 30

- Rule does not apply where there is an action on a personal covenant on a mortgage
- Court also has *juris* to determine the questions of title to foreign land in administering an estate or trust / actions for administering an estate or a trust

Jeske v. Jeske (1983 ABQB) Court may quantify foreign land

- Matrimonial action commenced in BC, former home located in AB
- In deciding how much to award, AB court considered amount awarded in BC court; Δ argued that AB had no *juris* as it was foreign land

Held: A court has *juris* in quantifying the value of foreign land; BC court was merely quantifying, not determining ownership

- **General rule:** “An English Court has no jurisdiction to adjudicate upon the right of property in, or the right to possession of, foreign immovables, even though the parties may be resident or domiciled in England. This general rule is generally based upon the practical consideration that only the court of the *situs* can make an effective decree with regard to land”

Wincal Properties v. Cal-Alta Holdings (1983 ABQB) Court has juris over matters of equity

- Action in AB to enforce the personal covenant over land in Manitoba

Held: Even though action involved foreign land, AB court had *juris*, as action was based on equity

Chapman Estate v. O'Hara (1988 Sask CA) Court has juris over administering an estate or trust of foreign land

- π was the Manitoba executor of his mother's estate; was removed by trustee, so π brought action in Manitoba claiming land in Sask did not form part of estate and was held in trust for π; Manitoba court held it was part of his mother's estate
- π then litigated action in Sask, claiming land was held in trust for him; Δ argued abuse of process and π argued Manitoba had no *juris* to determine the issue

Held: Court dealt with merits and decided that Manitoba did have *juris* as it dealt with administration of estate

- *Juris* arose as court had *juris* over the executor

2. Foreign Partnerships, Executors and Administrators

- Court will not have *juris* over these entities

Nova v. Grove Estate (1982 ABCA) No juris over foreign partnerships and executors

- Application to set aside service *ex juris* in TX on foreign partnership and foreign executor

Held: Service *ex juris* set aside

- 1) A partnership cannot sue or be sued in AB in its firm name in AB unless it carries on business here; individual partners can be sued
- 2) Foreign executor cannot sue or be sued in AB

Canadian Commercial Bank v. Belkin (1990 ABCA) No juris over foreign executor

- After collapse of bank, it sued its former directors (including Belkin) for incompetence
- B was served in BC as a proper party, then died, so probate of his estate proceeded in BC
- Bank amended proceedings to add B's executor to substitute B for action; executor was served *ex juris* in BC and he applied to have it set aside as AB had no *juris* over BC executor

- **Trial:** refused to set aside service *ex juris* as court stated that rule in *Nova* did not apply when action was commenced before executor was appointed – rejected by CA

Held: Service *ex juris* order set aside

- 1) A court has no *juris* over foreign executor
- 2) Court also rejected trial decision to recognize executor's “intermeddling” with prop (*de son tort*)

Note: Only remedy is to sue before the foreign court

- Can be costly to π if have to sue again after Δ dies

3. Crown and State Immunity

University of Calgary v. Colorado School of Mines (1995 ABQB) Foreign state is immune

- Δ claimed Colorado School (agency of the state) was immune

Held: Entity was not an agency of the state and therefore the AB court had *juris*

- 1) “*State Immunity Act* provides that except in certain circumstances, a foreign state is immune from the jurisdiction of Canadian courts. Foreign state includes any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state”
- 2) “Counsel agree that the determination of whether CSM is an agency of the

State of Colorado is determined by Canadian and not American law” – look to foreign law for information and then, under own law, determine if entity is a foreign state

Ratio: Universities are not agencies of the state and may be found liable (no immunity)

Kaman v. British Columbia (1999 ABQB) Crown is immune

- MVA in BC, involved two AB residents (passenger- π and driver- Δ); π sued Δ when returned to AB
- Δ served a third party notice against BC crown alleging that it was negligent in failing to install a guardrail – claiming BC is also liable; π amended SOC adding BC crown as Δ

Held: AB court had no juris over BC crown and therefore third party notice was struck out

Ratio: Rule that one cannot sue a foreign state applies to actions against another provincial government

Bouzari et al. v. Islamic Republic of Iran (2004 Ont. CA) Cannot sue foreign state in domestic court

- π was abducted and tortured in Iran before immigrating to Canada; sued state of Iran for damages in Ontario; Δ relied on *State Immunity Act* and π challenged the constitutional validity of act

Held: Act was constitutional, Canadian court had no juris to hear matter

Ratio: States are immune from being sued in a foreign state

Chapter 10: Enforcement of Foreign Judgments

1) If one has already received a domestic judgment, this might limit the party's ability to sue again

- Consider issues such as *res judicata* (cannot re-litigate the same issue) and doctrine of merger (prevents a successful plaintiff from suing on the same action)

2) **Issue:** how do these principles (*res judicata* and doctrine of merger) affect receiving a foreign judgment? Can a party sue Δ again in another juris after receiving judgment in AB?

3) **General rule:**

- *Res Judicata* applies to foreign judgment
- Doctrine of merger *does not* apply to foreign judgment
- Consider **USA v. Harden** (above): (1) a foreign state is precluded from suing in the country for taxes under the law of the foreign state; and (2) there is *no merger of the original cause of action* in a foreign judgment

4) A party cannot come to AB with an Ont judgment and expect it to be enforced in the same way as it would have been in Ont

- **Need to convert a foreign judgment into an AB judgment** before one can enforce it the normal way

5) 2 ways to convert a foreign judgment to a domestic judgment:

1. **Via common law** → bring an action on the judgment
2. **Register the judgment** under legislation
 - If neither option is available, then one can try and sue again on the original cause of action
 - In AB, we are looking at AB rules of judgment enforcement (rules might be different in other jurisdictions), i.e. question of whether UK judgment would be enforceable in AB is a question of AB law; whether an AB judgment can be enforced in UK would be a question of UK law (look at UK rules)

A. Common Law

1) **Steps to enforcing a foreign judgment under common law:**

1. Commence the action in the normal way (via Statement of Claim)
2. Instead of pleading the cause of action, you will plead the judgment (action in debt)
 - i.e. if the original cause of action was negligence causing injury and π received a judgment in Ont, when π attempts to enforce this judgment in AB, must not use the original pleadings – instead must plead the details of the judgment
3. AB court will grant judgment for the in debt judgment → judgment is converted into AB judgment

2) **Summary judgment:** often this process can be expedited if π applies for a summary judgment

3) To succeed on a foreign judgment, π must establish three conditions (**Pro Swing Inc. v. ELTA Golf**)

- Prior to *Pro Swing*, the foreign judgment had to be a definite and ascertainable money judgment – therefore, one could not enforce a judgment for specific performance or injunction
- The traditional approach was altered by *Pro Swing*

4) Requirement that the foreign court must be a court of competent international jurisdiction is the one that gets the most litigation (**Battaglia v. Ballas**: where AB court granted summary judgment to a CA judgment even while the judgment was under appeal there)

Pro Swing Inc. v. ELTA Golf Inc. (2006 SCC) **Foreign judgment does not have to be money judgment**

• π attempted to enforce an Ont judgment in Ohio re: infringement of trademark; Ont. judgment contained an injunction and a contempt order (no money judgment)

Issue: Can this Ont. order be enforced in Ohio?

Held: No longer need to have an ascertainable money judgment; however, this order should *not* be enforced

- 1) In making this change to the traditional approach, need to be cautious
- 2) Conditions for recognition and enforcement can be expressed as follows:
 - a) Judgment must be rendered by a court of competent jurisdiction;
 - b) Judgment must be final;
 - c) Judgment must be of a nature that the principle of comity requires the domestic court to enforce
- 3) Guidelines for enforcement (when a non-money judgment is to be enforced): courts can draw the relevant criteria from other foreign judicial assistance mechanisms based on comity
 - Specifics must be clear enough for Δ to know what is expected of him
 - Is the order limited in scope?
 - Does the originating court retain the power to issue further orders?
 - Is it a burdensome remedy?
 - Third parties involved?
 - Will the use of judicial resources be consistent with what would be allowed for domestic litigants?
- 4) This judgment cannot be enforced as (1) contempt order has a quasi-criminal nature; and (2) the principles of comity are not an appropriate tool for the enforcement of this judgment
 - The foreign judgment will not be enforced if it is subject to modification/variation by the originating court, i.e. a judgment for maintenance support is *not* final and conclusive because it is always open to either parties to go back and vary the order
- 5) Even if the judgment is under appeal, it is still enforceable under common law

Morguard Investments Ltd. v. De Savoye (1990 SCC) **Grounds of recognition**

- Δ was a BC resident and was sued in AB (Δ formerly lived in AB); action involved mortgages over land in AB
- π got default judgment and brought an action in BC to enforce the judgment
 - **Traditional principle:** AB judgment will not be enforced because the AB court did not have competent jurisdiction; unless Δ was served in the foreign jurisdiction or submitted to the foreign jurisdiction, then the court does not have jurisdiction to enforce the judgment
 - **BCCA:** judgment was enforceable based on *reciprocity*; BC court would have had jurisdiction if these events occurred in BC

Issue: Is this AB judgment enforceable in BC?

Held: Yes, judgment is enforceable (but not on principle of reciprocity)

- 1) Traditional rule was brought in from UK; no longer applicable in Canada where judgment is being enforced from province to another province
- 2) The courts in one province should give full faith and credit to the judgments of another province/territory as long as that court had appropriately or properly exercised their jurisdiction over the action
 - When does a court exercise jurisdiction appropriately? Based on traditional grounds accepted by courts as permitting recognition and enforcement of foreign judgments – when there is one or other traditional grounds of recognition (served in foreign jurisdiction or submitted to foreign jurisdiction), then it would automatically mean that the foreign court exercised their jurisdiction appropriately
- 3) If foreign court does not have a traditional ground of recognition but it has a real and substantial connection to the case, they can exercise their jurisdiction

Beals v. Saldanha (2003 SCC) **R&S connection to enforce foreign judgment**

Held: Some conditions should be met before a domestic court will enforce a judgment from a foreign jurisdiction

- 1) Real and substantial connection is the *overriding factor* in the determination of jurisdiction
- 2) Case suggesting that even where Δ is served in a foreign jurisdiction, this does *not automatically* mean that the foreign court exercised their juris appropriately – must apply the R&S test
 - Service in foreign jurisdiction is an important factor (but not determinative)
 - However, if Δ submitted to the foreign juris then the R&S test might not need to be applied

Note: *Beals* applies to a non-CDN judgments, whereas *Morguard* appears to apply to Canadian judgments

- a) Cases since *Morguard* indicate that it does not take much to satisfy R&S connection test; it is rare to find a foreign judgment not being enforced based on failed exercise of competent jurisdiction
- b) Most of the cases where foreign judgment is enforced fall within 2 categories:
 1. Subject matter is located in the foreign jurisdiction (easy to prove real and substantial connection)
 2. Δ used to live in the foreign jurisdiction (Δ had a strong connection to the foreign juris but by the time the law suit commenced, Δ had moved)
 - π 's residence, in itself, is *not enough* to give R&S connection – need something more to meet R&S connection test

Moses v. Shore Boat Builders Ltd. (1993 BCCA) R&S connection to issue order

- Alaskan judgment to be enforced in BC; Δ (BC boating co.) entered into K with π where Δ would build a fishing boat for π; K was signed in Alaska and financing was arranged in Alaska
 - π was dissatisfied with the boat and sued in Alaska; Δ did not defend and π received default judgment; π attempts to enforce Alaskan judgment in BC
- Issue:** Did the Alaskan court have a R&S connection to the case in order to appropriately exercise juris to issue this order?
- Held:** Both Alaskan and BC courts had a R&S connection to the case = judgment can be enforced
- K was created in Alaska and financing was arranged in Alaska = enough to give real and substantial connection
- Ratio:** Real and substantial connection may be derived from place of K and place of financing

Mention of case (not in casebook) Advertising can establish R&S conn

- π saw an advertisement in *National Inquirer* for a Peel Away Skin lotion for beautiful skin; she purchased the cream and used it, then suffers from severe burns on her face
 - π sued Δ (BC resident and place where product is manufactured) in CA and received default judgment; she turns to BC court to enforce the judgment
- Issue:** Did California have a R&S connection to the case?
- Held:** Yes, as Δ advertised the product in CA
- Combined with the fact that π lived in CA, that is enough to give CA a R&S connection

Gorman-Rupp of Canada Ltd. v. Electrical Industries Western Ltd. (1996 ABQB) Business can establish R&S conn

- π was incorporated in Ont and sued Δ in Ont; Δ was served in AB but did not attend proceedings; π received default judgment and sued in AB to enforce judgment
- Issue:** Is there a R&S connection in Ont to the case?
- Held:** There was a R&S connection in Ont – judgment can be enforced
- Enough business conducted b/w ON and AB to give ON a R&S connection

American Savings and Loan Assn. v. Stechishin (1993 ABQB) Reciprocity indicates juris

- Δs lives in AB and bought condos in Hawaii; the purchase was financed through a loan from π-bank who was based in Hawaii; the mortgage was granted over the prop

- Δ defaulted on the payments; π-bank seized prop and obtained judgment for the deficiency; π sued Δ in AB both on the original action and on the judgment
- Issue:** Does Hawaii have R&S connection?
- Held:** Yes, Hawaii does have a real and substantial connection
- 1) Land is situated in Hawaii = enough to give a real and substantial connection
 - 2) Other factors: place where business was conducted, π's residence, etc.
 - 3) In the reverse situation, AB would have taken jurisdiction → reciprocity
 - This was considered a factor in concluding that Hawaii had a R&S connection
 - Despite SCC rejecting reciprocity as the test for juris, this case used reciprocity as a factor indicating juris

Commercial Agency, a division of Cody Barden Daniels & Palo Inc. v. Jarvis (1996 ABQB) Reciprocity

- Example of reciprocity used as proving R&S connection
- Note:** If presence of reciprocity is an indicator of real and substantial connection, then is the absence of reciprocity an indicator that there is *no* real and substantial connection?

Webb v. Hooper (1994 ABQB) Lack of reciprocity and only π's residence not enough to establish R&S conn

- Enforcement of judgment in AB from Kentucky; only connection to Kentucky was that it was the place of residence for the π; π and Δ had entered into a partnership relating to property in CA and Colorado
 - Kentucky has broad rule for service ex juris – this is why π was able to sue in Kentucky and receive a judgment
- Issue:** Did Kentucky have a real and substantial connection?
- Held:** Kentucky did not have a real and substantial connection – judgment is not enforced
- 1) It would be difficult to say that an AB court should not recognize a foreign judgment where an AB court would have assumed jurisdiction if it had been in the place of the foreign court
 - Reciprocity is a very important (almost determining) factor
 - 2) Suggests that it would be difficult to satisfy R&S connection test if reciprocity was not present
 - 3) However, if an AB court had been in the place of the Kentucky court it would not have assumed jurisdiction over Δ → π's residence is not sufficient for an AB court to assume jurisdiction
 - Absence of reciprocity left the π's residence as the only connection Kentucky had to the case = not enough
- Note:** New AB Rules of Court will only have one test to granting *service ex juris* =

R&S connection test

- Given the way cases have been decided, look at whether reciprocity is present in the situation

Battaglia v. Ballas (1983 ABQB)

Held: Summary judgment could be granted to a CA judgment even while the judgment was under appeal in CA

B. Defences

1) Local courts cannot examine the case on its merits – this limits the defences

- Important to distinguish between defence to action on judgment versus original cause of action
- **Jarvis:** can only raise defence to action on the foreign judgment, not the original action

2) Assuming the 3 conditions of enforcement have been satisfied (final and conclusive, definite sum, competent court), then the only defences available are:

- a) **Fraud:** Δ must argue that the judgment was obtained fraudulently because jurisdiction was obtained fraudulently (going to the jurisdiction of the foreign court); can only argue fraud going to the merits if the fraud came to light after the judgment
- b) **Denial of natural justice:** must demonstrate fundamental unfairness; more than procedural unfairness
- c) **Public policy:** ask whether enforcing this judgment contravene FPP

Beals v. Saldanaha (2003 SCC) Standard defences against enforcement of foreign judgment

- Action in Ont. to enforce action in FL
- Ont. couple sold lot in FL; however, they transferred the wrong prop to π , so π sued couple in FL (for fraudulent misrepresentation); Δ s did not defend in proceedings and FL jury assessed substantial damages against Δ s
 - In FL, SOC does not have to specify how much damages are claimed
- Δ sought legal advice and Ont. lawyer told Δ not to do anything; π then came to Ont. to enforce judgment
- By the time the judgment reaches SCC, judgment had reached \$ 800 K
- Δ s relied on three defences: fraud, denial of natural justice and public policy

Held: Judgment was enforceable

1) **Issue of fraud:** no fraud

- a) **Fraud:** open to Δ to prove (1) fraud going to the juris (extrinsic fraud) or (2) fraud going to the merits of the claim if can show evidence of fraud after

the foreign proceeding (intrinsic fraud)

- b) “[T]he distinction between intrinsic and extrinsic fraud is of no apparent value... It is simpler to say that fraud going to jurisdiction can always be raised before a domestic court to challenge the judgment”; i.e. if π falsifies application, goes to juris; if π falsifies promissory note, goes to merits
- c) “In order to raise the defence of fraud, a defendant has the burden of demonstrating that the facts sought to be raised could not have been discovered by the exercise of due diligence prior to... obtaining... the foreign judgment”

2) **Denial of natural justice:** no denial

- a) Foreign proceedings must have been fundamentally unfair: “[C]ondition precedent to that defence is that the party seeking to impugn the judgment prove [on BOP] that the foreign proceedings were contrary to Canadian notions of fundamental justice”, i.e. Δ did not have chance to appear, etc.
- b) Court rejected Δ 's argument that Δ had no idea amount of award could be so high as Δ s had an opportunity to apply to have jury award struck out and they also knew π was claiming punitive damages in SOC
- c) **Reliance on negligent advice:** “Their failure to act when confronted with the size of the award of damages was not due to a lack of notice but due to relying on the mistaken advice of their lawyer”

3) **Public policy:** no contravention

- a) This is a defence that will apply in exceptional circumstances – this case was not one of them
- b) Must contravene fundamental PP of forum; shock the conscience of the public
- c) Although Δ s argued that the award was so shocking to Canadian morality, court rejected argument: “The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. **The defence of public policy should continue to have a narrow application**”

Note: Counsel must have understanding of current law and be aware of the possibilities when advising clients not to act – such advice must be cautiously given and cautiously received

Currie v. McDonald =s Restaurants of Canada (2005 Ont. CA) Denial of natural justice

- Class action in IL for fraud; π s sued McDonalds for scratch tickets that were unwinable
- π s and Δ settled for a large amount of money, but two Canadians had brought

action in Ont.

• Δ moved to have action struck out as the action should be barred by the foreign judgment

- **Lower court:** notice given to the Canadian πs was so inadequate as to violate the rules of natural justice

Issue: Should the action be allowed to proceed?

Held: Yes, R&S connection to Ont. and π was denied natural justice as there was inadequate notice

- 1) Although class actions have unique features, the R&S connection test applies to class actions
 - “Before enforcing a foreign class action judgment against Ontario residents, the court should ensure that the foreign court had a proper basis for the assertion of jurisdiction and that the interests of Ontario residents were adequately protected”
- 2) Inadequate notice served on Canadian πs, so Δ could not rely on foreign judgment = denial of natural justice
- 3) As π was not bound by U.S. judgment, Ont. courts should not recognize/enforce the U.S. class action settlement
- 4) *Res judicata* did not apply as π took no part in the U.S. action and *McDonald’s Canada* was not named as a Δ in that action

C. Legislation

Reciprocal Enforcement of Judgments Act (REJA)

• πs may apply to have judgment registered under *Act*; if successful, converts foreign judgment to AB judgment

- **s. 5:** Once registered, has the same effect as AB judgment
- **s. 2(1):** “When a judgment has been given in a court in a reciprocating jurisdiction, the judgment creditor may apply to the Court of Queen’s Bench within 6 years [of the judgment] to have [it] registered in the Court, and on the application the Court may order the judgment to be registered accordingly”
- **s. 7:** other options available even if Δ is unsuccessful in registering; “Nothing in this Act deprives a judgment creditor of the right to bring action on the judgment creditor=s judgment or on the original cause of action (a) after proceedings have been taken under this Act, or (b) instead of proceeding under this Act”
- **s. 2(6)** No order for registration shall be made if it is shown by the judgment debtor to the Court that

- (a) **[Lack of jurisdiction]** the original court acted either
 - (i) without jurisdiction under the conflict of laws rules of the Court, or

(ii) without authority under the law of the original court to adjudicate concerning the cause of action or subject-matter that resulted in the alleged judgment or concerning the person of the alleged judgment debtor, or without that jurisdiction and without that authority,

- (b) **[Lack of submission]** the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court,
- (c) the judgment debtor, being the defendant in the proceedings, was **not duly served** with the process of the original court and did not appear, notwithstanding that the judgment debtor was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court,
- (d) the judgment was obtained by **fraud**,
- (e) an **appeal is pending** or the time within which an appeal may be taken has not expired,
- (f) **[Defence of PP]** the judgment was in respect of a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the Court, or
- (g) the judgment debtor would have a good defence if an action were brought on the original judgment [Legis wanted to ensure that one could not register a judgment under this act if one could not enforce it under CL; so that any defence available under CL would be available under *Act*]

- ***Wilson v Hull*:** although legis was enacted prior to ***Morguard, s. 2(6)(a)(i)*** must be interpreted with current common law
- **Defences to registration:** possible to be successful to sue at CL but fail under legis
- **Example:** Δ served in BC for MVA that occurred there = establishes R&S connection → enforceable under CL; but if π registered judgment under *Act*, Δ would have defence of s. 2(6)(c)
- **What point of time is relevant for s. 2(6)(c)?** Date when foreign proceedings are commenced (***Kelowna v. Perl***); majority in ***Wilson v. Hull*** agreed

Reciprocating Jurisdictions Regulation

• *Reciprocal Enforcement of Judgments Act* only applies to judgments of a reciprocating jurisdictions:

- British Columbia, Manitoba, Newfoundland, New Brunswick, Nova Scotia, Ontario, PEI, Saskatchewan, Northwest Territories, Yukon Territory, Nunavut (not Quebec)
- Commonwealth of Australia
- WA, Idaho, and Montana
- UK dealt with in another piece of legis (*International Conventions Implementation Act*)

Royal Bank v. Lo (1990 BCSC) "Carrying on a business"

- Δ (BC resident) guaranteed loan in Ont. to son's pizza business; son defaulted on loan, bank sued mother in Ont. and got judgment; Δ did not defend
- Δ claimed defence of s. 2(6)(b) of not normally resident or carrying on a business; bank claimed Δ was a nominal director of business

Held: Δ was not carrying on a business in Ont even if she was a nominal director of Ont. co, as she took no part of day-to-day-business

Note: When requesting legal counsel to draw up guarantee, bank should have requested jurisdiction clause in favour of Ont. in guarantee, then judgment would have been registerable in BC as Δ submitted to juris of Ont. courts

Wilson v. Hull: held that judgment debtor was not carrying on business in Idaho even though Δ went there to buy 70 vehicles in Idaho intending to sell in AB

Kelowna v. Perl (1934 ABCA) "Ordinary Residence"

Issue: How to determine ordinary residence?

Held: Look at where the person lived at the commencement of proceedings

Wilson v. Hull (1996 ABCA) Statutory interpretation

- Judgment in Idaho
 - 1) **Post- Morguard legis** (s. 2(6)(a)(i)) should be interpreted with current common law
 - 2) **Carrying on a business:** purchasing goods for resale is not the same as carrying on a business in the place of purchase
 - 3) **Relevant point of time for s. 2(6)(c):** date when foreign proceedings are commenced

First City Capital Ltd. v. Winchester Computer Corp. (1987 Sask CA) Juris clause = submission to juris

- Δ had not defended in Sask; jurisdiction clause in favour of original court (AB)
- π-bank argued that Δ had no defence; Δ argued that they did not submit during

the proceedings as K was signed before the proceedings were commenced

Held: Submission in jurisdiction clause is a continuing submission

- Submission continues when proceedings are initiated

Ratio: Consent to juris clause in K amounts to submission to the jurisdiction

First Interstate Bank of Kalispell v. Seeley (1983 ABQB) Contravention of PP

- When Δ defaulted on a loan, π-bank obtained summary judgment against him in Montana; π subsequently commenced an action in AB and was granted summary judgment
- Δ sought to set aside the order and obtain permission to defend the claim made against him in AB on the ground that the Montana court erred in applying the Montana law rather than that of Alberta and that it was against PP to enforce the claim in AB as the document in dispute did not comply with *Guarantee Acknowledgment Act*

Issue: As the loan did not comply with the requirements of AB law, could Δ use contravention of FPP to set aside order?

Held: No, application dismissed

- There was no evidence that the judgment was obtained by fraud or was contrary to natural justice. Enforcing a foreign judgment under the circumstances would not be against public policy, even if the loan document did not comply with the requirements of Alberta law. The foreign law allowing the judgment did not offend a principle of morality or justice which commanded universal recognition

Bank of Montreal v. Snoxell (1982 ABQB) Contravention of PP

- Δ argued that "public policy dictates that unacknowledged guarantees should not be enforced by an Alberta court"

- 1) "The parties cannot make a [sham] of contracting under one law in order to validate an agreement that clearly has its closest connection with another law... the contract had a close connection with the jurisdiction selected by the parties so as to warrant labelling their choice as *bona fides*"
- 2) "The court did not "find that the choice [of law] by the parties... should be voided on the ground of public policy. The Alberta Court of Appeal does not view the enforcement in Alberta of an unacknowledged guarantee covered by the law of another province, of which it is valid, as being contrary to public policy"

Note: Recall that the enforcement of gambling debt does not contravene PP

Eggleton v. Broadway Agencies (1981 ABQB) Limited defences on judgment

- Application to register BC judgment based on breach of K; enforcement by judgment debtor
- Judgment debtor argued that she "would have a good defence if an action were brought on the original judgment" in reference to s. 2(6)(g)

Held: Only defences on judgment available are denial of natural justice, fraud, and FPP – not defences that go to merits of the case

- 1) “A defence to the cause of action and a defence to an action on the foreign judgment are not the same”
- 2) Outcome would be problematic: “[I]f a person sued on a foreign judgment was permitted to defend the action on the merits the result of clause (g) would be that the registering court would be trying the case *de novo*”

International Conventions Implementation Act

- Special legislation relating to UK judgments
- **Part III:** sets out method of registration that is almost identical to process in *REJA*
 - Some differences: defences available in this act may be unavailable in *REJA*
 - **Note: Article V, provision 2** provides a defense if (1) the property is immovable and outside territory of origin or (2) proceedings were brought contrary to an exclusive jurisdiction or arbitration clause in an agreement

D. Ex Parte Applications

1) **Scenario:** π receives default judgment in WA, Δ lives in AB and served *ex juris* in AB but does nothing to submit to juris of WA; case has little connection to WA except for fact that π is in WA – what are π 's options?

- **Registering via REJA:** not available as Δ not ordinarily resident in AB
- **Common law:** assuming there is no R&S connection, cannot satisfy CL/*Morguard* test
- **Suing in juris:** if limitations period passed, suing again not an option
- **Issue:** can one register under *REJA* if Δ has a defence to the registration?

2) **s. 2(2)/Reciprocal Enforcement Act:** allows *ex parte* registration

- Requirements: (a) Δ was personally served in the original action; or (b) Δ did something to voluntarily submit to the jurisdiction and “in which, under the laws of the... original court, the time within which an appeal may be made against the judgment has expired and no appeal is pending or was made and has been dismissed
- **“Personally served” (s. 1(2))** means “actual delivery of the process, notice, or other document, to be served, to the person to be served with it personally and service shall not be held not to be personal service merely because the service is effected outside the

jurisdiction of the original court” → simply phrased, service *ex juris* = personal service

- 3) If π is successful in serving service *ex parte*, Δ can apply to it set aside
 - Δ will normally be successful under **s. 2(6)(a)** (*Morguard* test) and **s. 2(6)(b)**
 - **Time limitation (s. 6):** Δ has one month to set aside order (**McCormack**) – mandatory deadline (**Mallett**)
- 4) Is π legally entitled to apply for *ex parte* order when Δ has a defence?
 - Interpretation of *REJA* suggests that π is entitled to apply
 - **s. 2(6):** “No order for registration shall be made if it is shown by the judgment debtor to the Court that...” contemplates that Δ is present and that defences only apply after application
 - **s. 2(2):** requirement that there has been personal service and appeal period has expired; **s. 2(6)(e):** “No order for registration shall be made if it is shown by [Δ]... that an appeal is pending or the time within which an appeal may be taken has not expired” which singles out one defence in s. 2(6) into a precondition of applying for *ex parte* order – legis intended that π can apply for *ex parte* application
- 5) Lawyers’ ethical obligation is a duty of frank disclosure as other party is not present (**Pricewaterhouse**)

McCormack v. Starr (1972 ABSC) Δ -debtor must file within one month and serve notice on π -creditor

Held: Judgment debtor must not only file notice to have it set aside within one month, but must also serve the notice on the judgment creditor

Ratio: Δ must serve and file within one month

*Mallett v. Yorkshire Trust Co. (1986 ABCA) **Deadline is mandatory***

Held: Court has no discretion to extend the one month deadline

- Judgment creditor has no other option besides applying for *ex parte*

Ratio: Deadline is mandatory

*Pricewaterhouse Coopers v. Morse (2000 NWTSC) **Ex parte requires π -creditor to disclose relevant authority***

• Judgment obtained in Ont.; *ex parte* application in NWT to register Ont. judgment; Δ was not normally resident in Ont and π was aware that Δ was not carrying on a business in Ont.

• None of this was disclosed in *ex parte* application; π granted order, Δ applied to have it set aside and was successful

Held: *Ex parte* registration set aside

- 1) “Applicants seeking relief... on an *ex parte* basis are... under the duty of disclosing all facts material to their applications... This duty is one to be zealously performed on their behalf by members of the legal profession... Members of the profession... have a duty to bring to the attention of the chambers judge any statutory or other authority which may reflect adversely on an *ex parte* application”
- 2) Not entirely correct that this applies only to *ex parte* applications, as even if other side is represented, both sides must show relevant legal authority
- 3) If counsel fails to bring attention any relevant authority, *ex parte* registration may be set aside
- 4) No duty of due diligence to investigate Δ 's defences under s. 2(6), but if π is aware of facts that Δ may have a defence, π required to disclose them
 - “[T]he duty to address those factors arises only where the judgment creditor has some knowledge of facts relevant to [s. 2(6)]. Obviously the expiry of the appeal period and the filing of an appeal are factors within the knowledge of the judgment creditor and should be addressed... Otherwise, if the judgment creditor has no such knowledge... it need only show that the judgment creditor was personally served in the original action”
 - To what extent can one be wilfully blind? Cannot ignore the basic facts surrounding the claim

Ratio: In an *ex parte* application, π -creditor must disclose relevant legal authority to the extent that the facts indicate Δ may have a defence

Banque Nationale du Canada v. Fleming (1986 ABQB) Difficult to piggy-back

- Bank obtained judgment in Que and applied to have it enforced under CL in Ont, then applied to register Ont. judgment in AB, where Δ resided (Ont. is a reciprocal juris of AB)

Issue: If third juris reciprocates with AB, can π register in third juris to enforce judgment in AB?

Held: Issue raised but not answered, but *ex parte* order was set aside

- 1) By applying the second time the bank waived any rights it had from the ON judgment
- 2) *International Conventions Implementation Act* deals with issue: according to Article IV, provision 1, “Registration of a judgment shall be refused or set aside if... (f) the judgment is a judgment of a country or territory other than the territory of origin which has been registered in the original court or has become enforceable in the territory of origin in the same manner as a judgment of that court”

Ratio: Cannot apply for *ex parte* registration via “piggy-backing”

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