4.1 Introduction

Canada is a democratic constitutional monarchy with a sovereign as head of the state and an elected Prime Minister as head of the Government. It has federal system of parliamentary government. The responsibilities and functions of the government are shared between federal, provincial and territorial governments. Being a federal state, Canada has two constitutionally recognized levels of government; the Federal government and the Provincial government. Both the federal and the provincial government are empowered to enact and implement laws independently from each other. The federal government or the national government is responsible for enacting and implementing laws for the whole of the Canada relating to topics explicitly reserved for it by the constitution. Similarly, the provincial governments or the level government are empowered to enact laws relating to their provinces. In Canada there are 10 provincial governments: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Newfoundland and Labrador, Nova Scotia, New Brunswick and Prince Edward Island, all having autonomous status. Except for Quebec province, common law prevails in the rest of the 9 provinces. Quebec province is civil law province. Canada has three territories: the Northwest Territories, the Yukon, and Nunavut. These territories are not constitutionally autonomous like the provinces. The territories are constitutionally subordinate to the federal government, which has the power to create territories, as well as to decide what powers and jurisdictions they will enjoy. The Constitution Act, 1982 sets out the division of powers between the federal and provincial governments. It gives Exclusive jurisdiction to both the provincial and the federal governments. Exclusive jurisdiction means the areas in which only the federal government or the provincial government may pass laws, thereby prohibiting the provinces or the federal government from enacting legislation in areas assigned to each other. The constitution
also grants Joint powers/jurisdictions in the areas in which both the provinces and the federal government may pass laws.¹

The Constitutional authority for judicial system in Canada is divided between federal and the provincial governments. The federal government has the power to create the Supreme Court of Canada, the federal court and the federal court of appeal. The federal government using this constitutional power has created all these three courts in Canada. The Supreme Court of Canada is the final court of appeal in Canada. It hears appeals from decisions of the appeal courts in all the provinces and territories, as well as from the Federal Court of Appeal. Supreme Court judgments are final. The provincial governments by virtue of constitutional authority have the power to establish provincial courts in their respective jurisdiction for the administration of justice in their provinces. There are three types of courts at the provincial levels at the lower level is the provincial court, then Supreme Court of the province / the Court of Queen’s Bench / the Superior Court of justice and the highest court in the province is the Court of Appeal of the provinces.

The Canadian constitution does not explicitly contain any provision that is directed to the issue of conflict of laws. Before the historical case of Morguard, the law relating to conflict of rules, in most of the common law provinces was product of judicial decision. However after the historical case of Morguard and series of other cases following the Morguard case, the whole body of conflict of law rules is subject to constitutional scrutiny whether they are common law or statutory rules.²

4.2. Jurisdictional Schemes of Canada

Personal jurisdiction over the defendant in Canada is of following types :-

1. Personal jurisdiction based on consent of the Defendant.
2. Jurisdiction based on presence or residence.
3. Jurisdiction based on real and substantial connection

¹ Available at: www.mapleleafweb.com (last visited on January 1, 2014).
1. **Personal Jurisdiction based on the Consent of the Defendant**

   Personal jurisdiction based on consent, is the jurisdiction vested into a court, with the consent of the parties, to determine their rights and obligations on a dispute between them. Sometimes the defendant gives consent to the plaintiff that he agrees with him to be tried by court of particular jurisdiction as chosen by the plaintiff. Consent may also be given by the defendant or both the parties to a dispute, by attorning to the court’s jurisdiction or by entering into an agreement nominating a particular court as a forum for deciding the dispute between them. In the case of *In Muscutt v. Courcelles*\(^3\) the court held at para 19 that, “There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extra provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extra-provincial judgments”. So the different means to establish consent-based jurisdiction: are voluntary submission, attornment by appearance and defense or by prior agreement to submit disputes to the jurisdiction of the domestic court. Whether this consent is given expressly, or is demonstrated by the parties’ conduct, it rests on the equitable principle of estoppel. The parties’ consent is considered first in the review of basis of jurisdiction because it can render the other bases irrelevant. However it is well settled law in Canada that parties in Canada cannot confer jurisdiction over a court through an agreement or consent, where none in fact exists\(^4\). A defendant cannot by his submission, vest jurisdiction in a court to a type of action it is not authorized to hear. But, this is reference only to the subject-

\(^3\) (2002), 2002 CanLII 44957 (ON CA).

matter jurisdiction; the same cannot be said for the territorial jurisdiction. A territorial jurisdiction can be consent based.\(^5\) Attornment depends upon the conduct of the defendant, which is a question of fact and does not depend upon the intent of the defendant. A defendant attorns to the jurisdiction of the plaintiff’s court when he takes steps in the litigation, except for objecting to the court’s jurisdiction or its order for service ex-juris, by filing appearance, statement of defense, demanding the discovery and production of documents from the plaintiff, filing the motion and appearing and arguing the motion etc.\(^6\) In the case of *M.J Jones v. Kingsway General Insurance Co.*,\(^7\) the court held that where a foreign defendant engages on the merits of the litigation, in such a case he is seen to have consented or submitted to the jurisdiction of Ontario court. The next question that comes is that whether a court can enforce and recognize a judgment of another court in which the parties have attorned to the jurisdiction of that other court, but in reality that court had no jurisdiction to decide the dispute? The answer has been answered in affirmative. In the case of *Stern et. al. v. Solehdin*,\(^8\) the court has held that what is important in the international cases is the territorial jurisdiction of that other court who has given the said judgment and whose judgment is brought to be enforced and recognized in court of another case. Once that jurisdiction is established, it is inappropriate for domestic courts in which the judgment is to be enforced to dig deeper to determine if the court that pronounced the judgment had jurisdiction vis-à-vis its own laws. Quoting the opinion of the editors of Dicey and Morris on the Conflict of Laws from 11th edition, the court held that a foreign judgment cannot, in general, be impeached on the ground that the court which gave it was not competent to do so according to the law of the foreign country concerned. Majority of cases from the Supreme Court in Canada up held the view that unless there is evidence of fraud,

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\(^7\) 2004 CanLII 6211 (ONCA).

\(^8\) 2010 ONSC 1012 (CanLII).
violation of natural justice or of public policy, the enforcing court is not interested in the substantive or procedural law of the foreign jurisdiction in which the judgment sought to be enforced domestically was rendered. A domestic court should recognize and enforce the judgments of another province or territory if that court had properly exercised jurisdiction in the action, namely that it had a real and substantial connection with either the subject matter of the action or the defendant.\textsuperscript{9} Jurisdiction based on attornment, implied consent and agreement is codified under the Court and Jurisdiction Act (CJPTA) of the provinces of British Columbia, Saskatchewan and Nova Scotia. The said Act provides the territorial competency to the courts of said provinces in cases where.\textsuperscript{10}

1. The defendant is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
2. The defendant during the course of the proceeding submits to the jurisdiction of the court,
3. The defendant enters into an agreement to the effect that the court has jurisdiction in the proceeding between them.

In international commercial contracts the parties to contract often agrees on the clause conferring exclusive jurisdiction or concurrent jurisdiction on a particular court to decide the dispute arising out of the contract. The exclusive jurisdiction agreements will preclude the parties from seeking relief in other court and the non-exclusive jurisdiction agreements will preclude the parties from challenging the jurisdiction of the forum selected, provided the forum selected has the subject matter over the dispute.\textsuperscript{11}

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\textsuperscript{9} Stern et. al. v. Solehdin 2010 ONSC 1012 (CanLII).
\textsuperscript{11} Supra Note 6 at 11.2.
\end{flushleft}
2. **Personal Jurisdiction based on the Presence, residence or domicile of the defendant under the common law, Civil Procedure Rules and the Court Jurisdiction and Proceedings Transfer Act**

The presence of defendant in the territory of the forum is an independently sufficient basis for asserting jurisdiction on him. This is also known as “jurisdiction as of right”.\(^\text{12}\) It is based on the theory of sovereignty. A sovereign has every right on all subjects present within the frontiers of his territory. Jurisdiction is asserted on the defendant, present within the territory of the forum by personally serving the originating process on him. However, the controversy mounts when the defendant induced by fraud or unknowingly enters the territory of the forum of the court and he is served with the originating process. The Canadian court in such cases has set aside the service on the ground of abuse of the process of the court\(^\text{13}\). The courts are entitled under their court rules to assume jurisdiction over an out-of–province defendant where such defendant is a resident of the province by issuing the service process\(^\text{14}\). Newfoundland and Labrador also allow service of originating process outside Canada even in the case where the defendant is domicile in the province also. It has been held in the case of *Club Resorts Ltd. v. Van Breda*\(^\text{15}\) by the Supreme Court of Canada that domicile or residence of the defendant in any province of Canada is a ground justifying the assumption of jurisdiction against such defendant. This ground of jurisdiction even though not mentioned in all the civil procedure rules of the provinces of Canada, but the case of *Club Resort* has laid down precedent for assuming jurisdiction on this very ground. The ground of ordinary residence is also

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\(^{13}\) *Id.* at 11.3.

\(^{14}\) Alberta Rules of Court, AR 124/2010, pt. 11, div. 5, r. 11.25(3)(g); Prince Edward Island Annotated Civil Procedure Rules, r. 17.02(p); Manitoba Court of Queen’s Bench Rules, Man. Reg. 553/88, pt. IV, r. 17.02(m); Newfoundland and Labrador Rules of Supreme Court, 1986, SNL.1986, c.42, Sch. D, r. 6.07 (1) (c); New Brunswick Rules of Court, N.B. Reg. 82-73, r. 19.01(p); Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r.17.02(p).

\(^{15}\) 2012 SCC 17 (CanLII).
codified under the Court Jurisdiction and Proceeding Transfer Act (CJPTA)\textsuperscript{16} enforced in the provinces of British Columbia, Saskatchewan and Nova Scotia which allows the Assumption of jurisdiction over a defendant ex-juris based on his ordinary residence in the province. The act lays down that the court will have territorial competency over a defendant in a proceeding before the court brought against him if the defendant is ordinary resident in the province at the time of the commencement of the proceedings.

3. **Jurisdiction based on the Real and Substantial Connection Test**

This category of jurisdiction allows the provincial courts in Canada to assume jurisdiction over an out-of-province defendant or a foreign defendant in another country where there is real and substantial connection between the parties or the subject matter of the action and the forum. The circumstances justifying the assumption of jurisdiction under this category should be capable of having a substance as opposed to illusory existence. The assertion of jurisdiction on the basis of real and substantial connection does not depend on the consent of the defendant or service within the territory of the court’s jurisdiction.

(a) **Constitution and the Real and Substantial Connection**

Sec 92\textsuperscript{17} of the Constitution Act, 1867 of Canada grants the provinces of Canada their basic legislative authority. As per section 92 (13), the legislature of each province may exclusively make laws in relations to matters concerning the property and Civil Rights in the Province. The Canadian constitution does not explicitly contain any provision which is directed to the issue of conflict of laws. Before the historical case of *Morguard*,\textsuperscript{18} the law relating to conflict of rules, in most of the common law provinces was product of judicial decision. However after the historical case of Morguard and series of other cases following the Morguard case, the whole


\textsuperscript{17} Canadian Constitution Act, 1867, s.92.

\textsuperscript{18} *Morguard Investment Ltd. v. De savoye* [1990] 3 SCR 1077.
body of conflict of law rules is subject to constitutional scrutiny whether they are common law or statutory rules. The main issue in the case of Morguard was the recognition and enforcement of judgments inter-provincially. The respondents were mortgagees of lands in Alberta. The appellant was the mortgagor and then resided in Alberta. He moved to British Columbia and has not resided or carried on business in Alberta since then. The mortgages fell into default and the respondents brought action in Alberta. Service was effected in accordance with the rules for service ex juris of the Alberta Court. The appellant took no steps to appear or to defend the actions. There was no clause in the mortgages by which he agreed to submit to the jurisdiction of the Alberta court and he did not attorn to its jurisdiction. The respondents obtained judgments nisi in the foreclosure actions. At the expiry of the redemption period, they obtained orders for a judicial sale of the mortgaged properties to themselves and judgments were entered against the appellant for the deficiencies between the value of the property and the amount owing on the mortgages. The respondents then each commenced a separate action in the British Columbia Supreme Court to enforce the Alberta judgments for the deficiencies. Judgment was granted to the respondents by the Supreme Court in a decision which was upheld on appeal to the Court of Appeal. The main issue in this case was whether a personal judgment validly given in Alberta against an absent defendant may be enforced in British Columbia where he now resides. It was argued that the common law regarding the recognition and enforcement of foreign judgments in Canada is based on the principle of territoriality according to which every state is a sovereign state and since jurisdictional issue is related to territorial limits of the state sovereignty, the law of the state should not interfere or have binding effect outside the territory of that very particular state. A state has territorial sovereignty to refuse to recognize and enforce judgments given by the courts of another state in their own states. But, the court dissented from this old perception and opined that in modernized world it is not possible for any state to adopt this kind of rigid attitude. Rather the state courts should adopt a more harmonious attitude by

19 Supra note 2.
giving recognition and enforcement to interprovincial judgments. It is possible only if every court of a state pay due respect and apply the cardinal principle of ‘Comity’. According to this principle each state should give respect to the decision given by the courts of another state provided the decision of the another court is given in a legitimate way. The principle is applicable, only if the judgment given by the foreign court is within the limits of jurisdiction of the foreign court. The courts held that the principle of comity should not be only looked upon from the angle of mere courtesy and goodwill, but, from the angle of international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its law. The court recalled the views of 19th century English courts and disproved them by saying that those 19th rules were outdated now and are incapable of being applied in today’s world. Today enormous transactions are takes place with heavy loads of money transactions, confining to the outdated rules would mean botching the legal job of changing of not interpreting the provisions of law according to the changing socio-economic legal environment. The court in the above said held that, the application of the underlying principles of comity and private international law when applied in a federation, will call for a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation. In short the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the constitution. Further the court held, “in any event, the English rules seem to me to fly in the face of the obvious intention of the constitution to create a single country. This pre-supports a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction. A common citizenship ensured the mobility of Canadians across provincial lives, a position reinforced today by section 6 of the Canadian Charter of Rights and freedoms. In particular, significance steps were taken to foster economic integration. One of the central features of the constitutional arrangements incorporated in the constitution Act, 1867, was the creation of common market. Barriers to interprovincial paddle were removed by section 121. Generally trade and commerce
between the provinces was seen to be a matter of concern to the country as a whole. “The peace, order and good governance’ clause gives the federal parliament power to deal with intra-provincial activities and the combined effect of sec 91(2a) and sec 92(10) does the same for interprovincial words and understanding”. As per the court all these provisions of the Constitution speaks only one thing that how important is for the provinces of Canada to respect and enforce the inter-provincial judgments. Such is the system of Canadian Judicial structure that even a slightest slip-up of justice between the provinces cannot crop up. The appointment and payment to all the superior court judges are made by the federal authorities. The Superior court judges have superintending control over other provincial courts and tribunals. But, all are subject to final review by the Supreme Court of Canada, which can determine whether the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments. The question of recognition and enjoinment does not arise where the defendant is within the jurisdiction of the court or where he has submitted to its jurisdiction by an agreement or attornment. But the problem arises where the defendant is outside the jurisdiction of the court and he is served ex juris. The court answered the query by laying down the principle of real and substantial connection. According to this principle the defendant may be sued outside the province of his residence if there is real and substantial connection with the jurisdiction where the case is instituted. The principle also affords some protection to the defendant against being pursued in jurisdictions having little or no connection with the transaction or the parties. The court in Morguard, citing the case of Moran v. Pyle, gave the view that, there are constitutional limits on the Private International Law rule requiring substantial connection with the jurisdiction. The substantial connection between the defendant and the forum province should be of such a kind that gives a reasonable inference of the defendant voluntarily submitting himself to the risk of litigation in the court of province. If there is no reasonable inference on the

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20 Supra note 18.
facts of the case, the court cannot summon the defendant on the ex-juris service rule, on the ground of reasonable and substantial connection with the case. In this case the court held that the Alberta court had jurisdiction, and its judgment should be recognized and be enforceable in British Columbia.

However in *Teja v. Rai*, the court held that the real and substantial connection test as laid down in the Morguard’s case does not over ride the traditional methods of assuming jurisdiction. Rather, the new test includes the traditional factors of assuming jurisdiction.

The case of *Hunt v. T &N Pte* was contested on the constitutional issue. The main issue in this case was whether Quebec law prohibiting the removal of company documents from the province is constitutionally valid. The provisions of the Quebec Business Concern Records Act, a blocking statute, prohibited the removal from province of Quebec, the documents of business concerns in Quebec that are required pursuant to judicial process outside the province of Quebec. The brief facts of the case are that, the appellants suffered from cancer caused due to the inhalation of asbestos fiber to which he was exposed while working as an electrician in British Columbia. The fibers were contained in a product which was manufactured and sold by the respondents, who were Quebec companies involved in the production and distribution of asbestos. The appellant sued the respondents for damages in British Columbia. He requested the production of documents relating to the action. But, the Quebec Business Concern Records Act prohibited the removal from the province of any document relating to business concern in Quebec pursuant to any requirement of judicial authority outside the province. The Quebec provincial court granted an order preventing the respondent companies from sending the document outside the province. The appellants then applied the British Columbia Supreme Court for an order compelling the production of the document. Both the Supreme Court of British Columbia and the Court of Appeal dismissed the appeal on the grounds that the Quebec Act was valid and the British Courts did not have jurisdiction over the

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21 2002 BCCA 16 (CanLII).
22 (1993) 4 SCR 289.
constitutional validity of Quebec Statue. The appellants then appealed to the Supreme Court of Canada to determine whether the statute is ultra-vires the province as being in relation to the matter outside the province, or constitutionally inapplicable to the judicial proceedings in other provinces. The respondents argued that by virtue of section 92 (13), 14 and 16 of the Constitution Act, 1867, the Act falls within the legislative competence of the provinces to enact such laws. The above mentioned Sections of the Constitution empower the provinces of the Canada to legislate laws with respect to enforcement of judicial and other orders emancipating from other provinces. An inference that could be drawn from such power is that, the provinces have legislative jurisdiction to prevent the enforcement in their respective jurisdictions, of any order in relation to the property located in the province, even if that affects the rights outside the province. But, the court held that, such statute does not stand fit in the modern day, as it discourages international commerce, efficient allocation and conduct of litigation. It is against the basic structure of the constitution. There are constitutional limits that apply to every provincial legislature as well as to the courts, which cannot be overridden by anyone. The pith and substance approach should be analyzed carefully in order to determine that the statute does not affect the rights of persons granted by legislature of other provinces. The court opined that the courts in Canada must consider appropriate policy in relation to recognition and enforcement of judgments issued in other provinces. It held that the old common law rules relating to recognition and enforcement of judgments were rooted in an outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness. Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe. Where a corporate citizen of one province engages into inter-province trading and commercial activities, the rules governing recognition and enforcement of judgments should be adapted to the specific nature of the Canadian federation, the blocking statues may prejudice the interest of the plaintiffs, when the defendant avoids the claims of plaintiff by placing the application of blocking statute.
As a result of which plaintiff will be compelled to institute a second suit in the province where the defendant resided which will multiply the financial burden of litigation on the plaintiffs. This would in turn trample the unity and efficiency of the Canadian market place. It is inherent in the structure of Canadian federation that the courts in each province should give “full faith and credit” to the judgments of other provinces. The court concluded that, “the whole purpose of the blocking statute is to impede successful litigation or persecution in other jurisdictions by refusing recognition and compliance with orders issued there. Everybody realizes that the whole purpose of blocking statute is not to keep documents in the province, but rather to prevent compliance, and so the success of litigation outside that province finds objectionable”. No doubt, under the constitution each province is empowered to legislate in respect of matters concerning the recognition and enforcement of foreign judgments emanating from other provinces, but while doing so they should observe the minimum standard of order and fairness as laid down in Morguard case. Hence, the court held Quebec business concerns records Act as constitutionally inapplicable to the present case and also to other provinces. The statute enacted with such an objective is surely against the principle of comity. The court order the respondents to produce for inspection the documents as required by the appellants within 30 days, regardless whether the documents are within or outside the province of Quebec.

*Muscett v. Courcelles,* 24 is the case where the concept of assumed jurisdiction was introduced for the first time. Although the case is related to the law of torts but it is important from the point of view of contract as well, for it deals with the law relating to service ex-juris, which is also applied in case of contracts. In this case the plaintiff claimed damages sustained in Ontario as a result of tort committed elsewhere. The Plaintiff is Ontario resident and the defendant is Out-of-province defendant. The plaintiff relied his claim on rule 17.02(h), of the Civil Procedure

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23 Ibid.
24 (2002), 213 DLR (4th) 577 (Ont.CA).
25 Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, sec. 17.02. It reads thus:- A party to a proceeding may, without a court order, be served outside Ontario with an originating
code of Ontario, claiming damages in respect of damage sustained in Ontario arising from a tort. The defendants appealed to set aside service out of the jurisdiction and to stay the action. They also argued that rule 17.02(h) was ultra-vires the legislative authority of the Province of Ontario since it had extraterritorial effect. The appeal raises the question of assumed jurisdiction, which is initiated in Ontario by service of the court's process out of jurisdiction pursuant to rule 17.02 of the Ontario civil procedure code. After the historical decision in Morguard's case the approach taken
towards the law relating to ex-service Juris has undergone drastic change. It is no longer required for the plaintiff to initiate action in the province in which he has suffered pain as result of the tort committed in that province. Now, a plaintiff who sustains damage in Ontario may sue in Ontario if there is a real and substantial connection with Ontario. In assuming jurisdiction, the first thing the court determines whether the forum can assume jurisdiction given the relationship among the case, the parties, and the forum. In other word, whether the forum should assert jurisdiction at the suit of the particular plaintiff against the particular defendant. But, the court may decline to exercise its jurisdiction on the ground that there is another more appropriate forum to entertain the action. The residual discretion provides a significant control on assumed jurisdiction and a rationale for lowering the threshold for the real and substantial connection test. The court held that Rule 17.02(h) was not ultra-vires the province of Ontario. The Rule is procedural in nature and does not by itself confer jurisdiction. Rule 17.02(h) is part of a procedural scheme that operates within the limits of the real and substantial connection test. The courts have to extensively their minds on the facts of each case incoming to the conclusion that whether a particular case is fit for assuming jurisdiction or not. The court held, “The real and substantial connection test is flexible and supports a broad approach in which the forum need meet only a minimum standard of suitability under which it must be fair for the case to be heard because the forum is a reasonable place for the action to take place. The nature of the defendant's connection with the forum is simply an important factor to be weighed with other factors. No factor was determinative, and all relevant factors should be considered in determining whether a court should assume jurisdiction against an out-of-province defendant on the basis of damage sustained in Ontario as a result of a tort committed elsewhere.”

The case tried to lay down the circumstances which could justify the court in the assuming jurisdiction on real and substantial test connection. These eight factors are:

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26 Supra note 24.
1. **The connection between the forum and the plaintiff's claim**
First, the connection between the forum and the claim of plaintiff should be substantial and convincing. If the connection is weak or tenuous, the courts should refuse to assume jurisdiction. The court has the duty to protect the legal interest of resident litigants by providing them generous access to the courts for redressing their grievances.

2. **The connection between the forum and the defendant**
If the defendant has done such an act, within the jurisdiction of the court, which has direct bearing upon the claim of the plaintiff, the court can assume jurisdiction on real and substantial connection test basis.

3. **Unfairness to the defendant in assuming jurisdiction**
The consideration of the defendant's position should not end with an inquiry as to acts or conduct that would render the defendant subject to the jurisdiction. The principles of order and fairness require further consideration, because acts or conduct that are insufficient to render the defendant subject to the jurisdiction may still have a bearing on the fairness of assumed jurisdiction. Some activities, by their very nature, involve a sufficient risk of harm to extra-provincial parties that any unfairness in assuming jurisdiction is mitigated or eliminated.

4. **Unfairness to the plaintiff in not assuming jurisdiction**
The principles of order and fairness should be considered in relation to the plaintiff as well as the defendant. The plaintiff's interest in access to the courts of his or her home jurisdiction should also be considered. Plaintiffs should not be saddled with the anachronistic "power theory" that focuses exclusively on subjection and territorial sovereignty.

5. **The involvement of other parties to the suit**
Involvement of other parties bears upon the real and substantial connection test. Multiplicity of proceedings and inconsistent result of case is another ground which strengthens the assumption of assumed jurisdiction by a court. Where a case involves
domestic defendants, the case becomes even stronger, for assuming jurisdiction on real and substantial basis. The obvious reason is to bring the whole buck of defendants in one single court, so as to avoid multiplicity of proceedings and inconsistent result which might happen, if each defendant is permitted to litigate at their respective places. But the court should be cautious while assuming jurisdiction on foreign defendants.

6. The court’s willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis

While assuming jurisdiction against an out-of-province defendant, the court should always keep in mind, whether it would allow the recognition and enforcement of extra-provincial judgment rendered on the same jurisdictional grounds by an out-of-province court. If the answer is affirmative, then it should assume jurisdiction against an out-of-province defendant. However, if the answer is negative then the court should refrain from assuming jurisdiction.

7. Whether the case is interprovincial or international in nature

Seventh, the court held that assumed jurisdiction is stronger justified in interprovincial cases, than in international cases as held in Morguard’s case.

8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

Comity aims that while devising the rules of jurisdiction, the courts should consider the international standard of jurisdiction, recognition and enforcement of foreign judgment present in the other countries, particularly when the case is of international character. In interprovincial cases, this consideration is unnecessary, since the same standard applies to assumed jurisdiction, recognition and enforcement within Canada.

In Spar Aerospace Ltd. v. American Mobile Satellite Corp.,27 the court held that, it is not always necessary to prove the real and substantial connection separately, for the purpose of assuming jurisdiction. The principle is said to be implicit in the provisions of any act or the code of any province, dealing with the jurisdictional

aspect, when the provision or the articles of the code uses the words like fault, damage, injurious act, obligations arising from a contract. In such cases real and substantial connection test is not required to prove separately as an additional requirement.

A Uniform Law Conference of Canada (ULCC) was founded in 1918 to harmonize the laws of the provinces and territories of Canada, as well as federal laws where necessary. Its job is to make recommendations and to point out deficiencies or gaps in the existing laws. Keeping this objective in mind, ULCC enacted a model act on Court Jurisdiction and Proceedings Transfer act with four main purposes:-

1. To replace the widely different jurisdictional rules currently used in Canadian courts with a uniform set of standards for determining jurisdiction.
2. To bring Canadian jurisdictional rules in line with the principles laid down by the Supreme Court of Canada in Mudguard Investment Ltd. v. De Savoye and Amchem Products Inc. v. British Columbia.
3. To provide an essential complement to the rule of nation-wide enforceability of judgments in the uniform enforcement of Canadian Judgments Act, by providing uniform jurisdictional standards.
4. To provide for the first time, 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 work.

The assiduous work of ULCC today helped a lot in unifying the law relating to Jurisdiction in Canadian Provinces. The model Act clearly defined the term territorial competence, thereby removing vagueness in the cases, where jurisdiction was merely established by the availability of service of process on the defendant. The model Act clearly laid down that a court have jurisdiction where there is defined connection between the territory or legal system of the enacting jurisdiction and a party to a proceeding or the facts on which the proceedings is based.
Section 10 of the model Act defines the circumstances in which real and substantial connection is presumed to exist, by the court and section 11 deals with the issue of forum non conveniens. Only three provinces of Canadian, namely British Columbia, Nova Scotia and Saskatchewan have enacted the CJPT Act based on the model of uniform law conference of Canada. The CJPT Act of these three provinces clearly mentions that courts in the said province have Territorial competence in a proceeding that is brought against a person only if;\(^{28}\)

1. If a person is a plaintiff in another proceedings in the court to which the proceedings in question is a counter claim.
2. If during the course of the proceeding that person submits to the court’s Jurisdiction.
3. If there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceedings.
4. If that person is ordinarily resident in the above said provisions at the time of the commencement of the proceeding or
5. There is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

So in simple words, the courts of the above mentioned provinces can assert Jurisdictions over the defendant,;

1. If the defendant is a party to another proceeding in the same court as a plaintiff in a counter claim.
2. On the basis of consent of the defendant.
3. The defendant has agreed on the basis of an agreement entered into between him and the plaintiff that the court of the province shall have jurisdiction for solving any dispute between them.
4. On the basis of ordinary residence of the defendant and

5. On the basis of real and substantial connection.

The courts in the provinces face no difficulty in asserting jurisdiction over the defendant if the proceeding is based on any of the first four categories. The fifth category, namely, the category of real and substantial connection has turned the wheels of Canadian Jurisprudence relating to jurisdictional issues up and down. Finally, the term has received wide recognition and has well groomed as a legal rule under the Canada law.

(b) Evolution of more refined test providing more certainty to the real and substantial connection test.

The Muscutt test to assume jurisdiction was held to be a highly discretionary test. It was thought that the test gave wide discretionary powers to the court to assume jurisdiction over a defendant on the basis of real and substantial connection test. It gave no guidance to motion judges on how to weigh the various factors. The discretionary nature of the test led to significant academic criticisms that the Muscutt test was too unpredictable. By this time the Court jurisdiction and Proceedings transfer Act was also adopted in the number of provinces and there were suggestions to implement or adopt the Act in other provinces also. So there was a need to give certainty to the term ‘real and substantial connection’ for the purpose of assuming jurisdiction over a defendant ex-juris as different approaches to the term was started emerging in Canada. The wait was over with the pivot case of Van Breda v. Village Resorts Ltd, which revised the test laid down in Muscutt case and gave a new certainty to the test of ‘real and substantial connection’. The case involved the issue as to when Ontario Courts should assume jurisdiction over an out of province defendants. Through this case Justice Sharpe made several clarifications and modifications to the Muscutt test.


2010 ONCA 84 (CanLII).
1. Firstly, Justice Sharpe, made an important interpretative change in the civil procedure code of Ontario. According to him rule 17.02 of Ontario civil procedure is not a mere guide providing a simple list of factors for the purpose of assuming jurisdiction over an out of province defendant. Rather, the rule is elite in itself, as it provides a list of connecting factors (except for rule 17.02 (h) and (o)), that would allow the courts of Ontario to assume jurisdiction over an out of province defendant, on the basis of real and substantial connection. Now, except for rule 17.02 (h) and (o), if the case of the plaintiff falls within any of the connecting list enumerated in rule 17.02 of the Ontario Civil procedure rules, a real and substantial connection is presumed to exist for the purpose of assuming jurisdiction by the court against an out of province defendant. Like section 10 of the CJPTA, this presumption would not preclude the plaintiff from proving a real and substantial connection in other circumstances and the defendant from demonstrating that, notwithstanding the fact that the case of falls under rule 17.02 of Ontario Civil Procedure, in the particular circumstances of the case, the real and substantial connection does not exist. The intention of the court in the said case was to bring Ontario law in conformity with the provisions of CJPTA, so as to bring certainty and reliability in the matter of jurisdiction in the province.

2. Secondly, the court pointed out that after the decision on Muscutt case, there has been growing tendency of courts to merge considerations pertaining to forum non conveniens into the real and substantial connections. A clear distinction should be drawn between the jurisdiction simpliciter and the discretionary test of forum non conveniens. In reality the factors which are to be taken into account for determining whether the court should assume jurisdiction on the basis of real and substantial connection or should refuse the assumption of jurisdiction on the basis of forum non conveniens, are different from each other. When a case is brought before the court, the court in the very first stage decides the question of jurisdiction simpliciter. Its decision is based on the test of real and substantial connection. Therefore, the considerations that are required for determining the forum non conveniens have no
bearing on real and substantial connection and in particular shall not be confused or mixed with the considerations that are accounted for determining the real and substantial connection to a case.

3. Thirdly, the core of the real and substantial connection test is the connection that the plaintiff claim has to the forum and the connection of the defendant to the forum respectively. The other or the remaining considerations\(^{31}\) in determining the real and substantial connection serve as analytic tools to help the court in assessing the connection between the forum, the claim and the defendant.

4. Fourthly, both order and fairness should be taken together into account as a guide for deciding the question of assumption of jurisdiction. The concept of both real and substantial connection and order and fairness are interrelated and interwoven. Consideration of fairness is not separate inquiry; rather it serves as an analytic tool to assess the relevance, quality and strength of the connection between the forum, the plaintiff’s claim and the defendant. The principles of order and fairness should equally apply to plaintiff as well as defendant.

5. Fifthly, the court’s willingness to recognize and enforce an extra provincial judgment rendered on the same jurisdictional basis should not be treated as a separate factor to be considered and weighed in the balance with the other relevant factors. It is a principle that a court should bear in mind when considering whether to assume jurisdiction against an extra provincial defendant. If an Ontario court would not be prepared to recognize and enforce an extra provincial judgment against an Ontario defendant rendered on the same jurisdictional basis, it should not assume jurisdiction against the extra provincial defendant.

6. Sixthly, the involvement of other parties to the suit is only relevant in cases where that is asserted as a possible connecting factor and in relation to avoiding a multiplicity of proceedings under forum non conveniens.

\(^{31}\) \textit{Supra} note 2 at 239.
7. Seventhly, where the case is of interprovincial character, rules of comity apply with much greater force between the units of federal state, making it easy the assumption of jurisdiction in interprovincial cases than international cases.

8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere, are relevant to the assessment of real and substantial connection. But, Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere, is not in itself an independent factor in assessing significance of connection between forum, claim and defendant.

9. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction.

Although the above case deals with the issue of tortuous liability, but in case of *Sears Canada Inc. v. C & S Interior Designs Ltd.*, the court held that held that para 14, “While the Supreme Court did not expressly extend this reasoning to contractual disputes, there appears to be no reason that they cannot be applied more generally”. The following factors have been held by the Supreme Court of Canada in the case of Van Breda as presumptive connecting factors that, prima facie, entitle a court to assume jurisdiction over a dispute,

I (a) The defendant is domiciled or resident in the province;
(b) The defendant carries on business in the province;
(c) The tort was committed in the province; and
(d) A contract connected with the dispute was made in the province.

In the above case the court established Jurisdiction Simpliciter on the defendant on the basis of his domicile in the province of Alberta and carrying on business in Alberta. The factor “the defendant carries on business in Alberta” is not mentioned in Alberta Court Rules explicitly a ground raising presumption of real and substantial connection against a defendant ex-juris under Rules 11.25, but, nevertheless it has been impliedly held to be a presumptive factor by virtue of the precedent or the law set by the historic judgment of Van Breda.

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32 2012 ABQB 573.
4.3 Assumption of Jurisdiction over different juristic entities in Canada

The next Para shall discuss in detail who the provincial courts in Canada are entitled to assume jurisdiction over different juristic entities like an individual, a corporation or a limited liability partnership firm.

4.3.1 Individuals

If the defendant is physically present in the territory of the court, Jurisdiction can be assumed as of right based on the theory of sovereignty, according to which a sovereign has every right on the subject present within its territory. But, for this, the individual defendant has to be served with the originating process within the territory of the provincial courts. All the Civil Procedure Rules of the provincial courts in Canada lay down that an individual defendant is to be served personally with the originating process by leaving a copy or of the said document with the defendant. In Alberta, the commencement document may also be served on an individual by sending it by recorded mail on the address of the individual. The CJPT Act of the provinces of British Columbia, Nova Scotia and the Saskatchewan lay down that the issue of jurisdiction shall be exclusively determined by reference to the CJPT Act. Under the CJPT Act, the court can assume over the defendant in a proceeding brought before it, if the defendant is ordinary resident at the time of commencement of the proceedings in the province of the court. The Act defines clearly, when a corporation and the partnerships is said to be ordinarily resident in the province, but is silent about individual. The act does not define the term ‘ordinarily resident’ in case of individual defendants. It presents difficulties in the cases where the
commercial contracts are entered into by individual defendants who are neither corporations nor partners of partnership firms. In case of *Blazek v. Blazek*, the court held that term "ordinarily resident" is a place where one, in the settled routine of his life, regularly, normally or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined, after taking all relevant factors into consideration. It is not the length of the visit or stay that determines the question of ordinarily resident. A person may have more than one residence at same time.

Apart from personally serving the originating process on the defendant, a plaintiff may also serve the defendant within the jurisdiction of the court, alternatively, with the permission of the court. The court rules of common law provinces may grant permission to serve the commencement document on:

(a) The solicitor of the defendant, if the solicitor endorses on the document his acceptance of service and the date of his acceptance. In such case he shall be deemed to represent to the court that he has the authority of his client to accept service on his behalf.

(b) On any person who appears to be an adult member of the same household in which the person to be served resides and on the same or the following day mailing another copy of the document to the person at the place of residence and service in this manner is effective on the fifth day of the document is mailed.

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36 2009 BCSC 1693.
37 Alberta Rules of Court, AR 124/2010, pt. 11, div. 1, r. 11.7; Prince Edward Island Annotated Civil Procedure Rules, r. 16.03(2); Manitoba Court of Queen’s Bench Rules, Man. Reg. 553/88, pt. IV, r. 16.03(2); Newfoundland and Labrador Rules of Supreme Court, 1986, SNL1986, c.42, Sch. D, r. 6.03; New Brunswick Rules of Court, N.B. Reg. 82-73, r. 18.03(2); Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r.16.05; Saskatchewan Queen’s Bench Rules 2013, pt. 12, div. 3, r.12-9; Nova Scotia Rules of Civil Procedure 2008, r.31.06; British Columbia Supreme Court Civil Rules, B.C. Reg. 168/2009, pt.4, r.4-2.
38 Alberta Rules of Court, AR 124/2010, pt. 11, div. 1, r. 11.15(1); Prince Edward Island Annotated Civil Procedure Rules, r. 16.03(5); Manitoba Court of Queen’s Bench Rules, Man. Reg. 553/88, pt. IV, r. 16.03(5); Newfoundland and Labrador Rules of Supreme Court, 1986, SNL1986, c.42, Sch. D, r. 6.04; New Brunswick Rules of Court, N.B. Reg. 82-73, r.
By mailing the commencement document to the last known address of the person to be served.  

4.3.2 Corporations and Partnerships

Jurisdiction over the corporation and the partnerships can be assumed in two ways. The first method of assuming jurisdiction over these two juristic entities is through the court rules or the civil procedure code of the respective provinces. The second method is of course through statutory Acts dealing with corporations and partnerships. In the provinces of British Columbia, Saskatchewan and Nova Scotia the territorial jurisdiction over the Corporations and the Partnership firms are exclusively determined by the Court Jurisdiction and Proceedings Transfers Act. Jurisdiction can be assumed both ways by the court. However, the court rules of the provinces clearly provide that a commencement document must be served in the province in accordance with the method of service provided by an enactment or the rules of the court. In case of discrepancies between the rules of the court and the provisions of the enactment, the enactment shall prevail to the extent of the conflict or inconsistencies.

4.3.2.1 Determination of jurisdiction over the Corporations as per the civil procedure rules of common law provinces in Canada

The provincial forum courts of common law provinces in Canada can assume jurisdiction over corporations by serving then document according to the court rules or the civil procedure rules of respective provinces.  


Alberta Rules of Court, AR 124/2010, pt. 11, div. 1, r. 11.15(2); Prince Edward Island Annotated Civil Procedure Rules, r. 16.03(4); Manitoba Court of Queen’s Bench Rules, Man. Reg. 553/88, pt. IV, r. 16.03(4); Newfoundland and Labrador Rules of Supreme Court, 1986, SNL1986, c.42, Sch. D, r. 6.03 & 6.04;New Brunswick Rules of Court, N.B. Reg. 82-73, r. 18.03(3);Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r.16.04;Saskatchewan Queen’s Bench Rules 2013, pt. 12, div. 3, r.12-4; British Columbia Supreme Court Civil Rules, B.C. Reg. 168/2009, pt. 4, r.4-2(7).

Alberta Rules of Court, AR 124/2010, pt. 11, div. 1, r. 11.9(1)(a); Prince Edward Island Annotated Civil Procedure Rules, r. 16.02 (1) (c); Manitoba Court of Queen’s Bench Rules, Man. Reg. 553/88, pt. IV, r.16.02(1)(c); Newfoundland and Labrador Rules of Supreme Court, 1986, SNL1986, c.42, Sch. D, r. 6.02 (1) (b);New Brunswick Rules of Court, N.B.
corporations can be served under the Civil Procedure Rules of provinces. Alberta, Nova Scotia, Saskatchewan and Newfoundland and Labrador provinces Civil Court rules provide that service of document on the corporation can also be made according to the enactment dealing with Corporation. In Alberta section 256 of the Business Corporations Act and section 92 of the Partnerships Act sets out the rules relating to service of originating documents on these two juristic entities. Hence service can be made either ways under the Alberta Rules of Court. Any discrepancy whatsoever regarding service of document will be solved in favour of the enactment, as per the said civil rules of Alberta. Similarly, the Newfoundland and Labrador Rules of Supreme Court provides that service on the corporation may also be made under the Corporations Act of the said province. Alternatively, the service of documents can also be made on the corporation by mailing a copy of the document to the corporation. Manitoba is the only province which provides that where the head office, registered office or principal place of business of a corporation or, in the case of an extra-provincial corporation, the attorney for service in Manitoba, cannot be found at the last address recorded with the director appointed under The Corporations Act, alternative service on the corporation is to be made under section 247 of the Manitoba Corporations Act.

4.3.2.2 Determination of jurisdiction over domestic corporations under the Business Corporation Acts of the provinces

Each province in Canada has enacted Business Corporation Acts. These statutory acts contain provisions as to how corporation. Generally, a notice required to be sent to a
corporation may be sent to the corporation by a prepaid mail at its registered office registered office on the address recorded with the Director or may also be served personally at its registered office. Alternatively, the corporation may also be served personally with the notice or documents at its registered office. Prince Edward Island Companies Act, provides that service of originating process on a company shall be made according to the rules of the court issuing the process. Hence, in the province of Prince Edward Island, service upon companies is made through the civil court rules of the court.

4.3.2.3 Determination of jurisdiction over the partnership and the Limited Liability partnerships under Civil Procedure Rules of the Provinces

In Alberta, Ontario, New Brunswick, Prince Edward Island, Manitoba, and Newfoundland, an action by or against two or more persons as partners may be brought using the name of partnership. Under the Alberta Rules of Court, service of commencement document may be made in the name of partnership or limited liability partnership by leaving the commencement document with an individual who is a partner or a general partner, or with an individual who appears to have management or control responsibilities with respect to the partnership or limited liability partnership at its principal place of business or activity or at the partnership’s place of business in Alberta or activity where the claim arose. Alternatively the commencement document may also be sent by recorded mail i.e by a mail or courier in which the receipt of document is acknowledged in writing, addressed to the

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47 Prince Edward Island Companies Act, Ch. C-14, s. 68.

48 Alberta Rules of Court, AR 124/2010, pt. 2, div. 1, r.2.2(1); Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194.r.8.01(1);New Brunswick Rules of Court, N.B. Reg. 82-73, r 8.01(2); Prince Edward Island Annotated Rules of Civil Procedure, r.8.01 (1); Manitoba Court of Queen’s Bench Rules, Man. Reg. 553/88, r. 8.01(1); Newfoundland Rules of Supreme Court, r.9.01 (1).
partnership or limited liability partnership, to the principal place of business or activity of the partnership in Alberta.\textsuperscript{49}

Under the Ontario Rules of civil Procedure, New Brunswick Rules of Court, Prince Edward Rules of Civil Procedure, Manitoba Court of Queen’s Bench Rules and Newfoundland Rules of Queen Bench Rules and Saskatchewan Queen’s Bench Rules, personal service of commencement document is made by leaving a copy of the document with any one or more of the partners or with a person at the principal place of business of the partnership who appears to be in control or management of the place of business.\textsuperscript{50} Under the Nova Scotia Civil Procedure Rules\textsuperscript{51}, personal service on a registered partnership i.e on the Limited Liability Partnership or extra-provincial limited liability partnership is made by handling the document to its registered agent or where there is no agent in the manner provided in legislation dealing with partnership. The legislation dealing with it is Partnership and Business Registration Act\textsuperscript{52}. Under the said act an agent or attorney is required to be appointed in case of Limited Liability Partnership or Extra-provincial Limited Liability Partnership.

\textsuperscript{49} Alberta Rules of Court, AR 124/2010, pt. 11, div. 2, r.11.11 (1).

\textsuperscript{50} Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194,r.16.01(1) (m); New Brunswick Rules of Court, N.B. Reg. 82-73, r. 18.02 (1)(m); Prince Edward Island Annotated Rules of Civil Procedure, r.16.02 (m); Manitoba Court of Queen’s Bench Rules, Man. Reg. 553/88., r. 16.02(1)(k); Newfoundland Rules of Supreme Court, r.6.02 (1) (c); Saskatchewan Queen’s Bench Rules 2013, div. 3, 12-6(b).

\textsuperscript{51} Nova Scotia Rules of Civil Procedure 2008, r. 31.03 (1) (e).

\textsuperscript{52} Nova Scotia Partnership and Business Registration Act, R.S., c. 335. s.18. It reads thus:- “(1) Every partnership holding a certificate of registration shall appoint and have a recognized agent resident within the Province service upon whom of any writ, summons, process, notice or other document shall be deemed to be sufficient service upon the Partnership and each member thereof.
(2) ............
(3) ............
(4) If a Partnership has no such agent, or he cannot be found or he is absent, any writ, summons, process, notice or other document may be served on any pt.ner or on any employee of the pt.nership, or in case there is no such employee or a pt.ner cannot be found or is absent, may be posted in a conspicuous place on any land or building owned or occupied by the pt.nership, and such service or posting shall be deemed to be sufficient service upon the Partnership and each member thereof.
4.3.2.4 Determination of jurisdiction under the Partnership Acts of the provinces

Under the Alberta Partnership Act, 2000, a notice or document required to be sent served on an Alberta Limited Liability Partnership or an Extra-provincial Partnership may be delivered to its registered office, or sent by registered mail to its registered office, or the separate post office box designated as its address for service by mail, as shown in the Registrar’s records.53 Under section 82 of the Newfoundland and Labrador, section 76 (1) and section 83 (1) of the Manitoba partnership Act, under 96 (1) and 104 (1) of Saskatchewan Limited Liability Partnership, in addition to the above methods as laid down in Alberta Partnership Act, a notice or document may also be served on the LLP formed under the Newfoundland, or on LLP and Extra-Provincial LL Partnership in Manitoba and on LLP and Extra-Provincial Limited Liability Partnership of Saskatchewan by personally serving or by sending it to the partner who is designated as the representative of the limited liability partnership as shown in the registrar's records. Under the British Columbia Partnership Act, service an attorney is authorised to accept service of process on behalf of extra-provincial limited liability partnership in each legal proceeding by or against it in British Columbia.54 Under section 19 of the Manitoba and Nova Scotia, 18 of the Prince Edward Island, British Columbia and the Alberta Partnership Act and section 17 of the Newfoundland, Ontario and New Brunswick Partnerships acts, a notice to a partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner. Under section 44.4 (5) the Ontario partnership Act a person may serve a notice or document on an extra-provincial limited liability partnership at its Ontario place of business or at its address required to be maintained under the laws of the jurisdiction of formation or at its principal office address and at Limited Liability Partnership under section 23.1 (1) the Limited liability Partnership Act, may be sent by ordinary mail or by any other method, including registered mail, certified mail or

53 Alberta Partnership Act, RSA 2000, ch.P-3, ss.92, 100.
54 The British Columbia Partnership Act, [RSBC 1996] Ch.348, s.123.

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prepaid courier. Under section 44 of the New Brunswick Limited Liability Partnership Act, a notice or document may served upon any limited partnership may be sent by registered mail to the address of the principal place of business in New Brunswick of the limited partnership.

4.3.2.5 Determination of jurisdiction over the Corporations and Partnership as per the Court Jurisdiction and Proceedings Transfer Act

Jurisdiction in the provinces of British Columbia, Saskatchewan and Nova Scotia over the corporations and partnership are determined according to the provisions of the Court Jurisdiction and Proceeding Transfer Act, though the manner in which the service is to be effected on theses juristic entities are determined according to the Civil Court Rules of these provinces. Jurisdiction over corporations and partnership are assumed by the courts if they are ordinary residence in the said provinces. The CJPT Act of above named three provinces lay down common provision as to when a corporation and partnership is said to be ordinary resident in the province.\(^{55}\)

As per the Acts, a corporation is ordinary resident in the province if:

(1) It has or is required by law to have a registered office in the provinces,

(2) It has registered an address in the province at which process may be served generally,

(3) It has nominated an agent in the province on whom process may be served generally,

(4) It has a place of business in province or a location in province for the purposes of conducting its activities; or

(5) Its central management is exercised in the province.

Similarly, a partnership is ordinary resident in the province if:

(1) A partner is ordinarily resident in the province, or

(2) The partnership has a place of business in the province.

The CJPT Act of the provinces of British Columbia, Nova Scotia and Saskatchewan also lay down the provision as to when the court of the provinces could exercise the discretion to decline or refuse to exercise the jurisdiction against the defendant. As per the Act in force in the provinces,\(^{56}\) the court after considering the interests of the parties to a proceeding and the ends of justice, decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to try the proceeding. In doing so the court shall 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;
(c) The desirability of avoiding 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.

In *Amchem Products Inc. v. British Columbia (Workers’ Compensation Board)*,\(^ {57}\) the Supreme Court of Canada held that “the existence of a more appropriate forum must be clearly established by the defendant in order to displace the forum selected by the plaintiff.

In *Teck Cominco Metals Ltd. v. Lloyd’s Underwriters*,\(^ {58}\) interpreting Sec. 11 of the CJPTA Act, the court held that, if a foreign court succeeds in asserting jurisdiction first in a particular case, the assertion of jurisdiction by foreign court, does not affect the courts of British Columbia to assume jurisdiction in the same case.

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The court held that section 11 of British Columbia CJPT act is itself a comity based section which gives due comity to foreign courts. The prior assertion of jurisdiction by a foreign court does not oust the section 11 enquiry by the court. The CJPTA of British Columbia creates a comprehensive regime that applies to all the proceedings where a stay of proceeding is sought on the ground that, the action should be pursued in a different jurisdiction. Section 11 of the CJPTA of British Columbia is a complete codification of the common law test for forum non conveniens admitting of no exceptions. It does not supplement the common law relating to forum non convenience but in fact codifies it. It was held by the court that, “Comity is not necessarily served by an automate deferral to the first court asserting jurisdiction. The assertion of jurisdiction by the foreign court is also not an overriding and determinative factor in the section 11 analysis. The avoidance of multiplicity of proceedings is only one factor, among many to be considered. Furthermore, the jurisdiction and policy considerations do not support a conclusion that a foreign court’s prior assertion of jurisdiction is an overriding and determinative factor in the forum non convenience analysis. To adopt such an approach would be to encourage a first to file system where considerations having little or nothing to do with where an action is most conveniently or appropriately heard would carry the day.” The court also held that, “Blind acceptance of a foreign court prior assertion of jurisdiction carries with it the risk of declining jurisdiction in favour of a jurisdiction which is not more appropriate. A holistic approach, in which the avoidance of a multiplicity of proceedings is one factor among others to be considered, better serves the purpose of fair resolution of the forum non conventions issue with due comity to foreign courts.”

Teck sued its insurers in the U.S. for coverage in relation to environmental damage alleged to have occurred in the U.S., downstream from its British Columbia smelter site. The insurers commenced parallel proceedings in British Columbia seeking declaratory orders regarding their obligation to defend or indemnify Teck. They also filed a motion in the U.S. District Court seeking an order to dismiss Teck’s claims against them, and Teck filed similar motions in British Columbia seeking orders
staying the British Columbia proceedings. The U.S. District Court denied the insurers’ applications to dismiss Teck’s claims against them on the basis of forum non conveniens. The British Columbia Supreme Court refused to grant the stays sought by Teck, and the Court of Appeal upheld that decision. Teck submits that where a foreign court has assumed jurisdiction in parallel proceedings, the usual multifactor test under s. 11 of the CJPTA must give way to a “comity-based” test that respects the foreign court’s decision to take jurisdiction. But, the Supreme Court of Canada also dismissed the appeal filed by Teck to stay the proceedings going on in British Columbia court, by holding that, no doubt, the job of the court is to avoid the conflicting situation of parallel proceedings, but the court cannot not overshadow the objective of forum non conveniens, which lays down that the action or the case should be tried in the jurisdiction that has the closest connection with the action and the parties.

Before proceedings further it is important to mention the new development that took place in the area of jurisdiction in the Canadian federation.

In *Gray v. Linwood Homes Ltd.*, the court held that in a forum conveniens dispute, the Court must first determine whether there is a real and substantial connection between the action and the chosen forum. If such a connection is found, then the domestic forum is the forum conveniens unless it can be shown that there is a more appropriate forum. The court listed the following factors to consider, which are to be kept in mind while deciding the issue of forum conveniens. They include but are not limited to:

1. The location of the majority of the parties.
2. The location of key witnesses and evidence.
3. Contractual provisions that specify applicable law or accord jurisdiction.
4. The avoidance of a multiplicity of proceedings.
5. The applicable law and its weight in comparison to the factual issues to be determined.

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59 2007 ABQB 790.
7. Whether declining jurisdiction would deprive the Respondents of a legitimate juridical advantage available in the domestic Court.
8. Where the cause of action arose.
9. Where the loss or damage occurred.
10. Any Juridical Disadvantage to the Applicant in the Jurisdiction
11. Convenience or Inconvenience to Potential Witnesses.
12. Cost of conducting the litigation.
13. The applicable law and the difficulty of proving foreign law.

4.4 General Provisions relating to Jurisdiction under the Civil Procedure Rule of the Provincial Courts

4.4.1 Service of originating process pursuant to contract

Some of the provinces in Canada allow service of originating process in a contractually agreed manner to save time of the parties. These methods are usually quicker and effective than the formal methods of service. The rules of the provinces state that if the parties to contract, which is the subject matter of the action also, agree on a place of service, mode of service and a person upon whom service may be effected, service of an originating process in the proceeding may be made in accordance with the contract, and when so made the notice shall be deemed to have been personally served. However, such agreement on service when so made does not effect or invalidate the service of document that otherwise complies with the rules of the court.\(^{60}\) It is to be noted that the contractual method of service are subject to international methods of service. These methods must also comply with the rules for international service. In the case of *Metcalf Estate v. Yamaha Motor Powered Products Co., Ltd., 2012 ABCA*, it has been held that if the parties belong to the countries who are signatory to the *Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters*, then the

\(^{60}\) Alberta Rules of Court, AR 124/2010, pt. 11, div. 2, r. 11.3; Prince Edward Island Annotated Island Civil Procedure Rules, r. 16.10; Newfoundand and Labrador Rules of Supreme Court, 1986, SNL1986, c.42, Sch. D, r. 6.02; British Columbia Supreme Court Civil Rules, B.C. Reg. 168/2009, pt. 4, R.4-5.
contractual method of service ex-juris cannot override the method of service laid under the *Hague Convention*.\(^{61}\)

### 4.4.2 Motion to set aside service outside the jurisdiction

The court rules of the provinces also lay down that an out-of-province defendant who has been served with an originating process outside the province may move, before delivering a defence, a notice of intend to defend or a notice of appearance for an order setting aside the service or for staying the proceeding. The court may in such case if satisfied that service outside the province is not authorized by the rules or that the province is not convenient forum, then it may make such order as it deem fit in the interest of justice.\(^{62}\)

### 4.4.3 Validating, substituting and dispensing the service of commencement document

The provincial court rules empower the court to make an order for substituted service or dispensing with the service of commencement document, where there are reasons to show that substituted service is impractical to be made on the defendant or that it is in the interest of justice that the service be dispensed on the defendant due to its being impossible to serve him, it may make an order to that effect.\(^{63}\) The court may also make an order for validating method used by the plaintiff for serving the commencement document on the defendant not specifically specified by the rules of the court, where the court is satisfied that the method of service used by the plaintiff

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\(^{61}\) Available at: www.lexology.com (last visited on January 2, 2016).

\(^{62}\) Alberta Rules of Court, AR 124/2010, pt. 11, div. 1, r. 11.31; Prince Edward Island Annotated Civil Procedure Rules, r. 17.06; Manitoba Court of Queen’s Bench Rules, Man. Reg. 553/88, pt. IV, r. 17.06; Newfoundland and Labrador Rules of Supreme Court, 1986, SNL1986, c.42, Sch. D, r. 6.07; New Brunswick Rules of Court, N.B. Reg. 82-73, r. 19.05 (1) (c); Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R.17.06; British Columbia Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 21-8; Saskatchewan Queen’s Bench Rules 2013, pt. 12, div. 1, 12-1.

has brought or was likely to have brought to the attention of the person to be served or had he not evaded the service it would have come to his attention.\(^{64}\)

In *New Brunswick Broadcasting Co. Ltd. et al. v. Speaker of the House of Assembly (N.S.),*\(^{65}\) the court has held that it is common practice for an applicant seeking substituted service to file an affidavit in support of the application, setting out facts from which the court can conclude that personal service is impracticable and that substituted service is likely to bring the originating notice to the attention of the person to be served. The onus or standard in an application for substituted service should such that, the applicant has made all reasonable efforts in the factual situation to effect personal service on the defendant. Where personal service is not practicable an alternate substituted service will be of such approved standard that it is likely to bring the matter to the attention of the person to be served. Court must order substitutional service in such manner as, after investigation of the facts of the case, presents the best possibility of notice of the proceedings to the respondent.

4.5 **Determination of Jurisdiction against an out-of-province Defendant in case of commercial contracts under the civil court rules of the provinces**

The court rules of common law provinces in Canada provide that the courts in Canada have jurisdiction over an out-of-province or foreign defendant in case of commercial contracts\(^{66}\) where:-

1. the contract is made in whole or in part in the province of Canada, or

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\(^{65}\) (1989), 92 N.S.R.(2d) 245.

\(^{66}\) Prince Edward Island Annotated Rules of Civil Procedure, r.17.02; Manitoba Court of Queen’s Bench Rules, Man. Reg. 553/88, r. 17.02; New Brunswick Rules of Court, N.B. Reg. 82-73, r. 19.01; Newfoundland and Labrador Rules of Supreme Court, 1986, SNL1986, c.42, Sch. D, r.6.07; Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r.17.02.
the parties to the contract have agreed that the court of the province shall have jurisdiction to try the case in case of any legal dispute which may arise between the parties with respect to contract entered into by them, or

3. a breach of the contract has been committed in the province, even though such breach was preceded by or accompanied by a breach outside province which rendered impossible the performance of that part of the contract which ought to have been performed in the province, or

4. the contract provides that the contact is to be governed by or interpreted in accordance with the laws of the province, or

5. Damage or loss has been sustained in the province from any cause of action committed anywhere relating to that contract.

But, In Wildwood Transport Inc. et al. v. Eagle West Cranes Inc. et al., case the defendants were served outside Manitoba pursuant to Queen’s Bench Rule 17.02(f)(i) on the basis that the contracts between the plaintiffs and the defendants, which were the subject matter of the claim, were made in whole or in part in Manitoba and, so, the Manitoba court has jurisdiction to try the case. But, the court held that Rule 17.02 of the Manitoba Court Rules, does not itself establish jurisdiction, it is merely a procedural rule. The honorable judge went on to say that Manitoba Sub-rule 17.02 (f) (i) does not provide a reliable indicator of a real and substantial connection to the province. He compared it with the Model Court Jurisdiction and Proceedings Transfer Act, which does not include the location where a contract was as a basis for presumptive jurisdiction. Under the model Act, where the contract is not performed in the forum or not expressly governed by the law of the forum, a court cannot assume jurisdiction over a foreign defendant simply on the basis that the contract was made in the forum. Presumed jurisdiction is limited to those contracts where defendants are marketing their products or services to consumers in the forum. Other Canadian jurisdictions allow service out of the jurisdiction where the contract was made within the jurisdiction, but not where

67 2011 MBQB 42.
it was made only “in part” in the jurisdiction. In this case the contract was for the transportation of a crane from Minnesota to British Columbia. The crane parts did not enter into Manitoba in the course of being transported to British Columbia. They travelled from Minnesota, through North Dakota and into Canada at a border crossing in Saskatchewan. From there they traveled west to British Columbia. The court held that the only factors which connect the claim of the plaintiffs to Manitoba are that they are resident in Manitoba and that their representatives were here when they negotiated the contracts to carry the defendant’s goods. Presence of representatives when the negotiations for the contract are being carried out does not mean that the contract is made part in the province, which is Manitoba in this case. Hence, the court held that Manitoba court does not have jurisdiction to try the case.

So, looking at the case law and the decision of the Hon’ble court it is clear that the provision which authorizes the court to assume jurisdiction on the basis of “contract made part in Manitoba” seems to be wider in approach, but in practice its application for the purpose of assuming jurisdiction by the court is still narrow. The courts have still not gained confidence to assume jurisdiction, in cases of commercial contracts, on this basis.

Apart from the above, the New Brunswick Rules of court and Newfoundland and Labrador also contain an additional for serving the commencement document outside the province with respect to the contract,

1. Where the contract was made by or through an agent trading or residing in New Brunswick on behalf of a principal trading or residing outside New Brunswick.
2. Against a person ordinarily resident or carrying on business in provinces.
3. Against a person outside the provinces who is a necessary or proper party to a proceeding properly brought against another person served in the provinces;

In such cases the defendant may be served outside any province of Canada, without the permission of the court, except, for the province of Alberta which allows service of originating process outside Alberta but within Canada without the permission of the court, and service outside Canada with the permission of the court.
In the case of service outside Alberta but within Canada the commencement document must disclose the facts and grounds in support for serving the originating process out of Alberta but within Canada. Where the commencement document is to be served outside Canada it must be accompanied with a document or affidavit setting out the grounds for service outside Canada. If the court is satisfied with the grounds mentioned in document or the Affidavit it will then only grant leave to the plaintiff to serve the defendant outside Canada. The defendant must be served with a copy of the order permitting the service outside Canada on him.  

In Prince Edward Island, Manitoba, New Brunswick, Newfoundland and Labrador, British Columbia and Ontario an originating process served outside the province without the leave of the court shall disclose the facts relied in support of such service and in case of originating process served with the leave of the court an affidavit or other evidence used to obtain such permission of the court. The defendant must also be served with the copy of the order granting permission to serve outside Prince Edward Island.

Under the Alberta court Rules service outside Canada is permissible with the leave of the court only if a real and substantial connection exists between Alberta and the facts on which a claim in an action is based. The above mentioned grounds relating to contractual disputes qualify the presumption in which a real and substantial connection is presumed to exist between Alberta and the facts on which a claim in an action is based. However, in Royal and Sun Alliance Insurance Co. of Canada v. Wainoco Oil & Gas Co., the court held that Alberta court Rule 11.25 (3) does not contain an exhaustive list of circumstances that may establish a real and substantial connection between the Province and the facts on which the claim in the action is

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68 Alberta Rules of Court, AR 124/2010, pt. 11, div. 5, r.11.25 (1)&(2).
69 Prince Edward Island Annotated Rules of Civil Procedure, r.17.04 (1)&(2).
70 Manitoba Court of Queen’s Bench Rules, Man. Reg. 553/88, r. 17.04 (1)&(2).
71 New Brunswick Rules of Court, N.B. Reg. 82-73, r.19.03.
73 British Columbia Supreme Court Civil Rules, B.C. Reg. 168/2009, pt. 4, r.4-5 (4)&(5).
75 Alberta Rules of Court, AR 124/2010, pt. 11, div. 5, r.11.25 (3).
based. If any of the circumstances as enumerated in the above said rule is absent or
the plaintiff wants to rely on some other circumstance, the burden is on him to
establish a real and substantial connection.

Although the term ‘real and substantial connection’ is not used in the court
rules of other provinces for serving the originating process outside Canada except the
provinces where the Court Jurisdiction and Proceedings Transfer Act (CJPTA) is
enforced or the Alberta Court Rules where it is explicitly mentioned, the ground of
real and substantial connection is impliedly taken into account after the historical case
of Morguard. The Alberta Court Rules have similar provisions with CJPTA in
respect to real and substantial connection. The Morguard case and the series of cases
following it, endorsed this ground as a basis of assuming jurisdiction by the
provincial courts in Canada against an out-of-province or a foreign defendant.

In Levasseur v. Autorité des Marchés Financiers, case the plaintiffs were
54 investors; 51 of them are residents of New Brunswick and the other three are
residents of Quebec. They allege having sustained a loss of approximately
$5,600,000.00 due to investments made from 2006 to 2009 with two companies. The
evidence clearly shows that the 54 plaintiffs signed a contract with one of the issuing
companies between 2006 and 2009. Pursuant to this contract, the investor loaned a
certain amount of money to the issuing company. In return, the investor would
receive interest for as long as the loan remained unpaid. The contracts were
promoted and offered by individuals acting as representatives of the issuing
companies in New Brunswick. The representatives were residents in New Brunswick
and also carried on business in New Brunswick. Each contract was signed
by the investor. In all cases, except two or three, the investor was a resident of New
Brunswick who was in New Brunswick at the time he signed the contract. His deposit
was made by remitting to the representative located in New Brunswick a cheque
drawn on an account at his financial institution located in New Brunswick. The plaintiffs bought investments varying in value from

77 2012 NBQB 409.
$5,000.00 to $500,000.00. Each contract was then faxed by the representative located in New Brunswick to the issuing companies and a representative of those companies would sign the contract in Quebec. A copy of the contract was then returned to the representative in New Brunswick who would give it to the investor, who, in turn, would hold on to it in New Brunswick as proof of his investment. The interest on these investments was from time to time deposited directly into each plaintiff’s account in New Brunswick. The applicants argue that the contracts were not made in the province because a representative of the issuing companies signed the contract on behalf of the company in Quebec and only then was the contract concluded. But, the court held that the issuing companies, through their representatives, offered their product, the investment, to potential investors in New Brunswick. Fifty-one plaintiffs in this case accepted the offer and communicated their acceptance to the issuing companies by signing the contract in front of the representative located in New Brunswick and giving him a cheque for significant amounts, some up to $500,000.00, to buy the product. There is no evidence that the plaintiffs were told that the contract would only take effect once it was signed by a representative in Quebec. The contract is silent on this point. Common sense dictates that the investors would not have withdrawn money from their financial institution unless the contract was concluded when they gave their cheque to the local representative. The representative accepted the cheque. The contract was concluded when the investor signed the contract and gave his cheque to the local representative. So the court held that at least 51 plaintiffs entered into their contract in New Brunswick. The court also held that the factor “a contract connected with the dispute was made in the province” as laid down in Van Breda case, as one of the factor for establishing jurisdiction on the basis of real and substantial connection, is established despite the fact that not all parties to the contract are involved in the action or that the action was brought in contract. The court also held that a contract may
be connected to the dispute despite the fact that not all parties to the contract are involved in the action or that the action was brought in contract.

In *True North v. HZPC Americas*,\(^78\) the court held that the general rule of contract law is that, a contract is made in the location where the offer or received notification of the offeree’s acceptance. But, there is an exception to this general rule. It is the postal acceptance rule, according to which, when contracts are to be concluded by post, the place of mailing the acceptance is to be treated as the place where the contract was made. So in this case the contract was signed and mailed from Saskatchewan, it was held to made in Saskatchewan even though the contract was standard form contract in accordance with the laws of the province of Prince Edward Island. Saskatchewan court was held to have jurisdiction over the subject matter of the dispute. However, in Prince Edward Island court of appeal in *HZPC Americas v. True North*,\(^79\) the honorable court held that in case of jurisdictional disputes the more appropriate question is where the contract was signed. In considering this factor, the purpose is not to focus on the normal rules applicable to the formation of the contract and the balancing of the rights of the two parties. The purpose is to consider all the facts surrounding the signing of the contract as part of the broader objective of determining whether there is clearly a more convenient forum than the one chosen by the plaintiff. In this case as per the evidence, prior to entering into the contract, True North had been approached in Saskatchewan by an agent for HZPC, a company with its primary place of business in Prince Edward Island. True North agreed to take some of the seed of HZPC and grow it. This it did for 2001 and 2002 growing seasons. In 2002 the parties entered into the written contract. The contract was formed as the result of discussions which took place in both Saskatchewan and Prince Edward Island. There were negotiations in Saskatchewan between agents for HZPC and True North. There was also telephone conversations between them and two principals of HZPC located in Prince Edward Island. When the Essential terms of the contract were agreed upon, HZPC signed the contract in Prince Edward Island and

\(^{78}\) 2004 PESCTD 81.  
\(^{79}\) 2006 PESCAD 02.
sent it by mail, in duplicate, to True North in Saskatchewan where it was signed by True North. One original copy was retained and the other was returned by mail, to HZPC in P.E.I. When careful consideration is given to all the connecting facts with respect to where the contract was signed, the inescapable conclusion is that the contract was signed in both provinces. Therefore the court of appeal found that the motions judge erred in holding that Saskatchewan court had jurisdiction over the subject matter of the dispute and is appropriate forum to hear the dispute.

In 3315207 Canada Inc. v. Decoexsa Global Logistics Inc.,\textsuperscript{80} the court held that if there is contradictory evidence as to where the contract was made, the plaintiff cannot rely on Rule 17.02(f) (i) of New Brunswick Court Rules. However, if the plaintiff proves that his case falls under rule 17.02 (h) the court can assume jurisdiction over the defendant. The court while quoting the reasoning given in case of Sandler Master in Canadian General Electric Co. v. C.M. Windows & Stained Glass Ltd. (1977), 3 C.P.C. 298 (Ont. Master) held that, wording of Rule 17.02 (h) does not require the damage to be sustained only in Prince Edward Island. The purpose of the Rule 17.02 (h) is to expand the class of actions which a Prince Edward Island litigants can commence in this Province against non-resident defendants, and there is no reason why a Prince Edward Island vendor of goods or services should not be permitted to resort to the Courts of this Province to enforce its alleged rights against a non-resident purchaser, subject to the overriding rule as to forum conveniens.

In Petroasia Energy Inc. v. Samek LLP,\textsuperscript{81} it has been held that if a real and substantial connection is established between the subject matter of the action and two courts, one provincial court of Alberta and the court outside Canada (Kazakhstan court) and the cause of action and loss or damage factors favour Kazakhstan as a more appropriate forum for the determination of the action where as the juridical advantage factor favours Alberta. The remaining factors are relatively neutral, and

\textsuperscript{80} 1998 CanLII 5859 (PE SCTD).
\textsuperscript{81} 2008 ABQB 50.
reflect the normal difficulties of litigation that encompasses international commerce. Then, the existence of a more appropriate forum must be clearly established in order to displace the forum selected by the Plaintiff.

In *RBZ Capital Corp. v. Petrol Alchemy, LLC.*,\(^8\) the court held that any of the presumptive factor listed in Rule 11.25 of the Alberta Rules of Court is enough for the court to assume jurisdiction as long as the link is not weak and tenuous.

### 4.6 Determination of Jurisdiction in Case of Commercial Disputes under the Court Jurisdiction and Proceeding Transfer Act

The assumption of jurisdiction in the provinces of British Columbia, Saskatchewan and Nova Scotia is regulated by the Court Jurisdiction and Proceeding Transfer Act. The Act contains special jurisdictional rules relating to contractual obligations. The Rules of the Act allow the serving of process outside Canada without the permission of Court, where:

1. The contractual obligations, to a substantial extent, were to be performed in the province,
   2. By its express terms, the contract is governed by the law of the Province, or
   3. The contract,
      (a) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and,
      (b) Resulted from a solicitation of business in the Province by or on behalf of the seller.

2. Concerns a business carried on in the Province.

The grounds concerning contractual obligations allowing the service of originating process outside Canada are based on the presumption of real and substantial connection empowering the court to assume territorial jurisdiction over the out-of-province or foreign defendant.

\(^8\) 2014 ABQB 102.
The second situation which enables the court to assume jurisdiction in case of contractual obligation is incorporated only in the CJPT Act of Saskatchewan province. This provision is left out in the CJPT Acts of Nova Scotia and British Columbia. It was felt that the provision did not reflect the current realities of cross-border contracts. Today’s is a digitalized world. Contracts are no more written or printed on paper. They are made and agreed upon through internet. So, it is relatively uncommon for persons to be physically present in a single location for the purpose of concluding inter-provisional or international contract, thereby, making it even more difficult to identify, the ‘place’ in which a contract is entered into, for the purpose of determining jurisdiction. However it does not mean that the plaintiffs of the province of British Columbia and Nova Scotia cannot take the plea that the contract was made in their province in order to establish real and substantial connection. In UniNet Technologies Inc. v. Communication Services Inc.,\(^{83}\) the court held that in addition to the claim of damage for the breach of contract within the jurisdiction of British Columbia, the plea that the contract was made in British Columbia were sufficient to found jurisdiction Simpliciter.

But in England v. Research Capital Corporation\(^{84}\) it was held that the plea that the contract was made in British Columbia itself is not sufficient to establish real and substantial connection. However if it is supported by the other connecting presumed factor like the contractual obligations were to be performed to a substantial extent in the province or by its express terms the contract is governed by the law of the province etc. then in such situation real and substantial could be presumed to exist.

In England v. Pfizer Canada Inc.,\(^{85}\) the court held that if a concern hires resident marketing representatives who presumably had phone numbers and addresses where they may be contacted in a province, namely Saskatchewan in this case, it is

\(^{83}\) 2005 BCCA 114.
\(^{84}\) 2008 BCSC 580.
\(^{85}\) 2006 SKQB 6 (CanLII).
will be presumed that it carries on business in Saskatchewan. Consequently, the Court will have jurisdiction pursuant to section 9 (h) of the Saskatchewan CJPT Act.

In *Sokha Kim and Shuk Ping Leung v. APK Holdings Ltd. and Arlen Paul Kerntope and Wally Kerntopf*, the court held that a forum selection clause does not oust the territorial competence of the Saskatchewan courts.

*I'O'brien v. Lake Country Log Homes*, in this case the Hon’ble court held that even though the case of the plaintiff (respondent) did not fall under any of the grounds enumerated under section 9 of the Saskatchewan CJPT Act raising presumed presumption as to existence of real and substantial connection between the province of Saskatchewan and the facts on which the proceedings are based, enabling the Saskatchewan court to assume an out-of-province defendant, nevertheless, the court of Saskatchewan will have territorial competency under section 4 of the CJPTA if the part of the claim arose from loss experienced by the plaintiff (respondent) from the product delivered to him by the defendant in Saskatchewan. This factor is sufficient to create a real and substantial connection between Saskatchewan and the facts on which the proceeding against that person is based. According to the court where the claim is based on the fact damage occurred in the province, contract considerations such as where the contract was formed, where property passed or where delivery took place are no longer relevant. The only thing that is relevant is the knowledge of the vendor that if the product is deficient, the deficiencies will not be discovered until the goods or product arrive in the foreign jurisdiction, these claims are sufficient to create a real and substantial connection to Saskatchewan jurisdiction.

The court in *Oleet Processing Ltd. v. Puratone Corporation*, held that at common law contract is made when an offer was accepted and the offeror notified of the acceptance. The place of posting the acceptance was the traditional place of the contract. However, it is otherwise where there is virtually instantaneous

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86 2013 SKQB 382.
88 2010 SKQB 69.
communication of the acceptance. In such a situation the place of the contract is where the acceptance is received. In this case the acceptance was received at Manitoba, so, Manitoba is where the contract was made, accordingly the Court of Saskatchewan does not have territorial competence over the subject matter of the action by reason of the place of the contract and therefore does not have jurisdiction.

_McLean v. Can American Van Lines/Yellow Self Storage_,\(^89\) in this case the court held that where the defendant moved and delivered the plaintiff’s household goods from Toronto, Ontario to Regina, Saskatchewan, the defendant, was in fact carrying on business in Saskatchewan. Under subsection 9(e) of the CJPTA, a real and substantial connection is presumed to exist if the proceeding concerns contractual obligations which were to be performed, to a substantial extent, in Saskatchewan. This case involves a moving contract. The Plaintiff’s household goods were loaded on a truck in Ontario and transported across a good portion of Ontario, Manitoba and a good portion of Saskatchewan. The Plaintiff’s household goods were then unloaded from a truck in Regina, Saskatchewan. Therefore the court held that the moving of the Plaintiff’s belongings from Toronto, Ontario to Regina, Saskatchewan was to a substantial extent performed in Saskatchewan.

_In Power Measurement Ltd. et al. v. Ludlum et al.,\(^90\)_ the court held that the plaintiff’s residency or his connection with British Columbia is no ground in determining the real and substantial connection. There must be some other or sufficient connecting factors or contacts which justify the assumption of jurisdiction on the basis of real and substantial connection. Defendant’s residency in the jurisdiction or the fact that damages were suffered in the jurisdiction is examples of sufficient connecting factors.

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\(^89\) 2007 SKPC 105.
\(^90\) 2006 BCSC 157.
In *Knapp Consulting Inc. v. Continovation Services Inc.*, the court held that carrying on business in British Columbia does not equate to being “Ordinarily resident” in British Columbia. To be deemed “ordinarily resident” in British Columbia, the CJPT requires the Plaintiff to show that the defendant had a place of business in British Columbia at the time of the commencement of the proceeding. So, where the agreement was terminated on November 18, 2011 and the proceeding commenced on December 15, 2011 and there is no evidence that the defendants continued to have a place of business in British Columbia after the agreement with the plaintiffs was terminated, it cannot be said that defendant was “ordinarily resident” in British Columbia as defined in CJPTA.

In *The Original Cakerie Ltd. v. Renaud*, the court held that the place where the damages are suffered in consequence of an alleged breach of contract, although is not a factor that raises a presumption in Section 10 of the CJPTA, is sufficient to meet the real and substantial test in the context of determining the validity of service ex juris under the applicable rule of the former Rules of court. Relaying on the case of *Pacific International Securities v. Drake Securities Inc.*, where the court held that the British Columbia Rules of Court under Rule 13(1) does not specify the connection of the damage sustained to jurisdiction as a ground for asserting jurisdiction but if compared to Ontario Rule 25 (1) (h) which allows service ex juris in respect of the damage sustained in Ontario arising from a breach of contract committed elsewhere, the court in this case sees no reason why the British Columbia Rules under Rule 13 (3) cannot uphold damage sustained within jurisdiction, as a real and substantial connection for asserting jurisdiction in breach of contract.

In *Beals v. Saldanha*, the supreme court of Canada at para 32 held that a “defendant can reasonably be brought within the embrace of a foreign jurisdiction’s law where he or she has participated in something of significant or was actively involved in that foreign has participated in something of significance or was actively

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91 2012 BCSC 887.
92 2013 BCSC 755.
93 2003 SCC 72 (CanLII).
involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one”.

4.7 Forum Non Convenience in Canada

While deciding the question of grant of stay, the Canadian courts follow the English doctrine on forum non conveniens, but, with some modifications. The courts in Canada follow the English historical case of Spiliada Maritime corp. v. Cansulex Ltd. on Forum Non Convenience, however, they give different weight to the factors justifying the grant of stay to the defendant than what English court does. There are number of factors laid down in the above said case which are to be taken into account while granting stay to the defendant. But, the Canadian authorities make a slight move in considering those factors. The question of forum non conveniens would only arise if the court has assumed jurisdiction properly over the defendant, that is, it has established jurisdiction over the defendant. Forum non conveniens is a doctrine which enables the court to decline or to refuse to exercise or assume jurisdiction over a given case on the fact that some other forum or court is more appropriate for the trial of the case. The plea of forum non conveniens is usually taken by the defendant to obtain a grant of stay against the forum selected by the plaintiff. Amchem products Inc v. British Columbia (Workers Compensation Board)\(^{94}\) is an important case on forum non conveniens in Canada, which called for the examination of private international law rules relating to forum non convenience in Canada. The brief facts of the case are that, the plaintiffs commenced a class action against defendant asbestos company of Texas, USA, for the injury suffered due to their prolonged exposure to asbestos. Many of the plaintiffs were resident of British Columbia. The defendant company filed an anti-injunction suit in the court of British Columbia to refrain the plaintiffs in continuing their action in Texas, a similar suit was filed by the plaintiffs in the court of Texas to obtain anti-injunction suit against the defendants to refrain them from obtaining anti-injunction suit in British Columbia. The British

\(^{94}\) (1993), 102 DLR (4th) 96 (SCC).
Columbia granted the anti-injunction suit to the defendants against the plaintiffs in Texas. The decision of the British Columbia court was upheld by the Court of Appeal, but was reversed by the Supreme Court of Canada. The Apex Court held that a stay would only be granted where the parties applying for stay could prove that there is some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice. Citing the case of Spiliada Maritime, the court stated that the law of Canada and other common law countries on the doctrine of forum non-convenience has evolved from the English case law of Spiliada Maritime. But, the Canadian courts are not bound to follow the rule as it. In this case, two significant departures were made by the Supreme Court of Canada from the English doctrine as explained in Spiliada case:-

1. The factor of ‘loss of juridical advantage’ to the plaintiff which the English Courts take into consideration while deciding the grant of stay to the defendant, is, not treated as separate factor by the Canadian Courts while deciding the application of grant of stay, as the English court does. The case of Spiliada treats this factor separate and distinct, by giving more weight to it, on the theory that a plaintiff’s right to the jurisdiction of court should not be displaced easily. However, the Supreme Court of Canada held that there is no reason why the loss of juridical advantage should be treated as a separate and distinct condition rather than being weighed together with other factors. According to the court an advantage gained by the plaintiff to institute the suit in the forum that has no or little connection with the claim will encourage forum shopping, when, infact the suit should be instituted in the other appropriate forum which has significant connection with the claim.

2. Under the English law the burden lies heavily on the plaintiff to prove that English court is clearly the appropriate forum for the trial of case in cases of service ex-juris when the question of forum non-convenience is raised by the defendant demanding stay of proceedings in English courts. The English courts make a difference between the cases when the service of process is to
be made within jurisdiction and when the process is to be served ex-juris i.e. outside England. Whereas the Canadian courts make no difference between the cases where service of originating process is to be made within or outside Canada, the issue will be only the appropriateness of other forum based on the facts of the case. The Supreme Court in this case held the rules of the court will decide who is to bear the burden. Where the rule on the basis of which service ex-juris is sought by the plaintiff, require the plaintiff to prove or justify the service, the obviously the plaintiff has to prove his point. The court held that burden of proof should not play a significant role unless judge cannot come to a conclusion on the basis of the material presented by the parties.

In the case of \textit{Young v. Tyco International of Canada Ltd},\textsuperscript{95} it was held that three principles should guide the judge’s exercise of discretion on the motion of on a forum non conveniens

1. On forum non convenience motion, the standard to displace the plaintiff’s chosen jurisdiction in high. The defendant should have to clearly establish more appropriate forum in order to displace the forum selected by the plaintiff.

2. The balancing of the relevant factors should aim to achieve the twin goals of efficiency and justice.

3. Since the motion of forum non convenience is brought in the proceedings at the early stage, the motion should act prudentially and should not adopt an aggressive approach to fact finding. The fundamental issues or important legal facts relating to merits of the case should not be decided in haste by the motion judge at the early stage of the proceedings.

It was held in this case motions relating to forum non conveniens are exercise of judicial discretion.

\textsuperscript{95} 2008 ONCA 709, 300 DLR (4\textsuperscript{th}) 385.
There is a difference between the test of real and substantial connection and that of forum non conveniens doctrine. The distinguish is well laid down in the case of *Tolofson v. Jensen*, by La Forest J, according to him the test of real and substantial connection has the effect of preventing a court from unduly entering into matters in which the jurisdiction in is located has little interest. In addition, through the doctrine of forum non conveniens a court may refuse to exercise jurisdiction where, there is a more convenient or appropriate forum elsewhere. In the case *Muscott v. Courcelles* quoting the article of Professor Elizabeth Edinger titled “*Morguard v. De Savoye: Subsequent Developments*”, at para 43, the court held that, “*Jurisdictional decisions are comprised of two elements: rules and discretion. While the real and substantial connection test is a legal rule, the forum non conveniens test is discretionary. The real and substantial connection test involves a fact-specific inquiry, but the test ultimately rests upon legal principles of general application. The question is whether the forum can assume jurisdiction over the claims of plaintiffs in general against defendants in general given the sort of relationship between the case, the parties and the forum. By contrast, the forum non conveniens test is a discretionary test that focuses upon the particular facts of the parties and the case*”.

In *Ayles v. Arsenault*, the court has held that the doctrine of forum non Conveniens is to be considered separate from and subsequent to the issue of real and substantial connection under the first stage, and it only arises where more than one forum can properly take jurisdiction Simpliciter. If the court does not have jurisdiction over the matter, the issue of the convenience of the forum is irrelevant. Also, it has held that the party seeking to establish jurisdiction Simpliciter need not prove the most real and substantial connection, it is enough if there is real and substantial connection to the jurisdiction. If the court assumes jurisdiction on the basis of real and substantial connection, it has the residual discretion to decline to exercise its jurisdiction on the basis that it is forum non Conveniens. It can do so it

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96 1994 CanLII 44 (SCC).
97 2002 CanLII 44957 (ON CA).
98 2011 ABQB 493.
the court is satisfied that some other forum, who is also having jurisdiction over the matter, is more appropriate forum to entertain the action.

There are certain set of factors devised by the provincial courts in Canada, based on facts of various cases, which enables the courts in coming to the conclusion whether they should stay a proceeding on the basis of doctrine of forum non conveniens or not on the ground that some other court or forum is more appropriate for trial of the proceedings. The following is a list of some of the factors which enable the court to decide whether proceedings should be stayed or not on the basis of forum non conveniens. The list not exhaustive it is open for the to consider other factors also which it considers necessary for deciding on the doctrine of forum non conveniens. The factors are:-

1. The location of the majority of the parties.

2. The location of key witnesses and evidence.

3. Contractual provisions that specify applicable law or accord jurisdiction.

4. The avoidance of a multiplicity of proceedings.

5. The applicable law and its weight in comparison to the factual issues to be determined.


7. Whether declining jurisdiction would deprive the Respondents of a legitimate juridical advantage available in the domestic Court.

8. Where the cause of action arose.

9. Where the loss or damage occurred.

10. Any Juridical Disadvantage to the Applicant in the Jurisdiction

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11. Convenience or Inconvenience to Potential Witnesses.

12. Cost of conducting the litigation.

Section 11 of the Model Court Jurisdiction and Proceedings Transfer Act also contains a list of similar factors, which includes- (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, (c) the desirability of avoiding 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. These factors are incorporated under the model act because they have been expressly and implicitly considered by the courts in the past.

The model CJPTA does not refer the factor of ‘Juridical advantage’ of the plaintiff to sue in his own forum court, but at the same time it also not specifically exclude the taking into consideration of this factor whenever the facts of a case requires so.

In the case of Club Resorts Ltd. v. Van Breda the court has held that the factor ‘Juridical advantage’ is against the concept of comity. At para 112 of the said case, the court laid that, “This factor obviously becomes more relevant where foreign countries are involved, but even then, comity and an attitude of respect for the courts and legal systems of other countries, many of which have the same basic values as us, may be in order. In the end, the court must engage in a contextual analysis, but refrain from leaning too instinctively in favour of its own jurisdiction”. Also in the case of Amchem products Inc v. British Columbia (Workers Compensation Board)14, the court held that, “The result of the above test will be that when a foreign court assumes jurisdiction on a basis that generally conforms to the Canadian rule of private international law for determining whether Canadian courts are the forum conveniens, that decision will be respected and a Canadian court will not purport to

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100 Available at: www.ulca.ca (last visited on March 1, 2015).
101 2012 SCC 17 (CanLII).
make the decision for the foreign court. The policy of Canadian courts with respect to comity demands no less. If, however, a foreign court assumes jurisdiction on a basis that is inconsistent with Canadian rules of private international law and an injustice results to a litigant or "would-be" litigant in Canadian courts, then the assumption of jurisdiction is inequitable and the party invoking the foreign jurisdiction can be restrained. The foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the basis of comity”.

In addition to the above factors the model CJPTC also provides under section 11(1) that 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 proceedings on the ground that a court of the State is more appropriate forum in which to hear the proceeding. The factors favoring the grant of stay on the basis of the doctrine of forum non conveniens are never the same, their interpretation and importance changes with facts of each case.

The doctrine of forum non conveniens in Canada depends upon the discretion of court whether to assume jurisdiction over a given case or to grant a stay so as enable the parties to litigate in the more appropriate forum. The doctrine has evolved over the time and the courts in Canada is trying their best to keep in pace with the changing rules of conflict of laws at the international level. That is why more stress is given to the concept of comity, order and fairness which is nothing but a way of giving respect to the laws of other countries. But, still the provincial courts lack uniformity in the application of principle of forum non conveniens. Each provincial court has its own way of interpreting the list of factors guiding the stay of proceedings on the basis of the doctrine forum non conveniens. The importance given to each factors varies from province to province. But, certainly at one point, all the courts are to adhere to the constitutional mandates of order, fairness, judicial restraint, with the international principle of comity, which makes the judgments delivered by the court acceptable to large extent by the provincial and foreign courts.