to the children as corollary relief in the divorce proceedings. In this event, the relevant legislative provisions will be found in the *Divorce Act*.[1] In most cases, it is immaterial whether a separated spouse or parent seeks support, custody, or access under the federal *Divorce Act* or under provincial or territorial legislation. The outcome of the dispute will not normally be affected. Spousal claims for property division are regulated by provincial or territorial legislation and fall outside the scope of the *Divorce Act*. Spousal property disputes can, nevertheless, be joined with a divorce petition so as to enable all economic and parenting issues between the spouses to be determined by the same court at the time of the divorce. The vast majority of divorces are uncontested, with the spouses settling their differences by a negotiated agreement or settlement. Less than 4 percent of all divorces involve a trial of contested issues where the spouses give evidence in open court.

Before examining provincial and territorial legislation regulating such matters as support, custody, access, and property division, it is appropriate to summarize the basic provisions of the *Divorce Act*. They relate to

- jurisdiction,
- the ground for divorce,
- bars to divorce,
- spousal and child support,
- parenting arrangements, and
- process.

The first three of these are dealt with in this chapter, while spousal support is dealt with in Chapter 8, child support in Chapter 9, parenting arrangements in Chapter 10, and process in Chapter 6.

B. JURISDICTION OVER DIVORCE

1) Introduction

Sections 3 to 7 of the current *Divorce Act* include detailed provisions respecting the exercise of judicial jurisdiction over a "divorce proceeding," "corollary relief proceeding," or "variation proceeding." Each of these terms bears a technical meaning that is defined in section 2(1) of the Act. Once jurisdiction has been established, the doctrine of *forum non conveniens* allows a defendant to contest a court's jurisdiction on the basis that another, more appropriate, forum exists.[2]

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1 RSC 1985, c 3 (2d Supp).

2 *Viana v Pontes*, 2015 NBQB 197; *LGV v LAP*, 2016 NBCA 23; *Wang v Lin*, 2013 ONCA 33; *Karkulowski v Karkulowski*, 2014 ONSC 1222; *Essa v Mekawi*, 2014 ONSC 7409. Compare *Theriault v Theriault*, 2014 SKQB 373 at paras 14–16, citing *Walling v Walling*, 2007 SKQB 43.

2) Definition of "Court"

The definition of "court" in section 2(1) of the *Divorce Act* designates a particular court in each province or territory that has jurisdiction to entertain proceedings under the Act. A designated court must be presided over by federally appointed judges. This reflects the constitutional limitations imposed on both the Parliament of Canada and the provincial legislatures by section 96 of *The Constitution Act, 1867*.[3]

3) Exercise of Jurisdiction by Judge Alone

Section 7 of the *Divorce Act* expressly provides that the jurisdiction to grant a divorce is exercisable only by a judge without a jury.

4) Jurisdiction in Divorce Proceedings

a) Basic Statutory Criteria

Pursuant to section 3(1) of the *Divorce Act*, a court of a province, as defined in section 2(1), has jurisdiction to hear and determine an application for divorce and any accompanying application for corollary relief by way of spousal or child support or custody or access, if either spouse has been ordinarily resident within the province for at least one year immediately preceding the commencement of the proceeding.[4] There is a potential conflict of jurisdiction if the one spouse's ordinary residence has been in one province or territory and the other spouse's ordinary residence has been in another. If, for example, the husband had always lived in Ontario but his wife, after separation, returned to her home province of Saskatchewan, where she has been living for the past year, the Ontario Superior Court of Justice as well as the Saskatchewan Court of Queen's Bench could deal with a divorce petition filed by either spouse. To avoid any such judicial conflict, section 3(2) of the *Divorce Act* provides that, if petitions have been filed in two courts that otherwise would have jurisdiction under section 3(1), the first in time prevails if it is not discontinued within thirty days of its commencement; thus, the second proceeding shall be deemed to be discontinued, and the court of the province or territory in which the first petition was filed will assume exclusive jurisdiction over the divorce.[5] If both petitions have been filed on the same

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3 (UK), 30 & 31 Vict, c 3. See *McEvoy v New Brunswick (AG)*, [1983] 1 SCR 704, (*sub nom Re Court of Unified Criminal Jurisdiction*) 46 NBR (2d) 219.

4 *Nafie v Badawy*, 2015 ABCA 36; *Schlotfeldt v Schlotfeldt*, [2008] BCJ No 984 (SC); *Cantave v Cantave*, 2013 ONSC 4082; *Theriault v Theriault*, 2014 SKQB 373; see also Section B(7), below in this chapter.

5 See *Astle v Walton* (1987), 10 RFL (3d) 199 (Alta QB).

day, the conflict of judicial jurisdiction is resolved by exclusive jurisdiction being vested in the Federal Court.[6] Before granting a divorce, a court has to receive a correctly dated clearance certificate pursuant to the *Central Registry of Divorce Proceedings Regulation*[7] in order to determine that the court has exclusive jurisdiction to deal with the divorce proceeding.[8] Section 3(2) of the *Divorce Act* does not apply when divorce petitions have been filed in two different registries in the same province. In that event, the appropriate course of action may be to consolidate the two proceedings.[9]

There is no constitutional right to a divorce that allows a court to reduce or eliminate the one-year ordinary residence requirement imposed by section 3(1) of the *Divorce Act*.[10] The imposition of a one-year ordinary residence requirement under section 3(1) of the *Divorce Act* does not contravene the mobility right guaranteed to every citizen of Canada by section 6(2) of the *Canadian Charter of Rights and Freedoms*,[11] nor the right to life, liberty, and security of the person that is guaranteed under section 7 of the *Charter*.[12] Faced with a situation where neither party had been ordinarily resident in any one Canadian province for the preceding year, the residence requirements of the *Divorce Act* may leave spouses temporarily without a jurisdiction in which to apply for a divorce.[13]

Where jurisdiction over a divorce petition arises pursuant to section 3(1) of the *Divorce Act*, a Canadian court may grant orders for spousal support, child custody, and child support even though the applicant and children live abroad. A Canadian court may decline to exercise its jurisdiction where there is another forum that is more appropriate. Factors that a court may take into account in addressing the *forum conveniens* include these:

- the location of the majority of the parties;
- the location of key witnesses and evidence;
- contractual provisions that specify applicable law or accord jurisdiction;
- the avoidance of a multiplicity of proceedings;
- the applicable law and its weight in comparison to the factual questions to be decided;
- geographical factors suggesting the natural forum;

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6 *Divorce Act*, RSC 1985 (2d Supp), c 3, s 3(3).
7 SOR/86-600.
8 *Corey v Boucher*, 2012 ONSC 572.
9 *Hiebert v Hiebert*, [2005] BCJ No 1409 (SC).
10 *Jung v Jung*, 2016 ONSC 3020; *Garchinski v Garchinski*, [2002] SJ No 465 (QB).
11 Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
12 *Thurber v Thurber*, [2002] AJ No 992 (QB).
13 *Jung v Jung*, 2016 ONSC 3020 at para 10, JR MacKinnon J.

- whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court; and
- enforceability.[14]

But parties should not be left without any forum to make their claim. As Sharpe JA, of the Ontario Court of Appeal, stated in *Van Breda v Village Resorts Ltd*,[15] the forum of necessity doctrine should be explicitly recognized: where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction.

b) Transfer of Divorce Proceeding to Another Province

A court that is seized of jurisdiction under section 3 of the *Divorce Act* has the discretionary power to transfer the "divorce proceeding" to a competent court in another province, if the divorce proceeding includes a contested application for an interim or permanent custody and access order and the child of the marriage is most substantially connected with the province to which the transfer is contemplated.[16] In determining whether a child is substantially connected with another province and whether the balance of convenience favours a transfer of jurisdiction to a court in that province, the judgment of Warren J in *Chung v Fung*,[17] cites the late Professor James G McLeod,[18] who distilled the following relevant factors from Canadian caselaw:

1) the presence of the child in the jurisdiction;
2) the length of residence in each competing jurisdiction;
3) the strength of the child's bonds to persons and circumstances in each province;

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14 *Alcaniz v Willoughby*, 2011 ONSC 7045, citing *Muscutt v Courcelles* (2002), 60 OR (3d) 20 (CA), and *Follwell v Holmes*, [2006] OJ No 4387 (Sup Ct); see also *LGV v LAP*, 2016 NBCA 23; *Ogunlesi v Ogunlesi*, 2012 ONSC 2112, aff'd 2012 ONCA 723; *Wang v Lin*, 2013 ONCA 33; *Karkulowski v Karkulowski*, 2014 ONSC 1222, citing *Van Breda v Village Resorts Ltd*, 2012 SCC 17; *Barkan v Ovodov*, 2016 ONSC 6105. See also *Theriault v Theriault*, 2014 SKQB 373.

15 2010 ONCA 84.

16 See *Astle v Walton* (1987), 10 RFL (3d) 199 (Alta QB); *Shields v Shields* (2001), 18 RFL (5th) 357 (Alta CA); *IBP v MSP*, 2012 ABQB 278; *Espinoza v Sutherland*, 2009 BCSC 1225; *Tibbs v Tibbs* (1988), 12 RFL (3d) 169 (Man QB); *Mann v Glidden*, 2011 NBCA 50; *D(TW) v D(YM)* (1989), 20 RFL (3d) 183 (NSTD); *Riehl v Key*, [2007] NWTJ No 66 (SC); *Ruyter v Samson* (1992), 44 RFL (3d) 35 (Ont Gen Div); *Rude v Rude*, [2007] SJ No 398 (QB). For a review of the words "most substantially connected," see *Cormier v Cormier* (1990), 26 RFL (3d) 169 at 171–72 (NBQB). See, generally, Vaughan Black, "Section 6 of the *Divorce Act*: What May Be Transferred?" (1992), 37 RFL (3d) 307; see also *SJH v MEH*, 2011 ONSC 1569 at para 39.

17 *Cousens v Ruddy*, 2009 BCSC 1719 (variation proceeding); *IBP v MSP*, 2012 ABQB 278; *Agnew v Violo*, 2013 ONSC 4430 (variation proceeding).

18 James G McLeod, *Child Custody Law and Practice*, loose-leaf (Scarborough, ON: Carswell, 1992–).

4) whether the removal was wrongful, that is, unilateral;
5) whether the removal was justified in light of abuse directed at the child by the parent remaining in the other province;
6) the behaviour of the parents towards compliance with interim custody orders;
7) the province where evidence of the child's present circumstances is most readily available; and
8) the province where the issue of custody can be most easily and cheaply determined.

The application for transfer must be made to the court in which the divorce proceedings were commenced and not the court to which the transfer is requested.[19] The primary factor in analyzing the facts of the case is the best interests of the child; a secondary factor is the proper administration of justice.[20] Section 6 empowers but does not compel a transfer to be ordered.[21] The word "may" rather than "shall" in matters affecting custody signifies a judicial discretion that is exercisable having regard to the best interests of the child.[22] A transfer should be denied where the best interests of the child would not be served by a transfer.[23] The transfer jurisdiction conferred by section 6(1) of the *Divorce Act* may be exercised on the application of a spouse or by the court acting on its own motion. Pursuant to section 6(4), where a transfer of the divorce proceeding has been made under the authority of section 6(1), the court to which the divorce proceeding has been transferred has exclusive jurisdiction to hear and determine the proceeding. Although section 6 of the *Divorce Act* enables a court to transfer a petition for divorce instituted in its jurisdiction to another provincial jurisdiction, it does not permit a court to transfer to its jurisdiction a petition commenced in another province.[24]

c) Competing Foreign Proceeding

Although conflicts in Canadian provincial divorce jurisdiction are resolved by section 3(2) of the *Divorce Act*, whereby the first to be initiated prevails, this is not the dominant factor when there are contemporaneous proceedings in

19 *Ruyter v Samson* (1992), 44 RFL (3d) 35 (Ont Gen Div).
20 *Mohrbutter v Mohrbutter* (1991), 34 RFL (3d) 357 at 358 (Sask QB), citing *D(TW) v D(YM)* (1989), 20 RFL (3d) 183 (NSTD); see also *SJH v MEH*, 2011 ONSC 1569; *Agnew v Violo*, 2013 ONSC 4430 (variation proceeding).
21 *Palahnuk v Palahnuk* (1991), 33 RFL (3d) 194 (Man CA).
22 *Mann v Glidden*, 2011 NBCA 50.
23 *Newman v Newman* (1993), 89 Man R (2d) 254 (QB); *Ketler v Peacey* (1990), 28 RFL (3d) 266 (NWTSC).
24 *Springer v Springer*, [1994] OJ No 450 (Gen Div).

a Canadian province and in a foreign jurisdiction. The principles applicable to an injunction to restrain foreign proceedings and those applicable to a stay of the Canadian proceedings in favour of a foreign court are not the same. A party should not be enjoined from pursuing foreign proceedings that are not vexatious or oppressive. Since the court is concerned with the ends of justice, account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he or she is not allowed to do so. Whether the Canadian proceedings should be stayed depends on whether the foreign court provides an alternative forum that is clearly or distinctly more appropriate. In deciding which of two jurisdictions offer the more convenient forum, the court should ordinarily consider which jurisdiction can deal more comprehensively with the issues in dispute. It is not *prima facie* unjust or vexatious to commence two actions about the same issues in different jurisdictions. Furthermore, a court will lean against interference where the plaintiff in one jurisdiction is the defendant in the other.[25]

5) Jurisdiction in Corollary Relief Proceedings

a) Basic Statutory Criteria

Section 2(1) of the *Divorce Act* defines "a corollary relief proceeding" as "a proceeding in a court in which either or both former spouses seek a support order or a custody order or both such orders." Sections 3(1) and 4 of the *Divorce Act* respectively provide that an original application for support or custody may be brought at the time of the divorce or thereafter.[26] A spouse who obtains an uncontested divorce which is silent on the issue of support cannot use the default divorce judgment as a bar to the other spouse's subsequent application for support; such an application should be determined on its merits.[27] And a prior support order granted pursuant to provincial legislation does not preclude a subsequent application for support under the *Divorce Act*.[28]

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25 *Kornberg v Kornberg* (1990), 30 RFL (3d) 238 (Man CA), leave to appeal to SCC refused (1991), 32 RFL (3d) 157n (SCC); *Follwell v Holmes*, [2006] OJ No 4387 (Sup Ct). As to the application of the *forum non conveniens* doctrine to a divorce proceeding, see *Bullecer v Mayangat*, 2010 ABQB 680; *Roco v Roco*, 2010 ABQB 683; *Kanwar v Kanwar*, 2010 BCCA 407; *LGV v LAP*, 2016 NBCA 23; see also *Armoyan v Armoyan*, 2013 NSCA 99; *Wang v Lin*, 2013 ONCA 33; *Karkulowski v Karkulowski*, 2014 ONSC 1222.

26 See *Evans v Evans* (1987), 6 RFL (3d) 166 (BCSC); *Currie v Currie* (1987), 6 RFL (3d) 40 (Man QB), aff'd (1987), 10 RFL (3d) 207 (Man CA); *Arsenault v Arsenault*, [2006] NSJ No 114 (CA); *Houle v Trottier*, 2012 ONSC 6661 (Div Ct); *Standing v Standing* (1991), 37 RFL (3d) 90 at 92–93 (Sask QB); see also Section B(4), above in this chapter.

27 *Bull v Bull*, 2013 ABQB 366.

28 *Houle v Trottier*, 2012 ONSC 6661 (Div Ct).

A court has jurisdiction to hear and determine a corollary relief proceeding if either former spouse is ordinarily resident in the province or both former spouses accept the jurisdiction of the court.[29] Where corollary relief proceedings are pending in two courts of competing jurisdiction, the first to be instituted prevails unless that proceeding is discontinued within thirty days of its commencement;[30] and if the two proceedings are commenced on the same day, the Federal Court has exclusive jurisdiction to hear and determine the corollary relief proceedings.[31]

The following statement appears in *Payne on Divorce*:

> The amended section 4 of the *Divorce Act*, which became effective 25 March 1993, appears sufficiently broad to enable a foreign divorcee to institute proceedings for support and custody under sections 15 and 16 of the Act, if he or she has established ordinary residence in a Canadian province.[32]

In the opinion of the British Columbia Court of Appeal in *LRV v AAV*,[33] and of the Ontario Court of Appeal in *Rothgiesser v Rothgiesser*,[34] the above statement is untenable. In *LRV v AAV*, the British Columbia Court of Appeal traced the evolution of relevant jurisdictional rules in the *Divorce Act* 1968 and the *Divorce Act* 1986, as subsequently amended in 1993, before concluding that there is nothing to lead to the conclusion that Parliament, by section 4, intended to confer jurisdiction on Canadian courts to grant "corollary" relief with respect to foreign divorces. The British Columbia Court of Appeal found it unnecessary to determine whether Parliament has the constitutional authority to enact legislation that would empower Canadian courts to grant

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29 *Divorce Act*, RSC 1985, c 3 (2d Supp), s 4, as amended by SC 1993, c 8, s 4(1). See *Arsenault v Arsenault*, [2006] NSJ No 114 (CA); *PMG v JH*, 2009 NBQB 41; *Tardiff v Guimont*, 2015 ONSC 4193.

30 *Divorce Act*, RSC 1985, c 3 (2d Supp), s 4, as amended by s 4(2); *Santos v Santos*, 2010 BCSC 331; *Tardif v Guimont*, 2015 ONSC 4193.

31 *Divorce Act*, RSC 1985, c 3 (2d Supp), s 4, as amended by s 4(3).

32 Julien D Payne, *Payne on Divorce*, 4th ed (Scarborough, ON: Carswell, 1996).

33 [2006] BCJ No 264 (CA), supplementary reasons, (*sub nom Virani v Virani*) [2006] BCJ No 1610 (CA); compare *Shokohyfard v Sotoodeh*, [2006] BCJ No 1348 (SC) (application for division of immovable property in British Columbia is not precluded by foreign divorce). See also *Armoyan v Armoyan*, 2013 NSCA 99.

34 [2000] OJ No 33 (CA); see also *Ziemann v Ziemann*, [2001] BCJ No 733 (SC); *Leonard v Booker*, 2007 NBCA 71; *LGV v LAP*, 2016 NBCA 23; *Okmyansky v Okmyansky*, 2007 ONCA 427; *Karkulowski v Karkulowski*, 2014 ONSC 1222; *Kadri v Kadri*, 2015 ONSC 321; *Wlodarczyk v Spriggs*, [2000] SJ No 703 (QB). Compare *Cheng v Liu*, 2017 ONCA 104. For relevant judgments relating to the jurisdiction of the Quebec Superior Court to provide relief to persons who are ordinarily resident in Quebec after the dissolution of their marriage in a foreign jurisdiction, see *Droit de la famille — 3148*, [2000] RJQ 2339 (Sup Ct), and *GM c MAF*, [2003] JQ no 11325 (CA).

orders for support, custody, or access to a foreign divorcee who is ordinarily or habitually resident in a Canadian province or territory, but whose former spouse is ordinarily or habitually resident in a foreign country. However, the British Columbia Court of Appeal did volunteer the statement that "much can be said for the proposition that such an enactment would be invading provincial jurisdiction over 'property and civil rights in the Province': see *Ontario (Attorney-General) v. Scott*, [1956] S.C.R. 137."[35] In *Rothgiesser v Rothgiesser*, the Ontario Court of Appeal had previously concluded that the aforementioned suggestion in *Payne on Divorce* is untenable, being of the firm opinion that Parliament did not intend to give Canadian courts jurisdiction over foreign divorcees. In the opinion of the Ontario Court of Appeal, "[a]ny attempt to deal with [spousal] support obligations in the absence of a Canadian divorce would encroach on provincial jurisdiction [*Constitution Act, 1867*] (s. 92, 'Property and Civil Rights')."[36] It does not follow that relief is unavailable to a foreign divorcee who has established his or her home in Canada. However, in the opinion of the British Columbia and Ontario Courts of Appeal, such relief must be found under provincial or territorial legislative authority. In *LRV v AAV*, the British Columbia Court of Appeal held that the *Family Relations Act*[37] does not empower British Columbia courts to make an original order for child support against a non-resident parent for the simple reason that, by enacting the *Interjurisdictional Support Orders Act*[38] the legislature intended to provide a code that is complementary to legislation existing in jurisdictions with which British Columbia has reciprocal arrangements.[39] Absent reciprocity, however, a foreign divorcee may have no alternative but to seek a remedy against his or her former spouse in the appropriate foreign jurisdiction.[40] The unfairness that can result from this situation has been specifically addressed in England by the *forum conveniens* provisions of the *Matrimonial and Family Proceedings Act 1984*,[41] which were enacted in response to the recommendations of the Law Commission (England).[42]

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35 *LRV v AAV*, [2006] BCJ No 264 at para 60 (CA).

36 [2000] OJ No 33 at para 59 (CA).

37 See now *Family Law Act*, SBC 2011, c 25, effective 18 March 2013.

38 SBC 2002, c 29.

39 See *DPC v TNC*, [2005] AJ No 1634 (QB) (Florida divorce; child support order registered in Alberta and varied pursuant to *Reciprocal Enforcement of Maintenance Orders Act*).

40 But see now, *RNS v KS*, 2013 BCCA 406 (foreign divorcee entitled to pursue spousal support application under *Family Law Act*, SBC 2011, c 25, which came into force on 18 March 2013).

41 (UK), 1984, c 42.

42 See Solicitors Family Law Association, *International Aspects of Family Law*, 2d ed (Orpington: SFLA, Spring 2004) ch 6; and see David Truex, "Matrimonial Financial Appli-

The fact that the parties have obtained a foreign divorce judgment does not prevent an application being brought for property or contractual entitlements under the Ontario *Family Law Act*.[43]

b) Transfer of Corollary Relief Proceeding to Another Province

Pursuant to section 6(2) of the *Divorce Act*, a court with jurisdiction under section 4 to entertain "a corollary relief proceeding," as defined in section 2(1), may transfer that proceeding to a court in a province with which a child of the marriage is most substantially connected, if the corollary relief proceeding includes an application for interim custody or access under section 16 and that application is opposed.[44] Pursuant to section 6(4), a court to which a corollary relief proceeding has been transferred under the authority of section 6(2) has exclusive jurisdiction to hear and determine the proceeding.

6) Jurisdiction in Variation Proceedings

a) Basic Statutory Criteria

Pursuant to section 5(1) of the current *Divorce Act*, the jurisdiction to vary, rescind, or suspend a permanent order for spousal or child support, custody, or access vests in the court of the province in which either former spouse is ordinarily resident, or in a court whose jurisdiction is accepted by the former spouses, provided that any such court falls within the definition of "court" under section 2(1).[45]

Pursuant to sections 5(2) and 5(3), where variation proceedings are pending in two courts that would have jurisdiction under section 5(1), the first to be instituted prevails unless it is discontinued within thirty days of its commencement,[46] and if the two proceedings are commenced on the same day, the Federal Court has exclusive jurisdiction to hear the variation proceedings.

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cations in England and Wales after Foreign Divorce" (Paper presented to CLT Seminar, London, 1 December 2004), online: www.internationalfamilylaw.com/pub/clt1004.html.

43 *Okmyansky v Okmyansky*, 2007 ONCA 427; *Ghaznavi v Kashif-Ul-Haque*, 2011 ONSC 4062 (enforcement of *Mahr*); *Cheng v Liu*, 2017 ONCA 104. See also *Armoyan v Armoyan*, 2013 NSCA 99.

44 See Vaughan Black, "Section 6 of the *Divorce Act*: What May Be Transferred?" (1992), 37 RFL (3d) 307. As to whether a court may transfer part of a corollary relief proceeding, see *Godin v Godin*, 2013 NSSC 401.

45 See *Dixon v Dixon* (1995), 13 RFL (4th) 160 (Alta QB); *Lavoie v Yawrenko* (1992), 44 RFL (3d) 89 (BCCA); *Shipowick v Shipowick*, 2016 MBQB 124; *IJ v TS*, 2015 NBQB 86; *Hiscocks v Marshman* (1991), 34 RFL 12 (Ont Gen Div).

46 See *Winram v Cassidy* (1991), 37 RFL (3d) 230 (Man CA); *Droit de la famille — 541*, [1988] RDF 484 (Que CA).

b) Transfer of Variation Proceeding to Another Province

Where a variation application in respect of a custody order is opposed in a "variation proceeding" as defined in section 2(1) of the *Divorce Act*, and the child is most substantially connected with another province, a court with jurisdiction over the variation proceeding under section 5 may transfer the variation proceeding to a court in that other province.[47] In exercising its discretion, the court looks to the best interests of the child and whether the proposed transfer would impede the proper administration of justice.[48] The accessibility of judicial resources, availability of counsel, systemic delays, and other factors might also come into play.[49] In the event of a transfer, the court to which the variation proceeding has been transferred has exclusive jurisdiction to hear and determine the proceeding by virtue of section 6(4).[50]

c) Variation of Foreign Orders

Section 5 of the *Divorce Act* confers no jurisdiction on any Canadian court to vary a foreign support order, although such jurisdiction may be exercisable under provincial legislation.[51]

7) Ordinarily Resident

A person is "ordinarily resident" in a Canadian province when that person has his or her customary residence in that province. A spouse will be ordinarily resident in a foreign jurisdiction if that jurisdiction is where he or she regularly, normally, or customarily lives.[52] Ordinary residence signifies that a spouse has taken up residence in the province with the intention of remaining there indefinitely. It is not dependent on citizenship, domicile, or

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47 See *Cosentino v Cosentino*, 2016 ABCA 377; *GRB v GMN*, 2008 BCSC 843; *IJ v TS*, 2015 NBQB 86; *Staranowicz v Staranowicz* (1990), 30 RFL (3d) 185 (Ont Gen Div); *Agnew v Violo*, 2013 ONSC 4430; *Heselton v Heselton*, 2011 SKQB 234; see also *Kermeen v Kermeen* (1989), 93 NSR (2d) 28 (Fam Ct). Compare *Naylen v Naylen* (1987), 6 RFL (3d) 350 (BCSC); but see Vaughan Black, "Section 6 of the *Divorce Act*: What May Be Transferred?" (1992), 37 RFL (3d) 307.

48 *Agnew v Violo*, 2013 ONSC 4430; *IJ v TS*, 2015 NBQB 86. See also *Crerar v Crerar*, 2013 BCSC 2244; *MacKinnon v MacKinnon*, 2015 NSSC 18.

49 *Cosentino v Cosentino*, 2016 ABCA 377 at para 5, Slatter JA.

50 *MacKinnon v MacKinnon*, 2015 NSSC 18.

51 See *Leonard v Booker*, 2007 NBCA 71; *Rothgiesser v Rothgiesser* (2000), 2 RFL (5th) 266 (CA); see also *Kendregan v Kendregan*, 2009 BCSC 23; *Jasen v Karassik*, 2009 ONCA 245; *Stefanou v Stefanou*, 2012 ONSC 7265. See also *Zeng v Fu*, 2014 ONSC 3268, wherein *parens patriae* jurisdiction was assumed with respect to custody/access and child support.

52 *Kadri v Kadri*, 2015 ONSC 321; see also *Nafie v Badawy*, 2014 ABQB 262; *Broad v Pavlis*, 2015 BCCA 20.

immigration status.[53] Residence in a place on a temporary basis for a specific purpose does not constitute ordinary residence within the meaning of sections 3(1), 4(1), and 5(1) of the *Divorce Act*, which regulate the jurisdiction of Canadian courts over divorce proceedings, corollary relief proceedings, and variation proceedings instituted pursuant to the *Divorce Act*. The test to be applied is "Where is [the spouse's] real home?" It is settled law that a person is ordinarily resident in the place where the person "regularly, normally or customarily" lives.[54] A person may be ordinarily resident although not actually resident in the province.[55] Accordingly, a spouse may retain an ordinary residence in a Canadian province, even though that spouse spends a number of years in another jurisdiction to which he or she has been posted by an employer.[56] A voluntary change of a spouse's home and private business may, however, terminate the period of ordinary residence previously established in another province.[57] The arrival of a person in a new province with intention of making a home there for an indefinite period makes that person ordinarily resident in that province. Future intentions unaccompanied by any change of residence will not, however, terminate an existing ordinary residence.[58] A person does not lose his or her place of ordinary residence until he or she has determined to give up that residence and arrives in another province with the intention of remaining there.[59]

A spouse may be ordinarily resident in a province within the meaning of the *Divorce Act*, notwithstanding that the initial entry and continued residence in Canada is illegal. Some degree of volition may be required, however, to establish an ordinary residence in a particular province.[60]

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53 *Murphy v Wulkowicz*, [2003] NSJ No 324 (SC); *Kadri v Kadri*, 2015 ONSC 321.

54 *Nafie v Badawy*, 2014 ABQB 262; *Robar v Robar*, 2010 NBQB 8; *Quigley v Willmore*, [2008] NSJ No 144 (CA); *Armoyan v Armoyan*, 2013 NSCA 99; *Ogunlesi v Ogunlesi*, 2012 ONSC 2112, aff'd 2012 ONCA 723; *Cantave v Cantave*, 2013 ONSC 4082; *Droit de la famille — 092181*, [2009] QJ No 9388 (CS); *Kalinocha v Suwannasri*, 2016 SKQB 18.

55 *Alcaniz v Willoughby*, 2011 ONSC 7045, citing *McFadden v Sprague*, [2005] OJ No 4627 (Sup Ct); *Ogunlesi v Ogunlesi*, 2012 ONSC 2112, aff'd 2012 ONCA 723.

56 *Marsellus v Marsellus* (1970), 2 RFL 53 (BCSC).

57 See *Nafie v Badawy*, 2015 ABCA 36; *Anema v Anema* (1976), 27 RFL 156 (Man QB); *Quigley v Willmore*, [2008] NSJ No 144 (CA); *Lajoie v Woito*, [2009] OJ No 151 (Sup Ct); *Masse v Sykora* (1979), 13 RFL (2d) 68 (Que CS); *Cable v Cable* (1981), 130 DLR (3d) 381 (Sask QB).

58 *MacPherson v MacPherson* (1976), 28 RFL 106 (Ont CA); see also *Nowlan v Nowlan* (1970), 2 RFL 67 (NSSCTD); *Quigley v Willmore*, [2008] NSJ No 144 (CA); *Lajoie v Woito*, [2009] OJ No 151 (Sup Ct); *Wang v Lin*, 2013 ONCA 33.

59 *Re Beaton* (1980), 42 NSR (2d) 536 (TD); *Cadot v Cadot* (1982), 49 NSR (2d) 202 (TD); compare *Wrixon v Wrixon* (1982), 30 RFL (2d) 107 (Alta QB).

60 See *Blair v Chung*, [2006] AJ No 882 (QB); *Murphy v Wulkowicz*, [2003] NSJ No 324 (SC); *Jablonowski v Jablonowski* (1972), 8 RFL 36 (Ont SC); *Wood v Wood* (1987), 4 RFL (2d) 182 (PEISCTD); compare *Spek v Lawson* (1983), 43 OR (2d) 705 (CA).

The jurisdictional requirements of section 3(1) of the *Divorce Act* cannot be waived or changed by consent of the spouses or by estoppel.[61]

Where neither spouse has been ordinarily resident in any single province for at least one year, no Canadian court can entertain an application for divorce.[62] It has been held that the term "ordinary residence" should not be construed too restrictively when it could create a jurisdictional vacuum.[63] No corresponding time limitation of one year applies with respect to variation proceedings under section 5(1). The residence requirement is a fundamental condition and is unqualified by the effect of a delay in raising the issue under the Quebec *Code of Civil Procedure*.[64]

Section 3(1) of the *Divorce Act*, which imposes a minimum one-year period of ordinary residence, does not contravene section 6(2)(a) (mobility rights) or section 15 (equality rights) of the *Canadian Charter of Rights and Freedoms*. The imposition of the one-year ordinary residence requirement should also be upheld as a reasonable limit on guaranteed rights and freedoms under section 1 of the *Charter*, having regard to the ramifications of divorce, which go beyond the personal interests of the spouses.[65]

The period of ordinary residence required by section 3(1) of the *Divorce Act* is not limited to one year and may exceed it, but the required period of ordinary residence must continue without interruption for at least one year immediately preceding the commencement of the divorce proceedings.[66] An application for divorce that is presented before expiry of the minimum one-year period of ordinary residence must be dismissed, even though either or both spouses have been ordinarily resident in the province for more than one year at the time of a divorce hearing. Under these circumstances, however, a new application could be successfully launched without delay.[67]

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61 *Byrn v Mackin* (1983), 32 RFL (2d) 207 (Que CS); *Quigley v Willmore*, [2007] NSJ No 426 (SC); *Lajoie v Woito*, [2009] OJ No 151 (Sup Ct); *NK c RV*, [2004] QJ No 8238 (CS); compare s 5(1) of the *Divorce Act*, RSC 1985, c 3 (2d Supp).

62 See *Winmill v Winmill* (1975), 47 DLR (3d) 597 (Fed CA); *Lietz v Lietz* (1990), 30 RFL (3d) 293 (NBQB).

63 CQLR c C-25.01. See *Droit de la famille — 1006*, [1986] RDF 81 (Que CS). See also *Mills v Butt* (1990), 82 Nfld & PEIR 42 (Nfld UFC).

64 See *Droit de la famille — 360*, [1987] RDF 171 (Que CS).

65 *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See *Koch v Koch* (1985), 23 DLR (4th) 609 (Sask QB); see also *Tit v Manitoba (Director of Vital Statistics)* (1986), 28 DLR (4th) 150 (Man QB) (application under the *Change of Name Act*, SM 1982–83–84, c 56).

66 See *Anema v Anema* (1976), 27 RFL 156 (Man QB); *Robichaud v Robichaud* (1974), 20 RFL 14 (NBQB); *Cullen v Cullen* (1969), 9 DLR (3d) 610 (NSTD).

67 *Anema v Anema* (1976), 27 RFL 156 (Man QB); *Stapleton v Stapleton* (1977), 1 RFL (2d) 190 (Man CA).

In calculating the minimum one year of ordinary residence for the purposes of section 3(1) of the *Divorce Act*, the court may take account of premarital residence in the province. Section 3(1) is not confined to ordinary residence *qua* spouse.[68]

The requirements of section 3(1) may be satisfied if either spouse was ordinarily resident in the province for at least one year immediately preceding the commencement of the divorce proceeding, notwithstanding that such ordinary residence was abandoned before the application is adjudicated.[69]

C. DIVORCE JUDGMENTS

1) Effective Date of Divorce Judgment; Appeals; Rescission of Divorce Judgment

Pursuant to section 12 of the *Divorce Act*, a divorce judgment normally takes effect on the thirty-first day after the day on which the judgment granting the divorce was rendered, or at such later date as all rights of appeal have been exhausted. A divorce is not effective until an appeal has been determined and the time for any further appeal from the appellate judgment has expired.[70] Pursuant to sections 12(3), 12(4), 12(5), and 21(2) of the *Divorce Act*, no appeal lies from a judgment granting a divorce on the expiry of the time fixed by law for instituting an appeal unless an extension of the time for appeal has been granted prior to expiry of the normal period. Less restrictive conditions apply to appeals respecting corollary relief in divorce proceedings, as distinguished from the judgment on marital status. Pursuant to section 21(4), an appellate court or a judge thereof may, on special grounds, grant an extension of the time for appealing corollary relief even after expiry of the normal period. Although no appeal lies from a divorce judgment that has taken effect under section 12 of the *Divorce Act*, the judgment may be set aside where it was obtained by irregular or illegal means,[71] as, for example, where there is a lack of jurisdiction or fraud is involved,[72] where statutory provisions or rules of court are contravened, or where principles of natural justice are infringed. Infringement of principles of natural justice should not, however, render the divorce judgment void but only voidable, so that the court

68 See *Navas v Navas*, [1969] 3 All ER 677; *Zoldester v Zoldester* (1974), 13 RFL 398 (BCSC).

69 See *Martin v Martin* (1970), 9 RFL 1 at 5 (NSWSC); *Battagin v Battagin* (1980), 28 AR 586 (QB); *Weston v Weston* (1972), 5 RFL 244 (BCSC); compare *Baia v Baia* (1970), 1 RFL 348 (Ont HCJ).

70 *Bast v Bast* (1990), 30 RFL (3d) 181 (Sask CA). As to the effect of supervening death, see *White v White*, 2015 ONCA 647.

71 *Geci v Gravel*, [1970] RP 402 (Que BR).

72 *Egware v Egware*, 2016 SKQB 116.