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Six of One, Half a Dozen of the Other? Jurisdiction in Common Law Canada

Stephen G.A. Pitel
Faculty of Law, Western University

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Abstract
This short article considers the central differences in the law on taking jurisdiction in civil and commercial disputes between those common law provinces that have implemented a statute on jurisdiction (British Columbia, Nova Scotia, and Saskatchewan) and those common law provinces that rely on the common law (Alberta, Ontario, and others). It focuses on the distinction between presence and ordinary residence, the role and analysis of presumptive connecting factors for taking jurisdiction, and issues related to immovable property.

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Special Issue
The *CJPTA*: A Decade of Progress

Six of One, Half a Dozen of the Other? Jurisdiction in Common Law Canada

STEPHEN G.A. PITEL*

This short article considers the central differences in the law on taking jurisdiction in civil and commercial disputes between those common law provinces that have implemented a statute on jurisdiction (British Columbia, Nova Scotia, and Saskatchewan) and those common law provinces that rely on the common law (Alberta, Ontario, and others). It focuses on the distinction between presence and ordinary residence, the role and analysis of presumptive connecting factors for taking jurisdiction, and issues related to immovable property.

* Professor, Faculty of Law, Western University. I am grateful to Vaughan Black, Sagi Peari, Janet Walker, and the three anonymous reviewers for their comments on a draft of this article.

THE AIM OF THIS SHORT ARTICLE is to consider the central differences in the law on taking jurisdiction in civil and commercial disputes between those common law provinces that have implemented a statute on jurisdiction and those common law provinces that continue to rely on the common law.[1] Jurisdiction is a broad topic and therefore this consideration must be somewhat selective, aiming to find the points of greatest divergence.[2] And before those differences can be identified and assessed, a general overview of the two approaches is required as context. That overview requires some history as to how the common law approach has evolved.[3]

I. APPROACHES TO JURISDICTION

In the early common law, there were two bases for jurisdiction *in personam* over a defendant: presence and submission.[4] However, in nineteenth-century England the *Common Law Procedure Act, 1852*[5] authorized courts to assume jurisdiction over defendants who resided outside the forum under provisions allowing for service of the originating process *ex juris*. A similar development occurred in Canada as each province adopted rules governing service *ex juris*. While the various Canadian regimes were not uniform, under the typical approach the provisions set out enumerated situations in which the plaintiff was allowed to serve an originating process *ex juris* without leave of the court. In addition, the plaintiff could apply to the court for leave to serve *ex juris* in any other case.[6] This basis for taking jurisdiction is called "assumed jurisdiction."[7]

Originally, the grounds for service *ex juris* set the boundaries of a court's assumed jurisdiction: It was as broad or as narrow as its rules permitting service abroad. But in 1990, *Morguard Investments Ltd v De Savoye* broke new ground in

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1. References to provinces include Canada's three territories.
2. This article considers only the issue of taking jurisdiction (jurisdiction *simpliciter*) and not the issue of declining to exercise jurisdiction (such as under *forum non conveniens*).
3. For greater detail on this context and history, see Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016) ch 5.
4. There was no debate about the court's jurisdiction over the plaintiff: He or she submitted to the court's jurisdiction by bringing the proceedings. Relatively recently, in the context of class actions, the issue has arisen about taking jurisdiction over members of the plaintiff class, especially if they are absent from the forum. See *e.g. Das v George Weston Limited*, 2017 ONSC 4129, 283 ACWS (3d) 78; *Airia Brands v Air Canada*, 2017 ONCA 792, 284 ACWS (3d) 260, rev'g 2015 ONSC 5332, 126 OR (3d) 756. This article does not address this particular issue. It focuses on jurisdiction over defendants.
5. (UK), 15 & 16 Vict, c 76.
6. See *e.g. Rules of Civil Procedure*, RRO 1990, Reg 194, r 17.03 [Ontario *Rules*].
7. See *e.g. Chevron Corp v Yaiguaje*, 2015 SCC 42 at para 82, [2015] 3 SCR 69 [*Chevron*].

holding that the rules for service *ex juris* do not by themselves confer jurisdiction on the courts.[8] The Supreme Court of Canada held that there had to be "some limits to the exercise of jurisdiction against persons outside the province."[9] Those limits could not be found in the various provincial rules for service *ex juris*. For the Court, Justice La Forest indicated that the correct approach was to allow for proceedings when there was "a real and substantial connection with the action," because that approach provided "a reasonable balance between the rights of the parties."[10]

In 1994 the Uniform Law Conference of Canada proposed for adoption the *Court Jurisdiction and Proceedings Transfer Act*.[11] Its purposes, in part, were to establish a uniform set of standards for determining jurisdiction and to ensure that Canadian jurisdictional rules were consistent with the principles underlying *Morguard*. It has been implemented in Saskatchewan,[12] British Columbia,[13] and Nova Scotia.[14] The law on taking jurisdiction in the other common law provinces and territories remains primarily based in the common law. Since the *CJPTA* was drafted with *Morguard* firmly in mind, one might have thought that the law on assumed jurisdiction would be reasonably similar as between provinces with the *CJPTA* and provinces relying on the common law. However, different approaches emerged.

In 2002, in *Muscutt v Courcelles*,[15] the Court of Appeal for Ontario engaged in a thorough analysis of the real and substantial connection principle. For the court, Justice Sharpe isolated eight factors that the courts should consider in determining whether the principle had been satisfied. He said that no single

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8. [1990] 3 SCR 1077, 52 BCLR (2d) 160 [*Morguard* cited to SCR].
9. *Ibid* at 1104.
10. *Ibid* at 1108.
11. Uniform Law Conference of Canada, *Proceedings of the Seventy-Sixth Annual Meeting, 1994*, Appendix C: *Court Jurisdiction and Proceedings Transfer Act*, online: <www.ulcc.ca/images/stories/1994_EN_pdf/1994ulcc0008_Court_Jurisdiction_Proceedings_Transfer_Act.pdf> at 140 [*CJPTA*]. All references in this article to sections of the *CJPTA* are to this uniform statute. Unfortunately, in the various provinces the section numbers sometimes differ. For a comprehensive and detailed analysis of the statute, see Vaughan Black, Stephen GA Pitel & Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012).
12. *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1.
13. *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28. For commentary, see Elizabeth Edinger, "New British Columbia Legislation: The *Court Jurisdiction and Proceedings Transfer Act*; the *Enforcement of Canadian Judgments and Decrees Act*" (2006) 39:2 UBC L Rev 407.
14. *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2nd Sess), c 2.
15. (2002), 60 OR (3d) 20, 213 DLR (4th) 577 [*Muscutt*].

factor was determinative but that they all had to be weighed together.[16] Under the *Muscutt* approach, it became common to refer to the "real and substantial connection test." For over a decade, this approach was used inside and outside[17] Ontario as the test for assumed jurisdiction. The British Columbia courts, however, tended not to apply the eight *Muscutt* factors specifically, but to rely simply on the general proposition that there must be a real and substantial connection between the court and the defendant or between the court and the subject matter of the litigation.[18] In addition, the New Brunswick Court of Appeal, in *Coutu v Gauthier (Estate)*,[19] cast doubt on the need for courts to adopt the *Muscutt* test. Chief Justice Drapeau stressed the importance of distinguishing issues of jurisdiction *simpliciter* from issues of *forum non conveniens* and of not conflating the applicable tests. To his mind, most of the eight *Muscutt* factors were directed towards the ascertainment of the convenient forum. He thought that the essence of the real and substantial connection test was captured by the first *Muscutt* factor: The connection between the forum and the plaintiff's claim.[20]

For its approach, the *CJPTA* drew directly on the *Morguard* principle in its provisions on territorial competence. It provides in section 3(e) for territorial competence in situations in which "there is a real and substantial connection between [*enacting province or territory*] and the facts on which the proceeding against that person is based."[21] Section 10 of the *CJPTA* goes on to develop the concept of real and substantial connection by providing a list of connections that are presumed, subject to being rebutted, to satisfy the test. The list is explicitly open-ended: The plaintiff remains free to establish other circumstances that constitute a real and substantial connection between the forum and the facts on which a proceeding is based.

Because it is open-ended, the *CJPTA* approach requires that the court have a means to analyze whether there is a real and substantial connection to the forum in cases falling outside the presumptions. In *Penny (Litigation Guardian of) v Bouch*,

16. *Ibid* at paras 76-112.
17. See *e.g. Royal and Sun Alliance Insurance Co of Canada v Wainoco Oil & Gas Co*, 2004 ABQB 643, 364 AR 151, aff'd 2005 ABCA 198, 367 AR 177; *Penny (Litigation Guardian of) v Bouch*, 2009 NSCA 80, 281 NSR (2d) 238 [*Penny*].
18. See *e.g. UniNet Technologies Inc v Communication Services Inc*, 2005 BCCA 114, 38 BCLR (4th) 366.
19. 2006 NBCA 16, 296 NBR (2d) 34.
20. *Ibid* at paras 56, 67. See also *Fewer v Sayisi Dene Education Authority*, 2011 NLCA 17, 305 Nfld & PEIR 39.
21. *CJPTA*, *supra* note 11 at 144 [emphasis in original].

the Nova Scotia Court of Appeal applied the eight factors from *Muscutt*.[22] Justice Saunders stressed that fairness to both parties was important at the jurisdiction *simpliciter* stage as well as at the *forum non conveniens* stage. In stark contrast to the approach in Nova Scotia, the British Columbia Court of Appeal indicated that "any reliance on the *Muscutt* factors as a guide to determining the question of jurisdiction came to an end in British Columbia with the coming into force of the *CJPTA*."[23] The statute itself does not mandate this conclusion, since it leaves open the means of analysis to be used in cases not fitting one of the presumptions. But this conclusion is consistent with the general hostility, mentioned above, of the British Columbia courts to the *Muscutt* approach.

In 2012 the Supreme Court of Canada further developed the law on assumed jurisdiction in *Club Resorts Ltd v Van Breda*.[24] The most important development was the Court's conclusion that the real and substantial connection test should no longer be used directly as a rule governing the taking of jurisdiction.[25] It held that it was a constitutional principle which operates at a higher level of generality. Instead, the real and substantial connection required for assumed jurisdiction had to be found in each case through a "presumptive connecting factor," a factor that triggers a presumption of such a connection.[26] When a presumptive connecting factor is established, the defendant can rebut the presumption.[27]

The Court stated that it would not set out a definitive list of presumptive connecting factors. The claims before the Court were in tort, and so the Court identified four presumptive connecting factors for tort claims: that the defendant is domiciled or resident in the forum, that the defendant carries on business in the forum, that the tort was committed in the forum, and that a contract connected with the dispute was made in the forum.[28] The Court acknowledged that additional presumptive connecting factors would need to be identified by lower courts. It held that "[i]n identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors."[29]

The most significant change from the *Muscutt* approach was that the Court held that where no presumptive connecting factor is established, a court cannot

22. *Penny*, *supra* note 17.
23. *Stanway v Wyeth Canada Inc*, 2009 BCCA 592 at para 73, 314 DLR (4th) 618.
24. 2012 SCC 17, [2012] 1 SCR 572 [*Club Resorts*].
25. *Ibid* at paras 30, 70.
26. *Ibid* at paras 75, 78, 100.
27. *Ibid* at paras 81, 95, 100.
28. *Ibid* at paras 68, 80, 90.
29. *Ibid* at para 91.

take jurisdiction.[30] It is not open to the plaintiff to establish jurisdiction by identifying factual connections that, while not amounting to a presumptive connecting factor, collectively warrant the court hearing the dispute.

As the law is now, the important differences between the common law approach and the *CJPTA* approach to jurisdiction are as follows.

1. The common law retains jurisdiction based on the defendant's presence in the province at the time he or she was served with process. The *CJPTA* abolishes presence-based jurisdiction and instead uses the defendant's ordinary residence in the province as a basis for jurisdiction.
2. At common law, an aggregation of factual connections, none of which amount to a presumptive connecting factor, cannot be a basis for assumed jurisdiction. The position under the *CJPTA* is less certain.
3. All of the presumptions listed in section 10 of the *CJPTA* are bases for assumed jurisdiction in *CJPTA* provinces. However, some of these presumptions may not be recognized as presumptive connecting factors at common law.
4. The common law might recognize presumptive connecting factors that were deliberately excluded from the list of section 10 *CJPTA* presumptions.
5. At common law, the court has no jurisdiction to determine title to, or the right to possession of, immovable property outside the province. This is likely also the case under the *CJPTA*, but there is some ambiguity on the matter because of the statute's wording.

30. *Ibid* at paras 81, 93.

II. PRESENCE VERSUS ORDINARY RESIDENCE

At common law, the central basis for jurisdiction *in personam* has been territorial power. If the plaintiff serves the defendant with process—the document commencing the proceedings—while the defendant is present in the forum, then the local courts have jurisdiction to hear an action *in personam* against that defendant. The presence need not have any particular duration: Purely transitory presence is sufficient.[31] The only limitation is in situations in which the defendant's presence in the forum is involuntary because of duress or fraud.[32]

The merits of grounding jurisdiction on presence have been questioned, especially because of the possibility that the presence might be fleeting and thus the connection with the jurisdiction might be weak. Presence, however, is a long-standing basis for taking jurisdiction and, having been recently confirmed by the Supreme Court of Canada in *Chevron Corp v Yaiguaje*, it does not appear that common law courts are likely to reconsider this basis for jurisdiction in the near future.[33]

It is relatively easy to determine whether an individual is present in the jurisdiction. Corporations and partnerships are more complex and, as a result, the common law has developed tests for determining the presence of these legal entities.[34]

In contrast, presence is not a basis for jurisdiction under the *CJPTA*. Rather, the *CJPTA* provides, in section 3(d), for jurisdiction when the defendant is "ordinarily resident" in the forum at the time of the commencement of the proceedings.[35] This is a more stringent requirement than presence. There is a growing jurisprudence on the meaning of ordinary residence.[36] In one of the leading cases, *Thomson v Minister of National Revenue*, Justice Rand stated that "[i]t is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual

31. For the famous English case on this point, see *Maharanee of Baroda v Wildenstein*, [1972] 2 QB 283, [1972] 2 WLR 1077 (CA).
32. See *Lewis v Wiley* (1923), 53 OLR 608 (SC), [1923] OJ No 170 (QL).
33. *Chevron*, *supra* note 7 at para 83.
34. See Pitel & Rafferty, *supra* note 3 at 62-66.
35. *CJPTA*, *supra* note 11 at 144. Under this provision, the defendant could be served inside or outside the forum.
36. See Black, Pitel & Sobkin, *supra* note 11 at 75-76. See also Pitel & Rafferty, *supra* note 3 at 23-25.

residence."[37] It is not necessary that an individual intend to make his or her home indefinitely in the jurisdiction, and an individual is not prohibited from having more than one ordinary residence, assuming a sufficient degree of settled purpose is evident in both places.[38] Under this definition, the question arises as to what constitutes a settled purpose or a customary mode of life. The purpose need not involve staying forever: Much shorter periods, even with a definitive end in sight, can qualify as a settled purpose.[39] A comprehensive analysis considers the residence of family members, location of furniture, ownership of property, and other relevant aspects of an individual's life.

The *CJPTA* contains specific provisions addressing the ordinary residence of corporations and partnerships.[40] Section 7 provides that a corporation is ordinarily resident in the province only if:

> (a) the corporation has or is required by law to have a registered office in [the province],
>
> (b) pursuant to law, it (i) has registered an address in [the province] at which process may be served generally, or (ii) has nominated an agent in [the province] upon whom process may be served generally,
>
> (c) it has a place of business in [the province], or
>
> (d) its central management is exercised in [the province].[41]

Section 8 states that a partnership is ordinarily resident in the province only if (a) the partnership has, or is required by law to have, a registered office or business address in [the province], (b) it has a place of business in [the province], or (c) its central management is exercised in [the province].[42]

The two approaches differ not only in the degree of connection to the forum they require, but also in the way they consider the relevant time of assessment. The common law looks at presence at the time of the service of process on the defendant. In contrast, the *CJPTA* looks at ordinary residence at the time of

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37. [1946] SCR 209 at 224, [1946] 1 DLR 689 [*Thomson*]. See also *Quigley v Willmore*, 2008 NSCA 33, 264 NSR (2d) 293; *Armoyan v Armoyan*, 2013 NSCA 99 at para 214, 334 NSR (2d) 204; *Nafie v Badawy*, 2015 ABCA 36, 381 DLR (4th) 208.
38. *Thomson*, *supra* note 37 at 224. See also *Knowles v Lindstrom*, 2014 ONCA 116 at para 32, 118 OR (3d) 763.
39. *Al Habtoor v Fotheringham*, [2001] EWCA Civ 186 at paras 23-24, [2001] 1 FLR 951; *Re R (Abduction: Habitual Residence)*, [2003] EWHC 1968 (Fam), [2004] 1 FLR 216.
40. For detailed analysis, see Black, Pitel & Sobkin, *supra* note 11 at 76-88.
41. *CJPTA*, *supra* note 11 at 147.
42. *Ibid* at 148. The *CJPTA* also addresses the ordinary residence of unincorporated associations in section 9. See *ibid* at 148.

the commencement of proceedings. While the *CJPTA* does not define what it means to commence proceedings, the procedural rules in the relevant provinces generally provide that proceedings are commenced by the issuing of process by the court. This typically occurs somewhat earlier than service on the defendant.

As noted above, in *Club Resorts*, the Court held that the defendant's residence in the province is a presumptive connecting factor in a tort claim. In subsequent decisions, this connection and others that the court set out for tort claims have been used beyond the tort context, such that they have become general presumptive connecting factors for all types of claims.[43] So the common law, like the *CJPTA*, includes jurisdiction based on the defendant's ordinary residence in the province.[44] The key difference is that the *CJPTA* rejects the defendant's presence as a basis for jurisdiction.

It is not surprising that the *CJPTA* does not use presence as a basis for jurisdiction. The modern trend is away from presence and toward concepts such as residence, and codifications prepared either for a single country or on a multilateral basis tend not to include it as a basis for jurisdiction.[45] It is therefore hard to fault the *CJPTA*'s choice on this issue. However, a strong case can be made for retaining presence as a basis for jurisdiction at common law.[46] The highest courts in Canada and the United States continue to support it.[47] It flows from territorial sovereignty, such that those present in a jurisdiction owe allegiance to the institutions, including the courts, of that place. It accords with reasonable expectations, in that a defendant would reasonably expect to be sued and be able to defend where he or she is present. It promotes certainty, providing a court with a relatively clear and rigid rule about jurisdiction. And the doctrine's harshest consequences, seen usually in cases of purely transitory presence, can

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43. See *e.g. Sears Canada Inc v C & S Interior Designs Ltd*, 2012 ABQB 573, 543 AR 191; *Avanti Management & Consulting Ltd v Argex Mining Inc*, 2012 ONSC 4395, 219 ACWS (3d) 555; *Royal Bank of Canada v DCM Erectors Inc*, 2013 ONSC 2864, 228 ACWS (3d) 687; *Sullivan v Four Seasons Hotels Ltd*, 2013 ONSC 4622, 116 OR (3d) 365.
44. There is a subtle difference, which is that under the common law there is the possibility that this presumptive connecting factor could be rebutted. Under the *CJPTA*, this is not possible.
45. See *e.g.* EC, *Commission Regulation (EC) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, [2012] OJ, L 351/1 online: <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:En:PDF>. This is known as the "Recast Brussels I Regulation."
46. See Stephen GA Pitel & Cheryl D Dusten, "Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction" (2006) 85:1 Can Bar Rev 61 at 68-70.
47. *Chevron*, *supra* note 7 at para 83; *Burnham v Superior Court of California*, 495 US 604 (1990).

be ameliorated through the doctrine of *forum non conveniens*. Accordingly, the elimination of presence-based jurisdiction is not a particularly strong reason for adopting the *CJPTA*. Ultimately, there is merit to both approaches, but on balance the Supreme Court of Canada should be commended for retaining presence as a basis for jurisdiction.

III. THE PRESUMPTIVE CONNECTING FACTORS

A. THE REQUIREMENT

As noted above, under the approach in *Club Resorts*, courts cannot take jurisdiction, apart from doing so based on presence and consent, unless there is a presumptive connecting factor connecting the dispute with the forum.[48] This is a departure from the approach in *Muscutt*, under which a real and substantial connection could be established without reliance on a specific connecting factor.

In contrast, and as also noted in Part I, above, the list in *CJPTA* section 10 of presumed real and substantial connections is a subsidiary aspect of the more general basis of jurisdiction set out in section 3(e). That means, at least on the wording of the statute, a court could take jurisdiction under section 3(e) even in the absence of a presumption. Prior to *Club Resorts*, the courts did precisely this in several cases.[49]

A critical question posed by *Club Resorts* is whether its approach to jurisdiction will influence the interpretation given to section 3(e). It could lead courts to hold that section 3(e) requires, if not one of the presumptions in section 10, a similar presumption recognized by the court, such that in the absence of either it could not take jurisdiction. This would make the approach under the *CJPTA* the same as that under the common law. In *Aleong v Aleong* the British Columbia Supreme Court examined this specific issue.[50] It held that:

> The idea of the court having a wide-ranging ability to establish other circumstances is very close to the "on-the-fly," case-by-case exercise of discretion rejected by Mr. Justice LeBel in *Van Breda*. It is not supported by Mr. Justice LeBel's discussion of the real and substantial connection test, or his discussion concerning identification of acceptable new presumptive connecting factors.[51]

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48. An odd exception is in a claim to recognize and enforce a foreign judgment. In such a claim, such a connection is, according to the Supreme Court of Canada, not required. See *Chevron*, *supra* note 7 at para 3.
49. See Black, Pitel & Sobkin, *supra* note 11 at 134-35.
50. 2013 BCSC 1428, 55 BCLR (5th) 364.
51. *Ibid* at para 105.

It held that a presumptive connecting factor had to be established and that "a court should not assume jurisdiction on the basis of the combined effect of a number of non-presumptive connecting factors."[52] While some other cases have appeared to maintain a broader approach to section 3(e),[53] they have done so without specifically considering whether *Club Resorts* has narrowed its scope and so are less valuable as authority.

It is regrettable that *Club Resorts* imposed the requirement of a presumptive connecting factor for assumed jurisdiction. The *Muscutt* approach was flexible but its open-endedness did not lead to errors in individual cases. Sections 3(e) and 10 the *CJPTA* have preserved that flexibility. Insisting on a presumptive connecting factor—at common law and perhaps even under the *CJPTA*—now means that courts will have to identify such factors for a wide range of causes of action like unjust enrichment and breach of equitable duties. Courts will also have to struggle to apply presumptive connecting factors, such as the place of the tort being in the province, for torts such as conspiracy, negligent misrepresentation, and conversion. It is arguable whether the central goal of the Supreme Court of Canada, which was to attain a measure of certainty and predictability in the law on assumed jurisdiction, will end up being achieved.[54]

B. THE FACTORS

The common law and the *CJPTA* both rely on presumptive connecting factors. A central comparative issue is whether the lists of such factors will be identical in the two contexts and, if not, what the differences will be. It is easiest to start with the factors listed in section 10 of the *CJPTA*. It would seem sensible to think that all of them would be accepted by common law courts as presumptive connecting factors. For example, section 10(e)(i) creates a presumption for a proceeding concerning contractual obligations when those obligations were, to a substantial extent, to be performed in the province. Section 10(e)(iii) creates a presumption for a proceeding concerning contractual obligations when the contract resulted from a solicitation of business in the province by the seller of property or services for use other than in the purchaser's business.[55] Both these presumptions are

52. *Ibid* at para 129. See also *Li v MacNutt & Dumont*, 2015 NSSC 53 at paras 35-36, 356 NSR (2d) 176; *DropLo Management Group Ltd v Howard*, 2015 BCSC 1102 at paras 50-55, 135 CPR (4th) 233.
53. See *e.g. Kilderry Holdings Ltd v Canpower International BV*, 2013 BCCA 82, 360 DLR (4th) 500; *Original Cakerie Ltd v Renaud*, 2013 BCSC 755, 229 ACWS (3d) 400.
54. See Stephen GA Pitel, "Checking in to Club Resorts: How Courts Are Applying the New Test for Jurisdiction" (2013) 42:1&2 Adv Q 190 at 214.
55. *CJPTA*, *supra* note 11 at 149-50.

not among the traditional grounds used by provinces to allow service *ex juris* in contract claims. But it would seem likely that common law courts will accept these as presumptive connecting factors, in large part because the *CJPTA* does.

One *CJPTA* presumptive connecting factor has been rejected by the common law approach, although for somewhat unusual reasons. Section 10(k) provides that in a proceeding to enforce a foreign judgment, a real and substantial connection to the forum is presumed to exist, though like all presumptions it can be rebutted. But, in *Chevron*, the Supreme Court of Canada concluded that because the analysis of a claim brought to recognize and enforce a foreign judgment considers the sufficiency of the rendering court's jurisdiction, that is the only required analysis of jurisdiction and there is no need for separate consideration of the enforcing court's jurisdiction. The Court stated:

> In an action to recognize and enforce a foreign judgment where the foreign court validly assumed jurisdiction, there is no need to prove that a real and substantial connection exists between the enforcing forum and either the judgment debtor or the dispute. It makes little sense to compel such a connection when, owing to the nature of the action itself, it will frequently be lacking. Nor is it necessary, in order for the action to proceed, that the foreign debtor contemporaneously possess assets in the enforcing forum. Jurisdiction to recognize and enforce a foreign judgment within Ontario exists by virtue of the debtor being served on the basis of the outstanding debt resulting from the judgment.[56]

This is not the place to debate the wisdom of this view of the law,[57] though it can perhaps be briefly noted that the Court's view that the basis for jurisdiction is found wholly in the defendant being served with process runs contrary to the Court's foundational decision in *Morguard*, which separated the issue of service of process from the issue of jurisdiction. The point here is simply the divergence between the common law and *CJPTA* approaches.

A more difficult issue is the extent to which the common law will develop presumptive connecting factors not found in the *CJPTA* and the extent to which courts in *CJPTA* provinces will then adopt those new factors under section 3(e). For example, in some provinces, the fact that the action is in respect of a contract made in the province is a ground for service *ex juris*.[58] However, the view that this particular connection is not sufficiently strong led to it being omitted from the *CJPTA*.[59] At common law, several cases have treated it as a presumptive

56. *Chevron*, *supra* note 7 at para 3. See also *Solecki v Stroud Resources Ltd*, 2017 BCSC 1130 at para 31, 281 ACWS (3d) 64.
57. See Pitel & Rafferty, *supra* note 3 at 165-66.
58. See *e.g.* Ontario *Rules*, *supra* note 6, r 17.02(f)(i).
59. Except in Saskatchewan. See Black, Pitel & Sobkin, *supra* note 11 at 35-36, 104.

connecting factor despite this lack of strength.[60] In *Club Resorts*, the Supreme Court of Canada suggested in passing that this is a presumptive connecting factor.[61] So there are two issues: whether the place of contract formation will survive sustained scrutiny as a presumptive connecting factor at common law, and, if so, whether the courts of *CJPTA* provinces will use that factor under section 3(e) despite its considered omission from section 10. It is possible, and perhaps likely, that the two approaches may come to different answers in respect of this factor.

Controversially, in *Club Resorts*, the Supreme Court of Canada held, with only minimal analysis, that in a tort claim a contract connected to the dispute and made in the province constitutes a presumptive connecting factor.[62] Such a presumption is not included in the *CJPTA* or in any province's list of enumerated grounds for service *ex juris*. The presumption raises several issues. First, as just noted, the place of making a contract is arguably not a strong connection to a particular forum. It seems even weaker in the context of a tort claim. Even if a connected contract matters in analyzing the tort claim, the focus on its place of formation, as opposed to its place of performance, may be misplaced. Second, courts now are faced with the difficult issue of determining when a contract is sufficiently "connected" to a tort claim.[63]

The Supreme Court of Canada affirmed this factor in *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*.[64] In this case, the Ontario Superior Court of Justice had been critical of the lack of clarity provided by the Supreme Court of Canada, noting that the Court "did not really explain how it came up with this … presumptive connecting factor."[65] It suggested a narrow interpretation: That the factor should be understood to mean that

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60. See *e.g. Edward Jones v Raymond James Ltd*, 2013 ONSC 4640 at paras 5-6, 229 ACWS (3d) 708; *Tyoga Investments Ltd v Service Alimentaire Desco Inc*, 2015 ONSC 3810, 255 ACWS (3d) 326, aff'd 2016 ONCA 15, 262 ACWS (3d) 350.
61. *Club Resorts*, *supra* note 24 at para 88.
62. *Ibid* at paras 88, 90.
63. This issue could arise frequently in respect of insurance contracts. See *e.g. Forsythe v Westfall*, 2015 ONCA 810, 128 OR (3d) 124; *Tamminga v Tamminga*, 2014 ONCA 478, 120 OR (3d) 671. In these decisions, the court held the insurance policies were not connected contracts.
64. 2016 SCC 30, [2016] 1 SCR 851, aff'g *Trillium Motor World Ltd v General Motors of Canada Ltd*, 2014 ONCA 497, 120 OR (3d) 598, aff'g 2013 ONSC 2289, 51 CPC (7th) 419 [*Lapointe Rosenstein*]. See also *Parque Industrial Avante Monterrey, SA de CV v 1147048 Ontario Ltd*, 2016 ONSC 6004 at paras 27-35, 134 OR (3d) 71; *Toews v Grand Palladium Vallarta Resort & Spa*, 2016 ABCA 408, 408 DLR (4th) 282.
65. *Lapointe Rosenstein* ONSC, *supra* note 64 at para 5.

> an Ontario court has jurisdiction over a tort claim brought by a non-party to an Ontario contract that is connected with the dispute, if the non-party can be brought within the scope of the contractual relationship by the terms of the contract, and if the events that gave rise to the claim flowed from the relationship created by that contract.[66]

The Court of Appeal for Ontario did not comment on this interpretation, but agreed with the motion judge that the presumptive connecting factor was established on the facts.[67] A majority of the Supreme Court of Canada held that this factor "requires that a defendant's conduct brings him or her within the scope of the contractual relationship and that the events that give rise to the claim flow from the relationship created by the contract."[68] In dissent, Justice Côté held that the defendants had not been brought within the scope of the contractual relationship and that, as such, the majority's approach amounted to allowing any contract connected to the tort claim to satisfy this factor.[69] While the debate about the interpretation of this factor is likely to continue, its existence as a factor in the common law analysis is clear. It is unclear whether the courts of *CJPTA* provinces will agree.

IV. IMMOVABLE PROPERTY

The general common law rule, invariably sourced to the decision of the House of Lords in *British South Africa Co v Companhia de Moçambique*,[70] is that a Canadian court has no jurisdiction to determine title to, or the right to possession of, immovable property situated outside the forum. The rationale underlying the rule is that a court should not grant a judgment which it has no power to enforce and which may bring the court into conflict with the authority of a foreign sovereign or the jurisdiction of a foreign court.[71] It is also clear that a foreign court includes one in another part of Canada and that foreign immovable property therefore

66. *Ibid* at para 12.
67. *Lapointe Rosenstein* ONCA, *supra* note 64 at paras 39-72.
68. *Lapointe Rosenstein* SCC, *supra* note 64 at para 44.
69. *Ibid* at paras 82-87.
70. [1893] AC 602, [1891-94] All ER Rep 640 (HL). See also *Tezcan v Tezcan* (1987), 20 BCLR (2d) 253 at para 14, 46 DLR (4th) 176 (CA); *Lucasfilm Ltd v Ainsworth*, [2011] UKSC 39 at para 55, [2012] 1 AC 208. For a recent application, see *Moradkhan v Mofidi*, 2013 BCCA 132 at para 52, 43 BCLR (5th) 116.
71. *Duke v Andler*, [1932] SCR 734 at 739, [1932] 4 DLR 529.

includes land in another part of Canada. The rule raises important issues as to its scope and also has some exceptions.[72]

In setting out rules for the taking of jurisdiction, the *CJPTA* does not mention the foreign immovable property rule.[73] While the matter is not entirely free from doubt, the common law rule likely continues to operate alongside the statutory scheme on the basis that the rule is one of subject matter jurisdiction rather than territorial jurisdiction and so is unaffected by the statute.[74] It would, however, be better for the *CJPTA* to have expressly addressed this important dimension of jurisdiction and so avoided ambiguity.

V. CONCLUSION

In *Club Resorts*, in making significant changes to the common law on jurisdiction, the Supreme Court of Canada noted that all of its comments "about the development of the common law principles of the law of conflicts are subject to provisions of specific statutes and rules of procedure."[75] This appears to accept that there is room for some difference in approach between the common law and the *CJPTA*. Nevertheless, the decision brought the common law much more in line with the *CJPTA* approach than it had previously been, certainly as far as Ontario is concerned.

In 2009, the Law Commission of Ontario issued a consultation paper examining the exercise of jurisdiction by Ontario courts in civil cases.[76] Written by Janet Walker, a leading Canadian private international law scholar, with input from a working group of other scholars in the field,[77] the paper called for the implementation of a jurisdiction statute in Ontario, though not necessarily in the same terms as the *CJPTA*.[78] The project did not move beyond the consultation stage. In part, it was interrupted by the *Club Resorts* litigation. In the consultation paper, a range of reasons were advanced for adopting a statute. Some were based

72. See Pitel & Rafferty, *supra* note 3 at 332-40.
73. Indeed, the *CJPTA* does not contain any provision that expressly states when the court does not have jurisdiction, as opposed to stating when it does.
74. For discussion, see Black, Pitel & Sobkin, *supra* note 11 at 46-48.
75. *Club Resorts*, *supra* note 24 at para 68.
76. The paper was only available on the Law Commission's web site but it is no longer there. However, for a detailed discussion of the paper, see Vaughan Black & Stephen GA Pitel, "Proposed Reform of Ontario's Law on Jurisdiction" (2009) 47:3 Can Bus LJ 469.
77. I was a member of the working group.
78. Black & Pitel, *supra* note 76 at 470.

on the notion that the common law was in need of reform.[79] The strength of those reasons may have been reduced by the changes which have since taken place to the common law on jurisdiction. If the common law is, in essence, quite similar to the *CJPTA*, reform along the lines of that statute is unnecessary.

However, there were other reasons for a jurisdiction statute, at least one of which remains equally important today. The law of civil jurisdiction is an important aspect of any legal system. It is somewhat anomalous for the law on such a topic to be found mainly in the decided cases. A statutory codification would make the law more accessible and more knowable, not just to lawyers but to the general public.[80] Indeed, it is arguable that one of the most important differences between the common law approach and the *CJPTA* approach involves not the content, but rather the means by which the content is expressed.

Accordingly, it would be a welcome development for those provinces which have not done so to implement a statute on jurisdiction. That statute should be along the general lines of the *CJPTA*, in part because there is value in some broad measure of consistency. But each such statute need not be identical. Variations in possible bases for jurisdiction are acceptable.[81] Indeed, such variations are expressly contemplated by the Supreme Court of Canada in *Club Resorts*.[82] In addition, it is time to consider whether some amendments to the *CJPTA* as enacted in British Columbia, Nova Scotia, and Saskatchewan are desirable. Legal principles about jurisdiction have evolved and globalization has increased incrementally since the *CJPTA* was drafted. The courts can only shift their interpretations of the various provisions for so long. Meaningful revisions are then required.

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79. *Ibid* at 472.
80. *Ibid* at 475.
81. *Ibid* at 475-76.
82. *Club Resorts*, *supra* note 24. The Court observes that:

> The development of an appropriate framework for the assumption of jurisdiction requires a clear understanding of the general objectives of private international law. But the existence of these objectives does not mean that the framework for achieving them must be uniform across Canada. Because the provinces have been assigned constitutional jurisdiction over such matters, they are free to develop different solutions and approaches, provided that they abide by the territorial limits of the authority of their legislatures and their courts (*ibid* at para 71).

Also, in the context of an interprovincial jurisdiction dispute, "[c]onflict rules vary from one jurisdiction to another." See *Lapointe Rosenstein* SCC, *supra* note 64 at para 33.