

BACK TO THE FUTURE! IS THE “NEW” RIGID CHOICE OF LAW RULE FOR INTERPROVINCIAL TORTS CONSTITUTIONALLY MANDATED?©

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In the last few years, the Supreme Court of Canada has held that private international law rules applicable to the jurisdiction of Canadian courts and the recognition and enforcement of the judgments of sister provinces must conform to the demands of territoriality and the principles of order and fairness which flow from the existence of an implied Full Faith and Credit clause in the Canadian Constitution. More recently, the Court has decided that, with respect to choice of law, the ancient *lex loci delicti* rule is applicable to both interprovincial and foreign torts and that it admits no exceptions in interprovincial litigation on the ground that the nature of Canadian constitutional arrangements requires such a solution. The author disagrees as he believes that it is inappropriate for the Court to attempt to constitutionalize all private international law rules applicable to interprovincial conflicts. The result would be two sets of private international law rules leading to discrimination against foreign litigation. He is also of the opinion that in the field of torts, an absolute rule for interprovincial litigation is a step backward. Justice requires the recognition of exceptions to the application of the *lex loci delicti* rule in appropriate circumstances.

Il y a quelques années déjà, la Cour suprême du Canada avait décidé que les règles du droit international privé qui déterminent la compétence interprovinciale des tribunaux canadiens ainsi que les conditions de reconnaissance et d'exécution des jugements d'une autre province, devaient se conformer aux exigences posées par la territorialité et aux principes d'ordre et de justice qui découlent d'une clause de "bonne foi et crédit" implicite dans la constitution canadienne. Plus récemment, la Cour fut d'avis que, dans la domaine des conflits de lois, la règle classique de la *lex loci delicti* s'applique à la responsabilité civile délictuelle et quasi-délictuelle, quelque soit le lieu où le fait générateur de la responsabilité s'est produit. Lorsqu'il s'agit de conflits interprovinciaux, la nature des accords constitutionnels ne permet aucune dérogation à cette règle. L'auteur n'est pas d'accord. Il estime qu'il n'est pas bon de "constitutionnaliser" les règles du droit international privé qui s'appliquent aux conflits interprovinciaux. Il en résulterait deux groupes de règles distinctes, ce qui nuirait aux conflits internationaux. Il vaut mieux soumettre les conflits interprovinciaux et les conflits internationaux aux mêmes règles. L'auteur est aussi d'avis que dans le domaine de la responsabilité civile délictuelle et quasi-délictuelle, une règle qui n'admet pas d'exceptions est malencontreuse. Le cas échéant, au nom de la justice, les tribunaux doivent pouvoir écarter la *lex loci delicti*.

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I. INTRODUCTION

In a series of cases,¹ beginning in 1990, the Supreme Court of Canada has held that, to be constitutionally valid, statutory or judicial private international law rules applicable to all interprovincial situations must conform to the demands of territoriality *and* the principles of order

¹ *Morguard Investments Ltd v. De Savoye*, [1990] 3 S.C.R. 1077 [hereinafter *Morguard*]; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* [1993] 1 S.C.R. 897 [hereinafter *Amchem*]; *Hunt v. T & N PLC*, [1993] 4 S.C.R. 289 [hereinafter *Hunt*]; and *Tolofson v. Jensen*; *Lucas v. Gagnon* (1995), 100 B.C.L.R. (2d) 1 [hereinafter *Tolofson and Lucas*].

and fairness.² In other words, there are now two grounds for challenging the constitutionality of a statutory or judicial rule of private international law: the traditional limitation on the power of the provinces to legislate extraterritorially and the new constitutional principles of order and fairness.³

These principles were applied first to the general rules of jurisdiction of Canadian courts and the common law rules of recognition and enforcement of sister-province judgments and, more recently, seem to have been extended to common law choice of law rules for interprovincial torts.

The “constitutionalization” of all aspects of private international law rules relevant to interprovincial situations could soon create two sets of rules: those applicable to cases containing legally relevant *foreign* elements and those applicable to cases containing legally relevant elements from other provinces.

In a highly integrated world economy that requires private international law rules best capable of promoting suitable conditions for the development of interprovincial and international commerce,⁴ it seems inappropriate for the Supreme Court to adopt rules that call for a more generous acceptance of the laws, jurisdictional rules, and judgments of sister-provinces. An interprovincial comity based on the new constitutional principles of order and fairness, which have their source in the notions of full faith and credit and due process held to be implicit in the Canadian Constitution,⁵ would be equally applicable to international situations.⁶ In today’s world, there is no valid justification for or advantage in treating interprovincial and international conflicts

² *Hunt, ibid.* at 326-27.

³ *Morguard, supra* note 1 at 1095 and 1099-1101.

⁴ Paraphrasing Professor H.E. Yntema in “The Objectives of Private International Law” (1957) 35 Can. Bar Rev. 721 at 741, which was relied upon by the Supreme Court in *Morguard* to support the principles of order and fairness.

⁵ *Morguard, supra* note 1 at 1101: “In short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.” Note that the notion of due process found in the 14th amendment to the American Constitution is not the exact equivalent to “fundamental justice” in section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁶ Professor Peter Hogg has remarked: “The conflicts law of each Canadian province has developed with little regard for the idea that there are constitutional limits on provincial extraterritorial competence, or the idea that, within a federal state, conflicts law rules might require modification upon constitutional grounds”: *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1992) at 328.

differently. With the exception of *Hunt*,⁷ the Supreme Court could have reached the same results without giving a constitutional dimension to the decisions under study. International comity demands no less than interprovincial comity. All aspects of private international or interprovincial law should be subjected to the same limitation: that there must exist a real and substantial connection to the forum for it to take jurisdiction or to apply its own law, and to have its judgments recognized elsewhere.

II. ORDER AND FAIRNESS IN INTERPROVINCIAL PRIVATE INTERNATIONAL LAW: JURISDICTION, PROCEDURE, AND JUDGMENTS

*Morguard Investment Ltd. v. De Savoye*⁸ is the first case where the Supreme Court laid down special rules applicable to interprovincial situations. It involved the recognition and enforcement in British Columbia of personal default judgments granted in Alberta against an absent defendant served *ex juris* in foreclosure proceedings for deficiencies on the sale of mortgaged property located in the latter province. The Supreme Court held that if it is fair and reasonable for the courts of one province to exercise jurisdiction in a particular case, it should, as a general principle, be reasonable for the courts of another province to enforce the resulting judgment. Mr. Justice La Forest, on behalf of the Court, stated:

[R]ecognition in other provinces should be dependent on the fact that the court giving judgment “properly” or “appropriately” exercised jurisdiction. It may meet the *demands of order and fairness* to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject matter of the action. But it hardly accords with *principles of order and fairness* to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject matter of the suit.⁹

His Lordship remarked that, in the past, Canadian courts had been wrong to transpose the common law rules developed for the recognition and enforcement of *foreign* money judgments to the recognition and enforcement of judgments from sister provinces. Principles of order and fairness must obtain in this area of private international law. When present, they create a type of interprovincial

⁷ It is the only case that was argued in constitutional terms: *supra* note 1.

⁸ *Ibid.*

⁹ *Ibid.* at 1103 [emphasis added].

comity which requires the recognition and enforcement of the judgments of sister provinces as it “is based on the common interest of both the jurisdiction giving judgment and the recognizing jurisdiction. Indeed, it is in the interest of the whole country, an interest recognized in the Constitution itself.”¹⁰ Thus, “[i]n short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.”¹¹

The relevant test in determining the appropriate forum, which is based on the principles of order and fairness, is whether there was a real and substantial connection between the court which gave the judgment and the action.¹² The court must have reasonable grounds for assuming jurisdiction if its judgment is to be recognized and enforced in other provinces pursuant to an implicit Full Faith and Credit clause in the Constitution of Canada.¹³ However, it is a test, the Supreme Court tells us, which cannot be applied rigidly.¹⁴

The real and substantial connection to the forum that assumed jurisdiction, a test designed to give substance to order and fairness, is not very demanding, although there must be limits on claims to jurisdiction.¹⁵ In *Morguard*, the Supreme Court refrained from determining these limits on the ground that no court can anticipate what constitutes a reasonable assumption of jurisdiction. Nevertheless, the Court did state that traditional rules of jurisdiction would be a good place to start¹⁶ and that each limit must be defined in accordance with the broad principles of order and fairness.¹⁷ This approach is constructive, but should it be restricted to interprovincial litigation? At the time, *Morguard* simply modified the common law rules applicable to both interprovincial *and* foreign judgments.¹⁸ This was acknowledged

¹⁰ *Ibid.* at 1107.

¹¹ *Ibid.* at 1101. See also *Hunt*, *supra* note 1 at 325: “One must emphasize that the ideas of ‘comity’ are not an end in themselves, but are grounded in notions of order and fairness to participants in litigation with connections to multiple jurisdictions.”

¹² *Morguard*, *supra* note 1 at 1108.

¹³ *Hunt*, *supra* note 1 at 325.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ It is not the purpose of this article to discuss the various aspects of this decision. This has already been done extensively. See Hogg, *supra* note 6 at 331-35; V. Black, “The Other Side of *Morguard*: New Limits on Judicial Jurisdiction” (1993) 22 Can. Bus. L.J. 4; E. Edinger, “*Morguard*

by Canadian courts which did not wait long to extend the new rules to *foreign judgments*.¹⁹

Why should the principles of order and fairness be given constitutional status? They could underlie any modern system of private international law of a unitary as well as a federal state.

In *Morguard*, the Supreme Court expressed the view that principles of order and fairness are “principles that ensure security of transactions with justice;”²⁰ that is, fairness to the defendant which requires that “the judgment be issued by a court acting through fair process and with properly restrained jurisdiction.”²¹

Although fairness is a flexible concept, in the constitutional context, as already noted, it means a real and substantial connection to the forum province. This test narrows the permissible basis for the exercise of judicial jurisdiction.

The originality of the Court’s approach lies in subjecting the relevant connections to the broad principles of order and fairness and subsequently, in *Hunt*, giving constitutional status to these principles.

v. De Savoye: Subsequent Developments” 22 Can. Bus. L.J. 29; P. Finkle & C. Labrecque, “Low-Cost Legal Remedies and Market Efficiency: Looking Beyond *Morguard*” 22 Can. Bus. L.J. 58; I. Swan, “The Uniform Enforcement of Canadian Judgments Act” 22 Can. Bus. L.J. 87; J.A. Woods, “Recognition and Enforcement of Judgments Between Provinces: The Constitutional Dimensions of *Morguard Investments Ltd*” 22 Can. Bus. L.J. 104; J.-G. Castel, “Recognition and Enforcement of a Sister-Province Default Money Judgment: Jurisdiction Based on Real and Substantial Connection” (1991) 7 B.F.L.R. 111; P. Finkle & S. Coakeley, “*Morguard Investments Limited* Reforming Federalism from the Top” (1991) 14 Dalhousie L.J. 340; V. Black & I. Swan, “New Rules for the Enforcement of Foreign Judgments: *Morguard Investments Ltd. v. De Savoye*” (1991) 12 Advocates’ Q. 489; J. Blom, “Conflict of Laws—Enforcement of Extraprovincial Default Judgment—Real and Substantial Connection: *Morguard Investments Ltd. v. De Savoye*” (1991) 70 Can. Bar Rev. 733; H.P. Glenn, “Foreign Judgments, the Common Law and the Constitution: *De Savoye v. Morguard Investments Ltd*” (1992) 37 McGill L.J. 537; and J.-G. Castel, *Canadian Conflict of Laws*, 3d ed. (Toronto: Butterworths, 1994) at 6-15 and 266-68 [hereinafter *Canadian Conflict of Laws*].

¹⁹ See, for instance, *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.); *Federal Deposit Insurance Corp. v. Vanstone* (1992), 63 B.C.L.R. (2d) 190 (S.C.); *Clarke v. Lo Bianco* (1991), 59 B.C.L.R. (2d) 334 (S.C.); *Minkler & Kirschbaum v. Sheppard* (1991), 60 B.C.L.R. (2d) 360 (S.C.); *Moses v. Shore Boat Builders Ltd* (1993), 106 D.L.R. (4th) 654 (B.C. C.A.); *Stoddard v. Accurpress Manufacturing Ltd* (1993), 84 B.C.L.R. (2d) 194 (S.C.); and *Allenv. Lynch* (1993), 111 Nfld. & P.E.I.R. 43 (P.E.I. S.C.T.D.). But see *Evans Dodd v. Gambin Associates* (1994), 17 O.R. (3d) 803 (Gen. Div.), which held, at 809, that *Morguard* does not alter the law relating to *foreign judgments*.

²⁰ *Supra* note 1 at 1097. According to Black, *supra* note 18 at 23, the notion of order echoes concern with peace, order and good government in section 91 of the *Constitution Act, 1867* (U.K), 30 & 31 Vict., c. 3. It also expresses concern with efficient and orderly territorial allocation of the adjudicatory function.

²¹ *Morguard, ibid.* at 1103.

The most important and most often cited objectives, guiding principles, or choice-influencing considerations relevant to private international law do not use the expressions “order and fairness” or “order and justice,” which have a constitutional flavour. However, these expressions are merely other ways of describing the general objectives of legal certainty and flexibility, mentioned by Aristotle centuries ago,²² and basic to any legal system.

Legal certainty requires clear, equal, and predictable rules of law which enable those who are subject to them to organize their affairs in an orderly manner to protect their justified expectations. Equally relevant is the need for flexible and just solutions which take into consideration the unique circumstances of each case. In practice, there always exists some tension between the principle of order on the one hand and the principle of fairness on the other. Depending upon the circumstances, one may prevail over the other or be totally absent.²³ This is why, in the past, escape devices have been used by the courts to displace and adjust rigid and mechanical legal rules in appropriate circumstances to defuse any potential conflict between the principles of order and justice.

The concept of a real and substantial connection as a basic rule is dangerous as it revels in subjectivity. It does not always achieve certainty and predictability because there may be several real and substantial connections pointing to different jurisdictions. Therefore, it seldom achieves justice and should only be used to correct a bad situation.

*Hunt v. T & N PLC*²⁴ is a very important decision because the Supreme Court of Canada gave constitutional status to the principles of *Morguard*²⁵ and expressed the opinion that they applied equally to the rules of *forum non conveniens*²⁶ stated in *Amchem Products Inc. v. B.C. (WCB)*.²⁷ In the latter case, the issue before the Court was whether an

²² *The Nicomachean Ethics* Bk. V, c. 10, quoted by S.C. Symeonides in “Exception Clauses in American Conflicts Law” (1994) 42 Am. J. Comp. L. 813 at 813. See also P.H. Neuhaus, “Legal Certainty Versus Equity in the Conflict of Laws” (1963) 28 Law & Contemp. Probs. 795; P. Hay, “Flexibility Versus Predictability and Uniformity in Choice of Law: Reflections on Current European and United States Conflict Law” (1991) 226 Recueil des cours 281; and F. Mosconi, “Exceptions to the Operation of Choice of Law Rules” (1989) 217 Recueil des cours 9.

²³ For an analysis of objectives or choice-influencing considerations see *Canadian Conflict of Laws*, *supra* note 18 at 47-52.

²⁴ *Supra* note 1.

²⁵ *Ibid.* at 324.

²⁶ *Ibid.* at 326.

²⁷ *Supra* note 1.

anti-suit injunction issued in British Columbia, which sought to prevent the appellants from pursuing their action against the respondents in Texas, should be set aside. The resolution of that issue required an examination of Canadian rules of private international law relating to *forum non conveniens* and anti-suit injunctions. Interprovincial comity was not involved in that case.²⁸

In the *Hunt* case, the plaintiff sought to have documents concerning a business in Quebec brought before a court in British Columbia. This raised the issue of whether Quebec's *Business Concerns Records Act*²⁹ a blocking statute which prohibits, *inter alia*, the removal from Quebec of documents of business concerns in that province, was *ultra vires* or constitutionally inapplicable in British Columbia.

After coming to the conclusion that a court of one province can determine the constitutionality of the law of another province that incidentally arises in the ordinary course of litigation, the Supreme Court reiterated that the guiding element in the determination of the appropriate forum for this purpose must be the principles of order and fairness³⁰ referred to in *Morguard*

The courts of the enacting province have no exclusive jurisdiction in this regard since all Canadian courts are routinely called upon to apply foreign law in appropriate cases. Thus, the courts of British Columbia had such jurisdiction, especially since the issue related to the constitutionality of the legislation of a province that had extraterritorial effects in another province, although it was not *ultra vires* as such.

Referring to *Morguard* at length,³¹ the Supreme Court, per La Forest J., made it clear that interprovincial situations call for special private international law rules:

I do not think litigation engendered against a corporate citizen located in one province by its trading and commercial activities in another province should necessarily be subject to the same rules as those applicable to international commerce. In particular, when a corporate citizen situate in one province chooses to engage in trading and commercial activities in other provinces, the rules governing consequential litigation, specifically rules for the recognition and enforcement of judgments, should be adapted to the specific nature of the Canadian federation. And it is difficult to believe that ordinary individuals

²⁸ For cases taking *Amchem* into account, see, for example, *Frymerv. Brettschneider* (1994), 19 O.R. (3d) 60 (C.A.). References to comity are found in *Amchem*, *supra* note 1 at 913, 930, 931, 934, 937, and 940.

²⁹ R.S.Q. 1977, c. D-12.

³⁰ *Hunt*, *supra* note 1 at 313-14.

³¹ *Ibid.* at 321-27.

moving across Canada in the exercise of their common right of citizenship should be treated differently; see *Black v. Law Society of Alberta*[1989] 1 S.C.R. 591.³²

His Lordship then stated unequivocally that the constitutional considerations in *Morguard* are constitutional imperatives which apply to the provincial legislatures as well as to the courts:

In short, to use the expressions employed in *Morguard*, at p. 1100, the “integrating character of our constitutional arrangements as they apply to interprovincial mobility” calls for the courts in each province to give “full faith and credit” to the judgments of the courts of sister provinces. This, as also noted in *Morguard*, is inherent in the structure of the Canadian federation, and, as such, is beyond the power of provincial legislatures to override. This does not mean, however, that a province is debarred from enacting any legislation that may have some effect on litigation in other provinces or indeed from enacting legislation respecting modalities for recognition of judgments of other provinces. But it does mean that it must respect the minimum standards of order and fairness addressed in *Morguard*.³³

The same holds true with respect to the exercise of discretion not to exercise jurisdiction: “Whatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.”³⁴

Applying the principles of order and fairness to the Quebec statute, La Forest J. stated:

A province undoubtedly has an interest in protecting the property of its residents within the province, but it cannot do so by unconstitutional means. Here the means chosen are intended to unconditionally refuse recognition to orders and thereby impede litigation, not only in foreign countries but in other provinces. At least when a court order is sought, if not before, a judicial order in another province will be denied effect. There are no qualifications. No discretion is given so it can scarcely be said that the Act respects the principles of order and fairness which must, under the *Morguard* principle, inform the procedures required for litigation having extraprovincial effects. Apart from the legislative aspect, the situation in *Morguard* differed in that the appellant there sought refusal of recognition after the judgment was rendered. But the constitutional mandate cannot be avoided by a preemptive strike. The whole purpose of a blocking statute is to

³² *Ibid.* at 323-24.

³³ *Ibid.* at 324.

³⁴ *Ibid.* at 326. Note that the Supreme Court added in *obiter*, at 326-27, that the federal parliament had the power to legislate respecting the recognition and enforcement of foreign judgments:

This issue is ultimately related to the rights of the citizen, trade and commerce and other federal legislative powers, including that encompassed in the peace, order and good government clause. But subject to these overriding powers, I see no reason why the provinces should not be able to legislate in the area, subject, however, to the principles in *Morguard* and to the demands of territoriality as expounded in the cases, most recently in *Re Upper Churchill Water Rights Reversion Act*[1984] 1 S.C.R. 297.

impede successful litigation or prosecution in other jurisdictions by refusing recognition and compliance with orders issued there. Everybody realizes that the whole point of blocking statutes is not to keep documents in the province, but rather to prevent compliance, and so the success of litigation outside the province that that province finds objectionable. This is no doubt part of sovereign right, but it certainly runs counter to comity. In the political realm it leads to strict retaliatory laws and power struggles. And it discourages international commerce and efficient allocation and conduct of litigation. It has similar effects on the interprovincial level, effects that offend against the basic structure of the Canadian federation.³⁵

On this note, His Lordship concluded that the Quebec statute was constitutionally inapplicable because it offended against the principles of order and fairness enunciated in *Morguard*³⁶

Today, Canadian courts must, as a constitutional requirement, give full faith and credit to judgments rendered in sister provinces when the original Court had reasonable grounds for assuming jurisdiction, defined in accordance with the broad principles of order and fairness. There is no such constitutional requirement with respect to *foreign* judgments.³⁷

³⁵ *Ibid.* at 327-28.

³⁶ *Ibid.* at 328-31. The Court also said, at 328:

Morguard requires that the rules of private international law must be adapted to the structure of our federation. In a federation, we assume that there is more commonality as to what is acceptable action; we have many common procedures. We even have similar conflicts rules, related, for example, to jurisdiction and deference, and to procedures regarding the *lex fori*. And courts are required, by constitutional restraints, to assume jurisdiction only where there are real and substantial connections to that place.

It would seem that on the basis of *Ladore v. Bennett* [1939] A.C. 468 and *Re Upper Churchill Water Rights Reversion Act*,^{supra} note 34, the Quebec statute was not *ultra vires*

³⁷ For the impact of *Hunt*, see C. Walsh, "Conflict of Laws—Enforcement of Extra Provincial Judgments and *In Personam* Jurisdiction of Canadian Courts: *Hunt v. T & N plc*" (1994) 73 Can. Bar Rev. 394, and C. Walsh, "Private International Law—Jurisdiction and Recognition of Judgments—*Hunt v. T&N plc*" (1993-94) 10:2 Solic. J. -N.B. 17. For an attempt to bring Canadian jurisdictional rules into line with the principles laid down in *Morguard* and *Amchem*, see *Model Uniform Court Jurisdiction and Proceedings Transfer Act* App. B, reproduced in Uniform Law Conference of Canada, *Proceedings of the Seventy-Sixth Annual Meeting* (1994), forthcoming.

III. COMPLETING THE TASK: CHOICE OF LAW RULES FOR INTERPROVINCIAL TORTS

Having subjected private international law rules dealing with the jurisdiction of Canadian courts, procedural rules that impede the course of interprovincial litigation, and the recognition and enforcement of sister province judgments, to the constitutional shackles of order and fairness, it was logical for the Supreme Court to attempt to subject choice of law rules to these same principles. It would thereby complete the task of constitutionalizing all aspects of private international law, a process which began when it discovered an implied Full Faith and Credit clause in the Canadian Constitution. The opportunity arose in 1993 with respect to the choice of law rule applicable to torts—one of the most controversial topics of private international law.

From a constitutional point of view, the power to exercise jurisdiction, on the basis of *Morguard*, does not automatically give the provinces authority to apply the *lex fori*. If it is fair to cause a defendant to be sued in the province on the basis of a real and substantial connection, that connection may not necessarily be the same for choice of law purposes. The application of the *lex fori* to the merits of the case, especially with respect to liability and assessment of damages, must not amount to an unconstitutional extraterritorial application of that law. It must also be fair to both the plaintiff and the defendant: there must be a sufficient nexus between the transaction that is the object of the litigation and the forum as well as the parties. For instance, in litigation involving a wrongful act committed outside the province by a forum resident which causes injury to another forum resident, may the forum apply its own law or is it constitutionally required to apply the law of the place of wrong; in other words, to give full faith and credit to the laws of that place? Would it not be fairer, at least with respect to some issues, to apply the *lex fori*? Is the law of the place of wrong the law *most* substantially connected so that the forum province must apply it? When conflicting provincial interests are involved, and this is often the case in the field of torts, the question arises as to when a province with a real and substantial connection with the occurrence, transaction, or the parties can apply its law and disregard the contrary existing interests of a sister province that also has a real and substantial connection with the occurrence, transaction, or the parties. Is there a constitutional duty to defer to countervailing interests of other provinces? With respect to choice of law, a higher quality of connection seems to be required than for jurisdiction. The connection must be the *most* real and substantial

connection, as different laws cannot be applied to the same tort in different jurisdictions. Is it possible to determine with any degree of certainty what is the *most* real and substantial connection? It is difficult to give an objective answer to this question. It may vary depending upon the issue involved. The interest of the province that has the *most* real and substantial connection should prevail. If the forum were to apply its own law and disregard the law of the province that is most substantially connected to the issue before the Court, it would violate the implied Full Faith and Credit clause. The application of the *lex fori* to a situation not sufficiently connected with the province may also violate the principle of territoriality. In its latest pronouncement, the Supreme Court held that in the case of interprovincial torts the law of the place where the accident occurred must be applied, thereby implying that it is the law *most* substantially connected.

A. Background: Choice of Law Rules and Approaches to Torts in General

Before analyzing *Tolofson v. Jensen* and *Lucas v. Gagnon*, it is important to refer very briefly to several major choice of law rules and approaches to torts in general that have been proposed by scholars or used by the courts, especially in the United States, the United Kingdom, and Australia, as they provide the necessary background to the decision of the Supreme Court of Canada.

The last fifty years have witnessed fundamental changes in theoretical approaches to choice of law, especially in tort cases, and particularly in the United States. The doctrinal and methodological battles that have been fought south of our borders have been largely ignored by our courts. This isolationist attitude has enabled us to retain traditional choice of law methodology and rules, and to avoid the uncertainty unleashed by the American revolution which nurtured open-ended approaches calling for individualized, *ad hoc* solutions for each conflicts case without the aid of specific rules.³⁸

1. The traditional *lex loci delicti* rule

Historically, beginning in the Middle Ages, the territorialist approach, which subsequently found its expression in the vested rights

³⁸ For a detailed analysis of theories and methodologies see *Canadian Conflict of Laws*, *supra* note 18 at 20-56. As to the distinction between rules and approaches see W.L.M. Reese, "Choice of Law: Rules or Approach" (1972) 57 Cornell L. Rev. 315.

theory, resulted in the adoption of the *lex loci delicti*—law of the place of injury—as the exclusive choice of law rule for torts in general. The law of the place where a wrong is committed governs the rights of the person injured and the liability of the wrongdoer. It determines whether a person has sustained a legal injury.³⁹ Most important is the definition of the place of wrong. According to the *Restatement of the Law of Conflict of Laws*: “The place of wrong is in the state where the last event necessary to make the actor liable for an alleged tort takes place.”⁴⁰ This is usually the place where the injury occurred, for there cannot be liability without injury. This definition is victim-oriented. When defined as the place of tortious conduct, it is tortfeasor-oriented. His or her liability is determined by the standards of the environment in which he or she acts and not by the standards of the environment where the victim suffered damages. Of course, where the wrongful act and the injury occur in the same state, the determination of the *lex loci delicti* is easy. The *lex loci delicti* as the place of injury has been the preferred choice of law rule of most European states⁴¹ and, until recently, of the United States.

Thus: “(1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states. (2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.”⁴²

Supporters of the *lex loci delicti* rule maintain that it promotes uniformity of results, achieves certainty and predictability, is easy to apply, discourages forum shopping, and is neutral since it does not favour the victim or the wrongdoer. It also recognizes that the consequences of a wrongful act are of primary interest to the state where they have occurred.

The application of the law of the place of injury has the advantage of facilitating the solution in situations where wrongful acts occur in several states but the injury is suffered in only one state, or in situations where several injuries are suffered in several states. This is because it is always possible to apply distributively several laws to different injuries resulting from the same wrongful act, whereas it is

³⁹ *Restatement of the Law of Conflict of Law* (St. Paul: American Law Institute, 1934) at § 378. See also J.H. Beale, *Conflict of Laws* (New York: Baker, Voorhis & Co., 1935) vol. 2, c. 9, at § 377.2.

⁴⁰ *Ibid.* at § 377.

⁴¹ In regard to France, see H. Battifol & P. Lagarde, *Droit international privé* 7th ed., vol. 2 (Paris: Librairie générale de droit et de jurisprudence, 1981) at s. 554ff.

⁴² *Restatement of the Law of Conflict of Law* *supra* note 39 at § 384.

impossible to apply different laws to the reparation of a single injury. The notion of injury rather than wrongful act is the foundation of tort liability, since civil liability may exist in the absence of fault but never in the absence of injury.

Unfortunately, this traditional rule is neither sufficiently fact-specific nor narrow enough to regulate a single issue in tort. It is too broad, having been applied not only to liability but to the other aspects of the cause of action, such as the measure and distribution of damages, the existence or non-existence of a defense, contribution or indemnity between tortfeasors, and the question of survival of the action. Furthermore, unexplored areas have not been subjected to general open-ended principles. No exceptions are provided.

The traditional rule has also been criticized for leading to questionable results, even in cases in which the wrongful conduct and the injury are localized in the same state, especially in guest statute and interspousal or interfamilial immunity cases. Furthermore, the determination of the place of harm or where the last event necessary to make the actor liable for an alleged tort takes place is not always an easy task, especially in cases of unfair competition, fraud, defamation, or invasion of privacy.

Where the place of wrongful conduct or of injury is purely fortuitous, the *lex loci delicti* does not achieve fairness to the parties. This is particularly true in the case of automobile accidents when the victim and the tortfeasor both reside in the forum or in the same foreign jurisdiction. In some cases there may be uncertainty with respect to the contents of the local law of the fortuitous place of injury.

To obviate the lack of any exceptions to or built-in escape clauses in the statutory or judicial *lex loci delicti* rule, the courts have resorted to escape devices such as characterization, *renvoi*, and public policy.⁴³

2. The American revolution

Realizing that the exclusive application of the *lex loci delicti* rule proved arbitrary in operation and most often was incapable of producing certainty and predictability as well as fairness to the parties (since concern for fairness to the local plaintiff does not necessarily address the

⁴³ In the United States, some courts have applied the "better law," usually the *lex fori* as the functional equivalent of the public policy exception to the application of foreign law. See, for instance, *Clark v. Clark*, 222 A.2d 205 (N.H. 1966); and *Conklin v. Horner*, 157 N.W.2d 579 (Wis. 1968).

question of fairness to the defendant), some American courts have applied a variety of approaches to foreign torts which were proposed by academic writers to solve conflict of laws problems generally.

a) *Interest analysis*

According to the governmental interest analysis ⁴⁴ pioneered by the late Professor Currie, the governmental interest inherent in each *substantive* rule of law determines the extent of application of that rule. Each rule of substantive law is spatially conditioned so that the extent of its application is found in the rule itself. Choice of law rules are not involved:

For each issue in a case as to which the laws of the states involved are potentially in conflict, the court is to apply the ordinary processes of construction and interpretation to those laws in order to decide whether, in the light of the respective policies expressed in the laws and of the circumstances of the case, the states involved would have an interest in the application of their respective laws to that issue. If only one state has such an interest, its law should be applied to the issue; if both have, the forum's law should be applied. However, in determining whether the interests of two states are actually in conflict, the forum should be prepared, when the circumstances warrant, to give a moderate and restrained interpretation to the policy or interest of one state or the other and thus avoid the conflict.⁴⁵

The central thrust of Currie's theory is his desire to effectuate the policies of the forum.

American case law that uses interest analysis presents a confusing picture, as the courts have found it difficult to apply, especially when governmental interests cannot be identified.⁴⁶

Instead of applying the *lex fori* as advocated by Currie, some states, like California, when confronted with a true or unavoidable conflict between the legitimate interests of two states, have employed a comparative impairment approach to the resolution of the conflict. This

⁴⁴ For a more detailed analysis, see *Canadian Conflict of Laws*, *supra* note 18 at 32-42.

⁴⁵ Where only one state has an interest there is a false conflict: see, for instance, *Griffith v. United Airlines Inc*, 203 A.2d 796 (Pa. 1964); and *Williams v. Rawlings Truck Line, Inc*, 357 F.2d 581 (D.C. Cir. 1965). Where both states have an interest there is a true conflict: see, for instance, *Foster v. Leggett* 484 S.W.2d 827 (Ky. C.A. 1972). In regard to reinterpreting state policies or interests in order to avoid conflicts, see: D.F. Cavers, *The Choice of Law Process* (Ann Arbor: University of Michigan Press, 1965) at 63-64; B. Currie, *Selected Essays on the Conflict of Law* (Durham, N.C.: Duke University Press, 1963); and B. Currie, "Case Comment on *Babcock v. Jackson*" 63 Col. L. Rev. 1233.

⁴⁶ For an analysis of the case law, see E.F. Scoles & P. Hay, *Conflict of Laws*, 2d ed. (St. Paul: West Publishing, 1992) at 590-94.

approach seeks to determine, “[w]hich state’s interest would be more impaired if its policy were subordinated to the policy of the other state.”⁴⁷

The comparative impairment approach is essentially one of allocation of the respective spheres of law-making influences. It involves several steps. First, the states with relevant interests must be identified (for instance, the state of the principal place of business, the state of the place of injury, and the state of the domicile or residence of the parties). Second, the Court must attempt to determine the relative commitment of each interested state to the law involved. This means examining the current status of that law and the intensity of interest with which it is held, and also the comparative pertinence of the law; that is, the fit between the purpose of the legislation and the situation in the case at hand. Only then will it be possible for the court to determine which law should be applied.⁴⁸

b) *The most significant relationship of the Restatement (Second) of Conflict of Laws: The Proper Law of a Tort*

The *Restatement (Second)* declares that, as a general principle: “(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship with the occurrence and the parties under the principles stated in section 6.”⁴⁹

These principles, factors, or choice-influencing considerations relevant to the choice of the applicable rule of law include:

- (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty,

⁴⁷ *Bernhard v. Harrah's Club*, 546 P.2d 719 (Ca. 1976) at 723, cert. den. 429 U.S. 859.

⁴⁸ Note that the Louisiana conflicts codification of 1991 provides for the application of the law of the state “where policies would be most seriously impaired if its law were not applied to that issue”: *Civil Code*, Art. 3515, para. (1); and Art. 3542, para. (1). See also, S.C. Symeonides, “Louisiana’s New Law of Choice of Law for Torts Conflicts: An Exegesis” (1992) 66 Tul. L. Rev. 677; and R.J. Weintraub, “The Contributions of Symeonides and Kozyris in Making Choice of Law Predictable and Just: An Appreciation and Critique” (1990) 38 Am. J. Comp. L. 511.

⁴⁹ *Restatement of the Law (Second): Conflict of Laws* 2d vol. 1 (St. Paul: American Law Institute, 1971) at § 145(1).

predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.⁵⁰

Of these factors, (a), (b), (c), (e), and (g) assume greater importance in the field of torts than factors (d) and (f).

Contacts to be taken into account in applying the principles of section 6 are as follows:

- (a) The place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is entered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.⁵¹

The contacts listed indicate the states that are most likely to be interested in the decision of the particular issue before the court. Once consideration is given to the relevant policies of all potentially interested states, the court is able to apply section 6 and determine the local law of the state that, with respect to each issue before the court, has the most significant relationship to the occurrence and the parties.

No particular weight or priority is given to these contacts or to the principles of section 6, nor is guidance given as to how a court should analyze the “relative interests.” However, the place of wrong continues to play a significant role.⁵² More precise rules are given for different torts and for different tort issues. They do not depart from the general principles. They are merely intended to give some guidance to the courts as to which local law has the most significant relationship to the occurrence and the parties.⁵³

It is interesting to note that one of the reasons given in support of this new approach is that, “[s]tate and national boundaries are of less significance today by reason of the increased mobility of our population and of the increasing tendency of men to conduct their affairs across boundary lines.”⁵⁴

⁵⁰ *Ibid.* at § 6(2).

⁵¹ *Ibid.* at § 145(2).

⁵² *Ibid.* at §§ 145(2)(a),(b), 146, 156-160, 162, 164-66, and 172.

⁵³ See *ibid.* at § 146, regarding personal injuries. Preference is given to the place of injury.

⁵⁴ *Ibid.* at 413.

No indication is given that a different approach should be used when dealing with an issue in tort involving a sister state because of the Full Faith and Credit and the Due Process clauses in the United States Constitution. In an interstate situation the Court of the forum may apply the law of any state, including its own law, that is significantly related to the issue. Therefore, “[d]ue [p]rocess reduces to the single consideration: what constitutes sufficient connection with the transaction so that application of forum law is permissible?”⁵⁵ The same holds true for the Full Faith and Credit clause. The American Supreme Court does not involve itself in the choice of law process so long as the forum has minimal contacts to support the application of the *lex fori*

Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such interest in the multistate activity.⁵⁶

An analysis of the American decisions⁵⁷ that have used the *Restatement (Second)* approach, also called the proper law of a tort,⁵⁸ indicates that, in general, the objective of justice in the particular case has taken precedence over the objective of uniformity and predictability of result.⁵⁹ Some American courts have questioned modern approaches on the ground of lack of uniformity and predictability of result. They are wary of approaches applied in an *ad hoc* fashion. In their search for principled rules, they have considered favourably the choice of law rules proposed by Fuld C.J. of the New York Court of Appeals in *Tooker v.*

⁵⁵ See Scoles & Hay, *supra* note 46 at 89, § 3.23, which is based on *Allstate Insurance Cov. Hague*, 101 S.Ct. 633 (1981).

⁵⁶ *Richards v. United States* 82 S.Ct. 585 (1962) at 594. See also Scoles & Hay, *supra* note 46 at 93, § 3.24: “By this analysis, the Supreme Court permits the states significantly related to the parties or the issue to adopt whatever choice of law provisions suit their needs. The only real constitutional limitation is that the law chosen be the law of a state having some significant ‘contact’ or relation with the transaction.” And see § 3.26.

⁵⁷ See, for instance, *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969); and Scoles & Hay, *ibid.* at § 17.23ff.

⁵⁸ See J.H.C. Morris, “The Proper Law of a Tort” (1951) 64 Harv. L. Rev. 881, a pioneer work.

⁵⁹ For a critical analysis of the proper law of a tort and the *Restatement (Second)* see Canadian Conflict of Laws, *supra* note 18 at 47-54, including the principle of proximity. See also 632-37.

*Lopez*⁶⁰ and applied in *Neumeier v. Kuehner*⁶¹—a guest statute case brought by a non-New York plaintiff on the ground that such rules injected uniformity and predictability in the *Restatement (Second)* approach to tortious liability.

It remains to be seen whether these rules will be widely accepted and extended to other tort situations. What emerges from *Neumeier v. Kuehner* is that in tort cases “significant contacts are, almost exclusively, the parties’ domiciles and the locus of the tort.”⁶²

3. The English common law choice of law rule

The English common law choice of law rule for torts combines the law of the forum and the law of the place where the wrong was committed. It has its origin in the following passage in the judgment of Willes J. delivered in 1870 in *Phillips v. Eyre*:⁶³

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. ... Secondly, the act must not have been justifiable by the law of the place where it was done.⁶⁴

⁶⁰ 249 N.E.2d 394 at 404 (N.Y. C.A. 1969).

⁶¹ 286 N.E.2d 454 at 457-58 (N.Y. C.A. 1972), appeal after remand 349 N.Y.S.2d 866 (1973):

1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.

2. When the driver’s conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim’s domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.

3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing the normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.

⁶² *Schultz v. Boy Scouts of America, Inc*, 480 N.E.2d 679 at 684 (N.Y. 1985). The Court stated that these rules are applicable to all torts in which the conflicting rules are loss-distribution rules rather than conduct-regulating rules. See also *Cooney v. Osgood Machinery, Inc*, 612 N.E.2d 277 (N.Y. 1993) in which the law of the place of injury was applied.

⁶³ [1870] 6 Q.B. 1.

⁶⁴ *Ibid.* at 28-29.

A plaintiff seeking to recover damages in England for a tort created by the domestic law of the place where it was committed must establish that, had the defendant's act been committed in England, it would have constituted an actionable tort by English domestic law⁶⁵ and that the act was not justifiable by the law of the place where it was done.

For a long time, English courts interpreted the words "not justifiable" to mean "not legally innocent." It was not necessary that the defendant's conduct be civilly actionable as a tort by the law of the place of wrong as long as it was merely criminal by that law.⁶⁶

This interpretation was widely criticized, particularly on the grounds that it did not take sufficient account of the law of the place of tort, and did not provide enough flexibility to ensure justice in the individual case: a civil remedy could be granted in England to the plaintiff when none was available in the place of wrong, thus encouraging forum shopping.

It was not until 1971 that the House of Lords, in *Boys v. Chaplin*,⁶⁷ decided to take these criticisms seriously into account and modify the rule in *Phillips v. Eyre*. Although it is difficult to extract the true *ratio* from the judgments of their Lordships, it is generally accepted that the case is authority for two propositions:

First, the rule in *Phillips v. Eyre* is modified so that it now has to be asked whether the conduct of the defendant is actionable, rather than not justifiable, by the law of the place of the tort. Second, the rule is one which is to be applied "with flexibility." Emphasis was placed by the House of Lords on the qualification by Willes J. in *Phillips v. Eyre* that his conditions apply "as a general rule." This was seized upon as a justification for diverging from the rule in *Phillip v. Eyre* when the special circumstances so demand.⁶⁸

The words "not justifiable" now mean "actionable" by the domestic law of the place where the tort was committed, in the sense of imposing civil liability on the defendant.

The first limb of the rule, which places undue emphasis on the *lex fori*, is often unfair to the plaintiff who has to find a forum which

⁶⁵ *The Halley*(1868), 2 P.C. 193.

⁶⁶ *Machado v. Fontes*, [1897] 2 Q.B. 231.

⁶⁷ [1971] A.C. 356.

⁶⁸ P.M. North & J.J. Fawcett, *Cheshire and North's Private International Law* 12th ed. (London: Butterworths, 1992) at 535.

recognizes the cause of action. Although its abolition has been recommended by the Law Commissions,⁶⁹ it is still the rule in England.⁷⁰

The general rule of double actionability is subject to an exception based on the *Restatement (Second)*⁷¹ It reflects the desire of a majority of their Lordships in *Boys v. Chaplin*⁷² to introduce some flexibility into the choice of law rule. As a result, a particular issue may be governed by the law of the state which, with respect to that issue, has the most significant relationship with the occurrence and the parties. Although their Lordships did not intend to adopt the general concept of the proper law of a tort,⁷³ English courts have not hesitated to endorse it as an exception.⁷⁴ The Law Commissions have also proposed a proper law exception to the *lex loci delicti* which calls for the application of the law of the “country or territory with which the tort or delict had the most real and substantial connection.”⁷⁵

4. Interstate torts in Australia

In Australia, a majority of the High Court in *Breavington v. Godleman*⁷⁶ held that the rule in *Phillips v. Eyre*, which had been followed in that country generally, did not apply to interstate torts, even as modernized by the views expressed by some Law Lords in *Boys v. Chaplin*.⁷⁷

Braevington v. Godleman dealt with a provision of the law of the Northern Territory, the place of commission of the tort, which imposed a limitation on the types of heads of damages recoverable in torts. The issue was whether that provision should be applied instead of the law of Victoria, where the action was brought, which had no such limitations.

⁶⁹ U.K., Law Commission and Scottish Law Commission, *Private International Law: Choice of Law in Tort and Delict* (London: H.M.S.O., 1990) at 9, para. 2.11.

⁷⁰ *Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc* [1990] 1 Q.B. 391 at 392-93.

⁷¹ *Supra* note 51 at § 145.

⁷² Especially Lord Hodson, at 378, and Lord Wilberforce, at 389-93, *supra* note 69.

⁷³ *Ibid.* at 381, 383, 405-06.

⁷⁴ See, for instance, *Coupland v. Arabian Gulf Petroleum Co*, [1983] 3 All E.R. 226.

⁷⁵ *Supra* note 69 at 14, para. 3.13.

⁷⁶ (1988), 80 A.L.R. 362.

⁷⁷ See generally *ibid.*

The majority⁷⁸ was of the opinion that the correct law to govern an alleged cause of action in the case of an interstate tort is the law of the place of commission of the tort. This rule is not subject to any exception “in regard to ‘inflexibility,’ degree of close relationship of the persons or events involved or occurring on any other considerations.”⁷⁹ Their Lordships based their decision on the Full Faith and Credit clause of the Australian Constitution⁸⁰ and the principle of territoriality. With respect to foreign torts, *Phillips v. Eyre* continues to prevail.⁸¹

5. Canada

As Professor Hogg has observed, “[p]roblems of choice of law are not usually seen as raising constitutional questions,”⁸² at least not until *Tolofson v. Jensen* and *Lucas v. Gagnon*.

For the last fifty years, in the area of interprovincial and international torts, Canadian courts have followed the decision of the Supreme Court of Canada in *McLean v. Pettigrew*⁸³ which had applied the general rule in *Phillips v. Eyre* as modified by *Machado v. Fontes*. In *McLean v. Pettigrew* both the wrongful act and the injury occurred in Ontario. The victim was a gratuitous passenger in an automobile driven and owned by the wrongdoer. Both parties resided in Quebec and the

⁷⁸ Wilson, Gaudron, and Deane JJ. Note that Mason C.J., also in favour of the *lex loci delicti* would consider an exception in favour of the law of another place where that place has the closest and most real relationship to the factual situation: *ibid.* at 371.

⁷⁹ E.I. Sykes & M.C. Pryles, *Australian Private International Law* 3d ed. (Sydney: Law Book Company Limited, 1991) at 565.

⁸⁰ *Commonwealth of Australia Constitution Act* 1900 (U.K.), 63 & 64 Vict., c. 3, s. 118. The High Court relied on a unitary system of law and section 118 of the Australian Constitution which provides that “Full faith and credit shall be given, throughout the Commonwealth, to the laws, public Acts and records, and the judicial proceedings of every State.” Wilson and Gaudron JJ. stated, *supra* note 78 at 386:

By the constitutional subjection of the Constitutions, the powers and laws of the States to s. 118, the consequence was effected that the one set of facts occurring in a State would be adjudged by only one body of law and thus give rise to only one legal consequence, regardless of where in the Commonwealth the matter fell for adjudication.

For an analysis and criticism of the constitutional aspects of the case, see Sykes & Pryles, *ibid.* at 325-35.

⁸¹ See Sykes & Pryles, *ibid.* at 565, para 1.5.2(3).

⁸² *Supra* note 6 at 335.

⁸³ [1945] S.C.R. 62. For earlier cases see *O'Connor v. Wray*, [1930] S.C.R. 231; and *Canadian National Steamship Co. v. Watson*, [1939] C.L.R. 11. As well, the common law rule was held to apply to Quebec.

automobile was registered and insured in that province. If the wrongful act and injury had occurred in Quebec, the wrongdoer would have been liable for the damages suffered by the gratuitous passenger, whereas in Ontario, at that time and in those circumstances, the wrongdoer would not have been liable. The gratuitous passenger brought her action in Quebec to recover damages for her injuries. On appeal to the Supreme Court of Canada, it was held that since the wrongdoer had driven in a careless manner in breach of Ontario's *Highway Traffic Act*⁸⁴ this wrongful act was not justifiable under the *lex loci delicti*. The act being civilly actionable by the *lex fori*, she was able to recover.

In order to prevent injustices that could result from a strict adherence to *McLean v. Pettigrew* some Canadian courts, after pointing out that in both *Phillips v. Eyre* and *McLean v. Pettigrew* their Lordships, when referring to the applicable rule, had used the prefatory words "[a]s a general rule," and "under these conditions," proceeded to identify the situations in which it should not be applied. In *McLean v. Pettigrew* the second limb of the general rule did not cause an injustice to the parties as they were all residents of Quebec. The same result could have been reached by applying the doctrine of the proper law of the tort. On the other hand, the application of that rule would have been unjust to the wrongdoer in *Grimes v. Cloutier*.⁸⁵ In that case the victim, a resident of Ontario, while riding as a passenger in an automobile registered and insured in Ontario and driven by an Ontario resident, sustained personal injuries as a result of a collision in Quebec with an automobile registered and insured in that province driven by a resident of Quebec. The driver of the Quebec automobile had been found guilty of driving in breach of Quebec's *Highway Code*⁸⁶ at the time of the collision. The passenger had received benefits in satisfaction of all amounts payable to her in accordance with the provisions of Quebec's *Automobile Insurance Act*⁸⁷ which, as a result of a 1978 agreement between Quebec and Ontario,⁸⁸ are part of Ontario's *Standard Automobile Policy*⁸⁹. She then brought an action in Ontario for common law damages against the driver of the automobile and its owner, both residents of Quebec, in order to obtain

⁸⁴ R.S.O. 1937, c. 288, now R.S.O. 1990, c. H-8.

⁸⁵ (1989), 69 O.R. (2d) 641 (C.A.).

⁸⁶ R.S.Q. 1977, c. C-24, s. 83.

⁸⁷ S.Q. 1977, c. 68, now R.S.Q. 1977, c. A-25.

⁸⁸ Agreement with the Minister of Consumer and Commercial Relations for the province of Ontario, Dec. 27, 1978.

⁸⁹ R.S.O. 1970, c. 224, as am. by Reg. 1004-78, now R.S.O. 1990, c. I-8.

more than is provided by the Quebec insurance scheme, which prohibits any action in the courts. On the basis of the “punishable” gloss of the second limb of the general rule, she would have succeeded.

However, the Ontario Court of Appeal did not apply that gloss. Since the Quebec residents were not civilly liable, her claim was held to fail. The Court pointed out that the application of the Ontario law was not within the reasonable expectations of the parties. Because she had received benefits under Quebec law, it would be unjust to compensate her again. To do so would also encourage forum shopping. The Court of Appeal did not reject the second limb of the general rule entirely, since it recognized that

[w]hatever weakness there may be in the interpretative reasoning in *Machado v. Fontes*, a countervailing consideration should also be noted: as a matter of policy an inflexible rule that the absence of civil liability in the place where the alleged tort took place is a valid defence can, in some cases, lead to an unjust result.⁹⁰

The defendants, as residents of Quebec, were legally entitled to the protection of that province’s automobile insurance compensation scheme. It would have been unjust to subject them to the law of the forum and so destroy their reasonable expectations of the legal consequences of their conduct. As for the victim, it would be difficult to believe that she would have had any reasonable expectation that Ontario law would apply to the exclusion of Quebec law with respect to any automobile accident occurring in Quebec. This approach gave great weight to the place of the accident.

The Court of Appeal also pointed out that interprovincial comity requires one province, when applying its laws, not to ignore the policies of another province as expressed in its legislation. *Machado v. Fontes* could still be used in some cases to achieve individual justice. Although the Ontario Court of Appeal did not adopt the doctrine of the proper law of a tort either as a general rule or as an exception, it was concerned with identifying the contacts that were the most significant in the particular situation in order to displace the general rule. Thus, for a time Canadian courts were in disarray, some adhering to *McLean v. Pettigrew* others favouring either the *lex loci delicti* or the *lex fori* depending upon the residence of the parties.⁹¹

⁹⁰ *Supra* note 83 at 649. See also *Bowes v. Chalifour* (1992), 18 C.P.C. (3d) 391 (Ont. Gen. Div.), where the Court applied the law having the most significant relationship with the occurrence and the parties.

⁹¹ For a survey, see *Canadian Conflict of Laws*, *supra* note 18 at 645.

In the latest edition of my treatise, after some hesitation with respect to the requirement of actionability by the *lex fori* caused by concern about forum shopping, I expressed the view that the present English approach was a good model. The general choice of law rule should be double civil actionability subject to the exception that a particular issue between the parties may be governed by the law of the jurisdiction which, with respect to that issue, has the most significant relationship with the occurrence and the parties:

Such a rule combines the objectives of certainty and flexibility in the interest of individual justice. The exception should be invoked only in special circumstances where, after examination of the policy underlying the law which may be applied and the interests of the parties to be affected, it is clear that the *lex loci delicti* has no real connection with the proceeding, in order to enable a plaintiff to recover damages available in the *lex fori* but not available in the *lex loci delicti*. This requirement should do much to alleviate any fears that unacceptable uncertainty will be introduced in this area of the law.⁹²

Having been impressed by the reasoning of Mason C.J. in *Breavington v. Godleman*,⁹³ I suggested that:

In the case of interprovincial torts, the flexible exception should not be invoked to avoid the application of the law of the province where the wrong occurred *especially when the residence of the parties or of the defendant is in that province*. To apply some other law, for instance, the *lex fori* in the name of flexibility would not be conducive to uniform enforceability of liability for torts occurring within Canada.⁹⁴

Paraphrasing His Lordship somewhat, I added:

When Canadian residents travel from one province or territory to another they are conscious of moving from one legal regime to another in the same country and aware that there are differences between the two which may impinge in some way on their rights, duties and liabilities. It may come as no surprise to them to find that the local law governs their rights and liabilities in respect of any wrong they did or any wrong they suffered in a province or territory. In these circumstances, there is a stronger case for looking to the *lex loci delicti* as the governing law for the purpose of determining the substantive rights and liabilities of the parties in respect of a tort committed within Canada. In a federation, an individual should not be exposed to the injustice of being subjected to the requirements of contemporaneously valid but inconsistent laws. In the absence of some relevant overriding territorial nexus, one province must not be able to attach legal liability for conduct and consequences which are wholly within the territory of another province, nor can it refuse to recognize or apply the substantive law of that other province in relation to that conduct and those consequences. Interprovincial comity requires such an attitude.⁹⁵

⁹² *Ibid.* at 661.

⁹³ *Supra* note 78 at 372.

⁹⁴ *Supra* note 18 at 661 [emphasis added].

⁹⁵ *Ibid.*

The decision of the Supreme Court of Canada in *Tolofson v. Jensen* and *Lucas v. Gagnon* constitutes a vindication of these views.

B. *The Decision of the Supreme Court of Canada: Appreciation and Critique*

1. General approach

The decision of the Supreme Court of Canada in *Tolofson v. Jensen* and *Lucas v. Gagnon*⁹⁶ is a good example of an unnecessary attempt to constitutionalize the common law choice of law rule applicable to interprovincial torts. Both cases are concerned with automobile accidents involving residents of other provinces.

In *Tolofson v. Jensen*, a young passenger in a car owned and driven by his father was seriously injured when it collided with a vehicle driven by Mr. Jensen. The accident occurred in Saskatchewan. The Tolofsons were residents of British Columbia where the automobile was registered and insured. Mr. Jensen was a resident of Saskatchewan and his vehicle was registered and insured in that province. The victim brought an action in British Columbia against his father and Mr. Jensen seeking damages for his injuries. At the time of the accident, the action was barred in Saskatchewan under that province's statute of limitations but was not barred in British Columbia. Furthermore, at that time, according to Saskatchewan law, a gratuitous passenger could not recover unless wilful or wanton misconduct by the driver of the vehicle in which he or she was a passenger could be established.⁹⁷ No such rule existed in British Columbia. The victim sought to avoid the limitation period and the higher standard of care in the jurisdiction where the accident occurred by bringing his action in a province that was free of these restrictions.

In *Lucas v. Gagnon*, Mrs. Gagnon brought an action on her own behalf and as litigation guardian of her two children against her husband for personal injuries suffered as a result of a collision which occurred in the Province of Quebec between an automobile driven by her husband in which she was a passenger, and an automobile owned and operated by Mr. Lavoie, a resident of Quebec whose vehicle was registered and insured there. The Gagnons were residents of Ontario and their vehicle

⁹⁶ *Supra* note 1.

⁹⁷ Both laws were subsequently modified to remove these restrictions.

was registered and insured in that province. Although, originally, Mrs. Gagnon joined Mr. Lavoie as defendant, she discontinued her action against him. However, Mr. Gagnon cross-claimed against Mr. Lavoie for contribution and indemnity should he be held liable to the victims. Mrs. Lavoie obtained no-fault benefits from Mr. Gagnon's Ontario insurer, who was reimbursed by the Régie de l'assurance automobile du Québec, pursuant to the 1978 agreement between Quebec and Ontario.⁹⁸ Since she could not bring an action for damages in Quebec, she decided to sue in Ontario to obtain greater compensation.

In both *Tolofson* and *Lucas*, it was necessary to decide which law should be applied to determine the liability of the defendant-drivers. *Tolofson* also raised the important subsidiary issue of characterization of the limitation period.

After reviewing the historical development of the Anglo-Canadian choice of law rule in tort, La Forest J., speaking on behalf of the majority of the Supreme Court, observed that it had "been applied with insufficient reference to the underlying reality in which [it] operate[s] and to general principles that should apply ... to that reality."⁹⁹ On the international plane, the relevant underlying reality is the territorial limits of law in the international legal order. Although the courts in the various states will, in certain circumstances, exercise jurisdiction on matters that may have originated in other states so that individuals need not, in enforcing a legal right, be tied to the courts of the jurisdiction where the right arose, rules have been developed for restricting the exercise of jurisdiction over extraterritorial and transnational transactions. Once the Court has properly taken jurisdiction on the basis of a real and substantial connection with the subject matter of the litigation, what substantive law should it apply? La Forest J.'s answer was as follows:

From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they may conflict and other considerations may play a determining role. But that is not this case. Though the parties may, before and after the

⁹⁸ *Supra* note 91.

⁹⁹ *Tolofson*, *supra* note 1 at 17, para. 35.

wrong was suffered, have travelled from one province to another, the defining activity that constitutes the wrong took place wholly within the territorial limits of one province, in one case, Quebec, in the other Saskatchewan, and the resulting injury occurred there as well. That being so it seems to me, barring some recognized exception, to which possibility I will turn later, that as Willes J. pointed out in *Phillips v. Eyre, supra*, at p. 28, “civil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law.” In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences.¹⁰⁰

His Lordship then proceeded to give a list of the usual arguments in favour of the *lex loci delicti*

I have thus far framed the arguments favouring the *lex loci delicti* in theoretical terms. But the approach responds to a number of sound practical considerations. The rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. Stability of transactions and well grounded legal expectations must be respected. Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.¹⁰¹

It is obvious that the law of the place of accident must determine the standard of conduct, for instance whether the driver of an automobile should drive on the right- or on the left-hand side of the road. But with respect to other issues arising out of a tort, for instance loss distribution, the arguments supporting the application of the *lex loci delicti* are less convincing. However, La Forest J. was right when he stated that in *McLean v. Pettigrew* the application of the *lex fori* infringes the territoriality principle. It invites forum shopping by litigants in search of the most beneficial place to litigate an issue. Although some social considerations may have militated in favour of the Anglo-Canadian rule in the 19th century, for instance the difficulty of proving the law of far-off countries,¹⁰² these considerations are no longer

¹⁰⁰ *Ibid.* at 20, para. 42.

¹⁰¹ *Ibid.* at 20, para. 43.

¹⁰² This is not a good example as under *McLean v. Pettigrew, supra* note 83 and *Machado v. Fontes, supra* note 66 it was still necessary to prove that under the law of the place of tort the act was unjustifiable. If that was not possible, the *lex fori* applied.

relevant. Therefore, the Supreme Court decided to overrule *McLean v. Pettigrew*

Addressing the issue of actionability of the wrong by the *lex fori*, the Court came to the conclusion shared, as noted earlier, by the Law Commissions, that it should not be part of the choice of law rule for torts as it is “a factor better weighed in considering the issue of *forum non conveniens* or, on the international plane, whether entertaining the action would violate the public policy of the forum.”¹⁰³

2. Constitutionalization of the *lex loci delicti*?

In the course of his opinion La Forest J. proceeded to examine the policies behind the opinions of the majority of the Australian High Court in *Breavington v. Goderman*,¹⁰⁴ which, it will be recalled, “favoured the view that, while different approaches might be taken in the international arena, within Australia the choice of law rule should be the *lex loci delicti*.”¹⁰⁵ Although His Lordship recognized that principles of Australian constitutional law could not be directly transported into Canada, he acknowledged that as “so much of the history and the social, practical and constitutional environment is of a nature akin to those with which we are faced in dealing with conflicts of laws within this country,”¹⁰⁶ the majority’s observations must be accorded considerable weight.

As noted earlier, in my treatise, I had supported the exclusive application of the *lex loci delicti* rule to interprovincial torts not on the basis of the majority’s arguments, but because I believed it was a reasonable rule in the Canadian context.¹⁰⁷

La Forest J. stated:

The nature of our constitutional arrangements—a single country with different provinces exercising territorial legislative jurisdiction—would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given

¹⁰³ *Supra* note 1 at 23, para. 50.

¹⁰⁴ See Mason C.J. at 372, Wilson and Gaudron JJ. at 379, and Deane J. at 404. For an incisive criticism of the High Court’s constitutional position, see Sykes & Pryles, *supra* note 81 at 325-35. They argue, at 330, that “state legislation should be treated as being *obliged* to conform to common law conflictual constraints in order to get the benefit of full faith and credit recognition in another state” [emphasis in original].

¹⁰⁵ *Tolofson*, *supra* note 1 at 29, para. 67.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Supra* note 18 at 661.

the same legal effect throughout the country. This militates strongly in favour of the *lex loci delicti* rule. In this respect, given the mobility of Canadians and the many common features in the law of the various provinces as well as the essentially unitary nature of Canada's court system, I do not see the necessity of an invariable rule that the matter also be actionable in the province of the forum. That seems to me to be a factor to be considered in determining whether there is a real and substantial connection to the forum to warrant its exercise of jurisdiction. Any problems that might arise could, I should think, be resolved by a sensitive application of the doctrine of *forum non conveniens*.¹⁰⁸

Although he was of the opinion that this approach has the advantage of unquestionable conformity to the Canadian Constitution, he was much more careful in his choice of words than he had been in *Hunt*, as in the present case the constitutional problems were not adverted to in the courts below. He added:

Unless the courts' power to create law in this area exists independently of provincial power, subject or not to federal power to legislate under its residuary power—ideas that have been put forth by some of the Australian judges in *Breavington v. Godleman*, *supra*, but never, so far as I know, in Canada—then the courts would appear to be limited in exercising their powers to the same extent as the provincial legislatures;¹⁰⁹

and concluded:

If a court is thus confined, it is obvious that an extensive concept of "proper law of the tort" might well give rise to constitutional difficulties. Thus an attempt by one province to impose liability for negligence in respect of activities that have taken place wholly in another province by residents of the latter or, for that matter, residents of a third province, would give rise to serious constitutional concerns. Such legislation applying solely to the forum province's residents would appear to have more promise. However, it is arguable that it is not constitutionally permissible for both the province where certain activities took place and the province of the residence of the parties to deal with civil liability arising out of the same activities. Assuming both provinces have legislative power in such circumstances, this would open the possibility of conflicting rules in respect of the same incident. I go no further regarding the possible resolution of these problems. What these considerations indicate, however, is that the wiser course would appear to be for the Court to avoid devising a rule that may possibly raise intractable constitutional problems.¹¹⁰

This cautious approach to the interplay of choice of law rules and constitutional imperatives seems to indicate that the Supreme Court may not be ready to entrench the *lex loci delicti* in the Constitution. It may be correct to declare that a statutory or judicial rule violates the principles of order and fairness or that, in interprovincial torts, the application of the *lex fori* to liability and the assessment of damages may in some circumstances constitute an extraterritorial application of that law. Yet,

¹⁰⁸ *Tolofson*, *supra* note 1 at 30, para. 69.

¹⁰⁹ *Ibid.* at 31, para. 71.

¹¹⁰ *Ibid.*

a declaration that Canadian courts must, in accordance with an implied Full Faith and Credit clause, apply the *lex loci delicti* to interprovincial torts, might usurp the power of the provincial legislatures and result in the formulation of a federal common law rule of choice of law for interprovincial tort cases without the express support of the Constitution or a legitimate federal policy or interest. It is one thing to declare that, for the law of the forum to be applied, the Constitution requires the existence of a real and substantial connection or minimum contacts to that forum; it is another to declare that the *lex loci delicti* is the rule applicable to interprovincial torts. In other words, is there an overriding necessity for uniformity which requires uniform federal choice of law rules for interprovincial torts? Even if such federal interest exists for the reasons stated by La Forest J., can it not be solved by provincial rules of choice of law? In a federal state, only a minimum level of uniformity is desirable. Diversity among its constituent members must be preserved, especially in Canada, even if residual powers rest with the federal authority. This is particularly important with respect to Quebec's *Civil Code* which contains a rule that, with respect to interprovincial torts, is partly different from the one adopted by the Supreme Court.

Article 3126 of Quebec's *Civil Code* provides as follows:

The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the latter country is applicable if the person who committed the injurious act should have foreseen that the damage would occur.

In any case where the person who committed the injurious act and the victim have their domiciles or residences in the same country, the law of that country applies.¹¹¹

The first sentence of the first paragraph, which contains the general rule, is in conformity with the decision of the Supreme Court. This may also be the case with respect to the second sentence, since it is more concerned with the determination of the place of the wrong than the creation of an exception to the general rule. La Forest J. has indicated that he may be prepared to adopt the place of injury as the place of tort when the place of wrong and the place of injury are not the same.

The second paragraph flies in the face of the rule adopted by the Supreme Court and could be declared constitutionally invalid if the *lex loci delicti* is constitutionally mandated for interprovincial torts. Since I

¹¹¹ For an analysis of this article, see J.A. Talpis & J.-G. Castel, "Le Code Civil du Québec, Interpretation des règles du droit international privé" in *La Réforme du Code Civil* vol. 3 (Sainte-Foy, P.Q.: Les Presses de l'Université Laval, 1993) 807; and H.P. Glenn, "Droit International Privé," *ibid.* at 671.

do not think that this should be the case, the application of the law of the common residence or domicile of the parties, be it the *lex fori* or some other law, can be justified constitutionally under *Morguard*. The question is always the same: is the applicable law really and substantially connected to the occurrence and the parties? The law of the common domicile or residence of the parties may be the law *most* substantially connected, especially with respect to loss distribution, when the place of tort is purely fortuitous and therefore not most relevant except to the extent of determining the conduct of the wrongdoer. This indicates how difficult it is to apply a single law to all issues of torts. Conduct-regulating rules must be governed by the law of the place of acting. But what about other issues? *Morguard* seems to require the application of a law that has minimum contacts with the issue before the Court.

The decision of the Supreme Court should not be given constitutional stature. It simply modifies the common law rule by overruling *McLean v. Pettigrew* and replacing it by the exclusive application of the *lex loci delicti* to interprovincial torts. Therefore, Quebec is free to modify the old rule legislatively or judicially as long as the new rule does not violate the real and substantial connection required by *Morguard*. The test is whether the application of the *lex fori* or some other law would deny full faith and credit to the law of the place of tort. Is it fair to the parties? I would answer in the affirmative but only if, in the circumstances, the *lex loci delicti* is a better connection. When the place of the accident is purely fortuitous, the law of the common residence or domicile of the parties is the better connection.

The territorial reach of provincial power and fairness to individuals in the exercise of that power do not require the exclusive application of the *lex loci delicti*. The implied Full Faith and Credit clause directs the forum to apply the law of a province that is interested in the transaction, not necessarily the law of the place of tort. This is what is meant by respect for the sovereignty of sister provinces. The Supreme Court should limit its constitutional role to setting limits on a province or its courts applying its domestic law to situations that have no real or substantial connection with the province. The place of tort is not such a limit.

3. Exceptions

Should there be exceptions to the exclusive application of the *lex loci delicti*? With respect to *foreign*torts La Forest J. stated:

There may be room for exceptions but they would need to be very carefully defined. It seems to me self evident, for example, that State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country, or for that matter the actions in State B of citizens of State C, and it would lead to unfair and unjust results if it did. The same considerations apply as between the Canadian provinces. What is really debatable is whether State A, or for that matter Province A, should be able to do so in respect of transactions in other states or provinces between its own citizens or residents.¹¹²

The last sentence refers to the situation covered by the second paragraph of article 3126 of Quebec's *Civil Code*. Can a province apply its law to its own citizens and residents with respect to a tort committed outside the province? La Forest J. answered the question by pointing out that the rule in *McLean v. Pettigrew* which in that situation gave preeminence to the *lex fori* is unfair as it invites forum shopping. Therefore, it should not be applied. How did he propose to replace actionability by the *lex fori*? After reiterating that the *lex loci delicti* is the governing rule, La Forest J. stated: "However, because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary."¹¹³

What are those circumstances? Does it mean that on the *international* level the forum can apply its own law to a situation where two local residents, the tortfeasor and the victim, were involved in an accident abroad while the *lex fori* performs only a subsidiary role, for instance to determine the type of damages to which the victim is entitled? The answer should be yes. The forum should also be able to apply the law of a third state where all the parties to the action are resident, even though it is not the law of the place of accident or the *lex fori*. In these two situations, if the victim would be more adequately compensated by the application of the *lex loci delicti*, the law of the common residence should be ignored.

¹¹² *Tolofson*, *supra* note 1 at 21, para. 45.

¹¹³ *Ibid.* at 23, para. 49 [emphasis added]. An exception to the *lex loci delicti* may also lie where the parties may either tacitly or by agreement choose to be governed by the *lex fori* if they find it advisable to do so: *ibid.* at 22, para. 47.

There is always the possibility of resorting to public policy to avoid the application of the foreign *lex loci delicti*¹¹⁴ Thus, where the forum has a serious relationship to the issues or the parties, it could apply its own law and in so doing base its choice on considerations of public policy as, for instance, if the *lex loci delicti* gave little or no recovery at all. A better approach in such cases is to apply the proper law of a tort as an exception.

On the *interprovincial* level, since *actionability* by the *lex fori* denies Full Faith and Credit to the *lex loci delicti* and *unjustifiability* by the *lex loci delicti* is unfair to the defendant, it is arguable that adherence to actionability by the *lex loci delicti* is even more important when foreign torts are involved. The mere fact that a province has an interest in a wrong committed in another province is not enough to warrant its exercising jurisdiction over that activity as it would encourage forum shopping. La Forest J. was opposed to the adoption of the proper law of a tort as an exception to the *lex loci delicti* as he believes that its greatest defect is its uncertainty and likelihood of creating or prolonging litigation, even if it is more flexible and better meets the demands of justice, fairness, and practical results.¹¹⁵ However, “[t]here might, I suppose be room for an exception where the parties are nationals or residents of the forum. Objections to an absolute rule of the *lex loci delicti* generally arise in such situations.”¹¹⁶

We are back to the same problem with no definite commitment. The recognition that there may be room for an exception, especially to replace actionability by the *lex fori*, forced La Forest J. to consider public policy, one of the oldest escape devices to the application of foreign law—in this case, the *lex loci delicti* of a sister province. Although at one point he stated that “[he] see[s] a limited role, if any, for considerations of public policy in actions that take place wholly within Canada,”¹¹⁷ he rejected that possibility for interprovincial torts where order must prevail over fairness as a precondition of justice. Differences between the laws of the provinces are a concomitant of the territoriality

¹¹⁴ *Ibid.* at 23, para. 50. In regard to the United States, see *Victory v. Sperry*, 329 P.2d 728 (Ca. Dist. C.A. 1958). Also, note that the parties may either tacitly (in the absence of proof of *foreign law*) or by agreement choose to be governed by the *lex fori* *Tolofson*, *ibid.* at 22, para. 47.

¹¹⁵ *Tolofson*, *ibid.* at 24-25, para. 53.

¹¹⁶ *Ibid.* at 25, para. 54.

¹¹⁷ *Ibid.* at 23, para. 50.

principle¹¹⁸ and tend to disappear over time.¹¹⁹ Why should an exception be allowed at all where two residents of the forum fortuitously happen to collide on the roads of another province? This is a good question. Luck, he said, should not be relevant. La Forest J. did not give any weight to judicial convenience as an argument for displacing the *lex loci delicti* “Whatever relevance that may have in the international sphere, I fail to see its application within a single country.”¹²⁰ In His Lordship’s opinion, the laws of the common law provinces are sufficiently similar that their application would not give Canadian judges and lawyers much difficulty. In opting for a strict rule, La Forest J. also pointed out that an exception would encourage frivolous cross-claims and joinders of third parties¹²¹: “Any exception adds an element of uncertainty, and leaves the door open to a resourceful lawyer to attempt to change the application of the law.”¹²² And further: “Clear application of law promotes settlement.”¹²³ Exceptions could lead to injustice. Therefore, “there is little to gain and much to lose in creating an exception to the *lex loci delicti* in relation to domestic litigation.”¹²⁴

However, there may be a way for the forum to avoid the application of the *lex loci delicti*

The fact that a wrong would not be actionable within the territorial jurisdiction of the forum if committed there might be a factor better weighed in considering the issue of *forum non conveniens* or, on the international plane, whether entertaining the action would violate the public policy of the forum. Certainly where the place of the wrong and the forum are both in Canada, I am convinced that the application of the *forum non conveniens* rule should be sufficient.¹²⁵

This is questionable since any Canadian court that takes jurisdiction must now apply the *lex loci delicti*

Can the doctrine of *forum non conveniens* really play a significant role as a substitute for actionability by the *lex fori* or public policy if the forum is the most appropriate forum or the natural forum? Consider the case where the cause of action created by the *lex loci delicti* is not

¹¹⁸ *Ibid.* at 26, para. 56.

¹¹⁹ *Ibid.* at 26, para. 57. This may be true with respect to the common law provinces.

¹²⁰ *Ibid.* at 27, para. 61.

¹²¹ *Ibid.* at 28, para. 63.

¹²² *Ibid.* at 28, para. 64.

¹²³ *Ibid.* at 28, para. 65.

¹²⁴ *Ibid.* at 29, para. 66.

¹²⁵ *Ibid.* at 23, para. 50.

known to the *lex fori* but both parties are resident or domiciled in the forum. In such a case the court cannot declare itself *forum non conveniens*. It must take jurisdiction and apply the *lex loci delicti* to the exclusion of the *lex fori*. Not only is there a real and substantial connection with the forum according to *Morguard*, but the victim could lose a juridical advantage if the forum declared itself *forum non conveniens*, as the court of the locus of the tort may not have jurisdiction on that basis alone. Applying *Amchem*,¹²⁶ would the *lex loci delicti* be a more appropriate jurisdiction for the pursuit of the action and securing justice? Clearly not in this case.

Only where the forum is not connected with the action, that is, not the appropriate jurisdiction based on all relevant factors, could it declare itself *forum non conveniens*, discourage forum shopping, and avoid the application of the *lex loci delicti*. But why would a plaintiff sue the defendant in that jurisdiction? In *Tolofson v. Jensen*, British Columbia was the *forum conveniens* as was Ontario in *Lucas v. Gagnon*. There was no more convenient or appropriate forum. Even if the cause of action is unknown to the forum, that forum may still be interested in the litigation since its residents are directly involved.

As we have noted, article 3126 of Quebec's *Civil Code* contains built-in exception clauses in order to escape the application of the *lex loci delicti*. Traditionally, our courts have, on very few occasions, sanctioned the public policy exception. They have also used, even more rarely, the doctrine of *renvoi*.

The best example of an escape device is the use of characterization to change legal categories and thereby use a different choice of law rule to apply the desired law.¹²⁷ The location of the connecting factor such as the place of tort is another method that can be used as an escape device, as is the distinction between substance and procedure.¹²⁸ In the past, these manipulative devices never led to an open-ended analysis. It seems to me that the intransigence of the Supreme Court will encourage litigants and the courts to resort to these traditional escape devices, with the exception of public policy, with respect to interprovincial torts.

¹²⁶ For a pre-*Tolofson* case, see *Wilson v. Moyes* (1993), 13 O.R. (3d) 202 (Gen. Div.).

¹²⁷ For example, contract versus tort.

¹²⁸ For example, the Court may characterize a statute of limitation or the calculation of damages as procedural. See, for instance, the pre-*Tolofson* case, *Brown v. Marwieh* (1993), 123 N.S.R. (2d) 194 (S.C.).

4. Specific issue: Characterization of statutes of limitation

When applying the law of Saskatchewan in *Tolofson*, the Supreme Court of Canada was faced with the characterization of the statute of limitation of that province.¹²⁹ In a burst of judicial creativity, it set aside the old common law rule of interpretation. No longer is it necessary to rely on the language used in the relevant statutory provision to determine if it extinguishes the right or bars the remedy.¹³⁰ Statutes of limitation are substantive:

The notion that foreign litigants should be denied advantages not available to forum litigants does not sit well with the proposition, which I have earlier accepted, that the law that defines the character and consequences of the tort is the *lex loci delicti*. The court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order.¹³¹

This is excellent insofar as the technical distinction between right and remedy is now outdated. The difficulties involved in making such a distinction enabled the courts to favour the *lex fori*, which encouraged forum shopping. In the future, it will not be possible for the *lex fori* to be invoked as a bar to any action based on a foreign tort. However, procedural rules of the forum may affect the operation of the foreign statute of limitation, for instance whether or not a litigant must plead that statute in order to rely on it.

The creation of a new common law rule that foreign limitation periods are substantive accords with the legislative reform that took place in England¹³² and with the law of Quebec.¹³³ It proves that common law rules can be modified without resorting to constitutional imperatives.

¹²⁹ The time within which the action could be brought in Saskatchewan had expired.

¹³⁰ Under the old common law, “[a] statute of limitations which operates merely to bar the plaintiff’s remedy is in general procedural, whereas a statute of limitations which operates not only to bar his or her remedy but also to extinguish his or her right is substantive”: *Canadian Conflict of Laws*, *supra* note 18 at 141. See also *Brown v. Marwieh* (1993), 125 N.S.R. (2d) 389 (C.A.).

¹³¹ *Tolofson*, *supra* note 1 at 34, para. 82.

¹³² *Foreign Limitation Periods Act* (U.K.), 1984, c. 16.

¹³³ Art. 3131 C.C.Q.

5. Summary

In *Tolofson*, since the law of Saskatchewan applied as the *lex loci delicti*, the statute of limitation and the gratuitous-passenger standard of that province governed. In *Lucas*, the Supreme Court applied the law of Quebec, which prevented recovery, especially since Quebec and Ontario's governments believed that the Quebec no-fault scheme applied to all accidents in Quebec, regardless of the domicile or residence of the persons involved.

The two concurring Supreme Court judges, Sopinka and Major, agreed that "in general" the law applicable to interprovincial torts should be the *lex loci delicti*. However, they doubted whether this rule should be absolute, admitting of no exceptions in circumstances in which the *lex loci delicti* would work an injustice.

Let us summarize what the decision stands for:

1. *McLean v. Pettigrew* no longer the law in Canada;
2. international torts are governed by the law of the place where the wrongful activity occurred;
 - a. exceptions to this rule must be carefully defined;
 - b. there may be cases where this rule can be set aside in favour of the *lex fori* on the basis of public policy;
3. interprovincial torts are governed exclusively by the law of the place where the wrongful activity occurred;
 - a. there are no exceptions to this rule, but its application could possibly be avoided by resorting to the doctrine of *forum non conveniens* and
4. statutes of limitation are substantive.

6. Questions left unanswered

The decision of the Supreme Court leaves several questions unanswered, including the possibility of exceptions to the *lex loci delicti* rule already discussed above.

a) *Place of tort*

The first question relates to the place of tort. La Forest J. was of the opinion that, for choice of law purposes, the place of tort is where the wrongful activity occurred. It is the law of that place which must

determine the character of the wrong and its legal consequences.¹³⁴ However, where all the facts and events that constitute the wrongful activity occur in one state while the consequences of that activity are felt in another state, His Lordship seemed to be prepared to consider the place of injury, that is, where the harm ensued, as the place of tort.¹³⁵ In the two cases before the Court the problem did not arise as the wrongful activity and the injury occurred in the same province.

It is not necessary to re-examine here all the aspects of the determination of the place of tort in complex situations, as this has already been done elsewhere.¹³⁶ Suffice it to say that *Moran v. Pyle*¹³⁷ does not contain an adequate answer as it is questionable whether jurisdictional cases should be used for choice of law purposes. To adopt the test of *most* real and substantial connection to determine the place of tort is not satisfactory either. In order to avoid using the determination of the place of tort as an escape device, it would have been better if the Court had definitely held that in all situations the place of injury is the place of tort, instead of just alluding to it. Another formulation of the rule could have been as follows: “as a general rule, the law to be applied in torts is the law of the place where the *injury* occurred.”¹³⁸ This would avoid the difficulties involved in dealing with the formal concept of the place of tort. However, the place of injury may be difficult to determine where the victim suffered harm in different jurisdictions, as is often the case with respect to defamation. Furthermore, some types of harm, like financial harm, are not easy to localize physically.

If an exception based on the proper law of a tort were introduced, there would be no need to resort to the concept of the place

¹³⁴ *Tolofson*, *supra* note 1 at 20, para. 42.

¹³⁵ “[I]t may well be that the consequences would be held to constitute the wrong”: *ibid.* In regard to the United States, see *Schultz v. Boy Scouts of America Inc*, *supra* note 62.

¹³⁶ See *Canadian Conflict of Laws*, *supra* note 18 at 648-53. See also, for example, *Banco do Brasil S.A. v. Alexandros G. Tsavlis (The)* [1992] 3 F.C. 735 (C.A.), which involved intimidation inducing breach of contract; and *Walker v. Bank of New York Inc* (1994), 16 O.R. (3d) 504 (C.A.), *rev'ing* (1993) 15 O.R. (3d) 596 (Gen. Div.), which involved deceit, fraud, misrepresentation, false imprisonment, and conspiracy.

¹³⁷ [1975] 1 S.C.R. 393. According to North & Fawcett, *supra* note 70 at 553:

[T]he jurisdictional test adopted by the Supreme Court of Canada, under which it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities and whose law is likely to have been in the reasonable contemplation of the parties is unworkable in the choice of law context, since it could lead to the result that a tort may be committed in more than one State at once.

¹³⁸ *Tolofson*, *supra* note 1 at 20, para. 42. The italicized word replaces the original word “activity” because, in fact, this meaning is indicated by the surrounding text.

of tort. The place of injury and the place of the wrongful activity would just be factors to be taken into consideration when determining that law. In this regard, it should be noted that Mr. Justice La Forest used the prefatory words “in general.”¹³⁹ This could open the door to exceptions even though, later on in the course of his opinion, he rejected this possibility.

b) *Scope of new rule*

Another issue concerns the scope of the new rule. Does it apply to all issues in tort? La Forest J. stated that the rule applies to the definition of the obligation and its consequences.¹⁴⁰ This means the rights and liabilities of the parties.

Civil actionability by the *lex loci delicti* denotes civil liability in accordance with the *lex loci delicti*, which includes the extent of such liability. The provisions of the *lex loci delicti* denying, limiting, or qualifying the recovery of damages must be taken into consideration. The question is whether civil liability of the kind sought to be imposed exists in respect of the relevant claim as between the actual parties under the *lex loci delicti*.¹⁴¹ This interpretation is consistent with the territorial-vested rights theory propounded by Willes J. in *Phillips v. Eyre*¹⁴² that has long been discredited in the United States, but seems to have regained respectability in Canada. Dépeçage is rejected. The law of the place of tort determines: the tortious character of the conduct; the standard of care; the duty owed to the plaintiff (including gratuitous passengers); causation; conditions for liability; contributory negligence and assumption of risk; imputed negligence; joint liability; whether an interest is entitled to legal protection; defences, including the statute of limitation; duty or privilege to act; and survival of action. With respect to damages and contribution, the *lex loci delicti* covers questions of remoteness and heads of damage, whereas their quantification, that is, the measure of damages, is governed by the *lex fori*. The *lex loci delicti* rule also applies to no-fault liability with respect to automobile

¹³⁹ *Ibid.* But see at 29, para. 66.

¹⁴⁰ *Ibid.* at 23, para. 50.

¹⁴¹ See Lord Wilberforce in *Boys v. Chaplin*, *supra* note 67 at 389. See also *Slaterv. Mexican National Railway Co.*, 194 U.S. 120 at 126 (1940).

¹⁴² *Supra* note 63 at 28. Note that in the Law Commission's report, *supra* note 71, it was stated, at 27, that “[a]ll tortious issues should be governed by the same choice of law rule. ... [This] prevents a party from accepting certain consequences but not others of the applicable law.”

accidents, whether a tort-state person is injured in a no-fault province or a no-fault state or province person is injured in another no-fault state or province, and whether the no-fault schemes are identical.¹⁴³

IV. CONCLUSION

The Supreme Court should be praised for clearing the air. Here is one instance where judicial law-making may be of some service to private international law, although the rule adopted will disappoint many scholars. The selection of the *lex loci delicti* assuming that it means the law of the place of injury in complex situations, is a progressive step even if it amounts to a return to the old historical rule: back to the future! It also avoids going through the growing pains of the American revolution. The characterization of statutes of limitation as substantive is also an excellent move. These new rules should provide the certainty which flows from the principle of order so close to Mr. Justice La Forest's heart.

Dropping the requirement of actionability by the *lex fori* was long overdue and I have no quarrel with it. On the other hand, like Sopinka and Major JJ., I regret that the majority did not provide a specific exception to be used sparingly as a flexible escape to achieve justice when needed, a principle which is also mentioned on several occasions by Mr. Justice La Forest. I am unwilling to place trust in the unfettered use of the *lex loci delicti* and, upon reflection, even with respect to interprovincial torts. One advantage of the *lex loci delicti* rule is that a single law governs all similar claims asserted against a defendant in a class action; for instance, a plane crash. However, let us hope that Canadian litigants and judges will be untroubled by problems of precedent and soon find flexible escapes, as they finally did with respect to *McLean v. Pettigrew* so as not to block the evolution of choice of law rules in that important area of private international law. A good case could be made for displacing the *lex loci delicti* with respect to loss distribution when all the parties reside or are domiciled in the forum state or province.

Again, I must state that I object to the progressive constitutionalization of private international law rules applicable to interprovincial situations on the basis of an implied Full Faith and

¹⁴³ No-fault schemes are in force in all provinces. In regard to Quebec, see C. Walsh, "A Stranger in the Promised Land? The Non-Resident Accident Victim and the Québec No-Fault Plan" (1988) 37 U.N.B. L.J. 173.

Credit clause, which finds its expression in the principles of order and fairness, as the arguments advanced in support thereof are not convincing. In the United States, even in the presence of explicit Full Faith and Credit and Due Process clauses in the Constitution, the Supreme Court's intervention has been quite subdued. The constitutional yoke imposed on the states is very light. The private international law rules adopted by the Supreme Court of Canada in *Morguard*, *Amchem*, and *Tolofson* are sensible common law rules. They can stand on their own merits. They are justified by common sense and do not require the support of the Constitution. They should apply to both international and interprovincial situations. How can an implied Full Faith and Credit clause furnish any definite solution to the question of the selection of the appropriate law for solving all interprovincial conflicts?

What is next on the Court's agenda? Is Mr. Justice La Forest going to continue his crusade to constitutionalize all private international law rules applicable to interprovincial situations?¹⁴⁴ When the occasion arises, will he give definite constitutional status to the *lex loci delicti* as he did in *Hunt* with respect to the new common law rules in *Morguard* and *Amchem*? Will the court move on to contracts—a likely target—and tell us that the inherent Full Faith and Credit clause compels the application of the law of the place of contracting or the law of the place of performance, or some other law, or that article 3117 of Quebec's *Civil Code* dealing with consumer contracts does not meet the principles of order and fairness? It is a dangerous course of action. Judicial reform of common law private international law rules is a legitimate objective but it must be done in an orderly manner, which is a difficult task when the Supreme Court may have to wait a long time for a case to come before it. One must not see a constitutional issue lurking behind every rule of Canadian private international law. The United States Supreme Court has avoided this attitude. The application of the law that has *a* or the *most* real and substantial connection, which is one of the major characteristics of modern private international law, is equally relevant to interprovincial and international situations. There is no need to adopt strict rules which would be difficult to change once they are constitutionally entrenched. The desire for unity of legal

¹⁴⁴ La Forest J. seems to have endorsed wholeheartedly the views of some authors who, like J. Swan in "The Canadian Constitution, Federalism and the Conflict of Laws" (1985) 63 Can. Bar Rev. 271, called for the complete replacement of existing private international law rules by new ones that would take into account constitutional imperatives. Fortunately, not so many cases have enabled the Supreme Court to succumb to this constitutional temptation.

consequences throughout Canada often mentioned by Mr. Justice La Forest as a legitimate constitutionally correct objective is not as strong in our country as it is in Australia, due to the existence of two legal systems and, at the political level, the promotion of multiculturalism. Diversity is more important here.

On the eve of the twenty-first century, the Supreme Court of Canada must not usher Canadian private international law rules into a period of strict law characterized by fixed, rigid rules, designed to achieve order rather than fairness. If a choice is to be made, contrary to the opinion expressed by La Forest J.,¹⁴⁵ fairness should prevail over order. This does not mean that some limits must not be placed on justice in individual cases. Choice of law rules should refer to the legal order “which, judging by external circumstances, seems most appropriate.”¹⁴⁶ For instance, providing a proper law exception to the *lex loci delicti* in difficult cases¹⁴⁷ in both interprovincial and international situations would have been a good compromise in order to reconcile the principles of order and fairness.

¹⁴⁵ Tolofson, *supra* note 1 at 25-26, para. 56. For an excellent analysis of the need to accommodate the tension between predictability and flexibility in a conflicts case, see Hay, *supra* note 22, especially at 334ff. The need for certainty in torts is not as great as in contract. Fairness is generally fostered by exceptions to the general rule.

¹⁴⁶ Neuhaus, *supra* note 22 at 805.

¹⁴⁷ See the Law Commission’s Report, *supra* note 69 at 10, para 3.3.