Jurisdictional Issues in Electronic Commerce Contracts:

A Canadian Perspective

by

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I. INTRODUCTION

Governments, the private sector, the media, and academicians have defined electronic commerce ("e-commerce") in a variety ways. Narrowly defined, e-commerce refers to sales or purchases transacted over open or public networks, such as the Internet, independent of whether the payment is made on the network. Employing a broader definition, e-commerce may also include sales and purchases made over closed or private networks, such as electronic data interchange ("EDI") and debit or credit cards.[1] This article will focus on the narrower definition

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1. Electronic Commerce Branch of Industry Canada, The Canadian Electronic Commerce Strategy, at

of e-commerce and, more specifically, business-to-consumer ("B-to-C") transactions rather than business-to-business ("B-to-B") transactions.

According to Statistics Canada's Household Internet Use Survey ("HIU Survey"), approximately 2.2 million Canadian households placed approximately 13.4 million orders over the Internet in 2001 and spent almost $2 billion[2] shopping on the Internet.[3] This is a significant increase in the number of households and dollars spent shopping online compared to the previous two years. In the year 2000, 1.5 million Canadian households placed 9.1 million orders from

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http://e-com.ic.gc.ca/english/strat/doc/ecom_eng.pdf (last visited, Jan. 31, 2004) [hereinafter Canadian Electronic Commerce Strategy].

2. All monetary amounts referred to in this paper are in Canadian currency, unless indicated otherwise.

3. The Daily Statistics Canada, Electronic Commerce: Household Shopping on the Internet (September 19, 2002), at http://www.statcan.ca/Daily/English/020919/d020919b.htm (last visited, Jan. 31, 2004) [hereinafter HIU Survey].

home and spent approximately $1.1 billion on online shopping,[4] while in 1999, 806,000 Canadian households placed 3.3 million orders from home and spent $417 million on online shopping.[5]

While Internet shopping comprised a very small fraction of the total expenditures by Canadian households during 1999 through 2001 and is not expected to become a significant part of the total spending by Canadians in the near future, the HIU Survey data at least confirms that Canadian households are feeling increasingly more comfortable purchasing products over the Internet, from both Canadian and foreign vendors.[6]

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4. It should be noted that a direct comparison between the HIU Survey data for 2001 and 2000 cannot be made because Statistics Canada redesigned the survey in 2001 to capture Internet shopping from households that regularly used the Internet from various locations whereas the 2000 survey only considered Internet use from home. There is, however, a consistency in the methodology employed by Statistics Canada between the years 1999 and 2000. The remarkable increase in Internet shopping by Canadian households in 2000 relative to 1999 would support the hypothesis that the data for 2001, despite the redesign of the survey, accurately conveys the year-by-year increase in Canadian consumer confidence in Internet shopping. Id.

5. The Daily Statistics Canada, Electronic Commerce: Household Shopping on the Internet (October 23, 2001), at http://www.statcan.ca/Daily/English/011023/d011023b.htm (last visited, Jan. 31, 2004).

6. See HIU Survey, supra note 3; see also Electronic Commerce Branch, Household Use Survey, at http://e-com.ic.gc.ca/english/research/rep/backgounder_oct23_01.pdf (last visited, Jan. 31, 2004) [hereinafter Household Use Survey].

The HIU Survey also indicates that approximately 35% or 680 million of the 2 billion dollars that Canadian households spent shopping on the Internet in 2001 was actually spent at foreign websites.[7] In both 1999 and 2000, 45% of the total amount that Canadian households spent over the Internet—approximately $244.5 million and $495 million, respectively—was spent at foreign websites.[8] While the percentage of the total online spending by Canadian households on non-Canadian websites decreased somewhat in 2001, the actual dollar value spent on non-Canadian websites has increased significantly over the past two years,[9] and there is no reason to expect that the spending by Canadian households on foreign websites will decrease in the future.

In the case of Canadian businesses, Statistics Canada reported in the 2001 Survey of Electronic Commerce and Technology ("ECT Survey") that 63.4% of businesses had Internet access in 2000 compared to 52.8% in 1999 and that 25.7% of the businesses maintained websites in 2000 compared to 21.7% in 1999.[10] The same survey also reported that while the number of

7. HIU Survey, supra note 3.

8. Household Use Survey, supra note 6.

9. Compare HIU Survey, supra note 3 ("Canadians spent 680 Million, or about 35% of their electronic commerce dollars, at non-Canadian Websites"), with Household Use Survey, supra note 6. (In 1999 and 2000, 45% of purchases were made from non-Canadian businesses, which translates to about $682 Million).

10. Electronic Commerce Branch of Industry Canada, Electronic Commerce & Technology 2000, at http://e-com.ic.gc.ca/english/research/rep/e-com_ict_2000.pdf (last visited Jan. 31, 2004) [hereinafter ECT Survey].

businesses selling products on the Internet declined from 10.1% in 1999 to 6.4% in 2000, the value of Internet sales increased by 7.3% from $4.2 billion in 1999 to $7.2 billion in 2000.[11] Moreover, business-to-consumer transactions represented 20% of the sales in 2000, and 17% of those sales were exported.[12]

While e-commerce sales currently amount to a very small fraction of the entire Canadian economy due to both technological and non-technological challenges facing Canadian businesses in the evolving sector, e-commerce is a reality for both businesses and consumers. The e-commerce industry will persist and evolve over time, particularly in light of the Canadian government's express strategy to become a world leader in the development and use of electronic commerce.[13]

According to Industry Canada, in 2004, Canadian e-commerce is expected to grow in sales to $151.5 billion or 3.9% of the world's total e-commerce.[14] Applying the ECT Survey's figure of 20% for online Canadian businesses-to-consumer sales in 2000 to Industry Canada's expected online sales figure for 2004, online sales by Canadian businesses to consumers may be expected to reach $30.3 billion in 2004.[15] Further, applying the 17% figure for online sales by Canadian

11. Id.

12. Id.

13. See Canadian Electronic Commerce Strategy, supra note 1.

14. Electronic Commerce Branch of Industry Canada, Canadian Internet Commerce Statistics Summary Sheet (March 2, 2001), at http://e-com.ic.gc.ca/english/research/rep/e-comstats.pdf (last visited, Jan. 31, 2004).

15. Compare id. with ECT Survey, supra note 10.

businesses to non-Canadians in 2000 to Industry Canada's expected online sales figure for 2004, online sales by Canadian Businesses to non-Canadian consumers could reach $5.15 billion in 2004.[16]

The impact of e-commerce on Canadian consumers and businesses and the anticipated growth of Canadian e-commerce warrant a closer examination of one of the most important and difficult legal issues of today: jurisdiction in cyberspace.[17] Professor Michael Geist succinctly articulated this concern in a 2001 article:

> The unique challenge presented by the Internet is that compliance with local laws is rarely sufficient to assure a business that it has limited its exposure to legal risk. Since websites are accessible worldwide, the prospect that a website owner might be hauled into a courtroom in a far-off jurisdiction is much more than a mere academic exercise – in an Internet environment that provides instant global access, it is a very real possibility. For businesses seeking to embrace the promise of a global market at the click of a mouse, the prospect of additional

16. Id.

17. See, e.g., ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000)(discussing a suit brought by the Civil Liberties organization on behalf of World Wide Web publishers against the Attorney General, alleging the Child Online Protection Act, 47 U.S.C. § 231 (2000), violated freedom of speech guarantees); Am. Libraries Assoc. v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997)(discussing a suit brought by organizations that use the Internet to communicate the constitutionality of a New York State Statute, which made it a crime to use a computer to disseminate obscene material to minors); Digital Equip. Corp. v. Alta Vista Tech., Inc., 960 F. Supp. 456 (D. Mass. 1997)(discussing trademark infringement jurisdiction in connections with the Internet).

compliance costs and possible litigation must be factored into the analysis.

> The risks are not limited to businesses, however. Consumers anxious to purchase online must also balance the promise of unlimited choice, greater access to information, a more competitive, global marketplace with the prospect that they will not benefit from the security normally afforded by local consumer protection laws. Although such laws exist online just as they do offline, their effectiveness is severely undermined if consumers do not have recourse to their local court system or if enforcing a judgement requires a further proceeding in another jurisdiction.[18]

In the first part of this article, the general legal framework governing the assumption of jurisdiction by Canadian courts over foreign defendants will be reviewed as a preamble to an examination of when Canadian courts may assume jurisdiction over foreign online vendors. In order to focus the analysis, the civil rules of the province of British Columbia will be used. It should be noted that each Canadian province and territory has its own civil rules and these rules equally share significant similarities and differences. Therefore, the reader is recommended not to blindly adopt the analysis of the British Columbia civil rules in this paper as authoritative in any other jurisdiction.It is recommended that the reader examine the civil rules of the specific jurisdiction in question before making any decisions to adopt or analogize from the following analysis of British Columbia civil rules.

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18. Michael Geist, Is there a there there? Toward a Greater Certainty for Internet Jurisdiction, 16 **Berkeley Tech. L.J.** 1345, 1347-48 (2001).

The second part of this article analyzes the issue of when a Canadian online vendor is subject to the jurisdiction of courts far from the vendor's location. Since e-commerce in the United States has experienced hyper-growth in the past few years and the level of e-commerce in the United States has far exceeded that of any other nation since the advent of e-commerce, American courts have had much more experience in adjudicating e-commerce related disputes. American courts have had the opportunity to consider, develop, and evolve tests for assuming jurisdiction over foreign defendants in e-commerce transactions. Therefore, it is necessary to examine American law governing assumption of jurisdiction over foreign defendants in e-commerce transactions to better appreciate the exposure of Canadian online vendors to foreign courts. Additionally, Canadian online vendors are more likely to sell their products to American consumers than to consumers from any other foreign jurisdiction because Americans are the largest group of online consumers in the world. Therefore, the risk of Canadian online vendors being subjected to the jurisdiction of American courts is real and warrants discussion in this article.

The third part of this article will briefly discuss the risks to which Canadian consumers may be exposed when purchasing products online from foreign websites and the remedies available to them. The fourth and final part of this article will provide some guidelines for Canadian businesses to curtail or limit their potential liability in foreign jurisdictions when engaging in e-commerce with consumers, particularly, American consumers.

II. JURISDICTION UNDER CANADIAN LAW

Foreign businesses that have a physical presence and conduct business in Canada may be

subject to innumerable federal, provincial, and municipal laws and regulations, including the common law of the land. When purchasing or licensing products or obtaining services from such foreign businesses, Canadian consumers may take solace in the protection afforded to them by Canadian consumer protection legislation, at the federal and provincial levels. At the federal level, for example, there is the Competition Act,[19] which creates a strict liability criminal offense for making certain false or misleading representations[20] and also affords the aggrieved party a civil claim for breach of the Act's provisions.[21] As an example at the provincial level, the British Columbia Sale of Goods Act[22] affords buyers certain implied conditions and warranties as to quality, fitness, and durability of goods supplied under a contract of sale or lease,[23] out of which the seller cannot contract.[24] Where a seller is in breach of warranty, the Act entitles the buyer to sue the seller for breach of the warranty in diminution or extinction of the purchase price or to maintain an action against the seller for damages. The British Columbia Trade Practice Act[25] empowers the Office of the Director of Trade Practices to investigate, on its own initiative or as a

19. Competition Act, R.S.C., ch. C-34 (1985) (Can.).

20. R.S.C., ch. C-34, § 52.1(8).

21. R.S.C., ch. C-34, § 36(1).

22. Sales of Goods Act, R.S.B.C., ch. 410 (1996) (Can.).

23. R.S.B.C., ch. 410, § 18(e).

24. R.S.B.C., ch. 410, § 20.

25. Trade Practice Act, R.S.B.C., ch. 457 (1996) (Can.).

result of a complaint made by a consumer,[26] any deceptive or unconscionable act[27] by a supplier, make various orders against the supplier,[28] and bring an action against the latter, which may result in restoration of monies to the complainant.[29] Another example is the British Columbia Consumer Protection Act,[30] which imposes specific disclosure requirements on sellers for the benefit and protection of consumers in executory contracts.[31] The Act also affords consumers an opportunity to cancel such contracts under certain circumstances where the seller breaches the disclosure requirements under the Act.[32]

While consumer protection legislation in Canada, whether at the federal or provincial level, applies to foreign businesses having a physical presence in and conducting business with consumers in Canada, these same laws may not be effective to protect Canadian consumers when purchasing products online from foreign vendors. For example, an online vendor based in New York may not be subject to British Columbia's Sale of Goods Act when selling its products

26. R.S.B.C., ch. 457, §§ 5, 9.

27. See R.S.B.C., ch. 457, §§ 3, 4 (defining "deceptive acts or practices" and "unconscionable acts or practices," respectively).

28. R.S.B.C., ch. 457, § 17(1).

29. R.S.B.C., ch. 457, § 18(4).

30. Consumer Protection Act, R.S.B.C., ch. 69 (1996) (Can.).

31. R.S.B.C., ch. 69, § 10.

32. R.S.B.C., ch. 69, § 11.

online to a British Columbia resident because the vendor has no physical presence in British Columbia. The question becomes whether the British Columbia courts will exercise jurisdiction over the New York online vendor in such case. The effectiveness as well as the applicability of local consumer protection legislation in online transactions depends significantly on whether or not the Canadian courts will assert jurisdiction over foreign online vendors. Some insight may be obtained with respect to this issue by first reviewing the law governing service of legal process on a foreign defendant (i.e. service ex juris).

A. Jurisdiction Simpliciter Under Common Law

In Canada, courts will assert jurisdiction over a party personally served with an originating process within their territorial jurisdiction.[33] J.G. Castel notes that, "In all the common law provinces and territories, personal service of process is the foundation of jurisdiction in actions in personam. In other words, personal jurisdiction over a defendant is based upon the requirement and sufficiency of personal service within the province or territory of the forum."[34] The courts will also assert common law jurisdiction over parties residing outside their territorial jurisdiction (i.e. foreign parties) where there is a "real and substantial connection" between the subject matter of the litigation and the forum where the action is brought.[35]

In De Savoye v. Morguard Investments Ltd., the Supreme Court of Canada enunciated the

33. See **Dicey and Morris on The Conflict of Laws** 172 (J.H.C. Morris ed., Stevens & Sons Ltd. 9th ed. 1973).

34. **J.G. Castel, Canadian Conflict of Laws** 190 (Butterworths 2d ed. 1986).

35. See Furlan v. Shell Oil Co., [2000] 77 B.C.L.R.3d 35.

"real and substantial connection" criterion.[36] In that case, De Savoye entered into a mortgage for land in Alberta. By the time that the foreclosure action commenced in Alberta, De Savoye had moved to British Columbia, where he was served with the Statement of Claim ex juris. He did not return to the jurisdiction of the Alberta Court and resisted the action to enforce the Alberta judgment in British Columbia on that ground. Voicing the opinion of the Court, Justice La Forest made it clear that the Courts in a province should give "full faith and credit" to the judgments given by a Court in another province so long as that Court properly exercised jurisdiction in the action. He referred to the case of Moran v. Pyle National (Canada) Ltd.,[37] which, although it involved a tort action, is also instructive as to the manner in which a court may properly exercise jurisdiction in contract actions. Justice La Forest stated:

> [A] more flexible, qualitative and quantitative test, posing the question, as had some English cases there cited, in terms of whether it was "inherently reasonable" for the action to be brought in a particular jurisdiction, or whether, to adopt another expression, there was a "real and substantial connection" between the jurisdiction and the wrongdoing.[38]

Further on in the case, the Justice also stated:

> It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection

36. See Morguard Invs. Ltd. v. De Savoye, [1990] 76 D.L.R.4th 256.

37. See Moran v. Pyle Nat'l (Can.) Ltd., [1973] 43 D.L.R.3d 239.

38. Morguard, 76 D.L.R.4th at 276.

with the transaction or the parties.[39]

In Tolofson v. Jensen, Justice La Forest further elucidated the policy reason for the "real and substantial connection test" in De Savoye:

> In Canada, a court may exercise jurisdiction only if it has a "real and substantial connection" (a term not yet fully defined) with the subject matter of the litigation. This test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. In addition, through the doctrine of forum non conveniens a court may refuse to exercise jurisdiction where, under the rule elaborated in Amchem, there is a more convenient or appropriate forum elsewhere.[40]

The Morguard decision has subsequently been followed and interpreted further in cases like Moses v. Shore Boat Builders Ltd.[41] In Moses, the defendant agreed to build a fishing boat for the plaintiff who executed the contract and financed the purchase in his home state of Alaska. The boat was designed and built in British Columbia and shipped to Alaska. The engine of the boat required repairs and the plaintiff sued the defendant in Alaska. Based on these facts, the court held that the action had a real and substantial connection with Alaska.[42]

The same case also addressed the Canadian Supreme Court's injunction that the result must be

39. Id. at 278.

40. Tolofson v. Jensen, [1994] 3 S.C.R. 1022, 1049 (internal citations omitted).

41. Moses v. Shore Boat Builders Ltd., [1992] 5 W.W.R. 282.

42. Id. at 287.

"fair."[43] The Moses court held that when the British Columbia boat builder contracted to build a boat for someone in Alaska, he should have foreseen that problems of design or warranty might come up in Alaska and that the boat owner might wish to bring a suit in Alaska.[44] The court further concluded that the real and substantial connection test in Morguard did not require that only the court with the most substantial connection be recognized as having jurisdiction.[45] Justice Huddart stated:

> I do not think that the real and substantial connection test requires that Alaska be the only territory with which the contract and the parties to it have significant contacts, or even that it be the territory with the most significant contacts. In my view, the rule in Morguard requires only such contacts as constitute a sufficiently real and substantial connection to make reasonable Alaska's taking and exercise of jurisdiction in the absence of any objection by the defendant.[46]

This decision was appealed to the British Columbia Court of Appeal.[47] In dismissing the appeal and holding that the action had a real and substantial connection with Alaska, the Court of Appeal delineated a non-exclusive list of factors that courts may consider when applying the real

43. Id.

44. Id.

45. Id. at 288.

46. Id. (internal citations omitted).

47. Moses v. Shore Boat Builders Ltd., [1994] 1 W.W.R. 112.

and substantial connection test.[48] Such factors may include "the place the cause of action arose, the respective residences of the parties, whether the defendant conducted business or had other dealings in British Columbia, and other similar 'connecting factors.'"[49]

B. Civil Rules of Court Permitting Service ex juris Without Leave of Court

Having outlined the common law "real and substantial connection" test and the factors considered when determining personal jurisdiction in a case involving a foreign defendant, it should be noted that most Canadian provinces and territories also have rules of civil procedure that delineate the specific circumstances under which service of originating process outside the province (ex juris) may be made against a foreign defendant. These rules of civil procedure define the circumstances in which, prima facie, there is a real and substantial connection between the litigation and the forum such that a court in the province may assume jurisdiction.

1. Rule 13(1)

In British Columbia, for example, Rule 13(1) of the Civil Rules of Court lists the specific circumstances in which service ex juris of an originating process, without leave of court, may be affected on a foreign defendant.[50] The specific provisions within Rule 13(1) relevant to our inquiry in this paper include subparagraphs (g), (m) and (o):

> (1)Service of an originating process or other document on a person outside British Columbia may be effected without leave if:

48. Id. at 124.

49. Id.

> (g)the proceeding is in respect of a breach, committed in British Columbia, of a contract wherever made, even though the breach was preceded or accompanied by a breach outside British Columbia which rendered impossible the performance of the part of the contract which ought to have been performed in British Columbia, . . .
>
> (m) the proceeding is founded upon a contract. . .and the defendant has assets in British Columbia, . . .
>
> (o)the claim arises out of goods or merchandise sold or delivered in British Columbia.[51]

Before examining these provisions, it is important to consider the legal effect of a plaintiff's successful reliance upon one or more of the categories enumerated in Rule 13(1). In Asfordby Storage & Haulage v. Bauer, the British Columbia Supreme Court construed Rule 13(1) as comprising a list of circumstances in which, facially, there is a real and substantial connection between the lis and the forum.[52]

Subsequently, in Morguard Investments, Ltd. v. ME Pritchard Associates, Ltd., the same court

50. See **B.C. Reg.** 221/90, § 13(1).

51. Id.

52. Asfordby Storage & Haulage Ltd. v. Bauer, [1997] 47 B.C.L.R.3d 271, 274-75 ("[A] Canadian court might exercise legitimate jurisdiction over a defendant not domiciled or resident in the court's territory where there is a real and substantial connection between the action and the territory. Rule 13(1) may therefore be seen as a list of circumstances in which prima facie there is a real and substantial connection between the lis and the forum.").

held that the categories delineated in Rule 13(1) "have been deemed by the Legislature to have a real and substantial connection to the province."[53] The court stated, "Once this connection to the province has been established, the court assumes jurisdiction simpliciter over foreign defendants. Thus, in certain circumstances, the court deems that a foreign defendant may be served ex juris without leave of the court. This is commonly known as service ex juris as of right."[54]

Based on Bauer and ME Pritchard Associates, it would seem that a court in British Columbia could simply assume jurisdiction simpliciter over a foreign defendant served ex juris without leave of the court if the action plead fits within one of the categories in Rule 13(1).[55] However, subsequent decisions in British Columbia have rejected this view.[56] For example, in Global Light Telecommunications, Inc. v. GST Telecommunications, the court reasoned, "Although the factors in Rule 13(1) suggest a real and substantial connection, there may be situations where the circumstances required therein create a connection, but not one that meets the criteria of real and substantial."[57] In Skrdla v. Graham, the court applied the test espoused in Cook and stated:

> Rule 13(1) of the B.C. Rules of Court sets out the circumstances under which a B.C. court may assume jurisdiction over an ex juris defendant by way of service ex juris without a court order.

53. Morguard Invs. Ltd. v. M.E. Pritchard Assocs. Ltd., [1999] 30 C.P.C.4th 117, ¶ 16.

54. Id.

55. Id.; see also Bauer, 47 B.C.L.R.3d at 274.

56. See Global Light Telecomms. Inc. v. GST Telecomms. [1999] 33 C.P.C.4th 206; see also Cook v. Parcel, Mauro, Hutlin & Spaanstra PC, [1997] 31 B.C.L.R.3d 24.

57. Global Light Telecommunications, 33 C.P.C. at ¶ 21a.

> It is well established in Canadian law, however, that a court may only assume jurisdiction over parties to actions, which display a "real and substantial" connection with the jurisdiction. Thus, regardless of whether a defendant is served in accordance with R.13(1), for a B.C. court to properly assume jurisdiction a "real and substantial connection" must exist between B.C. and the action. From this, it is clear that the determination of whether a B.C. court has jurisdiction simpliciter over the plaintiff's claims requires an examination of those claims.[58]

Finally, in CRS Forestal v. Boise Cascade Corporation, the court again referred to the Cook opinion and further elucidated the significance and place of Rule 13(1) in the Court's determination of jurisdiction simpliciter over a foreign defendant.[59] The court stated:

> The burden is on a plaintiff to demonstrate that it has a good arguable case that this court has jurisdiction over a foreign defendant. Jurisdiction requires a real and substantial connection with the courts of British Columbia. This is not simply a question of the pleadings. The plaintiff must present an evidentiary basis for the allegations which amounts to a good arguable case. . . . . .[60]

The question that initially arises in these situations is whether the plaintiff has the right to serve a foreign defendant ex juris under Rule 13. The opinions cited above demonstrate that resolution of this question in favor of the plaintiff is not necessarily also determinative of

58. Skrdla v. Graham, [1999] B.C.J. No. 1169, ¶ 5 (internal citation omitted).

59. See CRS Forestal v. Boise Cascade Corp., [1999] 36 C.P.C.4th 283.

60. Id. at ¶ 9.

jurisdiction.[61] Jurisdiction simpliciter depends on whether there is a real and substantial connection between the court and either the defendant or the subject matter of the litigation.[62] In Procon Mining & Tunnelling Ltd. v. Waddy Lake Res., the court rejected the notion that qualification under Rule 13(1) establishes jurisdiction simpliciter in all cases.[63] In Procon and the other cases cited above, however, the courts did not consider the decision of the British Columbia Court of Appeal in Strukoff v. Syncrude Can. Ltd.[64] The opinion in Strukoff clearly indicates that qualification under Rule 13(1) establishes jurisdiction simpliciter and that reference to the "real and substantial connection" test is only made when the case does not fall into one of the categories provided in Rule 13(1).[65]

In summary, some lower courts in British Columbia have not followed the Court of Appeal's interpretation of Rule 13(1) in Strukoff. As a result, it would be prudent for a plaintiff relying on one of the categories in Rule 13(1) to serve a foreign defendant ex juris in order to ensure satisfaction of the "real and substantial connection" test when attempting to persuade the court to

61. Id. at ¶ 10 (citing Bushell v. T & N plc [1992], 67 B.C.L.R.2d 330, 342).

62. Cook, 31 B.C.L.R.3d at 30.

63. Procon Mining & Tunnelling Ltd. v. Waddy Lake Res. Ltd., [2002] 16 C.P.C. (5th) 30 (stating that precedent does not specifically state that qualification under Rule 13(1) establishes jurisdiction simpliciter. Id. at ¶ 24).

64. Strukoff v. Syncrude Can. Ltd., [2000] B.C.J. No. 2010.

65. Id. at ¶ 10 (stating that the "real and substantial connection" test should be considered only when the proceedings do not fall within the criteria listed in Rule 13(1) on an application under Rule 13(3)).

assume jurisdiction over a foreign defendant.

2. Rule 13(3)

Where an action does not fall within one of the categories set out in Rule 13(1), the plaintiff may obtain leave of the court under Rule 13(3) to serve a foreign defendant ex juris.[66] Rule 13(3) vests discretion in the court to allow the plaintiff to serve the defendant ex juris by the use of the word "may" in the rule.[67] In Exta-Sea Charters Ltd. v. Formalog Ltd., the court established four factors to consider when determining whether to invoke its discretion under Rule 13(3):

> [T]o invoke the discretion of the court under Rule 13(3) to order service upon a defendant not in the province, there must be a connection between:
>
> (a)the defendant and British Columbia; or
>
> (b)the cause of action and British Columbia; or
>
> (c)the thing being litigated over and British Columbia; or
>
> (d)a person and British Columbia where the status of that person is the issue.[68]

These factors are merely elements of the "real and substantial connection" test articulated in

66. **B.C. Reg**. 221/90, r. 13(1), (3).

67. **B.C. Reg**. 221/90, r. 13(3).

68. Exta-Sea Charters Ltd. v. Formalog Ltd., [1991] 55 B.C.L.R.2d 197, 204.

Morguard and subsequent cases where courts have unanimously held that, under Rule 13(3), plaintiffs must satisfy the "real and substantial connection" test.[69]

D. Declining Jurisdiction under the Doctrine of Forum Non Conveniens

Once a court assumes jurisdiction simpliciter, it may still decline jurisdiction over the legal proceeding if there is a more appropriate forum.[70] In Stern v. Dove Audio, Inc., the court addressed a forum non conveniens claim and established a non-exhaustive list of factors that may be considered when determining whether the forum chosen by the plaintiff is appropriate:

(1) Where each party resides.

(2) Where each party carries on business.

(3) Where the cause of action arose.

(4) Where the loss or damage occurred.

(5) Any juridical advantage to the plaintiff in this jurisdiction.

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69. See Morguard Invs. Ltd. V. DeSavoye, 76 D.L.R.4th 256, 274-79 (developing the "real and substantial connection" test to establish jurisdiction simpliciter); Bakers Helper Bakery Inc. v. Tony's Fine Foods Inc., [2002] B.C.J. No. 684, ¶ 9 (requiring the "real and substantial connection" test to establish jurisdiction simpliciter); Cook, 31 B.C.L.R.3d 24, 30 (requiring the "real and substantial connection" test to establish jurisdiction simpliciter); Pac. Int'l Sec. Inc. v. Drake Capital Sec. Inc., [2000] B.C.J. No. 2328, ¶ 12 (requiring the "real and substantial connection" test to establish jurisdiction simpliciter).

70. CRS Forestal v. Boise Cascade Corp., 36 C.P.C.4th 283, ¶ 11.

(6) Any juridical disadvantage to the defendant in this jurisdiction.

(7) Convenience or inconvenience to potential witness.

(8) Cost of conducting the litigation in this jurisdiction.

(9) Applicable substantive law.

(10) Difficulty and cost of proving foreign law, if necessary.

(11) Whether there are parallel proceedings in any other jurisdiction. ("Forum shopping" is to be discouraged.)[71]

After weighing these factors, the court will determine if there is a more appropriate jurisdiction in which to try the claim.[72]

E. Affecting Service ex juris on a Foreign Defendant (Online Vendor) Pursuant to the British Columbia Civil Rules of Court

As has already been explained, a plaintiff in British Columbia may rely on one or more subparagraphs in Rule 13(1), namely, subparagraphs (g), (m), and (o) to affect service ex juris on

71. Stern v. Dove Audio, Inc., [1994] B.C.J. No. 863, ¶ 62; see also Procon Mining & Tunnelling Ltd. v. Waddy Lake Res. Ltd., [2002] 16 C.P.C.5th 30, ¶ 40 (referring to the list in Stern).

72. Stern, B.C.J. No. 863 at ¶ 60 (stating also, "The court should decline jurisdiction only where it is clear that there is a more appropriate forum for trial of the action.").

a foreign online vendor without leave of court.[73] Alternatively, if the evidence falls short of establishing any of the categories in Rule 13(1), the plaintiff may rely upon Rule 13(3) and seek leave of the court to affect service ex juris on the foreign online vendor.[74]

1. 13(1)(g)

Rule 13(l)(g) allows service ex juris by a British Columbia plaintiff if there is a breach of contract that occurs in British Columbia, regardless of where the contract was made.[75] In a recent decision, Bruk v. Eduverse.com, the Supreme Court of British Columbia limited this rule, at least in theory, by holding that Rule 13(1)(g) requires that the breach of contract render performance of the part of the contract that should have been performed in British Columbia impossible.[76] Although parties, when invoking Rule 13(1)(g), should be aware of the decision in Bruk, most courts do not emphasize the impossibility requirement and simply focus on the question of whether the breach of contract occurred in British Columbia.

Where a foreign online vendor enters into a contract to sell goods to a British Columbia

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73. See **B.C. Reg**. 221/90, r. 13(1)(g) (allowing service ex juris if there is a breach of contract in British Columbia, regardless of where the contract was made); **B.C. Reg.** 221/90, r. 13(1)(m) (allowing service ex juris where the legal proceeding initiated by the plaintiff is founded upon a contract, and the defendant has assets in British Columbia); **B.C. Reg**. 221/90, r. 13(1)(o) (allowing for service ex juris where "the claim arises out of goods or merchandise sold or delivered in British Columbia").

74. **B.C. Reg**. 221/90, r. 13(3).

75. **B.C. Reg**. 221/90, r. 13(1)(g).

76. Bruk v. Eduverse.com, [2002] B.C.J. No. 127, ¶ 10.

consumer, the latter should not be concerned with establishing whether the contract was entered into in British Columbia or in the jurisdiction of the foreign online vendor when invoking Rule 13(1)(g).[77] Rule 13(1)(g) alleviates the problem of determining where the last act essential for the formation of the contract took place, since it is not important where the contract was consummated.[78] Instead, the British Columbia consumer will have to establish that the breach of the contract occurred in British Columbia.[79] It should be noted, however, that if the consumer is required to satisfy the additional requirement of Rule 13(1)(g) imposed by the court in Bruk, the consumer might face a greater challenge in successfully invoking the rule.[80]

2. 13(1)(m)

Rule 13(1)(m) allows a British Columbia plaintiff to serve a foreign defendant ex juris where the legal proceeding is founded upon a contract and the defendant has assets in British Columbia.[81] Under Rule 13(1)(m), the court makes a two-part inquiry: first, whether the plaintiff's action is based upon a contract; and if so, whether the defendant has assets in British

77. **B.C. Reg**. 221/90, r. 13(1)(g).

78. Id.

79. Id.

80. See Bruk, B.C.J. No. 127 at ¶ 10 (adding an impossibility requirement to Rule 13(1)(g)).

81. **B.C. Reg**. 221/90, r. 13(1)(m).

Columbia.[82] The burden is on the plaintiff to establish both these elements.[83]

In Northern Sales Co. v. Gov'ernment Trading Corp. of Iran, the court articulated this two-part inquiry under Rule 13(1)(m).[84] The defendant in this case agreed to purchase grain from the plaintiff.[85] Pursuant to the contract, the risk (but not possession) in the grain was to pass from the seller to the buyer when the grain left the spout at the elevator and was placed on board a ship.[86] The defendant accepted, but failed to pay for the grain shipments, and the plaintiff brought suit in British Columbia.[87] Because the defendant did not carry on business in British Columbia,[88] the plaintiff relied upon Rule 13(1)(m) to serve the writ on the defendant ex juris.[89] As there was no issue with respect to the first requirement: that the proceeding be founded upon a contract, the court focussed on the second requirement: the defendant must have assets in British Columbia.[90] The plaintiff argued that the second requirement is satisfied if, at the time

82. Id.; see also N. Sales Co. v. Gov't Trading Corp. of Iran, [1991] 81 D.L.R.4th 316, 320.

83. Islip v. Coldmatic Refrigeration of Can., [2000] B.C.J. 223 No. ¶ 7.

84. See N. Sales Co., 81 D.L.R.4th at 320.

85. Id. at 317.

86. Id. at 320.

87. Id. at 317.

88. Id.

89. Id. at 319.

90. Id. at 321.

the action is commenced or thereafter, the defendant has any property within British Columbia, even if only for a brief period.[91] The court, however, rejected the plaintiff's interpretation, holding that such a literal reading of the requirement is incorrect.[92] The court stated that although the language "has assets in British Columbia" is ambiguous, it was not intended to include such a fleeting relationship with British Columbia as suggested by the plaintiff.[93]

Satisfying the second requirement of Rule 13(1)(m), therefore, requires something more than a fleeting relationship with British Columbia or the mere transitory presence of the defendant's assets in British Columbia.[94] With respect to the latter point, the Northern Sales court held that the defendant's assets must be present in British Columbia when the writ is issued or on the date it is served on the defendant, not simply at any time prior to the date of judgment.[95] The defendant did not have any assets in British Columbia either on the day the writ was issued or the day it was served; therefore, the second inquiry of Rule 13(1)(m) was not satisfied.[96]

The British Columbia Supreme Court further expounded on the requirements of Rule 13(1)(m)

91. Id.

92. Id. at 322.

93. Id.

94. Id.

95. Id. at 322-23.

96. Id.

in Islip v. Coldmatic Refrigeration Ltd.[97] In Islip, the defendant applied to set aside the plaintiff's service ex juris of a writ and statement of claim.[98] The plaintiff brought a wrongful dismissal action against the defendant in British Columbia based on an employment contract.[99] The defendant was an Ontario corporation in the business of manufacturing freezer display and storage units at its plant in Ontario and selling them to customers in Canada and the United States.[100] The plaintiff effected service on the defendant without leave of the court.[101] The defendant argued that Ontario was the more appropriate forum for the proceeding, alleging that, although negotiations took place between the parties in British Columbia, no contract was ever completed.[102] The defendant conceded that there was a contract of employment between the parties, but claimed that it had no assets in British Columbia and, further, had never carried on business, owned or operated offices, or employed anyone in British Columbia.[103] The plaintiff argued that the defendant had assets in the form of accounts receivable owed by its British

97. Islip, B.C.J. No. 223 at ¶ 1.

98. Id.

99. Id. at ¶ 2.

100. Id. at ¶ 9.

101. Id. at ¶ 1.

102. Id. at ¶ 8.

103. Id.

Columbia customers.[104]

The court held that the test for service ex juris under Rule 13(1)(m) does not involve consideration of whether the defendant is carrying on business within the province, but instead whether the defendant has assets within British Columbia.[105] The court referred to the holding in Northern Sales and found that the defendant's accounts receivables in British Columbia satisfied the second requirement of Rule 13(1)(m).[106] In Islip, the defendant's sales in British Columbia constituted five percent of its total business.[107] With sales at that level, the plaintiff asked the court to assume that there were probably accounts receivable in the aggregate.[108] Because the defendant presented no evidence to the contrary, the court agreed that the aggregate accounts receivable were significant enough to satisfy the second requirement.[109]

Applying Rule 13(1)(m) in a proceeding involving or arising out of an online transaction, the first requirement of the rule—that the proceeding be founded upon a contract—is not a very difficult one for the online consumer to satisfy. Online consumer transactions involve an offer to purchase by one party, an acceptance of that offer by another, and, thus, the formation of a

104. Id. at ¶ 12.

105. Id. at ¶ 11.

106. Id. at ¶¶ 15-20.

107. Id. at ¶ 19.

108. Id.

109. Id.

contract between them. However, it is the second and conjunctive requirement of the rule—that the defendant have assets in British Columbia—that may be more difficult for the British Columbia online consumer to prove. While Islip made it clear that Rule 13(1)(m) does not require that the defendant conduct business in British Columbia,[110] it is, perhaps, more likely that a foreign online vendor who regularly or consistently conducts business with British Columbia residents—be it consumers, businesses, dealers, or end users—will have accounts receivable in British Columbia, which may constitute "assets" within the jurisdiction under Rule 13(1)(m). Depending on the nature and extent of such receivables and the availability of evidence establishing them, the online consumer in British Columbia may be able to satisfy the second requirement of Rule 13(1)(m) and accordingly serve the foreign online defendant ex juris.

3. Rule 13(1)(o)

Rule 13(1)(o) allows for service ex juris where the claim arises out of goods or merchandise sold or delivered in British Columbia.[111] When a plaintiff invokes this rule, the court simply focuses on two issues: (1) whether the goods or merchandise were sold in British Columbia, and (2) whether the goods or merchandise were delivered in British Columbia?[112] The rule requires that there be evidence to satisfy at least one of these requirements.[113] In other words, if the answer to either question is in the affirmative, then the rule may be properly and successfully

110. See id. at ¶ 11.

111. **B.C. Reg**. 221/90, r. 13(1)(o).

112. Id.

113. Id.

invoked.[114]

In the context of an online transaction, the second question may be more likely answered in the affirmative than the first. With respect to whether the goods or merchandize were sold in British Columbia, it is more likely that the online British Columbia consumer's acceptance via her computer of the foreign vendor's offer to sell is received by the foreign vendor in his jurisdiction. Therefore, the goods or merchandise will likely be found to have been sold in the jurisdiction of the foreign online vendor where the contract was formed.

In Eastern Power Ltd. v. Azienda Communale Energia & Ambiente, the court stated that the general rule of contract law is that a contract is made in the location where the offeror receives notification of the offeree's acceptance.[115] There is an exception to this general rule, however, called the postal acceptance rule, which states that when contracts are to be concluded by post, the mailing place of the acceptance is treated as the location where the contract was made.[116] Even the exception is not absolute, however, particularly when applied to instantaneous communication between parties.[117] The court discussed several cases in which the postal exception rule was not invoked. First, in Brinkibon Ltd. v. Stahag Stahl G.m.b.H., a London buyer sent an acceptance to a seller in Vienna by telex, a form of instantaneous

114. Id.

115. E. Power Ltd v. Azienda Communale Energia & Ambiente, [1999] O.J. No. 3275, ¶ 22.

116. Id.

117. Id.

communication.[118] The court found that the contract was formed in Vienna, the location of the seller.[119] Then, in Joan Balcom Sales Inc. v. Poirier, two vendors in Ottawa accepted via facsimile an offer to sell from a real estate company in Berwick, Nova Scotia.[120] The court held that the contract was formed, in accordance with the general rule, in Berwick, Nova Scotia, where the real estate company received the vendor's acceptance.[121]

On the basis of the court's reasoning in Eastern Power, there is a persuasive argument that a British Columbia consumer's electronic acceptance of a foreign online vendor's offer to sell is analogous to acceptance by facsimile transmission.[122] Both modes of transmission or communication are instantaneous, and therefore, it is likely that the general rule of contract formation will govern online transactions.[123] In such a case, it is unlikely that Rule 13(1)(o) would apply based on whether the goods or merchandise were sold in British Columbia.

Turning to the second question under Rule 13(1)(o), concerning whether the goods or merchandise were delivered in British Columbia, it should be noted that most tangible goods or merchandise sold online to a consumer are delivered to the consumer either by mail, courier, or

118. Id. at ¶ 24.

119. Id.

120. Id. at ¶ 26.

121. Id.

122. See id. at ¶¶ 27-29.

123. See **Michael Geist, Internet Law in Canada** 658 (2d ed. 2001).

some other form of delivery. In the case of downloadable software or programs sold online, if a British Columbia consumer is sitting at her computer and downloading the software in British Columbia, she is arguably receiving delivery of the product in British Columbia.[124] With this in mind, it is much more likely that Rule 13(1)(o) will permit service ex juris based on delivery, rather than sale, of goods or merchandise purchased online by British Columbia consumers.

4. Rule 13(3)

Where the evidence falls short of satisfying Rule 13(l)(g), (m), or (o), the plaintiff may apply to the court for leave to serve an originating process ex juris pursuant to Rule 13(3).[125] In fact, it is advisable for any plaintiff to rely on and apply for leave under Rule 13(3) even where the plaintiff is convinced that there is sufficient evidence to satisfy one or more categories under Rule 13(1) to effect service ex juris without leave of court. In doing so, the plaintiff protects himself from the potential difficulty of a foreign defendant successfully challenging such service.

As previously indicated, in considering a Rule 13(3) application, the court, as a prerequisite to invoking its discretion to order service ex juris on a foreign defendant, will apply the real and substantial connection test as delineated in Exta-Sea Charters Ltd.[126] The court will examine the

124. However, it is also possible that the British Columbia consumer, in purchasing the downloadable software, may not satisfy either of the requirements of Rule 13(1)(o). An example of this may be where the British Columbia resident is purchasing software and downloading the same over her laptop computer while she is outside of British Columbia.

125. **B.C. Reg**. 221/90, r. 13(3).

126. Exta-Sea Charters Ltd. v. Formalog Ltd., [1991] 55 B.C.L.R.2d 197, 198.

facts of the case to determine whether the plaintiff has discharged the onus on him or her of establishing a connection between (a) the defendant and British Columbia; (b) the cause of action and British Columbia; (c) the thing being litigated over and British Columbia; or (d) a person and British Columbia where the status of that person is in issue.[127]

Therefore, if a consumer brings a legal proceeding in British Columbia against a foreign vendor based on an online transaction, the court may order service ex juris on the foreign vendor if the consumer establishes a connection between the foreign vendor and British Columbia, the cause of action and British Columbia, or the matter being litigated and British Columbia.[128] Each of these three possible connections will be examined below.

a. Connection Between a Foreign Online Vendor and British Columbia

If a foreign online vendor is "carrying on business" within British Columbia, the court will likely find a connection to exist between the vendor and British Columbia and thus order service ex juris on the vendor.[129] Black's Law Dictionary defines "carrying on business" as "conduct[ing], prosecut[ing], or continu[ing] a particular avocation or business as a continuous operation or permanent occupation. The repetition of acts may be sufficient. To hold one's self out to others as engaged in the selling of goods or services."[130] The phrase "carrying on

127. Id. at 204.

128. Id.

129. See id. at 206; Lainiere De Roubaix, S.A. v. Craftsmen Distribs. Inc., [1991] 55 B.C.L.R.2d 103, 106; Re Geigy (Can.) Ltd., [1968] 66 W.W.R. 689, 691.

130. **Black's Law Dictionary** 214 (6th ed. 1990).

business" also has a statutory definition in the British Columbia Company Act, and common law definitions of the phrase have evolved and been modified over time in recognition of developments in modern business practices.[131] Section 1(8) of the British Columbia Company Act defines "carrying on business" as follows:

> For the purposes of this Act, a corporation is deemed to carry on business in British Columbia if:
>
> (a)its name, or any name under which it carries on business, is listed in a telephone directory for any part of British Columbia,
>
> (b)its name, or any name under which it carries on business, appears or is announced in any advertisement in which an address in British Columbia is given,
>
> (c)it has a resident agent, or representative or warehouse, office or place of business in British Columbia, or
>
> (d)it otherwise carries on business within British Columbia. . . .[132]

Significantly, the requirements in subparagraphs (a) through (d) of Section 1(8) are disjunctive, not conjunctive. Therefore, a company must only meet one of the above definitions to be considered to be "carrying on business" within British Columbia.

131. Company Act, R.S.B.C., ch. 62, § 1(8) (1996) (Can.).

132. Id.

In the case of foreign online vendors, it is unlikely that they will have a listing in a telephone directory for any part of British Columbia; a British Columbia address in any advertisement; a resident agent, or representative or warehouse, office or place of business in British Columbia, as the rule requires. Thus, it is unlikely that a foreign online vendor will be found to be "carrying on business" in British Columbia under the definitions in subparagraphs (a) through (c) of Section 1(8) of the Company Act. However, a company may still be found to be "carrying on business" in British Columbia under the residual subparagraph (d) in Section 1(8) if the court is satisfied that the company is "otherwise carrying on business within British Columbia".[133] Whether a company falls under subparagraph (d) is a question of fact.[134]

In Wilson v. Hull, the appellant, an Alberta resident, appealed from the trial judge's refusal to set aside the registration of an Idaho default judgment rendered against him pursuant to Alberta's Reciprocal Enforcement of Judgements Act.[135] The Court of Appeal focused on the correctness of the trial judge's finding that the Alberta resident was in fact "carrying on business" in Idaho within the meaning of the Act.[136] While the court allowed the appeal, Justice McFadyen., in her dissenting opinion, laid out several factors to be considered in determining whether a party is "carrying on business":

(1) the judgement debtor must be engaged in some serious business activity in the jurisdiction

133. Id. § 1(8)(d).

134. Lainiere De Roubaix, 55 B.C.L.R.2d at 105-06; Re Geigy (Can.) Ltd., 66 W.W.R. at 691-92.

135. Wilson v. Hull, [1995] 34 Alta. L.R.3d 237, ¶ 1.

136. Id. at ¶ 2.

as distinct from a pastime or hobby;

(2) he/she must devote time, labor, skill or effort in the jurisdiction;

(3) the activity carried on in the jurisdiction should be of some importance or significance to the business endeavour of the debtor; and

(4) there should be some continuity or consistency to the business activity as distinct from an isolated transaction or series of transactions. [137]

These factors were subsequently adopted in a more recent opinion.[138] The dissent declined to address whether the term is "broad enough to encompass one who occasionally purchases business goods on a casual basis," but she did state that "a person may carry on business in several places at the same time."[139]

In Global Equity Corp. v. MKG Enterprises Corp., the British Columbia Supreme Court focused on the fourth factor from the Wilson dissent, namely, continuity in the business activity in the jurisdiction.[140] In Global Equity, an Ontario company entered into a single loan transaction with a British Columbia company. The latter defaulted on the loan and the Ontario company commenced an action in British Columbia. At issue was whether the Ontario company

137. Wilson, 34 Alta. L.R.3d at ¶ 50.

138. Thomas v. Peace Hills, [2001] 212 Sask. R. 21, ¶ 21.

139. Wilson, 34 Alta. L.R.3d at ¶ 50.

140. Global Equity Corp. v. MKG Enters. Corp., [1997] B.C.J. No. 1423, ¶ 9.

was carrying on business in British Columbia by reason of the single loan transaction. The court held that the isolated transaction did not amount to the carrying on of business by the Ontario company in British Columbia.[141] The court relied heavily upon A.J. Rathwell v. Pier Mack Tractor Ltd.,[142] wherein the British Columbia County Court recognized that "'carrying on' implies a repetition or series of acts," rather than a single transaction.[143] The Global Equity court also pointed out, however, that there may be an exceptional case such as Success International Inc. v. Environmental Export International of Canada, Inc.,[144] where one transaction in the Province could amount to carrying on business in the Province, but the court distinguished that case from the one before it:

> I quite accept that one transaction in a province could amount to carrying on business there. An example is to be found in Re Success where the magnitude and duration of what was a single transaction for the purchase of used tire restoration equipment and the activities associated with it were said to be features distinguishing the circumstances from those in the isolated transaction cases cited. There an American company was held to be carrying on business because it opened a large office in the province, furnished it with supplies, and engaged a full-time project manager and a staff of 22 for a period of six months. But, clearly,

141. Id.

142. [1981] B.C.D. Civ. 736-01.

143. Global Equity Corp., B.C.J. No. 1423 at ¶ 5.

144. [1995] 23 O.R.3d 137.

that is not this case.[145]

Additional factors considered by the courts in determining whether a company is carrying on business in a particular jurisdiction include where the contract at issue was made[146] and whether the contractual price is in Canadian dollars.[147] In Laniere De Roubaix, however, the fact that the contract price was in Canadian dollars and payment was to be made by checks drawn in British Columbia was not considered to be a sufficient connection with British Columbia to transform a business operation, which in all other respects was carried on elsewhere, into one carried on in British Columbia.[148]

More recently, in recognition of the reality of modern business practices, the British Columbia Court of Appeal, in the dicta of Pacific International Securities Inc. v. Drake Capital Securities Inc.,[149] observed that a party can carry on business in a jurisdiction through electronic means without having a physical presence in that jurisdiction. The court noted, "In the world of electronic commerce, physical locations can become almost incidental and other factors assume

145. Global Equity Corp., B.C.J. No. 1423 at ¶ 6.

146. Lainiere De Roubaix S.A. v. Craftsmen Distributors Inc., [1991] 55 B.C.L.R.2d 103, 106; Re Geigy (Can.) Ltd., 66 W.W.R. 689, 692.

147. John A. McAfee Law Corp. v. Willey, [2002] 20 B.L.R.3d 147, ¶ 16.

148. Lainiere De Roubaix, 55 B.C.L.R.2d at 106.

149. [2000] 82 B.C.L.R.3d 329.

greater importance."[150]

In Thomas v. Peace Hills Trust, Justice Klebuc of the Saskatchewan Court of Queens Bench echoed the view expressed in the dicta of Pacific International Securities Inc. and further suggested an even more expansive definition of "carrying on business," which recognizes new media for conducting business, such as the Internet and e-mail.[151] After reviewing the historical definitions of what constitutes "carrying on business," the court stated:

> In my view, the aforementioned historical definitions were responsive to the socio-economic factors then in place, and particularly to the dominant business model then in place, now frequently referred to in financial markets as the "brick and mortar model" for transacting commerce. An example of a brick and mortar operation would be a typical department store that invites potential customers to its physical premises for the purpose of viewing and purchasing goods it has for sale. . . . In recent years, the Internet, electronic mail, automated teller machines, facsimile machines, and better avenues of travel have enabled manufacturers, service providers, lending institutions, and others to extend their business operations far beyond their physical facilities by sending out agents to solicit and transact business in areas well beyond their traditional trading areas.

150. Id. at ¶¶ 19-20. In Pacific International Securities, the appellants "engage[d] in the business of selling U.S. securities to Canadian dealers. . .and buying Canadian securities for U.S. accounts. . . [.]. . ." Id. Noting that "securities transactions involve intangible property effected by electronic means through various intermediaries in different physical locations," the court stated that it was arguable, based on these facts, that the appellants carried on business in British Columbia. Id.

In my view, the "off-premises" approach to transacting commerce necessitates an expansion of what was traditionally understood as "carrying on business" in order to ensure citizens have access to this Court within reasonable proximity to where they live and customarily transact business. When viewed from a policy perspective, a commercial institution that chooses to engage in "off-premises" commerce is better able to absorb or distribute the cost associated with legal proceedings being tried at the judicial center nearest to the point of contact between it and the customer than the customer.[152]

Cases like Pacific International Securities and Thomas demonstrate that the courts are receptive to expanding the definition of the phrase "carrying on business" to accommodate technological developments in the manner in which business is conducted.[153] The courts recognize that there are new forums and avenues of communication, such as the Internet, through which business may be conducted by vendors in locations far away from their traditional "brick and mortar" locations.[154] This recognition of the modern business reality allows for a finding that a foreign online vendor may be carrying on business in a jurisdiction without any physical presence in that jurisdiction, particularly where there is evidence of continuity or consistency in the foreign online vendor's business activities.

151. Thomas, 212 Sask. R. at ¶ 16.

152. Id. at ¶¶ 14, 16.

153. See supra notes 149-152 and accompanying text.

154. See Thomas, 212 Sask. R. at ¶ 14.

b. Connection Between the Cause of Action and British Columbia

If there is a connection between British Columbia and the cause of action, the court will generally order service ex juris on the vendor pursuant to Rule 13(3).[155] As to what constitutes a connection between the cause of action and British Columbia, it is submitted that where there is a connection between the events giving rise to the proceeding and British Columbia, such as damages that are sustained in British Columbia, a court may find a connection to exist for purposes of Rule 13(3). In the case of damages sustained in British Columbia, Pacific International Securities reiterated that British Columbia courts are not precluded from taking jurisdiction simpliciter when damages, either in contract or tort, are sustained within the province.[156] In Pacific International Securities, the plaintiff, a securities dealer in British Columbia, commenced an action against the defendant, a securities dealer in the United States, for a breach of contract to deliver shares the plaintiff purchased from the defendant for its client. The plaintiff purchased replacement shares for the client at a higher cost in the open market and claimed as damages the difference in the value. The plaintiff served the writ on the defendant ex juris pursuant to Rule 13(1)(g) on the basis that the breach of contract occurred in British Columbia. The defendant contested the service on the ground that any breach of contract occurred outside British Columbia. The chambers judge ruled in favor of the defendant on the Rule 13(1)(g) challenge because of the plaintiff's failure to show that the alleged breach of contract occurred in British Columbia. However, he found that there was a real and substantial

155. See supra notes 73-74 and accompanying text.

156. Pac. Int'l Sec. Inc. v. Drake Capital Sec. Inc., 82 B.C.L.R.3d 329, ¶ 18.

connection between the action and British Columbia and granted the plaintiff leave to serve the writ ex juris pursuant to Rule 13(3).[157] In addition, the chambers judge concluded that jurisdiction should not be declined on forum non conveniens grounds.[158]

The defendant appealed the ruling of the chambers judge, contending that the plaintiff did not meet the real and substantial connection test under Rule 13(3) and that the judge erred in his application of the forum non conveniens test. Justice Mackenzie, writing for the majority, in the Court of Appeal, rejected both grounds of the defendant's appeal, upholding the decisions of the chambers judge.[159] On the issue of service ex juris pursuant to Rule 13(3), the majority found that there was a real and substantial connection between the cause of action and British Columbia since the plaintiff had suffered damages in British Columbia.[160] In arriving at this conclusion, the court referred to and drew support from the Ontario Rules of Practice, which, unlike the British Columbia Rules of Court, specifically allow service ex juris as of right where damages are sustained in the province, which arise from a breach of contract committed elsewhere.[161] The court stated:

> The connection of the damage sustained to jurisdiction is not a specific ground for asserting jurisdiction in Rule 13(1). The Ontario rule comparable to Rule 13(1) is Rule 25(1)(h) of the

157. Id. at ¶ 2.

158. Id.

159. Id. at ¶¶ 22, 26.

160. Id. at ¶ 21.

161. Id. at ¶ 15.

> Ontario Rules of Practice, which allows service ex juris "in respect of damage sustained in Ontario arising from a. . .breach of contract committed elsewhere." The Ontario rule implies that damage sustained within the jurisdiction arising from a breach of contract outside the jurisdiction meets the real and substantial connection test discussed in authorities such as De Savoye v. Morguard Investments Limited and Tolofson v. Jensen. Thus, jurisdiction on that ground is consistent with the general principles of conflict of laws and inter-jurisdictional comity. Although unlike Ontario, damage sustained within the jurisdiction is not a specific ground for asserting jurisdiction in a breach of contract case under Rule 13(1), I see no reason why it cannot be relied upon as a real and substantial connection "in any other case" under Rule 13(3).

In my view, neither Nitsuko nor Ell precludes the British Columbia courts from taking jurisdiction simpliciter where the damages, either in contract or tort, are sustained in British Columbia.[162]

Similarly, in Kitakufe v. Oloya, the Ontario Court of Justice found a connection between Ontario and the cause of action where the plaintiff allegedly suffered damages in the province.[163] This was a tort case involving an allegation of libel against the defendant. The defendant was a reporter for a newspaper published in Uganda and re-published on the Internet. The plaintiff was a medical doctor. Both the plaintiff and the defendant were Ontario residents of Ugandan background. The defendant wrote an article that referred to a Ugandan doctor arrested in

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162. Id. at ¶¶ 15, 18 (internal citations omitted).

163. [1998] O.J. No. 2537.

Toronto. The plaintiff claimed that the article suggested that he was dishonest or that he was guilty of professional misconduct. The defendant applied for an order staying the plaintiff's action contending that the action should have been brought in Uganda. The Court, in dismissing the defendant's application and finding Ontario to be the proper forum, reasoned that both parties resided in Ontario and the harm was suffered there.[164]

By way of contrast, in Old North State Brewing Co. v. Newlands Service Inc., the British Columbia Court of Appeal recognized a connection between the cause of action and a foreign jurisdiction and, thus, the jurisdiction of the foreign court to adjudicate the dispute.[165] The defendant, who carried on the business of manufacturing and selling brewery equipment in British Columbia, obtained a contract to supply equipment to the plaintiff brewery in North Carolina. The defendant supplied defective equipment and, after numerous attempts by the defendant to remedy the defects, the plaintiff brought an action against the defendant in North Carolina for breach of warranty. Relying on a contract clause providing that the parties would attorn to the British Columbia court, the defendant did not defend the action in North Carolina. The plaintiff obtained a default judgment for $1.6 million against the defendant in North Carolina and subsequently obtained a summary judgment in British Columbia based on the foreign judgment. The defendant appealed from the decision to enforce the foreign judgment, contending that the choice of forum clause in the contract gave British Columbia exclusive jurisdiction in disputes. The defendant also contended that the choice of law clause in the

164. Id. at ¶¶ 13, 16.

165. [1998] 41 B.L.R.2d 191.

contract provided for the application of British Columbia law to any disputes between the parties, which rendered the judgment based on North Carolina law unenforceable. Moreover, the defendant argued that it was contrary to the public policy of British Columbia to enforce the North Carolina judgment, as it awarded treble and punitive damages to the plaintiff.

The Court of Appeal, in rejecting the defendant's arguments and dismissing the appeal, held that the choice of jurisdiction clause in the contract did not confer exclusive jurisdiction on British Columbia courts.[166] Further, the Court of Appeal stated that the defendant had been properly served with process and had chosen not to defend.[167] The burden was on the defendant to prove British Columbia law and therefore, in the absence of such proof, the North Carolina court was entitled to assume that the law of British Columbia was the same as North Carolina law.[168] The Court of Appeal also stated that the enforcement of treble and punitive damage awards in Canada was not contrary to public policy.[169] Finally, and most importantly for purposes of this discussion, the Court of Appeal upheld the finding of the lower court that the North Carolina court had jurisdiction in the matter, as there existed a real and substantial connection between the cause of action and the State of North Carolina.[170] In particular, the Court of Appeal noted that the defendant represented itself as an international business in its

166. Id. at ¶ 23.

167. Id. at ¶¶ 40, 42-43.

168. Id. at ¶ 35.

169. Id. at ¶¶ 45, 52.

170. Id. at ¶ 32.

Internet advertisements; the purchase of the defendant's equipment was made in North Carolina; the equipment was installed in North Carolina; and the plaintiff suffered losses in North Carolina.[171] Thus, the real and substantial connection between the cause of action and North Carolina founded the jurisdiction of the North Carolina court.[172]

c. Connection Between British Columbia and the Subject Matter of the Litigation

Lastly, a British Columbia consumer can obtain an order to serve a foreign online vendor ex juris pursuant to Rule 13(3) by establishing a connection between British Columbia and the subject matter of the litigation.[173] The British Columbia Supreme Court considered this basis for establishing a real and substantial connection in Global Light Telecommunications Inc. v. GST Telecommunications Inc.[174] In this case, the defendants, GST and Telecom, brought an application for a declaration that the court did not have jurisdiction in the action brought against them by the plaintiffs, Global and Mextel. The defendant, Telecom, an American company, was a subsidiary company of Gus, another American company. Gus was a wholly owned subsidiary of the defendant GST, a Canadian company with its registered office in British Columbia.[175] In 1996, the defendant, GST, invested in a communications project in Mexico with Bestel, a Mexican company. The plaintiff, Mextel, was then incorporated as a wholly owned subsidiary

171. Id. at ¶ 31.

172. Id. at ¶¶ 28-29, 32 (citing Morguard and Moses).

173. Exta-Sea Charters Ltd. v. Formalog Ltd., [1991] 55 B.C.L.R.2d 197, ¶¶ 21-25.

174. Global Light Telecomm. Inc. v. GST Telecomm. Inc., [1999] B.C.J. No. 1153.

175. Id. at ¶ 2.

of Gus to hold GST's 49% interest in the Bestel project. Mextel's shares ended up being transferred to the plaintiff, Global, a Canadian company based in Vancouver. In 1998, the defendant, GST, commenced an action in California, alleging that its directors perpetrated fraud by transferring the Bestel project to the plaintiff, Global, with no compensation to GST.[176] The plaintiff, Global, successfully filed a motion in the California court to stay the proceeding on the ground that British Columbia was the convenient forum.[177] Subsequently, the plaintiffs, Global and Mextel, brought an action in British Columbia alleging that GST and Telecom breached the agreement that the Bestel project would be transferred to Global via Mextel's shares.[178]

The court dismissed the defendants' application, finding that that there was a real and substantial connection between British Columbia and the subject matter of the litigation, because both plaintiff Global and defendant GST were Canadian companies situated in British Columbia and subject to the regulations of the Vancouver stock exchange.[179] Further, the court reasoned that if a binding transfer agreement did exist, then the breach caused losses to Global in British

176. Id. at ¶ 10.

177. Id. at ¶ 11.

178. Id. at ¶ 16.

179. Id. at ¶¶ 25-26 ("GST is listed on the VSE and subject to the rules and regulations of the VSE, as is Global. Any transfer of Global shares to GST would be subject to VSE approval. The Control Agreement dated October 12, 1996, between GST and Odetel, states that GST's relationship with Global is to be governed by Canadian law.").

Columbia.[180]

III. JURISDICTION UNDER U.S. LAW

Reiterating the introduction to this article, developing an understanding of when a Canadian online vendor may be hauled into courts of jurisdiction outside Canada can be accomplished by examining the U.S. law governing assumption of personal jurisdiction over foreign parties. This is so because U.S. courts have had much more experience in adjudicating e-commerce related disputes than the courts of any other nation. Additionally, Canadian online vendors are more likely to sell online to American consumers than to consumers from any other country because Americans are the largest group of online consumers in the world.

In the United States, the law governing assumption of personal jurisdiction over a foreign party involves a two-part inquiry: a statutory inquiry and a constitutional inquiry.[181] Both must be satisfied before a court may exercise personal jurisdiction over a defendant. In CompuServe, Inc. v. Patterson, the Sixth Circuit delineated this test:

> To determine whether personal jurisdiction exists over a defendant, federal courts apply the law of the forum state, subject to the limits of the Due Process Clause of the Fourteenth Amendment. "[T]he defendant must be amenable to suit under the forum state's long-arm statute and the due process requirements of the Constitution must be met. . . ."[182]

180. Id. at ¶ 26 ("[T]he defendants' breach in refusing to complete the Agreement and in seeking the return of the Mextel shares has caused losses to the plaintiffs in British Columbia.").

181. CompuServ, Inc. v. Patterson, 89 F.3d 1257, 1263 (6th Cir. 1996).

182. Id. (quoting Reynolds v. Int'l Amateur Athletic Fed'n, 23 F.3d 1110, 1117 (6th Cir. 1994)) (emphasis

The first inquiry involves an examination of the forum state's long-arm statute to determine whether the cause of action against the foreign defendant falls within its limits.[183] This analysis is analogous in many respects to the inquiry that Canadian courts undertake when examining the local civil procedure or rules governing their jurisdiction over foreign parties.

The second inquiry, the constitutional question, arises because the statutory grant of jurisdiction within the state must be exercised in accordance with the limitations of the Fourteenth Amendment's Due Process clause.[184] In principle, this step is analogous to the inquiry that the Canadian courts undertake when examining if there is a "real and substantial connection" between the lis (i.e., the subject matter of the litigation) and the forum where the action is brought.[185] In International Shoe Co. v. Washington, the United States Supreme Court discussed this constitutional requirement:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and

added).

183. Int'l Tech. Consultants, Inc. v. Euroglas, S.A., 107 F.3d 386, 391 (6th Cir. 1997).

184. Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945); Warren B. Chik, U.S. Jurisdictional Rules of Adjudication Over Business Conducted Via the Internet-Guidelines and a Checklist for the E-Commerce Merchant, 10 **Tul. J. Int'l & Comp. L.** 243, 248-49 (Spring 2002).

185. See Int'l Shoe, 326 U.S. at 316.

substantial justice.[186]

A. General and Specific Jurisdiction

Under U.S. jurisdictional analysis, there are two types of personal jurisdiction: (1) "general jurisdiction," which is jurisdiction over the defendant for any cause of action, whether or not related to the defendant's contacts with the forum state; and (2) "specific jurisdiction," which is limited to the particular activity within the state that gives rise to the jurisdiction.[187] General jurisdiction over a party is created as a result of the party's sufficient, purposeful, continuous and systematic contacts with the forum state.[188] Specific jurisdiction, on the other hand, is created only where the cause of action arises out of or is related to the party's contacts with the forum state.[189]

The burden of establishing jurisdiction, whether general or specific, is on the plaintiff.[190] In the case of general jurisdiction, the plaintiff must show that the defendant's contacts with the forum

186. Id.

187. Chik, supra note 184, at 5.

188. Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408, 410 (1984); Int'l Shoe, 326 U.S. at 317-18; Fields v. Sedwick Associated. Risks, Ltd., 796 F.2d 299, 301 (9th Cir. 1986).

189. Int'l Shoe, 326 U.S. at 318; Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 (1980); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 (1985).

190. Welsh v. Gibbs, 631 F.2d 436, 437 (6th Cir.1980).

state are so continuous and systematic that the plaintiff is entitled to bring causes of action unrelated to the defendant's contacts with the forum state.[191] Proving general jurisdiction over a non-resident defendant is difficult, however, and thus the courts have refused to find such jurisdiction in a number of cases.[192]

B. The Tripartite Test for Specific Jurisdiction

To establish specific jurisdiction, the plaintiff must be able to demonstrate that the cause of action arises out of or is related to the defendant's contacts with the forum state. In Southern Machine Co. v. Mohasco Industries, the Sixth Circuit developed a three-part test for determining specific jurisdiction:

> (1) the defendant must purposefully avail himself of the privilege of acting in the forum state;
>
> (2) the cause of action must arise from the defendant's activities there; and
>
> (3) the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of the jurisdiction over the defendant reasonable.[193]

The first requirement is the sine qua non of the test and involves an inquiry into whether the defendant purposefully availed himself of the privilege of acting within the forum or caused a

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191. Int'l Shoe, 326 U.S. at 318; Fields, 796 F.2d at 300.

192. See Chik, supra note 184, at 251-52.

193. S. Machine Co. v. Mohasco Indus., 401 F.2d 374, 381 (6th Cir. 1968).

consequence in the forum state.[194] This requirement is intended to ensure that non-resident defendants will not be haled into a foreign jurisdiction as a result of random, fortuitous, or attenuated contacts or the unilateral actions of a plaintiff or third party.[195] "Purposeful availment" will only be found where the contacts with the forum state result from the non-resident defendant's own actions, such as when the defendant intentionally engages in significant activities within the forum state or continues obligations between himself and the residents of that forum state.[196] In Burger King Corp. v. Rudzewicz, the Supreme Court addressed the concept of purposeful availment:

> Jurisdiction is proper. . .where the contacts proximately result from the actions by the defendant himself that create a "substantial connection" with the forum State. . . [.]. . . Thus where the defendant "deliberately" has engaged in significant activities within the State. . .or has created "continuing obligations" between himself and residents of the forum. . .he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws, it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.[197]

The second part of the Burger King test involves an inquiry into whether the cause of action

194. Id. at 381-82.

195. Hanson v. Denckla, 357 U.S. 235, 252-53 (1958).

196. Id. at 253; World-Wide Volkswagen, 444 U.S. at 297.

197. Burger King, 471 U.S. at 475-76.

arises from the alleged in-state activities, such as the transaction of business in the forum state.[198] The third part of the Burger King test requires the connections with the forum state to be such that the court's exercise of jurisdiction is reasonable.[199] This inquiry is based on whether the forum state has "an interest in resolving the conflict at issue"[200] and whether the exertion of jurisdiction over the defendant is fair.[201] In Asahi Metal Inc. v. Superior Court of California, the Supreme Court set out several of the factors that courts should consider in applying the third part of the Burger King test: "the burden on the defendant, the interests of the forum State, the plaintiff's interest in obtaining relief, ... the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of several States in furthering fundamental substantive social policies."[202]

In First National Bank of Louisville v. J.W. Brewer Tire Company, the Sixth Circuit pointed out some additional factors for consideration in the third part of the Burger King test: "whether the buyer [the foreign defendant] (1) is an 'active' or 'passive' one, (2) could foresee a foreign suit, and (3) has physical contacts with the forum state."[203] The latter factors are also operative

198. In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 231 (6th Cir. 1972).

199. World-Wide Volkswagen, 444 U.S. at 292.

200. S. Machine, 401 F.2d at 384.

201. World-Wide Volkswagen, 444 U.S. at 292.

202. Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 113 (1987).

203. First Nat'l Bank of Louisville v. J.W. Brewer Tire Co., 680 F.2d 1123, 1126 (6th Cir. 1982).

elements of the first two parts of the Burger King test.[204] Thus, it is understandable that the Sixth Circuit concluded, "Once the first two questions have been answered affirmatively, resolution of the third involves merely ferreting out the unusual cases where interest cannot be found."[205]

C. Declining Jurisdiction under the Doctrine of forum non coveniens

Even when a court assumes jurisdiction, the inquiry does not necessarily end there. As under Canadian common law, a defendant in the U.S. may invoke the equitable doctrine of forum non conveniens to persuade the court to decline jurisdiction over the parties and the subject matter of the litigation.[206] U.S. courts employ a two-part test to determine whether to apply the doctrine of forum non conveniens and decline jurisdiction.[207] First, the court must consider whether there exists an adequate alternative forum where the suit may be tried.[208] "[The doctrine] presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes a criteria for choice between them."[209]

If the defendant is amenable to service of process in an alternative forum, and the forum permits litigation of the disputed subject matter, the court will then proceed to the second part of

204. S. Machine, 401 F.2d at 384.

205. Id.

206. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 503 (1947).

207. Id. at 508-09.

208. Id.

209. Id. at 506-07.

the test to determine whether adjudication of the action in plaintiff's chosen forum would be inconvenient and unjust.[210] Such a determination is made by balancing the private interests of the litigants and the public interest concerns of the court.[211]

In Gulf Oil Corp. v. Gilbert, the Supreme Court identified the following factors that the courts must consider when weighing the private interests of the litigants: "(1) the ease of access to evidence; (2) the availability of compulsory process; (3) the cost for cooperative witnesses to attend trial; (4) the enforceability of a judgement; and (5) other practical matters that might shorten any trial or make it less expensive."[212] With respect to the public interest concerns, the Supreme Court indicated that it would consider such factors as: "(1) administrative difficulties relating to court congestion; (2) imposing jury duty on citizens of the forum; (3) having local disputes settled locally; and (4) avoiding problems associated with the application of foreign law."[213]

Underscoring all of these factors in determining jurisdiction is a degree of deference to the plaintiff's choice of forum.[214] Deference to plaintiff's forum becomes an even stronger

210. Illusorio v. Illusorio-Bildner, 103 F. Supp. 2d 672, 674 (S.D.N.Y. 2000).

211. Id. at 675.

212. Id. at 676.

213. Id. at 678.

214. See Chik, supra note 184, at 298.

consideration where the plaintiff has chosen the home forum.[215] Thus, to overcome the presumption in favour of the plaintiff's forum choice, the defendant has the heavy burden of establishing that the public and private interest factors delineated in Gulf Oil strongly favor the alternative forum.[216]

D. Exerting Jurisdiction over Canadian Online Vendors in the United States

Canadian or foreign online vendors selling products within the U.S. must understand under what circumstances courts will enforce personal jurisdiction. In cases involving Internet-based contacts, U.S. courts have not deviated from the traditional tripartite jurisdictional analysis or the application of the doctrine of forum non conveniens described above.[217] In those cases involving Internet-based contacts, however, courts specifically consider the activities and interactions between the defendant's website and the residents in the forum in determining whether the defendant purposefully availed herself of the privilege of conducting business in the forum state.[218] The courts have developed and modified more than one test in analyzing the defendant's

215. See Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947).

216. Gulf Oil, 330 U.S. at 506-07.

217. See generally R.J. Yen, Personal Jurisdiction and the Internet: Applying the Old Principles to a "New" Medium, 76 **Fla. B.J.** 41 (Mar. 2002); A.K. Moceyunas and J.A. Bowen, Personal jurisdiction in the online context, 5 No. 1 **Cyberspace Law** 5 (2000); J.S. Burns, Personal Jurisdiction and the web, 53 **Me. L. Rev.** 29 (2001).

218. Id.

website contacts with the forum.[219] These tests include the Zippo "sliding scale" test,[220] the Calder "effects test,"[221] and the "targeting test."[222]

1. The Zippo "Sliding Scale" Test

Zippo Manufacturing Co. v. Zippo Dot Com, Inc. is the seminal American case involving the issue of whether the operation of an Internet site can support the minimum contacts necessary for the exercise of personal jurisdiction.[223] Zippo involved a trademark dispute. The plaintiff, Zippo Manufacturing, manufactured tobacco lighters in Pennsylvania. Zippo Manufacturing sued Zippo Dot Com, an online news service, in a Pennsylvania federal court, alleging that the defendant's use of the domain name "Zippo" violated the plaintiff's trademark rights.[224] The defendant challenged the court's personal jurisdiction. The court concluded that the defendant's website created sufficient contacts with the forum state because the defendant "sold passwords to approximately 3,000 subscribers in Pennsylvania and entered into seven contracts with Internet

219. Id.

220. See Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997).

221. See Calder v. Jones, 465 U.S. 783 (1984).

222. IMO Indus., Inc. v. Kiekert AG, 155 F. 3d 254, 265 (3d Cir. 1998); see also Bancroft & Masters, Inc. v. Augusta National Inc., 223 F.3d 1082, 1087-88 (9th Cir. 2000); Am. Info. Corp. v. Am. Infometrics, Inc., 139 F. Supp. 2d 696, 701-02 (D. Md. 2001); Pavlovich v. Superior Ct, 127 Cal. Rptr. 2d 329, 335-37 (2002).

223. Zippo, 952 F. Supp. at 1119.

224. Id.

access providers to furnish its services to their customers in Pennsylvania."[225] The court developed a "sliding scale" framework to determine when future courts should assume personal jurisdiction over a defendant in Internet cases.[226] The court described this analysis as follows:

> [T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. The exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Website.[227]

The sliding scale framework in Zippo divides Internet activity into three categories: (1) those in which the defendant clearly transacts business in foreign jurisdictions over the Internet; (2) those in which a defendant has posted information on a website, but has no further communication with potential customers over the Internet; and (3) those in which the defendant operates an interactive website that allows defendant and potential customers in foreign jurisdictions to communicate regarding defendant's goods or services.[228] In the first category, the court will usually exercise personal jurisdiction over the defendant.[229] In the second

225. Id. at 1126.

226. Id.

227. Id. at 1124.

228. Id.

229. Id.

category, the court will most likely not assume jurisdiction over the defendant.[230] In the final category, the court will examine the extent of the interactivity and nature of the forum contacts to determine whether or not to exercise jurisdiction over the defendant.[231]

The courts have considered a variety of factors in determining whether or not a foreign defendant's website is interactive, passive, or somewhere in the middle. Examples of some of these factors can be found in the Fifth Circuit's opinion in Mink v. AAAA Development LLC, wherein the court held that AAAA's website was insufficient to subject it to personal jurisdiction:

> The presence of an electronic mail access, a printable order form, and a toll-free phone number on a website, without more, is insufficient to establish personal jurisdiction. Absent a defendant doing business over the Internet or sufficient interactivity with residents of the forum state, we cannot conclude that personal jurisdiction is appropriate.[232]

The Montana Supreme Court's opinion in Bedrejo v. Triple E Canada, Ltd. provides another example of the application of the Zippo sliding scale test.[233] While Bedrejo involved a tort rather than a contract, it affords a better understanding of the manner in which post-Zippo courts view Internet advertising within the context of jurisdictional issues. In Bedrejo, the plaintiffs' claim

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230. Id.

231. Id.

232. Mink v. AAAA Dev. LLC, 190 F.3d 333, 337 (5th Cir. 1999).

233. See Bedrejo v. Triple E Can., Ltd., 984 P.2d 739 (Mont. 1999).

arose out of the sale of an allegedly defective motor home, which rolled over in Montana killing some of its occupants and injuring others.[234] The defendant, a non-resident Canadian manufacturer, successfully challenged the Montana trial court's assertion of personal jurisdiction.[235] Affirming the trial court's dismissal based on lack of personal jurisdiction, the Montana Supreme Court concluded that the Canadian manufacturer did not purposefully avail itself of the privilege of conducting activities in Montana and could not be found within Montana for purposes of general personal jurisdiction.[236] The court arrived at this conclusion despite evidence that the defendant advertised in nationally circulated magazines, which were distributed in Montana; that it maintained an interactive website available to Montanans with Internet access; that it established a network of dealerships, none of which was located in Montana, but which provided sales coverage for Montana; and that it provided a club for members, which organized trips across the United States and Canada, some of which necessitated travel through Montana.[237]

The court reasoned that the mere act of advertising on a website does not cause a defendant to reasonably anticipate being summoned into court in any state that has access to the website, particularly where there is no evidence of any transactions with Montana residents through the

234. Id. at 740-41.

235. Id.

236. Id. at 743.

237. Id.

defendant's website.[238] The court's analysis on the subject of Internet advertising relied upon the reasoning in Millennium Enterprises, Inc. v. Millennium Music LP: "Until transactions with Oregon residents are consummated through defendants' website, defendants cannot reasonably anticipate that they will be brought before this court, simply because they advertise their products through a global medium which provides the capability of engaging in commercial transactions."[239]

In Millennium Enterprises, the plaintiff, a retail music seller in Oregon, brought an action in Oregon against the defendants, South Carolina music sellers, for trademark infringement and unfair competition.[240] The defendants challenged the Oregon court's exercise of personal jurisdiction over them. The evidence established that the defendants sold their products through their retail stores and on the Internet. While the defendants sold fifteen compact discs to nine separate customers in six states and in one foreign country totalling $225, they sold only one of those compact discs to a customer in Oregon.[241] The sole Oregon customer purchased a compact disc from the defendants at the request of an attorney associated with the plaintiff. The plaintiff relied upon the isolated incident to argue that because the defendants had solicited Internet sales in Oregon, they had purposefully availed themselves of Oregon law. Analyzing the defendants'

238. Id.

239. Id. (quoting Millennium Enters., v. Millennium Music, LP, 33 F. Supp. 2d 907, 923 (D. Or. 1999)).

240. Millennium Enters., 33 F. Supp. 2d at 923.

241. Id. at 909.

website, the court concluded that it fell in the middle category of the Zippo sliding scale.[242] The court reasoned:

> Here, defendants have done nothing more than publish an interactive website. Defendants have not purposefully entered into contracts with Oregon residents through the Internet, other than Ms. Lufkin, nor have defendants otherwise exchanged files electronically with forum residents so as to create "repeated" or "ongoing obligations." Thus, defendants' website falls into the middle category, requiring further inquiry into the level of interactivity and commercial nature of the exchange of information" to determine whether jurisdiction should be exercised.[243]

Since the website at issue in Millennium Enterprises fell into the middle category of the Zippo sliding scale, the court's analysis required "further refinement to include the fundamental requirement of personal jurisdiction: 'deliberate action' within the forum state in the form of transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state."[244] The court ultimately denied personal jurisdiction over the defendants, noting specifically that the defendants did not take action creating "a substantial connection" with Oregon, did not deliberately engage in "significant activities" within Oregon, and did not create "ongoing obligations" with residents of Oregon in a

242. Id. at 921.

243. Id. at 920.

244. Id. at 921 (internal citations omitted).

manner related to the plaintiff's claims.[245] The court further noted that the defendants did not purposefully avail themselves of the protections of Oregon law in light of the fact that it was the act of "someone associated with plaintiff, rather than defendants' website advertising," which resulted in the sale of the defendant's product in Oregon.[246]

2. The Calder "Effects Test"

Instead of using the sliding scale test in Zippo, several U.S. courts have chosen to apply the "effects test," which was propounded by the Supreme Court in Calder v. Jones,[247] to evaluate the purposeful availment requirement for specific jurisdiction. In Calder, an editor and a writer for the National Enquirer, both residents of Florida, published a defamatory article about Shirley Jones, and the article was circulated in California where the actress resided. Jones sued both the editor and the writer in California for libel. The Supreme Court determined that California courts could properly exercise jurisdiction over both the editor and the writer on the ground that the tortious conduct was "expressly aimed" at the forum state in which harm occurred.[248] The Supreme Court reasoned that the libellous article concerned the California activities of a California resident, it "impugned the professionalism of an entertainer whose television career was centered in California, it was drawn from California sources, and the brunt of the harm was

245. Id.

246. Id. at 911.

247. 465 U.S. 783 (1984).

248. Id. at 789.

suffered in California."[249]

Based on this analysis, the Calder effects test contains three requirements: (1) the defendant must have committed an intentional act; (2) the act must be "expressly aimed at the forum state," and (3) the act must cause harm, "the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state."[250] This test has largely been employed in other intentional torts cases, including business torts cases.

3. The "Targeting Test"

A significant number of courts have found the Calder test to be insufficient and have endorsed a more rigorous effects-based analysis. Critics of the traditional Calder test suggest that courts should require more than knowledge of a possible effect. The resulting analysis has become known as the "targeting test," which requires evidence of specific intent. As the Third Circuit opined in IMO Industries, Inc. v. Kiekert AG:

> [W]e. . .agree with the conclusion that the Calder "effects test" can only be satisfied if the plaintiff can point to contacts which demonstrate that the defendant expressly aimed its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity. Simply asserting that the defendant knew that the plaintiff's principal place of business was located in the forum would be insufficient in itself to meet this requirement. The defendant must manifest behavior intentionally targeted at and focused on the forum for Calder to be

249. Id. at 788-89.

250. Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th Cir. 2000) (quoting the Calder effects test).

satisfied.[251]

The Ninth Circuit echoed this more stringent interpretation of the Calder effects test in Bancroft & Masters, Inc. v. Augusta National, Inc.[252] In Bancroft, the plaintiff, a California computer services corporation that owned the Internet domain name "masters.com," brought an action in California against the defendant, a Georgia golf club, which held the "Masters" trademark, seeking a declaratory judgment of non-dilution and non-infringement of mark and cancellation of the defendant's mark due to misuse.[253] The trial court in California dismissed the suit for lack of personal jurisdiction over the defendant and the plaintiff appealed. The Ninth Circuit expressed its problem with the Calder test: "[T]he case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. We have said that there must be 'something more,' but have not spelled out what that something more must be."[254] The Ninth Circuit then extrapolated that the "something more" was express aiming: "the requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state."[255]

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251. 155 F.3d 254, 265 (3d Cir. 1998).

252. 223 F.3d 1082 (9th Cir. 2000).

253. Id. at 1084-85.

254. Id. at 1087.

255. Id.

Subsequently, in American Information Corp. v. American Infometrics, Inc., the Maryland District Court adopted the Ninth Circuit's requirement in Bancroft of "a showing of 'express aiming' or 'individualized targeting' in addition to a foreseeable effect in the forum state under the Calder test."[256] In American Infometrics, a Maryland Internet service provider brought an action in Maryland against a California Internet service provider, alleging that the California provider's Internet address infringed on its trademark. The defendant moved to dismiss the plaintiff's claim for lack of personal jurisdiction. The district court granted the defendant's motion, finding that the allegedly infringing website did not constitute minimum contacts sufficient for the court to exercise personal jurisdiction over the defendant, even though the defendant's website was available to users in Maryland and permitted viewers to inquire about the company's services. The court reasoned that the website did not target Maryland residents in any way: "Under Calder v. Jones, the use of someone else's registered service mark as a website address, without any evidence of entry into the forum state, deliberate targeting of the plaintiff, or even a concentration of harmful effects in the forum state, does not constitute "effects" sufficient to create jurisdiction in the forum state."[257]

More recently, in Pavlovich v. Superior Court, the California Supreme Court rejected a lower court's exercise of personal jurisdiction over a non-resident defendant in a trade secret infringement case involving the posting of an offending computer code on a website.[258] The

256. 139 F. Supp. 2d 696, 702 (Md. 2001) (quoting Bancroft, 223 F.3d at 1087).

257. Id. at 702-03.

258. 127 Cal. Rptr. 2d 329 (2002).

California Supreme Court reviewed the common law history of the Calder effects test and concluded, "Indeed, virtually every jurisdiction has held that the Calder effects test requires intentional conduct expressly aimed at or targeting the forum state in addition to the defendant's knowledge that his intentional conduct would cause harm in the forum."[259]

In summary, since Calder, the effects test has been widely refined to include the additional requirement that the defendant expressly aim or target its tortious conduct toward a resident of the forum state. Some have argued that the targeting-based test is a better approach for the courts to employ than the sliding scale test in Zippo or the unmodified effects test in Calder when determining jurisdiction in cases involving Internet-based contacts because the targeting test, unlike the other two, places greater emphasis on identifying "the intentions of the parties and the steps taken to either enter or avoid a particular jurisdiction."[260] Further, the proponents of the targeting test view it as a better and fairer approach for determining whether the defendant reasonably anticipated being haled into a foreign court to answer for her activities in the foreign forum state.[261] This determination is central to the due process analysis articulated by the United States Supreme Court in World-Wide Volkswagen:

> [I]t is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. The Due Process Clause, by ensuring the "orderly administration of the laws," gives a degree of predictability to the legal system that

259. Id. at 336-37.

260. **Michael Geist, Internet Law in Canada** 69 (2d ed. 2001).

261. Id.

allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.[262]

4. Enforcing U.S. Judgments in Canada

If a U.S. court grants a judgment against a Canadian defendant, what options are available to the plaintiff for enforcing that judgment if the latter has exigible assets in Canada only? In Morguard, the leading Canadian case on enforcement of foreign judgments, the Supreme Court of Canada observed two available routes to the enforcement of foreign judgments: (1) the judgment creditor may register the judgment under reciprocal enforcement of judgments legislation, or (2) the judgment creditor may proceed by way of a common law action on the judgment.[263]

The first option exists because most Canadian provinces and territories have enacted reciprocal enforcement of foreign judgments statutes, which provide an alternative procedure for enforcing a foreign judgment that is more convenient than a common law action on the judgment.[264] The Morguard court stated that the various "Reciprocal Enforcement of Judgments Acts. . . were [not] intended to alter the rules of private international law; they [merely]

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262. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (internal citations omitted).

263. Morguard Invs. Ltd. v. De Savoye, [1990] 76 D.L.R.4th 256, 279-80; see also Wilson v. Hull, [1995] 174 Alta. L.R.3d 237, 239.

264. Morguard, 76 D.L.R.4th at 279.

provided. . . a more convenient procedure than before."[265] The registration of foreign judgments option is not available in all instances, however. Rather, its availability is limited to where judgments are granted by a court of a reciprocating state.[266] Reciprocating states are limited to the provinces and territories of Canada (not including Quebec), specific states in the United States, and a few countries with whom individual Canadian provinces or territories have a treaty or an agreement recognizing each other's judgments.[267] If there is not a treaty or an agreement between the Canadian province and the foreign jurisdiction, the judgment creditor may pursue the less convenient option of bringing a common law action on the foreign judgment in the provincial court where he or she seeks to enforce the judgment.[268]

In Morguard, the Supreme Court reviewed the history of Canadian law governing enforcement of foreign judgments via common law action on the foreign judgment.[269] In particular, the Court reviewed the English common law's influence on Canadian law, placing special emphasis on the English Court Of Appeal's decision in Emanuel v. Symon.[270] The Emanuel opinion summarized English law on the matter and, until recently, was repeatedly cited by Canadian courts as the

265. Id. at 279-80.

266. Allen v. Lynch, [1993] 348 A.P.R. 43, ¶ 7.

267. Id.; see also Morguard, 76 D.L.R.4th at 279-80.

268. Id. at 280.

269. Id. at 258-59.

270. Id. at 262; see also Emanuel v. Symon, [1907] 1 K.B. 302.

authority in dealing with the recognition of foreign judgments, including judgments of Canadian provinces that were considered foreign judgments for purposes of private international law.[271] The Emanuel court recognized five situations in which English courts would enforce a foreign judgment:

> (1)where the defendant is a subject of the foreign country in which the judgment has been obtained;
>
> (2)where he was resident in the foreign country when the action began;
>
> (3)where the defendant in the character of plaintiff has selected the forum in which he is afterward sued;
>
> (4)where he has voluntarily appeared; and
>
> (5)where he has contracted to submit himself to the forum in which the judgment was obtained.[272]

While the Supreme Court in Morguard recognized the authority of Emanuel, it supported the call of the courts below for the expansion of the common law grounds for the recognition of foreign judgments, particularly judgments from sister provinces within the Canadian

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271. Morguard, 76 D.L.R.4th at 262; see also Allen, 348 A.P.R. at ¶ 7.

272. Emanuel, 1 K.B. at 309.

federation.[273] However, Canadian courts should not transpose the rules by applying those that govern the enforcement of foreign judgments to enforce judgments of sister provinces.[274] The courts "should give full faith and credit. . . . . to the judgments given by a court in another province . . . . .so long as that court has properly. . . . . exercised jurisdiction in the action." [275] To hold otherwise would be unfair because "a person [could] avoid legal obligations arising in one province. . . . . by moving to another."[276] The Morguard court concluded that a judgment from another Canadian province should be enforced if the court of that province acted through a fair process in circumstances where its jurisdiction had a real and substantial connection with the action.[277]

While the Morguard opinion can be narrowly construed to apply only in cases where the judgment sought to be enforced is from another province, the Supreme Court made sufficient comments in dicta to provide a strong basis for the extension of the same principles to foreign judgments from other states.[278] To accommodate the flow of wealth under a world economy, Canada's approach to "the recognition and enforcement of foreign judgments" should be

273. Morguard, 76 D.L.R.4th at 264-66.

274. Id. at 270.

275. Id. at 273.

276. Id.

277. Id. at 278.

278. Id. at 270.

reconsidered.[279] Other countries, such as the United States and members of the European Community "have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants."[280]

Not surprisingly, the lower courts have heeded the dicta in Morguard and extended the principles for inter-provincial recognition of judgments to in personam foreign judgments from U.S. jurisdictions. For example, in Clarke v. Lo Bianco, the British Columbia Supreme Court agreed with Morguard's call "to lift the jurisdictional curtain . . . . . .between the provinces," but argued that it makes little sense to limit such a holding by enforcing foreign judgments only when they fall within the narrow categories proscribed in Emanuel.[281] The Clarke court posited instead that Morguard "compels a more comprehensive approach to the issue, mindful of the particular circumstances, and one which ensures that the rationale for reciprocity in a given case is weighed against concerns for fairness to the defendant."[282]

While the above remarks in Clarke were dicta because the court found that the facts of that case fell within the old common law rules for the recognition of jurisdiction set out in Emanuel, in a subsequent decision, Minkler & Kirschbaum v. Sheppard, the Supreme Court of British Columbia had the occasion to adopt the dicta and transform it into an opinion in which the

279. Id.

280. Id.

281. Clarke v. Lo Bianco, [1991] 59 B.C.L.R.2d 334, 341.

282. Id.

principles in Morguard were extended to some foreign states.[283] The court found that while "Morguard [could] be limited by its facts to a case where the judgment of one province is sought to be recognized in another[,]. . .the strong. . . dicta. . . . . favors its extension to the recognition of the judgments from some foreign states."[284]

The British Colombia Court of Appeal re-examined this issue in Moses v. Shore Boat Builders Ltd., where it affirmed the lower court's extension of the Morguard principles to in personam foreign judgments.[285] In Moses, the Court of Appeal examined the trial court's decision, which held that an Alaskan default judgment was enforceable in British Columbia based on Morguard.[286] The appellant, Shore Boat Builders, constructed a boat in British Columbia for the respondent Moses, and Moses subsequently brought an action in the Alaska courts.[287] As part of its legal strategy, Shore Boat did not appear in the Alaska proceeding and judgment was rendered in default.[288] The British Columbia Court of Appeal affirmed the decision of the court below, holding that Morguard offered sufficient reasons to extend the real and substantial connection

283. Minkler & Kirschbaum v. Sheppard, [1991] 60 B.C.L.R.2d 360, 363 (finding a real and substantial connection between Arizona and the subject matter because the defendant voluntarily subjected herself to Arizona law by living there).

284. Id. at 364.

285. Moses v. Shore Boat Builders Ltd., [1993] 1 W.W.R. 112, 125.

286. Id. at 114.

287. Id.

288. Id.

test to the enforcement of foreign judgments.[289] The court further noted that the same rules that support the foreign court's exercise of jurisdiction must govern the recognition and enforcement of that judgment in Canada.[290]

Having outlined the current state of the law governing the common law option of bringing an action in the provincial courts to enforce a foreign judgment against a Canadian defendant, it should be pointed out that at this article's writing, there has been only one foreign judgment based on Internet contacts that has been subject to consideration by a Canadian court.[291] In Braintech Inc. v. Kostiuk, Braintech, an American company with its corporate office in Vancouver, sued Kostiuk, a Vancouver resident, in Texas for damages resulting from defamation and business disparagement.[292] Kostiuk published some allegedly defamatory statements about Braintech on an Internet site bulletin board for investors under the name Silicon Investors.[293] Kostiuk did not appear in the Texas proceeding, and Braintech obtained a default judgment. Since Texas is not a reciprocating state under the relevant reciprocal enforcement of judgments legislation, Braintech pursued enforcement of the default judgment via a common law action in

289. Id. at 125.

290. Id. at 125-26.

291. See Braintech, Inc. v. Kostiuk, [1999] 63 B.C.L.R.3d 156, 158.

292. Id. at 159, 162.

293. Id. at 162.

British Columbia.[294] Kostiuk argued that the Texas judgment was unenforceable, as there was no real and substantial connection between Texas and either the parties or the subject matter of the action.[295] The Court rejected this argument and held that there was a real and substantial connection between the parties, the subject matter of the suit, and Texas.[296] In arriving at this conclusion, the court noted that Braintech had an office in Texas, its chief technology officer and director lived in Texas, the damages were partially incurred in Texas, and the defamation had been published in Texas.[297] Accordingly, the Court granted Braintech's application for judgment on the Texas default judgment.[298]

Kostiuk subsequently appealed the decision of the trial court. The British Columbia Court of Appeal, in allowing the appeal, disagreed with the court below and found no real and substantial connection between the parties, the subject matter, and Texas.[299] In arriving at this conclusion, the Court of Appeal agreed that the standard of review of foreign judgment by a Canadian court is the real and substantial connection test articulated in Morguard.[300] The Court also noted that in

294. Id. at 162-63.

295. Id. at 159.

296. Id. at 165-66.

297. Id. at 159.

298. Id. at 158, 165.

299. Id. at 165, 168-70.

300. Id. at 168-170.

the case of a true foreign judgment, fairness to the non-resident defendant with respect to the process in the foreign jurisdiction is also an important consideration.[301] In connection with this latter point, the Court examined the appropriateness of the Texas court's assertion of jurisdiction over the dispute and applied the Zippo sliding scale test to the facts in the case.[302] Since Kostiuk was not the operator of Silicon Investor and the bulletin board was only a passive posting site, the court found it inconceivable to hold that "a person who posts [a] . . . . . .comment on an Internet bulletin board could be haled before the courts of each" country with Internet access to this bulletin board."[303]

Accordingly, the Court found that the passive and non-commercial nature of Kostiuk's postings on the website did not provide the Texas court a sufficient basis to assert authority over Kostiuk and there was not a sufficient real and substantial connection between Texas, the subject matter, and the parties.[304] What is unclear is whether the Court would have found a real and substantial connection to exist if the defendant's posting were found to be "purposeful commercial activity."

301. Id. at 168.

302. Id. at 171.

303. Id.

304. Id. at 173-74.

IV. ISSUES FOR ONLINE CONSUMERS

A. Risks in Online Shopping

While online shopping may afford British Columbia and Canadian consumers significant advantages, such as greater convenience in shopping from their home or office, greater access to information, more opportunity to perform price comparisons, and a wider range of available products, there are also some significant inherent disadvantages to online shopping. One of the most troubling aspects of online shopping is Internet fraud. Inexperienced or naive online shoppers may fall prey to Internet fraud perpetrated by unscrupulous and unethical individuals disguising themselves as credible businesses on the Internet through sophisticated and impressive-looking websites.

Thankfully, there are a far greater number of legitimate and credible online businesses, which provide a good selection of quality products and services. Nevertheless, the nature of the Internet medium allows fraud to be perpetrated on consumers with greater ease than in face-to-face transactions in real space. For example, in the case of shopping in real space, a consumer can walk or drive to the physical location of the vendor's retail store to satisfy himself that there is an actual, credible business operating; however, the same type of physical authentication is not possible when shopping an online business. In real space, the consumer can also feel, touch, see, and perhaps even test the actual product he or she is interested in at the vendor's store before making her purchase. The same is not typically possible for the consumer making a purchase in the online world.

Other issues of concern for online consumers include misleading advertising and labelling;

misleading or undisclosed warranties, guarantees, products standards and specifications; lack of proper mechanisms for cancelling orders and obtaining refunds; defective products; non-delivered orders, and similar problems. While most of these problems may also arise in real space, the consumer is generally in a better position to mitigate or remediate the consequences of these problems in real space. For example, an online consumer may have difficulty in discovering warranty information, guarantees, product specifications, or return policies on vendors' websites. In real space, the consumer may be able to obtain this information more easily by simply seeking out the vendor's salesperson in the store and directly asking him or her for that information.

It should be noted that there are companies like VeriSign that assist online consumers and businesses by providing authentication services that mirror the authentication sought by parties doing business in the brick and mortar world, namely, physical credentials such as a handwritten signature, business license, or letter of credit to prove their identities and assure the other party of their ability to consummate a trade.[305] In the online world, there are also organizations such as the Better Business Bureau Online ("BBBOnline") with a self-regulation code to provide online businesses with guidelines to help address important online consumer protection issues and foster greater trust on the part of online consumers.[306] Businesses subscribing or agreeing to follow a code of business ethics or program of an organization such as BBBOnline are allowed to display the organization's seal to indicate to online consumers that they are scrupulous and

305. See VeriSign, 'at http://www.verisign.com (last visited Jan. 31, 2004).

306. Better Business Bureau, About Us, available at http://www.bbbonline.org/ (last visited Jan. 31, 2004).

reliable businesses.[307] Not all online businesses subscribe to such an organization, however, as it is not mandatory for them to do so.[308] Moreover, there is also the risk that an unscrupulous online business may display a consumer protection organization's seal on its website, without permission or approval, to dupe the consumer into believing that it is a credible business. Additionally, even if the online business is a legitimate member of an organization such as BBBOnline, these authenticating organizations do not actually endorse or guarantee the products of the online business. Consumer protection organizations simply assure that the subscribing online business has agreed to meet the organization's program standards, which may include, for example, resolving customer disputes through dispute resolution processes or maintaining a proven consumer-friendly track record.[309]

B. Limitations on Available Remedies

A further issue for the online consumer, as pointed out by Professor Geist, is the powerlessness of law enforcement officials to stop fraudulent activity on the Internet due to its "borderless nature."[310] In real space, if a vendor engages in misleading advertising, law enforcement officials may pursue legal action, such as a suit for misleading advertising under the

307. Id.

308. Better Business Bureau, Code of Online Business Practices, available at http://www.bbbonline.org/reliability/code/code.asp (last visited Jan. 31, 2004).

309. Better Business Bureau, supra note 306.

310. **Geist**, supra note 123, at 646.

Canadian Competition Act,[311] and obtain an injunction against the vendor, preventing it from continuing such action without risking a greater penalty.[312] Moreover, the courts are in a position to enforce such an order. In the online environment, however, even if the Canadian court properly assumed jurisdiction over the lis and the foreign online vendor, it will not issue an injunctive order against the foreign online vendor because such an order would not be enforceable in the jurisdiction of the vendor. Before a Canadian court can issue an injunction against a foreign defendant, the question of enforceability must be addressed, and if the foreign defendant has no assets within the jurisdiction of the court, the court must be cautious and will commonly decline to exercise jurisdiction on discretionary grounds.[313]

Another possible impediment to a Canadian consumer's legal action against an unethical online vendor is the cost associated with enforcing any monetary judgment obtained in a local province against a foreign online vendor. As previously discussed, a Canadian consumer can enforce a common law action or try to enforce under a reciprocal agreement. Either way, the cost of pursuing a legal proceeding in the consumer's province together with the cost of pursuing enforcement of the judgment against the foreign online vendor in the vendor's country is likely to be cost prohibitive unless the foreign online vendor has eligible assets within the home province of the consumer.

Additionally, online contracts with vendors often contain choice of forum and/or choice of law

311. R.S.C., ch. C-34, § 52(1) (1985) (Can.).

312. R.S.C., ch. C-34, § 33(1).

313. Fundy Cable Ltd. v. Arts & Entm't Network, [1997] 190 N.B.R.2d 291, ¶¶ 35-36'.

clauses. Choice of forum clauses require consumers to pursue any legal actions arising out of the online contract against the vendor in the vendor's jurisdiction. Choice of law clauses require the application of the law of the vendor's jurisdiction to any disputes arising out of the online contract. Canadian courts have upheld these types of clauses in the past unless there is a specific reason to overrule them.[314] For example, in Rudder v. Microsoft, the plaintiffs brought a class action proceeding in Ontario on behalf of Canadian members of the Microsoft Network ("MSN") claiming damages for breach of contract.[315] The plaintiffs alleged that the defendant, Microsoft, charged participants of MSN and accepted payment from their credit cards in breach of contract and that Microsoft did not provide "reasonable or accurate information concerning accounts."[316] The plaintiffs served the statement of claim on Microsoft at its offices in Redmond, Washington.[317] Microsoft applied for a permanent stay of the class action, arguing that the parties "agreed to the exclusive jurisdiction and venue of the courts in King County in the State of Washington in respect of any litigation between them."[318] Apparently, there was a choice of forum clause in the "Member Agreement," which each potential member of MSN was required

314. See generally Rudder v. Microsoft Corp., [1999] O.J. No. 3778; Sarabia v. Oceanic Mindoro, [1996] 26 B.C.L.R.3d 143.

315. Rudder, O.J. No. 3778 at ¶ 4.

316. Id. at ¶ 4.

317. Id.

318. Id. at ¶ 1.

to execute electronically before receiving the services Microsoft provided.[319] The clause in question stated: "[T]his Agreement is governed by the laws of the State of Washington, U.S.A., and you consent to the exclusive jurisdiction and venue of courts in King County, Washington, in all disputes arising out of or relating to your use of MSN or your MSN membership."[320]

Upholding Microsoft's choice of forum and choice of law clauses, the Court stated, "Forum selection clauses are generally treated with a measure of deference by Canadian courts. Such deference to forum selection clauses achieves greater international commercial certainty, shows respect for the agreements that the parties have signed, and is consistent with the principle of international comity."[321]

The court further held that deference should be given to such provisions unless there is a strong cause to override the agreement.[322] The burden "for a showing of a 'strong cause' rests with the plaintiff and the threshold to be surpassed is beyond the mere 'balance of convenience.'"[323] The court enunciated several factors to be considered in determining whether or not to enforce a forum selection clause:

> (1) in which jurisdiction the evidence on issues of fact is situated, and the effect of that on the convenience and expense of trial in either jurisdiction;

319. Id. at ¶ 5.

320. Id.

321. Id.

322. Id.

(2) whether the law of the foreign country applies and its differences from the domestic law in any respect;

(3) the strength of the jurisdictional connections of the parties;

(4) whether the defendants desire to enforce the forum selection clause is genuine or merely an attempt to obtain a procedural advantage; and

(5) whether the plaintiffs will suffer prejudice by bringing their claim in a foreign court because they will be

(a) deprived of security for the claim; or

(b) be unable to enforce any judgment obtained; or

(c) be faced with a time-bar not applicable in the domestic court; or

(d) unlikely to receive a fair trial.[324]

Based on the Rudder case, it appears that if an online contract contains an exclusive choice of forum clause and the Canadian consumer is unable to show "strong cause" as to why the clause should not be determinative, the Canadian court in which the consumer initiates the proceeding

323. Id. at ¶¶ 8-9 (internal citation omitted).

324. Id. at ¶ 20.

will likely not have jurisdiction over the action.[325] This may effectively deny the Canadian consumer any remedy against the online vendor, even where the latter has assets within the consumer's jurisdiction.

V. SUGGESTED GUIDELINES TO HELP BUSINESSES ENGAGING IN E-COMMERCE LIMIT THEIR POTENTIAL LIABILITY IN FOREIGN JURISDICTIONS

Canadian businesses engaging in e-commerce with non-Canadian consumers should properly plan their online businesses with a view towards curtailing their potential liabilities in foreign jurisdictions. As discussed in Part II of this article, courts in the United States, whose online consumers outnumber any other jurisdiction's consumers with whom Canadian online vendors transact business, have exhibited a willingness to assume jurisdiction in cases involving Internet-based contacts, regardless of the physical location of the foreign defendants. As indicated earlier, over the last several years, courts in the U.S. have developed and employed various tests, such as the Calder effects test, the Zippo sliding scale test, and the targeting test, in determining whether to assume personal jurisdiction over foreign defendants in suits lodged by U.S. residents in their forum.[326] While these tests provide helpful insight into when U.S. courts will assume jurisdiction over Canadian and other foreign online vendors, they provide equally valuable insight into when they will not assume jurisdiction. Accordingly, the following paragraphs will consider these jurisdictional tests and the case law applying them and will lay out specific guidelines to assist Canadian online vendors in limiting their liability in foreign jurisdictions.

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325. Id. at ¶ 19.

326. See discussion supra Part II.D.

A. Selecting a Website: Informational or Commercial?

The first step for the vendor is to decide whether to sell products online or simply provide an informational website for advertising products. In the case of the latter, it is advisable that the vendor design its website with a view to limiting the level of interactivity on the website. As indicated by the Zippo court, "A passive website that does little more than make information available to those who are interested in it is not grounds for exercise of personal jurisdiction."[327] Therefore, where a Canadian vendor establishes a website to provide, for example, information about its corporate history, its products, its address, telephone and fax numbers, but does not allow for interactive communication with consumers over the website, a U.S. court is not likely to assume personal jurisdiction over such a vendor.

If a Canadian vendor wishes to add an interactive feature on its website to permit consumers to communicate with or transmit inquiries to the vendor and receive the vendor's response, U.S. courts will consider the level of interactivity and commercial nature of the exchange between the Canadian vendor and the consumer in determining whether to assume personal jurisdiction over the vendor.[328] In Mink v. AAAA Development, the Fifth Circuit affirmed the trial court's decision that it lacked personal jurisdiction over a defendant whose website provided an e-mail address that permitted consumers to interact with the defendant, provided access to a printable order form, and provided a toll-free telephone number for the consumers to use to contact the

327. Zippo Mfg. Co. v. Zippo Dot Com Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

328. See Bedrejo v. Triple E Can., Ltd., 295 Mont. 430, 436-37 (Mont. 1999); Mink v. AAAA Dev. LLC, 190 F.3d 333, 336-37 (5th Cir. 1999).

defendant.[329] Critical to the Fifth Circuit's decision was the fact that the defendant did not allow consumers to purchase or order goods and services on its website.[330]

The Mink decision is very helpful in defining the maximum level of permissible interactivity on a website before U.S. courts will assume jurisdiction over the foreign vendor. Broadly interpreted, Mink arguably establishes that U.S. courts will not assume personal jurisdiction over foreign website owners operating interactive websites so long as they are not consummating or transacting any sales through their websites.[331]

An example of an interactive website that fits within the Mink model is the website of Liberty Furniture, a Jacksonville, Florida furniture company.[332] The website provides the corporate history of the company; the designer furniture items it carries in its brick and mortar location in Florida; furniture care information; the designers it is associated with; delivery and shipping information, including the Company's telephone and fax numbers; and an email address for consumers to contact or send in their inquiries to the company. The website has no facility for selling products online, however. While this website is interactive and arguably falls in the middle category of the Zippo sliding scale, the nature of the website would probably not qualify as being "commercial" despite the marketing aspect of the website. Moreover, the website does not appear to target residents of any particular forum. Therefore, it appears that Liberty

329. Mink, 190 F.3d at 336-37.

330. Id. at 337.

331. Id.

332. Liberty Furniture', at http://www.libertyfurnitureonline.com (last visited Jan. 31, 2004).

Furniture's website would fall into the Mink category of websites having insufficient interactivity to support establishing personal jurisdiction in a consumer's home forum.

B. Commercial Websites

1. Geographical Identification

If the vendor decides to sell its product online and to have an interactive website within the meaning of the Zippo test, the vendor should consider the geographical market for its product and where it is prepared to face any legal consequences for conducting business. For instance, if the vendor has made a calculated decision to sell its products in Colorado and California and to expressly target the residents of those states, then the vendor should take certain precautions in the design and operation of its website so that it does not inadvertently carry on business in other states. One writer recommends that a vendor:

> [decline] sale opportunities in a forum where it does not want to be subject to jurisdiction. . .by restricting access [to the website] by instituting an 'invitation or membership only' requirement, subjecting membership to approval, requiring password access, or defining shipment or offer limits in a mandatory main page and refusing purchases from a party in a country or state which it does not intend to trade (hence not availing itself of the benefits of the laws of that locale).[333]

A popular website that has heeded this advice is priceline.com, which is owned and operated

333. 'Chik, supra note 184, at 289.

by a Florida company.[334] Priceline.com enables consumers to make purchase offers on the Internet for such goods and services as leisure airline tickets, hotel rooms, rental cars, long distance calling minutes, home mortgages, and new cars at prices they want to pay. In return, the customers agree to varying degrees of flexibility in the brand and product they receive for their price. Once priceline.com receives a consumer's purchase offer, the service tries to find a participating business willing to sell its product at the consumer's desired price. While priceline.com's website is available to anyone, anywhere in the world with access to Internet, not everyone can make purchases on priceline.com's website. Before a consumer is allowed to make purchases on the website, priceline.com requires the purchaser to enter credit card information, including a billing address, which must be the same address as the address on the credit card, or else the transaction will be rejected. Further, priceline.com provides limited choices for the consumer's address by employing a menu with a selection of U.S. states for the consumer to choose from. Therefore, if the consumer is not a resident of any of the U.S. states included in the menu or does not have a credit card with a billing address in one of the states in the menu, then the consumer will not be able to submit her order or make a purchase through the service. Priceline.com is thus able to consciously control the jurisdictions in which it conducts business and curtail the risk of being haled before courts of jurisdictions in which it does not do business.

Ideally, an online vendor should indicate to consumers in a conspicuous place on its website whether it will accept any purchase orders from the consumer's jurisdiction. By clearly identifying the jurisdictions in which it wishes to do business, the online vendor protects itself

334. Priceline.com, 'at http://www.priceline.com (last visited Jan. 31, 2004).

against unexpectedly being pulled into courts in jurisdictions in which it had no intention of doing business. Further, it is recommended that all online vendors consider employing technology in the design of their websites with a view to preventing the possibility of inadvertently accepting any purchase orders from residents of jurisdictions in which they do not wish to transact business.

2. Choice of Forum Clause

Whether the online vendor is intending to market its products in two states or twenty states, it is advantageous for the vendor to limit jurisdiction to a single forum in the event of any dispute arising out of the vendor's transactions with consumers. Preferably the forum of choice should be the home forum of the vendor. As one writer notes:

> Every potential litigant wants the home court advantage and nobody wants to litigate in a foreign and distant jurisdiction. It would be expensive, inconvenient, time-consuming, require more work (such as understanding foreign laws or hiring foreign lawyers), increased chances of being sued, and may induce one who feels concerned into settling on less favorable terms.[335]

Thus, by simply adding an appropriately drafted choice of forum clause in the electronic commerce contract, the Canadian online vendor may curtail the risk of being sued in any unexpected foreign jurisdiction and may curtail the risk of being sued at all.

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335. Chik, supra note 184, at 288.

Choice of forum clauses are generally of two types: permissive and mandatory.[336] The permissive forum clause is a non-exclusive forum selection clause.[337] Such a clause simply means that the parties consent to the jurisdiction of a specified forum.[338] A mandatory choice of forum clause, on the other hand, is an exclusive choice of forum clause wherein the parties agree to the jurisdiction of a specific forum to the exclusion of all other forums.

The following is an example of a permissive or non-exclusive choice of forum clause: "Each party hereto irrevocably agrees that the courts of the Province of British Columbia are to have jurisdiction to settle any claims, differences, or disputes, which may arise out of or in connection with this Agreement."[339] The language of the choice of forum clause above does not clearly exclude other courts from having jurisdiction over any disputes arising out of the agreement; it only provides that British Columbia courts "are to have jurisdiction" over the disputes. The following is an example of a mandatory or exclusive choice of forum clause: "All disputes arising out of this Agreement shall be subject to the exclusive jurisdiction and venue of the courts of the Province of British Columbia."[340] The language in this choice of forum clause excludes all other courts from having jurisdiction over disputes arising out of the agreement

336. Scotland Mem'l Hosp., Inc. v. Integrated Informatics, Inc., No. Civ. 1:02CV00796, 2003 WL 151852, at *3 (M.D.N.C. 2003).

337. Id.

338. Id.

339. See Lehner v. Keller, [1997] B.C.J. No. 2303, ¶ 5.

340. Id. at ¶ 7.

referred to therein. It gives British Columbia courts "exclusive jurisdiction" to hear any disputes arising from the agreement.

In Bremen v. Zapata Off-Shore Co., the United States Supreme Court articulated the general rule that forum selection clauses are valid unless shown to be "unreasonable" by the party challenging them.[341] Moreover, "[a] freely negotiated private international agreement unaffected by fraud, undue influence, or overweening bargaining power. . . . . should be given full effect."[342] Although deference is given, the Supreme Court added a further consideration: "a contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[343]

In subsequent decisions, lower courts have adopted the Supreme Court's view of choice of forum clauses and, in fact, have applied the following three-part analysis, extrapolated from Bremen, for determining whether a choice of forum clause is valid and enforceable:[344]

> (1) whether or not the contract containing the choice of forum clause is a commercial contract. Of course, this is not to say that consumer contracts containing a choice of forum clause will not be enforced.

341. 407 U.S. 1 (1972).

342. Id. at 12-13.

343. Id. at 15.

344. Info. Leasing Corp. v. Jaskot, 784 N.E.2d 1192, 1195 (Ohio Ct. App. 2003); Stobaugh v. Norwegian Cruise Line Ltd., 5 S.W.3d 232, 235 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

(2) whether or not the choice of forum clause is a product of fraud or overreaching on the part of the vendor. To be valid and enforceable, a choice of forum clause must not be the product of "fraud or over reaching."[345]

(3) whether the forum selection clause is unreasonable or unjust. If an otherwise valid forum selection clause is unreasonable or unjust it will not be enforced. Choice of forum clauses are unreasonable or unjust if:

(i) their formation was induced by fraud or over reaching;

(ii) the complaining party 'will for all practical purposes be deprived of his day in court' because of the grave inconvenience or unfairness of the selected forum;

(iii) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or

(iv) their enforcement would contravene a strong public policy of the forum state.[346]

Thus, if a properly drafted mandatory or exclusive choice of forum clause, which passes this three-part reasonableness test, is included in the Canadian online vendor's contract with a U.S. consumer, U.S. courts may enforce the provision and may refuse to exercise jurisdiction over the vendor in a lawsuit brought against him by a U.S. consumer.

345. Kennecorp Mtge. Brokers v. Country Club Convalescent Hosp., 610 N.E.2d 987, 989 (Ohio 1993).

346. See Allen v. Lloyd's of London, 94 F.3d 923, 928 (4th Cir. 1996).

3. Choice of Law Clause

As with a choice of forum clause, it is advantageous for a Canadian online vendor to include a choice of law clause in his online contracts with consumers. Normally, the vendor, who has a greater balance of power in a contractual relationship with the consumer, may include a choice of law provision in the contract providing for the application of the law of the vendor's home forum if any disputes arise out of the contract. This has the potential of affording the vendor the advantage of maintaining a greater degree of control over any contractual disputes due to the vendor's greater familiarity with the law of its home jurisdiction and the convenience with which it can retain a lawyer in the home forum. There is also the psychological advantage that a party experiences when the law of its choosing governs any contractual disputes.

Conversely, the foreign consumer would be at a disadvantage in such a case due to unfamiliarity with the laws of the vendor's jurisdiction and having to retain a Canadian lawyer in the vendor's jurisdiction to pursue a claim. These factors may dissuade the foreign consumer from pursuing the Canadian vendor or, alternatively, persuade the consumer to compromise the claim to a greater extent than if there were no choice of law clause favoring the vendor.

In regard to the validity and enforceability of a choice of law provision, the governing law in the U.S. is relatively the same for both choice of law provisions and choice of forum provisions. Since the Bremen case, the U.S. Supreme Court has found choice of law clauses prima facie valid. In Scherk v. Alberto-Culver Co., the Supreme Court recognized the value of such agreements:"A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business

transaction."[347]"Subsequently in Northrop Corp. v. Triad Internationa'l Marketing., S.A., the Ninth Circuit referred to the Supreme Court's decision in Scherk and stated, "[C]hoice-of-law and choice-of-forum provisions in international commercial contracts should be enforced absent strong reasons to set them aside."[348]

As with choice of forum clauses, choice of law clauses must be reasonable or else they may be set aside. The three-part reasonableness test referred to in choice of forum clause cases also applies to choice of law clauses. Therefore, a Canadian vendor must be cognizant that the choice of law clause in his online contract meets the reasonableness standard. Further, with choice of law clauses, a Canadian online vendor must also investigate, in at least those jurisdictions it intends to do business, to determine that there is no local legislation preventing parties in consumer transactions from contracting out of the application of local consumer protection laws. As commented by one writer:

> Despite the overall favorable attitude towards [choice of law] provisions, merchants must still be careful to designate a forum (1) that allows parties to include choice of law provisions to govern their transactions without any limitation, and (2) where the parties' freedom to contract on an applicable law is not subject to, for example, nonderogable mandatory consumer protection laws.[349]

In cases where the local legislation in the consumer's state prohibits contracting out of the

347. 417 U.S. 506, 516 (1974).

348. 811 F.2d 1265, 1270 (9th Cir. 1987).

349. Chik, supra note 184, at 293.

application of the local consumer protection legislation, there is a real risk that a choice of law clause inconsistent with such legislation will be found unreasonable for contravening with public policy of the forum state and thus is unenforceable.

VI. CONCLUSION

While e-commerce currently comprises a small part of both Canadian and U.S. economies, it is growing significantly each year in both countries and there is no reason to doubt that the growth of e-commerce will continue to grow even faster in the future. Moreover, as the number of Internet users increases globally and consumers and vendors gain more familiarity and comfort in doing business online, the universal magnitude of e-commerce will soar as it plays an increasingly significant part in the economies of nations worldwide. Therefore, the subject of jurisdiction in e-commerce, as important as it is today, can only take on greater importance in the lives of online vendors, consumers, policy-makers, and governments worldwide in the future.

As e-commerce becomes increasingly prominent, courts will have to develop case law regarding jurisdiction in order to manage the business relationships over the Internet. This article has discussed the current state of the law concerning the determination of personal jurisdiction in Canada and the United States. By examining the trends addressed in this paper, online businesses can keep from overexposing themselves to liability in foreign jurisdictions if they limit the content of their websites, include choice of forum and choice of law provisions in their agreements with consumers, and are careful regarding where and to whom they market and sell their products. Similarly, by understanding the state of the law, online consumers can limit their vulnerability to fraud and bad business practices by choosing their transactions wisely.

While the Internet's global nature often leads to seemingly unfair results under the law with respect to jurisdiction, it can be a powerful tool and should be utilized. Those companies that protect themselves properly and utilize the Internet effectively have an enormous economic opportunity.