THE NEED FOR UNIFORM JURISDICTION AND CHOICE OF LAW RULES IN DOMESTIC PROPERTY PROCEEDINGS

British Columbia Law Institute

April 1998

TABLE OF CONTENTS

A. Introduction

When a family property dispute ends up before the court, the division of property can be an expensive and time-consuming process. The difficulties associated with a trial create hardships for all parties involved, whether directly or indirectly. These difficulties are compounded when issues of jurisdiction and choice of law arise in the proceedings.

Each province and territory has its own unique family relations legislation.[1] Each set of statutes contains provisions for the division of family property, and although all embody the underlying notion of sharing, there are substantial practical and philosophical differences between them. This is not usually a problem. Superior courts normally apply the family property legislation of their province, and most disputes are resolved by the application of that single piece of legislation. With the increasing mobility of the population, however, more and more families have lived or hold assets in other provinces, territories and countries. In such situations, two questions arise when a court is called to divide the assets of the marriage: Does the court have jurisdiction to hear the case? If it does, which law should it choose to apply?

The legal problems generally arising out of such situations, called *conflicts of law,* are not trivial. At best, resolving these questions will merely cause the length of the trial to be expensively extended, as complex legal arguments regarding jurisdiction and choice of law are put forward and considered. At worst, the judge will be unable to render a complete judgment, forcing the litigants to continue their action before the court of another territory. Moreover, the rules available to guide judges through these situations are unsatisfactory, especially in British Columbia. Having evolved primarily as tools for the resolution of commercial disputes, they are ill-suited to dealing with the special nature of family property.

Each province has taken a different approach to dealing with such situations in family property proceedings. Most provinces have enacted special provisions in their family law acts that set out, in greater or lesser detail, rules for deciding when a court should hear a case, and which laws to apply. British Columbia, along with Saskatchewan, has no statutory provisions, relying instead upon the common law, the existing body of judge-made law that has evolved throughout the centuries. No province has succeeded in developing a set of rules that deals satisfactorily with all of the many issues arising in such conflicts, and the lack of a consistent approach across the provinces exacerbates a bad situation.

The Uniform Law Conference of Canada has addressed these problems. In 1997, it promulgated uniform legislation aimed at resolving the most outstanding of them. This legislation, submitted to each of the provinces for adoption, is titled the *Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act* (hereafter referred to as the *Uniform Act*). It is attached as an Appendix, with the annotations of the Uniform Law Conference.

1. In British Columbia, this legislation is the *Family Relations Act*, R.S.B.C. 1996, c.128.

This Report reviews the current jurisprudence surrounding conflict of law problems in family property, and discusses the need for law reform in this area.[2] It provides background to and a general overview of the contents of the Uniform Law Conference's *Uniform Act*.

B. The Problem

Interprovincial migration has climbed steadily over the last two decades. According to the B.C. Stats Service[3], net migration to British Columbia from other provinces climbed from under 4000 in 1982 to over 32,000 in 1993. Immigration to the province over a similar period has more than tripled, from 13,000 in 1984 to 44,000 in 1995. This increased mobility of the population has meant that more and more married couples have, over the course of their relationship, spent time in territories outside of B.C. Furthermore, increased wealth and lower transportation and communication costs have meant that more families than ever before maintain assets outside the province.

Family property disputes that involve extra-provincial assets, or assets acquired while living outside the province, present two categories of problems for the court:

1. Jurisdiction: Jurisdiction refers to the power of a court to hear a case, and each court decides the extent of its own jurisdiction. What factors should be relevant in determining whether the court should hear the issue? Are factors relating to the subject matter in dispute more important than factors relating to the parties? When should a judge refuse to hear a case, and instruct the parties to appear before another court?

2. Choice of Law: Which territory's law should be applied in the case? Should the court apply just one body of family property law, or should it apply different rules for property located in different territories? In choosing which law to apply, what factors should the court look to? Should a decision be based simply on factors relating to the property? Or should the court also look to factors relating to its association with the marriage itself?

C. The Current State of British Columbia Law

Most provinces have enacted legislation setting out rules for determining when (a) a court has jurisdiction to hear a family property proceeding, (b) which laws should be applied in cases of conflict, or (c) both. British Columbia has not. Instead, B.C. courts rely upon the common law, which, in the absence of special legislation, is the only tool available to them for sifting through the complex questions created by conflict of law issues.

---

2. Another type of conflict can arise that may also raise choice of law issues. This is where the internal law of a territory may provide for two or more bodies of law whose application may depend on the personal characteristics of a party. In some countries the "personal law" applicable may depend on a person's religion. In Canada this kind of issue might arise where one or both parties to a family property dispute are aboriginal people. The Report is concerned only with choice of law problems that arise where the internal laws of different territories conflict.

3. http://www.bcstats.gov.bc.ca.

1. *Jurisdiction in the Common Law: The Current Situation*

(a) Jurisdiction Generally

The test for jurisdiction is broken into two avenues of investigation. The first is an examination of the jurisdiction of the court over the defendant. Such jurisdiction is automatically presumed if the defendant can be served within British Columbia. It is also presumed when an out of province defendant is properly served outside the province according to the British Columbia Rules of Court[4]. The second avenue of investigation is an examination of the jurisdiction of the court over the subject-matter of the dispute. The common law approach to family property proceedings takes the disputed property to be the subject-matter. This second avenue of analysis need not be pursued, however, if the defendant submits to the authority of the court.

If the defendant challenges the court's jurisdiction, or it is otherwise brought to the court's attention, the issue of jurisdiction is subject to stricter scrutiny. In *De Savoye* v. *Morguard Investments Ltd*,[5] the Supreme Court of Canada stated that, in such cases, a "real and substantial connection" to either the defendant or the subject-matter of the litigation is required before a court should accept jurisdiction. The common law surrounding jurisdiction has evolved rapidly in the last several years in response to these statements, regarded by many as representing a fundamental change in the approach to jurisdiction.

What constitutes a "real and substantial connection" has been the subject of much academic and judicial attention since the *Morguard* case. The Supreme Court did not set out in detail the elements that contribute to such a connection, leaving many issues for lower courts to work through. Although some factors relating to the defendant or subject-matter (such as the property in dispute being located within the province) can lead directly to the inference of a connection, the relative importance of other factors (such where the cause of action arose) is less clear.

(b) Forum Non Conveniens

The courts possess an important discretion in deciding jurisdictional issues. Even when there is a legal ground for assuming jurisdiction, the court can decline to exercise that jurisdiction by declaring itself *forum non conveniens* - literally, an "inconvenient place to litigate" - and ordering a stay of proceedings. Often, there are good reasons for a court to decline to hear a case, even when a real and substantial connection exists. The parties may live far away, or the court of another territory may have stronger ties to the case.

---

4. The rules for service outside the jurisdiction are set out in section 13(1) of the British Columbia Rules of Court. In situations falling outside of those set out in s.13(1), an order must be sought from the court allowing the service.

5. *De Savoye* v. *Morguard Investments Ltd*, [1991] 2 W.W.R. 216, [1990] 3 S.C.R. 1077 (S.C.C.).

2. *Choice of Law in the Common Law: The Current Situation*

Once a court accepts jurisdiction to hear a family property dispute with elements outside the province, it must decide which law should be applied in the case, and how. The common law may require a court to apply different law to different aspects of the dispute, depending upon the history and nature of the property in question.

(a) Movable Property

The presumption in the common law is that spouses have implicitly agreed that the law of the domicile[6] of the husband will govern the division of movable property[7] acquired before or during marriage. However, in territories that have, through statute, affirmed the right of wives to have an independent residence, the law of the first common domicile will govern the division instead.[8] If the parties change their domicile during the marriage, the law of the new territory will govern the division of the movables. There is an exception for those movables in which respective ownership rights have already come into being. Such movables are divided according to the law of the territory in which the respective rights came into being.

(b) Immovable Property

The law that determines the rules for immovable property is relatively simple: immovable property is governed by the law of the territory in which it is located.[9]

(c) Marriage Contracts

Where there is a marriage contract, the contract determines the disposition of the family property, whether movable or immovable. It may also select the law that will be used to determine the respective rights set out in the contract.

D. Problems with the current conflict of law rules in domestic property proceedings

There are several problems created by applying the current British Columbia law governing jurisdiction and choice of law issues to family property disputes. The first two problems, consistency and complexity, are due to the reliance in British Columbia upon the common law rules for dealing with

---

6. "Domicile" is not the same as "residence." Everyone receives a domicile at birth, and this domicile changes only when a move is made with the intention of taking up permanent residence somewhere else.

7. The distinction between movable and immovable property found in the principles of conflict of law resembles the distinction between real and personal property in common law. However, immovable property embraces a slightly larger category of interests than real property. Immovable property for example, unlike real property, includes leases.

8. The common law rule was changed in British Columbia in 1985, with the enactment of what is now section 60 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

9. Choice of law questions over immovable property rarely arise. A court does not have jurisdiction over property in another territory, unless its decision would have only an incidental affect on the rights of parties in that property *British South Africa Co.* v. *Companhia de Mocambique,* [1893] A.C. 602 [1891-4], All E.R. Rep. 640, 69 L.T. 604 (H.L.).

such situations. The last problem, that of jurisdiction and enforcement of court orders, is common to all the provinces.

1. *The common law is not in harmony with the principles of the* Family Relations Act[10]

This first, and most obvious conflict between the common law and the *Family Relations Act* is in the classification of property. The *Family Relations Act* makes no distinction between movable and immovable property; all assets connected with a family purpose are subject to the same analysis. The common law, however, for primarily historical reasons, accords a special status to immovable property and treats it differently than other types of property. Thus it is possible, under the common law, that a house and a motor home purchased at the same time and in the same province would be divided according to different laws.

There are less obvious conflicts between the common law and the *Family Relations Act*. In deciding issues of jurisdiction and choice of law, the common law focuses on the connection of the territory to the assets in dispute and to each of the parties. The *Family Relations Act* also looks to the assets in dispute and the parties when dividing property, but rights that arise are derived from the fact of the marital relationship. This marital relationship, and which territory may have had the closest association with the marriage plays no role in the common law analysis of conflict of law issues. This is arguably a deficiency in the common law. A consideration of the connections between the territory and the marital relationship could do much to help the court decide which is the best forum for hearing the dispute, and the most appropriate law to be applied. Allowing the court to examine this connection would do much to harmonize conflict of law rules with the *Family Relations Act*.

A more subtle disharmony arises out of the differing treatment by the common law and *Family Relations Act* of property itself. It has been many years since rights under the *Family Relations Act* depended upon who owned or had title to property when dividing it in family property disputes. However, the common law jurisprudence governing choice of law and jurisdiction has been heavily influenced by concepts of ownership and title. James G. Macleod stated;

> The problem in simply applying the common law rules is that the common law rules were geared to ownership of property whereas the matrimonial property statutes in Canada, are, in the main concerned with a division otherwise than according to ownership.[11]

The effect of ownership and title in choice of law and jurisdiction questions is less obvious than the other differences cited, but notable nevertheless. Which law will be chosen to divide rights in a moveable, for example, will be determined by where the vesting of ownership and title in the moveable occurred.

---

10. R.S.B.C. 1996, c.128.

11. Annotation to *Woodward* v. *Woodward*, (1981) 23 R.F.L. (2d) 448 (B.C.S.C).

2. *The common law is excessively complex and technical*

It does not take a complex fact pattern to create a scenario that will severely strain the financial resources of an ordinary family to resolve. Take the following example:

> *The parties married in Saskatchewan in 1960 and moved to Alberta in 1968. They separated in 1977 and the wife moved to British Columbia. In 1978 the husband and children moved back to Saskatchewan taking substantially all of the assets with them including a mobile home purchased in Alberta in 1975 and occupied by the husband and children until 1978 when he sold it and other family assets. There was no marriage contract or settlement.*

This is the fact pattern of *Woodward* v. *Woodward*.[12] Simple as these facts were, the court had to apply the laws of three separate territories in making its decision:

- British Columbia law was applied to decide jurisdiction and choice of law (the B.C. Supreme Court accepted jurisdiction, basing its decision to do so on the fact that the plaintiff was domiciled in British Columbia).
- Saskatchewan law was applied to divide the movable assets in Saskatchewan, it being the home of the husband.
- Alberta law was applied to divide the mobile home, as the court found that the interests of the parties in that property had come into being while they lived in Alberta.

The law has changed somewhat since 1981, and this case would receive a somewhat different analysis were it to go before a British Columbia court today.[13] However, the law has not become simpler, and it is not difficult to imagine a similar set of facts that would require the application of the law of three or more territories. Even more complex legal scenarios can be created when issues of *renvoi*[14] and extra-provincial enforcement arise.

3. *Problems in jurisdiction and extra-provincial enforcement*

A third criticism of the *status quo* in domestic property law is not restricted to the law of British Columbia. It is a problem faced by all provinces. This is the problem of extra-provincial enforcement of court orders. Tied closely to the enforcement problem is the problem of jurisdictional limitations over immovable property.

---

12. *Woodward* v. *Woodward*, (1981) 23 R.F.L. (2d) 448 (B.C.S.C.).

13. Two substantial differences can be noted. First, the law of the domicile of the husband is no longer necessarily the law that governs the division of the movable property. This is due to the enactment, in 1985, of section 60 of the *Law and Equity Act*, R.S.B.C. 1996, c.253. Instead, the law of the last common habitual residence will govern. Second, *Morguard* and the cases that have followed it would almost certainly have an influence on the jurisdictional analysis of the court.

14. *Renvoi* refers to a catch-22 situation created by reference to an external law. An example is territory A insisting that the law of territory B governs a dispute, when the law of the territory B insists that the law of territory A should govern. *Renvoi* problems have existed for more than 150 years, and there is an impressive body of case law built up for analyzing such situations. There are no easy answers, however, and complex and technical legal arguments are often necessary to resolve these problems. Fortunately, *renvoi* problems are rare in family property disputes, because of the efforts of many provinces (not including British Columbia) to eliminate them.

When a court hears a family property case with connections to more than one province, it is often impossible to make a fair division without taking into account family property in those other provinces. The common law in fact allows the consideration of the value of these other properties[15] when dividing property or awarding compensation for property rights. However, giving remedies that depend, in some way, upon the existence of these extra-territorial properties presents problems.

The simplest remedy is to order one party to make a compensatory payment to the other. Money judgments, however, are not automatically enforceable outside the province where the decision was made; they must be enforced through the court in each province where enforcement is sought. The machinery that exists in most Canadian provinces allows a defendant to challenge an out-of-province judgment on the grounds that the original court wrongly assumed jurisdiction. If a defendant is successful in this argument, then the judgment will not be enforceable within the other territory.[16]

A compensatory payment is not appropriate or possible in all cases. Sometimes, in order to make a fair division of property, the court must go beyond simply considering the value of extra-territorial immovable property, and make an order that affects the ownership rights in that property. The power to decide issues relating to title and ownership of foreign property, however, is within the exclusive jurisdiction of the province or territory where that property is located. Courts simply do not have the power to make orders affecting the title and ownership of extra-territorial property, no matter how much the facts of a particular case may warrant it.

The courts have developed various indirect methods of getting around this limitation. One is to reapportion entitlement to domestic property within the province to compensate for the court's inability to divide property outside the province. Although it has not been as widely used, courts may also order the losing party to convey part or all of their interest in an extra-territorial property to the other.[17]

All of these indirect solutions, however, suffer from inadequacies. They are not available or appropriate in all situations. As well, some doubts exist about the strength of their legal foundation. Because of these limitations, there will still arise instances where a family property action must be heard by the court of more than one territory before all the issues can be resolved.

All of these problems significantly limit the effectiveness of family law legislation when applied to family property disputes touching on issues outside the province. The complexity of the common law

15. *Tezcan* v. *Tezcan*, (1987) 20 B.C.L.R. (2d) 253 (B.C.C.A.).

16. Many of these difficulties are removed if the *Uniform Enforcement of Canadian Judgments Act (UECJA)*, promulgated by the Uniform Law Conference in 1992, has been adopted by the territory in which enforcement is sought. Extra-territorial Canadian judgments registered in a province or territory that has enacted *UECJA* are enforceable without the necessity of further proceedings. Currently, Prince Edward Island is the only province that has brought this legislation into force. Although the *EUCJA* has been enacted in British Columbia, it has not yet been brought into force.

17. Such *in personam* orders rest on a distinction between the foreign immovable itself, and rights in the foreign immovable. The rights in the foreign immovable are located in the person of the owner, and therefore, the court may make an order compelling that person to do what the court lacks the power to do itself: to effect a change in title to the property. Unfortunately, this remedy is only available if the defendant is within the territorial jurisdiction of the court. Such orders cannot (currently) be enforced extra-territorially.

conflict of law rules creates a lack of clarity and predictability, encouraging litigation as a means of solving family property disputes. When cases do go to court, the legalism that pervades the jurisprudence leads to unnecessarily technical arguments, extending trials and making an already expensive process more so. Finally, when a court does reach a decision on how to fairly divide the property, jurisdictional limitations on its power to effect that division can lead to unsatisfactory and incomplete results.

Family property law should be as simple and as clear as possible. Ideally, the division of assets should be governed by a single body of legislation, and the rules for choosing that legislation should be transparent and easy to understand. Furthermore, these rules should be in harmony with provincial family property legislation, and contain some provision for confronting the difficulties of extra-territorial enforcement. British Columbia is currently further away from this ideal than any other province.

E. The *Uniform Act*

In 1986, Quebec, Ontario and Nova Scotia were requested by the Uniform Law Conference of Canada to report on private international law in family property regimes. The Report was prepared by the Quebec Representatives and published in the *Proceedings of the Seventieth Annual Meeting of the Uniform Law Conference of Canada* (1988). In 1995 the Conference returned to the topic, and the B.C. Commissioners were asked to prepare a Report to be considered by the Conference at its 1996 Meeting.

The Report submitted by the B.C. Commissioners, entitled *Choice of Law in Matrimonial Property*, set out a number of principles as guides for the drafting of uniform legislation governing conflicts of law in family property disputes. In 1997, a legislative proposal based upon these principles was drafted and promulgated. The B.C. Law Institute recommends the adoption of that legislation, titled the *Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act* (the *Uniform Act*).

The following discussion is presented as an overview of the proposed *Uniform Act*. For more details, the reader is referred to the annotated *Act*, attached as an Appendix.

1. *Jurisdiction in the* Uniform Act

    (a) Jurisdiction Generally

A few years after the *Morguard* decision previously referred to was handed down, the Uniform Law Conference recommended the adoption of a *Uniform Court Jurisdiction and Proceedings Transfer Act (UCJPTA)*. This *Act* restated the basis of court jurisdiction that included a "real and substantial connection test," as in *Morguard*. Unlike the *Morguard* judgment, however, the legislation went into some detail in setting out the factors that would define such a connection. The *Uniform Act* proposed by the ULC draws much from the principles of jurisdiction and real and substantial connection laid down in *UCJPTA*.

The *Uniform Act* relies upon some new terminology. Instead of *jurisdiction* to refer to the authority of the court to hear and decide upon issues coming before it that touch upon its territory, the *Uniform Act* refers to the *territorial competence* of the Court. The object of this distinction is to highlight a difference between *territorial competence* - when jurisdiction is based on geographical factors - and *subject-matter competence* - when jurisdiction is based upon legal factors, such as constitutional boundaries or claim limits.

In setting out the rules for territorial competence, the *Uniform Act* incorporates aspects of the law both before and after *Morguard*. In determining territorial competence over the parties, section 3 of the *Act*, like the common law, instructs the court to look to factors such as the location of habitual residences, the existence of a marriage contract, and whether the defendant agrees or submits to the court's jurisdiction.

In determining territorial competence over the subject matter of the dispute, the *Act*, again like the common law, looks for a "real and substantial" connection between the forum and the subject matter of the dispute. The *Act*, however, takes a broader approach to what is embraced by the subject matter. Whereas in the common law, the subject matter of a family property dispute is simply the property at issue, section 3 of the *Uniform Act* instructs the court to look for a real and substantial connection the forum and the "facts on which the domestic property proceeding against the defendant is based." Section 4 provides an elaboration of elements of the case which may contribute to identifying such a connection between the forum and the facts.

(b) Forum non conveniens

The *Uniform Act* retains the common law concept of *forum non conveniens*. In section 5, the *Act* sets out a list of six factors that a judge must consider when deciding whether to decline to exercise jurisdiction. Some of these factors are found in the existing jurisprudence surrounding *forum non conveniens*,[18] for example section 5(2)(b), which requires a consideration of which law is to be applied. Some go beyond it, for example section 5(2)(f), which requires a consideration of the fair and efficient working of the Canadian legal system as a whole.

2. *Choice of Law in the* Uniform Act

It is in the choice of law rules that the *Uniform Act* is most strongly distinguished from the common law. There are two main differences:

First, the *Uniform Act* requires that the same law be applied to all property in the dispute. This law is referred to in the commentary to the *Act* as the "proper law" of the marriage, the law of the jurisdiction that is more closely associated to the marriage than any other. Restricting the division of property to a single law is a significant departure from the common law, which sets no limit on how many different

18. In *Stern* v. *Dove Audio, Inc.,* [1994] B.C.W.L.D. 1247 (B.C.S.C.) Low, J. set out a widely cited list of factors for determining "real and substantial" connection in the context of determining whether the *forum non conveniens* discretion should be exercised.

laws could be applicable in a single domestic property proceeding. Section 8 of the *Uniform Act* sets out the criteria to be used in identifying the proper law of the marriage.

Second, unlike the common law, the rules that determine the choice of law under the *Uniform Act* are not based upon characteristics of the property in dispute. Instead, a hierarchy of factors relating to the marriage is looked to when determining the proper law of the marriage. In dividing the family property, the court is to apply the law of the province of the couple's last common habitual residence. If there was no such residence, the province most closely associated with the marriage is to be used, and failing that, the law of the province in which the plaintiff habitually resided.

The *Uniform Act* treats marriage contracts in substantially the same way as the common law does now. Marriage contracts are binding and, in general, determinative of the respective property rights of the parties. This is set out in section 6. Section 7 provides a resolution to certain choice of law conflicts that arise between the civil law of Quebec and the common law. Essentially, the *Uniform Act* adopts the civil rules for choice of law for resolving disputes regarding particular kinds of marital property when the first common habitual residence of the parties was in a "regime of community of property."[19]

The choice of law rules in the *Uniform Act* represent a welcome improvement over the common law position. While they cannot totally eliminate what, from a British Columbia perspective, might be called "hard cases," they significantly narrow the range of circumstances in which they can arise.

3. *Remedies*

A significant problem that arises in family property disputes that deal with immovable property in another province or territory is the inability of the court to make a judgment enforceable against that property. It is a major, and arguably unnecessary obstacle to the efficient resolution of family property disputes. If the province hearing the case correctly accepted jurisdiction, and applies the appropriate law, what objection can be raised to having that judgment binding upon properties in other provinces? The judges empowered to hear family disputes are all appointed by the same body (the federal government), and despite differences in provincial law, the results are substantially the same in most cases. Moreover, if there is an error, all provincial courts answer to the same final arbiter, the Supreme Court of Canada.

There are many good arguments to be made against the current obstacles to enforcing extra-provincial judgments. The reality, however, is that the only forum capable of making a binding order affecting title to immovable property in another territory is the court of that territory. Despite the attempts of courts to circumvent these obstacles, judgments under current laws are often unsatisfactory and incomplete.

Section 9 of the *Uniform Act* provides for a more satisfactory approach to dividing extra-provincial property. Besides providing a more solid statutory authority for applying the indirect approaches

19. *Community of property* is based upon an assumption that the parties have an implied contract to share in all property acquired before and during the relationship. The only Canadian jurisdiction that has community of property is Quebec, and only spouses who married in Quebec before July 1, 1970 would be automatically under a regime of community of property.

increasingly relied upon by the courts, it also grants courts the jurisdiction to make direct orders regarding the division of the extra-provincial, immovable property in some situations. This latter option is available when the province where the property is located allows for the recognition and enforcement of an order for non-monetary relief by the court of another territory. The adoption by the provinces of the *Uniform Enforcement of Canadian Decrees Act*, promulgated by the Uniform Law Conference in 1997, is one means by which this may occur.

F. The Need for Uniformity

The *Uniform Act* offers an advantage over the common law in addition to those discussed above. The *Uniform Act* is drafted in such a way as to be easily adapted and inserted into the family law legislation of all the provinces and territories of Canada. This allows for a uniformity in conflict of law legislation that is important for family property disputes for two reasons:

1. Uniformity increases predictability in the law. It is important that, when the facts of a family property dispute touch upon more than one province or territory, it be easy for the parties to predict which laws will be applied in the dispute. Differences of expectation and opinion at this stage render litigation almost inevitable.

2. Uniformity discourages "forum-shopping." Where family property division rules differ from province to province, there is a tendency for each party to seek to have the dispute heard in the territory whose law is most sympathetic to their particular position. This tactical legal manoeuvring, called forum-shopping, increases the cost and duration of a trial without addressing any of the substantive issues. Uniform legislation setting out jurisdiction and choice of law rules would do much to minimize this problem.

It is true that the benefits of uniformity will not be seen immediately, and full uniformity across all provinces may never be realized. However, each province that adopts a version of the *Uniform Act* makes a significant contribution to the integration and rationalization of family law across Canada.

G. Adopting the *Uniform Act*

The *Uniform Act* was drafted in a form that allows it to be easily added as a Part to the statute in the enacting province or territory that deals with the division of family property. This Report recommends that the *Act* be adopted as section 69 in the current *Family Relations Act*, with the following modifications:

1. Sections 1 to 9 of the *Uniform Act* should be renumbered as sections 69.1 to 69.9
2. The definition of "court" should be removed, and all references to "court" throughout the *Act* should be replaced by "Supreme Court."
3. All references to "[enacting province or territory]" should be replaced by "British Columbia."
4. In sections 1(1) and 2, "Part" should be replaced by "Sections 69.1 to 69.9."

H. Conclusion

The B.C. Law Institute recommends the adoption of the *Uniform Act* as an addition to the current *Family Relations Act*. The *Uniform Act* is a superior legal instrument to the common law for resolving family property disputes for several reasons:

- It is simpler to understand and apply. The tests for jurisdiction and choice of law set out in the nine sections of the *Act* eliminate much of the legalism and technicalities of the common law.
- It is more in harmony with the principles of the *Family Relations Act*. Family law in British Columbia took a different direction than the common law many years ago, and the failure of conflict of family property law rules relating to family property to follow a similar path has worked against the basic objectives of family property legislation.
- It makes provision for the extra-provincial enforcement of orders pertaining to immovable family property, and the eventual possibility of uniform conflict of law rules across Canada.

Rapid changes in our society, combined with the inadequacies in the current law and the pressing need for interprovincial uniformity make the *Uniform Act* a large step forward for family property law in this province and across Canada. In order to ensure quick acceptance and ratification by all the provinces, it important that British Columbia take a leadership role in adopting the *Uniform Act*.

APPENDIX[20]

Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act

Comment: This uniform legislation is drafted to be added as a Part to the statute in the *enacting province or territory* that deals with the division of property owned by one or both spouses on the break up or termination of their relationship.

Whenever a dispute crosses over borders, involving more than one territory, questions arise concerning where proceedings should or can be brought (which court has jurisdiction to hear the dispute) and which territory's laws govern the resolution of the dispute (choice of law). Both the common law and civil law developed detailed legal rules to deal with these very complex questions. Most Canadian territories have amended at least some aspects of these rules as they apply to resolving disputes about domestic property. Not all Canadian territories have adopted the same approach to rationalizing the rules, and not all of the approaches adopted have been entirely successful.

This legislation sets out uniform principles to decide (a) when a court has jurisdiction to hear a dispute that concerns domestic property, (b) when a court that has jurisdiction should decline it, and (c) the selection of the territory whose law is to govern the disputes. The legislation applies where the dispute involves more than one Canadian territory as well as where it involves Canadian and non-Canadian territories.

20. The *Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act* was published by the Uniform Law Conference of Canada in the proceedings of its 1997 Conference.

Definitions and Presumptions

1 (1) In sections 2 to 9,

"regime of community of property" means any regime of domestic property which is imposed by law and which

(a) determines the extent to which each spouse has rights in and over all or certain of the domestic property owned by the other spouse during the marriage, and

(b) provides for the sharing of domestic property on the break up or termination of their marriage

and includes a regime of partnership of acquests, but does not include

(c) a regime of separate property,

(d) a regime under which rights in or with respect to domestic property are deferred until, or after, the occurrence of an event signifying the break up or termination of the marriage,

"Court" means the superior court of unlimited trial jurisdiction of [enacting province or territory].

"defendant" means a person who is or was in a marriage with the plaintiff and against whom a domestic property proceeding has been brought,

"domestic property" means real property or personal property wherever located owned by the plaintiff or defendant separately or as co-owners acquired by them before or during their marriage,

"domestic property proceeding" means a proceeding brought in connection with an application for

(a) a division of,

(b) compensation in lieu of, or for foregoing, rights in, or

(c) a declaration as to rights in

domestic property,

"marriage" includes any relationship involving cohabitation that is recognized under the internal law of the territory selected under ss. 6, 7 or 8 that governs domestic property rights on the break up or termination of the relationship,

"plaintiff" means a person who has commenced a domestic property proceeding,

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

(a) the territory or legal system of the state in which the court is established, and
(b) a party to a proceeding in the court or the facts on which the proceeding is based.

(2) Parties do not have a common habitual residence in a territory while they live separate and apart in the territory.

Comment: Once this Part is placed in the context of the domestic property legislation of the enacting province or territory, which will have its own set of definitions, many of these definitions may be unnecessary or require fine-tuning.

The definition of "regime of community of property" distinguishes between

(a) various regimes which recognize rights in domestic property arise immediately by virtue of the marriage and
(b) regimes which provide for
    (i) separate property or
    (ii) separate property during marriage and property division on the break up or termination of the relationship.

The legislation sets out one choice of law rule for domestic property proceedings that deal with property held in community of property (*see* section 7) and another choice of law rule for property not held in community of property (*see* section 8). The legislation sets out a choice of law rule that applies at the beginning of marriage where property is held in community of property because property sharing commences at that time. For other property, the choice of law rule that applies is based on a test that applies at the end of the relationship. The definition only refers to situations where community of property is imposed by law. In cases where the spouses agree that their property will be held in community of property, section 6, which applies in all cases where an agreement is made, would govern.

Some territories have enacted legislation, or are contemplating enacting legislation, that allows the courts to divide property on the break up or termination of a common law, or a same sex, relationship. The term "marriage," consequently, is given an expanded definition.

The legislation applies when marriage terminates by, *e.g.*, divorce or, where recognized under the applicable law, the death of a spouse. The definition of "marriage" also refers to the "break up" of the relationship to ensure that the legislation applies when the relationship does not terminate, but ends when, *e.g.*, a spouse obtains a court order recognizing that the spouses' have separated from board and bed, or an order of nullity,

The legislation sets out jurisdiction and choice of law rules for proceedings relating to domestic property. *See* the definition of "domestic property." For a court to make an order that finalizes all aspects of a dispute over domestic property, it must be able to have regard to property located outside its own territory, as well as outside Canada. To the extent that the order cannot be enforced outside the court's territory, other methods, described below, can be employed. *See* section 9.

The legislation addresses two separate issues: (a) what rules should determine when courts in a particular province or territory can entertain a proceeding relating to domestic property and (b) what rules should determine the law to be applied to resolve disputes concerning domestic property. The term "territorial competence" is used in the sections dealing with when a court has jurisdiction to entertain a proceeding. These sections are patterned after the *Uniform Court Jurisdiction and Proceedings Transfer Act*.

The test of first "common habitual residence" is used to select the law that applies to resolving a dispute over domestic property held in community of property. [See section 7] The test of last "common habitual residence" is used to select the law that applies to resolving a dispute over domestic property that is not held in community of property. [See section 8].[21]

The fact that spouses lived in the same territory but did not cohabit, is not relevant for determining choice of law issues, although may be relevant for determining whether the court has jurisdiction to hear the dispute. [*See* section 4] The phrase "common habitual residence" has been interpreted to mean "the place where the spouses most recently lived together as husband and wife and participated together in everyday family life." (*Pershadsingh* v. *Pershadsingh*, (1987), 9 R.F.L. (3d) 359, 361 (Ont. H.C.); *Adam* v. *Adam* (1994), 7 R.F.L. (4th) 63, 67 (Ont. Gen. Div.) confirmed on appeal (1996) 65 A.C.W.S. (3d) 756 (Ont.C.A.). It embraces the idea of cohabiting. Section 1(2) confirms that this interpretation also applies in the context of this legislation.

Territorial Competence

2 The territorial competence of the Court in a domestic property proceeding is to be determined solely by reference to this Part.

Comment: Ss. 2 to 5 are patterned after the *Uniform Court Jurisdiction and Proceedings Transfer Act* ("*UCJPTA*"). *UCJPTA* provides comprehensive rules for determining when the courts of a province or territory have jurisdiction to entertain a proceeding.

Territorial Competence Rules

3 The Court has territorial competence in a domestic property proceeding that is brought against a defendant only if

21. The expression "habitual residence" is not defined in the Act. This is consistent with a decision taken by the Uniform Law Conference in developinng the Uniform Court Jurisdiction and Proceeding Transfer Act where the synonymous term "ordinary residence" was left undefined. In this Act, the expression "habitual residence" was adopted since it is most often used (also without a definition) in the legislation of those provinces that have adopted conflict of law rules in relation to family property disputes. The Ontario *Family Law Act*, R.S.O. (1990) c.F-3 s.15 is an example of the term being used without being defined.

(a) the defendant has instigated another proceeding in the court to which the domestic property proceeding is a counterclaim,
(b) during the course of the domestic property proceeding the defendant submits to the court's jurisdiction,
(c) there is an agreement between the plaintiff and the defendant to the effect that the court has jurisdiction in the domestic property proceeding,
(d) either the defendant or the plaintiff is habitually resident in [enacting province or territory] at the time of the commencement of the domestic property proceeding, or
(e) there is a real and substantial connection between [enacting province or territory] and the facts on which the domestic property proceeding against the defendant is based.

Comment: Section 3 is based on *UCJPTA*, section 3.

Real and Substantial Connection

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

(a) the domestic property that is the subject matter of the domestic property proceeding is located in [enacting province or territory],
(b) the last common habitual residence of the plaintiff and defendant was in [enacting province or territory],
(c) a petition with respect to the marriage of the plaintiff and defendant has been validly issued under the Divorce Act in [enacting province or territory].

Comment: *UCJPTA*, section 10, sets out a number of factors from which it can be presumed that there is a real and substantial connection between the proceeding and the territory in which the court is located. Section 4 is based on *UCJPTA*, section 10, although the listed items are specially formulated to apply to domestic property proceedings and are not found in *UCJPTA*. A court whose jurisdiction derives solely from the fact that a minor portion of domestic property is located in the territory--item (a)--should ordinarily decline jurisdiction on principles of *forum non conveniens*. See section 5. Not all of the items listed in sections 3 and 4 will necessarily be consistent with other parts of the law of the enacting province or territory. *E.g.*, a Quebec court would not have jurisdiction unless the spouses currently have either domicile or residence in Quebec. In the absence of domicile or residence, parties cannot confer jurisdiction on a Quebec court by agreement. Each jurisdiction must consider whether a subsection is needed, or should be omitted because it is inconsistent with other provincial law.

Discretion About the Exercise of Territorial Competence

5 *(1) After considering the interests of the parties to a domestic property proceeding and the ends of justice, the Court may decline to exercise its territorial competence in the domestic property proceeding on the ground that the court of another state is a more appropriate forum in which to try the domestic property proceeding.*

(2) The Court, in deciding the question of whether it or a court outside [enacting province or territory] is the more appropriate forum in which to try a domestic property proceeding, must consider the circumstances relevant to the domestic property proceeding, including

(a) the comparative convenience and expense for the parties to the domestic property 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 domestic property proceeding,
(c) the desirability of avoiding a multiplicity of legal proceedings,
(d) the desirability of avoiding conflicting decisions in different courts,
(e) the enforcement of an eventual judgment, and
(f) the fair and efficient working of the Canadian legal system as a whole.

Comment: Section 5 is based on *UCJPTA*, section 11. It restates the doctrine of *forum non conveniens*.

Principles of *forum non conveniens* should play an important role in domestic property proceedings that concern property in more than one territory, or where the spouses lived in more than one territory during the marriage. While several courts may be able to assume jurisdiction on a variety of reasonable bases, if the policy of settling domestic property disputes by reference to a single law in a single proceeding is to work well, usually the dispute should be heard in the territory that is the most appropriate forum.

Choice of Law Rules: Contract

6 *(1) If the plaintiff and defendant entered into a contract, either before the formation of, or during, their marriage, that specifies how domestic property is to be divided in the event of the break up or termination of their marriage, their rights in domestic property are determined by the contract.*

(2) The contract referred to in subsection (1) is enforceable subject to the internal law of the territory determined in accordance with section 8.

Comment: Under both civil law and common law, parties may enter into a contract about domestic property. Some provinces have legislation that allows a court to inquire into the fairness of a contract made on or during marriage that relates to the disposition of domestic property on marriage break up

or termination. Subsection (2) provides a rule for determining which law governs on that issue. *See* section 8. Suppose, *e.g.*, that an Alberta court has territorial competence to hear the proceeding, but the choice of law rules select Nova Scotia law. The Alberta court would apply Nova Scotia law, not Alberta law, to determine whether the contract is enforceable. Subsection (2) does not address the question of whether the contract was validly made, which would continue to be determined by rules of private international law.

Choice of Law Rules: Marriage and Community of Property

7 *Subject to section 6, if the internal law of the territory in which the plaintiff and defendant first had a common habitual residence during their marriage provides that some or all of their domestic property is held in a regime of community of property, then regardless of a change of residence, their rights in the domestic property that is subject to the regime of community of property on the break up or termination of their marriage are determined by the internal law of that territory.*

Comment: Section 7 is based on a principle of both civil law and common law. It is called the "doctrine of immutability of original regime." The one difference is that the civil law and the common law tests are based upon domicile at the time of marriage, which may be different from residence. Using domicile as a test for resolving choice of law issues for matrimonial disputes has been expressly rejected in Canadian jurisdictions that have either (a) reconsidered choice of law issues, or (b) enacted legislation providing that a wife may establish a domicile independent of her husband. The alternative selected is to adopt an approach based on the proper law of the marriage, determined by a test that has regard to where the spouses first had a common habitual residence while married. Section 7 applies if the territory's law provides for community of property, which is given an expanded definition to embrace virtually every system which recognizes that one spouse has interests and rights in the property of the other by virtue of the marriage. *See* the definition of "regime of community of property."

The only Canadian jurisdiction that has community of property is Quebec, and only spouses who married without contract before July 1, 1970 would be under a regime of community of property. Since July 1, 1970, spouses in Quebec can still choose community of property by contract. If they do not make such a contract, they are subject to a regime of partnership of acquests. The definition of "regime of community of property" specifically includes partnership of acquests.

In most other cases, Canadian jurisdictions adopt principles of "deferred" community of property (*i.e.*, during the marriage, principles of separate property determine ownership. It is not until marriage break up that legislation calls for a division of property, or an adjustment of each spouse's net worth through an equalizing payment). This rule is proposed to accommodate the conflicting choice of law rules adopted by the common law (which looks to the end of the relationship) and those of the civil law (which look to the beginning of the relationship). The rule only applies to domestic property that is actually affected by the regime of community of property. In a jurisdiction such as Quebec, that has principles of community of property as well as separate property and partition of family patrimony at the break up or termination of the marriage, this rule would not apply to the domestic property that was

held as separate property or that qualified as family patrimony. The law that applies to domestic property that is held outside of community of property is determined by section 8. See the definition of "regime of community of property."

Canadian legal policy is firmly in favour of community of property rules or deferred community of property rules for dividing domestic property on marriage break up or termination. Consequently, a regime of separate property will govern the dispute only if either (a) the parties so agree, or (b) section 7 does not apply and separate property rules are required by the law of the territory selected in accordance with the choice of law rules in section 8. If the territory provides for community of property, but the spouses have made a marriage contract providing for a different regime, section 7 would not apply.

Choice of Law Rules: Proper Law of the Marriage

8 (1) Subject to sections 6 and 7, substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory where the parties had their last common habitual residence.

(2) If the territory selected by the application of subsection (1) is located outside Canada and is not the territory most closely associated with the marriage, the substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory that is most closely associated with the marriage.

(3) If there is no place where the parties had a common habitual residence, substantive rights of the plaintiff and defendant in a domestic property proceeding must be determined by the internal law of the territory where the plaintiff last habitually resided.

Comment: Domicile is no longer a practical test for determining the proper law of the marriage. There is a consensus among Canadian common law provinces that have reconsidered the common law rules that the proper law of the marriage is determined by the common habitual residence of the spouses. If they resided in more than one location, it is the last common habitual residence. While the question of domicile depends upon a number of factors, including intention, residence is determined purely by the physical fact of maintaining a residence in a particular territory.

Procedural rules would be determined by the law of the territory in which the proceeding takes place. Substantive questions, such as who qualifies as a spouse, the determination of when rights in property arise, whether property can be divided between the spouses and in which proportions, and valuing property for the purpose of determining compensation in lieu of, or for foregoing, rights of property, *etc.* would be determined by the law of the territory in which the parties last had a common habitual residence.

A special rule is adopted where a non-Canadian territory is involved. It might be thought that more problems will arise from easy mobility within a federation such as Canada than between Canada and another nation. In a federation, people will relocate fairly freely--resulting in relatively casual ties between the laws of any one territory and the marriage--while movement between different nations is complicated by immigration laws and the ability to earn a living. But within the Canadian federation there is a basic similarity in approach on when rights to domestic property will be determined by separate property principles.

In contrast, a change in common habitual residence between nations might result in fundamentally different legal principles applying. Consequently, movement from one nation to another raises more difficult questions than movement between Canadian territories. Where the parties move to another nation, the policy suggested is that the court should inquire into whether the law of the last common habitual residence is that of a territory most closely associated with the marriage.

The approach adopted in this Uniform Act departs from the policy of the *Convention on the Law Applicable to Domestic Property Regimes*. The Convention was adopted by the Hague Conference on Private International Law in 1978, and sets out precise choice of law rules where the laws of two or more nations might apply in cases where the spouses have not made an agreement. These rules place restrictions on how easily the governing laws of one nation will be replaced by those of another. The basic rule is that property rights on the break up of a marriage are determined by the law of the territory where the spouses first establish a habitual residence after they marry. The laws of another territory in which they establish a habitual residence will be applied, however, if the habitual residence extends for 10 years or more, or it is the territory of their common nationality. As of July 9, 1996, the *Convention* had been ratified by France, Luxembourg and the Netherlands and signed by Austria and Poland.

The test of "common habitual residence" cannot be applied if the parties never cohabited. *See* section 1(2). If the spouses never cohabited, the proper law is determined by the territory where the applicant last habitually resided.

The references to internal law are to ensure that principles of *renvoi* do not apply.

Property Located Outside Territory

9 *(1) A Court with territorial competence to entertain a proceeding relating to domestic property may dispose of all issues relating to ownership and division of the domestic property.*

(2) Where the Court has territorial competence to entertain a proceeding relating to domestic property, some of which is located outside [enacting province or territory], the court may

(a) reapportion entitlement to domestic property within [enacting province or territory] to compensate for rights in domestic property located outside [enacting province or territory],

(b) order the party who has legal title to domestic property located outside [enacting province or territory] to pay compensation to the other party in lieu of division,

(c) make an order in connection with domestic property located outside of [enacting province or territory] that is enforceable against the party that owns the domestic property, including an order preserving the domestic property, respecting possession of the domestic property or requiring the owner to convey or charge all or part of the owner's interest in it to the other party, or

(d) if the internal law of the territory in which the domestic property is located allows for the recognition and enforcement of an order for non-monetary relief made by a court of another territory, make an order for non-monetary relief.

Comment: Canadian courts routinely use the techniques set out in paragraphs (a) and (b) for arriving at a fair division of domestic property, although in some cases there is doubt concerning a court's ability to do so. Any such doubt would be put to rest by specifically incorporating these powers into the relevant legislation.

The option under paragraph (c), the *in personam* order, is often overlooked. It is open to the court to make an order requiring a person to perform a specific obligation. If the person subject to the order fails to obey it, contempt proceedings can be brought against that person to enforce it. Such an order is effective if the person is within the court's territory. It is an equitable jurisdiction that has been recognized since the 18th Century: *see, e.g., Penn* v. *Lord Baltimore*, (1750) 1 Ves. Sen. 444, 27 E.R. 1132.

The policy underlying paragraph (d) is that a local court can make an order pertaining to the ownership or division of domestic property located outside the territory, if the territory in which the domestic property is located adopts legislation similar in policy to the *Uniform Enforcement of Canadian Decrees Act*. This provision is less useful in those provinces that adjust property rights on marriage break up or termination by requiring one spouse to make an equalizing payment to the other spouse. But even in those provinces, legislation allows the court to make a non-monetary order to facilitate separating the finances and property of spouses on marriage break up or termination.