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Oy Nokia and Order XI: Notes On Unstructured Bases of Jurisdiction

In *Oy Nokia Ab* v. *The Ship "Martha Russ"* [1]the Trial Division of the Federal Court was faced with the issue of its power to authorize service of a statement of claim out of the jurisdiction. Before the court stood the plaintiff, Oy Nokia Ab, a Finnish corporation, and the defendants, the German registered ship "Martha Russ", her German corporate owners, E. Russ & Co., a second ship, the Dutch "Korendyk", and the latter's owners, the Dutch corporation Nederlandsche-Ameri-Kaansche Stoomvaart Maatschappij, N.V. Oy Nokia's claim sounded in both tort and breach of contract in that the defendants had allegedly delivered Oy Nokia's cargo to Vancouver in damaged condition.

Oy Nokia had sold serial capacitators to British Columbia Hydro. The goods were loaded on the "Martha Russ" in Finland and covered by a bill of lading for carriage to Germany. Upon arrival of the German ship in Hamburg, E. Russ & Co. notified the plaintiff's German agents. At the agents' direction, the cargo was loaded on barges ordered and paid for by the agents and the barges were towed from the "Martha Russ" to the "Korendyk". The goods were not inspected in Hamburg (indeed, they were not inspected until delivered in Vancouver),[2] but were charged on board the Dutch ship and covered by a bill of lading from Hamburg to Vancouver issued by or on behalf of the Dutch owners of the "Korendyk". The bills of lading issued by the German and Dutch companies were completely separate, and there was no allegation of any connection between the two companies. The German ship and her owners participated no further in the carriage or handling of Oy Nokia's cargo once it was loaded on the barges in Hamburg.

When the capacitators were discovered to be damaged, the plaintiff brought its action against both the German and Dutch ships

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1. [1973] F.C. 394; 37 D.L.R. (3d) 597 (Tr. Div.), *aff'd* [1974] 1 F.C. 410; 51 D.L.R. (3d) 632 (C.A.).

2. The Federal Court of Appeal emphasized that "the plaintiff was aware before the goods left Germany that damage had been sustained." [1974] 1 F.C. 410 at 414;51 D.L.R. (3d) 632 at 635, but the lower court decision does not allude to this fact.

and their corporate owners.[3] The basis of the Federal Court's jurisdiction over the Dutch ship and its corporate owner is not clear and apparently was not in dispute. It appears, however, that service was effected against them within Canada.[4] The German ship had not been arrested and service of process, which was effected in Germany against it and its corporate owner, had been authorized by order of the Federal Court. After entering a conditional appearance, these defendants applied to the court seeking to set aside the service of the statement of claim.

The argument for the German defendants on this motion was simple: the action had been brought against them *in personam* and jurisdiction — if any there were — must be *in personam*. If the plaintiff's claim were in contract, then in fact the contract was made and performed completely outside Canada and the territorial jurisdiction of the court. Any breach of that contract necessarily occurred outside Canada as well. If there were fault or negligence on the part of the German defendants, then it also occurred outside Canada. The only fact which could provide the nexus of jurisdiction was that the damaged goods ultimately had entered Canada.

Plaintiff disagreed and relied upon section 22 of the *Federal Court Act*,[5] which provided *inter alia* for the Federal Court's Trial Division to have "jurisdiction with respect to any claim or question arising out of . . . . (h) any claim for loss or damage to goods carried in or on a ship, . . . "[6] This same section specifically

3. The problem of the plaintiff who has a damage claim against one of several concurrent handlers of goods is a classic one. For instance, in *Beaver Lamb & Shearling Co. Ltd.* v. *Sun Insurance Office*, [1951] O.R. 401; [1951] 3 D.L.R. 470 (H.C.), the plaintiff attempted to call in the Australian vendor of sheepskins as a "necessary and proper party" to plaintiff's suit against the insurer of the carrier of the sheepskins from Sydney to Ontario. Damage to the skins had been sustained either on the ocean voyage or else prior to the delivery to that carrier, and in the latter case the vendor would have been the responsible party. The court refused to allow service on the Australian vendor, stating that plaintiff really had two separate and distinct causes of action, and the fact that there was a common question of fact in the cases against each defendant was not determinative. In *Oy Nokia* the equities of the situation were in plaintiff's disfavor because it was apparently aware that some damage had been sustained before the goods left Germany. Note 2, *supra*. Plaintiff's case against the Dutch defendants was consequently no real case at all. In similar circumstances under Order 11-type rules dealing with the right to serve "necessary and proper parties" *ex juris*, the courts have disallowed such service. *E.g.*, *Witted* v. *Galbraith*, [1893] 1 Q.B. 577 (C.A.).

4. [1974]1 F.C. 410 at 413; 51 D.L.R. (3d) 632 at 634 (C.A.).

5. R.S.C. 1970 (2nd Supp.), c. 10.

6. Section 22 reads as follows:

(1) The Trial Division has concurrent original jurisdiction as well between

provided that the court's jurisdiction is applicable "(a) in relation to all ships whether Canadian or not and wherever the residence or domicile of the owners may be. . . " and "(c) in relation to all claims whether arising on the high seas or within the limits of the territorial, internal or other waters of Canada or elsewhere. . . . "

Since the claim was for damages to goods "carried in or on a ship", the plaintiff argued that its case fell literally within the words of the statute. But, the trial court remarked, accepting plaintiff's contention would mean that the Trial Division would have jurisdiction over any cargo damage claim under any bill of lading issued by anyone anywhere regardless of where the damage occurred, so long as the goods ultimately arrived in Canada.[7] The trial court pointed out that

> a basic principle in asserting jurisdiction over foreigners [is] that there must be some legal nexus between the foreign defendants and the territorial jurisdiction of the Court. This nexus must arise from some act, conduct, or agreement by the foreign defendant

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subject and subject as otherwise, in all cases in which a claim for relief is made or a remedy sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

(2) Without limiting the generality of subsection (1), it is hereby declared for greater certainty that the Trial Division has jurisdiction with respect to any claim or question arising out of one of more of the following:

. . . (h) any claim for loss of or damage to goods carried in or on a ship including, without restricting the generality of the foregoing, loss of or damage to passengers' baggage or personal effects; . . .

(3) For greater certainty, it is hereby declared that the jurisdiction conferred on the Court by this section is applicable

(a) in relation to all ships whether Canadian or not and wherever the residence or domicile of the owners may be;

. . . (c) in relation to all claims whether arising on the high seas or within the limits of the territorial, internal or other waters of Canada or elsewhere

. . . .

7. [1973] F.C. 394 at 398; 37 D.L.R. (3d) 597 at 600. *Cf. Lauritzen* v. *Larsen* (1953), 345 U.S. 572 at 576-577; 73 S. Ct. 921 at 925, where it was argued that a Danish seaman working on a Danish registered ship owned by Danes had a right of action under American law because the Jones Act by its own terms extended an American law remedy to "any seaman who shall suffer personal injury in the course of his employment." Interpreted literally, the United States Supreme Court said, the statute would imply that "Congress has extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation — a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal meaning." The Court went on to limit the "literal catholicity" of the statute's terminology.

> which is or can be related *in personam* to the territorial jurisdiction of the court.[8]

The court evidently felt that section 22 of the *Federal Court Act* was not an assertion of jurisdiction over persons but a definition of the competency of the court over subject-matter.[9] The plaintiff's argument was therefore one which attempted to resolve issues of jurisdiction over the person of the defendant by use of a section defining the subject-matter jurisdiction of the court.

Subject-Matter Jurisdiction of the Federal Court in Admiralty

Before turning to the court's treatment of the problem of jurisdiction over persons, we might examine for a moment the limits of subject-matter competence under the *Federal Court Act*. At the time of the Trial Division's decision in *Oy Nokia,* the parameters of subject-matter jurisdiction were not clear. In *Anglophoto Ltd.* v. *The Ship "Ferncliff"*,[10] also decided by the trial judge of the *Oy Nokia* case, the court dealt with the question as to whether it had jurisdiction under section 22 over the operator of a warehouse in Tacoma, Washington. Goods had been bound for Vancouver under a bill of lading from Japan to Vancouver with transshipment intended to Montreal, but a Vancouver dock strike had forced diversion of the goods to the Tacoma warehouse. Ultimately, when the goods arrived in Montreal, it was discovered that part of the shipment was missing. The plaintiff served all parties who might have been responsible for the loss, including the ship, the overland carrier which had transported the goods from Tacoma to Canada, and the Tacoma warehouseman. The court set aside service *ex juris* against the warehouseman, holding that, since the bill of lading was not a through bill, it did not fall within the terms of section 22(2).[11] In a case after *Oy Nokia,*[12] however, the same judge was forced to recognize that his holding in *Anglophoto* was probably wrong.

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8. [1973] F.C. 394 at 399; 37 D.L.R. (3d) 597 at 601.
9. [1973] F.C. 394 at 398; 37 D.L.R. (3d) 597 at 600-601.
10. [1972] F.C. 1337 (Tr. Div.).
11. Section 22(2) (f) specifies the Trial Division's jurisdiction as extending to "any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit." The trial court felt that this clause excluded an action where the bill was not a through bill.
12. *McQuarrie* v. *The "U.S.S. American Ranger"*, [1974] 1 F.C. 42 at 43 (Tr. Div.).

Intervening after *Oy Nokia* had been the decision of the Federal Court of Appeal in *The Robert Simpson Montreal Ltd.* v. *Hamburg-Amerika Linie Norddeutscher.*[13] In that case,[14] the trial judge had interpreted section 22 as depriving his court of subject-matter jurisdiction over a third-party claim made by the defendants against a Canadian warehouseman who had taken possession of goods following an ocean voyage. As in the *Anglophoto* case, that trial court relied on the fact that there was no through bill of lading alleged and ruled that the case would not fall within the ambit of section 22(2) of the Act.

The Federal Court of Appeal rejected this reasoning and held that subject-matter competence of the Trial Division was, under section 22, as broad as Parliament's constitutional power over "Navigation and Shipping."[15] The court arrived at this conclusion by reading section 22(1) together with section 2(j).[16]

Section 22(1), said the court, states that the Trial Division's jurisdiction extends to all cases "in which a claim for relief is made . . . under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping. . . . . " Under section 2(b) of the Act, "Canadian maritime law" constitutes such Canadian admiralty law as existed prior to the Act.[17] But "Laws of Canada" under section 2(j) "has the same meaning as those words have in section 101 of the *British North America Act,* 1867," the court noted.[18] Therefore, it concluded, "those words in that section would seem to embrace not only a statute actually enacted by the Parliament of Canada but also a law 'that it would be competent for the Parliament of Canada to enact, modify or amend.'"[19]

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13. [1973]F.C. 1356; 43 D.L.R. (3d) 267 (C.A.).
14. [1973]F.C. 304 (Tr. Div.).
15. [1973] F.C. 1356 at 1361; 43 D.L.R. (3d) 267 at 273. *See British North America Act,* R.S.C. 1970 (App.) No. 5, s. 91 (10).
16. Section 2 reads: "In this Act, . . . (j) 'laws of Canada' has the same meaning as those words have in section 101 of *The British North America Act,* 1867." (The letters ascribed to the subsections appear in S.C. 1970-71-72, c. 1, s. 2 but not in R.S.C. 1970 (2nd Supp.), c. 10, s. 2).
17. Section 2(b) reads: " ' Canadian maritime law' means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act* or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this or any other Act of the Parliament of Canada."
18. [1973]F.C. 1356 at 1361; 43 D.L.R. (3d) 267 at 272.
19. *Id.,* citing *Consolidated Distilleries Ltd.* v. *Consolidated Exporters Corp.*

In contrast, in *Oy Nokia* the trial court's problem was not subject-matter competence. Nor did the Federal Court of Appeal, in reviewing the decision of the court below,[20] question the matter of subject-matter competence, although the appellate court did not specifically approve the trial judge's decision. But there was really nothing to question concerning the subject-matter competence of the Trial Division. If the "Martha Russ" had been a Canadian ship owned by Canadians, and yet had operated solely between Finland and Hamburg, it would appear quite clear that a Canadian court would have been competent to deal with a claim regarding harm to transported goods.

The decision in *The Robert Simpson Montreal Ltd.* consequently makes the subject-matter competence of the Trial Division rest solely on parliamentary constitutional limitations. Those limits are broad and, due to a lack of case law, ill-defined. Moreover, the Court's jurisdiction, being directly tied to the *British North America Act,* will vary with decisions concerning constitutional power.[21] In making this decision, the Federal Court of Appeal freed the Trial

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Ltd., [1930] S.C.R. 531 at 535; [1930] 3 D.L.R. 704 at 707 (Anglin, C.J.C.), which involved the jurisdiction of the former Exchequer Court and that court's power to promulgate a rule on the basis of its jurisdiction "in all cases relating to the revenue in which it is sought to enforce any law of Canada . . . . " *See Exchequer Court Act,* R.S.C. 1927, c. 34, s. 30. The Supreme Court stated, "While there can be no doubt that the powers of Parliament under section 101 [of the *British North America Act, 1867*] are of an overriding character, when the matter dealt with is within the legislative jurisdiction of the Parliament of Canada, it seems equally clear that they do not enable it to set up a court competent to deal with matters purely of civil right as between subject and subject. While the law, under which the defendant in the present instance seeks to impose a liability on the third party to indemnify it by virtue of a contract between them, is a law of Canada in the sense that it is in force in Canada, *it is not of law of Canada in the sense that it would be competent for the Parliament of Canada to enact, modify, or amend it.*" (Emphasis added). Section 101 of the *British North America Act,* 1867, reads "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better administration of the Laws of Canada."

In accord with *The Robert Simpson Montreal Ltd.* are *Anglophoto Ltd.* v. *The Ship "Ikaros"*, [1974] 1 F.C. 327 (C.A.), *rev'g* [1973] F.C. 483 (Tr. Div.), and *Antares Shipping Corp.* v. *The "Capricorn"*, [1973] F.C. 955 (Tr. Div.).

20. [1974] 1 F.C. 410; 51 D.L.R. (3d) 632 (C.A.).

21. *See, e.g., Canadian Fur Co. (N.A.)* v. *KLM Royal Dutch Airlines,* [1974] 2 F.C. 944 (Tr. Div.) (discussing whether navigation by air fell within "navigation and shipping") and *Sumitomo Shoji Canada Ltd.* v. *The Ship "Juzan Maru"*, [1974] 2 F.C. 488 (Tr. Div.) (discussing whether a warehouseman fell within "navigation and shipping").

Cf. C. Lyon, *Old Statutes and New Constitution* (1944), 44 Colum. L. Rev. 599,

Division from the constraints of a structured set of rules with respect to subject matter, a decision which foreshadowed to some extent an analogous result in the *Oy Nokia* appeal decision concerning jurisdiction over defendants *ex juris*.

The Decision in Oy Nokia on Appeal

The specific problem raised in *Oy Nokia* itself concerns the jurisdiction of the Federal Court over the persons of the German defendants. Under the *Federal Court Act,* the Trial Division may adjudicate *in personam* within its subject-matter competency.[22] But, that being said, there must still be legislation from which the court derives power to oblige those defendants to come to Canada and defend. The trial court in *Oy Nokia* was of a view that, in promulgating the *Federal Court Act,* Parliament did not intend "to confer a jurisdiction over foreigners which did not exist before"[23] in admiralty actions.

The traditional foundation of English jurisdiction *in personam* was the service of process upon the defendant, but that service, under the common law, was limited to service within the territorial confines of the court.[24] A writ served out of the jurisdiction was "mere waste paper."[25] The resulting impractical limitation upon the power of the common law courts to hear cases over absent defendants resulted in the *Common Law Procedure Act* of 1852.[26] The exercise of this power to summon absent defendants is now governed by Order 11 of the *Rules of the Supreme Court* 1965 for ordinary actions and by Order 75 for admiralty actions.[27] Rules similar to the English formulation may be found in most of the Commonwealth countries.[28]

Prior to the establishment of the Federal Court in 1970, admiralty matters were brought in the former Exchequer Court under section

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dealing with the "accordian effect" of American statutes which were tied to constitutional parameters.

22. R.S.C. 1970 (2nd Supp.), c. 10, s. 42.

23. [1973] F.C. 394 at 402; 37 D.L.R. (3d) 597 at 604 (Tr. Div.).

24. G. Cheshire & P. North, *Cheshire's Private International Law* (8th ed. London: Butterworth & Co. (Publishers) Ltd., 1970) at 78 [hereinafter Cheshire].

25. *McGlew* v. *New South Wales Malting Co.* (1918), 25 C.L.R. 416 at 420.

26. *Common Law Procedure Act,* 1852, 15 & 16 Vict., 76.

27. The power to make the present rules of court stems from the *Supreme Court of Judicature (Consolidation) Act,* 1925, 15 & 16 Geo. 5., c. 49, s. 100.

28. Z. Cowan, *Transient Jurisdiction: A British View* (1960), 9 J. Pub. L. 303 at 308.

20 (1) of the *Admiralty Act*.[29] When the court had jurisdiction under that section, the court could serve process *ex juris* under Rule 20 of the Exchequer Court.[30] This Rule was formulated under the authority of section 31(1) (a) of the *Admiralty Act*, which permitted the Exchequer Court to make rules concerning "the service of a writ of summons or other process out of the jurisdiction of the Court." Rule 20 followed to a certain extent some of the English Order 11 rules.[31]

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29. R.S.C. 1970, c.A-1 repealed by the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, s. 64 (1). Section 20 (1) reads:

> An action may be instituted in any registry when
>
> (a) the ship or property, the subject of the action, is at the time of the institution of the action within the district or division of such registry;
>
> (b) the owner or owners of the ship or property, or the owner or owners of the larger numbers of shares in the ship, or the managing owner, or the ship's husband, reside at the time of the institution of the action within the district or division of such registry;
>
> (c) the port of registry of the ship is within the district or divison of such registry;
>
> (d) the parties, so agree by a memorandum signed by them or their attorneys or agents;
>
> (e) the action is *in personam* and is founded on any breach or alleged breach within the district or division of such registry, of any contract, wherever made, that is one within the jurisdiction of the Court and, according to the terms thereof, ought to be performed within such district or division; or
>
> (f) the action is *in personam* and is in tort in respect of goods carried on a ship into a port within the district or division of such registry.

30. Rule 20 of the *Admiralty Rules*, P.C. 1495, Can. Gaz. (Supp.), July 29, 1939, reads:

> Service out of the jurisdiction of a writ of summons or notice of a writ of summons or a third party notice, may be allowed by the court wherever: —
>
> (a) Any relief is sought against any person domiciled or ordinarily resident within the district or division in which the action is instituted;
>
> (b) The action is founded on any breach or alleged breach within the district or divison in which the action is instituted of any contract wherever made, which according to the terms thereof ought to be performed within such district or division;
>
> (c) Any injunction is sought as to do anything to be done within the district or division in which the action is instituted;
>
> (d) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the district or division in which the action is instituted;
>
> (e) The action is in tort in respect of goods carried on a ship into a port within the district or division of the registry in which the action is instituted.

31. *Sumitomo Shoji Canada Ltd.* v. *The Ship "Wakamiyasan Maru"*, [1968] 1

Aside from admiralty matters, the Exchequer Court had a rather general power to serve process outside its territorial jurisdiction. This power, contained in section 75 of the *Exchequer Court Act*[32]and Rule 76 of the Exchequer Court Rules[33]was, like the present Federal Court Rule 307,[34] broadly drafted without Order

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Ex. C.R. 418 at 421. *Accord, Oy Nokia Ab* v. *The Ship "Martha Russ"*, [1973] F.C. 394 at 401; 37 D.L.R. (3d) 597 at 603.

32. R.S.C. 1970, c. E-11. Section 75 reads:

> (1) When a defendant, whether a British subject or a foreigner, is out of the jurisdiction of the Exchequer Court and whether in Her Majesty's dominions or in a foreign country, the Court or a judge, upon application, supported by affidavit or other evidence, stating that, in the belief of the deponent, the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, may order that a notice of the information, petition of right, or statement of claim be served on the defendant in such place or country or within such limits as the Court or a judge thinks fit to direct.
>
> (2) The order shall in such case limit a time, depending on the place of service, within which the defendant is to file his statement in defence, plea, answer, exception or demurrer, or otherwise make his defence, according to the practice applicable to the particular case, or obtain from the Court or a judge further time to do so.
>
> (3) Upon service being effected as authorized by the order, the Court has jurisdiction to proceed and adjudicate in the cause or matter to all intents and purposes in the same manner, to the same extent, and with the like effect as if the defendant had been duly served within the jurisdiction of the Court.

33. *Exchequer Court General Rules and Orders* April 21, 1931, as amended to April 8th, 1969 (Ottawa: Queen's Printer, 1969). Rule 76 reads:

> When a defendant is out of the jurisdiction of the Court, then upon application, supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, the Court may order that a notice of the information, petition of right, statement of claim or other judicial proceeding be served on the defendant in such place or country or within such limits as the Court thinks fit to direct, and the order is, in such case, to limit a time (depending on the place of service) within which the defendant is to file his statement in defence, plea, answer or exception, or otherwise make his defence according to the practice applicable to the particular case, or obtain from the Court further time to do so.
>
> The order for service and the notice for service may be in the terms of Forms 16 and 17 in the Appendix to these Rules.

34. *Federal Court Rules*, S.O.R. 71-68, Rule 307 reads:

> (1) When a defendant, whether a Canadian citizen, British subject or a foreigner, is out of the jurisdiction of the Court and whether in Her Majesty's dominions or in a foreign country, the Court, upon application, supported by affidavit or other evidence showing that, in the belief of the deponent, the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, may order (Form 5) that a notice of the

11-type categories and did not "set out the class of cases in which service *ex juris* may be permitted."[35]

The most confusing part of the trial court's decision in *Oy Nokia* involves its treatment of Rule 307 of the Federal Court. That rule states baldly that, once the plaintiff has submitted an affidavit or other evidence showing his belief that has a good cause of action and the place in which the defendant may be found, the Trial Division may order service upon the defendant outside the jurisdiction of the court, irrespective of the defendant's nationality or where defendant may be found. Yet the *Oy Nokia* trial court did not take Rule 307 at face value. Rather, it sought to determine whether Parliment in passing the *Federal Court Act* conferred jurisdiction over the person of the foreign defendant by permitting the court to "read in" the *former* Admiralty Rules, which set out specific cases in which service *ex juris* was permitted. Rejecting the notion that the Admiralty Rules constituted a part of the former admiralty law saved by the *Federal Court Act,* the court held that service *ex juris* was not allowed.[36] The court went even further and said that, even if the former Admiralty Rules were "read into" the *Federal Court Act,* those Rules would not permit service *ex juris* in the case at bar.[37] The court's opinion seems to mean that the lack of Order 11-type categories within Rule 307 meant that Rule 307 must be inapplicable.

The appeal in *Oy Nokia* presented three specific problems to the Federal Court of Appeals: (1) whether the Trial Division had the power to permit service *ex juris* and compel the German defendants to appear; (2) assuming that such power existed in the court, whether the court had the discretion to refuse to exercise that power; and (3) whether, in the case at bar, that discretion should be

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statement of claim or declaration may be served on the defendant in such place or country or within such limits as the Court thinks fit to direct. (Form 6).

(2) An order under paragraph (1) shall fix a time, depending on the place of service, within which the defendant is to file his defence or obtain from the Court further time to do so.

(3) If any problem arises concerning service of an originating document in a matter other than an action, an application may be made to the Court for directions.

35. *Oy Nokia Ab* v. *The Ship "Martha Russ"*, [1973] F.C. 394, at 401; 37 D.L.R. (3d) 597 at 603 (Tr. Div.). *Accord, id.*, [1974] 1 F.C. 410 at 412; 51 D.L.R. (3d) 632 at 634 (C.A.).

36. [1973] F.C. 394 at 402; 37 D.L.R. (3d) 597 at 603-604.

37. *Id.*

exercised in favour of the defendants. The court had none of the problems which the trial court seemed to experience on the question of the power of the court, although it did not directly deal with that aspect of the case. In fact, the appellate judgement specifically stated that "we should not be taken as approving the trial judge's reasoning as to the extent of the jurisdiction of the court to authorize service *ex juris.*"[38] At the same time, the Federal Court of Appeal emphasized with respect to Rule 307 that "the discretion arising under it is . . . at large" because the "rule does not describe categories of cases in which service *ex juris* may be allowed, as did the former Admiralty Rules."[39] This language indicates, without deciding, that the Trial Division had the *power* to serve the German defendants. But the Federal Court of Appeal affirmed the result of the trial judge on the basis of the latter's discretionary power to refuse to permit service *ex juris,* a judicial prerogative which English courts delineated as part of Order 11 in 1885.[40]

The *Federal Court Act* itself gives little direct indication of whether Parliament intended any territorial limits to the court's jurisdiction, but one strong indicator appears in section 43. After stating in subsection (1) that "the jurisdiction conferred on the Court by section 22 may in all cases be exercised *in personam,*" section 43 goes on to state in subsection (4) that no such *in personam* action may be commenced in Canada for a ship collision unless the defendant resides or has a place of business in Canada, the cause of action arose there, or the parties agreed that the Federal Court would have jurisdiction over the litigation.[41] This subsection

38. [1974] 1 F.C. 410 at 414; 51 D.L.R. (3d) 632 at 635.

39. [1974] 1 F.C. 410 at 412; 51 D.L.R. (3d) 632 at 634.

40. *Société Générale de Paris* v. *Dreyfus Bros.* (1885), 29 Ch.D. 239 at 243-244, rev'd on other grounds (1887), 37 Ch. D. 215 (C.A.). In the case on appeal, Lindley, L.J., affirming the court below on the point, stated that "the language of Order XI is [such that] . . . the Court has a discretion and is bound to exercise its discretion [with respect to service ex juris]". (1887), 37 Ch.D. 215 at 225. The decision of the lower court "has been regarded for many years as the first authoritative statement of the doctrine" of *forum conveniens.* B. Inglis, *Forum Conveniens — Basis of Jurisdiction in the Commonwealth* (1964), 13 Am. J. Comp. L. 583 at 584 note 4.

In *Oy Nokia,* the Federal Court of Appeal was "of the opinion that the case is not a proper one for the exercise of the discretion so as to compel the defendant, E. Russ & Co., to defend the plaintiff's claim in this Court." [1974] 1 F.C. 410 at 414; 51 D.L.R. (3d) 632 at 635.

41. Section 43 reads in relevant part:

> (1) Subject to subsection (4) of this section, the jurisdiction conferred on the Court by section 22 may in all cases be exercised *in personam.*

must have been meant to negate the inference which would arise from section 22(3)[42] that the Federal Court could entertain such actions, regardless of where the defendant was or the cause of action arose. If that is true, no other actions are so limited, and Rule 307 may mean what it appears to say: the Trial Division has world-wide power to serve process *ex juris,* limited only by considerations which it thinks are proper. Since the Federal Court of Appeal did not deal with the parameters of Rule 307, the matter is worth considering.

The Long Arm of the Federal Court: Background to Rule 307

The lack of clarity of the *Federal Court Act* coupled with the possible breadth of Rule 307 may have been a bit disconcerting to the *Oy Nokia* trial court. It is, after all, the tradition in Canada to have rules which specify the conditions under which service *ex juris* may be ordered, and the lack of categories may have been disturbing. In such a situation, a court has but a few alternatives which are:

(1) that the Rule does not apply, because it does not specify when it is applicable;

(2) to find, on the other hand, that the Rule permits service *ex juris* in any sort of case where the court has subject-matter competence; or

(3) to state that the Rule provides for service *ex juris* but that such service must be limited somehow, and then find those limitations by analogy to other rules or general principles of jurisdiction.

Although the court in the *Anglophoto*[43] case explored none of the consequences of its holding, that case seems to point in the direction of the first alternative. In *Anglophoto* the plaintiff argued that the defendant Tacoma warehouseman on which plaintiff wished to order service *ex juris* could be served as a "necessary and proper

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. . . (4) No action *in personam* may be commenced in Canada for a collision between ships unless

(a) the defendant is a person who has a residence or place of business in Canada;

(b) the cause of action arose within the territorial, internal or other waters of Canada; or

(c) the parties have agreed that the Court is to have jurisdiction.

42. Set out in note 6, *supra.*

43. *Anglophoto Ltd.* v. *The Ship "Ferncliff"*, [1972] F.C. 1337 (Tr. Div.).

party'' as had been permitted under former Admiralty Rule 20(d). The court held those rules to be inapplicable, as repealed;[44] in *Oy Nokia* the same trial judge held further that the former Admiralty Rules were not subsumed within the *Federal Court Act*.[45] Taken to their logical conclusion, these rulings would appear to mean that none of the catergories in former Admiralty Rule 20 were carried over by the *Federal Court Act*. Furthermore, as the trial court did not apply Rule 307 , *no* service *ex juris* would ever be possible, for if Rule 307 does not give the Federal Court the power it enjoyed under subsection (d) of former Rule 20, perforce the same argument should apply to all of the former Rule 20 categories. Doubtless the trial court would not subscribe to such an extreme view. But its opinion does not suggest a theory for limiting the scope of Rule 307.

In dealing with former Exchequer Court Rule 76, the direct predecessor of Rule 307, the Supreme Court of Canada also considered the problem of limiting scope, but did so under the approach in the third alternative above, that is, by analogizing to other jurisdictional rules. In *Muzak Corp.* v. *C.A.P.A.C.*,[46]three out of five Supreme Court justices held that the combined effects of Rules 76[47] and 42[48] of the former Exchequer Court and *Exchequer Court Act* section 75[49] made the English Order 11 rules applicable to the Exchequer Court. Most importantly of all, although the language of Rule 42 would not have appeared to require it, the *Muzak* decision seems to mean that Order 11 not only set out minimal parameters for service *ex juris* but actually limited the scope of Rule 76 so that such service could not be ordered *unless* the case fell within the scope of Order 11. Despite rule changes since

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44. [1972]F.C. 1337 at 1341.
45. [1973]F.C. 394 at 402; 37 D.L.R. (3d) 597 at 603-604.
46. [1953]2 S.C.R. 182; 19 C.P.R. 1.
47. Set out in note 33, *supra*. Rule 76, as amended in 1964, was substantially the same as it was when *Muzak* was decided.
48. *Exchequer Court General Rules and Orders* April 21, 1931, as amended to April 9th, 1956. Rule 42 reads:

Practice and procedure not provided for by Statute or by these Rules

> In any proceeding in the Exchequer Court respecting any patent of invention, copyright, trademark or industrial design, the practice and procedure shall, in any matter not provided for by an Act of the Parliament of Canada or by the Rules of this Court (but subject always thereto) conform to, and be regulated by, as near as may be, the practice and procedure for the time being in force in similar proceedings in Her Majesty's Supreme Court of Judicature in England.

49. Set out in note 32, *supra*.

Muzak, the case may indicate how Rule 307 is likely to be interpreted.

In *Muzak* the respondent argued that Rule 76 was broader than Order 11. In this case involving copyright infringement, the respondent applied under Rule 76 for leave to issue notice of a statement of claim upon the foreign appellant, a New York corporation having its chief place of business in New York. The lower court permitted the service, only to be reversed by the Supreme Court. Three judges not only expressed the opinion that the English Order 11 was read into the Exchequer Rules by virtue of Rule 42 but viewed that "reading in" as limiting Rule 76 as well. Mr. Justice Kellok expressly rejected the respondent's argument that Rule 76 and *Exchequer Court Act* section 75 "constitute a complete code of procedure and that Rule 42 does not apply so as to involve the practice of the Supreme Court of Judicature in England."[50] The respondent had failed to bring his case within the categories of Order 11. Two other justices gave similar opinions.[51] The same "limiting" effect may be found both in *C.A.P.A.C.* v. *International Good Music Inc.,*[52] which relied in good part on *Muzak,* and in later cases as well.[53]

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50. [1953]2 S.C.R. 182 at 194; 19 C.P.R. 1 at 15.

51. Cartwright J. agreed and explicitly stated that the case did not fall under any of the relevant clauses of Order 11, s. 1 citing clauses (ee), (f) and (g). [1953] 2 S.C.R. 182 at 197; 19 C.P.R. 1 at 20. Kerwin J. would also have applied Order 11 and dissented in the decision of the case because the majority decided that plaintiff had not brought itself within the rule. [1953] 2 S.C.R. 182 at 188; 19 C.P.R. 1 at 10.

52. [1963] S.C.R. 136; 37 D.L.R. (2d) 1. In that case Martland J. reviewed the plaintiff's affidavit for service *ex juris* and found that it met the requirements of Rule 76 and *Exchequer Court Act,* section 75. He then turned to Rule 4 of English Order 11 and applied the formal requirements of that Rule, except as those requirements were implicitly modified by section 75 itself. Rule 4 of Order 11 required a showing as to whether or not the defendant was a British subject, because under Rule 6 of Order 11, where defendant was neither a British subject nor within the British Dominions, notice of the writ and not the writ itself was to be served upon him. But section 75(1) of the *Exchequer Court Act,* beginning with the words "When a defendant, whether a British subject or foreigner, is out of the jurisdiction of the Exchequer Court . . . " provided merely for a notice of the statement of claim to be served in such circumstances Martland J. concluded that the affidavit of the plaintiff did not have to state whether or not the defendant was a British subject. The clear implication is that, if section 75 had not provided this variance from Order 11, then Rule 4 of Order 11 would have been applicable.

53. *Compare Dole Refrigeration Products Ltd.* v. *Canadian Ice Machine Co.* (1957), 27 C.P.R. 46 (Ex. Ct.) (English joinder rules utilized in silence of Exchequer Court Rules), *with Bain Ltd.* v. *The Ship "Martin Blake",* [1955] Ex.

Rule 42 expressly provided that in industrial and literary property cases "the practice and procedure shall, in any matter not provided for in any Act of the Parliament of Canada or by the Rules of the Court . . . conform to, and be regulated, as near as may be, the practice and procedure for the time being in force in similar proceedings in His Majesty's Supreme Court of Judicature in England."[54] Rule 2 had a similar effect in other actions.[55] But in 1966 Rule 42 was repealed and Rule 2, which was then made to apply generally, stated that the Exchequer Court's practice and procedure, in the absence of an applicable Rule or parliamentary act,

> shall be determined . . . by analogy
> (a) to the other General Rules and Orders of the Court, or
> (b) to the practice and procedure in force for similar proceedings in Courts of that province to which the subject matter of the proceedings most particularly relates,
> whichever is, in the opinion of the Court, most appropriate in the circumstances.[56]

C.R. 241 (reference to English rules on extension of time would not be made where inconsistent with implications of Admiralty Rules, applying Exchequer Rule 2).

54. Set forth in note 47, *supra*.

55. *Exchequer Court General Rules and Orders,* April 21, 1931, as amended to April 9th, 1956 (Ottawa, Queen's Printer, 1956), Rule 2:

> (1) In all suits, action, matters or other judicial proceedings in the Exchequer Court of Canada, not otherwise provided for by any Act of the Parliament of Canada, or any general Rule or Order of the Court, the practice and procedure shall:—
>
> (a) If the cause of the action arises in any part of Canada, other than the province of Quebec, conform to and be regulated as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England; and
>
> (b) If the cause of action arises in the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Superior Court for the Province of Quebec: and if there be no similar suit or matter therein then conform to and be regulated by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England.

56. *Exchequer Court General Rules and Orders,* April 21, 1931, as amended to April 8th, 1969 (Queen's Printer, Ottawa, 1969), Rule 2:

> "In any proceedings in the Court where any matter arises not otherwise provided for by any provision in any Act of the Parliament of Canada (except section 34 of the *Exchequer Court Act)* or by any general rule or order of the Court (except this rule), the practice and procedure shall be determined by the Court (either on a preliminary motion for directions, or after the event if no such motion has been made) for the particular matter by analogy

Rule 2, as amended, has been carried over practically verbatim to become Rule 5 of the Federal Court.[57]

All these rules were designed to fill any gaps in procedure which might exist, but former Rule 42 was used to limit the impact of Rule 75 while amended Rule 2 was not in an analogous situation after 1966. In *Libbey-Owens-Ford Glass Co.* v. *Ford Motor Co. of Canada,*[58] the question was whether service *ex juris* of a third party notice should be made under Rule 76 and section 75 of the *Exchequer Court Act.* The court held that it had jurisdiction to order such service and "there is nothing in Rule 2 which circumscribes this power or in the circumstances of this case makes applicable" the Order 11 rules of Ontario,[59] which had the closest connection with the case. A later case[60] explained *Libbey-Owens-Ford* as holding that the *Exchequer Court Act* and Rules "dealt with the situation and it was not necessary to apply Rule 2 so as to make" the Ontario Order 11 rules applicable.[61] Contrasting amended Rule 2 with former Rules 2 and 42, one cannot see why the language of the former rules would compel the "reading in" of the English Order 11 rules if the language of amended Rule 2 would not compel the same effect by the Ontario rules. All that one can say is that the Supreme Court in *Muzak* found something compelling about Rule 42 in conjunction with Rule 76 while the *Libbey-Owens-Ford* court found no such compulsion under amended Rule 2.

In the *Anglophoto*[62] case the unsuccessful plaintiff made the argument that, even if Rule 307 did not permit service *ex juris,* the court should utilize Federal Court Rule 5, the successor to Rule 2, in order to "read in" Order 11, Rule 1(g) of the British Columbia rules, a rule substantially similar to former Admiralty Rule 20(d). The trial judge rejected this method as being an improper utilization of Rule 5 to increase the jurisdiction of his court. Doubtless if Rule

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(a) to the other General Rules and Orders of the Court, or
(b) to the practice and procedure in force for similar proceedings in the Courts of that province to which the subject matter of the proceedings most particularly relates,
whichever is, in the opinion of the Court, most appropriate in the circumstances."

57. The phrase "(except section 34 of the *Exchequer Court Act*)" is deleted and subclause (a) has been changed to read "(a) to the other provisions of these Rules."
59. (1968) 55 C.P.R. 165 (Ex. Ct.).
59. *Id.* at 165-166.
60. *Appliance Service Co.* v. *Sarco Canada Ltd.* (1969), 58 C.P.R. 218 (Ex. Ct.).
61. *Id.* at 220.
62. *Anglophoto Ltd.* v. *The Ship "Ferncliff"*, [1972] F.C. 1337 at 1341 (Tr. Div.)

307 limited service *ex juris* in some way, Rule 5 should not be used to increase jurisdiction, since a mere stop-gap procedural provision ought not be used as the foundation for jurisdiction.[63] But that says nothing about the scope of Rule 307.

The Federal Court of Appeal's opinion in *Oy Nokia* points away from finding the kind of limitation which the Supreme Court found in *Muzak*. In particular, one should note in *Oy Nokia* that the appellate court cited Rand J. in *Muzak,* even though he was the only justice sitting who specifically avoided discussion of English Order 11.[64] Furthermore, the broad reading of the Federal Court of Appeal on subject-matter jurisdiction[65] would be consistent with a broad reading of Rule 307. One can therefore infer that the potential jurisdiction of the Federal Court over foreign persons is unlimited as to geography but "that it must still be exercised with the caution" traditionally employed.[66] As contrasted with the earlier *Muzak* decision, *Oy Nokia* seems to make Rule 307 a truly unstructured jurisdictional power.

The Desirability of an Unstructured Rule

The potential impact of a jurisdictional statute without express limits is, of course, enormous. It means that the only constraint upon the court which has such power is its own sense of when it

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63. The English courts have stated on several occasions that Order 11 is merely procedural. *See, e.g. In re Liddell's Settlement Trusts,* [1936] Ch. D. 365 at 371-373; this proceeds on the theory that the English courts always had jurisdiction over foreign defendants but were unable to exercise it effectively due to a procedural defect, corrected by Order 11. But there is little practical difference between a situation where a court has jurisdiction but cannot exercise it and one where the court just does not have jurisdiction. If one argued that the Federal Court has jurisdiction worldwide but cannot exercise it under Rule 307, it would be unwise to extend the scope of Rule 307 by means of a rather vague rule like Rule 5, even if both rules were "procedural".

64 In *Muzak Corporation* v. *C.A.P.A.C.,* [1953] 2 S.C.R. 182 at 190; 19 C.P.R. 1 at 12 Rand J. stated:

> The rules of the Exchequer Court dealing with service of this nature are of a most skeletal form. By rule No. 2 [sic] the practice and procedure not otherwise provided shall conform to and be regulated as near as may be by that at the time in force in the Supreme Court of Judicature in England; but it is not necessary, for the purposes of this appeal, to treat the rules of Order No. 11 as being applicable by reason of that provision.

65. *The Robert Simpson Montreal Ltd.* v. *Hanburg-Amerika Linie Norddeutscher,* [1973] F.C. 1356; 43 D.L.R. (3d) 267 (C.A.)

66. *Oy Nokia Ab* v. *The Ship "Martha Russ",* [1974] 1 F.C. 410 at 412; 51 D.L.R. (3d) 632 at 634 (C.A.)

would be unfair or unwise for the court to open its doors to litigation. In theory, these same sorts of constraints were embodied in structured jurisdictional rules. That is, Order 11 rules, with various differences made by individual legislative and judicial bodies, reflect the forum's view that it would be unfair or unwise to decide litigation which did not fall within the letter and the spirit[67] of those rules. Order 11 rules expanded common law *in personam* jurisdiction in five main categories so that the courts could serve process *ex juris*. These were cases involving land within the forum's territory, defendants who resided or were domiciled there, necessary or proper parties to suits brought within the forum, torts committed within the forum's territory, and contracts having a substantial connection with the forum.[68] Some jurisdictions have added a few miscellaneous categories.[69] With these broad powers available, what reasons are there for an unstructured rule, such as Rule 307, exceeding the scope of these traditional rules, when these rules themselves have been criticised as too broad?[70]

Two main objections can be made against the usual structured rules. First, they tend to be inflexible; and second, they tend to focus judicial attention upon the factors set out in the rule, even though the jurisdictional problem contained in a particular case involves many relevant factors other than the one required in order for the rule to be satisfied.

As for the first point, one can readily show that structured rules have required reinterpretation to meet changing social and economic conditions, and yet that such reinterpretation has been slow in coming. A prime example is the rule which permits service *ex juris*

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67. Compare *Kroch* v. *Rossell et Cie Société des Personnes à Responsabilité Limitée*, [1937] 1 All E.R. 725; 156 L.T. 379 (C.A.) (although tort of publishing libel had occurred within England, court would not authorize service *ex juris* because overwhelming part of publication affected Europe, not England), with *Oppenheimer* v. *Louis Rosenthal & Co.*, [1937] 1 All E.R. 23 (C.A.) (although breach of German contract fortuitously occurred in England, court took jurisdiction when plaintiff showed he would not receive fair trial in Germany).

68. *See generally*, Note, *British Precedents for Due Process Limitations on In Personam Jurisdiction* (1948), 48 Colum. L. Rev. 605.

69. *E.g.*, Rules of Practice and Procedure of the Supreme Court of Ontario, R.R.O. 1970, Reg. 545, Rule 25 (1) (c) and (e) concerning wills and administration of estates of persons dying domiciled within the jurisdiction, and Rule 25(1) (k), concerning actions in contract or alimony where the defendant has minimum assets of $200 within the jurisdiction.

70. *E.g.*, *George Monro, Ltd.* v. *American Cyanamid & Chemical Corp.*, [1944] 1 K.B. 432 at 437; [1944] 1 All E.R. 386 at 388 (C.A.) (noting continental criticism of English rules).

"where the action is founded on a tort committed within" the jurisdiction.[71] For many years, the rule was held inapplicable unless both the act causing injury and the injury itself took place within the forum's geographical territory.[72] The constraints of old interpretation were not easily shaken. Exceptions were made for libel cases, for instance, by interpreting the "publication" of a libel as being made within the jurisdiction, when in fact the physical reality may have been otherwise.[73] In Canada, one court was willing to say that an act of fraudulent misrepresentation fell within its jurisdiction when the plaintiff both heard and acted upon a misrepresentation within the forum, even though the defendant spoke the words of misrepresentation into a telephone in another province.[74] But in an English case, *Cordova Land Co.* v. *Victor Brothers,*[75] the court on analogous facts came to the opposite conclusion. A misrepresentation made by the defendants in Boston while contemplating that "it would in due course be received by, and acted upon," by persons such as plaintiff, was nevertheless not a tort committed in England because "the substance of wrongdoing occurred in the United States of America."[76]

Is the fact that the defendant's act was completed outside the jurisdiction that significant? The Supreme Court of Canada has not felt it to be so. In *Moran* v. *Pyle National (Canada) Ltd.,*[77] the Court said that jurisdiction could be taken where damage occurred in the forum's territory and the defendant had caused the damage by putting a defective product into the normal channels of trade, when it would be reasonably foreseeable that the plaintiff might consume it and be harmed within the forum's territory. The decision is in tune with the current need for local power over foreign manufacturers,

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71. *E.g. Rules of Practice and Procedure of the Supreme Court of Ontario,* R.R.O. 1970, Reg. 545, Rule 25 (1) (g); *Rules of the Supreme Court* 1965, S.I. 1965/1776, Order 11, r. 1 (England).
72. *E.g. George Monro Ltd.* v. *American Cyanamid & Chemical Corp.,* [1944] K.B. 432; [1944] 1 All E.R. 386 (C.A.): Abbott- Smith v. Governors of University of Toronto (1964), 49 M.P.R. 329; 45 D.L.R. (2d) 672 (N.S.C.A.).
73. *E.g., Jenner* v. *Sun Oil Co.,* [1952] O.R. 240; [1952] 2 D.L.R. 526; *Bata* v. *Bata,* [1948] W.N. 366 (Eng. C.A.). *Compare Kroch* v. *Rossell et Cie société des Personnes à Responsabilité Limitée* [1937] 1 All E.R. 725; 156 L.T. 379 (C.A.).
74. *Original Blouse Co.* v. *Bruck Mills Ltd.,* (1963), 42 D.L.R. (2d) 174 (B.C.S.C.). *See* S. Hebenton, *Jurisdiction: The Place Where the Tort is Committed* (1966), 2 U.B.C. L. Rev. 361.
75. [1966] 1. W.L.R. 793 (Q.B.D.).
76. *Id.* at 801.
77. [1975] 1 S.C.R. 393; 43 D.L.R. (3d) 239; [1974] 2 W.W.R. 586.

despite the difficulties in resolving the issue of when negligent caused damage could "foreseeably" occur in another province.[78] That difficulty does not exist with an intentional one, as the defendant clearly contemplates damage within the forum's territory. In such an instance, is there any reason why it would be unfair to the defendant to say that he must defend himself against a claim of damage in the very place where he intended to cause it? In this respect *Cordova* appears to be motivated by a need for doctrinal consistency, lacking any articulated need for adhering to the rigid position taken.[79]

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78. The question of the degree of foreseeability necessary for jurisdiction to be taken will certainly arise in Canada, as it has in the United States. In *Gray* v. *American Radiator & Standard Sanitary Corp.* (1961), 22 Ill. 2d 432; 176 N.E. 2d 761, defendant Ohio Manufacturer of an allegedly defective valve shipped the valve to a Pennsylvania corporation. The latter incorporated the valve in a hot water heater, which "in the course of commerce" was sold in Illinois and injured plaintiff there. There was no evidence that the defendant had done any other Illinois business, directly or indirectly. The court took jurisdiction, pointing out that "defendant does not claim that the present use of its product in Illinois is an isolated instance" and that "it is a reasonable inference that its commercial transactions, like those of other manufacturers, result in substantial use and consumption in this state." *Compare O'Brien* v. *Comstock Foods, Inc.* (1963), 123 Vt. 461; 194 A.2d 568, where it was held that "[t]he bare allegation that the defendant at Newark, New York, put its product 'into the stream of commerce', without more, is insufficient to show a voluntary contract or intentional participation in Vermont." The *O'Brien* court held that it would be contrary to the due process clause of the United States Constitution, Amendment XIV, to take jurisdiction over the defendant. The opposite conclusion was reached in *Gray*. The same issue arises under statutory construction or even as a matter of judicial discretion: at what point does the relationship between the defendant's act and the forum become so tenuous that taking of jurisdiction would be inappropriate?

79. *Cf.* Cheshire, note 24 *supra* at 280. In *Murphy* v. *Erwin-Wasey, Inc.* (1972), 460 F.2d 661 (1st Cir.), the court held that, where a defendant non-resident "knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state." *Id.* at 664. In *Murphy* the representation was mailed from outside the state to plaintiff within the state. On the other hand, in *Gluck* v. *Fastig Tipton Co.* (1972), 63 Misc. 2d 82; 310 N.Y.S.2d 809 (Sup. Ct.), where a Kentucky surgeon falsely certified a mare, knowing that the certificates would be relied upon in New York, the court held that the act of misrepresentation did not take place in New York, This decision though, was required by *Kramer v. Vogl* (1966), 17 N.Y.2d 27; 267 N.Y.S.2d 900; 215 N.E.2d 159, standing for the proposition that where "the representation in question had originally been made to plaintiff outside the jurisdiction and was then subsequently confirmed by letter to him inside the jurisdiction. jurisdiction would no lie." *Polish* v. *Threshhold Technology, Inc.* (1972), 72 Misc. 2d 610; 340 N.Y.S.2d 354 at 356 (Sup. Ct.). Both of these cases are based on statutory construction. In *Hoppenfeld* v. *Crook* (1973), 498 S.W.2d 52 (Tex. Civ. App.) *writ of error refused, no error,* a Texas court held that a tort had been committed within Texas by misrepresentation made

Prima facie the *Cordova* and *Moran* cases are irreconcilable, but one can reconcile them. One needs to look at the entire situation of litigation, not just the nature of the tortious act. For example, the defendant in *Moran* was shipping a great number of products outside its home province and, while it had no property, assets, salesmen, or agents in the forum's territory, it sold its product to distributors located there and contemplated the resale of its products there. In the traditional English and Canadian sense, the defendant was not "doing business" within the forum's territory because it lacked a fixed place of business[80] and an agent for service of process,[81] yet it was clearly drawing remuneration from activities in connection with the forum. In *Cordova,* on the other hand, there is no indication that the defendants had any sort of continuous business involving England. Comparing the two cases, one could argue that the *Moran* defendant might fairly be subjected to a jurisdiction in which it had committed a negligent tort connected with an ongoing commercial relationship, whereas the *Cordova* defendant might not be fairly subjected to a jurisdiction with which its sole connection was an isolated intentional tort, where the defendant acted completely outside the forum territory. By viewing the overall situation and not focussing exclusively on the factors necessary for fulfilling the statutory requirements, we can possibly justify the results in both cases.[82]

This comparison illustrates the second problem with structured jurisdictional rules; on their own terms, they do not permit the courts to articulate factors which might be involved in the decision to take jurisdiction when such factors fall outside the structural categories. As the illustration shows, many factors may be relevant to the jurisdictional problem, not merely those which are contained within the structured rule.

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in New York to plaintiff with the intent that plaintiff rely on them in Texas. However, the court held that despite this intent, there were insufficient contacts between the New York defendants and Texas for the Texas court to take jurisdiction. *Hoppenfeld,* holding on the constitutional requirements of the due process clause, Amendment XIV of the United States Constitution, seems somewhat contradictory to the *Murphy* case, *supra.* However, the overall contacts between defendants and forum in *Murphy* were far greater than those between defendants and forum in *Hoppenfeld,* and this may explain the difference.

80. *E.g., Okura & Co.* v. *Forsbacka Jernverks Aktiebolag,* [1914] 1 K.B. 715 at 718 (C.A.).

81. *E.g., Murphy* v. *Phoenix Bridge Co.,* (1899), 18 P.R. 495 (Ont. C.A.).

82. Such factors as the residence of the plaintiff may, in certain instances, convert an unfair taking of jurisdiction over a foreign defendant into a fair one. In *Seymour*

Let us compare the situation in *Moran,*[83] which involved a substantial manufacturer of lightbulbs, with a hypothetical situation concerning a rather small-scale candlemaker. We suppose that both the lightbulb manufacturer and the candlemaker are located in province A and that each sells his full output in province A. However, the lightbulb company sells to local distributors who ship all over Canada, whereas the candlemaker sells only to a small retail outlet in province A. A tourist from province B purchases a lightbulb and a candle in province A. Both are defective. The tourist is injured by each product in province B, where he first uses them. May we conclude that, despite the parallel torts and the equal "foreseeability" of where the product is going, that the lightbulb manufacturer may be fairly brought into province B's court while the candlemaker may not?[84]

This problem has been raised and discussed elsewhere.[85] What is merely being suggested here is that structured jurisdictional statutes stand in the court's way and discourage its focussing upon such factors as the nature and quality of the tortfeasor and his relationship with the forum, not to mention the plaintiff's connection with the

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v. *Parke, Davis & Co.*, (1970), 423 F.2d 584 (1st Cir.) *aff'g* (1969), 294 F. Supp. 1257 (D.N.H.), defendant's sole contact, with the forum, New Hampshire, were the presence of its salesman and a certain amount of advertising there. All orders for goods sold in New Hampshire were made through Massachusetts and defendant's branch office was in Massuchusetts. Under the circumstances, defendant could be said to be doing business in New Hampshire, but, as plaintiff's cause of action arose solely in Massachusetts and plaintiff went to New Hampshire only to avoid the Massachusetts statute of limitations, the court felt that fairness to the defendant would not permit taking of jurisdiction in New Hampshire. The plaintiff having no contacts with the forum, the defendant's contacts were insufficient to make the choice of forum a fair one. *But compare Maharanee of Baroda* v. *Wildenstein,* [1972] 2 Q.B. 283; [1972] 2 All E.R. 689 (C.A.) (Indian plaintiff could sue French defendant in England, despite fact defendant was served with process in England on temporary visit).

83. *Moran* v. *Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 395; 43 D.L.R. (3d) 239; [1974] 2. W.W.R. 586.

84. Some may argue that, despite its contacts with province B, even the lightbulb manufactuer should not have to defend there. If so, change the facts somewhat: have each manufacturer sell its product to the tourist knowing that he comes from province B and that he will not consume the product until he returns home. Some may now argue that *both* manufactuers should be subject to province B's jurisdiction. But surely that ought not be the case with the candlemaker, who has quite tangential contacts with province B whereas the lightbulb manufacturer has a continuous relationship and it was merely fortuitous that the injury which occurred in B arose out of a bulb sold in A rather than in B.

85. A. von Mehren & D. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis* (1966), 79 Harv. L. Rev. 1121 at 1169.

forum and the problem under consideration.[86] The emphasis in structured rules is entirely upon the factors indicated by the rule itself, with other factors perhaps being considered afterwards under the doctrine of *forum conveniens*.

One more illustration will show the disadvantages of structured rules. Suppose that an Ontario plaintiff enters into a contract with a New York defendant to purchase a power generator from the defendant and have defendant install and service it. The New York defendant initiates the contact in Ontario between the parties, although the defendant has no fixed place of business or agent there. All negotiations except the final session and the signing of the contract take place in Ontario. Ontario law governs the contract, but the defendant does not specifically consent to Ontario jurisdiction. Delivery and installation of the generator is made in Ontario as is payment. In fact, all of defendant's obligations must be discharged in Ontario, except for one: the defendant must stock certain disposable items to be used on the generator, and defendant is obligated only to deliver those items to plaintiff at defendant's New York plant. This obligation defendant breaches. Had any other obligation been breached, the present Ontario rules would have covered the jurisdictional problem. [87] But here, because the specific obligation was neither breached nor required to be performed within Ontario, there is no jurisdiction. In the context of a case which has far more contacts with Ontario than with New York, the result is unwarranted.

Naturally, the result could be changed by adopting the English rule[88] which would put jurisdiction in Ontario because the proper law of the contract was Ontario. Yet the fact the the parties might have selected New York law to govern their obligations should not radically change the fact that Ontario is at least as proper a forum as New York.

The arguments against having unstructured, open-ended jurisdictional rules is that they may encourage excessive utilization of local jurisdictional power, that they do not provide sufficient guidelines for potential foreign defendants to plan their affairs so as to avoid

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86. *See id.* at 1167.
87. *Rules of Practice and Procedure of the Supreme Court of Ontario,* R.R.O. 1970, Reg. 545, Rule 25 (1) (f).
88. *Rules of the Supreme Court* 1965, S.I. 1965/1776, Order XI, r. 1 (1) (f) (England).

the forum's jurisdiction, and that they may be too confusing to apply.[89] None of these points is completely convincing.

In practice, English and Canadian courts have made sparing use of their present power under Order 11 statutes, erring on the side of refusing to take jurisdiction in the doubtful cases rather than taking jurisdiction in the ones which are borderline.[90] As the Federal Court of Appeal emphasized in *Oy Nokia,* "the discretion arising under [Rule 307] is . . . at large, but it must still be exercised with . . . caution."[91] The mere opportunity to take jurisdiction has not persuaded the courts to do so where they have felt it unjustified, and there is no reason to believe that this general policy would be abandoned under an unstructured rule.

The second point is somewhat more telling. Can foreign defendants plan their affairs properly if they cannot insulate themselves from potential forums with which they have little contact? In fact, potential foreign defendants can and will take refuge behind their home jurisdiction's rules with respect to the rocognition of foreign judgements when the forum has made an excessive claim to local jurisdiction. If a businessman who operates in country A is called upon to defend himself in country B, and he has no contacts or interests within country B, then he will simply ignore the law suit. If he has present interests there or thinks he will have future interests, he will go in and defend himself.[92] In fact, his concern about the entry of a judgment against him in country B is a fairly good indicator in itself that he has contacts with country B.

The counter argument, of course, is that there will be situations where the defendant has some interests within the forum's territory,

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89. *Cf.* L. De Winter, *Excessive Jurisdiction in Private International Law* (1968), 17 Int. & Comp. L.Q. 706 at 719-720.

90. *See, e.g., George Monro, Ltd.* v. *American Cyanamid & Chemical Corp.* [1944] 1 K.B. 432; [1944] 1 All E.R. 386 (C.A.); *The Brabo,* [1949] 1 All E.R. 294 at 298 (H.L.); *Beaver Lamb & Shearling Co.* v. *Sun Insurance Office,* [1951] O.R. 401 [1951] 3 D.L.R. 470 (H.C.).

91. *Oy Nokia Ab* v. *The Ship "Martha Russ",* [1974] 1 F.C. 410 at 412; 51 D.L.R. (3d) 632 at 634.

92. *See, e.g., Somportex, Ltd.* v. *Philadelphia Chewing Gum Corp.* [1968] 3 All E.R. 26 (C.A.) Defendants were contemplating expansion of their operations to England, and consequently protested jurisdiction against them by putting in a conditional appearance. The jurisdictional point was decided against them, and they were also held to have submitted to English jurisdiction. The English judgement was recognized in the United States. *Somportex* v. *Philadelphia Chewing Gum Corp.* (1971), 453 F.2d 435 (3rd Cir.), *cert. denied* (1972), 405 U.S. 1017. The defendants clearly had taken their chances in England because of their contemplated future operations there.

and yet those interests — even coupled with the contacts involved in the situation about which the plaintiff complains — are insufficient to justify a taking of jurisdiction. The defendant, the arguments runs, is being put in the position of sacrificing those interests or else defending on the merits in a forum inconvenient to him. Defendant's dilemma should be resolvable by giving him the opportunity of arguing his jurisdictional point to the forum tribunal without submission for recognition purposes. The forum may then make a measured determination as to the fairness of subjecting the defendant to its legal processes. The fact that the standards by which the forum determines its jurisdiction is not structured into categories should not be particularly burdensome upon the defendant. Many of our jurisdictional rules (*forum conveniens,* for instance) are judicially developed and can only be interpreted by case law. If the entire jurisdictional rule were judicially developed that ought not be such a catastrophe or any more difficult to understand than is the common law itself.

There is, finally, the point that unstructured rules may be less easily applied by the courts than structured ones. One writer has suggested that if we "take into consideration all circumstances of a specific case . . . we will run into the same confusion and uncertainty as has been created by part of contemporary American doctrine with respect to choice of law problems."[93] The criticism leveled at the "no rules" school of choice of law has charged that adoption of unstructured rules in choice of law puts courts in confusing "three dimensional chess games", a situation completely inappropriate to the necessity of dealing with high-volume problems of administration of justice.[94] That criticism, though, is less easily leveled at questions of local jurisdiction, because the problems have not merely as many dimensions. The focus is on the law of the forum in local jurisdictional questions, not on two or more possible laws. To a far lesser extent that in analogous choice of law problems there may be an exploration of other jurisdictions as possible alternative forums. But in most cases the laws of other jurisdictions are not considered. Finally, the present structured rules are still available as guide lines to solve the easy cases. For the harder ones, though, involving less clear contacts by the overall situation with

93. L. De Winter, *Excessive Jurisdiction in Private International Law* (1968). 17 Int. & Comp.L.Q. 706 at 719-720.
94. M. Rosenberg, *Comment on Reich* v. *Purcell* (1968), 15 U.C.L.A. L.Rev. 551 at 644.

the forum, the court may well need to look at other elements of the situational scenario.

In conclusion, therefore, the Federal Court of Appeal decision in *Oy Nokia*, if it was meant to cast Rule 307 as an unstructured rule of jurisdiction, opens very important opportunities to the Canadian federal court system. In practice, one doubts very much if Rule 307, so construed, will greatly increase the Federal Court's taking of jurisdiction over foreign defendants. On the other hand, there is a very real opportunity for the Federal Court to enunciate the sort of factors which it considers to be important in taking jurisdiction, freed from the traditional mold of Order 11. A clear exposition in judgments will, in the long run, permit potential defendants to plan their affairs and result in the kind of fairness and reason which one expects from jurisdictional rules.

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