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UNIFORM LAW CONFERENCE OF CANADA

UNIFORM COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT (2021)

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Introductory commentary

0.1. The *Uniform Court Jurisdiction and Proceedings Transfer Act* has four main purposes:

(1) to replace the different jurisdictional rules currently used in Canadian courts with a uniform set of standards for determining jurisdiction.

(2) to embody the basic substantive principles of jurisdiction laid down by the Supreme Court of Canada, most notably in the decisions in *Morguard Investments Ltd. v. De Savoye* (1990) and *Club Resorts Ltd. v. Van Breda* (2012).

(3) by providing uniform jurisdictional standards, to provide an essential complement to the nation-wide enforceability of judgments under the *Uniform Enforcement of Canadian Judgments Act*, *Enforcement of Canadian Decrees Act* and *Enforcement of Canadian Judgments and Decrees Act*, and

(4) to provide a mechanism by which the superior courts of Canada can transfer litigation to a more appropriate forum in or outside Canada, if the receiving court accepts such a transfer.

0.2 To achieve the first three purposes, this Act gives the substantive rules of a jurisdiction an express statutory form instead of the traditional approach of leaving them implicit in a jurisdiction's rules for service of process. In the vast majority of cases this Act produces the same result as the traditional approach, but the principles are expressed in different terms. Jurisdiction is not established by the availability of service of process, but by the existence of defined connections between the territory or legal system of the enacting jurisdiction and a party to the proceeding or the facts on which the proceeding is based. The term "territorial competence" has been chosen to refer to this aspect of jurisdiction (section 1, "territorial competence") and distinguish it from other jurisdictional rules relating to subject matter or other factors (section 1, "subject matter competence"). In these phrases, “competence” has been used in preference to the traditional “jurisdiction” because “competence” refers unambiguously to authority to act, whereas “jurisdiction” can also refer to judicial power (“submit to the court’s jurisdiction”) or to a law district (“enacting jurisdiction”).

0.3 By including the transfer provisions in the same statute as the provisions on territorial competence, the Act makes the power to transfer, along with the power to stay proceedings, an integral part of the means by which a Canadian court can deal with proceedings that more appropriately should be heard elsewhere. The provisions on transfer owe a great debt to the Uniform Transfer of Litigation Act ("UTLA") promulgated in 1991 by the United States National Conference of Commissioners on Uniform State Laws.

0.4 This uniform Act is a revised version of the uniform Act originally adopted by the Uniform Law Conference of Canada in 1994 and slightly revised in 1995 and 2011. The present version revises provisions in Parts 1 and 2 and adds a new

Part 2.1. The transfer provisions, in Part 3, are essentially unchanged from those in the 1994 version. The principal changes to the 1994 Act include:

(1) The addition of a ground of territorial competence if a defendant is a mandatory party to a proceeding in which the court has territorial competence (section 3(d.1)).

(2) The clarification of the presumption of a real and substantial connection if the proceeding concerns a business carried on in the province or territory, by making explicit that the reference is to a business carried on by the defendant (section 10(h)).

(3) The inclusion of forum selection agreements in the provisions on declining to exercise territorial competence (sections 11(2)(b.1), (3), (4) and (5)).

(4) The addition of Part 2.1, the main purpose of which is to codify, with modification, the common law rule that a court lacks subject matter competence in questions of title to or possession of immovable property outside the province or territory (sections 12.1-12.3).

0.5 The Act does not reflect the 2005 *Hague Convention on Choice of Court Agreements*. If Canada becomes a party to the Convention and declares it to be applicable to the enacting jurisdiction, the enacting jurisdiction will need to implement it by statute. The Uniform Law Conference of Canada has proposed the *Uniform Act to Implement the Hague Convention on Choice of Court Agreements* (2019). For cases within the scope of the convention, the implementing legislation must prevail over the Act to the extent of any conflict or inconsistency (s. 12 of the Act). The scope of application of the convention is essentially limited to civil and commercial cases that have relevant connections outside Canada (see articles 1, 2 and 25(2)). Certain issues on which the convention's rules, if they are applicable, may conflict or be inconsistent with those in the Act are noted below in commentary 11.10.

0.6 This Act is generally compatible with the rules in the *Civil Code of Quebec* (CCQ) that govern the jurisdiction of Quebec courts in interprovincial and international litigation. Additional details are provided with respect to various sections of the Act where they are relevant. Quebec law does not provide for transfer of proceedings in the manner contemplated by Part 3 of the Act.

PART 1
Interpretation

Definitions

1 In this Act:

"consumer contract" means a contract that is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession;

"employment contract" means a contract of individual employment;

"person" includes a state;

"plaintiff" means a person who commences a proceeding, and includes a plaintiff by way of counterclaim or third party claim;

"proceeding" means an action, suit, cause, matter or originating applicationand includes a procedure and a preliminary motion;

"procedure" means a procedural step in a proceeding;

"state" means:

(a) Canada or a province or territory of Canada; and

(b) a foreign country or a subdivision of a foreign country;

"subject matter competence" means the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence;

"territorial competence" means the aspects of a court's jurisdiction that depend on a connection between:

(a) the territory or legal system of the state in which the court is established; and

(b) a party to a proceeding in the court or the facts on which the proceeding is based.

Commentary to section 1

1.1 The definitions of "consumer contract" and "employment contract" were not in the 1994 version of the Act. They relate to two provisions. One is the presumed real and substantial connection in a proceeding dealing with a consumer contract (section 10(e)(iii) of the Act, where the definition was previously found). The other is the effect of forum selection agreements in consumer and employment contracts (new section 11(5)). "Consumer contract" and "employment contract" are defined in various ways in provincial and federal legislation. The definitions in section 1 are intended to give the two terms a predictable, uniform meaning in this Act that does not vary by enacting jurisdiction. The definitions apply solely for the purposes of this Act. They have no impact on the operation of consumer protection or employment standards legislation, in which these terms may be defined differently.

1.2 The term "person" is used in the generic sense throughout the statute. The term covers natural persons, legal persons including corporate entities, and states or Crown agencies.

1.3 "Proceeding" is broadly defined to include interlocutory matters and even motions which are brought preliminary to formal commencement of an action.

1.4 "State" is defined for two purposes. One is to complement the definition of "territorial competence", which refers to connections with the territory or legal system of the "state" in which the court is established. The other is to make it clear that the power of transfer under Part 3 extends to transfers to and from countries outside Canada, or subdivisions of those countries.

1.5 The rationale for adopting the term "territorial competence" is noted in commentary 0.2. The definition is the key to the legal effect of the rules in Part 2, defining Canadian courts' territorial competence.

1.6 "Subject matter competence" is defined to include all aspects of a court's jurisdiction other than those relating to territorial competence. It thus includes restrictions on a court's authority relating to the nature of the dispute, the amount in issue and other criteria that are unrelated to the territorial reach of the court's authority. Part 2.1 contains one rule of subject matter competence, which concerns questions of title to or possession of immovable property outside the enacting jurisdiction; see commentary 12.1.1. The distinction between "territorial competence" and "subject matter competence" is important in certain of the transfer provisions in Part 3.

PART 2

TERRITORIAL COMPETENCE OF COURTS OF [*ENACTING PROVINCE OR TERRITORY*]

Application of this Part

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

(2) The territorial competence of a court is to be determined solely by reference to this Part.

Commentary to section 2

2.1 Part 2 is drafted so as to define the territorial competence of any court of the enacting jurisdiction. This may be subject to rules in any other statute that give a particular court a wider or narrower territorial competence than the rules in this Act (see section 12). The transfer provisions in Part 3 are drafted so as to apply only to the superior court of unlimited jurisdiction (see the note after the heading of Part 3).

2.2 Section 2(2) is intended to make it clear that a court's territorial competence is to be determined according to the rules in the Act and not according to any common law jurisdictional rules that the Act replaces.

2.3 The Act defines a court's territorial competence "in a proceeding" (section 3). It does not define the territorial aspects of any particular remedy. Thus, the Act does not supersede common law rules about the territorial limits on a remedy.

2.4 The Act only defines territorial competence; it does not define subject matter competence except for the rule in Part 2.1. It is not otherwise intended to affect any rules limiting a Canadian court's jurisdiction by reference to the amount of a claim, the subject matter of a claim or any other factor besides territorial connections.

2.5 The *Civil Code of Quebec* uses the expression “international jurisdiction of Quebec authorities” (articles 3134 CCQ and following) to reflect the notion of

"territorial competence" used in the Act. Questions of subject matter jurisdiction are dealt with in the *Code of Civil Procedure*.

Proceedings in personam

3 A court has territorial competence in a proceeding that is brought against aperson only if:

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

(b) during the course of the proceeding that person submits to the court's jurisdiction;

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

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

(d.1) that person is a mandatory party in a proceeding that is brought against another person in which the court has territorial competence; or

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

Commentary to section 3

3.1 Section 3 defines the six grounds on which a court has territorial competence in a proceeding *in personam*. Clauses (a), (b) and (c) include the three ways in which the defendant may consent to the court's jurisdiction: by invoking the court's jurisdiction as plaintiff, by submitting to the court's jurisdiction during the proceedings, or by having agreed that the court shall have jurisdiction. These reflect long-standing law. Clauses (d), (d.1) and (e) change traditional law, by replacing the criterion of service of process with the criterion of substantive connection with the enacting jurisdiction.

3.2 Clause (d) is effectively the replacement for the traditional rule that a court has jurisdiction over any person that is served with process in the forum province or territory. Replacing service in the province or territory of the forum court with ordinary residence in that province or territory means that a person who is only temporarily in the province or jurisdiction will not automatically be subject to the court's jurisdiction. This change in the traditional rule is made on the ground of fairness, because a defendant's mere physical presence in a province or territory should not be a sufficient basis for a province or territory to assert judicial jurisdiction over the defendant. Except in the case of mandatory parties (clause (d.1)), for a court to take jurisdiction over a person who is not ordinarily resident in its territory and does not consent to the court's jurisdiction, a real and substantial connection must exist within clause (e).

3.3 Clause (e) replaces the traditional service *ex juris* rules, in the common law provinces and territories, in cases of “assumed jurisdiction” (jurisdiction over a non-resident defendant). Territorial competence will depend, not on whether a defendant can be served *ex juris* under the rules of court, but on whether there is a real and substantial connection between the enacting jurisdiction and the facts on which the proceeding in question is based. This provision aligns the law on jurisdiction with the concept of "properly restrained jurisdiction" that the Supreme Court of Canada, in *Morguard Investments Ltd. v. De Savoye* (1990), held was a precondition for the recognition and enforcement of a default judgment throughout Canada. The Supreme Court further elaborated on the “real and substantial connection” requirement for jurisdiction in *Club Resorts Ltd. v. Van Breda* (2012). The "real and substantial connection" criterion is an essential complement to the *Uniform Enforcement of Canadian Judgments and Decrees Act*, which requires all Canadian judgments to be enforced without recourse to any jurisdictional test. The Act ensures that all judgments will satisfy the Supreme Court's substantive standards of jurisdiction.

3.4 If a proceeding concerns multiple claims against the same non-resident defendant, “the facts on which the proceeding . . . is based”, as used in section 3(e), may differ as between the claims. By the same token, some of the claims may fit within one or other of the presumed real and substantial connections in section 10 whereas other claims do not. Section 3, however, refers to territorial competence “in a proceeding”. The real and substantial connection criterion in section 3(e) must therefore be satisfied with respect to the proceeding taken as a whole, not necessarily with respect to each claim taken individually. See further commentary 10.3.

3.5 In rare cases a particular person must as a matter of law be a party to certain proceedings. This is usually because of the effect an order in the proceedings will have on that person’s rights. Such a person can be described as a mandatory or a necessary party. For example, co-owners of a chattel are likely mandatory parties to a claim in respect of damage to the chattel. So if one co-owner sues a resident defendant for damage to a chattel located abroad, and the other co-owner refuses to join in the claim, that co-owner must be made a defendant to the proceeding. But there may be no other basis for territorial competence over that defendant, who may be a non-resident. To address this gap, clause (d.1) provides for territorial competence over mandatory parties. This is distinct from the notion of a proper party which is a much broader concept typically based on considerations of efficiency and convenience. Clause (d.1) uses “mandatory” rather than “necessary” to avoid confusion that has arisen in the jurisprudence in some analysis of the phrase “necessary or proper”.

3.6 In a province or territory that adopts the Act, rules of court will still include rules as to service of process, but these will no longer be the source and definition of the court's territorial competence. Their role will be restricted to ensuring that defendants, whether ordinarily resident in or outside the jurisdiction, receive proper notice of proceedings and a proper opportunity to be heard.

3.7 The grounds listed in this section are largely compatible with those that would establish the territorial competence of Quebec courts (articles 3134-54 CCQ). The main difference is that there is no general “real and substantial connection” ground in Quebec law, although the practical implications of that distinction are minimal. The most notable particularity in Quebec law is that claims based on consumer or employment contracts can be brought in Quebec courts on the sole

ground of the residency of the consumer or employee in Quebec, without any requisite connection to the defendant or the dispute (article 3149 CCQ). In addition, article 3151 CCQ provides for the exclusive jurisdiction of Quebec courts over civil liability claims related to raw material extracted in the province.

Proceedings with no nominate defendant

4 A court has territorial competence in a proceeding that is not brought against aperson or a vessel if there is a real and substantial connection between [*enacting province or territory*] and the facts upon which the proceeding is based.

Commentary to section 4

4.1 This section deals with several miscellaneous actions where the proceedings are "technically *in personam*" but there is not, or is not yet, an identified "*persona*" whose connection with the territory founds jurisdiction. In actions such as preliminary estate matters or correction of a corporate register, it is the proceeding rather than a nominal defendant which is the crucial factor. The section is separate from section 3 to emphasize this point.

Proceedings *in rem*

5 A court has territorial competence in a proceeding that is brought against a vessel if the vessel is served or arrested in [*enacting province or territory*].

Commentary to section 5

5.1 In Section 5, an action *in rem* can be brought only against a vessel if the vessel is served or arrested in [*enacting province or territory*]. Actions *in rem* are primarily brought in the Federal Court under its admiralty jurisdiction, but concurrent jurisdiction over maritime matters exists in the courts of the provinces or Territories.

Residual discretion

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

(a) there is no court outside [*enacting province or territory*] in which the plaintiff can commence the proceeding; or

(b) the commencement of the proceeding in a court outside [*enacting province or territory*] cannot reasonably be required.

Commentary to section 6

6.1 This section creates a residual discretion to act, notwithstanding the lack of jurisdiction under normal rules, provided that the conditions in (a) or (b) are met. Residual discretion permits the court to act as a "forum of necessity" where there

is no other forum in which the plaintiff could reasonably seek relief. The language is based on the general principle in article 3136 CCQ but differs in one respect, namely the absence of a statement that the dispute must have a sufficient connection with the domestic forum.

Ordinary residence - corporations

7 A corporation is ordinarily resident in [*enacting province or territory*], for the purposes of this Part, only if:

(a) the corporation has or is required by law to have a registered office in [*enacting province or territory*];

(b) pursuant to law, it:

(i) has registered an address in [*enacting province or territory*] atwhich process may be served generally; or

(ii) has nominated an agent in [*enacting province or territory*] upon whom process may be served generally;

(c) it has a place of business in [*enacting province or territory*]; or

(d) its central management is exercised in [*enacting province or territory*].

Commentary to section 7

7.1 Sections 7, 8 and 9 define ordinary residence for corporations, partnerships and unincorporated associations. They reflect, with only minor modifications, the approach that is generally taken under existing law to decide whether these defendants are present in the jurisdiction for the purposes of service. The Supreme Court of Canada most recently affirmed this approach in *Chevron Corp. v. Yaiguaje* (2015).

7.2 This Act contains no definition of ordinary residence for natural persons. This connecting factor is widely used in Canada and has been judicially defined in numerous cases. It was felt that an express statutory definition would probably fail to match the existing concept and would therefore provide difficulty rather than certainty.

7.3 Under the *Civil Code of Quebec*, the equivalent to section 3(d) for legal persons depends on the legal person having is head office in the province (article 3148(1) CCQ). Otherwise, the legal person must have an establishment in the province and the dispute must relate to the activities of the legal person in Quebec (article 3148(2) CCQ). The result is narrower than what is provided under the Act in section 7.

Ordinary residence – partnerships

8 A partnership is ordinarily resident in [*enacting province or territory*], for the purposes of this Part, only if:

(a) the partnership has, or is required by law to have, a registered office or business address in [*enacting province or territory*];

(b) it has a place of business in [*enacting province or territory*]; or

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

Commentary to section 8

8.1 See commentary 7.1. Partnerships are both business entities and collections of individuals. This section defines the ordinary residence of a partnership in a business sense. It is analogous to the section 7 provisions on corporations, and excludes territorial competence over the partnership based on the residence of an individual partner alone.

Ordinary residence – unincorporated associations

9 An unincorporated association is ordinarily resident in [*enacting province or territory*] for the purposes of this Part, only if:

(a) an officer of the association is ordinarily resident in [*enacting province or territory*]: or

(b) the association has a location in [*enacting province or territory*] for the purpose of conducting its activities.

Commentary to section 9

9.1 See commentary 7.1.

Real and substantial connection

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

(a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in[*enacting province or territory*];

(b) concerns the administration of the estate of a deceased person in relation to:

(i) immovable property of the deceased person in [*enacting province or territory*]; or

(ii) movable property anywhere of the deceased person if at the time of death, he or she was ordinarily resident in [*enacting province or territory*];

(c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to:

(i) immovable or movable property in [*enacting province or territory*]; or

(ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in [*enacting province or territory*];

(d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:

(i) the trust assets include immovable or movable property in [*enacting province or territory*] and the relief claimed is only as to that property;

(ii) that trustee is ordinarily resident in [*enacting province or territory*];

(iii) the administration of the trust is principally carried on in [*enacting province or territory*];

(iv) by the express terms of a trust document, the trust is governed by the law of [*enacting province or territory*];

(e) concerns contractual obligations, and:

(i) the contractual obligations, to a substantial extent, were to be performed in [*enacting province or territory*];

(ii) by its express terms, the contract is governed by the law of [*enacting province or territory*]; or

(iii) the contract is a consumer contract that resulted from a solicitation of business in [*enacting province or territory*] by or on behalf of the seller;

(f) concerns restitutionary obligations that, to a substantial extent, arose in [*enacting province or territory*];

(g) concerns a tort committed in [*enacting province or territory*];

(h) concerns a business carried on in [*enacting province or territory*] by the person against whom the proceeding is brought;

(i) is a claim for an injunction ordering a party to do or refrain from doing anything:

(i) in [*enacting province or territory*]; or

(ii) in relation to immovable or movable property in [*enacting province or territory*];

(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in [*enacting province or territory*];

(k) is for enforcement of a judgment of a court made in or outside [*enacting province or territory*] or an arbitral award made in or outside [*enacting province or territory*]; or

(l) is for the recovery of taxes or other indebtedness and is brought by the Crown [*of the enacting province or territory*] or by a local authority [*of the enacting province or territory*].

Commentary to section 10

10.1 The purpose of section 10 is to provide guidance to the meaning of "real and substantial connection" in section 3(e). Instead of having to show in each case that a real and substantial connection exists, plaintiffs are able, in the great majority of cases, to rely on one of the presumptions in section 10. These are based, with modifications, on traditional grounds for service *ex juris* in the rules of court of many provinces or territories. If the defined connection with the enacting jurisdiction exists, it is presumed to be sufficient to establish territorial competence under section 3(e).

10.2 A defendant will still have the right to rebut the presumption by showing that, in the facts of the particular case, the defined connection is not real and substantial. Conversely, a plaintiff whose claim does not fall within any of the clauses of section 10 will have the right to argue that the facts of the particular case do have a real and substantial connection with the enacting jurisdiction so as to give its courts territorial competence under section 3(e). On the latter, see commentary 10.9-10.10.

10.3 As noted in commentary 3.4, whether a real and substantial connection exists is determined for the proceeding as a whole, not just for one claim in the proceeding. Many of the presumptions in section 10 refer to a particular type of claim. If a proceeding includes such a claim, the presumption will apply to the proceeding. This is consistent with the Supreme Court of Canada's observation that "If [a real and substantial] connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case." (*Club Resorts Ltd. v. Van Breda* (2012), at para. 99.) A concern that a particular claim may be included in a proceeding solely for tactical advantage, by triggering a presumption and so bolstering the case for territorial competence for the entire proceeding, can addressed in two ways. One is by rebutting the presumption by showing that the connection with the proceeding, taken as a whole, is not real and substantial. The other is by means of the discretion to decline to exercise territorial competence (section 11).

10.4 Section 10 does not include any presumptions relating to proceedings concerned with family law. Since territorial competence in these proceedings is usually governed by special statutes, it was felt that express rules in section 10 would lead to confusion and uncertainty because they would often be at variance with the rules in those statutes, which may have priority by virtue of section 12. For this reason, it was felt better to leave the matter of territorial competence for the special family law statutes. If the question of territorial competence in a particular family matter is not dealt with in a special statute, the general rules in section 3 of this Act, including ordinary residence and real and substantial connection, will govern.

10.5 Section 10 lists only those factors which give rise to the presumption. Certain factors have been deliberately excluded from the list. Although some rules of court may list them as grounds for service *ex juris*, these factors were excluded from section 10 because their presence alone does not justify presuming that a real and substantial connection exists between the province or territory and the facts on which the proceeding is based. These include that the defendant is a "proper party" (usually in the phrase "necessary or proper party") to a proceeding against another party that was served in the province or territory; that the proceeding concerns damage sustained in the province or territory; and that the proceeding concerns a contract that was made in the province or territory.

10.6 The reason for excluding the "proper party" ground is that such a rule would be out of place in provisions that are based, not on service, but on substantive connections between the proceeding and the enacting jurisdiction. If a plaintiff wishes to bring proceedings against two defendants, one of whom is ordinarily resident in the enacting jurisdiction and the other of whom is not, territorial competence over the first defendant will be present under section 3(d). Territorial competence over the second defendant will not be presumed merely on the ground that that person is a proper party to the proceeding against the first person. The proceeding against the second person will have to meet the real and substantial connection test in section 3(e). For mandatory parties, see section 3(d.1) and commentary 3.5.

10.7 The fact that damage was sustained in the province or territory does not, by itself, say much about the strength of the connection between the province or territory and the facts giving rise to the proceeding. If the damage is personal injury, the damage is arguably sustained wherever the victim lives, at least indirectly, because it is there that the victim suffers from the consequences of the injury. If the damage is financial, it is arguably sustained wherever the plaintiff has assets that are depleted because of the defendant's wrong. A territorial factor that is so tied to where the plaintiff is and what the plaintiff does, and that may have so little to do with the defendant, is inadequate to be presumed a real and substantial connection with the facts giving rise to the proceeding. The absence of both the "proper party" and the "damage sustained" grounds from the section 10 presumptions was noted by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda* (2012) at para. 55, with the observation that those two factors had not "gained broad acceptance as reliable indicators of jurisdiction."

10.8 As for the place of making of a contract, the Supreme Court of Canada has adopted the place of making as a presumptive connecting factor for a tort proceeding that is connected with the contract: see *Club Resorts Ltd. v. Van Breda* (2012) and *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP* (2016). Saskatchewan chose to include the place of making of a

contract in the list of presumed real and substantial connections when enacting its legislation based on the 1994 version of the Act. Despite its use in these contexts, the ground is excluded from section 10. The place of contracting, in and of itself, is an arbitrary construct. It depends on the rules of contract formation, which determine what was the last act necessary to conclude the contract. It is the location of that act that is taken to be the place of making (see *Lapointe* at paras. 41-43). The rationale for excluding this ground from section 10 is that the mere location of the last act necessary to form a contract is an insufficient connection with the province or territory to presumptively support territorial competence.

10.9 As the opening words of section 10 make clear, a proceeding that does not fit within any of the presumptions may still be shown to have a real and substantial connection with the enacting jurisdiction under section 3(e). The methodology for establishing such a real and substantial connection under the Act is left to the courts. Courts in provinces or territories that have enacted the 1994 version of the Act have sometimes adopted a global approach, asking whether a real and substantial connection has been shown, taking all the facts of the case into account. At other times they have looked to the case law on jurisdiction in non-CJPTA common law provinces or territories, most notably the Supreme Court of Canada's decision in *Club Resorts Ltd. v. Van Breda* (2012). There, the court specifically rejected a case-by-case global approach to real and substantial connection. Instead, it required judges to determine the existence of a real and substantial connection by applying "presumptive connecting factors" established in the case law or, where necessary, formulating new such factors. The technique resembles the use of presumptions in section 10 of the Act, but the content of the presumptive connecting factors that have been approved by the courts is sometimes markedly different from the presumptions used in the Act.

10.10 It is for the courts to decide whether the methodology of presumptive connecting factors should be applied in this context, and how persuasive any such presumptive connecting factors used in non-CJPTA jurisdictions should be in assessing whether a real and substantial connection has been established for the purposes of section 3(e) of the Act. Whatever approach is adopted to these questions should, however, be consistent with the statutory scheme. Section 10, as commentary 10.5-10.8 notes, lists certain presumptively sufficient connections but omits others. It would run counter to this approach if a connection that is deliberately omitted from the statutory presumptions in section 10 can nevertheless operate as a "common law" factor that presumptively establishes a real and substantial connection under section 3(e).

Discretion as to the exercise of territorial competence

11(1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a clearly more appropriate forum in which to hear the proceeding.

(2) Subject to subsections (3) to (5), a court, in deciding whether a court of another state is a clearly more appropriate forum in which to hear the proceeding, must consider the circumstances relevant to the proceeding, including:

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

(b) the law to be applied to issues in the proceeding;

(b.1) an agreement between the parties that designates a state where such a proceeding may be brought but does not exclude other states;

(c) the desirability of avoiding a multiplicity of legal proceedings;

(d) the desirability of avoiding conflicting decisions in different courts;

(e) the enforcement of an eventual judgment; and

(f) the fair and efficient working of the Canadian legal system as a whole.

(3) If the parties to a proceeding have agreed that such a proceeding must be brought exclusively in a state other than [*enacting province or territory*], the court must decline to exercise its territorial competence unless strong cause is shown why the agreement should not be enforced.

(4) If the parties to a proceeding have agreed that such a proceeding must be brought exclusively in [*enacting province or territory*], the court must exercise its territorial competence unless strong cause is shown why the agreement should not be enforced.

(5) If a proceeding that is otherwise subject to subsection (3) or (4) concerns a consumer contract or an employment contract, at the option of the consumer or the employee, as the case may be,

(a) subsections (3) and (4) do not apply, and

(b) the agreement that such a proceeding must be brought exclusively in a designated state shall be deemed for the purposes of clause (2)(b.1) not to have excluded states other than the designated state.

Commentary to section 11

11.1 As was stated by the Supreme Court of Canada in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters* (2012), section 11(1) and (2) are a codification of the doctrine of *forum non conveniens*. The language of section 11(1) is taken from the common law cases on the doctrine. The adverb "clearly" in "clearly more appropriate" did not appear in the 1994 version of the uniform Act but has been added to reflect the Supreme Court of Canada's specific approval of the phrase in *Club Resorts Ltd. v. Van Breda* (2012), at paras. 108-09. The factors listed in section 11(2) as relevant to the court's discretion are all factors that have been expressly considered by courts in the past.

11.2 The discretion in section 11 to decline the exercise of territorial competence is defined without reference to whether a defendant was served in the enacting

jurisdiction or *ex juris*. This is consistent with the approach in Part 2 as a whole, which renders the place of service irrelevant to the substantive rules of jurisdiction. It is also consistent with the Supreme Court's statements in *Amchem Products Inc. v. British Columbia* (1993) and *Club Resorts Ltd. v. Van Breda* (2012) that there was no reason in principle to differentiate between declining jurisdiction where service was in the jurisdiction and where it was *ex juris*.

11.3 Sections 11(2)(b.1) and 11(3) to (5) were not in the 1994 version of the Act. They have been added to round out the codification of the discretion to decline territorial competence by including provisions on what, in case law and in the literature, are typically called forum selection agreements or choice of court agreements. The statutory provisions do not use this terminology but, rather, are drafted simply in terms of what the agreements do. Essentially, the agreements are those that designate a state in which a proceeding may be brought (s. 11(2)(b.1)) or must be brought (s. 11(3)-(4)). An important point is that in each of these statutory provisions, the "proceeding" to which the agreement relates is a judicial proceeding (see s. 1, "proceeding"). It does not refer to an arbitral proceeding. Arbitration agreements are beyond the scope of the Act because their effect is determined according to the law that governs arbitration

11.4 Section 11(2)(b.1) reflects the case law on the effect of a non-exclusive forum selection agreement. If the agreement designates a court outside the enacting jurisdiction, but the plaintiff brings the proceeding, as the agreement permits, in the domestic forum, the agreement is still a relevant factor if the appropriateness of the domestic forum is challenged on the ground of *forum non conveniens.* Likewise, a non-exclusive agreement selecting the domestic court does not bind the parties to litigate there, but the parties' acceptance of the domestic forum is a relevant factor if the appropriateness of that forum is challenged on the ground of *forum non conveniens*.

11.5 Sections 11(3) and (4) are intended to codify the case law on forum selection agreements as laid down in, *inter alia*, the Supreme Court of Canada's decisions in *Z.I. Pompey Industrie v. ECU-Line N.V.* (2003) and *Douez v. Facebook Inc.* (2017). The court has a discretion not to enforce an exclusive forum selection agreement, but only if "strong cause" is shown for not holding the relevant party to the agreement. This distinguishes the discretion referred to in section 11(3) and (4) from the ordinary *forum non conveniens* discretion in section 11(2). Section 11(3) deals with agreements that designate an exclusive forum outside the enacting province or territory. Here, enforcing the agreement means declining to exercise territorial competence. Section 11(4) deals with agreements that designate a court in the enacting province or territory as the exclusive forum, where enforcing the agreement means exercising territorial competence.

11.6 Section 11(5) is the only new provision that departs from current law. The case law does not treat consumer and employment contracts as being in a different category from other types of contracts that contain forum selection agreements. Rather, the nature of the contract has been factored on a case-by-case basis into the exercise of the "strong cause" discretion. By contrast, section 11(5) is based on the premise that there is a qualitative difference in how exclusive forum selection agreements in these types of contracts ought to be treated compared with similar agreements in commercial contracts, and that it is useful for the Act to provide clear guidance on that difference in treatment.

11.7 Section 11(5) gives the employee or the consumer the option of removing the forum selection agreement from the purview of section 11(3) and (4), as stated in section 11(5)(a). If the option is exercised the agreement is deemed, as stated in section 11(5)(b), to be a non-exclusive forum selection agreement for the purposes of section 11(2)(b.1). The agreement retains its full effect except for that one aspect.

11.8 The result of exercising the deeming option is as follows. If the exclusive forum selection agreement designates a forum outside the enacting jurisdiction, it can be overcome, according to section 11(3), only if strong cause is shown for the court to exercise its territorial competence. It will usually be the employee or consumer who seeks to invoke the territorial competence of the domestic forum and therefore needs to show strong cause. If the employee or consumer takes the option in section 11(5), section 11(3) does not apply. Strong cause for departing from the agreement need not be shown. However, an application by the defendant (the employer or supplier) that the court decline to exercise its territorial competence is possible. In such an application the defendant must meet the standard of showing *forum non conveniens* under section 11(2). The forum selection agreement is now deemed non-exclusive for the purposes of section 11(2)(b.1) and is therefore to be considered, in that form, as a relevant but not decisive factor in the exercise of the *forum non conveniens* discretion.

11.9 Turning to the result of the option in section 11(5) if the selected exclusive forum is the domestic court, an employee or consumer against whom a proceeding is brought in that forum can, by taking the option, change the weight of the onus in an application to have the court decline to exercise its territorial competence. Rather than having to show “strong cause” not to enforce the agreement, as section 11(4) would otherwise require, the employee or consumer need only show that the court should decline to exercise its territorial competence under the *forum non conveniens* discretion in section 11(2), with the agreement again being a relevant but not decisive factor under section 11(2)(b.1).

11.10 The *Hague Choice of Court Convention* (see commentary 0.5), if implemented in the enacting jurisdiction, contains provisions that would conflict with parts of section 11. The convention refers to exclusive forum selection agreements as “exclusive choice of court agreements” (article 3, para. a)). The Act treats the question whether a forum selection agreement is exclusive or non-exclusive as a matter of construction of the agreement according to ordinary contract principles. The convention, however, deems a choice of court agreement to be exclusive unless the parties have expressly provided otherwise (article 3, para. b)). The convention also precludes any discretion to decline the exercise of territorial competence if the exclusive choice of court agreement gives competence to the domestic forum (article 5(2)), and so is inconsistent with section 11(4). The convention also strictly limits the grounds on which the domestic forum can exercise territorial competence in the face of an exclusive choice of court agreement that designates a court in another state that is a party to the convention (article 6). The permitted grounds are essentially that the agreement is invalid or not viable, which is significantly narrower than the “strong cause” discretion in section 11(3). The convention does not apply to choice of court agreements entered into by consumers or employees (article 2(1)), which are expressly within the scope of section 11.

11.11 Quebec law specifically provides for court discretion to decline to exercise jurisdiction (article 3135). The criteria applied by courts largely follow those listed

in section 11(2) of the Act but are not identical (see *Spar Aerospace Ltd v. American Mobile Satellite Corp*., 2002 SCC 78 at para. 71). There are two significant differences between Quebec law and section 11(3) and (4) of the Act. First, if the defendant invokes a valid exclusive forum selection agreement designating a foreign court, a Quebec court will be without jurisdiction (article 3148 *in fine* CCQ) and has no discretion to hear the case. Second, Québec consumers or employees instituting claims in Québec are not bound by forum selection clauses designating foreign courts (article 3149 CCQ).

Conflicts or inconsistencies with other Acts

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

(a) confers jurisdiction or territorial competence on a court; or

(b) denies jurisdiction or territorial competence to a court,

that other Act prevails.

Commentary to section 12

12.1 The Act is intended to be a comprehensive statement of the substantive law of territorial competence. Exceptions clearly compromise that comprehensiveness. However, there may be special provisions, particularly in the areas of family, consumer or employment law, which are inconsistent with the Act and are to be preserved. Section 12 preserves any limitation or extension of the territorial competence of a particular court that is provided, either expressly or by implication, in another statute

12.2 The 1994 version of the Act had square brackets around section 12. The commentary explained that jurisdictions could choose, as an alternative, to replace section 12 with a specific list of statutes that prevail over the Act. Of the four jurisdictions that adopted and brought into force the 1994 version of the Act, only Yukon opted to include a specific list of statutes rather than enact section 12. In the three provinces that enacted section 12, the courts have encountered no difficulty in interpreting or applying the section. Given this background, the present version of the Act has removed the square brackets and makes section 12 the default option.

12.3 The French version uses only the expression “compétence territoriale” since it is sufficient to cover the reference to “jurisdiction and territorial competence” in the English version.

PART 2.1

SUBJECT MATTER COMPETENCE OF COURTS OF [*ENACTING PROVINCE OR TERRITORY*]

Definition for Part

12.1 In this Part, **"court"** means a court of [*enacting province or territory*].

Commentary to section 12.1

12.1.1 Unlike Part 2, which contains a comprehensive definition of territorial competence (see section 3), Part 2.1 does not contain a comprehensive definition of subject matter competence. Subject matter competence is too broad to be amenable to such an approach and, as noted earlier, is left to be addressed by provincial, territorial and federal law. However, one aspect of subject matter competence, namely a court's jurisdiction in respect of claims involving immovable property outside the province or territory, is sufficiently important and well-established to warrant being addressed specifically in this Part.

Immovable property outside [*enacting province or territory*]

12.2(1) A court lacks subject matter competence in a proceeding that is principally concerned with a question of the title to or the right to possession of immovable property outside [*enacting province or territory*].

(2) For greater certainty, subsection (1) does not deprive a court of subject matter competence in a proceeding that concerns trespass to, or any other tort affecting, immovable property situated outside [*enacting province or territory*] and that is not principally concerned with a question of the title to or the right to possession of that property.

(3) Notwithstanding subsection (1), a court has subject matter competence in a proceeding relating to immovable property situated outside [*enacting province or territory*] if the proceeding concerns a contractual or equitable obligation that can be effectively enforced without the assistance of a court in the state where the property is situated.

Commentary to section 12.2

12.2.1 A line of common law authority flowing from the House of Lords' decision in *British South Africa Co. v. Companhia de Mocambique* (1893) provides that a Canadian court has no jurisdiction to determine title to or the right to possession of immovable property situated outside the forum. While open to debate, this is generally considered to be a rule relating to the court's subject matter competence rather than its territorial competence. Section 12.2 is, with one exception, intended to codify the common law rule. The general rule, which acts as a limitation on a court's subject matter competence, is set out in section 12.2(1). The jurisprudence indicates that the rule is subject to an exception, often cited to *Penn v. Lord Baltimore* (Chancery, 1750), and this exception is preserved in

section 12.2(3). As illustrated by *Hesperides Hotels Ltd. v. Muftizade* (House of Lords, 1979), the rule has been applied not only to questions of title to or the right to possession of foreign immovable property but also to questions of trespass to, or any other tort affecting, such property. However, in England this extension of the rule has been reversed by statute: see *Civil Jurisdiction and Judgments Act 1982* (U.K.), c. 27, s. 30. Section 12.2(2) is drafted to similarly give the statutory rule a narrower scope than the common law rule.

12.2.2 Quebec law treats this issue as one going to territorial competence and not subject matter jurisdiction. Specifically, any dispute relating to property rights can be brought in Quebec only if the property is in the province (article 3152 CCQ). Where the claim relates to tort or contract, the location of the immovable abroad is not relevant to the exercise of territorial competence which is governed by rules relating to those claims. There are also specific rules of territorial competence for matters of succession (article 3153 CCQ) and matrimonial regimes (article 3154 CCQ) that may impact property rights relating to foreign immoveables.

Conflicts or inconsistences with other Acts

12.3 If there is a conflict or inconsistency between this Part and another Act of [*enacting province or territory*] or of Canada, that other Act prevails if it expressly:

(a) confers subject matter jurisdiction or subject matter competence on a court; or

(b) denies subject matter jurisdiction or subject matter competence to a court.

Commentary to section 12.3

12.3.1 Section 12.3 is intended to operate in a manner similar to section 12 but specifically with reference to section 12.2. It is possible that certain statutes, such as those relating to family law, might extend a court's subject matter competence so as to allow a court to address title to, or the right to possession of, foreign immovable property. If so, the effect of those statutes would be preserved by the priority provided in section 12.3.

12.3.2 The French version refers only to "compétence matérielle" since it covers the two expressions (subject-matter jurisdiction and subject-matter competence) necessary in the English version.

PART 3

TRANSFER OF A PROCEEDING

[Note: For "[superior court]" throughout this Part, each enacting province or territory will substitute the name of its court of unlimited trial jurisdiction]

General provisions applicable to transfers

13(1) The [superior court], in accordance with this Part, may:

(a) transfer a proceeding to a court outside [*enacting province or territory*];or

(b) accept a transfer of a proceeding from a court outside [*enacting province or territory*].

(2) A power given under this part to the [superior court] to transfer a proceedingto a court outside [*enacting province or territory*] includes the power to transfer part of the proceeding to that court.

(3) A power given under this Part to the [superior court] to accept a proceeding from a court outside [*enacting province or territory*] includes the power to accept part of the proceeding from that court.

(4) If anything relating to a transfer of a proceeding is or ought to be done in the [superior court] or in another court of [*enacting province or territory*] on appeal from the [superior court], the transfer is governed by the provisions of this Part.

(5) If anything relating to a transfer of a proceeding is or ought to be done in a court outside [*enacting province or territory*], the [superior court], despite any differences between this Part and the rules applicable in the court outside [*enacting province or territory*], may transfer or accept a transfer of the proceeding if the [superior court] considers that the differences do not:

(a) impair the effectiveness of the transfer; or

(b) inhibit the fair and proper conduct of the proceeding.

Commentary to section 13

13.1 Part 3 sets up a mechanism through which the superior court of general jurisdiction in the enacting province or territory can - acting in cooperation with a court of another province, territory or state - move a proceeding out of a court that is not an appropriate forum into a court that is a more appropriate forum. In the absence of a transfer provision, if a court thinks the proceeding would be more appropriately heard in a different court, its only option is to decline jurisdiction and force the plaintiff to recommence the proceeding in the other court if the plaintiff wishes and is able to do so. The transfer mechanism will accomplish the same purpose more directly, by preserving whatever has already been done in the old forum and simply continuing the proceeding in the new forum. It is therefore designed to avoid waste, duplication, and delay.

13.2 The present Act, like the *Uniform Transfer of Litigation Act* (UTLA) promulgated by the Uniformity Commissioners in the United States, allows for transfers not only to and from courts within Canada but also to and from courts in foreign nations. Differing views can be held as to whether this is appropriate. Two principal arguments can be made against it. First, Canadian courts should not, it can be argued, be given the power to relegate litigants to foreign legal systems that might be very different from our own, where the standards of justice might not be comparable, and which could not be openly evaluated by a Canadian court without the risk of embarrassment to Canada. Secondly, it can be argued that cooperation between a Canadian court and a foreign court should not be possible in the absence of authorization, in a treaty, by the two nations involved.

The primary response that can be made to the first argument is that the transfer mechanism cannot force a litigant into a foreign legal system. There is no practical

difference between a plaintiff being "forced" into a foreign court by means of a stay of Canadian proceedings, as the current law allows, and being "forced" there by a transfer. Arguments about the suitability of the foreign court, and the likelihood of justice being done there, can arise under a stay of proceedings just as they could under the transfer mechanism. And, of course, plaintiffs can never be "forced" to pursue the proceeding in another court if they do not wish to do so. In a small minority of cases it may be, not the plaintiff, but the defendant (or a third party) who is "forced" into a foreign court by a transfer (for example, at the behest of a co-defendant). Even in those cases there is no practical difference, in terms of the effect on the defendant's rights, between being transferred into the foreign court and being sued there in the first place.

As for the second argument, the main response that can be made is that the proposed transfer mechanism does not by-pass the proper route of a treaty any more than do the uniform statutes on the reciprocal enforcement of judgments and of maintenance orders. These result in the enforcement of foreign court orders in Canada, and vice-versa, through the combined operation of foreign and Canadian court systems, each operating by authority of the legislature in its jurisdiction.

It can also be argued, in support of the present scope of this Act, that a transfer mechanism will be much more valuable if it allows a Canadian court to request transfers to, and accept transfers from, courts in the United States and elsewhere. In each case the Canadian court will have a completely free discretion to decide whether the ends of justice would be served by requesting the outbound transfer or accepting the inbound transfer. Hence this Act is not restricted to transfers within Canada.

13.3 Section 13 provides the framework for all the other provisions of Part 3. Whether the transfer is from the domestic court to the extraprovincial court (section 13(1)(a)) or from an extraprovincial court to the domestic court (section 13(1)(b)), the Act only purports to regulate those aspects of the transfer that relate to the domestic court (or a court on appeal from the domestic court, referred to in section 13(4)). The provisions of Part 3 are drafted so that they do not purport to lay down any rules for the courts of the other jurisdiction that is involved in the transfer. It may be that the other jurisdiction's rules for accepting or initiating transfers differ from those in the present Act. In that event, section 13(5) provides that the domestic court can transfer (i.e. initiate the transfer) to, or accept a transfer from, the other jurisdiction if the differences do not impair the effectiveness of the transfer or the fairness of the proceeding.

Grounds for an order transferring a proceeding

14(1) The [superior court] by order may request a court outside [*enacting province or territory*] to accept a transfer of a proceeding in which the [superior court] has both territorial and subject matter competence if the [superior court] is satisfied that:

(a) the receiving court has subject matter competence in the proceeding; and

(b) under section 11, the [superior court] should decline to exercise its territorial competence in the proceeding in favour of the receiving court.

(2) The [superior court] by order may request a court outside [*enacting province or*

territory] to accept a transfer of a proceeding, in which the [superior court] lacks territorial or subject matter competence if the [superior court] is satisfied that the receiving court has both territorial and subject matter competence in the proceeding.

(3) In deciding whether a court outside [*enacting province or territory*] has territorial or subject matter competence in a proceeding, the [superior court] must apply the laws of the state in which the court outside [*enacting province or territory*] is established.

Commentary to section 14.

14.1 A key feature of the transfer provisions, which is taken from UTLA, is a transfer may be made so long as either the transferring or the receiving court has territorial competence over the proceeding. The receiving court must always have subject matter competence; in other words, it cannot, by virtue of a transfer, acquire jurisdiction to hear a type of case that it usually has no jurisdiction to entertain. But it can, by virtue of a transfer, hear a case over which it would not otherwise have territorial competence, so long as the court that initiated the transfer did have territorial competence. It should be noted in this connection that all that Part 3 does is to make a transfer to the receiving court possible. It does not guarantee that the receiving court's eventual judgment will be recognized in the transferring court - or anywhere else - as binding on a party who refuses to take part in the continued proceeding in the receiving court. As a practical matter, a transferring court would be most unlikely to grant the application for a transfer in the first place, if it appeared that the outcome might be a judgment that was unenforceable against a party opposing the transfer.

14.2 Section 14(1) deals with an outbound transfer where the domestic court has territorial as well as subject matter competence. The receiving court need only have subject matter competence, and be a forum in favour of which the domestic court should decline its territorial competence under section 11.

14.3 Section 11 includes two grounds for declining to exercise territorial competence. One is that another court is a clearly more appropriate forum under section 11(2), and the other is that another court has been designated in a forum selection agreement as the exclusive forum for such a proceeding. In the latter case the court must decline to exercise territorial competence unless strong cause is shown not to enforce the forum selection agreement (section 11(3)). If the domestic court is satisfied that it should decline to exercise its territorial competence on either ground, section 14(1)(b) is met.

14.4 Section 14(2) authorizes an outbound transfer where the domestic court lacks territorial or subject matter competence, but the receiving court is possessed of both.

14.5 In relation to section 14(2), it may seem curious that a court that lacks competence to hear the case can nevertheless "bind" the parties by requesting a transfer. In reality, however, the transferring court's request does not "bind" anyone. It only sets in motion a process whereby the receiving court can agree to take the proceeding. It is the receiving court's acceptance of the transfer that "binds" the parties - which, since it has full competence (under its own rules - section 14(3)), is no more than that court could have done if the proceeding had originally started there.

Provisions relating to the transfer order

15. (1) In an order requesting a court outside [*enacting province or territory*] to accept a transfer of a proceeding, the [superior court] must state the reasons for the request.

(2) The order may

(a) be made on application of a party to the proceeding,

(b) impose conditions precedent to the transfer,

(c) contain terms concerning the further conduct of the proceeding, and

(d) provide for the return of the proceeding to the [superior court] on the occurrence of specified events.

(3) On its own motion, or if asked by the receiving court, the [superior court], on or after making an order requesting a court outside [*enacting province or territory*] to accept a transfer of a proceeding, may

(a) send to the receiving court relevant portions of the record to aid that court in deciding whether to accept the transfer or to supplement material previously sent by the [superior court] to the receiving court in support of the order, or

(b) by order, rescind or modify one or more terms of the order requesting acceptance of the transfer.

Commentary to section 15.

15.1 Section 15 deals with the order of the superior court of the enacting jurisdiction, requesting another court to accept a transfer. Rules of court will provide the procedure for a party to apply for a transfer, as referred to by section 15(2)(a). The rules of court will also deal with matters such as notice to the other parties and the opportunity to be heard.

15.2 The superior court is free to attach whatever conditions it thinks fit to the request for a transfer. These may be conditions precedent to the transfer's taking place (section 15(2)(b)) or terms as to the further conduct of the proceeding (section 15(2)(c)). The superior court may also stipulate that the proceeding is to return to it on the occurrence of certain events (section 15(2)(d)). The receiving court is free to accept or refuse the transfer on those conditions. Section 15(3) contemplates that the receiving court may ask the superior court if it will modify a term of the transfer as requested, and gives the superior court the power to do so.

[Superior court's] discretion to accept or refuse a transfer

16. (1) After the filing of a request made by a court outside [*enacting province or territory*] to transfer to the [superior court] a proceeding brought against a person in the transferring court, the [superior court] by order may:

(a) accept the transfer, subject to subsection (4), if both of the following requirements are fulfilled:

(i) either the [superior court] or the transferring court has territorial competence in the proceeding;

(ii) the [superior court] has subject matter competence in the proceeding, or

(b) refuse to accept the transfer for any reason that the [superior court] considers just, regardless of the fulfillment of the requirements of clause (a).

(2) The [superior court] must give reasons for an order under subsection (1)(b) refusing to accept the transfer of a proceeding.

(3) Any party to the proceeding brought in the transferring court may apply to the [superior court] for an order accepting or refusing the transfer to the [superior court] of the proceeding.

(4) The [superior court] may not make an order accepting the transfer of a proceeding if a condition precedent to the transfer imposed by the transferring court has not been fulfilled.

Commentary to section 16.

16.1 Section 16 provides for the superior court's response to a request to accept a transfer from another court. It may accept the inbound transfer, provided that it is satisfied that the requirements of territorial and subject matter competence are satisfied. Those requirements, contained in section 16(1)(a), parallel those in section 15 dealing with the superior court's requesting an outbound transfer. Either the transferring court or the (receiving) superior court must have territorial competence, and the superior court must have subject matter competence.

16.2 The superior court is completely free to refuse the transfer even if the requirements of territorial and subject matter competence are met (section 16(1)(b)), but must give reasons for doing so (section 16(2)).

16.3 Rules of court will supplement the provision in section 16(3) under which a party may apply to the superior court to have it accept or refuse a transfer.

16.4 If a condition precedent to the transfer, as set by the transferring court, is not fulfilled the superior court may not accept the transfer (section 16(4)). It would need to ask the transferring court to modify or remove the condition precedent, as contemplated (for outbound transfers) in section 15(3)(b).

Effect of transfers to or from [superior court]

17. A transfer of a proceeding to or from the [superior court] takes effect for all purposes of the law of [*enacting province or territory*] when an order made by the receiving court accepting the transfer is filed in the transferring court.

Commentary to section 17.

17.1 The time when a transfer - whether inbound or outbound - takes effect is critical to the operation of sections 18 to 23.

Transfers to courts outside [*enacting province or territory*]

18. (1) On a transfer of a proceeding from the [superior court] taking effect:

(a) the [superior court] must send relevant portions of the record, if not sent previously, to the receiving court, and

(b) subject to section 17 (2) and (3), the proceeding continues in the receiving court.

(2) After the transfer of a proceeding from the [superior court] takes effect, the [superior court] may make an order with respect to a procedure that was pending in the proceeding at the time of the transfer only if

(a) it is unreasonable or impracticable for a party to apply to the receiving court for the order, and

(b) the order is necessary for the fair and proper conduct of the proceeding in the receiving court.

(3) After the transfer of a proceeding from the [superior court] takes effect, the [superior court] may discharge or amend an order made in the proceeding before the transfer took effect only if the receiving court lacks territorial competence to discharge or amend the order.

Commentary to section 18.

See the commentary to section 19.

Transfers to [superior court]

19. (1) On a transfer of a proceeding to the [superior court] taking effect, the proceeding continues in the [superior court].

(2) A procedure completed in a proceeding in the transferring court before transfer of the proceeding to the [superior court] has the same effect in the [superior court] as in the transferring court, unless the [superior court] otherwise orders.

(3) If a procedure is pending in a proceeding at the time of the transfer of the proceeding to the [superior court] takes effect, the procedure must be completed in the [superior court] in accordance with the rules of the transferring court, measuring applicable time limits as

if the procedure had been initiated 10 days after the transfer took effect, unless the [superior court] otherwise orders.

(4) After the transfer of a proceeding to the [superior court] takes effect, the [superior court] may discharge or amend an order made in the proceeding by the transferring court.

(5) An order of the transferring court that is in force at the time the transfer of a proceeding to the [superior court] takes effect remains in force after the transfer until discharged or amended by

(a) the transferring court, if the [superior court] lacks territorial competence to discharge or amend the order, or

(b) the [superior court], in any other case.

Commentary to section 19.

19.1 An instantaneous transfer, in all respects, of a legal proceeding from one court to another would be ideal but obviously cannot be fully realized in practice. Sections 18 and 19 deal with the procedures that are completed before the transfer, procedures that are pending at the time of transfer, and orders that have been made before the transfer takes effect.

19.2 Section 18(1)(b) and section 19(1) define the effect of a transfer for, respectively, outbound and inbound transfers: the proceeding continues in the receiving court.

19.3 A procedure that is completed before the transfer takes effect is simply given the same effect in the receiving court as it had in the transferring court, subject to the receiving court's right to change that effect (section 19(2)). (There is no need for an equivalent for outbound transfers.)

19.4 If a procedure is pending at the time a transfer takes effect, the transferring court retains power to make an order in respect of that procedure only in the limited circumstances defined in section 18(2) (for outbound transfers). The general rule is that the procedure must be completed in the receiving court. Section 19(3) provides (for inbound transfers) that it must be completed according to the rules of the transferring court and that relevant time limits run from 10 days after the transfer takes effect unless the court orders otherwise.

19.5 An order made before the transfer takes effect continues in effect until the receiving court discharges or amends it (sections 19(4) and (5) for inbound transfers). The transferring court has no power to discharge or amend such an order unless the receiving court lacks the territorial competence to do so (section 18(3), for outbound transfers, and section 19(5)(a) for inbound transfers). The latter situation might arise, for example, with respect to injunctions relating to things to be done or not done in the territory of the transferring court.

Return of a proceeding after transfer

20. (1) After the transfer of a proceeding to the [superior court] takes effect, the [superior court] must order the return of the proceeding to the court from which the proceeding was received if

(a) the terms of the transfer provide for the return,

(b) both the [superior court] and the court from which the proceeding was received lack territorial competence in the proceeding, or

(c) the [superior court] lacks subject matter competence in the proceeding.

(2) If a court to which the [superior court] has transferred a proceeding orders that the proceeding be returned to the [superior court] in any of the circumstances referred to in subsection (1) (a), (b) or (c), or in similar circumstances, the [superior court] must accept the return.

(3) When a return order is filed in the [superior court], the returned proceeding continues in the [superior court].

Commentary to section 20.

20.1 A return of a transfer may be necessary for two reasons. The terms of the original order requesting the transfer may require the return if certain events occur (section 20(1)(a), dealing with the return of inbound transfers; (compare section 15(2)(c), giving power to impose such terms in outbound transfers). Or it may appear, after the receiving court has accepted the transfer, that the transfer was in fact unauthorized because a requirement of territorial or subject matter competence was not satisfied (sections 20(1)(b) and (c), dealing with the return of inbound transfers).

20.2 A return may not be refused by the court to which the proceeding is returned (section 20(2), dealing with the return of outbound transfers), because the receiving court cannot retain the proceeding and the only place the proceeding can therefore be located is the transferring court. If that court lacks territorial or subject matter competence over the proceeding, the return of the proceeding may be simply for the purposes of dismissal.

Appeals

21. (1) After the transfer of a proceeding to the [superior court] takes effect, an order of the transferring court, except the order requesting the transfer, may be appealed in [*enacting province or territory*] with leave of the court of appeal of the receiving court as if the order had been made by the [superior court].

(2) A decision of a court outside [*enacting province or territory*] to accept the transfer of a proceeding from the [superior court] may not be appealed in [*enacting province or territory*].

(3) If, at the time that the transfer of a proceeding from the [superior court] takes effect, an appeal is pending in [*enacting province or territory*] from an order of the [superior court], the court in which the appeal is pending may conclude the appeal only if

(a) it is unreasonable or impracticable for the appeal to be recommenced in the state of the receiving court, and

(b) a resolution of the appeal is necessary for the fair and proper conduct of the continued proceeding in the receiving court.

Commentary to section 21.

21.1 Some provinces and territories do not require leave to appeal in respect of interlocutory orders. For those jurisdictions, the section introduces a leave requirement in a small defined class of cases, namely interlocutory orders granted before the transfer order takes effect. Such orders can be appealed in the receiving court only if leave of the Court of Appeal of the receiving court is obtained. An interlocutory order granted by the receiving court, after the transfer order, may be appealed in the normal manner appropriate to the appeal of interlocutory orders in that jurisdiction.

21.2 Section 21, like sections 18 and 19, deals with a practical difficulty when a transfer takes effect. In principle, consistently with the policy of a complete continuance of the proceeding in the receiving court, appeals from any order made in the proceeding must be taken there (section 21(1), dealing with inbound transfers). The order requesting the transfer, however, can be appealed only in the transferring court, not the receiving court (the exception in section 21(1)). Likewise, the order accepting the transfer can be appealed only in the receiving court, not the transferring court (section 21(2), dealing with outbound transfers).

21.3 Pending appeals raise the same kind of difficulty as the pending procedures dealt with by sections 18(2) and 19(3). The solution adopted in section 21(3) (dealing with outbound transfers) is the same as that adopted in those sections for pending procedures, namely, that the appeal court in the transferring jurisdiction should be able to complete an appeal if, and only if, that is a practical necessity.

Departure from a term of transfer

22. After the transfer of a proceeding to the [superior court] takes effect, the [superior court] may depart from terms specified by the transferring court in the transfer order, if it is just and reasonable to do so.

Commentary to section 22.

22.1 Once a transfer has taken effect, it is appropriate to give the receiving court a discretion to depart from terms specified in the transfer order by the transferring court. Circumstances may arise that the transferring court had not anticipated, or the terms in its transfer order may turn out to be impractical, or the parties may agree on the alteration of a term of the transfer.

Limitations and time periods

23. (1) In a proceeding transferred to the [superior court] from a court outside [*enacting province or territory*], and despite any enactment imposing a limitation period, the [superior court] must not hold a claim barred because of a limitation period if

(a) the claim would not be barred under the limitation rule that would be applied by the transferring court, and

(b) at the time the transfer took effect, the transferring court had both territorial and subject matter competence in the proceeding.

(2) After a transfer of a proceeding to the [superior court] takes effect, the [superior court] must treat a procedure commenced on a certain date in a proceeding in the transferring court as if the procedure had been commenced in the [superior court] on the same date.

Commentary to section 23.

23.1 Section 23(1), dealing with inbound transfers, ensures that a limitation defence that would have been unavailable in the transferring court cannot be invoked in the receiving court after the transfer takes effect. The rule is limited to cases where the transferring court could itself have heard the case; in other words, where it had both territorial and subject matter competence.

23.2 Section 23(2), also dealing with inbound transfers, is needed so that the sequence of dates on which procedures were commenced in the transferring court is preserved intact after the transfer takes effect. If, however, a procedure is pending at the time of transfer, the special rule of section 19(3) applies to determine the time when the procedure must be completed.