

COMPANY LAW—DIVIDENDS—VALIDITY OF DIRECTORS' POWER  
TO ALLOCATE DIVIDENDS TO ONE CLASS OF SHAREHOLDER—  
DIVIDENDS AS INCOME OF THE RECIPIENT SHAREHOLDER—  
INCOME TAX, S.C. 1970-71-72, c. 63, s. 56(2): *The Queen v. McClurg*.

Brian R. Cheffins\*

*Introduction*

The Supreme Court of Canada has dealt with few corporate law issues in recent years. *The Queen v. McClurg*<sup>1</sup> is a departure from this trend. The case is particularly noteworthy because it reveals distinct philosophical differences on the Supreme Court. The majority and minority judgments are each consistent with a distinct approach to corporate law. As will be seen, business planners should be encouraged that the approach adopted by the majority prevailed.

To place the judgments in *McClurg* in proper context, a brief review of corporate law theory is necessary. By the 1960s most commentators agreed that the traditional legal model, under which shareholders, as owners, delegate managerial authority to the directors, did not describe how most corporations work.<sup>2</sup> The consensus instead was that corporations are controlled by managerial personnel. It was felt that managers are able to exercise that control because they can determine who is selected to the board and because shareholders lack the means and the inclination to participate actively in corporate affairs.

The primary lesson drawn from this characterisation of intracorporate relations was that the legal system should make those in control more accountable to shareholders. Many argued that disclosure requirements should be enhanced to provide investors with more information. It was

---

\* Brian R. Cheffins, of the Faculty of Law, University of British Columbia, Vancouver, British Columbia.

<sup>1</sup> [1990] 3 S.C.R. 1020, (1990), 76 D.L.R. (4th) 217. On the Supreme Court's marginal role in commercial/corporate disputes, see R.J. Daniels, *Should Provinces Compete? The Case for a Competitive Corporate Law Market* (1991), 36 McGill L.J. 130, at p. 187.

<sup>2</sup> G.W. Dent Jr., *Toward Unifying Ownership and Control in the Public Corporation*, [1989] Wisc. L. Rev. 881, at pp. 883-884; W.W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History* (1989), 41 Stan. L. Rev. 1471, at pp. 1474-1476. This view finds its origins in work done by A. Berle and G. Means, *The Modern Corporation and Private Property* (1932).

also suggested that managerial dominance of shareholder voting needed to be curbed and that shareholder remedies should be enhanced.<sup>3</sup>

For the past ten years or so law and economics analysts have been articulating a very different view of intracorporate relations.<sup>4</sup> They say that a corporation can best be understood as a legal fiction which encompasses a nexus of implicit and explicit bargains formed between managers, shareholders, creditors, employees and others.<sup>5</sup> These commentators argue that the bargain between those controlling corporations and shareholders is generally not a one-sided or exploitative one. They reason that given the success of corporate shares as an investment vehicle, there must be a variety of factors which induce managers to maximise corporate profits and thus act in shareholders' interests. For example, the prospect of greater remuneration and an enhanced business reputation appears to motivate those operating corporations to do so efficiently. In public corporations this tendency is reinforced by the fear of a takeover. Internal monitoring and express contracting, primarily through shareholders' agreements, do the same in close corporations.<sup>6</sup>

In addition to analysing corporations differently from those who emphasize the need for managerial accountability, economic analysts describe the law's role in more deregulatory terms. They suggest that instead of providing shareholders with special protection, the legal system's appropriate function is to improve the bargaining process between corporate participants.<sup>7</sup> Corporate law can do this by playing a facilitative, enabling role. Under this approach, legal rules act like default terms in a standard form contract. Corporate participants who adopt the standard form should have negligible bargaining costs, while those who find the default terms do not meet their needs should be able to contract out with minimal difficulty.<sup>8</sup>

<sup>3</sup> For a Canadian example of such reasoning, see F. Iacobucci *et al.*, *Canadian Business Corporations: An Analysis of Recent Legislative Developments* (1977), pp. 134-145. See generally Dent, *loc. cit.*, footnote 2, at pp. 892-903; H.G. Manne, *Intellectual Styles and the Evolution of American Corporation Law* in G. Radnitsky and P. Bernholtz (eds.), *Economic Imperialism: The Economic Approach Applied Outside the Field of Economics* (1987), pp. 225-228.

<sup>4</sup> Bratton, *loc. cit.*, footnote 2, at p. 1476.

<sup>5</sup> For an overview of the economic approach to corporations, see F.H. Easterbrook and D.R. Fischel, *The Corporate Contract* (1989), 89 Col. L. Rev. 1416; H.N. Butler, *The Contractual Theory of the Corporation* (1989), 11 Geo. Mason U.L.R. 99.

<sup>6</sup> See H.N. Butler and L.E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians* (1990), 65 Wash. L. Rev. 1, at pp. 18-28; F.H. Easterbrook and D.R. Fischel, *Close Corporations and Agency Costs* (1986), 38 Stan. L. Rev. 271, at pp. 274-275, 277-279.

<sup>7</sup> J.A.C. Hetherington, *Redefining the Task of Corporation Law* (1985), 19 U.S.F.L.R. 229, at pp. 250-259.

<sup>8</sup> B.R. Cheffins, *An Economic Analysis of the Oppression Remedy: Working Towards a More Coherent Picture of Corporate Law* (1990), 40 U.T.L.J. 775, at pp. 785-787.

Commentators who argue that those in control of corporations are not sufficiently accountable to shareholders have responded to the challenge posed by economics, which in turn has led to a flurry of articles in law journals.<sup>9</sup> The debate is potentially significant for practitioners. For example, shareholder protection concerns helped to foster securities regulation in North America and influenced the corporate law reforms which took place in Canada in the 1970s and 1980s.<sup>10</sup> On the other hand, economic reasoning appears to underlie some of the recommendations made by a recent British Columbia discussion paper on company law.<sup>11</sup>

From a corporate planning perspective it would be advantageous if economic analysis became more influential. If corporate law is treated as a series of flexible, enabling rules, practitioners will have a broad discretion to develop arrangements which suit their clients' needs. This should help commercial lawyers to perform what seems to be their primary economic function, which is reducing transaction costs so that clients can reach agreements which maximize their joint wealth.<sup>12</sup>

### *The Queen v. McClurg*

The facts in *McClurg* arose before the current debate on the role of corporate law began in earnest. In 1979 Jim McClurg and Verlye Ellis formed Northland Trucks (1978) Ltd. under the Saskatchewan Business Corporation Act<sup>13</sup> to purchase and operate a truck dealership. Mr. McClurg and Mr. Ellis each held an equal number of voting Class A common shares. Their wives each held an equal number of Class B common shares, which were non-voting and which were authorised to participate in dividends upon the unanimous consent of Northland's directors. The corporation's articles of incorporation provided that each class of shares carried "the

---

<sup>9</sup> A series of articles in vol. 89, no. 7 of the Columbia Law Review illustrate the debate. The articles are summarised by L.A. Bebchuk, *The Debate on Contractual Freedom in Corporate Law* (1989), 89 Col. L. Rev. 1395. The debate has generally taken place in U.S. journals, but this is beginning to change. See J.L. Howard, *Fiduciary Relations in Corporate Law* (1991), 19 C.B.L.J. 1, and B.R. Cheffins, *Law, Economics and Morality: Contracting Out of Corporate Law Fiduciary Duties* (1991), 19 C.B.L.J. 28.

<sup>10</sup> On securities regulation, see R. Hessen, *The Modern Corporation and Private Property: A Reappraisal* (1983), 26 J.L. & Econ. 273, at pp. 279-281; W.M.H. Grover and J.C. Baillie, *Disclosure Requirements* in P. Anisman *et al.*, *Proposals for a Securities Market Law for Canada*, v. 3 (1979), pp. 371-393. On Canadian corporate law reform, see R.W. Dickerson, *Proposals for a New Business Corporations Act for Canada*, v. 1 (1971), pp. 3, 114-115, 158-165; B. Welling, *Corporate Law in Canada: The Governing Principles* (1984), pp. 495-504, 528-532.

<sup>11</sup> Government of British Columbia, Ministry of Finance and Corporate Relations, *Company Act Discussion Paper* (1991), pp. 9-12.

<sup>12</sup> R.J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing* (1984), 94 Yale L.J. 239, at pp. 253-256.

<sup>13</sup> R.S.S. 1978, c. B-10.

distinction and right to receive dividends exclusive of other classes in the said corporation".

In 1978, 1979 and 1980, Northland's directors, pursuant to the discretionary dividend clause attached to the Class B common shares, declared and distributed a dividend of \$100 on each Class B common share. Consequently Wilma McClurg and Mr. Ellis' wife received \$10,000 per year in dividends. During the same time, Mr. McClurg and Mr. Ellis received no dividends. Mr. McLurg, however, received about \$156,000 in salary, bonuses and bonus entitlements.

In 1982 the Minister of National Revenue decided that Northland's dividend policy had been used to split improperly Jim McClurg's income between himself and his wife.<sup>14</sup> Consequently, Revenue Canada reassessed his income for the 1978, 1979 and 1980 tax years, declaring that 80% of the dividends received by Wilma McClurg should be attributed to her husband's income. The reassessment was based on section 56(2) of the Income Tax Act,<sup>15</sup> which states that if a taxpayer directs a payment to another person, the payment will be treated as part of a taxpayer's income if the payment was for the taxpayer's benefit.

The Tax Court upheld the Minister's reassessment.<sup>16</sup> The Federal Court Trial Division reversed and ruled in favour of the taxpayer.<sup>17</sup> The Federal Court of Appeal upheld the Trial Division's decision.<sup>18</sup>

The Minister of National Revenue appealed to the Supreme Court of Canada. He attacked Northland's dividend policy on two grounds. First, he said that giving dividends exclusively to the Class B common shares improperly violated the common law presumption that shares are to be treated equally.<sup>19</sup> Second, he said that Northland's discretionary dividend clauses could not be used to uphold Northland's actions because the clauses were inconsistent with the Saskatchewan Business Corporations Act.

The Minister acknowledged that section 24(4)(a) of the Saskatchewan Act permits corporations to attach, in their articles of incorporation, different rights to different classes of shares. He argued, however, that discretionary dividend clauses do not attach rights to shares because the receipt of dividends depends on director discretion rather than specific terms set out in the articles of incorporation.

<sup>14</sup> On what Revenue Canada's view was at that time towards dividend payments, see V. Krishna, *Designing Share Capital Structures for Income Splitting* (1984), 1 Cdn. Current Tax C51, at p. C52.

<sup>15</sup> S.C. 1970-71-72.

<sup>16</sup> (1983), 84 DTC 1379.

<sup>17</sup> (1986), 86 DTC 6128.

<sup>18</sup> (1987), 88 DTC 6047.

<sup>19</sup> On the presumption, see *Birch v. Cropper* (1889), 14 App. Cas. 525 (H.L.).

Dickson C.J.C., writing for the majority (Sopinka, Gonthier and Cory JJ. concurring), dismissed the Minister's appeal. In so doing, he dealt at some length with the Ministry of National Revenue's argument about Northland's discretionary dividend clauses.

To start, Dickson C.J.C. was clearly unsympathetic to the Minister's attempt to intervene in corporate law matters. He said that:<sup>20</sup>

... it would be paternalistic in the extreme for this Court to invalidate the clause at the behest of the appellant Minister of National Revenue.

Dickson C.J.C. conceded that the situation might have been different if an aggrieved shareholder had applied or if the discretionary dividend clauses had been restricted by statute. No Northland's shareholder had complained, however, and the Chief Justice ruled that the Saskatchewan Business Corporations Act posed no obstacle.

In construing the Saskatchewan Act, Dickson C.J.C. found it to be significant that the Act prohibits the declaration of dividends in some circumstances but says nothing about discretionary dividend clauses.<sup>21</sup> He also placed substantial weight upon section 24(4)(a), saying that it authorises corporations to use share classes to create different rights for shares.<sup>22</sup> He held that Northland's articles of incorporation had created such rights by attaching the discretionary dividend provisions to each class of shares.

In reaching this result the Chief Justice rejected the Minister's argument that section 24(4)(a) requires class rights to be precise and specific. He held instead that the articles could give the board broad general authority to allocate dividends between share classes, and that discretionary dividend clauses were an appropriate way of doing this.<sup>23</sup>

Dickson C.J.C. also ruled that there were no common law obstacles to Northland's share structure. He noted that there was a presumption that shares would be treated equally. He said, however, that the discretionary dividend clauses gave each share class sufficiently differentiated rights to displace the presumption.<sup>24</sup>

The reasoning which underlay the Chief Justice's analysis of Northland's dividend policy strongly resembled that used by law and economics

---

<sup>20</sup> *Supra*, footnote 1, at pp. 1048 (S.C.R.), 234 (D.L.R.).

<sup>21</sup> See *ibid.*, at pp. 1039-1040 (S.C.R.), 227-228 (D.L.R.). On the restrictions in the Saskatchewan Act, see *supra*, footnote 4, s. 40.

<sup>22</sup> In so doing, Dickson C.J.C. suggested that dividing shares into classes was the only way that Saskatchewan corporations could create different rights for shares; *ibid.*, at pp. 1041 (S.C.R.), 229 (D.L.R.). This is consistent with the Alberta Court of Queen's Bench's interpretation of s. 24(4) of the Canada Business Corporation Act, R.S.C. 1985, c. C-44, in *Jacobsen v. United Canso Oil & Gas Ltd.* (1980), 113 D.L.R. (3d) 427, [1980] 6 W.W.R. 38.

<sup>23</sup> *Supra*, footnote 1, at pp. 1044-1047 (S.C.R.), 231-233 (D.L.R.).

<sup>24</sup> *Ibid.*, at pp. 1043-1045 (S.C.R.), 230-231 (D.L.R.).

commentators.<sup>25</sup> For example, he said that Northland's dividend clauses were "a valid exercise of contractual rights between the corporation and its shareholders".<sup>26</sup> He seemed supportive of a limited role for the legal system, saying again that it would be paternalistic in the extreme for courts to strike down clauses like the ones Northland used. He suggested that corporate legislation should attempt to help corporate participants structure their relationship in a mutually beneficial manner. Hence, he characterised the Saskatchewan Business Corporations Act as being,<sup>27</sup>

... facilitative—that is, it allows parties, within certain explicit restrictions, to structure bodies corporate as they wish.

The Chief Justice recognised that allowing corporate participants freedom to plan their affairs could lead to some abuses. He said, however, that any such problems could be dealt with by applications under the statutory oppression remedy.<sup>28</sup>

In a strong dissent, La Forest J. (Wilson and L'Heureux-Dubé JJ. concurring) held that Northland's discretionary dividend clauses did not allow the board to allocate the corporation's dividends solely to the Class B common shares. La Forest J. relied on three basic arguments in coming to this conclusion. He said, first, that discretionary dividend clauses are impermissible at common law because they would allow directors to allocate

<sup>25</sup> An exception is Dickson C.J.C.'s characterisation of dividends. Quoting Welling, *op. cit.*, footnote 10, p. 64, the Chief Justice suggested that a dividend is a corporate gift—*supra*, footnote 1, at pp. 1040-1041 (S.C.R.), 228 (D.L.R.). As is indicated from passages from Welling's text which the Chief Justice does not quote, this view of dividends is based on the analysis of corporations in Berle and Means, *op. cit.*, footnote 2. Welling suggests that because corporations are independent social and legal entities rather than mere representatives of their shareholders, dividend decisions made by directors on the basis of shareholder interests are improper in the same way that granting charitable donations on the basis of the needs of the charity would be—*op. cit.*, pp. 609-614.

Welling's approach ignores that shareholders have a unique status which merits special attention with dividends. Under economic analysis, lenders, customers and employees, like shareholders, are in bargaining relationships with corporations. These groups, however, have claims which are generally fixed in amount and which are consequently not directly tied to the profitability of the corporation. The investment made by shareholders, on the other hand, is linked closely with the profitability of the business, and dividends are a primary way in which shareholders participate in the profits. See O.E. Williamson, *The Economic Institutions of Capitalism* (1985), pp. 302-311.

Admittedly, shareholders, when they buy their shares, implicitly give the board of directors wide discretion over the allocation of corporate profits; D.R. Fischel, *The Law and Economics of Dividend Policy* (1981), 67 Va. L. Rev. 699, at pp. 713, 715-717. Shareholders no doubt expect, however, that the board will keep their interests paramount in making dividends decisions, and it would be consistent with the implicit bargain between shareholders and directors that these expectations be recognised in law.

<sup>26</sup> *Supra*, footnote 1, at pp. 1043 (S.C.R.), 230 (D.L.R.).

<sup>27</sup> *Ibid.*, at pp. 1047 (S.C.R.), 233 (D.L.R.).

<sup>28</sup> *Ibid.* For an economic analysis of the oppression remedy, see Cheffins, *loc. cit.*, footnote 8.

dividends on the basis of shareholders' personal characteristics rather than the share structure of the corporation. To allow directors that authority was improper because they would find it difficult to comply with duties they owed to the corporation as a whole and because minority shareholders would be completely dependent on the good-will of the board.<sup>29</sup>

Second, La Forest J. said that Northland's discretionary dividend clauses did not displace the common law presumption that shares should be treated equally. He reasoned that, because the discretionary dividend clause applied to all categories of shares, all shares should have received equal dividends.<sup>30</sup>

The third argument La Forest J. relied upon was that the Saskatchewan Business Corporations Act does not give corporations the right to use discretionary dividend clauses. He accepted the Minister's assertion that section 24(4)(a) did not authorise the use of such clauses by Northland because shareholder entitlement to dividends would depend on the director's discretion rather than terms in the articles.<sup>31</sup>

In reaching his decision, La Forest J. reasoned along the same lines as commentators who argue that legal intervention should play a key role in properly balancing shareholder/management relations. He seemed to feel that shareholders are potentially ripe for exploitation. For example, he pointed out that if Northland's share structure was permissible, logically corporations could adopt discretionary voting clauses. He said that clauses of this type were unacceptable because directors could use them to extend their tenure indefinitely, thus leaving shareholders highly vulnerable.<sup>32</sup>

La Forest J. was comfortable with the idea that legal intervention was needed to redress the balance between shareholders and those controlling corporations. He asserted that his approach to Northland's dividend clauses was justified because protecting individual shareholders was one of the driving forces behind recent Canadian corporate law reform. Litigation, in his view, could only be a partial answer to potential abuse because initiating legal proceedings was burdensome and expensive.<sup>33</sup> Hence, he apparently felt that in the case before him a court was fully justified in striking down clauses which were not directly prohibited by statute and which no participant had complained about.

La Forest J. acknowledged that his approach might appear to be protectionist and patronizing. This did not trouble him too deeply. He asserted that:<sup>34</sup>

<sup>29</sup> *Ibid.*, at pp. 1061-1064 (S.C.R.), 244-246 (D.L.R.).

<sup>30</sup> *Ibid.*, at pp. 1065 (S.C.R.), 246-247 (D.L.R.).

<sup>31</sup> *Ibid.*, at pp. 1066-1069 (S.C.R.), 248-250 (D.L.R.).

<sup>32</sup> *Ibid.*, at pp. 1069 (S.C.R.), 250 (D.L.R.).

<sup>33</sup> *Ibid.*, at pp. 1070 (S.C.R.), 250 (D.L.R.).

<sup>34</sup> *Ibid.*

Corporate law has not yet evolved to the point where the freedom to contract has become paramount to all other concerns.

In other words, La Forest J. felt, much more than Dickson C.J.C., that corporate law must impose restrictions on those controlling corporations in order to protect shareholders.

The fact that Dickson C.J.C.'s views prevailed in the Supreme Court should be encouraging to Canadian business lawyers. Commercial planning should be more effective if corporate law is treated as flexible and enabling. Also, the Supreme Court's views on the Saskatchewan Act should have a national impact. This is because the Saskatchewan Business Corporations Act closely resembles the Canada Business Corporations Act,<sup>35</sup> which has been the model for corporate legislation in five provinces in addition to Saskatchewan.

Still, Canadian business lawyers should be aware that *McClurg* sanctions some important constraints on corporate planning. Dickson C.J.C. spoke favourably of shareholder applications under the statutory oppression remedy, hinting that such applications should receive more sympathetic treatment from the courts than those by corporate outsiders like the Minister of National Revenue.<sup>36</sup> The case law suggests indeed that the oppression remedy can be a fruitful source of relief for shareholders who are aggrieved about dividend policies.<sup>37</sup>

The Income Tax Act will also have to remain a concern for corporate planners. Some tax practitioners had been hoping that the courts would uphold Northland's dividend policy without treating Wilma McClurg's contribution to the corporation as being relevant.<sup>38</sup> The Supreme Court did not do this. Dickson C.J.C. held that section 56(2) normally could not be used to attribute dividend payments to the income of directors or shareholders.<sup>39</sup> He ruled, however, that section 56(2) could apply if the payment and receipt of dividends was part of a blatant tax-avoidance scheme rather than a commercially realistic business transaction.<sup>40</sup>

<sup>35</sup> *Supra*, footnote 22. The other provinces with Canada Business Corporations Act style legislation are Manitoba, Ontario, Alberta, New Brunswick and Newfoundland.

<sup>36</sup> *Supra*, footnote 1, at pp. 1047 (S.C.R.), 233 (D.L.R.).

<sup>37</sup> See *Re Ferguson and IMAX Systems Ltd.* (1983), (D.L.R.), 43 O.R. (2d) 128 (Ont. C.A.); *Re Daniels and Fielder* (1988), D.L.R., 65 O.R. (2d) 629 (Ont. H.C.); *Westfair Foods Ltd. v. Watt* (1990), 73 Alta. L.R. (2d) (Alta. Q.B.).

<sup>38</sup> S.H. Goodman, *The Last Bastion for Income-Splitting?* (1986), 34 Can. Tax. J. 404.

<sup>39</sup> He said this was because corporations, not their directors or shareholders, make dividend payments.

<sup>40</sup> *Supra*, footnote 1, at pp. 1050-1051 (S.C.R.), 235-236 (D.L.R.). The minority's interpretation of s. 56(2) was very similar to the majority; see *ibid.*, at pp. 1071-1072 (S.C.R.), 252 (D.L.R.).

On the facts, Dickson C.J.C. held that Northland's dividend policy was not part of a tax-avoidance scheme because Wilma McClurg had made a real contribution to the business.<sup>41</sup> Dickson C.J.C. suggested, though, that section 56(2) might apply when a shareholder receiving unequal dividends was in a non-arm's length relationship with the controlling shareholder and had not made a legitimate contribution to the business.<sup>42</sup> Tax practitioners should also keep in mind that a dividend policy which serves to split income could run afoul of a number of Income Tax provisions which were not in force when *McClurg* arose.<sup>43</sup>

While *McClurg* does not give those operating corporations an unqualified licence to arrange their dividend policies as they see fit, the decision remains an encouraging one for business lawyers. The Supreme Court had the opportunity to advocate an interventionist approach to corporate law. Commercial planners should be relieved that the majority declined to do so, and demonstrated considerable sensitivity to the idea that individuals retain primary responsibility for ordering their own commercial affairs.

Two of the judges who heard the *McClurg* case have left the bench, including Dickson C.J.C.<sup>44</sup> It is unknown what impact these changes will have on the court's approach to business law matters. Business planners should hope, however, that the approach taken by Dickson C.J.C. continues to hold sway, especially given that Lamer C.J.C. has said that the Supreme Court will be giving more attention to commercial law cases in the future.<sup>45</sup>

\* \* \*

---

<sup>41</sup> She helped her husband to finance the business and did stenography, bookkeeping and stock taking.

<sup>42</sup> *Supra*, footnote 1, at pp. 1054 (S.C.R.), 238-239 (D.L.R.).

<sup>43</sup> See, for example, *supra*, footnote 18, ss. 74.4 and 245(1). See D. Louis, Discretionary Shares May Allow Exotic Tax Planning, *The Bottom Line*, March, 1991, 26; B.J. Arnold and J.R. Wilson, The General Anti-Avoidance Rule—Part 3 (1988), 36 Can. Tax. J. 1369, at pp. 1398-1400; E.G. Kroft, Splitting and Shifting Tax Benefits: A Guide for the Perplexed Practitioner, in Report of Proceedings of the Fortieth Tax Conference, 1989, Conference Report (1990), pp. 32:1, 32:21-22, 32:71-74, 32:82-83.

<sup>44</sup> Wilson J. has also retired. They have been replaced by Stevenson J., formerly of the Alberta Court of Appeal, and Iacobucci J., formerly of the Federal Court of Appeal. Iacobucci J. acted as counsel for the Minister of National Revenue in *McClurg* in the lower courts.

<sup>45</sup> Act Promptly to Inscribe S.C.C. Appeals, *Lawyers' Weekly*, October 5, 1990, p. 12.

CONFLICT OF LAWS—ENFORCEMENT OF EXTRAPROVINCIAL  
DEFAULT JUDGMENT—REAL AND SUBSTANTIAL CONNECTION:  
*Morguard Investments Ltd. v. De Savoye.*

Joost Blom\*

*Introduction*

*Morguard Investments Ltd. v. De Savoye*<sup>1</sup> is not only a seminal case in the Canadian conflict of laws. It includes some reflections on constitutional law that may have repercussions over a much wider field. It is also interesting as an example of judicial technique. The Supreme Court of Canada abandoned a venerable, if restrictive, rule of common law in favour of a new principle couched in terms that practically demand further definition, and that appeal, moreover, to a mix of constitutional and private law considerations. The case raises many more questions than it answers.

The issue was under what circumstances a judgment creditor could sue on a default judgment obtained in another province when jurisdiction over the defendant had been based on service *ex juris*. The answer traditionally given by the Anglo-Canadian common law was that such a judgment is not binding on the defendant unless that person has submitted to the original court's jurisdiction by entering an appearance or taking other steps in the proceedings, or has previously made a binding agreement with the judgment creditor to be bound by that court's jurisdiction. *Ex juris* service, while giving the court jurisdiction under its own rules of civil procedure, was not regarded as giving it jurisdiction "in the international sense".<sup>2</sup>

Jurisdiction in the international sense was usually taken to mean exactly the same thing as jurisdiction in the interprovincial sense. Where the original court's jurisdiction was based solely on *ex juris* service the judgment could not be recognized or enforced, even if it came from a sister province. This rigid denial has always seemed at odds with the fact that courts in all the common law provinces, following the English model, use service *ex juris* as a routine ground for jurisdiction. The contrast has become

\* Joost Blom, of the Faculty of Law, University of British Columbia, Vancouver, British Columbia.

<sup>1</sup> [1990] 3 S.C.R. 1077, (1990), 76 D.L.R. (4th) 256.

<sup>2</sup> J.-G. Castel, Canadian Conflict of Laws (2d ed., 1986), p. 246; J.G. McLeod, The Conflict of Laws (1983), pp. 598-599; G.C. Cheshire and P.M. North, Private International Law (11th ed. by P.M. North and J.F. Fawcett, 1987), pp. 353-354. The logical underpinning of this common law rule was that a foreign judgment is recognized or enforced only if a foreign court has created a vested right in favour of the plaintiff; that the power of a court to vest rights is territorial; and consequently that an *in personam* judgment is binding only if the person to be bound was within the territory of the court when the action began, or consented to the court's exercise of its power. See H.E. Read, Recognition and Enforcement of Foreign Judgments (1938), pp. 125-134.

even starker as most of these provinces have expanded their courts' jurisdiction by liberalizing the grounds for service *ex juris*, although recently the courts, again following an English lead, have adopted a much firmer doctrine of *forum non conveniens* to deal with cases where such jurisdiction is inappropriate.

In *Morguard*, two lenders who had advanced money on a mortgage on land in Alberta brought foreclosure proceedings. They obtained "Rice orders" under which the land was judicially sold and personal judgments for the deficiency entered against Mr. De Savoye, who had originally been a guarantor but had later taken title to the land and assumed the obligations of mortgagor. Mr. De Savoye had been resident in Alberta when the money was originally borrowed but had moved to British Columbia, where he was served *ex juris* pursuant to leave by the Alberta court. There were several grounds for such service: the action was on a contract made in Alberta and governed by Alberta law; the failure to pay the debt was a breach of contract in Alberta; and the proceedings were in respect of a mortgage on Alberta land.<sup>3</sup> The lenders could not register their personal default judgments under the British Columbia uniform reciprocal enforcement of judgments statute because it reflects the orthodox common law view that the judgment debtor must have been served in the original province or submitted to the jurisdiction of its courts.<sup>4</sup> So each lender brought a common law action on its Alberta judgment in the British Columbia Supreme Court.

With a unanimity that is remarkable in view of the consistent line of authority against it, all eleven judges in all three courts held the judgments enforceable in British Columbia, but the grounds changed with each court. At first instance Boyd L.J.S.C. simply held that the Alberta court "had jurisdiction over the subject properties and the foreclosure proceedings",<sup>5</sup> by which she apparently meant that the Alberta court had properly taken jurisdiction under its own rules. Conventionally, this has not been considered a relevant criterion.<sup>6</sup>

The Court of Appeal<sup>7</sup> accepted the argument, vigorously promoted by Dr. Kennedy in the 1950s,<sup>8</sup> that, at least for judgments from within Canada, the test for enforceability should be whether service *ex juris* would have been authorized under the *recognizing* court's rules in a parallel case.

---

<sup>3</sup> Alta. Q.B.R. 30(f)(i) and (ii), (g) and (k) respectively.

<sup>4</sup> Court Order Enforcement Act, R.S.B.C. 1979, c. 75, s. 31(6)(b).

<sup>5</sup> [1988] 1 W.W.R. 87, at p. 88 (B.C.S.C.).

<sup>6</sup> *Infra*, footnote 43 and accompanying text.

<sup>7</sup> [1988] 5 W.W.R. 650 (B.C.C.A.).

<sup>8</sup> G.D. Kennedy, "Reciprocity" in the Recognition of Foreign Judgments: The Implications of *Travers v. Holley* (1954), 32 Can. Bar Rev. 359; *ibid.*, Recognition of Judgments in Personam: The Meaning of Reciprocity (1956), 35 Can. Bar Rev. 123.

This is usually called a "reciprocity" test, although it has nothing to do with reciprocal enforcement of two provinces' judgments; it is really an equivalence of jurisdiction test. Given the variety and, in many provinces, the breadth of Canadian rules for *ex juris* service, such a "mirror image" approach would mean recognition rules that differed from province to province and might be extremely broad. This, coupled with the rule that a foreign judgment entitled to recognition cannot be reexamined on its merits, had the potential for creating considerable difficulties.<sup>9</sup>

Probably for these reasons the Supreme Court of Canada rejected the "reciprocity" approach in favour of testing the original court's jurisdiction according to revised criteria.<sup>10</sup> The traditional tests, service in the province or submission, were too limited. In support of this view La Forest J., who gave the unanimous judgment of the court, cited arguments both general, and specific to the Canadian situation. The traditional rule, he said, was grounded on comity, "the informing principle of private international law".<sup>11</sup> The "power theory" of comity, that respect for another sovereign's courts was required only if that sovereign had power over litigants through their presence in the state or by their consent, was obsolete. The real nature of comity was:<sup>12</sup>

... an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among foreign sovereign states of adopting a doctrine of this kind. . . [T]he rules of private international law 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.

Accordingly, "what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice".<sup>13</sup>

The common law recognition rules had their roots in nineteenth century conditions. The English courts apparently felt that it was unfair to expect defendants to conduct litigation in far-off and possibly unreliable foreign courts. But the ease with which wealth, skills and people now moved among jurisdictions made it essential to reappraise these rules.

In any event, said La Forest J., the situation as between Canadian provinces had never been comparable to that as between England and

<sup>9</sup> J. Blom, Comment [*Morguard Invts. Ltd. v. De Savoye* (B.C.C.A.)] (1989), 68 Can. Bar Rev. 359.

<sup>10</sup> *Supra*, footnote 1, at pp. 1104 (S.C.R.), 275 (D.L.R.).

<sup>11</sup> *Ibid.*, at pp. 1095 (S.C.R.), 268 (D.L.R.).

<sup>12</sup> *Ibid.*, at pp. 1096 (S.C.R.), 268-269 (D.L.R.).

<sup>13</sup> *Ibid.*, at pp. 1097 (S.C.R.), 269 (D.L.R.). The term "comity" is perhaps not ideal. Comity suggests sovereign entities, and the courts as their representatives, making mutual concessions. What the court described was, rather, a view of private international law based, not on the idea of reconciling claims of sovereigns to have their laws applied, but on doing justice to the private actors involved.

foreign nations. "The considerations underlying the rules of comity apply with much greater force between the units of a federal state."<sup>14</sup> To him the English rules seemed "to fly in the face of the obvious intention of the Constitution to create a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction".<sup>15</sup> The mobility of Canadian citizens among all the provinces and territories, now recognized in the Charter,<sup>16</sup> and the common market created by free trade between the provinces<sup>17</sup> and by federal regulation of trade and commerce, created a strong need for national enforcement of judgments given in a province.

Moreover, the administration of justice in Canada was of a uniform standard, assured by the federal appointment of superior court judges and the supervision of all court systems by the Supreme Court of Canada.<sup>18</sup> It followed that the Canadian constitutional arrangements "make unnecessary a 'full faith and credit' clause" as in the constitutions of the United States<sup>19</sup> and Australia,<sup>20</sup> although these clauses showed that "a regime of mutual recognition of judgments across the country is inherent in a federation".<sup>21</sup> Thus "the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution".<sup>22</sup>

What recognition rule, then, followed from these propositions? La Forest J. said that both the central goal of security of transactions, and fairness to the plaintiff, were offended by a rule under which a defendant could effectively compel the plaintiff to sue in a different forum, no matter how expensive or inconvenient, just by moving to another province.<sup>23</sup> On the other hand, fairness to the defendant required that the original court have acted through fair process, which was not an issue in the Canadian setting, and "properly restrained jurisdiction".<sup>24</sup> Thus a judgment from another province was entitled to "full faith and credit" so long as the court "properly, or appropriately, exercised jurisdiction in the action".<sup>25</sup>

<sup>14</sup> *Ibid.*, at pp. 1098 (S.C.R.), 270 (D.L.R.).

<sup>15</sup> *Ibid.*, at pp. 1099 (S.C.R.), 271 (D.L.R.).

<sup>16</sup> Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I, s. 6.

<sup>17</sup> Constitution Act, 1867, s. 121.

<sup>18</sup> *Supra*, footnote 1, at pp. 1099-1100 (S.C.R.), 271 (D.L.R.).

<sup>19</sup> Art. IV, s. 1.

<sup>20</sup> S. 118.

<sup>21</sup> *Supra*, footnote 1, at pp. 1100 (S.C.R.), 272 (D.L.R.).

<sup>22</sup> *Ibid.*, at pp. 1101 (S.C.R.), 272 (D.L.R.). The court also referred to *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, (1985), 15 D.L.R. (4th) 161, where the principles applied in English courts to the awarding of *Mareva* injunctions had been modified to take account of the Canadian federal setting.

<sup>23</sup> *Ibid.*, at pp. 1102-1103 (S.C.R.), 273 (D.L.R.).

<sup>24</sup> *Ibid.*, at pp. 1103 (S.C.R.), 274 (D.L.R.).

<sup>25</sup> *Ibid.*, at pp. 1102 (S.C.R.), 273 (D.L.R.).

What bases of jurisdiction are "proper" or "appropriate"? In the first place, as La Forest J. affirmed with perhaps a surprising lack of qualification, the traditional bases of jurisdiction meet the test. The original court has jurisdiction if the defendant was in the jurisdiction at the time of the action, or if the defendant submitted to the court's jurisdiction by agreement or attorney.<sup>26</sup> La Forest J. gave no indication that the notion he was putting forward of "proper" or "appropriate" jurisdiction would now make it possible to challenge such personal jurisdiction on the grounds of fairness or proper judicial restraint. Such a challenge would most obviously be on the cards where an individual was served in the province on a short visit.<sup>27</sup> It would also be possible in other cases, such as an agreement to submit that is contained in an overbroad standard form clause.<sup>28</sup> It is arguable that La Forest J.'s statement that "[n]o injustice results" when the traditional grounds are used<sup>29</sup> should be read as meaning that *usually* no injustice results. On that basis it would be open to a recognizing court to examine whether, notwithstanding the presence of a traditional ground of jurisdiction, the original court had "exercised its jurisdiction appropriately"<sup>30</sup> from the point of view of "order and justice".<sup>31</sup> Whether such challenges ought to be open to defendants is not beyond debate. The rule that mere presence in the jurisdiction is decisive may work harshly in the odd case, but it does have the merit of clarity. This was one reason why the United States Supreme Court recently held it was consistent with due process.<sup>32</sup>

For the case not covered by the traditional rule—where the defendant was served *ex juris* and did not submit to the jurisdiction—a new principle was needed. In framing this principle, La Forest J. began by saying:<sup>33</sup>

<sup>26</sup> *Ibid.*, at pp. 1103-1104 (S.C.R.), 274 (D.L.R.).

<sup>27</sup> Cf. *Re Carrick Estates Ltd. and Young* (1987), 43 D.L.R. (4th) 161 (Sask. C.A.), which cast doubts on whether temporary presence is an adequate basis for jurisdiction at common law. A.V. Dicey and J.H.C. Morris on the Conflict of Laws (11th ed. by L. Collins, 1987), pp. 436-437. (Rule 37), expresses the jurisdictional ground as being "resident (or perhaps, present) in the foreign country". See also Castel, *op. cit.*, footnote 2, pp. 190-191; McLeod, *op. cit.*, footnote 2, pp. 584-586.

<sup>28</sup> In *Batavia Times Publishing Co. v. Davis* (1977), 82 D.L.R. (3d) 247 (Ont. H.C.), aff'd (1979), 102 D.L.R. (3d) 192<sub>n</sub>, endorsement on the record 105 D.L.R. (3d) 192<sub>n</sub> (Ont. C.A.), the agreement to submit to the Pennsylvania court's jurisdiction was on the plaintiff's standard form, it applied to "any court of record of Pennsylvania, New York, Canada or elsewhere", and the defendant waived any right to notice of the proceedings. The judgment was enforced.

<sup>29</sup> *Supra*, footnote 1, at pp. 1104 (S.C.R.), 274 (D.L.R.).

<sup>30</sup> *Ibid.*, at pp. 1103 (S.C.R.), 273 (D.L.R.).

<sup>31</sup> *Ibid.*, at pp. 1102 (S.C.R.), 273 (D.L.R.).

<sup>32</sup> *Burnham v. Superior Court*, 109 L. Ed. 631, esp. at pp. 647-648 (U.S.S.C. 1990). For scholarly comment, generally critical, see *The Future of Personal Jurisdiction: A Symposium on Burnham v. Superior Court* (1991), 22 Rutg. L.J. 559-699.

<sup>33</sup> *Supra*, footnote 1, at pp. 1104 (S.C.R.), 274-275 (D.L.R.).

[T]here must be some limits to the exercise of jurisdiction against persons outside the province . . . [A] nexus may have to be sought between the subject-matter of the action and the territory where the action is brought.

He found the key to the correct approach in *Moran v. Pyle National (Canada) Ltd.*,<sup>34</sup> a product liability case in which the Supreme Court decided that an Ontario manufacturer had committed a tort in Saskatchewan for the purpose of that province's service *ex juris* rules. The defendant had sold the allegedly defective product into the normal channels of trade, and so ought to have had in contemplation the chance that the product might cause personal injury in Saskatchewan and that an action for the injury might be brought before that province's courts:<sup>35</sup>

(I)f this court thinks it inherently reasonable for a court to exercise jurisdiction under circumstances like those described, it would be odd indeed if it did not also consider it reasonable for the courts of another province to recognize and enforce that court's judgment.

The general principle, of which *Moran* was an example, was that the province must have a "real and substantial connection with the action".<sup>36</sup> Tying the recognition rule to such a connection would allow a plaintiff to sue an absent defendant in the province where, for example, the contract took place or the damage occurred, while at the same time giving defendants some protection against being sued in a jurisdiction having little connection with the case.<sup>37</sup>

In the present case, the mortgaged properties were in Alberta, the contracts were entered into there by persons resident there, and it was natural for deficiency proceedings to be consolidated with foreclosure proceedings. "A more 'real and substantial' connection between the damages suffered and the jurisdiction can scarcely be imagined."<sup>38</sup> Alberta therefore had jurisdiction and the judgment was enforceable in British Columbia.

The moral of this story for future defendants who are sued in another province is that any argument they have, whether jurisdictional or on the merits, should be made to the other province's court. If they do not do this the plaintiff can sue on the default judgment in their home province, so long as the required real and substantial connection with the original province can be shown. (What exactly this connection may be will be considered below). The underlying premise is that, given the existence of

<sup>34</sup> [1975] 1 S.C.R. 393, (1973), 43 D.L.R. (3d) 239.

<sup>35</sup> *Supra*, footnote 1, at pp. 1106 (S.C.R.), 277 (D.L.R.).

<sup>36</sup> *Ibid.*, at pp. 1108 (S.C.R.), 278 (D.L.R.). This phrase, which Dickson J. used in passing in *Moran*, gained prominence as the basis for recognizing foreign divorces: *Indyka v. Indyka*, [1969] 1 A.C. 33 (H.L.), quoted in *Morguard, supra*, footnote 1, at pp. 1090-1091 (S.C.R.), 264 (D.L.R.).

<sup>37</sup> *Ibid.*, at pp. 1108 (S.C.R.), 278 (D.L.R.).

<sup>38</sup> *Ibid.*, at pp. 1107 (S.C.R.), 277 (D.L.R.).

such a connection, defendants cannot reasonably complain if they are forced to defend an action anywhere in Canada.

### *Analysis*

Few will quarrel with the essential fairness of the conclusion that Mr. De Savoye was bound in British Columbia to pay the Alberta default judgment on his mortgage debt. But for a point of law of everyday importance, with great practical ramifications, the Supreme Court's judgment leaves an unsettling number of basic questions hanging in the air. Four will be discussed here. First, is a Canadian default judgment that meets the new test for jurisdiction equally as enforceable in all respects as a judgment that qualifies for recognition under the old test? Secondly, what exactly is the new test? Thirdly, does the new recognition rule, or the jurisdiction test it uses, have the status of a constitutional rule as well as a rule of private international law? And, fourthly, what is the effect of *Morguard* on the recognition and enforcement of default judgments from outside Canada?

### *What Defences Against Enforcement?*

The first question is the easiest. There is no suggestion in the court's decision that a default judgment based on *ex juris* service, if entitled to recognition under the *Morguard* test, is any less binding on the judgment debtor than a judgment recognized under the traditional rule. La Forest J. referred to the defendant's having redress "in certain cases such as fraud or conflict with the law or public policy of the recognizing jurisdiction".<sup>39</sup> These seem to repeat the standard common law defences. The public policy defence is unlikely ever to succeed as against a judgment from another province, because it would be almost unimaginable for a court to stigmatize the law of a sister province as being contrary to fundamental moral values.<sup>40</sup> The reference to a conflict with the *law* of the recognizing jurisdiction is obscure. If this means that a province may pass a law requiring its courts not to recognize or enforce a judgment from a sister province, even though that judgment meets the *Morguard* test—in order, for example, to let the province's own law decide the issue—it is a clear indication that the rule the Supreme Court lays down is not constitutionally binding on the recognizing province. Other passages in the judgment, however, seem to leave this question much more open.<sup>41</sup> Possibly what La Forest J. refers to is the possibility that the sister province judgment is inconsistent with a judgment from the province's own courts that makes the matter *res judicata*.

<sup>39</sup> *Ibid.*, at pp. 1110 (S.C.R.), 279 (D.L.R.).

<sup>40</sup> In the United States, a state may not refuse to give full faith and credit to a valid sister state judgment even in the face of a strong public policy of the state: Restatement, Second, Conflict of Laws (1971, partly revised 1988), s. 117.

<sup>41</sup> See *infra*, footnotes 74 to 79 and accompanying text.

In any event there is no hint that a default judgment based on *ex juris* service can be attacked on the merits, any more than judgments recognized under the old rule can. The British Columbia courts have held that a default judgment, unlike a judgment in a defended case, can be attacked on the ground of "manifest error".<sup>42</sup> This defence has not been accepted elsewhere, and its already shaky standing is weakened further by *Morguard's* thesis that defendants ought to make their defence before an original court exercising "proper" jurisdiction, not before the recognizing court.

By the same token, the judgment debtor presumably cannot raise any argument that the other province, although having the necessary minimum connection with the case, was *forum non conveniens*. This also is an argument to be made to the original court, not a defence to the enforcement of its default judgment. And, if the original court had jurisdiction under the *Morguard* test, the judgment debtor can presumably not be heard to say that the service *ex juris* on which the court's jurisdiction was based was invalid under the court's own rules (because, for instance, the breach of contract or the tort being claimed for was in point of law not committed in the province). It has long been the rule that it is the foreign court's jurisdiction "in the international sense" that matters, not whether its domestic rules of jurisdiction were satisfied.<sup>43</sup>

### *What Kind of Real and Substantial Connection?*

The court describes the new test in very general terms that waver on emphasis. A litigant arguing one side or other of an action to enforce a default judgment under the *Morguard* rule will be able to invoke an array of different expressions used by La Forest J. Two have already been

<sup>42</sup> *Re Gacs and Maierovitz* (1968), 68 D.L.R. (2d) 345 (B.C.S.C.); *May v. Shell Co. of Hong Kong Ltd.*, [1981] 1 W.W.R. 193, at pp. 195-196 (B.C.C.A.). In *Marcotte v. Megson* (1987), 19 B.C.L.R. (2d) 300 (B.C.S.C.), which anticipated the Court of Appeal's application of the "reciprocity" theory in *Morguard*, Gow L.J.S.C. suggested, at p. 310, too broadly, that the "manifest error" doctrine permits a default judgment to be reviewed on the merits generally, even if it is otherwise entitled to recognition under the reciprocity rule. This *obiter dictum* was taken up in *Alberta Mortgage & Housing Corp. v. Pelkey* (27 Nov. 1990), Salmon Arm Reg. Nos 900678 and 900839 (B.C.S.C.) [unrep.], decided after the Court of Appeal's decision in *Morguard*. The court refused to enforce an Alberta default judgment for a deficiency after sale on a chattel mortgage because the debtor had a defence on the merits, which, very strangely, was not a rule of Alberta law but a procedural provision of British Columbia law (the "seize or sue" rule)—a defence that could never have been made in the original action.

<sup>43</sup> Castel, *op. cit.*, footnote 2, p. 247; McLeod, *op. cit.*, footnote 2, pp. 609-611. A failure to observe the original court's own rules may be fatal if the resulting judgment is a nullity in the province where it was given: Dicey and Morris, *op. cit.*, footnote 27, pp. 464-467; Read, *op. cit.*, footnote 2, pp. 93-100. But the fact that service *ex juris* was unjustified under the pleaded facts would usually not make the proceedings a nullity; see, e.g., Ont. Civ. Proc. R. 2.01(1).

quoted, "a nexus between the *subject-matter of the action* and the territory where the action is brought",<sup>44</sup> which is used several times,<sup>45</sup> and a "connection between the *damages suffered* and the jurisdiction".<sup>46</sup> In addition the litigant could argue for a test based on "*legal obligations* arising in [the] province",<sup>47</sup> on a "connection the relevant *transaction* [has] with [the] province",<sup>48</sup> on a "connection with the *transaction or the parties*",<sup>49</sup> and on "a substantial connection between the *defendant* and the forum province".<sup>50</sup> Possibly, the litigant could argue for any connection that makes the province a "reasonable place for the action ... to take place".<sup>51</sup> The lack of focus in the court's terminology reflects ambiguity about the underlying rationale for the test. Why exactly are some bases for jurisdiction "fair" or "just" and others not?

Broadly speaking, I suggest that there are two ways of thinking about this. One, which might be called an "administration of justice" theory, is based on the idea that the forum for the original action must meet a minimum standard of suitability. This approach resembles the idea of *forum conveniens*, but with the difference that a court's jurisdiction presumably meets the standard even if the province is not the place where the interests of the parties and of the ends of justice can *best* be served, so long as they can be served there acceptably. Under this theory it is "fair" that a case be heard in any province that is, to repeat La Forest J.'s words, a "reasonable place for the action to take place".

The other approach can be called a "personal subjection" theory. It is based on the notion that jurisdiction is legitimate if the action is brought in any province within the ambit of whose legal system the defendant either regularly lived or carried on business, or voluntarily brought himself by doing something that related to the province in such a way as to make it reasonable to contemplate that he might be sued there. This was the idea emphasized in the *Moran v. Pyle* test for the locus of a tort.<sup>52</sup>

How one evaluates the territorial connections with a province, to decide if its courts took jurisdiction properly, depends on which rationale one finds more persuasive. An administration of justice theory would attach

<sup>44</sup> *Supra*, footnote 33 (emphasis added in this and the other quotes in this and the next sentence).

<sup>45</sup> "Subject-matter of the action" is used twice more, *supra*, footnote 1, at pp. 1103 (S.C.R.), 274 (D.L.R.).

<sup>46</sup> *Supra*, footnote 38.

<sup>47</sup> *Ibid.*, at pp. 1102-1103 (S.C.R.), 273 (D.L.R.).

<sup>48</sup> *Ibid.*, at pp. 1103 (S.C.R.), 274 (D.L.R.).

<sup>49</sup> *Ibid.*, at pp. 1108 (S.C.R.), 278 (D.L.R.).

<sup>50</sup> *Ibid.*, at pp. 1109 (S.C.R.), 278 (D.L.R.), quoting from P.W. Hogg, *Constitutional Law of Canada* (2nd ed., 1985), p. 278.

<sup>51</sup> *Ibid.*, at pp. 1107 (S.C.R.), 277 (D.L.R.).

<sup>52</sup> *Supra*, footnote 34 and accompanying text.

weight to the respective interests of the plaintiff and the defendant, and to factors like the cost and length of litigation and avoiding multiple proceedings. In effect it would treat the Canadian judicial system as a group of independent but coordinated sub-systems among which jurisdiction should be allocated on the basis of where cases can reasonably be heard.

A personal subjection theory, if strictly applied, would take into account only those connections with the province that relate to the defendant and his activities. The interests of the plaintiff, and factors relating to the efficient allocation of jurisdiction among provinces, would be irrelevant. This approach rests ultimately on the idea that each province's legal system represents an independent sovereignty, which cannot touch a defendant's legal rights unless that person has voluntarily subjected himself in some way to the proper claims of that sovereignty.<sup>53</sup>

The various expressions used by La Forest J. can be squared with either of these two theories. Maybe the court had in mind a combination of both ideas, but in some cases they yield quite different results and a choice has to be made.<sup>54</sup> A couple of examples will be discussed below.

The American theory of constitutional limits on state court jurisdiction, with which La Forest J.'s theory of jurisdiction has obvious affinities,<sup>55</sup> is clear on this score. It uses the "personal subjection" approach, which focuses entirely on the defendant's connections with the state. This stems from the source of the doctrine in the due process clause of the Fourteenth Amendment.<sup>56</sup> What is at stake in issues of jurisdiction to adjudicate is the "individual liberty interest" of the defendant.<sup>57</sup> The defendant's liberty is viewed as something the defendant personally controls. It is unfair to subject him to the jurisdiction of a state's court unless his own contacts or activities justify that impingement on his liberty.

---

<sup>53</sup> See further, A.R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction* (1987), 65 Tex. L. Rev. 689; A.T. von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated* (1983), 63 B.U.L. Rev. 279.

<sup>54</sup> Although sometimes the conflict of laws gets along very well with a test whose underlying rationale is obscure. The pedigree of the court's real and substantial connection test for jurisdiction probably reaches back, through the divorce recognition case *Indyka v. Indyka*, *supra*, footnote 36, to the "closest and most real connection" test for determining the proper law of a contract, first formulated in *Bonython v. Commonwealth of Australia*, [1951] A.C. 201 (P.C.). The theory behind that test has never been satisfactorily explained either, although the test has been happily used for forty years now.

<sup>55</sup> V. Black and J. Swan, *New Rules for the Enforcement of Foreign Judgments: Morguard Investments Ltd. v. De Savoye* (1991), 12 Adv. Q. 489, at p. 503.

<sup>56</sup> U.S. Constitution, Am. XIV, s. 1: "... nor shall any State deprive any person of life, liberty, or property, without due process of law."

<sup>57</sup> *Insurance Corp. of Ireland v. Compagnie des bauxites de Guinée*, 456 U.S. 694, at pp. 702-703 (1982). At n. 10 the court says that the due process clause is the sole source of the limits on jurisdiction, but commentators still regard state sovereignty and federalism as sources as well; see, for example, Stein, *loc. cit.*, footnote 53.

Thus a state has "general jurisdiction" (jurisdiction in relation to any *in personam* claim against the defendant, whether or not it arises out of defendant's activities in relation to the state)<sup>58</sup> where the defendant, though not served in the jurisdiction, has a persistent personal relationship with the state or has engaged in "systematic and continuous activity" there.<sup>59</sup> The state has "specific jurisdiction" (jurisdiction over any claim arising out of defendant's activities in relation to the state) where the necessary "minimum contacts" for such jurisdiction exist. As first explained by *International Shoe Co. v. Washington*,<sup>60</sup> these contacts arise out of activities the defendant has engaged in, which relate to the state's territory in such a way as to make it consistent with "fair play and substantial justice" to exercise jurisdiction in a cause of action related to that activity.<sup>61</sup> The United States Supreme Court has repeatedly stressed that the essential idea is that the defendant have done "some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws".<sup>62</sup>

To return to the *Morguard* test, its practical application can be illustrated with two examples.

#### *Example 1*

P, a junior hockey player resident in Nova Scotia, signs on with D, a hockey club in Ontario, during a visit to Ontario with his father. The contract is followed up with some correspondence by mail to Nova Scotia.

<sup>58</sup> The terminology of general and specific jurisdiction was first suggested by A.T. von Mehren and D.T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis* (1966), 79 Harv. L. Rev. 1121, esp. at p. 1136. It was adopted in *Helicópteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408 (1984).

<sup>59</sup> See R.A. Leflar, L.L. McDougal III and R.L. Felix, *American Conflicts Law* (4th ed., 1986), pp. 53-56; E.F. Scoles and P. Hay, *Conflict of Laws* (1982), pp. 268-275, 284-309; Restatement, *op. cit.*, footnote 40, ss. 29-31, 35(3).

<sup>60</sup> 326 U.S. 310 (1945).

<sup>61</sup> *Ibid.*, at p. 316. See Restatement, *op. cit.*, footnote 40, ss. 35(1), (2); Leflar, *op. cit.*, footnote 59, pp. 97-136; Scoles and Hay, *op. cit.*, footnote 59, pp. 332-341.

<sup>62</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, at p. 475 (1985), cited in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, at p. 109 (1987). For recent examples of the minimum contacts analysis, see *Keeton v. Hustler Magazine Inc.*, 465 U.S. 770 (1984) (magazine's substantial circulation in the state gave jurisdiction in defamation action); *Burger King*, *ibid.* (out-of-state franchisee's having made contract with in-state franchisor gave jurisdiction in breach of contract action against franchisee); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (out-of-state car distributor not subject to state's jurisdiction in negligence action arising out of accident in the state, merely because it could foresee that a customer might take the car into the state). The *Asahi* case, *ibid.*, held that a manufacturer was not subject to state jurisdiction just because it sold its product into normal channels of trade and could foresee that the product might cause injury in the state; it had, in some degree, to direct its sales or distribution towards that state specifically. Cf. *Moran v. Pyle*, *supra*, footnote 34.

P plays for D for two seasons and returns home. He sues D in Nova Scotia for money owing under his contract. He serves the club *ex juris* in Ontario pursuant to Nova Scotia Civil Procedure Rule 10.08(1), which permits such service without leave in any case if the defendant is in Canada or the United States. The Nova Scotia court, upon D's application for a stay, holds that D has not shown Nova Scotia to be *forum non conveniens*.<sup>63</sup> D takes no further part in the proceedings and lets default judgment be given.

The first question will be whether D's arguing *forum non conveniens* was an attornment to the Nova Scotia court's jurisdiction, to which the answer is probably no.<sup>64</sup> If D did not attorn to the court's jurisdiction, is an Ontario court nevertheless bound to recognize the judgment under *Morguard*? On an administration of justice theory the connections of the subject-matter of the action, the transaction or the parties (to take three expressions of the test) with Nova Scotia may be "real and substantial" enough. D knew it was recruiting a boy who lived in Nova Scotia; P still lives there and would find it difficult to sue in Ontario; D would suffer no great disadvantage by having to defend in Nova Scotia. On this line of reasoning the judgment might well be enforceable. But on a personal subjection theory the defendant club's connection with Nova Scotia is minimal. Its activities were entirely related to Ontario, except for P's residence and the correspondence with P at his home. On this theory the Nova Scotia default judgment would be unenforceable in Ontario. Therefore this is one of those cases where the result may depend on choosing which of the two theories about the jurisdiction test one prefers.

### *Example 2*

P, a B.C. company, has its solicitor in Vancouver instruct D, a solicitor in Alberta, to register a mortgage in favour of P on land in Alberta. Later, when P seeks to enforce its rights the mortgage turns out not to have been registered properly. P sues both its British Columbia solicitor and D in the British Columbia Supreme Court for negligence, serving D *ex juris* on the ground that she is a necessary or proper party to the action against the British Columbia solicitor.<sup>65</sup> D does not appear and default judgment is entered against her.<sup>66</sup>

<sup>63</sup> Cf. *Cranston v. Hull (Ville)* (1983), 62 N.S.R. (2d) 343 (N.S.S.C.).

<sup>64</sup> *Henry v. Geoprosco Int'l Ltd.*, [1976] Q.B. 726 (C.A.), which held that making such a jurisdictional argument as submission, has not been well received in Canada: see *Clinton v. Ford* (1982), 137 D.L.R. (3d) 281, at p. 285 (Ont. C.A.); *Dovenmuehle v. Rocca Group Ltd.* (1981), 34 N.B.R. (2d) 444 (N.B.C.A.), aff'd, [1982] 2 S.C.R. 534.

<sup>65</sup> B.C.S.C.R. 13(l)(j).

<sup>66</sup> Cf. *Glenbrook Developers Ltd. v. Gatley*, [1984] 6 W.W.R. 450 (B.C.S.C.), a *forum conveniens* case. A very similar case is *First City Investments Inc. v. Shrum, Liddle & Hebenton* (1988), 26 B.C.L.R. (2d) 46 (B.C.C.A.).

If, following the administration of justice line of thinking, one can take into account factors like P's convenience, avoiding multiple proceedings, and the like, a good case can be made that the transaction, the subject-matter of the action or the parties were sufficiently connected with British Columbia to enforce the default judgment against D in Alberta. But if the *Morguard* test means that the defendant must, to use the American expression, have "purposefully availed" herself of British Columbia law, the answer is almost certainly no. She just took instructions from a British Columbia solicitor for British Columbia clients.

What can be seen from these two examples is how little guidance the judgment in *Morguard* gives as to how even fairly standard situations are to be handled under the new recognition rule. They also point up the considerable gap between current jurisdictional practice, in which service *ex juris* is liberally available but controlled through notions of *forum conveniens*, and a test for jurisdiction based on minimum contacts. The gap is especially wide if those contacts are interpreted as they are under the United States doctrine, because many of the elements typically taken into account in deciding the issue of *forum conveniens* are irrelevant to the question whether the defendant, through his activities, can be said to have invoked the benefits and protections of the forum province's laws.

#### *Constitutional Status of the New Principles?*

That raises the next question: can the courts go on with their current jurisdictional rules and practices, or is *Morguard* a constitutional edict that these are now altered too? On this view, the reason a judgment need not be recognized if *Morguard*'s jurisdictional criteria are not met is that it is a nullity in the original province, as an unconstitutional exercise of provincial legal authority. The "real and substantial connection" principle would be a new, absolute constitutional limit on the power of each province to confer judicial jurisdiction on its courts.

As the two examples discussed above show, this could at one stroke invalidate a good part of the common law provinces' current jurisdictional practice. It would have the same effect in Quebec. Although that province's jurisdiction rules are territorially narrower than the common law provinces' service *ex juris* rules, the Code of Civil Procedure does give the courts jurisdiction wherever the defendant has property situated in the province, the whole cause of action arose in the province, or the action is on a contract that was made in the province.<sup>67</sup> Some cases could satisfy these criteria without meeting the Supreme Court's "real and substantial con-

<sup>67</sup> C.C.P. art. 68(1)-(3) respectively. If the court has jurisdiction over an action as against one defendant, it apparently has jurisdiction as against all other defendants in the same action, irrespective of their domicile: C.C.P. art. 75. See J.-G. Castel, *Droit international privé québécois* (1980), pp. 665-669.

nection" test. Moreover, the extent of the court's jurisdiction is not modified in practice by *forum non conveniens*, because that doctrine has so far not been accepted in Quebec.<sup>68</sup>

La Forest J. disclaimed any intention to lay down a new constitutional theory for the domestic jurisdiction of Canadian courts, because "the case was not argued in constitutional terms and it is unnecessary to pronounce definitively on the issue".<sup>69</sup> But some of his *obiter dicta* are very suggestive. He referred repeatedly to the recognition rule's being based on the "proper" or "reasonable" exercise of jurisdiction by the original court, which implies that a court's taking jurisdiction if the *Morguard* test was not met would be "improper" or "unreasonable". He said that "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'",<sup>70</sup> and that a recent Quebec case<sup>71</sup> was "authority for the view that the contact required by the Constitution for the purposes of territoriality is the same as required by the rule of private international law between sister provinces", an approach he confessed to finding "attractive".<sup>72</sup> For a case that was not argued as a constitutional one, these are fairly heavy hints. Two commentators have already concluded that "in the future [defendants] served *ex juris* with the process of the court of a Canadian province will have the option of challenging the proceedings on constitutional grounds if the 'foreign' province lacks real and substantial connection with the action".<sup>73</sup>

Even if the *Morguard* test does not define the constitutional limits on Canadian courts' domestic jurisdiction, does it still have constitutional force in so far as it lays down an obligation on each province and territory to recognize each other's judgments if the test is met? Whilst the court expressly reserved its position on the former question it was less clear-cut on the latter. After noting academic suggestions that a full faith and credit clause should be read into the Canadian Constitution, La Forest J. did say that the case had not been argued on that basis and that he need not go that far.<sup>74</sup> But what are lower courts to make of other passages, like "the rules of comity or private international law as they apply between

<sup>68</sup> *Aberman c. Solomon*, [1986] R.D.J. 385 (Que. C.A.). See also *Dominion of Canada Gen. Ins. Co. c. Johns-Manville Corp.* (30 July 1991), No 500-09-000372-912 (Que. C.A.), [unrep.].

<sup>69</sup> *Supra*, footnote 1, at pp. 1109 (S.C.R.), 278 (D.L.R.).

<sup>70</sup> *Ibid.*, at pp. 1109 (S.C.R.), 278 (D.L.R.), referring to Constitution Act, 1867, s. 92(13) and (14).

<sup>71</sup> *Dupont v. Taronga Holdings Ltd.* (1986), 49 D.L.R. (4th) 335 (Que. S.C.).

<sup>72</sup> *Supra*, footnote 1, at pp. 1109 (S.C.R.), 278 (D.L.R.).

<sup>73</sup> Black and Swan, *loc. cit.*, footnote 55, at pp. 493-494.

<sup>74</sup> *Supra*, footnote 1, at pp. 1100-1101 (S.C.R.), 272 (D.L.R.). La Forest J. referred to V. Black, *Enforcement of Judgments and Judicial Jurisdiction in Canada* (1989), 9 Oxf. J. Leg. Stud. 547, and Hogg, *op. cit.*, footnote 50, p. 278.

the provinces *must* be shaped to conform to the federal structure of the Constitution";<sup>75</sup> "the English [recognition] rules seem to me to fly in the face of the obvious *intention of the Constitution* to create a single country";<sup>76</sup> and in the Canadian federation "various constitutional and subconstitutional practices make *unnecessary* a 'full faith and credit' clause such as exists in other federations";<sup>77</sup> Those could be read as saying that the recognition principle the court lays down is inherent in the Canadian constitutional structure, which is tantamount to saying that the principle itself is constitutional.

As with the jurisdictional principle, the consequences of attributing constitutional status to the recognition principle are drastic. It would remove from provincial power the right to regulate the recognition of judgments, at least those from within Canada, because to cut back on the range of judgments recognized, or to qualify the conclusive effect of any judgments entitled to recognition, is to violate a constitutional duty. The courts of Quebec, with an entirely different regime for the exemplification of foreign judgments,<sup>78</sup> suddenly find themselves locked into a national recognition rule (or rules) that the province cannot alter.

Indeed, it is far from clear who, aside from the Supreme Court, could change the rule. Certainly the provinces could not. Unlike the situation if the rule were based on a Charter right of due process, there would be no way of using a "reasonable limit" exception, much less a notwithstanding clause. It is an open question whether the federal "peace, order and good government" power would sustain legislation dealing with the recognition of civil judgments.<sup>79</sup> Failing federal authority to do it, the only way to change the rule would presumably be by constitutional amendment.

<sup>75</sup> *Morguard, ibid.*, at pp. 1101 (S.C.R.), 272 (D.L.R.). (Emphasis added in all the quotes in this sentence).

<sup>76</sup> *Ibid.*, at pp. 1099 (S.C.R.), 271 (D.L.R.).

<sup>77</sup> *Ibid.*, at pp. 1100 (S.C.R.), 272 (D.L.R.). The practices referred to include the uniform standard of justice across the country, the federal appointment of superior court judges, and the supervisory rule of the Supreme Court of Canada in all provincial legal systems.

<sup>78</sup> For Canadian judgments the actual operation of the Quebec rules, contained in C.C.P. arts. 178-180.1, is not dissimilar to the English recognition rules. If the defendant was personally served in the province from which the judgment originated, the judgment must be exemplified; but if the judgment is from outside Canada, or from inside Canada but without personal service in the province, it not only must meet jurisdictional requirements (basically reflecting the jurisdictional rules for the Quebec courts) but also may be reviewed on the merits. See Castel, *op. cit.*, footnote 67, pp. 836-843; Black and Swan, *loc. cit.*, footnote 55, at pp. 497-499.

<sup>79</sup> The question was expressly left open by La Forest J., *supra*, footnote 1, at pp. 1100-1101 (S.C.R.), 272 (D.L.R.). On the "national importance" head of the "peace, order and good government" power, see *R. v. Crown Zellerbach Can. Ltd.*, [1988] S.C.R. 401, (1988), 49 D.L.R. (4th) 161. If the *interprovincial* enforcement of judgments is a federal matter because of its importance to the functioning of the federal system, is the enforcement of judgments from *outside* Canada still a provincial matter?

### What About Non-Canadian Judgments?

Although the court restricted its decision to foreign judgments from within Canada, it did not rule out an expansion of the common law rules for the recognition of judgments from other nations.<sup>80</sup> Its stress on how the notion of "comity" must change in the light of modern conditions is as relevant to judgments from New York or the state of Washington as it is to judgments from Yellowknife or Regina. The arguments based upon the federal system, of course, would not apply. Nor, by the same token, would a new recognition rule for non-Canadian judgments have constitutional status.<sup>81</sup>

So it is possible that Canadian courts may begin recognizing judgments from the United States and elsewhere based on "long-arm" jurisdiction over (presumably Canadian) defendants, applying the *Morguard* real and substantial connection test, probably coupled with a requirement of fair process, which is superfluous in the Canadian context.<sup>82</sup> On the other hand, *Morguard*'s stress on the federal setting was so pronounced that the courts may prefer to leave the rules in their traditional form for judgments from outside Canada. In addition, if *Morguard* were extended to judgments from other nations it would be hard to discriminate between judgments from nearby (the United States) and further away (for example, Europe, Japan). Within Canada a rule that forces a defendant to defend an action brought in another province, where the real and substantial connection exists, may not work excessive hardship (although in the case of individuals and small businesses I think the court may underestimate it). Extending the rule to actions brought in the United States might not work much more hardship; defending in a neighbouring American state might actually be easier than doing so in a distant Canadian province. But extending the rule to actions brought on other continents would raise real problems for Canadians. If judgments from other nations are to be recognized on a broader basis than until now, there is much to recommend a nation-by-nation reciprocal agreement approach, in preference to an extension of *Morguard*.

---

<sup>80</sup> La Forest J. said in passing, *ibid.*, at pp. 1104 (S.C.R.), 275 (D.L.R.), that on the international plane the "reciprocity" approach might have merit, although even here he was "more comfortable" with the real and substantial connection approach used in *Indyka v. Indyka*, *supra*, footnote 36.

<sup>81</sup> But a constitutional restriction on the courts' jurisdiction might well apply irrespective of whether the defendant was Canadian or from a foreign nation. Unlike the United States due process clause, which protects only American defendants, a jurisdictional limit based on what is considered to be "in the province" would seem to apply to international cases as well as interprovincial ones.

<sup>82</sup> *Supra*, footnote 1, at pp. 1103 (S.C.R.), 274 (D.L.R.); Black and Swan, *loc. cit.*, footnote 55, at pp. 507-508.

### Conclusions

*Morguard* changes the face of Anglo-Canadian private international law. It is the first time in this subject that any Canadian appellate court has deliberately set out on a path that English courts have not trodden before. The Supreme Court's willingness to go back to first principles; its insistence that a conflicts rule must ultimately be judged on its practical value in helping the orderly movement of people and property across legal boundaries (what the court called "comity"); its emphasis on the importance of the Canadian federal setting—all these are to be heartily welcomed. They will have repercussions throughout our private international law.<sup>83</sup>

On the specific question of the enforcement of default judgments, the decision in the actual case is perfectly fair. At the same time, I would suggest that *Morguard*, however sensible its result, is a textbook example of the drawbacks of judicial legislation even when aimed at a highly desirable reform. The court wanted to frame a rule that would make the lenders' judgments enforceable in British Columbia against Mr. De Savoye. It could see that the Court of Appeal's "reciprocity" approach would create problems because, among other things, it would tie the recognition of sister province judgments too closely to whatever happened to be the jurisdictional rules used in the recognizing province. However, the court could not lay down a reasonably precise list of the types of case where *ex juris service* would be an acceptable basis for a judgment entitled to recognition. That would have been to legislate openly, and in any case judges are not equipped for the analysis that would be required to frame such rules adequately. So if the reform was to be achieved a general principle was needed. The closest to a suitable principle that could be found elsewhere in the conflict of laws was the "real and substantial connection" test invented by the House of Lords to deal with the recognition of foreign divorces<sup>84</sup> and echoed in *Moran v. Pyle*.<sup>85</sup> Perhaps because the analogy with divorce recognition was felt not to be compelling,<sup>86</sup> or perhaps because a test so generally worded seemed to need a more solid footing, the court bolstered its test by invoking the spirit if not the letter of the Canadian constitution. It regarded the recognition principle as emanating from the nature of the Canadian federal system, but at the same time, in discussing the jurisdictional requirement for sister province judgments and the "full faith and credit" idea, it referred to American doctrines based on a quite different constitutional background.

<sup>83</sup> An early example of the wide applicability of some of the *Morguard* reasoning is *Hunt v. T & N Plc*, [1991] 5 W.W.R. 475 (B.C.C.A.).

<sup>84</sup> *Indyka v. Indyka*, *supra*, footnote 36. The *Indyka* test, of course, was based on the connection of the petitioner (or, as later cases held, the respondent) with the jurisdiction granting the divorce.

<sup>85</sup> *Supra*, footnote 34.

<sup>86</sup> La Forest J. treated the matrimonial area as being quite separate: *supra*, footnote 1, at pp. 1104 (S.C.R.), 275 (D.L.R.).

So we have a new rule, but we do not know exactly what its jurisdictional test is; we do not have a clear idea of the rationale underlying that new test; we do not know how far the American example is important; we do not know for certain whether the recognition rule has constitutional force; and we do not know for certain whether the jurisdictional test imposes new constitutional limits on domestic jurisdiction as well as the recognition of judgments from sister provinces. No doubt all these issues will be resolved in good time by future decisions or by legislation, but it can be asked whether the benefits we can expect from this change in our law are worth the price in uncertainty and litigation that follow from the court's method of decision.

We are entitled, I would suggest, to be skeptical about the effect of the new rule in strengthening the fabric of our federation. With great respect to La Forest J., it is not demonstrably "inherent" in a federation that default judgments against non-resident defendants must have full faith and credit in sister provinces.<sup>87</sup> It may be sensible, but so would be many other features that our constitution lacks. The problem is no more and no less than one of the efficient administration of justice and fairness to litigants. Where should a plaintiff have to bring a civil action, and where should a defendant have to defend one?

It is on the practical level that the *Morguard* rule must justify itself. To the extent that it allows an action to be brought in a more appropriate forum the system gains, because trials take place where the case can be best dealt with. The change does not help litigants as a class—what plaintiffs gain by it, defendants lose—but to the extent that it enables plaintiffs to recover, who under the old recognition rules could not have pursued their defendant in another province because it was too difficult or costly, the new rule will let justice be done in cases where it would not have been done before. Whether the ambiguous methodology of "real and substantial connection" offers the best way to this improvement is another question.

A better way may be legislation, which can be framed much more precisely than a judge-made rule. Some form of legislative regime for the enforcement of judgments within Canada is possible in the near future. At its 1991 meeting the Uniform Law Conference of Canada approved a Uniform Enforcement of Canadian Judgments Act, which, subject to final review by the jurisdictions, is to become official as of the end of February 1992.<sup>88</sup>

---

<sup>87</sup> In fact it was not law in the United States until *International Shoe, supra*, footnote 60. Until then state court jurisdiction was based on the presence of the defendant or his property in the state: *Pennoyer v. Neff*, 95 U.S. 714 (1878).

<sup>88</sup> I am grateful to Professor Peter Lown for the information about the activities in this area of the Uniform Law Conference, and the National Conference of Commissioners on Uniform State Laws.

The Act would go further than *Morguard* in that it would not permit any defence based on lack of jurisdiction under either the rules of private international law or the domestic law of the province or territory.<sup>89</sup> The philosophy is simply that any jurisdictional argument should be made to the original court, and a defendant who fails to do that should have to accept the enforceability of the resulting judgment. The Conference thought that it was inconsistent with the full faith and credit principle for Canadian courts to pass judgment on the actions of the courts of other provinces. Presumably, no legislation can prevent a defendant from asking a recognizing court to pass on the *constitutional* validity of the original court's jurisdiction, since that goes to the very existence of the judgment in law. That in turn would raise the unresolved issue whether the constitutional limits on judicial jurisdiction have already been defined by *Morguard*'s real and substantial connection test, or whether another, more accommodating, standard can still be adopted as the constitutional one.

The proposed Uniform Act clearly contemplates that the courts of the provinces will exercise their jurisdiction in a reasonably similar manner across the country and that none will apply "exorbitant" rules. With the strengthening of the doctrine of *forum non conveniens* this is now much closer to being true than in the past. If one looks at what the courts of common law provinces and territories actually do, rather than at what their rules say they may do, the problem of conflicting jurisdictions is not all that large. Cases where, after argument, a court takes jurisdiction even though it is clearly an inappropriate forum are becoming rare.

The picture, not to mention the operation of legislation like the proposed Uniform Act, will become much more troubled if the courts begin to multiply constitutional grounds for objecting to jurisdiction. Notwithstanding La Forest J.'s emphasis on constitutional factors, it is submitted that *Morguard* should not be read as a constitutional decision. The case was not argued on that basis, and the court might well have expressed itself very differently if it had been. Far-reaching constitutional change should not be the almost casual by-product of a case argued on a conflicts point.

If and when Canadian courts do examine the constitutional limits on jurisdiction and sister province judgments they should resist the temptation simply to import the American doctrines on this subject. Even after four decades of development since *International Shoe*,<sup>90</sup> during which there has been a steady stream of appeals to the United States Supreme Court, the philosophical basis for the minimum contacts approach is still elusive and many points remain uncertain.<sup>91</sup> Moreover, the Canadian constitutional

<sup>89</sup> Draft, s. 7(2).

<sup>90</sup> *Supra*, footnote 60.

<sup>91</sup> Leflar, *op. cit.*, footnote 59, p. 114, n. 13, refers to an "ever increasing view by scholars that the *International Shoe* standards are unworkable", and cites some of the

setting is entirely different. There is (as yet) no due process protection for property rights, which is the main source of the American doctrine.<sup>92</sup> Instead, the sources for a Canadian constitutional doctrine of jurisdiction must be the relationship between provincial legal systems, including the coordinating role of the Supreme Court of Canada at the apex of each of those systems, and the fact that provincial powers over property and civil rights and the administration of justice are limited by the words "in the province".<sup>93</sup> This offers much more scope for developing a rational system for allocating jurisdiction than a due process doctrine that focuses almost exclusively on the defendant. The administration of justice approach to the question of jurisdiction has much to recommend it in comparison to the personal subjection approach, both in principle and on practical grounds. As between the provinces and territories of Canada notions of rival sovereignty, or of defining a province's "right" to take jurisdiction by reference to some idea of personal subjection by the defendant, are undesirable and arguably out of place.<sup>94</sup> The American experience also suggests that they are anything but easy to translate into practical rules.

My own suggestion for the best starting point in developing a Canadian theory of jurisdiction would be the core idea of *forum conveniens*, that cases should in principle be heard in the Canadian province or territory that under all the circumstances is the most appropriate forum.<sup>95</sup> In looking at possible foreign models, we might consider the legislative solution recently

---

recent literature. For further debate, see the Colorado Symposium on the constitutional limits on jurisdiction and choice of law (1988), 59 U. Colo. L. Rev. 1-104.

<sup>92</sup> *Supra*, footnote 57. Possibly, as La Forest J. hints, *supra*, footnote 1, at pp. 1110 (S.C.R.), 279 (D.L.R.), jurisdictional issues could be related to the protection of "life, liberty and security of the person" in s. 7 of the Charter; see also P. Lindsay, *Automobile Negligence and Conflict of Laws: The Charter Dimension* (1989), 11 Adv. Q. 159. The Supreme Court has held that a plaintiff's right to recover civil damages is an economic right only, and thus outside Charter protection: *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, aff'g (1988), 51 D.L.R. (4th) 509, at pp. 519-522 (B.C.C.A.). If a defendant is to invoke s. 7 the argument must be that even if a plaintiff's right of recovery is only economic, being held liable for such damages brings the defendant's liberty or security of the person into play. In any event it would seem that a corporate defendant cannot invoke s. 7, since liberty and security of the person in that context are seen as inhering solely in humans: *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, (1989), 58 D.L.R. (4th) 577.

<sup>93</sup> Constitution Act, 1867, s. 92(13) and (14). See *Morguard*, *supra*, footnote 1, at pp. 1099-1100 (S.C.R.), 271 (D.L.R.).

<sup>94</sup> At bottom a due process theory based on the idea of personal subjection by the defendant is only a variant of the "power" theory of jurisdiction, because it rests on a notion of implied consent to the sovereign's authority. In *World-Wide Volkswagen*, *supra*, footnote 62, at p. 308, Brennan J. (diss.) suggests that the *International Shoe* principle, "with its almost exclusive focus on the rights of the defendants, may be outdated".

<sup>95</sup> A complicating factor is that the choice of the most appropriate forum may be influenced by choice of law, which may differ between provinces. Two provinces may each be the most appropriate forum from their respective courts' point of view, because

adopted in Australia. As a result of cross-vesting legislation passed by the Commonwealth and by all the states, limitations on the jurisdiction of federal and state courts have ceased to matter for most purposes. Any court must order a case transferred to any other court in Australia if it is persuaded that it would be more appropriately heard there.<sup>96</sup> With jurisdiction effectively coordinated in such a way, the problem of recognizing sister state judgments disappears. Jurisdiction is subject to nationally agreed standards, so all judgments can be recognized.

*Morguard* has given a strong impetus to the development of a rational Canadian system of jurisdiction and recognition of judgments, but the uncertain guidance it gives to the lower courts and the clouds of constitutional speculation it throws up have made the task more complicated, and also more urgent.

\* \* \*

CONTRACT—SALE OF LAND—TIME OF THE ESSENCE—  
BOTH PARTIES IN BREACH—PURCHASER'S ACTION FOR  
SPECIFIC PERFORMANCE: *Shaw Industries Ltd. v.  
Greenland Enterprises Ltd.*

Paul M. Perell\*

A recent decision of the British Columbia Court of Appeal, *Shaw Industries Ltd. v. Greenland Enterprises Ltd.*,<sup>1</sup> offers the opportunity to examine a troublesome question arising from the choice of remedies for a breach of contract. The question is, what happens if the wrongdoer atones for the breach before the innocent party chooses to end the contract. The decision in *Shaw* can be usefully contrasted with a 1988 decision of the same court, *Fletton v. Peat Marwick Ltd.*,<sup>2</sup> and a 1986 decision of the Federal Court of Appeal, *Beauchamp v. Coastal Corporation*.<sup>3</sup>

In *Shaw Industries Ltd. v. Greenland Enterprises Ltd.*, the plaintiff agreed to purchase land from the defendants. Time was of the essence

---

each thinks its own province's law ought to apply to the case, and that can be secured only by a trial in the province. Cf. *Avenue Properties Ltd. v. First City Devt. Corp.* (1986), 32 D.L.R. (4th) 40 (B.C.C.A.).

<sup>96</sup> K. Mason and J. Crawford, The Cross-Vesting Scheme (1988), 62 A.L.J. 328. For the federal statute, see Jurisdiction of Courts (Cross-Vesting) Act 1987 (Aust.), no. 24. American law may also be moving in this direction. A draft Transfer of Litigation Act was considered at the August 1991 meeting of the National Conference of Commissioners on Uniform State Laws.

\* Paul M. Perell, of Weir & Foulds, Toronto, Ontario.

<sup>1</sup> (1991), 79 D.L.R. (4th) 641 (B.C.C.A.).

<sup>2</sup> (1988), 50 D.L.R. (4th) 729 (B.C.C.A.).

<sup>3</sup> (1986), 26 D.L.R. (4th) 146 (F.C.A.).

and the completion date was Friday, September 29, 1989. On the completion date, the plaintiff's solicitors wrote the defendants' solicitors and proposed arrangements to complete. This letter was the first communication between the parties. The letter was not opened until the following Monday, October 2, 1989, after which the defendants' solicitors sought instructions. On October 6, 1989, the defendants took the position that the plaintiff had breached the contract. On November 7, 1989, the plaintiff sued for specific performance. The action was dismissed and the plaintiff appealed.

Southin J.A. gave the judgment of the court and allowed the appeal. She reasoned that both parties had breached a contract where time was of the essence. (The plaintiff's breach was the failure to prepare the conveyance within the time for completion and the defendants' breach was the failure to clear the title of encumbrances as required by the contract). In the circumstances of both parties having breached the contract, the rule to apply was that put forward by the Ontario Court of Appeal in *King v. Urban & Country Transport Ltd.*<sup>4</sup> The rule from the *King* case was that the contract was still alive with time no longer of the essence but with either party able to restore time of the essence by giving notice to the other party to perform at a new and reasonably set date. Southin J.A. said that because the contract was still alive, neither party was discharged by the other's breach. To treat the other side's failure as grounds to end the contract, a party who has also failed to perform must give notice of a date for performance and at that date be ready, willing, and able to perform. The rationale was that a party in default "cannot be heard to complain of the wrongdoing of the other until he has given the other the opportunity to do right and is himself ready to do right".<sup>5</sup> Here, the defendants had not "expiated their own sin" and were not entitled to treat the contract as at an end. By comparison, although the plaintiff had not given notice of a new date for performance, the plaintiff, by seeking specific performance, had showed it was ready, willing, and able to perform. So, having atoned for its breach, the plaintiff was entitled to specific performance.

One evident lesson from the *Shaw* case is that atonement is possible where both parties are wrongdoers and the contract is still alive.<sup>6</sup> The case leaves unanswered whether there are other circumstances where a

<sup>4</sup> (1973), 40 D.L.R. (2d) 641 (Ont. C.A.).

<sup>5</sup> *Supra*, footnote 1, at p. 648.

<sup>6</sup> Southin J.A. observed that it was not necessary for her to decide what would happen if neither party atoned, beyond saying that if the repenting party waited too long, the court might refuse its aid. The answer seems to be that the court will treat the contract as: (1) repudiated by both sides: *Young Estate v. 503708 Ontario Ltd.* (1988), 67 O.R. (2d) 40 (Ont. H.C.); *Jonert Investments Ltd. v. Rothmans, Benson & Hedges Inc.* (1989), 68 O.R. (2d) 562 (Ont. H.C.); or (2) abandoned by both sides: *Zender v. Ball* (1974), 5 O.R. (2d) 747 (Ont. H.C.); *Chapman v. Ginter*, [1968] S.C.R. 560; *Paal Wilson & Co. A/S v. Partenreederei Hannah Blumenthal*, [1983] 1 All E.R. 34 (H.L.).

wrongdoer may atone and enforce the contract. This question was posed by the second British Columbia case, *Fletton Ltd. v. Peat Marwick Ltd.*<sup>7</sup>

In this case, Fletton Ltd. signed an agreement to purchase 2,797 imported washer-dryer units from Peat Marwick Ltd., the receiver of the insolvent Canadian importer of the units. Because Peat Marwick was concerned about exposure to products liability claims from consumers, it was a condition of the agreement that Fletton provide evidence of adequate insurance coverage or an unqualified legal opinion that there was no exposure. Before the date set for performance, while Fletton was still trying to obtain insurance coverage, Peat Marwick repudiated the agreement. Fletton Ltd. responded with an action for specific performance and alternatively for damages. Up to and including the trial of the action, Fletton attempted but was unable to satisfy the condition of the agreement. Fletton's action was dismissed.

Fletton appealed only the dismissal of its claim for damages. The theory of the appeal was that by suing in the alternative, Fletton had adopted an equivocal position about whether the contract was at an end, and, therefore, it was open to it to end the contract at trial and claim damages. To support its theory, Fletton relied upon, among other authorities, the following passage from R.J. Sharpe's text, *Injunctions and Specific Performance*:<sup>8</sup>

... the view [is] sometimes expressed that a party who disregards a repudiation cannot later recover damages on account of the breach. Because the breach has not been "accepted" the contract remains alive and unbroken. In certain circumstances failure to act on the repudiation within a reasonable time may preclude the promisee from relying on it to establish his action later. However, it is inaccurate to state that the breach must be accepted. The innocent party may adopt an equivocal position and keep his options open by suing for specific performance and claiming damages in the alternative, and postpone his election until judgment.

Hinkson J.A., who delivered the judgment for the court, dismissed the appeal. He disagreed with the above passage from Sharpe's text and stated:<sup>9</sup>

In my opinion this is a confused analysis of the option available to an innocent party to elect between inconsistent rights. Generally, a party has made his election when he sues for specific performance. Thereafter he may only pursue alternative remedies.

Hinkson J.A.'s analysis was that because of Peat Marwick's repudiation, Fletton had a "right" to treat the contract as at an end or as continuing. By picking the "remedy" of specific performance, Fletton had bound itself to treat the contract as continuing. In these circumstances, Fletton could not change its decision and treat the contract as at an end and claim

<sup>7</sup> *Supra*, footnote 2.

<sup>8</sup> (1983), p. 399.

<sup>9</sup> *Supra*, footnote 2, at p. 732.

the remedy of damages for the loss of the benefit of the bargain unless Peat Marwick's repudiation was a continuing repudiation. But, there was no continued refusal by Peat Marwick to perform. Therefore, by atoning for its repudiation, Peat Marwick could rely on Fletton's failure to perform as a defence to the claim for specific performance and to show that there was no breach of contract to ground a claim for damages.

While Hinkson J.A.'s ultimate conclusion is correct, his criticism of Sharpe's analysis is wrong and unnecessary. In particular, for reasons set out below, Hinkson J.A.'s treatment of the Supreme Court of Canada decision in *Dobson v. Winton & Robbins Ltd.*,<sup>10</sup> the case underlying Sharpe's analysis, is wrong. Further, while Hinkson J.A.'s methodology of distinguishing between rights and remedies is helpful, his articulation yields a contradiction; *viz.*, if the claim for the remedy of specific performance precludes the alternative claim for damages, then there is not any true alternative remedy to pursue. Under Hinkson J.A.'s methodology, the innocent party's alternative claim for damages becomes meaningless unless there is a continuing or new breach of contract.

Before considering the *Dobson* case, it is necessary to set out part of the general theory of the rights and remedies arising from a breach of contract. Under conventional theory, where there is a breach of contract, the right of an innocent party to end the contract depends upon the classification of the contract term that has been breached. Where the breached term is classified as a warranty, the innocent party may seek the remedies of damages or specific performance, but the innocent party may not lawfully end the contract, that is, the innocent party is not discharged from performing its own obligations. Where the breached term is classified as a condition, the innocent party may treat the breach as if it were a breach of warranty or the innocent party may lawfully end the contract and both sides are discharged from further performance.<sup>11</sup>

So, for conditions, the innocent party has a choice. This choice yields enormous difficulties of legal analysis because it mixes rights and remedies. The right is to end the contract. The remedies are damages or specific performance. This combination of rights and remedies yields at least three types of case.

First, if the innocent party sues only for the remedy of damages, then the choice of remedy shows that the innocent party has exercised its right or "elected" to end the contract. (Correspondingly, independent

---

<sup>10</sup> [1959] S.C.R. 775, (1959), 20 D.L.R. (2d) 164.

<sup>11</sup> *Johnson v. Agnew*, [1979] 1 All E.R. 883 (H.L.). For present purposes, it is not necessary to discuss the modern refinement of intermediate terms that will be treated as warranties or as conditions depending on the seriousness of the consequences of the particular breach: *Hongkong Fir Shipping Co. v. Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26 (C.A.); *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1973] 2 All E.R. 39 (H.L.).

of any court proceedings, if the innocent party asks for the return of its deposit, this conduct shows that the innocent party has decided to exercise its right to end the contract.<sup>12)</sup> If the innocent party chooses to end the contract, then it cannot change its decision or election. As Lord Wilberforce put it: "the contract has gone, what is dead is dead."<sup>13</sup>

Second, if the innocent party sues only for specific performance,<sup>14</sup> then this choice of remedy shows that the innocent party has forgone the right or elected not to end the contract. (Correspondingly, independent of any court proceedings, the conduct of the innocent party may show a decision to forgo the right to end the contract.<sup>15)</sup> Sometimes, for the choice of keeping the contract alive, the innocent party may be able to get a second chance to make a decision since the breach may be a continuing breach or the wrongdoer may breach anew and provide the innocent party with a fresh opportunity to end the contract.

Third, there is the case of the innocent party suing for specific performance accompanied by an alternative claim for damages for the loss of the benefit of the bargain. This was the general situation in the *Fletton* and the *Dobson* cases.

The situation in the *Dobson* case, more precisely, was that a vendor sued for specific performance with damages in the alternative. Hard upon the beginning of the trial, the vendor abandoned the claim for specific performance by reselling the property. This resale mitigated but did not eliminate the vendor's claim for damages. The lower courts ruled, however, that the vendor did not have a claim for damages. The reasoning of the lower courts was as follows. There are two types of damages: (1) damages for the loss of the benefit of the bargain, a common law claim; and (2) equitable damages awarded in lieu of specific performance, a statutory extension of the jurisdiction of equity that was introduced by Lord Cairns' Act.<sup>16</sup> Equitable damages are available only if specific performance would have been available. Here, reasoned the lower courts, the common law claim for damages had not been pleaded and the equitable claim for damages was not available because specific performance was not available. Thus, the decision of the lower courts was based on a point of pleading grounded on an obscure vestige of the former separate jurisdictions of the common law and equity.

<sup>12)</sup> *Macnaughton v. Stone*, [1949] O.R. 853 (Ont. H.C.).

<sup>13)</sup> *Johnson v. Agnew*, *supra*, footnote 11, at p. 894.

<sup>14)</sup> The innocent party may also claim damages incidental to the delay in receiving specific performance.

<sup>15)</sup> See the discussion of waiver and election in P.M. Perell, Putting Together the Puzzle of Time of the Essence (1990), 69 Can. Bar Rev. 417, at pp. 427-437.

<sup>16)</sup> Chancery Amendment Act, 1858 (Imp.), c. 27.

The Supreme Court of Canada granted the vendor's appeal. On the point of pleading, the court ruled that there was a common law claim and the vendor was entitled to seek damages for loss of the benefit of the bargain. Having reached this decision, Judson J., who delivered the judgment of the court, next had to decide whether the common law claim for damages had been compromised in any way by the claim for specific performance. In the passage that supports the above quoted passage from Sharpe's text, Judson J. stated:<sup>17</sup>

The plaintiff's common law right of action on the facts of this case, as found by both Courts, is clear. On the purchaser's repudiation of the contract, the vendor could have forfeited the deposit and claimed for loss of bargain and out-of-pocket expenses. The *Judicature Act* gives him the right to join this claim with one of specific performance. At some stage of the proceedings he must, of course, elect which remedy he will take. He cannot have both specific performance and a common law claim for loss of bargain. But he is under no compulsion to elect until judgment, and the defendant is not entitled to assume that by issuing the writ for specific performance with a common law claim for damages in the alternative, the vendor had elected at the institution of the action to claim specific performance and nothing else.

Later in his judgment, Judson J. linked the choice of remedies with the choice of ending or keeping alive the contract. He stated:<sup>18</sup>

If the claim for specific performance alone is made, that constitutes an affirmation of the contract and, to that extent, an election to enforce the contract. But where the alternative common law claim is made, the writ is equivocal and there is no election.

Thus, for the third case, where the innocent party sues for specific performance and alternatively for damages, the *Dobson* case is authority that this course is equivocal about both the choice of remedies and about whether the innocent party has exercised its right to end the contract.<sup>19</sup>

If the argument so far is correct, then the judgment in the *Fletton* case cannot be supported on the ground that the claim for the remedy of specific performance was an election that precluded the claim for damages. But, the judgment can be supported on the ground that the claim for specific performance combined with the claim for damages was no election at all. The right to end the contract not having been exercised, the contract remained alive. Now comes the key point for the purposes of this comment. The contract being alive, Peat Marwick, the wrongdoer, was able to atone for its repudiation and enforce the contract by insisting that Fletton perform its side of the bargain.

This brings us to the decision of the Federal Court of Appeal in *Beauchamp v. Coastal Corporation*.<sup>20</sup> This case is inconsistent with the

<sup>17</sup> *Supra*, footnote 10, at pp. 779 (S.C.R.), 166-167 (D.L.R.). (Emphasis added).

<sup>18</sup> *Ibid.*, at pp. 781 (S.C.R.), 168 (D.L.R.).

<sup>19</sup> See also *Johnson v. Agnew*, *supra*, footnote 11. This case also makes the point that there is no difference between the quantum of damages at law or at equity.

<sup>20</sup> *Supra*, footnote 3.

*Fletton* case and the theory that a wrongdoer may atone. In the *Beauchamp* case, the plaintiff sued for specific performance or in the alternative for damages for the defendant's failure to complete the sale of a sea vessel. After the action was commenced, the defendants attempted to confess judgment and tendered performance of the contract. The plaintiff successfully resisted the defendant's motion for judgment based on the confession and rejected the defendant's offer of performance. The plaintiff proceeded to trial where it abandoned the claim for specific performance and where it received a judgment for damages for \$207,500. The defendant appealed and, like the successful defendant in the *Fletton* case, the defendant in *Beauchamp* argued that because the contract had been kept alive by the claim for specific performance, it could atone and so there was no breach of contract and no basis for an award of damages.

This time the defendant's argument failed. MacGuigan J. delivered the judgment of the court dismissing the appeal. The heart of MacGuigan J.'s judgment was his conclusion that if the wrongdoer were able to compel the innocent party to accept specific performance, then the wrongdoer would deprive the innocent party of its right to elect between remedies. MacGuigan J. felt this was unfair and inequitable for it would "abrogate the distinction between the wronged and the wronging party". He stated:<sup>21</sup>

The election of remedies must remain at the option of the innocent party, and to that extent, the contract will be alive in an unequal way; or, more accurately, it will remain alive but will be enforceable, if at all, only by the originally non-defaulting party on such terms as to compensation as a court of equity may prescribe.

In reaching his conclusion that the innocent party's action for specific performance did not make the contract enforceable by the wrongdoer, MacGuigan J. relied on a theory that if there was an outstanding claim for specific performance, then only the court could enforce the contract.<sup>22</sup> This theory is inconsistent with the result in the *Fletton* case. This theory is also inconsistent with another point made by Professor Sharpe in his text. It is Sharpe's analysis that an innocent party suing for specific performance must remain ready to perform.<sup>23</sup>

---

<sup>21</sup> *Supra*, footnote 3, at p. 154.

<sup>22</sup> MacGuigan J. relied on *Public Trustee v. Pearlberg*, [1940] 2 K.B. 1 (C.A.) and *Johnson v. Agnew*, *supra*, footnote 11. He drew support from the Ontario case of *Lyew v. 418658 Ontario Ltd.* (1982), 134 D.L.R. (3d) 384 (Ont. C.A.), rev'd. (1982), 132 D.L.R. (3d) 472 (Ont. H.C.), where the Ontario Court of Appeal felt it was inappropriate to grant summary judgment to a defendant who confessed judgment to a claim for specific performance. The court's judgment is a one-paragraph endorsement that the law was unclear and, accordingly, the action should proceed to trial where the matter would be determined on all the equities.

<sup>23</sup> Sharpe, *op. cit.*, footnote 8, pp. 398-399. The authorities supporting Sharpe are: *Frost v. Knight* (1872), L.R. 7 Ex. 111; *Howard v. Pickford Tool Co. Ltd.*, [1951] 1 K.B. 417 (C.A.); *Goldenberg v. Lieberman*, [1951] 2 D.L.R. 584 (Ont. H.C.).

Thus, in this troublesome area of the wrongdoer's ability to atone, the Federal Court of Appeal agrees with Sharpe on the issue that a combined claim for specific performance and damages is not an election against damages but disagrees with him that the innocent party must be ready to perform. Conversely, the British Columbia Court of Appeal disagrees with Sharpe on the issue of election, but agrees with him that specific performance obliges the innocent party to be ready to perform and specific performance allows the wrongdoer to atone and enforce the contract.

The criticism of the British Columbia Court's treatment of election has already been made but its treatment of the obligation on the innocent party to remain ready to perform is preferable to the unfairness rationale of the Federal Court of Appeal. It is difficult to see any unfairness in awarding the plaintiff what was bargained for originally and what was sought by an action for specific performance. On the moral plane, it is difficult to understand why a wrongdoer should be denied the opportunity to atone and make good its promises or why that opportunity should be available only if the other party is in default. If the opportunity to atone is to be denied, there should at least be some examination of why the plaintiff is abandoning the claim for specific performance and why the defendant is now willing to perform its promises, especially since it is likely that both parties will be motivated by economic and not moral principles. This examination may yield a better answer than the current confused response to the question of what happens if a contractual wrongdoer atones for the breach before the innocent party chooses to end the contract.

\* \* \*

RESPONSABILITÉ CIVILE—*ABUS DE DROIT CONTRACTUEL*—  
UN JALON DANS L'ÉTABLISSEMENT D'UN NOUVEL ORDRE CONTRACTUEL?  
*Houle c. Banque canadienne nationale.*

Daniel Gardner\*

*Introduction*

La recherche d'un meilleur équilibre contractuel est une préoccupation constante des juristes contemporains. Contrairement au début du siècle, il n'existe plus de défenseurs purs et durs d'une application absolue de la théorie de l'autonomie de la volonté. Le refus premier de reconnaître la lésion entre majeurs (article 1012 C.c.) a été depuis tempéré par des réformes sectorielles et la notion d'ordre public a pris une importance considérable. C'est dans cette lignée que nous plaçons *Houle c. Banque canadienne nationale*,<sup>1</sup> un arrêt rendu en novembre 1990 par la Cour

\* Daniel Gardner, de la Faculté de droit, Université Laval, Ste-Foy, Québec.

<sup>1</sup> [1990] 3 R.C.S. 122.

suprême. Avant d'en analyser le contenu, nous nous permettrons un court commentaire sur la forme.

Depuis quelques années, on assiste à une recrudescence, à la Cour suprême, de l'emploi de la méthode dite "anglaise" de rédaction des jugements. Même dans les affaires mettant en jeu les règles du droit civil, l'épaisseur des jugements semble vouloir suivre la courbe inflationniste que nous connaissons présentement. L'arrêt *Houle* constitue un exemple de cet état de fait. On y retrouve un foisonnement de citations doctrinales et jurisprudentielles, des "aperçus historiques" en droit français et en droit québécois, bref tous les ingrédients d'une excellente étude doctrinale! Pourtant, il nous semble que la tâche du juge est précisément de juger, à partir des faits particuliers de l'affaire qui lui est soumise, et non de discourir. Lorsque la phrase "[a]près ces quelques remarques d'ordre général, il y a lieu d'aborder la question principale"<sup>2</sup> apparaît à la trentième page du jugement, on peut se demander si la jurisprudence ne fait pas le travail de la doctrine!

Il n'y a donc pas ici d'intérêt à procéder à une étude historique et comparative de la théorie de l'abus de droit, tant en matière contractuelle que délictuelle: celle-ci a été faite (et bien faite) par la juge L'Heureux-Dubé.<sup>3</sup> Nous tenterons plutôt de replacer cet arrêt dans le cadre contractuel en général, tout en ajoutant des commentaires sur des questions traitées plus rapidement dans cette affaire, telles l'évaluation du préjudice et l'indemnité additionnelle.

### *Les faits*

Après plus d'un demi siècle de relations d'affaires fructueuses, la Banque canadienne nationale mettait fin abruptement à son association avec la compagnie Hervé Houle ltée en exigeant le remboursement intégral d'un prêt à demande. Quelques heures plus tard, les actifs de la compagnie avaient été saisis et on avait déjà procédé à leur liquidation (essentiellement en vertu d'un acte de fiducie signé vingt jours plus tôt). Les intimés, seuls actionnaires de la compagnie, étaient à ce moment en négociation pour vendre leur actions. Les agissements de leur créancière les forcèrent à céder ces actions pour 300 000\$, soit 700 000\$ de moins (selon eux) que ce qu'ils étaient sur le point d'obtenir. Une action fut donc intentée pour réclamer cette différence. La Cour supérieure (en 1983) et la Cour d'appel (en 1987) leur donnèrent raison pour un montant réduit (250 000\$). La Cour suprême confirme ces décisions en ajoutant l'indemnité additionnelle de l'article 1056c) C.c., point sur lequel nous reviendrons.

<sup>2</sup> *Ibid.*, à la p. 159.

<sup>3</sup> Nous renvoyons également le lecteur aux commentaires dont a fait l'objet l'arrêt de la Cour d'appel: C. Vennat (1988), 22 R.J.T. 387; P. Martel (1987), 33 R.D. McGill 213.

## I. *La théorie de l'abus de droit*

Le point majeur de la décision de la Cour suprême est certes la confirmation de la théorie de l'abus de droit contractuel. La Cour indique clairement que celle-ci peut être invoquée même lorsque son récipiendaire a usé de son droit sans aucune mauvaise foi. Cette prise de position, annoncée par le juge Malouf en Cour d'appel,<sup>4</sup> était prévisible. Une décision contraire aurait heurté de plein fouet l'évolution jurisprudentielle et doctrinale en ce domaine. Fallait-il que le dogme de l'autonomie de la volonté soit profondément enraciné dans la culture juridique québécoise pour avoir résisté aussi longtemps à une règle si évidente! Comment expliquer autrement que la formule magique de l'individualisme juridique ait permis de camoufler la place non négligeable, faite par les codificateurs de 1866, à une conception plus sociale du contrat? Le recours aux "usages" pour interpréter le contrat, autorisé par l'article 1017 C.c., ainsi que les notions d'"usages" et d'"équité", que l'article 1024 C.c. permet d'utiliser pour compléter le contenu du contrat, ne sont que des exemples du contrepoids, voulu par les codificateurs, à la recherche de la seule volonté interne des parties.

### (1) *Le fondement du recours*

#### (i) *En l'espèce*

À cause des faits particuliers de l'affaire, la responsabilité de la banque est retenue sur la base *délictuelle*. En effet, le contrat de prêt avait été conclu entre la banque et la compagnie Hervé Houle ltée. Les actionnaires, demandeurs intimés, n'étaient pas parties à ce contrat et ne pouvaient donc fonder leur action sur une base contractuelle.<sup>5</sup> À ce niveau, la qualification sans nuance de "tiers au contrat" pour ces actionnaires nous étonne. L'occasion aurait été excellente de rappeler l'existence d'une catégorie intermédiaire (les "tiers non étrangers"), catégorie déjà reconnue par la Cour suprême et permettant à ces tiers de tirer des droits de contrats où ils ne sont pas nommément parties.<sup>6</sup> Le fait que les demandeurs étaient les seuls actionnaires de la compagnie, le caractère familial de celle-ci, leur engagement personnel à titre de caution de la compagnie, tout cela aurait pu servir à motiver une décision de la Cour en ce sens.

<sup>4</sup> "... j'en viens à la conclusion que le moment est maintenant opportun pour déclarer que cette théorie, qui fait maintenant partie du droit québécois, ne doit plus être limitée en matière contractuelle seulement aux cas où le créancier réagit malicieusement, méchamment ou est de mauvaise foi": *Banque nationale du Canada c. Houle*, [1987] R.J.Q. 1518, à la p. 1529 (C.A.).

<sup>5</sup> On comprend donc que la Cour ait refusé de lever le voile corporatif en l'espèce, décision plus catégorique sur ce point que celle de la Cour d'appel, qui avait contourné le problème en se prononçant sur l'existence d'un "lien de droit" entre la banque et les actionnaires de la compagnie; *ibid.*, à la p. 1523.

<sup>6</sup> Voir *Vermont Construction c. Beatson*, [1977] 1 R.C.S. 758, à la p. 768; *Demers c. Dufresne Engineering*, [1979] 1 R.C.S. 146, à la p. 149.

Il faut souligner que la Cour donne une portée très limitée au fondement délictuel du recours qu'elle reconnaît en l'espèce. On nous avertit que "sauf circonstances exceptionnelles, le rappel d'un prêt ou le délai accordé pour le paiement par la suite, même s'il est abusif, n'engendrera pas de responsabilité délictuelle envers les actionnaires de la compagnie, mais seulement une responsabilité contractuelle envers cette compagnie".<sup>7</sup> C'est donc ailleurs qu'il faut rechercher la portée de cet arrêt.

### (ii) *De façon générale*

La Cour suprême apporte ici une précision importante. Ce qui ouvre la voie à un recours pour abus de droit contractuel, ce n'est pas tant une faute analysée sous l'angle de l'article 1053 C.c., mais plutôt la contravention aux règles contractuelles régissant la matière, nommément l'article 1024 C.c.:<sup>8</sup>

Dans le cadre de l'exercice abusif des droits contractuels, ce sont les droits résultant du contrat lui-même qui sont exercés, droits que seuls possèdent les parties contractantes, tout comme l'obligation corrélatrice de les exercer raisonnablement. Cette obligation dérive exclusivement du contrat. *Par conséquent, lorsque la faute alléguée découle strictement de l'abus d'un droit contractuel, la responsabilité ne peut alors prendre sa source que dans le contrat.*

Il est intéressant de noter qu'il ne s'agit que d'un *obiter*. Il y a cependant fort à parier que cet énoncé fera jurisprudence. Nous souscrivons à cette approche, qui évite le brassage inutile des règles contractuelles et délictuelles et donne toute son importance à l'analyse du contenu du contrat, explicité par l'article 1024 C.c. Ce n'est d'ailleurs pas la première fois que la Cour suprême a recours à l'article 1024 C.c. en matière de responsabilité bancaire. Une décennie plus tôt, le juge Beetz l'appliquait expressément à l'exécution d'un contrat de cautionnement.<sup>9</sup> Il entretenait cependant quelque peu la confusion en portant le débat sur la notion de faute et en fondant sa décision sur l'argument procédural de la "fin de non-recevoir".<sup>10</sup> L'arrêt *Houle* fait œuvre utile en se prononçant clairement sur la source du droit en question.

### (2) *Les conditions d'exercice du recours*

Les faits particuliers de l'affaire impliquant un recours d'ordre délictuel, la Cour devait rechercher l'existence des trois conditions de la responsabilité civile en vertu de l'article 1053 C.c. La juge L'Heureux-Dubé s'est, à bon droit, efforcée d'analyser séparément chacune de ces trois conditions. On en retrouve cependant une synthèse implicite dans sa conclusion sur l'existence d'une faute:<sup>11</sup>

<sup>7</sup> *Supra*, footnote 1, à la p. 182.

<sup>8</sup> *Ibid.*, à la p. 167. (Mots mis en italique par l'auteur).

<sup>9</sup> B.N.C. c. Soucisse, [1981] 2 R.C.S. 339, à la p. 355.

<sup>10</sup> *Ibid.*, aux pp. 356 et ss.

<sup>11</sup> *Supra*, note 1, à la p. 185.

Par conséquent, en agissant sans justification de façon impulsive et dommageable pour prendre possession et vendre les actifs de la compagnie après un délai aussi court et déraisonnable, tout en étant pleinement au courant de la vente imminente des actions des intimés, la banque appelante a commis une faute qui engage sa responsabilité pour le dommage direct ainsi causé aux actionnaires.

Un lien de cause à effet ayant été établi entre le préjudice subi par les actionnaires de la compagnie et la faute de la banque, sa responsabilité fut engagée.

Comme nous l'avons signalé plus tôt, le tribunal ne s'est pas borné au règlement du litige présenté devant lui. Il a examiné de façon approfondie les conditions d'exercice d'un recours pour abus de droits contractuels. Il fallait d'abord se demander si l'exercice par la banque de son droit de rappeler le prêt était en lui-même abusif. La Cour répond par la négative.<sup>12</sup> Une réponse affirmative outrepasserait d'ailleurs la portée de l'article 1024 C.c., qui peut servir à *compléter* le contenu d'un contrat et non à le *modifier*. L'examen du caractère abusif d'un droit *per se* relève en fait de la notion de lésion ou de celle de l'ordre public économique. La jurisprudence se montre peu enclue à intervenir à ce niveau.<sup>13</sup>

C'est plutôt sur *l'exercice* du droit contractuel que la juge L'Heureux-Dubé porte le débat. On en arrive alors à l'examen du "délai raisonnable" que doit donner le créancier à son débiteur avant d'agir. Souscrivant à la conclusion des tribunaux inférieurs, la Cour est d'avis que le délai de trois heures ne fut pas en l'espèce raisonnable.<sup>14</sup> La nécessité de donner un préavis raisonnable à son débiteur constitue un exemple d'obligation contractuelle implicite, que l'article 1024 C.c. permet d'imposer.

Répétons qu'il ne s'agit en l'espèce que d'un *obiter*. L'importance que lui accorde la Cour est cependant à souligner. La confirmation du fondement contractuel d'un tel recours rend inapproprié la recherche d'une faute délictuelle. Il n'est donc plus nécessaire de se demander si un banquier raisonnable, placé dans les mêmes circonstances, aurait agit de la même façon. C'est l'examen du contenu du contrat, selon les directives de l'article 1024 C.c., qui constitue l'enjeu du débat. Il est d'ailleurs intéressant de noter que la juge L'Heureux-Dubé n'emploie pas une seule fois le mot "faute" dans son analyse du caractère raisonnable du délai.

On objectera que l'analyse d'un "délai raisonnable" revient implicitement à rechercher l'existence d'une faute de la banque, la violation d'une règle de conduite. C'est peut-être ce qui s'est produit en l'espèce, mais nous croyons que la distinction faite entre l'abus de droit de source contractuelle ou délictuelle permet d'aller plus loin. En retournant au texte

<sup>12</sup> *Ibid.*, à la p. 170: "je me dois de conclure que le rappel du prêt ne constituait pas en lui-même un abus des droits contractuels de la banque".

<sup>13</sup> *116704 Canada inc. c. 113500 Canada inc.*, [1990] R.D.I. 12, à la p. 19 (C.A.).

<sup>14</sup> *Supra*, note 1, aux pp. 175-176.

de l'article 1024 C.c., débarrassé des critères de la responsabilité délictuelle, on pourrait considérer abusives des pratiques contractuelles présentement jugées non fautives sur une base délictuelle. Ainsi en serait-il de la pratique bancaire incontournable, obligeant les caution à renoncer aux bénéfices de discussion et de division, à l'exception de subrogation, etc. Ce n'est pas parce que tous les banquiers raisonnables, placés dans la même situation, recherchent la meilleure garantie possible que la notion d'abus de droit contractuel ne pourrait être appliquée, par exemple, au recours immédiat contre la caution sans tentative réelle d'obtenir paiement par le débiteur en défaut. L'exercice de ce type de clauses contractuelles, par ailleurs tout à fait légales, pourrait parfois être jugé inéquitable sur la base de l'article 1024 C.c. On aperçoit tout de suite la portée d'une telle distinction. Elle ne se limite pas évidemment aux pratiques bancaires, mais pourrait permettre de freiner les abus criants qui existent présentement dans certains secteurs, tels les contrats de franchisage. Cela ne signifie pas nécessairement que l'examen de la conduite fautive du créancier sera dorénavant mis de côté, mais plutôt que les critères d'appréciation pourront être différents.

Cette notion de délai raisonnable, dont la Cour suprême réaffirme l'importance, n'est en fait que l'équivalent jurisprudentiel des délais fixés législativement pour protéger certaines catégories de contractants. On songe ici au délai de soixante jours de l'article 1040a) C.c., visant à retarder l'exercice par le créancier de son droit contractuel de devenir propriétaire de l'immeuble de son débiteur.<sup>15</sup> On songe aussi au délai de trente jours de la *Loi sur la protection du consommateur*<sup>16</sup> en matière de vente à tempérament. La jurisprudence ne fait ici qu'étendre ce procédé aux relations bancaires. La fixité des délais législatifs est cependant mise de côté au profit d'une règle plus souple, où "tout est fonction des faits de chaque cause".<sup>17</sup> On peut prédire qu'une jurisprudence s'établira peu à peu sur la longueur de ce délai, comme cela s'est fait en matière de délai-congé lors d'une rupture de contrat de travail à durée indéterminée.

Les obligations contractuelles implicites, mises à la charge des banquiers, font de plus en plus penser à celles pesant sur le médecin dans ses relations avec son patient. Dans un cas comme dans l'autre, le cocontractant "expert" assume une obligation de renseignement face à l'autre partie. Dans le domaine bancaire, cela se traduit par l'obligation d'avertir les héritiers d'une caution de l'existence d'une lettre de cautionnement continu<sup>18</sup> ou, comme dans l'arrêt *Houle*, par l'obligation d'avertir le débiteur dans un délai raisonnable de son intention de réaliser ses garanties. Cette obligation de

<sup>15</sup> Le plus souvent par une clause de dation en paiement ou une clause résolutoire de plein droit.

<sup>16</sup> L.R.Q., c. P. 40.1, arts 139, 140.

<sup>17</sup> *Supra*, note 1, à la p. 174.

<sup>18</sup> B.N.C. c. Soucisse, *supra*, note 9.

renseignement connaît la même limite dans les deux cas, à savoir que le défaut de la remplir n'entraînera la responsabilité ni du médecin, ni de la banque, en l'absence d'utilité réelle.<sup>19</sup>

## II. *L'évaluation des dommages*

Si la Cour suprême s'est montrée prolixe en ce qui concerne les conditions de la responsabilité de la banque, on ne peut en dire autant de l'évaluation des dommages. Pourtant, au-delà des questions de principe, c'est bien l'importance des sommes en jeu qui ont amené les parties à se battre jusque devant le plus haut tribunal au pays.

### (1) *Les dommages compensatoires*

Toutes les instances ont reconnu que les dommages compensatoires se chiffraient en l'espèce à 250 000\$, soit la différence entre la valeur des actions *avant* les agissements de la banque (550 000\$) et le prix de vente obtenu une semaine après la liquidation des actifs (300 000\$). L'emploi de l'article 1075 C.c. par la juge L'Heureux-Dubé<sup>20</sup> appelle certains commentaires. Le texte de l'article 1075 dit bien qu'il ne doit être appliqué que lorsque "l'inexécution de l'obligation résulte du dol du débiteur", les auteurs assimilant cette notion de dol à celle de mauvaise foi.<sup>21</sup> Or, dans l'arrêt *Houle*, le problème de l'applicabilité de la théorie de l'abus de droit venait justement du fait qu'aucune mauvaise foi ne pouvait être reprochée à la banque. On rétorquera qu'en l'espèce la responsabilité était de source délictuelle et qu'il n'est pas rare de voir la jurisprudence employer l'article 1075 dans de telles hypothèses.<sup>22</sup> On ajoutera que le critère de la "suite immédiate et directe" n'est pas discuté en matières délictuelles.<sup>23</sup> Il n'en reste pas moins que l'application à un débiteur délictuel de bonne foi d'une règle primairement destinée à un débiteur contractuel de mauvaise foi n'est pas très éclairante. Le critère "du gain dont il a été privé" de l'article 1073 nous apparaît beaucoup plus approprié. Il explique parfaitement que les actionnaires de la compagnie *Houle* puissent exiger le manque à gagner

<sup>19</sup> Soit à cause du caractère urgent (*Gburek c. Cohen*, [1988] R.J.Q. 2424, à la p. 2442 (C.A.)) ou inévitable (*O'Hearn c. Estrada*, J.E. 84-449, à la p. 16 (C.A.)) de l'opération chirurgicale, soit à cause de l'inutilité d'un tel délai de paiement lorsque la situation financière du débiteur est irrémédiablement compromise: *Vicply inc. c. Banque Royale*, [1989] R.R.A. 11, à la p. 25 (C.S.), en appel.

<sup>20</sup> *Supra*, note 1, à la p. 185.

<sup>21</sup> J. Pineau, D. Burman, *Théorie des obligations* (1988), no 365; M. Tancelin, *Des obligations. Contrat et responsabilité* (1988), no 748; J.-L. Baudouin, *Les obligations* (1989), no 713.

<sup>22</sup> Voir J.-L. Baudouin, *La responsabilité civile délictuelle* (1990), no 168.

<sup>23</sup> Nous ne sommes pas du tout convaincus que la jurisprudence n'indemnise, à titre d'exemple, que les conséquences "immédiates" d'une faute délictuelle. Voir à ce sujet les intéressants commentaires de G. Viney, *Les obligations. La responsabilité: conditions* (1982), no 359.

résultant de la baisse de la valeur de leurs actions. L'utilisation par la jurisprudence de l'article 1075 en matière délictuelle est un exemple d'approximation dont on pourrait se passer. Cela rappelle l'emploi fréquent de l'article 1053 C.c. pour identifier une faute contractuelle.

## (2) *Les dommages moratoires*

De façon assez inexplicable, les procureurs des actionnaires avaient oublié de demander l'octroi de l'indemnité additionnelle prévue à l'article 1056c) C.c. Ce n'est "qu'à la fin de 1989 que les intimés ont présenté une requête, sans opposition, après l'expiration du délai fixé par le paragraphe 29(1) des *Règles de la Cour suprême du Canada*, DORS 83/74".<sup>24</sup> Il est étonnant de constater que les procureurs de la banque n'ont pas tenté de contester cette demande tardive, qui a des conséquences pécuniaires importantes. En effet, selon nos rapides calculs, cette indemnité additionnelle représente à peu près le même montant que celui des dommages compensatoires.

Après avoir examiné trois arrêts portant sur ce point, la Cour décide, en un paragraphe, d'accorder l'indemnité. Voilà, à notre avis, une belle occasion ratée par la Cour suprême d'éclairer les tribunaux inférieurs sur les "valid legal reasons"<sup>25</sup> qui permettraient d'en refuser l'octroi. Des précisions auraient été d'autant plus appréciées que la jurisprudence récente semble retenir de plus en plus d'hypothèses où le pouvoir discrétionnaire du juge peut être exercé négativement.<sup>26</sup> Il s'agit là d'un exemple où le rôle de la Cour suprême serait mieux rempli que dans la reprise de citations archi connues sur la notion de faute.

## *Conclusion*

Que restera-t-il de l'arrêt *Houle* pour la postérité? Certainement une confirmation non équivoque de la jurisprudence et de la doctrine contemporaine, appliquant la théorie de l'abus de droit en l'absence de mauvaise foi de "l'abuseur". On devrait également retenir la distinction salutaire opérée par la Cour suprême en ce qui concerne la source du recours, qui pourrait entraîner une évolution intéressante de la jurisprudence appliquant l'abus de droit contractuel. Malheureusement, nous ne pouvons passer sous silence notre désaccord avec l'emploi de l'article 1075 C.c. en l'espèce, ainsi que l'occasion ratée de fixer les paramètres encadrant l'exercice du pouvoir discrétionnaire du juge face à l'indemnité additionnelle.

\* \* \*

<sup>24</sup> *Supra*, note 1, à la p. 188.

<sup>25</sup> Selon les termes du juge Montgomery dans *Godin c. Trempe*, J.E. 85-822, à la p. 8 (C.A.).

<sup>26</sup> Voir, par exemple, *Canuel c. Fournier*, [1990] R.J.Q. 2253, à la p. 2267 (C.S.), en appel; *Lamarre c. Canadien Pacifique ltée*, [1990] R.R.A. 90, aux pp. 93-94 (C.Q.).

RESPONSABILITÉ PROFESSIONNELLE—RESPONSABILITÉ CIVILE  
DU NOTAIRE QUÉBÉCOIS—CHOSE JUGÉE—ERREUR DE DROIT—  
FAUTE PROFESSIONNELLE—PRATIQUE NOTARIALE COURANTE—  
RÔLE DES EXPERTS—DEVOIR DE CONSEIL:  
*Dorion c. Roberge et Beaupré.*

Paul-Yvan Marquis\*

*Introduction*

Le 28 février 1991, la Cour suprême du Canada a rendu, en l'affaire *Dorion c. Roberge et Beaupré*,<sup>1</sup> un jugement d'une importance manifeste dans le domaine de la responsabilité notariale au Québec. Il s'agit d'un arrêt très élaboré et fort documenté ayant comme axe central la responsabilité civile d'un notaire pour les conseils d'ordre juridique donnés à ses clients à l'occasion d'une transaction immobilière et, plus particulièrement, d'un examen des titres de l'immeuble.

Les faits prouvés et les arguments soumis ont induit le Tribunal à aborder plusieurs sujets et entre autres: la nature de la responsabilité civile du notaire; l'erreur de droit et la faute; la chose jugée et l'examen des titres; la valeur d'un témoignage d'expert; la relation de causalité. À la vérité, on pourrait, en droit, résumer tout le litige en ces deux propositions: le notaire appelant a-t-il commis une erreur de droit? Dans l'affirmative, cette erreur constituait-elle une faute susceptible de déclencher sa responsabilité? Vraisemblablement les autres sujets ont été considérés en fonction de la solution de ces deux interrogations fondamentales.

Nous nous proposons, en ce commentaire d'arrêt, d'essayer de saisir la portée exacte de cette décision et de mesurer son impact sur l'exercice de la profession de notaire en général et à l'égard de l'examen des titres plus spécialement. À ces fins, nous allons présenter d'abord une synthèse des faits pertinents du litige. Nous rapporterons ensuite les principales dispositions de l'arrêt de la Cour supérieure du Québec et surtout de celui de la Cour suprême. L'autorisation de pourvoi à la Cour d'appel du Québec n'avait pas été accordée. Nous ferons pour terminer les commentaires qui nous sembleront les plus appropriés.

*Les faits*

Les intimés Roberge et Beaupré s'étaient engagés par une offre d'achat, signée le 7 avril 1987, à acquérir un immeuble du mis en cause Bolduc. Celui-ci, en acceptant cette offre, s'était obligé à fournir aux acheteurs

---

\* Paul-Yvan Marquis, notaire honoraire, Aylmer, Québec.

<sup>1</sup> [1991] 1 S.C.R. 374.

“... un titre bon et valable, libre de toutes charges et autres droits réels sauf ceux spécifiés dans l'offre d'achat”.<sup>2</sup>

Le notaire appelant s'était vu confier la mission d'examiner les titres de l'immeuble et de préparer l'acte de vente si le titre du vendeur s'avérait bon et valable et si les futurs acquéreurs pouvaient consentir sur l'immeuble une première hypothèque à la Banque Nationale du Canada. Cette dernière avait accordé un prêt pour l'acquittement d'une partie du prix de vente.

Cependant, l'examen des titres devait soulever de sérieuses questions. D'abord, en 1977, une hypothèque avait été enregistrée sur l'immeuble, sans l'assentiment du propriétaire (Paul Leclerc Inc.), pour garantir l'emprunt contracté auprès d'une Caisse populaire par l'ancien propriétaire (Paul Leclerc). Puis, en 1980, Paul Leclerc Inc. et Paul Leclerc avaient fait une cession de leurs biens et le même syndic avait été nommé à ces faillites. Ce dernier avait omis de faire enregistrer sur l'immeuble un avis de la faillite de Paul Leclerc Inc.

Subséquemment, vu le défaut de l'emprunteur, la Caisse populaire avait fait valoir la clause de dation en paiement stipulée comme autre sûreté dans l'acte de prêt hypothécaire. L'avis de soixante jours exigé par l'article 1040a C.c.B.C. avait été signifié à Paul Leclerc et à Paul Leclerc Inc. L'action en dation en paiement qui avait suivi avait été régulièrement signifiée et était dirigée contre le syndic à la faillite de Paul Leclerc et contre la compagnie Paul Leclerc Inc. Cette action non contestée—aucun des défendeurs n'ayant même comparu—avait été accueillie, le 17 juillet 1980, par un protonotaire spécial qui, par son jugement, avait reconnu “... la demanderesse propriétaire incommutable ...” de l'immeuble “... avec effet rétroactif au 1er juin 1987” et déclaré “... que ni les défendeurs, ni le mis-en-cause, ni aucun tiers n'a aucun droit en ou contre cet immeuble ...”.<sup>3</sup> Ce jugement fut enregistré le 20 août 1980. En 1981, la Caisse populaire vendait l'immeuble à l'épouse de Bolduc et, en 1984, celle-ci le revendait à son époux.

En présence de tous ces faits, le notaire informa ses clients, par téléphone, le ou vers le 30 avril 1987, que le titre du vendeur était vicié et que “... le jugement obtenu par la Caisse n'avait pu avoir pour effet de corriger le vice ...”.<sup>4</sup> Cette opinion fut confirmée par un confrère notaire. Elle fut contredite, toutefois, par l'avocat du promettant-vendeur Bolduc, le 13 mai 1987. Ce juriste était d'avis que “... le jugement enregistré ... avait rendu le titre parfait et ... il avait acquis l'autorité de la chose jugée”.<sup>5</sup> Le 22 mai 1987, le notaire confirmait par écrit l'imperfection du titre “... relativement au jugement en déclaration de propriété de la Cour

<sup>2</sup> *Ibid.*, à la p. 384.

<sup>3</sup> *Ibid.*, à la p. 385.

<sup>4</sup> *Ibid.*, à la p. 386.

<sup>5</sup> *Ibid.*

supérieure . . . *L'acte hypothécaire . . . ayant été consenti par une personne autre que le propriétaire enregistré, cette hypothèque était donc nulle et le jugement ne pouvait donner plus que ce que valait cette hypothèque*".<sup>6</sup>

Finalement, les acquéreurs éventuels refusèrent d'acheter l'immeuble et poursuivirent en dommages, pour un montant de 4 910,00\$<sup>7</sup> le promettant-vendeur Bolduc. Celui-ci riposta par une demande reconventionnelle par laquelle il réclamait la somme de 15 000,00\$ pour le préjudice lui résultant du refus des demandeurs Roberge et Beaupré. Ces derniers intentèrent alors au notaire une action en garantie alléguant "... que c'était sur son conseil qu'ils avaient refusé de se porter acquéreurs de l'immeuble".<sup>8</sup>

Lors de l'enquête au mérite, le notaire avait fait entendre comme témoin expert un autre notaire, au sujet de la pratique notariale courante en une pareille situation. Celui-ci avait émis l'opinion que son confrère avait "... agi sagement, prudemment et de la manière la plus adéquate dans les circonstances".<sup>9</sup>

### *L'arrêt de la Cour supérieure*

Le 9 février 1988, l'action principale fut rejetée mais la demande reconventionnelle maintenue pour 3 500,00\$ plus les intérêts et l'indemnité prévue à l'article 1078.1 C.c.B.C. L'action en garantie fut accueillie.

Selon le juge Mignault, "[l]e jugement contentieux du 17 juillet 1980 avait un caractère définitif et l'autorité de la chose jugée et conférait un titre bon et valable à la Caisse populaire . . .".<sup>10</sup> Le magistrat a été d'avis aussi que le notaire en était arrivé "... à une conclusion erronée en droit" et elle avait été la cause des dommages subis par les demandeurs Roberge et Beaupré attendu que le praticien "... n'était pas justifié de . . . faire la recommandation que l'on sait".<sup>11</sup>

D'après la Cour encore, le notaire "... ne pouvait ignorer les dispositions du premier alinéa de l'article 1241 C.C. Dans l'exercice de son devoir de conseiller juridique des demandeurs, il eut dû pousser plus avant sa recherche et se demander si le jugement du 17 juillet 1980 avait en droit quelque effet plutôt que de conclure sans plus que le jugement était entaché de nullité du seul fait que l'hypothèque consentie par Paul Leclerc à la Caisse populaire était nulle".<sup>12</sup>

<sup>6</sup> *Ibid.*, à la p. 387. (Mots mis en italique par la Cour suprême).

<sup>7</sup> L'action fut inscrite en Cour provinciale mais il y eut subséquemment évocation à la Cour supérieure en vertu des dispositions des articles 32 et 155 C.P.C.

<sup>8</sup> *Supra*, note 1, à la p. 387.

<sup>9</sup> *Ibid.*, à la p. 389.

<sup>10</sup> *Ibid.*, à la p. 388.

<sup>11</sup> *Ibid.*, à la p. 389.

<sup>12</sup> *Ibid.*

Enfin, au sujet de la pratique notariale courante prouvée par l'expert, le juge a déclaré: "... nous ne pouvons partager l'opinion du notaire Demers lorsqu'il affirme que le notaire Dorion a ... agi sagement, prudemment et de la manière la plus adéquate dans les circonstances".<sup>13</sup>

### *L'arrêt de la Cour suprême*

Le jugement de la Cour supérieure a été confirmé à l'unanimité. Les motifs de la décision ont été exprimés, au nom de la Cour, par le juge Claire L'Heureux-Dubé.

La Cour a voulu d'abord placer le litige "... dans son contexte général, soit celui de la responsabilité professionnelle",<sup>14</sup> celle-ci empruntant ses règles à la responsabilité civile "ordinaire".<sup>15</sup>

Il s'ensuit qu'un professionnel ne saurait être tenu responsable s'il adopte la conduite d'"un professionnel raisonnable".<sup>16</sup> Il doit donc exécuter ses obligations avec "... tous les soins d'un bon professionnel de sa spécialité".<sup>17</sup> Le notaire, entre autres, doit agir comme un "... praticien du droit de compétence ordinaire".<sup>18</sup> De plus, selon la Cour, les obligations d'un professionnel sont généralement des obligations de prudence et de diligence et non des obligations de résultat. À l'égard des notaires en particulier, la Cour a affirmé que "... même s'il peut y avoir des cas où leur obligation pourrait en être une de résultat, ce qui n'est pas le cas en l'espèce, les notaires du Québec ont, *en principe*, envers leurs clients une obligation de diligence".<sup>19</sup>

Dans ce domaine des normes encore, le Tribunal a également émis l'opinion que la relation professionnelle du notaire avec son client est ordinairement de nature contractuelle. Le juge Claire L'Heureux-Dubé a écrit: "Bien que le notaire puisse encourir une responsabilité délictuelle pour une faute commise à l'extérieur du domaine contractuel, les relations qu'il entretient avec son client sont généralement de nature contractuelle".<sup>20</sup> Il a été mentionné en outre qu'en cette affaire, la différence entre les responsabilités contractuelle et délictuelle était sans importance "... étant

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, à la p. 393.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, à la p. 395.

<sup>17</sup> Voir H. et L. Mazeaud et A. Tunc, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, t. 1 (6e éd., 1965), no 705, pp. 812 et 813, cités par le juge, *ibid.*, à la p. 395.

<sup>18</sup> Voir *Legault c. Thiffault*, C.A. Montréal, no 09-000-488-742, le 4 août 1976, à la p. 8, notes du juge Lajoie citées par le juge, *ibid.*

<sup>19</sup> *Ibid.*, à la p. 398. (Mots mis en italique par la Cour suprême).

<sup>20</sup> *Ibid.*, aux pp. 399-400.

donné que les deux types de responsabilité sont fondés sur les mêmes principes généraux concernant la faute".<sup>21</sup>

D'autre part, devant la prétention des intimés à l'effet que le notaire avait commis une erreur de droit, qualifiée par eux de fautive, et qui aurait consisté à ne pas avoir tenu "... compte de l'autorité de la chose jugée"<sup>22</sup> et de ses effets sur le titre de propriété, le tribunal s'est demandé si le jugement du protonotaire spécial avait réellement "...acquis l'autorité de la chose jugée".<sup>23</sup> Avec justesse, le juge Claire L'Heureux-Dubé a pu écrire que ce problème "...est au coeur du présent litige".<sup>24</sup>

Après une étude détaillée, inspirée tant du droit québécois que du droit français, de "la nature et des conditions d'existence" de cette présomption *juris et de jure*, la Cour en est arrivée à une réponse positive. L'arrêt du protonotaire spécial, en date du 17 juillet 1980, déclarant la Caisse populaire propriétaire incommutable de l'immeuble, était revêtu de l'autorité de la chose jugée. Selon la Cour:<sup>25</sup>

... vu que toutes les conditions énoncées à l'art. 1241 C.c.B.-C. quant à la compétence et à l'identité des parties, d'objet et de cause sont remplies en l'espèce, le jugement obtenu par la Caisse a acquis l'autorité de la chose jugée. Ce jugement a conféré à la Caisse un bon et valable titre étant donné qu'il n'a pas été porté en appel et qu'il n'aurait pu, d'après les faits de l'espèce, faire l'objet d'autres procédures.

Il a été reproché au notaire appelant de ne pas avoir "... fait la distinction entre le vice de l'hypothèque, qui existait, et le vice du titre, qui n'existant pas puisqu'il y avait été remédié par le jugement conférant la propriété de l'immeuble à la Caisse".<sup>26</sup>

Le Tribunal a reconnu, cependant, "...qu'à l'époque où l'appelant a conseillé les intimés, la pratique notariale courante aurait mené à la conclusion qu'il y avait un vice dans le titre du vendeur et que ce vice n'avait pas été effacé par le jugement conférant la propriété à la Caisse".<sup>27</sup> Il a été affirmé aussi "... que le notaire appelant ait agi en conformité avec la pratique notariale générale de l'époque ne semble pas contesté".<sup>28</sup> Deux notaires, dont l'un à titre d'expert, avaient témoigné, en effet, que "...l'opinion du notaire appelant était conforme aux normes de pratique d'un notaire prudent et avisé, placé dans les mêmes circonstances".<sup>29</sup> Mais cette expertise a été admise, comme en première instance, seulement à

<sup>21</sup> *Ibid.*, à la p. 401.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, à la p. 437.

<sup>25</sup> *Ibid.*, à la p. 427.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, à la p. 432.

<sup>28</sup> *Ibid.*, à la p. 434.

<sup>29</sup> *Ibid.*, à la p. 428.

l'égard de la pratique notoriale et non quant à la rectitude de l'avis juridique du notaire. La Cour a souligné que "[...] le juge [...] reste l'arbitre final et n'est pas lié par le témoignage des experts".<sup>30</sup> Elle a déclaré également:<sup>31</sup>

... les tribunaux ont le pouvoir discrétionnaire d'apprecier la responsabilité, malgré l'existence d'une preuve non contredite quant à la pratique professionnelle courante à l'époque en question. La norme doit toujours être, compte tenu des faits particuliers de chaque espèce, celle du professionnel raisonnable placé dans les mêmes circonstances.

Bref, d'après le Tribunal, "... il ne suffit pas [...] de suivre la pratique professionnelle courante pour échapper à sa responsabilité. Il faut que le caractère raisonnable de cette pratique puisse être démontré".<sup>32</sup>

Au sujet de la chose jugée elle-même, la Cour a été d'opinion que ce "... n'est pas une question controversée dans le domaine juridique"<sup>33</sup> et que même si "... son application aux faits de chaque espèce puisse nécessiter une analyse approfondie, c'est là la démarche qu'on attend d'un praticien du droit, qu'il soit avocat ou notaire".<sup>34</sup> Mais "[d]ans la présente affaire, les faits ne présentaient pas de difficultés particulières eu égard à l'appréciation du principe de la chose jugée".<sup>35</sup>

La Cour a donc décidé que, dans les circonstances, l'erreur de droit constituait une faute. Selon elle, "[...] la pratique notariale en matière de recherche de titres, telle que la preuve en a été établie au procès, ne saurait ... être qualifiée de raisonnable et diligente compte tenu de la clarté du droit à cette époque, pas plus qu'on ne saurait excuser le traitement superficiel accordé à la question de la chose jugée".<sup>36</sup> Elle a ajouté:<sup>37</sup>

L'omission de prendre en considération l'autorité de la chose jugée en pareil cas est déraisonnable, peu importe qu'il s'agisse ou non d'une pratique notariale courante. Bien que l'appelant ait eu raison de souligner le vice dont était entaché l'acte de prêt, il a eu tort de ne pas évaluer soigneusement l'effet du jugement obtenu par la Caisse sur le titre du vendeur. Cette erreur de droit était déraisonnable et constitue une faute au regard des faits de la présente affaire.

Le défaut du notaire de prendre en considération l'effet de la chose jugée était "... une ligne de conduite que n'aurait pas adopté (sic) un notaire raisonnable, diligent et prudent".<sup>38</sup> Comme enfin un lien de causalité a été démontré entre cette faute et le préjudice souffert, "... l'opinion du notaire appelant a été la cause directe, immédiate et logique de la décision

<sup>30</sup> *Ibid.*, à la p. 430.

<sup>31</sup> *Ibid.*, à la p. 436.

<sup>32</sup> *Ibid.*, à la p. 434.

<sup>33</sup> *Ibid.*, à la p. 437.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, aux pp. 437-438.

<sup>37</sup> *Ibid.*, à la p. 439.

<sup>38</sup> *Ibid.*, à la p. 441.

des intimés de ne pas acheter l'immeuble”,<sup>39</sup> et la responsabilité du praticien a été retenue.

### Commentaires

Le juge Claire L'Heureux-Dubé a eu raison d'écrire que “... la présente espèce revêtait une importance considérable aux yeux des notaires du Québec”.<sup>40</sup> Comme elle le signale, les affidavits de trois notaires éminents à l'appui de la requête en autorisation de pourvoi de l'appelant en témoignent d'ailleurs éloquemment. Il y a lieu de noter aussi la portée possible de ce jugement qui, jusqu'à un certain point, serait susceptible d'affecter tout le champ des conseils d'ordre juridique donnés par le notaire. Il ne nous paraît pas sans intérêt de mentionner encore que déjà, en deux affaires très récentes<sup>41</sup> concernant la responsabilité notariale, la Cour d'appel du Québec s'est référée à la présente décision sur des questions de pratique notariale courante, d'expertise et du caractère fautif ou non d'une erreur de droit.

Ce litige a été également, pour la Cour suprême, l'occasion de prendre position sur plusieurs principes fondamentaux de la responsabilité notariale. Ces opinions, à la vérité, ne sont peut-être pas tellement innovatrices puisqu'elles avaient été exprimées antérieurement dans notre droit soit par la doctrine, soit par la jurisprudence, soit souvent même par les deux. Les nombreuses références doctrinales et jurisprudentielles que le juge a citées—and l'on pourrait en ajouter d'autres—le démontrent. À l'avenir, cependant, ces normes professionnelles, en raison de l'autorité qui s'attache aux arrêts de notre plus haut Tribunal, posséderont une force contraignante plus grande et un élément sécuritaire plus décisif que lorsqu'elles se retrouvaient seulement sous la plume d'un auteur ou dans les arrêts des cours inférieures.

Ainsi, selon la Cour suprême, “[l]a responsabilité professionnelle est régie par les principes de la responsabilité civile ordinaire, c'est-à-dire la théorie de la faute”;<sup>42</sup> la relation du notaire avec son client est généralement d'ordre contractuel; les obligations contractées par le notaire sont ordinairement des obligations de moyens encore que, suivant les cas, l'obligation de résultat puisse se rencontrer; l'erreur de droit du notaire n'est pas nécessairement synonyme de faute; “... en matière de responsabilité professionnelle ... le témoignage d'un expert ne lie pas quant à la question de droit précise que le juge est appelé à trancher. Cette question relève

<sup>39</sup> *Ibid.*, à la p. 443.

<sup>40</sup> *Ibid.*, à la p. 448.

<sup>41</sup> Voir *Julien c. Banque nationale du Canada*, C.A. Montréal, no 500-09-001194-869, le 2 avril 1991; *Sasseville c. Bonneville*, C.A. Québec, no 200-09-000694-874, le 26 avril 1991.

<sup>42</sup> *Supra*, note 1, à la p. 393.

du domaine du juge";<sup>43</sup> "... il ne suffit pas ... de suivre la pratique professionnelle courante pour échapper à sa responsabilité. Il faut que le caractère raisonnable de cette pratique puisse être démontré".<sup>44</sup>

Ce n'est pas l'endroit, toutefois, pour gloser sur chacun des sujets traités en cette décision. Nous n'avons pas non plus l'intention d'examiner en détail et au fond le problème primordial de la chose jugée sur la solution duquel les opinions des parties différaient radicalement. Cette dernière question nous conduit néanmoins à l'un des points essentiels discutés en cette décision, soit celui de l'erreur de droit attribuée au notaire et qualifiée de faute.

Il ne semble pas réellement contesté que l'erreur de droit imputable à un notaire n'engendre pas inéluctablement une faute professionnelle. Il y a lieu, au contraire, de tenir compte des circonstances particulières de chaque cas. En l'espèce, le notaire a été reconnu fautif non parce qu'il avait ignoré la notion de chose jugée mais parce qu'il n'aurait pas suffisamment approfondi cette règle de droit dans le contexte donné. Il est difficile de déterminer avec précision quel examen le notaire a effectivement fait de ce problème. La Cour paraît avoir pris pour acquis, cependant, que si une étude plus sérieuse avait été effectuée, le notaire serait sûrement arrivé à une opinion favorable à l'existence de la *res judicata*.

Il est possible d'émettre certains doutes. Certes, il faut bien distinguer entre une hypothèque nulle et une dation en paiement (sous condition suspensive) nulle. Il s'agit, en effet, comme l'a déjà souligné la Cour d'appel du Québec,<sup>45</sup> de deux garanties distinctes accordées au prêteur et dont la validité peut être considérée séparément. Mais, en cette affaire, la dation en paiement à l'instar de l'hypothèque n'était pas valide parce que consentie par un non-propriétaire. Il y avait là assurément, *prima facie*, pour un juriste, une juste cause à réflexion. Il n'était pas davantage anormal de s'interroger sur l'aptitude du jugement fondé sur cette convention à rectifier la situation.

D'un autre côté, il est bien sûr que l'article 1241 C.c.B.C. doit faire partie du patrimoine juridique de tout notaire. Il est vrai aussi que cette question n'est pas controversée dans notre droit mais le tribunal a reconnu tout de même, et avec raison, qu'elle est "semée d'embûches".<sup>46</sup> Or, à notre avis du moins et avec respect pour l'opinion contraire, en ce litige le problème de la chose jugée se présentait avec une certaine complexité.

Il n'est donc pas si manifeste peut-être qu'une étude plus sérieuse du sujet par l'appelant l'aurait inévitablement conduit à admettre, devant

<sup>43</sup> *Ibid.*, à la p. 431.

<sup>44</sup> *Ibid.*, à la p. 434.

<sup>45</sup> Voir *Mercure c. Vanier*, [1976] C.A. 838.

<sup>46</sup> *Supra*, note 1, à la p. 437.

les circonstances de l'espèce, la réalisation des différentes conditions requises à l'existence de la chose jugée. Le notaire aurait pu, en toute bonne foi, conserver un doute sérieux sur la valeur du titre et même, à l'exemple d'excellents juristes, émettre une opinion défavorable à la *res judicata*. Lorsqu'il s'agit, en effet, d'appliquer à un ensemble de faits des principes de droit, même bien établis, les juristes les plus distingués ne sont pas toujours unanimes; les tribunaux, entre autres, nous en offrent fréquemment la preuve.

Est-ce qu'en une pareille hypothèse d'un examen plus approfondi de la question de la chose jugée, on aurait également qualifié de fautif l'avis juridique du notaire excluant l'opération de cette dernière? Cette étude aurait-elle été suffisante pour exonérer le praticien bien que celle-ci eût comporté une conclusion identique supposée erronée et eût été suivie de conseils similaires aux clients? Il reste certain qu'il aurait été plus difficile alors de déceler un manque de diligence chez le notaire et d'imputer à celui-ci une faute caractérisée. Surtout que, dans le domaine de la responsabilité notariale, il faut prendre comme modèle de comparaison un notaire de compétence normale, pas nécessairement aussi versé en droit que les plus savants de ses confrères.

Il nous apparaît encore important, en cette note d'arrêt, de ne pas passer sous silence le problème du respect par un professionnel d'un usage de sa profession, en l'occurrence d'une pratique notariale courante relative à l'examen des titres. Les auteurs du Répertoire de Droit sur les Titres immobiliers ont écrit:<sup>47</sup>

Lorsqu'il examine les titres d'un immeuble, le notaire s'acquitte d'une obligation de moyens. Il doit faire preuve de prudence et de diligence, et agir selon les règles et usages de sa profession.

La question est vraiment de savoir si le respect par un professionnel d'un tel usage, d'une pareille pratique, le met entièrement à l'abri de toute responsabilité. Il a été soutenu que le professionnel est alors exempt de toute faute, car il agit comme le bon père de famille de sa profession. La thèse contraire a aussi été soumise, parce qu'un usage pourrait être opposé aux "... règles de la prudence et de la raison".<sup>48</sup> Cette dernière opinion est actuellement prépondérante et elle se trouvera renforcée dans notre droit par la position de la Cour suprême en cette affaire. Conséquemment l'usage ne serait pas nécessairement une source d'exonération et il ne saurait en être tenu compte, par exemple, s'il était "... constitutif de négligence professionnelle".<sup>49</sup> Il appartiendra aux tribunaux de se prononcer souverainement le cas échéant.

<sup>47</sup> Voir R.D. Titres immobiliers, Doct., Doc. 1, Le notaire et l'examen des titres, no 46, p. 29.

<sup>48</sup> Voir Mazeaud et Tunc, *op. cit.*, note 17, no 94, p. 97.

<sup>49</sup> Voir P.-A. Crépeau, La responsabilité médicale et hospitalière dans la jurisprudence québécoise récente (1960), 20 R. du B. 433, à la p. 481.

Dans le présent litige, la Cour a bien reconnu, dans les termes suivants, que le notaire avait effectivement suivi la pratique notariale courante:<sup>50</sup>

Il apparaît peu douteux qu'à l'époque où l'appelant a conseillé les intimés, la pratique notariale courante aurait mené à la conclusion qu'il y avait un vice dans le titre du vendeur et que ce vice n'avait pas été effacé par le jugement conférant la propriété à la Caisse.

Pourtant le notaire a été trouvé fautif. On est naturellement porté à se demander: mais alors qu'aurait-il dû faire?

C'est que la Cour a été d'avis que la pratique à laquelle le notaire avait conformé son conduite n'était pas raisonnable. Pour le juge Claire L'Heureux-Dubé, en effet, "... il ne suffit pas, ... de suivre la pratique professionnelle courante pour échapper à sa responsabilité. Il faut que le caractère raisonnable de cette pratique soit démontré".<sup>51</sup> Or, selon le juge, cette pratique notariale invoquée par l'appelant et confirmée sans contradiction par deux de ses confrères ne possédait pas cette caractéristique indispensable et ne pouvait donc constituer une sauvegarde pour le praticien. Il est possible d'approuver ou de contester cette dernière conclusion, mais elle est inscrite dans le jugement.

Évidemment, ce principe d'un usage ou d'une pratique raisonnable sera apprécié en fonction des circonstances de chaque espèce. Mais, pour le professionnel, comme on peut le constater en cette affaire, il ne sera pas facile souvent de mesurer la suffisance en prudence et diligence d'une pratique ou d'un usage, principalement quand cette pratique est généralisée au sein de sa profession. Comme le signale le juge Claire L'Heureux-Dubé, "[o]n peut ... espérer qu'une pratique qui s'est développée parmi les professionnels relativement à un acte professionnel donné témoigne d'une façon d'agir prudente".<sup>52</sup> Cependant, pour le magistrat, "[l]e fait qu'un professionnel ait suivi la pratique de ses pairs peut constituer une forte preuve d'une conduite raisonnable et diligente, *mais ce n'est pas déterminant*".<sup>53</sup> Aucune norme décisive ne pourrait donc être reliée à ce caractère de généralité. En vertu de cette pratique, le professionnel doit agir "de façon raisonnable" sinon sa responsabilité risque d'être engagée. Or, en cette affaire, la Cour a jugé que l'erreur de droit attribuée au notaire était "déraisonnable" et que celui-ci avait "... eu tort de ne pas évaluer soigneusement l'effet du jugement obtenu par la Caisse sur le titre du vendeur".<sup>54</sup> attendu, semble-t-il, qu'une telle évaluation aurait indubitablement entraîné l'adhésion du praticien à l'opinion favorisant l'existence de la chose jugée.

<sup>50</sup> *Supra*, note 1, à la p. 432.

<sup>51</sup> *Ibid.*, à la p. 434.

<sup>52</sup> *Ibid.*, aux pp. 436-437.

<sup>53</sup> *Ibid.*, à la p. 437. (Mots mis en italique par la Cour suprême).

<sup>54</sup> *Ibid.*, à la p. 439.

Un autre aspect de cette question nous paraît devoir retenir l'attention: comment apprécier la conduite d'un notaire qui, en un cas précis, ne se conforme pas à une pratique notariale courante? Dans l'arrêt *Sasseville c. Bonneville*,<sup>55</sup> le juge McCarthy de la Cour d'appel du Québec, après s'être référé à la présente décision, a affirmé: "Je crois, toutefois, qu'il faut probablement convenir que le notaire qui ne suit pas la pratique professionnelle courante n'échappe pas à sa responsabilité". Est-ce que le notaire ne se trouverait pas ainsi enfermé dans un certain dilemme? D'un côté, en effet, s'il se conforme à une pratique notariale courante, il ne possède aucune certitude absolue d'agir avec suffisamment de prudence et de diligence. D'un autre côté, s'il s'abstient de respecter cette pratique, il serait susceptible d'encourir une responsabilité.

Les solutions pourraient peut-être se retrouver dans les deux propositions suivantes: (1) si la pratique est déraisonnable, il n'y a évidemment aucun inconvénient à l'ignorer, au contraire; (2) si, par contre, cette pratique s'avère raisonnable—ce qui ne sera pas toujours facile à établir—le notaire doit normalement l'adopter et ce n'est pas sans risques qu'il s'en éloignera; mais sa responsabilité restera alors subordonnée à la présence simultanée des trois éléments essentiels de la responsabilité civile.

Parmi les sujets importants examinés en cette affaire, celui du rôle d'un expert dans le domaine de la responsabilité professionnelle d'un conseiller juridique mérite également d'être considéré. Il est bien admis qu'en principe la fonction de l'expert est limitée aux problèmes d'ordre technique et scientifique mais ne s'étend pas aux questions d'ordre juridique. L'expert, en effet, émet une opinion, donne un avis, pour éclairer la Cour; c'est le juge, cependant, qui décide et il n'est pas lié par les conclusions de l'expertise.

En la présente espèce, un notaire, entendu comme témoin expert, avait déclaré que l'appelant avait "...agi sagement, prudemment et de la manière la plus adéquate dans les circonstances"<sup>56</sup> et que "[l]e vice de titre qu'il a relevé le justifiait de donner le conseil qu'il a exprimé ...".<sup>57</sup> Selon les termes mêmes du jugement, les deux confrères, dont l'un a titre d'expert, du notaire appelant avaient affirmé "... que l'opinion du notaire était conforme aux normes de pratique d'un notaire prudent et avisé, placé dans les mêmes circonstances".<sup>58</sup> Les intimés avaient contesté cette déposition relativement à "... la rectitude de l'opinion de l'Appelant ...".<sup>59</sup>

<sup>55</sup> *Supra*, note 41, à la p. 3.

<sup>56</sup> *Supra*, note 1, à la p. 389.

<sup>57</sup> *Ibid.*, à la p. 433.

<sup>58</sup> *Ibid.*, à la p. 428.

<sup>59</sup> *Ibid.*

La Cour a tenu compte de l'opinion de l'expert uniquement à l'égard de l'existence de la pratique normale et non quant à l'invalidité du titre. Après avoir signalé qu'"[e]n matière de responsabilité légale professionnelle, l'admissibilité du témoignage d'expert a toujours été reconnue",<sup>60</sup> le juge Claire L'Heureux-Dubé a souligné que "... le témoignage d'un expert ne lie pas quant à la question de droit précise que le juge est appelé à trancher. Cette question relève du domaine du juge".<sup>61</sup> Le rôle de l'expert se borne donc à renseigner la Cour, ce qui vraisemblablement ne saurait éliminer la possibilité du témoignage d'un expert sur la manière d'agir d'un professionnel. Malgré un tel témoignage, cependant, il appartiendra exclusivement au magistrat de décider du caractère fautif ou non d'une pareille conduite. En se référant au présent arrêt, le juge LeBel de la Cour d'appel du Québec déclarait récemment dans une affaire relative à la responsabilité notariale:<sup>62</sup>

Il est exact qu'il n'appartient pas aux experts de rendre jugement sur l'existence de la faute professionnelle ou de se prononcer, en dernier ressort, sur la qualification d'un acte professionnel à l'égard des principes de la responsabilité civile. La décision de le considérer ou non comme une faute engageant la responsabilité relève du tribunal....

Enfin on ne saurait s'empêcher de noter que le devoir de conseil du notaire a aussi été mentionné en cet arrêt. Étant donné que le mis en cause et les intimés étaient liés par une promesse de vente, il a été fait grief au notaire de s'être abstenu d'informer ces derniers "... des répercussions légales que pourrait avoir une décision de ne pas donner suite à la vente..."<sup>63</sup> et notamment de la "probabilité" que le vendeur exerce contre eux un recours judiciaire. On peut constater une fois de plus la souveraine importance de cette obligation dans la vie professionnelle du notaire et l'attention particulière que les tribunaux lui accordent.

### *Conclusion*

Il nous semble que cet arrêt, en raison des principes qu'il reconnaît, présente, au Québec, un intérêt presque aussi grand pour les professionnels en général que pour les notaires en particulier. Nous limiterons, cependant, nos remarques finales à ces derniers puisqu'ils sont les plus directement touchés par le jugement.

Il y a lieu de signaler d'abord que le problème de la chose jugée, même s'il ne se rencontre pas fréquemment en matière d'examen de titres, peut, le cas échéant, être accompagné de difficultés spéciales. Le notaire sera donc prudent en lui accordant une attention particulière. Comme, lors d'un conflit, c'est le Tribunal qui aura à mesurer la suffisance du

<sup>60</sup> *Ibid.*, à la p. 429.

<sup>61</sup> *Ibid.*, à la p. 431.

<sup>62</sup> Voir *Sasseville c. Bonneville*, *supra*, note 41, opinion du juge Le Bel, à la p. 2.

<sup>63</sup> *Supra*, note 1, à la p. 439.

degré d'approfondissement de la question, il apparaît que c'est le plus qui assurera la meilleure protection. Mais le plus, toutefois, qui peut être donné par un praticien de compétence normale.

Ce litige ramène également à l'esprit cette constatation exprimée par plusieurs conseillers juridiques à l'effet que ce n'est pas sans motifs sérieux qu'un titre de propriété puisse être refusé par un examinateur de titres.<sup>64</sup> Il nous semble normal et logique d'ailleurs qu'en pareille circonstance le notaire informe son client des conséquences juridiques prévisibles susceptibles de découler d'une telle situation.

Nous sommes porté à croire enfin que la pratique notariale courante dont la considération est soumise au Tribunal ne devrait pas faire l'objet nécessairement d'une appréciation trop sévère, surtout quand elle s'est généralisée au sein de la profession. Il nous semblerait, en cette dernière hypothèse principalement, exister une certaine présomption qu'un tel usage aussi répandu s'est avéré apte à bien satisfaire à la fois les impératifs de la profession et les intérêts des clients. Il faut éviter qu'un professionnel de bonne foi soit pris par surprise.

\* \* \*

**TORTS—NEGLIGENT MISSTATEMENTS CAUSING ECONOMIC LOSS—  
ELEMENTS OF A SUCCESSFUL ACTION: *Kripps v. Touche Ross;*  
*Surrey Credit Union v. Willson.***

G.H.L. Fridman\*

Several recent English and Canadian decisions have been concerned with unsuccessful claims for economic loss caused by relying on an inaccurate statement made by a defendant.<sup>1</sup> Some of them involved applications to strike out statements of claim on the basis that they disclosed no cause of action. This feature of these decisions does not necessarily weaken their

<sup>64</sup> Évidemment, nous ne voulons nullement laisser entendre que tel était le cas en la présente affaire où les opinions juridiques concordantes de trois notaires avaient été émises.

\* G.H.L. Fridman, of the Faculty of Law, University of Western Ontario, London, Ontario.

<sup>1</sup> England: *Caparo Industries plc v. Dickman*, [1990] 2 A.C. 65, [1990] 1 All E.R. 568 (H.L.); *Al-Nakib Investments (Jersey) Ltd. v. Longcroft*, [1990] 1 W.L.R. 1390, [1990] 3 All E.R. 321 (Ch. D.); *James McNaughton Paper Group Ltd. v. Hicks Anderson & Co.*, [1991] 2 W.L.R. 641, [1991] 1 All E.R. 134 (C.A.); *Morgan Crucible Co. plc v. Hill Samuel Bank Ltd.*, [1991] 2 W.L.R. 655, [1991] 1 All E.R. 148 (C.A.) (where the Court of Appeal reversed the trial judge and allowed an amendment which recognized the possibility of liability); see also *Smith v. Eric S. Bush*, [1990] 1 A.C. 831, [1989] 2 All E.R. 514 (H.L.). Canada: *MacPherson v. Schachter* (1989), 1 C.C.L.T. (2d) 65, xxviiin. (B.C.S.C.); *Dixon v. Deacon Morgan McEwan Easson* (1990), 41 B.C.L.R. (2d) 82 (B.C.S.C.); *McGauley v. The Queen in right of British Columbia* (1990), 44 B.C.L.R. (2d) 217 (B.C.S.C.).

legal effect: it is legitimate for courts to refuse to allow actions to continue where ultimately the plaintiff would fail on legal grounds. At the same time, certainly in Canada, there is great reluctance on the part of courts to deny a party the right to a trial on the basis of the argument that the action will not succeed because the law does not recognise the plaintiff's type of claim.<sup>2</sup> In one of two recent British Columbia decisions arising from allegations of negligent misstatement causing economic loss, *Kripps v. Touche Ross*,<sup>3</sup> the defendant sought, unsuccessfully as it emerged, to preclude continuation of the suit. In another, *Surrey Credit Union v. Willson*,<sup>4</sup> the action was taking place, and the judgment of McColl J. is reported on one essential issue. These cases are the subject-matter of this comment. They are worthy of consideration because they are concerned with some important elements of a successful action for negligent misrepresentation causing economic loss, a form of tort liability that has become of considerable significance in the past thirty years.<sup>5</sup>

Both cases arose as a consequence of inaccurate information contained in a financial statement. In *Surrey Credit Union v. Willson*, the statement was made by chartered accountants as auditors of a company. In *Kripps v. Touche Ross*, the statement was made in a prospectus approved by the company's auditors and accepted by the Superintendent of Brokers, an agency of the Provincial Crown. In both instances the plaintiff alleged that it had acted in reliance on the statement and, in the *Surrey Credit Union* case, purchased debentures in the company, in the *Kripps* case loaned money to the company. Because the statements were inaccurate and provided an untrue picture of the financial state of the company in question, the money invested or loaned was lost. The respective plaintiffs sued the respective auditors for their respective losses.

*Surrey Credit Union v. Willson* dealt with the issue of "reliance" by the plaintiff. In *Kripps v. Touche Ross*, the case turned not only on the question of whether a duty of care was owed by the defendant to the plaintiff in the circumstances of the case, but also on three other issues. One related to what was termed "deemed reliance";<sup>6</sup> another with what

<sup>2</sup> See, for example, *Hunt v. Carey Canada Inc.* (1991), 74 D.L.R. (4th) 321, especially at pp. 333-336 (S.C.C.), per Wilson J.

<sup>3</sup> Vancouver Registry No. C862031, December 31st 1990, [1990] B.C.J. No. 2787.

<sup>4</sup> (1990), 49 B.C.L.R. (2d) 102 (B.C.S.C.).

<sup>5</sup> Since the decision in *Hedley Byrne & Co. v. Heller & Partners*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.); see G.H.L. Friedman, *Law of Torts in Canada* (1969), Vol. I, pp. 263-276.

<sup>6</sup> Rejected by Boyd J. on the basis of the judge's interpretation of s. 141 of the Securities Act, S.B.C., 1985, c. 83, and the effect of the language of the English Court of Appeal in *Clarke v. Bruce Lance & Co. (a Firm)*, [1988] 1 W.L.R. 881, [1988] 1 All E.R. 364 (on which see Friedman, *op. cit.*, footnote 5, pp. 270-271).

has been called in the United States "fraud on the market";<sup>7</sup> and the third with the liability of the Crown for negligence on the part of its agents causing economic loss.<sup>8</sup> In the event Boyd J. held that the action should proceed against the auditors on the ground that the defendant auditors had not proved "absolutely beyond doubt" that the pleadings disclosed no reasonable cause of action. However the plaintiff failed in respect of the allegations about "deemed reliance" and fraud on the market. The judge also decided that the Crown's objections to the plaintiff's amended statement of claim and the Third Party Notice issued by the defendant auditors should be upheld. Important and interesting though these questions may be, they are not considered in this comment, the scope of which is restricted to a discussion of the elements of duty and reliance in relation to an action of this kind as adumbrated and expounded by McColl J. in *Surrey Credit Union v. Willson* and Boyd J. in *Kripps v. Touche Ross*.

Every court that has been seized of a problem of the type encountered in these two cases has agreed that a primary issue to be resolved is whether the defendant owed the plaintiff a duty of care. Equally, every court since the decision in the case of *Hedley Byrne & Co. v. Heller & Partners*<sup>9</sup> has accepted that there must be the kind of relationship between the parties, based on expectations of reliance on information, advice or similar statements made by the defendant to the plaintiff, that will give rise to the requisite duty of care. What is a matter of dispute, however, is whether, on the facts of a particular case, the necessary relationship, and therefore the

<sup>7</sup> M.J. Stanek, The Fraud on the Market Theory: The Debate Rages On (1988-89), 27 Duquesne L.R. 277; W.J. Carney, The Limits of the Fraud on the Market Doctrine (1988-89), 44 The Business Lawyer 1259. This theory was rejected by Boyd J. as regards Canada based on the decisions in *McGauley v. The Queen*, *supra*, footnote 1, and *Kripps v. Touche Ross* (1987), 7 B.C.L.R. (2d) 105 (B.C.S.C.).

<sup>8</sup> Such liability was rejected by Boyd J. on the basis of *Yeun Kun-Yeu v. Attorney General of Hong Kong*, [1988] A.C. 175, [1987] 2 All E.R. 705 (P.C.); *Davis v. Radcliffe*, [1990] 1 W.L.R. 821, [1990] 2 All E.R. 536 (P.C.); *Birchard v. Alberta Securities Commission* (1987), 42 D.L.R. (4th) 300, [1987] 6 W.W.R. 536 (Alta. Q.B.). Contrast, however, *Brewer Bros. v. The Queen in right of Canada* (1990), 66 D.L.R. (4th) 71 (F.T.D.).

This area of the law, that is, the basis for imposing negligence liability, is in some confusion. Canadian cases have accepted and followed the reasoning of the House of Lords in *Anns v. Merton Borough Council*, [1978] A.C. 728, [1977] 2 All E.R. 492; see, for example, *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 1, (1984), 10 D.L.R. (4th) 641. The *Anns* approach has recently been overruled by the House of Lords: *Murphy v. Brentwood D.C.*, [1991] 1 A.C. 398, [1990] 2 All E.R. 908; *Department of the Environment v. Thomas Bates & Sons*, [1991] 1 A.C. 499, [1990] 2 All E.R. 943. See also Fridman, *op. cit.*, footnote 5, pp. 234-236; G.H.L. Fridman, Fridman on Torts (1990), paras. 12.05-12.10.

<sup>9</sup> *Supra*, footnote 5.

necessary duty, existed.<sup>10</sup> Prior to recent English decisions<sup>11</sup> it was considered that foresight of harm was the crucial test, subject only to the issue of policy, that is whether, despite the foreseeability of harm in the circumstances, there were reasons of public policy for negating a duty and consequent liability for alleged acts of negligence. The rejection of this test that was set out by Lord Wilberforce in *Anns v. Merton Borough Council*,<sup>12</sup> has led to the formulation of the appropriate test as being three-fold, *viz.*, that harm was foreseeable; that there was a sufficient relationship of "proximity" between the parties; and that it would be just and reasonable to impose a duty in the circumstances.<sup>13</sup>

In the two cases now under consideration the issue seems to have been one of "proximity", rather than of foresight of harm or whether the imposition of liability would be just and reasonable. On the question of proximity the judgment of McColl J. is briefer than that of Boyd J., because the issue in the case before the former was really whether there was evidence of reliance, whereas the issue before Boyd J. was quintessentially whether the accountants owed a duty of care to those who lent money to the company. In the *Surrey Credit Union* case McColl J., founding his views on the leading English and Canadian cases,<sup>14</sup> stated that there was a distinction between reliance by strangers upon a statement alleged to be inaccurate and reliance by someone entitled to claim reliance.<sup>15</sup> Whether a party claiming such entitlement was a stranger or not depended on whether the party providing the statement knew the purpose for which the consent to use their audited statements was being sought, that is, to attract capital to the company by getting people to subscribe to the debentures; it could no longer be said that those to whom the statements were shown were strangers. The auditors knew the circumstances and purpose for which consent was sought. Therefore, they owed a duty of care towards those to whom the statements would be shown. It appears to have been important that the auditors were the regular auditors of the company seeking purchasers

<sup>10</sup> See, for example, *Brewer Bros. v. The Queen in right of Canada*, *supra*, footnote 8, at pp. 95-100, per Collier J.; *Fletcher v. Manitoba Public Insurance Co.* (1991), 74 D.L.R. (4th) 636, at pp. 647-651 (S.C.C.), per Wilson J.

<sup>11</sup> For example, *Yeun Kun-Yeu v. Attorney General of Hong Kong*, *supra*, footnote 8; *Rowling v. Takara Properties Ltd.*, [1988] A.C. 163, [1988] 1 All E.R. 163 (P.C.); *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.*, [1985] A.C. 210, [1983] 3 All E.R. 417 (H.L.); *Richardson v. West Lindsey D.C.*, [1990] 1 W.L.R. 522, [1990] 1 All E.R. 296 (C.A.), Pet. All., [1990] 1 W.L.R. 551H (H.L.).

<sup>12</sup> *Supra*, footnote 8, at pp. 751-752 (A.C.), 498 (All E.R.).

<sup>13</sup> *Caparo Industries plc v. Dickman*, *supra*, footnote 1, at pp. 617-618 (A.C.), 573-574 (All E.R.), per Lord Bridge of Harwich.

<sup>14</sup> For example, *Hedley Byrne & Co. v. Heller & Partners*, *supra*, footnote 5; *Caparo Industries plc v. Dickman*, *supra*, footnote 1; *Haig v. Bamford*, [1977] 1 S.C.R. 466, (1977), 72 D.L.R. (3d) 68.

<sup>15</sup> *Supra*, footnote 4, at pp. 107-108.

for its debentures. Hence the auditors were familiar with all the relevant circumstances, including the necessity for the disclosure of the material financial statements whether the offering of the debentures was public, in the form of a prospectus, or private, in the form of a memorandum.

The issue in the *Kripps* case was more complex. It was not as straightforward a situation as that which existed in the *Surrey Credit Union* case. The auditors, Touche Ross & Co., tried to argue that the plaintiff's pleadings disclosed no reasonable cause of action. Boyd J. concluded that Touche Ross had not succeeded in proving this "absolutely beyond doubt". The tenor of the judgment, and the language just quoted, seem to suggest that Boyd J. was not completely convinced that the requisite duty of care did exist between the auditors and the plaintiff; but at the same time the judge did not feel so convinced of this that it would be reasonable and legitimate to strike out the plaintiff's pleadings on this point. Once again it must be emphasized that the judgment now under discussion was an interlocutory judgment, given in chambers, not a decision rendered at the trial of an action.

To arrive at the conclusion she reached, Boyd J. had first to distinguish the decisions in *MacPherson v. Schachter*<sup>16</sup> and *Dixon v. Deacon Morgan McEwan & Easson*.<sup>17</sup> In the first the accountants had no knowledge that the shares purchased by the plaintiff were for sale and were ignorant of the existence of the plaintiff as a potential purchaser. In *Dixon*, again, while foreseeability was not in question, the requisite proximity was also lacking. The plaintiff was a member of the public at large, not a "take-over suitor" nor a member of any other identifiable limited class of which an auditor might have been aware. In the *Kripps* case, the auditors argued that the plaintiff was a member of the "public at large", since the audited financial statements in that case were included in prospectuses and the debentures were offered for sale to the public generally, not to any specific person or persons. Hence the class of potential investors was unidentifiable and unlimited; moreover, the amount of money that might have been invested by the public at large was also unlimited. In consequence the auditors had no means of knowing over what period of time and through what intervening circumstances the plaintiff might have continued to rely on the financial statements in issue. Another argument of the auditors was founded upon the provincial Company<sup>18</sup> and Securities<sup>19</sup> Acts. Their report was made for the purposes of the first statute, not to inform potential investors. Furthermore the Securities Act was not intended to make auditors liable for consenting to the inclusion of an audit report in a prospectus

<sup>16</sup> *Supra*, footnote 1.

<sup>17</sup> *Ibid.*

<sup>18</sup> R.S.B.C., 1979, c. 59.

<sup>19</sup> *Supra*, footnote 6.

where a debenture was offered to the public at large. That argument was based on an interpretation of the language of the Securities Act that was urged on Boyd J. The auditor's twofold argument was directed towards the common law of negligence and the inappropriateness of invoking the common law to supplant the role of the legislature or the statutory scheme that regulated the kind of activity that was involved in this instance.

Boyd J. did not accept this line of reasoning. Identification of the specific plaintiff or a limited class of plaintiffs was not, in her words, "the focus of the Courts". Instead it was the awareness of the auditor of the nature of the transaction or transactions for which the statement was intended that was the important feature of liability. That this was so was supported, *inter alia*, by the language of Dickson J. in *Haig v. Bamford*<sup>20</sup> and of McColl J. in the *Surrey Credit Union* case.<sup>21</sup> Boyd J. relied most especially on the latter, which she followed. Although Touche Ross endeavoured to restrict the language of McColl J. to the particular facts of the *Surrey Credit Union* case, that is, a private offering, by definition an offering to a limited class of persons, Boyd J. was unsympathetic. Whether sufficient proximity can be found in any given case varied with the facts. In the *Kripps* case, the facts pleaded (but not, once again let it be stressed, found as facts by a court in a trial) were sufficient to give rise to the necessary proximity and therefore the necessary duty of care. Nor did the statutes make any difference. Whatever the nature of the acts performed by the auditors under those statutes, the auditors were aware of the nature of the transaction and of the fact that an identifiable class of persons, that is, those who would attend the offices of the company to obtain the prospectuses, would receive the information in the statements and the audit reports, and would likely rely on that information to decide whether to buy the debentures. Knowledge of the individual investors was not necessary. As long as the auditors were aware of the nature of the transaction or, in the words of McColl J., "the circumstances and purposes for which consent was sought", that was enough to oblige them to use reasonable care and skill in the preparation of the statements and reports.

In *Haig v. Bamford*<sup>22</sup> Dickson J. referred to three possible tests for the existence of a duty of care in this sort of situation. One was foreseeability of the use of a financial statement and the auditor's report thereon by the plaintiff; another was actual knowledge of the limited class that would use and rely on the statement; the third was actual knowledge of the specific plaintiff who would use and rely on the statement. The first test did not fall to be considered on the facts in the *Haig* case. The choice was between the second and third tests. The third test was too narrow. Hence Dickson

<sup>20</sup> *Supra*, footnote 14, at pp. 478-479 (S.C.R.), 76 (D.L.R.).

<sup>21</sup> *Supra*, footnote 4, at pp. 107-108.

<sup>22</sup> *Supra*, footnote 14, at pp. 476-477 (S.C.R.), 75 (D.L.R.).

J. adopted and applied the second test, that is, the actual knowledge of the limited class. In that case, therefore, the Supreme Court held accountants liable to a potential investor in a company when the investor relied on an audited financial statement which the accountants knew would be shown, *inter alia*, to such potential investors.

What is the present validity of the *Haig* decision in light of the judgment of the House of Lords in *Caparo Industries plc v. Dickman*,<sup>23</sup> holding that accountants owed no duty of care to members of the public, or to existing shareholders in a company, who relied on statements by the accountants in order to purchase shares or more shares in a company? The House of Lords considered that such statements were made by the accountants for the benefit of shareholders in order to enable them as a body to exercise informed control of the company. They were not made to enable individual shareholders, in this respect in no better position than members of the public generally, to buy shares with a view to profit.<sup>24</sup> The distinction between this case and the *Haig*, *Surrey Credit Union* and *Kripps* cases lies in the fact that in these three Canadian decisions the accountants knew, or were taken to have known, that their financial statements would be used for a purpose other than the normal one of informing the shareholders of a company about the company's financial status. On that basis, the *Haig*, *Surrey Credit Union* and *Kripps* cases can stand alongside the decision in *Caparo Industries plc v. Dickman*. They will not be inconsistent. Taken together, indeed, they will reinforce the idea that sufficient knowledge of the use to which a statement is going to be made must be established before the party who makes and puts into circulation such a statement will owe a duty of care to those who rely on and use such statement for investment or similar purposes.

The underlying purpose of these decisions, it may be suggested, is in some way to limit the scope of liability of accountants lest they be made subject to unlimited liability. It would appear that step by step the courts are finding the way to marking a line between liability and non-liability for the economic consequences of an inaccurate audit or other financial statement or report. Otherwise than in somewhat exceptional instances, the watchword for potential investors or lenders of money to companies may well be *caveat emptor*.

\* \* \*

---

<sup>23</sup> *Supra*, footnote 1.

<sup>24</sup> *Ibid.*, at pp. 623, 624, 626 (A.C.), 578, 579, 580 (All E.R.), per Lord Bridge; 630, 650 (A.C.), 583, 598 (All E.R.), per Lord Oliver; 662 (A.C.), 607-608 (All E.R.), per Lord Jauncey.