JURISDICTION AND MATRIMONIAL PROPERTY DISPUTES: A CANADIAN LENS

CLA Conference 2023 – Goa, India

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INTRODUCTION

Canada is a cold country with a rich portrait of diversity and a wealthy population. It is the perfect landscape for jurisdictional conflicts to emerge. Many wealthy Canadians have property

sprinkled all over the globe, others have homes in places such as Florida to escape the bitter Canadian winter, and many new immigrants continue to have property in their home countries.

Canada's *Divorce Act*, which applies to married spouses, is federal matrimonial legislation. Other than an order for divorce, the *Divorce Act* covers corollary relief (child and spousal support orders and parenting). Corollary relief does not include orders with respect to property and its division.

Section 92(13) of Canada's *Constitution Act* gives provincial legislatures the exclusive jurisdiction to make laws relating to, among other matters, "property and civil rights" in the province.[1] The Canadian provinces and territories, as a result, each have legislation governing property which apply to a couple's property in the event of a marriage breakdown.

Canada is divided into nine provinces and three territories. The largest provinces from which case law on jurisdictional matrimonial disputes emerge are British Columbia ("B.C.") and Ontario. This is largely due to the significant population, diversity, and wealth in these two provinces in comparison to the rest of Canada.[2]

When a jurisdictional conflict arises, several questions must be considered. First, when can a jurisdictional property dispute be heard by the Canadian Court? Second, should it be heard by the Canadian Court? Third, should Canadian law be applied?

If acting for a property and support recipient, Canada is an attractive jurisdiction. It is home to very generous family law legislation. While "forum shopping" is actively discouraged in our Courts, there is no denying that a non-monied spouse benefits from the largesse of Canadian law.

The test for determining *'when'* and *'whether'* a Canadian Court will assume jurisdiction are set out below.

THE FIRST HURDLE: jurisdiction *simpliciter* (the real and substantial connection test)

[1] *Constitution Act, 1982*, s. 92(13), Schedule B to the Canada Act 1982 (UK), c 11.
[2] This paper largely references Ontario law.

In Canada, in order for the Court to take jurisdiction of a matter, a litigant must first satisfy the 'jurisdiction *simpliciter*' test. This means a litigant must show that there is a 'real and substantial connection' between the court and the subject matter of the litigation.

THE SECOND HURDLE: forum non *conveniens* (are the 'connecting factors' satisfied?)

If the answer to the 'real and substantial connection' test is 'yes', the second decision the court must make is **whether** the Court should exercise its jurisdiction. In deciding the second arm of the test, the Court assesses which jurisdiction provides the most appropriate forum for the litigation to be adjudicated in.

Difference Tests For Divorce and Corollary Relief (parenting and support) vs. Property

a) The Test for Divorce, Parenting and Support

As outlined above, parenting and support proceedings can be brought under Canada's *Divorce Act*, however a property matter cannot.

The test for jurisdiction simpliciter is found in the *Divorce Act*. A Canadian Court has jurisdiction to hear and determine a divorce proceeding including parenting and support issues, so long as ***either spouse*** is "habitually resident"[3] in the province in which the proceeding is started at the commencement of the proceeding, or if both spouses accept the jurisdiction of the court.[4] Accordingly, only *one* of the married spouses has to be habitually resident in a province or territory of Canada in order for the Canadian court to have jurisdiction *simpliciter* over a case for divorce, parenting or support purposes.

b) Property

Unlike proceedings under the *Divorce Act*, for property matters, the test for jurisdiction *simpliciter* is found in the common law. This is discussed in more detail, below.

[3] Prior to March 2021, the term "ordinarily resident" was used instead of "habitually residence". The only purpose to the change was to align the English and Frensh version of the *Divorce Act*. Canadian courts have held that the change in language does not change the actual meaning of the provision.
[4] *Divorce Act*, RSC 1985, c.3, s.4(1)

Obviously, given the different tests for jurisdiction *simpliciter*, depending on the relief sought on marriage breakdown, property issues may be determined outside of Canada, but a non-monied spouse may still wish to bring an application for support in Canada and benefit from Canada's generous support regime.

THE FIRST HURDLE: Deciding When Canada will Assume Jurisdiction, The "Real and Substantial Connection" Test

A Canadian court may assume jurisdiction if there is a "real and substantial connection" (jurisdiction *simpliciter*) between the forum and the parties, or the subject matter of the dispute.

The Supreme Court of Canada in *Van Breda*, a tort case, held that a "real and substantial connection" must be established "primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum".[5]

Under the *Van Breda* test, a single presumptive connecting factor, in the absence of any rebuttal of that presumption, is sufficient to establish jurisdiction *simpliciter*.

Family law cases have adopted the *Van Breda*'s "real and substantial" connection test when determining whether a property matter should be determined in a Canadian province. In *Knowles v. Lindstrom*, the Ontario Court of Appeal affirmed that if real property is located in Canada, the location of that property is a presumptive connecting factor.[6] (Of court, this is helpful if the parties only have property in one country!)

In *Wang v. Lin*, another family law case decided by the Ontario Court of Appeal, the court established a new presumptive connecting factor: the location of the parties' "real home" or "ordinary residence".[7] The Court found that this factor was an appropriate "presumptive connecting factor given that "ordinary residence" (now "habitual residence") is the jurisdiction *simpliciter* test under the *Divorce Act*.[8]

[5] *Van Breda v Village Resorts Ltd.*, 2012 SCC 77, at para 82.
[6] *Knowles v Lindstrom*, 2014 ONCA 116, at para 21.
[7] *Wang v Lin*, 2013 ONCA 33, at para 19.
[8] Ibid.

The Supreme Court of Canada defined "ordinary residence" (now "habitual residence") as a place where in the settled routine of one's life, one regularly, normally or customarily lives. There must be an element of permanence, however, the length of the stay is not determinative either.[9] The analysis of "ordinary residence" is identical to the one taken to establish "habitual residence" which is further explained below.

In applying the "habitual residence" connection test in the recent case of *Doersam v. Doersam*, the Court found that the parties had very little connection to Ontario. Neither of the parties, nor their children resided in Ontario and their habitual residence was clearly in Costa Rica. Sporadic vacations in Ontario or expressed intentions to return to Canada *eventually* did not create an Ontario residence.[10]

A person can also have a "habitual residence" in more than one place at the same time, something not uncommon among the wealthy. In *Knowles v. Lindstrom*, the Court of Appeal found that the spouses were habitually resident in Canada *and* the United States. The parties had their primary home in Florida and annually, for months at a time, they would reside in Ontario. This pattern occurred for more than five years, amounting to "ordinary residence" according to the Court of Appeal.[11] In cases where there is more than one "habitual residence", and multiple jurisdictions *can* hear the matter, the question then turns to which jurisdiction *should* hear the matter.

THE SECOND HURDLE: *FORUM NON CONVENIENS:* Whether the province in Canada should hear the matter?

A finding that there is a real and substantial connection is not the end of the inquiry. If the answer to the first question is 'yes', only then may the court turn to the *forum non conveniens* test.

[9] *Thomson v Minister of National Revenue*, [1946] SCR 209.
[10] *Doersam v Doersam*, 20222 ONSC 4095, at para 14.
[11] *Knowles v Lindstrom*, 2014 ONCA 116, at paras 31 and 32.

In addition, the issue of *forum non conveniens* is only in issue if a party to the litigation raises it as one.[12] A Court may decline to assume jurisdiction in a case where there is a real and substantial connection if the local court is not the *forum conveniens* or appropriate forum.

The question the Court asks when addressing the second hurdle, is whether there is *clearly* a more appropriate jurisdiction than the domestic forum chosen by the applicant spouse.[13]

In determining this, Ontario case law has cited a variety of factors including,

1. The location of the majority of the parties;
2. The location of key witnesses and evidence;
3. Contractual provisions that specify the applicable law or accord jurisdiction;
4. The avoidance of a multiplicity of proceedings;
5. The applicable law and its weight in comparison to the factual questions to be decided;
6. Geographical factors suggesting the natural forum; and
7. Whether declining jurisdiction would deprive the applicant spouse of a legitimate juridical advantage available in the domestic court.[14]

In *Nicholas v. Nicholas*, the Court of Appeal in Ontario upheld a motions judge's decision determining that Trinidad was the *forum conveniens* to adjudicate divorce proceedings. In *Nicholas*, the only issues in dispute were about money and property. The wife asserted that Ontario, not Trinidad was the *forum conveniens.*[15]

The motions judge found that the family had established roots in Trinidad, extended family and social ties who would provide a large pool of potential witnesses were in Trinidad, and numerous assets including the two matrimonial homes and the husband's extensive business interest were in Trinidad. The only asset in Ontario was one of the parties' homes however, the evidence was clear that the parties looked at Trinidad as their permanent home.[16]

[12] *Van Breda v Village Resorts Ltd., 2012 SCC 77, at paras 101-102.*
[13] *Frymer v Brettshneider* (1994), 19 OR (3d) 60 (ONCA) at para 57.
[14] *Muscutt v Courcelles,* [2002] OJ No 2128 (ONCA), at para 41.
[15] *Nicholas v Nicholas,* [1996] OJ No. 3543 (ONCA), at paras 9-21.
[16] Ibid.

Further, there was no juridical disadvantage to either spouse for these issues to be litigated in Trinidad. Trinidadian law shared the same universal principles of family law and the Court found there would be a strong possibility that the Trinidadian court could come to a similar conclusion that an Ontario court would come to.

Despite the wife's arguments that the parties were Canadian citizens and they had a home in Ontario where the children resided, the Court held that the other factors overwhelmingly pointed to Trinidad being the appropriate jurisdiction to hear the parties' dispute.[17]

Given the boom in the use of technology in the legal system and in legal practice, particularly post-March 2020, it will be interesting to see how the *forum non conveniens* arguments are applied in this new era. In the event a spouse wants to litigate an issue in Ontario, many of the factors a court considered in the past may no longer be relevant given a court's ability to call witnesses and experts through platforms such as Zoom. There may no longer by juridical advantages over having a dispute litigated in one court or the other given the ability for us to connect with another jurisdiction with the click of a button.

Will Canadian Property Law Be Applied? What Was the Parties' "last common habitual residence"?

Once it has been determined that there is a 'real and substantial connection' to a province in Canada and that the province is the appropriate forum, the last step is to determine what *law* should apply to the dispute (i.e. the conflict of laws).

In Ontario, the question to be asked is where both spouses had their *last common habitual residence*. The internal law of the place of such residence then governs the spouse's dispute.[18]

This inquiry may be a short one if the issue of "real and substantial connection" (jurisdiction *simpliciter*) has already been established and .the presumptive connecting factor of being habitually resident in a province has been met.

[17] Ibid.
[18] *Family Law Act*, RSO 1990, c F3, s. 15.

It must be remembered, however, that parenting claims, and spousal and child support claims under the *Divorce Act* can be made if *either* spouse is habitually resident in a province, whereas when there is a conflict as to which law applies to the spouses' property, the provincial legislation requires that for Canada's provincial matrimonial property laws to apply, the spouses must have had their last *common* habitual residence in the province.

The term "habitual residence" is a phrase utilized by The Hague Conference on Private International Law. However, no definition of habitual residence has ever been included in a Hague Convention. One of Ontario's most senior judges has theorized that this is a matter of deliberate policy in order to prevent any rigidity and inconsistencies between different legal systems.[19] The lack of definition also ensures that this inquiry can remain fact specific and based on the circumstances of each case, allowing the assessment to be free of presuppositions and presumptions.[20]

While Canada's provinces and territories have differing conflict of laws legislation, the common thread in most family law legislation in Canada requires the court to determine the parties' "common habitual residence". The majority of the provinces' and territories' legislation, including Ontario, contains the following conflict of laws provision: property rights of spouses are governed by the internal law of the place where both spouses had their *last common habitual residence*.[21] If there is no last common habitual residence, then the law of that province governs. A brief summary of differing provincial legislation is attached to this paper as Appendix "A".

Habitual Residence: What Does it Mean?

While no such definition exists in any statute, it is clear that "habitual residence" is not mere "residence". The word "habitual" indicates a "quality of residence rather than it length".[22] Ontario's case law has noted a variety of factors to help assist courts in determining habitual residence, although it ultimately is a fact specific analysis.

[19] *Pershadsingh v. Pershadsingh*, [1987] OF No. 641 (Ont. HC), at para 7.
[20] Ibid.
[21] Supra note 18.
[22] Supra note 19.

In making a fact driven inquiry, there are a variety of factors to be weighed by a court in determining "habitual residence", although no one factor is determinative. Such factors include where the parties owned a home, where they worked, where they filed income tax returns, where their personal belongings were kept, where family assets and/or bank accounts were located and where they declared ownership of foreign property.[23] The parties intentions are also an important consideration in this inquiry. Factors that are *not* as persuasive nor determinative include citizenship, immigration status[24], or length of time of the residence.[25]

There must be some permanence to the living arrangements before such can be considered a "habitual residence". In *Koutzarov v. Koutzarov*, the parties lived together in Ontario until the husband was later transferred to Texas for work. The family moved together to Texas and continued to live there post-separation. The court in this case concluded that Ontario was the spouses' last habitual residence. The husband's work visa allowing the parties to reside in Texas contained severe limitations and was subject to annual renewal. The parties left behind properties in Ontario, including the matrimonial home, and the understanding was that once the husband's employment ceased, the family was to return to Ontario. There was no permanence to their residence in Texas.[26]

The Ontario courts have also determined that the "last common habitual residence" is the place where spouses most recently lived together as spouses. This is a place where they participated together in everyday family life. In *Adam v Adam*, the parties moved with their children from Alberta to Zimbabwe as the husband had been offered a judiciary appointment. Less than two years later, the wife and children moved back to Canada, in Ontario, while the husband stayed in Zimbabwe. Once the move occurred to Canada, the spouses ceased cohabitation. It was clear in this case, that it was in Zimbabwe that the parties last lived together as husband and wife.[27] In a recent 2021 case, a similar finding was made where the husband had two families, one with his girlfriend in Kenya and one with his wife in Ontario. The husband would return to Ontario three to four times a year throughout the parties' marriage to be with his wife and children. Despite

[23] *Babi v. Chaykhouni*, 2022 ONSC 7128, at para 30.
[24] *Jenkins v Jenkins*, [2000] OJ No. 1631, at para 15.
[25] *Jadavji v Jadavji* [2001] BCJ No. 1027, at para 21.
[26] *Koutzarov v Koutzarov* (1986), 1 ACWS (3d) 317 (OSC).
[27] *Adam v Adam*, [1994] OJ No. 1930 (OCJ).

the husband's complicated relationships, the issue of jurisdiction was less complicated: as husband and wife, they clearly last lived together as spouses in Ontario.[28]

Can Spouses Make Binding Contracts in Canada About Choice of Jurisdiction and Choice of Law in the Event of a Marriage Breakdown?

When spouses want to pre-determine these issues, they may do so by a domestic contract. In Ontario, a "domestic contract" may be a cohabitation agreement, a marriage contract or a separation agreement. A domestic contract allows spouses to express their clear intention for their matters to be governed by a particular law and be heard by a particular jurisdiction. The absence of an expressed choice results in a jurisdiction and choice of law being imposed on them instead by a Court.

In most jurisdictions in Canada, including in Ontario, legislation specifies that certain requirements must be met before the Court will recognize the validity of the contract.

The *Family Law Act* first requires that the domestic contract be formally valid. All domestic contracts must be,

1. Made in writing;
2. Signed by the parties; and
3. Witnessed.[29]

The *Act* also requires the domestic contract to be essentially valid. In making the contract,

1. The parties must have disclosed to each other significant assets, debts and liabilities that existed when the contract was made;
2. The parties must understand the nature or consequences of the contracts; and
3. The contract must be otherwise in accordance with the law of contract.[30]

[28] *Gulamali v Gulamali*, 2021 ONSC 4787, at paras 20-21.
[29] Supra note 18, s. 55(1).
[30] Supra note 18, s. 56(4).

How Does Canada Consider Foreign Contracts that Purport to Address Jurisdiction and Choice of Law?

A contract made *outside* of Ontario may still be a valid and enforceable contract in Ontario so long as it is entered into in accordance with the province's internal law.[31] However, given Canada's generous legislation with respect to property and support, a finding that a foreign contract is invalid may well greatly benefit a property recipient. If Canada finds the foreign domestic contract to be invalid, or if it is set aside, the court will apply the tests related to jurisdiction and then the last common habitual residence test per Ontario's conflict of laws legislation outlined above.

Even if a foreign contract is held to be valid, a recipient spouse may still be eligible to have Ontario's equalization regime apply. In *Bosch v Bosch*, the Court of Appeal affirmed that for a domestic contract to prevail over Ontario's equalization regime, an agreement that only refers to *ownership* of property is insufficient. The contract must contain provisions which address (either through intent or explicit language) the waiver of rights to the *division* of property or equalization of net family property or some other form of economic redress upon marriage breakdown.[32]

As an example, in *Oskalns v. Oskalns*, the parties entered into a marriage contract in Latvia. There was no doubt that the marriage contract was a valid contract under Ontario law. However, there was no direct and cogent language contained in the contract that addressed the economic consequences of their marriage breakdown nor provisions that excluded property from an equalization.[33] Accordingly, the wife in *Oskalns*, was able to rely on Ontario's equalization regime in the face of a valid foreign contract.

How Do the Courts Treat Religious Marriage Contracts In Canada?

In Canada, the Supreme Court in 2007 held that just because a contractual agreement has a religious aspect to it, such does not prevent a court from determining the enforceability of the

[31] Supra note 18, s. 58.
[32] *Bosch v Bosch*, [1991] OJ No. 1694 (ONCA) at paras 40-42.
[33] *Oskalns v. Oskalns*, 2016 ONSC 1676, at paras 54-63.

agreement, so long as it satisfied the necessary requirements.[34] For example, a Mahr agreement, which is a marriage contract entered into under Islamic law, has been enforced in Ontario in cases where it was a valid contract per Ontario's family law legislation.[35]

However, this is a case specific analysis. In a 2015 case, a Mahr was set aside by an Ontario court and deemed unenforceable under Ontario law. While the Mahr was made in writing, signed by both parties, and witnessed, it was entirely written in Arabic, a language that neither party to the contract spoke, read or wrote in. The Ontario court could not be satisfied that the parties were of like mind, understood the nature and consequences of what they were signing, nor whether they agreed to be bound by the terms of the contract.[36]

With Canada's growing religious and racialized populations, the issue of applying foreign and religious contracts will continue to play out in its courts.

How Are Foreign Family Law Judgments for Property Enforced In Canada?

Under Canada's common law and its federal and provincial legislation, Canadian courts can recognize and enforce a foreign judgment. Foreign support judgments are commonly enforced in Canada, however, our courts also have a limited ability to enforce foreign property judgments.

In 1984, Canada and the United Kingdon entered into a Convention providing for the reciprocal recognition and enforcement of judgments. This Convention has been codified in both federal and provincial legislation. However, the legislation specifically *excludes* judgments that determine "matrimonial matters".[37] Canada is also not a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[38]

Aside from the Canada-United Kingdom convention, provincial legislation in Ontario is limited with respect to "foreign" judgments as it applies only to provinces and territories of Canada (except Quebec). Other provinces, such as Quebec and Saskatchewan, have reciprocal

[34] *Yar v Yar*, 2016 ONSC 151, at para 32.
[35] Ibid, at para 33.
[36] Ibid, at para 41.
[37] *Canada-United Kingdom Civil and Commercial Judgments Convention Act*, RSC, 1985, c C-30.
[38] Cavanaugh, Peter and Snider, Chloe, "Enforcement of Foreign Judgments 2014", Getting the Deal Through.

enforcement legislation that applies to *all* foreign jurisdictions. A table setting out the varying provincial legislation regarding reciprocal enforcement of judgments is at Appendix "B".

Our common law provides a wider scope to enforce property judgments made outside of Canada. In general, a foreign judgment is *prima facie* enforceable if the foreign judgment,

1. Originated from a court of competent jurisdiction (that is, if the jurisdiction had a real and substantial connection to the matter);
2. The foreign judgement is final and conclusive; and
3. The foreign judgement is not for a penalty, taxes, a fine, or enforcement of a foreign public law.

The real and substantial connection test by the Supreme Court of Canada, as in *Van Breda*, is used to determine whether a foreign court appropriately took jurisdiction when making the foreign judgment. However, it is <u>not</u> necessary for a court to determine that a real and substantial connection existed between a party and Ontario. Once recognized, a foreign judgment is enforceable in the same manner as any other judgment.[39]

<u>Reciprocal Enforcement of Support Orders in Canada</u>

Each province and territory in Canada has legislation regarding the reciprocal enforcement of support orders. While many jurisdictions in the Commonwealth are reciprocal jurisdictions, a surprising number are not. The following reflect the current reciprocating enforcement jurisdictions under the Ontario legislation[40]:

1. All provinces and territories of Canada apart from Ontario.
2. The United States of America, including the 50 states, American Samoa, District of Columbia, Guam, Puerto Rico, United States Virgin Islands and any other jurisdiction of the United States participating in Title IV-D of the Social Security Act (U.S.A.).
3. The Commonwealth of Australia and the following States and Territories of Australia:

Capital Territory of Australia	South Australia
New South Wales	Tasmania
Northern Territory of Australia	Victoria
Queensland	Western Australia

[39] Ibid.
[40] *Reciprocal Enforcement of Support Orders Act,* RSO 1990, c R7, s. 19 and *Reciprocating States*, O. Reg. 140/94.

4. The following jurisdictions:

Federal Republic of Germany	Guernsey, Alderney and Sark
Fiji	Hong Kong
Finland	Isle of Man
Gibraltar	Malta and its Dependencies
Republic of Austria	New Zealand and the Cook Islands
Republic of Ghana	Papua New Guinea
Republic of Poland	Republic of South Africa
States of Jersey	United Kingdom
Zimbabwe	

Do Canadian Courts Grant Orders Against Foreign Property?

As a general rule in Ontario, our courts cannot make orders with respect to property outside of Ontario. There is however, one exception: if a court determines it is appropriate to exercise *in personam* jurisdiction. If that is the case, a court may make an order for the sale of foreign property and the division of proceeds.

In short, while a province or territory may not have jurisdiction over foreign property, if it has jurisdiction over the party, certain orders can be made a party to the litigation.

The Court of Appeal in Ontario set out four criteria to be met in order to determine whether a court in Canada has jurisdiction to make an order with respect to foreign property:

1. The Plaintiff/Applicant must be able to serve the other side with originating process, or the other side must submit to the jurisdiction of the court;
2. There must be some personal obligation running between the parties. The jurisdiction cannot be exercised against strangers to the obligation unless they have become personally affected by it;
3. The jurisdiction cannot be exercised if the local court cannot supervise the execution of the judgment; and

4. The court will not exercise jurisdiction if the order would be of no effect in the jurisdiction where the property is located.[41]

The fourth condition does not apply however, unless the court must require the foreign property to be sold by one of the parties.

In the 2018 case of *Knight v Knight*, the court did find that all of the criteria set out in the Court of Appeal applied. The court exercised its *in personam* jurisdiction over property in Jamaica. In *Knight*, the parties were both Canadian citizens and they were spouses. Jamaica, being a common law jurisdiction could supervise the execution of an Ontario judgment; and there was good reason to believe that Jamaica would act on the judgment provided. The court accordingly ordered that the equalization payment owing by the wife to the husband was to be paid from her share in the Jamaican properties. This order also allowed all of the parties' property issues to be resolved at once instead of leaving an outstanding piece of litigation in Jamaica to be determined.[42]

An Ontario court also exercised its *in personam* jurisdiction in the case of *Glasco v Bilz*, where the husband did not come to court with clean hands. In *Glasco*, the wife was induced and encouraged to liquidate her assets in Ontario and invest them in properties in Florida, even though she had no legal ownership of the Florida properties. She was deceived by her husband who was both her spouse and financial advisor. The wife asked the Ontario court to grant an order to sell the Florida properties and pay the proceeds of sale to the wife. While the court recognized an order for sale of properties would be difficult to enforce, in the unconscionable circumstances of the case, it was appropriate for an order to be made.[43]

The court's power to exercise *in presonam* jurisdiction is both limited and highly exceptional, recognizing that the majority of the time, the court that has jurisdiction over a property dispute is the one more equipped to make an order.

Choice of law and jurisdiction in alternative dispute resolution settings: how does it work?

[41] *Catania v. Giannattasio*, [1999] CarswellOnt 950 (ONCA), at para 12.
[42] *Knight v Knight*, 2018 ONSC 4027, at paras 75 and 77.
[43] *Glasco v Bilz*, 2014 ONSC 7202, at paras 63-69.

Mediation

The Canadian legal system, particularly in family law, promotes the use of mediation. In mediation, a neutral third-party mediator (often a experienced family lawyer), assists parties in settling a dispute. Mediation is a voluntary process which often provides a practical path forward for parties, as opposed to adhering to strictly legal solutions. Canadian courts have the ability to order parties to attend a mediation session, especially in situations where the issue does not need immediate court intervention.

However, mediators do not decide cases nor can they impose a settlement. Mediation is premised on the good faith and commitment of the parties involved. A successful mediation can result in a settlement agreement which can later be turned into a separation agreement (which is a domestic contract under Ontario's *Family Law Act*) and can dictate the choice of law and jurisdiction to apply in the event of a future dispute.

Arbitration

Arbitration on the other hand, is a private dispute resolution process wherein parties can appoint an arbitrator to adjudicate their matter, resulting in an arbitral award. Parties can, by way of motion or application, enforce arbitral awards. While the legislation differs on this issue across Canada, in Ontario, an arbitrator's jurisdiction is limited by a "family arbitration agreement" which the parties must enter into in order to have a valid and binding arbitration in Ontario. Arbitrators, of course, do not have any inherent jurisdiction, outside of that given to them under the arbitration agreement.

In April 2007, in Ontario (the jurisdiction in Canada where private dispute resolution – both mediation and arbitration-- are most advanced) the *Family Law Act* and Ontario's *Arbitration Act* were amended to provide specific parameters with respect to Ontario family arbitrations. The amendments distinguished family arbitrations from arbitrations conducted in other areas of law.

A “family arbitration” can only be conducted exclusively in accordance with the law of Ontario or another Canadian jurisdiction. Other third-party decision-making processes in family matters are not considered family arbitrations and will have no legal effect.[44]

The amendments to the legislation were a response to the emerging “sharia courts” which were conducting many arbitrations and applying Sharia law instead of the property law of Ontario, and the parenting and support laws pursuant to the *Divorce* Act.

It is noteworthy that in Ontario, in other areas of law, the parties to an arbitration are able to designate their own choice of law, which includes non-Canadian law. [45]

CONCLUSION

The growing interdependence of the world’s economies, cultures, and populations makes jurisdictional issues more and more common and relevant in family law cases. While this paper attempts to simplify the process in determining the appropriate jurisdiction in matrimonial property disputes, many families’ circumstances are not simple and jurisdictional disputes can become complex.

Globalization and evolving family dynamics and structures make it all the more important to have a strong understanding of these issues as family lawyers.

[44] *Arbitration Act*, 1991, SO 1991, c. 17, ss. 1 and 2.2.
[45] Ibid, ss. 32(1) and 32(4).

Appendix "A": Provincial "Conflict of Laws" Legislation

B.C.

In B.C., the legislation starts out the same as in Ontario, the internal law of the place where both spouses had their last common habitual residence governs.

However, if the jurisdiction of the spouses' last common habitual residence is *outside* of Canada, it is the internal law of the place most closely associated with the spouses' relationship that governs. When no common habitual residence exists, the internal laws of the most recent habitual residence of the spouse making an application for an Order under the B.C. legislation will apply.[46]

Alberta & Manitoba

In Alberta, a spouse may apply to the court for a "matrimonial property order" under its legislation only if,

1. The habitual residence of both spouses is in Alberta;
2. The *last* habitual residence of the spouses was in Alberta; or
3. If the spouses had not established a joint habitual residence since marriage but the habitual residence of *each* of them at the time of marriage was in Alberta.

If none of the above apply but a statement of claim for divorce is issued under Canada's *Divorce Act* in Alberta, a spouse may still apply for a matrimonial property order under Alberta's legislation.[47]

Manitoba's legislation is similar to that of Alberta's.[48]

New Brunswick

In New Brunswick, the conflict of laws provisions looks to see if the last common habitual residence of the spouses is in the province. When there is *no* common habitual residence, New

[46] *Family Law Act*, SBC 2011, s. 107
[47] *Matrimonial Property Act*, RSA 2000, s. 3(1)
[48] *Family Property Act*, CSSM, s. 2(1)

Brunswick legislation will still apply so long as one of the spouses has maintained their last habitual residence in the province.

New Brunswick also allows a spouse to apply under its legislation with respect to matrimonial property and the Court will then apply the law of the last common habitual residence of the spouses or if no such residence exists, the last habitual residence of the applicant.[49]

Quebec

Canada is a bijural country in which every province and territory, except for the province of Quebec, are governed by common law. Quebec, is governed by the civil law system. The conflict of law provision in its civil code differ the most compared to the other provinces as it focuses on a point in time, being the time of the parties' marriage, rather than where the parties' commonly reside. The conflict of laws provision says,

1. The property issue is governed by the law of the parties country or domicile *at the time of their marriage or civil union;*
2. If the parties are domiciled in different countries at that time, the applicable law is the law of their *first common residence;*
3. If there is no first common residence, then the applicable law is the law of their *common nationality;*
4. Finally, if they have different nationalities, the applicable law is the law of the *place of solemnization* of the parties' marriage or civil union.[50]

[49] *Marital Property Act*, RSNB 2012, c 107, ss. 46(1) – 46(2).
[50] Walker, Janet, *Canadian Conflict of Laws,* 25-9.

Appendix "B": Provincial "Reciprocal Enforcement of Judgments" legislation[51]

	Applicable Law/Statutory Regime	Relevant Jurisdiction(s)
Canada	*Canadian-United Kingdom Civil and Commercial Judgments Convention Act*, RSC 1985, c C-30	United Kingdom
Ontario	*Reciprocal Enforcement of Judgments Act*, RSO 1990, c R5 *Reciprocal Enforcement of Judgments (UK) Act*, RSP 1990, c R5	All Canadian provinces and territories with the exception of Quebec United Kingdom
British Columbia	*Court Order Enforcement Act*, RSBC 1996, c 78	All Canadian provinces and territories with the exception of Quebec Australia, Austria, Germany, the United Kingdom, and the United States (only Alaska, California, Colorado, Idaho, Oregon, Washington)
Alberta	*Reciprocal Enforcement of Judgments Act*, RSA 2000, c R-6 *International Conventions Implementation Act*, RSA 2000, C-16	All Canadian provinces and territories with the exception of Quebec Australia; and the United States (only Washington & Idaho) United Kingdom
Saskatchewan	*Enforcement of Foreign Judgments Act*, SS 2005, c E-9.121 *The Canada-United Kingdom Judgments Enforcement Act*, SS 1988-89, c C-0.1	All foreign jurisdictions. United Kingdom
Prince Edward Island	*Reciprocal Enforcement of Judgments Act*, RSPEI 1988, c r-6	All Canadian provinces and territories with the exception of

[51] "Enforcement of Foreign Judgments Laws and Regulations Canada 2022-2023", *The International Comparative Legal Guides*, March 30, 2022: <https://iclg.com/practice-areas/enforcement-of-foreign-judgments-laws-and-regulations/canada>

	Canada-United Kingdom Judgments Recognition Act, RSPEI 1988, c C-1	Quebec; United States (Washington) United Kingdom
Newfoundland & Labrador	*Reciprocal Enforcement of Judgments Act*, RSNL 1990, c R-4	All Canadian provinces and territories with the exception of Quebec Australia; United Kingdom
Manitoba	*The Enforcement of Judgments Conventions Act*, CCSM, cE117 *The Canada-United Kingdom Judgments Enforcement Act*, CCSM, c J21	France United Kingdom
Quebec	*Civil Code of Quebec*, CQLR c CCQ-1991, Articles 3155-3163	All foreign jurisdictions