Succession and Conflict of Laws

CAMERON HARVEY*

I. INTRODUCTION

This brings up to date surveys of Manitoba cases published in 1992, Conflict of Laws,[1] and 1998, Succession,[2] and is my swan song, as I am retiring within a year.

II. WILLS

Most commonly the validity of a will is challenged on the basis of mental capacity and undue influence. *Re Janicki Estate*[3] is an unremarkable case involving disparate allegations, (i) of suspicious circumstances surrounding the preparation and execution of a holograph will, principally of undue influence by a friend of the testator who had no interest in the deceased's estate, (ii) that the holograph document was merely instructions for a will to be prepared by the deceased's lawyer, and (iii) that the holograph will was a conditional will, none of which impressed the court. Similarly, *Hazen v. Wusyk Estate*,[4] *Slobodianik v. Podlasiewicz*,[5] and *Thorsnes v. Ortigoza*[6] are straightforward cases of suspicious circumstances of mental capacity and also in *Hazen* of undue influence. However, they involve four matters worthy of comment.

---

* Professor, Faculty of Law, University of Manitoba

1 (1992), 21 Man. L.J. 138.

2 (1998), 25 Man. L.J. 321, although this survey had to do with 1995–1996.

3 (1997), 120 Man. R. (2d) 178 (Q.B.).

4 (2002), 162 Man. R. (2d) 55 (Q.B.).

5 (2003), 173 Man. R. (2d) 287 (C.A.).

6 (2003), 174 Man. R. (2d) 274 (Q.B.). The issue was an allegation of insane delusion, the court's treatment of which is excellent.

First, in each of the cases, except *Thorsnes*, the court refers to what is now the leading case on the doctrine of suspicious circumstances, *Vout v. Hay*.[7] This doctrine has been fraught with misconceptions, a couple of which the Supreme Court of Canada treated in *Vout v. Hay*. One of these misconceptions is that the doctrine raises the standard of proof on the propounder of a will. Among others, Justice Hanssen in *Re Hall Estate*[8] correctly squashed this notion. So did Justice Sopinka in *Vout v. Hay*,[9] adding:

> The evidence must, however, be scrutinized in accordance with the gravity of the suspicion. As stated by Ritchie J. In Re Martin; *McGregor v. Ryan* ... "The extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case."

Unfortunately, the reiteration of Justice Ritchie's statement muddies the water as it suggests a higher standard of proof. Both Justice McCawley in *Hazen v. Wusyk Estate*[10] and the Court of Appeal *Slobodianik v. Pudlasiewicz*[11] quote Justice Ritchie too.

The doctrine of suspicion is curious in two respects. First, why does it exist? Essentially, it cautions the court to be careful in determining the validity of a will, when there are suspicious circumstances; does this not fall within the expressions "It goes without saying" and "Needless to say"? Second, why is there this discrete doctrine respecting the validity of a will when there is no such doctrine respecting any other civil issue, for instance respecting the validity of a contract? It is too bad that the Supreme Court of Canada did not trash the doctrine of suspicion, as it did *res ipsa loquitor* in *Fontaine v. Ins. Corp. of British Columbia*.[12]

Second, it seems that, despite the effort of law teachers, bar admission instructors, and the courts, some lawyers, perhaps pressed for time or out of sheer laziness, continue to fail to take the time to interview carefully clients in taking instructions for a will. Again, in *Slobodianik v. Podlasiewicz*[13] and *Thorsnes v. Ortigoza*,[14] the courts admonished a lawyer with reference to, *inter alia*, Chan-

---

7 [1995] 2 S.C.R. 876.

8 (1986), 44 Man. R. (2d) 232, para. 15 (Q.B.).

9 *Supra* note 7 at para. 24.

10 *Supra* note 4 at para. 26.

11 *Supra* note 5, para. 21.

12 [1998] 1 S.C.R. 424.

13 *Supra* note 5 at paras. 28–33.

tigoza,[14] the courts admonished a lawyer with reference to, *inter alia*, Chancellor Boyd's oft-quoted statement in *Murphy v.Lamphier*.[15]

Third, the criteria of testamentary mental capacity are certain, but they are articulated in two ways, one of which is not correct. Both articulations are to be found in the leading, but not the seminal, case of *Banks v. Goodfellow*.[16] Chief Justice Cockburn said:

> It is essential ... that a testator shall understand the nature of the act and its effect; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect.[17]

There is a subtle, but significant, difference between understanding and being able to comprehend. Another statement of the criteria, which is frequently quoted or paraphrased by Canadian courts,[18] is Justice Laskin's statement in *Re Schwartz*:[19]

> The testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property.

Again, like Chief Justice Cockburn, Justice Laskin requires the testator "to know" and to be "capable of appreciating ... and forming ...", which comprise two different standards. If a testator "shall understand" or "must ... know", then I lack testamentary capacity because, however comparatively modest my investments are, I do not know the extent of my property; I do not know because I am not sufficiently interested, but certainly I am "able to comprehend" the extent of my property, if I put my mind to it. Later in his reasons Chief Justice Cockburn quotes Erskine in *Harwood v. Baker*:

> ... in order to constitute a sound disposing mind a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the

---

[14] *Supra* note 6 at paras. 29–32.

[15] (1914), 31 O.L.R. 287, 318 (H.C.).

[16] (1870), L.R. 5 Q.B. 549.

[17] *Ibid.* at 564, quoted by the Manitoba Court of Appeal in *Slobodianik v. Podlasiewicz*, *supra* note 5 at para. 27.

[18] For instance, *Hazen v. Wusyk Estate*, *supra* note 4 at para. 20.

[19] (1970), 10 D.L.R. (3d) 15, 32 (Ont. C.A.).

> extent of his property and the nature of the claims of others, whom by his will he is excluding ...[20]

Lord Erskine's articulation is perfect, as is Justice McCawley's in *Hazen v. Wusyk Estate*[21] and Master Sharp's in *Toomer v. Canada Trust Co.*.[22]

Fourth, regarding the evaluation of a testator's mental capacity, courts can be persuaded to prefer the assessment of a lay person, such as a lawyer or a friend, over the assessment of a physician.[23] This was an issue in *Slobodianik v. Podlasiewicz*[24] on which the trial court and Court of Appeal differed.

Toomer v. Canada Trust Co. is noteable also for its reminder of the wider discovery allowed of medical records concerning a testator's mental capacity.[25]

Three cases involved s. 23 of The Wills Act,[26] pursuant to which the Court of Queen's Bench can validate imperfect execution of a will. In *Belser v. Fleury*[27] the court was prepared to admit to probate an unsigned, partially completed printed will form, but for the lack of persuasive evidence that the handwritten completions were the handwriting of the deceased. In *Prefontaine v. Arbuthnot*[28] the court admitted to probate such a document. *Re Weselowski Estate*[29] illustrates the point made by the Court of Appeal in *George v. Daily*[30] that on a s. 23 application, in addition to execution and intention, the other aspects of validity, knowledge and approval in *George v. Daily*, and mental capacity in *Re Weselowski Estate*, can be made an issue.

When testators make a joint will or mutual wills there can be an issue of whether they intend there to be between them an agreement not to revoke their will. While the judicial inference of such an agreement with a joint will has been fairly consistent, there has been uncertainty with mutual wills.[31] *Shew-*

---

20 *Supra* note 16 at 568.

21 *Supra* note 4 at para. 21.

22 *Toomer v. Canada Trust Co.* (1997), 117 Man. R. (2d) 135, para. 9.

23 *Ibid.* at paras. 10–15.

24 *Supra* note 5.

25 *Supra* note 22 at paras. 23–28.

26 C.C.S.M. c.W150.

27 (1999), 139 Man. R. (2d) 149 (Q.B.).

28 (2001), 154 Man. R. (2d) 75 (Q.B.).

29 (2003), 176 Man. R. (2d) 103 (Q.B.).

30 (1997), 115 Man. R. (2d) 27 (C.A.).

31 For example, *Re Gillespie* [1969] 0.R. 585 (C.A.).

chuk v. Preteau[32] involved cross-motions for summary judgment respecting mutual wills made by the plaintiffs' father and his second wife, the defendant. The plaintiffs contended that the wills were intended to be irrevocable. In granting the defendant's contrary motion Justice Keyser decided the issue in line with recent case law, although she does not refer to it, *Patomis Estate v. Bajoraitis*[33] and *Bell v. Bell*[34], that an agreement not to revoke will not be inferred with mutual wills; it must exist expressly. She also refers to an oft-cited case of a joint will, *Re Ohorodnyk*,[35] in which the court refused to infer such an agreement with a joint will in which the testators gave their estates to each other absolutely, not for life, with identical gifts-over.

Unfortunately, Justice Keyser quoted, as have other courts, from Mr. Justice Culliton's dissenting reasons in *Re Johnson*:[36]

> ... It appears to me that where there was a joint will, or where there are mutual wills, a trust enforceable in equity against the estate of the survivor where the joint or mutual will has been revoked by the survivor can only be established if there is found: (1) that such joint will or mutual wills were made pursuant to a definite agreement or contract not only to make such a will or wills but also that the survivor shall not revoke; and (2) [That] such an agreement is found with preciseness and certainty, from all of the evidence; and (3) [That] the survivor has taken advantage of the provisions of the joint or mutual will.

The quote is misleading in all three points it makes. First, since courts, as *Re Gillespie*[37] illustrated, are willing to infer an agreement not to revoke with a joint will, it is misleading to say that such an agreement must be "a definite agreement or contract ... found with precision and certainty", which suggests an express agreement. Second, since the enforcement of such an agreement is based upon fraud, and not unjust enrichment, it is not the law[38] that "the survivor has taken advantage of the provisions of the joint or mutual will".

Finally, *Re Hall Estate*[39] has to do with the meaning of "belongings". As other judges have observed, so did this court that, in determining what a testa-

---

32 (1999), 136 Man. R. (2d) 229 (Q.B.).

33 (1994), 2 E.T.R. (2d) 200 (Ont. G.D.).

34 (1998), 24 E.T.R. (2d) 169 (B.C.S.C.).

35 (1979), 24 O.R. 228 (H.C.).

36 (1957) 8 D.L.R. (2d) 221, 247 (Sask. C.A.).

37 *Supra* note 31.

38 *University of Manitoba v. Sanderson Estate* (1998), 20 E.T.R. (2d) 148, paras. 37–59 (B.C.C.A.).

39 (1999), 140 Man. R. (2d) 146 (Q.B.).

tor meant by "belongings", it is not of much, if any, assistance what courts in previous cases have found other testators intended in using the same word.

III. INTESTATE SUCCESSION

An advancement is an *inter vivos* gift made expressly or impliedly subject to the condition that the donee receives the gift as an advance on the donee's anticipated share of the donor's estate. A donee must account for an express advancement when the donee becomes a successor to the donor's estate. Regarding implied advancements, the common law particularly concerns itself with gifts called advancements of a portion. According to Sir George Jessel in *Taylor v. Taylor*,[40] an advancement of a portion is an *inter vivos* gift to a child of the donor "to establish the child in life ... not a mere casual payment ... [but] a large sum in one payment ... on marriage ... early in life". Such implied advancements have to be accounted for on a testacy by virtue of the concept variously called ademption by advancement, satisfaction by portion, and the presumption or rule against double portions.

Similarly, the common law requires such gifts to be taken into account on an intestacy. The former *Devolution of Estates Act* did not affect this common law. However, Justice Monnin, as he then was, in *Re Loipersdeck Estate*[41] decided that s. 8 of the current *Intestate Succession Act*[42] has superceded the common law:

Advancements

8(1) If a person dies intestate as to all of his or her estate, property which the intestate gave to a prospective successor during the lifetime of the intestate shall be treated as an advancement against that successor's share of the estate if the property was either

(a) declared by the intestate orally or in writing at the time the gift was made; or

(b) acknowledged orally or in writing by the recipient;

to be an advancement.

Value of advancement

8(2) Property advanced shall be valued as declared by the intestate, or acknowledged by the recipient, in writing, otherwise it shall be valued as of the time of the advancement.

---

[40] (1875) L.R. 20 155 (Exch.).

[41] (1998), 133 Man. R. (2d) 289 (Q.B.).

[42] C.C.S.M., c.I85.

Effect of advancement on recipient's issue

8(3) If the recipient of the property advanced fails to survive the intestate, the property advanced shall not be treated as an advancement against the share of the estate of the recipient's issue unless the declaration or acknowledgement of the advancement so provides.

Determination of shares of successor

8(4) Under this section, the shares of the successors shall be determined as if the property advanced were part of the estate available for distribution, and if the value of the property advanced equals or exceeds the share of the estate of the successor who received the advancement, that successor shall be excluded from any share of the estate, but if the value of the property advanced is less than the share of the estate of the successor who received the advancement, that successor shall receive as much of the estate as is required, when added to the value of the property advanced, to give the successor his or her share of the estate.

Onus of proof

8(5) Unless the advancement has been declared by the intestate, or acknowledged by the recipient, in writing, the onus of proving that an advancement was made is on the person so asserting.

Justice Monnin wrote:

> "[26] The [Intestate Succession] Act was enacted in 1989 and came into force on July 1, 1990. It followed reports prepared by the Manitoba Law Reform Commission on statutory reform of the Devolution of Estates Act and the Testators Family Maintenance Act inter alia. The issue of advancements by portion was dealt with in the Manitoba Law Reform Commission, Report on Intestate Succession (1985), at 45–52. The Commission, in its report, reviewed the state of the law as it then was, including that of a presumption of an advancement where a gift is made by a parent to a child with a view to establishing the child in life. The Commission recommended that the law on advancements be reformed so as to limit its application to cases where it was clearly intended by the donor. It then recommended a provision such as is found in s. 8 of the Act requiring that an advancement be proven by declaration of an intention by the donor either orally or in writing or by acknowledgement by the recipient either orally or in writing that the gift was to be an advancement. The onus of proof was on the party asserting the advancement. No presumption would necessarily apply.
>
> [27] I agree with counsel for Reinhard Loy that, given s. 8 of the Act, any presumption as found in the jurisprudence is no longer applicable. In this case, there is no oral or written declaration of an intention by Mr. Loipersbeck, nor is there an oral or written acknowledgement by Reinhard Loy that the monies were to be an advancement by portion, and, therefore, [they]

> should not be considered as such for the purposes of the distribution of the estate".
>
> *Re Loipersbeck Estate* was approved in *Dmytrow v. Dmytrow*.[43] I disagree that the common law of advancement of a portion has been extinguished in Manitoba. Section 8(1) does not contain the word only. In addition to placing the onus of proof on the person asserting that an *inter vivos* gift was an advancement in the situation of an oral declaration or acknowledgement, I think that s. 8(5) reinforces the absence of the word only in s. 8(1) to preserve the common law of advancement of a portion.

Finally, unless the situation is within one of the presumptions of paternity stipulated in s. 23 of *The Family Maintenance Act*, a person who has not established the paternity of the deceased prior to the death of the deceased cannot make a claim to a share of an intestate estate, *Hill v. Marion Estate*.[44] However, if there is *prima facie* proof of paternity, obviating the necessity for a declaration of paternity pursuant to *The Family Maintenance Act*, a determination of paternity can be obtained *post mortem*. (*Re Poldmae Estate*,[45] distinguishing *Hill v. Marion Estate*).

IV. THE DEPENDANTS RELIEF ACT

To qualify as an applicant the Act[46] requires some dependants to have been "substantially dependent" upon the deceased. Of course, this is a factual judgment and will result in unevenness in the availability of the Act. This was an issue in *Kawiuk v. Wagenko*.[47]

Although the Manitoba Law Reform Commission recommended that a waiver, or release, or contracting out of the Act not be a bar to an application, the Act, like all its counterparts in other provinces, is silent in this regard. There is a clear majority view in the case law that a contracting out of the Act does not bar an application, *i.e.* is not effective. Until recently, there was no certainty for Manitoba. In *Davids v. Balbon*,[48] the Court of Appeal dismissed an appeal from a decision, making an interim order pursuant to s. 11, in which the Court of Queen's Bench held that a co-habitor cannot effectively contract out of the Act. Nonetheless, a contracting out, waiver, or release should be a circumstance to be taken into account pursuant to s. 8, especially if the

---

[43] (2000), 147 Man. R. (2d) 120, paras. 70–76 (Q.B.), which, incidentally, comprise an obiter dicta, aff'd without reasons (2001) 156 Man. R. (2d) 142 (C.A.).

[44] (1998), 126 Man. R. (2d) 217 (C.A.).

[45] (2001), 155 Man. R. (2d) 142 (Q.B.).

[46] C.C.S.M., c.D37.

[47] (1999), 135 Man. R. (2d) 143 (Q.B.).

[48] (2002), 166 Man. R. (2d) 62 (C.A.).

cumstance to be taken into account pursuant to s. 8, especially if the situation comes within this quote from *Wagner v. Wagner*.[49]

Agreements freely negotiated and with the advice of independent legal counsel should, as a general rule, be respected. The parties to such an agreement ought to be able to rely with some confidence upon its terms in ordering their affairs. The notorious uncertainty surrounding application of the *Wills Variation Act* tends to spawn protracted litigation. When spouses, through their lawyers, have been at pains to reach a permanent settlement, it would seem appropriate for a court, as well as the parties, to respect their agreement in the absence of compelling reasons to the contrary.

Respecting interim orders, for which provision is made in s. 11, *Davids v. Balbon*[50] and *Herchak v. Popko*[51] provide an excellent common law gloss.

Finally, our Act, compared to the similar legislation throughout the common law world, uniquely is based solely on financial need. In *Lam v. Le Estate*[52] the application was dismissed simply because the applicant failed to disclose sufficient particulars to determine her financial need and her custodial uncle also failed to disclose his financial situation.

V. CONFLICT OF LAWS

In recent years there have been six very important developments in this area of the law, beginning with the addition of real and substantial connection as an additional basis for recognition of foreign judgments and an additional requirement to establish jurisdiction *simplicitur* in cases involving service *ex juris*,[53] the rearticulation of the law of *forum non conveniens* and anti-suit injunction,[54] and changes to the choice of law rule for torts and the substantive-procedural characterization of limitations legislation.[55] Almost all of the reported Manitoba cases during the period being reviewed are *forum non conveniens* cases. From 1870 until *Amchem Products Inc. v. B.C. Workers Comp. Bd*[56] there were nine reported Manitoba cases; since the *Amchem Products* decision there have been

---

[49] (1990), 39 E.T.R. 5, para. 32 (B.C.S.C.).

[50] *Supra*, note 48.

[51] (2002), 161 Man. R. (2d) 252 (Q.B.).

[52] (2002) 161 Man. R. (2d) 318 (Q.B.).

[53] *Morguard Invests. Ltd. v. De Savoye* [1990] 3 S.C.R. 1077.

[54] *Amchem Prods. Inc. v. B.C. Workers Comp. Bd.* [1993] 1 S.C.R. 897.

[55] *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022.

[56] *Supra* note 54.

fifteen reported Manitoba cases.[57] Incidentally, in seven of the pre-*Amchem Products* cases the motion for a stay was not successful, but the post *Amchem Products* cases are almost even. The Court of Appeal in *Henwood v. Levesque Beaubien Geoffrion Inc.*[58] stated that the appropriate disposition of a successful *forum non conveniens* motion is a stay of proceedings, not a dismissal of the action. A few of the post-*Amchem Products* cases also involve the issue of real and

---

[57] Pre-Amchem Manitoba cases: *Van Vogt* v. *All Candn. Group Dists. Ltd.*, (1967) 60 W.W.R. 729, aff'd. without reasons 61 W.W.R. 704 (Man. C.A.), an abuse of process/f.n.c. case; *Van Vogt* v. *All Candn. Group Dists. Ltd.* (1969) 71 W.W.R. 535 (Man. C.A.), *Suncorp Realty Inc. v. Reid* [1984] 3 W.W.R. 219 (Man. C.A.), *Burt* v. *Clarkson Gordon* (1989) 60 Man. R. (2d) 149 (C.A.), *Jepson Estate* v. *Westfair Foods Ltd.* (1989) 61 Man. R. (2d) 56 (Q.B.), **Corrigal** v. *Hudson's Bay Co.* (1990) 63 Man. R. (2d) 274 (Q.B.), *Dal Ponte* v. *Northern Man. Native Lodges* (1990) 64 Man. R. (2d) 247 (Q.B.) (involved two issues, f.n.c. and security for costs; a few pages hence reference is made to it regarding security for costs. Regarding f.n.c. the case is of interest only as an example of *a plaintiff* asking for a stay on the basis of f.n.c.), *Kornberg* v. *Kornberg* (1990) 70 Man. R. (2d) 182 (C.A.), and *Pietzsch* v. *R-Tek Corp.* (1993) 87 Man. R. (2d) 298 (Q.B.) . Post-*Amchem* Manitoba cases: *Tortel Communication Inc.* v. *Suntel Inc.* (1994) 97 Man. R. (2d) 265 (C.A.), noteworthy only for the court's discussion of the sufficiency of the sole connection of the garnishee action to Manitoba being that the defendant owed money to a U.S. company, which the Ontario plaintiff wanted to garnishee in connection with a debt owed to it by the U.S. company; *Imperial Agencies Ltd.* v. *Regal Confections Inc.* (1995) 102 Man. R. (2d) 74 (C.A.), a very brief, totally unremarkable decision; *Sto. Domingo Estate* v. *Kenora (Town)* (1996) 109 Man. R. (2d) 32 (Master), aff'd (1996) 111 Man. R. (2d) 124 (Q.B.) involved service *ex juris* pursuant to Q.B.R. 17.02(h); the Master's reasons are a nice piece of work and the Q.B. appeal reasons are noteworthy for the discussion regarding Q.B.R. 17.02(h); *Craig Broadcast Systems Inc.* v. *Magid (Frank N.) Assocs. Inc.* (1997) 116 Man. R. (2d) 312 (Q.B.) involved service *ex juris* pursuant to Q.B.R. 17.02(f)(i), (h), and (m); again the reasons are commendable and perhaps especially noteworthy for the court's treatment of the facts in regard to Q.B.R. 17.02(f)(i) and (m), aff'd (1998) 123 Man. R. (2d) 252 (C.A.), *Negrych* v. *Campbell's Cabins* (1978) Ltd. (1997) 119 Man. R. (2d) 216 (Q.B.), *U.S.A.* v. *Down* (1998) 127 Man. R. (2d) 190 (Q.B.), an extradition hearing, *Torlen Supply & Services Inc.* v. Con Agra Ltd. (1998) 128 Man. R. (2d) 134, esp. paras. 5 and 6 (Q.B.), *infra* at 225, provides an excellent summary, aff'd for a different reason (1999) 134 Man. R. (2d) 270 (C.A.), *Reimer* v. *Alvarez* (1997) 132 Man. R. (2d) 161 (Master), *Henwood* v. *Levesque Beaubien Geoffrian Inc.* (1998) 128 Man. R. (2d) 279 (Q.B.), *Progressive Holdings Inc.* v. *Crown Life Insurance Co.* (2000), 147 Man. R. (2d) 175 (Q.B.)), *TD Bank* v. *Hudye Soil Services Inc.* (2000) 149 Man. R. (2d) 56 (Q.B.), containing another summary to which reference is made, obviously with approval in *2916372 Manitoba Ltd.* v. *Kornberg* (2002) 164 Man. R. (2d) 1, Q.B., aff'd (2002) 166 Man. R. (2d) 72 (C.A.), *Waldron* v. *Kist* (2002) 171 Man. R. (2d) 204 (Master Q.B.), *Load Runner Logistics Ltd.* v. *Transport Seblanc Inc.* (2003) 171 Man. R. (2d) 214 (Q.B.), *279022 Ontario Ltd.* v. *Posen* (2003) 172 Man. R. (2d) 169 (Master, Q.B.), *Caspian Construction Inc.* v. *Drake Surveys Ltd.* (2003) 174 Man. R. (2d) 263, a better than average review of the governing cases, principles, and factors (Master, Q.B.).

[58] *Supra* note 57.

substantial connection respecting jurisdiction *simpliciter* in connection with service *ex juris*.[59]

In the preceding review of conflict of laws cases, the cross motion for an anti-suit injunction in *Kornberg v. Kornberg*[60] was treated.[61] *Amchem Products* is essentially an anti-suit injunction use, in which the Court dealt with the law of *forum non conveniens* as the first part of its anti-suit injunction analysis. Regarding the balance of the analysis, the Court's decision builds on earlier lower court decisions like *Kornberg*.

Is there a difference between a simple jurisdiction clause in a contract and an exclusive jurisdiction clause? *E.K. Motors Ltd. v. Volkswagen Canada Ltd.*,[62] *Khalij Comm. Bank v. Woods*,[63] *Old North State Brewing Co. v. Newlands Services Inc.*,[64] and the Manitoba case, *1279022 Ontario Ltd. v. Posen*,[65] suggest that there is. I think not, because the leading case, *Carvalho v. Hull Blyth (Angola) Ltd.*[66], had to do with a contract containing an exclusive jurisdiction clause and the court made no reference to the exclusivity wording of the clause. Also, if exclusivity wording could make such clauses absolutely effective, such wording would become boiler-plated and a beneficial judicial discretion would be lost. I prefer other decisions,[67] including the Manitoba case, *Northern Sales Co. v. Sask. Wheat Pool*,[68] in which the exclusivity wording was not a factor.

---

59 For ex. *Craig Broadcasting System* v. *Magid (Frank) Assocs. Inc.*, *supra* note 57, and *Negrych* v. *Campbell's Cabins*, *supra* note 57. *Muscott* v. *Courcelles* (2002), 213 D.L.R. (4th) 577 (Ont. C.A.) is a useful case not only for the Court's discussion of the difference between the real and substantial connection requirement for jurisdiction simplicitur and the forum non conveniens concept upon which a court which has jurisdiction simplicitur can decline to exercise it, but the Court discusses the meaning of real and substantial connection, creating an eight point checklist, which, may become a template for courts across the country.

60 *Supra* note 57.

61 *Supra* note 1 at 141–142.

62 [1973] 1 W.W.R. 466 (Sask. C.A.).

63 (1985), 29 B.L.R. 69 (Ont. H.C.).

64 [1999] 4 W.W.R. 573, paras. 34–37.

65 (2003), 172 Man. R. (2d) 169, paras. 28–31 (Master, Q.B.), aff'd (2003) 179 Man. R. (2d) 108 (Q.B.).

66 [1979] 3 All E.R. 280 (C.A.).

67 Including *Westcoast Commods. Inc.* v. *Yehia* (1985), 30 B.L.R. 107 (B.C. Co. Ct.) and *Volkswagen Can. Inc.* v. *Auto Haus Frohlich Ltd.* [1986] 1 W.W.R. 380 (Alta. C.A.).

68 (1992) 78 Man. R. (2d) 200 (C.A.).

In *Van Vogt v. All Canadian Group Dists. Ltd.*[69] the Manitoba Court of Appeal reminded readers that there is a difference between a jurisdiction clause and a choice of law clause, and that, while the former constitutes a submission to the designated court, the latter does not; this is echoed in *Progressive Holdings Inc. v. Crown Life Ins. Co.*.[70]

The Reciprocal Enforcement of Judgments Act[71] contains:

3(6) No order for registration shall be made if the court to which application for registration is made is satisfied that ...

(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court; . . .

While by common law in a civil action for recognition of a foreign judgment either submission to the jurisdiction pursuant to Lord Buckley's "cases" articulated in *Emanuel v. Syman*[72] or a real and substantial connection between the action and the foreign court, pursuant to *Morguard Invests. Ltd. v. De Savoye*,[73] results in recognition, s. 3(6)(b) comprises for registration pursuant to *The Reciprocal Enforcement of Judgments Act* either a statutory additional requirement to real and substantial connection or a statutory exception, however you wish to state it. Reading through the section, it bars registration if the defendant "was neither carrying on business nor ordinarily resident within the state of the original court, [and] did not voluntarily appear or otherwise submit". Several courts of appeal, including the Court of Appeal of Manitoba in *T.D.I. Hospitality Managt. Consults.v. Browne*,[74] have so held.

Finally, there are two cases worth no more than a passing reference. *Morrisette v. Performax Systems Ltd.*[75] is simply an example of a civil action for the recognition of a foreign judgment, compared to registration pursuant to *The Reciprocal Enforcement of Judgments Act*, based upon real and substantial connection. The issue in *Michalski v. Olson*[76] was whether the decision in *Tolofson v.*

---

69 *Supra* note 57 at 539.

70 *Supra* note 57 paras. 33 and 52.

71 R.S.M. 1987, c.J20.

72 [1908] 1 K.B. 302, 309.

73 *Supra* note 53.

74 (1994), 95 Man. R. (2d) 302 (C.A.).

75 (1997) 115 Man. R. (2d) 55, esp. paras. 9–11 (C.A.). The case has to do with a Quebec judgment, the recognition of which cannot be sought pursuant to *The Reciprocal Enforcement of Judgments Act*, *supra* note 71, because Quebec is not a reciprocating jurisdiction.

76 (1997), 123 Man. R. (2d) 101 (C.A.).

Jensen; Lucas (Litigation Guardian of) v. Gagnon [77] is retroactive. Reversing the trial judge, the Court of Appeal, in accordance with a long line of decisions held that *Tolofson* is retroactive; in other words, the common law has always been as stated in *Tolofson* and earlier contrary decisions were wrongly decided.

---

[77] *Supra* note 55.