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Jurisdictional Fairness and Freezing Measures

An Analysis in Canadian Private International Law

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Canada

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ABSTRACT

Over the last decade the law of judicial jurisdiction has undergone profound changes in Canada. Chief among the factors that prompted evolution is the recognition of fairness as a guiding principle in the elaboration of jurisdictional rules. This thesis presents the consequences such recognition has already had and should have on the granting of freezing measures, those specific provisional measures aimed at freezing a defendant's assets pending litigation.

Having reviewed the freezing measures that can be obtained from Canadian courts, this thesis shows how concerns of fairness to the parties have questioned traditional grounds of jurisdiction and how it has affected the very availability of freezing measures. However, out of concerns of fairness to the plaintiff, Canadian courts with no jurisdiction to hear the merits of a dispute should be ready to assert jurisdiction for the limited purpose of freezing assets.

Finally, turning to the scope of those measures, this thesis deals with the issue of extraterritoriality. It is argued that out of concerns of fairness to innocent third parties courts should be extremely cautious in granting extraterritorial measures.

RÉSUMÉ

Au cours de la dernière décennie, le droit canadien de la compétence internationale a subi de profonds changements. Une des causes principales de cette évolution est la reconnaissance de l'équité comme principe directeur de l'élaboration des règles de compétence. Cette thèse présente les conséquences qu'une telle reconnaissance a eu et devrait avoir sur les mesures de gel, ce type particulier de mesures provisoires spécifiquement destinées à geler, dans l'attente d'un jugement au fond, les biens d'un défendeur.

Après avoir présenté les mesures de gel pouvant être ordonnées par les tribunaux canadiens, cette thèse montre comment des considérations d'équité entre les parties ont pu remettre en cause certains chefs traditionnels de compétences et affecté la disponibilité même des mesures de gel. Cependant, pour des raisons d'équité envers le demandeur, les tribunaux, même dépourvus de compétence au fond, devraient être prêt à se déclarer compétent pour ordonner des mesures de gel.

Finalement, s'intéressant à la portée de ces mesures, cette thèse traite de la question de l'extraterritorialité. Il est soutenu que les tribunaux, en raison de préoccupations d'équité envers les tiers, devraient faire preuve à la fois de retenue et de prudence lorsqu'ils ordonnent des mesures de gel à portée extraterritoriale.

INTRODUCTION

The plaintiff in a lawsuit faces several fundamental risks. First of all, he runs the risk that his claim be dismissed on the merits. Though this is undoubtedly a major hazard of litigation, this is one that can be reasonably managed through legal expertise and advice. A second risk he faces is of a different nature. Should the plaintiff be successful in obtaining a favourable outcome in the courthouse, he would still need to have the judgment actually enforced against the defendant. This might prove difficult. The judicial process is far from being an instantaneous one and several months or even years might have passed between the date the plaintiff initiated the proceedings and the date the court rendered its decision. In the meantime the legal or factual situation could have changed a great deal so as to render the judicial decision nugatory and useless. The defendant's behaviour could have caused irredeemable damage to the plaintiff. To give but a few examples, his reputation might have been harmed or business opportunities might have been lost. The judicial system's response to that time-induced risk takes the shape of provisional measures—measures ordered by the court pending litigation and designed to preserve the effectiveness of the future judgment.[1] Those measures are various: for example, the court can enjoin a defendant from disclosing confidential information or can order the sale of perishable goods.

[1] In *Aegean Sea Continental Shelf* [1976] I.C.J. Rep. 3 at 15, the President of the International Court of Justice, Mr. Jiménez de Aréchaga, stated: "The essential object of provisional measures is to ensure that the execution of a future judgment on the merits shall not be frustrated by the actions of one party *pendent lite*." Quoted by Professor Collins in Lawrence Collins, *Essays in International Litigation and the Conflict of Laws* (Oxford: Clarendon Press, 1994) at 10.

The measures that will be the object of the present study are designed to answer one specific need. While the judicial process is under way, an unscrupulous defendant may dispose of his assets so as to frustrate the enforcement of an eventual money judgment. In particular, modern means of telecommunication make it extremely easy to transfer funds to some remote safe haven where they will be out of the plaintiff's reach. In so doing, an ingenious defendant can effectively make himself judgment proof. The judicial answer to such a course of dealing is to provisionally freeze the dishonest defendant's assets by removing them from his control. The legislator and the courts in Canada have devised several such "freezing measures", which will be presented in Chapter I.

The core of the present study is dedicated to examining issues of judicial jurisdiction, as understood in the conflict of laws,[2] encountered by Canadian courts when asked to order freezing measures. In other words, when will a Canadian court be competent to order a freeze? In Canada the rules governing judicial jurisdiction have undergone far-reaching changes over the last decade. In a series of decisions starting with *Morguard Investments Ltd. v. De Savoye*[3] the Supreme Court of Canada has profoundly reworked the theory that had traditionally underpinned judicial jurisdiction.[4] From a theory based on premises of power over the defendant's person, the Supreme Court of Canada has evolved a theory premised on the principle of proximity—the so-called "real and substantial connection"—between the forum and the parties or the cause of

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[2] Professors Castel and Walker give the following definition "Judicial jurisdiction in the conflict of laws is the authority of a court to determine an issue in a case involving a legally relevant foreign element." Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws* looseleaf (Toronto: Butterworths, 2002) at §11.1.

[3] [1990] 3 S.C.R. 1077 [*Morguard*]. See also *Amchem Products Inc. v. British Columbia (Workers Compensation Board)* [1993] 1 S.C.R. 897, and *Hunt v. T&N plc* [1993] 4 S.C.R. 289.

[4] The reworking undertaken by the Supreme Court of Canada also concerns choice of law rules. See *Tolofson v. Jensen* [1994] 3 S.C.R. 1022.

action.[5] The jurisdictional analysis is now governed by three overarching principles, comity, order and fairness.[6] The consequences of this revolution are far from being settled.[7] The present work will try to sketch the implications of *Morguard*, and in particular the acknowledgment of concerns of fairness in the jurisdictional analysis, on the granting of freezing measures in a trans-jurisdictional dispute.

Chapter II will explore the present and future consequences of the recognition of a principle of fairness on the availability of freezing measures from Canadian courts. Some consequences have already been felt. Indeed, for long the mere presence of the defendant's assets in a province had been considered sufficient for that province's courts to assert full personal jurisdiction over the defendant. Having jurisdiction to hear the merits of the dispute opposing the plaintiff to the defendant, courts could order ancillary measures provisionally freezing the latter's assets. However, this type of jurisdiction—based on the mere presence of property in the province—could prove profoundly unfair to a defendant, who might have no other contact with the forum than the presence of the said assets. It will be shown that, as such, this basis for jurisdiction has been one of the victims of *Morguard*. Yet, with respect to freezing measures, its abandonment has given rise to a serious jurisdictional conundrum: if the mere presence of assets is insufficient to found judicial jurisdiction, how can a court, with no other contact with the dispute or the defendant, order a freeze of those assets?

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[5] Castel & Walker, supra note 2 at §11.1.

[6] *Spar Aerospace Ltd. v. American Mobile Satellite Corp.* 2002 S.C.R 78, 28 C.P.C (5th) 201, [*Spar* cited to S.C.R.] at § 21.

[7] See Vaughan Black and Janet Walker, "The Deconstitutionalization of Canadian Private International Law?", *S.C.L. Review* (forthcoming) where the authors note in introduction that "those decisions so re-shaped the field as to raise as many important questions as they answered". Most notably in *Spar*, *supra* note 6, the Supreme Court of Canada seemingly held that the real and substantial connection test would apply only to the inter-provincial context and not to the international one. The implications of this holding are debated and run against the interpretation of *Morguard* that has so far been given by most Canadian court. The present work will make the assumption that the real and substantial connection test and the principle of fairness in particular equally govern assertions of jurisdiction in the inter-provincial and international contexts.

This jurisdictional conundrum has been addressed by legislation and judicial intervention. Through legislation some Canadian provinces have provided for their courts' jurisdiction to order freezing measures when they are not in a position to assert jurisdiction to hear the merits. In other provinces, courts have shown their willingness to endorse a distinction between jurisdiction to hear the merits and jurisdiction to freeze. As Chapter II will conclude, in a fairness framework this purposive distinction has much to recommend it. More often than not the court seized of the merits will not be in a position to counteract an unscrupulous defendant's scheme to make himself judgment-proof. Accordingly, out of concerns of fairness to the plaintiff and comity to the foreign court, Canadian courts should be ready to assert jurisdiction for the purpose of provisionally freezing the defendant's assets.

Having examined the interplay between the principle of fairness and the availability of freezing measures, this thesis will turn in Chapter III to a different matter. It will address the implications of the principle of fairness on the territorial scope of freezing measures. Indeed, some freezing measures available in Canadian courts may seek to achieve a freeze of some of the defendant's assets located abroad. From the perspective of fairness as between the plaintiff and the defendant, such an extraterritorial freeze may not pose any difficulty. Both the plaintiff and the defendant appear to benefit from an extraterritorial freeze: the plaintiff will obtain an effective freeze of the defendant's assets; the defendant will be in a position to petition a single court to obtain a variation or a discharge of the freeze, which is arguably less of a burden than having to petition the courts in every jurisdiction where his assets are

located. However, while extra-territoriality may be fair to the immediate parties, this may not be the case for third parties, often directly affected by freezing measures.

As Chapter III will show, an extraterritorial freeze is often achieved by using judicial compulsion against innocent third parties present in Canada and who happen to hold some of the defendant's assets abroad. Though effective, the freeze can cause hardship on those innocent third parties. In particular, they can face conflicting orders issued by the courts where the assets are located and the courts where they are themselves located. It will be argued that on a true application of the *Morguard* principle, Canadian courts should recognize the potential unfairness to innocent third parties and limit their assertions of jurisdiction accordingly.

The recognition of a principle of fairness in the jurisdictional analysis is not peculiar to Canadian private international law. Rather, it appears to be a global trend.[8] Similarly, freezing measures are not peculiar to the Canadian legal system, but are common to all legal systems.[9] In light of this reality, this thesis draws on sources from different jurisdictions and different legal traditions to guide the analysis and support its conclusions. Though the primary focus is on Canadian law, in itself diverse given the presence of the Civil law province of Quebec alongside the Common law provinces, it is both relevant and enlightening to refer to cases and doctrine drawn from Canada, the United States and Europe to channel and foster this reflection on a naturally trans-jurisdictional problem.

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[8] See generally, Arthur Von Mehren, "Adjudicatory Jurisdiction: General Theories Compared And Evaluated" (1983) 63 B.U.L. Rev 279 where the author contrasts traditional jurisdictional theories based on the premise of power to more modern theories based on a premise of "convenience, fairness, and justice". See also Paul Lagarde, "Le Principe de Proximité dans le Droit International Privé Contemporain" [1986] 1 Rec. des Cours 9, and especially the part concerned with conflicts of jurisdiction at 128-93.

[9] Collins, *supra* note 1 at 10, where the author considers that the interim protection of rights is a "principle of law common to all legal systems".

CHAPTER I: A PRIMER ON FREEZING MEASURES IN CANADA

This chapter will present the remedies available in Canadian courts to preserve, pending litigation, a defendant's assets out of which an eventual judgment might be satisfied. Although it is beyond the scope of this work to present in details the rules governing the granting of those measures, it remains necessary to give the reader an overview of the type of measures that can be obtained in Canadian courts.

The practice of attaching a defendant's assets pending litigation has long been accepted in civil law, and arguably it formed part of the inheritance brought by the French colonist in Québec.[10] In this province the freezing of a defendant's assets can be readily obtained by way of seizure before judgment (Section 1). By contrast, common law courts for long refused to restrain a defendant's dealings with his property before judgment was properly entered upon.[11] This "abhorrence"[12] for prejudgment freezing of assets was undoubtedly caused by the perception that such remedy can be plainly oppressive on an innocent defendant and give considerable leverage to a plaintiff whose case has not even been considered.[13] On the other hand, chances are that an unscrupulous defendant will frustrate the whole judicial process by spiriting his assets away and by making himself judgment proof. This reality of litigation was taken into consideration much earlier in Canada than in England.

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[10] Alberta Institute of Law Research and Reform, Report No 50, *Prejudgment Remedies for Unsecured Claimants*, (Edmonton: A.I.L.R.R., 1988) at 28 where the authors note that the first known enactment touching the issue, a 1787 Ordinance, was merely regulating "an already flourishing remedy".

[11] The seminal case in England is *Lister & Co v. Stubbs* (1890), 45 Ch.D. 1 (C.A.) [*Lister*], see Robert J.C. Deane, "Varying the Plaintiff's Burden: An Efficient Approach to Interlocutory Injunctions to Preserve Future Money Judgments" (1999) 49 U.T.L.J. 1 at 3.

[12] In the words of Estey J. in *Aetna Financial Services Ltd. v. Feigelman* [1985] 1 S.C.R. 2 [*Aetna*] at 12.

[13] C.R.B. Dunlop, *Creditor-Debtor Law in Canada* (Toronto: Carswell, 1995) at 128.

First, the so-called "absconding debtor legislation" has long provided for the prejudgment attachment of a debtor's assets in some specific situations (Section 2). Second, in many provinces the process of garnishment of a debt owed to the defendant is available before judgment (Section 3). The risk of non-recovery for the plaintiff has eventually been acknowledged by the Courts in England, and their answer, the so-called *Mareva* injunction, has been adopted in Canada (Section 4). The resulting collection of freezing measures has caused some provinces to undertake an overhaul of their law in this field. In Alberta and in Newfoundland and Labrador a unified approach to prejudgment remedies has been adopted (Section 5).

Section 1: Seizure Before Judgment in Québec

Though there are several kinds of seizure before judgment (or *saisie avant jugement* in French),[14] the one of interest for the present study is established by article 733 of the *Code of Civil Procedure*. This provision reads:

> The plaintiff may, with the authorization of a judge, seize before judgment the property of the defendant, *when there is reason to fear that without this remedy the recovery of his debt may be put in jeopardy.* [Emphasis added]

The only purpose of seizure before judgment is to remove the assets out of the defendant's control and to place them "in the hands of justice pending suit".[15] This is achieved by having an officer of the court enter into possession of the said assets.[16]

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[14] Denis Ferland & Benoît Emery, *Précis de procédure civile du Québec*, vol. 2, 4th ed. (Cowansville, QC: Yvon Blais, 2003) at 381-399.
[15] Art. 737 C.C.P.
[16] Art. 736 C.C.P.

This remedy is available at or after the commencement of the main proceedings.[17] To obtain a seizure before judgment, the plaintiff will first have to convince the court that there is an objective risk of non-recovery caused by the defendant's dealings with his property.[18] The Code does not require the plaintiff to establish the defendant's fraudulent intent.[19] Yet before granting leave courts appear to require that the plaintiff establish exceptional circumstances that can objectively ground the belief that the defendant is trying to make himself judgment-proof.[20]

The defendant's assets can also be seized in the hands of a third party. In this case, the court will address an order to the third party not to part with the property and will hold him guardian of it.[21] This process known as *saisie arrêt* is designated as "seizure by garnishment" in the English version of the code. This might be misleading since, as will be seen below, at common law, in Canada and England, "garnishment" designates the attachment of a debt. In Québec seizure by garnishment designates the attachment of any property in possession of a third party, including debts owed by a third party to the defendant.[22] The terminology used in the Code is in fact akin to the American

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[17] Ferland & Emery, *supra* 14 at 378.
[18] *Ibid.* at 382.
[19] The former version of the Code of Civil Procedure required that the plaintiff established the defendant's fraudulent intent. Article 931 then read: "A creditor may before, obtaining a judgment, procure a writ to attach the goods and effects of his debtor [...] when the defendant [...] is secreting or making away with, has secreted or made away with, or is immediately about to secrete or make away with his property with the intent to defraud his creditor in general or the plaintiff in particular".
[20] See *Elkin c. Hellier*, (1991) R.D.J. 49 (Qc.C.A.) at 51 where the court said "bien que la jurisprudence n'exige pas la demonstration de l'intention frauduleuse, il faut cependant démontrer des manoeuvres déloyales ou des actes destinés à soustraire des biens du débiteur à l'exécution normale par ses créanciers"; see *Michalczyk c. Choynowski*, (1977) C.A. 203 (Qc.) at 206 the court stated "[Pour obtenir la saisie] il lui fallait encore établir des faits tells qu'un homme raisonable puisse sérieusement croire que par des agissements reprochables la partie adverse cherche à se soustraire à une exécution éventuelle";
St. Lawrence Mechanical Contractor Limited c. Acadian Consulting Company Limited, (1974) C.A. 236 (Qc.) at 237 the Court said "La saisie avant jugement est certainement une mesure extraordinaire qui ne peut être accordée que pour des raisons extraordinaires: pour y avoir droit il faut pratiquement alléguer la fraude ou des moyens s'apparentant à la fraude contre le débiteur en défaut".
[21] Art. 625 and 626 C.C.P.
[22] Art. 625 C.C.P.

practice.[23] In this text the terms "seizure" or "attachment" will designate the attachment of tangible property whether in possession of the defendant or of a third party, and "garnishment" will designate the attachment of a debt.

Section 2: Absconding Debtors Legislation and Attachment in the Common Law Provinces

The process of attaching a debtor's property before judgment has its origin in Roman law where it was conceived as a means of forcing appearance of the debtor in court.[24] Ignored by the common law courts, this process was customarily applied under the name of "foreign attachment" by the merchant courts of London.[25] Pursuant to this custom the property in the city of an absent defendant could be attached so as to force him to appear in court, failing which the plaintiff would obtain satisfaction out of the attached property.[26] Though it fell into disuse in England during the 19th Century,[27] the custom appeared as a useful device to the American legislators and rule-makers concerned with the ease fraudulent debtors could abscond and hide in the immensity of the new territories.[28] By the early 18th Century, absent and absconding debtor legislation, modeled upon the custom of foreign attachment, had become part of the law of most American colonies.[29] In Canada similar statutes were first enacted in the Maritimes and were subsequently adopted in all common law provinces.[30] Those Acts provided that a plaintiff in an action for debt could attach an absent or absconding

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[23] For this distinction between the Canadian and the American terminology, see Dunlop, *supra* note 13 at 100.
[24] Janet M. Dine & John J. McEvoy, "Are *Mareva* Injunctions Becoming Attachment Orders?" (1989) 8 Civ. J. Q. 236 at 236.
[25] *Ibid.*
[26] Alberta Institute of Law Research and Reform, *supra* note 10 at 21.
[27] The reasons for this are the same that grounded the traditional reluctance to provide a plaintiff with prejudgment remedies generally, most notably the huge pressure that the plaintiff can then exercise on the defendant, Dunlop, *supra* note 13 at 128.
[28] *Ibid.* at 100.
[29] Alberta Institute of Law Research and Reform, *supra* note 10 at 23.
[30] Dunlop, *supra* note 13 at 101.

debtor's property in order to secure satisfaction of any judgment he might obtain.[31] The process of attachment has fallen into disuse in some common law provinces, like Ontario, where the Acts have been left almost untouched for a century.[32] In British Columbia the Act was even repealed in 1978 following a recommendation by this province's Law Reform Commission considering it as "beyond repair" and "obsolete".[33] In Alberta and in Newfoundland and Labrador, absconding debtor legislation has been included in the overhaul of prejudgment remedies which will be presented later on in this Chapter.

In other provinces, efforts have been made to transform attachments into effective freezing measures available against fraudulent defendants generally. Such is the case in Saskatchewan where the *Absconding Debtors Act* provides for an additional ground of attachment when the defendant "has attempted to remove [his] personal property out of Saskatchewan or to sell or dispose of it with intent to defraud his creditors generally or the plaintiff in particular".[34]

Reforms have been carried further in Nova Scotia and Manitoba. As in Saskatchewan the grounds for attachment have been widened. Customarily, attachment of a defendant's property is available at or after the commencement of the main action

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[31] *Ibid.* at 145.
[32] *Ibid.* at 148. Such seems to be the case of the *Absconding Debtor Acts* in Ontario, R.S.O. 1990, c. A.2; in Prince Edward Island the process appears to have disappeared altogether, see Dunlop, supra note 13 at 146; in New Brunswick, the *Absconding Debtors Acts*, S.N.B., c. A-2 appears to function as a mini-bankruptcy, see Dunlop, supra note 13 at 148.
[33] Law Reform Commission of British Columbia, *Report on the Absconding Debtors Act and Bail Act: Two Obsolete Acts* (1978) cited in Dunlop, supra note 13 at 148.
[34] *Absconding Debtors Act*, R.S.S. 1978, c. A-2, s. 3(1)(b). It has yet been noted that the procedure is rarely used, see Tamara M. Buckwold & Ronald C.C. Cuming, *Interim Report on the Modernization of Saskatchewan Money Judgment Enforcement Law*, College of Law, University of Saskatchewan, available on the Saskatchewan Queen's Printer website at http://www.qp.gov.sk.ca, click on "Links" at 7.

when the debtor is absent,[35] absconding[36] or leaving the jurisdiction.[37] Attachment can also be obtained when the defendant has or is about to permanently remove property out of the province.[38] Finally, attachment is available when a defendant "has concealed, removed, assigned, transferred, conveyed, converted or otherwise disposed of property with an intent to delay, defeat or defraud a creditor or is about to do so".[39] Accordingly, in Nova Scotia and Manitoba, attachment provides an effective remedy against a defendant that would entertain the idea of making himself judgment-proof by removing his property out of the jurisdiction.[40]

Section 3: Prejudgment Garnishment in the Common Law Provinces

Garnishment is primarily a process of execution whereby a creditor may obtain satisfaction of his claim out of a debt due to his debtor by a third party.[41] The process of garnishment is known in all the Canadian common law provinces and is derived from the English *Common Law Procedure Act*, 1854.[42] In England garnishment was

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[35] *Civil Procedure Rules of Nova Scotia*, r. 49.01(1)(a); *Court of the Queen's Bench Act*, C.C.S.M, c. C280, [*Manitoba Queen's Bench Act*] s. 60(1)(a) (attachment is available when the debtor resides out of the province or is a corporation not registered in the province).

[36] *Civil Procedure Rules of Nova Scotia.*, r. 49.01(1)(b); *Manitoba Queen's Bench Act, ibid.*, s. 60(1)(b) (attachment is available when the debtor hides ("conceals" in Nova Scotia) or absconds in the province in order to avoid service of documents).

[37] *Civil Procedure Rules of Nova Scotia.*, r. 49.01(1)(c); *Manitoba Queen's Bench Act, ibid.*, s. 60(1)(c) (attachment is available when the debtor is about to leave or has left the province with the intent to change is residence, defraud a creditor or avoid service of documents).

[38] *Civil Procedure Rules of Nova Scotia.*, r. 49.01(1)(d); *Manitoba Queen's Bench Act, ibid.*, s. 60(1)(d).

[39] *Manitoba Queen's Bench Act, ibid.*, s. 60(1)(d); *Civil Procedure Rules of Nova Scotia, ibid.*, r. 49.01(1)(d) speaks of an intent to "hinder or delay his creditors". Rule 49.01(1)(e) also provides for attachment when a debtor "has fraudulently incurred a debt or liability in issue in a proceeding"

[40] See *Avedis Agencies Ltd. v. Swapper's Furniture Annex Ltd.* [1991] N.S.J. No. 600 (S.C.) (QL) (where the defendant had transferred assets from one corporation under his control to another one). See also *R & M White Holding Ltd. v. Canadian Garden Products Ltd.* (1993), 86 Man. R. (2d) 217, 1993 CarswellMan 387 (Q.B.).

[41] Jean-Gabriel Castel, *Canadian Conflict of Laws*, 1st. ed. (Toronto: Butterworths, 1975) [Castel, *Conflict of Laws 1975*] at 381.

[42] Dunlop, *supra* note 13 at 88, *Common Law Procedure Act*, 1851, 17 & 18 Vict., c. 125, ss.60-67.

and is still conceived of exclusively as a means of post-judgment execution,[43] and in Canada such is the practice in Ontario,[44] in New Brunswick,[45] and in the Federal Court.[46]

Yet contrary to the original English practice, in the rest of the Canadian common law provinces garnishment is available as a prejudgment remedy.[47] In these provinces prejudgment garnishment is available at or after the commencement of the main proceedings.[48] The types of debts that can be attached before judgment are varied. For example, in some provinces garnishment of wages is not allowed before judgment has been properly entered upon against the defendant.[49]

In Nova Scotia prejudgment garnishment is obtained by an order of attachment as presented in the foregoing.[50] Prejudgment garnishment is thus available on the same grounds as prejudgment attachment of tangible property, most notably when the defendant is absconding or fraudulently trying to remove his property from the jurisdiction. In Alberta and in Newfoundland and Labrador the process has been included in the overhaul of prejudgment remedies that will be presented later.

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[43] Dunlop, *supra* note 13 at 368. United Kingdom, *Civil Procedure Rules*, Part 72 (garnishment orders are now known as third party debt orders).
[44] Ontario, *Rules of Civil Procedure*, r. 60.08
[45] *Garnishee Act*, S.N.B. c. G-2, s. 2.
[46] *Federal Court Rules*, r. 449-457
[47] *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, s. 3; *Attachment of Debts Act*, R.S.S 1978, c. A-32 s.3; *Garnishee Act*, R.S.P.E.I. 1988 c. G-2, s. 6; *Judgment Enforcement Act* S.N.L. 1996 c. J-1.1, s. 28 (1)(g); *Civil Enforcement Act* R.S.A. 2000, c. C-15, s. 17(3)(e); *Manitoba Queen's Bench Act*, *supra* note 35, s. 61 and *Garnishment Act*, C.C.S.M., c. G20; *Civil Procedure Rules of Nova Scotia*, r. 49.04(1)(f).
[48] The *Garnishee Act* in Prince Edward Island does not contain such requirement. Yet Rule 60.10 of Civil Procedure Rules that the plaintiff shall commence an action within 5 days.
[49] Such is the case in British Columbia, Saskatchewan, Manitoba and Prince Edward Island, see *Court Order Enforcement Act*, *supra* note 47, s. 3(4); *Garnishment Act*, *supra* note 47, s. 11; *Garnishee Act*, *supra* note 47, s. 17(1); *Attachment of Debt Act*, *supra* note 47, s. 9.
[50] *Civil Procedure Rules of Nova Scotia*, r. 49.07.

In British Columbia, Manitoba, Saskatchewan and Prince Edward Island the grounds upon which a plaintiff may obtain a prejudgment garnishment are not limited. So long as the plaintiff abides by the procedural requirements—cause of action for a debt or a liquidated amount precisely disclosed in the affidavit—he will obtain the garnishment sought as of right.[51] In particular the plaintiff need not establish that the defendant is in anyway fraudulent or trying to make himself judgment-proof.[52] Under the circumstances the order can be plainly oppressive: an innocent defendant can be barred from meeting his ordinary business and living expenses. Conversely it gives the plaintiff considerable leverage to obtain an advantageous settlement.[53] This has caused the courts to insist that the procedural requirements be meticulously respected.[54] The proceedings have been said to be *strictissimi juris*.[55] Courts are also ready to set aside prejudgment garnishments when they constitute an abuse of the process.[56]

To a certain extent concerns of fairness to the defendant have been built into the procedural rules in British Columbia where the *Court Order Enforcement Act* now expressly provides that a prejudgment garnishment can be set aside whenever the

[51] Dunlop, *supra* note 13 at 131.
[52] See *e.g. Silver Standard Resources Inc. v. Joint Stock Co. Geolog* [1998] B.C.J. No 2887 (C.A.) (QL) [*Silver Standard*] reversing the decision of the lower judge who had held that the defendant was not fraudulent and had accordingly set aside the garnishment.
[53] Allan A. Parker, "Garnishment Before Judgment in British Columbia: Fifty Ways to Lose Your Order" (1990) 48 Advocate (B.C.) 407 at 407.
[54] See *e.g. Read v. Read et al. (No.1)* (1995), 131 Nfld. & P.E.I.R. 91 (P.E.I.S.C.(T.D.)) at §16 where the Court stated "The effect of a prejudgment garnishee order often is to prevent a defendant from receiving monies justly due and owing, or accruing due by the garnishee, thereby giving a plaintiff some security while the litigation is pending. The procedure may be employed in situations where there could be a legitimate defence to the plaintiff's claim, where the defendant is solvent and capable of responding to any judgment the plaintiff may obtain, and indeed in situations where the plaintiff may not, in the end, obtain a judgment against the defendant. *If the rules prescribed for the procedure are not meticulously observed, the process could be open to wide abuse thereby causing substantial prejudice to a defendant.*" [emphasis added].
[55] Dunlop, *supra* note 13 at 130.
[56] See Barclay J.'s remarks in *Ricco's Health & Fitness Centre Ltd. v. Lemstra et al.* (1998), 171 Sask. R. 267 (Q.B.) at 269 stating that courts will not hesitate to strike out prejudgment garnishments "where employed for a purpose collateral to securing the plaintiff's claim, to embarrass or annoy the defendant or is brought for the purpose of oppression or extortion".

court considers it "just in all the circumstances".[57] Similarly in Manitoba, a prejudgment garnishment may be set aside when in the circumstances it "is unjust or imposed undue hardship on the defendant".[58] In those two provinces, the courts are thus in a position to balance the plaintiff and the defendant's interests. Arguably, a fraudulent defendant might experience difficulties in having a prejudgment garnishment set aside on this ground.[59]

When it can be secured, a prejudgment garnishment constitutes an effective freezing measure against a defendant who would entertain the idea of dissipating his assets. Yet the restrictive approach taken by the courts towards it can make its use uncertain.[60] This might explain the success in Canada of the English response to fraudulent defendants, the *Mareva* injunction.

Section 4: The *Mareva* Injunction

Until recently English courts had no means of ensuring that a defendant would not, pending litigation, spirit his assets away so as to make himself judgment-proof. By the end of the nineteenth Century writs of foreign attachment customarily issued by the Mayor Court of London had fallen into disuse[61] and the Courts had consistently refused to enjoin a defendant from dealing with his property before judgment had

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[57] *Court Order Enforcement Act*, *supra* note 47, s. 5(1).
[58] Manitoba, *Court of the Queen's Bench Rules*, r. 46.14(6)(b).
[59] See *e.g. Silver Standard*, *supra* note 52 and accompanying note.
[60] Buckwold & Cuming, *supra* note 34 at 7-8 where the authors note that "the strength of prejudgment garnishment as an asset preservation measure is, therefore, its weakness. Because it is too effective and too susceptible to abuse, the courts have limited its efficacy".
[61] In 1881 the House of Lords held that the procedure was not available when the garnishee was a corporation, which in practice made it useless, see *Mayor and Aldermen of the City of London v. London Joint Stock Bank* (1881), 6 A.C. 393 (H.L.). See Professor Collins' comment in Collins, *supra* note 1 at 18.

properly been entered upon.[62] This state of the law was unfortunate and was regularly decried by reform committees.[63] Since legislative reforms were not forthcoming, the breakthrough came by judicial law making.

In two cases rendered in 1975, *Nippon Yusen Kaisha v. Karageorgis*[64] and *Mareva Compania Naviera SA v. International Bulkcarriers SA*,[65] the Court of Appeal led by Lord Denning granted an *ex-parte* interlocutory injunction restraining a foreign defendant from removing property, bank accounts held in London, out of the jurisdiction. The remedy has been named after the second case a *Mareva* injunction. The Court of Appeal found jurisdiction to grant this remedy in section 45 of the *Supreme Court of Judicature (Consolidation) Act*, which provided than a interlocutory injunction could be granted whenever the court deemed it just and convenient.[66] Though the line of authorities that had held such power not to be available was almost ignored in those early cases,[67] it was considered and distinguished in *Rasu Maritima SA v. Perusahaan Pertambangan Manyak Dan Gas Bumi Negara (Pertamina)*.[68] The distinction hinged on the fact that the former line of authorities was concerned with defendants resident in England whereas the *Mareva* cases were concerned with foreigners.[69] This distinction was subsequently abandoned and *Mareva* injunctions are

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[62] As was noted earlier the seminal case is *Lister*, *supra* note 11. See also *Robinson v. Pickering* (1881), 1 Ch. D. 660. For a more recent application, see *Mills v. Northern Railway of Buenos Aires Co* (1970), 5 Ch. 621. (C.A.).

[63] In 1969, the so-called Payne Committee presented a report on the Enforcement of Judgment Debts arguing for the "power which ought to exist to prevent a debtor from disposing of assets or leaving the country and taking with him assets which may be required by judgment creditors for the satisfaction of their judgments", see Payne Committee, *Report of the Committee on the Enforcement of Judgment Debts*, (Cmnd. 3909, 1969) at § 1245.

[64] [1975] 1 W.L.R. 1093 (C.A.) [*Nippon Yusen*].

[65] [1975] 2 Lloyd's L.R. 509 (C.A.) [*Mareva*].

[66] (UK) 15 & 16 Geo. 5, c. 49.

[67] *Lister*, *supra* note 11, was simply not considered in *Nippon Yusen*, *supra* note 64 and, though it was noted in *Mareva*, *supra* note 65, the court seemingly ignored it.

[68] [1977] 3 All E.R. 324 (C.A.).

[69] *Ibid.* at 332-333.

now indifferently available against foreign and domestic defendants.[70] Similarly, *Mareva* injunctions are now available before an action is commenced, though in such a case the plaintiff has to proceed promptly with the action.[71]

In *Third Chandris Shipping Corp. v. Unimarine SA*[72] Lord Denning elaborated some guidelines to the exercise of the new *Mareva* jurisdiction. In order to obtain a *Mareva* injunction the plaintiff had to satisfy five requirements.[73] First, he should give the court an undertaking in damages to cover the loss an innocent defendant might suffer. Second, he should make a full and frank disclosure of all material facts. Third, he should objectively present his claim against the defendant and the points the defendant would make against it. Fourth, he should establish that the defendant has assets in the jurisdiction. And, finally, he should present some evidence grounding the belief that there was a risk that those assets be removed from the jurisdiction before satisfaction of the judgment. Those five factors have become the basic structure of *Mareva* jurisdiction in England and in another countries.[74] The latest three points need some elaboration.

First of all, with the emergence of worldwide *Mareva* injunctions—injunctions freezing the defendant's assets wherever situated—the requirement of the defendant

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[70] *Prince Abdul Rahman Bin Turki Al Sudairy v. Abu-Taha* [1980] 3 All E.R. 409, [1980] 1 W.L.R. 1268 (C.A.) [*Prince Abdul Rahman* cited to All E.R.].
[71] Steven Gee, *Mareva Injunctions and Anton Piller Relief* (London: Sweet & Maxwell, 1998) at 378; there is considerable debate on the question whether the plaintiff's cause of action needs to have arisen when the injunction is sought, *ibid.* at 178-180 ; see also Dunlop, *supra* note 13 at 174-75.
[72] [1979] 1 Q.B. 645 (C.A.) [*Third Chandris*].
[73] *Ibid.* at 668-669.
[74] Deane, *supra* note 11 at 7.

having assets within jurisdiction appears less relevant.[75] This type of injunction will be presented later in this work.[76]

Second of all, with respect to the strength of the plaintiff's case English courts have departed from the classic threshold governing the granting of interlocutory injunctions set up in *American Cyanamid Co. v. Ethicon Ltd.*[77] In that case the House of Lords put an end to the practice which required plaintiffs seeking interlocutory injunctions to establish that they had a strong *prima facie* case.[78] This practice was indeed onerous since it almost entailed a "preliminary trial".[79] Delivering judgment for the House, Lord Diplock held that all that is required from the plaintiff is to satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". It is then up to the court to appraise under the circumstances whether it is just and convenient to grant the injunction.[80] However, the *American Cyanamid* test has not been applied to *Mareva* injunctions.[81] With those injunctions, the plaintiff has to satisfy the court that he has "a good arguable case", which seemingly would be a higher threshold than the "serious question to be tried" test.[82] It has rightly been pointed out that the difference is "more semantic than substantive"[83] since the granting

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[75] Gee, *supra* note 71 at 200-02.
[76] See Chapter III below.
[77] [1975] A.C. 396 (H.L.) [*American Cyanamid*].
[78] Peter Devonshire, "Freezing orders, disappearing assets and the problem of enjoining non-parties" (2002) 118 Law Q. Rev. 124 at 127, see *e.g. Smith v. Grigg Ltd.* [1924] 1 K.B. 655 at 659.
[79] Devonshire, *supra* note 78 at 128.
[80] *Ibid.* at 128.
[81] It was expressly refused by Lord Diplock MR in *Polly Peck International plc. v. Nadir (No. 2)*, [1992] 4 All E.R. 769 (C.A.) [*Polly Peck*] at 786. See also Devonshire, *supra* note 78 at 128. But see Gee, *supra* note 71 at 183 stating that the approach is that of *American Cyanamid* but the threshold is different.
[82] *Nimemia Maritime Corporation v. Trave Schiffahrtsgesellschafft GmbH (The 'Niedersachsen')*, [1983] 2 Lloyd's L.R. 600 at 605. See also Gee, *supra* note 71 at 184 and Devonshire, *supra* note 78 at 128.
[83] Devonshire, *supra* note 78 at 128. See also Michael A. Skene, "Commercial Litigation Beyond the Pale: A Comparison of Extraterritorial Antisuit and *Mareva* Jurisdiction excercised by the Courts of England and British Columbia in Commercial Disputes" [1996] 30:1 U.B.C. L. Rev. 1 at 29. But see Deane, *supra* note 11 at 9.

of a *Mareva* injunction is submitted to a further test, which leads to the third observation on Lord Denning's guidelines.

One of the requirements put forward by Lord Denning in *Third Chandris* was that the plaintiff established the risk of the assets being removed from the jurisdiction before satisfaction of the judgment.[84] First, courts quickly realized that the plaintiff might also be at risk when the defendant was likely to dissipate his assets within the jurisdiction, and *Mareva* injunctions have been granted in such cases.[85] Second, though it has been questioned, it is now clearly recognized in England that an injunction will be granted only against a defendant who deliberately intends by dealing with his assets to frustrate any judgment a plaintiff might recover.[86] Conversely, an injunction will not be granted when the defendant's dealings are in the ordinary course of business.[87] The situation may be slightly different in Canada.

Adoption of the Mareva injunction in Canada

Lord Denning's innovation has been readily embraced in Canada.[88] Jurisdiction to grant *Mareva* injunctions was recognized by the Supreme Court of Canada in *Aetna*

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[84] *Third Chandris*, *supra* note 72 at 669.
[85] See *e.g. Prince Abdul Rahman*, *supra* note 70. See also *Z Ltd. v. A-Z*, [1982] Q.B. 558 (C.A.).
[86] In *Polly Peck*, *supra* note 81, Lord Donaldson M.R. noted at 786: "So far as it lies in their power, the courts will not permit the course of justice to be frustrated by a defendant taking actions, the purpose of which is to render nugatory or less effective any judgment or order which the plaintiff may thereafter obtain". See generally A.A.S. Zuckerman, '*Mareva* and Interlocutory Injunctions Disentangled" (1992) 109 L.Q.R. 559 at 559. See also Deane, *supra* note 11 at 10.
[87] In *Polly Peck* , *supra* note 81, Scott LJ stated at 782: "As a general principle, a *Mareva* injunction ought not to interfere with the ordinary course of business of the defendant". See Zuckerman, *supra* note 86 at 560-61 and Deane, *supra* note 11 at 10.
[88] The remedy was first accepted in British Columbia, see *Manousakis v. Manousakis* (1979), 10 B.C.L.R. 21 (S.C.), the jurisdiction was confirmed by the British Columbia Court of Appeal in *Sekisui House Kabushiki Kaisha (Sekisui House Co. Ltd.) v. Nagashima* (1982), 42 B.C.L.R. 1 (C.A.) [*Sekisui House*]. A 1978 Ontario case refused to recognize the *Mareva* injunction as part of Canadian law, see *OSF Industries Ltd. v. Marc-Jay Investments Inc.* (1978), 88 D.L.R. (3d) 446 (Ont. H.C.). However,

Financial Services Ltd. v. Feigelman.[89] The Supreme Court noted that in England the courts had derived their power to grant such relief from the legislation allowing them to order an interlocutory injunction whenever it appeared just and convenient to do so and that a similar provision existed in the law of Manitoba. It concluded that the power of the courts of Manitoba to grant a *Mareva* injunction was "undoubted".[90] Since similar legislation exist in the other Canadian provinces,[91] the reasoning of the Supreme Court must be taken as applying in those other provinces as well.[92]

In Québec, article 732 of the Code of Civil Procedure allows courts to issue interlocutory injunctions when "it is considered to be necessary in order to avoid serious or irreparable injury to [the plaintiff], or a factual or legal situation of such nature as to render the final judgment ineffectual". This article has been interpreted as giving judges powers similar to their common law counterparts,[93] and the type of interlocutory injunctions known as *Anton Piller* injunctions has flourished in the province.[94] Though injunctions restraining a defendant from removing assets out of the jurisdiction have been granted,[95] *Mareva* injunctions have not known a widespread

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this case was expressly overruled by the Ontario Court of Appeal in *Chittel v. Rothbart* (1982), 30 C.P.C. 205 at 208 (C.A.) [*Chittel*].

[89] *Aetna, supra* note 12.

[90] *Ibid.* at 16.

[91] See *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 39; *Judicature Act*, R.S.A. 2000, c. J-2, s. 13(2); *Queen's Bench Act*, S.S. 1998, c. Q-1.01, s. 65(1); *Court of Queen's Bench Act*, C.C.S.M., c. C280, s. 55; *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 101; *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 33; *Judicature Act*, R.S.N.S. 1989, c. 240, s. 43(9); *Supreme Court Act*, R.S.P.E.I. 1988, c. S-10, s. 34; *Judicature Act*, R.S.N.L. 1990, c. J-4, s. 105; *Judicature Act*, R.S.N.W.T. 1988, c. J-1, s.41; *Judicature Act*, R.S.Y. 2002, c. 128, s. 26. In New Brunswick, the Rules of Court expressly empower the court to grant a *Mareva* injunction, see New Brunswick, *Rules of Court*, r. 40.03;

[92] Dunlop, *supra* note 13 at 169.

[93] The Supreme Court in *Aetna* actually made reference to this provision as giving the Québec courts "at least as much authority and latitude as the jurisdiction" of courts in other provinces, see *Aetna, supra* note 12 at 15-16.

[94] See Jacques A. Léger, "Analyse et évolution des ordonnances Anton Piller et *Mareva* au Canada", (1990) 2 *Cahiers de propriété intellectuelle* 377.

[95] See *Oerlikon Aérospatiale Inc c. Ouellette*, [1989] R.J.Q. 2680 (C.A.).

success in Québec arguably because of the effective relief provided by seizures before judgment in this province.[96]

In the course of its judgment in *Aetna*, the Supreme Court went on to consider whether the principles guiding the granting of *Mareva* injunctions as developed in England could "survive intact a transplantation from that unitary State to the Federal State of Canada".[97] In *Aetna* the plaintiff had obtained an injunction against a national corporation restraining the transfer of funds from Manitoba to either Ontario or Québec. The fact that the plaintiff could have swiftly enforced a Manitoba judgment against the defendant in the sister provinces of Québec or Ontario weighted in the Supreme Court's decision to set aside the injunction.[98] Yet it is discussed whether the "federal fact", as put by Estey J. in *Aetna*,[99] constitutes a general principle against enjoining a defendant from moving his assets from one province to another or is merely one factor to be considered by the courts in exercising their discretion.[100]

Canadian courts have generally followed the guidelines put forward by Lord Denning in *Third Chandris* and the subsequent evolutions that occurred in England.[101] Nonetheless, some significant variations deserve to be underlined. First, there would be a difference as to the strength of the plaintiff's case. Canadian courts appear to have embraced a stricter test than their English counterparts.[102] In *Aetna* the Supreme

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[96] It remains to be seen whether the availability of worldwide *Mareva* injunctions will change the approach of Québec courts and litigants.
[97] Estey J. in *Aetna*, *supra* note 12 at 34.
[98] *Ibid.* at 35.
[99] *Ibid.* at 37.
[100] The latter solution was retained in *Gateway Village Investments Ltd. v. Sybra Food Services Ltd.* (1987), 12 B.C.L.R. (2d) 234. Such a solution is supported in Skene, *supra* note 83 at 43.
[101] Deane, *supra* note 11 at 14. See also Dunlop, *supra* note 13 at 173. See *e.g. Sekisui House*, *supra* note 88, and see *Chittel*, *supra* note 88.
[102] Deane, *supra* note 11 at 11.

Court seemingly endorsed the requirement of "a strong prima facie case".[103] Whether this really constitutes a departure from the English standard of "good arguable case" is open to question. In any event, the bottom line is that courts in both countries appear willing to hold the granting of a *Mareva* injunction to a higher standard than the granting of other types of interlocutory injunctions.[104]

The second observation pertains to the defendant's dealings with his assets. As English courts, Canadian courts have extended the *Mareva* relief from restraining the removal of assets from the jurisdiction to enjoining a defendant from dissipating his assets within the jurisdiction.[105] Similarly, Canadian courts have required that the defendant's dealings be intended to frustrate a future judgment.[106] However, a trend towards greater flexibility in the analysis may be witnessed and it is not certain that courts would impose the strict threshold of proving the defendant's fraudulent intent when satisfaction of the judgment would be irredeemably threatened by the defendant's dealings.[107]

Section 5: The Unified Approach in Alberta and Newfoundland

As was seen in the foregoing, there is a collection of freezing measures available in Canadian courts. Some provinces have tried to harmonize them. Alberta was the first

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[103] Aetna at 26; however, this endorsement occurred in a review of previous authorities and it is not clear whether the Court thought it was the proper test, see Dunlop, *supra* note 13 at 175.
[104] Deane, *supra* note 11 at 12.
[105] Dunlop, *supra* note 13 at 178, n. 63.
[106] Deane, *supra* note 11 at 12, citing *Newman v. Newman* (1995), 168 N.B.R. (2d) 250 (Q.B.); *Lombard Dairy Cheese Ltd. v. Grisnich*, [1994] B.C.J. No.1090 (S.C.); *Hamza v. Hamza* (1994), 200 A.R. 342 (C.A.); *Reynolds v. Harmanis*, [1995] 39 C.P.C. (3d) 64 (B.C.S.C); *Alers-Hankey v. Salomon*, [1994] B.C.J. No.1201 (S.C.).
[107] Deane, *supra* note 11 at 12-13; the leading case is *Mooney v. Orr* [1995] 100 B.C.L.R. (2d) 335 (S.C.) where the way the defendant has structured his assets—through offshore trusts—was considered sufficient to warrant the granting of an injunction.

common law province to undertake an overhaul of its judgment enforcement law through the *Civil Enforcement Act* passed on November 10, 1994.[108] As part of the reform were prejudgment remedies. The approach taken in the Alberta Act, recommended in a report from the Alberta Institute for Law Reform and Research, has consisted in creating a unified remedy, called an attachment order, in place of the various garnishments, attachments and other *Mareva* injunctions.[109] In Newfoundland and Labrador the *Judgment Enforcement Act* adopted in 1996 provides for a similar attachment order and is largely inspired from the Alberta experience.[110] Similar developments are currently contemplated in Saskatchewan.[111]

An attachment order is available when the plaintiff has commenced or is about to commence the main proceedings.[112] The procedure is very similar to that for obtaining a *Mareva* injunction:[113] the court may exercise its discretion to grant an attachment order when the plaintiff has met a twofold threshold.[114] First, regarding the strength of his case, he must convince the court that he has a "reasonable likelihood" of success.[115] Second, with respect to the defendant's actual or potential dealings with his property, the plaintiff must satisfy the court that those dealings are not for "meeting

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[108] For a commentary of this act, see generally Roderick J. Wood, "The Reform of Judgment Enforcement Law in Alberta", (1995) 25 Can. Bus. L.J. 110.
[109] *Ibid.* at 114.
[110] *Judgment Enforcement Act*, *supra* note 47.
[111] See Buckwold & Cuming, *supra* note 34. See also the current work of the Uniform Law Conference of Canada on the development of a Uniform Enforcement of Civil Judgment Act, available online at ULCC <www.ulcc.ca>.
[112] *Civil Enforcement Act*, *supra* note 47, s. 17(1) (in case the main action is to be prosecuted abroad, the Act requires the plaintiff to have already commenced the foreign proceedings).
[113] Wood, *supra* note 108 at 114.
[114] In *Rea v. Patmore* [1999] A.J. No. 1168 (QL) the Court made it clear that it retained discretion to grant the remedy. Veit J. observed at p. 2 "Although pre-judgment relief is incorporated into the Civil Enforcement Act, it remains an extraordinary remedy. Even a litigant who meets all the statutory prerequisites for the remedy may be denied the remedy: the court retains discretion to grant the remedy. While there is no catalogue of factors that will necessarily apply in all situations, when deciding whether to grant the remedy, the court will be guided by the 'judicial abhorrence for prejudgment execution.'"
[115] *Civil Enforcement Act*, *supra* note 47, s. 17(2)(a).

the defendant's reasonable and ordinary business or living expenses" and that they would "seriously hinder" enforcement of the judgment.[116] The courts do not seem to interpret those provisions as requiring the plaintiff to establish the defendant's actual intent to defeat his creditors.[117] If those thresholds are met and the court decides under the circumstances to grant the attachment order, the plaintiff will be required to give an undertaking in damages.[118]

Though the procedure is obviously inspired of the *Mareva* injunction, the scope of an attachment order is wider, for it may incorporate, besides a personal order enjoining the defendant from dealing with his property, the garnishment of a debt due to the defendant or the physical seizure of his property.[119] The main feature of the Act thus is to have unified the grounds upon which a freezing of assets might be obtained. Yet caution is in order since the terminology "attachment" may be misleading.[120] Accordingly, further in this thesis the term attachment or attachment order will refer to the physical seizure of the defendant's assets, the term garnishment or garnishing order will refer to an order made to a third party not to pay the debt due to the defendant, and the term *Mareva* injunction will refer to an order enjoining the defendant from dealing with his assets.

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[116] *Ibid.*, s. 17(2)(b).

[117] The only decision that touches the question is *Alberta (Treasury Branches) v. Pocklington* (1998), 231 A.R. 84, at 86 Bielby J held "Intent is not expressly required by the [Act]. It may well be that the legislature intended attachment orders to be available to protect creditors who faced the risk of dissipation of assets whether or not a debtor did it with intent to hurt his creditors or for some other reason. In other words, the remedy may exist to protect recovery of the indebtedness, rather than to punish improper intent"; the judge however went on to say that in any event in the case at hand there was sufficient evidence of the defendant's intent to defeat his creditors. In any event, the cases have underlined the extraordinary character of the remedy and the 'judicial abhorrence' to prejudgment execution, see *Rea v. Patmore* [1999] A.J. No. 1168 (QL) at §4 and *Industrial Rewind & Supply Inc. v. Kuntz & Kramer Services Inc.* [2001] A.J. No.201 (QL) at §8.

[118] *Civil Enforcement Act, supra* note 47, s. 17(4).

[119] *Ibid.*, s. 17(3).

[120] For this reason the uniform freezing measure proposed as part of the reform of enforcement laws in Saskatchewan would be named a prejudgment preservation order, see Buckwold & Cuming, *supra* note 34 at 9.

Conclusion:

The purpose of this part was twofold. First, it intended to give the reader an overview of the measures available in Canadian courts to freeze a defendant's assets pending litigation so as to ensure satisfaction of a future judgment. Prejudgment attachments and seizures, garnishments and *Mareva* injunctions were presented. Second, it intended to give a sense of the context in which such measures would be granted. The requirements as to a defendant's dealings with his property are varied and changing. In the majority of cases a plaintiff has to establish something close to a fraud or deliberate intent on the part of a defendant to defeat his creditors. Admittedly, transactions made in the ordinary course of business should not be interfered with, lest putting a defendant against whom no claim has been established in difficulties. The granting of prejudgment freezing measures undoubtedly requires balancing the interests of plaintiffs and defendants. However, if those concerns of fairness to defendants are to be taken into account, it is through the procedural safeguards and thresholds which have been sketched in this part. Such concerns as to the propriety of interfering with the defendant's business should not pollute the enquiry as to the court's international jurisdiction to grant those freezing measures, which will now be studied.

CHAPTER II: FAIRNESS TO THE PARTIES AND THE AVAILABILITY OF FREEZING MEASURES

This part will show how the recognition of a principle of fairness in the jurisdictional analysis has had important consequences on the very availability of freezing measures. Section 1 will show that for a long time courts used to assert judicial jurisdiction based on the mere presence in the forum of a defendant's property unrelated to the underlying dispute. Since such a property-based jurisdiction could cause a defendant to stand trial in a forum with almost no connection to him or to the substantive dispute, it has been condemned by the recognition of an overriding principle of fairness to the parties. However, property-based jurisdiction warranted the availability of freezing measures, ordered as ancillaries to the main proceedings, from the courts where the assets were located. Its abandonment has given rise to a jurisdictional conundrum. Since the presence of assets is insufficient to ground jurisdiction, the availability of freezing measures in the forum where the assets are situated can no longer be taken for granted. Section 2 will demonstrate that the only escape out of the jurisdictional conundrum is by recognizing jurisdiction to order a freeze as distinct from jurisdiction to hear the merits. Indeed, fairness to the plaintiff requires that the courts where the assets are located be ready to assert jurisdiction to freeze.

Section 1: Fairness to the Defendant and the Rejection of Property-Based Jurisdiction

This section will illustrate how the recognition of a principle of fairness to the defendant has threatened the availability of freezing measures. First, the relationship between jurisdiction based on the mere presence of property and freezing measures will be presented (Subsection 1). Second, it will be shown how property-based jurisdiction is now challenged (Subsection 2). Finally, the consequences of such challenges on freezing measures will be drawn (Subsection 3).

Subsection 1: Property-Based Jurisdiction and the Availability of Freezing Measures

Judicial jurisdiction for long rested on a theory of power. As put by Von Mehren, so long as the court could exercise "an effective hold on the defendant", it would have jurisdiction.[121] The presence of the defendant in the forum undoubtedly could provide such a hold. Alternatively, the presence of his property would be sufficient to found the court's jurisdiction. As will be shown in this section, courts not only in the United States and continental Europe, but also in Canada, used to assert this type of property-based jurisdiction. In most cases this would warrant the availability of freezing measures. In the United States and most countries of continental Europe, the very act of attaching the assets would found jurisdiction. While the courts in Canada never recognized such an attachment-based jurisdiction, personal jurisdiction over the defendant could nevertheless be assumed when he had assets in the forum's territory.

Attachment-based jurisdiction: *in rem*, *quasi in rem*, and *forum arresti*

[121] Von Mehren, *supra* note 8 at 285.

In the United States courts for long considered that the attachment of a defendant's property was sufficient to found their jurisdiction over the merits of a dispute. This was true even when the said dispute was totally unrelated to the attached assets.[122] This jurisdiction was known as *quasi in rem* jurisdiction, since if the defendant failed to appear personally, the judgment the plaintiff might obtain would be limited to the value of the attached property.[123] A similar type of jurisdiction was also recognized in several civil law countries on the European continent under the name of *forum arresti*.[124] Accordingly, in these countries the question of jurisdiction to order freezing measures never arose given the basis upon which the court's jurisdiction was founded.

Canada currently knows a similar type of jurisdiction: the customary *in rem* jurisdiction exercised by Admiralty courts in the common law tradition.[125] In Canada admiralty claims are primarily heard by the Federal Court.[126] The Federal Court's jurisdiction in Admiralty may be exercised either *in personam*, in which case the defendant has to be properly amenable to the court, or *in rem*, in which case the only

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[122] Russell J. Weintraub, *Commentary on the Conflict of Laws* (New York: Foundation Press, 2001) at 252; this head of jurisdiction was discarded by the Supreme Court decision in *Shaffer v. Heitner* 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) [*Shaffer* cited to U.S.].

[123] Collins, *supra* note 1 at 20 where the author quotes Justice Story in *Picquet v. Swan*, 5 Mason 35 (1828) stating " Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment in personam, for the plain reason that, except so far as the property is concerned, it is a judgment *coram non judice*". Another interesting consequence was that a *quasi in rem* judgment was not binding on the defendant, who could subsequently be sued for the remainder of the plaintiff's claim in a court having personal jurisdiction over him, see Weintraub, *supra* note 122 (New York: Foundation Press, 2001) at 252.

[124] See Collins, *supra* note 1 at 17-26. In France, see *Dame Nassibian* c. *Nassibian*, Cass. civ. 1ere, 6 November 1979, reported in (1980) Rev. crit. dr. int. privé 588, (1980) J.D.I 95. See also the comment of that case in Bernard Ancel & Yves Lequette, *Les Grands Arrêts de la Jurisprudence Française de Droit International Privé*, (Paris: Dalloz, 2001) at 565-72. In Switzerland, see article 4 of the Federal Act on Private International Law (RS 291, *Loi fédérale sur le droit international privé*, LDIP) (18 December 1987).

[125] For a thorough analysis of this practice, see D.C. Jackson, *Enforcement of Maritime Claims*, 3ed. (London, Hong Kong: LLP, 2000).

[126] *Federal Court Act*, R.S.C. 1985, c. F-7, s. 22 (the jurisdiction of the Federal Court is concurrent).

requirement is that the ship could be arrested within the territorial waters of the forum.[127] When exercised *in rem*, the Admiralty jurisdiction is similar to the continental *forum arresti* or the attachment jurisdiction practiced by American courts. The arrest of the ship is constitutive of the *in rem* jurisdiction and the Court will have jurisdiction over the merits of the claim wherever the defendant may happen to be.[128] The action *in rem* was originally conceived of as mostly procedural, in that the arrest of the ship aimed only at compelling the defendant's personal appearance in court. Still today the defendant can obtain release of the ship by his personal appearance and by his providing a guarantee.[129] But should the defendant fail to make a personal appearance, judgment will be limited by and satisfied out of the value the ship.[130]

Yet this *in rem* jurisdiction parts from the *forum arresti* and the American *quasi in rem* jurisdiction on one fundamental point: it is available only to entertain admiralty claims, which are by their nature related to the operation of the arrested ship.[131] To give but a few examples, an action will be brought in admiralty when compensation is sought for damage arising out of a collision caused by a ship,[132] or when ownership or possession of a ship is disputed.[133] By contrast, the attachment jurisdiction allows courts to entertain actions totally unrelated to the attached assets. It is actually to underline this fundamental difference that the American attachment jurisdiction was termed *quasi in rem.*[134]

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[127] *Ibid.*, s. 43.
[128] Jackson, *supra* note 125 at 367.
[129] Jackson, *supra* note 125 at 236.
[130] *Ibid.*
[131] *Federal Court Act*, *supra* note 126, s. 22(2). This section gives a list of admiralty claims.
[132] *Ibid.*, s. 22(2)(e).
[133] *Ibid.*, s. 22(2)(a).
[134] Joseph Beale, "The Exercise of Jurisdiction *In Rem* to Compel Payment of a Debt", (1913) 27 Harv. L. Rev. 107 at 109.

The absence of attachment-based jurisdiction in Canada

Though the process of prejudgment attachment of goods has been imported from the American colonies into Canada,[135] Canadian courts have never developed it as a means of establishing jurisdiction. On the contrary, Canadian courts have always insisted that personal jurisdiction over the defendant be established before an attachment order can issue.

This is illustrated in an early decision of the Manitoba Court of Appeal in *Emperor of Russia v. Proskouriakoff*.[136] Proskouriakoff was the former treasurer of the District of Tashkent in the province of Turkestan, then under Russian rule. He had fled his country after having embezzled a substantial sum of money and had settled in Manitoba where he was living a pleasant life. This came to be known to the Emperor of Russia who, forthwith, initiated proceedings to extradite the crooked civil servant. The move proved to be futile. Proskouriakoff having heard of the proceedings, fled to the United States leaving all his property in the hands of a trustee in Winnipeg. Consequently, the Emperor of Russia applied to serve the defendant with a statement of claim in Illinois and to obtain provisional attachment of the defendant's property in Manitoba. The first instance judge set aside both the order for service *ex juris* and the order of attachment so far as they did not concern land. His decision was upheld by the Manitoba Court of Appeal and leave to appeal to the Supreme Court of Canada was refused.[137]

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[135] See supra chapter I.
[136] *Emperor of Russia v. Proskouriakoff* (1908), 18 Man. R. 56 (C.A.) [*Emperor of Russia*], aff'g (1908), 7 W.L.R. 766 (K.B.), leave to appeal to S.C.C. refused (1910), 42 S.C.R. 226.
[137] *Ibid.* (the Supreme Court refused to entertain the claim on the ground that it involved questions of practice and procedure, which it had invariably refused to hear).

The reasoning of the trial judge was straightforward: the defendant had definitely left Manitoba and thus could not be served within the jurisdiction. It followed that the plaintiff had to secure service out of the jurisdiction under one of the heads of service *ex juris*, which he failed to do. In particular the judge refused to accept the plaintiff's contention that the defendant had committed the tort of conversion within Manitoba, which would have warranted service *ex juris*.[138] He then concluded that since the court was without personal jurisdiction over the defendant, it had no jurisdiction to issue an order of attachment over the defendant's assets.[139] The issuance of an attachment order was seen as being dependant on the assertion of full personal jurisdiction over the defendant and in no way as a means of founding a limited *quasi in rem* jurisdiction, let alone full personal jurisdiction.

The Court of Appeal agreed with this reasoning.[140] As Perdue J.A. succinctly wrote:

> If a party has fled from Manitoba, from (sic) whatever motive, there is always the possibility of his return, and if he does return and is served while in this province the Court has jurisdiction over him. But in case where it is sought to issue an order for attachment against the defendant as an absconding or concealed debtor, or as one who has transferred or is about to transfer his property in order to defraud his creditors, it must be shown that the person applying has a cause of action enforceable by the Court, one in respect of which the Court then actually has jurisdiction. [...] It is not enough to show that a cause of action arose in a foreign country between two persons who were then residents of that country, unless it is shown that the defendant is domiciled or ordinarily resident in this province so that the Court has jurisdiction over him.[141]

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[138] *Emperor of Russia*, *supra* note 136 at 61-62.
[139] *Ibid.* at 63.
[140] In fact the appeal was dismissed because the Court was equally divided. Richards J.A. and Phippen J.A. would have allowed the appeal on the ground that it fell on the defendant to establish that he was not anymore "ordinarily resident" in the province, and thus that the Court could not assert personal jurisdiction over him. Yet the dissent does not concern the need of establishing personal jurisdiction before issuing an order of attachment, *ibid.* at 79.
[141] *Ibid.* at 73.

Those familiar with the intricacies of *Mareva* injunctions would have recognized the holding of the House of Lords in *The Siskina,*[142] some seventy years in advance. For long this issue of jurisdiction to order freezing measures did not cause insuperable problems in Canada since this country knew of a type of personal jurisdiction based on the presence of the defendant's property within the forum's territory (hereinafter "property-based jurisdiction").

Personal jurisdiction based on the presence of property in Canada

Contrary to the American practice, which grounded jurisdiction in the very attachment of the defendant's assets, the Manitoba Court of Appeal in the Emperor of Russia case considered that it had no inherent jurisdiction to issue an order of attachment. The plaintiff thus had to establish the court's jurisdiction over the merits, which at common law is traditionally done by personal service of process.[143] Though his assets where in Manitoba, the defendant was outside the forum's territory. Under the circumstances, service of process had to be done *ex juris* under one of the enumerated heads of service *ex juris*. In England, the rules of service *ex juris* have never contained any head based on the mere presence within the jurisdiction of assets unrelated to the dispute.[144] The situation appears to be different in Canada.

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[142] *Siskina v. Distos Compania Naviera SA (The Siskina)* [1979] 2 A.C. 210 [*Siskina*] at 256 where in a similar fact pattern—i.e. property within the forum territory but defendant residing abroad and not liable to be serve *ex juris*, Lord Diplock stated "the right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action" and then held that a court had no power to order a *Mareva* injunction "except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment". For a more extensive discussion of this case, see subsection 3 below.

[143] P. M. North & J. Fawcett, ed., *Cheshire and North's Private International Law*, 13th. ed. (London: Butterworths, 1999) at 285.

[144] *Ibid.* at 323-25. The situation is different when the action concerns real property or is related to personal property within the jurisdiction.

Professor McLeod, writing in 1983, noted that at this date Ontario, Alberta, Manitoba, and New Brunswick allowed for service *ex juris* when "it [appeared] that the plaintiff [had] a cause of action against the defendant in contract or in respect of a claim for alimony and the defendant [had] assets inside the local jurisdiction worth at least $ 200 which [were] available for execution."[145] The rules in British Columbia had a similar provision.[146] It is undoubtedly an extraordinary head of service *ex juris* since, contrary to the others, no link between the dispute and the forum was required.[147] Provided the plaintiff could frame his claim in contract and the defendant had sufficient property in the province, a court could assume full jurisdiction over the dispute.

In the civil law province of Québec, the practice appears to have been even more liberal than in the common law provinces. Before the 1994 reform of the Civil Code, Québec courts could assert jurisdiction whenever a defendant had assets in the province, in accordance with article 68 of the Code of Civil Procedure which reads:

> Si le défendeur n'est pas domicilié dans la province mais qu'il [...] y possède des biens, il peut être assigné [...].[148]

The origins of those rules are unclear. According to Chief Justice Meredith commenting on Ontario's rule :

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[145] James G. McLeod, *The Conflict of Laws* (Calgary: Carswell Legal Publication, 1983) at 104.
[146] John W. Horn, *Court Jurisdiction* (Victoria: Law Reform Commission of British Columbia, 1989) at 55.
[147] McLeod, *supra* note 145 at 104.
[148] Jean-Gabriel Castel, *Droit International Privé Québécois* (Toronto: Butterworths, 1980) [Castel, *DIP Québécois*] at 676. Article 68 of the current version of the C.C.P. still reads the same; however, rules of judicial jurisdiction are now detailed in Book X of the Civil Code of Québec.

> The rule was enacted to cover cases where persons living near the border were trading on each side of the line. It was felt a great hardship that, although there were assets in the province, the creditor had to go to the neighbouring province and sue there in order to recover his debt. [149]

Ascertaining this statement would need a great deal of legal archeology. In any event, the rule is undoubtedly linked to the idiosyncrasies of the Canadian context. Commenting on the apparition of the American courts' *quasi in rem* jurisdiction, Professor Levy notes that since debtors could easily flee and hide out in the immensity of pioneer America, the need for jurisdiction based on the mere presence of assets was much more compelling there than in England, a "land of shopkeepers".[150] The observation is applicable, *mutatis mutandis*, to the Canadian practice.

Although the American and Canadian contexts were similar and both countries had adopted a type of prejudgment attachment, the jurisdictional question was treated differently. In Canada, the assumption of jurisdiction was a full assumption of personal jurisdiction over the defendant based on the mere presence of property in the forum but not limited to the value of this property. As such it resembled what was known in continental Europe as the *forum patrimoni*.[151] Contrary to the American practice, and as the case of the *Emperor of Russia* evidences, the attachment of assets in the province did not play a fundamental role in establishing jurisdiction. To the contrary, personal jurisdiction over the defendant had to be established beforehand. In fact, in the *Emperor of Russia* the plaintiff did not invoke property-based jurisdiction and as noted by the lower judge, it was doubtful whether he could have framed his

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[149] *Gibbons (J.J.) Ltd. v. Berliner Gramaphone Co.* (1913), 13 D.L.R. 376 (Ont. C.A.) at 378.
[150] The quoted expression and argument are used by Levy in relation to the development of attachment and *quasi in rem* jurisdiction in the United States, Nathan Levy, "Mesne Process in the Early American Colonies" (1973) 44 Miss. L.J. 671 at 685.
[151] Collins notes that such was the practice under article 23 of the German Code of Civil Procedure, see Collins, *supra* note 1, at 22. See also Lagarde, *supra* note 8 at 136 n. 344.

case in contract.[152] Even in Québec, the act of attachment, through a seizure before judgment, did not found jurisdiction.

However, the link between property-based jurisdiction and attachment proceedings was strong. This basis for personal jurisdiction, when the defendant had property in the forum, warranted the availability of freezing measures, ordered as ancillaries to the main proceedings.[153] In *The First National Bank of Boston v. La Sarachi Compagnie*[154] considering whether the plaintiff had established jurisdiction pursuant to article 68 C.C.P., the Québec Court stated:

> Thus our problem is to decide whether the proof made establishes this essential fact that the defendant had at the institution of the action *property of the type that could have been seized in satisfaction of the judgment* that the plaintiff seeks and, since it is the source of the Superior Court's jurisdiction, *that can be kept here until judgment has been rendered.*[155]

This connection between property-based jurisdiction on the one hand, and the availability of freezing measures on the other, appears to have been overlooked. Writing in 1980 about the Québec practice, Professor Castel rightly notes that besides actions brought to determine the ownership of the assets, the link between Québec and the dispute might be extremely weak.[156] Accordingly, the noted author would have opined for abandoning this head of jurisdiction but for the hurdles one had to face in

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[152] *Emperor of Russia, supra* note 136 at 62 the judge notes: "No attempt was made to bring the case within Rule 202. Had there been evidence that the defendants were possessed of property in Manitoba to the value of $200 it would have been necessary to consider whether or not, under that Rule, leave to serve the statement if claim out if the jurisdiction should not have been obtained before the statement of claim was issued[...] and also whether or not the duty which the law imposes upon a person who has stolen or misappropriated money to return it to the person to whom it belongs and enables the injured party to recover it as money had and received for his use constitutes a contract within the meaning of that Rule".

[153] For an example of prejudgment garnishment, see *Love v. Bell Piano (Furniture) Co.* (1909), 10 W.L.R. 657.

[154] [1961] B.R. 702.

[155] *Ibid.* at 704 [emphasis added].

[156] Castel, *DIP Québécois, supra* note 148 at 676.

enforcing a foreign judgment in Québec at the time.[157] In an uncooperative judicial world, a plaintiff had to obtain judgment where it could be readily enforced against the defendant's property.

As concerns of fairness to the defendant gained momentum in the jurisdictional analysis, assumptions of jurisdiction based only on considerations of power were doomed to disappear, and property-based jurisdiction was an ideal victim. Yet it has not always been perceived that a wholesale abandonment would irredeemably affect the availability of freezing measures.

Subsection 2: The Abandonment of Property-Based Jurisdiction

As this subsection will show, jurisdiction based on property has become a contentious one over the years. Skepticism comes from the fact that the forum may have no other contact with the dispute than the casual presence of assets unrelated to the claim. In this context, an assertion of jurisdiction may be plainly oppressive to the defendant.

The wind of change came from the south. In the landmark case of *Shaffer v. Heitner*,[158] the United States Supreme Court held that the *quasi in rem* jurisdiction should be controlled according to the reasonableness and minimum contact test developed in *International Shoe*.[159] The case concerned a shareholder derivative

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[157] *Ibid.* at 676-77.
[158] *Shaffer*, *supra* note 122.
[159] In *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), the United States Supreme Court held that assumption of judicial jurisdiction were to be controlled according to the constitutional standard of due process enshrined in the Fourteenth Amendment. Following this decision, a court can assert jurisdiction over an absent defendant only when the latter has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice", *ibid.* at 16.

action against the directors of a Delaware corporation for recovery of damages paid by the corporation in certain antitrust proceedings in Oregon. The corporation had its head office in Arizona and none of its directors were residents in Delaware. Yet the Delaware court had assumed jurisdiction pursuant to the attachment in Delaware of stocks and stock options belonging to the defendant directors and rendered judgment against them. In overturning the Delaware decision the Supreme Court stated:

> The fiction that an assertion of jurisdiction over the property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state court jurisdiction that is fundamentally unfair to the defendant.[160]

The rationale of fairness to the defendant underlying *Shaffer* did not go unnoticed in Canada. Professor McLeod, commenting on this "extraordinary" head of service *ex juris* in the common law provinces, noted:

> The clause has the potential of causing widespread unfairness to defendants if it is not regulated by judicial discretion, administered before the fact.[161]

In Québec, the presence of assets as a ground of jurisdiction has been abandoned in the new Civil Code for it was seen as too fortuitous.[162] One will remember Professor Castel's remark that such a ground of jurisdiction was acceptable only because of the difficulties of enforcing foreign judgments in Québec.[163] Convenience to the plaintiff

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[160] *Shaffer*, *supra* note 122 at 212.
[161] McLeod, *supra* note 145 at 105.
[162] H. Patrick Glenn, "Droit International Privé" in *La Réforme du Code Civil,* vol. 3 (Québec: Presses Universitaires de Laval, 1993) at 753. See also *DDH Aviation inc. c. Fox*, (4 July 2002) Montréal 500-09-011686-011 (C.A.) (Azimut) at §35 where the Court stated: "The fact that Appellants' property is temporarily in Quebec is not, by and of itself, attributive of jurisdiction. The presence of property in Quebec of a defendant does not confer jurisdiction on the Courts in Quebec over the cause of action. The same result ensues, a fortiori, if the presence of defendant's property in Quebec is temporary. It may give rise however to the granting of provisional or conservatory measures (art. 3138 C.C.Q.)".
[163] Castel, *DIP Québécois*, *supra* note 148 at 677.

militated for this type of jurisdiction. The adoption of a liberal framework for the enforcement of foreign judgments in the new Civil Code has undoubtedly allowed for a rebalancing of the legislator's concern towards fairness to the defendant.[164]

A 1989 Study Paper by the British Columbia Law Reform Commission quoted *Shaffer* and argued for the abandonment of the property-based jurisdiction.[165] Yet those academic misgivings seem not to have been taken into consideration by the provincial legislator. Rule 13(1)(m) of the current Supreme Court Rules in British Columbia still provides for service of process *ex juris* when assets of the defendant are located in the province, and this without prior leave of the court.[166] The other common law provinces have been more receptive to the concerns of fairness to the defendant and the mere presence of assets has disappeared altogether from the rules of service *ex juris* without prior leave.[167] In those provinces, however, a plaintiff may still apply to a court to obtain a leave to serve a defendant *ex juris* in situations not specifically covered by the rules.[168] A plaintiff could then still try to obtain leave when the presence of property would be the only connection between the forum and the dispute. Accordingly, it is necessary to study the approach taken by Canadian courts in such a situation. Unsurprisingly, this approach has been affected by the extensive reworking

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[164] The official commentary of the new regime by the Minister of Justice is instructive. It reads "[Le nouveau régime] vise à favoriser la reconnaissance et l'exécution des décisions étrangères en accordant une présomption de validité à la décision étrangère rendue par une autorité."
[165] Horn, *supra* note 146 at 55-57.
[166] British Columbia, *Supreme Court Rules*, r. 13(1)(m). The rule reads "the proceedings is founded upon a contract, or is in respect of a claim for alimony, and the defendant has assets in British Columbia".
[167] See *e.g.* Ontario, *Rules of Civil Procedure*, r. 17.02. See also Alberta, *Rules of Court*, r. 30(p) where traditional rule is restricted: the action must be founded upon a judgment or for alimony or maintenance, but not anymore on a contract, and if the defendant does not file a defense, the plaintiff must obtain leave of the court.
[168] See notes 218 and 219 below.

of Canadian private international law following the decision of the Supreme Court in *Morguard Investment Ltd. v. De Savoye*.[169]

In British Columbia, courts had for long been uneasy when asked to assert jurisdiction under Rule 13(1)(m) and tended to interpret the provision in a restrictive way. In *Northern sales Co. Ltd v. Government Trading Corporation of Iran*,[170] the plaintiff seller had contracted with the Iranian defendant for the sale of grain. Facing difficulties in obtaining payment under the contract, the plaintiff brought an action in British Columbia and served the defendant *ex juris* under rule 13(1)(m). Pursuant to this rule, he alleged that the action was based upon a contract and that the defendant had assets in British Columbia in the form of a cargo of grain, unrelated to the dispute, on board a ship about to sail out of Prince Rupert. The defendant application to set aside service of the writ was rejected by the lower judge. On appeal, the British Columbia Court of Appeal had to interpret the scope of rule 13(1) m. Though the case occurred a year after *Morguard*, the Court did not explicitly consider the Supreme Court's decision.[171] Its reasoning was mainly based on what was intended by the rule when it referred to "assets in British Columbia". The Court held that the legislator could not reasonably have meant "to encompass such a fleeting relationship" with the province as the transient presence of a cargo of grain on board a ship.[172]

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[169] See *Morguard*, *supra* note 3.
[170] [1991] 5 W.W.R. 758, 56 B.C.L.R (2d) 219, 48 C.P.C. (2d) 254, 81 D.L.R. (4th) 316 (C.A.) [*Northern Sales* cited to W.W.R.].
[171] Admittedly, the Court referred to the notion of real and substantial connection but not in imperative terms. The Court stated: "We should be mindful not only because, unless there is a real and substantial connection of a transaction with British Columbia, it is simply arrogant to assume jurisdiction over it but also because it cannot be in the commercial interest of Canada as a trading nation that it should acquire a reputation for enmeshing foreign merchants in lawsuits not grounded on a footing generally accepted in the civilized world", *ibid.* at §19.
[172] *Ibid.* at §28.

There is obviously a bit of judicial legislation in this holding. But, there is mostly a sense of profound disarray in front of an abusive assertion of jurisdiction. *Northern Sales Co. Ltd* was referred to in a case where the presence of $ 923.74 on a RRSP account was alleged to be sufficient to warrant personal jurisdiction.[173] Though it provided a solution against improper assertions of jurisdiction, the approach adopted in *Northern Sales* was not a principled one.

Applying *Morguard,* the British Columbia Court of Appeal recently reached a far-better outcome. In *Marren v. Echo Bay Mines Ltd.*[174], the Court had to consider an action instituting class proceedings for damages for wrongful dismissal brought by former employees of an Alberta corporation operating a mine in the Northwest Territories. The plaintiffs purported to assert jurisdiction under Rule 13(1)(m) alleging that the defendant had a $ 11 million controlling interest in a Vancouver-based corporation. The trial judge determined that he had jurisdiction and refused to decline it on the ground of *forum non conveniens*. In so doing, he considered that the various heads of service *ex juris* contained in Rule 13(1) established a rebuttable presumption that a real and substantial connection existed between the forum and either the defendant or the subject matter of the dispute as required by *Morguard.* In the judge's opinion, the defendant had not rebutted the presumption. The Court of Appeal quashed the decision. It rejected any such presumption and stated that, though both conditions in Rule 13(1)(m)—e.g. action based upon a contract and assets in the province— were satisfied, it was only the "starting point of the enquiry" to establish whether a real and substantial connection existed.[175] The Court of Appeal held that the

[173] *Asfordby Storage & Haulage Ltd. v. Bauer*, 1997 CarswellBC 2471 (S.C).
[174] 2003 B.C.C.A. 298, 13 B.C.L.R. (4th) 177, 24 C.C.E.L. (3d) 222, 31 C.P.C. (5th) 223, 226 D.L.R. (4th) 622 [*Marren* cited to B.C.C.A.].
[175] *Ibid.* at § 16.

presence of assets "unconnected to the employment contract or with any active business of the defendant" and the residence of one of the plaintiffs in British Columbia were "not sufficient to ground jurisdiction as a matter of law".[176]

Following this decision, assumptions of jurisdiction based on the mere presence of assets unrelated to the dispute appear definitely condemned in British Columbia. Courts in other provinces have adopted similar approaches. Hence, the Manitoba Court of Appeal stated in *Tortel Communication Inc. v. Suntel Inc.*[177] that:

> The mere presence of unrelated funds in this jurisdiction may be a juridical advantage to a foreign party, but it is not a legitimate one if it is the sole foundation of jurisdiction.[178]

Once justified on a pure power-based theory, jurisdiction grounded on the mere presence of assets is now challenged in Canada. Though it can be considered among other contacts in applying the *Morguard* test, the casual presence of property in itself is seen as too tenuous a connection to ground personal jurisdiction over the defendant. Forcing the latter to be ready to defend civil trials in every forum where he might own property is too heavy a burden. Property-based jurisdiction is condemned to oblivion in a system that expressly acknowledges concerns of fairness and comity as guiding principles in the elaboration of jurisdictional rules. Unfortunately, this abandonment poses difficulties with respect to freezing measures.

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[176] *Ibid.* at §20.
[177] *Tortel Communication Inc. v. Suntel Inc.* (1994) 120 D.L.R. (4th) 100 (Man. C.A) [*Tortel*].
[178] *Ibid.* at 102.

Subsection 3: The Jurisdictional Conundrum: Is the Emperor of Russia Back in Manitoba?

The holding of the Manitoba Court of Appeal in *Tortel* illustrates the consequences following the abandonment of property-based jurisdiction. In this case the plaintiffs, two Ontario corporations, had obtained a prejudgment garnishment of a debt unrelated to the dispute, owed by a resident of Manitoba to the defendant, a Californian corporation. They also served a statement of claim *ex juris* on the defendant. Considering that the dispute related to a contract executed in Ontario, the Court of Appeal held that the mere presence of a debt in Manitoba did not constitute a real and substantial connection with the province and refused to assume jurisdiction over the Californian corporation.[179] As such this decision was in line with the general trend in Canada and elsewhere towards rejection of property-based jurisdiction. The consequences drawn by the Court of Appeal remain debatable. The plaintiffs had argued that if the main action was stayed they nevertheless should not be deprived of the prejudgment security they had obtained. The Court refused to let the prejudgment garnishment stand. A majority of the Court held that it was not prepared to assume such a jurisdiction in a case where the *forum* had no real and substantial connection with the dispute. They followed the reasoning of the lower judge that since the court was lacking jurisdiction in the first place, the garnishment was "without legal foundation and therefore invalid".[180]

The judges in the Manitoba Court of Appeal came to the same result their predecessors in the same Court of Appeal had reached, some 86 years earlier, in the

[179] *Ibid.* at 102-03.
[180] *Ibid.* at 104.

Emperor of Russia case. Since the Court could not assert personal jurisdiction over the defendant in the first place, it was without jurisdiction to issue an order of prejudgment garnishment. To the credit of the Manitoba judges, the House of Lords had also reached a similar outcome with respect to *Mareva* injunctions in the landmark case of *The Siskina*.[181]

The decision of the House of Lords in *The Siskina* has confused academic thinking about *Mareva* injunctions ever since it was rendered. In this case the Lords for the first time had to hear of the newly created remedy. The plaintiffs had had their cargo wrongfully arrested in Cyprus by the defendant owners of the ship *The Siskina*. The ship had subsequently sunk and the only assets owned by her former owners were the proceeds of insurance policies held in London accounts, which the plaintiffs sought to freeze. The plaintiffs were Saudi Arabian and the defendants Greek. The only contact with England was the presence of the insurance monies in London. Though the trial judge had refused to grant the injunction, Lord Denning in the Court of Appeal had reversed the decision. A unanimous House of Lords reinstated the trial judge's decision and set aside the injunction.

As was seen previously, contrary to the Canadian situation, in England the rules of service *ex juris* have never included any head based on the mere presence of assets in the forum. Accordingly, the plaintiffs attempted to obtain leave to serve *ex juris* on the basis of the sub-rule which allowed for service *ex juris* when an injunction was sought ordering the defendant to do or to refrain from doing something within the forum's territory.[182] On its face, the plaintiff's contention could have been sustained.

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[181] *Siskina, supra* note 142.
[182] UK, *Rules of The Supreme Court*, Order 11 rule 1(1)(i) as it was then worded.

Nonetheless, the Lords looked to a line of cases holding that a court had no power to order an interlocutory injunction "except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment".[183] Consequently, the plaintiffs were unable to secure service *ex juris* and to establish the court's jurisdiction over the defendant. The result was that the Lords came to the same conclusion the Manitoba Court of Appeal had reached in *Tortel* and *Emperor of Russia*: since the court had no jurisdiction on the merits in the first place, it could not order a *Mareva* injunction.

Similarly to the decision of the Manitoba Court of Appeal in *Tortel*, the Lords' decision was motivated by the rejection of exorbitant jurisdiction based on the mere presence of property in the forum.[184] Lord Diplock, noting that property-based jurisdiction had been abandoned in the Brussels Convention system, stated:

> Comity, therefore so far as the treaties which concern the Common Market can be relied upon as any guide, would seem to be against using a *Mareva* injunction as a procedural device on which to found jurisdiction in the English courts to adjudicate on the merits in actions against foreign defendants not ordinarily resident in England but possessed of some assets here.[185]

In effect, the Lords refused to evolve the *Mareva* injunction into a type of American-style attachment giving the attaching court a limited *quasi in rem* jurisdiction.[186] Admittedly, property-based jurisdiction can be profoundly unfair to defendants and

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[183] *Siskina*, *supra* note 142 at 256. Lord Diplock refers *North London Railway Co. v. Great Northern Railway Co* (1883), 11 Q.B.D. 30.
[184] North and Fawcett subscribe to this interpretation, see North & Fawcett, *supra* note 143 at 324.
[185] *Siskina*, *supra* note 142 at 259.
[186] Which was how the plaintiffs' contention was actually perceived. Indeed, at trial Kerr J noted "the plaintiffs contend, in effect, that the recent practice developed by the courts of freezing the assets of foreign defendants in this country, when there is a danger of their removal to avoid enforcement of a judgment, can be extended to provide a general power of attachment even in case in which our courts have no other basis of jurisdiction against the defendants", *ibid.* at 215.

there is a global trend toward rejecting such exorbitant jurisdiction.[187] However, what both the Manitoba Court of Appeal and the House of Lords overlooked is that this rejection has never been absolute. Indeed, fairness to the plaintiff militates in favor of the courts where the assets are located asserting jurisdiction for the limited purpose of ordering freezing measures.

Section 2: Fairness to the Plaintiff and the Recognition of Jurisdiction to Freeze

The previous section illustrated the trends towards rejecting assertions of jurisdiction based on the mere presence of property. It also presented the consequences of this trend on the availability of freezing measures. Since the mere presence of assets is insufficient to ground the jurisdiction of the courts where the assets are situated, the plaintiff cannot petition those courts to obtain provisional relief in the form of a freezing measure. As will be demonstrated in this section, the escape out of this jurisdictional conundrum is, first, to distinguish between assertions of jurisdiction for the purpose of hearing the merits and for the purpose of provisionally freezing assets (Section 1) and, second, to recognize the legitimacy of this distinction in a fairness framework (Section 2). Out of considerations of fairness to the plaintiff, Canadian courts should not hesitate to assert jurisdiction for the limited purpose of freezing the defendant's assets pending litigation in another forum.

Subsection 1: The Distinction Between Jurisdiction to Freeze and to Hear the Merits

[187] See subsection 2 above.

In *Tortel* and *The Siskina*, the courts rejected the mere presence of property in the forum as sufficient to ground their jurisdiction. In so doing, they paid heed to the global trend towards the rejection of similar assertions of jurisdiction. Nonetheless, they overlooked that, in foreign countries, this rejection had implied recognizing jurisdiction for the limited purpose of freezing assets. In Canada, this purposive distinction between assertions of jurisdiction has been adopted in some provinces through legislation. In the remaining provinces such legislative developments might prove unnecessary given current judicial developments.

Foreign Developments

As was seen in the previous part, property-based jurisdiction in the United States was rejected in *Shaffer v. Heitner*.[188] Yet, in the course of that judgment, the Supreme Court specifically reserved assertions of jurisdiction for the limited purpose of attaching assets pending litigation in another forum having jurisdiction over the merits. Indeed, the Supreme Court noted:

A State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*.[189]

Similarly, while *forum arresti* has been abandoned in France pursuant to a decision of the *Cour de Cassation* in *Société Strojexport et autre c. Banque centrale de Syrie*,[190] this decision of the French high court does not question the availability of *saisies*

[188] *Shaffer*, *supra* note 122.
[189] *Ibid.* at 210.
[190] Cass. civ. 1er, 11 February 1997, Bull. civ. 1999. I. 30, No. 47.

conservatoires even where the ordering court has no jurisdiction over the merits of the case. Moreover, as noted by Lord Diplock in *The Siskina*, the Brussels and Lugano Conventions (now the so-called Brussels Regulation)[191] specifically exclude exorbitant bases of jurisdiction found in the national laws of the member states, including property-based ones.[192] Yet both instruments provide that courts have jurisdiction to order provisional and protective measures even when they have no jurisdiction over the merits.[193]

In numerous jurisdictions, therefore, the rejection of property-based jurisdiction was accompanied by the recognition that asserting jurisdiction for the purpose of adjudicating the merits of a dispute and asserting jurisdiction to provisionally freeze assets are quite different things. An author commenting on *The Siskina* rightly pointed out that:

Jurisdiction to freeze assets is not premised on possession of jurisdiction to determine the substantive merits of the dispute, and there is accordingly no reason why the same standard of personal jurisdiction should apply in both instance.[194]

Still, in *Tortel* and in *The Siskina*, both the Manitoba Court of Appeal and the House of Lords refused to recognize this distinction and adhered to a unitary conception of jurisdiction: either the court has jurisdiction, i.e. full personal jurisdiction established

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[191] EC, *Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2001] O.J. L 12/1.
[192] In their articles 3 express reference is made to article 23 of the German Code of Civil Procedure (*ZPO*) and article 4 of the Swiss Federal Act on Private International Law.
[193] Article 24 of the Convention and article 31 of the Regulation read "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter."
[194] Paul Michell, "The *Mareva* Injunction in Aid of Foreign Proceedings" [1996] 34:4 Osgoode Hall L. J. 741 at 768

by personal service, and then can order a freezing measure as ancillary to the main proceedings, or it has not and then is powerless.

This difficulty was eventually overcome in England by legislation. Section 25 of the Civil Jurisdiction and Judgments Act 1982 establishes the jurisdiction of English courts to order interim measures when they have no jurisdiction over the merits.[195] The provision was originally based on article 24 of the Brussels Convention.[196] Following this development, certain authors had considered that the availability of *Mareva* injunctions was warranted even where jurisdiction over the merits could not be established and the main proceeding were taking place in non-convention States.[197] However, renewed problems with jurisdiction arose when litigation was taking place in non-convention States,[198] and the statutory provision was amended explicitly to include assistance to courts and arbitral tribunals in non-member States. Similar legislative developments have occurred in Canada.

Legislative Developments in Canada

In Canada, the purposive distinction between assertions of jurisdiction was first adopted when freezing measures were sought in aid of foreign arbitral proceedings. This development is directly linked to the adoption in Canada in 1986 of the

[195] For a full discussion of the English practice, see Adrian Briggs & Peter Rees, *Civil Jurisdiction and Judgments* (London, Hong Kong: L.L.P., 2002) at 406-22.
[196] In *Channel Tunnel Group. Ltd. v. Balfour Beatty Construction Ltd.*, [1993] A.C. 334 [*Channel Tunnel*], the House of Lords decided that it had jurisdiction to order a *Mareva* injunction in aid of arbitral proceedings taking place in Belgium.
[197] See Lawrence Collins, "The End of The Siskina?", (1993) 109 Law. Q. Rev. 342.
[198] See *Mercedes-Benz AG v. Leiduck* [1996] A.C. 284 (H.L.) [*Mercedes*].

UNCITRAL Model Law on International Commercial Arbitration.[199] In its article 9, the Model Law specifies that an arbitration agreement does not prohibit a court ordering "an interim measure of protection". This provision was conceived to be an answer to the approach taken in certain courts, especially in the United States, that an arbitration agreement excluded their jurisdiction altogether and that they had no power to order interim relief.[200] Pursuant to the Model Law, Canadian courts are now prone to hold that, though an arbitration agreement providing for foreign arbitration excludes their jurisdiction to hear the merits of the dispute, they remain empowered to order freezing measures.[201] Unsurprisingly, in the cases that have so held, the issue of the court's jurisdiction to hear the merits has never been fully argued in terms of conflict of jurisdictions.[202] To exclude the jurisdiction of Canadian courts, the defendant would merely rely on the mandatory stay of proceedings induced by an arbitration agreement. However, it is submitted that article 9 has allowed Canadian courts to differentiate between judicial interventions for the purpose of deciding a case and for the purpose of freezing measures.

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[199] *Model Law on International Commercial Arbitration*, GA Res. A/40/17, UN GAOR, 40, Supp. No. 53, UN Doc. A/40/53 (1985). See generally, Claude R. Thomson & Annie M.K. Finn, "International Commercial Arbitration: A Canadian Perspective" (2002) 18:2 Arb. Int'l 205.

[200] United Nation Commission on International Trade, *Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration*, 25 March 1985 (UNDOC. A/CN 9/264) at 24-25, available online at UNCITRAL <http://www.uncitral.org>. The seminal case is *McCreary & Tire & Rubber Co. v. CEAT S.p.A*, 501 F.2d 1032 (3d Cir. (1974)), where the US Court of Appeals for the third circuit considered that it had no jurisdiction to order an attachment in aid of arbitral proceedings; for a discussion of subsequent developments, see Gary B. Born, *International Commercial Arbitration*, (New York: Transnational Publishers; The Hague: Kluwer Law International, 2001) at 937 and 947-48.

[201] See for example *Silver Standard, supra* note 52 (where a Stockholm arbitration clause did not deprive the court of jurisdiction to grant a *Mareva* injunction and a prejudgment garnishment). See also *Trade Fortune Inc. v. Amalgamated Mill Suppies Ltd.* (1994) 89 B.C.L.R (2d) 132 (S.C) [*Trade Fortune*] (where a London arbitration clause did not exclude the court's power to grant a prejudgment garnishment).

[202] In *Trade Fortune, ibid.*, the defendant was a resident of British Columbia and the courts of this provinces could arguably have asserted jurisdiction over the merits. However, in *Silver Standard, supra* note 52, it could have proved more difficult to establish jurisdiction over the merits since the defendants were Russian corporations and the dispute arose out of a contract, governed by Swedish law, for the financing of mining operations in eastern Siberia. The only contacts with the forum were that the plaintiff and the garnishee were resident in British Columbia.

In addition to the arbitral context, legislation in Québec, Alberta and Newfoundland has established a freestanding basis for jurisdiction to order freezing measures when the court has no jurisdiction over the merits. In Québec, the reform of the Civil Code was seized upon as an opportunity to undertake an extensive reworking of private international law rules informed by the principle of proximity.[203] In the process, the legislator relinquished property-based jurisdiction.[204] Yet, a new basis for jurisdiction was adopted for provisional and protective measures. [205] Article 3138 reads:

> A Québec Authority may order provisional or conservatory measures even if it has no jurisdiction over the merits of the dispute.

When freezing measures are at issue, the Québec courts have interpreted this article in a way that supports the present analysis. In *DDH Aviation inc. c. Fox*,[206] an Ontarian plaintiff had seized aircrafts owned by the defendants while the planes were in Québec. The trial judge had not only confirmed the prejudgment seizures, but also found jurisdiction over the merits of the claim. The Court of Appeal reversed this latter finding and stated:

> The fact that Appellants' property is temporarily in Quebec is not, by and of itself, attributive of jurisdiction. The presence of property in Quebec of a defendant does not confer jurisdiction on the Courts in Quebec over the cause of action. The same result ensues, a fortiori, if the presence of defendant's property in Quebec is temporary. It may give rise however to the granting of provisional or conservatory measures (art. 3138 C.C.Q.).[207]

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[203] See Justice LeBel in *Spar*, *supra* note 6 at § 55.
[204] As noted earlier, the connection between the dispute and the forum was seen as too tenuous.
[205] This disposition was adopted from article 10 of the Swiss's *Federal Act on Private International Law*, see Gérard Goldstein & Ethel Groffier, *Droit international privé* (Cowansville, Qc. : Yvon Blais, 1998) at 334.
[206] *DDH Aviation inc. c. Fox*, *supra* note 162.
[207] *Ibid.* at § 34.

In Québec, the rejection of property-based jurisdiction is limited since the presence of assets in the province warrants at a minimum jurisdiction for the purpose of freezing those very assets.[208]

Of interest are also the initiatives taken in Newfoundland and Alberta. As was seen in Chapter I, Newfoundland's *Judgment Enforcement Act*[209] and Alberta's *Civil Enforcement Act*[210] provide a modernized regime for attaching assets before or after judgment. The Alberta Act followed a report by the province's Institute of Law Research and Reform that recognized the impropriety of asserting full jurisdiction on the mere presence of assets. The same report nevertheless criticized the holding in *The Siskina* and argued for the availability of jurisdiction to order pre-judgment attachments.[211] Article 17(1) of the Alberta act reads:

> A claimant may apply to the Court for an attachment order where
> (a) the claimant has commenced or is about to commence proceedings in Alberta to establish the claimant's claim, or
> (b) the claimant has commenced proceedings before a foreign tribunal to establish a claim if
> (i) a judgment or award of the foreign tribunal could be enforced in Alberta by action or by proceedings under an enactment dealing with the reciprocal enforcement of judgments or awards, and
> (ii) the defendant appears to have exigible property in Alberta.

Article 27(1) of the Newfoundland and Labrador Act is formulated with similar language. Those acts revive property-based jurisdiction but for the limited purpose of ordering protective measures in aid of foreign proceedings.

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[208] In addition, article 3140 provides for emergency jurisdiction to protect property located in the province.
[209] *Judgment Enforcement Act*, *supra* note 47, part II.
[210] *Civil Enforcement Act*, *supra* note 47, s. 17.
[211] Alberta Institute of Law Research and Reform, *supra* note 10 at 175. The report reads "[...] there is a major difference between using attachment as a device for expanding a court's jurisdiction, and using attachment as a means of preventing a defendant in foreign proceedings which could result in a judgment enforceable in Alberta from disposing of assets located in Alberta for the purpose of frustrating enforcement of the anticipated foreign judgment."

This legislative approach is gaining recognition elsewhere in Canada as is attested to by some current developments in the Uniform Law Conference of Canada. At its latest annual meeting, mid-August 2003, in Fredericton, the working group on the civil enforcement of judgments project presented a draft act that adopted an approach similar to that found in the Alberta and Newfoundland's acts.[212] While it would clarify the field, one can wonder whether a legislated basis of jurisdiction is necessary in Canada given current judicial developments

Judicial Developments in Canada

The problem highlighted in *The Siskina* and in *Tortel* was that courts did not know where to derive their jurisdiction from when personal jurisdiction over the defendant could not be established—i.e. when he could not be personally served. While the constitutive role of personal service to establish jurisdiction may still be valid in England,[213] it is open to question whether it is still so in Canada following the far-reaching reworking of private international law begun with *Morguard.*

In *Muscutt v. Courcelles*,[214] Sharpe J.A., delivering judgment for the Ontario Court of Appeal, made what might appear to be a surprising statement. In the course of a dispute, the constitutionality of Rule 17.02(h) of the Ontario Rules of Civil Procedure was challenged. The appellants contended that this rule, which allowed for service *ex*

[212] See section 27 of the draft Act available on the Uniform Law Conference of Canada's website at <http://www.ulcc.ca>.
[213] At least when the case is outside the ambit of the Brussels and Lugano Conventions. Cheshire and North, *supra* note 143, state at p. 285 "The most striking feature of the English common law rules relating to competence in actions *in personam* is their purely procedural character. Anyone may invoke or become amenable to the jurisdiction, provided only that the defendant has been served with a claim form".
[214] (2002), 60 O.R. (3d) 20, [2002] O.J. No. 2128 (QL) (C.A.)[*Muscutt*].

juris when damage had been sustained in Ontario, was *ultra vires* pursuant to the real and substantial connection test established by *Morguard.* Dismissing this argument, Sharpe J.A. said:

> Rule 17.02(h) is procedural in nature and does not by itself confer jurisdiction. [...] In fact, it has long been accepted that service in accordance with the rules of court does not determine the issue of jurisdiction [...]. Service merely ensures that the parties to an action receive timely notice of the proceedings so that they have an opportunity to participate.[215]

Sharpe J.A.'s observation relates to the overhaul the Ontario rules of service *ex juris* had undergone in 1975. Then, Ontario departed from the traditional English approach which required that the plaintiff have both a claim falling under one of the specific heads of service and obtain leave from the Court. From this date on, the Ontario rules have provided that the defendant can be served *ex juris* without leave when the case falls under one of the enumerated heads and that, in any other case, he can be served with leave of the court.[216] In Sharpe J.A.'s view the real argument on whether the court has jurisdiction, arises on the defendant's application to set aside service, when both parties are represented. It is this argument, and the Court's subsequent appraisal of its jurisdiction, that are governed by *Morguard* and the real and substantial connection test.[217]

Save in Alberta,[218] a similar evolution of the rules of service *ex juris* has occurred, in one way or another, in all the common law provinces.[219] In this context—i.e. the real

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[215] *Ibid.* at §48-50.
[216] Ontario, *Rules of Civil Procedure*, r. 17(2).
[217] *Muscutt*, *supra* note 214 at §53.
[218] In Alberta, service *ex juris* still requires both prior leave of the Court and falling under one of the specific heads, see Alberta, *Rules of Court*, r. 30. Yet the situation in this province is different since *Civil Enforcement Act*, *supra* note 47, s.17(1) gives the court jurisdiction to order the revamped attachment remedies when proceedings are pending before a foreign tribunal and the defendant has exigible property in the province.

and substantial connection analysis is the very test of jurisdiction and service is conceived of only as a means of informing the defendant of the proceedings—Canadian courts dispose of much more flexibility than their English counterparts and could readily articulate a purposive distinction among assumptions of jurisdiction. Apparently, there is evidence of their willingness to go down this path.

In *Tortel*, Twaddle J.A., who was dissenting, seems to have been ready to distinguish between assumptions of jurisdiction. He stated:

> The mere presence in Manitoba of a garnishable asset belonging to the defendant does not strike me as a sufficient basis on which to assume jurisdiction, even for the limited purpose of securing the plaintiff's claim. But jurisdiction might be assumed in such circumstances if it is also shown that, without the security provided by the Manitoba asset, any judgment the plaintiff might obtain elsewhere would likely remain unsatisfied.[220]

Twaddle J.A. could now refer to the precedent established in the decision of the Supreme Court of Canada in *B.M.W.E. v. Canadian Pacific Ltd.*[221] In this case, the employees of the defendant had sought an interlocutory injunction in the Supreme Court of British Columbia restraining him from executing a decision that was the object of labour arbitration proceedings. The defendant employer argued that since the court had no jurisdiction over the cause of action, which was to be heard by labour

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[219] British Columbia, *Supreme Court Rules*, r. 13(3); *The Queen's Bench Rules of Saskatchewan*, r. 31(2); Prince Edward Island, *Rules of Civil Procedure*, r. 17.03; Manitoba, *Court of Queen's Bench Rules*, r. 17.03; Newfoundland and Labrador, *Rules of the Supreme Court*, r. 6.07(2). In Nova Scotia the rules provide for service ex juris without leave when it is to be effectuated in Canada or the United States, and with leave in every other case, *Civil Procedure Rules of Nova Scotia*, r. 10.07. In New Brunswick service outside the jurisdiction is available with leave when one of the parties resides in the province, see New Brunswick, *Rules of Court*, r. 19.02, in the other case, the plaintiff's claim needs to fall under one of the specific heads of service *ex juris* without leave. One of this heads allows for service ex juris when "proceedings against that party consists of a claim or claims [...] (b) in respect of personal property situate in New Brunswick"; presumably service could issue when the claim is for a freezing measure, see New Brunswick, *Rules of Court*, r. 19.01(b).

[220] *Tortel*, *supra* note 177 at 104-05.

[221] [1996] 2 S.C.R. 495, 21 B.C.L.R. (3d) 201, 136 D.L.R. (4th) 289 [*B.M.W.E.* cited to S.C.R.]

arbitrators, it could not issue an interlocutory injunction, which according to *The Siskina* had to be "adjunct to a cause of action properly instituted in the court".[222] The Court nonetheless granted the injunction. Justice McLachlin, delivering judgment for the Court, held that "the absence of a cause of action claiming final relief in the Supreme Court of British Columbia did not deprive the court of jurisdiction to grant an interim injunction".[223]

Admittedly, this case presented no issue of international jurisdiction. All parties being resident within British Columbia, the court could have readily asserted full jurisdiction over the merits but for the compulsory labour arbitration scheme. Yet lower courts have interpreted this decision as warranting jurisdiction for the limited purpose of ordering *Mareva* injunctions where jurisdiction over the merits could not have reasonably been established, the only contact with the forum being the presence of assets.

Such an interpretation took place in the course of what is known as the *United States v. Friedland* litigation.[224] There, the defendant had been operating a mine in Colorado and, due to his alleged fraud and carelessness, the mining operations had caused extensive environmental damage. Consequently, the plaintiff had brought an action in

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[222] *Ibid.* at 503.
[223] *Ibid.* at 506.
[224] Michell, *supra* note 194 at 788. The litigation is still ongoing and an appeal pending in the Supreme Court of Canada, *United States v. Friedland* 1996 CarswellBC 2893 (S.C) (*Mareva* order in British Columbia) [*Friedland*]; *United States v. Friedland* (21 august 1996) (Ont. Ct. (Gen. Div.)) [Unreported] (*Mareva* order in Ontario); *United States v. Friedland* 1996 CarswellOnt 5566 (Ont. Ct. (Gen. Div.)) (Setting aside the *Mareva* injunction for lack of full and frank disclosure) [*Friedland 2*]; *United States v. Friedland* 1996 CarswellOnt 3604 (Ont. Ct. (Gen. Div.)) (Privilege claim); *United States v. Friedland* 1998 CarswellOnt 2477 (Ont. Ct. (Gen. Div.)) (counterclaim by the defendant); *United States v. Friedland* 1998 CarswellOnt 3600 (O.C.A [in chambers]) (immunity of the original plaintiff); *United States v. Friedland* 1998 CarswellOnt 4666 (O.C.A.) (immunity of the original plaintiff); *United States v. Friedland* 1999 CarswellOnt 4210 (O.C.A.) (immunity of the original plaintiff); *United States v. Friedland* 2000 CarswellOnt 3016 (S.C.C.) (leave to appeal to the S.C.C. granted).

Colorado for compensation for the expected clean-up costs, which amounted to more than US$ 150 million. Chances were that the incoming Colorado judgment would never been satisfied. Indeed, refusing to stand trial, the defendant had fled from the United States to British Columbia and from there to Singapore, and was, at the time of the Canadian proceedings, describing his own address as "a seat on Singapore Airlines".[225] The plaintiff happened to know that, pursuant to a share exchange agreement, the defendant would receive 500 million dollars worth of shares either in British Columbia or in Ontario. The plaintiff, accordingly, moved to obtain a provisional freeze in both provinces, in the form of *Mareva* injunctions, of those assets as soon as they would be delivered to the defendant's agent, a trust company. Injunctions were granted in both provinces.

The application undoubtedly presented difficulties in terms of jurisdiction. The defendant was no longer a resident of either of the provinces, nor had he attorned to the jurisdiction of their courts. Jurisdiction had thus to be establish by personal service *ex juris*. Yet the alleged torts and statutory infractions had taken place in Colorado, as did the subsequent environmental damage.[226] In short, the plaintiff was unable to pigeonhole his claim in one of the enumerated heads of service without leave of the court. The situation would thus have been equivalent to the one in *The Siskina* and *Tortel*, but for the open-ended provision providing for service *ex juris* in any case with leave and the court's willingness to distinguish between jurisdiction to hear the merits and jurisdiction to freeze.

[225] *Friedland, supra* note 224 at §14.
[226] *Ibid.* at §17-18.

The reasons of the Ontario judge are unreported and the injunction was eventually set aside by Sharpe J. (as he then was), because of the plaintiff's lack of full and frank disclosure and not on jurisdictional grounds.[227] In British Columbia, though he recognized the jurisdictional issue, Spencer J. nevertheless granted the injunction. He stated:

> In my view, the proceedings fall within Rule 13(3) [the rule for service *ex juris* with leave] and leave may be granted under that subsection of the rules where there is a real or substantial connection between the defendant and the province. [...] I agree that any action to enforce rights arising from either a breach of statute or tort in Colorado should probably be tried there rather than in British Columbia. [...] However since the *B.M.W.E.* case, it is now clear that interlocutory assistance can be granted to proceedings in a foreign court without an underlying cause of action. Here, it is appropriate that this court should grant leave to serve those interlocutory proceedings on the defendant and I therefore grant leave.[228]

Like Twadle J.A. in *Tortel*, Spencer J. recognized that a distinction should be made according to the purpose of the assumption of jurisdiction—whether to hear the merits or to provisionally freeze assets. By doing so he reached the same outcome that had been achieved elsewhere through legislation.

It remains to be determined whether such assertions of jurisdiction, pursuant either to legislation or to judicial fiat, do indeed meet the overarching jurisdictional principle of fairness to the parties established in *Morguard*. Implicit in Twadle J.A. and Spencer J.'s holdings was that though an assumption of jurisdiction to hear the case would not have met the test, an assumption of jurisdiction for the limited purpose of provisionally freezing the defendant's assets would have. The following part will elaborate on this intuition.

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[227] *Friedland 2*, *supra* note 224 at §202.
[228] *Friedland*, *supra* note 224 at §26-27.

Subsection 2: The Legitimacy of the Distinction in a Fairness Framework

Coming back to the holding in *Tortel* for a moment, one can see that the mere presence of assets was too weak a contact to satisfy *Morguard*'s real and substantial connection test as far as jurisdiction over the merits of the case was concerned. It would have been profoundly unfair to hail the defendant before a forum with which the only connection was the mere presence of property. Similarly, out of concerns of fairness to the defendant, it could be argued that only the court seized of the merits should have jurisdiction to order freezing measures. However, the potential hardship to the defendant must be balanced with the unfairness that would result to the plaintiff if no effective freeze of the defendant's assets could be secured. The overriding concern must be to ensure an effective interim protection of the plaintiff. It will be shown that this can only be achieved by recognizing the jurisdiction to freeze of the courts where the assets are located.

2.2.1. Balancing Fairness to the Defendant and to the Plaintiff

A 1983 Report by the Ontario Law Reform Commission highlighted this concern of fairness to the defendant.[229] The words of the report bear reproducing:

> We are in agreement with the conclusion of the House of Lords in *Siskina (Cargo Owners) v. Distos Compania Naviera SA.* While this conclusion was based in large part on the wording of the English equivalent of Rule 25 of the Ontario Rules of Practice [then the rule of service *ex juris*], we believe that it can be supported on grounds of public policy. As we have stated earlier, a just

[229] Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters, Part IV* (Toronto: OLRC, 1983).

> and equitable law of prejudgment attachments requires that the interests of debtors and creditors be balanced evenly. *Attachment of a person's property on the contingency that, at some future time, the Ontario courts will have jurisdiction over that person poses serious risks to the debtor, risks that we believe outweigh the possible benefit to his creditor.*[230]

The Ontario Commission is silent as to the nature of the risks run by the defendant. First, it can be taken as expressing a concern as to the risks generally entailed by freezing measures. Admittedly, attachment of his property can cause great hardship to the defendant by disturbing his business and his daily life. However, as was underlined in Chapter I, those risks are taken into account, or should be taken into account, by the requirement that the defendant's motive in dealing with his assets be questionable and often close to fraudulent. If those risks are not adequately addressed, reform is undoubtedly needed.[231] However, it should take place at the level of the procedural requirements governing the granting of freezing measures. Limiting jurisdiction to order those freezing measures is not a principled means of curing deficient legislation.

Second, the Ontario Commission's position may be taken as expressing the concern that the plaintiff might not proceed with the foreign proceeding and that enforcement against the frozen assets might never be sought. However, as was seen in Chapter I, in most cases freezing measures are not available before the plaintiff has started the proceeding on the merits.[232] Admittedly *Mareva* injunctions can be ordered even before the plaintiff has started the main proceedings. Nevertheless it is submitted that the risk that the plaintiff's move to obtain a freezing measure be only tactical and

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[230] *Ibid.* at 86 [emphasis added].

[231] An ideal candidate is the process of prejudgment garnishment in Saskatchewan which does not require that the defendant be trying to make himself judgment proof. Buckwold and Cuming consider that it "represents a policy choice heavily favouring plaintiffs, and one that has scant regard for the need to protect the property rights of defendants", see Buckwold & Cuming, *supra* note 34 at 7.

[232] Such is the case with seizure before judgment, attachments and garnishments, see supra Chapter I.

dilatory could appropriately be taken into account by the ordering court when exercising its discretion whether or not to grant the injunction. The court could require that the plaintiff give an undertaking to prosecute promptly his claim in the foreign jurisdiction or simply refuse to grant such relief until the foreign proceedings are commenced.[233]

Finally, the principal risk run by the defendant appears to be that to obtain a release of his property he would have to petition a distant court with no contact to the dispute whatsoever. Undeniably, that could constitute a heavy burden. It could consequently be argued that jurisdiction to order freezing measures should be reserved to the court seized of the merits. However, the potential burden to the defendant needs to be compared to the risk run by the plaintiff. If the latter cannot secure an effective interim protection, the defendant's dealings with his property will threaten the enforcement of an eventual judgment and frustrate the whole judicial process of the foreign court. Accordingly, concerns of fairness to the defendant can be taken into consideration only insofar as an effective interim protection is available in the court seized of the merits. Unfortunately, as the next part will show such is not necessarily the case.

2.2.2. Ensuring Effective Interim Protection for the Plaintiff

Out of concern for fairness to the defendant, it could be argued that only the court properly seized of the merits of the dispute should order freezing measures. However,

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[233] The latter solution has been adopted in the Alberta and Newfoundland Acts, see *Civil Enforcement Act*, *supra* note 47, s. 17(1)(b) and *Judgment Enforcement Act*, *supra* note 47, s. 27(1)(b).

the decision of the Privy Council in *Mercedes-Benz AG v. Leiduck*[234] illustrates the difficulties inherent in such a proposal.

In that case, a suit had been brought in Monaco against a resident of the principality. The only significant assets possessed by the defendant were bank accounts in Hong Kong. The court in Monaco had considered that it had no jurisdiction to order prejudgment seizure of foreign assets and directed the plaintiff to the Hong Kong courts. The question that went up to the Privy Council was whether the Hong Kong courts had jurisdiction to order a *Mareva* injunction to freeze the accounts in Hong Kong. A majority of the Lords held that they did not. Reasoning in terms of *in personam* jurisdiction, they found that the plaintiff could not bring its case within one of the heads of service *ex juris*, as required under Hong Kong law, because the defendant was in Monaco. Accordingly, the plaintiff was left without adequate interim protection anywhere.

In a forceful dissent, Lord Nicholls expressed his frustration with such an outcome:

> The first defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.[235]

Giving priority to concerns of fairness to the defendant requires that the court seized of the merits is able adequately to protect the plaintiff. In the *Mercedes AG* case, such

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[234] *Mercedes*, *supra* note 198 where both the majority led by Lord Mustill and Lord Nicholls dissenting framed the issue as one of personal jurisdiction over a defendant whose only contact with the forum was the presence of bank accounts.
[235] *Ibid.* at 304-05.

protection could have been achieved had the court in Monaco been in a position to provisionally freeze the defendant's assets in Hong Kong—i.e. to order a freezing measure with extraterritorial effect. However, as will be shown in the following, freezing measures than can develop such effects are not available in every forum. Indeed, the potential for extraterritoriality is dependent on the way judicial compulsion is exercised, either on the defendant's person or directly on its assets. The conclusion will be that the courts where the assets are situated are in a better position to order a freeze and should thus be ready to assert jurisdiction to do so.

Worldwide Mareva injunctions and the exercise of compulsion on the defendant's person

At the beginning of the 90's, courts in Australia and England accepted for the first time to order *Mareva* injunctions restraining a defendant from dealing with his assets wherever situated.[236] In Canada, the first reported case where such a worldwide *Mareva* injunction was granted is *Mooney v. Orr*.[237] The practice had been followed in other courts[238] and approved by commentators.[239]

The recognition of judicial jurisdiction to freeze assets located abroad goes to the understanding that judicial compulsion is exercised against the defendant himself and

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[236] For Australia, see *Ballabil Holdings Pty. Ltd. v. Hospital Products Ltd.* (1985), 1 N.S.W.L.R. 155 (C.A.). For England, see *Babanafi International Co SA v. Bassatne*, [1990] Ch. 13 (C.A.) [*Babanafi*]; *Derby & Co Ltd v. Weldon (No. 1)*, [1990] Ch 48 (C.A.); *Derby & Co Ltd v. Weldon (Nos. 3 & 4)* [1990] Ch. 65 (C.A.) [*Derby*]; *Derby & Co Ltd. v. Weldon (No. 6)* [1990] 1 W.L.R. 1139 (C.A.); *Republic of Haiti v. Duvalier* [1990] 1 Q.B. 202 (C.A.).

[237] *Mooney v. Orr* (1994), 98 B.C.L.R.(2d) 318.

[238] See for example *Community Assn. of South Indian Lake Inc. v. MacIver* (1995), 42 C.P.C. (3d) 104 (Man. C.A.); *Pharma-Investment Ltd. v. Clark*, [1997] O.J. No. 1334 (QL); *Montreal Trust Co. of Canada v. Occo Developments Ltd.* [1998] N.B.J. No. 104 (QL); *Hickman v. Kaiser* (1996), 28 B.C.L.R. (3d) 195 (S.C.); *Cussons v. Slobbe*, [1996] B.C.J. No. 3028 (QL).

[239] Vaughan Black & Edward Babin, "*Mareva* Injunctions in Canada: Territorial Aspects" [1998] 28 Can. Bus. L.J. 430.

not against the foreign assets. Indeed, contrary to prejudgment seizures and attachments, the freezing effect of *Mareva* injunctions is not achieved by provisionally dispossessing the defendant and exercising power over the assets. As put by Tyree:

> It is fundamental to understand that the [*Mareva*] injunction takes effect in personam only. The existence of the injunction grants no new property rights, has no effect on the ownership of the defendant's property and in no way inhibits the defendant's power to alienate his property or to dispose of his assets as he sees fit. The exercise of that power will, of course, be a contempt of court, but will not affect the title of a purchaser who takes without notice of the terms of the injunction. A purchaser who takes with notice will himself be in contempt.[240]

Mareva injunctions are effective as freezing measures because of the common law courts' broad power to punish those who disobey their orders.[241] At common law, a person who knowingly disregards a court injunction is guilty of contempt. As a consequence he may be barred from presenting a defense, fined or imprisoned. When the contemnor is a legal person, the court can order sequestration of its assets and fine or imprison its officers.[242] Those are harsh penalties designed "primarily to compel obedience rather than to punish disobedience".[243]

Since the *Mareva* injunction takes effect against the defendant only, so long as he is within the ordering Court's jurisdictional reach there is potentially no limit as to the territorial scope of the order. Technically, its effect respects the international law

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[240] Alan Tyree, "*Mareva* Injunctions: The Third Party Problem" (1982), 10 Aust. Bus. L.R. 375 at 377 quoted in Dunlop, *supra* note 13 at 165.
[241] Common law refers here to the body of law inherited from England as opposed to civil law. Jurisdiction to grant injunctions historically comes from this body of the law known as Equity and administered by the Chancery Court as opposed to the body of law known as the common law and administered by the Royal Courts. For an historical account see Julie E. Martin, ed., *Hanbury & Martin Modern Equity*, 15th ed., (London: Sweet & Maxwell, 1997) at 3-43.
[242] *Ibid.* at 739.
[243] *Australian Consolidated Press Ltd. v. Morgan* (1965) 112 C.L.R. 483 at 498 quoted in I.C.F. Spry, *Equitable Remedies*, 6th ed. (Sydney: Law Books, 2001) at 370.

principle that requires States to exercise compulsion only within their territorial borders.[244] It has been noted that:

> Although a freezing injunction, and orders requiring the giving of information as to assets, may be made in relation to assets of a defendant out of the jurisdiction, it is inaccurate and dangerously unhelpful to consider this as an extra-territorial order. It is made against a defendant who is subject to the *in personam* jurisdiction of the court, and is therefore intra-territorial.[245]

As a result, so long as the threat of being held in contempt is real for the defendant, the injunction will indirectly freeze the assets wherever situated. Accordingly, when the court seized of the merits can order a worldwide *Mareva* injunction, it is in a position to ensure an effective protection of the plaintiff. However, the *Mareva* injunction is itself a product of the Common law judge's equitable power to punish contempt and as such is not available in most civilian jurisdictions.[246] In those jurisdictions the availability of an effective extraterritorial freeze is much more problematic.

The problematic extraterritoriality of attachments

While *Mareva* injunctions, which operate *in personam* in restraining the defendant's activity, attachments and seizures operate *in rem* directly against the assets to be

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[244] Alain Pellet & Patrick Daillier, *Droit International Public* (Paris: L.G.D.J., 2002) at 479-80. The seminal decision on this principle is the famous arbitral award by Max Huber in the *Palmas* case (*Island of Palmas* (1928) 2 R.I.A.A. 858 (Permanent Court of Arbitration) (Huber)).

[245] Briggs & Rees, *supra* note 195 at 404.

[246] Aside of England, *Mareva* injunctions are recognized in Australia, Bermuda, the Bahamas, the Cayman Islands, Canada, Hong Kong, Singapore, Malaysia, Gibraltar, Jersey, the Turks and Caicos Islands, the Isle of Man, New Zealand and the Republic of Ireland, see Gee, *supra* note 71 at 11. Interestingly enough, the United States Supreme Court in *Grupo Mexicano de Desarrollo SA v. Alliance Bond Fund Inc*, 527 U.S. 308, 119 S. Ct. 1961, 144 L.Ed.2d 319, 1999 WL 392980, (1999), refused to recognize the power of Federal Courts to order such injunctions. On the United States' practice, see Simon J. Bushell, "Freezing Assets" (January 2000) Int'l. Buss. Law. 3

frozen by removing them from the defendant's control.[247] For example in Québec, the sole effect of a seizure before judgment is "to place the property in the hands of justice".[248] In practice, this is effectuated by ordering an officer of the court to physically seize the designated assets[249] and to entrust them to a guardian.[250] In the common law provinces that recognize it, the freezing effect of a prejudgment attachment is achieved by having the sheriff enter into possession of the goods.[251]

Contrary to the situation with *Mareva* injunctions, the extraterritoriality of *in rem* freezing measures poses a real issue in international law. Judicial compulsion being exercised directly on the defendant's assets, an extraterritorial attachment would mean officers of the ordering court going and seizing the assets in the foreign country, which would be a blatant infringement of the latter's sovereignty. Accordingly, courts in most jurisdictions refuse to order extraterritorial attachments.[252] Such was the case of the Monaco courts in *Mercedes Benz A.G.* and since the courts in Hong Kong, where the assets were located, refused to assume jurisdiction to freeze them, the plaintiff was left without adequate interim protection.

However, some continental authors, inspired by the development of worldwide *Mareva* injunctions in common law jurisdictions, have argued for the availability of

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[247] Franck Gerhard, "La compétence du juge d'appui pour prononcer des mesures provisoires extraterritoriales" [1999] 2 S.Z.I.E.R. 97 at 111-12, where the author uses the concept of "indisponibilité".
[248] Art. 737 C.C.Q.
[249] Art. 736 C.C.Q.
[250] Art. 737 C.C.Q.
[251] See *e.g Civil Procedure Rules of Nova Scotia*, r. 49.05(2) reads "A sheriff shall hold and safely keep any property attached by him to satisfy any execution order issued to enforce any order obtained against a defendant in the proceedings [...]". See also *Court of the Queen's Bench Act*, C.C.S.M, Chapter C280, s. 60(2) and *Executions Act*, R.S.M. 1987, c. E160.
[252] For example in France, see Gilles Cuniberti, *Les measures conservatoires portant sur des biens situés à l'étranger* (Paris: LGDJ, 2000) at 3, and in Switzerland, see Gerhard, *supra* note 247 at 114; the position in Québec with respect to prejudgment seizures appears to be similar, see *Martin c. Espinhal*, J.E. 2001-1193, R.E.J.B. 2001-24926, A.E./P.C. 2001-1036 (C.Q.) (Azimut), where the Québec court set aside a prejudgment seizure purporting to freeze assets in Portugal.

extraterritorial *in rem* freezing measures.[253] Those authors have insisted on the distinction between jurisdiction to order and jurisdiction to enforce freezing measures.[254] The court in country A, with jurisdiction over the merits, would order an *in rem* measure purporting to freeze assets located in country B. It would then be up to country B to decide whether to recognize and enforce the measure. Actually, this appears to be the practice in Germany where courts do not hesitate to pronounce extraterritorial attachments ("*arrests*"), which in any event are effective only insofar as they are recognized and enforced locally in the jurisdiction where the assets are located.[255]

In *Baur v. Nevalna*[256] the Ontario Court had to deal with a German arrest order. The German plaintiffs had brought suit in Germany against a German defendant, alleging that they had been induced by fraud to invest in a partnership run by the defendant. Pending litigation, they obtained from the German court an *ex parte* attachment (*arrest*) purporting to freeze assets of the defendant in Germany and elsewhere. Some of those assets happened to be royalty payments owed to the defendant by Nevalna, a group of companies incorporated in Canada. The German plaintiffs applied to the Ontario court for recognition and enforcement of the German freezing order. Though the Ontario court would have been ready to enforce the order, it refused to do so.

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[253] See Professor Cuniberti's whole doctorate thesis, Cuniberti, *supra* note 252. See also Olivier Merkt, *Les Mesures Provisoires en Droit International Privé* (Zürich: Schulthess Polygraphischer, 1993) at 138; and see Gerhard, *supra* note 247.
[254] Merkt, *supra* note 253 at 138; Cuniberti, *supra* note 252 at 25-26.
[255] For a thorough analysis of the German practice, see *ibid.* at 138-42. The leading case was rendered by the *Oberlandesgericht* in Karlsruhe, 26 april 1972, *OLGZ* 1973.58, *AWD* 1973.272. However, the author notes that few decisions are reported.
[256] [1991] O.J. No. 2364 (Ont. Ct. (Gen. Div.)) (QL).

Apparently, the court experienced difficulties in translating the German *in rem* order into common law parlance—i.e. into an *in personam Mareva* injunction.[257]

The plaintiffs in *Baur* were thus left without adequate interim protection and this arguably because the Ontario court was unsure about its jurisdiction for the purpose of freezing the defendant's assets. Indeed, as noted by the Court, "it was truly a fight between German parties", and since the dispute had no link whatsoever with Ontario but for the presence of a third party owing monies to the defendant, the Court could not have asserted personal jurisdiction over the defendant, and accordingly, in line with the reasoning of *Tortel* and *Siskina*, could not have ordered a freezing measure.[258] This is arguably the reason why the plaintiffs had turned to the German courts for a freezing measure which they then sought to enforce in Ontario rather than directly petitioning the Ontario court for a freezing measure.

The bottom line is that it cannot be assumed that the court seized of the merits will be in a position to provide the plaintiff with an effective interim protection. Admittedly, an effective worldwide freeze can be obtained through the *in personam* effect of a *Mareva* injunction. Yet it was seen that such a relief is far from being available everywhere. Moreover, when the defendant is not a resident within the ordering court's territory, the freeze can be illusory since the court will not be in a position to

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[257] *Ibid.* at 53 the court stated: "It seems to me that I have a fundamental difficulty in granting the applicants the relief they seek. The basis of their application is a German order which appears to be an order *in rem*. It is not, on the basis of the limited material before me one that can be twisted into a German *Mareva* order; that is an order which is *in personam* but certainly one that has effect upon the defendant's assets."

[258] The Court even showed some disappointment that there was no equivalent legislation to section 25(1) of the Civil Jurisdiction and Judgments Act 1982 (U.K.) in Ontario and stated " Given the ever-expanding nature of international business and the attendant opportunities for transferring assets outside the domestic jurisdiction with the aid of technological developments, one might well wonder why we in this jurisdiction apparently do not have equivalent legislation."

punish the defendant's contempt.[259] In other jurisdictions where the freezing measures operate *in rem*, the courts will only be in a position to effectively freeze assets located on their own territories. As to assets located abroad, they will either generally refuse to make an order concerning them or in some rare cases rely on a subsequent foreign enforcement which may not be forthcoming.

Accordingly, if fairness is to be the scale on which the propriety of an assertion of jurisdiction to freeze is to be weighed, it undeniably tips in the plaintiff's favour. Failing to recognize the jurisdiction of the courts in a position to readily, and effectively, freeze the assets would allow a fraudulent defendant to escape into the black hole described by Lord Nicholls in *Mercedes Benz A.G.* Such a defendant would frustrate both the plaintiff's legitimate expectations and the foreign judicial process. On grounds of fairness to the plaintiff and comity to the foreign court, an autonomous jurisdiction to freeze must be recognized. However, this is not to say that the Canadian court asked to freeze the defendant's assets should not pay attention to the rulings of the court seized of the merits. In particular, if this court is in a position to order an effective extraterritorial freeze, the Canadian court should decline to exercise its jurisdiction to freeze. But it is submitted that it should come in a second step as a matter of discretion and not of jurisdiction.

Conclusion:

[259] Admittedly, the court could still bar the defendant's from presenting a defence on the merits. However, a defendant who is in the process of taking steps to make himself judgment-proof is obviously not expecting much from the eventual judgment. Therefore, the prospect of having a default judgment rendered against him would be a weak deterrent.

For a long period the courts could rely on property-based jurisdiction to ground their power to order freezing measures. However, such a basis for jurisdiction is now widely discredited. While inspired by concerns of fairness to the defendant, the abandonment of property-based jurisdiction actually threatens the availability of freezing measures. Indeed, if the mere presence of property in the forum is no longer a sufficient ground to found jurisdiction over the defendant, the court is powerless and cannot order freezing measures since it has no jurisdiction in the first place. Unfortunate plaintiffs discovered the painful implications of this proposition in *Tortel* and *The Siskina.*

Overcoming the difficulty requires recognizing the difference between an assumption of jurisdiction for the purpose of hearing the merits of a dispute on the one hand, and for the purpose of ordering a freezing measure on the other hand. This purposive distinction has often been achieved by legislation, which expressly give the courts discretionary jurisdiction to order freezing measures when personal jurisdiction cannot be established over the defendant. The provinces of Québec, Alberta, and Newfoundland and Labrador have followed this path. In other provinces, though no such legislation has been enacted, Courts have nonetheless shown their willingness to address the jurisdictional conundrum.

Those initiatives are commendable and legitimate in a fairness framework. Indeed, though recognizing the jurisdiction to freeze of the courts where the assets are situated may add to the defendant's burden, it is so far the only way of ensuring an effective interim protection for the plaintiff. Failing to recognize this jurisdiction would mean that unscrupulous defendants could unilaterally frustrate the judicial process and leave

plaintiffs with empty judgments, simply by strategically organizing their affairs on an international scale. The resulting unfairness to plaintiffs far outweighs the extra-burden on defendants. Accordingly Canadian courts should be ready to assert jurisdiction to freeze the defendant's assets pending litigation in another forum.[260]

[260] Though this part was concerned with drawing the consequences of the recognition of a principle of fairness in the jurisdictional analysis, similar conclusions could undoubtedly have been reached on grounds of comity to the foreign legal process.

CHAPTER III: FAIRNESS TO THIRD PARTIES AND THE SCOPE OF FREEZING MEASURES

This chapter will address the implication of the principle of fairness on another aspect of freezing measures: their territorial scope. As was seen in the previous chapter, some freezing measures can have an extraterritorial reach and effectively freeze assets located in foreign jurisdictions. The defendant is not necessarily worse off from such an extraterritorial freeze since he can apply to one single court to obtain a variation of the freeze or a release of his assets wherever located. An extraterritorial freeze is definitely beneficial to the plaintiff since he obtains an effective interim protection. While extraterritorial freezing measures may be fair to the immediate parties, this may not be the case for third parties. Section 1 below will show that both *Mareva* injunctions and prejudgment garnishments can reach extraterritorial assets by restraining innocent third parties present in the ordering court's jurisdiction. However, section 2 will argue that such extraterritorial freezes can cause hardship to those innocent third parties. Accordingly, Canadian courts should limit the territorial reach of their orders with respect to innocent third parties. In a concluding section, the meaning of this territorial solution to the third-party problem will be elaborated in the Canadian context. Indeed, within the Canadian federation, the third-party effect of freezing measures ordered by the courts in one province can extend to the territory of other provinces without putting innocent third parties at risk. The territorial solution to the third-party risk has thus to be understood as a Canadian solution.

Section 1: Freezing Assets By Restraining Third Parties: The Potential for Extraterritoriality

As was seen in the previous chapter, freezing measures generally operate by using compulsion against the defendant himself, as in the case of *in personam* injunctions, or directly against the assets to be frozen, as in the case of *in rem* attachments and seizures. However, two of the freezing measures known in Canada also operate by restraining third parties holding some of the defendant's assets: *Mareva* injunctions (Subsection 1) and prejudgment garnishments (Subsection 2).

Subsection 1: The Third Party Effect of *Mareva* Injunctions

Both innocent third parties (i.e. third parties that happen to hold some of the defendant's assets) and fraudulent third parties (i.e. third parties that are part of the defendant's scheme to make himself judgment proof, such as trading corporations holding assets in fact beneficially owned by the defendant) are indirectly affected by *Mareva* injunctions. Courts nevertheless appear prone to enjoin the latter directly following their joinder to the main proceedings.[261] This subsection will address the indirect effects of *Mareva* injunctions on innocent third parties (s.1.1.1) and will

[261] Peter Devonshire, "Freezing Orders, Disappearing Assets and the Problem of Enjoining Non-Parties" (2002) 118 L.Q.R. 124 [Devonshire, "Freezing Orders"] at 130-36 where the author comments on a series of recent English decisions and similar developments in Australia. See most notably *TSB v. Chabra* [1992] 1 W.L.R. 231; *Mercantile Group v. Aiyela* [1994] Q.B. 366; and *Yukong Line Ltd v. Rendsburg Investments Corporation* [2001] 2 Lloyd's Rep. 113, where third-parties were joined to the main action and then addressed a freezing order. The author suggests that *Mareva* injunctions should be available against third-parties in three types of cases: when the third party has possession or control of assets to which the defendant is beneficially entitled, when the defendant has alienated his property on favorable terms to the third-party, and when the defendant has elaborated a scheme for the third party to receive assets from an independent source, Devonshire, "Freezing Orders" *ibid.* at 135.

emphasize the extraterritorial reach of these injunctions on corporate third parties (s.1.1.2).

1.1.1 *Mareva* Injunctions and the Use of Compulsion on Third Parties

Though primarily directed at a party to the proceedings, interlocutory injunctions have significant third party effects. This is due to the equitable principle that a third-party with notice of the order who "aids and abets a breach of injunction is guilty of contempt."[262] On notice of the injunction, a third party will be liable to be held in contempt. This even if the defendant has not yet received notice of the injunction.[263] In Canada this was acknowledged by the Supreme Court in *MacMillan Bloedel Ltd. v. Simpson.*[264] In *Z. Ltd. v. A-Z and L-L,*[265] a test case brought by the banking industry, Lord Denning recognized the third-party effect as applicable to the specific type of interlocutory injunctions that are *Mareva* injunctions. This has great practical implications since the asset the most likely to be spirited away by an unscrupulous defendant, namely cash, is also the asset the most likely to be held by third parties, such as bankers or insurers.

The indirect third-party effect plays two crucial roles in making *Mareva* injunctions effective freezing measures. First, it complements the injunction's direct restraint of the defendant and reinforces the freeze. Indeed, as noted by Black and Babin:

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[262] Martin, *supra* note 241 at 739.
[263] See *Z v. A_Z* [1982] 1 All E.R. 556 (C.A.) at 562 [*Z v. A_Z*].
[264] [1996] 2 S.C.R. 1048; (1996), 137 D.L.R. (4th) 633.
[265] *Z v. A_Z, supra* note 263.

> [...] unscrupulous defendants will simply fail or refuse to disclose all of their assets, or will transfer, hide or dissipate them despite a court order to the contrary. In doing so, they will rely on difficulties of detection or on their ability, should they be detected, to flee the jurisdiction ahead of a contempt order. But such persons' brokers, accountants, lawyers and (of greatest practical importance) bankers are both less motivated and less able to entertain such options.[266]

Second, through this third-party effect a court can effectively freeze assets of a defendant who is outside the court's territory and therefore out of the reach of the court's power to punish contempt. Indeed, in such a case, a defendant can safely ignore a *Mareva* injunction. The court cannot imprison or fine him for his contempt. At a maximum, when the ordering court is also the court seized of the merits, it can bar the defendant from presenting a defense. However, such a perspective of a default judgment is arguably a weak deterrent against an unscrupulous defendant who is in the process of making himself judgment-proof. In contrast, third parties within the court's territorial jurisdiction cannot disregard the injunction since the court is in a position to punish their contempt. Accordingly, so long as the assets are held by third parties present within the court's territorial jurisdiction, a *Mareva* injunction will be effective in freezing them wherever the defendant may happen to be.

The third-party effect is thus a fundamental feature of *Mareva* injunctions. As will be shown below, the recognition of worldwide *Mareva* injunctions has nevertheless raised concerns as to the scope of this third-party effect.

1.1.2 The Extraterritorial Reach of Mareva *Injunctions and Corporate Third Parties*

[266] Black & Babin, *supra* note 239 at 452.

The acceptance of worldwide *Mareva* injunctions[267] has raised several questions as to the effect of this type of injunction on third parties. A first question goes to the effects of a worldwide injunction on foreign third parties. In *Babanaft International Co SA v. Bassatne*,[268] the first case of a worldwide *Mareva* injunction, the English Court of Appeal realized how contentious it would be for an English court order to purport affecting foreign third parties. Neill LJ noted:

> It is wrong in principle to make an order which, though intended merely to restrain and control the actions of a person who is subject to the jurisdiction of the court, may be understood to have some coercive effect over persons who are resident abroad and who are in no sense subject to the court's jurisdiction.[269]

Accordingly, the Court of Appeal thought it necessary to incorporate in the order a provision making it clear that it did not purport to affect the foreign activities of foreign third parties.[270] This clarification came to be known as the *Babanaft* proviso.[271]

A second question goes to the effects of a worldwide *Mareva* injunction on corporate third parties present in England and in some foreign jurisdictions as well. In *Babanaft*, following the decision of the trial judge, the plaintiff's solicitors had given notice of the worldwide injunction to some 47 entities in various countries. The wording of one

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[267] See supra Chapter II, section 2.2.2.
[268] *Babanaft, supra* note 236 [1990] Ch 13 at 44.
[269] *Ibid.* at 40.
[270] The proviso is reproduced in *Derby, supra* note 236 at 83. It reads "(a) No person other than [the defendants] and any officer and any agent appointed by power of attorney of [the defendants] and any individual resident in England and Wales who has notice of this paragraph shall as regards acts done or to be done outside England and Wales be affected by the terms of this paragraph or concerned to inquire whether any instruction given by or on behalf of [the defendants] or anyone else, whether acting on behalf of [the defendants] or otherwise, is or may be a breach of this paragraph save to the extent that this paragraph is declared enforceable by or otherwise enforced by an order of a court outside England and Wales and then only within the jurisdiction of that other court [...]."
[271] *Ibid.* Collins even doubts that the court would have jurisdiction to punish the foreign third parties in the first place. Indeed, he notes, first, that aiding an abetting the breach of an injunction is a contempt which constitute a criminal charge and, second, that the criminal jurisdiction is territorial, see Collins, *supra* note 1 at 209-10.

of such notification, a telex addressed to the Athens branch of a Bank having a branch in England, bears reproducing:

> It is of course conceivable that the officers of the bank within the English jurisdiction could be responsible for any breaches of the injunction by the bank in foreign jurisdictions, and it is possible that those breaches may be punishable by proceedings for contempt. [272]

As a solution to this concern, the proviso adopted by the Court of Appeal in *Babanaft* excluded corporate third parties altogether from the effects of the injunction for their acts to be done abroad. In short, the proviso shielded international banks and other entities operating a branch in England, and having as such a presence within the jurisdiction, from the effects of the injunction.[273] The proviso was subsequently amended in the Court of Appeal's decision in *Derby & Co. Ltd. v. Weldon (Nos. 3 & 4).*[274] It read:

> Provided that, in so far as this order purports to have any effect outside of England and Wales, no person shall be affected by it or concerned with the terms of it until it shall have been declared enforceable or shall have been recognized or registered or enforced by a foreign court (and then it shall only affect such person to the extent of such declaration or recognition or registration or enforcement) unless that person is:
>
> a) a person to whom this order is addressed or an officer or an agent appointed by power of attorney of such a person, or
>
> b) a person who is subject to the jurisdiction of this court and who: (i) has been given written notice of this order at his or its residence or place of business within the jurisdiction and (ii) is

[272] Reproduced in Kerr L.J's speech in *Babanaft, Babanaft, supra* note 236 at 26.
[273] The rationale for the exclusion of corporate third parties in *Babanaft* is probably to be found in Nicholls L.J.'s speech where he stated "I do not think that it would be right to attempt to distinguish between third parties who are resident or domiciled or present within the jurisdiction and those who are not. This could give rise, for instance, to a distinction between an overseas bank which as a branch in London and one which does not.", *ibid.* at 45.
[274] *Derby, supra* note 236, at 84 where Lord Donaldson of Lymington M.R. proposed the current wording.

> able to prevent acts or omissions outside the jurisdiction of this court which assist in the breach of the terms of this order. [275]

This formulation is in substance the proviso that is now recommended by the *Commercial Court Guide* in England,[276] and it has also been adopted in Canada.[277] The wording makes clear that an injunction does not purport to affect foreign third parties directly. However, contrary to the original proviso in *Babanaft* it does not exclude foreign activities of corporate third parties with a presence in England. When it was adopted in *Derby*, that language was mainly conceived as a means of providing banks willing to respect the order with an excuse to freeze a defendant's foreign accounts.[278] As currently worded, however, the proviso allows for a worldwide *Mareva* injunction freezing accounts opened with foreign branches of an international bank by mere service of notice on a local branch in the ordering court's jurisdiction.[279] In case of breach of the order, the limitation in subdivision (ii) implies only that the local branch officers would be held in contempt only insofar as they had control over foreign activities. Indeed, it would be profoundly unfair to hold such officers "hostage in the hope that the controlling actors located elsewhere would act out of concern for the hostages and comply with the injunction".[280] In contrast, the corporate third party itself will be held in contempt if one of its branches abroad breaches the injunctions. In *Securities and Investments Board v. Pantell SA*,[281] a Swiss company was enjoined

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[275] *Ibid.* at 84.
[276] Anthony Colman, Victor Lyon & Philippa Hopkins, *The Practice and Procedure of the Commercial Court*, (London and Hong Kong: LLP, 2000) at 137. A similar proviso is provided in the standard form in Appendix 5 to the *Commercial Court Guide*.
[277] Black & Babin, *supra* note 239 at 459.
[278] *Derby*, *supra* note 236 at 84. As stated by Lord Donaldson, the third party "may know of the injunction and wish to support the court in its efforts to prevent the defendant from frustrating the due course of justice, but the proviso deprives it of the one justification which it would otherwise have for refusing to comply with his instructions" (*ibid.*).
[279] Gee, *supra* note 71 at 291.
[280] Black & Babin, *supra* note 239 at 458.
[281] [1990] 1 Ch. 426.

from dealing with assets held with Barclays Bank both in England and in Guernsey. Though the order incorporated the *Babanaft* proviso, the Vice-Chancellor stated:

> The result of that proviso in the present case is to ensure that my order has no operation within the Channel Islands and does not trespass upon jurisdiction of the Guernsey court. However, if the branch of Barclays Bank in Guernsey is holding moneys belonging to either of the defendants, the bank (being locally resident in England) will, after service of the order, be required not to part with such moneys from the accounts held with the bank with their Guernsey branch.[282]

The end result of these developments is that even when limited by the *Babanaft* proviso, a worldwide *Mareva* injunction has clear extraterritorial effects on corporate third parties. As will be further examined below, garnishment orders may have similar reach and effect.

Subsection 2: The Third Party Effect of Garnishments

Through a prejudgment garnishment order, the plaintiff seeks to attach a debt, a *chose in action*, over which no physical constraint can be exercised. The freezing effect of a garnishment order is achieved by restraining a third party owing money to the defendant (s.1.2.1). When the garnishee is a corporate entity, these orders have the potential to affect assets outside the jurisdiction (s.1.2.2.).

1.2.1 Garnishments and the Use of Compulsion on Third Parties

[282] *Ibid.* at 432-33, quoted in Campbell McLachlan, "Extraterritorial Orders Affecting Bank Deposits" in Karl M. Meessen, ed., *Extraterritorial Jurisdiction in Theory and Practice*, (London, The Hague & Boston: Kluwer Law International, 1996) at 48.

Garnishment proceedings are varied, but their main features are similar across most Canadian jurisdictions. First, and of practical interest to the present thesis, prejudgment and post-judgment garnishment proceedings are dealt with either in an integrated fashion[283] or by cross-reference.[284] This process is of no surprise, since prejudgment garnishments are nothing more than execution proceedings ordered on a provisional basis. The case law that has developed in relation to post-judgment garnishments will be relevant to the present analysis.

Second, garnishment proceedings operate roughly in the same way in all the provinces. On receipt of a garnishee summons, the garnishee is compelled either to hold the moneys due to the defendant until further notice or to pay those into court.[285] Payment into court is considered a valid discharge of the garnishee obligation towards the defendant.[286] There are strong incentives for the garnishee to comply promptly with the order. First, he runs the risk that execution for the satisfaction of the

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[283] See British Columbia, *Court Order Enforcement Act*, *supra* note 47, s. 3; Saskatchewan, *Attachment of Debts Act*, *supra* note 47, s. 3(1); Prince Edward Island, *Garnishee Act*, *supra* note 47, s. 6(2). These acts apply similarly to pre and post-judgment garnishments.

[284] See arts. 736 and 737 C.C.P.; Newfoundland and Labrador, *Judgment Enforcement Act*, *supra* note 47, s. 28(6)(a); Alberta, *Civil Enforcement Act*, *supra* note 47, s. 17(7)(a); and Manitoba, *Court of the Queen's Bench Act*, *supra* note 35, s. 61. These acts extend the rules governing post-judgment garnishments to prejudgment ones. In Nova Scotia, the situation is slightly different since there is no specific reference; however, the language dealing with prejudgment attachment of intangible property in the hands of a third party is the same as the one dealing with post-judgment execution against intangible property in the hands of a third party, see *Civil Procedure Rules of Nova Scotia*, r. 49.04(1)(f) and 53.02(1)(d).

[285] Prince Edward Island, *Garnishee Act*, *supra* 47, s. 6(1) and Saskatchewan, *Attachment of Debts Act*, *supra* note 47, s. 18. See also Tamara Buckwold, "From Sherwood Forest to Saskatchewan: The Role of the Sheriff in a Redesigned Judgment Enforcement System" (2003), 66 Sask. L.R. 219 at § 11. See also arts. 625, 626 and 641 C.C.P.

[286] Alberta, *Civil Enforcement Act*, *supra* note 47, s.78(h); British Columbia, *Court Order Enforcement Act*, *supra* note 47, s. 21; Saskatchewan, *Attachment of Debts Act*, *supra* note 47, s. 19; Newfoundland and Labrador, *Judgment Enforcement Act*, *supra* note 47 , s.111(g); *Civil Procedure Rules of Nova Scotia*, r. 49.04(1)(f)(i). This effect of garnishment is not specifically provided for in all the enactments, yet the third party garnishee undoubtedly has a defense against a claim for non-payment by the defendant on the ground of compulsion of the law. Whether statutory or issued of the general principles of law, this defense is available only when the defendant's action against the garnishee takes place in the same forum, which causes problems with garnishees present in several jurisdictions, see Section 2 below.

plaintiff's claim may be levied against himself rather than against the defendant.[287] In short, an uncooperative garnishee may have to pay twice the debt owed to the defendant. Second, the recipient of a garnishee order who fails to comply with it may be held in contempt of court and may be punished accordingly.[288]

1.2.2. The Extraterritorial Reach of Garnishment

Garnishing orders, whether issued before or after judgment, are available whenever a purported garnishee is present within the jurisdiction. As is the case with *Mareva* injunctions, this has the potential to give these measures extraterritorial force and effect when addressed to a corporate third party.

The basic principle of garnishment legislation is that the proceedings are binding on the garnished debt upon service on the garnishee.[289] Though some courts have, in

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[287] Prince Edward Island, *Garnishee Act*, *supra* note 47, s. 6(1) reads "if a garnishee fails to comply forthwith with any order for payment by him of money to a judgment creditor, or into court, then the court or judge may order execution to issue, and execution lay thereupon issue to levy the amount due from such garnishee towards satisfaction of the judgment debt or amount claimed by a plaintiff". See also Saskatchewan, *Attachment of debt act*, *supra* note 47, s. 18; art. 634 C.C.P.

[288] See *Civil Procedure Rules of Nova Scotia*, Form 49.04 , which reads "any person who fails to comply with the provision of paragraph 4 [which deals with prejudgment attachment of property in the hands of a third person] may be held to be in contempt of the court an may be dealt with as the court thinks just"; whether the third-party could be imprisoned for its breach is nevertheless debatable since imprisonment for debts has been abandoned, see Nigel Lowe & Brenda Sufrin, *The Law of Contempt* (London, Dublin & Edinburgh: Butterworths, 1996) at 582.

[289] Alberta, *Civil Enforcement Act*, *supra* note 47 s. 78(e); BC section 9; Manitoba, *Garnishment Act*, *supra* note 47 s. 4(1); Newfoundland, *Judgment Enforcement Act*, *supra* note 47 s. 111(d); *Civil Procedure Rules of Nova Scotia*, r. 49.04(1)(f); Saskatchewan, *Attachment of Debts Act*, *supra* note 47, s. 5(1); Prince Edward Island, *Garnishee Act*, *supra* note 47, s. 6(3) which provides that a garnishee cannot be compelled to pay money into court "unless four clear day days have elapsed since service upon him of the order absolute or since service on him of such notice thereof as a judge may direct" ; art 625 C.C.P. reads "Seizure by garnishment is effected by the service on the garnishee and on the judgment debtor of a writ of seizure by garnishment", which seems to imply that service on the defendant is necessary, yet the same article provides that if he has "no known domicile, residence or business establishment in the district where judgment was rendered, the writ is served upon him at the office of the court".

obiter, accepted the proposition that a garnishee could be served *ex juris*,[290] (i.e. assumed jurisdiction to garnish through service *ex juris* upon a foreign third-party with no presence in the province) it appears that no Canadian court has ever actually done so. In contrast, the few courts which have had to address the issue on the facts have held that service upon a third-party garnishee outside the jurisdiction was not possible.[291]

While presence of the garnishee within an ordering court's territory is regarded as necessary to establishing jurisdiction to garnish, presence of the principal defendant appears irrelevant.[292] Accordingly, presence of the third party within the jurisdiction is

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[290] See *McMulkin v. Traders Bank* (1912), 26 O.L.R. 1 (C.A.) at 5 [*McMulkin*] where Middleton J. stated "If a garnishee is not within Ontario and cannot be served within Ontario, then a debt cannot be collected under this process unless it falls within the classes enumerated in Con. Rule 162 [the rules of service *ex juris*]". See also *Gorman v. Gorman*, [1949] 1 W.W.R. 153 (Alta. Dist. Ct.) [*Gorman*]. The holding in those two cases was rightly criticized as being *obiter dicta* by Master Funduk in *Technaflow Inc. v. Minti Sales Ltd*, (1991), 81 Alta. L.R. (2d) 38 at 42-43 (Q.B., Master) [*Technaflow*]. Middleton J's holding in *McMulkin* was inspired by the wording of the Ontario Rules of Court which provided that service on a garnishee outside Ontario was available when a defendant could have sued a garnishee in Ontario for payment of the debt. Similar language still appears today in the rules of court in Ontario, Prince Edward Island and Manitoba, see Ontario, *Rules of Civil Procedure*, r. 60.08 (9); Prince Edward Island, *Rules of Civil Procedure*, r. 60.09 (4) and Manitoba, *Court of Queen's Bench Rules*, r. 60.08 (7).

[291] See *Technaflow*, *ibid.*, where the plaintiff sought to obtain leave to serve garnishee summons on an American company, which had no presence in Alberta. In that case, Master Funduk stated "[The rules for service *ex juris*] should not be interpreted to allow this Court to thrust its execution process all over the world. What is critical is that the person sought to be ordered to do something be within the Jurisdiction of the Court. This Court should not assume *in personam* Jurisdiction over a non-resident garnishee. This Court does not possess *in personam* Jurisdiction over foreigners as of right and any applicant must establish that this Court should assume Jurisdiction over the foreigner" (*ibid.* at §29). See also *Gauthier v. Langelier* J.E. 88-665 (S.C.Q.), where the Superior Court held that, though the defendant was resident in Québec, it had no jurisdiction to order a seizure by garnishment operated against an insurance company with its head office in Halifax but with no presence whatsoever in the Province. See also *Royal Bank of Canada v. Miller and Miller* (1965), 52 W.W.R. 148, where the Saskatchewan court in a case of prejudgment garnishment stated at 155 "On the authorities cited, I hold that there was no jurisdiction to issue the garnishee summons against the garnishee in Montreal and the fact that the garnishee paid the moneys into court cannot and does not in any way affect the result".

[292] Castel, *Conflict of Laws 1975*, *supra* note 41 at 387, where the author noted that the only case that had touched the question, *Haydon v. Haydon*, 45 Man. R. 465, [1937] 3 W.W.R. 537, [1937] 4 D.L.R. 617 (Man. C.A.) [*Haydon*], had rejected the contention. That approach has been confirmed in *Technaflow*, *supra* note 290, where Master Funduk stated "As long as the garnishee is present in the Jurisdiction that is sufficient to attach a debt owing by it to the Judgment debtor regardless where the debt is payable and regardless where the Judgment debtor is.". See also *Bank of Nova Scotia v. Mitchell and Mitchell*, [1981] 5 W.W.R. 149 (B.C.C.A.) at §37 [*Mitchell*] where Seaton J.A. stated "In my view, the obligations of the bank to pay money into court pursuant to this Act, and the jurisdiction of the court to order the bank to pay the moneys, are not dependant upon proper service on [the defendant, a resident of the West Indies]" . But see *Hansen v. Danstar Mines Ltd.* [1978] 2 W.W.R. 201 (Man. CA)

regarded not only as necessary but also as sufficient to found jurisdiction to garnish. With corporate garnishees, this jurisdictional rule has allowed courts to develop extraterritorial garnishments, which are discussed below.

The leading case in this area is *McMulkin v. Traders Bank of Canada*.[293] In the case, a judgment creditor sought to garnish an account opened at the Alberta branch of the Traders Bank of Canada, a corporation having its head-office in Ontario. The judgment creditor argued that the bank, not the branch, was the debtor, and since it was present in Ontario, the courts of that province could assert personal jurisdiction over the garnishee and order it to pay over the debt.[294] The bank objected on the basis that the account was not a debt in Ontario, that it was located in Alberta, and that only the courts of the *situs* had jurisdiction.[295] The Ontario Court of Appeal refused the argument of the bank. Middleton J stated:

> The Rule does not proceed upon any theory as to the *situs* of the cause of action to be taken in execution, but proceeds upon the theory that the creditor has a right to be subrogated to the position of his debtor, and to assert, for the purpose of enabling him to obtain satisfaction of the judgment, any right which the debtor himself could assert. If the garnishee is within Ontario and can be served within Ontario, the judgment creditor is given the right to collect the debt due by him to the judgment debtor. [296]

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where the Manitoba Court set aside a garnishment served on the garnishee in Manitoba but purporting to garnishee monies held in Vancouver in the name of the defendant, a resident of British Columbia. O'Sullivan J.A. held that it would be "unfair and inequitable" to put the defendant's assets in British Columbia at risk when he had neither been served within Manitoba nor attorned to the jurisdiction of the courts", *ibid.* at 115.

[293] *McMulkin, supra* note 290.

[294] *Ibid.* at 2.

[295] *Ibid.* at 3.

[296] *Ibid.* at 5.

The approach adopted in *McMulkin* has been followed on a number of occasions.[297] In *Bank of Nova Scotia v. Mitchell and Mitchell*,[298] the British Columbia Court of Appeal subscribed to this formulation. The appellant, an employee of the Bank of Nova Scotia in the West Indies, had been directed to pay a monthly maintenance allowance to his former wife. Since he never made any payment, the woman had an order purporting to garnish the appellant's wages served on the Bank's branch in Victoria, B.C. The Court of Appeal, relying on *McMulkin*, upheld the order. It grounded its decision on the fact that the bank, not any particular branch, was the garnishee and that it was materially present in the jurisdiction.[299]

In Québec, the Superior Court achieved a similar result in *Lowby's Limited v. Choules*.[300] Though it did not refer to *McMulkin*, the court considered that the mere presence of a branch in Québec of a corporation with its head office in Ontario was

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[297] See *e.g. Haydon, supra* note 292; *Gorman, supra* note 290, aff'd [1949] 1 W.W.R. 968 (Alta. C.A.); *Metro Investigation & Security (Can.) Ltd. v. C.F.I. Operating Ltd.* [1972] 5 W.W.R. 621, 31 D.L.R. (3d) 190 (Man. C.A.) [*Metro Investigation*], rev'd on other grounds *C.F.I. Operating Co. v. Metro. Investigation & Security (Can.) Ltd.* [1975] S.C.R 546; *Bell v. Bell* (1960), 32 W.W.R. 376, 24 D.L.R. (3d) 435 (B.C.S.C.). Professor Castel at 385-86 refers to *Century Indemnity Co. v. Rogers* [1932] S.C.R. 529, a case that went up from the Ontario Court of Appeal to the Supreme Court of Canada, as supporting the *McMulkin* theory, Castel, *Conflict of Laws 1975, supra* note 41 at 386-86. This case involved the garnishment of the proceeds of an automobile insurance policy due by an American company to an American driver who had caused an accident in Ontario. The insurance company had an office in Ontario and a garnishing order was served there, and was upheld both by the Ontario Court of Appeal and the Supreme Court of Canada. However, that case cannot be taken as affirming the jurisdiction to garnishee foreign debt since the point was not raised by the garnishee. This is confirmed by the fact that it has never been quoted again as authority for the garnishment of a foreign debt.

[298] *Mitchell, supra* note 292.

[299] *Ibid.* at 157.

[300] [1967] R.P 49 [*Lowby's*]. The position is less clear-cut in Québec than in Ontario and British Columbia. In *Lacourcière v. Lacasse and Port Royal Pulp Co. Ltd.*, [1945] B.R. 66, the Court of Appeal had upheld the garnishment of wages due in New Brunswick to employee in this province of a corporation present in Québec and New Brunswick. However, that case was distinguished in *McLellan v. Stevenson*, [1963] C.S. 17 (S.C.Q), on the ground that in *Lacourcière* the garnishee had its principal place of business in Québec and was accordingly domiciled there. Such a distinction was refused by the Superior Court in *Lowby's* on the ground that the Code of Civil Procedure in its article 130 provided for service of documents not only on the head office of a corporation but also on a branch in the province, see *Lowby's ibid.* at 53. Though article 130 of the Code of Civil Procedure still reads the same, the implications of the new Civil Code need to be spelled out by the courts. The subsequent developments in this Chapter could serve as guidelines.

sufficient to found jurisdiction to order a garnishment ("*saisie-arrêt*") of the wages due by the corporation in Ontario to one of its Ontarian employee.[301]

To this point, the freezing of a defendant's assets by the restraint of third parties has been discussed. In particular it has been shown how the exercise of judicial power over a corporate third party by way of *Mareva* injunction or garnishment order may lead to an extraterritorial reach of such a freeze. The following section will show that such extraterritorial effects create risks for innocent third parties and that this should be taken into consideration when assuming jurisdiction to freeze assets. Out of concerns of fairness Canadian courts should not restrain third parties regarding their dealings with *ex juris* assets.

Section 2: Freezing Assets by Restraining Third Parties: The Case for Territoriality

As illustrated above, so long as the third party is present in a jurisdiction, it can be obliged to freeze a defendant's assets either directly (when he is served with a garnishee order) or indirectly (through notice of a *Mareva* injunction addressed to the defendant). When the third party is a corporate entity with a presence in the province, courts have readily asserted jurisdiction to catch assets held by the third party abroad. However, such a course of action is likely to cause hardship to the innocent third party. The risk of unfairness to innocent third parties should be taken into consideration by Canadian courts when ordering *Mareva* injunctions and garnishments. The English experience will provide interesting guidance. Indeed, in England courts are prone to exercise self-restraint in order not to adversely affect the

[301] *Ibid.* at 53.

interests of innocent third parties. They refuse to order *Mareva* injunctions and garnishments affecting the foreign activities of innocent third parties. This section will conclude that in the Canadian context this territorial solution is the only advisable remedy to the risk of unfairness run by third parties.

Subsection 1: Limiting the Scope of Worldwide *Mareva* Injunctions

Even when curtailed by the *Babanaft* proviso, a worldwide *Mareva* injunction has significant effects on the foreign activities of third parties. For example, following an Ontario injunction an international bank with a branch in Ontario could be forced to freeze a defendant's deposits at its foreign branches. A branch in the Cayman Islands paying out the defendant could result in the bank and its officers in Ontario being held in contempt.[302] As a consequence of such an order, the third party might find itself in considerable difficulty in a foreign jurisdiction. The course of dealing imposed by the *Mareva* injunctions may even constitute a breach of the third party's contract with the defendant or a violation of local laws or other judicial orders.[303]

In England, the courts have acknowledged this risk of unfairness to third parties. In *Baltic Shipping Company v. Translink Shipping Ltd.*[304] the plaintiffs obtained a worldwide *Mareva* injunction freezing bank accounts held by the defendant at Crédit Lyonnais's branch in Noumea, New Caledonia. The injunction incorporated the standard *Babanaft* proviso and, since Crédit Lyonnais had a branch in London, it was liable to be held in contempt if the Noumea branch paid money to the defendant.

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[302] A similar example is given by Collins, Collins, *supra* note 1 at 211.
[303] Gee, *supra* note 71 at 291.
[304] [1995] 1 Lloyd's LR 673 [*Baltic Shipping*].

Conversely, refusing to pay the defendant would amount to a breach of contract, and subject the bank to litigation in Noumea. The bank, therefore, applied to vary the order. The plaintiffs opposed the motion arguing that the bank was sufficiently protected by an undertaking in damages they had formerly given. Justice Clark stated:

> The bank is not a party to these proceedings. It should be given all reasonable protection. It is not in principle desirable for a bank to have to rely upon the undertaking in damages. [...] I do not think that the bank should have to run the risk that it would be in breach of contract under the law of Noumea for it to pay out pending an application by the plaintiff to the local Court.[305]

Consequently, the judge varied the order and authorized the bank to comply with what it reasonably believed "to be its obligations, contractual or otherwise, under the laws and regulations of the country or state in which those assets are situated or under the proper law of the account in question or any orders of the Courts of that country or state."[306] Since this judgment, this limitation of *Mareva* injunctions on corporate third parties has become the standard practice in English courts.[307]

This formulation can be criticized, however, as being overly restrictive and as depriving the injunction of most of its extraterritorial effect.[308] It is difficult to conceive of a legal system that would not consider a bank's refusal to repay its customer a breach of contract. The bank could be excused for such a breach if the

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[305] *Ibid.* at 678-79.
[306] *Ibid.* at 674-75.
[307] Gee, *supra* note 71 at 292. See also Colman, Lyon & Hopkins, *supra* note 276 at 152 quoting *Commercial Court Guide* § F15.10 which reads "As regards freezing injunctions in respect of assets outside the jurisdiction, the standard wording in relation to effects on third parties should normally incorporate wording to enable overseas branches of banks or similar institutions which have offices within the jurisdiction to comply with what they reasonably believe to be their obligations under the laws of the country where the assets are located or under the proper law of the relevant banking or other contract relating to such assets".
[308] See Black & Babin, *supra* note 239 at 461 stating that justice Clark "solution would render the order ineffective against most non-parties outside the United Kingdom". See also McLachlan, *supra* note 282 at 48-49.

Mareva injunction were to be recognized locally. Unfortunately, it has been noted that such recognition is unlikely to be forthcoming in the foreign forum.[309] Accordingly, to be on the safe side, the bank or other third party is likely to obey the defendant's instructions, and pursuant to the *Babanaft* proviso, it will run no risk of being held in contempt. As to third parties, the freezing effect of worldwide *Mareva* injunctions incorporating the proviso is actually limited to a forum's immediate territory.

It has been rightly pointed out that the court issuing the order could insist on the defendant providing a third party with written authorization to freeze his foreign assets, and that this would undoubtedly constitute a valid defense against a claim for breach of contract.[310] First, this solution implies that a defendant could be compelled to give such an authorization, i.e. that he be within the reach of the court's contempt power, which will not always be the case. Second, the proponents of this solution also recognize that it offers no protection to the third parties when to obey the *Mareva* injunction amounts to a breach of state-enforced laws and regulations, as bank secrecy laws, or other court orders.[311] In such a case their proposal is for the court to operate a balancing of the rights and interests of the parties, third parties and jurisdictions concerned.[312]

With respect, it is submitted that Canadian courts should not adopt such a course of action. Admittedly, an unlimited worldwide *Mareva* injunction ensures an effective interim protection of the plaintiff. However, this relief appears to be more in the

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[309] Gee, *supra* note 71 at 292 stating that even under the Brussels and Lugano conventions such orders are not entitled to recognition.
[310] Black & Babin, *supra* note 239 at 461.
[311] *Ibid.* at 462.
[312] *Ibid.* at 463. Such a balancing would be inspired from the one effectuated by Master Sandler in *Comaplex Resources International Ltd. v. Schaffhauser Kantonalbank* (1990), 42 C.P.C (2d) 230 (Ont. S.C., Master), a case concerned with the disclosure of documents in civil proceedings.

nature of a convenient advantage in litigation than of a necessity. Indeed, limiting the scope of the injunction with respect to third parties would not deprive the plaintiff of any protection. First, so long as the defendant is within the ordering court's territorial jurisdiction, a worldwide injunction will be effective without having to rely on its third party effect. Second, when the defendant is outside the ordering court's territorial jurisdiction, the plaintiff can still pursue freezing measures in the courts where the assets are located. Admittedly, such a solution is likely to be more onerous and less convenient to the plaintiff. However, providing the plaintiff with an advantage in litigation cannot reasonably be an overriding concern. It must give way in front of the unfairness that would result from using innocent third parties, strangers to the dispute, as levers for reaching foreign assets. Even a cross-undertaking in damages given by the plaintiff cannot reasonably be regarded as making good the litigation risk run by innocent third parties.[313]

Therefore, the restrictive course adopted in *Baltic Shipping* should be commended to Canadian courts. When the defendant is within the court's contempt jurisdiction, a worldwide *Mareva* injunction should include a proviso limiting its scope with respect to third parties to the defendant's assets located within the court's territory. When the defendant is not within the reach of the court's power to punish contempt, the freezing effect of a *Mareva* injunction is achieved solely by exercising compulsion on third parties. Under the circumstances, Canadian courts should not assert jurisdiction to freeze extraterritorial assets at all. As will be shown in subsection 2 below a similar territorial solution should be adopted with respect to garnishments.

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[313] Gee, *supra* note 71 at 291.

Subsection 2: Extraterritorial Garnishments and the *Situs* Solution

The potential extraterritorial effects of garnishment proceedings were emphasized in the previous section. Those proceedings operate by threatening the third party with retaliation if it paid out the sum owed to the defendant. The *in personam* effect of garnishing orders implies that the mere presence of a branch of a purported garnishee in the jurisdiction is sufficient for a court to effectively freeze assets in a foreign branch of the same garnishee. As with *Mareva* injunctions, this extraterritorial effect presents obvious risks for a third party garnishee, the most critical being that of conflicting judgments. Many of the cases presented below are concerned with post-judgment garnishments—i.e. garnishments as measures of execution. As will be seen, an inconsiderate order may force the third party to pay the debt twice over. Though not measures of execution, prejudgment garnishments present similar risks to the third party garnishee. Indeed, if he paid out the garnished debt to the defendant, he would be in breach of the garnishment order and could be asked to pay the debt over again to the plaintiff. To limit this risk of double jeopardy the courts in England have adopted a strictly territorial approach to garnishments (s.2.2.1.). Though Canadian courts have often overlooked the third party issue, some have followed the English practice (s.2.2.2.).

2.2.1 The English Approach

In a leading case, *Martin v. Nadel*,[314] the Court of Appeal had to deal with a garnishment order served on the London branch of the Dresdner Bank, a German bank. The order purported to affect the judgment debtor's account opened with the Berlin branch of the bank. The Court of Appeal refused to make the order absolute on the grounds that the garnishee bank would run the risk of having to pay twice. Accordingly, it would be "inequitable" and "contrary to natural justice" to make the order.[315] Sterling LJ said:

> Mr Dicey, at p 318 of his treatise on the Conflict of Laws, points out the rule of law that debts and choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced. On the facts of this case the debt of the bank to Nadel would be properly recoverable in Germany. That being so, it must be taken that the order of this court would not protect the bank from being called on to pay the debt a second time.[316]

Martin v. Nadel was distinguished by the Court of Appeal in *Swiss Bank Corporation v. Boehmische Industrial Bank*,[317] on the grounds that the garnished debt was payable and thus situated in London. Bankes L.J stated:

> The decision of that question depends upon where the debt sought to be attached is situate. If the debt is situate, or in other words if it is properly recoverable, in this country, then it would be discharged by payment under an order of our Courts and the garnishee need have no fear of being required to pay it a second time; but if the debt is situate, that is properly recoverable, in a foreign country, then it is not discharged by payment in this country under an order of the Courts of this country, and the debtor may be called to pay it over again in the foreign country. [In *Martin v. Nadel*] that was a debt situate in Berlin, being properly recoverable in Berlin. That was the debt sought to be garnished. Here the debt sought to be garnished was a debt situate in England being properly recoverable in England. In this case the debt can be properly discharged in England. In *Martin v. Nadel* the debt could be properly discharged only in Berlin.[318]

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[314] [1906] 2 K.B. 26 (C.A.) [*Martin v. Nadel*]. See also *Richardson v. Richardson* [1927] P. 228 (C.A.)
[315] *Martin v. Nadel*, *ibid.* at 30-31.
[316] *Ibid.* at 31.
[317] [1923] 1 K.B. 673 (C.A.) [*Swiss Bank*].
[318] *Ibid.* at 678-79.

Establishing the jurisdiction of a court based on the *situs* of a debt is premised on the idea that only orders of the courts at the *situs* would be recognized abroad, thus effectively shielding the third party garnishee against conflicting decisions.[319] The approach has been reaffirmed forcefully by the House of Lords in two recent decisions, *Société Eram Shipping Co Ltd v. Compagnie Internationale de Navigation*[320] and *Kuwait Oil Tanker Co SAK v. Qabazard.*[321] Both cases involved garnishing orders served on the London branches of, respectively, a Hong Kong bank and a Swiss bank. In both cases, the defendants had opened accounts with the head offices of the banks in Hong Kong and Switzerland, and the Court of Appeal had previously reversed the trial judge's decision to refuse to make the orders. The reasoning of the Court was that, as a matter of discretion, the lower court judge should not have refused to make the order since there was no risk that the garnishees would have to pay twice.[322] The decision of the Court of Appeal was thus framed in terms of the discretion to order a garnishment. On the merits, the Court found that it should not decline to make the order.

These decisions rested on a reading of *Martin v. Nadel* and *Swiss Bank* that the Court of Appeal had elaborated by the end of the 1980's in two cases, *SCF Finance Co Ltd. v. Masri (No. 3)*[323] and *Interpool Ltd v. Galani.*[324] Though none of these cases

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[319] In the *Swiss Bank* case, *ibid.*, Bankes L.J quoted Bovill C.J. in *Ellis v. M'Henry*, L.R. 6 C.P. 228 at 234 stating "There is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the Courts of that country, but in every other country. *This is the law of England, and is a principle of private international law adopted in other countries.*" [emphasis added].

[320] *Société Eram Shipping Co Ltd v. Compagnie Internationale de Navigation* [2003] 3 All ER 465 [*Eram Shipping*].

[321] *Kuwait Oil Tanker Co SAK v. Qabazard* [2003] 3 All ER 501 [*Kuwait Oil*]. Though this case involved the Brussels and Lugano conventions, the House of Lords followed the same reasoning and reached the same conclusion.

[322] The Court of Appeal relied on the availability of a restitutionary remedy in Hong Kong and Switzerland. See *Eram Shipping*, *supra* note 320 at 469, and *Kuwait Oil, supra* note 321 at 507.

[323] [1987] 1 All E.R. 194 (C.A.).

concerned the garnishment of a foreign debt, the Court held that the authorities did not require that the debt be properly recoverable within the jurisdiction. However, when a debt was recoverable abroad, a court would refrain, as a matter of discretion, from making a garnishee order if the garnishee showed that the risk of having to pay twice was "real and substantial".[325]

The House of Lords refused the Court of Appeal's reasoning. Lord Millett, considering that this reasoning was based on a misreading of *Martin v. Nadel* and *Swiss Bank*, stated:

> The reasoning in those cases [*Martin v. Nadel* and *Swiss Bank*] does not support the gloss which has been put upon them. The judgments were directed to the territorial reach of the court's jurisdiction, and were founded on the rule of international law that a debt can be discharged only by the law of the place where it is recoverable. There was no attempt to evaluate the risk that the third party might be compelled to pay twice. *It was enough that the English court could not itself protect the third party and discharge the debt by the force of its own order.* [...] Our courts ought not to exercise an exorbitant jurisdiction contrary to generally accepted norms of international law and expect a foreign court to sort out the consequences.[emphasis added][326]

Consequently, it is now clear that English courts have no jurisdiction to attach foreign debt even when the garnishee is present in England. Out of concern of fairness to innocent third parties, the Law Lords have, in effect, refused a conception of garnishing orders as operating *in personam* against the garnishee.[327]

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[324] [1987] 2 All E.R. 981 (C.A.).
[325] See Lord Millet's speech in *Eram Shipping*, *supra* note 320 at 498.
[326] *Ibid.* at 499.
[327] *Ibid.* at 492-93 where Lord Millett stated "The Court of Appeal reasoned that in making the order it was merely exercising in *personam* jurisdiction against a third party within the jurisdiction. [...] it followed that the order would not have extraterritorial effect. The English court would not be entrenching on the jurisdiction of the courts of Hong Kong, since it would not order the bank to do anything in Hong Kong. It would merely order the bank to pay a sum of money to the judgment creditor in England, and leave it to the bank to recoup itself out of the sum standing in its books to the credit of the judgment debtor. [...] My Lords, this reasoning is coherent and intelligible, and if it reflected the true nature of a third party debt order I would accept it. But an immediate question presents itself. What

2.2.2. The Canadian Approach

Surprisingly, in *McMulkin*, the Ontario Court of Appeal made no reference to *Martin v. Nadel*. The garnishee had nonetheless raised the point that the Ontario order might not be recognized elsewhere and that, under the circumstances, he might be liable to pay a second time in Alberta where the debt was owed. Middleton J. stated:

> Upon the argument, much was made of the difficulty that might in some cases arise if the Courts of Ontario were to assume authority to take in execution a debt of this kind, because, it was suggested, foreign Courts might not accord to the judgment of the Ontario Court any extra-territorial recognition. It is a sufficient answer to point out that this is a question of policy, affecting those who make the law, and that it cannot be considered by the Courts, who are called upon to administer the law as they find it.[328]

The holding in *McMulkin* implies that the third party risk is not a matter for evaluation by the courts. As noted by Professor Castel, however, this was probably an oversight since Middleton J. seemed to approve of *Martin v. Nadel* in a later case, *Richer v. Borden Farm Products Co. Ltd.*[329] In this case, judgment had been obtained against an Ontario plaintiff, Richer, in the courts of Québec. Pursuant to the decision, the courts in Québec had ordered garnishment of monies owed to Richer by Borden Farm Products. Ignoring the Québec garnishment, Richer sued Borden in Ontario and obtained summary judgment there.

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justification can there possibly be for ordering the third party to discharge the judgment debt out of its own money? The third party is a stranger to the transaction which gave rise to the judgment debt."

[328] *McMulkin, supra* note 290 at 6.

[329] (1921), 49 O.L.R. 172 (Ont. CA), cited in Castel, *Conflict of Laws 1975, supra* note 41 at 392-93.

The debt had arisen in Ontario and was payable there but the defendant was carrying on business in both Ontario and Québec. The Québec courts had claimed jurisdiction to order the garnishment on the mere presence of the garnishee in Québec. The reasoning was thus similar to that developed by Middleton J. in *McMulkin*. Curiously, delivering judgment for the majority of the Ontario Court of Appeal, Middleton J. expressed his frustration at the approach adopted by the Québec courts. He said:

> Whether the court of Quebec should allow its machinery to be made use of for the purpose of reaching a debt due in Ontario with respect to a transaction in Ontario by a debtor resident in Ontario, merely because there is power to reach such debtor by reason of his having assets within Quebec, is a question, it seems to me, for the Courts of that province. Suffice it to say that the English Courts have thought it not proper to exercise such a jurisdiction, for in *Martin v. Nadel*, 2 K.B. 26, the Court of Appeal, in a case analogous to the present refused to grant an attachment of a debt due by the Dresdner Bank to an English judgment debtor, because the debt was one which arose in Germany and could be enforced against the Bank in Germany. It was deemed inequitable and unrighteous to place the bank in such a position that it would be liable to pay twice. If the same principle had been recognized in the province of Quebec, the order would not have been made there.[330]

Accordingly, the Ontario Court of Appeal considered that there was a triable issue and that summary judgment should not have been granted. The Court nevertheless indicated that it would be reluctant to compel the defendant to pay twice, since that would be contrary to "natural justice" as underlined in *Martin v. Nadel*.[331] In view of this reluctance, it is of considerable concern that Middleton J.'s holding in *McMulkin*, reached in ignorance of *Martin v. Nadel*, has become the leading authority on the issue in Canada.[332] However, it is important to note that, despite this line of case, concerns of fairness to third party garnishees have not escaped every court in Canada. As will

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[330] *Richer v. Borden Products*, *ibid.* at 175-176.
[331] *Ibid.* at 176.
[332] For a relatively recent application, see *Mitchell*, *supra 292* note at §23, where Seaton J.A. quoted Middleton J. in *McMulkin* and accepted his holding as applicable in British Columbia.

be now presented, some courts have shown their willingness to go down the path traced by English courts.

The Discretionary Approach

In *Haydon v. Haydon and C.N.R.*[333] the plaintiff obtained a garnishing order in the Manitoba court against a railway company which was employing her former husband in Saskatchewan, where he was a resident. Since the husband was not a party to the Manitoba proceedings, and since the debt arose in Saskatchewan, it was likely that the garnishee would be forced to pay over the husband's wages a second time. Though it affirmed *McMulkin* and refused to set aside the order, the Manitoba Court of Appeal did not consider, as Middleton J. had done in *McMulkin*, that the risk for the garnishee was not a concern for the courts. Citing *Martin v. Nadel* and the *Swiss Bank* case, the Court stated that, in some cases, there existed the discretion to refuse to make an order on grounds of convenience "where an action[...] should have been brought elsewhere and [was] on that account oppressive on the defendant".[334]

Although it incorporated concerns of fairness to the garnishee, the holding in *Haydon* is not wholly satisfactory: first, its reading of *Martin v. Nadel* and the *Swiss Bank* case (i.e. as framing the issue as one of discretion rather than one of jurisdiction) is similar to that criticized by Lord Millet in *Eram Shipping*; second, it places the burden of convincing the court to make use of its discretion on the innocent third party garnishee. Indeed, in *Haydon*, the Manitoba Court of Appeal refused to set aside the

[333] *Haydon, supra* note 292.
[334] *Ibid.* at 546.

garnishing order because the garnishee had failed to provide an affidavit proving the risk. The Court stated:

> 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.[335]

The *Situs* Solution

In Saskatchewan, the courts have long insisted that a garnishing order can only be issued concerning a debt situated in the province.[336] The seminal case is *Marlow v. Yager and C.P.R.*,[337] where an order purporting to garnish a debt payable in British Columbia to a resident of British Columbia by a railway company present in both provinces was set aside. Taylor J. noted:

> Now, with much respect for those who have expressed a contrary opinion (see *McMulkin v. Traders Bank of Canada,* 26 O.L.R. 1, 21 O.W.R. 640, 3 O.W.N. 787), I hold a very clear opinion that the province of Saskatchewan would have no power to enact legislation binding a debt due and payable by one resident in British Columbia to another resident in British Columbia. [...] If the other conclusion were accepted and there were power to attach this debt, which law as to exemption of salary or wages from attachment would apply?[338]

This approach has been followed consistently in Saskatchewan.[339] It was applied recently in *Delaire v. Delaire*,[340] where the Saskatchewan court faced the issue of a

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[335] *Ibid.* at 548.
[336] Castel, *Conflict of Laws 1975*, *supra* note 41 at 386.
[337] [1922] 2 W.W.R. 191 (Sask. C.A.).
[338] *Ibid.* at 192-93.
[339] *Royal Bank of Canada v. Miller and Miller and Pension Fund Security of the Royal Bank of Canada* (1965), 52 W.W.R. 148 (Sask. Q.B.); *Agricultural Credit Corporation of Saskatchewan v. Bishop* (1993), 13 C.P.C. (3d) 269, 110 Sask. R. 68 (Q.B.); *Delaire v. Delaire* [1996] S.J. No. 542 (Q.B.) (QL) [*Delaire*]. In *McIlrath Lumber Co. v. Shore et al.*, [1931] 2 W.W.R. 785 (Sask. C.A.) the Court of Appeal considered that attornment by a non-resident garnishee would be sufficient when the debt was payable in Saskatchewan.

garnishing order purporting to catch an RRSP account opened with the local branch of a national brokerage firm in British Columbia. Notice of garnishment had been served on the garnishee at one of its Saskatchewan branches. In the reasoning of the court, Dawson J. presented two theories of jurisdiction to garnish: the service theory and the *situs* theory. The former theory was inherited from *McMulkin*, and the latter had been the one applied in Saskatchewan following *Marlow v. Yager*.[341] Dawson J. was extremely critical of the approach developed in *McMulkin*, most notably of the refusal to consider the risk to the garnishee, "the major flaw of the service theory of jurisdiction, i.e., that the courts of other provinces or countries might not recognize the force or effect of the garnishment or garnishee's discharge."[342] Accordingly, the court opted for the solution elaborated in *Martin v. Nadel*[343] and concluded that the court had no power to garnish a debt situated beyond the territorial boundaries of the province.[344] Dawson J. would now find much support in the recent decisions of the House of Lords presented in the previous section.

The *situs* theory undoubtedly provides an answer to the risk of unfairness run by third parties in garnishment proceedings. As with *Mareva* injunctions, the risk of unfairness to third parties is remedied by limiting the scope of the order to the ordering court's territory. Such a territorial solution needs to be appraised in the Canadian context.

Concluding Section: The Meaning of Territoriality in the Canadian Context

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[340] *Delaire, ibid.*
[341] *Ibid.* at §32-33.
[342] *Ibid.* at §54.
[343] *Ibid.* at §54.
[344] *Ibid.* at §61.

Extraterritorial *Mareva* injunctions and garnishments have significant adverse effects on the interests of innocent third parties. Indeed, foreign courts in the jurisdiction where the assets are located may take a dim view of Canadian courts' claim to regulate activities on their territories. As a result, there is a high probability that third parties will face conflicting orders. A solution to this risk of unfairness appears to emerge through the limitation of both garnishments and *Mareva* injunctions, insofar as they affect third parties, to the territorial jurisdiction of the court making the order.

A territorial solution has been adopted by Canadian legislators with respect to bank accounts. Section 462 of the *Bank Act*, 1991,[345] which nationally regulates banking activities, reads:

> (1) A writ or process originating a legal proceeding or issued therein or in pursuance thereof, an order or injunction made by a court or a notice by any person purporting to assign, perfect or otherwise dispose of an interest in any property or in any deposit account affects and binds only property in the possession of a bank belonging to a person at the branch where the writ, process, order, injunction or notice or notice thereof is served and, in the case of a deposit account in a bank, affects only money owing to a person by reason of the deposit account if the branch on which the writ, process, order, injunction or notice or notice thereof is served is the branch of account in respect of the deposit account.
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> (2) Any notification sent to a bank with respect to a customer of the bank, other than a document referred to in subsection (1), constitutes notice to the bank and fixes the bank with knowledge of the contents thereof only if sent to and received at the branch of the bank that is the branch of account of an account held by the bank in the name of that customer.

One interpretation of the effects of this provision is to limit the power to freeze, or to seize assets in execution, to the courts of the jurisdiction where the deposit was made

[345] R.S.C. 1991, c. 46 (first enacted in 1923, 1923 (Can.) c. 32).

and the account opened.[346] The rationale behind this provision was explained by Seaton J.A. in *Bank of Nova Scotia v. Mitchell*.[347] Commenting on the former version of the *Bank Act*, he stated:

> The subsection was necessary to protect the bank against garnishing orders issued, say, in Victoria when there was an account, say, in Halifax. The bank would be bound, upon receiving each garnishing order, to search the records of every branch in Canada and probably out of Canada, a quite impractical proposition. What need be done now is to search only the branch at which the garnishing order is served. If there is found to be neither property in the possession of the bank belonging to the person garnisheed nor moneys to the credit of that person, the bank need not search further.[348]

Some courts have nevertheless considered that this enactment left untouched their ability to catch accounts held at a branch in another province so long as the garnished bank was in the jurisdiction and service on the branch of account was effectuated *ex juris*.[349] The propriety of such an interpretation in the context of the *Bank Act* is dubious.[350] In *Metropolitan Investigation & Security (Canada) Ltd. v. C.F.I. Operating Co*,[351] on appeal from a decision of the Manitoba Court of Appeal,[352] the Supreme Court of Canada had an opportunity to decide on the propriety of both *McMulkin* and the liberal interpretation of the *Bank Act*. Though the Supreme Court

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[346] Nicole L'Heureux & Edith Fortin, *Droit Bancaire*, 3ed. (Cowanswille, Qc: Yvons Blais, 1999) at 107.
[347] *Mitchell, supra* note 292 .
[348] *Ibid.* at 157 where Seaton J.A. commented on section 96(4) of the *Bank Act*, R.S.C. 1970, c. B-1, which then read "A writ or process originating a legal proceeding or issued therein or in pursuance thereof or an order or injunctions made by a court affects and binds only property in the possession of the bank belonging to, or moneys to the credit of, a person at a branch where such writ, process, order or injunction or notice thereof is served."
[349] See *e.g. Fox v. Canadian Rocky Mountain Trees Incorporated* [1989] B.C.J. No. 655 (S.C.) (QL), rev'd in *Fox v. Canadian Rocky Mountain Trees Incorporated*, [1990] B.C.J. No. 566 (C.A.) (QL) (on the ground that the plaintiff should have obtained leave for service *ex juris*). In *Prudential Co. of England (Properties) Ltd. v. NRS Block Bros. Realty Ltd.* 41 C.P.C. (3d) 256 (Man. Master), the Manitoba court refused to allow service *ex juris* of an order of prejudgment garnishment of a bank account held with the Royal Bank of Canada in Vancouver.
[350] See comment of the *Fox* case in (1989) 47 *The Advocate (Van.)* 829.
[351] *Metropolitan Investigation & Security (Canada) Ltd. v. C.F.I. Operating Co.* [1975] 2 S.C.R. 546 (S.C.C.).
[352] *Metro Investigation, supra* note 297.

did not seize the chance to settle the controversy, its holding seemingly provides an answer to the third party problem.

In this case the court in Manitoba had held that the Bank of Montreal and the Royal Bank were trustees under *The Builder and Workmen Act* of funds deposited by the principal defendant with their Montreal branches. The court had then ordered the banks to account for those monies and to pay them in Winnipeg, Manitoba. However, the same monies had previously been attached by way of prejudgment garnishment in Québec. Counsel for the defendant and the banks argued to the Court of Appeal that the Manitoba judgment was similar to a garnishing order and that since the accounts were held with the Montreal branches the courts in Manitoba had no jurisdiction to garnish them.

Freedman C.J.M, delivering judgment for the court, relied "on the *in personam* jurisdiction of a Court of equity and on the power of the Court to make effective an adjudication that a trust existed under *The Builder and Workmen Act* and rejected the contention.[353] Nevertheless, the Court was of the opinion that even if the judgment were to be considered a garnishing order the court would have had jurisdiction to garnish the Montreal accounts. The Court relied on *McMulkin* and *Haydon* but did not address the interests of the third party garnishees even though those interests were obviously at stake in this case given the prejudgment garnishments in Québec.[354] The Court also rejected the contention that the *Bank Act* effectively counteracted *McMulkin*.[355]

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[353] *Metropolitan Investigation, supra* note 351 at §10.
[354] *Metro Investigation, supra* note 297 at §16-17.
[355] *Ibid.* at §20.

Though the Supreme Court of Canada reversed the decision, it did not decide on the correctness of *McMulkin* or the effects of the *Bank Act*.[356] Rather, the Court was of the view that the Manitoba Court of Appeal should have deferred to the previous garnishment orders issued by the courts in Quebec. Laskin C.J. stated:

> Since the two banks were already subject to the Quebec garnishment when the Manitoba proceedings began, the Manitoba judgment calls upon them to be faithless to the competent order of a sister judicial district. This Court, with the reviewing and controlling authority over both the Courts of Manitoba and of Quebec, cannot be expected to support such a call. Unless this Court is in a position (an it is not in these appeals) to rule on the validity of the Quebec garnishment, it cannot with any propriety approve an order of one provincial Court that purport to deal with assets already captured by the competent order of another provincial Court, and particularly an order of the Court of the province where those assets are situated.[357]

The Supreme Court of Canada decided neither on the propriety of an assertion of jurisdiction to attach foreign debts nor on the interpretation of the *Bank Act*. Rather, it reasoned that the courts in Quebec should be regarded as "having jurisdiction over the two banks [...] in as full a manner as jurisdiction over them has been declared by the Manitoba Courts." [358] It followed that the latter should recognize the previous decision of the Quebec courts. In this sense the Supreme Court's decision is an early manifestation of the principle of full faith and credit developed in *Morguard*.[359]

In fact, in light of *Morguard* the Supreme Court's decision in *Metropolitan Investment* provides a solution to the third-party problem inherent in extraterritorial freezing orders. So long as a freezing order issued in one province is entitled to recognition

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[356] *Metropolitan Investigation, supra* note 351 at §20 (those two points had been raised in argument).
[357] *Ibid.* at §18.
[358] *Ibid.* at §17.
[359] *Morguard, supra* note 3, was primarily concerned with the issue of recognition and enforcement of foreign judgments. La Forest J. considered that the courts in one province should "give full faith and credit" to the decision of the courts of a sister province (*ibid.* at §41).

under the full faith and credit principle in the other Canadian provinces, the risk of unfairness disappears. Indeed, the third party does not anymore run the risk of being confronted by conflicting orders of the courts of the province where the assets are located.[360] In the inter-provincial context, the full faith and credit solution undoubtedly provides an effective answer to the third-party risk. Accordingly, the reach of freezing measures with respect to third parties need not be limited to the provincial territory but can extend to the whole Canadian territory.

One could envisage that such a solution be extended to foreign orders and that Canadian courts defer to prior foreign freezing measures.[361] However, in the international context, the full faith and credit solution is not satisfactory. Admittedly, Canadian courts would recognize foreign freezing measures and would not impose conflicting obligations on innocent third parties. However, this is not a solution when the extraterritorial freezing measure is issued by a court in Canada. Indeed, the supervisory jurisdiction of the Supreme Court of Canada obviously does not extend to courts in foreign jurisdiction, and those courts cannot be forced to give full faith and credit to the Canadian order purporting to affect assets on their territories. In the international context, absent a treaty, the full faith and credit solution is not a answer to the third-party risk. Accordingly, the reach of freezing measures with respect to third parties should not extend outside the Canadian territory.

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[360] That actually is the solution adopted by the United States Supreme Court in *Harris v. Balk* 198 U.S. 215 (1905) where *quasi in rem* proceedings had been brought against the plaintiff, Balk, by garnishing a debt owed him by the defendant, Harris, while he was temporarily in Maryland. Judgment was entered in Maryland and Harris paid. Back to his residence in North Carolina, Harris was sued by Balk for payment of the same debt. The Supreme Court held that the Maryland assumption of jurisdiction was proper and that its decision should be given full faith and credit. Accordingly, Harris was discharged of his debt owed to Balk.

[361] Castel & Walker, *supra* note 2 at § 14.1, where the authors note that Canadian courts have extended the *Morguard* principles to the recognition of foreign judgments and "in doing so have eliminated much, if not all, practical distinction between the regard shown for foreign judgments with respect to questions of jurisdiction and that shown for Canadian judgments." See now *Beals v. Saldanha*, [2003] S.C.J. No. 77 (QL).

At bottom, the criterion of fairness to innocent third parties commands two solutions as to the scope of freezing measures. First, in the international context, only the territorial solution can adequately protect third parties. Worldwide *Mareva* injunctions should include a proviso similar to that adopted in *Baltic Shipping* and limiting their third-party effects to the Canadian territory. In the same way, Canadian courts should not assert jurisdiction to order prejudgment garnishments affecting assets located outside of Canada. Second, in the inter-provincial context, the interests of innocent third parties are protected by the recognition of the principle of full faith and credit. Accordingly, Canada-wide *Mareva* injunctions needs not limit their effects as to third parties. Similarly, prejudgment garnishments could reach assets in other provinces without threatening the interests of innocent third parties. However, the constitutionality of such attempts to deal with assets situated in sister provinces and the implication of the *Bank Act* still need to be elucidated by the Supreme Court of Canada.[362]

[362] In *Hansen v. Danstar Mines Ltd.*, *supra* note 292, the Manitoba Court of Appeal used its discretion to refuse garnishing a debt located in British Columbia. However, the Court doubted having jurisdiction to do so in the first place. O'Sullivan J.A. questioned the constitutionality of an attempt to deal with assets located in another province (*ibid.* at §118) This is not the purpose of this work to spell out such a constitutional case. However, it should be noted that, as much as the availability of extra-provincial garnishments, such a constitutional case could question the very availability of Canada-wide *Mareva* injunctions, which have been praised by authors and practitioners.

CONCLUSION

This thesis has presented the implications of the recognition of a principle of fairness in the jurisdictional analysis for evaluating the availability and the scope of freezing measures in Canadian law.

Having first canvassed the different freezing measures available in Canadian courts, this thesis examined the consequences flowing from the recognition of a principle of fairness as between the parties on the availability of freezing measures. First, it was shown that on grounds of fairness to the defendant, courts now refuse to assume jurisdiction based on the mere presence of assets in their territory. However, it was argued that on grounds of fairness to the plaintiff this abandonment of property-based jurisdiction should not threaten the availability of freezing measures from the same forum. Accordingly, Canadian courts should be ready to assert jurisdiction based on the presence of assets but for the limited purpose of freezing those assets.

The third chapter looked beyond fairness to the parties to examine the consequences of recognizing an overriding principle of fairness for third parties. It was shown that both *Mareva* injunctions and prejudgment garnishments can affect innocent third parties as to their activities abroad. Since such an extraterritorial third-party effect could result in hardship, it was argued that the scope of freezing measures with respect to innocent third parties should be limited to the Canadian territory.

Along the previous developments one question was not addressed: could a Canadian court assert jurisdiction in aid of foreign proceedings for the limited purpose of freezing the defendant's assets on a worldwide basis? While this thesis did not seek to answer this question, its argument may be tested by attempting a brief answer as a conclusion to the work. In other words, can the principle of fairness help to answer this further query?

Relying on section 25 of the *Civil Jurisdiction and Judgment Act*, English courts have extended their freezing jurisdiction to assist foreign proceedings. In *Republic of Haiti v. Duvalier*[363] the English Court of Appeal ordered a worldwide *Mareva* injunction in aid of proceedings taking place in France. Though the validity of this jurisdiction was subsequently doubted,[364] the Court of Appeal reaffirmed it in *Crédit Suisse Fides Trust S.A. v. Cuoghi*[365] where a worldwide *Mareva* injunction was ordered in aid of proceedings taking place in Switzerland.

There is no *prima facie* reason why a Canadian court could not adopt such a course. In the provinces where jurisdiction to freeze is established by legislation, there is no explicit limitation as to the territorial reach of the freezing measure that can be ordered in aid of foreign proceedings.[366] In the other provinces, an assertion of jurisdiction to freeze is dependent only on its consistency with the *Morguard* framework. The

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[363] [1990] 1 Q.B. 202 [*Duvalier*].
[364] *Rosseel N.V. v. Oriental Commercial Shipping (UK) Ltd* [1990] 3 All ER 545; and *S&T Bautradings v. Nordling* [1997] 3 All ER 718.
[365] [1997] 3 All ER 724 [*Crédit Suisse*].
[366] Such is the case in Québec where article 3138 C.C.Q. is silent on the issue. In Alberta and Newfoundland, the plaintiff need to establish that "the defendant appears to have exigible property" in the province to ground the court's jurisdiction to order a freezing measure. However, the measure needs not relate to the property within the jurisdiction, see 17(1) Alberta and 27(1) Newfoundland. On the contrary, the so-called preservation order proposed by the Buckwold and Cuming report would, when ordered in aid of foreign proceedings, be limited to the defendant's assets in Saskatchewan, see section 2(5)(a) of the proposed *Enforcement of Money Judgments Act* in Buckwold & Cuming, *supra* note 34. The explanatory note is silent on this limitation.

question is thus whether an assertion of jurisdiction for the limited purpose of freezing assets on a worldwide basis would be consistent with this framework generally and with the principle of fairness in particular.

Two concerns of fairness were underlined in Chapter II. First, one should take into account the burden on the defendant resulting from a freeze ordered by a court different from the one hearing the merits. This concern would, however, give way to a second, overriding concern, that of ensuring an effective interim protection of the plaintiff.

Where the court seized of the merits can order such a worldwide freeze and accordingly ensure an effective interim protection of the plaintiff, a Canadian court should not assert jurisdiction to order an extraterritorial freeze. Indeed, the foreign court hearing the case would be in a position to ensure an effective interim protection for the plaintiff and a Canadian court should not impose an additional burden on the defendant. Moreover, concerns of comity to the foreign judicial process should deter a Canadian court from preempting the foreign court's decision (when the foreign court has not yet been petitioned for a worldwide freeze) or to review that court's decision (when the foreign court has refused to make a worldwide order).

By contrast, where the court seized of the merits is not in a position to order a worldwide freeze, the concern of ensuring an effective interim protection of the plaintiff can undoubtedly support a Canadian court's decision to do so. This concern was actually recognized by the English Court of Appeal in *Crédit Suisse*.[367]

[367] This concern was noted in *Crédit Suisse*, *supra* note 365, at 731 where Lord Millett commenting on the *Duvalier* case stated "The circumstances can be said to have been 'very exceptional', though to my

Finally, there is a noteworthy difference between the *Duvalier* and *Crédit Suisse* cases and it should be taken into account by Canadian courts. In *Duvalier* the defendant was residing in France where the main proceedings where taking place. The jurisdiction exercised by the English court in this case appeared to be exorbitant and was described by Collins as "going to the very edge of what is permissible."[368] In reaffirming the jurisdiction to order a worldwide freeze in assistance of foreign proceedings, the Court of Appeal in *Crédit Suisse* insisted on the fact that in that case, though the main proceedings were taking place in Switzerland, the defendant was an English resident.[369]

The developments in Chapter III support such a distinction. Indeed, in *Crédit Suisse*, since the defendant was present in England, he could have been punished for his contempt. Accordingly, the extraterritorial freeze was obtained by restraining the defendant himself. On the contrary, in *Duvalier* since the defendant was outside England, he could not have been punished for his contempt. The freezing effect of the worldwide *Mareva* injunction was thus achieved not by restraining the defendant but by restraining third parties present in England. As was argued in Chapter III, the effect of freezing measures with respect to innocent third parties should be limited to the Canadian territory. Accordingly, a court should order a freezing measure extending outside the Canadian territory only where the freeze would take effect by directly restraining the defendant, that is when the defendant is a resident in the ordering court's province and as such subject to the court's contempt power.

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mind the circumstance which justified the exercise of the jurisdiction was that otherwise no effective protection could be given to the plaintiff anywhere."

[368] Collins, *supra* note 1 at 207.

[369] *Crédit Suisse*, *supra* note 365 at 732.

This sketch hints at the potential usefulness of the arguments in this thesis to answer broader questions about jurisdiction to freeze assets. So long as the principle of fairness continues to inform legislative reform and judicial innovation in Canada, this should ultimately serve the interests of all parties involved directly or indirectly in international business and international litigation.

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