ONTARIO BAR ASSOCIATION
A Branch of the CANADIAN BAR ASSOCIATION

300-20 rue Toronto Street
Toronto, Ontario M5C 2B8
416-869-1047 1-800-668-8900
Fax/Télécopieur: 416-869-1390
www.oba.org

April 30, 2009

Dr. Patricia Hughes
Executive Director
Law Commission of Ontario
Computer Methods Building, Suite 201
4850 Keele Street
Toronto, ON, Canada, M3J 1P3

Dear Dr. Hughes:

On behalf of the Ontario Bar Association (OBA), I am pleased to provide you with our submission on the Codification of Judicial Jurisdiction in Ontario.

The OBA working group, chaired by Scott Fairley and Colin P. Stevenson, has worked tirelessly to develop a response that both addresses the questions posed in your consultation paper and is reflective of the large and diverse membership of the association.

I trust you will find the enclosed submission both informative and helpful.

Yours truly,

Jamie Trimble
President
Ontario Bar Association

c.c. Professor Janet Walker, OHLS Law Commission of Ontario, Scholar in Residence

OBA Commentary on the Codification of Judicial Jurisdiction in Ontario

Submitted on *April 30, 2009*

Submitted by:

Jamie Trimble
President
Ontario Bar Association

Scott Fairley
Co-Chair (International)
Judicial Jurisdiction
Working Group

Colin P. Stevenson
Co-Chair (Civil)
Judicial Jurisdiction
Working Group

Submitted to:

Law Commission of Ontario
Crossborder Litigation Project
Computer Methods Building, Suite 201,
4850 Keele Street
Toronto, ON, Canada, M3J 1P3

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Introduction

The LCO has sought input from stakeholders to ensure all relevant issues are identified and "the problems that now exist are resolved in the most appropriate way" (p.1). The OBA appreciates the opportunity extended to it by the LCO to provide constructive input into this important law reform initiative and the very helpful and informed structural framework the LCO has provided in its Consultation Paper. The law in this area is said to be "complex and uncertain" (p.1). Uncertainty is said to have a "direct impact on business decisions affecting the local economy" (p.2). Chief Justice Winkler is quoted:

> "Ontario needs to do a better job of marketing its world class legal system to the business community as a means of strengthening its economy during these tough financial times." (p.2)

The OBA concurs with Chief Justice Winkler's comment. However, the OBA interprets that comment, particularly in the context of the law of jurisdiction, as a general endorsement of the common law as it now stands in Ontario rather than a criticism of it. Part of the "world class legal system" to which the Chief Justice of Ontario refers includes the concept of properly restrained jurisdiction respectful of other jurisdictions, a concern for conserving scarce judicial resources, and robust criteria for exercising jurisdiction resistant to opportunistic forum shopping.

The Consultation Paper suggests that clarifying the law of jurisdiction in legislation could make the civil justice system considerably more relevant, effective and accessible. The OBA concurs that there is always room for improvement; but the OBA does not view the common law rules on jurisdiction as currently understood and applied in Ontario as something "broken", in need of a "fix". The OBA's responses to the specific questions addressed by the LCO proceed from this underlying premise and the related view that the Model Law proposed in 1994 by the Uniform Law Conference of Canada should be enacted substantially as drafted. Although the OBA has commented on each of the LCO's questions, it recommends that departures from or additions to the Model Law should be minimized.

OBA Codification of Judicial Jurisdiction Working Group Members

Colin P. Stevenson, Co-Chair (Civil Litigation)
Scott Fairley, Co-Chair (International Law)
Jonathan Hood, Secretary, OBA International Law Section
Kevin A Johnson, Vice-Chair, OBA International Law Section
Antonin I. Pribetic, Vice-Chair, OBA International Law Section

OBA Commentary on the Codification of Judicial Jurisdiction in Ontario

Background

Question 1

Considering the current state of the law of judicial jurisdiction in Ontario, in your view, would the interests of Ontario residents be best served by developing a statute on judicial jurisdiction or would it be preferable to allow the common law to continue to evolve without introducing legislation?
If a statute should be developed, what are the main concerns that it should address?

The OBA's view is that the Model Law proposed in 1994 (the *Court Jurisdiction and Proceedings Transfer Act*; hereinafter *CJPTA* or Model Law) is generally reflective of existing common law, but usefully codifies it in a manner that will genuinely assist the bench and bar in Ontario, as well as any litigants seeking to come to this jurisdiction. This Model Law should be enacted substantially as proposed and drafted by the ULCC. Such a statute would promote consistency with at least three of the other common law provinces while maintaining compatibility with Québec. Furthermore, it should introduce a degree of simplification over the existing common law. While the *CJPTA* will not resolve all issues, its enactment will optimize the goals of greater relevance, effectiveness and accessibility.

The OBA doubts that a statute which is significantly broader than the *CJPTA* would better achieve these objectives. Indeed, an expanded statute may be counter-productive because:

(a) it would not be consistent with other Canadian jurisdictions which adopt the Model Law;

(b) it would not benefit from judicial interpretation in other Canadian jurisdictions;

(c) delays and inertia in the legislative process will not allow the Act to be readily amended if any of its provisions are ineffective or subsequently require amendment;

(d) rather than simplifying the process, it may instead substitute a new level of complexity for the complexity of the existing common law.

Indeed, the OBA notes that there is a reasonable argument that no statute is necessary. The common law has developed in its traditional way in this area in leaps and bounds since the seminal case of *Morguard* (1990).[1] The SCC has dealt with these and related issues on various occasions, including *Hunt v. T&N PLC* (1993)[2], *Amchem* (1993), *Beals* (2003)[3] and *Lépine* (2009).[4] The Ontario Court of Appeal in 2002 elaborated on these issues in a fairly comprehensive manner in *Muscutt*[5] in 2002.

Thus, the common law, while always subject to criticism, has developed incrementally to expand the reach and relevance of Ontario's legal system without introducing unacceptable uncertainty or confusion, or, at least, no more than would be associated with enactment of a new, complex statute.

It can reasonably be argued that the existing case law is already largely capable of meeting Chief Justice Winkler's objective of marketing Ontario's world class legal system to the business community as an asset in the currently weak economic climate.

The OBA recognizes, however, that marketing Ontario's world class legal system is not so much as a job for the judiciary as it is for other participants in the legal system. To this end, legislation should be helpful. To achieve this end the legislation must, however, be straightforward and should not introduce complexity or unwarranted discretion at the expense of certainty, ease of application and consistency across the country.

The OBA, therefore, has concluded that enacting the CJPTA in its current form (rather than a seriously amended version) is appropriate and "clarifying the law of jurisdiction by adopting legislation", would make the system more relevant, effective and accessible.

The *CJPTA* Is Not Outdated

As noted in the LCO paper, the *CJPTA* has been enacted in B.C., Saskatchewan and Nova Scotia and its enactment has been recommended in Alberta. The LCO paper says, however, that the law and practice of cross border litigation has evolved in significant ways in the 15 years since the *CJPTA* was proposed.

Nonetheless, one may reasonably anticipate equally significant changes in the next 15 years. The OBA does not believe that the changes in the past few years have been so dramatic to warrant significant changes to the Model Law. Furthermore, the 2009 SCC decision in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*[6], which applied B.C.'s version of the *CJPTA*, does not support a conclusion that the wording of the *CJPTA* is outdated.

Rather, as noted by Chief Justice McLachlin for a unanimous Court, the Supreme Court of Canada regarded the *CJPTA* as a contemporary statement of the law. In discussing section 11 of the *CJPTA* in relation to the factors to be applied in *forum non conveniens* analysis, the Chief Justice concluded (at para. 22): "Section 11 of the *CJPTA* thus constitutes a complete codification of the common law test for *forum non convenien*s. It admits of no exceptions."

The LCO notes that the law of Québec is not identical to the *CJPTA* with the result that consistency across the country cannot be fully achieved even if the *CJPTA* is enacted in Ontario. The OBA does not believe Ontario's law needs to mirror that of Québec, so long as they are compatible.

Question 2
Considering the patchwork of legislative regimes (the *CJPTA* and the Civil Code of Québec) and common law doctrines that operate in Canada, should a statute in Ontario seek to harmonize its provisions with the law in other parts of Canada?
If so, or should drafters endeavour to use the same language as exists in enactments or common law doctrines in other provinces, or would it be sufficient for the statute to be consistent in its effect with the law in other parts of the country?
Does your view apply to all questions of jurisdiction, or are there particular areas of the law of jurisdiction in which either uniformity or consistency should be sought?

The OBA agrees that it is feasible and desirable (although probably not "necessary") to enact a statute in Ontario to assist in harmonizing the law across "common law" Canada. Such a statute should not, however, introduce its own, idiosyncratic standards (even if arguably "superior") in respect of jurisdiction. That would not assist in harmonization, nor would it make Ontario's legal system more relevant, effective and accessible. Ontario should instead enact the Model Law as done already in three other provinces and recommended in Alberta. Such a law would still be compatible with the Civil Code of Québec.

The OBA acknowledges that the comments at p. 6 of the LCO paper about related areas of necessary reform are both appropriate and significant. Thus, areas such as recognition and enforcement of judgments from other provinces and other countries, related limitation periods, proof of foreign law may merit legislative intervention concurrently with or, in some instances, ahead issues of judicial jurisdiction.

The OBA also notes the work done by the author of the LCO paper, together with members of the International Bar Association Task Force, which generated the 2007 Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress. The issues of coordinating national class actions and interprovincial and, to a much lesser extent, international enforcement of class action judgments requires urgent attention, notwithstanding the recent SCC decision in *Lépine*[7].

In short, the OBA recognizes the validity of the concerns raised by the LCO in its paper and accepts not only that a limited codification (the *CJPTA*) is generally consistent with the law of Ontario but also that it will make Ontario's legal system more relevant, effective and accessible.

Jurisdiction based on the parties' consent

Question 3
Should a provision for exercising jurisdiction over defendants to counterclaims specify that this is limited to counterclaims that are related to the main proceeding?

Yes, jurisdiction over defendants to counterclaims should be limited to counterclaims that are related to the main proceeding; although this can be left to be dealt with under sections 10 and 11 of the *CJPTA*.

Question 4

Should a provision for attornment define or enlarge upon what constitutes contesting the merits?
If so, should the statute provide for determining jurisdictionally significant facts or potentially dispositive questions of law in a way that would preserve the right to challenge jurisdiction?

Yes, a provision with respect to attornment should define or enlarge upon what constitutes contesting the merits.

The concept of a "conditional appearance" should be considered. The problem of attornment (or lack thereof) is exacerbated if mandatory mediation exists or even if the parties voluntarily submit to mediation. It would be preferable to allow a party to challenge personal jurisdiction or subject matter jurisdiction in the pleading with the opportunity to challenge jurisdiction throughout until trial.

Question 5

Should the statute provide that valid exclusive jurisdiction agreements are, in principle, determinative of the court's jurisdiction, or should it provide that such agreements are a factor to weighed with other factors in the exercise of discretion to assume or decline jurisdiction?

Yes; the statute should provide that valid exclusive jurisdiction agreements are, in principle, determinative of the court's jurisdiction. This approach makes the most sense in the commercial context and is reflective of international consensus on point, as per the *Hague Convention on Choice of Court Agreements*.

Question 6

Are these suitable bases on which to determine the validity of a jurisdiction agreement?
Should provision(s) for determining the validity of jurisdiction agreements specify the law to be applied?

These are suitable bases to determine validity, are consistent with existing common law and there is considerable value in not departing from the consensus already achieved in part in the *Hague Convention on Choice of Court Agreements*(Article 5). Consistent therewith, the law of Ontario should apply on this issue where an Ontario court is the designated court.

Question 7

Are the grounds specified for setting aside a jurisdiction agreement—invalidity, that the chosen court has declined jurisdiction, and manifest injustice and public policy—sufficiently specific and comprehensive?
Are there other grounds that should be included?
Should any of these grounds be omitted?

These grounds are sufficiently specific and comprehensive and should neither be added to, nor subtracted from again, as above in consideration of the international consensus on point embodied in the *Hague Convention on Choice of Court Agreements* (Art. 6)

Jurisdiction based on the defendant's ordinary residence

Question 8

Is ordinary residence the best means of defining the connection to Ontario that would establish general jurisdiction over persons regardless of consent?
Should the statute specify the time at which the person's ordinary residence in Ontario is determined for the purposes of establishing jurisdiction?
Alternatively, should the statute contain a general provision specifying the time at which the connections to Ontario described in the statute are determined for the purposes of establish jurisdiction?
If so, what is the relevant point in time?

"Ordinary" or "habitual" residence is an adequate concept. The former term corresponds to the *CJPTA*, which is in itself a compelling reason to use the same concept in an Ontario implementing statute. However, the OBA does note that it may introduce uncertainty in the law by replacing the existing concept of "presence"- based jurisdiction. The latter concept, which Ontario practitioners and the courts are already comfortable with essentially avoids the issues raised by the following three questions. If "relevant point in time" is to be included, the time the cause of action arose appears the most relevant; although "time of service" could be easier to apply to apply in some instances where temporality in relation to the cause of action is itself problematic (e.g. in some tort claims).

Question 9

Are these grounds—registration, central management and principal location of business and professional activities—appropriate for determining the ordinary residence of parties other than natural persons?

The OBA views these grounds as logical, but also potentially problematic, particularly in relation to multi-jurisdictional enterprises. These criteria do not quite capture the existing focus of Ontario Law on local residence of the company and local business activity of the corporate entity being related to the subject matter of the *lis*.

Jurisdiction based on a real and substantial connection

Question 10

Should the statute preserve the "two layers of discretion" that exist in the *CJPTA* for exercising jurisdiction based on a real and substantial connection? In other words, should the statute preserve discretion to identify real and substantial connections beyond those contained in a list, and to determine that connections contained in the list were not real and substantial, in addition to the discretion to accept or decline jurisdiction on grounds other than the existence of a real and substantial connection?
Alternatively, should discretion be confined to the "second layer"—that associated with an exercise of jurisdiction on forum of necessity grounds or declining jurisdiction on forum non conveniens grounds?
If so, should the statute eliminate discretion in determining what constitutes a real and substantial connection by providing a definitive list as has been done in the Civil Code of Québec?
Alternatively, should the courts retain the flexibility to find that a real and substantial connection exists on grounds analogous to those listed in the statute?

The statute should preserve the "two layers of discretion" that exist in the *CJPTA* for exercising jurisdiction based on a real and substantial connection. The OBA does not support a definitive list similar to the *Civil Code of Quebec*. The courts should retain the flexibility to find that a real and substantial connection exists analogous to those listed in the statute. In this respect, it is noteworthy that the Manitoba Law Reform Commission[8] and the Alberta Law Reform Institute[9] have each made a recommendation for a rebuttable presumption, based upon the ULCC annotation to s.10, which reads as follows:

> 10(2) Despite the presumption established by subsection (1) a party may prove there is no real and substantial connection between the [province] and the facts on which the proceeding is based.

Question 11

Is the proposed list of real and substantial connections sufficiently comprehensive? If not, what should be added?
Is the list over-inclusive? If so what should be omitted?

The proposed list of real and substantial connections is sufficiently comprehensive; albeit not over-inclusive, provided that the court may still find analogous grounds as referenced in Q10 above.

Question 12

Should provision be made for prohibiting courts from exercising jurisdiction over questions of title to immovables located outside Ontario, or for tortious damage to foreign immovables?
If so, should special provision be made for an exception to this prohibition for matters involving persons within the jurisdiction of the court who may be ordered to convey title to foreign immovables?

Although the OBA believes the *CJPTA* should be enacted as is, one should bear in mind that the traditional distinctions between subject-matter jurisdiction and personal jurisdiction (*cf.* territorial competence or judicial jurisdiction), on the one hand, and proceedings *in rem* and proceedings *in personam*, on the other, would be reinforced by adding a statutory provision prohibiting courts from exercising jurisdiction over question of title to immovables located outside of Ontario, or for tortious damage to foreign immovables. There would also have to be a special provision made for the "*in personam*" exception to the *Moçambique* Rule for matters involving persons within the jurisdiction of the court who may be ordered to convey title to foreign immovables, arising from consent-based or presence-based jurisdiction over the defendants, or existence of a "real and substantial connection" under s.10 of the *CJPTA.*[10]

Additional bases of jurisdiction

Question 13

Should a provision for forum of necessity be included in the statute?
If so, should such a provision specify the need for a substantial connection between the matter and/or the parties and Ontario?

The courts should retain residual discretion as a forum of necessity based upon the proposed formulation at p.23 of the LCO Consultation Report or the current wording under s.6 of the *CJPTA*, subject to a provision specifying the need for a substantial connection between the matter and/or the parties and Ontario.

Question 14

Should a provision be included for jurisdiction over ancillary proceedings based on jurisdiction over the main claim?
If so, should such a provision specify the need to demonstrate that exercising jurisdiction would avoid a multiplicity?

Jurisdiction should be taken over ancillary proceedings based upon jurisdiction over the main claim. In order to maintain internal consistency with ss.11 (2)(c) of the *CJPTA* (Discretion as to exercise of territorial competence/judicial jurisdiction), there should be a provision specifying the need to demonstrate that exercising jurisdiction would avoid a multiplicity of proceedings.

Question 15

Should a provision be included for jurisdiction to order interim measures independent from the main claim?
If so, are there restrictions on its availability that should included?

A provision should be included for jurisdiction to order interim measures independent from the main claim, without specified restrictions. This is appropriately addressed in the Transfer of a Proceeding provisions within the *CJPTA*.

Declining jurisdiction

Question 16

On what grounds should an Ontario court be permitted to decline jurisdiction that is founded an exclusive jurisdiction clause nominating it?
Should these grounds resemble those that would permit an Ontario court to set aside an exclusive jurisdiction clause nominating another court, or should they resemble those on which a court might decline jurisdiction on grounds of forum non conveniens?
Are there other grounds that should be included?

The language contained within the *Hague Convention on Choice of Court Agreements* sufficiently responds to this issue. The grounds should resemble those that would permit an Ontario court to set aside an exclusive jurisdiction clause nominating another court first seised, not on a forum non conveniens grounds. There are no additional grounds that should be included.

Question 17

Should a provision for declining jurisdiction specify its discretionary nature and that the court has the authority impose terms

A provision for declining jurisdiction should specify its discretionary nature and that the court shall have the authority to impose terms as provided for in the *CJPTA* [see sections 11, 14 and s.15(2)(b)].

Question 18

Should the provision for declining jurisdiction on discretionary grounds specify the standard as one of a "clearly" more appropriate forum elsewhere, or should the standard be simply one of demonstrating that there is a more appropriate forum elsewhere? Should a provision for declining jurisdiction specify whether it is the moving party or the respondent who bears the burden of proof in establishing whether or not there is a clearly more appropriate in cases of defendants who are Ontario residents and those who are not?

The standard should be one of a "clearly" more appropriate forum with the moving party bearing the burden of proof, recognizing that this is a shift from the *dicta* in *Frymer v. Brettschneider* (1994), 19 O.R. (3d) 60 (C.A.) which placed the burden of proof upon the plaintiff where the defendants were non-Ontario residents. However, it remains the OBA's general recommendation that Ontario enact the Model Law which takes a slightly different approach to the subject as noted in the ULCC comments to Section 11 and specifically those of 11.2:

> 11.2 The discretion in section 11 to decline the exercise of territorial competence is defined without reference to whether a defendant was served in the enacting jurisdiction or ex juris. This is consistent with the approach in Part 2 as a whole, which renders the place of service irrelevant to the substantive rules of jurisdiction. It is also consistent with the Supreme Court's statement in the Amchem case that there was no reason in principle to differentiate between declining jurisdiction where service was in the jurisdiction and where it was ex juris.

Question 19

Should participation in the proceedings preclude a request to decline jurisdiction or should it be considered as a factor affecting the exercise of discretion to do so?

A Party should be able to participate in appropriate circumstances without attorning to the jurisdiction of the Court. However, participation in the proceedings amounting to attornment on the merits should preclude a subsequent request to decline jurisdiction. Reference is made to the concept of conditional appearances as set out in the response to question 4. Provision for this could be made within the Ontario *Rules of Civil Procedure* in relationship to an enacted *CJPTA* in similar fashion to that which occurs in British Columbia between the Supreme Court Rules and the *CJPTA*.

Question 20

Should a provision be included for considering as a factor the existence of a non-exclusive jurisdiction agreement?

The OBA agrees that the existence of a non-exclusive jurisdiction agreement should be a factor to be considered with respect to jurisdiction. The OBA takes the position that a non-exclusive jurisdiction agreement should not be considered with respect to *forum non conveniens*.

Question 21

Should a provision concerning comparative convenience specify different standards depending on where the defendant is based?

The OBA concludes that the provision concerning comparative convenience should use the same standard, regardless of the defendant's location.

Question 22

Should the law applicable to the issues in the proceeding be included as a factor in determining whether to decline jurisdiction?

The OBA concludes that the law applicable to the issues in the proceeding should be included as a factor in determining whether to decline jurisdiction, particularly where proving foreign law may be a significant and difficult issue.

Question 23

Should the statute provide for taking the potential of a multiplicity of legal proceedings into account in determining whether to decline jurisdiction?

The OBA concludes that the statute should permit courts to consider the potential for a multiplicity of legal proceedings in determining whether to decline jurisdiction. However, the potential for multiplicity of proceedings should not be a determinative factor (see *Teck Cominco Metals Ltd. v. Lloyd's Underwriters* [11]).

Question 24

Is a general provision ("basket clause") necessary in an non-exhaustive list of considerations such as this? Under what circumstances might it be invoked?

The OBA acknowledges that a basket clause may be necessary to permit Ontario courts to consider scarce resources and the impact of taking or declining jurisdiction on access to justice. However, any jurisdiction statute should increase clarity and minimize the discretion available to the court. Therefore, the basket clause should be carefully and restrictively drafted.

Endnotes

[1] *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077.
[2] *Hunt v. T&N* plc*, [1993] 4 S.C.R. 289*
[3] *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72
[4] *Canada Post Corp. v. Lépine*, 2009 SCC 16
[5] *Muscutt v. Courcelles* (2002) 213 D.L.R. (4th) 577 (Ont. C.A.); J. Walker, "Beyond Real and Substantial Connection: The *Muscutt* Quintet" in T. Archibald & M. Cochrane eds, *Annual Review of Civil Justice 2002* (Toronto; Carswell, 2003); S.G.A. Pitel, "Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction" (2006) 85 Can. Bar Rev. 61;T. Monestier, "A 'Real and Substantial' Mess: the Law of Jurisdiction in Canada" (2007) 33 *Queen's L.J.* 179; J.-G. Castel, "The Uncertainty Factor in Canadian Private International Law" (2007) 52 *McGill LJ* 555.
[6] *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11
[7] *Supra,* note 4
[8] Manitoba Law Reform Commission, Report #119 on Private International Law dated January 2009, available online at: http://www.gov.mb.ca/justice/mlrc/reports/119.pdf at pp. 15-16.
[9] Alberta Law Reform Institute, Final Report No. 94 dated September 2008, available online at: http://www.law.ualberta.ca/alri/docs/FR94.pdf at pp.30-31.
Court Jurisdiction and Proceedings Transfer Act, S.Y. 2000, c.7.
[10] See, *Precious Metal Capital Corp. v. Smith (2008)*, 297 D.L.R. (4th) 746, 92 O.R. (3d) 701 (Ont. C.A.) and *Victoria Oil & Gas Plc v. Alhambra Resources Ltd.*, (2009) CarswellAlta 235; 2009 ABCA 64 (Alta. C.A). Cf. Antonin I. Pribetic, "Staking Claims Against Foreign Defendants in Canada: Choice of Law and Jurisdiction Issues Arising from the In Personam Exception to the Moçambique Rule for Foreign Immovables" (2009) 35 *Adv. Q.* 230 at 264.
[11] *Supra,* note 6