Conflict of Laws in Canada: The Case for an Interpretive Approach

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CONFLICT OF LAWS IN CANADA:
THE CASE FOR AN INTERPRETIVE APPROACH

by

Shelley M. Kierstead

A thesis submitted in conformity with the requirements for the degree of Master of Laws
Faculty of Law
University of Toronto

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Shelley M. Kierstead  
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Abstract

In this work, current Canadian conflict of laws principles are canvassed in order to assess whether the methodology underlying the adjudication of conflicts cases has shed its formalist roots, and to determine the extent to which judges have become aware of the need to consider Canada's constitutional realities when deciding such cases. Additionally, an examination of the applicability of the *Canadian Charter of Rights and Freedoms* to questions of jurisdiction and choice of law is undertaken.

It is argued throughout the thesis that the Supreme Court of Canada holds the key to integrating federalism concerns with conflicts cases. A survey of Supreme Court jurisprudence shows that such integration has occurred to a great extent with respect to enforcement of sister province judgments and to some degree regarding jurisdiction issues. Considerably less progress is evident in the choice of law area, however, and suggestions for reform are made throughout the work.
Acknowledgements

I would like to thank my supervisors, John Swan and Robert Howse, who gave generously of their time throughout the development of my thesis.

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FOREWORD

I. The Aims of The Thesis

The aims of this thesis are twofold. First, I intend to survey the state of conflict of laws principles in Canada to determine the extent to which current decisional doctrine is adopting a methodology that is less formalistic and more concerned with the consideration of constitutional principles than has traditionally been applied in Canada. Secondly, I will attempt to extend the argument for the applicability of constitutional considerations to cases of geographic complexity by suggesting that the Canadian Charter of Rights and Freedoms (the Charter) is relevant to questions of jurisdiction and choice of law.

II. Introduction to Conflict of Laws

"Conflict of laws" is a body of principles designed to assist courts in dealing with what I will refer to as geographically complex factors that may be present in a legal action. A geographically complex factor is one which implicates at least one territorial jurisdiction other than the forum in which the action is brought. Its presence raises issues of whether or not the forum court should assert jurisdiction over the matter, and if so, whether that court should apply its own law or that of another relevant jurisdiction to resolve the dispute. Finally, geographically complex factors lead to the closely interrelated issues of recognition and enforcement of foreign judgments, where one court must decide whether to recognize and/or enforce a judgment that has been rendered by a court of another territorial unit.

Several "goals" have been attributed to conflict of laws principles. Probably the most commonly cited of these goals is that of uniformity, which stems from the


2 Hessel E. Yntema in "The Objectives of Private International Law" (1957) 35 Can. Bar Rev. 721 at 734, has listed the commonly stated objectives in the following way:

[T]he objectives that have been proposed are somewhat heterogeneous and in part artificial. They include, for example: uniformity of legal consequences, minimization of conflict of laws, predictability of legal consequences, the reasonable expectations

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belief that a conflicts case should be conducted in a manner that ensures the same conclusion is reached regardless of the court in which it is heard. The validity of this objective will be the subject of ongoing discussion throughout this work.

Primarily developed in England during the eighteenth and early-nineteenth centuries, conflict of laws principles were influenced greatly by what I will refer to as that era's "conceptualist" view of law. By conceptualist, I refer to an approach that reflects principles advanced by proponents of positivism. Conflicts methodology falls within the scope of a particular form of positivism identified by one of that school's modern adherents:

[Positivism is] the contention that a legal system is a "closed logical system" in which correct legal decisions can be deduced by logical means by predetermined rules without reference to social aims, policies or moral standards...4

Predetermined rules of the nature described above found expression in one of the earliest English treatises respecting conflict of laws. In A Digest of the Law of England with Reference to the Conflict of Laws, Dicey discussed positivism in the conflict of laws context. He wrote in 1898 that:

[consistent adherence to [the positivist] method ... relieves [the writer] from the necessity of justifying the maintenance of one rule rather than another as soon as it is ascertained to be part of the law of England ...

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3 One of the most influential positivist scholars during the early-nineteenth century was John Austin, whose views were articulated in The Province of Jurisprudence Determined (1832) (London: Weidenfeld and Nicholson, 1968).


The adoption of the positive method fixes the path to be followed by an author whose business it is to determine the principles of English law with regard to the extra-territorial recognition of rights.

In a 1936 article, Canadian scholar John Willis, while accepting without question the fact that both Anglo-Canadian and American conflict of laws rules embodied a conceptual approach, argued that the former allowed for more judicial consideration of justice and convenience than the latter. This was so, he argued, because the American Restatement relied on the "vested rights" theory of conflict of laws. As embodied in the Restatement, this theory stood for the following propositions:

(a) the court of the forum, being a court of law which exists for the enforcement of legal rights only, can give no help to a party unless he can pull out of his pocket a legal right which he, quite fictitiously of course, is carrying about with him, and (b) that legal right only exists in so far as some system of law created it.

By contrast, said Willis, English conflict of laws principles were an aggregate of rules which had emerged from "the application of British domestic law to situations in which one of the possibly relevant facts is the fact that the transaction in question occurred wholly or partly abroad, or between foreign parties...." In other words, conflict of laws rules were nothing more than an appendix of domestic English rules, and as such, had the capacity to be applied in a more just and convenient manner than could rules that were applied pursuant to a vested rights

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8 American Law Institute, Restatement, Conflict of Laws (1932).

9 Willis, supra, note 7 at 3.

10 Ibid. at 12.
theory. In short, Willis had no quarrel with the abstract, mechanical rules that formed conflict of laws; rather, he was concerned with the theory underlying those rules.

Willis was not the only writer to criticise the American Restatement. By the middle of the twentieth century, a revolution in American conflict of laws theory had begun. Scholars, however, were not only challenging the vested rights theory; they also disputed the validity of the entire conceptual approach to conflict of laws. As well as advocating the abolition of mechanical conflicts rules in favour of a more functional approach to cases of geographic complexity, proponents of a new method argued for the adoption of principles that encompassed the special needs of the American federal system.

There was no corresponding shift in Canadian perspective. Unlike its neighbour to the south, Canada has not dispensed with the conceptualist approach to the resolution of geographically complex cases, and has continued to deem provinces "foreign" units for the purposes of conflict of laws. Additionally, little attention has historically been paid by the Canadian judiciary to concerns for federalism or to specific constitutional provisions which might affect conflicts cases. This is not to say that there have been no academic suggestions for reform. Though

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11 Ibid.


constituting a much smaller amount of literature than found in the U.S.,¹⁵ dissatisfaction with the Canadian judiciary's approach to this area of the law has been strongly expressed. Critics have concerned themselves with two main problems: (i) the impropriety of traditional conflict of laws methodology; and (ii) the failure of decisional doctrine to integrate constitutional principles with the resolution of "conflicts" problems. The two issues have been discussed in varying degrees by different authors. Both problems, as they arise within the Canadian context, are addressed in this thesis.

The thesis will proceed as follows. Chapter one begins with an overview of courts' functions as they relate to private actions at common law, and as they pertain to judicial review of legislative action within the Canadian federation. Chapter two offers a conceptual framework for an integrated approach to resolving geographically complex cases in light of constitutional considerations. This is assisted by a discussion of proposals that have been made by various scholars. An analysis of the theories offered concludes that particularly in relation to "choice of law" issues, a theory which rejects mechanical rules for the resolution of geographically complex cases is essential to the integrative task. Instead, an approach that allows courts to interpret competing rules in light of the factual circumstances and by virtue of the policy interests that they embody is preferred. This approach has the added quality of being easily expanded to include arguments respecting the applicability of the Charter to geographically complex cases. I will sketch briefly the manner in which the Charter should operate in this context.

Chapters three and four explore the extent to which the framework suggested in Chapter two has been applied to the respective areas of jurisdiction and choice of law, and provides a more detailed discussion of Charter applicability to these areas.

¹⁵ For a comprehensive list of American literature, see the Table of Books and Articles in Reese, Rosenberg and Hay, Conflict of Laws, 9th ed. (New York: The Foundation Press Inc., 1990) lxvii to lxviii.
Chapter three also discusses recent changes that have occurred in the common law rules relating to the recognition and enforcement of sister province judgments. Chapter four includes a discussion of the special role that the Supreme Court of Canada has to play in the development of a federally responsible approach to the resolution of geographically complex private actions.
CHAPTER 1: THE ADJUDICATORY FUNCTION IN GEOGRAPHICALLY COMPLEX CASES

I. Introduction

As a foundation for the analysis to be undertaken in this thesis, it is essential to discuss the general functions that courts should exercise when presented with a case of geographic complexity. The merger of constitutional considerations with such cases involves the integration of courts' responsibilities for deciding private disputes at common law with their judicial review function. In the following sections, I will offer what I believe is a plausible account of what may be expected in each respect. I make no assertion that this is the definitive approach, nor that all of the premises adopted are undisputed. I do maintain, however, that the account offered is a sound one which provides a suitable foundation for the discussions that follow in subsequent chapters.

II. Function of Common Law Courts

This discussion is premised on the notion that generally, people in society organize their behaviour around a set of understandings and arrangements through which they maintain a cooperative, collaborative mode of living. The need for interpretation of these understandings and arrangements from time to time is unavoidable. The interpretive function has been entrusted to certain institutional bodies. One such set of institutions is courts. Another important institution is legislative bodies. Legislatures and courts are, respectively, designed to deal with certain types of questions, and each approaches its duties in distinctive manners. Each is theoretically capable of dealing with the complaint of one citizen as against another. A legislature, however, is at liberty to refuse to address the matter, and to focus instead on issues of broader social concern. A court, however, provided the complainant follows that body's procedural requirements, can generally not refuse to address the complaint, and must attempt to resolve it in a manner that is generally acceptable to the society which relies on the institution.

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adjudicating a matter are often required to assess the consequences of a set of facts in light of certain legislative enactments. In addition, they resolve actions with reference to principles which have evolved over time without express legislative input. While these two bodies of doctrine often operate in similar or identical fashion, the authority underlying each is quite different.

Statutes owe their existence to legislatures, and as such, a court dealing with a statute must have regard to the intended scope and purposes of the enacting legislative body. Decisional doctrine, on the other hand, is arguably justified by the judiciary's power and obligation to decide cases on reasoned grounds that are fairly reflective of the "general community's understanding." As a result, when considering common law principles, a court must evaluate the applicability of established doctrine to the particular set of facts before it, and determine whether the existing principles continue to be reflective of what that court considers to be the

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18 Hart and Sacks, supra, note 16 at 139.

19 Presumably, the legislators' intent will be generally reflective of community interests.

20 This phrase is used by Hart and Sacks, supra, note 16 at 139. Their concept of the judicial function clearly suggests a relationship between law and morality. One of the modern proponents of this approach was Lon Fuller. Fuller purported to respect both legal positivism and natural law, and found a role for both in his analysis. His portrayal of the manner in which a judge would function in a newly formed society has been summarized as follows by Beryl Harold Levy in Anglo-American Philosophy of Law: An Introduction to its Development and Outcome (New Brunswick, U.S.: Transaction Publishers, 1991) at 102:

1. As a matter of human nature, [the judge] would know that his decisions would come to be looked upon as precedents, especially if there were recurring patterns for ordinary situations.
2. He would foresee that, out of his treatment of individual cases, a body of rules would emerge. The community, in some degree, would tend to adjust to these rules.
3. He would feel that his decisions should be considered right - in light of the group's common purpose and efforts.

Fuller's acceptance of natural law was the key to his great debate with H.L.A. Hart. It must be noted, however, that unlike Austin, supra, note 3, Hart sees some place for moral considerations in the law. Such considerations are relevant from his perspective, in situations where benefits or burdens are to be distributed among persons, and where an injury has been perpetrated requiring fair compensation or redress. Arguably, the application of Hart's approach to the resolution of cases of geographic complexity would lead to the same conclusions reached through Fuller's theory.
general community understanding.

Certain individuals argue that adjudicative evaluation should be undertaken as a means of returning parties to the status quo which existed prior to the events leading to their dispute.21 This is in direct opposition to the position that adjudication should promote structural change in accordance with the sociological and political realities of modern society.22 Still others are of the opinion that the adjudicatory process and its underlying procedural guidelines can effectively undertake both roles.23

The analysis presented in this chapter tends to favour an understanding of adjudication premised on the acceptance of many of the tenets of corrective theory. This theory is consistent with the first view of the proper adjudicative function described above, namely that the interaction at stake "is conceived as being immediate to the parties as doer and sufferer of a single wrong."24 However, regardless of the extent to which one sees adjudication as better suited to performing a distributive justice function, which is consistent with the theory that adjudication should be aimed at achieving structural change, it still seems logical to argue that certain conditions must exist in order for judicial pronouncements of either type to be considered principled.

A principled decision at common law is one that is arrived at after the parties have had an opportunity to present relevant facts to the court and to make reasoned

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24 Weinrib, supra, note 21 at 4.
arguments respecting the applicability of legal principles to those facts. Additionally, in order to make legal arguments, the parties must know what criteria the court considers relevant. Given the system of precedent in operation at common law, parties gain this knowledge through previous decisions. It is crucial to the functioning of the judicial system that when courts render decisions, they give rational explanations about why they consider certain factors important to the resolution of the issues at stake. The decisions need not, and will not, always be based on factors that each citizen considers appropriate, but judges must always make clear the considerations which lead to their conclusions. As Lon Fuller stated:

[t]he efficacy of adjudication depends upon a faith in its essential rationality. This faith in the process itself is quite consistent with the view that a particular product of it is plainly mistaken.

A. Common Law Courts and Cases of Geographic Complexity

(i) Traditional Methodology: The Classificatory or Characterization Approach

In order to compare the judicial functions suggested above to those exercised in the resolution of Anglo-Canadian conflicts cases, it is necessary to review the traditional methodology. In the foreword, I argued that conflict of laws rules embody a conceptual approach to the law. I now propose to provide an illustration in support of this assertion.

Once a court has determined that it has jurisdiction to entertain an action


26 It has been noted by Fuller that not all adjudicators give reasons for their decisions. He argues, however, that generally the fairness and effectiveness of adjudication are promoted by reasoned opinions. Without such opinions the parties must assume that their participation in the decision has been real, and that the arbiter has in fact understood and taken into account their proofs and arguments. Ibid. at 106.

27 Ibid.
containing geographically complex facts, it will address the "choice of law" issue. English and Canadian courts resolve this question by applying "jurisdiction selecting rules." The important feature of these rules is that they lead to a choice of the entire substantive law of one jurisdiction to govern the dispute.

In order to determine the governing jurisdiction the forum court must determine the characterization or classification to be attributed to the issues raised in the pleadings. For example, do the alleged facts give rise to a question of contract or tort? Depending on the legal characterization, the court will be directed to a specific rule (often called a "connecting factor") which will automatically point to the jurisdiction whose laws will be used to resolve the dispute. The law of this jurisdiction is known as the "proper law."

Perhaps the most notable aspect of this method is that it does not call for consideration of the content of the individual rules that the litigants argue are applicable to the resolution of the substantive dispute between them. This may be illustrated by applying the jurisdiction selection process to a hypothetical fact pattern. Note that the following example is not a restatement of the facts of any particular

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28 Jurisdiction is discussed at length in chapter 3, infra.

29 The procedural law of the forum, on the other hand, is always applied. As we shall see later, the procedural/substantive distinction is often used by judges to manipulate results.

30 Falconbridge succinctly summarized this process in "Conflict of Laws: Examples of Characterizations" (1937) 15 Can. Bar Rev. 215 at 215-216:

[T]he court should, in the first place, characterize or define the juridical nature of the question upon which its adjudication is required. The court should, in the second place, select the proper law, that is, the law of a particular country as indicated by the conflict rule of the forum appropriate to the question as already characterized. The conflict rule of the forum will of course merely indicate in general terms that a particular place element in the factual situation (as, for example, the domicile of a person, the place of making of a contract or the situs of a thing) is the appropriate connecting factor, that is, the element which connects the factual situation with a particular country; and the court, following this conflict rule, is enabled by the use of this connecting factor, to select the law of the country thus indicated as the proper law. The court should, in the third place, apply the selected proper law to the factual situation for the purpose of deciding what, if any, legal consequences result from that situation... .

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case, nor a representation of any particular law.

Suppose that A, a resident of the Province of Raeland, visits a friend in the Province of Devinity. To return home, A purchases a ticket from a Devinity-based bus line. The ticket provides that any disputes arising under the contract will be governed by the laws of Devinity. Passengers are, as a routine matter, made aware of this provision prior to the purchase of their ticket.

During the trip back to Raeland, but while still in Devinity, A is seriously injured when the bus in which she is travelling is involved in a collision caused by the negligence of the bus driver. The driver is subsequently convicted of an offence under the Devinity *Highway Traffic Act*.

A returns to Raeland where she receives extensive medical attention. Eighteen months after the accident she commences a legal action in Raeland against the bus company whose employee she alleges is responsible for the accident. A's claim is framed in negligence. The defendant claims that any liability must stem from a breach of the contract between the parties. There is a one year limitation period on contract actions in the Province of Devinity.

Assuming the Raeland court can properly assert jurisdiction over the matter, it must then decide which jurisdiction's law will govern the resolution of the dispute. In order to do this, the court must characterize the action as sounding in either tort or contract. Although in the example given above, this is a difficult characterization and a convincing case might be made for either, it is crucial that the court definitively conclude into which category the case falls. If, on one hand, the court

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31 This is not unusual; the leading Canadian case respecting choice of law in torts required a determination of whether the action should be characterized as a contract or tort. See *McLean v. Pettigrew*, [1945] S.C.R. 62, [1945] 2 D.L.R. 65.

32 As stated by Lord Denning in *Sayers v. International Drilling Co. NV*, [1971] 3 All E.R. 163, 1 W.L.R. 1176 (C.A.) at 1181 W.L.R.: ...

"... it is obvious that we cannot apply two systems of law, one for the claim in tort and the other for the defence in contract. We must apply one system of law by which to decide both claim and defence."
decides that the cause of action relates to a breach of contract, it will be directed to apply the "proper law of contract" rules. The first question to be asked in determining the proper law is whether the parties have expressly chosen to have the dispute governed by the laws of a particular jurisdiction. In this case, recall the provision in the contract calling for the application of the law of Devinity. When such a clause exists, the court generally need not go any further.\(^3\) The law of Devinity will apply and the limitation period will defeat the plaintiff's claim.\(^4\)

Now suppose the court decides that the root of the cause of action is negligence, and characterizes the issue as a tort. Since the alleged tort occurred in Devinity, the court is directed to apply a double actionability test to determine whether Raeland laws may govern. This test is based on the British case of *Phillips v. Eyre*\(^3\) which has been interpreted as setting out the principle that forum law will apply to the resolution of a conflicts case in the event that (i) had the act occurred in the forum, it would have been actionable according to forum law and (ii) the act was not justifiable under the law of the legal unit where it allegedly occurred.

In the example above, the first requirement would be satisfied since the allegedly wrongful acts would have been actionable had they occurred in Raeland. Satisfaction of this branch of the test allows the court to proceed to the second element. The question for the court to ask at this stage is whether the act of the defendant was somehow justified in Devinity. Since the defendant has been

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\(^3\) This approach seems to preclude consideration of the concept of concurrent liability to which the Supreme Court of Canada has given approval in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481.

\(^4\) In Chapter 4, *infra* we will discuss situations where no express choice of law is made by the parties to the contract, as well as some of the specific exceptions to parties' rights to contractually stipulate a choice of law.

\(^3\) This is subject to the court characterizing the limitation period as procedural as opposed to substantive. See note 37, *infra* and accompanying text.

\(^3\) [1870] L.R. 6 Q.B. 1.
convicted of a quasi-criminal offence as a result of the behaviour in question, the act is not justified. This being the case, the forum court is entitled to apply the law of Raeland to determine liability and damages, and the plaintiff will recover.

In summary, the manner in which a court characterizes the nature of the case before it is, in the traditional conflicts methodology, determinative of the outcome of the substantive dispute between the parties. The shortcomings of such an approach are discussed below.

(ii) Evaluation of Traditional Methodology

The example above raises several difficulties for a judge attempting to reach a principled decision in the manner suggested in previous sections. By working within the confines of jurisdiction selecting rules, a judge places herself in a no-win situation. If she strictly adheres to the mechanical approach, she runs the risk of reaching an illogical and unfair decision, since she has not considered the real issues that are of concern to the litigants. Alternatively, she may manipulate the process in order to achieve a just result, in which case, she has weakened the integrity of the methodology. One example of such manipulation occurs when a judge chooses a characterization of the issue that leads to an application of the rule of law that she considers most applicable to the case given its unique features. The propriety of such manipulation is readily defended by J.-G. Castel in Conflict of Laws, Cases, Notes and Materials, 6th ed. (Toronto: Butterworths, 1987). He states at 1-35:

If the court feels that it would lead to an unjust result to apply the law called for by [a lawyer's] suggested characterization, it will reject such characterization, or use other techniques such as renvoi, public policy, and so on in order to apply a different law and reach a different result. As will be noted, characterization is not a purely mechanical process. If more than one characterization is available for a set of facts, the choice between the characterizations may turn upon the court's desire to achieve justice in the particular case or preference for one rule of law over another.

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that body of law.37

The practical consequences of the two alternatives open to the judge are that
decisions made in strict adherence to the mechanical conflicts rules may not accord
with the general community understanding of how loss should be apportioned, while
those reached by use of manipulation or "escape devices"38 lose their value as
precedents, since the true factors that influenced the decision are masked by the
language of the escape devices employed. In a federal state, an additional problem
arises where, for example, the courts of one province apply their law to residents of
another province when the scope of that law does not encompass the parties and
circumstances in issue. When this occurs, not only has the court arguably treated the
out-of-province party unfairly. It has also infringed the sovereignty of a sister
province. This leads us to the other important aspect of the judicial function relevant
to this work, namely judicial review.

III. Judicial Review

A. The Nature of Federalism

The nature of judicial review in Canada is informed by the political system in
which it operates. Canada is a federal system. The essence of a federal country is
that its people are directly governed by two levels of government consisting of a
central authority and a number of regional (ie provincial/state) authorities.39

37 This tactic has often been employed with respect to limitation periods. The generally
accepted principle is that a statute of limitation which bars a remedy is procedural while one which
also operates to bar the party's right is substantive. The numerous decisions concerning the
substantive/procedural distinction are incapable of reconciliation, and indeed Castel seems to
consider this appropriate when he states that "[l]ogical analysis is of little help here. Practical and
policy considerations seem to be paramount." J.-G. Castel, Canadian Conflict of Laws, 2d ed.
(Toronto: Carswell, 1986) at 117. For a list of cases relating to the characterization of limitation
periods, see Castel, ibid. at 136, n.99.

38 The negative effects of escape devices are discussed by Moffat Hancock in Studies in Modern

American states and Canadian provinces have been allocated power under their respective Constitutions to regulate many of the matters which affect the day-to-day interactions of their residents.\(^{40}\)

The importance of the federal concept to the concerns of this chapter is not the common issue of federal-provincial relations, but rather relations among the provinces. In that respect, there is a crucial balance to be maintained in fostering cooperation within the country while preserving distinctive regional identities. Cooperation, for example, is required for the promotion of the Canadian common market.\(^{41}\) Regional diversity, on the other hand, was one of the driving forces behind the formation of a federal union instead of a legislative union in 1867,\(^{42}\) and its importance cannot be understated. Fostering cooperation while maintaining diversity, however, is not an easy task. We are often made aware of the tensions resulting from these two objectives in discussions of issues such as interprovincial trade barriers.\(^{43}\) They are also present, however, in disputes among private parties where different provincial policies clash. It is in this context that judicial review in cases of geographic complexity arises.

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\(^{40}\) In Canada, this power is derived from s. 92 of the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3 (formerly the British North America Act, 1867.) Certain provisions of this section will be discussed in detail in later portions of this thesis. In the U.S., the federal government has been allocated power over certain specified subject matters, while the states retain authority over the balance of (unspecified) subject matters.

\(^{41}\) This was one of the court's key considerations in Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 [hereinafter Morguard cited to D.L.R.]. See Chapter 3, infra, where Morguard is discussed in detail.

\(^{42}\) Hogg, supra, note 39 at 102.

\(^{43}\) The tension here is between the acknowledged necessity for the provinces to compete effectively within the country and for Canada to compete effectively on the international scene, and the desire of certain provinces to preserve regional industries. One of the best examples is the agriculture industry, where the struggles arising from the divergent goals are seen in cases like the Manitoba Egg Reference (Manitoba (A.-G.) v. Manitoba Egg and Poultry Association), [1971] S.C.R. 689, 19 D.L.R. (3d) 169. This case arose as a result of Ontario and Quebec's 'chicken and egg war'. For an account of the case and its background, see Hogg, ibid. at 554-556.
B. The Rise of Judicial Review in Canada

Courts in both Canada and the United States have taken a role in supervising the division of powers as designated in their respective Constitutions. The assumption of this duty of judicial review, however, is not inherited from the common law. Although seventeenth century English courts occasionally claimed power to evaluate the validity of parliamentary legislation, by the mid-nineteenth century any notion to that effect had been discarded and parliamentary supremacy was clearly accepted.

How, then, did judicial review in Canada become an accepted and expected process? The original Constitution Act, 1867 like the U.S. Constitution, gave no mandate for courts to police the distribution of authority. Nevertheless, the highest courts of each country presumed they had competence to do so. In Marbury v. Madison, the U.S. Supreme Court expressly asserted that it had inherent jurisdiction to supervise the Constitution. There is no comparable Canadian case explicitly declaring the judiciary's role as arbiter of the Constitution, although both the Supreme Court of Canada and the Judicial Committee of the Privy Council assumed that role from the outset.

It has been suggested that the assumption of authority to review the Canadian Constitution's distribution of powers was based largely on the concept of imperialism.

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46 Strayer, supra, note 44 at 3.

47 The U.S. Constitutional document was adopted by a Constitutional Convention in 1787, and a new government was formed pursuant to the Constitution in 1789.

48 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

The pre-Confederation *Colonial Laws Validity Act, 1865* provided that colonial laws would be void to the extent they conflicted with any existing or future English statute. Since the *British North America Act* was an Imperial Statute, it qualified as an existing English statute. With the 1931 enactment of the *Statute of Westminster*, Parliament and the provincial Legislatures were exempted from the dictates of the *Colonial Laws Validity Act*, except as that Act encompassed the *British North America Act, 1867*. As a result, when Canadian courts found a statute to be constitutionally invalid, they were effectively holding that the Act in question was repugnant to an Imperial statute within the meaning of the *Colonial Laws Validity Act*.

In 1982, the assumed right of courts to perform judicial review was replaced by an express constitutional provision. Section 52(1) of the *Constitution Act, 1982* expressly provides that "the Constitution of Canada is the Supreme Law of Canada, and any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect." This provision is now the basis of judicial review in Canada. In addition, the enactment of the Charter in 1982 substantially broadened the scope of judicial review in Canada. Not only are Canadian courts required to supervise the constitutional division of powers; they are now key players in the protection of individuals from government activity which violates the rights and freedoms listed in the Charter.

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50 (U.K.), 28 & 29 Vict., c. 3.


52 (U.K.), 22 & 23 Geo. 5, c. 4.

53 See Strayer, *supra*, note 44 at 7 where the author notes that Canadian courts sometimes expressly applied the *Colonial Laws Validity Act, 1865* in such cases. For an example of one such holding, see *R. v. Chandler* (1869), 12 N.B.R. 556 (C.C.).


C. The Argument for Judicial Review in Cases of Geographic Complexity

The expanded role for the Supreme Court of Canada invoked by the Charter has rekindled debate about whether that court is properly constituted and qualified to perform the judicial review function, which is often termed a "political" one. It is not my intention here to discuss this debate exhaustively. Instead, I wish to establish a plausible argument in support of the judicial review function in the context of geographically complex cases. The basis for this argument is, I believe, provided by Katherine Swinton in The Supreme Court and Canadian Federalism.56

Swinton sets the stage for her defence of judicial review by summarizing the major concerns of one of its principal critics, Paul Weiler.57 Weiler perceives three major problems with judicial review. First, constitutional adjudication requires policy decisions to be made without the assistance of existing rules or principles from past cases. As such, it is unprincipled since it is not legally grounded. It is not proper for the court to resort to its own views about the appropriate balance for the federal system.58 Secondly, judges are incompetent to adapt the Constitution to the needs of a modern federal system because they often do not have before them the proper evidence with which to determine "the need for a particular law, its impact, the efficiency of allocating power to one level of government or another, and the degree of consensus or regional cleavage necessary to an informed decision".59 Thirdly, there is a lack of legitimacy in judicial review, since courts do not have the mandate to determine the needs of a federal system and are less qualified than legislatures to do so.60

57 See Paul Weiler, In the Last Resort: A Critical Study of the Supreme Court of Canada (Toronto: Carswell/Methuen, 1974).
58 Swinton, supra, note 56 at 35.
59 Ibid. at 36.
60 Ibid. at 37.
As a result of these criticisms, Weiler proposes that constraints on the legislative jurisdiction of Provinces and the Federal Government should, in almost all cases, be established by electoral considerations and federal-provincial negotiations. Only in cases where there are direct conflicts between federal and provincial laws (in which case the paramountcy doctrine should be applied) or provincial discriminatory action against extraprovincial products and citizens in international trade, should the courts play any role in federalism review.61

In response to Weiler's concerns, Swinton forcefully argues in favour of judicial review. In the following paragraphs, I will briefly review those of Swinton's arguments which are particularly pertinent to the issues involved in this thesis.

First, Swinton argues that by allowing federal-provincial negotiations to be virtually the sole manner by which the division of powers is organized, there is a strong possibility for a shift in the balance of power in the direction of central government, leading to a decline in regional diversity.62 Judicial review, she argues, provides some protection of regional diversity by "placing legal constraints on the bargaining process and federal unilateralism."63

Additionally, Swinton is concerned with Weiler's apparent lack of recognition of individual or private interests in preserving the federal system. She states:

Many disputes arise which affect individuals or corporations in important ways, but which either fail to attract the attention of the federal-provincial machinery or which drag along in the machinery without timely resolution because of their lack of importance on the government agenda.64

At least, she argues, the current system of court supervision of constitutional boundaries allows individuals or institutions recourse when they have been "unduly

61 Ibid. at 34.
62 Ibid. at 41.
63 Ibid. at 49.
64 Ibid. at 50.
squeezed" by federal or provincial action.65

Finally, Swinton asserts that courts have an important role to play in checking provincial action which negatively impacts out-of-province residents.66 Such actions include licensing of pollution activities that may have a deleterious impact in other provinces, and the enactment of various consumer protection laws that have an impact on contracts made outside the province.67 While corporate interests may be able to influence legislation in their favour, individuals, and in particular non-residents with no electoral say over the activities of the enacting province, have no such power. With Weiler’s scheme, these individuals’ only protection from undue extraprovincial interference is the federal-provincial policy making process, and, if their concerns are not considered sufficiently important to warrant attention, the individuals will have no recourse.68

Swinton’s arguments in support of judicial review of the division of powers suggest an important role for the courts in protecting both individual and regional interests. The former role is, of course, also the focus of Charter adjudication. Though the debate over the propriety of judicial review will no doubt continue, its entrenchment in the Constitution and its lengthy history in Canada indicate that it is unlikely to be ousted in the foreseeable future.

IV. Integration of Roles

Judicial review and private dispute adjudication are at their cores concerned with different objectives. While the former is aimed at maintaining the proper balance of legislative power within the country, the latter deals directly with the

65 Ibid. at 51.
66 Ibid.
67 Ibid. at 52.
68 Ibid.
concerns of private parties. Although there may be some tension in these roles, it will not necessarily be clearly evident in the context of geographically complex cases.

Essentially, Professor Swinton's reference to individuals centres around the effects that extraprovincial acts may have on private parties, and the extent to which judicial review may curb unacceptable levels of interference by provinces on sister province residents. It is precisely this issue that is of concern to this thesis. The point at which judicial review and private law adjudicative functions may be seen to overlap is where concern for the individual operating within the federal system arises.

Part of the factual situation surrounding geographically complex cases includes the relationship of the parties to the particular provinces involved, and the degree to which they may reasonably have expected to be governed by those provinces. As a result, it is important for the court to recognize and consider these issues when they adjudicate "conflicts" cases.

It is not sufficient to simply state that both judicial review and private law adjudicative functions are relevant to the resolution of geographically complex cases. What is required at this stage is a set of guidelines by which such cases may be decided. The establishment of such guidelines is the objective of the following chapter.
CHAPTER 2: FOUNDATIONS FOR AN INTEGRATED APPROACH

I. Introduction

In order to assess the extent to which constitutional considerations have been integrated with issues of geographic complexity and to suggest the proper method for courts to adopt in achieving a larger degree of integration in the future, it is important to undertake a brief overview of the Canadian constitutional framework as it pertains to the division of powers. Following this overview, suggestions as to how the judiciary might best achieve a principled approach to the resolution of geographically complex cases will be assisted by a discussion of proposals for reform that have been made by various Canadian scholars.

II. Canada’s Constitutional Structure

A. Division of Powers

The Constitution Act, 1867 enumerates the subject matters over which federal and provincial legislative authority may properly be exercised. Section 91 deals with Federal matters, including a residuary power to make laws for the peace, order and good government of Canada with respect to "matters not coming within the classes of subjects by [the] Act assigned exclusively to the Legislatures of the Provinces." Section 92 of the Act enumerates the subject matters falling under Provincial authority.

Many cases coming before courts for judicial review arise from conflicts between federal and provincial authority, and require a determination of which level of government may properly legislate or regulate respecting a particular subject matter. In early post-Confederation cases, the Privy Council attempted to maintain what have been termed "watertight compartments" by advancing the notion that all subject matters could be slotted neatly into either a provincial or federal head of
Such a view has not survived the realities of an increasingly complex array of societal arrangements over which both provincial and federal legislative bodies may both plausibly assert some degree of authority. Recognition of the fact that in some cases Parliament and the Legislatures may validly enact legislation with respect to the same subject matter has led to the evolution of the doctrines of "double aspect" and "paramountcy."

The double aspect doctrine applies where subjects fall for one purpose within federal legislative authority, and for another, within the scope of provincial power. As Peter Hogg has summarized, "when the court finds that the federal and provincial characteristics of a law are roughly equal in importance, then the conclusion is that laws of that kind may be enacted by either Parliament or a Legislature."70

The paramountcy doctrine deals with situations where both levels of government have enacted legislation over a particular subject matter and certain aspects of the respective statutes are inconsistent. It has been clearly established that when such inconsistency arises, federal law will prevail.71 Less certain, however, is the extent of inconsistency required to invoke the paramountcy rule. A mere duplication of laws, for example, will not render the provincial provision inoperative.72 There is authority for the statement that there must be an impossibility of compliance with both rules in order for the paramountcy doctrine to

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69 The term "watertight compartments" was first coined by Lord Atkin who stated in Canada (A.-G) v. Ontario (A.-G) (Labour Conventions), [1937] A.C. 326, 5 Cart. 266 (P.C.) at 354 A.C.: "while the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure."

70 Hogg, supra, note 39 at 382. Securities regulation and power over highways are examples of subject matters falling validly within both federal and provincial legislative competence.

71 Ibid. at 418.


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apply, although this definition is also subject to varying interpretations. A detailed analysis of the doctrine is not necessary for the purposes of this work, however. Instead, it is sufficient to note the tools available in the federal-provincial context which permit courts to recognize concurrent authority over certain subject matters. The same flexibility should exist in situations where two or more provinces have legislated in certain areas with the result that both sets of provisions arguably apply to a particular subject matter.

While a "double aspect" principle has not been explicitly recognized in the type of situation described in the preceding paragraph, I believe that the current approach respecting the extent to which provinces may legislate with extraterritorial effect implies the need for recognition of such a doctrine. This argument is explored further in subsequent sections.

(i) Provincial Extraterritorial Incompetence

Restrictions on provincial power to legislate in a manner affecting the rights of parties outside the enacting province represent a continuation of the tradition of colonial extraterritorial incompetence. While the Statute of Westminster established that Canada had the capacity to legislate extraterritorially, the same freedom was not granted to the provinces.

In Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, 65 D.L.R. (4th) 361, the Bank of Montreal, in seizing property pursuant to its s. 178 (now s. 427) Bank Act security, failed to comply with the notice requirements of Saskatchewan's Limitation of Civil Rights Act. Giving such notice would not have been contrary to the Federal Act, yet La Forest J., for the majority, found that there was an actual contradiction in the laws. As Hogg has noted in his critique of this case, the only effect of having the bank comply with the provincial Act would have been a delay in its realization of security, and as such, it was possible to comply with both Acts by simply following the more stringent provincial requirements. See Hogg, supra, note 39 at 421. This case, however, does not detract from the general principle that the doctrine of paramountcy does allow two bodies of authority to govern the same subject matter in certain circumstances. It is the broader principle that is of concern for the purposes of this work. In addition, the Supreme Court in two cases subsequent to Bank of Montreal v. Hall, seems to have reverted to the Multiple Access formulation of the test. See Clarke v. Clarke, [1990] 2 S.C.R. 795, 73 D.L.R. (4th) 1 and Kourtesis v. Canada (Minister of National Revenue), [1993] 2 S.C.R. 53, 102 D.L.R. (4th) 456.

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Territorial limitations on provincial legislative authority are reinforced by the phrase "in the province" which follows many of the provincial heads of power listed in s. 92 of the *Constitution Act, 1867*. Originally, judicial mandates respecting provincial extraterritorial incompetence were quite rigid, but a more flexible stance has recently been adopted by the Supreme Court of Canada.

A strict characterization of territorial competence emanated out of the case of *Royal Bank of Canada v. The King.* Here, the Privy Council was asked to determine whether an Alberta statute aimed at the expropriation of the proceeds of a bond issue made by a railway company in England was *ultra vires* the Alberta Legislature. Their Lordships affirmatively answered this question based on the following reasoning. First, they found the statute had the effect of rendering uncertain the Alberta Government's commitment to completing a railway in that province, the construction of which was the original purpose behind the bond issue. In other words, they considered the statute to have effected a change in purpose respecting the bond issue. Such a change in purpose gave rise to a right at common law for the bondholders to recover the money they had invested.

The right of recovery existed at the head branch of the Royal Bank of Canada in Montreal, where the funds attributable to the bond issue were technically deposited, but the statute precluded the Bank from returning the money. As such, the Alberta statute affected rights that existed in another province. Concluding that such effect was unacceptable, the court stated:

> The statute was ... beyond the powers of the legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it.

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75. The funds were actually on deposit with a branch of the Royal Bank of Canada in Alberta.
76. *Royal Bank, supra*, note 74 at 345.
This strict approach to extraterritoriality was generally followed until 1984 when the Supreme Court of Canada in *Re Churchill Water Rights* adopted the more flexible approach enunciated by the Privy Council in the long ignored case of *Ladore v. Bennett*.

In *Churchill*, Newfoundland enacted a statute to expropriate the assets and water rights of a Newfoundland company generating hydro-electricity at Churchill Falls. The company was not compensated for the expropriation, which rendered them unable to perform a pre-existing contract with Hydro-Québec. The contract had created rights outside Newfoundland in two ways. First, the electricity was to have been delivered in Québec. Secondly, by express contractual provision, the contract was enforceable in the Québec courts. Newfoundland argued that the deprivation of these rights was incidental to the primary objective of the province which was to expropriate assets in Newfoundland.

The Supreme Court of Canada rejected Newfoundland’s argument, finding that the legislation was directly aimed at interfering with the contract. As such, the "pith and substance" of the statute was the destruction of extraterritorial contractual rights. The Court also rejected, however, Québec's argument that the Act was *ultra vires* merely because it affected the rights of creditors outside Newfoundland. McIntyre J.,

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79 [1939] A.C. 468, 3 D.L.R. 1 (P.C.) [hereinafter *Ladore* cited to A.C]. In *Ladore*, an Ontario statute which effected the amalgamation of four municipalities into the city of Windsor also effected the exchange of all existing debentures for new ones with a reduced rate of interest. The Privy Council rejected the argument that the statute amounted to an invalid interference with the civil rights of debenture holders outside Ontario. It held that the pith and substance of the legislation was in relation to s. 98(2) of the *Constitution Act, 1867* (Municipal Institutions within the Province), and it was inevitable that the destruction of old debts and creation of new ones would affect creditors whether they resided within Ontario or not. Lord Aitken stated at 482-483 that "though they affect[ed] rights outside the province, they only so affect[ed] them collaterally, as a necessary incident of their lawful powers of good government within the province."
speaking for the majority, stated:

There is nothing in the Act itself or in the extrinsic evidence to indicate that the Act is aimed at the rights of secured creditors. Any effect on these rights would be of an incidental nature and, in accordance with the principle of *Ladore v. Bennett* discussed above, would not of itself be grounds for declaring the Act ultra vires.80

Thus, the current principle relating to the issue of extraterritorial provincial competence may be summarized as follows: the impairment of extraprovincial rights will be valid to the extent that such effect is incidental to a statute that is, in pith and substance, related to a matter territorially within the province and within a head of provincial power.

**B. Canada's Court Structure**

It is important to be cognizant of the fact that while the jurisdiction of Canadian courts is not divided along the same lines as is legislative power pursuant to the *Constitution Act, 1867*.

Essentially, Canadian courts may be described as falling within what I will describe as three general categories. First, there is the pre-Confederation court structure which was continued by s. 129 of the *Constitution Act, 1867*. This structure consists in each province of superior courts which entertain disputes raising issues of federal law, provincial law, constitutional law, or a mixture of all three81 and "inferior" (often termed "provincial") courts with jurisdiction over small civil claims and minor criminal offences.82 Nova Scotia also has district or county courts whose jurisdiction is limited to local counties or districts.

Pursuant to s. 92(14) of the *Constitution Act, 1867*, responsibility for the

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80 *Churchill*, supra, note 78 at 333.


82 Hogg, *supra*, note 39 at 162.

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organization and jurisdiction of these courts lies with the provinces, but staffing of
the same bodies is not solely within provincial authority. The appointment and
payment of inferior court judges does fall exclusively within provincial domain by
virtue of s. 92(4). The superior courts of the provinces, on the other hand,
including a Court of Appeal in each province, are made up of judges who are
appointed and paid by the federal government pursuant to ss. 96 and 100 of the
Constitution Act, 1867.

The second category of court that exists in Canada is the final appellate court
for the nation. Immediately upon Confederation, the Privy Council became Canada's
final Court of Appeal. Section 101 of the Constitution Act, 1867 also provided that
Parliament could establish (i) a general court of appeal for Canada, and (ii) any
additional courts for the better administration of the laws of Canada. In 1875,
Parliament established the Supreme Court of Canada pursuant to the first branch of
s. 101. Until 1949, however, appeals from provincial courts of appeal and the
Supreme Court of Canada could still be taken to the Privy Council. From 1949 onward,
the Supreme Court of Canada has been the final court of appeal for the
nation. While being a court established by statutory enactment, the Supreme
Court of Canada, as the final court of appeal, enjoys "appellate, civil and criminal
jurisdiction within and throughout Canada." Such jurisdiction stands in contrast
to that of the Federal Court, the third of the categories of courts to which I have
alluded.

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83 Section 92(4) confers on each province the power to make laws relating to "the establishment
and tenure of provincial offices and the appointment and payment of provincial officers."

84 Pursuant to s. 3 of An Act to Amend the Supreme Court Act, S.C. 1949, c. 37, the Supreme
Court of Canada became the final appellate court for the country.

85 Supreme and Exchequer Courts Act, 1875, S.C. 1875, c. 11; now Supreme Court Act, R.S.C.

86 Supreme Court Act, s. 35.
As noted above, s. 101 of the Constitution Act, 1867 also conferred on Parliament the power to establish "any additional courts for the better administration of the laws of Canada." In 1875, the Exchequer Court of Canada was established, but its jurisdiction was limited solely to cases involving the revenue of the Crown in right of Canada. This jurisdiction was gradually increased and in 1971 the Federal Court,87 which replaced the Exchequer Court, inherited the same jurisdiction. The existence of the Federal Court means that there is a dual court system operating in Canada.

Section 22(2) of the Federal Court Act outlines several of the specific subject matters over which the Federal Court has jurisdiction. Because the court has no inherent jurisdiction, its authority is limited to the subject matters expressly outlined in the Act or other federal statutes. In addition, the Federal Court may only adjudicate over subject matters governed by "the laws of Canada."88

The question of what constitutes the law of Canada has been a matter of some discussion and dispute. Until 1976, it was assumed that the Federal Court could assert jurisdiction over any matter in relation to which Parliament had legislative competence, whether or not federal statutory law was in place to regulate the subject matter.89 Pursuant to this understanding, the laws of Canada could include a rule of provincial statute law or a rule of the common law if it was with respect to a subject matter over which Parliament could have enacted or adopted laws.90 This assumption was dislodged, however, in Québec North Shore Paper Co. v. Canadian

88 Hogg, supra, note 39 at 175.
89 Ibid.
90 Ibid. at 175.
Pacific,\textsuperscript{91} where the Supreme Court of Canada held that the Federal Court could not constitutionally assume jurisdiction over a case where there was no applicable and existing federal law in place governing the relevant subject matter. The Court's reasoning was reiterated in McNamara Construction v. The Queen.\textsuperscript{92} These decisions have led to some scholarly dissatisfaction respecting the difficulty of achieving relief where part of a claim lies against a party who may only be sued in the Federal Court, while another part lies against a party over whom the Federal Court has no jurisdiction according to the principles of North Shore and McNamara.\textsuperscript{93}

As noted previously, the division of power between courts is not analogous to that set out in ss. 91 and 92 of the Constitution Act, 1867. As this work proceeds, however, it will be argued that in exercising their authority in matters that involve the relevant laws of two provinces, courts should, as a matter of respect for their sister provinces, restrict their assertion of power along the lines of the territorial restraint imposed on provincial legislatures. For the remainder of the thesis, the courts to which attention will be specifically directed are those with general jurisdiction, namely, the provincial superior courts and the Supreme Court of Canada.

Decisions such as Royal Bank and Churchill, respecting restrictions on legislation with extraterritorial effect, were considered strictly constitutional cases and


\textsuperscript{92} [1977] 2 S.C.R. 655, 75 D.L.R. (3d) 273 [hereinafter McNamara]. In McNamara, the Supreme Court held that the Federal court had no jurisdiction over a breach of contract action brought by the Crown in right of Canada against a builder of an Alberta Penitentiary. The top court held where the applicable law governing the case was the common law, the requirement of "applicable and existing federal law" set out in Québec North Shore was not satisfied.

\textsuperscript{93} This issue is discussed in J.M. Evans "Federal Jurisdiction - A Lamentable Situation" (1981) 59 Can. Bar Rev. 124.
there was no judicial reference to their applicability to conflict of laws cases. A limited number of early post-Confederation cases did link constitutional principles with conflict of laws issues by holding that jurisdiction asserted over out-of-province defendants pursuant to provincial legislation was authorized by sections 92(13) and 92(14) of the Constitution Act, 1867. Unfortunately, the decisions did not include any analysis of possible limits on the authority to call out-of-province parties into the forum court's jurisdiction. This was generally the case up until 1974 when the Supreme Court of Canada dealt with an issue respecting the extraterritorial assertion of jurisdiction in Moran v. Pyle National (Canada) Ltd. In Moran, a light bulb allegedly negligently manufactured in Ontario fatally injured an electrician when he used it in Saskatchewan. The issue before the Supreme Court was whether, on the facts presented, a tort had been committed in Saskatchewan so that service upon the defendant, which did no business in Saskatchewan, but placed its product there through a distributor, was appropriate. The court answered the question in the affirmative, and its reasoning will be explored in both this and subsequent chapters.

The scarcity of decisional doctrine respecting the Constitution and cases of

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94 The annotation to Royal Bank, supra note 74, does, however, draw attention to the connection between constitutional law and international sovereignty doctrines. In the portion of the annotation dealing with the territorial restriction of provincial legislative power, the author states at 348 that "the limitation of the powers of the Provincial Legislature to property and civil rights within the province is no more than that imposed on any sovereign state by the comity of nations." The author concludes that "by the law of nations and by the British North America Act ... the Provincial Legislature could not properly pass this legislation."

95 See, for example McCarthy v. Brener (1896), 16 C.L.T. 201 (NWT); Exchange Bank v. Springer (1881), 29 Gr. 270 (Ont. C.A.); and Deacon v. Chadwick (1901), 1 O.L.R. 346 (Div. Ct.).

96 A good example of such a case is Stairs v. Allen (1896), 28 N.S.R. 410 (App. Div.), where Henry J. made the following statement at 418:
Save as to the effect of the British North America Act, in respect of the division thereby of the subjects of the legislative jurisdiction in Canada, there is no longer any ground for questioning such right and power as exercised in the rule under which service is sought to be effected in this case.

geographic complexity has meant that scholars attempting to map out principled methods of integrating the two areas have had little assistance from the established caselaw. The efforts of various authors are canvassed in the sections which follow.

III. Scholarly Contributions to Conflict of Laws in Canada: An Introduction

For many years, both lawyers and judges depended on the principles of conflict of laws as interpreted by British authors to argue and decide geographically complex cases. Two of the most broadly used treatises were those originally written by Dicey and Cheshire. Both of these authors adopted a conceptual approach to conflicts problems, and while both cited Canadian cases, neither made reference to the possibility of according unique treatment to Canadian conflicts cases due to that country's federal structure.

Gradually, Canadian authors took on the task of compiling treatises respecting conflict of laws, and some of these scholars began to depart from blind adherence to British authorities. Canadian writings in this area have tended to embody three broad approaches, which, for the purposes of this work, can be summarized into the following headings: (i) the traditional approach, advocates of which on occasion attempt to speculate as to how special Canadian attributes might be superimposed onto the traditional conflict of laws principles; (ii) the territorial approach, proponents of which suggest a virtually direct transposition of constitutional doctrine respecting extraterritorial legislation to conflicts cases; and (iii) the interpretive approach, whose supporters argue that the conceptual framework by which conflicts matters are decided is fundamentally flawed, and as such, incapable of properly taking into account constitutional considerations. Each approach warrants separate


treatment and will be explored in greater detail below.

IV. The Proposed Approaches

A. The Traditional Approach

John Falconbridge provided the first comprehensive Canadian treatise on conflict of laws.\textsuperscript{100} Though his work constitutes a significant contribution to this area of scholarship, in many areas of his treatise, Falconbridge's loyalty to the traditional English approach is evident.

Falconbridge recognized the possibility of arguing that Canada's federal system gives rise to the need for an approach to inter-provincial conflicts cases distinct from that used in the international context. He reviewed the arguments of American authors that special principles should apply to interstate conflicts in that country, but concluded that such an approach was unnecessary in Canada. Falconbridge's opinion was largely based on what he viewed as the virtual uniformity of common law among the provinces which he stated was preserved by appeals to the Supreme Court of Canada or Privy Council. While he did see the possibility that divergent conflict of laws rules might be introduced by provincial statutory enactment, Falconbridge did not consider such legislation probable.\textsuperscript{101} As a result, there was no need to make any special accommodation for diversity of rules among the common law provinces.

Falconbridge did recognize a divergence of conflicts rules between the common law provinces and Québec. A dispute between a Québec resident and a resident of a common law province would, he stated, only technically be an intranational one, and instead, would have the characteristics of an international conflicts case,\textsuperscript{102} comparable to one which might arise between England and France. As such, it

\textsuperscript{100} John D. Falconbridge, Essays on the Conflict of Laws (Toronto: Canada Law Book, 1947).

\textsuperscript{101} At 278-279, ibid. Falconbridge noted "the only significant statutory departure from English conflict rules that occurs to me consists in divergent provincial versions of Lord Kingsdown's Act."

\textsuperscript{102} Ibid. at 279.
would be proper to apply general conflict of laws principles to resolve any action of this nature.

If the argument that the role of the Supreme Court of Canada is to ensure uniformity of common law is correct, much of Falconbridge's argument may be warranted to the extent that it speaks to common law principles. The failure of his analysis to include Québec, however, is more problematic since it does not attempt to make any accommodation for the civil regime operating within the federation.

The positive aspect of Falconbridge's analysis is that it does not attempt to argue that traditional conflict of laws rules do accommodate the special needs of a federation. Rather, it concludes that in Canada's particular case, such accommodation is not required. Certainly, Falconbridge's assumptions about the role of the Supreme Court in ensuring this state of affairs are subject to debate, as is the propriety of the traditional conflicts methodology he adopted. The latter issue has been addressed in part in the previous chapter, and will continue to be discussed throughout the thesis. The former assumption is also referred to at various points throughout the work, but is specifically addressed in chapter four. Falconbridge's position, however, at least keeps the two issues very clear. The approach of one of Canada's current conflict of laws scholars is somewhat different.

In *Canadian Conflict of Laws*, J.-G. Castel takes a different position to that of Falconbridge by asserting that Canada's federal structure is an important consideration in conflict of laws. He also argues that the Charter may be applicable to certain conflicts cases.

With respect to judicial assertions of jurisdiction, Castel contends that a province must "have a substantial interest to protect in order to subject a non-

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103 Supra, note 37.
104 Ibid. at 38.
resident defendant to its judicial jurisdiction. This argument is quite consistent with that of other current scholars who comment about extraterritorial exercises of jurisdiction, as we shall see below. What I wish to focus on is the manner in which Castel proposes that courts may adhere to principles of federalism when dealing with choice of law issues.

Like Falconbridge, Professor Castel accepts the traditional jurisdiction selecting approach to choice of law. For example, Castel accepts the "proper law" rule for selecting the jurisdiction which is to govern the resolution of contract disputes. This rule, briefly stated, allows the parties to choose the law that they wish to govern their contract. In the event they have done so, as was the case with the parties in the example given in chapter one, with certain exceptions, the place they have chosen should become the governing jurisdiction.

If the parties have not included an express choice of law clause in their contract, courts must first look for the implied intention of the parties, and if none is found, they must choose the jurisdiction with which the transaction has its closest and most real connection. In the latter inquiry, the factors most often considered are the place of contracting, place of performance, place of residence or business of the parties, and the nature and subject matter of the contract.

Castel argues that the proper law approach may serve the purpose of respecting predominant provincial interests in conflicts cases. Noting the provinces' inability to legislatively impact upon extraprovincial contracts which have some effect within the province, he states:

If the provincial law sought to be impugned is the proper law of the

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105 Ibid. at 11.

106 For example, the choice must be bona fide and legal. See Vita Food Products Inc. v. Unus Shipping Co., [1939] A.C. 277, [1939] 2 D.L.R. 1 (P.C.) [hereinafter Vita Food cited to D.L.R.].

107 Castel, supra, note 37 at 527.

108 Ibid. at 537.
contract ascertained objectively, in other words, if that law is most really and substantially connected with the transaction and the parties, there is no reason why it should not be held valid and applied even if civil rights outside the province are affected. Otherwise, a province having a predominant interest in applying its own law to a contract which, under ordinary conflict of laws rules would be governed by that law, would not be able to prevent its citizens from entering into such a contract outside the province and then enforcing it in the courts of the province.\textsuperscript{109}

The author seems to assume that the presence of the contacts listed above for determining the proper law automatically imply a province's predominant interest in applying its law. It is difficult to give credence to this assumption, however, when the policies underlying that law have not been examined.

With respect to choice of law rules for torts, Castel advocates abandoning the double actionability rule, and adopting in its place one which selects the law of the place "most substantially connected with the issue before the court, provided it is not contrary to the public policy of the forum."\textsuperscript{110} Though he does not detail the factors that would be considered in applying this new test, one might assume they would not stray greatly from the "proper law" approach in contract. That he is not willing to meander far from the traditional methodology is illustrated by the author's closing passage:

To conclude this book, one attractive feature of clearly formulated conflict of laws rules and traditional methodology is their objectivity and the ensuing predictability of results in spite of their possible manipulation by the courts, albeit within narrow limits... Modern methodologies encourage excessive manipulation as the courts can easily decide which solution they wish to give to the problem facing them and then proceed to look for a system of law which provides such a solution... \textsuperscript{111}

\textsuperscript{109} Ibid.

\textsuperscript{110} Ibid. at 613.

\textsuperscript{111} Ibid. at 624.
Castel's proposals are firmly rooted in the conceptual approach discussed previously. It is important to note that he is still advocating the adoption of a methodology which chooses an entire jurisdiction whose laws will govern the dispute, as opposed to looking at the applicability of specific rules of law to a particular factual situation.

B. Evaluation of the Traditional Approach

The key difficulty with Castel's commentary is the assumption that policy and constitutional concerns may be superimposed on the traditional system. The problems that arise from this assumption are implicit in his statement that "[t]o achieve justice in the particular case the court must examine the contents of the laws in conflict." The incongruity of this statement with approval of the choice of law process described in chapter one is that the jurisdiction selection process does not call for the court to consider the content of competing rules when choosing the jurisdiction whose law will be applicable. Thus, if the court does, when it deems necessary, take policies into account when choosing the governing jurisdiction, it is not remaining true to the methodology that it purports to follow. This creates uncertainty for the application of conflicts rules.

Likewise, if the court manipulates the characterization process to achieve the result it considers just, such as characterizing the action in the example given in chapter one as contract or tort, depending on which law it thinks is better applied to the action, parties have no way of knowing what is relevant to the court in its adjudication process. Again, uncertainty and inconsistency are created. In addition, no coherent body of principles by which people may order their affairs is developed.

Adherence to the conceptual approach makes it difficult to develop a

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112 I have referred to Castel since he is probably the most widely read current proponent of traditional theory in Canada. Others take a similar approach. See, for example, James McLeod, The Conflict of Laws (Calgary: Carswell, 1983).

113 Castel, supra, note 37 at 30.
jurisprudentially sound theory of how interprovincial cases of geographic difficulty should be resolved. Where the underlying rules do not allow courts to decide cases in a principled manner, it is impossible to add federalism issues to the equation and expect to achieve a more coherent approach.

C. The Territorial Approach

Elizabeth Edinger's discussion of the relationship between conflict of laws and the Constitution centres around the principles relating to the territorial limitations on legislative competence discussed in earlier sections of this chapter. These limitations, she states, are logically applicable to both the assertion of jurisdiction over, and the application of provincial law to, out-of-province defendants.

Edinger discusses three approaches to the merger of constitutional principles and conflict of laws cases. The first is to "constitutionalize" traditional common law conflict rules by applying them to determine the province which has the right to legislate with respect to the issues in question. There is some support for this suggestion, she notes, in the case of Interprovincial Cooperatives v. The Queen. We shall examine that case in some detail in later portions of the thesis.

Secondly, the phrase "in the province" suggests that a province may legislate with respect to things physically located in the province, including debts or tort

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115 Ibid. at 64.
116 Ibid. at 67-81.
117 Ibid. at 84.

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actions that are deemed to be located in the province.\textsuperscript{119} This interpretation would be a direct application of the principle enunciated by the Privy Council in \textit{Royal Bank}.

Finally, a province may legislate in a manner which affects the rights of out-of-province parties provided two conditions are met: (i) the legislation is in relation to some provincial object; and (ii) the expanded application of the legislation is necessary for the attainment of its object which has a nexus with the province.\textsuperscript{121} This test, proposed by Edinger to deal with issues of geographic complexity, is based on the principles enunciated in \textit{Ladore}\textsuperscript{122} and approved by the Supreme Court of Canada in \textit{Churchill}.\textsuperscript{123} These cases, it will be recalled, stand for the proposition that legislative action by a province may validly impact actors beyond that province provided such effect is incidental to the primary aims of the statutory enactment which must be directed to a matter falling within provincial competence.

\textbf{D. Evaluation of the Territorial Approach}

The problems with the first option, constitutionalizing common law conflicts principles, are numerous. First, one must be cognizant of the unprincipled results which may be achieved by application of the traditional rules discussed above. Edinger identifies other concerns, one of which is that the constitutionalization of the rules would dispel provincial initiatives toward their modification.\textsuperscript{124} Secondly, she notes that the purposes of common law conflict rules and constitutional review differ:

\begin{itemize}
\item \textsuperscript{119} Edinger, \textit{supra}, note 114 at 72-75.
\item \textsuperscript{120} \textit{Supra}, note 74.
\item \textsuperscript{121} Edinger, \textit{supra}, note 114 at 94.
\item \textsuperscript{122} \textit{Supra}, note 79.
\item \textsuperscript{123} \textit{Supra}, note 78.
\item \textsuperscript{124} Edinger, \textit{supra}, note 114 at 83.
\end{itemize}
[T]he common law rules of private international law were formulated to achieve justice and convenience for individuals and not for the purpose of determining the absolute limits of legislative jurisdiction of any state.\textsuperscript{125}

It would be inaccurate to imply that there are no concerns for sovereignty underlying traditional conflict of laws rules. Rather, the sovereignty issues at stake in traditional private international law doctrines are based upon concerns for comity among nations.\textsuperscript{126} The aim of constitutional review, on the other hand, is to ensure that the sovereign status of each constituent unit of the federal state as set out in the Constitution is preserved. It might be more accurate to say, then, that the sovereignty issues associated with traditional conflict of laws principles are quite distinct from the sovereignty matters that are at the heart of judicial review.

Edinger correctly concludes that the option of constitutionalizing common law principles is not an attractive one. The second test, that of following the Royal Bank approach to determining the propriety of applying a particular province's law in cases of geographic complexity, is also open to criticism, which is well set out by Edinger and others. First, the test requires the court to determine a physical \textit{situs} for intangible rights, a process which tends to be arbitrary,\textsuperscript{127} and as a result offers "the maximum in uncertainty."\textsuperscript{128} The test also implies that where one effect is felt, however slight, outside the province, it will be sufficient to declare the legislation \textit{ultra vires}.\textsuperscript{129} This is not an appropriate approach in a modern society where

\textsuperscript{125} \textit{Ibid.} at 82.

\textsuperscript{126} For a discussion of the doctrine of territorial sovereignty as it relates to conflict of laws principles, see R.E. Sullivan, "Interpreting the Territorial Limitations on the Provinces" (1987) 7 Sup. Ct. L. Rev. 511.

\textsuperscript{127} For a discussion of the various rules applied to determine the \textit{situs} of intangible property, see Castel, \textit{supra}, note 37 at 401.

\textsuperscript{128} Edinger, \textit{supra}, note 114 at 94.

\textsuperscript{129} Sullivan, \textit{supra}, note 126 at 539.
interprovincial activity in the Canadian context is a regular mode of living. Finally, the approach does not allow the court to fully explore the interests of each province in having its law applied to the resolution of a dispute.

While the third test, that of following Ladore, is preferred by Edinger, the inquiries involved in that approach provide a more appropriate framework for jurisdiction than for choice of law matters. The former issue is concerned with the question of whether the court may properly assert its authority over an out-of-province defendant. The simple assertion of authority does not automatically lead to the application of forum rules of law to the resolution of the issues at stake. As such, an examination of the policies of the other relevant jurisdiction is not as pressing as is the case with choice of law issues.

Where choice of law issues are at stake, the policy interests of another relevant jurisdiction are often quite clearly implicated. In this context, Edinger's test is incomplete because it does not indicate how to deal with situations where the expanded application of the legislation is necessary for the attainment of its object and there is a nexus with the province, but there is also a valid rule of another province significantly connected with the dispute.

Edinger's article does not explain what, in her proposed model, should happen with traditional choice of law rules. Presumably, if the question is one of simple interpretation of the applicability of the statute to the resolution of the dispute, mechanical choice of laws principles should be discarded, for the reasons discussed in the section respecting the traditional approach. Edinger does not clearly state that she has reached this conclusion. Her analysis, though helpful for its discussion.

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130 Supra, note 114 at 96-97, Edinger proposes that the following questions should be asked by a provincial court in applying the test she advocates:

1. Is the statute which is invoked a law of the forum or a law of some other province?
2. If it is the statute of another province, do the conflicts rules of the forum permit or require its application?
3. If it is a forum statute:
   a. Is it directly applicable by its express terms or, if drafted in very general
of the connection between constitutional tests of legislative competence and cases of geographic complexity, requires clarification and expansion.

E. The Interpretive Approach

Though most of Moffat Hancock's writings were devoted to U.S. conflicts issues, he also, during and after his professorship at the University of Toronto, turned his attention to Canadian conflict of laws. In one article, Hancock advocated a 'statutory construction' approach to the resolution of torts cases involving geographically complex factors. In particular, he stated that this approach would be appropriate in the interprovincial context in Canada, and that it should be applied instead of the double actionability test discussed earlier. Hancock argued that to apply a forum rule where, given all the circumstances of the case, the scope of that rule did not encompass the parties, and the forum had no interest in having the rule applied, was improper. Specifically, to do so despite the fact that the scope of another province's law did encompass the situation before the court, where the other province had a clear interest in having the policies represented by that rule upheld, would constitute "an officious intermeddling in the affairs of a sister-province."

Hancock recognized that this approach would not lead the courts in each province to the same conclusion given the same set of facts. In situations where the action was substantially connected with both jurisdictions, and the policies of each forum could plausibly be interpreted as applying to the issues between the parties,

\[
\begin{align*}
&\text{terms, by the process of statutory interpretation; or} \\
&\text{(b) } \text{is it applicable by way of} \\
&(\text{i) the general rules of conflicts, or} \\
&(\text{ii) a particular conflicts rule in the statute itself?} \\
\end{align*}
\]

This approach would conceivably operate to allow for the application of traditional choice of law rules, which I have argued does not reach principled results.


132 Ibid. at 333.
each province might quite properly apply its own law to the resolution of the matter. This he found quite acceptable.133

Had the flexible interpretation of the paramountcy doctrine articulated in *Multiple Access*134 been in existence when Hancock wrote, he might have thought it appropriate to draw an analogy between the reasoning in that case and his proposals. This argument would have proceeded on the basis that the approach the Supreme Court has adopted in allowing the co-existence of provincial and federal legislation respecting the same subject matter in most situations, should be adopted where two provinces have validly legislated with respect to a common matter.

Particularly in light of the test of acceptable extraterritoriality enunciated in *Churchill*, it is only logical to expect that different provinces may enact legislation having an overlapping effect on certain subjects and actors. Even though Hancock wrote at a time when the more strict interpretation of extraterritoriality set out in *Royal Bank* was followed, he did argue that such overlap could quite plausibly occur and concluded that his proposals respecting how the judiciary should deal with such situations were consistent with the obligation of all Canadian courts, who were "constitutionally bound to give effect to the letter and policy of valid provincial statutes so far as they extend[ed] to cases litigated in that province."135

Hancock’s writings136 are important because of their suggestion of an entirely different way of thinking about cases of geographic complexity in the Canadian


134 *Supra*, note 72.

135 Hancock, *supra*, note 131 at 337.

136 Other significant writings by Hancock include *Torts in the Conflict of Laws* (Chicago: Callaghan & Company, 1942) and *Studies in Modern Choice of Law: Torts, Insurance, Land Titles*, *supra*, note 38. Though the latter work takes on a predominantly American perspective, one of its reviewers states that it is in many ways applicable in the Canadian context. See Vaughan Black, Book Review of *Studies in Modern Choice of Law: Torts, Insurance, Land Titles* by Moffat Hancock (1985) 17 Ottawa L. Rev. 677.
context. Others have taken a similar approach to the one espoused by Hancock, and have expanded upon it. One of these scholars is John Swan, who began his assault on what he views as the irrationality of conflict of laws principles in a 1969 article respecting tort liability in the conflict of laws.\textsuperscript{137} His focus in that article was the double actionability rule in \textit{Phillips v. Eyre},\textsuperscript{138} and his suggested approach to a more appropriate resolution of geographically complex cases was based on the New York Court of Appeal's decision in \textit{Babcock v. Johnson}.\textsuperscript{139} In that case, the court, in dealing with a geographically complex action arising out of a motor vehicle accident, discarded the traditional choice of law rules and instead adopted an approach which allowed it to choose the law of the jurisdiction which it concluded had the greatest interest in having its rule applied to the dispute.

In essence, Swan's argument was that we must recognize that none of the traditional, mechanical rules for choosing the jurisdiction whose laws will govern a dispute is capable of achieving consistently just and sensible results. Instead, he argued, "we must develop more discriminating tests that will enable us to reach the "right" result in almost all cases."\textsuperscript{140} With this new method, courts should be concerned with choosing the most appropriate "rule" to resolve the issue, as opposed to selecting a governing "jurisdiction". This choice, Swan argued, should be made after having explored the scope and policies embodied in the competing rules.

In subsequent writings, Swan has extended the application of his suggested approach to other areas of choice of law.\textsuperscript{141} Additionally, working from the fundamental premise that traditional choice of law rules are inappropriate, he has

\textsuperscript{138} \textit{Supra}, note 35.
\textsuperscript{139} 191 N.E. 2d 279, N.Y. 2d 473 (C.A. 1963).
\textsuperscript{140} Swan, \textit{supra}, note 137 at 191.
\textsuperscript{141} See, for example, John Swan, "Choice of Law in Contracts" (1991) 19 Can. Bus. L.J. 213.
suggested an approach for the integration of constitutional considerations with a more principled manner of adjudicating geographically complex cases.

In "The Canadian Constitution, Federalism and the Conflict of Laws"\(^{142}\) Swan argues there is a constitutional dimension to each of the key issues in conflict of laws cases. For example, jurisdiction over out-of-province defendants must be limited pursuant to the restriction on the provinces' legislative extraterritorial reach as prescribed under the Constitution Act, 1867. Unlike Edinger, however, Swan does not advocate the simple transfer of constitutional principles to conflicts questions. Citing the U.S. due process test as an appropriate model for limits on the extraterritorial exercise of jurisdiction, Swan notes that the test must meet both concerns for fairness to the parties to the litigation and for respect of state sovereignty.

The U.S. due process clause\(^{143}\) provides that "nor shall any State deprive any person of life, liberty or property, without due process of law." This test, as applied to the question of the assertion of jurisdiction over out-of-state defendants, entails three elements. First, the defendant must be given notice of the proceedings. Secondly, he or she must have an opportunity to be heard.\(^{144}\) Finally, the court must have a proper jurisdictional basis to exercise jurisdiction over defendants.\(^{145}\) This latter requirement has been and continues to be, the subject of some judicial attention and much scholarly comment.

In International Shoe Co. v. State of Washington,\(^{146}\) the U.S. Supreme Court set out what has come to be considered the basis for the current test of jurisdiction. In essence, it established that the assertion of jurisdiction over an out-of-state

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\(^{143}\) U.S. Const. amend. XIV.


\(^{145}\) Ibid.

\(^{146}\) 326 U.S. 310, 66 S. Ct. 797 (1945) [hereinafter International Shoe cited to U.S.].
defendant will only be constitutionally proper where the forum court has sufficient contacts with the defendant or the subject matter of the suit so that the exercise of authority does not offend "the traditional notions of fair play and justice." The catch-phrase developed to test whether the exercise of jurisdiction is proper is known as the "minimum contacts" test.

In his 1985 article, Swan argued that the Supreme Court of Canada's decision in *Moran* could be interpreted as providing the proper foundation for the development of a constitutionally sound test respecting the judicial exercise of jurisdiction over out-of-province defendants in Canada. He discussed the similarity of the language used in *Moran* with that of *International Shoe* and argued that a similar test to that employed in the U.S. would "ensure not only fairness to defendants (at no unjustifiable cost to plaintiffs) but also responsible behaviour on the part of each province in the context of the Canadian federation." As we will see in later chapters, this approach has been favourably considered by the Supreme Court of Canada in *Morguard*, though it has not been definitively framed as a constitutional test.

In addressing "choice of law" questions, Swan argues that the key issue in deciding which rule to apply in geographically complex cases within Canada is "the need to balance the claim of one province to legislate extra-territorially against a

\[147\] *Ibid.* at 316.

\[148\] *Supra*, note 97.

\[149\] Others also noted the similarity of language and suggested that *Moran* could serve as the proper test of acceptable extraterritorial assertions of jurisdiction in Canada. See Peter Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 279 and Michael Terry Hertz, "The Constitution and the Conflict of Laws: Approaches in Canadian and American Law" (1977) 27 U.T.L.J. i.

\[150\] Swan, *supra*, note 142 at 296.

\[151\] *Supra*, note 41.

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claim of another (or others) that its (or their) sovereignty is being infringed.\textsuperscript{152} Again using a U.S. approach by way of analogy, he concludes that the proper question for a court to ask in deciding whether it might properly apply its own rule to resolve the issue between the parties is whether to do so "would impair a predominant interest of a sister [province] or violate a national interest.\textsuperscript{153}

Swan's approach to the choice of law question arguably expands the analysis suggested by Edinger to completion. If so, the test respecting whether or not a law is applicable in a particular circumstance would involve first asking whether its reach is constitutionally valid within the context of the principles enunciated in \textit{Ladore}. As Edinger notes,\textsuperscript{154} and as I have alluded to earlier, the \textit{Ladore} test may lead to permissible overlap in legislation respecting certain subject matters, similar to the double aspect concept in the federal-provincial context.\textsuperscript{155}

The implications of such overlap are addressed by Swan in his suggestion that courts, in the interest of cooperation within the federation, should ask whether the application of the forum rule might impair a more important interest that would be promoted by the application of another province's rule. If the answer is affirmative, the court of the "less interested" province should defer to the more important policy interest of the sister province. If, having assessed the evidence produced and arguments made by the parties respecting the applicability of the rules in question to the facts at issue, and having considered the policies furthered by the competing rules, the court cannot conclude that one interest is predominant over the other, it is acceptable that it should apply the law of its own province.

\textsuperscript{152} Swan, \textit{supra}, note 142 at 304.


\textsuperscript{154} Edinger, \textit{supra}, note 114 at 95.

\textsuperscript{155} See note 70, \textit{supra}, and accompanying text.
F. Evaluation of the Interpretive Approach

The interpretive approach is certainly not without difficulties. The policy evaluation it calls for will, in some circumstances, require the court to engage in a great deal of speculation. This feature of the approach will no doubt raise the type of concerns articulated by Weiler in his criticism of judicial review,\(^ {156}\) for example that it is improper for the court to resort to its own views about the appropriate balance for the federal system. Such arguments, as discussed in chapter one, have been countered by scholars such as Katherine Swinton,\(^ {157}\) who argues, among other things, that without judicial oversight of the federal system, certain parties would have no avenue for relief when they were negatively impacted by overreaching legislation.

The advantage of the interpretive approach is that for the most part it allows courts to determine cases of geographic complexity in the same manner that they would consider wholly domestic cases. First, they are able to consider the validity of provincial legislation in a manner analogous to that which courts are accustomed to using in strict "division of power" cases. Secondly, with respect to the issues between the parties, courts are able to assess the applicability of competing rules in much the same respect that they would consider competing intraprovincial laws in domestic cases. Specifically, they are able to examine the intended scope of the rules and the extent to which the parties have brought themselves within the scope of these rules. Finally, courts have the additional factor of sister provinces' interests to consider. This approach allows them to do so in an open manner.

The value of decisions reached by the process described above is that they will be rational and constitutionally sound. When I say that the decisions will be rational, I refer to the fact that they will have been reached only after a thorough evaluation

\(^{156}\) See chapter one, supra, pages 19 to 20.

\(^{157}\) See chapter one, supra, pages 20 to 21.
of all relevant facts and policies pertaining to the case. As a result, decisions should enable parties in future cases to predict more readily the factors that a court will consider relevant to particular fact situations than is the case with decisions rendered pursuant to the traditional approach.

It might be argued that this departure from the traditional methods may lead to uncertainty and to lack of uniformity in result. It is true that the assessment of policies underlying legislation may lead to some uncertainty. In the chapters that follow, however, I will show that it is an acceptable level of uncertainty in comparison to that produced by the manipulation of traditional rules by judges seeking to do justice in particular cases.

The argument that the interpretive approach to cases of geographic complexity may decrease uniformity of result raises the important issue of the role of the Supreme Court of Canada. Above, I stated that it was possible that two provinces might have enacted legislation which is applicable to a fact situation that leads to litigation. The court of one province may not be able to determine that the law of a sister province has a predominant interest in having its law applied, and may, by default, apply its own law. The sister province, faced with an identical fact pattern, might quite logically apply its own law. Thus, it is true that uniformity of result is not always achieved. The question is whether, in a federal system, this is to be deplored. While some might say the very nature of federalism is that it allows for diversity among the provinces in matters that are within their competence, others assert that the Supreme Court of Canada should adjudicate in a manner which promotes uniformity among Canada's provinces.

The problem may be illustrated as follows. Suppose there was an appeal to

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158 Swan and Hancock lean in this direction. See also Albert Abel, "The Role of the Supreme Court in Private Law Cases" (1965) 4 Alta. L.R. 39.

159 This was Falconbridge's view. It also seems to be the assumption of Hertz, supra, note 147. See also John Willis, "Securing the Uniformity of Law in a Federal System - Canada" (1944) 5 U.T.L.J. 352.
the Supreme Court of Canada with respect to a decision of the Ontario Court of Appeal where that court had applied its law as opposed to a law of Manitoba. Assume also that had a Manitoba court entertained the case, it could quite legitimately have applied its own law to resolve the dispute.

What should the Supreme Court do with the case? Should it, in essence, accept that the Court of Appeal decided the case in a principled manner that accorded with constitutional requirements, and dismiss the appeal? Alternatively, should it try to decide which of the policies involved is of greater significance, and decide the appeal in accordance with this evaluation? My argument is that the former approach is to be preferred, since it accords a desirable respect for provincial autonomy. Chapter four of this work will illustrate the strength of the arguments in favour of this approach.

The interpretive approach has the added advantage of lending itself well to the expansion of Charter arguments into geographically complex cases. Though tentative suggestions of Charter applicability have been suggested by proponents of each of the approaches discussed above,¹⁶⁰ no serious attempt to discuss the possible manner in which it might apply has been undertaken.

V. Expansion of the Interpretive Approach: The Charter of Rights and Freedoms

A. Applying the Charter to Geographically Complex Cases: Preliminary Considerations

In discussing how the Charter may be applied to common law actions involving geographically complex elements, a number of potential hurdles must be recognized. Briefly, they are: (i) the Charter has been held inapplicable to the rules of common law that regulate relationships between private parties in the absence of a "government connection" to the dispute; (ii) it is uncertain whether courts themselves constitute "government" within the meaning of s. 32 of the Charter; and iii) many

¹⁶⁰ Swan, supra, note 144 at 320; Sullivan, supra, note 126 at 549; Castel, supra, note 37 at 11.
provisions of the Charter have been held inapplicable to corporations, which are often parties to contract and tort disputes involving geographically complex issues. Each of these hurdles has potential impact for a party seeking to invoke the protection of the Charter.

The first question was addressed by the Supreme Court in *RWDSU v. Dolphin Delivery*.¹⁶¹ There, the court held that s. 2(b) of the Charter, which guarantees the right to freedom of expression, did not apply to the issue of whether a court could grant an injunction restraining picketing by union members on the basis of the common law tort of inducement to breach of contract. The court was careful, however, not to say that the common law could never be subjected to Charter scrutiny. The restriction, as articulated in *Dolphin Delivery*, is only applicable to the common law insofar as it relates to the relationships between individuals as opposed to relationships between individuals and the state.¹⁶²

*Dolphin Delivery* has been subject to much criticism¹⁶³ which was addressed by Wilson J. in *McKinney v. University of Guelph.*¹⁶⁴ In *McKinney*, the court was faced with the question of whether the mandatory retirement schemes of several universities constituted a violation of s. 15 of the Charter. One of the core issues addressed by the court was whether the actions of the universities in enacting such policies fell within the scope of government activity. As a foundation for the


discussion of this issue, Wilson J. discussed the general scope of application of the
Charter.

Section 32 of the Charter states:

(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the Legislatures and government of each province in respect of all matters within the authority of the Legislature of the province.

Wilson J. spoke approvingly of McIntyre J.'s decision in *Dolphin Delivery*, and summarized the principles set out in that case as follows:

(i) s. 32 (1) of the Charter applies to legislation broadly defined and to acts of the executive or administrative branch of government;

(ii) s. 32(1) of the Charter does not apply to private litigation divorced from any connection to government; and

(iii) a court order does not constitute government action for purposes of Charter review.\(^\text{165}\)

These principles, she said, do not preclude the application of the Charter to all common law actions. Instead "the Charter applies to the common law, whether in public or private litigation, provided the government has acted upon it."\(^\text{166}\) If the Charter is to apply to a private action, then, there must be some act of government in proximity to the action.

In order to circumvent the restrictions concerning Charter application to common law actions, one might argue that the court adjudicating the action is a part of government, and as such, the Charter applies. This argument, however, has also

\(^{165}\) *Ibid.* at 558.

\(^{166}\) *Ibid.* at 560.
been dealt with and its scope has been severely restricted by the Supreme Court.

In *Dolphin Delivery*, McIntyre J. held that the word "government" referred to the executive branch of government, and did not include the judicial branch.\(^{167}\) In *R. v. Rahey*,\(^ {168}\) however, the court rendered a slightly different opinion. In that case, the trial judge had adjourned an application by the defendant for a directed verdict of acquittal, and had taken 11 months to reach his decision, which was ultimately to deny the application. The court's action was held to constitute a breach of the defendant's right to be tried within a reasonable time. La Forest J. stated: "It seems obvious to me that the courts, as custodians of the principles enshrined in the Charter, must themselves be subject to Charter scrutiny in the administration of their duties."\(^ {169}\) This approach was confirmed by the Supreme Court in *British Columbia Government Employees' Union v. British Columbia*.\(^ {170}\) Here, Dickson C.J., writing for a unanimous Court (on this issue) found that a court order was subject to Charter review where "the court is acting on its own motivation and not at the instance of any private party, and the court's motivation is entirely 'public' in nature, rather than 'private'".\(^ {171}\) In *McKinney*, Wilson J. stated the principle in the following way:

"In exercising their adjudicative function under the Charter in a dispute between others, [courts] cannot be viewed as "government" and the end product of their decision-making, the order of the court, as government action for purposes of s. 32(1)."\(^ {172}\)

In summary, then, it appears that in order for an act of the court to be subject to Charter scrutiny, it must be one that is somehow divorced from the actual dispute

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\(^{167}\) *Supra*, note 161 at 598-600.


\(^{171}\) *Ibid.* at 244.

\(^{172}\) *Supra*, note 164 at 564.
between the parties.\textsuperscript{173}

The third problem noted above, namely the inapplicability of the Charter to corporations, is only a problem in the sense that it limits the parties who may rely on its protection in cases of geographic complexity. It does not in any way affect the assertion that the Charter does apply to such cases. I do not propose to debate the issue of whether corporations should have the benefit of the protection of Charter provisions.\textsuperscript{174} Rather, in the chapters that follow, when discussing specific sections of the Charter, I will simply note the extent to which the issue of corporate protection under that section has been the subject of adjudication.

\textbf{B. Evaluation of the Charter's application to Cases of Geographic Complexity}

(i) Jurisdiction

The applicability of the Charter to questions of courts' assertion of jurisdiction over out-of-province defendants should be undisputed. In all provinces, such defendants are called into the courts' jurisdiction by way of legislative provisions, whether it be acts similar to the Ontario \textit{Rules of Civil Procedure}\textsuperscript{175} or other specific statutes. As such, it cannot be logically argued that the private action is divorced from government. Consequently the \textit{Dolphin Delivery} restrictions do not apply. As will be seen in the following chapter, Charter arguments have been made by

\textsuperscript{173} An interesting issue is the one raised by \textit{Slaight Communications v. Davidson}, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416. In that case, the Supreme Court held that the orders of adjudicative bodies which are statutorily created are subject to Charter scrutiny. How might this affect the Federal Court, which is also a statutorily created body who's authority is derived from the \textit{Federal Court Act} and other statutes, when it deals with conflicts cases in admiralty? Does this mean that the court's decision reached by the application of common law conflict of laws principles could be subject to Charter scrutiny?


\textsuperscript{175} O. Reg 73/92. McIntyre J. specifically stated in \textit{Dolphin Delivery}, supra, note 161 at 198, that the Charter applied to subordinate legislation such as "regulations, Orders in Council, possibly municipal by-laws, and by laws and regulations of other creatures of Parliament and the legislatures."
defendants opposing the assertion of jurisdiction over them, and although the cases have been decided on other grounds, the applicability of the Charter has not been rejected.

(ii) Choice of Law

Given the limitations discussed above, how can the Charter be employed to impact upon the adjudication of "choice of law" issues? It is possible, I believe, to approach this question in two ways. First, the traditional choice of law rules themselves can be challenged. Secondly, the constitutional validity of the rules that are in conflict may be tested.

**Challenging the Jurisdiction Selecting Process**

The first approach would involve, for example, a defendant challenging a court's use of the double actionability rule for choice of law in tort which may lead to the application of forum laws to resolve a dispute when the defendant has no reason to have expected that law to apply to her actions. That the application of the rule has this effect is illustrated in some of the geographically complex motor vehicle accident cases that we shall review in the fourth chapter.

We could proceed by arguing that it is the court's act of applying the mechanical rule which is being challenged, and that the choice of law rules have nothing to do with the substantive dispute between the parties. The rules are, it would be argued, tools of the court employed to assist it in reaching the point where it can adjudicate the substantive issues at stake. As such, the court is subject to Charter standards in using these tools. So, just as it was an infringement of the accused's Charter rights in *Rahey* for the judge to adjourn the case too often, it is an infringement of one of the guaranteed Charter rights for the court to use rules that lead to the unjust application of laws to that party's behaviour. For example, Annalise Acorn has argued that a decision reached by application of the common law rules of domicile which result in a married woman having no domicile separate from
that of her husband is one which violates the guarantee of gender equality under s. 15 of the Charter. Acorn recognizes the limitation of Charter applicability to private disputes at common law resulting from Dolphin Delivery. She addresses the issue in two ways. First, she simply states that Dolphin Delivery should be overruled. Secondly, she argues that given the context in which the domicile issue arises, there is sufficient government contact to attract Charter protection. A woman's domicile of dependence stems from her status at law as a married woman. Simply because courts, as opposed to legislatures, have set out this particular term of the marriage relationship, there is no less state involvement. Acorn concludes on this point that:

The state sets many of the terms of the marriage agreement and also sets the conditions under which the agreement may be dissolved. Whether it acts through the arm of the legislature or the arm of the courts, its coercive power is invoked and its determinations are authoritative. It is difficult to respond to or argue against any argument that the court, in making legal rules, is not acting as part of government.

The cases which are the focus of concern in this work, namely contracts and torts cases, are more likely to fall within the parameters of s. 7 of the Charter. I shall return to a discussion of the rights protected by this section shortly.

Challenging the actual content of the common law rules would entail two major hurdles. First, it would be unlikely that the court's application of the common law choice of law rules would be seen as an action separate from the adjudication of the substantive dispute between the parties. Secondly, in making this argument, the private dispute has been removed two steps from the substantive legislation in question. In other words, the argument is only that the choice of law rule works a

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177 Ibid. at 449.

178 Ibid. at 455.
violation because it leads to the application of a law which violates the party's Charter right. The rule itself does not technically violate the right. This would in all likelihood lead to the conclusion that the nexus between the private dispute and the government action is too tenuous to support the application of the Charter.

Challenging the Validity of Statutory Provisions

If we assume that the court is taking an interpretive approach to the resolution of the matter before it, there is no two-step process in evaluating the impugned law. Instead, in the course of arguing which of the competing rules is applicable to the resolution of the dispute, parties may simply argue that to subject them to the law in question would be a violation of their Charter rights. This is a much more straightforward argument, and it would be more likely to establish the required nexus between private action and government. As such, it is a preferable approach to the one outlined above, and it seems that it would work well as long as the competing rules are statutory ones.

Where, however, one of the rules arises at common law, it appears that the party seeking to avoid its application will not be able to invoke the Charter to assist in this objective. This leads to the rather strange result that a rule of private law contained in the Civil Code of Québec could be subject to challenge simply by virtue of the fact that it is a statutory enactment, while an almost identical rule of common law will be shielded from Charter review. Wilson J. admits this consequence in McKinney, and seems quite ready to simply accept the broader application of the Charter in Québec than in other provinces. I will leave to others the battle of convincing the Supreme Court that this approach might deserve further thought, and will proceed with my analysis on the basis of the restrictions discussed above.

179 Supra, note 164 at 560-561.
C. What Rights?

I indicated above that the rights most likely to be at issue in contracts and tort cases are those embodied in s. 7 of the Charter. Section 7 provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." A successful s. 7 challenge requires the satisfaction of two separate and distinct enquiries. First, one must establish that the exercise of government or statutory power has deprived them of life, liberty or security of the person. Secondly, it must be shown that this deprivation was contrary to the principles of fundamental justice.180

In contrast to the due process clause of the American Constitution which is aimed at the protection of property, s. 7 does not apply to purely economic interests.181 However, it has been held that the liberty interest protected by s. 7 is sufficiently broad to apply where there is an incidental economic component to the right asserted.182

It is also arguable that the definitions of liberty and security in Canada are sufficiently flexible to encompass the situation where a defendant is coerced into defending an action in a jurisdiction with which she has no connection. In fact, La Forest J., while delivering the Supreme Court's opinion in Morguard, seemed to foresee this possibility as well when he expressly stated183 that s. 7 might be

181 Hogg, supra note 39 at 1023-1024.
183 Supra, note 41 at 279.
applicable to issues of jurisdiction.\textsuperscript{184}

One manner in which one might argue that their liberty is at stake in a civil action is that non-compliance with a court order rendered against them may, in many cases, lead to their incarceration. Incarceration is definitely a matter of liberty, but its link to a court order rendered in civil proceedings is far more tenuous than the nexus between criminal convictions and imprisonment.

A defendant might also invoke the "security of the person" protection in cases of geographic complexity. Security has been held to encompass concerns for human dignity. The seminal case in extending the concept beyond the physical dimension is \textit{R. v. Morgentaler}.\textsuperscript{185} In holding "serious psychological tension caused by the State" to be an interference with security,\textsuperscript{186} the majority of the Supreme Court approved of the following passage from Lamer J.'s dissent in \textit{R. v. Mills}:

\begin{quote}
[S]ecurity of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" ... These include stigmatization of the accused, loss of privacy, stress and anxiety resulting form a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to outcome and sanction.
\end{quote}

Again, if this principle is transposed to the civil context, it is not difficult to see how defendants might argue that being required to appear before the courts of

\textsuperscript{184} A s. 7 argument was successfully invoked in the Ontario Provincial Court case of \textit{Re Beaton and Gatecliff}, [1985] F.L.C. 072, 7 C.R.D. 125.40-04. Here, a judge refused to confirm a provisional child maintenance order made in Nova Scotia on the basis of a finding that the father was a "possible father" under Nova Scotia legislation, although the evidence did not show on a balance of probabilities that he was the father of the child in issue. To confirm such an order in Ontario pursuant to reciprocal enforcement legislation would, held the court, infringe the respondent's s. 7 rights by conferring on him the status of parent which he was not willing to assume. Additionally, since the Nova Scotia provisions were unfair and contradictory to Ontario legislation, the procedure involved in violating the Charter right could not be in accordance with the principles of fundamental justice and would not be demonstrably justified in a free and democratic society.


\textsuperscript{186} \textit{Ibid.} (Dickson, C.J.C. at 45; Beetz J. at 80; Wilson J. at 161).

Ontario when they have no connection to that jurisdiction could constitute a violation of security by producing the stress and anxiety referred to above. There is much more at stake in being subjected to a legal action than simply the potential judgment in favour of the plaintiff. Being forced to defend an action in another province causes a disruption of work and family life. This disruption may be warranted where the defendant has affiliated herself sufficiently with the jurisdiction, but the same is not true where no such nexus has been established. As one author has argued:

It is not the money or property at stake in a lawsuit which is of concern; but rather with the coercive aspect of forcing the out-of-province defendant to either defend the action, or have judgment entered against her.\footnote{Lindsay, "Automobile Negligence and Conflict of Laws: The Charter Dimension" (1990) 11 Advoca Q. 159 at 172.}

In the event that a deprivation has been established, the next issue is whether such deprivation has been in accordance with the principles of fundamental justice. From the Charter's inception, there has been considerable debate about whether this part of s. 7 requires only that procedural due process has been accorded, or that substantive due process be included. By way of analogy to the U.S. requirements of due process in the context of extraterritorial assertions of jurisdiction, the first two requirements, namely that the defendant be given notice and opportunity to be heard, are procedural requirements. The third requirement, that there be a proper jurisdictional basis established by means of a "minimum contacts" test, is a substantive due process requirement.\footnote{Whitten, "The Constitutional Limitations on State Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses" (1981) 14 Creighton Law Rev. 725 at 736.}

The Supreme Court of Canada has attempted to steer clear of the procedural/substantive quagmire. In the \textit{B.C. Motor Vehicle Reference},\footnote{\textit{Reference Re s. 94(2) of the Motor Vehicle Act}, [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289 [hereinafter cited to S.C.R.].} the court...
found that fundamental justice is not merely a procedural concept. In that case, s. 94(1) of the B.C. Motor Vehicle Act made it an offence to drive while prohibited or while under suspension and prescribed a minimum penalty of seven days imprisonment. Section 94(2) went on to state that guilt under subsection (1) would be established by proof of driving, regardless of whether the driver was aware of the suspension or prohibition. The Supreme Court was asked to rule on whether associating a penalty of imprisonment with an offence which could be committed without fault was contrary to s. 7 of the Charter. The issue, as a result, did not require the court to examine the types of behaviour for which driving suspensions or prohibitions were warranted, but rather, the proper means by which the policy goal could be pursued. As a result, the court was not required to definitively state the extent to which substantive review might be encompassed by s. 7.

In another important case dealing with the definition of fundamental justice, most of the Supreme Court of Canada used the word "procedural" to describe the type of review warranted under s. 7 but gave a very broad scope to that term. In Morgentaler, Smoling and Scott v. The Queen, the majority of the court held that a particular section of the Criminal Code contravened s. 7 of the Charter. The impugned section of the Code provided that abortions would be illegal unless performed in an "accredited or approved hospital" and unless a "therapeutic abortion committee" of the hospital had certified that an abortion was necessary to preserve the life or health of a pregnant woman.

Wilson J. provided an explicitly substantive ground for her finding, namely that the restriction on abortions to those performed for therapeutic reasons was

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191 Ibid at 500-513.
unconstitutional.195 The remainder of the majority held that the procedures prescribed for the authorization and performance of abortions were unconstitutional. Some of the reasons that these procedures were held offensive, however, were quite clearly akin to substantive matters. For example, Bectz J. found that there was no medical justification for the requirement that all abortions take place in hospitals.196 Dickson C.J. objected to the fact that administrative barriers to obtaining abortions had made the apparent defence of therapeutic purpose practically illusory for many women.197 As one author has noted, "if such ... vagueness and illusion are matters of "procedure", then the realm of "substance" must be severely confined."198

All of this is simply to state that the Supreme Court is willing to take a flexible approach to the concept of fundamental justice. Further, it is not unthinkable that if faced, for example, with a challenge to the constitutionality of a provision by which the courts of one province purported to assert jurisdiction over a defendant from another province, the Supreme Court might adopt a requirement of "jurisdictional basis" similar to that which is required in the United States. In the following chapter, I will attempt to show how the application of s. 7 might operate given specific fact situations.

D. What Remedy?

One final note remains to be made respecting the Charter’s application to cases of geographic complexity. Here, I am speaking of the situations described above where Charter provisions are directly applied to a dispute. Given the nature of such cases, it is possible that the application of a legislative provision will be a

195 Supra, note 193 at 163-184.
196 Ibid. at 114-119.
197 Ibid. at 70-73.
violation of one person's rights, while its application to another party will be totally legitimate. This will depend on the particular fact situation and relationship of the challenging party to the province which has enacted the provisions. As a result, in most cases, the requested remedy will not necessarily be that the offending provision be struck down, but rather that it not be applied in the particular case. This remedy is consistent with the scope of judges' authority in accordance with both s. 52 of the *Constitution Act, 1982* and s. 24(2) of the Charter.

Section 52(1) provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." This provision, combined with the Supreme Court's early pronouncement that both the purpose and effect of the law in question should be assessed,\(^{199}\) means that the situation described above falls within the scope of s. 52. Section 24(2) of the Charter also gives the court authority to furnish "such remedy as the court considers appropriate and just in the circumstances." I can see no reason why such remedy would not include a simple refusal to apply a particular law in the appropriate circumstances.

**VI. Summary**

In this chapter, I have argued for a constitutionally sound method of resolving cases of geographically complex cases based on what I have termed an interpretive approach. I have also argued that it is logical to extend Charter scrutiny to jurisdiction and choice of law issues. The remainder of the thesis will explore the extent to which these arguments have received judicial recognition and approval.

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CHAPTER 3: NEW DIRECTIONS IN JURISDICTION AND ENFORCEMENT

I. Enforcement of Sister Province Judgments

A. Introduction

In 1990, the Supreme Court of Canada in Morguard200 departed quite dramatically from the traditional British approach to the recognition and enforcement of "foreign" judgments, at least as it applies to judgments between sister provinces. This change has been called for by most scholars who have written about Canadian conflicts law in the past four decades. It is important to review the court's ruling and rationale, not only as a means of predicting how the Supreme Court of Canada might approach other interprovincial conflicts issues in the future, but also as a specific precursor to a discussion of extraterritorial jurisdiction. In order to understand the significance of the decision, it is necessary to discuss the traditional rules for enforcement at common law.

B. Enforcement and Recognition at Common Law

The common law provinces of Canada adopted the British common law principles for the recognition and enforcement201 of foreign judgments. This approach was articulated in Emanuel v. Symon,202 which provided that for a court to enforce a foreign judgment, the defendant must have been a subject of the original jurisdiction or a resident in that jurisdiction when the action began. Additionally, where the defendant had chosen the forum as a plaintiff in earlier proceedings,

200 Supra, note 41.

201 The terms "recognition" and "enforcement" tend to be used interchangeably, but there is a distinction between the two. Recognition occurs where a matter needs no further action. Enforcement requires the "enforcing" court to take another step to give force to the foreign judgment. Recognition is a prerequisite to enforcement, but it does not confirm enforcement. See von Mehran and Patterson, "Recognition and Enforcement of Foreign Country Judgments in the United States" (1974) 6 Law & Pol'y Int'l Bus. 37.

202 [1908] 1 K.B. 302.
voluntarily appeared in the jurisdiction, or contracted to submit to the jurisdiction, the court was authorized to enforce that judgment.\textsuperscript{203} 

Canadian common law provinces followed this approach stringently, with the focus of their inquiry in enforcement proceedings being whether or not the defendant had submitted to the original court’s jurisdiction.\textsuperscript{204} If this crucial element of submission was not satisfactorily established, a plaintiff who had received judgment from the courts of one province would be denied enforcement by the courts of a sister province.\textsuperscript{205}

\textbf{C. The Decision in Morguard}

These enforcement mechanisms tended to work to the advantage of defendants, who could confidently avoid court enforcement of their obligations by doing nothing when served with pleadings by a plaintiff of another province. The propriety of this approach in the Canadian context was questioned by a number of authors.\textsuperscript{206} The essence of their dissatisfaction with the traditional rules stemmed

\textsuperscript{203} Ibid.


\textsuperscript{205} This amounted to a more stringent application of the common law rules than applies within the United Kingdom. Pursuant to the Foreign Judgments Extension Act, 1868 (U.K.), 31 & 32 Vict., c. 54 and the Inferior Courts Judgments Extension Act, 1882 (U.K.), 45 & 46 Vict., c. 31, judgments obtained in England, Northern Ireland and Scotland became effective in any other part of the United Kingdom. These Acts have been replaced by the Civil Jurisdiction and Judgments Act 1982 (U.K.), 1982, c. 27, which continues the requirement for enforcement within the U.K. For examples of one province’s refusal to enforce the judgment of a sister province, see Lung v. Lee (1928), 63 O.L.R. 194, [1929] 1 D.L.R. 130 (C.A.); Banque Nationale Du Canada v. Fleming (1986), 74 A.R. 321 (M.C.); Mattar v. Alberta (Public Trustee), [1952] 3 D.L.R. 399, [1952] W.W.R. 29 (Alta C.A.).

from the fact that there was no correlation between the jurisdiction required for
enforcement and that required for the original court to entertain the case.
Consequently, as John Swan noted, a judgment rendered by a foreign court in
circumstances identical to those under which an Ontario court would assert
jurisdiction would not, in the absence of the defendant’s submission to the original
court’s jurisdiction, be enforced in Ontario.207

The impropriety of such an approach became blatantly obvious in light of the
Supreme Court of Canada’s decision in Moran.208 In this case, the Supreme Court
upheld the validity of Saskatchewan’s assertion of jurisdiction over an Ontario
defendant who was served pursuant to Saskatchewan’s rules of service ex juris. At
this point, it is appropriate to provide a brief description of rules of service ex juris,
for they will become the focus of much of the remainder of this chapter.

Rules of service ex juris are legislated provisions enacted by each province, and
generally contained in provincial Rules of Civil Procedure. For example, Ontario has
rules setting out the circumstances under which a plaintiff may properly serve out-of-
province defendants with notice of proceedings in Ontario to which they have been
made a party. In other words, these rules allow the plaintiff to give notice to a
defendant that he or she is being called into the courts of Ontario which will be
asked to exercise authority over the parties. An example of the type of situation
authorizing service ex juris is one where it is alleged that a tort was committed in the
province where the plaintiff commences the proceedings.

At common law, jurisdiction could be properly asserted in specified
circumstances as long as the procedural rules respecting service ex juris, such as

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208 Supra, note 97.
service being performed in the manner prescribed under the rules and opportunity for the defendant to be heard, were met. In Moran, however, the court laid the groundwork for a more substantive analysis of when jurisdiction would be proper. This will be the focus of examination in the discussion of jurisdiction below. At this point, however, I wish to focus on the commentary that the Supreme Court decision in Moran received respecting the relationship between the original assertion of jurisdiction by one court and subsequent enforcement of that court’s judgment by a sister province court.

As Swan pointed out in discussing Moran, for an Ontario court to subsequently refuse to enforce the Saskatchewan judgment where the Supreme Court had ruled the assertion of jurisdiction by that originating court proper, would be quite absurd:

It is one thing for the Ontario courts to apply the common law rules to deny enforcement of a foreign judgment when there may be a suspicion that the foreign court has behaved unfairly. It is, however, quite another thing for the Ontario court to deny enforcement of a judgment given when the Supreme Court of Canada has not only specifically upheld the jurisdiction of the Saskatchewan court, but has also explicitly addressed the issue of the fairness (from the defendant’s point of view) in doing so. The essence of the argument made by Swan and others was that a revised concept of enforcement should be directly linked to the appropriateness of the original court’s assertion of jurisdiction. The full faith and credit approach of the U.S., they argued, was an appropriate response to the needs of enforcement within a federal system.

The Supreme Court of Canada in Morguard agreed that the traditional common law approach needed substantial amendment in order to meet the requirements of Canadian federalism. The case was commenced by an Alberta

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209 Sharpe, supra, note 206 at 9.
210 Swan, supra, note 142 at 292.
211 For a discussion of full faith and credit in the American context, see Chapter 4 infra.
plaintiff who received default judgement in Alberta on a claim relating to a deficiency owing on defaulted mortgages following the completion of foreclosure proceedings. The defendant mortgagor, who had been a resident of Alberta at the time the mortgages at issue were executed, had since moved to British Columbia. He was served ex juris according to Alberta’s Rules of Court, and did not appear to defend the case. After receiving default judgment in Alberta, the plaintiff sought enforcement of the judgment in British Columbia against the defendant’s assets in that province.

The defendant argued that he had not submitted to the jurisdiction of the court in any of the traditional common law manners, and as such, the courts of British Columbia should not enforce the judgment. At both the British Columbia Supreme Court and Court of Appeal levels, judgment was rendered in favour of the plaintiff.

At the Supreme Court of Canada, the defendant’s appeal was dismissed. La Forest J. who rendered the unanimous decision on behalf of the court, stated the Supreme Court’s position succinctly in the following passage:

...[T]he courts of one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action. I shall return to what La Forest J. considered properly restrained jurisdiction. At this point, however, I wish to focus on the underlying concerns which led the court to import a full faith and credit element into the Canadian system.

214 The other justices who sat on the appeal were Dickson C.J., L’Heureux-Dube, Sopinka, Gonthier, Cory and McLachlin JJ.
215 Morguard, supra, note 41 at 273.
D. The Supreme Court's Rationale

In support of the Supreme Court's rejection of much of the traditional approach to enforcement, La Forest J. stated that "[t]he English approach ... was unthinkingly adopted by the courts of this country, even in relation to judgments given in sister provinces." Later in the decision, he continued:

...there is really no comparison between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. Indeed, in my view, there never was and the courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister provinces.

Obviously, the Supreme Court was ready to offer a new approach. I will argue that in so doing, the court was clearly influenced by its characterization of what it termed "Canada's constitutional arrangements and practices" and by its desire to promote the common market concept.

(i) Constitutional Arrangements and Practices

La Forest J. asserted that Canada's constitutional and other legal arrangements and practices lead to a "full faith and credit" component within Canada. The practices and arrangements to which he referred are: the federal appointment and payment of superior court judges who have a supervisory function over other provincial courts and tribunals, the ability of the Supreme Court of Canada to give final review to all superior court decisions, and the adherence of all Canadian lawyers

216 Ibid. at 268.

217 Ibid. at 270.

218 The basis for the common market discussion is ss. 121 and 122 of the Constitution Act, 1867. Section 121 states that "[a]ll articles of the growth, produce and manufacture of any one of the Provinces shall, from and after the union, be admitted free into each of the other Provinces." Section 122 establishes an external tariff.

219 Morguard, supra note 41 at 272.
to a common code of ethics. These elements, stated La Forest J., make an express full faith and credit clause such as those found in the Constitutions of the United States and Australia unnecessary in Canada. In his opinion, however, the existence of such clauses do indicate that a mutual regime for the recognition of judgments is inherent in a federation.

(ii) The Common Market

In addition to finding that the structure of the Canadian system implies an inherent element of full faith and credit, La Forest J. considered the full faith and credit concept a desirable means of promoting economic union in Canada. Many of his comments in Morguard serve to illustrate the value he places on the efficient functioning of the Canadian (and international) market. Most directly indicative of this perspective is his comment that it is necessary in Canada to discard legal rules which "fly in the face of the obvious intention of the Constitution to create a single country, one of the central features [of which] was the creation of a common market." Also indicative of his view are the contentions that "[b]oth order and justice militate in favour of the security of transactions," and that modern conflicts rules are "grounded in the need in modern times to facilitate the flow of wealth, skills, and people across state lines in a fair and orderly manner."

Few are likely to question the logic of the actual conclusions in this

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220 Ibid. at 271.
221 Ibid. at 272.
222 Ibid. at 271.
223 Ibid. at 273.
224 Ibid. at 269.
decision,225 nor the importance of the concerns for the promotion of national and international cooperation articulated in Morguard. One of the potentially problematic issues raised by the language of the decision, however, is whether or not Morguard constitutes a constitutional dictate for the enforcement of all sister province judgments. In other words, does the test articulated in Morguard establish a constitutional principle from which no province may deviate? The potential issues arising from this question are discussed in sections below.

(iii) Constitutional Dictate?

La Forest J.'s references in Morguard to common market factors and to the presence of federally appointed judges, a common code of ethics, and the Supreme Court's final power over appeals seem to assume that the rules respecting enforcement should be uniform throughout the country. If this is the case, it would appear that legislative modification of the rules is undesirable. To draw this inference is to raise interesting issues respecting the enforcement provisions of Québec's Civil Code. Although the Revised Code226 adopts a method of enforcement which is largely consistent with the full faith and credit approach,227 it deviates somewhat from that principle. The differences lie mainly in the situations

225 In fact, a number of favourable comments have been made in response to the decision. See, for example, Peter Finckle and Simon Coakeley, "Morguard Investments Limited: Reforming Federalism from the Top" (1991) 14 Dal. L.J. 340; H.P. Glenn, "Foreign Judgments, the Common Law and the Constitution: De Savoye v. Morguard Investments Ltd" (1992), 37 McGill L.J. 537; Vaughan Black and John Swan, "New Rules for the Enforcement of Foreign Judgments: Morguard Investments Ltd. v. De Savoye" (1991) 12 Advocates' Q. 489.

226 Assented to on December 18, 1991; to come into force on January 1, 1994.

227 Art. 3158, for example, provides that Québec courts may not reexamine an original judgment on its merits. This replaces art. 179 of the Québec Code of Civil Procedure, R.S.Q. 1977, c. C-25, which provides that the original cause of action on a sister province judgment may be reopened where the defendant was not served personally in the originating province.
where original assertions of jurisdiction will be deemed improper.\textsuperscript{228}

In addition, Article 3164 of the Code reflects a concept of reciprocity by providing that jurisdiction will be recognized where it has been asserted in one of the manners by which a Québec court would have asserted jurisdiction. Reciprocity as a justification for the full faith and credit principle was rejected by the Supreme Court of Canada in \textit{Morguard} on the grounds that it does not necessarily ensure properly restrained jurisdiction.\textsuperscript{229} The Court specifically noted the broad service \textit{ex juris} rules in Nova Scotia and Prince Edward Island, implying that these rules might not in some cases satisfy the jurisdictional requirements being proposed.\textsuperscript{230} Whether the same might be true of the Québec rules of jurisdiction is an unanswered question, although the basis of jurisdiction enumerated in the Revised Code do not seem exorbitant.\textsuperscript{231}

The point to all of this, broadly speaking, is that although Québec’s provisions are consistent with the full faith and credit principles set out in \textit{Morguard}, there are some differences. This has led at least one author to conclude that \textit{Morguard} should be regarded as a set of guidelines, but not as a constitutional dictate:

\textsuperscript{228} Article 3165 limits the recognition of the assertion of jurisdiction by a foreign court in certain circumstances. For example, the jurisdiction of a foreign authority will not be recognized where, by reason of the subject matter or an agreement between the parties, Québec law grants exclusive jurisdiction to its authorities to hear the action which gave rise to the foreign decision.

\textsuperscript{229} \textit{Morguard, supra}, note 41 at 275.

\textsuperscript{230} \textit{Ibid.} at 274.

\textsuperscript{231} The general provisions of Title Three of the Code provide that a Québec court will, absent special circumstances, have jurisdiction over a defendant domiciled in Québec; that it may decline jurisdiction where it considers another forum more appropriate; that it may assert jurisdiction where Québec would not ordinarily have jurisdiction but the matter cannot be instituted outside the province; that on the application of a party, it may stay a ruling on an action brought before it if another action between the same parties and concerning the same subject matter is pending before a foreign authority; that it may make provisional orders in the absence of jurisdiction; that where it has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand; and that in cases of emergency, it may take such measures as considered necessary for the protection of the person or property of a person present in Québec.
The choice of the Supreme Court to adapt ... rules ... as informed and limited by the constitution ... present[s] clear advantages over the imposition of constitutional or federal legislative norms. It allows some (tolerable) diversity in the articulation of provincial rules of jurisdiction and recognition ... Québec may therefore codify specific grounds of recognition without seeing a broad jurisprudential principle given authority ... Invocation of an implicit and unarticulated constitutional norm would leave much to be decided in terms of its content, creating an unnecessary principle of uniformity while leaving a great deal of underlying uncertainty.232

The issue is also relevant to common law provinces. In 844903 Ontario Limited v. Anthony Vander Pluijm,233 a New Brunswick court ruled that the existence of the Foreign Judgments Act234 in that province precludes the application of Morguard to the enforcement of judgments of sister provinces. The Foreign Judgments Act reflects New Brunswick's acceptance of the 1933 Uniform Law Conference's Uniform Foreign Judgments Act which in effect codified the common law rules of enforcement discussed above. The only other province to adopt the Uniform Foreign Judgments Act was Saskatchewan. In Vander Pluijm, Deschene J. found that the intention of the drafters of the legislation was to "foreclose further common law development."235 He noted, however, that he was not addressing the case as a constitutional one, since the proper notice of constitutional question had not been given to the A.-G's of Canada and New Brunswick. As such, he concluded that "until such time as the limitation imposed by s. 2 of the Foreign Judgments Act is successfully challenged on constitutional grounds ... the will of the legislator should be respected."236

232 H. P. Glenn, supra, note 224 at 541-542.


235 Supra, note 237.

Subsequent to *Morguard*, the Uniform Law Conference drafted a model Uniform *Enforcement of Canadian Judgments Act*. Thus far, British Columbia is the only province to have adopted legislation modeled after the Uniform Act. Section 6(2) of the B.C. Act imposes a stricter requirement of full faith and credit than that proposed by La Forest J., by precluding a defendant from questioning the propriety of the original court's assertion of jurisdiction before the enforcing court. This approach has been approved by one commentator, who argues that the provision reflects the underlying philosophy that any jurisdictional argument should be made to the original court and a defendant failing to do so should accept the resulting enforcement by another court. On the other hand, the Act has received sharp criticism as being legislation which proceeds "in complete disregard of the decision of the Supreme Court in *Morguard*."  

The court in *Morguard* did not speak of the possibility that legislative provisions might affect the principles enunciated. The only exceptions to enforcement noted by La Forest J. were the traditional defences of fraud, conflict with the law of the recognizing jurisdiction, or conflict with the public policy of the

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240 John Swan, "The Uniform Enforcement of Canadian Judgments Act" (1993) 22 Can. Bus. L.J. 81 at 97. Elizabeth Edinger also criticizes the effect of this section. In "*Morguard v. De Savoye: Subsequent Developments*" (1993) 22 Can. Bus. L.J. 29 at 48 she states: Section 6(2)(a) constitutes the heart of the Act. The provision expressly prohibits a British Columbia court from applying the common law conflicts recognition rules to a Canadian judgment. Because the *Morguard* rule is a common law conflicts rule, it falls squarely within the exclusionary provision. In the result, the Act requires recognition and enforcement of Canadian judgments even if jurisdiction was not properly restrained.
recognizing jurisdiction. The extent to which the Supreme Court intended its decision to be absolute is uncertain. In the interest of preserving provincial autonomy, slight modifications should probably be permissible, as long as the general connection between propriety of original assertions of jurisdiction and enforcement is maintained.

The full faith and credit element in Morguard renders the issue of properly restrained jurisdiction by the originating court extremely important. While the discussion in Morguard of what constitutes properly restrained jurisdiction is technically obiter, it is well considered obiter from a unanimous court which deserves careful attention. Prior to discussing the constitutional implications of the principles respecting jurisdiction enunciated by the Supreme Court, I wish to trace the growth of extraterritorial jurisdiction at common law, and to assess the extent to which constitutional limitations have impacted upon this development. Where it seems relevant to the discussion, I will also refer to the evolution of jurisdictional doctrine in the United States.

II. Jurisdiction Over Out of Province Defendants

A. Jurisdiction at Common Law

Any discussion of Canadian concepts of jurisdiction must include an examination of their British roots. Unlike continental European countries, England's unitary legal system did not involve internal conflicts. Instead, the common law extended throughout the country. In order to found jurisdiction at common law, it was essential that a defendant had been served personally in England with a writ of summons or its equivalent. The acts leading to the proceedings were required

\[\text{Morguard, supra, note 41 at 279. There is some question as to whether any of these defences could ever be sustained in the Canadian context. See Filac., and Swan, supra, note 224 at 505-507.}\]


to have occurred in England. In addition, a forum court could not exercise jurisdiction over actions determining right, title, or interest in a foreign immovable.\(^{244}\)

Prior to the seventeenth and early-eighteenth century, the only circumstances under which a matter containing foreign elements would be tried in England were those over which admiralty or commercial courts took jurisdiction.\(^{245}\) In 1540 the Admiralty was given jurisdiction to try, in addition to all matters relating to shipping and cargo, bills of exchange and other contracts made abroad.\(^{246}\) The extent of the Admiralty's jurisdiction varied over the years, with the high point being reached in 1648.\(^{247}\)

When deciding cases, Admiralty courts did not rely on the common law. Instead, they applied the codified sea merchant customs, sources which were seen as better suited than common law principles to resolving matters of international commerce.\(^{248}\) Thus, maritime law was not considered the law of a particular country, but rather the "law of nations,"\(^{249}\) or \textit{ius gentium}. This concept of a law of

\(^{244}\) \textit{British South Africa Co. v. The Companhia de Mocambique}, [1893] A.C. 602 (H.L.). This case concerned mining land in South Africa, upon which the plaintiff company alleged that the defendant company had trespassed. The House of Lords held that it did not have the jurisdiction to entertain the trespass action, because it was an action dealing directly with interests in foreign immovable. The case is still "good law" today. See \textit{Tezcan v. Tezcan} (1987), 20 B.C.L.R. (2d) 253, 46 D.L.R. (4th) (C.A.) and \textit{Standard Trust Co. v. Ginnell} (1992) D.L.R. (4th) 693 (Sask. Q.B.).

\(^{245}\) Juenger, \textit{supra}, note 242 at 436.


\(^{247}\) \textit{Ibid.}

\(^{248}\) Juenger, \textit{supra}, note 242 at 437.

nations obviated the need for choice of law rules, since its application transcended national boundaries. Instead of aiming to further the objectives of one specific nation, the goal of these laws was to promote "principles of equity and usages of trade which general convenience and common sense of justice had established to regulate dealings of merchants and mariners in all the commercial countries of the civilized world." 

As a result of the above noted circumstances, the sixteenth century English legal system consisted of a coexistence of different bodies of law as well as different kinds of courts, where the only conflicts of jurisdiction related to whether matters were triable at common law or by the admiralty courts.

The inability of the common law courts to adjudicate foreign matters stemmed in large part from the procedural requirement within the country that the jury hearing the matter had to be drawn from the neighbourhood where the relevant events had taken place. Jury members were chosen from people who were acquainted with the facts of the case. They based decisions respecting questions of fact on their own personal knowledge rather than the testimony of witnesses. In essence, they were witnesses. Accordingly, the jury had to be chosen from the place where the relevant facts had taken place. Since it was impossible to summon a jury in a foreign country, it was held that courts had no jurisdiction to entertain an action where the facts had occurred in a foreign jurisdiction.

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252 Ibid. at 356. These conflicts led to a struggle for jurisdictional power between the courts of admiralty and the common law courts, with the latter attempting to usurp the extraterritorial reach of the former.

253 Juenger, supra, note 242 at 436.
The inability to adjudicate foreign matters was illustrative of a strict theory of sovereign territoriality. This theory reflected two propositions. The first was that since every nation had exclusive sovereignty within its jurisdiction, its laws could affect and bind all property within its territory, all residents, and all contracts made and acts done therein. The second, and correlative, proposition was that no state's laws could bind property or residents outside that nation's boundaries, except for the sovereign's subjects.254

Gradually, rules of trial in common law courts underwent substantial changes, one of the most significant being the transition in the role of jury members from that of witness to that of judge of facts. As a result of being able to adjudicate such facts on the basis of the testimony of witnesses before the court, the rule that the jury had to be taken from the region where the action had arisen was no longer required. It was sufficient for the purpose of selecting a jury that the venue named in the pleadings was within England.255

The change in jury requirements, combined with the common law courts' recognition of the injustice of forcing parties to litigate abroad, led to the development of an innovative mechanism. In pleadings concerning matters arising in foreign countries, English lawyers would allege that the wrongful conduct had occurred in England. Judges accepted this technique, as is evident from the following passage taken from a judgment concerning an instrument dated in Hamburg, Germany:

[W]e shall take it that Hamburg is in London in order to maintain the action which otherwise would be outside our jurisdiction. And while we know the date to be at Hamburg beyond the sea, as judges we do not take notice that it is beyond the sea.256

254 Edinger, supra, note 114 at 59.
255 Sack, supra, note 246 at 357.
256 Ward's Case (?625), Latch 4, 82 E.R. 245 (K.B.) at 246 E.R.
Similar advocacy techniques were used until as late as 1774. Eventually, however, legislation was enacted to enumerate the circumstances under which it would be proper for courts to assert jurisdiction over foreign defendants and subject matters. The Common Law Procedure Act, 1852, authorized such assertions of jurisdiction in situations such as an alleged breach of contract or tort occurring in the jurisdiction, or a foreign person being a necessary party to an action brought against some other person duly served within the jurisdiction. The manner by which defendants were notified of the British court's intention to adjudicate a dispute to which they were a party was service of a notice of a writ of summons upon them. The writ of summons contained the command of the sovereign to appear before the courts of Britain. To avoid infringing another nation's sovereignty by serving one of their residents with such a command, only notice of the writ was delivered to that person.

The English territorial theory of sovereignty was paralleled in the United States. The distinguishing factor of the American jurisdiction doctrine, however, was its express application in the context of interstate litigation. This is illustrated in *Pennoyer v. Neff.* The Supreme Court's territorial theory of jurisdiction was reflected in that case in the following passage:

> Every state owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals

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258 (U.K.), 15 & 16 Vict., c. 76, ss. 18-19.

259 For a more detailed discussion of the circumstances under which assumed jurisdiction could be triggered, see Cheshire, *supra*, note 45 at 80-86.


can inquire into that non-resident's obligations to its own citizens... .

This strict territoriality was eventually replaced by the minimum contacts requirement articulated in *International Shoe Co. v. State of Washington*, and based on the due process clause. From that point forward, the U.S. Constitution, as well as the perceived requirement of a flexible theory of jurisdiction to accommodate a growing number of interstate transactions, has played a great role in the assessment of the propriety of jurisdiction over out-of-state defendants.

In Canada, the *Common Law Procedure Act of 1852* provided the foundation for colonial legislation respecting extraterritorial service. The circumstances under which service of notice of proceedings against out-of-colony defendants could be effected were contained in colonial statutes. We noted earlier that at Confederation, pursuant to s. 129 of the *Constitution Act, 1867*, provincial courts retained the jurisdiction they exercised before Confederation, except as modified by competent federal or provincial legislation. Statutory provisions relating to service *ex juris* fall within the parameters of ss. 92(13) and 92(14) of the *Constitution Act, 1867*.

I noted above that the decision of the Supreme Court in *Moran* implied there was a tenable argument to be made that in order to assert jurisdiction pursuant to service *ex juris* provisions, a court has to enquire into more than the procedural requirements relating to those provisions. In particular, this case led commentators

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263 *Supra*, note 146.

264 See for example *An Act Relating to the Service of Process*, R.S.N.B. 1855, 18 Vict., c. 25, s.2; Upper Canada *Common Law Procedure Act* 1859, 22 Vict., c. 22, ss. 43-47; and *An Act Relating to the Supreme Court and its Officers*, R.S.N.S. 1864, c. 123, s. 1.

265 Section 92(13) provides that provinces may legislate respecting the Administration of Justice in the Province ... including Procedure in Civil Matters ... . Section 92(14) authorizes Provinces to legislate in relation to Property and Civil Rights in the Province.

266 *Supra*, note 97.
to speculate about the extent to which the Supreme Court, in future cases, might or should relate the question of jurisdiction to issues of federalism.

(i) Moran v. Pyle

The essential facts of Moran have been discussed in earlier portions of this work and will not be repeated here. At this stage, I wish to focus more closely on the constitutional implications of the decision of the Supreme Court.

In discussing when it would be "inherently reasonable" that an action be brought in a particular jurisdiction, Dickson J. stated:

[W]here a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant.267

The test articulated in Moran resembles the "minimum contacts" test of jurisdiction used in the United States to satisfy the due process clause of the fourteenth amendment.268 I referred earlier to this test which provides that a defendant may only be called into a court's jurisdiction when he or she has sufficient contacts such that so doing does not offend the traditional notions of fair play and justice. This rule, seen as a welcome relief from the restrictions of Pennoyer,269 has been the subject of much subsequent interpretation and definition. In the case of Worldwide Volkswagen Corporation v. Woodson,270 the U.S. Supreme Court found that:

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267 Moran, supra, note 97 at 250-251.
268 See chapter two, supra, at p. 47.
269 Supra, note 261.
The forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by the consumers of the foreign state.

The Court in *Worldwide* described the minimum contacts test as serving two functions: (i) the protection of defendants from distant litigation; and (ii) the assurance that states, through their courts, not overstep the bounds of their sovereignty.271

Of the various authors who saw the value of *Moran* as a general "all purpose" test of extraterritorial jurisdiction, Peter Hogg provided perhaps the most concise summary:

The rule in *Moran v. Pyle*, although not offered as a rule of constitutional law, bears a striking resemblance to the constitutional law which has developed in the United States with respect to the limits of the "long-arm" jurisdiction (based on service *ex juris*) of the state courts. Those limits are imposed by the due process clause of the fourteenth amendment... While Canada does not have an equivalent to the due process clause of the fourteenth amendment ... in my view, the due process test ... could as easily serve as a test of extraterritoriality under the Constitution of Canada.272

At least one superior court also interpreted *Moran* as establishing a

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271 Ibid. at 291-291. It should be noted that the U.S. Supreme Court has recently modified its position respecting the underlying role of the due process clause. The Supreme Court's most recent approach is that constitutional limitations on state court jurisdiction over non-residents are not based on separate concerns regarding the role of state courts in the federal system, but instead are based on due process principles. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 465 U.S. 694, 102 S.Ct. 2099 (1989), the Court found that limitation on state court jurisdiction must be seen as ultimately a function of the individual liberty interest preserved by the due process clause. The due process clause, which makes no mention of federalism concerns, is the only source of the personal jurisdiction requirement. While the merit of this assertion has been and will continue to be debated in the U.S., in the Canadian context, the presence of s. 92 of the *Constitution Act, 1867* makes clear the need for a test of jurisdiction to address both concerns of fairness and sovereignty. In *Moran, supra*, note 97 at 250, Dickson J. alluded to the concern for sovereignty at p. 250 when he said "[t]his rule recognizes the important interest a State has in injuries suffered by persons within its territory."

constitutional limitation on service ex juris. In Dupont v. Taronga Holdings,\textsuperscript{273} the Québec Superior Court addressed the issue of the constitutionality of s. 209 of the Québec Securities Act. This section provided that companies having neither their head office nor any place of business in Québec could be served by registered or certified mail addressed to the residence, head office or place of business outside Québec of the interested party. An issue arose concerning the validity of the extraterritorial reach of such legislation. The Québec Superior Court applied the ratio of the Moran decision to find that the legislation was not ultra vires in its application. In the Court’s opinion, by establishing procedures for service of a summons outside the jurisdiction, the Securities Act enabled the courts to police people carrying on business in Québec despite having no residence or place of business there. It was to be noted, however, that:

\[\text{although s. 209 (of the Québec Securities Act) is not, in itself, ultra vires, it could be ultra vires in application, if the so called "long arm" rules implicitly suggested by the Honourable Mr. Justice Dickson in the case of Moran v. Pyle were not respected}\textsuperscript{274}\]

\textit{(ii) Morguard Investments}

The Supreme Court of Canada’s attention was not drawn to the issue of proper assertions of extraterritorial jurisdiction again until its decision in Morguard. Having established that the enforcement of sister province judgments should be directly related to properly asserted jurisdiction, La Forest J. was required to provide guidelines as to how this requirement would be met. In doing so, he turned to Moran, stating that although that case was based on a claim in tort, it was “instructive as to the manner in which a court may properly exercise jurisdiction in actions in


\textsuperscript{274} Ibid. at 341.
contract as well. continuing with the reasoning in Moran, he found that in order for an assertion of jurisdiction over an out-of-province defendant to be proper, there must be a sufficient nexus between the elements of the case before the court and the forum such that it is reasonable for the court to hear the action.

The test articulated in Morguard has been referred to as the "real and substantial connection test." That phrase, however, has its origins in an English case involving a geographically complex divorce matter which concerns issues different from those with which the court was concerned in Morguard. In the latter case, the court was developing a new test of jurisdiction in the context of the Canadian federal state. It would therefore be inappropriate to predict the consequences of the new restrictions on jurisdiction by focusing solely on the words "real and substantial connection" or by examining how this phrase has been interpreted in English decisions. The future development of the jurisdiction test would be far better served by focusing on the goals that it is intended to achieve.

Clearly, the court in Morguard was concerned with balancing the interests of plaintiffs and defendants. On one hand, plaintiffs should not be required to chase defendants to their place of residence, no matter what the expense or inconvenience, in order to recover against these defendants. On the other hand, defendants should not be pursued in jurisdictions having virtually no contact with the transactions or the parties to the transaction. In addition, there is a clear indication that the Supreme Court in Morguard was cognizant of issues of provincial sovereignty. This is apparent in La Forest J.'s treatment of the issue of whether the principles being

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275 Morguard, supra, note 41 at 275.
276 Ibid. at 78.
277 La Forest J. himself referred to the phrase, and it has been used in various commentaries since. See for example, Blom, supra, note 238.
279 Morguard, supra, note 41 at 78.
articulated were to have a constitutional status.

La Forest J. expressly recognized the connection that scholars have drawn between the test enunciated in Moran and possible constitutional limitations on jurisdiction. Though he did not give his complete endorsement to that thesis, his leaning in that direction seems quite clear in the following passage:

The private international law rule requiring substantial connection with the jurisdiction where the action took place is supported by the constitutional restriction of legislative power "in the province." ... The restriction to the province would certainly require at least minimum contact with the province, and there is authority for the view that the contact required by the Constitution is the same as required by the rule of private international law between sister provinces ... I must confess to finding the approach attractive, but ... the case was not argued in constitutional terms and it is unnecessary to pronounce definitively on the issue.\(^{280}\) (emphasis added).

Given the passage above and the court's definite focus on federalism throughout the judgment, there is ample reason to believe that if required the Supreme Court would have little hesitation in according "constitutional" status to the guidelines for asserting jurisdiction over out-of-province defendants in a reasonable manner.

Various passages of the judgment in Morguard use different terminology respecting the contacts required to justify jurisdiction. There have been suggestions that depending on which phrasing is used, different conclusions may be reached.\(^{281}\) In the following section, this aspect of the Morguard decision will be examined in some detail.

(iii) What Contacts?

At one point, English courts held the view that plaintiffs should have the right to bring suits before the British judicial system, which they considered superior in

\(^{280}\) Ibid. at 278.

\(^{281}\) Blom, supra, note 238 at 740-41.
quality to other courts. This attitude is clearly no longer acceptable, and parties' choice of court must be limited, particularly within a federal system, to jurisdictions that could reasonably have been contemplated by the parties. In Morguard, La Forest J. gave support to this assertion when he stated that "it hardly accords with principles of order and fairness to permit the 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."

The requirement of certain contacts between the action and the jurisdiction may still leave more than one forum open to the plaintiff, since different contacts make the assertion of jurisdiction by more than one forum reasonable. Sopinka J. seemed to express this opinion recently when he stated that "[f]requently, there is no single forum that is clearly the most convenient or appropriate for the trial of an action but rather several which are equally suitable alternatives." As a result, fairness as reflected in the constitutional restrictions on the assertion of jurisdiction must retain a flexible quality. Such flexibility respecting two bodies validly asserting authority over one subject matter is not unknown to Canadian constitutional jurisprudence, as we have noted in our earlier discussion of the double aspect and paramountcy doctrines.

The flexibility to which I have referred is consistent with the Supreme Court's

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283 Sopinka, J. in Anchem Products Inc. v. British Columbia (Workers Compensation Board), [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96 stated that "the parochial attitude exemplified by Bushby v. Munday ... is no longer appropriate."

284 The jurisdictions within the reasonable contemplation of the parties will, of course, depend on the particular relationship between them.

285 Morguard, supra, note 41 at 274.

286 Anchem, supra note 283.

287 Chapter 2, supra.
use of a number of terms when referring to the connections required for the proper assertion of jurisdiction. I will list the different phrases employed by La Forest J. for ease of subsequent discussion:

1. Contacts between the jurisdiction and the defendant;
2. Contacts between the jurisdiction and the subject matter of the suit;
3. Connection between the jurisdiction and the damages suffered; and
4. Connection between the jurisdiction and the action.

While it may be true that the different terminology used by the court makes the test ambiguous, it seems logical that the fourth formulation of the above test, requiring a connection between the action and the jurisdiction is an "umbrella" which encompasses the connections enumerated in numbers one to three. The "action" comprises the defendant, the subject matter of the suit, and the damages suffered. As such, depending on the particular facts of a case, one or a combination of these connections may take on prominence. The key is that in some manner, whether by bringing oneself voluntarily within the purview of the province's authority, or by acting in a manner that causes effects that a province has an interest in adjudicating and that were reasonably foreseeable, the defendant's activity may be properly subjected to the scrutiny of the forum court.

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288 Morguard, supra, note 41 at 274.
289 Ibid.
290 Ibid. at 277.
291 Ibid. at 278.
292 It may be that by using these terms the court is implicitly articulating a theory of general and specific jurisdiction similar to that existing in the United States. General jurisdiction allows a court to adjudicate any claim against the defendant, and may be based on the defendant's nationality, domicile, residence, or incorporation in the state. As well, general jurisdiction may be founded on the defendant having "continuous and systematic" contacts with the forum. See /klicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984). This would account for the Supreme Court of Canada's reference to a connection between the forum and the defendant. Specific jurisdiction, on the other hand, permits the court to adjudicate only claims that relate to or arise out of the defendant's contact with the forum, and may be asserted when "the activities of a defendant that relate to the plaintiff's suit have sufficient contacts with the forum to satisfy the due process
With the foregoing comments in mind, in the following sections I will discuss some of the service *ex juris* provisions in operation in Ontario and the problems that might be encountered with their application in light of *Morguard*.

III. **Rules of Service *Ex Juris***

In *Morguard*, La Forest J. referred to the broad reaching rules of service *ex juris* in Nova Scotia and Prince Edward Island. We need look no further than Ontario, however, to find service *ex juris* provisions authorizing the assertion of jurisdiction which may not, when applied to particular facts, satisfy the connections required by *Morguard*.

Rule 17.02 of the Ontario *Rules of Civil Procedure* enumerates the occasions where a plaintiff may effect service of an originating process on an out of province defendant without prior leave of the court. Rule 17.02(h) provides that service is authorized where damages arise in the province as a result of a tort or breach of contract outside the province.

If we are to interpret this provision in the context of *Moran* and *Morguard*, there must be more than the mere fact that damages have occurred in Ontario to justify the Ontario courts’ exercise of jurisdiction. Otherwise, any Ontario resident who received medical treatment in Ontario after travelling to another province and being injured there by a person having no idea they were dealing with a resident of

standard articulated in *International Shoe* and subsequent cases.: Gary Born and David Westin, *International Civil Litigation in United States Courts: Commentary and Materials*, 2d ed. (Boston: Kluwer Law and Taxation Publishers, 1992). The court’s reference to the other connections listed above would probably fall within this category. Whether it is desirable for courts to develop such a distinction in Canada is questionable. Vaughan Black has suggested that the vagueness of La Forest J.’s discussion of the proper connections is appropriate. In his opinion, the decision properly performs the Delphic task of stating the themes for a dialogue in which the appropriate standards for enforcement and jurisdiction may be talked out in years to come. *Morguard* is not so much a paradigm-shifting case as it is a paradigm-seeking one.: Vaughan Black, "The Other Side of *Morguard*: New Limits on Judicial Jurisdiction" (1993) 22 Can. Bus. L.J. 4 at 12-13.

291 *Morguard*, supra, note 41 at 274.
Ontario, could hail that person into the Ontario courts. Jurisdiction has, in fact been asserted in such situations. Motor vehicle accidents with geographically complex fact patterns provide one of the best examples. One such case was *Beck v. Cyr.* In that case, two Ontario residents were injured in New Brunswick by a New Brunswick defendant. They returned to Ontario, claiming common law damages as well as damages according to Ontario’s *Family Law Reform Act* for loss of guidance and companionship.

It is interesting to note that the New Brunswick defendant conceded the jurisdiction of Ontario’s courts. Presumably, Rule 17.02(h) was the operative provision for service *ex juris.* If the suit was brought today, in light of *Morguard,* would jurisdiction be conceded? One would expect not. This New Brunswick defendant, driving within his province, with no reasonable way of knowing that he was sharing the highway with Ontario residents, could hardly be expected to contemplate being haled into Ontario’s courts.

A recent Ontario case provides a good example of situations where, in my opinion, Rule 17.02 may and may not be properly invoked. In *Furlong v. Station Mont Tremblant Lodge Inc.*** an Ontario resident was injured while skiing at Mont Tremblant in Québec when he was struck by another skier. The plaintiff sued both Mont Tremblant Lodge Inc., a Québec corporation, and the individual skier, who was also a Québec resident. The former did not officially carry on business in Ontario, although it did advertise there and had hired a Toronto firm to market Mont

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295 R.S.O. 1980, c. 152, repealed by s. 71(1) of, and replaced by, the *Family Law Act,* 1986, c. 4; now R.S.O. 1990, c. F.3.


Tremblant within Ontario and to sell its ski packages. The court refused to assert jurisdiction over the Québec defendant.

When the plaintiff commenced his Ontario action, similar proceedings were time barred in Québec. He served the defendants pursuant to Rule 17.02(h) of the Ontario Rules of Civil Procedure. The corporate defendant moved to set aside service of the statement of claim, arguing that Ontario could not validly assert jurisdiction over the action, and that to do so would constitute a violation of s. 7 of the Charter. The individual defendant had delivered a statement of defence, and as a result was precluded from bringing the same challenge. I wish, however, to include in my analysis a number of speculative comments as to how the jurisdiction question might have been treated had this defendant not submitted to the Ontario courts' jurisdiction in this manner.

The court ultimately set aside service ex juris on the basis of the principles enunciated in Bonaventure Systems Inc. v. Royal Bank where it was held that in order to stay proceedings, it must be shown that there is another jurisdiction which is more substantially connected with the action, and that the choice of an alternative jurisdiction would not deprive the plaintiff of a legitimate juridical advantage. In this case, Somers J. held that Québec had a more significant connection with the action, and since, on an application of the choice of law rule in Phillips v. Eyre, Québec law would apply to govern the action, it could not be said that the plaintiff was being deprived of a juridical advantage.

An application of the principles set out in Moran and Morguard could have led to a different conclusion. The passage from Moran quoted above could surely be

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298 Ibid.
300 Supra, note 297.
301 Supra, at page 82.
interpreted in this case to mean that by advertising in Ontario the defendant could have expected first, that Ontario residents would ski at Mont Tremblant, and secondly, that a plaintiff using its services might well be injured as a result of Mont Tremblant’s negligence. Consequently, it is reasonable that Ontario should exercise judicial jurisdiction over that defendant when injury is suffered by the Ontario plaintiff. The fact that the plaintiff may not have relied on the defendant’s advertising does not weaken this conclusion. The defendant should have expected that by directly bringing its business to the attention of Ontario residents, it might be opening itself to adjudication by Ontario courts. This is part of the risk of expanding one’s business horizons.

The same conclusion should not be drawn with respect to the personal defendant in Mont Tremblant. In this case, had the defendant not submitted to the jurisdiction of the Ontario courts, assertion of jurisdiction pursuant to R. 17.02(h) would have been a contravention of the principles enunciated in Morguard. Not only would this exercise of jurisdiction have been totally unforeseen by the defendant who simply went out for a day of skiing in her home province, but it is difficult to see how the Ontario provisions, enacted pursuant to ss. 92(13) and 92(14), could validly extend to infringe upon the civil rights of this defendant in Québec.

Unfortunately, Somers J., having reached his conclusion on the grounds noted above, did not find it necessary to render an opinion with respect to the constitutional argument. It is worth speculating, however, about the manner in which the Charter issues might have proceeded. Again, in so doing, I wish to ponder the manner in which the argument would have proceeded on behalf of the personal defendant.

A. Charter of Rights

The defendant Mont Tremblant argued that service ex juris pursuant to R. 17.02(h) constituted a violation of s. 7 of the Charter since Mont Tremblant had no
connection with Ontario. I have noted already La Forest J.'s reference to the possibility of s. 7 applying to jurisdictional issues. Vaughan Black has also noted that "the language of Morguard shows that the court is ... concerned with the interference with a person's liberty which can occur through uncheckered service ex juris rules."302

Before exploring this issue further, we must address a preliminary difficulty that would have been encountered by Mont Tremblant had the court considered the Charter argument in any detail. The Supreme Court of Canada has held that "everyone" as employed in s. 7, does not apply to corporations, since an artificial person such as a corporation is incapable of possessing "life, liberty or security of the person."303 On the other hand, a corporation has been held able to invoke s. 7 "on the basis that the law is a nullity."304 Thus, in R. v. Wholesale Travel Group,305 a corporation was able to defend a criminal charge on the basis that the law pursuant to which the charge was laid would have been unconstitutional as applied to an individual. If this principle is equally applicable to defendants in civil cases, it is possible that Mont Tremblant would have been able to proceed. Again, however, the argument for the individual defendant in this case seems much stronger, and I propose to discuss the manner in which she might have used s. 7 to oppose the assertion of jurisdiction by Ontario courts.

In chapter two, the scope of s. 7 and its protection of psychological as well as physical security was canvassed. It could reasonably be argued that the coercion of this defendant into Ontario, particularly after the expiry of the Québec limitation period to which she could reasonably have expected to be subject, would produce

302 Black, supra, note 292 at 14.
304 Hogg, supra, note 39 at 1025.
stress, anxiety and embarrassment constituting an infringement of security of the person as discussed by the Supreme Court of Canada in *Morgentaler.* As noted in chapter two, it is entirely possible that this deprivation might be considered contrary to the principles of fundamental justice if the court is to interpret that term as encompassing more than simply procedural considerations.

Once a violation has been established, it must then be determined whether the violation may be justified pursuant to s. 1 of the Charter. Section 1 provides:

>The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This enquiry involves looking at the purposes of the legislation, and whether the measure is in proportion to that objective. The purpose of the broad rules of service *ex juris* is to afford plaintiffs the right to bring actions in the forum they desire. Earlier, I argued there must be limits on this right. Similarly here, I believe that the objective is not important enough to warrant asserting authority over all defendants whether they are connected to the forum or not.

The arguments being made here are somewhat tentative, and remain to be expanded. I think they are important, however, in suggesting an alternative means for defendants to ensure that they are fairly treated when they are involved in civil actions.

### IV. Summary

In the preceding sections, it has become obvious that there is an increasing awareness of "federalism" by the Supreme Court of Canada with respect to issue of

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306 See the discussion of *Morgentaler* in Chapter 2 *supra.*


308 For a discussion of how sections 6 and 15 may be directly applied to questions of jurisdiction, see Peter Lindsay, *supra,* note 188.
jurisdiction over out-of-province defendants. In addition, the potential for Charter scrutiny in respect of such questions has been shown to be a viable argument. In the following chapter, we shall explore the extent to which the same respect for federalism may be said to apply to "choice of law" issues in Canada. It is also my assertion that the arguments made in this chapter with respect to the Charter could also be applied by the personal defendant in the Mont Tremblant case in the choice of law context, assuming an interpretive approach was taken to that issue. Since the arguments are much the same as those presented above, however, they will not be reiterated in the following chapter.
CHAPTER 4: CHOICE OF LAW

I. Introduction: A Review of the Suggested Approach

The choice of law issue and its relation to constitutional principles has occupied a significant portion of conflict of laws literature, particularly in the United States. The Canadian judiciary has a less than admirable past when it comes to the development of a principled approach to dispute resolution in geographically complex cases. In chapter two, I suggested that an "interpretive" or statutory construction approach is better equipped to resolve cases of geographic complexity in a rational and fair manner than the traditional "jurisdiction selection" method. In addition, I argued that this approach better accommodates the need for appropriately limiting the extraterritorial assertion of legislative authority in a manner consistent with the interests of federalism.

It was also suggested in chapter two that in any case where the forum court is faced with applying its own provincial statutory provision or common law rule instead of an opposing rule of another relevant jurisdiction, that court should make the following inquiries: (i) whether the provision in question falls within the scope of legislative authority as defined in Ladore;309 (ii) the extent to which the parties have brought themselves within the valid reach of the relevant rules and policies involved in the dispute; and (iii) whether, by applying its provincial law, the forum court is impairing a more pressing interest of a sister province in regulating the activity in question. In the case of the latter enquiry, where a court does determine that the policy interests of a sister province are greater than those of the forum province, it should refrain from applying its own rule, and should instead apply that of its sister province. In this way, decisions provide predictive rules for future cases, and should generally conform with what the court assesses in each case to be the reasonable expectations of the litigating parties. In addition, such decisions promote cooperation within the federal system.

309 Supra, note 79.
In the following sections, I propose to review some of the major cases in Canadian jurisprudence with a view to determining the extent to which the approach described above has been taken. Although geographically complex factors occur in virtually every area of the law, space does not permit the exploration of any great number of examples. I will therefore confine my discussion to torts and contracts cases. As a preface to the review of Canadian jurisprudence, the manner in which U.S. courts have dealt with choice of law issues will be briefly canvassed.

A. The U.S. - Full Faith and Credit

The full faith and credit clause of the American Constitution requires the recognition of 'Public Acts, Records, and Judicial Proceedings' of every other State. Judicial interpretation of this clause has led to the requirement that state courts give full faith and credit to judgments rendered by courts of sister states. Courts also suggested early on that this provision had a role to play in the proper determination of choice of law issues. This role has been described as "balanc[ing] conflicting state interests by commanding that the states respect the sovereignty of sister states in a federal context." The manner in which this respect has been accorded, however, has a somewhat checkered history. Interpretations have ranged from the view that the full faith and credit clause permitted a forum to apply its own law only when the application of the other territorial unit's law would be "obnoxious" to the forum's policy to attempts to balance state interests in having their laws applied to

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310 U.S. Const., art. IV, §1.


313 This history is discussed in Hay and Scoles, ibid. at 85-95

resolve disputes,\textsuperscript{315} and finally to the current point where the notion of full faith and credit and that of due process have become blurred in choice of law decisions, so that "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."\textsuperscript{316} Some have suggested that this blurring ignores the fact that the jurisdiction and choice of law question are different,\textsuperscript{317} and that full faith and credit should operate to require that the law of a state may only be applied where that state has a significant interest in the transaction.\textsuperscript{318}

**B. Applicability of Full Faith and Credit in Canada**

The lack of consensus in the U.S. respecting the applicability of the full faith and credit concept to choice of law questions\textsuperscript{319} suggests that Canadian courts might be well advised not to adopt U.S. precedent in this area without reservation. The advantage of the full faith and credit cases is that they contain analyses of competing rules and the underlying policies they embody. This approach of evaluating the rules as they relate to the transaction and the parties is preferable to the blind application of traditional rules. For this purpose, U.S. decisions are useful reference tools.

\textsuperscript{315} In *Pacific Employers Insurance Co. v. Industrial Accident Commission* 306 U.S. 493, 59 S. Ct. 629 (1939), the Supreme Court, after examining the conflicting interests of the states involved, held that the Full Faith and Credit Clause did not mean that a state had to ignore its policy to enforce another state’s statute.

\textsuperscript{316} Scoles and Hay, *supra* note 153 at 93.

\textsuperscript{317} Scoles and Hay state that the connection of the state must be to the defendant to gain jurisdiction while the connection between the transaction and the state is the consideration when determining whether local law should be applied: *Ibid.* at 102.

\textsuperscript{318} *Ibid.*

Canadian courts must, however, develop their own manner of resolving cases within the context of this general form of analysis. Canada does not have the problem of defining an ambiguous full faith and credit clause; nor should such a clause be inferred in choice of law matters. This only has the potential of leading us through the same definitional maze described above. Instead, I think, we need only ask provinces to behave responsibly within the federal system by enacting and applying properly restrained legislation, and cooperating to allow each province to maintain its autonomy. This does not always mean finding the solution that each province agrees upon. As discussed earlier, autonomy and cooperation do not always co-exist peacefully. It simply means compromising where to do so will clearly promote the interest of a sister province, and will not unduly restrict the forum's policies.

II. The Canadian Judiciary and Choice of Law in Tort

A. The Motor Vehicle Cases

I have previously discussed the double actionability rule in Phillips v. Eyre. That case involved an English plaintiff who sued the Governor of Jamaica for wrongful imprisonment as a result of an insurrection in Jamaica. The court's rationale in refusing to award the plaintiff damages was that the defendant had a statutory defence to the claim under the law of Jamaica. In support of his decision, Willis J. stated that "if the foreign law extinguishes the right [established by the alleged acts being actionable in the forum] it is a bar in this country as equally as if the extinguishment had been by a release of the party, or an act of our own

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Supra, note 35.

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The decision in *Phillips v. Eyre* may have been a just one in all of the circumstances. What was at issue was whether the defendant had a justification for imprisoning the plaintiff. In this case, if it was intended that persons would fall within the scope of the Jamaican statute simply by entering Jamaica, it may be reasonable that the provisions in question should be applied to clarify the rights of each party. The problem with the decision, however, was its subsequent generalization into a rule of required application in each torts case, regardless of the particular facts and rules before the court.

In Canada, the problem was worsened when the Supreme Court added a gloss to the second branch of the test, providing that if the act is "punishable" by the *lex causae*, the challenge will have been met by the plaintiff. In *McLean v. Pettigrew*, a Québec plaintiff was injured by a Québec defendant while a passenger in the latter's car. The accident happened in Ontario where, at the time, a "guest passenger" statute relieved drivers of liability for injuries occasioned to gratuitous passengers. The plaintiff brought suit in Québec, arguing that the action was founded in contract, and that since Québec was the place where the contract was entered into, it was the jurisdiction who's law should govern. Alternatively, she argued, if the matter was one of tort, she should succeed on the grounds that the acts of the defendant would have been actionable if committed in Québec, and were "wrongful" or "not justifiable" in the province of Ontario. As a result, the Québec forum was at liberty to apply its law. The problem for the court was that the Ontario guest passenger statute extinguished any possible right of action of the plaintiff, meaning that the acts then were not wrongful in Ontario.

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Before we proceed further, let us look at what was involved in *McLean*. The fundamental issue as between these parties was how to apportion the loss that had occurred. In order to properly resolve this issue, it was necessary to determine the potentially applicable rules, and the extent to which the parties had brought themselves within the purview of those rules. The applicable rule in Ontario, where the accident occurred, was aimed at limiting the liability of drivers who carried gratuitous passengers. Which drivers was the Legislature of Ontario concerned with when it enacted this legislation? Certainly it must have been Ontario drivers. It is difficult to imagine why Queen’s Park would enact legislation with Quebec drivers, and moreover, Quebec passengers, in mind. The laws of Quebec, on the other hand, did not afford such protection to drivers. To which drivers and to which passengers was Quebec’s policy of awarding recovery for injuries aimed? Surely the answer would be that it was aimed largely at Quebec residents. Since the Quebec law was well within constitutional limits, Quebec had a valid interest in applying its recovery rule to its residents, and Ontario arguably had no interest in applying its guest passenger statute to these parties, it was clear that recovery under the applicable Quebec rule was warranted. This situation presents what, in U.S. jurisprudence, has been called a "false conflict" - where one state has absolutely no interest in having its rule applied to the dispute between the parties.324

To assume, however, that there are false conflicts must imply there are circumstances where "true" conflicts do arise. I do not adopt this position, but rather make the argument that when cases of geographic complexity are adjudicated by means of an interpretive approach, all "conflicts" in the conflict of laws context disappear, and the court is simply left with a tort or contracts case which contains geographically complex factors. While these factors may make the interpretation of the rules at stake in the action more complex, and may render more difficult the process of reaching a reasonable resolution of the tort or contracts issues involved,

324 This term was originally coined by Brainerd Currie, *supra*, note 14.
they do not transform the case into some other type of action. They produce no true or false conflicts; rather, as with purely domestic cases, geographically complex actions manifest varying degrees of complexity.\footnote{The process for resolving \textit{McLean} suggested above does not require the judiciary to undertake any unusual reasoning methods. It simply involves questions of constitutional validity and statutory construction. While the Supreme Court did find that Québec's law governed, and that the plaintiff should recover, its reasoning was radically different from that described above.}

First, Taschereau J. characterized the action as tortious.\footnote{\textit{He held that the law does not recognize a contract of transport in gratuitous passenger situations. \textit{McLean, supra}, note 31 at 66-76.}} He then proceeded to apply the double actionability rule. The first branch was not problematic, since had the acts occurred in Québec, they would have been actionable.\footnote{\textit{Ibid.} at 78.} The second branch, however, presented more difficulty. Above we noted that the Ontario guest passenger statute operated to defeat that portion of the test. If this was the case, the plaintiff would not recover. After having noted that the Ontario statute worked to relieve the defendant of civil liability, the court went on to state that the \textit{Highway Traffic Act}\footnote{R.S.O. 1937, c. 288, s. 27 as am. by S.O. 1939, c. 20, s. 6.} of Ontario contained a provision which invoked quasi-criminal liability for driving without due care and attention. If the defendant’s conduct fell within the purview of this section, the court reasoned, it would be "not justifiable" as required by the second part of the test. This being said, another hurdle arose, namely the fact that the defendant had been acquitted of a charge under that section. Undaunted, Taschereau J. formed his own judgment with

\footnote{For these reasons, I do not accept this aspect of Currie’s approach, nor do I accept the need for "principles of preference" as presented by David Cavers in \textit{The Choice of Law Process, supra, note 14, or R.A. Laflar’s "choice influencing factors" set out in "Choice Influencing Considerations in Conflicts Laws" (1966) 41 N.Y.U. L. Rev. 267.}}
respect to the care and attention exercised by the driver when he stated:

It is true that the Magistrate at Rockland acquitted the appellant of a charge under this section, but that decision evidently does not have the authority of *res judicata* and cannot bind the civil courts ... I am of the opinion, shared by the trial Judge and the Court of Appeal, that the appellant did not drive his car with the "due care and attention" required by s. 27. For, it seems to me, that if he had shown due care and the necessary attention, this accident would have been avoided.\(^{329}\)

In the final analysis, the defendant's action was found to be "punishable", or "not justifiable" under the law of Ontario, and Québec law applied.

The significant degree of manipulation required for the Supreme Court to reach a decision that it could well have reached by using its every day "tools" of adjudication is remarkable.\(^{330}\) While in many cases, courts have been able to avoid the unjust application of the rule, in some cases they have been unwilling or unable to do so. This was precisely the situation in *Ang v. Trach*.\(^{331}\)

In *Ang v. Trach*, the parties to the action, which arose as a result of damages suffered in a motor vehicle accident in Québec, were two Ontario plaintiffs, two defendants (the owner and operator of the car in which the plaintiffs were passengers) who were Ontario residents, and two other defendants who were Québec residents. The Québec defendants brought a motion to have the action against them dismissed. They relied on the provisions of La Régie de Québec, which establishes a no-fault regime of insurance for motor vehicle accidents in that province.\(^{332}\) Henry J. dismissed the motion by finding that if the acts had occurred in Ontario, the plaintiff would have had a cause of action, and if it was proven at trial that the defendants' acts were punishable under Québec law as violations of that province's

\(^{329}\) *McLean, supra*, note 31 at 79.

\(^{330}\) The decision was greeted with immediate criticism. See John D. Falconbridge, "Annotation: Torts in the Conflict of Laws," [1945] 2 D.L.R. 82.

\(^{331}\) (1986), 57 O.R. (2d) 300, 33 D.L.R. (4th) 90 (H.C.) [hereinafter cited to 57 O.R. (2d)].

Highway Traffic Act, the second element of the common law test would be satisfied. Though he was bound by authority to reach this conclusion, Henry J. noted that the result seemed unfair to the defendants, particularly with respect to their reasonable expectations as to the legal results of their conduct:

Where ... the defendant tortfeasor is resident in Québec ... [h]is reasonable expectation in the course of everyday driving in his home province is that where he commits a tort or delict, he cannot be sued by the victim who is to be compensated for any injury by the régie, without proof of fault on his part, nor can he in turn sue the tortfeasor who injures him. But if by chance he injures an Ontario resident who is sojourning there, he finds himself subjected to possible liability and damages in an Ontario court in accordance with Ontario law, which is a regime of law in direct conflict with that of Québec which would otherwise protect him. That seems to be unfair to him by any reasonable test.333

In Grimes v. Cloutier,334 the Ontario Court of Appeal took what might be seen as a bold step away from the traditional approach to choice of law questions and toward an interpretive one. The facts were similar to those in Ang ... Track. The plaintiff, a resident of Ontario, brought an action in Ontario as a result of injuries suffered in an automobile accident in Québec. The defendant was a Québec resident. The issue before the court was which law should be applied to the resolution of the matter. If Québec, the plaintiff would have no further right of recovery because he had already been compensated by La Régie. The Court of Appeal found that Québec law should govern. In so doing, it confined McLean to its specific facts, stating that in situations where the fact pattern differed from McLean, and where the results produced were unjust, the test in that case was to be approached with caution.335


335 Ibid.
Having distinguished McLean, the court went on to assert that a particular issue between the parties may be governed by the law of the jurisdiction having the "most significant" relationship with the occurrence and the parties. Here, the court found that the jurisdiction with the most significant relationship to the occurrence and the parties, given the Québec defendant and Québec situs of the tort, was Québec. In addition, the court reasoned that to apply Ontario law would defeat the intent of the Québec no-fault legislation and the reasonable expectation of the parties. In the words of Morden J.A., it would be "an officious intermeddling with the concerns of a sister province for an Ontario court to impose liability under the Ontario Highway Traffic Act and common law on this defendant."3

What does it mean to refer to the possibility of "officious intermeddling?" In answering this question, it is helpful to recall that the phrase was also used by Moffact Hancock.3 For Hancock, it meant that a forum court, by applying its laws to the resolution of a dispute, where, using an interpretive approach, the rule of another province was properly applicable to the outcome of a case, was not fulfilling its constitutional obligation to give effect to the letter and policy of valid provincial statutes so far as they extend to cases litigated in that province. It is reasonable to think that Morden J.A. was concerned with the same issue, which must be interpreted as concern for provincial sovereignty under the Constitution Act, 1867.3

As noted by John Swan in "Conflict of Laws - Torts - Automobile Accident in Quebec - Action in Ontario - Paradigm Shift or Pandora's Box" (1990) 69 Can Bar Rev. 538 at 544 n.27, the term "most significant" does not have a consistent meaning. It appears in the Restatement, Second, Conflict of Laws (1971), at paragraphs 6 and 145, and is used by various American authors and judges.

Grimes, supra, note 334 at 524.

Supra, page 43.

The fact that Morden J.A. cites Hancock immediately after the statement concerning "officious intermeddling" supports the argument that he had the same issues in mind as Hancock.
In Prefontaine v. Frizzle, the Court of Appeal was asked to render an opinion on certain stated questions pursuant to Rule 22.03 of Ontario’s Rules of Civil Procedure. The relevant facts of the case were that a Québec resident was killed in a motor vehicle accident which occurred in Québec. The accident was caused by an Ontario defendant. The widow of the deceased, on behalf of herself and other dependants of the deceased, brought an action in Ontario relying on provisions of Ontario’s Family Law Reform Act which allowed for compensation to dependants of an injured or deceased person. Mrs. Prefontaine had also been compensated by La Régie.

The key question before the Court of Appeal was which rule of law was applicable given these facts. Griffiths J.A., who delivered the judgment of the court, found that the provisions of the Quebec Automobile Insurance Act should be applied to determine the extent of compensation available to the plaintiffs. He stated:

It seems to me ... that it would not be within the reasonable expectations of the parties to apply Ontario law to a claim where the plaintiffs reside in Québec, the place of the alleged wrong. It is not without significance that the plaintiffs in this case, as in Grimes v. Cloutier, have chosen their remedy in the province of Québec in the form of benefits paid by the Regie pursuant to the Québec Automobile Insurance Act ... it strikes me as unjust that the plaintiffs should take the benefits of the Québec legislation and then seek to avoid the application of Québec law in the action brought in Ontario.

In this passage, as in Grimes v. Cloutier, it appeared that the court was shifting from the traditional double actionability test to one more akin to that proposed in this work. Recently, the Ontario Court of Appeal has again had two opportunities to entertain appeals concerning motor vehicle accidents containing geographically complex facts.

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While indexed under Prefontaine v. Frizzle, Cuddihay v. Robinson was tried at the same. In the following discussion, I will deal with the facts of Prefontaine.

341 Ibid. at 284.
In Lucas v. Gagnon, three Ontario plaintiffs were injured in an automobile accident which occurred in Québec. One defendant, the operator of the car in which the plaintiffs were passengers, was a resident of Ontario. The other party having a connection to the action was a Québec resident who had collided with the vehicle driven by the Ontario defendant. The Québec resident, Lavoie, was originally named as a defendant in the plaintiffs' statement of claim, although that action was eventually discontinued by the plaintiffs. In addition, the Ontario defendant crossclaimed against Lavoie for contribution and indemnity in the event that he was held liable to the plaintiffs. Lavoie delivered a statement of defence to the crossclaim.

The adult plaintiff received benefits from the Ontario defendant's insurer, who was reimbursed by La Régie. She was prohibited, however, from bringing an action in Québec pursuant to s. 4 of that Province's Automobile Insurance Act.

Pursuant to the same rule of civil procedure used in Prefontaine, the parties posed three questions to the judge of the General Division based on an agreed statement of facts. The questions were: (i) whether Ontario courts could properly assert jurisdiction over the action; (ii) which law should be applied to resolve the dispute; and (iii) if Ontario law was held to govern the dispute between the plaintiffs and the Ontario defendant, could that defendant claim indemnity against Lavoie, the Québec defendant by crossclaim. Hurley J. found that Ontario could properly assert jurisdiction, that the laws of Ontario should apply, and that the Ontario defendant could maintain his crossclaim against Lavoie. The latter two answers were appealed.

Tarnopolsky J.A., writing for the court, characterized the issues as follows. First, did the fact that the defendant to the crossclaim was a resident of Québec and that the accident had occurred in that province served to distinguish this fact situation from that in McLean. Secondly, if McLean did apply to the main action, could the principles in Grimes and Prefontaine operate to make the choice of law with

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respect to the defendant Lavoie different from that applicable to the Ontario defendant.343

The court found that the facts of the main action were indistinguishable from those in McLean, since all parties were residents of the forum. Tarnopolsky J.A. stated that "only when a case involves parties from outside of the forum should a court make further inquiries into what is a just result, as in Grimes v. Cloutier."344 This led to the issue of whether the action against the defendant Lavoie fell within the scope of Grimes.

The court concluded that the effect of the Rules of Civil Procedure respecting the discontinuance by the plaintiffs of their claim against Lavoie but the maintenance of the claim by the Ontario defendant, was to create an independent action between that defendant and Lavoie. As a result, the court was able to consider this aspect of the case in light of Grimes. Tarnopolsky J.A. enunciated the court's decision to apply the principles in that case to the defendant, Lavoie, in the following manner:

In my opinion, given the facts of the case at bar it [sic] be unjust if the action against Lavoie were not bound by Grimes v. Cloutier. After all, Lavoie was a Québec resident driving his car in his own province. Therefore, when an Ontario resident is involved in an accident in Québec with a Québec resident, although both the passenger and his or her driver are residents of Ontario, a claim against the Québec driver must be barred by the Québec non-actionability law.345

Lucas v. Gagnon is currently pending appeal to the Supreme Court of Canada,346 as is the case of Williams v. Osei-Twum,347 a case involving a car accident which occurred in Québec where all parties were Ontario residents but one defendant's

343 Ibid. at 428.
344 Ibid. at 433.
345 Ibid. at 438.
automobile was registered in Québec. The Ontario Court of Appeal held that the facts in that case meant that it was bound by McLean, and that the trial of the action should proceed pursuant to Ontario law, subject to the plaintiff proving that the defendant’s actions were not justifiable according to the law of Québec. 348

Although the Ontario Court of Appeal has arguably reached just results in each of its two most recent decisions in this area, it seems to have strayed from deciding these cases pursuant to the interpretive approach that appeared to be developing in Grimes. This is particularly true with Williams v. Osei-Twum, where the court was content to simply find itself bound by McLean based on the residence of the parties instead of discussing the scope of the rules and policies in question, and the extent to which the parties had brought themselves within their purview. It is to be hoped that the Supreme Court of Canada will take the opportunity to address these cases by adopting the method that has been suggested throughout this work.

A decision of the British Columbia Court of Appeal based on facts somewhat similar to those in Lucas v. Gagnon is also pending appeal before the Supreme Court. As a result, we shall soon have occasion to determine whether the Supreme Court will extend the concerns for federalism that it has expressed in the area of the enforcement of judgments to cases involving "choice of law" issues. I propose to discuss how the court might approach this task based on the facts of the British Columbia case.

In Tolofson v. Jensen, 349 a British Columbia plaintiff was injured in 1979 while he was a minor passenger in his father’s car. Mr. Tolofson, as such, became a co-defendant with the driver of the second car involved in the automobile accident which occurred in Saskatchewan. The second defendant is a Saskatchewan resident. At the time of the occurrence, Saskatchewan had a one year limitation period which

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348 Ibid. at 744.

began to run at the time of the event regardless of whether plaintiffs were minors or not. It also had in place a statutory provision requiring proof of wilful or wanton misconduct to establish liability of drivers of gratuitous passengers. The action was commenced in British Columbia in 1987. The British Columbia Court of Appeal was asked to determine whether a declaration that the laws of Saskatchewan are the laws applicable in the action in respect of the limitation period and the standard of care owed to a gratuitous passenger should be made.

This case raises an interesting blend of the fact situations we have discussed above. Let us examine the case as against each of the defendants separately. In the action between the British Columbia plaintiff and the British Columbia defendant Tolofson, it is difficult to see why Saskatchewan standards of negligence respecting gratuitous passengers or time limits would be found applicable simply because the accident happened to occur in Saskatchewan. As noted in Tolofson, "[i]n its essence, the trip, in a car licensed in British Columbia, began in British Columbia and it was intended that it end in British Columbia." With respect to the defendant Jensen, however, the opposite conclusion might be reached. Not only would it be relevant that the accident occurred in Saskatchewan where he had reason to believe that his activity would be governed by Saskatchewan law; it also seems that the Saskatchewan time limit could reasonably have been intended to protect Saskatchewan drivers from exposure to legal actions for unlimited periods of time.

This situation illustrates the problems that arise in choosing one jurisdiction's set of laws to determine the totality of the case before the court as opposed to examining the respective rules as they pertain to the particular parties. On an interpretive approach, it might be argued that the defendant Jensen should have the benefit of the Saskatchewan limitation period that was in place when the accident occurred. With respect to the defendant Tolofson, however, Saskatchewan has no interest in applying its policies to British Columbia residents. Therefore, Tolofson

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80 Ibid at 144.
should be subjected to the laws of British Columbia.

The Court of Appeal reviewed the approach taken by the Ontario Court of Appeal in *Grimes*, but concluded that respecting the facts as between the plaintiff and the defendant Tolofson, it was bound by *McLean*. Presumably, the choice of British Columbia as the governing jurisdiction includes the defendant Jensen. The fact that he is a resident of Saskatchewan did not alter this decision. Once more, we see the possible injustice that may arise from an analysis that seeks an entire governing jurisdiction as opposed to one that examines the applicability of individual rules of law.

The British Columbia Court of Appeal raises another interesting point when it justifies its conclusion by stating that "[t]he one year limitation period as it applied to infants in Saskatchewan at the time of the accident has since been repealed, as has the requirement of proving wilful and wanton misconduct on the part of the driver of the vehicle in which the gratuitous passenger was riding."\(^{351}\) While this may well be indicative of Saskatchewan's lessened interest in having its statutory provisions apply, the issue of fairness to the defendant who is not able to rely on the limitation period as he could have expected it to apply at the time of his actions is not as clear.

In this and the other cases discussed, the Supreme Court of Canada will have the opportunity to revamp the law in this area in a major way. First, the facts present an ideal manner for the court to illustrate that it is the rules in conflict which must be considered in light of the activities of all parties, and not an entire jurisdiction which must be selected to govern all aspects of the action. In other words, the Court has the ideal opportunity to accept an interpretive approach. Secondly, it will be open to the court to introduce the concept of assessing provincial interests in the resolution of these geographically complex matters. The role of the Supreme Court generally in deciding cases of geographic complexity is discussed in more detail below. First, however, choice of law in contracts will be discussed.

\(^{351}\) *Ibid.* at 145.
III. Choice of law in Contract

A. Proper Law of the Contract

The leading case in Canada respecting the application of a "proper law" approach to choice of law in contract is Imperial Life Assurance Co. of Canada v. Colmenares.352 There is no one particular Canadian case, however which illustrates a unique or particularly clear application of the approach, and as such, I have chosen a British example to illustrate that the problems of the approach are similar to, though perhaps less obvious than, those generated by the jurisdiction selecting process for torts cases.

The proper law has been defined by Dicey and Morris as:353

the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.

One of the best examples of the English courts' application of the proper law approach is Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.354 In this case, the plaintiff, a Liberian corporation carrying on business in Dubai, owned a small cargo vessel which was insured against marine war and risks. The vessel was detained by Saudi Arabian authorities because of an alleged oil smuggling attempt. The plaintiff brought an action against its Kuwaiti insurer respecting the constructive total loss of its vessel. The issue before the House of Lords was whether England or Kuwaiti law constituted the proper law of the contract. The court first determined that the parties had not included an express choice of law provision in their contract. The next step was to determine whether the circumstances surrounding the contract implied a choice by the parties.


The court considered it significant that at the time the insurance policy was issued in Kuwait, that country had no indigenous law of marine insurance, and the form of the policy was identical to a Lloyd's policy. Lord Diplock found that this form and language indicated an implied choice of English law by the parties. Lord Wilberforce, on the other hand, was of the opinion that the parties had neither expressly nor impliedly chosen a governing law, and that the English form was merely an incorporation by reference. As such, he went on to the third step in the "proper law" method, the determination of the jurisdiction with the most 'real and substantial' connection to the action. The factors he considered overlapped somewhat with those considered by Lord Diplock: (i) use of Lloyds form expressed in English and requiring interpretation by English rules of practice, (ii) nationality of the parties, (iii) use of English sterling as money of account, (iv) issuing of policy in Kuwait, and (v) provision of claims to be paid in Kuwait. The last two factors were given little weight, and Lord Wilberforce concluded that England was the place with the most real and substantial connection to the contract.

The perceived importance of enhancing party autonomy through the enforcement of choice of law clauses is evident in geographically complex contracts cases. The parties' ability to independently choose a governing law is subject only to the restriction that the choice must be *bona fide* and legal,355 and in some cases by statutory mandates.356 I shall return to the latter issue below.


356 This is particularly so respecting Admiralty matters. Here, where, for example, the *Carriage of Goods by Water Act* provides that it will govern matters respecting goods leaving any port in Canada and being transported to any other port, a contrary choice of jurisdiction and law in a bill of lading will not automatically be enforced. Instead, courts tend to adopt the approach of interpreting the intended scope of the *Act* and the effect of the foreign law, in deciding whether or
The problem with the choice of law rule for contracts is, quite simply, that the "proper law" rule must be applied without regard to the specific issues that are being litigated by the parties as a result of one of the parties allegedly breaching the contract between them. Consequently, the decision respecting which law should be applied does not call for the interpretation of the scope of the competing rules, nor does it allow the parties to make reasoned legal arguments.

Parties are certainly able, in the absence of an express provision in the contract, to argue that specific aspects of the transaction, such as the place of contracting, residence of the parties, or place of performance, are more closely related to the contract than others. These arguments, however, do not address the core issue at stake, namely how the risk of loss will be allocated as between the parties. This exercise also runs the risk of becoming a contest to see which party can conjure up the greatest number of contacts, many of which bear virtually no significance to the contract issues. The effect of the rules governing the proper law has been characterized as follows:

The choice, whether it is that of the parties or the court, suggests that the parties are choosing in some abstract sense between the entire laws of the possibly applicable jurisdictions, that the chosen law will apply whether or not it makes any sense for the chosen law to be applied to the facts of the case.

An interesting point about *Amin Rasheed* is related to the assumption that the parties choose the entire laws of an applicable jurisdiction. It was argued by one of the parties in this case that the contract was an international one which did not necessarily require governance by one particular jurisdiction, particularly since it was not to give effect to the parties chosen law. See for example, *Agro Co. v. The Regal Scout*, [1984] 2 F.C. 851, 148 D.L.R. (3d) 412 (T.D.).

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made on a Lloyd's form which is used internationally. Instead, it was suggested that "more importance should be attached to what is to be done under the contract - its substance - than to consideration of the form and formalities of the contract."\footnote{Amin Rasheed, supra, note 354 at 57, quoting Coast Lines Ltd v. Hudic & Veder Chartering N.V., [1972] 2 Q.B. 34, [1972] 1 All E.R. 451 (C.A.) at 46G Q.B.}

This suggestion is not foreign to the historical resolution of maritime cases, which under original Admiralty jurisdiction were governed in accordance with the "law of nations."\footnote{See Vaughan Black, supra, note 53.} The court in Amin Rasheed, however, flatly rejected the logic of simply determining the rules which seemed to best deal with the case at hand given all of the circumstances. Lord Diplock stated:

... contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a court of justice for failure to perform those obligations; and this must be so however widespread geographically the use of a contract employing a particular form of words to express the obligations assumed by the parties may be.\footnote{Amin Rasheed, supra, note 354 at 57.}

By adhering to the positivist notion embodied in that statement, the proper resolution of the actual issues between the parties is obscured by the preoccupation with choosing a governing jurisdiction instead of dispositive rules.

Another problem arising from with the common law approach to choice of law in contracts is well illustrated by a Canadian case. In Vita Food,\footnote{Supra, note 106.} a bill of lading was issued in Newfoundland for carriage of herring by a Nova Scotia ship to New York. By mistake, the bill of lading used was an old one which did not incorporate the Hague Rules that had been adopted by the Newfoundland Carriage of Goods by
Instead, it provided that the contract would be governed by English law. Sections 1 and 3 of the Newfoundland Act provided as follows:

1. Subject to the provisions of this Act, the Rules shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in this Dominion to any other port whether in or outside this Dominion...

3. Every bill of lading, or similar document of title, issued in this Dominion which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the said Rules as expressed in this Act.

The argument was that the failure of the bill of lading to comply with s. 3 of the Act was illegal and as such the contract was void. Contrary to this assertion, the Privy Council found that s. 3 of the Act was "directory" as opposed to "mandatory," and as such, the failure to insert the clause dictated by that section did not invalidate the contract. Thus, the intention of the parties, as expressed in the bill of lading, should be given force "provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy." In this case, it was quite reasonable in the court's view, that the parties might desire the familiar principles of English commercial law to be made applicable.

The interpretation of the legislation in question as "permissive" instead of "mandatory" is questionable, as is the weight accorded the "express choice" of the parties. In the face of a statutory dictate, which provided that non-compliance would invalidate the contract, the Court upheld a provision in the contract which inadvertently referred to English law. The first problem with the decision is that it infringed upon the authority of the Newfoundland legislature, and interfered with the

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361 S.N. 1932, c. 18.
364 Vita Food, supra, note 106 at 8.
365 Ibid.
application of an international standard. This view is articulated in the editorial note following the case:

Until this revolutionary judgment of the Privy Council, it had been assumed that the effect of the various Carriage of Goods by Sea Acts ... was that the provisions contained in the Schedules of the Acts were compulsorily incorporated into every bill of lading. It is now decided that it is optional with the parties to incorporate such provisions, thus restoring the law to the state which the statutes were intended to reform.366 (emphasis added)

Ignoring for a moment the presence of the Newfoundland Act, had the choice of English law in Vita Food been the result of negotiation between the parties, it should have been given serious consideration, as should any other term negotiated between the parties. Given the existence of the Carriage of Goods by Sea Act, however, the choice should not override the application of a provision in that Act which is clearly applicable to the parties in the particular circumstances. The manner in which a choice of law clause should be interpreted has, in my view, been properly described in the following passage:

"[A choice of law clause] has no more (or no less) effect than any other clause that the parties may include. It neither justifies nor avoids the application of any rule, statutory or common law, that is properly applicable to their relations."367

In summary, the principles applicable to the resolution of a contract dispute containing geographically complex factors are no different from those that have been described for torts cases. The properly applicable rule is one that resolves the dispute in a manner consistent with what the court determines to be the reasonable expectations of the parties given their particular relationship, and that coincides as far as determinable with the policies of the jurisdictions whose rules are in conflict.

366 Vita Food, ibid., Headnote. Other early concerns that the Privy Council had not fully appreciated the intent behind the Hague Rules were expressed in case comments by H.C. Gutteridge, (1939) 55 L.Q.R. 323 and O. Kahn Freund, (1939) 3 Modern L. Q. 61.

367 Swan, supra, note 141 at 218.
There are hints of this approach in a handful of Supreme Court of Canada cases and a recent Ontario Court of Appeal decision. In the following sections, these cases will be reviewed, with the purpose of proving that courts do have the tools necessary to resolve geographically complex cases in a principled manner and that they must simply recognize the desirability of utilizing the tools in a consistent, coherent fashion.

IV. Hints of An Interpretive Approach

A. Interprovincial Cooperatives

In *Interprovincial Co-operatives v. the Queen*[^368] ("IPCO"), the defendants were operators of chlor-alkali plants in Ontario and Saskatchewan, each of which had obtained permits in its respective province to discharge mercury into watercourses that drained into Manitoba. Persons engaged in the commercial fishing industry in Manitoba suffered as a result of the mercury entering Manitoba waters. They received compensation from the province pursuant to section 2 of the *Fishermen’s Assistance and Polluter’s Liability Act*.[^369] The province became an assignee of their rights of action pursuant to s. 4(1) of the Act, which imposed liability for financial loss occasioned when a contaminant was discharged into any waters that subsequently connected with Manitoba waters. Section 4(2) of the Act provided as follows:

For the purposes of [determining liability] it is not a lawful excuse for the defendant to show that the discharge of the contaminant was permitted by the appropriate regulatory authority having jurisdiction at the place where the discharge occurred, if that regulatory authority did not also have jurisdiction at the place where the contaminant caused damage to the fishery.

The Province of Manitoba initiated actions against the out-of-province defendants for damages pursuant to the Manitoba legislation, which had the effect

[^368]: Supra, note 118.
[^369]: S.M. 1970, c. 32.
of prohibiting traditional common law defences.\textsuperscript{370} The defendants argued that the sections of the Act relied on by the plaintiff were \textit{ultra vires} due to their extraterritorial effect, and asked that the portions of the statement of claim relying on those sections be struck.

This case raises clearly the issue of provincial interests in geographically complex cases. I shall begin with a suggested application of the interpretive approach to the resolution of the matter. First, let us look at the facts and the expectations which may have arisen from them. The defendants were licensed to discharge mercury into their respective provincial waterways. It might be argued that they expected this licensing to protect them from any suit arising in Ontario or Saskatchewan respectively as a result of such discharge. Is it reasonable, however, in the expanded world of tort liability, to expect that these statutes should have protected them from all liability arising anywhere? Arguably it is not. A further argument from the defendants’ point of view is that legislatures have an interest in promoting industry, and to do so, they may licence the types of activities described above. However, to construe the legislation as protecting the defendants anywhere that their activities lead to injuries may be to give it unacceptable extraterritorial effect.\textsuperscript{371} On this interpretation, the "pith and substance" of the legislation is to protect provincial residents from liability anywhere. This is not consonant with the \textit{Ladore} reasoning.

The Manitoba legislation, on the other hand, is aimed at compensating Manitoba victims for injuries incurred in Manitoba as a result of activities which quite foreseeably caused the injuries. This legislation is, I think, quite clearly concerned in "pith and substance" with a subject matter that is within the competence of the Manitoba legislature. Its impact on out-of-province parties might be seen as an

\textsuperscript{370} At common law, polluters were able to avoid liability by showing that their acts were licensed by the province in which they acted.

\textsuperscript{371} Hogg, \textit{supra}, note 39 at 324.
acceptable incidental effect.

Assuming for a moment that the application of Ontario and Saskatchewan law is not ultra vires, the "interpretive" court, Manitoba, having determined that the facts of the case reasonably connect the parties with each of the competing rules, should ask whether the application of its own law would impair the predominant interest of a sister province. In this case, there seems to be little reason to say that the interests of the other relevant provinces are paramount to those of Manitoba. As a result, Manitoba should be free to apply the Fishermen’s Assistance and Polluter's Liability Act. This was not the conclusion of the majority of the Supreme Court of Canada who decided in favour of the defendants. Their decision was not unanimous, however, and the rationale of the majority members varied.

Pigeon J. found that while Saskatchewan and Ontario could not licence polluting in a manner that would preclude a legal remedy for those injured in Manitoba as a result of such activities, neither could Manitoba legislate to regulate pollution in other provinces. He stated:

> It seems clear that a Province, as owner of inland fisheries in its territory, is entitled to legislate for the protection of its property. However, in respect of injury caused by acts performed outside its territory, I cannot accede to the view that this can be treated as a matter within its legislative authority when those acts are done in another Province any more than when they are accomplished in another country.

As a result, in Pigeon J.’s view, Manitoba plaintiffs could seek remedies only from the common law or under federal legislation.

Ritchie J. applied Phillips v. Eyre to find Manitoba law inapplicable. To do so, he was required to assume that the alleged tortious activity had occurred outside

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372 Martland and Beetz J.J. concurring.
373 IPCO, supra, note 118 at 248.
374 Ibid. at 359.
Manitoba. The propriety of this assumption is open to question. It could surely just as easily have been concluded by the court that the tort occurred in Manitoba where the damage occurred. Ritchie J. then found that the second branch of *Phillips v. Eyre* was not satisfied since the activity of the defendants was not "wrongful" in the jurisdiction in which it occurred, and held that it was not proper for Manitoba to apply its law to resolve the case.

Perhaps the most disturbing aspect of Ritchie J.'s decision, and its failure to assess the matter in terms of provincial interests, is that it was made in spite of the fact that the Attorney General of Ontario explicitly stated in its factum that Ontario did not oppose the application of Manitoba law. In the face of an express disclaimer of provincial interest, Ritchie J. applied the law of the disinterested province to defeat the plaintiff's claim.

In dissent, Laskin C.J. found that the Manitoba legislation was valid on the grounds that Manitoba, being the forum and place where injury was suffered, had a predominant interest in applying its own law. He found that what emerged from the lower court decisions was a "concern about the interaction of conflict of laws questions with the territorial limits of provincial legislative power." Noting that Manitoba's jurisdiction over the action had not been contested, Laskin C.J. approached the matter by weighing the interest of each province in having its laws applied. He concluded in Manitoba's favour, and went on to state:

If, as I would hold, Manitoba law is applicable to redress the injury suffered in that Province, how can there be constitutional infirmity in its imposition of liability merely because the damage arose outside Manitoba ... or because Manitoba refuses to recognize within Manitoba

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375 Hertz, *supra* note 149 at 64.
376 Judson and Spence J.J. concurring.
377 *IPCO, supra* note 118 at 332.
the lawfulness of the discharge of the pollutant outside Manitoba? Laskin C.J.'s decision is most closely associated with the reasoning that I have proposed throughout this work. The fact that it was offered in dissent leaves open the extent to which it might become the approach of the majority in a case before the Supreme Court today.380

B. Thomas Equipment

In R. v. Thomas Equipment,381 the defendant Thomas Equipment, a New Brunswick resident, was charged with an offence pursuant to Alberta Legislation. The facts leading up to the charge were that the defendant had sold farm implements to an Alberta agent who had exclusive licence to sell the products in a specific region of Alberta, pursuant to a contract executed by the parties. This contract stated that it was to be governed by the law of New Brunswick. Pursuant to a provision in the contract, the dealer terminated the agreement. He then demanded that Thomas Equipment repurchase the equipment. Thomas Equipment refused to do so, and was subsequently charged and convicted under s. 22(3) of the Farm Implement Act382 of Alberta which provided:

Where a notice to purchase is given to the vendor... the vendor shall, subject to this Act and the regulations, purchase from the dealer all the unused farm implements and attachments thereto, and all unused parts, obtained by that dealer from the vendor.

Failure to comply with this section led to the imposition of a fine not exceeding

379  Ibid. at 340.

380  In an address at Dalhousie Law School, Willis Reese, Reporter of the Second Restatement, offered the opinion that had IPCO involved parties from two states, and had the case been adjudicated by a U.S. court, the outcome would have been very different from that achieved by the Supreme Court of Canada. See Willis Reese, "Limitations on the Extraterritorial Application of Law" (1978) 4 Dalhousie L.J. 589 at 608.


The majority of the Supreme Court of Canada upheld the conviction. Martland J. found that the terms of the contract between the parties brought them, as dealer and manufacturer, within the provisions of the *Farm Implement Act*, the objective of which was to regulate business or trade in Alberta.\(^{383}\) When Thomas Equipment entered into the agreement and sold the farm equipment to the dealer for resale in Alberta, it "rendered itself subject to the provisions of the regulating statute."\(^{384}\) The contractual provision stating that New Brunswick law should govern contractual obligations did not affect the statutory obligations upon vendors of farm equipment who sell such equipment in Alberta.\(^{385}\)

Laskin C.J., in dissent, held that the making of the contract in New Brunswick and the choice of law provision in the contract led to the conclusion that New Brunswick law, which had no rule similar to the Alberta statute, should exculpate Thomas Equipment from liability. Not to reach this conclusion, in his opinion, gave the Alberta statute unacceptable extraterritorial effect as determined by the then-dominant statement of principle in *Royal Bank*.\(^{386}\)

The reasoning of the both the majority and the minority in this case seems quite consistent with an interpretive approach. On one hand, it is not unreasonable for the court to have decided that Alberta had an overriding interest in controlling trade in farm implements in that province, and that the defendant could clearly have foreseen that by establishing a relationship with Alberta, it might become subject to its rules. On the other hand, Laskin C.J. in dissent, may have found a more compelling national interest in promoting freedom of contract or geographic mobility.

\(^{383}\) *Thomas Equipment*, supra, note 381 at 491.

\(^{384}\) *Ibid.*


\(^{386}\) *Ibid.* at 483-484.
The important point to be made here is that the members of the court seemed able to resolve this issue of geographic complexity by use of their regular adjudicative processes of statutory interpretation and judicial review when they were not sidetracked by arcane conflicts language.

A recent decision of the Ontario Court of Appeal is worthy of mention as one embodying the approach espoused throughout this work. It is appropriately discussed in this section by virtue of the court's analysis of the competing provincial policies at stake. For the purposes of illumination of the approach adopted by the Court of Appeal, some aspects of the case are compared with *IPCO*, discussed above.387

C. *(Québec) Sa Majesté du Chef v. Ontario Securities Commission*388

The facts of *Québec v. OSC* relevant to this discussion are as follows. In 1981, SNA, a Québec Crown Corporation, purchased a controlling interest in a subsidiary of General Dynamics Corporation ("GD"). GD held the control block of Asbestos Corporation Limited ("ACL"), a public company whose shares are traded on the Toronto and Montreal stock exchanges and which in 1977 was the second largest asbestos producer in Canada. GD's subsidiary held the controlling interest in GD. Québec's purpose in this acquisition was to expand the province's manufacturing sectors and, in particular, to patriate a larger share of the processing of asbestos fibre mined in Québec. Under the 1981 agreement, GD was granted a "put" option which it exercised in 1986, requiring SNA to purchase the remainder of the GD subsidiary. The purchase, completed at a cost of approximately $170 million, gave the province of Québec 100% beneficial ownership of the control block of ACL. For the purposes of the *Ontario Securities Act*, the 1986 transaction constituted a take-over bid which obligated SNA to make a follow up bid to minority shareholders. No such follow up

387 Supra, pages 118 to 122.

388 (1993), 10 O.R. (3d) 577 (C.A.) [hereinafter *Québec v. OSC*].

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offer was made. As a result, a hearing was brought before the OSC. Among the issues stated in the notice of hearing were the following:\textsuperscript{389}

1. Whether it appears to the Commission that (SNA) has failed to comply with subsection 91(1) of the \textit{Securities Act} as such subsection read prior to the June 30, 1987 (hereinafter referred to as the "Follow-up Offer Provision");

2. Whether the Commission should apply under subsection 122(1) of the Act to a judge of the High Court for an order,
   a. directing SNA and/or Sa Majesté du Chef du Québec (the "Province of Québec") to comply with the Follow-up Offer Provision; and
   b. directing the directors and senior officers of SNA to comply with the follow up provision.

The issue before the Court of Appeal was whether the OSC had jurisdiction to adjudicate these matters.\textsuperscript{390} The province of Québec argued that the OSC was without jurisdiction because the application of Ontario law to the transaction would be unconstitutional by reason of its extraterritoriality, and because it was beyond the jurisdiction of the OSC on the true construction of the \textit{Securities Act} to seek to regulate the actions of the Quebec Government in relation to the transaction in issue.\textsuperscript{391} Two distinctions should be drawn between \textit{Québec v. OSC} and \textit{IPCO}. First, there is no issue of competing legislation, although there are certainly competing provincial policies involved. Secondly, the Québec Government did not argue the invalidity of the Ontario legislation in general, but rather its application to this particular transaction, given that the application of Ontario law would lead to

\textsuperscript{389} \textit{Ibid.} at 580-581.

\textsuperscript{390} On August 15, 1988, the OSC held that it had jurisdiction; that decision was upheld by the Divisional Court on January 8, 1991.

\textsuperscript{391} \textit{Supra}, note 388 at 584.
costs in excess of $100 million to the Québec Government. In Québec’s view, this extraterritorial effect "should not be tolerated in a federal state."²⁹² Herein lies the key to the similarity of issues before the courts in each case: which provincial policy should be promoted given the competing issues of sovereignty and cooperation within a federal country?

That the clash of provincial policies was at issue was recognized by McKinlay J.A. who delivered the judgment of the court.²⁹³ She characterized the objective of the Ontario statute as the regulation of the operation of capital markets in Ontario for the protection of all who use them,²⁹⁴ and that of the Province of Québec as the creation of an asbestos manufacturing industry in Québec to complement the asbestos mining industry in that province and to thereby create new employment in certain regions.²⁹⁵ She stated the dilemma as follows:

There can be no doubt that both objectives represent "compelling governmental interests". The question posed by the Appellant is, "Which is more compelling?" For Québec to comply with the provisions of the Ontario Act, the cost to it, we are told, would be approximately $100,000,000. But that $100,000,000 is saved at the expense of persons who have invested in shares trading on Ontario markets, trusting that all who use those markets will trade in accordance with the rules.²⁹⁶

In response to the difficulty presented by the differing policy objectives, McKinlay J. continued:

I see no way the courts can assist in advancing interprovincial harmony in a situation such as this, since there is no objective way of choosing which governmental interest is more compelling. However, I see no reason why residents of one province should suffer financial loss for the

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²⁹² Ibid. at 585.
²⁹³ The other members were La Courciere and Krever J.J.A.
²⁹⁴ Supra, note 388 at 590.
²⁹⁵ Ibid.
²⁹⁶ Ibid. at 590.
purpose of benefiting another province in advancing its legitimate interests.\footnote{Ibid. at 590-591.} In addition, McKinlay J. did not agree that Québec had a closer relation to the action than did Ontario. As a result, the Ontario Court of appeal upheld the propriety of the OSC jurisdiction over the matters in issue.

Had this case been heard by the Supreme Court of Canada,\footnote{Application for leave to appeal was dismissed without reasons: [1992] S.C.C.A. No. 580.} some of the questions we have entertained throughout this work would have been placed clearly before the court. Was the Ontario Court of Appeal correct in choosing to favour Ontario law when it was unable to conclude that Québec had a policy concern predominant to that of Ontario? On the other hand, was the policy embodied in the Ontario legislation more important than Québec's objectives, or \textit{vice versa}? These sorts of questions raise fundamental issues about the role of the Supreme Court of Canada, questions which the Court should not only keep in mind, but deal with openly when it has an opportunity to provide authoritative principles respecting geographically complex cases in the future. The remainder of this chapter is devoted to addressing some of the important but often neglected aspects of the Supreme Court of Canada's role.

V. \textbf{Role of the Supreme Court of Canada}

The manner in which the Supreme Court would decide a case of geographic complexity today may very well be indicative of the role that it sees for itself in promoting Canadian federalism. One of the key issues in this context is the extent to which the Supreme Court should be concerned with deciding cases with a view to promoting uniformity. Uniformity in choice of law matters means that any court entertaining a case involving geographic complexity should reach the same result.

The interpretive approach to choosing the applicable rule in a conflicts case
is not always consistent with the uniformity goal, since it recognizes that the courts of one province may well apply a rule of their own jurisdiction to resolve a dispute, while another province's courts, given the opportunity to adjudicate the dispute, could quite validly apply a rule of their jurisdiction.

Before delving into the debate about the desirability of uniformity, I wish to make note of one important difference in the competence of the Supreme Court of Canada and the provincial Courts of Appeal. While the latter courts, when faced with potentially applicable laws from another province, must generally rely on the construction of those laws as proven by the parties, the Supreme Court of Canada may take judicial notice of all provincial and federal laws, statutory and common law. In *Logan v. Lee*, the court stated:

> This court is bound ... to take judicial notice of the statutory or other laws prevailing in every province and territory in Canada, *suo motu*, even in cases where such statutes or laws may not have been proved in evidence in the courts below, and although it might happen that the views as to what the law might be, as entertained by the members of this court, might be in absolute contradiction of any evidence upon those points adduced in the courts below.

The significance of the principle stated above is that the Supreme Court of Canada may find that a particular Court of Appeal incorrectly construed its own law or that of another province. By extension, the court could also find that this Court of Appeal had erred in its assessment of the relative provincial interests in having their rules applied to the resolution of issues between the parties, in which case, the appeal should be allowed. By deciding cases in this manner, the court is able to avoid the need for conflicts language by simply interpreting the scope of the rules and policies in question as they apply to the parties to the action. A clear expression of the

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399 Castel, *supra*, note 37 at 139-141. Some provincial legislation provides for judicial notice or proof of the law of other provinces, territories or countries.

400 (1907), 39 S.C.R. 311.

factors considered by the Supreme Court in such interpretation could add predictability to future cases, and bring more consistency in subsequent provincial court interpretations of the scope of particular rules of law.

A more difficult question arises where a Court of Appeal whose decision is under scrutiny is found to have reached a reasonable conclusion both as to the scope and content of the relevant rules, and as to the extent of the policy interests of each relevant province. In this case, should the Supreme Court choose one policy as overriding and thereby promote uniformity of result, or should it dismiss the appeal, thereby accepting the diversity generated by federalism?

A. Uniformity or Diversity?

The issues involved in the Canadian debate respecting the obligation of the Supreme Court to promote uniformity are well set out in two early articles by distinguished scholars. John Willis was a strong advocate of uniformity. Albert Abel, on the other hand, firmly believed that judicial competence should fall somewhere along the lines of legislative competence as designated under the Constitution Act, 1867.

Willis admitted that the existing uniformity of common law and legislation in Canada was largely a result of heavy reliance by Canadian lawyers, legislators, and judges on English law, coupled with the existence of a common final court of appeal. With respect to the common law, he concluded that "the centralization is perfect and the result is perfect uniformity." With respect to legislation, Willis was less satisfied. He rued the fact that more subject matters did not fall within the purview

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402 Supra, note 159.
403 Supra, note 158.
404 Willis, supra, note 159 at 360.
of federal authority and that the Model Acts of the Uniform Law Conference had been met with only limited success.

While recognizing the difficulty arising from the inability of courts of one province to apply the laws of another unless those laws are pleaded and proved, Willis concluded that as between common law provinces, no real hardship resulted. Since the common law rules were almost uniform in those provinces, "the applicable 'foreign' law [would] but rarely differ from the law of the court which [was] trying the case." In summary, Willis assumed the desirability of uniformity while recognizing that it was not a constitutional dictate, and without explaining why it was desirable.

Abel too recognized that the Constitution Act, 1867 did not definitively state whether the Supreme Court should promote uniformity of provincial law. Rather, he stated, "it is wholly a matter of what is the appropriate policy for the Supreme Court to adopt... ." By electing not to change the judicially declared law of the provinces respecting matters falling within provincial legislative jurisdiction, Abel argued, the Supreme Court would be promoting federalism. His concluding paragraph summarizes the heart of his argument:

Federalism is union without uniformity. Matters of common concern and the law about them are for the common government. Matters of particular concern and the law about them are for the particular governments. Fundamentally ... those notions pervade the Canadian constitutional structure as for the law emanating from the legislatures. But, for one who accepts the federal principle as valid and vital, it is equally true whoever makes the law and whatever form it takes ... [F]ederalism which excludes its judicial aspect is perforce a hobbled

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405 Ibid. at 364.
406 Ibid. at 365.
407 Ibid. at 367.
408 Abel, supra, note 158 at 44.
federalism.  

Abel was arguing that the Supreme Court should exercise the same restraint respecting provincial decisions as mandated by the U.S. Supreme Court in *Erie Railroad Co. v. Tompkins* regarding state decisional doctrine. In *Erie*, the court held that it should defer to the law as enunciated by the highest court of the state whose law is applicable. In *Klaxton Co. v. Stentor Electric Manufacturing Co.*, the Supreme Court extended this principle to choice of law rules, finding that the Supreme Court, and federal courts sitting in diversity jurisdiction, must apply state conflict of laws rules to the issues at stake.

The applicability of the *Erie* doctrine to choice of law matters has been questioned. Two authors have stated that "[t]he reach of state laws ... should no more be left to the unilateral determination by individual states than is the determination of their physical boundaries." In Canada, assuming the Supreme Court was to enunciate an interpretive approach to geographically complex cases, its role in subsequent decisions could be similar, but not identical, to that adopted by the U.S. Supreme Court. Where the Court of Appeal below has made a rational decision based on a reasonable interpretation of the potentially applicable rules, the Supreme Court could exercise restraint and dismiss the appeal before it instead of considering itself obligated to find a "national value" at stake in the dispute. This would preserve the diversity that is natural to federalism. Where, on the other hand, the lower court has misinterpreted the law or seriously misconstrued the importance of one of the policies underlying the rules in question, the Court should correct the error. While

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410 304 U.S. 64, 58 S. Ct. 817 (1938).


412 Eugene Scoles and Peter Hay, *supra*, note 144 at 111-112.
this will not necessarily lead to complete uniformity of results, it will provide predictive rules by which parties may determine the factors that courts will consider in adjudicating future cases, and guidelines for provincial courts hearing such actions.

The method described in the above paragraph would probably leave intact the relative uniformity of common law existing in Canada. More importantly, however, it would accord a desirable respect to provinces who have expressed their autonomy through legislative enactments in particular subject matters, where the scope of such enactments encompasses the parties to a dispute before the court.

The proposed approach provides a proper blend of diversity and cooperation within Canada. As a result, it should, in my opinion, be adopted by the Supreme Canada. Having said this, it must be noted that in recent years, the Court has been concerned with the need for laws which promote national objectives, particularly respecting economic matters. This is most clearly seen in decisions respecting the proper division of federal-provincial powers, but the cases may be useful in speculating about the approach that the court might take in interprovincial cases. As such, it is useful to briefly review the reasoning employed in those decisions.

B. Recent Supreme Court Attitudes Respecting the National Economy

The Supreme Court has recently turned its attention to what it perceives as the needs of modern trade and international relations in a number of recent cases. In General Motors v. City National Leasing, for example, the Court upheld expanded federal powers in relation to intraprovincial aspects of competition legislation. The challenged provision of the Competition Act was one which established a private right to pursue a civil remedy for violations of the Act. In upholding the provision as valid under the general trade and commerce power of s. 91(2), Dickson C.J. stated that "[c]ompetition cannot be successfully regulated by federal legislation which is

restricted to interprovincial trade. As such, the desired efficacy of competition law justified the incidental intrusion on provincial jurisdiction over property and civil rights.

In *Alberta Government Telephones v. CRTC*, the Supreme Court held that the AGT was within federal jurisdiction pursuant to s. 92(10) of the *Constitution Act*. This decision was based on the finding that AGT's telephone systems outside Alberta created an interprovincial undertaking and that it was essential that jurisdiction over the different aspects of telecommunications not be divided.

Finally, in *R. v. Crown Zellerbach*, the Supreme Court upheld legislation relating to the regulation of marine pollution which was in part consistent with the implementation of an international treaty to which Canada was a party. Although the legislation did not expressly state that part of its purpose was the implementation of the treaty, the Court found the treaty to be important, and in upholding the legislation under the peace, order and good government power, found the "international character and implications" of the legislation to be of integral importance.

In addition to its manifestation in the federal/provincial struggles described above, the court's concern for a "national" approach respecting the relationship among sister provinces is also clearly evident in *Morguard*. The fact that La Forest J. was concerned with developing a rule for the enforcement of judgments which would promote the efficient functioning of the national economy was evident in his comment respecting the necessity for Canada to discard legal rules which "fly

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418 *Supra*, note 41. *Morguard* is discussed in some detail in chapter three, *supra*.
in the face of the obvious intention of the Constitution to create a single country, one of the central features [of which] was the creation of a common market.\footnote{Ibid. at 271.} He also noted that "[b]oth order and justice militate in favour of the security of transactions,"\footnote{Ibid. at 273.} and that modern conflicts rules are "grounded in the need in modern times to facilitate the flow of wealth, skills, and people across state lines in a fair and orderly manner."\footnote{Ibid. at 269.}

C. Predictions

In light of the above cases, certain predictions may be made respecting the approach that the Supreme Court will be inclined to take when faced with competing valid provincial policies. It seems arguable that the court would see the uniformity role as a strong one, and as such would feel compelled to choose one policy over another, as the expression of a predominant "national value". If this is the case, the interpretation of geographically complex cases will no doubt be subject to much more controversy than would be the case with the interpretive approach advocated throughout this work, since one province will have to accept the fact that its policies are subordinate to those reflected in a sister province enactment. As such, its courts will be required to apply the latter province's law in situations where contrary policies of significant interest to the former province exist. This seems to be a strange result in a federal state designed to protect regional diversity,\footnote{Even Hogg, a proponent of uniformity, admits that it is "undoubtedly at variance with an ideal model of federalism." Supra, note 39 at 210.} and it is to be hoped that the court will recognize this problem.
VI. Conclusions

The Supreme Court of Canada holds the key to integrating federalism concerns with cases of geographic complexity. We have seen in this chapter and throughout this work that this has happened to a great degree with respect to enforcement of sister province judgments, to some degree with respect to jurisdiction, and to little or no extent with respect to choice of law issues. The latter problem does not stem from any deficit of tools available to the Court to develop a new integrated and principled approach. It depends simply on the court stepping back from the traditional rules, recognizing their inadequacy in the Canadian context, and adopting a more appropriate method of resolving cases of geographic complexity. The fact that this was done in Morguard leads to some optimism that it is also possible with other issues that arise in such cases. The cases pending before the top court that have been discussed in this work provide a clear opportunity for the court to do so. In addition to articulating a new approach to guide provincial courts, the Supreme Court should seize the opportunity to define for itself a new role of judicial restraint where these courts have made principled decisions.
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