**REVIEW ARTICLE**

**STATUTORY JURISDICTION: AN ANALYSIS OF THE COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT**

**GENEVIÈVE SAUMIER**

The rules governing international jurisdiction in Canada have undergone significant changes over the past twenty years. The Supreme Court of Canada signalled a fundamental shift in the early 1990s with its landmark decisions in *Morguard Investments v De Savoye* and *Hunt v T&N plc*, followed one year later with a complete reform of private international law in the Civil Code of Quebec. That same year, the Uniform Law Conference of Canada (ULCC) put forward a model Act offering a statutory regime for court jurisdiction. It took more than ten years, however, for this model Act to make its formal entrance onto the Canadian legal landscape. As of 2013, the model has been adopted by five legislatures in Canada but is in force in only three jurisdictions. The timing for the publication of Black, Pitel and Sobkin's new book on the Court Jurisdiction and Proceedings Transfer Act (CJPTA) is therefore propitious: it provides a timely and useful guide for those provinces where the new statutory regime already applies as well as a meaningful tool for the remaining jurisdictions that are, or may be, considering following suit.

It will be apparent from the previous paragraph that the law governing the jurisdiction of courts in cross-border cases is not uniform across Canada. Indeed, legislative competence over all aspects of private international law remains with the provinces and there is thus no federal power to enact a national regime. The Supreme Court's jurisprudence has confirmed that general constitutional limitations on provincial legislative and adjudicative power apply to judicial jurisdiction but has also reiterated that uniformity is not required. Diversity is indeed the norm as there are currently at least three models of jurisdictional regimes across the country: a comprehensive codification in the Civil Code of Quebec; a limited-scope statutory

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* Faculty of Law, McGill University.
* *Morguard Investments v De Savoye* [1990] 3 SCR 1077; *Hunt v T&N plc* [1993] 4 SCR 289.
* As discussed in Chapter 3 of the book at p 31, Saskatchewan was the first province to bring the CJPTA into force in Canada on 1 March 2004.
* At pp 30–31.
* *Club Resorts v Van Breda* [2012] SCC 17, affirming [2010] ONCA 84 (both available online free of charge at www.canlii.org.)
regime in three provinces; and a case-based common law system in the remaining jurisdictions. The book under review deals primarily with the common law jurisdictions in Canada, though references to Quebec’s regime are provided in some instances. From the book’s title, it will be obvious that the authors have focused their attention on the statutory regime now in place in three provinces. Still, given that this new regime has replaced the previous common law regime that remains in place in a majority of provinces, the work cannot but deal with that model, which it does from both a theoretical and a critical perspective.

The book is divided into ten chapters. The first three introduce and trace the legislative history of the statutory regime and its implementation in those jurisdictions that have adopted it and declared it in force. The subsequent six chapters provide an in-depth examination of every section of the statute, including, where available, judicial interpretations and applications of various sections. A final chapter considers the impact of the statutory regime in those provinces that retain the traditional common law model. The book also includes four appendices reproducing the model Act and the statute as enacted in the three provinces where it is in force. The volume also includes a table of cases as well as an index.

Unlike in the European Union where the adoption of the Brussels regime and its recent amendments were the subject of significant public and academic debate, the legislative history of the CJPTA in Canada reflects the limited attention that it received outside of the rather small community of interested parties in academia and government. In a thorough and enlightening examination of the various steps that led to the elaboration of the model act by the ULCC, the authors consider in detail a report commissioned by the British Columbia government in 1989. The report by John Horn formed the basis for the ULCC’s own early work on the CJPTA and it is revealing that he looked at the then Brussels Convention in formulating his own views on various jurisdictional bases. This chapter is also useful for identifying changes in the various versions of the ULCC’s draft. For example, in an earlier version, the ULCC had included the “place of contracting” as a presumptive jurisdictional ground but subsequently removed it in its final version.

Discussion of the ULCC model is also useful on topics that remain challenging in terms of international jurisdiction. For example, the Horn report recommended a rule for torts that provided alternative fora in either the place of the wrongful act or of the injury but specified that the latter was limited to the injury “first inflicted” in order to increase predictability. The ULCC preferred to maintain the less precise “tort committed in the province” in the model law although it did not include the potentially more objectionable “damages sustained in the province from a

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6 See eg the discussion at p 21.
7 P 23.
tort committed elsewhere\textsuperscript{8} that continues to give rise to uncertainty in those provinces that retain that basis for service \textit{ex juris}.\textsuperscript{9}

Chapter 3, dealing with provincial implementation, provides insight into the manner in which model laws are eventually transposed into legislation. Three points of interest emerge from the text. First is the fact that legislators seem unable to resist the urge to make some changes to the proposed model law. While this might respond to peculiar local exigencies, it has the inevitable result of reducing any overall harmonising effect across the provinces. One technical effect of this diversity is the absence of consistence in the numbering of sections; this has the unfortunate effect of making comparisons across provinces dependent on references to several section numbers. One substantive effect flows from divergent decisions regarding the inclusion of certain jurisdictional grounds: for example, Saskatchewan did not enact the provision creating a forum of necessity while British Columbia and Nova Scotia did.\textsuperscript{10} A second point of interest is the fact that in some provinces the model Act has been adopted but has yet to be put into force,\textsuperscript{11} while in others its adoption has been recommended by provincial law reform bodies but no legislative action has resulted.\textsuperscript{12} In both cases, it seems obvious that the availability of a model law may well provide the necessary first impetus to facilitate reform of jurisdictional law. The failure of legislators to take the next steps may rest less on the substantive issues than on the low priority accorded to private international law, particularly in periods where economic issues dominate the political and legislative agenda.

The remainder of the text considers the statute in detail, examining its provisions individually as well as their interpretation by courts and commentators. In the opening chapter on “Definitions and Scope”, two issues are worthy of note. The first is probably the most significant as regards the change effected by the adoption of the statutory model for jurisdiction. As the authors note, prior to the enactment of the CJPTA, all of the Canadian common law provinces followed the classic English law model for international jurisdiction, ie a combination of common law rules and service rules. While most provinces had departed from the traditional model by foregoing the requirement for leave to serve \textit{ex juris}, the general bases for jurisdiction, including presence, consent and submission, remained largely analogous to their English counterparts. With the CJPTA, a “momentous” change, to quote the authors,

\textsuperscript{8} P 107. See also the Commentary to the ULCC’s CJPTA under s 10.

\textsuperscript{9} An attempt at resolving that uncertainty was most recently provided by the Supreme Court of Canada in \textit{Club Resorts v Van Breda}, supra n 5.

\textsuperscript{10} One extraordinary insight raised in the text is that Saskatchewan appears to have enacted the Draft model law and not its final version. The authors note eight significant differences between the Saskatchewan statute and the model law, all of these reflecting the earlier version. The authors were unable to identify any reason for this legislative decision which may be attributable to a simple error: p 36.

\textsuperscript{11} Namely in Prince-Edward-Island and in Yukon (see p 37).

\textsuperscript{12} Namely in Alberta and Manitoba (see p 38).
has taken place. Indeed, according to subsection 2(2) of the Act, the statute has become the unique source for “judicial territorial competence”. Although rules of service will continue to apply, they are no longer the basis for jurisdiction, having become merely a procedural precondition to instituting an action before a particular court or tribunal.

A second issue raised by the CJPTA concerns the traditional notion of subject-matter jurisdiction. In the definitional provision, section 1, the CJPTA uses the term “subject-matter competence” defined as “the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence”. It then proceeds to refer to subject-matter competence exclusively in Part 3 of the Act that deals with the innovative transfer mechanism allowing a court to transfer proceedings to another court outside the province (further discussed below). The authors note that the drafters chose the term “competence” instead of “jurisdiction” as a qualifier for both subject-matter and territorial dimensions of a court’s jurisdiction. Whether the change of terminology is merely a matter of aesthetics or carries with it a more significant change is discussed by the authors in a manner that reveals both the existing ambiguities in the law as well as the CJPTA’s failure to resolve these adequately.

What is clear, however, is that courts in provinces that have enacted the CJPTA should speak of “territorial competence” rather than jurisdiction when applying the rules in Part 2, and this despite the fact that the statute title contains the word “jurisdiction” rather than “competence”!

Chapter 5 of the book discusses the CJPTA’s main provision on territorial competence. According to section 3 of the Act, such competence is established according to three broad categories: (i) submission of the defendant, whether explicit or implied; (ii) ordinary residence of the defendant in the jurisdiction; or (iii) a real and substantial connection between the forum and the “facts on which the proceeding” is based. This provision does not modify the pre-existing law in any significant manner although a few points are worth drawing out. First, in terms of submission, the CJPTA merely reiterates the common view that a defendant may agree to be sued before a court that would not otherwise have jurisdiction to hear the dispute. This may occur in advance by way of a forum selection agreement or at the time of proceedings by way of a counterclaim or any conduct that expresses the defendant’s acceptance such as filing a defence on the merits. The CJPTA does not,

13 P 52.

14 The CJPTA does give priority to more specific rules of jurisdiction contained in other statutes (s 12). The authors note that these will include rules applicable to specific tribunals such as Small Claims Courts where they exist, to the federal Crown Liability and Proceedings Act, RSC 1985, c S-18, the federal Divorce Act, RSC 1985 c 3 (2nd Supp), etc. See pp 53–57.

15 Ibid. The authors add that the CJPTA is oddly silent about whether a court can hear a dispute where its competence is not established under its own rules.

16 The authors refer, for example, to the rule regarding jurisdiction to hear disputes concerning foreign immovable property and some intellectual property rights: see pp 43–50.
however, provide any details as to what conduct is equivalent to submission and therefore the common law should continue to provide guidance to courts interpreting this provision.\(^\text{17}\)

Section 3 does alter the common law in relation to the link to the defendant sufficient to establish territorial competence. By adopting the criterion of residence, the CJPTA departs from previous law according to which service \textit{in juris}, whether on a resident or transient defendant, was considered sufficient to grant jurisdiction to the court even in the absence of any other connections to the dispute. As stated emphatically by the authors, the CJPTA effectively “abolishes mere presence as a basis of adjudicatory jurisdiction”.\(^\text{18}\) While the statute does not provide a definition of residence for individuals, it does establish four tests for corporations in section 7 though the authors note some potential for confusion in their application.\(^\text{19}\)

In addition to providing for jurisdiction based on consent and on the residence of the defendant, section 3 of the CJPTA also includes a general jurisdictional basis where there is “a real and substantial connection between the [forum] and the facts on which the proceeding against [the defendant] is based”. The text devotes an entire chapter to this jurisdictional basis and at 63 pages it constitutes by far the most detailed chapter in the book. Chapter 6 reviews the list of presumed real and substantial connections that the CJPTA provides in section 10 in relation to the following types of claims: property, estate administration, instruments concerning property such as wills, proceedings against trustees, contract and tort claims, restitutionary claims, claims concerning a business, injunctions and enforcement of judgments, proceedings to determine personal status or capacity and claims brought by public authorities. Most of the connecting factors provided replicate pre-existing rules governing service \textit{ex juris} thereby maintaining continuity in the law of international jurisdiction over foreign defendants. Nevertheless, as the authors note, the CJPTA has rejected some traditional factors and adopted a few new ones. For example, the place of contracting or the mere presence of property is not presumptive grounds for jurisdiction. On the other hand, a new presumption regarding consumer contract claims is included.\(^\text{20}\) For tort claims, the CJPTA maintains the classical “place of the tort” link, thereby presuming a real and substantial connection whenever one of the constituent elements of a tort is located in the forum. The authors argue persuasively that the Supreme Court of Canada’s recent decision in \textit{Van Breda v Club Resorts} may well provide an opportunity for a defendant to rebut the presumption whenever a “relatively minor element of the tort” can be located.

\(^\text{17}\) For example, a request for a stay under the \textit{forum non conveniens} doctrine will not usually constitute submission either at common law or in some provinces, as provided by rules of court. See pp 64–65.

\(^\text{18}\) At p 69. The authors question the ULCC’s claim that this modification was made to conform to constitutional imperatives (at pp 69–73).

\(^\text{19}\) For example, on the distinction between the registered office and the registration of a place for service, see pp 80–81.

\(^\text{20}\) Pp 104–05 and 110–11.
in the forum.\textsuperscript{21} The authors offer useful critical commentary of many of the presumptions. For example, the vagueness of claims concerning a “business carried on in the forum” creates uncertainty as to its application to the plaintiff’s business and on the necessity of relating the claim to the business activities in question.\textsuperscript{22} Another is the breadth of the presumption relating to injunctions and its failure to specify whether it must be connected to an underlying claim over which the forum otherwise has jurisdiction – this will be relevant for stand-alone \textit{Mareva} injunctions, for example.\textsuperscript{23}

The \textit{CJP}TA's list of presumed connecting factors is not a closed one, a fact that is often glossed over by courts applying the statutory scheme. The authors examine closely the framework for analysis applicable where none of the presumptions apply, concluding that the impact of the \textit{Van Breda} decision remains uncertain but potentially significant. Indeed, although that decision did not involve the \textit{CJP}TA, it nevertheless rejected the approach that had been favoured by several courts in applying the open-ended real and substantial connection option under the \textit{CJP}TA.\textsuperscript{24} The analysis in this part of the book will be of great assistance to courts and counsel grappling with the challenges posed by this section of the statute.

Amongst the most interesting chapters of the book is Chapter 7 that deals with residual discretion and other jurisdictional bases. This chapter deals in depth with the new statutory basis for jurisdiction of necessity included in the \textit{CJP}TA at section 6,\textsuperscript{25} devoting over thirty pages to its origins, purpose, interpretive challenges, case law and constitutional validity. The authors carefully examine the particularities of the drafting of section 6 \textit{CJP}TA in contrast to its equivalent in the Civil Code of Quebec (Article 3136). The authors argue that while the Quebec version includes a specific requirement of a connection to the province, the \textit{CJP}TA's silence on that issue should not necessarily be interpreted to deny such a requirement,\textsuperscript{26} although the constitutionality of section 6 may be founded on alternative grounds not dependent on territorial links.\textsuperscript{27} The detailed discussion also confirms that the primary purpose of the forum of necessity is to allow plaintiffs to overcome “unacceptable barriers to justice”,\textsuperscript{28} whether these relate to political unrest or judicial corruption in the only

\textsuperscript{21} Pp 120–22.
\textsuperscript{22} Pp 122–26.
\textsuperscript{23} Pp 127–31.
\textsuperscript{24} Pp 134–46.
\textsuperscript{25} The chapter also deals with proceedings against no nominate defendant (s 4) and proceedings against a vessel (s 5). These will not be discussed in this review. The chapter also includes a discussion of the availability of a forum of necessity at common law (also discussed at pp 260–61), which is relevant elsewhere in Canada including in provinces that enact the \textit{CJP}TA without including s 6, as was done in Saskatchewan (see pp 174–77).
\textsuperscript{26} See discussion at pp 164–65.
\textsuperscript{27} As argued at pp 177–88, should a forum of necessity conform to the more general principles of “order and fairness”, this may be sufficient to meet the constitutional limitation on provincial powers.
\textsuperscript{28} P 169.
alternative forum or rather to unique circumstances involving substantial juridical
disadvantages equivalent to a denial of justice.29

Having canvassed the various grounds for establishing a court’s jurisdiction, the authors move on to examine how the CJPTA deals with the court’s discretion to exercise that jurisdiction. Indeed, the now well-known forum non conveniens doctrine, prevalent throughout Canada (even in Quebec at Article 3135 Civil Code) is “codified” in the statute at section 11. While the CJPTA uses the traditional reference to “the interests of the parties and the ends of justice” as the basis for the court’s exercise of its jurisdictional discretion, section 11 provides an open-ended list of criteria to be taken into account. As the authors note, this list largely reflects existing law but one cannot avoid noticing that it does not reproduce the commonly found “juridical advantage” criterion.30 Case law is divided on whether the list of criteria sets up a new framework for analysing forum non conveniens; since the list is not closed, there is no exclusion of previously used elements or methods of evaluation. In addition, the CJPTA does not address some relevant questions such as the onus of proof, the effect of attornment and the treatment of exclusive forum selection clauses. Whether or not the latter are to be considered within or without the forum non conveniens framework remains unclear under the CJPTA and recent jurisprudence.31

The statute that is the subject of this book includes a relatively innovative part on the transfer of proceedings, as its title indicates. Chapter 9 covers this aspect of the legislative scheme, noting its breadth (no reciprocity requirement and application internationally as well as nationally) and its link to current trends in inter-jurisdictional co-operation in other matters.32 The authors also refer to similar regimes in the US and in Australia, allowing for interesting comparative commentary.33

The final chapter of the book considers the influence of the CJPTA in those common law provinces that have either not enacted it or not yet declared it into force. A recent series of decisions from the Ontario Court of Appeal and the Supreme Court of Canada in Club Resorts v Van Breda is central to this assessment, demonstrating the attractiveness of an approach based on presumptions rather than ad hoc factual evaluations. Nevertheless, the authors demonstrate that not all courts across the country have moved away from an analysis based on the identification of a “real and substantial connection” in the particular case, thus confirming the remaining diversity in approaches between CJPTA and non-CJPTA provinces. For

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29 See eg the discussion at pp 172–74 of Josephson (Litigation Guardian of) v Balfour Recreation Commission [2010] BCSC 603.
30 See p 196 and further discussion at pp 211–12.
32 Such as service of process, discovery, taking of evidence, etc (at pp 214–15).
33 At pp 218–21.
foreign jurists, therefore, it remains critical to be well aware of the different regimes in place in the Canadian provinces, and not to assume any uniformity in approach or result even across the common law provinces despite judicial or legislative consensus on many fundamental issues of law and policy.

Black, Pitel and Sobkin’s book on the CJPTA is essential reading for all jurists, whether local or foreign, interested in the law of judicial jurisdiction in the Canadian common law provinces. The book provides essential historical and analytical detail not only on the statute itself but also on its links to and influence on the common law rules that remain applicable in several provinces. No other text has examined in such depth the challenging aspects of transborder jurisdictional law in Canada. While the CJPTA remains a relatively young statute, this text will no doubt provide the necessary guidance for practitioners and judges charged with its application but also critical insight for all interested jurists.