Commentaires

INTERPROVINCIAL GARNISHMENT: HANSEN ET AL. v. DANSTAR MINES LTD. ET AL.

par E.R. EDINGER*

L'auteur traite des problèmes de droit international privé et de droit constitutionnel soulevés par l'exécution, au niveau interprovincial, des saisies en mains tierces et décrit les différentes solutions mises de l'avant par les juridictions provinciales. Le commentaire est basé sur un arrêt de la Cour d'appel du Manitoba, Hansen et al. *v.* Danstar Mines Ltd. et al., *(1978) 83 D.L.R. (3rd) 346, qui semble vouloir opérer un revirement jurisprudentiel au Manitoba. Dans cet arrêt, des demandeurs manitobains, ayant obtenu un jugement par défaut contre une société de la Colombie Britannique en matière de résiliation d'un contrat conclu au Manitoba, se sont vus refuser l'émission d'un bref de saisie en mains tierces contre une société de fiducie faisant affaire tant en Colombie Britannique qu'au Manitoba, la saisie ayant pour objet une dette payable à l'origine en Colombie Britannique. Pour refuser l'émission du bref, la Cour d'appel du Manitoba se base sur différents motifs qui remettent en cause non seulement la juridiction pour ce faire et les critères relatifs à l'exercice de ce pouvoir discrétionnaire, mais aussi, et de façon plus fondamentale, l'opportunité de réviser les règles concernant la reconnaissance interprovinciale des jugements de même que les règles de rattachement juridicitonnelles.*

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Enforcement of judgments can be sufficiently difficult even in a wholly domestic situation but when the judgment debtor and his property are dispersed across other jurisdictions additional problems arise. Not only are the usual tactical decisions faced by the judgment creditor as to how best to proceed multiplied, but the situation also has ramifications in the fields of conflicts and constitutional law.

A recent decision of the Manitoba Court of Appeal, *Hansen et al.* v. *Danstar Mines Ltd. et al.*[1] squarely raises a number of issues in these fields and may have changed for Manitobans the practice respecting garnishment of companies doing business on a national basis. The case followed "a long and confusing trail"[2] through the Manitoba courts and the result of the decision reached by the Court of Appeal was not to end the litigation but rather to send the plaintiffs on to try their luck in British Columbia. Indeed, it is probable that the majority in the Court of Appeal considered that British Columbia had always been the exclusively appropriate forum.

In 1975, shares in Danstar Mines Ltd., a company incorporated in British Columbia, having its head office in British Columbia and carrying on business in British Columbia, were offered for sale to the public. The plaintiffs, apparently all residents of Manitoba, purchased shares in Manitoba, for $28,215.00. Proceeds from the sale of all shares were paid to Guaranty Trust Company of Canada, a Canadian company having branch offices in both Vancouver and Winnipeg, and were placed on deposit at the Vancouver branch to be held until all the shares were sold.

On August 26, 1975 a "freeze" order was issued in British Columbia by the Superintendent of Brokers pursuant to the Securities Act[3] directing Guaranty to hold all funds or securities of Danstar.

On April 28, 1976 the plaintiffs sued Danstar in Manitoba, claiming rescission of the contract and return of the purchase price, $28,215.00, pursuant to s.63(2) of the *Manitoba Securities Act*[4] which provides:

> s.63(2) An agreement of purchase or sale referred to in subsection (1) is not binding upon the purchaser if the person or

1. (1978) 83 D.L.R. (3d) 346 (Man. C.A.).
2. *Id.*, at 349.
3. S.B.C. 1967, s. 28(1) as am. S.B.C. 1973, c. 78, s.4.
4. R.S.M. 1970, c.S50

> company from whom the purchaser purchased the security receives written or telegraphic notice evidencing the intention of the purchaser not to be bound by the agreement of purchase and sale not later than midnight on the second day, exclusive of Saturdays, Sundays and holidays, after receipt by the purchaser of the prospectus or amended prospectus, whichever is the last required to be filed with the commission, and in respect of which the director has issued a receipt.

No prospectus was filed in Manitoba. Danstar did not appear in the Manitoba action and on July 20, 1976 default judgment was signed against Danstar for $28,215.00 and $123.50 costs. The judgments in the Court of Appeal state neither the grounds on which the Court of Queen's Bench for Manitoba assumed jurisdiction over Danstar nor the basis for the decision in favour of the plaintiff purchasers. It seems highly likely, however, that service *ex juris* was made under Manitoba Queen's Bench Rule 28(f).

> R.28 Service out of Manitoba of a statement of claim may be made wherever
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> (f) the action is one brought to enforce, rescind, dissolve or otherwise affect a contract, or to recover damages or other relief for, or in respect of, the breach of a contract
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> (i) made within Manitoba; or
>
> (ii) made by or through an agent trading or residing within Manitoba on behalf of a principal trading or residing out of Manitoba; or
>
> (iii) by its terms or by implication to be governed by the law of Manitoba...

Furthermore, since it appears that the Court of Queen's Bench did rescind the contract under the *Manitoba Securities Act*, the proper law of the contract must have been considered to be that of the forum, Manitoba.

Between the commencement of the action in Manitoba and the signing of the default judgment two events occurred in British Columbia: the Superintendent of Brokers revoked the freeze order with respect to all the assets of Danstar in the hands of Guaranty except for the sum of $28,215.00, representing the proceeds from the sale of the shares in Manitoba; and the Superintendent consented to the purchase of B.C. Hydro and Power Authority bonds by Guaranty with that sum. The only explanation that appears for this conversion is that because of the Manitoba action commenced by Hansen *et al.* Guaranty anticipated some delay in being able to pay out the money to Danstar and considered investment a provident disposition of the money.

On June 16, 1976 one month before the conversion of the $28,215.00 into B.C. Hydro bonds, the plaintiffs commenced what turned out to be a series of attempts to enforce their Manitoba judgment. On that date they obtained an attaching order pursuant to Queen's Bench Rule 582.

R.582 Where a debtor

> (b) not being a resident of Manitoba, is indebted or legally liable to a creditor either in respect of a contract, express or implied, made in Manitoba, or in respect of any cause of action arising therein, or in case of a contract or other obligation, if made elsewhere, to be performed or partly performed in Manitoba, or liable to be compensated for in damages, or in respect of a cause of action which arose or partly arose and for which he is liable to satisfy another person in Manitoba... the court may, in an action by a creditor whose claim is not less than one hundred dollars, make an attaching order. (Form 87).

Form 87 is a direction to the Sheriff "to attach, seize and safely keep all personal property, credits and effects" etc. of the defendant.

Notice was given to the Manitoba office of Guaranty which forwarded a copy to the B.C. branch, having advised plaintiffs in Manitoba that it had no accounts on file. In September, 1976, however, when plaintiffs moved for an order compelling Guaranty to pay the $28,215.00 plus interest into Court under the attaching order, their application was refused by Hamilton, J. on the grounds that such orders were limited to seizure of personal property within the Province and the money was in British Columbia.

Within a week the plaintiffs had obtained a garnishing order which was served on the Manitoba branch of Guaranty, whose solicitors replied by letter that there was "no debt, obligation, or liability owing payable, or accruing due from Guaranty Trust Company of Canada to Danstar Mines Ltd." Plaintiffs then moved before Solomon, J., for an order that Guaranty pay the sum into court under the garnishing order or, alternatively, for an order for the appointment of a receiver. On March 24, 1977, Solomon, J., ordered Guaranty either to pay into Court the $28,215.00 or to deliver the Hydro bonds. On April 21, 1977 the Superintendent revoked the freezing order in British Columbia and on May 10, 1977 the order by Solomon, J., was signed. A second garnishing order was subsequently obtained but it was the March 24th order whose validity was in issue in the Court of Appeal.

Following upon the plaintiff's apparent success in Manitoba, the branch of Guaranty in British Columbia applied to the Supreme

Court there for an order of interpleader and Danstar, by notice of motion, moved to replevy the bonds. Both actions were adjourned by the B.C. Court.

At no point in any of the proceedings thus described did Danstar Mines Ltd. make any appearance in Manitoba. Their only action was that in B.C.: to replevy the bonds. The appeal from the garnishing order of Solomon, J., was taken by Guaranty Trust with the Manitoba Securities Commission appearing as intervenor.[5]

Three main grounds were advanced by Guaranty in the Court of Appeal in their application to have the garnishing order set aside: that at the time of the garnishing order Guaranty Trust did not owe any monetary obligation to the defendant, Danstar, the money having been converted to bonds; that the garnishing order was ineffective because at the time it was made the freeze order of the Superintendent of Brokers in B.C. was still in effect and the principle enunciated by the Supreme Court of Canada in *Bank of Montreal* v. *Metropolitan Investigation and Security (Canada) Ltd.*[6] was applicable; and, finally, that the Manitoba Court had no jurisdiction to attach by way of garnishment a debt situated in a foreign jurisdiction even though the garnishee was present in Manitoba or, alternatively, that if such jurisdiction did exist it should not be exercised. The constitutionality of such a garnishment provision was also raised but not fully argued.[7] The garnishing order was set aside by a four to one majority, Hall, Monnin, Matas and O'Sullivan, JJ.A., concurring and, Guy, J.A., dissenting. However, three separate majority judgments were delivered each arriving at the common result by a different route.

With respect to the first issue raised by the garnishee, the liability to garnishment of the bonds, the position of the Court of Appeal remains ambiguous. Guy, J.A. clearly thought them subject to the garnishing order in the circumstances:

> I am not the slightest bit concerned about the fact that the Superintendent of Brokers of British Columbia permitted the conversion of the money held by Guaranty Trust into bonds. The fact that the Superintendent of Brokers permitted the Guaranty Trust Company to hold the moneys in the form of bonds

5. The Commission supported the plaintiffs but on separate grounds which will not be discussed here. These grounds were dismissed summarily by the Court of Appeal as not only were they inconsistent with the grounds advanced by the plaintiffs but no notice had been given to Danstar.

6. (1974) 50 D.L.R. (3d) 76; (1975) 2 S.C.R. 546 (S.C.C.)

7. *Supra*, n. 1 at 369.

> is of no consequence to the judgment creditors who hold their judgment in Manitoba against Danstar Mines Ltd. If Danstar Mines Ltd. were to ask Guarantee Trust for an accounting, the mining company would not ask for bonds but would ask for the money. The trust company cannot suggest that it does not owe the money because the money has been converted into bonds.[8]

Hall and Matas, JJ.A., really fail to deal with the issue and no accurate indication of what position they might take can be gleaned from their judgments.

O'Sullivan, J.A., on the other hand, considers the question at some length and concludes that "bonds held in trust by a trustee for a beneficiary cannot be attached by the beneficiary's creditors by means of garnishment."[9] The crucial difference between the opinions of Guy, J.A., and O'Sullivan, J.A., appears to be that the former focussed on the special circumstances surrounding the conversion of the pecuniary liability into bonds and regarded that conversion as irrelevant because on demand the trust company could not refuse to deliver the $28,215.00 whereas the latter ignored those special surrounding circumstances and the fact that there was a pre-existing ascertainable pecuniary liability and held that there would be no pecuniary liability on Guaranty until the bonds were reconverted to money. A pecuniary liability, according to O'Sullivan, J.A., was the *only* asset to which the *Garnishment Act*[10] could extend[11] and although Guaranty Trust *had* been so liable to Danstar when the trust condition had been fulfilled by the sale of all the shares, the nature of the obligation changed with the conversion of the proceeds from the sale of the shares into the bonds and would not revive until reconversion. The critical time was when the garnishing order was issued.

In recognition, presumably, of the uncertainty as to the garnishability of bonds the plaintiff judgment creditors had in fact opted for attachment rather than garnishment initially but that procedure had been precluded by the decision of Hamilton, J. The Court of Appeal was in complete agreement as to the correctness of that decision: the Sheriff clearly could not be directed to seize property outside the boundaries of Manitoba.

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8. *Id.*, at 350.

9. *Id.*, at 361.

10. R.S.M. 1970, c.G20.

11. Citing Lake of the *Woods Milling Co.* v. *Collin*, (1900) 13 Man. R. 154 at 163.

Obviously the issue is not likely to arise with much frequency. Nevertheless, a recent decision of the Supreme Court of British Columbia supports the conclusion reached by Guy, J.A. and indicates that there may be other situations in which bonds may be garnished. In *Re Papdopoulos*,[12] Mr. Justice Anderson held that the relationship between a bank and a customer in respect to a Registered Retirement Savings Plan was that of debtor and creditor rather than trustee and beneficiary:

> I have reached the conclusion that the better solution is to regard the relationship between the Bank and the Bankrupt (customer) as a contractual one. This finding overlooks the argument that the parties have agreed in writing to establish a "trust" and that merely because the beneficiary of a trust can bring the trust to an end may not be a good and sufficient reason for saying the relationship is not a purely trust relationship. *This finding also overlooks the fact that the funds are not held in cash, but are invested in income bearing securities.*[13]

Upon termination of the plan the Bank would be required to pay to its customer, the 'beneficiary,' the cash surrender value of his share of the investments. In these circumstances, Anderson, J., considered that an R.R.S.P. would be a debt subject to garnishment in British Columbia, although this finding was obiter. Like Guy, J.A., he put great emphasis on the nature of the obligation on the debtor if a demand should be made rather than on the nature of the property at the time the judgment creditor sought the garnishing order.

The second ground of attack was based on *Bank of Montreal* v. *Metropolitan Investigation and Security Ltd.*[14] In that case the Supreme Court of Canada was called upon to determine which of two competing judicial orders with respect to the same assets should be given effect to. The assets in question consisted of four million dollars, deposited in Montreal branches of the Bank of Montreal and the Royal Bank of Canada. The Manitoba Court of Appeal purported to attach the deposits in an action under the trust section of the *Builders and Workmen Act*[15] on behalf of unpaid workmen on a Manitoba project even though the money was already subject to garnishing orders issued in Quebec. The Supreme Court of Canada, without deciding on or even discussing the validity of either order, although noting that Quebec clearly had jurisdiction over the

12. (1979) 2 W.W.R. 203 (B.C. S.C. Chambers).

13. *Id.*, at 207. Emphasis added.

14. *Supra*, n.6.

15. R.S.M. 1970, c.B90, s.3.

assets in that both the garnishee and the debt were within the province, gave priority to the earlier Quebec order. The language employed by Laskin, C.J.C., speaking for the Court, was reminiscent of American terminology:

> Since the two banks were already subject to the Quebec garnishment when the proceedings began, the Manitoba judgment calls upon them to be faithless to the competent order of a sister judicial district. This Court, with a reviewing and controlling authority over both the courts of Manitoba and of Quebec, cannot be expected to support such a call.[16]

One commentator has suggested hopefully that the case looks "...something like the harbinger of a Canadian 'full faith and credit' rule" such that "where once a competent order of a sister judicial district has been made, it cannot be disregarded."[17] The attitude of a provincial Court of Appeal to the principle invoked is therefore of some significance. However, the position of the Court with respect to the second ground of attack remains almost as uncertain as on the first issue as only two of the four judgments deal with the point. Both agreed that on the facts in *Hansen* the principle was inapplicable because the freezing order had been revoked before the garnishing order was signed. Thus there was no competing order from a sister judicial district in effect at the relevant time.

Nevertheless, there is some development of the scope of the principle. Both Matas and O'Sullivan, JJ.A., were in agreement, that the principle should not be restricted to courts of law:

> I agree with counsel for the appellant that the principle enunciated by the Supreme Court in *Bank of Montreal* v. *Metropolitan, supra,* is applicable not only to orders made by Superior Courts in another Province, but to all apparently valid orders made by inferior Courts *and tribunals* in another Province.[18]

Thus, subject to the next point, the order of the Superintendent of Brokers would have qualified for recognition. Furthermore, both were in agreement that a court asked to defer to an order made in another province is entitled to examine the *effect* of the order in determining whether to apply the *Metropolitan* principle:

> The popular term used to identify the direction of the Superintendent, i.e., "freezing order" explains its effect quite well. The

16. *Id.*, at 83, 557.

17. M.T. Hertz, "The Constitution and the Conflict of Laws," (1977) 27 *U. of T. L.J.* 1 at 47.

18. *Supra*, n.1 at 364. Emphasis added.

> direction was intended to maintain the status quo while the Superintendent conducted appropriate investigations. It was not intended to change legal relationships and did not have that effect.[19]

Therefore, it was not an order binding on the Manitoba Court. This could be an important qualification if it were to be found that more than one province were competent to garnish the same assets.[20]

Two very important aspects of the *Metropolitan* principle were not dealt with: what constitutes a competent order and whether the principle has any application beyond determining priorities in relation to disputed property. Possibility a negative inference can be drawn with respect to wider applicability of the *Metropolitan* principle from the fact that there is no indication that the Manitoba Court thought a B.C. Court would or should apply it to the Manitoba judgment in either the original action or the garnishment action. It was simply assumed that the traditional conflicts recognition rules would determine the fate of that judgment in B.C.

The only reference to the requirement that the order made in a sister judicial district be a "competent" one is constituted by a substitution by O'Sullivan, J.A., of the phrase "apparently valid"[21] for the term competent, thus leaving unresolved the most critical aspect of the *Metropolitan* principle: is domestic competence sufficient or must there still be conformity to the traditional rules establishing the standard for international jurisdiction. The problem of the double standard for determining jurisdiction which prevails in Canada where each province assumes a far wider jurisdiction than it accords to other provinces in recognition and enforcement proceedings does not exist in the United States, the source of the full faith and credit doctrine, where both domestic jurisdiction and jurisdiction for purposes of recognition under the full faith and credit clause[22] must conform to the same standard — that established by the constitutional requirement imposed by the due process clause.[23]

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19. *Id.*, at 354.
20. See text accompanying note.
21. *Supra*, n.1 at 362.
22. "Full faith and credit shall be given in each State to the public Acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, records and proceedings shall be proved, and the effect thereof." Art. IV, s. 1 of the United States Constitution.
23. Amendment XIV, s.1.

All jurisdiction assumed by any court in the United States must conform to the standard enunciated by the U.S. Supreme Court in *International Shoe Co.* v. *Washington*[24]: fairness to the defendant.

> *International Shoe* was given substance by later Court decisions resulting in a four part flexible analysis to aid in determining whether a state may properly exert *in personam* jurisdiction over a defendant. The factors include the nature and quality and the circumstances of the defendant's acts within the forum state; the quantity of defendant's activity; an "estimate of the inconveniences" the defendant encounters by having to defend in such a forum; and the interest of the forum state in providing redress for its residents. No single part of this analysis is controlling by itself. In addition, *Hansen* v. *Denkla* warns that it is "essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."... Even within these guidelines, courts have great freedom in the determination of that which constitutes sufficient "minimum contacts" to support the exercise of personal jurisdiction over a defendant.[25]

Until the recent case of *Schaffer* v. *Heitner*[26] a vestige of the power theory of jurisdiction remained untouched by the due process fairness test in that the presence of any property, tangible or intangible, within the state gave that state *quasi in rem* jurisdiction[27] automatically. Since *Schaffer*, however, even *quasi in rem* jurisdiction may be exercised only where the state would have personal jurisdiction according to the *International Shoe* due process fairness standard.

Once it has been ascertained that jurisdiction was properly taken, however, every other state must obey the constitutional mandate of the full faith and credit clause and accord recognition to the decision, whether it be a judgment in *personam* or one *quasi in rem*. Thus the discharge of a garnishee in one state would be given full faith and credit in all sister states.

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24. (1945) 326 U.S. 310 (U.S. S.C.).

25. S.A.L. Humphreys, "*Kulko* v. *California Supreme Court:* Has The Long Arm Extended Too Far?", (1979) 1 *Detroit Coll. L.R.* 159 at 161-62. Footnotes omitted.

26. (1977) 433 U.S. 186 (U.S. S.C.).

27. "A judgment *quasi in rem*, like a judgment *in rem*, affects interests in a thing; but unlike a judgment *in rem* it affects the interests of only particular persons in a thing and not the interests of all persons in the thing. It differs from a personal judgment in that it does not impose a personal liability or obligation upon anyone." Restatement of the Law, Second, *Conflict of Laws* (American Law Institute 1971) at 104.

The full faith and credit doctrine does not extend to foreign nation judgments so the states may vary in their recognition rules as to non-American judgments. Nevertheless, all foreign nation judgments must at least conform to minimum due process standards before recognition may be accorded because recognition in the absence of such farness would itself be a breach of due process.[28]

Whether the *Metropolitan* principle does constitute an incipient full faith and credit doctrine for Canada depends entirely upon the meaning attributed to the term "competent" employed by Laskin, C.J.C. Only if it is held to mean something less stringent than jurisdiction according to the traditional rules for international recognition will there be any hope for the development of a Canadian full faith and credit doctrine. Unfortunately the Manitoba Court of Appeal is silent on this point.

The third main ground of appeal was one to which each of the opinions addresses itself and, although the result is clear in that three members of the Court agreed that the garnishing order should be set aside, the reasons adduced for so determining are varied. The first branch of this third ground was that the Court lacked jurisdiction to issue a garnishing order when the garnishee was present in the province but the situs of the debt was outside the jurisdiction. Guy, J.A., in dissent, was quite clear on this point. He considered himself bound by authority, a unanimous judgment of the Manitoba Court of Appeal in *Metropolitan Investigation and Security (Canada) Ltd.* v. *C.F.I. Operating Co. Ltd.*[29] in which Freedman, C.J.M.,had expressly stated that presence of the garnishee in the province was sufficient for jurisdiction under Queen's Bench Rule 526. In fact, Guy, Hall and Monnin, JJ.A., had all concurred in that judgment. In *Hansen*, however, Hall, J.A., with Monnin, J.A., concurring, neither dissents from nor agrees with his earlier concurrence on the question of the existence of jurisdiction under Rule 526. He simply says "Assuming that a branch office of Guaranty is enough to confer jurisdiction in Manitoba courts to garnish..."[30] and then founds his decision on an exercise of discretion.

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28. *Id.*, at 298.

29. (1973) 31 D.L.R. (3d) 190 (Man. C.A.). Reversed on appeal on another point *sub nom. Bank of Montreal* v. *Metropolitan Investigation Security Ltd., supra*, n.14.

30. *Supra*, n.1 at 351.

Matas, J.A., however, was in agreement that jurisdiction existed to issue the garnishing order following earlier Manitoba authorities.[31]

O'Sullivan, J.A., on the other hand, while purporting to follow the same authorities, came to a different conclusion on this issue. He held that a Manitoba Court has no jurisdiction to issue a garnishing order unless the garnishee is present in the province *and* can be sued in the province by the judgment debtor/creditor to enforce the debt. Citing Dicey[32] for the rule that where a debtor/garnishee has more than one residence recoverability and situs of the debt are determined by the place of payment either as agreed upon, expressly or impliedly, or as determined by the ordinary course of business O'Sullivan declared that this rule had been incorporated into Canadian law for the benefit of banks by section 96(4) of the *Bank Act*[33] and went on to hold it equally applicable to trust companies such as Guaranty. It was almost indisputable that the place of payment would have been in British Columbia, Danstar being a British Columbia company, Guaranty having a B.C. branch and the proceeds being on deposit at that B.C. branch, so the conclusion followed that the debt was recoverable only in B.C. and not in Manitoba and the Court was without jurisdiction to issue a garnishing order.

In so holding O'Sullivan, J.A., differs from the position taken by the earlier decision of the Manitoba Court of Appeal both as to the specific effect of section 96(4) of the *Bank Act* and, as to the proper interpretation of the rule as to recoverability of a debt in relation to jurisdiction to garnish.

In *Metropolitan Investigation*[34] Freedman, C.J.M., had had considerable doubt that section 96(4) was effective in altering the rule as to place of payment for garnishment purposes even if that had been the intended objective of the provision:

> It simply provides that a Court process affects and binds only property or money of a person at the branch where the process is served. It does not deal with any question of territorial jurisdiction. It focusses upon the place where service is made, but says nothing about the place where the Court proceedings originated. More

31. *Id.*, at 354-55.

32. Dicey and Morris, *The Conflict of Laws*, (9th ed. 1961) 507-08.

33. R.S.C. 1970, c.B-1.

34. *Supra*, n.29.

> specifically, it does not provide that only proceedings in the Court of a Province in which the branch is located "affects and binds..."[35]

O'Sullivan on the other hand is of the opinion that the section achieves its purpose.

The trend of Canadian authority has been to ignore the rule which fixes recoverability and the situs of a debt in a single locale based on place of payment and to regard a debt as recoverable for purposes of jurisdiction to garnish wherever jurisdiction could be assumed to enforce the debt. In the case of corporations, a debt has thus been considered to be recoverable wherever the corporation carries on business. That was the position taken, for example, by Middleton, J., in *McMulkin* v. *Traders Bank of Canada* in the very passage cited by O'Sullivan, J.A. in *Hansen*[36]:

> The debtor would not be exempt from suit at the instance of his original creditor if found and served within Ontario, (in spite of an agreement to pay in another province) because the Courts of Ontario have universal jurisdiction in all personal actions, subject only to their ability to effect service within their own jurisdiction.

Freedman, C.J.M., put the point even more forcefully in *Metropolitan Investigation:*

> To assert as against the plaintiff that the branches in Quebec should be regarded as separate entities, that the debt of the banks should be declared to have a Quebec locale, and that no action in respect thereof would lie in Manitoba without prior demand and refusal at Montreal appears to be technical and artificial in the extreme.[37]

Those Courts have not been unaware of the purpose of the rule — to prevent unfairness to the garnishee — but they have always acted as if Canada had no recognition problems among the provinces and simply assumed, in the absence of any evidence to the contrary, that sister provinces would recognize the garnishment proceedings, even in circumstances such as those in *Hansen* v. *Danstar* in which the judgment debtor had not attorned to the jurisdiction of the Court in the original action. *Hayden* v. *Hayden*, an early Manitoba decision, is typical. There the defendant, an employee of the C.P.R., made no appearance in the Manitoba courts in the action by his wife to obtain maintenance payments. He lived in Saskatchewan, worked in Saskatchewan and was paid in

35. *Id.*, at 197.

36. *Supra*, n.1 at 365.

37. *Supra*, n.29 at 201.

Saskatchewan. Nevertheless the Court held that both the original judgment and the garnishment would be recognized as binding in Saskatchewan and double liability for the garnishee, C.P.R., would be averted:

> It is enough to say that there is no affidavit on behalf of the garnishees here to the effect that there is any likelihood of their being called upon to pay again in Saskatchewan. It would be impossible without convincing proof to entertain the suggestion that the Saskatchewan Courts might ever make the garnishee here pay a second time money it had once paid under lawful process to defendant's wife on a judgment in a maintenance proceeding.[38]

Whether the opinion of O'Sullivan, J.A., as to the proper rule for determining the *existence* of jurisdiction will be sufficient to alter the rule in Manitoba remains to be seen. He is in the minority on this point as the other four members of the Court appear to be prepared to follow previous authority on the scope of Rule 526 which held that the only necessary conditions for the existence of jurisdiction to garnish thereunder are the existence of a debt and the presence of the garnishee in Manitoba, such that the debt would be recoverable in Manitoba even if it were also recoverable elsewhere.

Nevertheless, it is likely that the practice of that province has been altered by *Hansen* as the majority were agreed that this was the type of case in which their discretion should be exercised to set aside the garnishing order and that it was improper for the Manitoba Courts to aid in the attempt to enforce one of their own decisions. The proper course of conduct for the plaintiffs was to proceed to B.C. and either register the Manitoba judgment under the *Reciprocal Enforcement of Judgments Act*[39] or proceed "in such other manner as they may be advised."[40] "Such other manner" would be either to relitigate the entire issue or to bring an action at common law on the Manitoba judgment. Hall, J.A., furthermore, appears to be of the opinion that use of the *Reciprocal Enforcement of Judgments Act* should be actively promoted by the Courts even at the expense of individual litigants:

> The integrity of the reciprocal enforcement of judgments legislation as reflecting reciprocity and comity between reciprocating

38. *Haydon* v. *Haydon*, (1937) 4 D.L.R. 617 at 626 (Man. C.A.) per Robson, J.A. See also *Gorman* v. *Gorman and C.P.R.*, (1949) 1 W.W.R. 153 (Alta. D.C.); *Bell* v. *Bell* and Wehran and Pacific Western Airlines Ltd., (1960) 32 W.W.R. 376, 24 D.L.R. (2d) 435 (B.C.S.C.)

39. R.S.B.C. 1960, c. 331.

40. *Supra*, n.1 at 351.

> states is far more important than facilitating Hansen and others in attaining whatever remedy they have against Danstar here, rather than in British Columbia.[41]

The existence of any "reciprocity and comity" under such legislation is somewhat questionable in view of the acknowledged fact that in British Columbia Danstar would probably be entitled to relitigate the merits of the Manitoba default judgment and/or to question the jurisdiction of the Manitoba Court.[42]

Indeed, the very unusual aspect of this case is that the reasons advanced for the exercise of the discretion in favour of Guaranty by the majority of the Manitoba Court of Appeal amount to an impugning of the initial assumption of jurisdiction by the Manitoba Queen's Bench in the action for rescission of the contract. Even though O'Sullivan, J.A., cites Halsbury[43] to the effect that an English Court will in its discretion refuse a garnishing order if "the attachment of the debt would work inequitably or unfairly or cause prejudice or injustice to some person or persons *other than the judgment debtor*"[44] and notes that possible double liability on the garnishee is not the only instance in which the discretion will be exercised, he ignores the exclusionary aspect of the final clause in the passage cited. It is inequity or unfairness to innocent third parties with which the English Courts are concerned — not unfairness to the judgment debtor. How could an English court consider it unfair to the judgment debtor that his assets should be seized to satisfy an English judgment? However, in the Manitoba Court of Appeal it is primarily fairness to the judgment debtor, Danstar, with which the Court is concerned with no consideration for the garnishee, Guaranty, and very little for the judgment creditors, *Hansen et al.* That the latter might be prejudiced by their decision was evidently of some concern at least to Hall, J.A. as he makes the express point that:

> In the circumstances, it is no offence to law or equity to require them (the judgment creditors) to employ the British Columbia forum for the recovery of their money.[45]

None of the majority saw anything unfair in forcing the judgment creditors to use the reciprocal enforcement of judgments legislation

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41. *Ibid.*

42. *Reciprocal Enforcement of Judgments Act, supra*, n.39 s.6.

43. 17 Hals. (4th ed. 1973) at 337 para. 539.

44. *Supra*, n.1 at 368. Emphasis added. Matas, J.A., refers to the same passage.

45. *Id.*, at 351.

even though they recognized that method would almost inevitably result in relitigation of the substance of the claim. O'Sullivan, J.A., does not even attempt to balance fairness to Danstar against fairness to Hansen.

Some emphasis is placed by both Matas and Hall J.A., on the additional factor of the interpleader and replevin actions in British Columbia, actions which had been commenced only after the garnishment order had been issued and signed in Manitoba, yet neither enters into any discussion of the principles determining the applicability of the plea of *lis alibi pendens*. It is the simple existence of the other proceedings which they regard as significant. It is instructive to compare their attitude on this point with that of the British Columbia Court of Appeal in *Tomkins Contracting* v. *Northern Clearing Enterprises Ltd. and Majestic Contractors Ltd.*[46] when it was asked to stay garnishment proceedings in B.C. because similar proceedings had been taken in Alberta and an interpleader action had been commenced there. Both the garnishee and the judgment debtor were Alberta companies although they had registered offices in British Columbia and were engaged in a construction project in British Columbia. Nevertheless, Davey, J.A. refused to stay the B.C. proceedings saying:

> The only significant fact supporting Alberta as the more convenient forum is that all the other claimants, a large number, are in that province.[47]

and pointing out that since "rights and priorities of judgment creditors to moneys realized by execution and attachment are in the main statutory"[48] no presumption arises that rights and liabilities will be the same in proceedings in another province and that the judgment creditor might be gravely prejudiced by having to litigate the issue in Alberta. No such examination of the merits was taken by the Manitoba Court of Appeal.

No consideration was given to the question of whether Guaranty would be subject to double liability, the issue apparently being rendered redundant by the conclusion of the Court that they were entitled to consider fairness to the judgment debtor in determining how to exercise their discretion rather than only fairness to third parties. According to the passage cited from Dicey the risk of double liability "must be a real risk, not a mere

46. (1965) 50 W.W.R. 246.

47. *Id.*, at 250.

48. *Id.*, at 251.

speculative or theoretical hazard." Had the Manitoba Court been proceeding in line with authority cited by them then, they should have required evidence as to whether, the garnishee having complied with the Manitoba order, a B.C. Court would refuse to recognize that compliance as a discharge of the debt.

Possibly it was assumed by the Court that since it was highly unlikely that B.C. would recognize the Manitoba judgment in the original action there was no chance of recognition of any payment as a discharge of the debt to Guaranty. Certainly the fact that B.C. assumes a jurisdiction to garnish[49] which the Manitoba Court of Appeal was declining was no sure guide to recognition and cases on the recognition of garnishment are scarce. Furthermore, *Richer* v. *Borden Farm Products Co.*[50] demonstrates a recognizing judge may be far less happy about the existence and exercise of such jurisdiction than a garnishing judge. In that case Middleton, J., who had had no qualms whatsoever several years earlier about garnishing branches of the Traders Bank in Ontario after the account had been moved to Alberta in *McMulkin* v. *Trader's Bank of Canada*[51] saying that the problem of double liability for the garnishee was "... a question of policy for those who make the law" and that it could not "... considered by the Courts, who are called upon to administer the law as they find it..."[52] was not so sure in *Richer* that Quebec should have proceeded in a similar fashion when the garnishee was primarily liable to the judgment debtor in Ontario. Nevertheless, the *Richer* case is significant in that the Ontario Supreme Court, Appellate Division, was prepared to stay an action in Ontario by the judgment debtors in the Quebec action to enforce the debt in Ontario which had been garnished in Quebec. The Ontario court was prepared to so proceed even though it was likely that the judgment in the original action in Quebec was not one on which would be recognized under the traditional rules as the defendants probably had not attorned to the jurisdiction of the Quebec Court[53]:

> It seems contrary to natural justice that after the defendants (garnishees) have been compelled to pay money in satisfaction of a judgment against these plaintiffs, the plaintiffs could be at liberty

49. *Bell* v. *Bell and Wehran and P.W.A., supra*, n.38.

50. (1921) 64 D.L.R. 70, 49 O.L.R. 172 (Ont. S.C. App. Div.).

51. (1912) 6 D.L.R. 184, 26 O.L.R. 1 (Ont. Div. Ct.).

52. *Id.*, at 186, 6.

53. The uncertainty was due to a lack of evidence as to the way in which the Quebec Court had obtained jurisdiction in the original action.

to compel payment again to themselves.[54]

Other garnishing courts have apparently simply assumed that the payment in their province will be recognized as a discharge in other provinces[55]. Whether a B.C. Court would have taken the same approach as the Ontario Court in *Richer* and recognized payment into Court in Manitoba by Guaranty as a discharge of the debt is a question which cannot be answered with any assurance. In *Tompkins*[56] where the B.C. Court of Appeal was called upon to recognize as a discharge a payment into court in another province, the issue was clouded by the fact that garnishment proceedings had been commenced in B.C. prior to the garnishment proceedings in Alberta so that Davey, J.A., was able to find that there was no debt left which the Alberta order could attach. It is, therefore, impossible to say whether there was a real risk of double liability for Guarantee, whether the risk was merely speculative, or indeed, whether there was any risk at all. However, since Guaranty was the only person other than the judgment debtor involved, in theory the Manitoba Court should have been considering only fairness to Guaranty and not fairness to the judgment debtor.

Indeed, even administrative inconvenience to the garnishee, a point which has been raised in other cases, was not mentioned. For example, in *Richardson* v. *Richardson*[57] Hill, J., was concerned that if a garnishing order issued in England could attach all money in any branch "...the burden would be imposed upon the banks of communicating with all its branches in all parts of the world." As he was dealing with the National Bank of India which operated on an international scale administrative convenience was clearly a weighty factor in considering fairness to the garnishee. In an Alberta case, *Gorman* v. *Gorman and C.P.R.*[58] counsel for the garnishee, C.P.R., suggested that it would be "embarassing" to the C.P.R. if creditors of its employees could bring garnishee proceedings in any province where the C.P.R. was present. Effect was not given to this argument, however. While this is a factor of less weight than the risk of double liability it is relevant to the question of fairness to the garnishee and in the case of a company doing business on a national or international scale could assume more importance.

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54. *Supra*, n.50 at 73, 176.

55. See text accompanying n.38, *infra*.

56. *Supra*, n.46.

57. (1927) p. 228 at 236.

58. (1949) 1 W.W.R. 153 (Alta. D.C.).

The final objection raised was not fully argued[59] and was adverted to only by O'Sullivan, J.A., but if the contention of the garnishee is correct the preceding discussion concerning the jurisdiction and discretion to garnish becomes otiose. The essence of that contention was that if Queen's Bench Rule 526 did give jurisdiction to Manitoba Courts to garnish assets situated outside the province then it was extraterritorial legislation and so *ultra vires* s.92(13) of the *British North America Act*. Citing the leading case of *Royal Bank of Canada* v. *The King*[60] O'Sullivan, J.A., concluded:

> Applying these words to the case before us, it appears that Danstar's right against Guaranty Trust was a civil right which had arisen and remained enforceable outside Manitoba. Manitoba cannot by the exercise of its legislative jurisdiction extend garnishment law so as to preclude Guaranty Trust from fulfilling its obligation to Danstar in British Columbia.[61].

In so concluding the learned judge has made two fundamental assumptions: first, that the Rule was one in relation to the civil rights arising from contract; and second, that such civil rights are located in a single jurisdiction so it was irrelevant that the contract might also be enforced in Manitoba, Guaranty having a presence there. In this latter assumption, O'Sullivan, J.A. has imported and applied the English interpretation of the conflicts rule discussed earlier[62] to determine where the contract was enforceable.

Oddly enough, although the constitutionality of the garnishment jurisdiction contended for by the plaintiffs has been raised in other cases, no decision has actually turned on that issue. Even though the Saskatchewan courts have always been worried about the constitutional issue, they have avoided making a declaration of invalidity by consistently reading down their legislation and that of other provinces in order to make it conform to what they take to be the territorially limited legislative jurisdiction of a province.[63]

Both the Saskatchewan Courts and O'Sullivan in the Manitoba Court of Appeal are of the view that branches of corporations doing business nationally must be considered as discrete units and that a

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59. *Supra*, n.1 at 369.

60. (1913) 9 D.L.R. 337, (1913) A.C. 283, 3 W.W.R. 994 (P.C.).

61. *Supra*, n.1 at 369.

62. See text accompanying n.32 *infra*.

63. R. ex rel. *Henderson* v. *C.P.R.*, (1916) 10 W.W.R. 1281, 30 D.L.R. 62 (Sask. C.A.); *Marlow* v. *Yarger and C.P.R.*, (1922) 2 W.W.R. 191 (Sask. K.B. Chambers); *Royal Bank of Canada* v. *Miller and Miller and Pension Fund Society of the Royal Bank of Canada*, (1965) 52 W.W.R. 148 (Sask. Q.B. Chambers).

debt can have only one situs for the purpose of allocating legislative competence to garnish. Both are applying the narrow English conflicts rule developed for another purpose tying situs exclusively to the place where the debt is primarily recoverable. Courts applying the broader Canadian modification interpreting recoverability as liability to suit wherever the debtor can be found for garnishment seem, when they consider the issue, to apply the same rule to determine constitutionality. For example, in *Bell* v. *Bell*, Verchere, J., held that even though the defendant was ordinarily paid in Alberta the debt would have been enforceable in B.C. and concluded:

> ...I cannot accept the submission that the judgment debtor's right to collect his salary was a civil right which had arisen and remained enforceable outside British Columbia and that legislation to attach that debt was *ultra vires*. There was a debt in existence from the garnishee to the judgment debtor, and the garnishee was present within British Columbia, and that is sufficient.[64]

Under this approach, the corporation is regarded as a unit, the court does not have to determine where the debt is primarily enforceable and there is no province with exclusive legislative jurisdiction. Legislative jurisdiction corresponds with adjudicatory jurisdiction, regardless of any agreement as to place of payment entered into for the convenience of the parties.

The constitutional issue can, of course, be avoided by reading down garnishment legislation or by exercising discretion to decline to take jurisdiction to attach but if it is ever squarely raised the result may well depend upon which view the court takes of a corporation and of the proper conflicts rules. If each branch is a discrete and independent unit and the conflicts rule determining situs of a debt by its place of primary enforceability is applied to ascertain its territorial location then it is highly likely that legislation which purports to attach debts primarily enforceable outside the province will be held to be extraterritorial and so *ultra vires*. That there is no constitutional mandate for applying that particular conflicts rule, however, is evidenced by the very case which raised the problem of the extraterritorial location of civil rights initially, *Royal Bank of Canada* v. *The King*.[65] There the Privy Council departed from the rule established by *R.* v. *Lovitt*[66] that the situs of a debt is where it is

64. (1960) 32 W.W.R. 376 at 380 (B.C.S.C.).

65. *Supra*, n.60.

66. (1912) A.C. 212 (P.C.).

primarily enforceable and that as between a bank and its customer the debt is primarily enforceable at the branch where the account is kept, and held that even though the account was in Edmonton, the debt would have been enforceable in Quebec at the head office of the Bank.

Thus, even if the common law rules of the conflict of laws are part of the constitutional law of Canada for some purposes so that, for example, a province may not unilaterally alter the rule determining the situs of an intangible such as a debt for taxation purposes[67] it may be that the applicability of a particular rule will depend on the purpose of the legislation. So for the purpose of jurisdiction to enact garnishing legislation it may be arguable that the ordinary rule for determining the situs of a debt is applicable rather than the one developed by the English courts attempting to prevent double liability:

> Under ordinary circumstances the debt would be situated in each place where the corporation can be found.[68]

If that ordinary rule were applicable, which rule is in fact the one employed by those provinces which do permit garnishment even when the debt may be primarily payable and enforceable outside the province, legislation giving such jurisdiction would not be *ultra vires* as extraprovincial legislation because the debt and the civil right arising from the contract creating the debt would be within the province.

The object of the English courts in developing a single situs rule was protection for innocent third parties. The assumption was that all other countries employed the same rule and would therefore recognize a payment in England by the garnishee as a valid discharge of the debt.[69]

Though it did occur to an occasional judge that other countries might be using different rules[70] the question of the probable conduct of the foreign court appears generally to have been treated as one of law rather than fact. Jurisdiction was declined in the discretion of the court if according to the English rule the debt was not situated in

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67. J. Blom, "The Conflict of Laws and the Constitution — *Interprovincial Co-operatives Ltd.* v. *The Queen*", (1977) 11 *U.B.C. L. Rev.* 144 et 148.

68. *New York Life Insurance Co.* v. *Public Trustee*, (1924) 2 Ch. 101 at 120 per Atkin L.J.

69. *Employees Liability Assurance Corp.* v. *Sedgwick Collins & Co.*, (1927) A.C. 95 (H.L.); *Swiss Bank Corp.* v. *Boehmische Industrial Bank*, (1923) 1 K.B. 673 (C.A.).

70. Eg. Warrington L.J. in *New York Life Insurance Co.*v. *Public Trustee, supra*, n.68 at 117.

England but if, according to that same rule the situs of the debt was England, strong evidence of a real risk of double liability was required before an English court would refuse to issue a garnishing order. Whether the assumption about the universality of the rule was actually correct is now, of course, irrelevant. There is, however, no reason why a rule developed for a particular purpose in one field should be transposed arbitrarily to the field of constitutional law for the purpose of allocating legislative jurisdiction. Though there may be practical reasons of fairness and simplicity for confining jurisdiction to garnish a debt to a single province there is constitutionally no justification:

> There need not be a single 'proper legislature' analogous to a proper law, for every interprovincial situation. For constitutional purposes one can take the position, in a suitable case, that two provinces each have a legitimate interest in making their own courts apply their own law, even if it means that conflicting result will be reached in different courts.[71]

Surely it is arguable that a province has a legitimate interest in helping a resident judgment creditor in enforcing a just obligation arising from a decision in its own courts.

Neither constitutional outcome actually is ideal from the point of view of the garnishment process. If the right of enforceability is localized exclusively within the province where payment is to be made then judgment creditors may be prejudiced as not only will corporations operating nationally such as banks, railroads, trust companies and airlines, *inter alia*, no longer be available as garnishees wherever they have a branch but also the prospect arises of individuals attempting to immunize their assets, by arranging for payment outside of the province where they might be subject to execution. The problem then would be to decide whether the parties should have absolute freedom to so localize the debt or whether such clauses should be ignored. An analogy could perhaps be drawn here to jurisdiction selecting clauses which, though generally deferred to now were not always so well received or to the *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*[72] restriction on choice of law clauses.

On the other hand, if it were to be determined that jurisdiction to garnish existed in every province in which a corporate debtor was present, regardless of where the debt was primarily payable, problems of exemptions, priorities and recognition arise.

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71. Blom, *op. cit., supra*, n.67 at 153.

72. (1939) A.C. 277, (1939) 1 All E.R. 513 (P.C.).

There is no necessary uniformity as to exemptions permitted under the garnishment legislation of each province. The possible inequity in depriving a judgment debtor of the exemption permitted by the province in which he resides by the application of the less liberal exemption of the forum garnishing statute was perceived at an early date by the Courts in Saskatchewan:

> It would certainly be a strange jurisdiction if the courts of Ontario could prevent him (the judgment debtor) from collecting even the $25 which under the laws of the country in which he worked and earned the wages attached that amount was exempt from any such process.[73]

That the forum, applying the garnishing statute of the forum, should also allow only the exemptions permitted by the forum seems entirely logical if it is agreed that exemptions from part of the remedy and that remedies must be subsumed under the procedural half of the substance/procedure dichotomy. It is arguable, however, and has been so held in some state courts in the U.S., that the exemption is part of the substantive right to the debt, that it is "such an incident and condition of the debt from the employer that it will follow the debt..."[74] Regardless of whether there remains any great variation among the provincial exemption provisions, this is a problem which can be virtually eliminated by the bestowal on the court of a discretion to vary the exemption such as exists for example in B.C.[75] and in Ontario.[76] If the garnishing court enjoys such discretion it will really be irrelevant which exemption is permitted.

Priorities and double or multiple liability present a somewhat more difficult problem. The present conflicts rule developed by the English courts is to fix a single situs and to accord sole jurisdiction to garnish to that situs of the debt and to let that law determine both the effect of garnishment and priorities among competing claims.[77] Already Canadian cases have made inroads on both branches of the English rule: a number of provinces exercise jurisdiction to garnish regardless of where the debt is primarily enforceable and in least

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73. R. ex rel. *Henderson* v. *C.P.R., supra*, n.63 at 1288. See also *Marlow* v. *Yager and C.P.R., supra*, n.63 at 193.

74. Drake v. Lake Shore and M.S. Ry., (1888) 69 Mich. 168 at 179, 37 N.W. 70 at 75. Cited in R.W. Swenson, "Conflict of Laws Problems under the Iowa Garnishment Statutes", (1949) 34 *Iowa L.R.* 605 at 626 n.103.

75. *Attachment of Debts Act*, R.S.B.C. 1960, c. 20, s. 3A as am. S.B.C. 1971, c.6.

76. *Wages Act*, R.S.O. 1970, c. 481, s.7.

77. Dicey, *op.cit., supra*, n.32 at 555-57, Rule 86.

one case, *Richer* v. *Borden Farm Products Co.*[78] there was a willingness to accord recognition to a garnishing order not made by that *lex situs*. Some modification of the traditional rules for recognition will be required. Application of the *Metropolitan* principle would give priority to the garnishing order served first, subject to the qualification added by *Hansen* that the recognizing court be entitled to determine the effect of the order. The effect of the order would be determined by the domestic law of the garnishing province not the *lex fori*. If, like the order of the Superintendent of Brokers in *Hansen*, the effect of service of the garnishing order were merely to freeze the asset and to create no charge or lien then according to the Manitoba Court of Appeal, the order could be disregarded.[79]

There are at least three possible ways in which modification of the recognition rules could be achieved. The first would be for the Courts to combine the principle enunciated by the Supreme Court of Canada in *Bank of Montreal* v. *Metropolitan Investigation and Security Ltd.*[80] with that of reciprocity as enunciated in *Travers* v. *Holley*[81] or with that of a real and substantial connection as enunciated in *Indyka* v. *Indyka*.[82] Neither has ever successfully been carried over into the general rules of recognition from the special rules for divorce recognition[83] but without some such combination the *Metropolitan* principle will be useless. The critical question there as was mentioned before[84] is the meaning to be attributed to the term "competent." To continue to use the traditional rules to decide as to competence will change nothing. In the absence of a due process standard to measure competence, *Travers* v. *Holley* reciprocity would appear to be a reasonable standard though the *Indyka* principle in theory, if not in application, is probably closer to the due process standard. If a province considers its own service *ex juris* provisions to be fair then it should accord recognition to the jurisdiction of another province assumed on similar if not identical grounds. If the resulting recognition required is too broad then the

78. *Supra*, n.50.

79. An examination of the effect of service of a garnishment order in each province is beyond the scope of this paper.

80. *Supra*, n.6.

81. (1953) p. 246, (1953) 2 All E.R. 794 (C.A.)

82. (1969) A.C. 33, (1967) 2 All E.R. 689 (H.L.).

83. See e.g. G.D. Kennedy, "Recognition of Judgments in Personam: The Meaning of Reciprocity", (1957) 35 *C.B.R.* 123.

84. See text accompanying n. 21, *infra*.

bases for service *ex juris* provisions should be revised so as to amount to a real and substantial connection.

The second method of modifying the traditional rules, possible now though perhaps never before, would be by constitutional amendment either by the inclusion of some sort of full faith and credit clause or by the bestowal of legislative jurisdiction on the federal government. The Australian Constitution, expressly modelled on that of the United States of America in this respect, in fact employs both these techniques.[85] Section 118 of the Australian Constitution provides:

> Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

Furthermore, section 51, the equivalent of section 91 of the B.N.A. Act, provides:

> s.51 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> (xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:
>
> (xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States.

Possibly the Canadian Parliament could legislate on the matter even now under the Peace, Order and Good Government Clause of section 91 under the "gap test" or "the national dimensions test"[86] if that test survived *Re Anti-Inflation Act*[87] but with constitutional reform soon perhaps a reality, putting the federal general power to the test again may be unnecessary.

The third method possible would be for each province to enact uniform legislation modifying the recognition rules. This is a respected technique not infrequently used.

Thus although to certain problems would have to be worked out were multiple jurisdiction to garnish held to be constitutionally valid, they are not insurmountable and neither the garnishee nor

85. Pryles and Hanks, *Federal Conflict of Laws*, 66 (Butterworths 1974).

86. See Hogg, *Constitutional Law of Canada*, 245-48 (Carswell 1977).

87. (1976) 2 S.C.R. 373, 68 D.L.R. (3d) 452 (S.C.C.).

the judgment debtor need be prejudiced. A certain amount of inconvenience to the garnishee is inevitable and occurs in entirely domestic situations but that would have to be balanced against fairness to the judgment creditor and could be handled by the exercise of judicial discretion.

The present situation in Canada with respect to jurisdiction to garnish is that several provinces do assume jurisdiction to garnish based simply on the existence of a debt and the presence of the garnishee within the province. Apart from the question of a constitutional impediment to so proceeding there would appear to be no reason in justice and equity (to paraphrase the Manitoba Court of Appeal) why such a practice should not continue. It seems only fair to the judgment creditor that the court having taken jurisdiction in the original action should be able to aid in enforcing its own judgment. There are certainly very real problems as to the possibility of double liability and administrative inconvenience to the garnishee. The latter problem is not one which can be alleviated by judicial action except perhaps by giving a more liberal allowance of time for compliance. The former problem, on the other hand, is within the power of the courts to eliminate, either by application of the broad principle mentioned in *Richer* v. *Borden Farm Products Co. Ltd.*[88] that it is contrary to natural justice that a person should be subject to double liability or by a modification of the recognition rules with respect to judgments rendered within Canada. It has been said that it is "incongruous" that a federation such as Australia whose component states are even more homogenous in their laws and policies than their American counterparts should continue to employ common law rules of recognition and enforcement "based on theories developed for international conflictual situations or founded on antiquated rules of procedure..."[89] That comment can be transposed with equal force to Canada.

What is anomalous about *Hansen* v. *Danstar* is the spectacle of the Manitoba Court of Appeal in effect impugning the jurisdiction assumed by the Manitoba Queen's Bench after judgment had been rendered in the action. This may very well be the direct result of rules of court which provide for service *ex juris* as of right rather than with leave of the court so that if the defendant makes no appearance the question of *forum non conveniens* is never raised. Nevertheless, the case does give rise to questions not only as to whether the Court

88. *Supra*, n.50.

89. Pryles and Hanks, *op. cit., supra*, n.85 at 71.

correctly applied the rules governing the exercise of discretion in garnishment proceedings and to the very existence of jurisdiction to garnish in such circumstances but also to more general and fundamental question respecting the need for the modification of the recognition rules in force in the provinces and possibly also to the need for revising the bases for service *ex juris*. The Manitoba Court of Appeal was so sure that British Columbia would not recognize and enforce the Manitoba judgment that it was unwilling to aid the plaintiffs' enforcement attempt in what must have been for them more convenient forum.