Case Comments
Commentaires d'arrêt

COMPANIES — LIABILITY OF DIRECTORS FOR PAY IN LIEU OF NOTICE: *Barrette v. Crabtree* — Kenneth Wm. Thornicroft — [1993], 72 C.B.R. 380.

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> "[Public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."[1]

It is a present day treat, albeit a rare one, to behold a Supreme Court of Canada judgment that inhabits fewer than twenty reported pages, is unanimous and addresses a narrow issue. *Barrette* v. *Crabtree*[2], which was discussed and criticized by Professor Kenneth Wm. Thornicroft recently in this journal[3], is one. The purpose of this response is to argue that, *contra* Thornicroft, the Supreme Court of Canada[4] reached the correct conclusion.

The Judgments

The case deals with what now is section 119(1) of the *Canada Business Corporations Act*:[5]

> 119 (1) Directors of a corporation are jointly and severally liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.

Twenty nine employees of the Wabasso plant in Trois-Rivières were laid off in 1985. The judgment of approximately $300,000 in damages for pay in lieu of termination notice was unpaid when Wabasso became insolvent. The laid off workers applied for personal orders against the directors pursuant to section 119. The Superior Court of Quebec[6] found that, because reasonable notice was

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[1] *Richardson* v. *Mellish* (1824), 2 Bing. 229, 130 E.R. 294, *per* Burroughs, J. at 252.

[2] [1993] 1 S.C.R. 1027, (1993), 101 D.L.R. (4th) 66, 47 C.C.E.L. 1, 10 B.L.R. (2d) 1, 150 N.R. 272, 53, Q.A.C. 279 (S.C.C.). Page references are to the DLR reports.

[3] "Companies - Liability of Directors for Pay in Lieu of Notice of Dismissal: Canada Business Corporations Act, S.C. 1974-75-76, C.33, S.114(1) (Now Canadian Business Corporations Act, R.S.C.C. C-44, S.11.9(1)): *Barrette* v. *Crabtree.*" (1993) 72 Can. Bar Rev. 380.

[4] *Supra*, footnote 2. Judgment by L'Heureux-Dubé J., concurred in by Lamer C.J.C. Sopinka, Gonthier and Iacobucci JJ.

[5] R.S.C. 1985, c. C-44 (herein, "CBCA") formerly, S.C. 1974-75-76, c. 33 section 114(1) of the *Canada Business Corporations Act.*

[6] *Barrette* v. *Crabtree* (25 May 1989), Trois-Rivières 400-02-000129-880, J.E. 89-1311 (C.Q.) at 12, per Judge Gagnon.

a legal requirement for employer termination of indefinite employment contracts, the judgment was a debt "associated with the performance of services for the corporation"[7]. This is the interpretation which Thornicroft appears to favour. The Quebec Court of Appeal[8] denied the workers of this statutory remedy. It focused on the meaning of "debts" in section 119(1). The Court said that "the wording clearly suggests"[9] only an "amount of which is known because the rates are specified in the employment contract...or by law"[10] was recoverable from the directors. In other words, the claim was for unliquidated damages, not a readily quantifiable debt. Instead of characterizing the judgment which was the subject of the appeal, the Court of Appeal opted to treat the employees' *claims* as unliquidated:[11]

> The debt here is not a liquidated and due one, but simply a contingent debt. Though the judgment on which the debt is based has become *res judicata* between the insolvent company and the employees, the fact remains that it does not necessarily have this finality vis-a-vis the directors...

L'Heureux-Dubé J., for the Supreme Court of Canada also found for the directors, but for different reasons. She pointed out how section 119(1) is "exceptional (to the general principles governing company law) in at least three respects".[12] These are:

(1.) "the rule departs from the fundamental principle that a corporation's legal personality remains distinct from that of its members...creates an exception to the more general principle that no one is responsible for the debts of another";

(2.) "unlike other statutory rules which may impose personal liability on directors, s. [119(1)] does not contain an exculpatory clause as such"[13]; and

(3.) "the provision in question imposes on directors a positive obligation. This distinguishes it from most statutory rules, which prohibit directors from engaging in certain acts or transactions"[14]

The Court chose not to extend the meaning of "debts...for the performance of services for the corporation":[15]

> An amount payable in lieu of notice does not flow from "services performed for the corporation". An amount payable in lieu of notice does not flow from services performed for the corporation, but rather from the damage arising from non-performance of a contractual obligation to give sufficient notice.

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[7] *Ibid.* p. 12.

[8] [1991] R.J.Q. 1193, 26 A.C.W.S. (3d) 946.

[9] *Ibid.*, R.J.Q. at 1195.

[10] *Ibid.*

[11] *Ibid.* at 1195-6.

[12] *Supra* footnote 2 at 77.

[13] In fact, this varies from one Canadian jurisdiction to another. See, *eg.* the Alberta *Business Corporations Act*, S.A. 1981, c. B-15, s. 114 (2) (a) where the director is not liable "if he believes on reasonable grounds that the corporation can pay the debts as they become due."

[14] *Ibid.* at 77-8.

[15] *Ibid.* at 81.

The notice pay damages were, therefore, not recoverable from the directors.

Critique of the Thornicroft Analysis

Thornicroft characterizes the notice/severance requirement as an "employment benefit" which, even if implied by law outside of the individual employment contract, "forms part of the overall compensation package" whether or not it is actually used.[16] That is true. That would also fortify the position of these former employees, if it were "employment benefits" which were personally chargeable to the directors. The statute, however, does not specifically authorize this. It does not, as do some provincial counterparts,[17] attempt to define wages to possibly include ordered notice pay.

Thornicroft then points out that prior service is one factor embraced by judges to assess the length of the notice period. The argument follows that notice pay is:

> based at least in part...on the employee's past services performed for the corporation. That being so, the plaintiff's claims in *Barrette* v. *Crabtree* did fall within the purview of section [119(1)] and the directors should have been found liable.[18]

One might even go further in establishing this relationship. Although L'Heureux-Dubé J. conceded that "the main objective of this obligation [ie. notice] is to give the employee the time to find a new job and the employer to find a new employee"[19] and "rules of thumb" relationships between length of service and notice period are judicially repudiated[20], length of service often does serve as the clearest predictor of the reasonable and necessary time for the employee to find a new job. This is reflected in provincial legislation for minimum notice periods being tied directly, and solely, to length of service.[21] *The issue lies, however, not in a relationship upon which notice pay is based.*

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[16] *Supra* footnote 3 at 382.

[17] See *eg.*, *Business Corporations Act*, R.S.S. 1978, c. B-10, s. 114 which incorporates the *Labour Standards Act*, R.S.S. 1978, c.L-1, s. 2 (r) definition of "wages".

[18] *Supra* footnote 3 at 383.

[19] *Supra* footnote 2 at 79.

[20] *Speight* v. *Uniroyal Goodrich Canada Inc.* (1989), 97 N.B.R. (2d) 216 (Q.B.); *Hourie* v. *Joseph E. Seagram & Sons Ltd.* (1990), 106 A.R. 231 (Alta. Q.B.); *Pelech* v. *Hyundai Auto Canada Inc.* (1991), 40 C.C.E.L. 87 (B.C.C.A.); *McCrea* v. *Conference Board of Canada* (1993), 45 C.C.E.L. 29 (Ont. Gen. Div.).

[21] *Employment Standards Code*, S.A. 1988, c. E-10.2, ss. 55-62 (Div. 9); *Employment Standards Act*, S.B.C. 1980, c. 10, ss. 41-48 (Part 5); *Employment Standards Act*, R.S.M. 1987, c. E 110, s. 39; *Employment Standards Act*, S.N.B. 1982, c. E-7.2, ss. 29-34; *Labour Standards Act*, R.S.N. 1990, c.L-2, ss. 49-56; *Labour Standards Act*, R.S.N.W.T. 1988, c. L-1, ss. 14.01-14.10 (Part II.1); *Labour Standards Code*, R.S.N.S. 1989, c. 246, ss. 72-78; *Employment Standards Code*, R.S.O., c. E.14, s. 57; *Employment Standards Act*, S.P.E.I. 1992, c. 18, s. 29; *Labour Standards Act*, R.S.Q. c. N-1.1, ss. 82-83.1; *Labour Standards Act*, R.S.S. 1978, c. L-1, ss. 42-44; *Employment Standards Act*, R.S.Y. 1986, c. 54, ss. 46-55; and *Canada Labour Code*, R.S.C. 1985, c. L-2, ss. 230-234.

The statute only permits directors to be charged for "wages payable to such employee for services performed for the corporation."

Finally, Thornicroft describes how this result "is also troubling from a public policy perspective."[22] If employees receive notice, work through it and are not paid, the directors are liable, providing the other conditions are met in section 119. This is likely the purpose the law intended to achieve. Thornicroft adds, "however, if the requisite notice is *not* given to the employees, the directors will *not* be personally liable for severance pay in lieu of notice."[23] Nor, one may argue, should they be. If the policy of the legislation is to make directors personally responsible only for unremunerated services at the request of the corporate enterprise, such a policy is not offended by this possible outcome. If the erstwhile employees wish to seek damages for lack of sufficient notice of termination, they may, of course, do so and obtain judgment in that action. They will simply rank as equals with other unsecured judgment creditors for that particular claim. For work actually performed at the request of the corporation, which might have otherwise have unjustly enriched the corporation, they will enjoy this "exceptional" legislated right of recourse against third party directors.

For Thornicroft to assert that "corporate directors otherwise subject to section [119(1)] may now have an incentive to *withhold* the giving of notice to employees, especially if the corporation is in a precarious financial position",[24] is to pre-ordain directors automatically liable in their personal capacity for notice pay at the outset. Only then would a reduction from that liability scenario be viewed as an "incentive". It is perhaps simplistic to maintain that an effect of this decision is to "encourage the withholding of notice to employees"[25] when the basis for director liability is not notice at all, but instead unremunerated services actually rendered to the corporation. On the other hand, it is difficult to predict what the incentive effect would be. The result favoured by Thornicroft might have the effect of stimulating the employer to convert all indefinite employment to term certain employment or requiring the employees to contract out of common law notice rights. Both responses are legal and render notice less germane.

While one is discussing director incentive, it is fitting to address the disincentive effects of the interpretation that Thornicroft prefers on the willingness of the most qualified directors to offer themselves to serve in that capacity. Presumably if one searches, there is a competing public policy that supports the original principles of *Salomon* v. *Salomon & Co.*[26] and corporate personality. Such a public policy would favour creating an atmosphere in which competent and service-minded persons will be willing to step forward to manage corporations

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[22] *Ibid.*

[23] *Ibid.* (emphasis in original).

[24] *Ibid.* at 383-4 (emphasis in original).

[25] *Ibid* at 384.

[26] [1897] A.C. 22 (H.L.).

without daily concerns about their personal estates being attached by employees.[27] The popular press today regularly reports of directors leaving their posts, sometimes *en masse*, and throwing their respective corporations into management crises,[28] for reasons such as potential wage liabilities. Such reactions cannot be in the interests of corporations or employees. The relative vulnerability of employees vis-a-vis employers and other creditors has long been presumed and was so again in the case at bar,[29] but recent *dicta* are showing a trend to re-consider that premise, at least with respect to having the employee shoulder some of the responsibility for economic conditions in calculation of common law notice periods.[30]

Thornicroft points to certain "public policy" anomalies which may result from this decision. Such is a common technique employed by commentators to demonstrate the folly of the decision and, consequently, to lend support to the legitimacy of one's position. Here, I have tried to show above that this was not a case about notice at all, but about unpaid service. The weight of anomalous results, however, which Thornicroft does not refer to, is far greater by virtue of having the provision at all than by interpreting it in the manner he criticizes. This provision does not appear, at all or in the same form, in every other Canadian jurisdiction. Ironically, if this employer had been incorporated under the Quebec *Companies Act*[31], instead of the CBCA, the analysis may have been quite different.[32] That increasing number of Canadian workers who are subject to short renewable fixed-term employment contracts have no notice periods. Nor would section 119 by itself protect non-corporate employees. The point here is that section 119 is the greatest anomaly. In several ways it is an "exception" to the general principle of corporate personality. Its enactment creates more anomalies than any of its several reasonable interpretations.

One might argue that an equally plausible "public policy choice"[33] is the more conservative one articulated by the Supreme Court of Canada. Different

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[27] For an analysis of the extent to which legislation has shattered the corporate veil, see *eg.* E.D.D. Tavender, C. M. Poyen and D. M. Hallett, "Developments in Corporate Liability: Is the Sky the Limit?" (1993) 22 Can. Bus. L. J. at 258-295.

[28] See, B. Marrotte, "Directors Beware", *Calgary Herald* (23 September 1993) D1, citing Curragh Inc., Peoples Jewellers Ltd., Westar Mining and subsidiaries of PWA Corp. Wage liabilities were reported as the cause of the resignations in the last two instances.

[29] *Supra* footnote 2 at 75-7.

[30] This may have its modern origins in *Bohemier* v. *Storwal Int. Inc.* (1982), 142 D.L.R. (3d) 8 (Ont. H.C.J.); principle affirmed but decision varied on other grounds (1983), 44 O.R. (2d) 361 (C.A.); leave to appeal to S.C.C. refused 3 C.C.E.L. 79n. The "Bohemier doctrine" is criticized in I. Christie, G. England and W. B. Cotter, *Employment Law in Canada* 2d ed. (Toronto: Butterworths, 1993) at 611-15. The judicial decisions confronting the issue remain split on the question.

[31] R.S.Q., c. C-38, s. 96.

[32] *Supra* footnote 2 at 69.

[33] *Supra* footnote 2 at 384. See, Thornicroft's footnote 18: "...given that Parliament has seen fit, as a matter of public policy, to legislate as it has, the courts must respect and enforce that public policy choice...".

perspectives on public policy usually arise from different starting points and expectations. The Supreme Court of Canada started with a narrow conception which favoured circumscribing director liability and found the legislative language to facilitate that. Thornicroft started with a broader conception which favours employee recourse and found arguments in the legislation to facilitate that. Thornicroft amply, if ironically, articulates the risk of presuming the correctness in one's own policy preferences:[34]

> However, the relative merit of the Supreme Court of Canada's judgment should not reset on one's view concerning the normative question of which party should have prevailed as a matter of public policy. The policy question should be left, in my view, to Parliament and the various provincial legislatures. The court's function should be to implement the public policy choice as expressed by Parliament or a legislature in a particular statutory provision.

One cannot credibly divine legislative intent better than another. Can indeed Parliament be even credited having an intention on such a question? This Court interpreted the policy of the statutory provision differently than another might have done. To say that the Supreme Court of Canada "ignored" the public policy intention of Parliament "under the guise of respecting Parliament's will"[35] is unfair to a Court that chooses not to itself legislate in the manner the commentator would like.

[34] *Ibid.* at 382.

[35] *Supra* footnote 3 at 384, footnote 18.

CONFLICT OF LAWS - ENFORCEMENT OF EXTRA PROVINCIAL JUDGMENTS AND *IN PERSONAM* JURISDICTION OF CANADIAN COURTS: *Hunt* v. *T & N plc*

Catherine Walsh*

Introduction

In *De Savoye* v. *Morguard Investments*,[1] the Supreme Court radically changed the common law rules governing the interprovincial recognition of *in personam* money judgments. Under the old approach, a judgment rendered by a court in a sister province would be refused recognition unless the defendant was present in the judgment forum when served with process or voluntarily submitted to the jurisdiction of the court. Under the new rules, a default judgment rendered against an out-of-province defendant will be recognized by the courts in other provinces provided there existed a "real and substantial connection" between the underlying cause of action and the judgment forum.

That reform was long overdue cannot be debated. In requiring that the defendant have been present in the judgment forum at the time of service of process, the traditional rules forced the plaintiff to bring action in what was often an inconvenient and inappropriate forum. This was most dramatically demonstrated in cases like *Morguard* itself, where a wholly domestic cause of action was converted into a conflicts case by the defendant's *ex post facto* departure to another province before action was commenced.[2]

On the whole, the *Morguard* solution has been well received. Plaintiffs are given a choice of *fora* in which to sue in cases where the cause of action is substantially localized in one place and the defendant in another. Yet defendants are protected from having to defend their conduct in a forum to which neither they nor the subject matter of the action are connected.

However, the full implications of *Morguard* are far from settled. Nor is this likely to happen soon judging by the flood of commentary that the decision has

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

[2] At issue in *Morguard* was the recognition to be given by the British Columbia courts to default judgments rendered in Alberta against a British Columbia defendant in its capacity as guarantor under several mortgages. The judgments were for the deficiencies left owing on the mortgage loans at the conclusion of foreclosure proceedings in Alberta. The mortgaged lands were located in Alberta and, at the time the mortgages were executed, all of the parties were resident there. However, the defendant had moved to British Columbia before the Alberta proceedings were commenced and had been served there by registered mail.

already generated.[3] *Hunt* v. *T & N plc*,[4] decided by the Court in November 1993, does, however, resolve one of the more significant of the questions left open in *Morguard* - the constitutional status of the obligation of Canadian courts to recognize judgments rendered by courts in a sister province. Moreover, *Hunt* is only the second in what promises to be a definitive trilogy of cases in this area. In February 1994, the Court heard oral argument in the combined appeals in *Tolofson* v. *Jensen*[5] and *Lucas* v. *Gagnon*.[6] These cases, on appeal from British Columbia and Ontario respectively, concern what is perhaps the most intractable problem in private international law - choice of law in tort.

The Court's decision in *Hunt* - and its pending decision in the *Tolofson* and *Gagnon* appeals - will undoubtedly engage the intellects, and indeed the passions, of courts and commentators to an even more dramatic extent than *Morguard* has done. This comment analyses the impact of *Hunt* on Canadian law in relation to both the *in personam* jurisdiction of Canadian courts and the recognition of extraprovincial judgments. As we shall see, the most pressing question left to be elaborated is whether the Court should adopt a narrow or a broad approach to the permissible scope of jurisdiction of Canadian courts, a question with significant implications for the future evolution of Canadian conflict of laws generally, and one that will almost certainly determine the Court's reasoning, if not the result, on the choice of law issues presently confronting it in *Gagnon* and *Tolofson*.

1. *"Constitionalization" of the Full Faith and Credit Doctrine*

In *Morguard*, Justice La Forest concluded that the courts in common law Canada had made a "serious error" from the outset in simply transplanting the traditional English recognition rules, developed in the context of a unitary state,

[3] Most recently, see the following collection of papers from the 22nd Annual Workshop on Commercial and Consumer Law published in (1993) 22 Can. Bus. L. J.: V. Black, "The Other Side of *Morguard*: New Limits on Judicial Jurisdiction" at 4; E. Edinger, "*Morguard* v. *De Savoye*: Subsequent Developments" at 29; P. Finkle and C. Labrecque, "Low Cost Legal Remedies and Market Efficiency: Looking Beyond *Morguard*" at 58; J. Swan, "The *Uniform Canadian Enforcement of Judgments Act*" at 87; J. A. Woods, "Recognition and Enforcement of Foreign Judgments Between Provinces: The Constitutional Dimensions of *Morguard Investments Ltd.*" at 104. For earlier comments, see: J.-G. Castel, "Recognition and Enforcement of a Sister Province Default Money Judgment: Jurisdiction Based on Real and Substantial Connection" (1991) 7 B.F.L.R. 111; P. Finkle and S. Coakeley, "*Morguard Investments Limited*: Reforming Federalism from the Top" (1991) 14 Dal. L.J. 340; V. Black and J. Swan, "New Rules for the Enforcement of Foreign Judgments: *Morguard Investments Ltd.* v. *De Savoye*" (1991) 12 Advocates' Q. 489; J. Blom, "Conflict of Laws - Enforcement of Extraprovincial Default Judgments - Real and Substantial Connection: *Morguard Investments Ltd.* v. *De Savoye*" (1991) 70 Can. Bar Rev. 733; H. P. Glenn, "Foreign Judgments, the Common Law and the Constitution: *De Savoye* v. *Morguard Investments Ltd.*" (1992) 37 McGill L.J. 537.

[4] [1993] 4 S.C.R. 289. See also the Court's recent decision, more discursive than revolutionary, in *Amchem Products* v. *B.C. (W.C.B.)* [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96 concerning the doctrines of *forum non conveniens* and *lis alibi pendens*.

[5] (1992), 89 D.L.R. (4th) 129 (B.C.C.A.).

[6] (1992), 59 O.A.C. 174.

to Canadian federal soil.[7] In his view, the "obvious intention of the [Canadian] Constitution to create a single country"[8] required the courts in each province to give "full faith and credit" to the judgments of courts in sister provinces so long as they had exercised appropriately restrained jurisdiction. The phrase "full faith and credit" is derived from the *United States Constitution* which imposes an express obligation on American state courts to give full faith and credit to the judgments and laws of sister states.[9] Although there is no equivalent rule in the *Constitution Act, 1867*, La Forest J. regarded the obligation as inherent in the very nature of Canadian federalism.

Morguard had been argued, however, solely in terms of the need for reform of the common law, not as a constitutional case. Thus considerable doubt remained on whether the full faith and credit doctrine constituted a rule of Canadian constitutional law (mandated by federalism) or a common law conflicts rule (merely informed by federalism). If the latter, it applied only in common law Canada and then only in the absence of a more restrictive statutory regime. But if it was a constitutional rule, it bound courts everywhere and neither the provincial legislatures nor Parliament could legislate to restrict its operation.

The constitutional status of full faith and credit has now been squarely confronted - and confirmed - by the Court. *Hunt* v. *T & N plc*[10] arose out of an application by the plaintiffs in a British Columbia tort action for an order compelling the Quebec corporate defendants to comply with a demand for discovery of documents. In refusing to comply, the defendants had relied on the Quebec *Business Concerns Record Act*,[11] which prohibits the removal from Quebec of the records of Quebec business concerns pursuant to extraprovincial judicial order. The plaintiffs challenged the defendants' right to rely on the Quebec statute, arguing *inter alia* that it was *ultra vires* the Quebec National Assembly.

The British Columbia courts declined to rule on whether the Quebec statute was *ultra vires*, believing themselves to be without jurisdiction to determine the constitutionality of the legislation of a sister province. They therefore proceeded on the assumption that the *Act* was valid and upheld its applicability in the

[7] *Supra* footnote 1 at 270 (D.L.R.). To say that the Canadian courts made a "serious error" in this regard may be an overstatement. In fact, exceptions to the principle that internal and international conflicts should be treated identically have generally resulted from deliberate constitutional innovation or international convention rather than the evolution of judge-made law: see O. Kahn-Freund, *General Principles of Private International Law* (The Netherlands: A.W. Sijthoff Publishing, 1976), especially at 174, where he states that the identical treatment of internal and international conflicts "is and remains one of the fundamental principles of private international law" and that "in relation to the recognition of judgments as in relation to jurisdiction, special legislation was needed everywhere to set aside that principle".

[8] *Ibid.* at 271 (D.L.R.).

[9] U.S. Const. art. IV, s. 1.

[10] *Supra* footnote 4.

[11] RSQ, c. D12.

British Columbia proceedings on the basis of interprovincial "comity".[12] In the view of the Court of Appeal, comity compelled deference to an enactment of a sister province except where that enactment was designed, in pith and substance, to intrude into the exclusive legislative field of British Columbia. Applying the approach endorsed in *Re Upper Churchill Water Rights Reversion Act*,[13] the Court concluded that the *Quebec Act* did not fall into that category. Rather, it had been enacted in pursuit of Quebec's legitimate public policy concerns and any "incidental or consequential effect in British Columbia" did not render it *ultra vires* Quebec.[14]

Speaking for a unanimous Supreme Court, Justice La Forest overturned the British Columbia courts on both the preliminary and the principal issues. In his view, the Canadian superior courts had jurisdiction to independently determine the constitutionality of sister province laws, given their inherent power over both federal and provincial laws, and given the Supreme Court's supervisory jurisdiction, as the ultimate and general court of appeal for Canada, to mediate in the event of conflicting rulings in different provinces. This was not to say that a court could pronounce gratuitously on the validity of another province's laws. Exercise of this power should be restricted to cases where "there is a real interest affected in their province - that is to say, where the issue relates to the constitutionality of legislation of a province that has extraprovincial effects in the province whose courts are called upon to answer the issue".[15]

Turning to the principal question of the constitutionality of the Quebec *Act*, La Forest J. concluded that there were not one but two aspects to that question. Firstly, as the British Columbia Court of Appeal had recognized, the *Act* was open to scrutiny on traditional extraterritoriality grounds.[16] But because the specific extraterritoriality issue concerned "the extraterritorial application of judicial pronouncements in another province", the case also raised the issue of "whether the doctrine propounded in *Morguard* is of a constitutional character and whether that doctrine applies in the circumstances".[17]

On the general extraterritoriality question, La Forest J. had "considerable reservations"[18] about whether the *Quebec Act* could be justified as a valid exercise of provincial power under any of sections 92(14),[19] 92(16)[20] and even

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[12] The *Morguard* decision came down in the interim between the trial and appeal decisions in *Hunt*. In the view of the British Columbia Court of Appeal, the vision of interprovincial comity expressed by the Supreme Court in that case compelled the "recognition of, and deference to the validly enacted legislation of a province by the courts of another province": *Hunt* v. *T & N plc* (1991), 81 D.L.R. (4th) 763 (B.C.C.A.) at 767.

[13] [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1.

[14] *Supra* footnote 12.

[15] *Supra* footnote 4 at 315.

[16] *Ibid.* at 319.

[17] *Ibid.* at 319-20.

[18] *Ibid.* at 320.

[19] Administration of justice in the province.

[20] Matters of a merely local or private nature in the province.

92(13).[21] In the end, however, he did not vigorously pursue this aspect of the case. Rather, it was the *Morguard* doctrine that dominated his constitutional analysis and which ultimately proved determinative.

La Forest J. began his analysis by reiterating the features of Canadian federalism that he had identified in *Morguard* as requiring a recognition regime that would ensure the interprovincial mobility of Canadian judgments.[22] *Morguard*, he acknowledged, had not been argued in constitutional terms and it had been sufficient in that case to simply "infuse" the constitutional considerations into the Court's analysis of the common law.[23] But *Hunt* "very clearly" raised the constitutional issue and it was therefore possible and necessary to confirm the status of these constitutional considerations as "constitutional imperatives".[24] Canadian courts, he concluded, were constitutionally obligated to give "full faith and credit" to the judgments of the courts of sister provinces and that obligation was beyond the power of the provincial legislatures to override.[25]

In Justice La Forest's view, the full faith and credit doctrine limited provincial legislative power not merely over the recognition of judgments rendered in other provinces but also over any laws that might impede the course of litigation in other provinces. The *Quebec Act* in issue in *Hunt* was such a law. While the *Act* was not aimed directly at invalidating the end product of the British Columbia actions, it did attempt to limit the adjudicatory authority of the British Columbia courts by purporting to exclude relevant documents from the reach of the British Columbia discovery process. Legislation that attempted such a "preemptive strike"[26] at the adjudicatory power of a sister province was equally invalid under *Morguard.* Consequently, he held that the *Quebec Act* was constitutionally inapplicable to the British Columbia proceedings and to civil proceedings in other provinces generally.[27]

2. *The Impact of Hunt on Existing Provincial Legislation*

Constitutionalization of the *Morguard* doctrine does not preclude a province from enacting legislation to regulate the "modalities" for recognition and enforcement of sister province judgments.[28] However, such laws must, after *Hunt*, respect the "minimum standards of order and fairness" expressed in

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[21] Property and civil rights in the province.

[22] *Supra* footnote 4 at 322: "(1) common citizenship, (2) interprovincial mobility of citizens, (3) the common market created by the union as reflected in ss. 91(2), 91(10), 121 and the peace, order and good government clause, and (4) the essentially unitary structure of our judicial system with the Supreme Court of Canada at its apex".

[23] *Ibid.* at 324.

[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid.* at 327.

[27] *Ibid.* at 331.

[28] *Ibid.* at 324.

Morguard.[29] Moreover, *Hunt* confirms the existence of concurrent federal legislative power - a power only hinted at in *Morguard* - to enact a national regime to regulate the recognition and enforcement of judgments among the provinces and territories.[30] Conflicting provincial legislation would therefore also be subject to challenge, under paramountcy, in the event of the future exercise by Parliament of its newly-discovered power.

A constitutionally-mandated full faith and credit doctrine puts into question the validity of the *Uniform Reciprocal Enforcement of Judgments Acts*[31] in force throughout common law Canada. These *Acts* supply a summary registration procedure for the enforcement of judgments rendered by courts in jurisdictions declared by the LieutenantGovernor in Council in the enacting province or territory to be reciprocating jurisdictions for the purposes of the *Act*. Reciprocal enforcement by way of registration is limited, however, to cases where the foreign court had jurisdiction on the traditional grounds of presence or submission. A court cannot make an order for registration if the judgment debtor was neither ordinarily resident nor carrying on business in the foreign jurisdiction when the action was commenced and did not voluntarily submit to the jurisdiction of the foreign court. In light of these restrictions, the Ontario Court of Appeal has concluded that a foreign judgment cannot be enforced by way of registration, even where the "foreign" judgment was rendered in a sister province, if the jurisdiction of the foreign court is founded on the *Morguard* "real and substantial connection" criterion.[32] In the wake of *Hunt*, we can expect a constitutional challenge to this position on the theory that provincial legislation relating to the enforcement of sister province judgments, even when it relates only to the machinery for enforcement, must respect the requirements of full faith and credit.

For Saskatchewan and New Brunswick courts, *Hunt* is particularly significant. In the other common law provinces, judgment creditors, even prior to *Hunt*, could always avoid the restrictive recognition criteria set out in the reciprocal enforcement acts by pursuing enforcement through a common law action on the judgment in which the *Morguard* test could be applied.[33] But Saskatchewan and New Brunswick enacted both the uniform *Reciprocal Enforcement of Judgments Act* and the uniform *Foreign Judgments Act*.[34]

[29] *Ibid.*

[30] *Ibid.* at 326.

[31] R.S.A. 1980, c. r-6; R.S.M. 1987, c. J-20; R.S.N.B. 1973, c. R-3; R.S. Nfld. 1990, c. R-4; R.S.O. 1990, c. R-5; R.S.P.E.I. 1988, c. R-6; R.S.S. 1978, c. R-3 and the *Judgment Extension Act*, R.S.S. 1978, c. J-3; *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, ss. 30-41; R.S.Y. 1986, c. 146; R.S.N.W.T. 1988, c. R-1. The *Uniform Reciprocal Enforcement of Judgments Act* was first approved in 1924 by the Conference of Commissioners on the Uniformity of Legislation in Canada (as it then was). The *Act* was subsequently revised and approved in 1958 (*1958 Proceedings*, 90) and further amended in 1962 (*1962 Proceedings*, 108).

[32] *Acme Video* v. *Hedges* (1993), 12 O.R. (3d) 160 (C.A.).

[33] *Ibid.*

[34] R.S.S. 1978, c. F-18; R.S.N.B. 1973, c. F-19. Both *Acts* are based on the *Uniform Foreign Judgments Act*, revised and approved by the Conference of Commissioners on Uniformity of Legislation in Canada in 1933 (*1933 Proceedings*, 35).

Unlike the former, the latter does not address the enforcement process at all. Instead, it purports to codify the substantive common law governing the recognition of all extraprovincial judgments *in personam*, regardless of the method of enforcement. The Saskatchewan Commissioners who drafted the "code" did not attempt a fundamental reform. Rather, they simply reiterated the main thrust of the then existing common law rules, including the rule that a foreign court has jurisdiction for recognition purposes "only" where the defendant was present (either ordinarily resident or carrying on business) in the foreign jurisdiction when served with process or submitted to the jurisdiction of the foreign court.[35] In light of this wording, the Courts of Appeal in both Saskatchewan and New Brunswick have ruled that the expanded *Morguard* recognition rules do not apply even to sister province judgments.[36] However, they reached that conclusion purely as a matter of statutory interpretation. The cases were not argued on constitutional grounds and, in the wake of *Hunt*, one can safely assume that the statutory restrictions cannot stand in their application to sister province judgments.

Hunt is apt to excite the greatest controversy in Quebec where the rules governing the recognition and enforcement of foreign decisions and the jurisdiction of foreign authorities are and always have been statutorily based in the *Civil Code*.[37] Admittedly, the fact that the European Community has adopted a uniform reciprocal jurisdictional and judgment enforcement regime[38] demonstrates that full faith and credit is not incompatible with strong residual sovereignty and that the distinctive nature of the civil law and common law traditions do not make this kind of cooperation impossible. Nonetheless, in today's constitutional climate, there are obvious sociopolitical repercussions to any impingement on the authority of the *Code* in an area traditionally seen to lie

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[35] Professor Horace Read apparently protested the use of the word "only" in the *Act* to the Conference on the ground that "it is always a mistake to introduce premature rigidity into the law, however philanthropic the immediate motive may be": G.D. Kennedy, "Recognition of Judgments in Personam: The Meaning of Reciprocity" (1957) 35 Can. Bar Rev. 123; see also G.D. Kennedy, "'Reciprocity' in the Recognition of Foreign Judgments" (1954) 32 Can Bar Rev. 358. However, the word was retained on the theory that the purpose of the *Act* - to achieve uniformity - would be undermined if the courts were left free to develop supplementary recognition rules. Professor Read's views eventually won out. In 1964, the Conference revised the *Act* to delete the word "only" and to add a new section 9 stating that the *Act* was not intended to prevent the recognition of foreign judgments in circumstances not covered by it (*1964 Proceedings*, 107). However, New Brunswick and Saskatchewan had already adopted the 1933 version of the Act and did not amend it to conform to the 1964 revision.

[36] *Cardinal Couriers Ltd.* v. *Noyes* (1993), 109 Sask. R. 108 (C.A.); *Bower* v. *Sims* (1993), 138 N.B.R. (2d) 302 (C.A.).

[37] See now C.C.Q. 1991, c. 64, arts. 3155-3168. While the general reaction of *Morguard* commentators to the possible constitutionalization of full faith and credit has been lukewarm at best, it is no coincidence that the most comprehensive challenge to that possibility was advanced by a Quebec commentator: J. A. Woods, *supra* footnote 3.

[38] For a general introduction, see North and Fawcett, *Cheshire and North's Private International Law*, 12th ed. (London: Butterworths, 1992), Ch. 14, 16.

within Quebec's exclusive control over the administration of justice in the province.

In fact, the *Civil Code of Quebec*[39] takes a generally balanced and relatively liberal view of the jurisdiction of foreign authorities and is likely, in general, to withstand constitutional scrutiny under *Morguard*.[40] In one very specific respect, however, the Quebec rules almost certainly do not satisfy the principles of "order and fairness" demanded by *Morguard*. In "matters of civil liability for damage suffered in or outside Quebec as a result of exposure to or the use of raw materials originating in Quebec", the *Code* purports to vest exclusive jurisdiction in the Quebec courts,[41] to make the application of Quebec law mandatory[42] and to refuse recognition to the jurisdiction of foreign courts.[43] Enacted in reaction to the massive tort litigation involving manufacturers of asbestos, the possibility has already been floated that these provisions may be open to constitutional challenge on extraterritoriality grounds.[44] Where the foreign judgment forum is a sister province, the *Morguard* full faith and credit doctrine is now also engaged and it is frankly impossible to see how either the Quebec provisions, or similar legislation enacted in British Columbia,[45] can survive constitutional challenge on that basis, assuming the jurisdictional criteria required by *Morguard* are satisfied.[46]

3. *Implications for the Recognition of Foreign Country Judgments*

Strictly speaking, *Morguard* was concerned only with the recognition and enforcement of the judgments of sister provinces. But the general thrust of Mr. J. La Forest's reasoning supported a similar liberalization of the traditional recognition rules in relation to foreign country judgments. In his view, the old

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[39] *Supra* footnote 37.

[40] Although I return to this question again later, it should be emphasized that a detailed account of the new Code rules on the jurisdiction of Quebec courts and the recognition of foreign judgments is beyond the scope of this comment, not to mention the expertise of this commentator. Suffice to note here that the jurisdictional rules for *in personam* proceedings found in C.C.Q. art 3148 take a generally rational approach to the scope of authority of the Quebec courts and that C.C.Q. art. 3164 then imposes a mirror image standard for the jurisdiction of foreign courts, subject to the overriding test that the dispute be "substantially connected" with the foreign judgment forum.

[41] Art. 3151.

[42] Art. 3129.

[43] Art. 3165(1).

[44] H. Patrick Glenn, "La guerre de l'amiante" (1991) Rev. crit. dr. internat. privé 80. Professor Glenn advanced a more detailed version of the extraterritoriality argument at a round-table discussion of the *Hunt* decision at the annual meeting of the Canadian Association of Law Teachers, Private International Law Section, Calgary, June 1994.

[45] The *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, as amended by S.B.C. 1984, c. 26, s. 8, precludes recognition and enforcement of a foreign judgment arising out of exposure to or the use of asbestos mined in British Columbia and prohibits the commencement or continuance of any such action in the British Columbia courts.

[46] See further Elizabeth Edinger, *supra* footnote 3 at 51-2.

common law recognition rules were as incompatible today with international comity as they had been historically with Canadian federalism.

In the wake of *Morguard*, the courts in common law Canada have generally not hesitated to apply the real and substantial connection test sanctioned in that case to foreign country default judgments.[47] *Hunt* does nothing to reverse this trend. On the contrary, La Forest J. reiterated his critique of the old common law rules as "rooted in an outmoded concept of the world that emphasized sovereignty and independence, often at the cost of unfairness" and reemphasized the need for "greater comity...in our modern era where international transactions involve a constant flow of products, wealth and people across the globe".[48]

This does not mean that the recognition regimes for foreign country and sister province judgments are identical. As La Forest J. emphasized in both *Morguard* and *Hunt*, any concerns about the differential quality of justice among provinces are *a priori* tempered by the essentially unitary character of the Canadian judicial system and by a commonality of natural justice and due process standards. In relation to the recognition of foreign country judgments, however, there is no basis for assuming a similar commonality of substantive and procedural legal norms. This difference means that more flexibility and discretion is needed in the recognition rules governing foreign country judgments,

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[47] Most recently, see *Moses* v. *Shore Boat Builders Ltd.* (1993), 35 B.C.A.C. 146 (application for leave to appeal to the Supreme Court dismissed March 1994); *Arrowmaster Inc.* v. *Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.); *Allen* v. *Lynch* (1993), 111 Nfld. & P.E.I.R. 43 (P.E.I. T.D.). *Morguard* (and *Hunt*) have also influenced the interpretation of Quebec law in this context: *Barnett Bank of South Florida, N.A.* v. *Fellen*, [1994] Q.J. No. 305 (QL, Que. C.A., April 20, 1994). In only one case has a court refused to accept that the expanded *Morguard* recognition rules apply to a foreign country judgment. *Dodd* v. *Gambin Associates* (1994), 17 O.R. (3d) 803 (Ont.-Gen.-Div.) involved an application by an English plaintiff for registration of default judgment obtained in England against an Ontario defendant under the Ontario version of the *Reciprocal Enforcement of Judgments (U.K.) Act* R.S.O. 1990, c. R-6. Unlike the *Uniform Reciprocal Enforcement of Judgments Acts*, *supra* footnote 31, these latter *Acts* do not preclude registration of a foreign default judgment on the basis of the *Morguard* test: *Fabrelle Wallcoverings & Textiles Ltd.* v. *North American Decorative Products Inc.* (1992), 6 C.P.C. (3d) 170 (Ont. Gen. Div.). However, the English proceedings in issue in *Dodd* had been commenced before *Morguard* was decided and the defendant had been advised by counsel not to defend the action because it would not be recognized in Ontario, sound advice under the then-prevailing state of the law. In view of the defendant's detrimental reliance on the old rules, the court refused to issue an order for registration of the English judgment, observing simply that it was "too soon to say" that the extension of the *Morguard* test to foreign country judgments, through supported by *obiter dictum* in *Morguard*, is now the law of Canada. Compare *Moses* v. *Shore Boat Builders Ltd.*, *supra* this footnote, where the defendant's detrimental reliance on the old law was held not to preclude recognition of an Alaska default judgment pursuant to *Morguard*. In this context, the fairest and most efficient solution to the potential unfairness generated by the retroactive application given to common law judicial decisions might be to allow the judgment debtor to raise any defence to the merits that would have been available in the original action as an exception to the general rule that a foreign judgment is conclusive on the merits in enforcement proceedings. *Contra*: *87313 Canada Inc.* v. *Neeshat Oriental Carpet*, [1992] O.J. No. 1907 (QL).

[48] *Supra* footnote 4 at 321-22.

giving rise to a potentially greater scope of play for defences based on natural justice and public policy concerns.[49]

Hunt confirms another distinction between the two contexts. In the interprovincial arena, the recognition of sister province judgments is constitutionally mandated whereas on the international plane, it is the quasi-obligatory doctrine of comity that informs recognition theory. At a practical level, this difference means that provincial legislation regulating the recognition of foreign country judgments is not open to scrutiny under the *Morguard* full faith and credit doctrine.

However, other constitutional restraints may exist on provincial legislative authority over the recognition of foreign country judgments. As La Forest J. observed in *Hunt*, the Quebec statute impugned in that case was based on identical legislation enacted by Ontario in response to the aggressively extraterritorial anti-trust statutes of the United States.[50] But the US Congress, like the Canadian Parliament,[51] is empowered to legislate with international extraterritorial effect. Ontario and Quebec are not. Their sovereignty, even within the exclusive spheres of power allocated to them, is limited to subject matter "in the Province" and that territorial limitation applies regardless of whether the impugned legislation has extraprovincial effects in another province or another country.[52]

As noted earlier, Justice La Forest did not ultimately determine whether the Quebec statute impugned in *Hunt* was invalid on general extraterritorial grounds. Having concluded that it was *ultra vires* in its application to a sister province on the basis of the full faith and credit doctrine, it was unnecessary for him to decide "whether it is wholly unconstitutional because, in pith and substance, it relates to a matter outside the country" or to consider "whether the statute could properly be `read down' to permit its application to jurisdictions outside the country".[53]

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[49] See, for instance, *Arrowmaster Inc.* v. *Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.) where the court observed that although *Morguard* applies to foreign country default judgments, there will be some that should not still not be enforced in Ontario, "perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process". See also *Beals* v. *Saldanha*, [1993] O.J. No. 3045 (QL) where it was held that the plaintiff's failure to specify the sum claimed in a Florida action constituted a denial of natural justice so as to preclude recognition of a Florida default judgment pursuant to *Morguard*. And see *Stoddard* v. *Accurpress Manufacturing Ltd.* (1993), 39 B.C.A.C. 9 where the British Columbia Court of Appeal extended time to appeal a decision recognizing an American judgment on the issue of whether a Canadian court, as a matter of policy, should recognize a foreign country default judgment pursuant to *Morguard* where the judgment awarded damages for personal injury in an amount many times that which a Canadian court would have awarded in similar circumstances. Compare *Clancy* v. *Beach* [1994] B.C.J. No. 280 (QL, B.C.S.C., Feb. 11, 1994).

[50] *Supra* footnote 4 at 304, 328.

[51] *Interprovincial Co-ops* v. *The Queen* [1975] 1 S.C.R. 474, 53 D.L.R. (3d) 321, 356.

[52] *Ibid.*

[53] *Supra* footnote 4 at 331.

Delineation of the territorial limits on extraprovincial authority in this context will inevitably come back before the Court. Apart from the Quebec (and Ontario) *Business Records Act* in issue in *Hunt*, the attempts by the Quebec and British Columbia legislatures to protect their residents against the reach of foreign country judgments related to asbestos litigation[54] may also be open to scrutiny on the theory that a provincial legislature cannot legislate, on the basis of jurisdiction over the judgment debtor only, so as to extinguish the civil rights of non-residents where those civil rights are affected by damage caused beyond the borders of the province and outside the territorially limited regulatory authority of the province.[55]

4. *The In Personam Jurisdiction of Canadian Courts*

(a) *Introduction*

A constitutional full faith and credit obligation does not mean that Canadian courts must automatically recognize the judgments of sister provinces regardless of the basis on which jurisdiction was assumed. On the contrary, both *Morguard* and *Hunt* emphasize that recognition is compelled only if the judgment was rendered by a court exercising appropriately restrained jurisdiction. What then constitutes appropriately restrained jurisdiction?

(b) *General Jurisdiction Based on the Defendant's Presence in the Forum*

In *Morguard*, Justice La Forest did not question the continued legitimacy of both presence and consent-based jurisdiction independently of the existence of a real and substantial subject matter nexus to the judgment forum. The issue of whether a court has exercised its jurisdiction appropriately "poses no difficulty", he stated, "in the case of judgments *in personam* where the defendant was within the jurisdiction at the time of the action or when he submitted to its jurisdiction whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement".[56]

In *Hunt*, La Forest J.'s position on the same point was expressed in more equivocal terms. In determining the limits of jurisdictional authority, the "connections relied on under the traditional rules", he stated, "are a good place to start ... though some of these may require reconsideration in light of *Morguard*".[57]

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[54] *Supra* footnotes 41-43, 45.

[55] *Supra* footnote 44 and *infra* footnote 102. And see *A.-G. Ont.* v. *Scott* (1956) S.C.R. 137, 1 D.L.R. (2d) 433 at 436. The New Brunswick and Saskatchewan *Foreign Judgment Acts*, *supra* footnote 34, also purport to limit the recognition to be accorded to foreign country judgments to cases that satisfy the traditional pre-*Morguard* common law criteria. Are these statutes also open to challenge on extraterritorial grounds in cases where the restrictions they impose on the recognition of foreign judgments serve only to protect local residents against liability under a cause of action otherwise outside the province's regulatory authority?

[56] *Supra* footnote 1 at 274 (D.L.R.).

[57] *Supra* footnote 4 at 325.

In principle, there should always exist at least one forum where the defendant can be haled into court regardless of the subject matter of the action. The place where the defendant makes his or her legal home is the obvious choice. The defendant can scarcely complain about being asked to defend conduct on home turf and the voluntary establishment of residence in a jurisdiction presumably implies a correlative responsibility to respect state authority. It is true that where the subject matter is localized in another jurisdiction, the defendant's home forum may not be the most appropriate place for litigation from the point of view of either choice of law or relative convenience. But the plaintiff has control over the venue. If another more convenient forum exists with a stronger subject matter connection that makes litigation there more appropriate, the plaintiff presumably will initiate action in that forum. If the plaintiff nonetheless brings suit in an implausible forum for no legitimate juridical reason, the defendant can always fall back on the doctrine of *forum non conveniens* to have the action stayed.

Most legal systems in fact recognize some species of presence-based jurisdiction, independently of any subject-matter nexus. However, the quality of the presence necessary to found jurisdiction varies between civil law and common law traditions. In general, the civil law demands a durable presence. Thus, it is the defendant's domicile in the judgment forum that matters under the *Civil Code of Quebec* for the purposes of determining both the "international jurisdiction of Quebec authorities"[58] and the "jurisdiction of foreign authorities"[59] in personal actions of a patrimonial nature. In the case of an individual, domicile is equated with ordinary residence rather than with the more rigid common law notion of that concept.[60] In the case of a corporation, domicile is located in the place where the corporation has its head office.[61]

The common law, on the other hand, has traditionally equated presence-based jurisdiction with physical presence, whether permanent or transient.[62] Thus service of process on a defendant within the territorial boundaries of the court's authority vests jurisdiction, however fleeting or casual the defendant's presence might have been.[63] A similar philosophy is applied to corporate

[58] C.C.Q. art. 3134.

[59] C.C.Q. art. 3168(1)

[60] The domicile of a person is the "place of his principal establishment": C.C.Q. art. 75. An individual's principal establishment is determined by actual residence in a place combined with the intention of making that place "the seat of his principal establishment": C.C.Q. art. 76. Residence in this context means "ordinary residence" and if a person has more than one residence, "his principal residence is considered in determining domicile": C.C.Q. art. 77.

[61] The domicile of a "legal person" is at the place and address of its head office: C.C.Q. art. 307.

[62] J.-G. Castel, *Canadian Conflict of Laws*, 3d ed. (Toronto and Vancouver: Butterworths, 1994) at 191, para. 119.

[63] In practice, however, where jurisdiction is based solely on physical presence, the courts usually apply the doctrine of *forum non conveniens* to stay the action in favour of the natural forum: *Logan* v. *Bank of Scotland* [1906] 1 K.B. 141 C.A. (action against Bank of Scotland served at its branch in England stayed because the action was essentially a

defendants. Service on a branch office vests jurisdiction in the court even though the cause of action is entirely unrelated to the activities of the corporate defendant at that branch office and even though the jurisdiction where the cause of action is centred would clearly be the more appropriate forum for the litigation.[64]

The difference between the two approaches is based more on historical than contemporary philosophical difference. In the civil law tradition, substantive jurisdictional law and the procedural rules governing service of process are stated independently of each other and both are statutorily based. As a result, each has evolved according to its own function. But jurisdictional law in the common law system was wholly judge-made in origin and the nineteenth century English courts conceived the function of jurisdictional rules to be the establishment and mediation of mutually exclusive spheres of power among legal institutions and actors.[65] A rule that equated service of process with jurisdiction *in personam* achieved that goal because it ensured that only one jurisdiction at any given time - the place where the defendant could physically be found and served with process - possessed adjudicatory authority in *in personam* actions. Thus, substantive jurisdictional law came to be equated with the procedural rules for service of process, an unnatural union that the enactment of the English *Common Law Procedure Act 1852*[66] only served to entrench. In fact, the object of that *Act* was to expand the jurisdictional bases available to the English courts in *in personam* proceedings. However, the mechanism chosen

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Scottish action and should be prosecuted before a court in Scotland); *Egbert* v. *Short* [1907] 2 Ch. 205 (English action against a defendant served in England while temporarily there was stayed because the cause of action arose in India and was subject to Indian law). More recently, in the Canadian context, see *Garson Holdings Ltd.* v. *Norman Wade Co.* (1991), 111 N.S.R. (2d) 32 (T.D.). Because of the *de facto* limitations on jurisdiction imposed by the doctrine of *forum non conveniens* in the domestic context, it has frequently been argued that to simply extrapolate domestic jurisdictional theory to the recognition context is to effectively cede a much wider presence-based jurisdiction to foreign courts than courts in common law jurisdictions claim for themselves: see, for instance, A. Briggs, "Which Foreign Judgments Should We Recognize Today?" (1987) 36 Int'l & Comp. L.Q. 240. However compelling the obvious logic of this argument, the English Court of Appeal recently reaffirmed the proposition that casual presence vests jurisdiction even for the purposes of foreign judgment recognition: *Adams* v. *Cape Industries* [1990] Ch. 433 (C.A.).

[64] *Charron* v. *La Banque Provinciale du Canada* [1936] O.W.N. 315 (Ont. S.C.). But see *ibid.*

[65] A. R. Stein, "Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction" (1987) 65 Texas L. Rev. 689 at 693-4 footnote 25. The nineteenth century English common law jurisdictional tests for other types of proceedings reveal a similar bias against concurrent jurisdiction. In crime, the forum where the crime was committed and only that forum had jurisdiction to try and punish the offender. In divorce, the forum where the husband was domiciled and only that forum had jurisdiction to entertain a petition. The "ideal" of exclusive jurisdiction has been abandoned in both areas and today jurisdiction may be exercised by any forum with a real and substantial connection to the subject-matter. In divorce, see *Indyka* v. *Indyka* [1966] 3 All E.R. 583 (H.L.); in crime, see *Libman* v. *The Queen* [1985] 2 S.C.R. 178.

[66] (U.K.) 15 & 16 Vict. c. 76, ss. 18, 19.

was the grant of a power to serve defendants physically absent from England rather than a restatement of jurisdictional law, and derivative common law legal systems, including those in Canada, have perpetuated that legislative tradition.

In observing in *Hunt* that some of the traditional jurisdictional rules might require rethinking in light of *Morguard*,[67] La Forest J. likely had in mind the legitimacy of transient presence as a sufficient jurisdictional basis. It is difficult to see how the transient presence rule can survive constitutional challenge against the overriding *Morguard* jurisdictional standards of "order and fairness", standards that La Forest J. took pains to re-emphasize in *Hunt*. A jurisdictional rule based on casual or transient presence does not comport with either value. Order is undermined because the forum is entirely fortuitous. Fairness is undermined because a defendant can be haled into court to defend conduct in a forum that does not bear any connection either to the defendant or to the conduct underlying the action.

It is true that the English Court of Appeal reaffirmed the validity of the transient presence rule for jurisdiction as recently as 1990.[68] However, the English courts have held that they lack authority to reform their common law jurisdictional authority and that any change can only come through legislation.[69] Given this perceived limitation, it is understandable that the Court felt obliged to continue endorsing a strict, precedent-driven, approach to presence based jurisdiction, expressly eschewing the relevance of "concepts of justice" to the exercise. Canadian courts cannot engage in such formalistic reasoning: *Morguard* demands that all exercises of jurisdictional power conform to the standards of both order and fairness.

More surprising, perhaps, is the recent reaffirmation by the United States Supreme Court of transient presence jurisdiction against constitutional challenge[70] on due process grounds. Four members of the Court reached that conclusion purely on the basis that because the physical presence rule was firmly established in the American legal tradition, it *ipso facto* satisfied due process standards. The other four rejected the idea that tradition alone could ever immunize a jurisdictional rule from constitutional scrutiny under the due process clause. Tradition was sufficient only if so well-entrenched as to give notice to a defendant transiently present in the jurisdiction that he or she is thereby subject to suit. Perhaps recognizing the circularity of this position - "the existence of a continuing tradition is not enough, fairness must also be considered; fairness exists because there is a continuing tradition" - they attempted to bolster their conclusion on the theory that without transient jurisdiction, an asymmetry would arise: the transient could invoke the jurisdiction of the local courts as a plaintiff without being subject to their process as a defendant. But this also seems open to a circularity objection. After all, a plaintiff does not have open-

[67] *Supra* footnote 57.

[68] *Adams* v. *Cape Industries p.l.c.*, *supra* footnote 63.

[69] *The Siskina* [1979] A.C. 210 (H.L.).

[70] *Burnham* v. *Superior Ct.* 495 U.S. 604 (1990).

ended access to the courts: access depends on whether the particular defendant is subject to the jurisdiction of the court and that is the very question in issue.

Perhaps influenced by the English and American caselaw, a British Columbia court in a recent post-*Morguard* case seemed to take it for granted that the casual presence rule still survives in common law Canada. While recognizing that "where a transient defendant is served in British Columbia, the connection between the *lis* and the forum may be close to vanishing point", the Court felt that "the rule that service in the territory founds jurisdiction is too long established to be doubted, and it can, in any event be justified on the ground that there must always be a forum where a defendant, without doubt, can be sued and that is the place where he can be found".[71]

With respect, the policy of ensuring a universally available litigation forum can be achieved equally well, and with greater fairness and rationality, by adopting ordinary residence as the required level of presence.[72] In any event, the casual presence rule is much less entrenched in the Canadian than the American jurisprudence where the view that "the foundation of jurisdiction is physical power"[73] exerted a powerful hold over the American legal mind, achieving quasi-constitutional status at one point. Whereas England expanded its domestic jurisdictional rules in the mid-nineteenth century with the enactment of the *Common Law Procedure Act 1852*,[74] presence remained the primary basis of jurisdiction for both local and sister state jurisdiction in the United States for almost another century. It was not until 1945, in *International Shoe Co.* v. *Washington*[75] that the United States Supreme Court finally expanded state court jurisdiction to permit actions to be instituted against out of state defendants on the basis of "minimum contacts" with the forum sufficient to satisfy "traditional notions of fair play and substantial justice".[76] In contrast, the caselaw in common law Canada in support of jurisdiction based on transient presence is relatively more sparse[77] and considerably more tentative,[78] in part because the

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[71] *Extra-Sea Charters* v. *Formalog* (1991), 55 B.C.L.R. (2d) 197 (S.C.), citing *Butkovsky* v. *Donahue* (1984), 52 B.C.L.R. 278 (S.C.).

[72] Problems may arise in the rare case of a truly transient defendant with no fixed address. But that problem can be resolved by a rule, like that found in the *Civil Code of Quebec*, under which, in the absence of a residence, a person is deemed to be domiciled where he or she lives and if that is unknown, at the last known domicile: C.C.Q. art. 78.

[73] *McDonald* v. *Mabee*, 243 U.S. 90 at 91 (1917), *per* Holmes, J. at 91. For a critical analysis of the power presence rule in the American jurisprudence, see A. A. Ehrenzweig, "The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens" (1956) 65 Yale L.J. 288.

[74] *Supra* footnote 66.

[75] 326 U.S. 310 (1945).

[76] *Ibid.* at 316.

[77] *Forbes* v. *Simmons* (1914), 20 D.L.R. 100 (Alta. SC); and see *supra* footnote 71.

[78] *Re Carrick Estates Ltd and Young* (1987), 43 D.L.R. (4th) 161 (Sask. CA). And see Horace Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (Cambridge, Mass: Harvard University Press, 1938) at 251*ff.*

Reciprocal Enforcement of Judgments Acts long ago rejected physical presence as a basis for jurisdiction in favour of the more durable connections of ordinary residence or carrying on business in the judgment forum.[79]

If physical presence without ordinary residence does not suffice for jurisdiction, what about ordinary residence without physical presence? If jurisdiction is to be based, as urged above, on the residence and not merely the presence of the defendant in the forum, it should not matter where the defendant happened to be served. In fact, as a general rule, the courts in common law Canada have authority, under the service *ex juris* rules, over resident defendants who are served abroad while temporarily absent from the province. Moreover, the same rule applies for the purposes of recognizing the jurisdiction of a foreign court: ordinary residence without physical presence suffices both under the *Reciprocal Enforcement of Judgments Acts*[80] and at common law.[81]

While there does not appear to be any Supreme Court of Canada authority directly on the point, the Court recently signalled its willingness to disregard the distinction between service within and outside the jurisdiction for the purposes of determining the discretionary limits on a court's adjudicatory power under the doctrine of *forum non conveniens*.[82] A similar approach to jurisdiction *strictu senso* would be welcome. The adoption of an ordinary residence standard for general presence-based jurisdiction, independent of service of process considerations, would allow jurisdictional law in common law and civil law Canada to be approached according to a similar, and theoretically more defensible, conceptual structure, a welcome achievement in light of the fact that the jurisdictional rules of both systems are now clearly subject to a common constitutional standard.

(c) *Specific Jurisdiction Based on a Subject Matter Connection to the Forum*

In addition to general jurisdiction based on the defendant's residence/presence in the forum at the time action is commenced, most legal systems also recognize jurisdiction based on the existence of a connection between the forum and the specific subject matter of the case at the time the cause of action arose. Again, however, the strength of the required connection varies.

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[79] *Ibid.*

[80] *Land Management Group of North America Inc.* v. *Wilson* (1993), 135 N.B.R. (2d) 129 (Q.B.).

[81] *Marshall* v. *Houghton* [1923] 2 W.W.R. 553 (Man. C.A.).

[82] In *Amchem Products* v. *B.C. (W.C.B.)*, *supra* footnote 4 Justice Sopinka thought the distinction should play no role in relation to the operation of the doctrine of *forum non conveniens*: "It seems to me that whether it is a case for service outside the jurisdiction or the defendant is served in the jurisdiction, the issue remains: is there a more appropriate jurisdiction based on the relevant factors?" For a recent affirmation and analysis of this aspect of *Amchem*, see the majority reasons for judgment delivered by Arbour, J.A. in *Frymer* v. *Brettschneider* [1994] O.J. No. 1411 (QL, Ont. C.A., June 30, 1994).

The English *Common Law Procedure Act 1852*[83] essentially equated subject-matter jurisdiction with choice of law. Service of process on a defendant outside the forum was limited to cases where the cause of action arose in England or involved a contract made in England (and therefore governed by English law under then existent choice of law theories). However, the legislatures in common law Canada have gradually expanded the *prima facie* statutory authority of the courts to the point where no connection, or the most tenuous of connections, suffices to allow a plaintiff to at least commence an action against a non-resident defendant.[84]

In Quebec, the equation between choice of law and specific subject matter jurisdiction persisted far longer than it did in common law Canada. The old Code used the original *English Common Law Procedure Act 1852* formulation: subject matter jurisdiction existed only if the cause of action arose in Quebec or involved a contract made in Quebec.[85] The new Code rules[86] are somewhat less cautious that their predecessors. Although they still demand a fairly substantial nexus to found jurisdiction for the purposes of both local and foreign court jurisdiction, the old equation between subject-matter jurisdiction and choice of law has been abandoned.

In any event, *Morguard* and *Hunt* make it clear that counsel in both common law Canada and Quebec can no longer rely, if ever they could, on their provinces' statutory rules as an absolute indicator of what subject matter connections are sufficient for jurisdiction.[87] Legislative authority over jurisdictional law, like any other subject-matter, is limited by the words "in the province" that appear throughout section 92 of the *Constitution Act, 1867*. Although the existence of territorial limits on long-arm jurisdiction had been recognized prior to *Morguard* and *Hunt*, what those limits were had not been articulated.[88] In *Morguard*, La Forest J. suggested that the "real and substantial

[83] *Supra* footnote 66.

[84] For examples of the various types of service *ex juris* rules in force in common law Canada, see J-G Castel, *Conflict of Laws, Cases, Notes and Materials*, 5th ed. (Toronto: Butterworths, 1984) at 5-7*ff*. For a full analysis, see J. Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985) 63 Can. Bar Rev. 271.

[85] H. P. Glenn, "De la cause d'action et de la compétence internationale" (1982) 27 McGill L.J. 793 at 797.

[86] Articles 3148-3151, 3164, 3165, and 3168 and see *supra* footnote 40.

[87] See, e.g., *Wilson* v. *Moyes* (1993), 13 O.R. (3d) 302 (Gen. Div.); *Mathias Colomb Band of Indians* v. *Saskatchewan Power Corp.* [1993] 6 W.W.R. 153 (Man. Q.B.) aff'd 111 D.L.R. (4th) 83 (Man. C.A.).

[88] Until *Morguard*, the courts in common law Canada tended to assume that a province's legislative authority to vest its courts with adjudicatory power over foreign defendants was unlimited: *Paradis* v. *King and King* (1956), 6 D.L.R. (2d) 277 (N.B.S.C.A.D.); *McMulkin* v. *Trader's Bank of Canada* (1912), 6 D.L.R. 184 (Div. Ct.). In taking this view, they were undoubtedly influenced by the English caselaw, failing to appreciate that, unlike the provincial legislatures, the English Parliament is not subject to a territorial limit on its legislative authority. As long as service *ex juris* required the prior leave of the court, a *de facto* territorial limitation could still be imposed pursuant to the court's discretionary power to refuse leave: *Boston Law Book* v. *Canada Law Book* (1918), 43 O.L.R. 13 (S.C.) aff'd 43 O.L.R. 233; *Beaver Lamb and Shearling Co.* v. *Sub Insurance*

connection" standard could serve both as an appropriate basis for foreign court jurisdiction and as an appropriate expression of the limits on domestic jurisdiction and in *Hunt*, he confirms the general thrust of that suggestion.[89]

What constitutes a sufficiently "real and substantial" connection in concrete cases, however, remains open. The post-*Morguard* lower court cases are definitive on only one rather obvious point: if the only connection to the forum is the plaintiff's residence, the court lacks jurisdiction regardless of whether or not it is *forum conveniens*.[90] In *Hunt*, La Forest J. made a point of affirming that the jurisdictional principle articulated by the Court in *Moran* v. *Pyle*[91] exemplified a sufficient connection to justify an assertion of jurisdiction.[92] Thus, we know that a manufacturer who negligently produces defective goods in one province may be sued in any other jurisdiction where the goods cause injury provided the manufacturer knew that the goods were destined to enter the interjurisdictional stream of commerce and might therefore cause injury in that province.[93] However, whether *Moran* v. *Pyle* goes to jurisdiction and choice of law or jurisdiction alone has not yet been definitively determined[94] and *Hunt* does not resolve that issue.[95] On the contrary, La Forest J. was disinclined to speculate

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Office of London, England [1951] 3 D.L.R. 470 (Ont. H. Ct.); *Brenner* v. *American Metal Co.* (1920), 55 D.L.R. 702 (Ont. S.C.); *J.J. Gibbons Ltd.* v. *Berliner Gramaphone Co. Ltd.* (1912), 8 D.L.R. 471 (Ont. S.C.). Today most provinces allow service *ex juris* without prior leave: J.-G. Castel, *Canadian Conflict of Laws*, *supra* footnote 62. However, a *de facto* territorial limitation can still be interjected pursuant to the discretion to stay an action under *forum non conveniens*.. The strength of the English influence on the courts in common law Canada, coupled with doubts concerning the availability of the *forum non conveniens* doctrine in Quebec law prior to the enactment of the new *Code*, probably explains why it was a Quebec Court that first clearly articulated and applied a constitutionally-based territorial limit on adjudicatory authority over foreign defendants: *Dupont* v. *Taronga Holdings* (1986), 49 D.L.R. (4th) 335 (Que. Sup. Ct). Generally, see John Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985) 63 Can. Bar Rev. 271.

[89] *Supra* footnote 1 at 278. For a comprehensive and thoughtful analysis of this aspect of *Morguard*, see Vaughan Black, "The Other Side of Morguard: New Limits on Judicial Jurisdiction" (1993) 22 Can. Bus. L. J. 4, referred to with approval by La Forest J. in *Hunt*.

[90] *Canadian International Marketing Distributing Ltd.* v. *Nitsuko Ltd.* (1990) 68 D.L.R. (4th) 318 (B.C.C.A.); *Ell* v. *Con-Pro Industries Ltd.* (1992) 11 B.C.A.C. 174; *Wilson* v. *Moyes supra* footnote 87; *Webb* v. *Hooper*, [1994] A.J. No. 335 (QL); *First City Trust Co.* v. *Inuvik Automative Wholesale*, [1993] N.W.T.R. 273 (S.C.).

[91] *Moran* v. *Pyle National (Canada) Ltd.* [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239.

[92] *Supra* footnote 4 at 315-16.

[93] Some post-*Morguard* courts seem to have taken a rather generous view of *Moran* v. *Pyle*. In *Sobstyl* v. *Finzer*, [1993] B.C.J. No. 33 (QL), a British Columbia court relied on it to support the assertion of jurisdiction in an action by a local resident against an out-of-province doctor and an out-of-province hospital in relation to injury consisting in a second ectopic pregnancy occurring in-province as a consequence of the negligently-performed out-of-province medical procedure.

[94] *Interprovincial Co-ops* v. *the Queen*, *supra* footnote 51 at 358.

[95] It is worth noting, however, that under the new *Civil Code of Quebec*, a rule resembling the *Moran* v. *Pyle* formula controls choice of law: article 3126 sanctions a general *lex loci delicti* rule in relation to civil liability for injury caused to another; however,

on "the relative merits of adopting a broad or narrow basis for assuming jurisdiction" and the implications of that decision on either *forum non conveniens* or choice of law,[96] preferring to leave further development "to the gradual accumulation of connections defined in accordance with the broad principles of order and fairness".[97]

In determining what connections suffice to satisfy order and fairness, the Court is unlikely to simply import unadulterated the American "minimum contacts" jurisprudence. Stein's analysis of the caselaw under *International Shoe* demonstrates that three theoretically distinct, yet doctrinally interwoven, rationales underly "minimum contacts" jurisdiction in the United States.[98] The first is ancillary territorial jurisdiction: the theory that a state may exercise authority over persons outside its borders in order to give effect to a legitimate regulatory authority it possesses over the subject matter of the action. On this theory, a state has judicial authority based on a subject-matter nexus in any case where that nexus gives it a constitutionally permissible interest in regulating the conduct or activities underlying the action. The second rationale is based on a theory of implied consent: corporate defendants who choose to purposefully establish contacts with a state must accept the burden of being subjected to suit in that state along with the benefits that are assumed to accompany their presence there. The third and final rationale is based on jurisdictional fairness in the sense of the actual burden of litigation: on this theory, jurisdiction depends on whether it would be unfair, in the sense of inconvenient, for the defendant to be forced to defend its conduct in the particular forum.

Of these three theories, only the first fits comfortably within the Canadian constitutional and conflicts framework. The implied consent/purposeful availment rationale is, in reality, a species of general presence-based jurisdiction and should be dealt with under that rubric where the question will be whether the corporate defendant has structured a sufficiently close relationship to the particular forum to justify treating it a *de facto* resident.[99] The fairness/convenience rationale is "nothing more than a constitutionalized version of *forum non conveniens*".[100] That may be appropriate in the United States where the due process clause has come to be regarded in the caselaw as the sole source of constitutional limits on jurisdiction; concerns with federalism or with mediating the territorial limits on state judicial authority are not engaged.[101] In Canada, however, the constitutional limits on adjudicatory authority are based primarily on territoriality, with due process and mobility rights possibly

"if the injury appeared in another country, the law of that county is applicable if the person who committed the injurious act should have foreseen that the damage would occur".

[96] *Supra* footnote 4 at 326.

[97] *Supra* footnote 4 at 325.

[98] *Supra* footnote 65.

[99] *Ibid.* at 758.

[100] *Ibid.* at 707.

[101] *Insurance Corporation of Ireland* v. *Compagnies des Bauxites de Guinée*, 456 U.S. 694 (1982).

operating as supplementary limits to ensure that the order achieved by territoriality[102] is tempered by fairness. Jurisdiction and *forum non conveniens* are thus conceptually and functionally distinct.[103] The one is an *a priori* constitutionally mandated condition of jurisdiction, the other, an *ex post facto* discretionary brake on an otherwise legitimate jurisdiction. Indeed, this difference in the constitutional underpinnings of the Canadian and American theories may explain the differences in values that are said to inform jurisdiction based on a subject matter nexus in each jurisdiction. Under the American jurisprudence, the overriding consideration is whether the exercise of jurisdiction satisfies standards of "fair play and substantial justice"[104] whereas in both *Morguard* and *Hunt*, La Forest J. emphasized "order and fairness" as the dominant values.

It may also be significant that the Canadian test for subject matter jurisdiction - the existence of a "real and substantial connection" - is derived from divorce[105] and criminal law.[106] In both these areas, the jurisdictional and choice of law rules are synonymous in the sense that if jurisdiction is assumed, forum law applies. This meaning need not, of course, be carried over to *in personam* proceedings, where jurisdiction and choice of law can be separated.[107] Nonetheless, the doctrinal source of the test, as well as the ordinary meaning of the words, supports the proposition that a "real and substantial connection" must be one that would give the forum province a constitutionally sufficient interest in regulating the conduct underlying the action. After all, where a Court does not have presence-based jurisdiction over the person of the defendant, surely the considerations which make it constitutional for a court to take jurisdiction based on a subject-matter nexus cannot easily be distinguished from the considerations which would give the forum a constitutionally permissable interest in regulating the outcome.

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[102] On the role of the Supreme Court in regulating and enforcing the constitutionally-mandated limits on provincial ancillary territorial authority, see *Interprovincial Co-Ops* v. *The Queen*, *supra* footnote 51 at 356. See also *R.* v. *Thomas Equipment Ltd.* [1979] S.C.R. 529, 96 D.L.R. (3d) 1.

[103] See, for instance, *Extra-Sea Charters Ltd.* v. *Formalog* (1991), 55 B.C.L.R. (2d) 197 (B.C.S.C.).

[104] *Supra* footnote 76.

[105] *Indyka* v. *Indyka*, [1966] 3 All E.R. 583 (C.A.).

[106] *Libman* v. *The Queen*, [1985] 2 S.C.R. 178.

[107] The relationship between jurisdiction and choice of law explains the old common law distinction between local and transitory actions. A local action is one that can be tried only where the cause of action arises because the forum, for reasons of public policy, only applies local law. Thus, crimes "are in their nature local and the jurisdiction of crimes is local": *Rafael* v. *Verelst* (1776), 2 Wm. Bl. 1055, 96 E.R. 621. Divorce proceedings, as well as actions involving title to immovables, are also local actions in this sense: *Bereton* v. *C.P.R.* (1897), 29 O.R. 57 (H. Ct.). In contrast, "personal injuries [and pure actions *in personam* generally] are of a transitory nature": *Rafael* v. *Verelst supra.* They can be tried in a forum unconnected to the cause of action because forum choice of law rules permit application of the appropriate substantive law to the outcome.

Apart from its theoretical appeal, there are pragmatic considerations in favour of a jurisdictional test that would limit a plaintiff's choice of forum, except in cases of presence-based jurisdiction, to one with sufficient contacts to the case to engage the regulatory interest of that forum over some aspect of the underlying subject matter. Such an approach would minimize the dual risks of a misapplication of foreign law and an improper application of forum law.[108] Moreover, it would allow a clear dividing line to be drawn between connections that go to litigation fairness - more appropriately dealt with under the doctrine of *forum non conveniens* - and those that regulate adjudicatory authority in the first instance. Finally, it would also rationalize that set of jurisdictional rules under which the existence of authority over one defendant automatically vests jurisdiction over a second defendant. The rules of court in a number of the common law provinces authorize service *ex juris* against a foreign defendant who is "a necessary or proper" party to an action properly commenced against a local defendant.[109] The *Civil Code of Quebec* contains a somewhat similar rule: where authority exists to rule on the principal demand, Quebec courts also have authority to rule on an incidental demand or a cross-demand.[110] If jurisdiction in such cases is based on the existence of ancillary territorial authority over the subject matter of the action, the assertion of authority against the foreign defendant is not incompatible with a territorial limit on provincial adjudicatory authority. But if jurisdiction over the principal defendant is based on "minimum contacts" insufficient to give the forum a regulatory interest in the outcome, it is difficult to see how the further extension of authority over the foreign defendant with no contacts whatsoever to the forum can escape challenge on extraterritoriality grounds, however convenient from the point of view of the administration of justice that rule might be.

There is a final reason, perhaps the most significant one, why we should want to take a fairly stringent approach to jurisdiction based on a subject matter nexus. Translated to the recognition context, "real and substantial connection" supplies the basis on which foreign judgments against non-resident defendants must be recognized. It is one thing to say that the judgments of the courts with

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[108] It should be emphasized, however, that a jurisdictional theory based on the existence of ancillary territorial authority over the subject-matter of the action is distinct from the "proper law in a proper forum" approach advocated, *inter alia*, by A. A. Ehrenzweig, "A Proper Law in a Proper Forum: A Restatement of the Lex Fori Approach" (1965) 18 Okla. L. Rev. 340. Unlike the latter, subject matter jurisdiction under the former does not depend on whether the forum's own law applies to the outcome under its choice of law rules (although this would frequently be the result) but on whether the subject matter of the action raises an interest falling within the territorial limits of the forum's regulatory power. In relation to this distinction, see H. P. Glenn, "Conflicts of Laws-Eviction of Proper Law of Contract by Legislation Creating Provincial Offense - Extraterritorial Effect of Provincial Legislation - Where is an Omission?" (1981) 59 Can. Bar Rev. 840. See generally Stein, *supra* footnote 65. And see D. Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law" (1992) 92 Colum. L. Rev. 249.

[109] J.-G. Castel, *Canadian Conflict of Laws*, 3rd ed., *supra* footnote 62 at 206.

[110] Art. 3139 C.C.Q.

territorial jurisdiction over the defendant or the subject matter of the action must be respected everywhere. But it is less palatable to accept that a connection insufficient to vest either adjudicatory power over the person of the defendant or regulatory power over the substantive subject matter of the dispute nonetheless supports internationally or even interprovincially binding jurisdiction.

The caselaw on this point suggests there is good reason for caution. The British Columbia Court of Appeal recently granted leave to appeal on the question of whether, as a matter of policy, recognition should be extended to an American default judgment for personal injury damages in an amount many times that which a Canadian court would award.[111] If foreign court jurisdiction based on a subject matter nexus were restricted to cases where the foreign court had a legitimate regulatory interest in the outcome, presumably the courts would feel less discomfort in extending recognition in cases of this sort.

Summary

Hunt confirms an important distinction between the recognition of sister province and foreign country *in personam* judgments. In the interprovincial context, all Canadian courts are obligated, as a constitutional matter, to give full faith and credit to judgments rendered in sister provinces so long as the rendering court exercised appropriately restrained jurisdiction compatible with the principles articulated in *Morguard*.[112] That obligation is one that the provincial legislatures (and indeed the Canadian Parliament) cannot override.[113] On the international plane, however, *Morguard* controls recognition only within common law Canada and then only in the absence of a more restrictive statutory regime, such as now exists in Saskatchewan and New Brunswick[114] and, in relation to asbestos litigation, in British Columbia.[115] The only constitutional restraints in this context are to be found in the general territorial limits on provincial legislative competence.[116]

What constitutes an appropriately restrained exercise of jurisdiction so as to engage the full faith and credit doctrine is said to depend on whether the assertion of authority over the defendant, in the concrete case, is compatible with the values of "order and fairness". Where jurisdiction is based on the defendant's presence in the forum at the time action is commenced, these values are apparently satisfied at least if, as argued in this comment, presence is equated, as it is in Quebec law, with ordinary residence (or its notional equivalent in the case of a corporation) and not merely physical presence.[117]

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[111] *Stoddard* v. *Accurpress Manufacturing Ltd.*, *supra* footnote 49.

[112] *Supra* text at footnote 7 *ff.*

[113] *Supra* text at footnote 28 *ff.*

[114] *Supra* text at footnote 34 *ff.*

[115] *Supra* footnote 45.

[116] *Supra* text at footnote 50 *ff.*

[117] *Supra* text at footnote 56 *ff.*

But where jurisdiction rests on a real and substantial connection between the subject matter of the action and the judgment forum, the question of whether a narrow or a broad approach to the quality of the connections necessary for jurisdiction to exist has been left wide open for debate by *Hunt*.[118] The answer to that question has obvious repercussions for the development of the doctrine of *forum non conveniens* and the resolution of the choice of law issues presently confronting the Court in the *Tolofson* and *Gagnon* appeals.[119] After all, the more demanding the subject-matter nexus that is required for jurisdiction, the more likely it is that a case will be heard in the more convenient forum and in the one whose substantive law applies to the outcome.

This comment has advocated a relatively cautious approach to subject-matter jurisdiction, one that would require the forum to have a sufficient interest in the subject-matter of the action to justify the exercise of ancillary territorial authority, that is to say, authority to regulate the substantive conduct underlying the action.[120] That approach is the one most compatible with the values of order and fairness and with the territorial principle that *Morguard* and *Hunt* have affirmed determine the Canadian judicial authority over the conduct of non-resident defendants.

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[118] *Supra* text at footnotes 96, 97.

[119] *Supra* footnotes 5, 6.

[120] *Supra* text at footnote 98 *ff.*

ABORTION - PROVINCIAL LEGISLATION - CONTROL OVER HEALTH CARE: *R* v. *Morgentaler*

Moira L. McConnell*

One of the most puzzling things about the latest round between the Queen, Henry Morgentaler and the Supreme Court of Canada[1] is why it got beyond the first ritual political *pas de deux*.[2] It was obvious to most observers that when rumour of Henry's imminent Nova Scotia debut hit the streets, a response would be required if only for show. A scrappy structure of regulations was hastily erected. It was quickly and firmly dismantled by the Trial Court after the first inspection largely because the structure was found to have been built with the wrong materials.[3] At this point, it would have been acceptable for the Queen in Right of in Nova Scotia to give in gracefully, and appease opponents by pointing to the dictates of the various courts and the will of Senate. Still, it seems to have become a point of honour to establish that indeed the structure was made correctly. A re-inspection took place and again the Nova Scotia Court of Appeal supported the Trial Judge in ruling that no matter how painted or carved, the structure was made out of the wrong materials.[4] At this point, good sense would suggest that Nova Scotia give up. Certainly the public was losing patience with

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[1] *R.* v. *Morgentaler*, [1993] 3 S.C.R. 463.

[2] Probably one of the most troubling aspects of the abortion debate has been the exclusion of women as active participants in the legal debate in Canada, unlike the United States where the issue has usually centred around a particular woman's decision to have an abortion. Taken at its starkest, the entire abortion saga could be re-characterized as a battle by a medical practitioner to perform a particular operation without restriction - in effect, decriminalizing a speciality practice. In fact, the first criminalization of abortion in the United States occurred in the context of a move to professionalize medical practice (See: L. Tribe, *Abortion: The Clash of Absolutes* (New York: Norton & Co., 1990) at 30. Given the make-up of the Supreme Court in this case, it is interesting that in 1991 McLachlin, J. commented ("Crime and Women - Feminine Equality and the Criminal Law", address to the Elizabeth Fry Society, Calgary, 17 April 1991, at 17) on the relative invisibility of women in the discussion of criminalization of abortion.

> [T]he future of the crime of abortion in Canada cannot be considered without the explicit recognition of the criminal liability of women with respect to abortion. Medical developments such as the morning-after pill have made it likely that one day, women seeking abortions will have no need to involve the medical practitioners who have been the focus of legislation concerning abortion since its inception. As a result, in the future abortion could well become a uniquely "feminine" crime, for better or worse, a fact which must be borne in mind when determining whether to continue to treat abortion as a crime.

[3] *The Queen* v. *Henry Morgentaler* (1990), 99 N.S.R. (2d) 293 (T.D.).

[4] *The Queen* v. *Henry Morgentaler* (1991), 104 N.S.R. (2d) 361, Freeman, J.A. with Clarke, C.J.N.S., Hart and Chipman, J.J.A. concurring, Jones, J.A. dissenting.

this charade.[5] Instead, however, the Queen in Right of Nova Scotia sought leave to appeal on the grounds of "national importance and control over health care".[6] To the surprise of many, the Supreme Court agreed to hear the case, and did so two years later in February 1993.[7] Since the Supreme Court of Canada has scarce resources and a choice in these matters, its decisions are usually reserved for matters of national importance or where there appears to be conflicting decisions. It is also elementary law that a refusal, particularly from the Supreme Court of Canada, to give leave to appeal effectively endorses the decision of the last Court. It was fair therefore to presume that the decision to hear the appeal in this case would do something new - either overturn the last decision, or disagree with some main point, or perhaps find a whole new ground for discussion. Yet the unanimous decision of the Supreme Court of Canada in September 1993 essentially reiterated much of the Trial Judge's decision and approach, endorsed points of evidence here and there, and mildly corrected a few points of interpretation by the Nova Scotia Court of Appeal.

A starting point then in commenting on *Morgentaler '93*, is to try to ferret out the reason for the coming of the case before the Supreme Court of Canada. Why was the Court enticed onto the floor at all? Was it merely good politics and courtesy to support the Nova Scotia Court of Appeal in its legal analysis (which it could have done through deference as well), or is there some skillfully choreographed turn and twists of phrase and nuance which justify the expensive exercise?

Before summarizing the case and the various points that arise from it, it may be for useful readers to outline briefly the understanding I, as commentator on several stages of the *Morgentaler* saga,[8] came to in trying to sort out what the case, and indeed the whole triangular relationship of the last decade and a half, is about. In this respect the comment is as much a reflection on changes in my own analysis of the issues.

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[5] B. Deakin, "Time, money-wasting Appeal", Spectrum (column in the *Chronicle Herald/Mail Star*), September 1991. In fact it is notable that the most recent action has involved a claim filed by Henry Morgentaler for his full legal costs (about $100,000). See J. Tibbetts "Morgentaler will sue Nova Scotia for over $100,000 *Chronicle Herald* (5 January 1994) A3. In addition, he has filed a claim for costs of abortions in the clinic. Presumably the former claim is based on the view that the entire prosecution was ill founded and harassment. It is ironic that the fact that the Supreme Court of Canada gave leave to appeal argues against this point since presumably the case was seen to present some legally contentious points.

[6] "It is our position that this is a matter of public importance in that it deals with the constitutional question of the division between federal and provincial jurisdiction", John Pearson, Public Prosecutor, as quoted by C. Mellor, "Province seeks to appeal Morgentaler ruling" *Mail Star* (4 September 1991) A1.

[7] Present: Lamer, C.J., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major, JJ. The decision was written by Sopinka, J. for the Court.

[8] See for example: McConnell, "Even by Common Sense Morality: Morgentaler, Borowski and The Constitution of Canada" (1989) 68 Can. Bar Rev. 765; McConnell, "Sui Generis: The Legal Nature of The Foetus in Canada" (1991) 70 Can. Bar Rev. 548; McConnell & Clark, "Abortion Law in Canada: A Matter of National Concern" (1991) 14 Dal. L.J. 81.

Morgentaler '93, is explicitly *NOT* about equality for women or financial and actual access to services, or better quality health care, or decriminalizing women's decisions, or de-medicalizing women's decisions or population control, environmental concerns, or whether the foetus is a person, or really even whether there are abortions in Nova Scotia (in fact, that seemed to be one of the issues glossed over by the Court). Nor is it really about provincial control over funding decisions on health care services - that issue, along with the *Charter* issues, were fairly clearly ducked by the Court, as battles to be fought another day - perhaps. Rather, after a great deal of sifting through comments, the case seems to be about the public moral queasiness that is invoked when contemplating profit-oriented (free-standing) provision of certain kinds of medical services. The opening statement of the Trial Judge in the case is telling:

> "He [Morgentaler] stands charged, not because he performed therapeutic abortions, but because of where he did them. They were performed at his free-standing abortion clinic... ."[9]

Throughout the Supreme Court of Canada decision there is reiteration of the point that the entire legislative effort was to rid the Province of Dr. Morgentaler's free-standing clinics for abortion - a matter that might have raised concerns about access to abortion. But this was not the focus of determinative evidence or much discussion by the Court. Rather, the Court emphasizes morality rather than access, when it comments, "... it seems clear to me that the present legislation, whose primary purpose is to prohibit abortions in certain circumstances, treats of a moral issue".[10] But what is the moral issue being addressed by legislation directed at free standing clinics?

Unlike the predecessor "morality based" *Criminal Code* provisions, which only allowed abortions in certain situations relating to balances struck between the woman's health and the foetus's existence, the provincial legislation took a "moral" stance, it seems, on free-standing or profit-oriented versus public institutions. The force of this morality is supported by penal sanctions and economic incentives for compliance. For example, it is notable that the Supreme Court of Canada refers to the evidence that "Nova Scotia's health care system evolved around the public hospital and that there have never been "for profit" medical clinics in the province".[11] And in its final section examining the pith and substance of the legislation the Court concludes that:

> "Its legislative history, the course of events leading up to the *Act*'s passage and the making of the N.S. Reg. 152/89, the Hansard excerpts and the absence of evidence that privatization and the cost and quality of health care services were anything more than incidental concerns, lead to the conclusion that the Medical Services *Act* and the Medical Services Designation Regulation were aimed primarily at suppressing the perceived public harm or evil of abortion clinics ... The primary objective of the legislation was to prohibit abortion outside hospitals as socially undesirable conduct... [t]his legislation involves regulation of the place where an abortion may be obtained,

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[9] *Supra* footnote 3.

[10] *Supra* footnote 2 at 505.

[11] *Ibid.*

> not from the point of view of health care policy, but from the viewpoint of public wrongs or crimes."[12]

Access to abortion which has often been seen as the underlying issue in provincial legislation, is only really specifically considered in a final section where the Court comments:

> "One of the effects of the legislation is consolidation of abortions in the hands of the provincial government, largely in one provincially-controlled institution. This renders free access to abortion vulnerable to administrative erosion."[13]

These comments suggest[14] that, although *Morgentaler'93* does, in part, entrench abortion in the criminal law area, the case is perhaps more about the public or moral wrong of carrying out this kind of operation in a blatantly[15] profit-oriented or private centre than about whether abortion is a criminal law area or not. I suggest that this case can be understood as dealing with who can decide whether or not abortions can take place in profit-oriented (private clinics). Many medical services, including abortions, are provided in hospitals and other facilities but it seems that when it comes to morally uneasy issues somehow the spectre of profiteering taints the practice as "unacceptable". One needs only to look at issues such as organ donations which seems to be considered as against the public interest and morally repugnant when they are based on contractual arrangement. In deciding that the regulation of abortion in free-standing clinics is a criminal law or public morality area, the Supreme Court of Canada is, without expressing it as such, basically confronting this concern. What is now classified more clearly as the "criminal" or public wrong activity is not the abortion but the profit-oriented provision of abortion. This is combined with the Supreme Court of Canada's view that abortion is clearly a federal criminal law matter, an area of authority which is understood to include the exclusive jurisdiction to determine what is not criminal activity as well by not legislating that the activity is a crime. The result of *Morgentaler'93* on this point is that crimes which are specifically identified as crimes by the federal government are criminal and, presumably, coincidental with this exclusive list is an indeterminate unarticulated list of non-criminal activity which is also equally part of criminal law governed by the federal government.

As an observer of these cases, it appears to me as ironic that in 1975 in the first round of cases, Dr. Morgentaler challenged federal abortion law on the basis

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[12] *Ibid.* at 12-13.

[13] *Ibid* at 514.

[14] As I have argued elsewhere, this whole issue is, ultimately a no-win situation for women since even if the legislation is struck down it somehow ends up defining women's conduct as inherently criminal (see my comments in McConnell, "Sui Generis: The Legal Nature of the Foetus in Canada", *supra* footnote 8 at 552). Given the national concern about the issue, it has seemed to me that there is an argument that the matter could be dealt with by Peace Order and Good Government (POGG) power, (McConnell & Clark, *supra* footnote 8, an argument that the Court referred to in its decision at 479 but did not address.

[15] It is important to remember that, although hospitals are public and ostensibly non-profit enterprises, the people working in them are not volunteers.

that it was health-related and therefore within provincial jurisdiction. In that case, the Supreme Court of Canada used the principle of indivisibility to permit the federal government to legislate, through hospital procedures, for the provision of a defence to the crime of abortion. In the present case, Dr. Morgentaler challenged provincial health legislation as unconstitutional because it regulated abortion as a criminal matter. Once again the Court found the principle of indivisibility operative and concluded that the provincial legislation was really federal "criminal" law (including law not in the *Criminal Code*) and not provincial health law.

1. *The Morgentaler Saga 1975-1993*

This section will provide an overview of the Morgentaler decisions. The Supreme Court of Canada ruling in the 1993 case is set out more fully on the assumption that the case is of interest to many practitioners for its evidentiary and constitutional rulings as well as the actual result. The background legal facts to the abortion saga are outlined for those who have not followed the legal debate on abortion in detail. The comment concludes with a "bottom line" list of propositions that have been developed to date and followed by a comment on the overall results which seem to emerge from them.

2. *The Legal Background 1975-1993*

In 1976, the Supreme Court of Canada found that the *Criminal Code* provisions challenged by Dr. Morgentaler as provincial health law because they provided that crime of abortion would not be a crime when it took place after a hospital board had determined that the woman's health or life was endangered, were valid federal criminal law because the hospital provisions were a defence to the crime and therefore inseparable from the prohibition and definition of the crime.[16] In 1988[17], Morgentaler again challenged the *Criminal Code* medical service provisions, and succeeded in having them struck down because the hospital administrative procedures involved were cumbersome enough to endanger the life and security of the woman under section 7 of the *Charter*. Because these provisions were inseparable from the prohibition (as determined by Court in 1975), the prohibition was struck down with the "defence". As the Court in the 1993 decision notes:

> "The 1988 decision meant that abortion was no longer regulated by the criminal law. It was no longer an offence to obtain or perform an abortion in a clinic such as those run by [Morgentaler]."[18]

In March 1989, after hearing that a freestanding abortion clinic was to be set up in Halifax, the Nova Scotia government rapidly passed two regulations, by Order In Council, under health legislation which essentially prohibited the

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[16] *Morgentaler* v. *The Queen*, [1976] 1 S.C.R. 616.

[17] *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30.

[18] *Supra* footnote 2 at 469.

performance of an abortion anywhere other than in a hospital. It also passed a regulation denying medical service insurance for abortions performed outside hospitals. These were challenged in Court but, in June 1989, before the case could proceed, the government introduced the *Medical Services Act*, S.N.S. 1989 c.9, (followed shortly after by the Medical Services Designation Regulation, N.S. Reg 152/89 which repealed the earlier regulations). The *Medical Services Act*[19] stated that its purpose was to prohibit privatization of "certain medical services" and performance of "designated medical services" in other than a hospital approved under the *Hospitals Act*. Where a service was provided contrary to the *Act*, neither the person performing the service nor the person for whom it was performed was entitled to benefits or medical insurance coverage. In addition, a person contravening the *Act* by performing the medical service was liable on summary conviction to a fine of between $10,000-$50,000. The "designated medical services" were not set out in the *Act* but were found in the *Regulations*, which enumerated nine procedures including "liposuction", upper gastro-intestinal endoscopy, abortion including a therapeutic abortion, but not including emergency services related to spontaneous abortion or related complications arising from a previously performed abortion".[20]

Dr. Morgentaler provided abortion services in his clinic in Halifax contrary to the *Act* and *Regulations* and was charged with 14 breaches of the *Act*. Since he had proclaimed quite openly and publicly that he had carried out the abortions, the issue was not whether he was guilty of breaching the *Act* but whether the legislation prohibiting the servicing was valid provincial legislation. He argued that the provisions violated women's equality and security rights under the *Charter* and were an unlawful (*ultra vires*) encroachment on the exclusive jurisdiction of the federal government regarding criminal law (s 91(27)). The Attorney General of Nova Scotia argued that the legislation was valid provincial health legislation designed to ensure quality health care services. It should be noted that the main issue was the prohibition of the performance of the operation rather than the payment provisions.[21] As stated in the Supreme Court case:

> "The allegation of *ultra vires* and the decision in the courts below focused on the offence provision of the legislation. No argument was directed toward the "de-insurance" section in this Court. Although the "de-insurance and the injunction provision clearly enhance the practical clout of the prohibition, they do not require independent consideration in the context of this case."[22]

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[19] S.4.

[20] N.S. Reg. 154/89.

[21] In fact this issue is now being dealt with as Dr. Morgentaler has claimed payment in full for services. It is of interest that he is claiming full payment even if it is above the amount allowed for this service.

[22] *Supra* footnote 2 at 49-95.

3. *The Morgentaler 1993 Case*

A. *Trial Decision*

The Trial Judge, Kennedy, Prov. Ct. J.'s, reasoning, findings and language with respect to evidentiary matters were later adopted by the Supreme Court of Canada. The case, as noted above, was argued on two grounds, the *Charter* and the distribution of powers, with the former being the more central of the defendant's submissions. Kennedy J., with no explanation, stated that he had decided to determine the division of powers under the *Constitution Act, 1867* issue first, although lengthy arguments had been advanced by both parties on the *Charter* issue. On this issue, he concluded that the power to enact criminal law was federal under s.91(27) of *Constitution Act, 1867* and that the prohibition and regulation of abortion has always been and remains criminal law. In so concluding, he referred to the 1976 *Morgentaler* decision where Laskin, C.J., in upholding the constitutional validity of the "defence" or exemption provisions in the *Criminal Code* regarding abortions, held that Parliament may determine what is or is not criminal behaviour. Kennedy, J. reasoned by extension that this meant:

> "... [if] the prohibition or regulation of abortion is criminal law and if Parliament, as part of its proper exercise of its exclusive criminal law making power, may determine what is not criminal as well as what is criminal, then by restricting the performance of therapeutic abortions to hospitals the Province of Nova Scotia has trespassed into an area of Federal Government competence."[23]

In response to the Crown's case that this was an incidental effect of the legislation, and that the *Act* was within provincial jurisdiction as it was health related law, Kennedy, J. went through various tests for establishing the "pith and substance" of the legislation. In other words, what was the real purpose of the legislation? This was to be determined by going "beyond the four corners" or a prima facie reading of the *Act* to consider its effects. Kennedy, J., considered the political circumstances surrounding its enactment to be admissible, including the timing of the *Act*, the fact that a Provincial Health Care Commission had not yet released its report when the legislation was passed, and that the Medical Society was not consulted and, when consulted, disagreed with the *Act*. In addition, he considered excerpts from the Hansard Report recording the debates over the Bill. Finally, he considered, but clearly regarded as not determinative, the severity of the penalties under the *Act*. He concluded:

> "There is no specific element of the evidence that is definitive. It is the totality of evidence pieced together that creates a clear picture of a province intent on stopping the imminent establishment of a free standing abortion clinic... .[24]

The legislation was, therefore, *ultra vires* and it was unnecessary ("not prudent" was the phase) to make alternative findings on the *Charter*.

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[23] *Supra* footnote 3 at 295, cited also by the Supreme Court *supra* footnote 2 at 473.

[24] *Supra* footnote 3.

B. *Nova Scotia Supreme Court (Appeal Division)*

Freeman, J.A., writing for the majority, held that the Province could, in principle, pass a law in the form taken by the *Medical Services Act*. However, using the doctrine of colourability, it was found to be criminal law. That is, the law on its face was valid provincial legislation, but in pith and substance it was *ultra vires*. This conclusion was based on the view that the legislation "in effect" duplicated the earlier *Criminal Code* provisions on abortion as well as preventing privatization. In considering the purpose of legislation through an indepth evaluation of the context of its enactment, the majority of the Court was able to conclude that the primary objective or purpose of the *Act* was to prevent the establishment of the Morgentaler Clinic in Nova Scotia and not to deal generally with privatization. This meant that, in pith and substance, the *Act* was criminal law because it was regulating abortion and morality. Jones, J.A., dissenting, concluded that the Province had jurisdiction to determine where health care services could be delivered and that, in the absence of federal legislation, he could see no difference between the provincial regulation of this matter and regulation requiring that AIDS patients or battered children be treated in a hospital.

C. *Supreme Court of Canada*

The Supreme Court of Canada, in granting leave to appeal, was asked to consider an appeal from a jurisdiction where a case had been decided on fairly narrow grounds and where the two lower Courts seemed only to differ slightly on the issue of whether legislation was valid on its face, and, even on that point, both the Trial and Appeal Court had focused mainly on a pith and substance analysis. The two decisions did not differ on the use of extrinsic evidence and Hansard, nor did they differ on the weight to be placed on the severity of penalties as factors to consider or even on the question of whether the *Charter* argument should be considered. Nevertheless, the Supreme Court of Canada granted leave to appeal. The Court stated that the questions which were to be argued were whether the *Medical Services Act* and the *Medical Services Designation Regulations* were *ultra vires* the province because they were legislation in relation to criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s.91(27) of the *Constitution Act, 1867*. In short, they were the same questions that had been addressed by the Courts below.

Sopinka, J., writing for the Court, held that the *Act* and *Regulations* were indivisible and that they constituted an attempt by the province to legislate in the area of criminal law.[25] He reached this conclusion through the traditional analysis based on classifying the legislation by its "matter", (or pith and substance). After citing tests from the 1950s to support the non-controversial view that the key to validity of legislation is to be found in its dominant purpose

[25] *Supra* footnote 2 at 480.

or aim, which was to be defined by examining the *Act's* stated purpose, the purpose evidenced in its background, and its legal and practical effect. The first step, the legal "effect" of legislation essentially amounts to prima facie evaluation. That is, what does the legislation say it is doing and what legal effect does it seem to have on rights and obligations? In addition, the analysis can go beyond "the four corners of *Act*" to see what effect it actually has, or was intended to have, although the ultimate long-term effect proposed may not be relevant or probable.

Sopinka, J., supported the Trial Judge's use of Hansard materials and legislative history as extrinsic evidence of purpose provided they were relevant and not inherently unreliable.[26] In this case, the Hansard evidence established that:

> "members of all parties in the House understood the central feature of the proposed law to be the prohibition of Dr. Morgentaler's proposed clinic on the basis of a common and almost unanimous opposition to abortion clinics per se".[27]

The Court considered evidence of practical effect in light of the Crown's argument that there was no evidence to indicate any actual restriction of abortion services. The Court concluded that legal effect is always relevant to purpose, but practical effect may not be relevant to determining the purpose, perhaps because the purpose of the *Act* may be valid but the effects may be unintended or not apparent or may alter with time or be otherwise unpredictable.

> "In the majority of cases the only relevance of practical effect is to demonstrate an *ultra vires* purpose by revealing a serious impact upon a matter outside the enacting body's legislative authority and thus either contradicting an appearance of *intra vires* or confirming an impression of *ultra vires*."[28]

In considering the scope of federal criminal law power, Sopinka, J., pointed to the "classic" test enunciated by Rand, J. in 1949, [29] which means that "the presence or absence of a criminal public purpose or object is thus pivotal." Sopinka, J. gave a similarly broad reading to provincial health jurisdiction and stated that the provinces have general jurisdiction over health matters. He cited the 1982 *Schneider*[30] case regarding a provincial heroin treatment programme as a case of provincial legislation dealing with a matter also dealt with by criminal law. The provincial legislation in *Schneider* was sustained because it was intended to provide treatment rather than punish the activity, a comparison which leads him to comment:

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[26] *Ibid.* at 483.

[27] *Ibid.* at 485.

[28] *Ibid.* at 86-87.

[29] *Ibid.* at 489. *Reference re Validity of section 5(a) of the Dairy Industry Act* (the Margarine Reference) [1949] S.C.R. 1 at 49-50, In brief he said that these are laws which are directed to some public wrong or evil or injurious or undesirable effect and the legislature is seeking to suppress the evil or safeguard the interest of the public. "Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law...".

[30] *Schneider* v. *The Queen*, [1982] 2 S.C.R. 112.

> "Accordingly, if the central concern of the present legislation were medical treatment of unwanted pregnancies and the safety of and security of the pregnant woman, not the restriction of abortion services with a view to safeguarding the public interest or interdicting a public harm, the legislation would arguably be valid health law enacted pursuant to the province's general health jurisdiction. In addition there is no dispute that the heads of s.92 invoked by the appellant confer on the provinces jurisdiction over health care in the province generally, including matters of cost and efficiency, the nature of health care delivery system, and privatization of the provision of medical services."[31]

In evaluating whether regulating performance or procurement of abortion as socially undesirable conduct is criminal law, the Court seemed to sidestep the issue by simply indicating that, as of the 1975 *Morgentaler* case, the regulation of abortion through hospital regulation has been part of the criminal law power. The Supreme Court of Canada decision in *Morgentaler* 1988 had various grounds for agreeing with this, although each of the Judges in that case had characterized the purpose of the *Criminal Code* provisions differently. Sopinka, J. stated that it was not necessary to determine the extent to which the province could regulate abortion but clearly envisaged that some regulation if "solidly anchored in one of the provincial heads of power"[32] would be valid. In this case, however, he concluded that the evidence,

> "[L]eads to the conclusion that the legislation's central purpose and dominant characteristic is the restriction of abortion as a socially undesirable practice which should be suppressed or punished ... it is not necessary to establish that its immediate or future practical impact will actually be to restrict access to abortions in order to sustain this conclusion."[33]

This seems a fairly definitive conclusion regarding the legislation which, understood broadly, would contradict the earlier proposition that the province could regulate abortion as a "health" matter (including access to funding) since presumably anything less than complete access would seem suspect. As I suggested earlier, the analysis which follows this conclusion suggests that the underlying issue regarding profit-oriented institutions is the problem. Having set out the proposed test for assessing the purpose of legislation, the Supreme Court of Canada decision works through an application of the test to the facts of the case. On this point there is a mild disagreement with the Court of Appeal's majority decision concluding that the province could pass legislation in this form but, since its legal effect duplicated the earlier *Criminal Code* abortion provisions regarding private clinics, it was unconstitutional. Sopinka, J., decided, as had the Trial Judge, that *prima facie,* regulation of abortion with penal consequences was suspect as a matter traditionally viewed as criminal. Therefore, the colourability doctrine invoked by Freeman, J.A., was unnecessary, particularly as ordinary analysis of pith and substance would enable the Court to go beyond the four corners of the legislation. In considering the duplication of the *Criminal*

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[31] *Supra* footnote 2 at 491.

[32] *Ibid.* at 493.

[33] *Ibid.* at 494.

Code provision, again Sopinka, J. appears to disagree with the Court of Appeal decision when he comments that:

> "The legal effect of s.251 [*Criminal Code* provision] and the present legislation, each taken as a whole, is quite different ... [but] Freeman, J.A., was clearly right, however, in that in so far as it prohibits abortion clinics the legal effect of the medical services legislation is completely embraced by s.251 and, had the latter provision not been struck down, the present legislation would have been redundant in that respect."[34]

The Supreme Court of Canada considered and indeed, reproduced the Hansard evidence admitted by the Trial Judge to establish that the concern was suppression of free-standing clinics. Sopinka J., responded to Nova Scotia's[35] point that even if the object of the legislation was to suppress free-standing abortion clinics on grounds of public morals, this is not fatal to provincial jurisdiction by commenting:

> "Although there has been some recognition of a provincial 'morality' power, it is clear that the exercise of such a power must be firmly anchored in an independent provincial head of power ... it cannot be denied that interdiction of conduct in the interest of public morals was and remains one of the classic ends of the criminal law... ."[36]

Having reached the conclusion that the evidence indicated the purpose was regulation of public morality, Sopinka, J. reviewed the evidence presented by the Province to substantiate its argument that the purpose was primarily related to public health. The Court's conclusion on this point essentially adopted the view of the lower courts on this matter that the evidence contradicted the Province's case with respect to privatization of services, cost efficiency, and consultation regarding health policy.

> "If the means employed by a legislature to achieve its purported objectives do not logically advance those objectives, this may indicate that the purported purpose masks the legislation's true purpose."[37]

Finally, Sopinka, J., agreed with the lower Court's approach to the issue of penalties. He stated "with little weight", that the relatively severe penalties provided for by the *Act* were a factor relevant to its constitutional characterization.[38]

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[34] *Ibid.* at 498.

[35] Based on discussions after the case with the representative it appears this had not been a critical aspect of Nova Scotia's case.

[36] *Supra* footnote 2 at 504.

[37] *Ibid.* at 511.

[38] This is a matter of broader interest in that there have been proposals to create provincial legislation in Nova Scotia regulating spousal assault enforceable with sanctions including prison terms, greater than the existing criminal sanctions. See B. Norton, *Domestic Violence Discussion Paper* (Halifax: N.S. Dept of Justice, 1993), ($10,000 fine or 2 years in jail). Given the fact that assault is an area regulated by the *Criminal Code* this suggests that there may be problems with provincial legislation to the extent that penal sanctions are included. Further, the issue of whether such legislation is essentially one of public morality remains open to argument. Although there are severe penalties provided in connection with environmental legislation it can be distinguished in that neither s.91 or s.92 deal with the environment as a head of power.

The conclusion of the Supreme Court of Canada decision reiterates the overall argument that the Nova Scotia *Act*, on its face, regulated abortion (a matter historically regulated as a moral wrong or crime) and enforced this with penal sanctions, a combination which made it suspect as criminal law. The analysis of events leading up to passage of the *Act* supported the view that its primary purpose was the suppression and punishment of behaviour in the case (abortions outside hospitals, as socially undesirable conduct). This constituted an attempt by the Province to pass criminal law and was therefore *ultra vires*. The Regulation and the *Act* were not found to be severable consequently the provisions in the *Act* and regulations were unconstitutional. As pointed out earlier, the Court left open the *Charter* issues, suggested that the province could regulate abortion as a health matter, and did not deal with funding of abortions as an access issue.

4. *Comments*

Having outlined all the decisions in this case, the key question for any lawyer is what propositions can be taken away. In this case, the conclusions are relevant to a broad range of interests. The conclusions on what is or is not criminal law under S.91(27) as well as the relevance of penal sanctions to this determination are of broad interest. Further, the conclusion as to the scope of health care jurisdiction and *Charter* concerns are also of interest. Finally, the findings on evidentiary matters, in particular the use of Hansard and other evidence including the role of the actual or intended effect of the legislation, are of practical importance. For people concerned with women's autonomy in decision making, the conclusions are obviously significant. Based on analysis of this and the earlier Morgentaler cases the following propositions emerge:

1. Criminal law power under s.91(27) includes the right to determine through an absence of regulation what is not criminal. The broadness of this proposition seems a substantial extrapolation from the determination of the boundaries of a criminal act which might including its defence, but the view of the Trial Judge seems to have been endorsed by the Supreme Court of Canada.

2. The suppression of activity by the state as a public wrong in combination with penal sanctions is probably criminal law, particularly where the activity has traditionally been regulated by the criminal law.

3. Abortion was regulated by the criminal law and although there is no criminal legislation in place, it is an area of moral judgement.

4. Preventing abortions in profit-oriented clinics is punishing or suppressing a public wrong and falls within the criminal law area.

5. Legislation is to be reviewed on its face for legal effect, and where this is suspect, there is no need to use the doctrine of colourability.

6. The Court may go beyond the "four corners" of legislation, particularly where it is suspect on its face, to consider the legislation's dominant purpose.
7. Going outside the "four corners" can include the legislative history and context of its environment. Hansard evidence, while somewhat unreliable, is admissible.
8. The practical effect of legislation, while relevant, is not determinative and the absence of evidence of impact or predicted impact will not render suspect legislation constitutional.
9. The presence of severe penalties will not necessarily be a determining factor but they are a factor to be considered, particularly where the legislation is suspect on its face.
10. The provinces have general jurisdiction over health care and services, although there may be an argument in the context of abortion for federal health regulation under POGG.
11. The province may be able to regulate some aspects of abortion if securely anchored under health care purposes.
12. Such provincial legislation may not, however, survive a *Charter* challenge.
13. Restricting access to abortion may endanger a woman's security.
14. Failing to provide for financial compensation for abortion services is an undecided issue.
15. The status of the foetus remains unknown.
16. The effect on the position of women on this case, aside from reference to the fact of the decisions to have an abortion being inherently moral (and arguably, then, inherently regulated as criminal), is uncertain.

One suspects the next scene in this saga will be dealing with the same area of case law as that currently prevalent in the United States: financial support for abortions and the effect of this on the equality of women and access to abortion.[39] It is important in evaluating the case law, to recall that there is increasing evidence to suggest that decriminalizing abortion, and making it easily available in the context of overall family planning and improved health care has an effect on lowering fertility rates (and hence the population explosion) and also the

[39] This is of interest in the context of race concerns in that evidence from the United States suggests that lack of public funding and access to abortion may impact more directly on women of colour who may have less opportunity for choice and less access to alternatives. D. Roberts, "Reconstructing the Patient Starting with Women of Colour" (paper given at Feminist Theory Workshop, Columbia University, June 1994). Interestingly, a restriction of abortion in the 1800s occurred in response to both the professionalization of the medical profession and concerns about racial majorities and the fact that most abortions were sought by middle class anglo saxon women and not immigrants; see Tribe, *supra* footnote 1.

[40] J. Jacobson, *The Global Politics of Abortion,* World Watch Paper 97, 1990 at 57.

overall number of abortions.[40] In short, the overweening emphasis on regulation, prohibition and prosecution is misplaced. The social policy inherent in regulation - reduction of abortions - could be achieved more easily and effectively through an alternative strategy of support and service, rather than penalty and restriction. The fact that this social policy issue has been continually framed and dealt with as a legal problem is itself problematic.

In fact, the extent of social disagreement on the issue suggests that this is exactly the wrong approach to resolving this issue since the legal conclusion, in either result will provoke civil interest and "illegal" resistance to the decision.[41]

[41] Since the completion of this commentary Dr. Morgentaler commenced proceedings before the Courts of New Brunswick. In *Morgentaler* v. *The A-G (N.B.) et al.* (C.F. No. F/M/24/94) he requested a declaration that certain regulations made pursuant to the New Brunswick medical Services Payment Act R.S.N.B. 1973, C-M-7 and certain provisions of an Act Respecting the New Brunswick Medical Society and the College of Physicians and Surgeons of New Brunswick S.N.B. 1981 C-87 were unconstitutional. The application argued that the legislation in question violates rights guaranteed by the Charter of Rights of freedoms and in particular those granted under Section 7 and that the provisions of legislation governing Medical Society and College were *ultra vires* the legislative competence of the Province of New Brunswick being in pith and substance criminal law. Dr. Morgentaler's counsel, Mr. Eugene Mockler Q.C. of Fredericton, N.B., advised that pending the hearing on August 22nd, 1994 restrictions were placed on Dr. Morgentaler's medical licence which prohibited him from performing therapeutic abortion procedures. [And see: *Morgentaler* v. *P.E.I.* (Min. of Health and Social Services) (1994), 112 D.L.R. (44) 756 (P.E.I. S.C.).] In a judgment delivered on 14th September, 1994 Mr. Justice Ronald C. Stevenson held the impugned provisions of the provincial legislation to be *ultra vires* the Province writing - "It is now settled beyond debate that either the prohibition or the regulation of abortions is a legitimate subject to be dealt with by the federal Parliament as criminal law, as field assigned to Parliament by the Constitution." - Daily Gleaner, 15.9.94, P.1, col. 5. The Province's appeal of that decision will be argued beginning 7.10.94.