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MANITOBA

COMMISSION DE RÉFORME DU DROIT

REPORT
ON
SECTION 83 OF *THE QUEEN'S BENCH ACT*
THE CONCLUSIVENESS OF FOREIGN JUDGMENTS IN MANITOBA

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REPORT ON SECTION 83 of

THE QUEEN'S BENCH ACT

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CHAPTER 1

INTRODUCTION

1.01 In October, 1984, a Court of Queen's Bench judge referred section 83 of *The Queen's Bench Act*, C.C.S.M. c. C280, to the Commission for study and reform. The judge stated that the section was an anachronism and that there was no policy reason for its continued presence within Manitoba's legislation. The section reads:

> Subject to The Reciprocal Enforcement of Judgments Act, a defendant in an action upon a foreign judgment may plead to the action on the merits, or set up any defence that might have been pleaded to the original cause of action for which the judgment was recovered; but the plaintiff may apply to the court to strike out any such pleading or defence upon the ground of embarrassment or delay.

1.02 In this Report, we examine section 83 and the desirability of retaining it as part of Manitoba's legislation. We begin, in Chapter 2, with a discussion of recognition and enforcement of foreign judgments in the local forum. We then review section 83, giving a brief history of the section followed by a review of its judicial interpretation. In Chapter 3, we examine the role of section 83 and whether it is a desirable part of Manitoba's legislation. In doing so, we discuss comparable legislation in other jurisdictions and provide our recommendations for reform.

CHAPTER 2

FOREIGN JUDGMENTS IN MANITOBA

A. COMMON LAW

1. General

2.01 Generally, countries and states, provinces or territories within federal jurisdictions are separate law units with distinct court systems. The courts of each law unit are authorized to act only within the geographic boundaries of that unit. Beyond the boundaries, a court judgment is 'foreign' and of no *direct* effect, which means that it is neither recognized as a valid judgment nor enforceable without further action.[1] An Ontario court judgment, for example, is automatically recognized and can be directly enforced within Ontario. However, outside Ontario, that judgment is not afforded automatic recognition nor direct enforcement. Likewise, a judgment which emanates from a non-Canadian court is foreign in every Canadian forum and has no direct effect within Canada. Professor Castel has described the rationale for this treatment of foreign judgments as follows:

> The principle of territorial sovereignty is said to prevent foreign judgments from having any direct operation as such in any of the Canadian provinces. This attitude is principally due to a lack of confidence in other legal systems. It may be difficult for the enforcing court to ascertain the independence and legal ability of the foreign judge, and to assess the reliability of the foreign legal system. This difficulty is reinforced where the countries involved adhere to fundamentally different legal systems and thus may have different concepts of public policy and due process.[2]

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[1] J. G. McLeod, *The Conflict of Laws* (1983) 583, referring to *Vezina v. Will H. Newsome Co.* (1907), 14 O.L.R. 658 at 664 (C.A.) and H. Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (1938) 13.

[2] J.-G. Castel, "Recognition and Enforcement of Foreign Judgments *in*
(Footnote continued to page 3)

2. Recognition

2.02 When will a judgment be recognized and enforced outside the original granting jurisdiction? The local forum will not enforce a foreign judgment that it does not recognize. Therefore, the issue of recognition of a foreign judgment must be first addressed. One of the prerequisites for the recognition of a foreign judgment is that the original granting court must have 'international jurisdiction'.[3] This means that the original court must have jurisdiction which is recognized to be competent outside the boundaries of the original granting court. The requirements for international jurisdiction differ according to whether a judgment is an *in personam* judgment[4] or an *in rem* judgment.[5]

(a) *In personam* judgment. A court will have international jurisdiction where there is a sufficient connection between the granting jurisdiction and the judgment-debtor.[6] Specifically, this will exist where a judgment-debtor falls within one of the following categories:

(Footnote continued from page 2)
Personam and *in Rem* in the Common Law Provinces of Canada" (1971), 17 McGill L.J. 11.

[3]In this Report, the term 'international jurisdiction' does not describe the jurisdiction of certain courts to hear and determine matters between different countries or persons of different countries.

[4]An *in personam* judgment is: "A judgment against a particular person, as distinguished from a judgment against a thing or a right or *status*." *Black's Law Dictionary* (5th ed. 1979) 711.

[5]A judgment *in rem* is: " . . . [A judgment] pronounced upon the status of some particular thing or subject matter . . . . It is binding upon all persons in so far as their interests in the property are concerned . . . ." *Black's Law Dictionary* (5th ed. 1979) 758.

[6]J. G. McLeod, *supra* n. 1, at 582.

(1) (s)he is a subject of the original jurisdiction;

(2) (s)he is a resident in the original jurisdiction when the action began;

(3) (s)he is a plaintiff in a former suit in the original forum;

(4) (s)he voluntarily appeared in the original jurisdiction;

(5) (s)he contracted to submit to the court of the original jurisdiction.[7]

(b) *In rem* judgment. A court will have international jurisdiction where the subject matter of the judgment, the *res*, is located within the territorial jurisdiction of the granting court at the time of the original court proceedings.[8]

2.03 At common law, when a judgment emanates from a court with international jurisdiction, it is recognized in the local forum as conclusive of its merits: a court in the local forum will not allow a party to re-open the judgment by raising defences on the merits. This rule, known as the doctrine of conclusiveness of foreign judgments, applies to both *in rem* and *in personam* judgments,[9] whether a judgment-creditor or judgment-debtor seeks to rely on the foreign judgment.[10] The doctrine developed at common

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[7] *Emanuel* v. *Symon*, [1908] 1 K.B. 302 at 309 (C.A.).

[8] J. G. McLeod, *supra* n. 1, at 632-633. There are a few narrow exceptions to the rule for moveable property.

[9] J.-G. Castel, 1 *Canadian Conflict of Laws* (1975) 465, n. 207, 208; J.G. McLeod, *supra* n. 1, at 600, n. 160, 161.

[10] J.G. McLeod, *supra* n. 1, at 600-601, n. 162.

law in the mid-1800's.[11] It changed the previous common law position that a foreign judgment was only *prima facie* evidence of the matters adjudicated upon by the foreign court and the onus of proof was on the defendant to disprove a claim if an action was brought in the local forum. Today, at common law, recognition of a foreign judgment on the merits is guaranteed, even where the original judgment was based on an error of fact or law.[12] For example, where the original court misinterpreted the facts as presented to it or misinterpreted its own law or the law of some other country, these factors cannot be raised to prevent recognition of the foreign judgment.

2.04 Although defences on the merits cannot be raised in an action on a foreign judgment, certain common law defences are available to prevent recognition of a foreign judgment.[13] When any of these defences apply, a foreign judgment will not be recognized in the local forum. The defences available at common law to impeach a foreign judgment are:

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[11]he doctrine was firmly established by *Godard* v. *Gray* (1870), L.R. 6 Q.B. 139 at 150-151 where Blackburn J. stated:

> [I]t is no longer open to contend . . . that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law.
>
> . . .
>
> It can make no difference that the mistake appears on the face of the proceedings. . . . Nor can there be any difference between a mistake made by the foreign tribunal as to . . . [the local forum's law], and any other mistake.

[12]J.-G. Castel, *supra* n. 9, at 466 *et seq.*

[13]As mentioned previously, a foreign judgment must emanate from a court with 'international jurisdiction', as a prerequisite to recognition in the local forum. Lack of 'international jurisdiction' may be raised in appropriate circumstances to prevent recognition of a foreign judgment. See *supra*, at 3-4.

(1) the original court did not have valid internal jurisdiction;[14]

(2) the judgment was a result of the fraud of the party in whose favour the judgment was granted or the fraud of the court;[15]

(3) the judgment was granted in proceedings which were contrary to fundamental concepts of natural justice accepted in the local forum;[16]

(4) the recognition of the foreign judgment is contrary to the fundamental public policy of the local forum; or

(5) the original court knowingly and perversely disregarded the rights of the party against whom the judgment was granted.[17]

3. Enforcement

2.05 Assuming that the local court will recognize the foreign judgment, can the judgment be enforced in the local forum? The local forum will not

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[14]That is, the judgment is void and without effect according to the law of the original jurisdiction. See J.G. McLeod, *supra* n. 1, at 611.

[15]This rule conforms to the general principle of law, that no court will aid in the perpetuation of fraud. See, J.G. McLeod, *supra* n. 1, at 511, n. 245. While there are exceptions to this rule, where the fraud has led the original court to an incorrect assumption of jurisdiction and the judgment is void without further action in the original court, the foreign judgment will not be recognized by the courts of the local forum.

[16]Generally this rule is invoked by inadequate notice or the lack of the right to be heard in the original court proceedings, and not by mere irregularity in the original court proceedings. See, J.G. McLeod, *supra* n. 1, at 616.

[17]*Godard* v. *Gray*, *supra* n. 11, at 149.

enforce every foreign judgment which it recognizes.[18] Generally, only *in personam* judgments are amenable to enforcement in the local forum.[19] Money judgments must be final and conclusive[20] and for a sum certain,[21] to be enforced in the local forum.

2.06 Where a foreign judgment is enforceable, what steps must a party take to enforce it? Enforcement procedures of the local forum cannot be utilized directly to enforce a foreign judgment. Instead, under the common law, a new action based on the foreign judgment must be brought in the local forum so as to obtain a local judgment.[22] This judgment can then be enforced in the local forum.

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[18]Not every party will want to enforce a foreign judgment; a party may simply wish to have a foreign judgment recognized by a court in the local forum. For example, a foreign judgment may be utilized to prove a fact in a new action in the local forum. For such a use, recognition of the foreign judgment is necessary, while enforcement is unnecessary. See, J.G. McLeod, *supra* n. 1, at 581.

[19]J.G. McLeod, *supra* n. 1, at 581. While foreign *in rem* judgments are regularily recognized by courts, the nature of *in rem* judgments is such that foreign *in rem* judgments are rarely enforced by the courts in the local forum.

[20]To be final and conclusive, a judgment must have the following characteristics: (1) it must be *res judicata* according to the law of the country where it is granted; (2) it must have determined all matters in controversy between the parties; and (3) it must be immune from alteration in subsequent proceedings between the same parties in the same court. See J.G. McLeod, *supra* n. 1, at 622-627 for more detail and case law.

[21]The sum must be assessed and not an indefinite sum to be determined at a later date. The sum is certain if it can be calculated by a simple arithmetic process. For further detail, and cases on this point, see J.G. McLeod, *supra* n. 1, at 621-622.

[22]In the alternative, or in addition to an action based on the foreign judgment, a party can institute a new action based on the original cause of action in the local forum.

2.07 With this introduction to the concepts of recognition and enforcement of foreign judgments at common law, we now turn our attention to the Manitoba legislation which pertains to foreign judgments.

B. STATUTE

1. *The Reciprocal Enforcement of Judgments Act*

2.08 The need for a judgment-creditor to bring a new action based on the foreign judgment may result in additional time, effort and expense. The requirement of bringing an action has been eliminated, however, for certain foreign judgments by statutory reform. That is, legislation has been enacted which establishes a registration system for the enforcement of foreign judgments. In Manitoba, *The Reciprocal Enforcement of Judgments Act* (REJA)[23] provides a registration system for judgments which emanate from Canadian courts (excluding Quebec) and the courts of certain Australian territories.[24] When judgments from these reciprocating jurisdictions meet the requirements set out in the Act, they can be registered and enforced in Manitoba.

2.09 As well, legislation which is similar to REJA has been enacted in Manitoba to provide for more efficient enforcement of foreign maintenance orders,[25] custody and access orders,[26] and money judgments from the United

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[23] *The Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20 (hereinafter referred to as REJA).

[24] *A Regulation under The Reciprocal Enforcement of Judgments Act declaring Reciprocating States*, Man. Reg. 319/74.

[25] *The Reciprocal Enforcement of Maintenance Orders Act*, C.C.S.M. c. M20, pertains to maintenance orders which emanate from Canadian courts, as well as certain other jurisdictions. See *A Regulation respecting Reciprocating States under The Reciprocal Enforcement of Maintenance Orders Act*, Man. Reg. 188/84 for a complete list of reciprocating jurisdictions.

[26] *The Child Custody Enforcement Act*, C.C.S.M. c. C360, enacted S.M. 1982, c. 27. The Act pertains to all extra-provincial custody and access orders.

Kingdom.[27]

2. Section 83 of *The Queen's Bench Act*

2.10 Section 83 of *The Queen's Bench Act* modifies the doctrine of conclusiveness of foreign judgments in Manitoba by allowing a re-opening of a foreign judgment on its merits. The section was first enacted in 1876.[28] It retained essentially its original form until 1952, when it was amended to become subject to REJA.[29] It has not been amended since.

2.11 What defences can be raised in an action on a foreign judgment pursuant to section 83? Section 83 provides:

> . . . [A] defendant in an action upon a foreign judgment may plead to the action on the merits, or set up any defence that might have been pleaded to the original cause of action for which the judgment was recovered . . . .

It is clear that a defence which could be set up in the original jurisdiction can be pleaded in the local forum, whether or not the defence was raised and tried in the original action in the foreign court.[30] Some uncertainty

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[27]*The Canada-United Kingdom Judgments Enforcement Act*, C.C.S.M. c. J21, enacted S.M. 1984, c. 14.

[28]*An Act Respecting the practice in the Courts*, S.M. 1876, c. 2, s. 8.

[29]*An Act to amend The King's Bench Act*, S.M. 1952 (1st Sess.), c. 13, s. 4.

[30]*Hickey* v. *Legresley* (1905), 15 Man. R. 304 at 309-310 (C.A.). Richards J.A. stated that to conclude otherwise would require that section 83 contain the words "but was not" after the words "might have been" and he found no reason for reading these words into the statute. This interpretation was confirmed by Dennistoun J.A. in *Callaghan* v. *Nicholls* (1921), 31 Man. R. 331 at 332-333 (C.A.). But see *Moore* v. *International Securities Co. Ltd.* (1916), 10 W.W.R. 378 (Man. C.A.), where the Court held that section 83 does not enable a defendant to set up defences which have already been pleaded and fought out in a foreign court, and if such defences are raised in Manitoba, they may be struck out on application as embarrassing or a delay.

exists though as to whether a defence which exists in Manitoba but which was unavailable in the original jurisdiction can be pleaded in an action on a foreign judgment in Manitoba. One line of cases suggests that only a defence which was available to the defendant in the cause of action in the original court can be pleaded in Manitoba.[31] Thus, a defendant could not plead a defence which is available in Manitoba but unavailable in the foreign court.[32] A second line of cases suggests a wider interpretation.[33] That is, section 83 permits the local defendant to raise any defence which (s)he could have set up in the original jurisdiction and any defence which (s)he could have set up if sued in Manitoba on the original action.[34] In our opinion, the second interpretation is arguably preferable as it gives effect to section 83 in its entirety;[35] the first interpretation seems to ignore the phrase "may plead to the action on the merits".

2.12 Given this wide interpretation of the defences available under section 83, are there limitations to the defences which can be raised pursuant to the section? The section provides: " . . . [T]he plaintiff may apply to the court to strike out any such pleading or defence upon the ground of

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[31] *British Linen Co.* v. *McEwan* (1892), 8 Man. R. 99 (C.A.); *Harbican* v. *Kennedy*, [1937] 2 D.L.R. 541 (Man. K.B.); *The Bank of Montreal* v. *Cornish*, [1879] Man. R. Temp Wood 272 (Q.B.).

[32] *Harbican* v. *Kennedy*, *supra* n. 31, at 542. J.-G. Castel considers this interpretation to be correct. He stated, *supra* n. 9, at 475: " . . . [T]he defendant may set up only those defenses [sic] which might have been set up to the original cause of action in the foreign court." J.-G. Castel cited several authorities in support including *British Linen Co.* v. *McEwan*, *supra* n. 31 (see J.-G. Castel, *supra* n. 9, at 475, n. 236).

[33] *Hickey* v. *Legresley*, *supra* n. 30; *Wright* v. *Narovlansky*, [1920] 1 W.W.R. 680 (Man. K.B.).

[34] *Hickey* v. *Legresley*, *supra* n. 30, at 310, per Richards J.A., and at 312-313 per Perdue J.A.

[35] J.G. McLeod considers this interpretation to be correct. See *supra* n. 1, at 603. He cites *Hickey* v. *Legresley*, *supra* n. 30, as support for this view.

embarrassment or delay." It is clear that section 83 entitles a defendant to raise defences on the merits in an action on a foreign judgment and that this entitlement is subject to the discretionary power of the Manitoba court to deny that right by striking out a defence as embarrassing or instituted to delay proceedings.[36] To strike out a pleading for embarrassment or delay, the court "must be convinced that the pleading or defence is without merit, or has an ulterior purpose".[37] The fact that the same defences were presented and adjudicated upon in the foreign jurisdiction, that an unsuccessful appeal was taken, or that a consent judgment was entered, will have a strong bearing on a Manitoba court's discretion to strike out a pleading.[38]

2.13 The opening phrase of section 83 states: "Subject to The Reciprocal Enforcement of Judgments Act . . .". What is the meaning of this phrase?

2.14 As mentioned previously, REJA provides a more efficient system for the enforcement of certain foreign judgments from reciprocating jurisdictions. Pursuant to REJA, a foreign judgment-creditor need not obtain a local judgment by a new action on the foreign judgment but may simply try to register the original judgment as a prerequisite to enforcement. In this case, section 83 of *The Queen's Bench Act* is not applicable and the section cannot be relied upon to re-open the foreign judgment on the merits. However, REJA does have a provision which is somewhat similar to section 83 in the protection which it affords to a local defendant in those limited

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[36] *Lange* v. *Manitoba Western Colonization Company, Limited*, [1921] 3 W.W.R. 877 (Man. K.B.).

[37] *Lesperance* v. *Leistikow*, [1935] 3 W.W.R. 1 at 6 (Man. C.A.) per Trueman J.A. Several other cases in which the meaning of the proviso in section 83 was considered are: *Meyers* v. *Prittie* (1884), 1 Man. R. 27 (Q.B.); *International & C. Corporation* v. *Great North West Central Railway Company* (1893), 9 Man. R. 147 (Q.B.); *Callaghan* v. *Nicholls*, *supra* n. 30.

[38] See, for example, *Gault* v. *McNabb* (1884), 1 Man. R. 35 (Q.B.); *Sloman* v. *Brenton* (1916), 29 D.L.R. 387 (Man. K.B.); and *Callaghan* v. *Nicholls*, *supra* n. 30.

circumstances where REJA applies. The provision allows a defendant to raise a defence which would be a "good defence" should an action be brought on the judgment. Clause 3(6)(g) of REJA reads as follows:

> 3(6) No order for registration shall be made if the court to which application for registration is made is satisfied that,
>
> . . .
>
> (g) the judgment-debtor would have a good defence if an action were brought on the judgment.[39]

2.15 The Courts have interpreted the words "good defence" in this clause as dependent upon the statutory provisions concerning recognition of a foreign judgment in effect in the province,[40] which in Manitoba, is section 83. This is not to say that this interpretation directly equates "good defence" with "any defence" as found in section 83. Rather, a "good defence" is said to be narrower than "any defence" in section 83, as the former must be probable of, if not certain of success.[41] Thus, two standards exist. In an action on a foreign judgment, a defendant can raise "any defence" short of one that is embarrassing or intended to cause delay, whereas under REJA, only a defence probable of success can be raised to prevent registration of a foreign judgment on the merits. The interpretation of the courts that the words "good defence" in clause 3(6)(g) of REJA is dependent upon section 83 of *The Queen's Bench Act* produces some confusion as to the meaning of the proviso in section 83. Professor McLeod has commented that perhaps it is REJA that is subject to *The Queen's Bench Act*:

> The meaning of the reference to the Reciprocal Enforcement of Judgments Act is confusing . . . . The interrelationship of the two Acts fits uncomfortably with the words of section 83. It would

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[39] *The Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 3(6)(g).

[40] *Re Gacs and Maierovitz* (1968), 68 D.L.R. (2d) 345 at 350 (B.C.S.C.), foll'd by *Re Aero Trades Western Ltd. and Ben Hocum & Son Ltd.* (1974), 51 D.L.R. (3d) 617 at 619 (Man. Co. Ct.) (hereinafter referred to as *Re Aero Trades*); *Re Mahon/Moore Group of Companies Ltd. and Mercator Enterprises Ltd.* (1978), 7 C.P.C. 150 (N.S.S.C.,T.D.).

[41] *Re Aero Trades*, *supra* n. 40, at 623.

appear that the Reciprocal Enforcement of Judgments Act does not prevent a re-opening on the merits if provincial law allows it since section 3(6)(g) [of REJA] states that no registration order will be made if the court is satisfied that the defendant would have a good defence if the action were brought on the judgment. In such a case, it is questionable whether the Queen's Bench Act is subject to the Reciprocal Enforcement of Judgments Act or vice versa.[42]

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[42]J.G. McLeod, *supra* n. 1, at 604.

CHAPTER 3

THE NEED FOR REFORM OF SECTION 83

3.01 Section 83 has been criticized by both the judiciary and commentators as being out of date. The Manitoba Court of Appeal has stated:

> The section should be sparingly used. It is a survival of the doctrine once entertained in discarded English cases that foreign judgments were only *prima facie* evidence of debt and were not conclusive on the merits, a doctrine which after a varied fortune was given its decisive quietus in decisions between 1850 and 1870.[43]

In a similar vein, Professor Nadelmann has stated that "[t]he Manitoba provision of 1876, which has no common-law background is clearly out of date."[44] In light of the criticisms which the section has received, it must be questioned whether the presence of section 83 continues to be justifiable.

3.02 An Ontario court commented that a now-repealed Ontario provision which was similar to section 83 was enacted to deal with cases such as "where the foreign Court contemptuously disregarded the comity of nations . . . and to meet the chances of mistakes being made in English law by foreign tribunals".[45] Are these considerations appropriate today?

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[43] *Lesperance* v. *Leistikow*, *supra* n. 37, at 7, per Trueman J.A.

[44] K. H. Nadelmann, "Enforcement of Foreign Judgments in Canada" (1960), 38 Can. Bar Rev. 68 at 81-82.

[45] *Barned's Banking Co. Ltd.* v. *Reynolds* (1875), 36 U.C.Q.B. 256 at 290 (C.A.), per Wilson J., commenting on a very similar provision in *An Act Respecting Foreign Judgments and Decrees*, 23 Vict., c. 24, s. 1 (Province of Canada, 1860), which read (prior to its repeal in 1876):

> In any suit brought in either section of the Province upon a Foreign Judgment or Decree (that is to say, upon any Judgment or Decree not

(Footnote continued to page 15)

3.03 It is now routine for the residents of one country (or law unit) to travel to other countries and transact business with the residents of those countries, just as it is routine for countries themselves to interract through extensive international trade. In this international era, where "private relations generally ignore international boundaries", there is a need for security in private international transactions. Professor Castel has suggested that denial of the effect of a foreign judgment destroys this security.[46]

3.04 Uniformity of legislation in different jurisdictions is also recognized as an important factor in fostering international relations. As Professor Castel has said:

> Regionalism [in private international law] is out of place . . . . By remaining in jealous legal isolation one encourages aimless and inevitable differentiations of legal rules. This is not conducive to the development of international trade, a development that is so important to Canada's economic growth.[47]

In a like manner, an Ontario court has criticized a now-repealed provision which was similar to section 83 in the following manner: " . . . [I]t is not well to isolate ourselves from other countries in this respect, and to refuse

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(Footnote continued from page 14)
obtained in either of the said sections, except as hereinafter mentioned) any defence set up or that might have been set up to the original suit may be pleaded to the suit on the Judgment or Decree.

[46] *Supra* n. 2, at 67-69.

[47] J.-G. Castel, "Canada and the Hague Conference on Private International Law: 1893-1967" (1967), 45 Can. Bar Rev. 1. It is notable that the Commissioners on Uniformity of Legislation in Canada have also been critical of a statutory re-opening of the merits of a foreign judgment. See, G.D. Kennedy, "Recognition of Judgments in Personam: The Meaning of Reciprocity - *Archambault* v. *Solloway*" (1957), 35 Can. Bar Rev. 123 at 147 referring to Uniform Law Conference of Canada, *Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada* (1930) at 85.

to give the like measure which we would receive from others".[48]

3.05 Is Manitoba isolated in having a provision such as section 83? Certainly Manitoba is alone amongst Western provinces in allowing a statutory re-opening of a foreign judgment on its merits. In Ontario, as mentioned previously, a similar provision to section 83 was repealed in 1876.[49] Today in Ontario, the general rule is conclusiveness of foreign judgments.[50] In the rest of Eastern Canada, with limited exceptions, foreign judgments are also conclusive on their merits.[51] As well, in England[52] Australia[53]

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[48]*Supra* n. 45, at 290.

[49]*An Act Respecting Foreign Judgments and Decrees*, 23 Vict., c. 24, s. 1 (Province of Canada, 1860); repealed in 1876 by *An Act to carry into effect certain suggestions made by the Commissioners for Consolidating the Statutes and for other amendments of the law*, S.O. 1876, c. 7, s. 1, Sch. A.

[50]In Ontario, a defendant may raise defences for default judgments or where no personal service was effected, for judgments from Quebec. See, *The Judicature Act*, R.S.O. 1980, c. 223, ss. 54, 55 which reproduce ss. 2, 4 of *An Act Respecting Foreign Judgments and Decrees*, 23 Vict., c. 24 (Province of Canada, 1860).

[51]In New Brunswick, defences which arise subsequently to the original judgment can be raised. See *Foreign Judgments Act*, R.S.N.B. (1973), c. F-19, s. 8. Quebec's provision is wider; for judgments emanating from outside Canada, any defence can be raised, while for judgments from within Canada, defences may be raised where there was no personal service or for default judgments. See *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, art. 178, 179, 180.

[52]M. Borm-Reid, "Recognition and Enforcement of Foreign Judgments" (1954), 3 Int'l & Comp. L.Q. 49 at 49-50.

[53]P. E. Nygh, *Conflict of Laws in Australia* (4th ed. 1984) 99. The foreign judgment will not be enforced if the foreign judgment was obtained by fraud or by duress, the foreign court acted contrary to natural justice, the foreign judgment is penal or for a revenue debt or is contrary to public

(Footnote continued to page 17)

and the United States[54] foreign judgments are conclusive on their merits. Thus, it is apparent that Manitoba is isolated in having a provision such as section 83. Adoption of the conclusiveness doctrine therefore would result in uniformity between Manitoba and the other law units in Canada, England, Australia and the United States.

3.06 Other consequences of section 83 include the additional time, effort and expense which may be incurred when a trial is allowed to proceed for a second time with the consequent uncertainty of the status of the original foreign judgment. These factors would be reduced or eliminated by adoption of the conclusiveness doctrine. As Professor Castel has stated, it is desirable that "[t]here be an end to litigation, and that those who have contested an issue should be bound by the result so that matters once tried are forever settled between the parties."[55] Similarly, Professor Nadelmann stated in reference to section 83:

> A second trial after a trial abroad by a court with proper jurisdiction always causes embarrassment and delay. Consequently, no defendant should succeed in having his cause re-argued. By encouraging manoeuvres for delay, the provision can only inconvenience the courts.[56]

(Footnote continued from page 16)
policy, the foreign court acted perversely in refusing to apply the appropriate law, or the party seeking enforcement or recognition is estopped by reason of a prior judgment between the same parties on the same issue (at 99-103).

[54]In the United States, generally, a valid judgment of one state is recognized and enforced in other states pursuant to the Full Faith and Credit Clause in the American Constitution (The American Law Institute, *Restatement of the Law (Second), Conflict of Laws* 2d. (1971), s. 93). Generally, foreign judgments from outside the United States are also afforded recognition and enforcement, although a court's failure to recognize a non-U.S. judgment is not prohibited by the U.S. Constitution, as it is for a U.S. judgment (s. 98) (M.T. Hertz, "The Constitution and the Conflict of Laws: Approaches in Canadian and American Law" (1977), 27 U.T.L.J. 1 at 11).

[55]*Supra* n. 2, at 85.

[56]*Supra* n. 44, at 82.

At the same time, generally a foreign court is as qualified to rule on the merits of a case as a local court. Indeed, Professor Castel has suggested that foreign courts are generally better qualified to interpret their own law and should be permitted to do so without subsequent interference by a court in the local forum. As well, usually appeal procedures are available in the original jurisdiction to remedy an erroneous decision. It has accordingly been suggested that no hardship would result by requiring a party to follow appeal procedures in the foreign jurisdiction.[57]

3.07 It will be recalled that section 83 directly affects the interpretation of clause 3(6)(g) of REJA. Adoption of the common law conclusiveness doctrine by elimination of section 83 would directly affect the defences available to a defendant under clause 3(6)(g) and would reduce the defences to those which are available at common law.[58] The result would be uniformity between the defences which are available to a defendant on an action based on a foreign judgment in the local forum and the defences which are available to a defendant when registration of a foreign judgment is sought pursuant to REJA.

3.08 Obviously, the present system in Manitoba which rejects conclusiveness best protects local defendants. At present, a defendant can ignore foreign proceedings as (s)he can defend an action in Manitoba when sued here on a foreign judgment.[59] While it is true that adequate safeguards are necessary to regulate the recognition of foreign judgments in order to protect

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[57] *Supra* n. 9, at 467-468.

[58] *Re Mahon/Moore Group of Companies Ltd. and Mercator Enterprises Ltd.*, *supra* n. 40; *Canadian Imperial Bank of Commerce* v. *Sebastian* (1984), 44 C.P.C. 207 (N.S.Co.Ct.); *Eggleton* v. *Broadway Agencies Ltd.* (1981), 32 A.R. 61 (Q.B.); *Canadian Credit Men's Trust Association Limited* v. *Ryan*, [1929] 3 W.W.R. 403 (Alta. S.C.). See *supra*, at 5-6 for a discussion of the defences which are available at common law.

[59] See *Re Aero Trades*, *supra* n. 40, at 623, where Molloy C.C.J. stated that clause 3(6)(g) of REJA is both useful and necessary as it enables a defence to be brought by a defendant in Manitoba without burdening the defendant with the expense and trouble of pleading and defending in a foreign court. A similar comment could be made in favour of section 83.

the interests of a local defendant, surely sufficient protection of the interests of a local defendant does not require the extensive protection afforded by section 83. Therefore, it must be considered whether other protections should be implemented to safeguard a local defendant in an action on a foreign judgment.

3.09 A possible solution is the approach taken by several Eastern provinces: general conclusiveness of foreign judgments, with exceptions.[60] This approach has been criticized as discriminatory and based on irrelevant factors. Professor Castel has commented as follows with respect to the exceptions in Ontario law regarding the recognition and enforcement of Quebec judgments:

> The rejection of the conclusiveness rule by statute can no longer be justified today. The Ontario statutory provisions are the most offensive since they discriminate against Quebec judgments only. They should all be repealed as historically they were intended to favour Quebec judgments in specific situations at a time when foreign judgments were not conclusive on the merits. Now that at common law foreign judgments are conclusive, the Ontario rules can no longer achieve their original objective.[61]

J. G. McLeod has also commented as follows:

> The statutory rejection of the doctrine of conclusiveness is difficult to explain. In some cases, the provisions date from the early days of Confederation. The provisions all accept, in general, the principle of conclusiveness but allow for deviations from it on the basis of largely irrelevant factors, for example, Quebec domicile at the time of enforcement.[62]

These criticisms suggest that the enactment of a similar statutory exception to the conclusive doctrine in Manitoba would not provide an acceptable solution.

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[60] See *supra* n. 51.

[61] J.-G. Castel, *supra* n. 9, at 478.

[62] J. G. McLeod, *supra* n. 1, at 606.

3.10 A consideration of the present common law indicates that the common law rules pertaining to international jurisdiction of foreign courts and recognition of foreign judgments provide adequate protection for the local defendant.[63] Our conclusion is supported by Professor Nadelmann who has stated that "[t]he common-law rules on requirements of jurisdictions of the foreign courts, notice, and so forth, are entirely adequate to protect the local defendant in the matter of enforcement of foreign judgments".[64] E.D. Ram also supports this conclusion. He has stated:

> . . . [T]he Canadian system of foreign country money judgment recognition [which generally regards a foreign judgment as conclusive on its merits] makes sense. It is a workable compromise between a nationalistic desire to protect local citizens from foreign powers and the realization that Canada is a part of a larger community in which a foreign judgment must be respected.[65]

In reaching our conclusion, we are cognizant that the present common law does not provide a local defendant with the extensive protection provided by section 83 and in some cases a local defendant will no longer be able to ignore foreign proceedings in anticipation of defending a future action on a foreign judgment in the local forum. Without section 83, where a foreign court has 'international jurisdiction', the local defendant generally would have to defend in the foreign jurisdiction to protect his/her interests as (s)he would be unable to defend on the merits in the local forum. We recommend:

RECOMMENDATION 1

That section 83 of The Queen's Bench Act be repealed.

3.11 It remains for us to consider the necessity of transition provisions respecting the repeal of section 83 of *The Queen's Bench Act*. Section 10 of

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[63]These requirements are discussed *supra*, at 3 *et seq*.

[64]*Supra* n. 44, at 82.

[65]E.D. Ram, "Reciprocal Recognition of Foreign Country Money Judgments: The Canada-United States Example" (1977), 8 Man. L.J. 473 at 492.

The Interpretation Act states: "The provisions of an enactment do not affect litigation pending at the time of its enactment unless it is so expressly stated therein."[66] It is our opinion that section 10 does not provide sufficient protection for local defendants who have relied on section 83 of *The Queen's Bench Act* and in doing so have ignored foreign proceedings, and who may now be barred from re-opening the foreign judgment in the original foreign forum on its merits. Therefore, we recommend that a transition provision be enacted to provide that the repeal of section 83 not apply to an action on a foreign judgment where the foreign judgment was rendered from litigation that was in progress at the time the repeal came into force. Such a transition provision should be enacted within *The Queen's Bench Act*.

RECOMMENDATION 2

That legislation be enacted which reads similarly to the following:

Repeal

1(1) Section 83 of The Queen's Bench Act, C.C.S.M. c. C280 is repealed.

Transitional provision

1(2) Notwithstanding subsection (1), where prior to the coming into force of this section an action was commenced in a foreign jurisdiction, any action commenced in Manitoba upon a foreign judgment rendered as a result of that action shall be dealt with and completed as if this section had not been enacted.

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[66] *The Interpretation Act*, C.C.S.M. I80, s. 10.

CHAPTER 4

LIST OF RECOMMENDATIONS

The recommendations contained in this Report are as follows:

1. That section 83 of *The Queen's Bench Act* be repealed.

2. That legislation be enacted which reads similarly to the following:

> **Repeal**
>
> 1(1) Section 83 of *The Queen's Bench Act*, C.C.S.M. c. C280 is repealed.
>
> **Transitional provision**
>
> 1(2) Notwithstanding subsection (1), where prior to the coming into force of this section an action was commenced in a foreign jurisdiction, any action commenced in Manitoba upon a foreign judgment rendered as a result of that action shall be dealt with and completed as if this section had not been enacted.

This is a Report pursuant to section 5(2) of *The Law Reform Commission Act*, signed this 31st day of March, 1986.

Clifford H.C. Edwards, Chairman

Knox B. Foster, Commissioner

Lee Gibson, Commissioner

John C Irvine, Commissioner

Gerald O. Jewers, Commissioner