

CURRENT DEVELOPMENTS IN CANADIAN PRIVATE INTERNATIONAL LAW

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Private international law in Canada was long dominated by a spirit of dependence on the common law conflicts rules inherited from England. Since 1990, however, a number of major decisions by the Supreme Court of Canada have served to liberate the country from a slavish reliance on outmoded British rules, and have laid the foundation for a modern, made-in-Canada law of conflicts. These developments in Canada's common law have been paralleled by the new rules of private international law enacted as part of the Québec Civil Code 1991 (in force in 1994). In consequence, one may speak of a veritable "Canadian conflicts revolution". This article outlines the history of that revolution, starting with the Supreme Court's four major decisions, and illustrates the repercussions of the new conflicts thinking in the case law of provincial courts of appeal across the country since 1996.

Le droit international privé au Canada a été longtemps dominé par un esprit de dépendance à l'égard des règles de conflit héritées de la common law anglaise. Depuis 1990, toutefois, certaines décisions rendues par la Cour suprême du Canada ont contribué à libérer le pays de son assujettissement aux règles britanniques démodées, posant ainsi les bases d'un droit international privé moderne et "fait au Canada". En même temps, le Québec a connu une semblable transformation de ses règles de conflit civilistes, lors de l'adoption du nouveau Code civil de 1991 (entré en vigueur en 1994). En conséquence, on peut parler d'une véritable "révolution canadienne du droit des conflits de lois". Cet article trace les grandes lignes de cette "révolution", en commentant d'abord sur les quatre principaux arrêts de la Cour suprême et en résumant ensuite certains jugements rendus depuis 1996 par les tribunaux d'appel provinciaux, lesquels illustrent les répercussions de cette transformation du droit à travers le pays.

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I. Introduction

Up until recently, Canadian conflict of law theory and practice followed English theorists (particularly Dicey & Morris¹) and English decisions. Thus we slavishly adopted the double actionability rule of the House of Lords in *Chaplin v. Boys*,² derived from the “actionable and not justifiable” rule articulated one hundred years earlier in *Phillips v. Eyre*,³ giving it only a slight Canadian twist in *McLean v. Pettigrew*.⁴ (In fact, however, even that “twist” originated in an earlier English decision).⁵

We rarely applied the “closest and most real connection” and rarely invoked any form of “full faith and credit”.

Recently, however, many changes have been made by four major Supreme Court of Canada decisions: *Tolofson v. Jensen*,⁶ *Morguard Investments, Ltd. v. DeSavoye*,⁷ *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*⁸ and *Hunt v. T & N. Plc.*⁹

The new Québec Civil Code 1994,¹⁰ with its modern private international law provisions for Canada's sole civil law province, is another stimulating influence.

¹ Dicey & Morris (L. Collins, ed.), *The Conflict of Laws*, 12 ed., Sweet & Maxwell, London, 1993.

² [1971] A.C. 356, (1969) 2 All E.R. 1085 (H.L.).

³ (1870) 6 Q.B. 1 (Ch.).

⁴ [1945] S.C.R. 62.

⁵ *Machado v. Fontes*, [1897] 2 Q.B. 31 (C.A.).

⁶ [1994] 3 S.C.R. 1022.

⁷ [1990] 3 S.C.R. 1077.

⁸ [1993] 1 S.C.R. 897.

⁹ [1993] 4 S.C.R. 289.

¹⁰ S.Q. 1991, c. 64, in force January 1, 1994.

Thus Canada is going through its own minor Canadian “conflicts revolution”, not quite as striking as the “American conflicts revolution”, but it has put Canada in the forefront of conflict theory and practice, close to the advances of the European Union.

II. *The Purpose of this Paper*

The purpose of this paper is to outline the recent major changes in Canadian conflicts theory and then to summarize the decisions of the last few years which reflect those changes.¹¹

III. *Major Changes*

Among the major recent changes in private international law in Canada have been the following:

1) The old English common law “actionable and not justifiable” conflicts rule in tort¹² has been replaced by the *lex loci delicti* principle, combined with a flexibility exception, found in the “real and substantial connection” test, coupled with a *forum non conveniens* rule.¹³ In Québec, the historic *lex loci delicti* rule of civilian private international law has also been affirmed as the general conflicts rule for delict at art. 3126 of the Québec Civil Code 1994¹⁴ (C.C.Q.), but is subject to a few specific exceptions.

2) Time limitations are now seen as substantive rather than procedural,¹⁵ thus bringing Canadian common law conflicts rules into conformity with those of the civil law, which has always regarded “prescription” as substantive (see art. 3131 C.C.Q.).

3) The substance/procedure dichotomy in the conflict of laws is defined more clearly, with reference to its purpose, which is “to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties”.¹⁶ This effectively means that “procedure” is identified with what I call “formalities of the forum court” (involving, for example, how writs or originating notices or processes are drawn up and served; how the trial is conducted; how witnesses are examined and

¹¹ For the purposes of concision, only reported judgments rendered by the federal and provincial courts of appeal and by the Supreme Court of Canada are summarized, with few exceptions.

¹² See *Phillips v. Eyre*, *supra* note 3 and *Chaplin v. Boys*, *supra* note 2.

¹³ *Tolofson v. Jensen*, *supra* note 6 at 1049, 1054-56, 1060, 1062, 1078.

¹⁴ *Supra* note 10.

¹⁵ *Tolofson v. Jensen*, *supra* note 6 at 1069-71.

¹⁶ *Tolofson*, *ibid.* at 1071-72.

cross-examined; what remedies the court can grant; how security is given and how judgments are executed), rather than with matters directly affecting the rights of the parties.¹⁷

4) The “real and substantial connection” test is now entrenched as *the* general criterion of validity of the jurisdiction of Canadian courts in conflicts cases.¹⁸

5) The “*forum non conveniens*” doctrine (founded on the “real and substantial connection” test), is now also an essential feature of Canadian conflicts theory and practice.¹⁹ In Québec, the principle is codified at art. 3135 C.C.Q.²⁰

6) The “full faith and credit” doctrine, requiring that the laws and judgments of one province or territory of Canada be recognized and enforced in the courts of all other Canadian provinces and territories, is now established as a fundamental principle in interprovincial conflicts cases.²¹ This principle, which exists in the constitutions of some federal states,²² is a judge-made principle in Canada.

7) Certain basic legal principles and values are increasingly invoked by the Supreme Court of Canada in supporting its conflicts decisions, including, in particular, certainty and uniformity of the law (seen as especially important in a federal state),²³ order and fairness (order coming first)²⁴ and comity in both domestic and international situations.²⁵

It is instructive to review the above, and subsequent, conflicts decisions, to see how this Canadian conflicts revolution is faring in the day-to-day reality of litigation in the three traditional spheres of private international law, choice of law, choice of jurisdiction and the recognition of foreign judgments.

¹⁷ W. Tetley, *International Conflict of Laws. Common, Civil and Maritime*, Les Éditions Yvon Blais, Montréal, 1994 at 48 and 65-66.

¹⁸ *Morguard Investments, Ltd.*, *supra* note 7 at 1104-1109. See also *Hunt v. T. & N. Plc.*, *supra* note 9 at 325 and 328.

¹⁹ *Tolofson*, *supra* note 6 at 1049. See also *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, *supra* note 8.

²⁰ Art. 3135 C.C.Q. provides: “Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.”

²¹ *Morguard Investments, Ltd.*, *supra* note 7 at 1100-1101. See also *Hunt v. T. & N. Plc.*, *supra* note 9 at 324; and (implicitly) *Tolofson*, *supra* note 6.

²² See, e.g., the United States Constitution, Article IV, sect. 1 and the Australian Constitution, sect. 118.

²³ *Tolofson*, *supra* note 6 at 1064.

²⁴ *Tolofson*, *ibid.* at 1058. See also *Morguard Investments, Ltd.*, *supra* note 7 at 1097 and 1102.

²⁵ *Tolofson*, *ibid.* at 1047. See also *Morguard Investments, Ltd.*, *ibid.* at 1095-1097, 1099 and 1101; *Amchem Products Inc.*, *supra* note 8 at 913-14.

IV. *Choice of Law*i) *Tort/Delict*1. *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*²⁶

This case involved tort actions arising out of two automobile accidents, one in Saskatchewan and the other in Québec. After the Saskatchewan accident, the plaintiff passenger, a British Columbia resident, sued the British Columbia driver and the Saskatchewan driver of the other car in British Columbia. The action was time-barred in Saskatchewan under Saskatchewan law. Moreover, Saskatchewan's guest statute then precluded a gratuitous passenger from suing the driver absent wanton or reckless misconduct on the latter's part. Following the Québec accident, the Ontario passenger sued the Ontario driver and the Québec driver of the other car in Ontario. Québec's no-fault *Automobile Insurance Act*²⁷ barred any suit for bodily injuries in Québec.

The Supreme Court of Canada allowed both appeals. LaForest, J. dispensed with the "actionable and not justifiable" rule of English conflicts law which had previously applied in Canadian common law since *McLean v. Pettigrew*,²⁸ and ruled that the *lex loci delicti* should henceforth apply to choice of law in tort. Such a rule was certain, easy to apply, predictable, and comported with the demands of comity, as well as of order and fairness. Accordingly, Saskatchewan law governed the first action, and Québec law, the second.

The Court further held that time limitations and prescription periods were substantive rather than procedural in nature, and therefore also subject to the *lex loci delicti*. Consequently, the claim in the first action was time-barred under the properly applicable (Saskatchewan) law, with its one-year time limitation period, and the second suit was barred by Québec's no-fault automobile insurance regime, even in an Ontario court.

The Supreme Court nevertheless acknowledged that, in specific cases, the *lex loci delicti* rule might require flexibility exceptions, to be found in the "real and substantial connection" test (approved in the Court's previous decisions in *Morguard Investments Ltd. v. DeSavoye*²⁹ and *Hunt v. T. & N. Plc.*³⁰ and in the principle of *forum non conveniens* (approved in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*).³¹

²⁶ *Supra* note 6.

²⁷ R.S.Q., c. A-25.

²⁸ *Supra* note 4.

²⁹ *Supra* note 7.

³⁰ *Supra* note 9.

³¹ *Supra* note 8.

2. *Stewart v. Stewart*³²

Following a car accident in Saskatchewan, the plaintiff passenger, a British Columbia resident, sued her father, the Saskatchewan driver of the vehicle, which was owned by the second defendant, a Saskatchewan corporation. The action was commenced in British Columbia within the two-year British Columbia limitation period, but beyond the one-year Saskatchewan period. When the action was instituted, the Supreme Court of Canada had not yet decided *Tolofson v. Jensen*,³³ so that the British Columbia limitation period applied in virtue of the British Columbia Court of Appeal's decision in *Tolofson*.³⁴ The Chambers judge, therefore, refused the defendants' application to dismiss the action as time-barred under Saskatchewan law.³⁵ The defendants' insurer appealed to the British Columbia Court of Appeal after the Supreme Court rendered its decision in *Tolofson*.³⁶

Holding that the *lex loci delicti* rule and the rule characterizing limitation periods as substantive applied both prospectively and retroactively, Esson, J.A. decided that Saskatchewan law — the law of the place of the tort — including its one-year limitation period, applied, thus time-barring the plaintiff's suit.

3. *Bakker v. Van Adrichem*³⁷

This case was heard together with *Stewart v. Stewart*.³⁸ Bakker, a British Columbia resident, injured in a car accident in Saskatchewan, took suit in British Columbia beyond Saskatchewan's one-year limitation period, but within British Columbia's two-year period. Because Bakker had begun to receive payments from the defendant's insurer within the one-year period, however, the British Columbia Supreme Court held that her action had been confirmed and that the one-year limitation began to run only after receipt of the payments, pursuant to sect. 5 of British Columbia's *Limitation Act*³⁹ (a provision having no equivalent in Saskatchewan law).

On appeal, Esson, J.A. found that the facts were substantially similar to those in *Stewart v. Stewart*⁴⁰ and in consequence dismissed the action on the ground that British Columbia's limitation statute was inapplicable and that the suit was out of time under the applicable (and substantive) limitation act of Saskatchewan, the *locus delicti*.

³² (1997) 145 D.L.R. (4th) (B.C.C.A.).

³³ *Supra* note 6.

³⁴ (1992) 65 B.C.L.R. (2d) 114, (1992) 89 D.L.R. (4th) 129 (B.C.C.A.).

³⁵ *Stewart v. Stewart* (1996), 24 B.C.L.R. (3d) 141 (S.C.).

³⁶ *Supra* note 6.

³⁷ [1997] 5 W.W.R. 151, (1997) 30 B.C.L.R. (3d) 199 (B.C.C.A.).

³⁸ *Supra* note 32.

³⁹ R.S.B.C. 1979, c. 236.

⁴⁰ *Supra* note 32.

4. *Brown v. Marwieh*⁴¹

The Browns sued in their home province (Nova Scotia) for injuries sustained in a motor vehicle collision with Marwieh in Alberta. Although their action was filed beyond the two-year limitation periods of both Nova Scotia and Alberta, the plaintiffs obtained from a Chambers judge an order disallowing the limitation defence under subsect. 3(2) of Nova Scotia's *Limitation Act*,⁴² and holding the Alberta limitation period procedural and therefore inapplicable. The ruling was subsequently upheld by the Nova Scotia Court of Appeal. After the Supreme Court of Canada decided *Tolofson*,⁴³ the defendant moved for dismissal of the action, but the Nova Scotia Supreme Court held that the Chambers judge's ruling, as upheld, had *res judicata* effect.

In appeal, Bateman, J.A. decided that although *Tolofson* had established that limitation periods were substantive, there was *res judicata* in this case and, therefore, "cause of action estoppel", which prevented Marwieh from invoking the substantive nature of the limitation periods in order to obtain dismissal of the action.

5. *Hanlan v. Sernesky*⁴⁴

Hanlan, an Ontario resident, was injured in Minnesota while a passenger aboard a motorcycle belonging to the defendant, Sernesky, another Ontario resident. When Hanlan, together with his parents and siblings, sued in Ontario, both parties proceeded on the basis that the law of Ontario applied. After the Supreme Court's ruling in *Tolofson*,⁴⁵ however, Sernesky moved to amend his statement of defence to add that the law of Minnesota applied as the *lex loci delicti*. Hanlan had not been wearing a helmet at the time of the crash, and Minnesota law allowed damages to be reduced where the victim could have avoided or mitigated injury by wearing a helmet. The motions judge denied the application, holding that the amendment would unduly prejudice the plaintiff.

The Ontario Court of Appeal, reversing the motions judge, allowed the amendment, finding that the sole prejudice to the plaintiffs resulting from the defendant's pleading Minnesota law "is that which would be inevitable as a result of any successful plea."⁴⁶

Subsequently, however, the Ontario Court of Appeal upheld a later ruling by a motions judge of the Ontario Court (General Division)⁴⁷ that the application

⁴¹ (1995) 145 N.S.R. (2d) 220 (C.A.).

⁴² R.S.N.S. 1989, c. 258.

⁴³ *Supra* note 6.

⁴⁴ (1996) 95 O.A.C. 297.

⁴⁵ *Supra* note 6.

⁴⁶ *Supra* note 44, 95 O.A.C. at 298.

⁴⁷ (1998) 38 O.R. (3d) 479 (Ont. Ct. App.), upholding (1997) 35 O.R. (3d) 603 (Ont. Gen. Div.).

of the *lex loci delicti* rule in this case would work an injustice, because both the victim and the defendant were residents of Ontario, and the motorcycle was registered and insured there. Accordingly, the law of Ontario was applied as the law most closely connected to the parties. Hanlan's parents and siblings were therefore found to be entitled to certain benefits under Ontario's *Family Law Act*⁴⁸ which would not have been available to them under the law of Minnesota.

6. *Cowley v. Brown Estate*⁴⁹

The plaintiffs/appellants, residents of Saskatchewan, were involved in a car accident in Alberta with an Albertan resident, whose estate was fully liable in negligence for the plaintiffs' injuries. All of the appellants' hospital and health care services were paid for out of Saskatchewan's consolidated fund under two Saskatchewan statutes,⁵⁰ which allowed the appellants to recover the cost of those services from the tortfeasor just as if they had been required to pay for the services themselves. The statutes also conferred a right of subrogation on the Province of Saskatchewan for damages recovered for such hospitalization and medical expenses. The respondents settled with the appellants with respect to special and general damages, but denied liability on the appellants' hospitalization and health services claim. The trial judge dismissed that claim, on the ground that the Saskatchewan legislation did not apply in Alberta.

The Alberta Court of Appeal reversed, following *Régie de l'assurance automobile du Québec v. Brown*.⁵¹ Foisy, J.A. held that Saskatchewan law governed both the rights of the appellants to recover from the Alberta tortfeasor the medical and hospitalization costs, which had been incurred in Saskatchewan by the Saskatchewan Government under the Saskatchewan legislation concerned, as well as the eventual subrogation rights of Saskatchewan. Those rights were found to be independent of rights arising from the underlying cause of action, which after *Tolofson* were governed by Alberta law as the *lex loci delicti*.

7. *Brill v. Korpaach Estate*⁵²

Brill, an Alberta resident, was injured in Saskatchewan in a car accident with the defendant, a resident of Saskatchewan. Brill took suit in Alberta against the defendant's estate after the Saskatchewan limitation period (but not the Alberta period) had elapsed. Following the Supreme Court's

⁴⁸ R.S.O. 1990, c. F.3.

⁴⁹ (1997) 147 D.L.R. (4th) 282 (Alta. C.A.).

⁵⁰ The *Saskatchewan Hospitalization Act*, R.S.S. 1978, c. S-23 and the *Saskatchewan Medical Care Insurance Act*, R.S.S. 1978, c. S-29.

⁵¹ (1990), 107 N.B.R. (2d) 11 (C.A.).

⁵² (1997), 148 D.L.R. (4th) 467 (Alta. C.A.), leave to appeal to Supreme Court of Canada denied, December 18, 1997, [1997] S.C.C.A. No. 443.

decision in *Tolofson*,⁵³ the defendant amended its defence, alleging that the applicable (and substantive) limitation period was that of Saskatchewan, in virtue of the new *lex loci delicti* conflicts rule. The Chambers judge granted a summary judgment in favour of the defendant from which the plaintiff appealed.

Upholding the Chambers judge, the Alberta Court of Appeal decided that the case could not be distinguished from *Tolofson*, and, in consequence, the appellant's claim was time-barred under Saskatchewan law as the *lex loci delicti*.

8. *Michalski v. Olson*⁵⁴

This case, resulting from two separate motor vehicle accidents in Saskatchewan, involved the joinder of several actions. In the first accident, which gave rise to three of the actions, both the driver and passenger of one vehicle, the plaintiffs, were residents of Manitoba, while the driver of the other vehicle, the defendant, was a resident of Saskatchewan. In the second accident, the driver and passengers of the first vehicle, the plaintiffs, were also Manitobans, but the driver of the second vehicle, the defendant, was a Saskatchewan resident. All of the actions were brought in Manitoba within that province's two-year limitation period, but beyond Saskatchewan's one-year limitation. In both cases, the defendants unsuccessfully moved for summary judgment, and both defendants appealed.

The Manitoba Court of Appeal dismissed, Huband, J.A. holding that the rule on choice of law in tort was "now abundantly clear"⁵⁵ after the Supreme Court's decision in *Tolofson*,⁵⁶ and that "the *Tolofson* case involved a factual scenario almost exactly the same as the present actions."⁵⁷ As in *Stewart v. Stewart*,⁵⁸ the Court affirmed that Supreme Court of Canada decisions apply both prospectively and retroactively. Huband, J.A., applying Saskatchewan's one-year limitation period as substantive law, observed: "To say that a limitation period is procedural because it bars a remedy rather than extinguishing a right is an exercise of semantic gymnastics that would baffle any rational observer outside the legal profession."⁵⁹

⁵³ *Supra* note 6.

⁵⁴ (1997) 123 Man. R. (2d) 101 (C.A.), leave to appeal to Supreme Court of Canada denied without reasons, May 14, 1998, [1998] S.C.C.A. No. 12.

⁵⁵ *Ibid.*, Man. R. (2d) at 103.

⁵⁶ *Supra* note 6.

⁵⁷ (1997) 123 Man. R. (2d) 101 at 103.

⁵⁸ *Supra* note 32.

⁵⁹ (1997) 123 Man. R. (2d) 101 at 103.

9. *Leonard v. Houle*⁶⁰

The respondent Houle, an Ontario resident, having stolen a van in Ontario, was pursued into Québec in a high-speed car chase by the Ottawa Police, who were joined by the Hull Police in Québec. The chase ended in a car accident in Québec, causing serious injuries to Leonard, the appellant, also an Ontario resident, who sued Houle, the two police forces, and other parties (notably insurers) in Ontario. A motions judge granted summary judgment, dismissing the action against the two police forces to the extent that it was based on negligence in operating a motor vehicle, because Québec's no-fault *Automobile Insurance Act*,⁶¹ barred any civil action for bodily injuries arising out of an automobile accident in Québec. The appellant appealed this finding. The motions judge refused summary judgment on the claim against the Ottawa Police for negligence in commencing and continuing the chase in Ontario, claims she held to be governed by Ontario law. The respondents appealed this finding.

The Ontario Court of Appeal upheld the dismissal of the negligence claim under Québec's *Automobile Insurance Act*. While admitting that the common residence of Houle and the appellant in Ontario might have justified an exception to the *lex loci delicti* conflict rule for tort laid down in *Tolofson v. Jensen*⁶² if the case had been an international one, Charron, J.A. decided that such an exception did not apply in domestic litigation involving two Canadian provinces. He also held that the motions judge had erred in refusing to grant summary judgment to the Ottawa Police on the claim based on the decision to commence and continue the chase in Ontario, because that conduct was not an actionable wrong, no injury having resulted from it, but only from the subsequent accident in Québec. Charron, J.A. also found that the wide interpretation given by Québec courts to the bar on civil suits for "damage caused by the use of an automobile" under the Québec no-fault statute barred any action against the Ottawa Police or its officers or director based on alleged inappropriate use of a high-speed chase and inadequate training, as well as any action against the Hull Police based on its allegedly inadequate communications system. The action, however, was allowed to proceed against Houle and other defendants.

ii) *Liens/Trusts*1. *Batoni Construction Inc. v. Anthomax Mechanical Ltd.*⁶³

Both the appellant and corporate respondent companies were incorporated and had head offices in Ontario. The corporate respondent was engaged to

⁶⁰ (1997), 36 O.R.(3d) 357, leave to appeal to Supreme Court dismissed without reasons, May 14, 1998, [1998] S.C.C.A. No. 19.

⁶¹ R.S.Q., c. A-25, as amended, sect. 83.57.

⁶² *Supra* note 6.

⁶³ (1997) 33 O.R. (3d) 647 (Ont. C.A.).

perform construction work in Québec and in turn engaged the appellant as sub-contractor, to supply labour and materials to the job site. The appellant, unpaid for the materials it had supplied, sued the corporate respondent for breach of contract, as well as its individual directors, officers and shareholders (all Ontario residents), claiming that they had wrongfully withheld the appellant's payment which they knew, or should have known, to be subject to the trust provisions of Ontario's *Construction Lien Act*.⁶⁴ Upholding the decision of a motions judge, the Ontario Court of Appeal held that, as a matter of "pure statutory construction",⁶⁵ the *Construction Lien Act* was restricted in its application to land situate in Ontario.

V. Jurisdiction

i) *Forum non conveniens*

1. *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*⁶⁶

Appellants, residents of several jurisdictions, took suit in Texas against the respondent corporations (manufacturers, sellers and/or suppliers of asbestos) for injuries they claimed to have sustained while exposed to asbestos during their former employment in British Columbia. The British Columbia Workers' Compensation Board, having compensated many of the appellants, had a subrogation interest in the Texas litigation. Most of the respondents were incorporated in the United States, with their principal places of business in various United States states and, in most cases, carried on business in Texas. When the Texas District Court found jurisdiction and venue, most of the respondents challenged that jurisdiction and sought a stay of proceedings on grounds of *forum non conveniens*, but their motions were dismissed in first instance and appeal in Texas, *forum non conveniens* then having been abolished in that state by statute.⁶⁷ Respondents then obtained an anti-suit injunction in the British Columbia Supreme Court, prohibiting the appellants from continuing

⁶⁴ R.S.O. 1990, c. C.30.

⁶⁵ (1997) 33 O.R. (3d) 647 at 651.

⁶⁶ [1993] 1 S.C.R. 897.

⁶⁷ That was the finding of the Texas Supreme Court in *Dow Chemical Co. v. Alfaro* 786 S.W. 2d 674 (Tex. 1990), where the Court held that the effect of sect. 71.031 of the Texas Civil Practice and Remedies Code was to preclude the doctrine of *forum non conveniens* in personal injury and wrongful death suits. Following the *Alfaro* case, however, the Texas legislature responded by enacting sect. 71.051 of the Code, which specifically allows an action or proceeding to be stayed on the ground of *forum non conveniens* in Chapter 71 actions, namely personal injury and wrongful death suits brought in state court. See Carl Christopher Scherz, "Section 71.051 of the Texas Civil Practice and Remedies Code — the Texas Legislature's Answer to *Alfaro*: *Forum non Conveniens* in Personal Injury and Wrongful Death Litigation" (1994) 46 Baylor L. Rev. 99.

the Texas actions. When the British Columbia Court of Appeal upheld the injunction, the appellants appealed to the Supreme Court of Canada.

The Supreme Court of Canada allowed the appeal and set aside the anti-suit injunction. Sopinka, J., after analyzing English and Canadian law on *forum non conveniens* and anti-suit injunctions, concluded that the current test governing *forum non conveniens* in Canada was whether there was a clearly more convenient and appropriate forum for the pursuit of the action and for securing the ends of justice. This test applied both in cases where the defendant was served within the jurisdiction and in cases of service *ex juris*. Furthermore, the question of whether the plaintiff would be deprived of some personal or juridical advantage if his choice of forum were not respected was to be considered, not as a separate issue (as under some of the English case law), but merely as one factor among others in determining the appropriate (natural) forum for the litigation (i.e., the jurisdiction having the closest connection with the parties and the action). Where no one forum is shown to be clearly more appropriate, the domestic court should give effect to the plaintiff's choice of forum and keep jurisdiction by default.

Anti-suit injunctions should not be granted unless foreign proceedings were pending, and the applicant had already failed to secure a stay or termination of those proceedings in the foreign court. If no stay were granted there, the domestic court must entertain the injunction application, but only if it was alleged to be the most appropriate forum, and was potentially an appropriate forum, for the action. An anti-suit injunction, although arguably opposed to comity, was sometimes necessary to prevent serious injustice where a foreign court took jurisdiction over cases not satisfying the basic requirements of the domestic court's *forum non conveniens* test. In such cases, the domestic court should first determine, using its own *forum non conveniens* principles, whether there was a clearly more appropriate (natural) forum. If the foreign court, on a basis consistent with those principles, could reasonably have concluded that there was no clearly more appropriate forum, the domestic court should respect its decision and refrain from granting any anti-suit injunction. But if the domestic court concluded that the foreign court had taken jurisdiction on a basis inconsistent with its domestic *forum non conveniens* principles, and that the foreign court's conclusion could not reasonably have been reached had those principles been applied, the domestic court must then, in a second step, decide whether an injustice would result if the plaintiff were allowed to proceed in the foreign jurisdiction. Losses of advantages to both the plaintiff and the defendant must then be weighed, always bearing in mind the connection of the foreign court to the facts and parties.⁶⁸

Applying the foregoing principles, Sopinka, J. found that there was evidence of a sufficient connection between the respondents and Texas in this case to

⁶⁸ Sopinka, J.'s formulation of the anti-suit injunction test was subsequently cited with approval by Lord Goff in *Airbus Industrie v. Patel* [1998] 1 Lloyd's Rep. 631 at 640-41 (H.L.).

allow that state to assert jurisdiction over the appellants' actions under the Due Process clause of the United States Constitution. The decision of the Texas courts to assume jurisdiction over the litigation on that basis was consistent with Canadian principles of *forum non conveniens*. Accordingly, the anti-suit injunction was set aside.

ii) *Maritime Law (Contract/Tort/Evidence)*

1. *Sarabia v. The "Oceanic Mindoro"*⁶⁹

The respondent, a resident of the Philippines, was a seaman injured aboard the OCEANIC MINDORO while it was docked in Vancouver. The vessel was owned by the appellant shipowner, also a resident of the Philippines. The respondent's contract of employment incorporated the "Standard Employment Contract Governing the Employment of all Filipino Seamen on board Ocean-Going Vessels" and was duly approved by the Government of the Philippines. The contract provided for Filipino law and the "original and exclusive jurisdiction" of a Philippines agency over disputes arising under the contract. Nowhere, however, did the contract expressly prohibit a crewman from suing the employer in tort outside of the Philippines. The Chambers judge refused to stay the action and find the British Columbia to be a *forum non conveniens*. He held that the terms of the jurisdiction clause did not expressly exclude claims in tort outside Philippine tribunals, and that substantive rights could only be taken away by express language. The shipowners appealed.

The appeal was allowed. Huddart, J.A. agreed with the appellant that Philippine law should be used to interpret the terms and scope of the contract, but that as foreign law was a question of fact, a court was bound to interpret that law for itself when faced with conflicting opinions as to the state of the foreign law on a given point. Huddart, J.A. found that, because no evidence had been adduced as to Philippine rules of construction, the Chambers judge had correctly held that British Columbia rules of construction should be applied to the contract. Secondly, he observed that the words "arising out of" in choice of forum clauses in international contracts had been interpreted broadly so as to include non-contractual claims. The language of the jurisdiction clause in this case was therefore sufficiently clear to include tort claims. A "strong cause", going beyond a mere balance of convenience, must be shown by the plaintiff to convince a court to grant a stay of proceedings in the face of an exclusive jurisdiction clause. In an *obiter dictum*, the Court stated that, in principle, jurisdiction clauses should be treated with the same deference as arbitration agreements.

⁶⁹ [1997] 2 W.W.R. 116 (B.C.C.A.), leave to appeal to Supreme Court denied May 22, 1997, [1997] S.C.C.A. No. 69.

2. *Maxwell-Humm v. Mauran (The "Beaugeste")*⁷⁰

The plaintiffs, English underwriters and Lloyd's Syndicates, took suit in the Federal Court of Canada against the BEAUGESTE (a Canadian ship), as well as its registered owner (a Canadian citizen residing in Toronto) and the loss payee (a Liberian corporation carrying on business from the Bahamas) for the repayment of certain insurance proceeds paid out for repairs to the vessel effected in Mallorca, Spain. The insurance policy had been placed in London by English brokers and the certificates of insurance had been issued out of Southampton, England. The request for the policy to be placed was made by the sole director of the corporate defendant through a broker in Florida, neither of whom were parties to the action. The defendants argued on motion for a stay of proceedings under sect. 50(1) of the *Federal Court Act*⁷¹ that: i) the "service of suit" clause contained in the policy granted exclusive jurisdiction to the Florida Court over the matter; and ii) the action should be stayed on the grounds of *forum non conveniens*, as Florida was a more appropriate forum.

The defendants' motion was dismissed and both arguments were rejected. First, although the "service of suit" clause was found to have provided the assured the right to serve the underwriters with process in any United States court chosen by the assured, this did not provide any such United States court with exclusive jurisdiction or restrict the insurer from bringing suit outside the United States. Secondly, the motion to stay on the grounds of *forum non conveniens*⁷² was rejected, because none of the parties or the key witnesses were based in Florida. Furthermore, the policies were concluded in England, not Florida. The defendants thus failed to establish clearly that the Florida Court had a more real and substantial connection to the dispute.

iii) *Contract*

1. *Schleith v. Holoday*⁷³

Schleith, the plaintiff/respondent, invested funds through Holoday, the individual defendant-appellant, a broker employed with a securities dealer. Holoday informed Schleith that he was leaving his employment and moving to

⁷⁰ (1997) 141 F.T.R. 222.

⁷¹ R.S.C. 1985, c. F-7.

⁷² Under subsection 50(1) of the Federal Court Act, R.S.C. 1985, c. F-7, as amended, which reads:

"The Court may, in its discretion, stay proceedings in any cause or matter,

(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(b) where for any other it is in the interest of justice that the proceedings be stayed."

⁷³ (1997) 31 B.C.L.R. (3d) 81 (C.A.).

First Marathon Securities, the other appellant. Schleith decided to continue dealing with Holoday at First Marathon and, at the latter's request, signed a "customer agreement", stipulating that the agreement and its enforcement would be governed by Ontario law, and that the parties agreed "that all disputes, claims, actions or proceedings arising directly, indirectly or otherwise in connection with, out of, related to or from this Customer Agreement" would only be litigated, at the discretion of First Marathon, in either federal or provincial court in Toronto, Ontario. Other former clients of Holoday subsequently commenced proceedings against him in Ontario, but Schleith took suit in the British Columbia Supreme Court, alleging that he had lost over \$400,000 U.S. as investment capital, due to Holoday's fraudulent representations and that First Marathon was vicariously liable for its broker's activities. Schleith also claimed that he personally had loaned \$200,000 U.S. to Holoday which was never repaid. First Marathon raised a declinatory objection, based on the choice of forum clause in the Customer Agreement. A Chambers judge refused to decline jurisdiction, however, using factors of a *forum non conveniens* test. The defendants appealed.

The appeal was dismissed. The British Columbia Court of Appeal found that the choice of forum clause in question was ambiguous and thus did not bar an action instituted outside Toronto, Ontario.

2. *Lamborghini (Canada) Inc. v. Automobili Lamborghini S.P.A.*⁷⁴

The appellant was the exclusive Canadian dealer for the respondent's luxury automobiles. Their agency contract contained a choice of forum clause, conferring exclusive jurisdiction on Italian courts and making Italian law applicable to the contract. After being bought out by Chrysler in 1991, the respondent mother company, wishing to reorganize its distribution system in North America, sought to terminate all its general agency contracts. In 1993, the respondent therefore notified the appellant that it was resiliating the contract between them, effective one year later. When no agreement with respect to the resiliation was reached at the end of that year, the respondent considered the contract terminated, on the basis that it was a mandate with an indeterminate term. The appellant, on the other hand, regarded the resiliation as illegal under the terms of the contract and sued for a permanent injunction and damages in the Québec Superior Court in Montreal. The respondent raised a declinatory objection, invoking the forum selection clause in the contract, which was upheld under art. 3148 C.C.Q. second para.⁷⁵ The

⁷⁴ [1997] R.J.Q. 58 (C.A.).

⁷⁵ Art. 3148 C.C.Q. first para provides for the jurisdiction of a "Québec authority" over personal actions of a patrimonial nature. The second para. provides: "However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority."

appellant's argument that jurisdiction could be taken under the *forum conveniens* doctrine as codified at art. 3136 C.C.Q. was dismissed.

Dismissing the appeal, LeBel, J.A. found that art. 3148 C.C.Q. second para., requiring respect for foreign choice of forum clauses, applied, although the dispute predated the coming into force of the new Civil Code in 1994.⁷⁶ He also held that mere convenience did not justify invoking the doctrine of *forum conveniens* under art. 3136 C.C.Q.⁷⁷ In order for a Québec court to accept jurisdiction on that ground despite the existence of a negotiated, exclusive foreign jurisdiction clause, there must be an element of necessity warranting trial in Québec, or an "almost absolute impossibility"⁷⁸ of access to the foreign court, rather than mere inconvenience to the plaintiff in having to sue in the other jurisdiction. The dispute must also have a sufficient connection with Québec. In other words, *forum conveniens* was not simply the juridical mirror image of *forum non conveniens*, as different considerations governed their respective applications.

3. 472900 British Columbia Ltd. v. Thrifty Canada Ltd.⁷⁹

Thrifty Canada granted a licence in respect of its car rental business in British Columbia to a company which in turn assigned it to 472900 British Columbia Ltd., one of the three plaintiffs.⁸⁰ Under the original license agreement, the parties attorned to the "non-exclusive jurisdiction of the courts of the Province of Ontario" and agreed that the license agreement would be interpreted in accordance with the law of Ontario. The assignment agreement, for its part, was silent as to jurisdiction, but called for the laws of British Columbia. The three plaintiffs sought the rescission of the license agreement with Thrifty Canada in British Columbia, a claim later amended to one for damages for wrongful termination of the contract. A few days earlier, however, Thrifty Canada, defendant in the British Columbia proceedings, had commenced an action in Ontario against 472900 British Columbia Ltd., seeking recovery of sums due under the license agreement. 472900 British Columbia Ltd., as defendant in Ontario, then applied to the Ontario court for an order declining

⁷⁶ The provision applied in virtue of the transitional provisions of the Act Respecting the Implementation of the Reform of the Civil Code, S.Q. 1992, c. 57.

⁷⁷ Art. 3136 C.C.Q. provides: "Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required."

⁷⁸ [1997] R.J.Q. 58 at 68.

⁷⁹ (1997) 93 B.C.A.C. 30.

⁸⁰ The other two plaintiffs were a licensee of Thrifty Canada in a portion of British Columbia, under a license agreement which was terminated before this litigation commenced, and the parent company of the two other plaintiffs, which had guaranteed their obligations to Thrifty Canada.

jurisdiction on the grounds of *forum non conveniens*. The application was dismissed by Gravelly, J. of the Ontario Court (General Division), who found that the case could be tried either in Ontario or in British Columbia without great difficulty for either side. Thrifty Canada, as defendant in the British Columbia action, then applied in the British Columbia Supreme Court for a similar order to decline jurisdiction on the grounds of *forum non conveniens*. A Chambers judge refused the application, holding that Ontario had not been shown to be the clearly more appropriate forum.

On appeal, Newbury, J.A. of the British Columbia Court of Appeal (in chambers) refused a stay of the action in British Columbia, because Ontario courts did not have exclusive jurisdiction under the choice of forum clause of the license agreement. Newbury, J.A. observed that the existence of simultaneous proceedings in two jurisdictions was not necessarily to be avoided at all costs. Moreover, a stay of the British Columbia action could well render the plaintiffs' appeal moot, which was to be avoided, particularly because the British Columbia action involved different parties and sought wider relief than the Ontario litigation.

4. *K-Lath, a Division of Georgetown Wire Company, Inc.. v. Gemini Structural Systems Inc.*⁸¹

K-Lath, sued Gemini Structural Systems Inc. and an individual (Schilger) in Alberta, claiming that Gemini owed it \$8,000 on the sale of goods and that Schilger had personally guaranteed Gemini's obligations. The defendants denied liability and counterclaimed for \$17,500,000.00 on the basis of lost commissions on sales in Mexico, damages for breach of contract, breach of a confidentiality agreement, misrepresentations, misuse of confidential information, and for inducing other parties in Mexico to breach their contracts. Their allegations made references to dealings in Alberta, California and Mexico. K-Lath, as defendant in the counterclaim, applied either to strike out the counterclaim entirely as being unconnected to the main action, or, alternatively, to declare that Alberta was a *forum non conveniens* to hear the counterclaim. The Chambers judge declined to decide on the first alternative, and dismissed K-Lath's application based on *forum non conveniens*, concluding that Alberta, California, or even Mexico, would all be equally convenient fora, and that California was not "clearly or distinctly more suitable".⁸² K-Lath appealed.

The appeal was dismissed, because the Alberta court possessed jurisdiction as of right over K-Lath, which carried on business in Alberta. Despite K-Lath's assertion that it was a division of a foreign corporation and thus not a resident of Alberta, the Alberta court automatically acquired jurisdiction over K-Lath once it brought suit in the main action in Alberta, thereby attorning to the

⁸¹ (1997) 200 A.R. 285 (C.A.).

⁸² *Ibid.*, 200 A.R. at 287.

jurisdiction of that court. Moreover, K-Lath was properly served *in juris* and "...once having invoked the jurisdiction of this court, a respondent should live with the consequences of that action."⁸³

Secondly, the Court of Appeal recalled that a stay of action based on *forum non conveniens* was a discretionary decision, and the Chambers judge's decision that the balance of convenience did not clearly favour either California or Mexico was neither improper nor unreasonable.

5. *Craig Broadcast Systems Inc. v. Frank N. Magid Associates, Inc.*⁸⁴

The plaintiff/respondent (Craig) was a Manitoba corporation that owned and operated radio and television stations. The defendant/appellant corporation (Magid) provided consulting services to the radio and television industry from its location in Iowa. When the Canadian Radio-Television and Telecommunications Commission (CRTC) called tenders for applications for the right to offer a new T.V. service in Alberta, Craig hired Magid to assist it in making such an application. The contract was concluded at Magid's office in Iowa. After Craig's application had been rejected, it learned that Magid had also been involved with two other applicants for the Alberta licence, in breach of the parties' contract. Craig sued Magid in Manitoba for breach of contract and fiduciary duty and served the defendant *ex juris* in Iowa. The defendant moved in the Manitoba court for a stay of the proceedings based on lack of jurisdiction, also alleging that Manitoba was a *forum non conveniens*. That motion was denied by the motions judge,⁸⁵ invoking Rule 17.02(h) of the Manitoba Queen's Bench Rules,⁸⁶ which stipulates that a party may serve another *ex juris* without prior court authorization in respect of loss or damage *sustained* in Manitoba from *any* cause of action, *wherever* committed (emphasis added). The defendant appealed the ruling.

The appeal was dismissed. Helper, J.A. upheld the motions judge's reasoning, and held that the Manitoba court had established jurisdiction *simpliciter*. Two of the most important contacts were that Magid had on numerous occasions come to Canada to solicit business from the plaintiff, and that it regularly sent its employees to Manitoba to consult at least one other broadcaster in Manitoba, thus founding a real and substantial connection between the underlying cause of action and the Province of Manitoba. Finally, the Court of Appeal decided that the onus of establishing a *forum non conveniens* defence was on the party moving for the stay (Magid in this case). Magid had not satisfied the motions judge that Iowa was a clearly more appropriate forum than Manitoba, and the judge had also concluded that Alberta

⁸³ *Ibid.*, 200 A.R. at 288.

⁸⁴ [1998] 4 W.W.R. 17 (Man. C.A.).

⁸⁵ [1997] 3 W.W.R. 509 (Man. Q.B.).

⁸⁶ Manitoba Regulations No. 553/88.

was the least convenient forum. Her decision to accept jurisdiction was therefore upheld, particularly as the dispute involved Craig, a Manitoba corporation, headquartered in that province, and a contract negotiated in Manitoba for consulting services to be provided to an Alberta entity created and controlled by Craig.

6. *Bitton v. Margo Movers International Inc.*⁸⁷

The respondent (Bitton) contracted with Margo Movers International (MMI) to transport her furniture from Miami, Florida, to Montreal, Québec. MMI subcontracted the carriage to Morales Moving and Storage Co. Inc. (Morales) the appellant company, a corporation domiciled in Miami, under a contract signed in Miami. When the furniture was delivered in Montreal damaged, Bitton sued Morales and MMI. MMI, which had an office in Montreal, then took an action in warranty against the appellant. Morales raised a declinatory exception to the action in warranty, arguing that the Québec courts were without jurisdiction. It appealed to the Québec Court of Appeal from the dismissal of that exception by the Québec Superior Court.

Mailhot, J.A. dismissed the appeal, holding that although there was no direct contractual link between the respondent and the appellant, there was a delictual link between them, because the respondent's property was delivered by the appellant in a damaged condition. Under art. 3148(3) C.C.Q.,⁸⁸ Québec courts have jurisdiction where a fault was committed in Québec, where damage was suffered in Québec or where one of the obligations arising from a contract was to be performed in Québec. A fault could be committed in Québec even if the damage occurred elsewhere, and damage could be suffered in Québec even where the defendant's act, omission or activity took place elsewhere. Jurisdiction also existed in cases of breach of a contractual obligation to be performed in Québec, even if some of the other obligations under the same contract were to be performed elsewhere. In this case, the damage was suffered in Québec, because it was there that the furniture was delivered in a damaged condition and there that the damage was discovered. Québec courts therefore had jurisdiction over the respondent's action.

7. *Canadianoxy Holdings Inc. v. Gerling Global General Insurance Co.*⁸⁹

The respondent insurers sought a declaration from the Alberta Court of Queen's Bench in an action on an insurance policy against the defendants/appellants. The defendants/appellants, contending that the Court was not a

⁸⁷ [1996] R.D.J. 14 (C.A.).

⁸⁸ Art. 3148(3) C.C.Q. provides: "In personal actions of a patrimonial nature, a Québec authority has jurisdiction where...(3) a fault was committed in Québec, damage was suffered in Québec or one of the obligations arising from a contract was to be performed in Québec."

⁸⁹ (1997) 209 A.R. 68 (C.A.).

forum conveniens, moved to have the action set aside or stayed pending the disposition of a related suit which they themselves had instituted against the respondents in Louisiana.⁹⁰ A Chambers judge refused to set aside or stay the respondents' action, whence the appeal.

Dismissing the appeal, the Alberta Court of Appeal found that the Chambers judge had applied the correct test in determining the convenient forum, namely whether there was clearly some other forum more convenient and appropriate for pursuing the action and securing the ends of justice. He had committed no reversible error in concluding that the appellants had failed to establish clearly that Louisiana was a more appropriate forum, and this "discretionary" decision permitted no retrial of the issues raised. The trial judge would not be bound, however, by the decision of the Chambers judge as to the proper law of the insurance contract in question, because the trial judge might have more complete evidence before him as to the intentions of the parties in that regard.

iv) *Insurance*

1. *Shannon v. Insurance Corp. of British Columbia*⁹¹

Shannon, a resident of Alberta, having been injured in a motor vehicle accident in British Columbia, sued his own insurer in British Columbia to enforce no-fault provisions in an automobile insurance policy issued in Alberta. He claimed entitlement to benefits of up to \$150,000 under British Columbia's no-fault automobile insurance legislation, while his insurer claimed that there was a \$5,000 limitation under the no-fault provisions of the policy. The general scheme of the legislation in the various provinces permitted a plaintiff to take advantage of higher benefits available under the law of the province where the accident occurred, even though such benefits were not provided for in the coverage under the policy. Alberta court decisions interpreting the relevant legislation of that province, however, had generally limited the recovery to the benefits under the policy, although some recent case law suggested that Alberta courts might now grant the higher recovery. A Chambers judge stayed the action, on the motion of the insurer, on the grounds that the court should decline jurisdiction in favour of allowing the action to proceed in Alberta. He held that the recent Alberta decisions suggested that Shannon would probably obtain the

⁹⁰ See *CXY Chemicals U.S.A. v. Gerling Global General Ins. Co.* 991 F. Supp. 770 (E.D. La. 1998), where the District Court of Louisiana held that the law of Louisiana and not that of Alberta applied, because Louisiana was where the insured was domiciled and where the insured property was situated.

⁹¹ (1996) 83 B.C.A.C. 90, (1996) 40 C.C.L.I. (2d) 49. Although the Insurance Corporation of British Columbia (I.C.B.C.) was a defendant in this action, because it was the insurer of the other driver whom Shannon was suing in related proceedings, Shannon made no claim against I.C.B.C., nor was any objection made to its participation in this appeal.

higher benefits if he sued there, so that the juridical advantage of his suing in British Columbia was lessened. Shannon appealed.

The appeal was allowed and the stay set aside. Esson, J.A. held that in order for a court to decline jurisdiction in favour of another forum, "the test is that the existence of a more appropriate forum must be *clearly* established to displace the forum selected by the plaintiff."⁹² In speculating on the likelihood of Shannon's recovering the higher benefits in an Alberta action because of the seeming change in the Alberta case law, and in concluding that the juridical advantage of his suing in British Columbia was therefore reduced, the Chambers judge had erred. Jurisdiction was therefore retained in British Columbia

2. *Canadian Life and Health Insurance Compensation Corporation v. Blue Cross of Atlantic Canada*⁹³

The appellant (CL) a federally incorporated Canadian insurer, provided compensation to policy holders having unpaid insurance claims against any of CL's member-insurers who became insolvent. The respective *Insurance Acts* of Nova Scotia⁹⁴ and New Brunswick⁹⁵ required certain insurers to be members of CL, and the latter's by-laws required its members to pay assessments approved by CL's Board of Directors. The two respondent insurers, incorporated under the laws of Nova Scotia and licenced to carry on insurance business in New Brunswick, after becoming members of CL, had refused to pay CL the assessment fees prescribed by the by-laws since August 14, 1994. CL instituted an action against the respondents in the New Brunswick Court of Queen's Bench for all outstanding assessments. The respondents filed a defence and counterclaim in the New Brunswick action. Subsequently, the respondents commenced separate actions sounding in unjust enrichment against CL in the Supreme Court of Nova Scotia. As in their counterclaim in N.B., the respondents alleged in their N.S. action that they were not actually required under either N.B. or N.S. law to be members of CL, and therefore, they reclaimed all assessments they had paid from 1990 to August 1994. CL, defendant in the N.S. action, stated in its defence that the N.S. action was "duplicitous, vexatious, and an abuse of process", as identical issues were being litigated in the N.B. proceedings, and applied to strike the respondents' claim based on unjust enrichment. The N.S. Chambers judge dismissed that application, and CL appealed.

The appeal was allowed. The Nova Scotia Court of Appeal agreed with the appellant that, *prima facie*, it was vexatious and oppressive for a plaintiff to sue concurrently in two courts for the same matter. Jones, J.A. decided that there

⁹² *Ibid.* C.C.L.I. (2d) 49 at p. 53, citing *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 921, and noting that the word "clearly" in the quotation was underlined in the original.

⁹³ (1997) 156 N.S.R. (2d) 384 (C.A.).

⁹⁴ R.S.N.S. 1989, c. 231.

⁹⁵ R.S.N.B. 1973, c. I-12.

was an identity of parties, object and cause of action, thus giving rise to the *lis pendens* defence, rather than to a defence of *forum non conveniens*. By filing a defence and counterclaim in New Brunswick, the respondents had accepted the jurisdiction of its courts. Nor was the N.B. court being asked to rule on the constitutionality of the N.S. *Insurance Act*. Jones, J.A. nevertheless cited *Hunt v. T. & N. Plc.*⁹⁶ in upholding the jurisdiction of superior courts in any province of Canada to rule on the constitutionality of the laws of any other Canadian province, where some real interest of the province of the forum is affected.

v) *Tort*

1. *Cunningham v. Hamilton*⁹⁷

Cunningham and two other appellants, holders of common shares of a company, alleged a conspiracy by three groups of defendants to devalue the shares, and also claimed that one of the defendants had misrepresented the value of certain assets underlying the shares it offered to purchase. The various defendant corporations were incorporated in Delaware, Colorado and Sweden. Cunningham resided in Denver, Colorado, and the others resided in Alberta. None of the corporate defendants maintained a business office or came on business to Canada, nor were their shares ever traded on any Canadian stock exchange. When the action was commenced in Alberta, the limitation period had already expired in both federal and state courts in the United States. A Chambers judge struck the order for service *ex juris* against one of three defendants, finding that it was a parent corporation of the alleged co-conspirator and not responsible for any wrongdoing by its subsidiary, so that there was no compelling reason to lift the corporate veil. Service on the second group of defendants was dismissed due to an insufficient link between the court and the tort of misrepresentation alleged to have been committed. Service on a third group of defendants was upheld. The plaintiffs appealed and the third defendant group cross-appealed.

The appeal was dismissed *vis-à-vis* the first defendant, but allowed with respect to the second and third groups of defendants. There was a good and arguable case that a tort of fraudulent or negligent misrepresentation had been committed in Alberta, sufficient to uphold an order for service *ex juris* under Rule 30 of the Alberta Rules of Court.⁹⁸

In a subsequent proceeding before the Alberta Court of Appeal,⁹⁹ the Chambers judge's decision to grant a stay of the proceedings in favour of Colorado on the ground of *forum non conveniens* was confirmed. Emphasizing

⁹⁶ [1993] 4 S.C.R. 289.

⁹⁷ (1995) 169 A.R. 132 (C.A.).

⁹⁸ AR 390/68, issued under the *Court of Appeal Act*, R.S.A 1980, c. c-28.

⁹⁹ *Sub nom. Pasukonis Estate v. Hamilton* (1997) 209 A.R. 123 (C.A.).

that such a decision was discretionary in nature, the Court agreed that most of the factors or contacts favoured litigation in Colorado: i) some of the witnesses resided there, while most others resided neither in Colorado nor in Alberta; ii) Alberta law would not govern the question of liability; iii) the appellants' attempt to sue in Alberta could be viewed as forum shopping by one of the appellants, seeking the juridical advantage of Alberta's longer limitation period; and iv) the dispute lacked any substantial connection with Alberta, except that the province was the residence of two minor shareholders and the place where they had received the offer to purchase the shares. Colorado was held to be clearly and distinctly a more appropriate forum for the litigation.

2. *152581 Canada Ltd. v. 152330 Canada Ltd.*¹⁰⁰

152581 Canada Ltd. sued 152330 Canada Ltd., alleging that the latter had its domicile in British Columbia, but without alleging that it had a business establishment in Québec. The defendant company raised a declinatory objection, arguing that the Québec court lacked jurisdiction over it. Mass, J. of the Québec Superior Court refused the request, on the ground that it was not supported by a sworn statement. The defendant company appealed.

The appeal was dismissed. Although the Québec Court of Appeal found that the issue of the sworn statement was a legal red herring because the plaintiff itself never alleged that the defendant had a place of business in Québec, the declinatory objection was without grounds in law. Beauregard, J.A. held that under art. 3148, para. 1(3) C.C.Q., Québec courts had jurisdiction over this dispute because the declaration alleged that the plaintiff had sustained harm in Québec and also alleged other faults committed in the province.

3. *Dennis v. Salvation Army Grace General Hospital*¹⁰¹

After their child was born disabled in Newfoundland, Mr. and Mrs. Dennis, having moved to Nova Scotia, instituted an action in negligence in the Supreme Court of Nova Scotia against the Newfoundland hospital where the child was born and against the doctors involved. The defendants applied to set aside the originating notice of action, or alternatively, to stay the action on the basis that Nova Scotia was a *forum non conveniens*. The Nova Scotia Supreme Court stayed the action and found that Newfoundland was a more appropriate forum.¹⁰² The plaintiffs appealed.

The appeal was allowed. Finn, J.A. decided that the Chambers judge had incorrectly failed to consider factors favouring Nova Scotia as a convenient

¹⁰⁰[1996] R.D.J. 399 (C.A.).

¹⁰¹(1997) 156 N.S.R. (2d) 372 (C.A.); leave to appeal to the Supreme Court denied, July 10, 1997, [1997] S.C.C.A. No. 158.

¹⁰²See (1997) 153 N.S.R. (2d) 211 (S.C.).

forum, such as the Nova Scotia residence of many of the plaintiffs' medical witnesses, the plaintiffs' impecuniosity and their having retained Nova Scotia counsel on a contingency fee basis, the problems of travel with a handicapped child, and the fact that the husband had only recently begun a new job in Nova Scotia. While some factors weighed in favour of Newfoundland as the appropriate forum, such as the expenses that the hospital would incur in a trial in Nova Scotia, on balance Nova Scotia was just as convenient a forum, and the defendants had failed to establish that Newfoundland was more appropriate.

4. *Oakley v. Barry*¹⁰³

When Oakley resided in New Brunswick, she was treated by Dr. Barry and other physicians and a New Brunswick hospital, who diagnosed her as having hepatitis "B". She subsequently moved to Nova Scotia, where other physicians told her that she did not in fact suffer from that disease. She later sued the New Brunswick physicians and hospital in the Supreme Court of Nova Scotia for damages. Neither the physicians nor the hospital were ever served with the originating process. They moved to set aside the originating notice on the ground that Nova Scotia lacked jurisdiction over them or the matter. The motions judge dismissed the motion,¹⁰⁴ and they obtained leave to appeal that decision to the Nova Scotia Court of Appeal.

The appeal was dismissed on its merits. The provisions of Nova Scotia's Civil Procedure Rules¹⁰⁵ for service *ex juris* gave the Nova Scotia Supreme Court jurisdiction, even though the Rules did not require that leave be obtained before effecting service outside the jurisdiction. Nova Scotia courts still retained three discretionary techniques for refusing jurisdiction: i) declining jurisdiction; ii) applying *forum non conveniens*; and iii) striking pleadings as an abuse of process. Moreover, Pugsley, J.A. held that Nova Scotia had jurisdiction in this case, there being a real and substantial connection between the province and both the subject-matter of the dispute and the damages sustained, because Oakley, now residing in Nova Scotia, had been diagnosed there, was continuing to suffer damages there and was being treated there, and the province had a financial interest in her health. She was also impecunious and dependent on Nova Scotia social assistance. There was no evidence that she had chosen to sue in Nova Scotia to gain any juridical advantage, nor would the New Brunswick appellants be at any juridical disadvantage if her suit continued in Nova Scotia. In any event, Nova Scotia was not a foreign state with respect to neighbouring New Brunswick.

¹⁰³ (1998) 158 D.L.R. (4th) 679 (N.S.C.A.), leave to appeal application filed May 25, 1998, [1998] S.C.C.A. No. 282 (S.C.C.).

¹⁰⁴ (1997) 68 A.C.W.S. (2d) 1036 (S.S.C.) (summary).

¹⁰⁵ Nova Scotia's Civil Procedure Rules are created by the judges of the Court of Appeal and the Supreme Court, who derive their authority to do so by virtue of sect. 46 of Nova Scotia's Judicature Act, R.S.N.S. 1989, c. 240. See *Oakley v. Barry* (1998) 158 D.L.R. (4th) 679 at 687 (N.S.C.A.).

The Court specifically recalled the Supreme Court's rulings in *Morguard*,¹⁰⁶ *Hunt*,¹⁰⁷ and *Tolofson*,¹⁰⁸ in which the high court emphasized that the principles of order and fairness (rather than a merely mechanical counting of contacts or connections) were also to be considered by Canadian courts in deciding whether or not to exercise jurisdiction. The need for fairness applied equally to the respondent and appellants. It was proper to consider fairness, as well as the issue of juridical advantage, not only in respect of the issue of *forum non conveniens*, but also in cases (such as this one) involving jurisdiction *simpliciter*. On the fairness issue, Pugsley, J.A. concluded: "When one considers the respondent's personal situation, and the unchallenged deposition that she is 'financially incapable of proceeding with this action in any other place other than Halifax', it would...be manifestly unfair to allow the appellants to succeed in this appeal."¹⁰⁹

The Court further observed that the American requirement of minimum contacts of the defendant with the forum seeking to exercise jurisdiction (a doctrine reflecting the strong emphasis on the sovereignty of United States states, the multiplicity of jurisdictions in the United States and the demands of Due Process under the Fourteenth Amendment to the American Constitution) could well result in a different outcome in this case from the Canadian test of real and substantial connection.

5. *ABN Amro Bank Canada v. Wackett*¹¹⁰

ABN Amro Bank Canada had retained CB, a firm of chartered accountants including Wackett and the other appellants, to determine if a certain company, which had been incorporated in order to raise capital for the construction of a factory in Nova Scotia, had met the "equity requirements" imposed under its loan agreement with the Bank. In actions instituted first in Ontario and later in Nova Scotia, the Bank alleged that CB had been negligent in advising that the equity requirements had been met and in misrepresenting the nature of the transaction. The bank also sued a German company involved in the project (Krupp).

In the Ontario action, CB moved that the proceeding be stayed pending resolution of the Bank's action against Krupp, as well as on the ground that Ontario was a *forum non conveniens*. A Master of the Supreme Court of Ontario in Chambers held that the Bank's action against the CB be stayed pending the action against Krupp, but that in such a case, CB would be bound by any findings of fact made in that action.¹¹¹ The Bank's appeal from that decision was subsequently dismissed.

¹⁰⁶ [1990] 3 S.C.R. 1077 at 1103.

¹⁰⁷ [1993] 4 S.C.R. 289 at 326.

¹⁰⁸ [1994] 3 S.C.R. 1022 at 1110.

¹⁰⁹ *Supra* note 103, 158 D.L.R. (4th) at 693.

¹¹⁰ (1997) 161 N.S.R. (2d) 48 (C.A.).

¹¹¹ *ABN Amro Bank Canada v. Krupp MaK Maschinenbau GmbH* (1993) A.C.W.S. (3d) 981 (Ont.) (summary).

Before its action against Krupp was resolved, the Bank took suit against CB in Nova Scotia, alleging essentially the same cause of action as in the Ontario action. CB moved in the Nova Scotia Supreme Court that the Bank's statement of claim be struck out under Rule 14.25(1)(d) of Nova Scotia's *Civil Procedure Rules*,¹¹² on the grounds that it was an abuse of process of the Court. That application was dismissed by Kelly, J., who held that the Nova Scotia action was different from the Ontario suit and thus did not constitute an abuse of process.¹¹³ The defendants appealed.

The appeal was allowed. The Nova Scotia Court of Appeal found that the Nova Scotia action raised substantially the same issues as the Ontario suit. Kelly, J. had therefore erred in law in concluding that the *lis alibi pendens* doctrine was irrelevant and in failing to conclude that the N.S. suit constituted an abuse of process.

vi) Family Law

1. *Droit de la famille* — 2094 (J.B. v. S.W.B.)¹¹⁴

The Québec Superior Court rendered a judgment declaring that it lacked jurisdiction to decide on the custody of the minor child of the appellant and respondent. In May 1992, the child lived with the appellant in Québec, at which time the respondent, domiciled in Ontario, applied to the Superior Court for custody. Forget, J. postponed the hearing of the respondent's application to a later date, but declared that custody of the child was to go to the respondent, who took the child with him to Ontario. The respondent later petitioned the Superior Court of Québec for a declaration that it lacked jurisdiction over the custody of the child under art. 3142 C.C.Q., as the child was domiciled in Ontario. That motion was refused, Duval-Hesler, J. holding that a court preserves its jurisdiction from the moment the action is instituted. Chaput, J., also of the Superior Court of Québec, however, seized of the respondent's original action, held that the Superior Court of Québec did indeed lack jurisdiction over the matter based on the principle that a new provision of law which removes a court's jurisdiction has an immediate application. Chaput, J.'s judgment was appealed.

The appeal was allowed, Beauregard, J.A. agreeing with Duval-Hesler, J. that a court retains its personal jurisdiction, from the moment the action is instituted. Beauregard, J.A. also refused to decline jurisdiction and stay the action on the grounds of *forum non conveniens* under art. 3135 C.C.Q. merely because of the child's Ontario domicile and the possible need for some Ontario witnesses to travel to Québec for trial. Moreover, no proceedings had been

¹¹² *Supra* note 105.

¹¹³ (1996) 157 N.S.R. (2d) (C.A.).

¹¹⁴ [1996] R.J.Q. 276 (C.A.).

instituted in Ontario and it was unclear whether Ontario would have jurisdiction over any such proceedings.

2. *Droit de la famille*—2555 (*F.L. v. M.S.*)¹¹⁵

A Québec divorce judgment granted custody of two children to the mother, with visitation rights to the father. The judgment was amended several times on motion of the mother. The father later moved for a change in his visitation rights to one of the children. The mother moved in the Québec Superior Court for an order declining jurisdiction, which motion was dismissed. She sought leave to appeal the dismissal. The father asked that her request for leave to appeal be denied, because visitation rights were governed by the federal *Divorce Act*,¹¹⁶ in virtue of which interlocutory judgments were appealable as of right. He argued that, as no notice of appeal had been filed in time, there should be no appeal before the Court of Appeal. The mother also pleaded that the matter should be stayed on grounds of *forum non conveniens* under art. 3135 C.C.Q., so that it could be tried in Switzerland where she then resided.

Leave to appeal was dismissed. Deschamps, J.A. held that the *Divorce Act* gave the judge the authority to extend the time in which notice to appeal must be filed. In this case, there was no reason to extend that term. Under subject. 5(1) of the *Divorce Act*, a provincial court had jurisdiction over a matter dealing with changes to visitation rights when one of the ex-spouses habitually resided in that province at the commencement of the suit. Accordingly, the Superior Court of Québec properly had jurisdiction over the matter, as the respondent father resided in Québec. Secondly, the mother had not shown any “exceptional circumstances”, as required by art. 3135 C.C.Q., which would justify the Québec forum in declining jurisdiction by reason of *forum non conveniens*.

3. *Droit de la famille* — 2561 (*L.G. v. B.M.*)¹¹⁷

The parties were married in France in 1986 and then moved to Québec. They separated in 1989, and the father left Québec with their minor child. Between 1989 and 1992, the father brought an action for divorce in France and proceedings in Québec for an alimentary pension and custody of the child. The mother likewise instituted proceedings in Québec for an alimentary pension and custody of the child and in 1993, she sued in Québec for divorce. The father moved under art. 165(1) of the Québec Code of Civil Procedure¹¹⁸ to dismiss the mother’s divorce action on the grounds of *lis pendens*, in virtue of the Québec statute implementing the Entente between Québec and France Regarding

¹¹⁵[1997] R.D.F. 1 (C.A.).

¹¹⁶R.S.C. 1985, 2nd Supp., c. 3.

¹¹⁷[1997] R.D.F. 3 (C.A.).

¹¹⁸S.Q. 1965, 1st Sess., c. 80 as amended.

Judicial Mutual Aid in Civil, Commercial and Administrative Matters.¹¹⁹ Desmeules, J. of the Québec Superior Court noted that no judgment had yet been rendered in the French proceedings and decided that, because the Entente stipulated that a foreign judgment could only be executed in Québec once it had been exemplified, a French judgment had no automatic *res judicata* effect in Québec. The judge further found that the Entente did not apply to the case at bar. The father appealed to the Québec Court of Appeal.

Allowing the appeal, Brossard, J.A. granted the father's motion to dismiss the mother's action for divorce. Brossard, J.A. found that the Entente applied to the case. Although art. 1f) of the Entente referred only to *res judicata*, and not to *lis pendens*, there was no actual difference between the two concepts, both notions being based on the same three factors: identity of the parties, of the facts and of the object. By analogy, then, the mother's divorce action should be dismissed under art. 1f) of the Entente, as the decision to be rendered in the pending French divorce action would acquire the force of *res judicata* in Québec under the Entente. That position was also in accordance with arts. 3137¹²⁰ and 3155¹²¹ C.C.Q., which, although in force only since 1994, would nonetheless apply to the French divorce action commenced in 1989, under art. 9 of the *Act respecting the Implementation of the Reform of the Civil Code*.¹²²

4. *Droit de la famille* — 2378 (N.P. v. J.C.)¹²³

The parties lived as common law spouses close to 15 years, mostly in Ontario. After they separated, the common law wife obtained an interim alimentary pension from an Ontario court. Subsequently, a "veritable guerilla war" of legal proceedings ensued between the ex-spouses, with 35 proceedings or judgments in Ontario and 38 in Québec. The common law husband filed a motion in Québec Superior Court to annul the alimentary pension of \$4,500 per

¹¹⁹ An Act to Secure the Carrying Out of the Entente between France and Québec Respecting Mutual Aid in Judicial Matters, S.Q. 1978, c. 20 (now R.S.Q., c. A-20.1). Title VII of the Entente implemented by the Act is entitled "Recognition and Execution of Decisions Regarding the Status and Capacity of Persons and Particularly the Custody of Children and Alimentary Obligations".

¹²⁰ Art. 3137 C.C.Q. provides: "On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority."

¹²¹ Art. 3155 C.C.Q. provides: "A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:...(4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec."

¹²² S.Q. 1992, c. 57.

¹²³ [1997] R.D.F. 44 (C.A.).

month and the accumulated arrears due, amounting to several tens of thousands of dollars. In response to the wife's arguments, the Superior Court declared that the Ontario Court (General Division) was the more appropriate forum. That judgment was appealed, and the wife then obtained a provision for costs against the husband in the Superior Court, in the amount of \$20,000, under art. 588 C.C.Q.¹²⁴ The husband appealed the judgment with respect to costs.

The Québec Court of Appeal dismissed the appeal. The argument that only a legally married spouse could be an alimentary creditor entitled to a provision for costs in Québec was rejected. A party could also be an alimentary creditor as an ex-spouse (under a divorce judgment) or under the applicable law of another province or country (see arts. 3094,¹²⁵ 3095,¹²⁶ and 3096¹²⁷ C.C.Q.) if Québec courts had jurisdiction over the dispute according to art. 3143¹²⁸ C.C.Q. In this case, the wife's status as an alimentary creditor under Ontario law had already been recognized by an Ontario judgment, so that she was entitled to a provision for costs under art. 588 of the Civil Code of Québec, the measure of which was to be determined by considering both her needs and the ability to pay of her common law husband.

5. *Nicholas v. Nicholas*¹²⁹

Mr. and Mrs. Nicholas resided and were married in Trinidad. They also had four children there. They moved to Ontario in the 1970s, primarily to educate their children. They became Canadian citizens and built a home in Ontario, but the husband continued to conduct his business from Trinidad, and the family frequently vacationed there. For tax purposes, the husband was considered to be a non-resident of Canada. They also planned to return to Trinidad once the children completed their education. In 1993 the parties separated. The husband filed divorce proceedings in Trinidad, and shortly thereafter, the wife filed for

¹²⁴ Art. 588 C.C.Q. provides: "The court may award provisional support to the creditor of support for the duration of the proceedings. It may also award a provisional sum to the creditor of support to cover the costs of the proceedings."

¹²⁵ Art. 3094 C.C.Q. provides: "The obligation of support is governed by the law of the domicile of the creditor. However, where the creditor cannot obtain support from the debtor under that law, the applicable law is that of the domicile of the debtor."

¹²⁶ Art. 3095 C.C.Q. provides: "No claim for support of a collateral relation or a person connected by marriage is admissible if, under the law of his domicile, there is no obligation for the debtor to provide support to the plaintiff."

¹²⁷ Art. 3096 C.C.Q. provides: "The obligation of support between spouses who are divorced or separated from bed and board or whose marriage has been declared null is governed by the law applicable to the divorce, separation from bed and board or declaration of nullity."

¹²⁸ Art. 3143 C.C.Q. provides: "A Québec authority has jurisdiction to decide cases of support or applications for review of a foreign judgment which may be recognized in Québec respecting support when one of the parties has his domicile or residence in Québec."

¹²⁹ (1996) 94 O.A.C. 21.

divorce in Ontario, claiming custody of the children, child and spousal support, and a division of property. The husband was served *ex juris* in Trinidad. He brought a motion in the Ontario Court to set aside that service and to stay the Ontario divorce proceedings, on the basis that Trinidad was a more convenient forum. The motions judge upheld the service but stayed the action. The wife appealed the stay.

The Ontario Court of Appeal dismissed the appeal, agreeing with the motions judge that Trinidad had the closest connection with the dispute and was therefore the appropriate jurisdiction for the divorce proceedings, and that litigating in Trinidad would not put the wife at a juridical disadvantage. The Court of Appeal also held that proof of Canadian citizenship of the parties, although favouring the wife's argument for keeping jurisdiction in Ontario, was outweighed by other factors in this case. Consequently, the motion judge's failure to consider citizenship did not undermine her conclusion that Trinidad was the proper forum for the litigation.

6. *Corridon v. Dwyer*¹³⁰

The appellant mother and the respondent father lived together intermittently but were never married. Together they had two boys. The mother lived in Ontario with those children and four others from a different man, and was financially dependent on social assistance. The father worked off and on but had a reasonable income. When the children visited the father in British Columbia in the summer of 1996, they had scabies. Prior to their leaving Ontario, the mother had obtained a custody order, apparently with no notice being served on the father. The father, concerned for the children's health, sought a custody order before the British Columbia Supreme Court shortly after the boys arrived in British Columbia. The mother argued that Ontario was the more convenient forum, but the British Columbia court took jurisdiction under the British Columbia *Family Relations Act*,¹³¹ awarded the father interim custody, and found that British Columbia was the *forum conveniens*. The mother applied for leave to appeal that decision to the British Columbia Court of Appeal.

The application for leave to appeal was dismissed. Hall, J.A. held that British Columbia was the more convenient forum, and that the Ontario court may not have been fully aware of the entire situation at the time it awarded custody to the mother. Courts in Canada would not encourage forum shopping and *forum non conveniens* was an exceptional remedy. In any event, in these cases, the paramount consideration was the children's best interests, and not jurisdictional matters. Hall, J.A. held that it would have been virtually a dereliction of duty for the British Columbia Supreme Court not to have taken jurisdiction in the situation concerned. The interests of the two boys could best

¹³⁰(1997) 86 B.C.A.C. 263.

¹³¹R.S.B.C. 1979, c. 121.

be secured by allowing them to live with their father in British Columbia where their progress could be assessed.

vii) *Bankruptcy*

1. *Re Confederation Treasury Services Ltd.*¹³²

The rehabilitator of a bankrupt insurer brought an action in Michigan against the former directors and officers of the bankrupt (Canadian) corporation and a second action in Ontario against the trustee of the bankrupt's estate. Both actions were based on the same underlying loss, arising from the alleged wrongful removal of assets held in trust for the benefit of United States policyholders of the bankrupt insurance company. The company's former officers and directors filed a motion in Ontario for leave to assert claims against the trustee for relief arising out of their potential liability in the action pending against them in Michigan. That motion was dismissed, giving rise to this appeal.

The appeal was allowed. The existence of the rehabilitator's two proceedings in Michigan and Ontario carried with it the potential for prejudice to the former directors and officers, as either court could issue dispositions adverse to them, either by settlement or following trial. The Ontario Court of Appeal decided that: "[t]he logical proceeding in which the appellants should assert their position against the trustee is the Michigan action.... Even if there is not... 'complete confluence' of the claims in the two proceedings, the overlap between them is so substantial that it is neither sensible nor fair to deny the appellants the right to seek to bring the trustee into the Michigan proceeding and to assert their position against it in the determination of that proceeding."¹³³ An application to stay the Court of Appeal's order was subsequently dismissed by the Supreme Court of Canada and leave to appeal the decision itself was later denied.¹³⁴

viii) *Injunctive Relief/Solicitor-Client Relationship/Privilege*

1. *Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.*¹³⁵

American regulatory agencies were investigating alleged violations of United States environmental laws by a United States mining company in Colorado, its parent company (the appellant British Columbia corporation) and

¹³²(1997) 43 C.B.R. (3d) 1 (Ont. C.A.).

¹³³43 C.B.R. (3d) at 3.

¹³⁴Application for the stay of the order was dismissed, [1997] 2 S.C.R. 5 (Sup. Ct. Can.); application for leave to appeal the order was denied on May 26, 1997, [1997] S.C.C.A. No. 229 (S.C.C.).

¹³⁵(1997), 143 D.L.R. (4th) 213 (C.A.), leave to appeal to Supreme Court of Canada denied on July 10, 1997, [1997] S.C.C.A. No. 218.

that corporation's former officers and directors (all British Columbia residents). The British Columbia company made an assignment of its property and the United States agencies sought access to some of its documents from the trustee in bankruptcy, who applied to the British Columbia Supreme Court for directions. The United States Government also took proceedings in Colorado against a Colorado law firm (the respondent) which acted for the appellants, to compel production of certain written communications between the firm and the British Columbia company and its former officers and directors, which documents the appellants claimed were subject to solicitor-client privilege. The British Columbia appellants took an action in the British Columbia Supreme Court, to compel the respondent law firm to respect solicitor-client privilege and obtained an order for the service of the action *ex juris* on the firm in Colorado. The law firm then obtained from the British Columbia Supreme Court a declaratory order staying the appellants' action in British Columbia, declaring that the Supreme Court had no jurisdiction over the action, and setting aside the *ex juris* service that had been effected upon it. The appellants appealed to the British Columbia Court of Appeal from that order.

The appeal was dismissed. Prowse, J.A., applying the recent Supreme Court case law,¹³⁶ held that British Columbia lacked jurisdiction over the case because there was no real and substantial connection between the British Columbia court and either the respondent law firm or the subject-matter of the litigation (the cause of action). Although there was *some* connection between the law firm and the British Columbia court, the link was insufficient to meet the "real and substantial connection" test. The only connection between the British Columbia court and the cause of action was the fact that the appellants resided in British Columbia. Furthermore, the appellants were seeking not merely declaratory, but injunctive, relief that would bind the Colorado courts, challenging that state's territoriality principle.¹³⁷ The fact that Colorado courts would be unlikely to enforce any such British Columbia judgment further supported the conclusion as to lack of British Columbia jurisdiction. The proper law governing the nature and extent of the privilege claimed was to be determined by the Colorado courts under Colorado conflicts rules. Because British Columbia lacked jurisdiction over the dispute, it was not necessary to consider *forum non conveniens*.

¹³⁶*Ibid.*, (1997) 143 D.L.R. (4th) at 219-20, applying the "real and substantial connection" test of jurisdiction announced by the Supreme Court of Canada in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1049 and *Morguard Investments Ltd. v. DeSavoye*, [1990] 3 S.C.R. 1077.

¹³⁷Prowse, J.A., *ibid.*, (1997) 143 D.L.R. (4th) at 222-23, recalled the importance which the Supreme Court of Canada had given to respect for the principle of territoriality in *Morguard Investments Ltd. v. DeSavoye*, [1990] 3 S.C.R. 1077 at 1095, and also noted that the Supreme Court, in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 940, had set aside an anti-suit injunction prohibiting B.C. residents from suing in Texas, because the injunction restrained the jurisdiction of Texas courts contrary to the demands of comity.

ix) *Administrative Law*1. *Pearson v. Canadian Radio-Television and Telecommunications Commission*¹³⁸

Pearson operated a broadcasting facility which televised religious programming, without holding a licence from the Canadian Radio-Television and Telecommunications Commission (CRTC). The CRTC issued an order requiring him to cease broadcasting without the licence, which order, upon its filing with the Federal Court of Canada, became an order of that Court, pursuant to sect. 13 of the *Broadcasting Act*.¹³⁹ Instead of appealing the order or seeking its review by the Federal Court, however, Pearson challenged the constitutional validity of the CRTC's religious policy and of the order, in the Alberta Court of Queen's Bench. The CRTC sought to strike the originating notice of motion under the Albert Rules of Court, arguing that either the Federal Court had exclusive jurisdiction over matters involving the CRTC, or alternatively, that, if the Alberta Court of Queen's Bench had concurrent jurisdiction, then the Federal Court was the more convenient forum. A Chambers judge of the Alberta Court of Queen's Bench dismissed the application, and the CRTC appealed to the Albert Court or Appeal.

The appeal was dismissed by a two-to-one majority. Foisy, J.A., speaking for the majority, held that the "plain and obvious test" was appropriate for determining both whether the Federal Court had exclusive jurisdiction over Pearson's claim and the question of whether that Court was the more convenient forum. Secondly, the Chambers judge had correctly found that the Court of Queen's Bench, as a provincial superior court, always had jurisdiction, to the exclusion of the Federal Court, to hear cases involving the constitutional division of powers between Parliament and the provincial Legislatures under the *Constitution Act, 1867*,¹⁴⁰ as well as an inherent jurisdiction to make constitutional declarations, based on the *Canadian Charter of Rights and Freedoms*,¹⁴¹ with respect to governmental action (which could include the CRTC's religious policy). Finally, the Federal Court, being a purely statutory court, had no inherent jurisdiction, but only the powers conferred on it by statute. Since the motion involved strictly constitutional matters, rather than an application of federal legislation to a specific set of facts, it was not clear that the Federal Court had concurrent jurisdiction with the Court of Queen's Bench to entertain the dispute.

¹³⁸ [1997] 9 W.W.R. 573 (Alta. C.A.), leave to appeal granted, February 12, 1998, [1997] S.C.C.A. No. 559.

¹³⁹ S.C. 1991, c. 11.

¹⁴⁰ The *British North America Act*, (1867) 30 & 31 Vict., c. 3 (U.K.), now the *Constitution Act, 1867*, pursuant to the *Canada Act*, U.K. 1982, c. 11, Schedule B, and now cited as R.S.C. 1985, Appendix II, No. 5.

¹⁴¹ Part I (sects. 1 to 34) of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c.11.

x) *Intellectual Property*

1. 679927 Ontario Ltd v. Wall¹⁴²

Wall sued 679927 Ontario Ltd. and an individual defendant in the Supreme Court of Nova Scotia for having allegedly appropriated his idea for the board game "Trivial Pursuit". Wall claimed that the defendants were the constructive trustees for him as beneficiary of all the intellectual property rights in the game and all proceeds flowing from the exploitation of such rights. The defendants applied to a Chambers judge of the Nova Scotia Supreme Court for a stay of the Nova Scotia proceedings on the ground of *forum non conveniens*, as most of the documentation and their witnesses were located in Ontario. Wall countered that all of his witnesses resided in Nova Scotia. The Chambers judge denied the stay. On appeal, the defendants sought to adduce new evidence dealing with interviews conducted with Wall's witnesses.

The appellants' application to lead new evidence was dismissed, as was their appeal on the question of the more appropriate forum. Flinn, J.A. held that the Chambers judge had correctly applied the test for *forum non conveniens* laid down by the Supreme Court in *Amchem*,¹⁴³ in concluding that the appellants had failed to discharge their onus of showing that Ontario was a clearly more appropriate forum than Nova Scotia for the trial of the action. This being a case where no one forum was clearly more appropriate, Wall's choice to sue in Nova Scotia should prevail by default, provided that that province was an appropriate forum, which it was, because both Wall and his witnesses resided there and the cause of action had arisen there.

VI. *Recognition & Enforcement of Foreign Judgments*

1. *Morguard Investments Ltd. v. De Savoye*¹⁴⁴

The appellant De Savoye was the mortgagor, and the respondents the mortgagees, of real estate situated in Alberta. The mortgage agreements contained no clause in which De Savoye attorned or submitted to the jurisdiction of Alberta's courts. De Savoye subsequently moved to British Columbia and never again resided or carried on business in Alberta. When he defaulted on the mortgage payments, the respondents served him *ex juris* in British Columbia and instituted foreclosure proceedings in Alberta. Because De Savoye neither appeared in nor defended the Alberta action, the respondents obtained *nisi* judgments in their foreclosure suits and later became owners of the properties

¹⁴² (1997) 156 N.S.R.(2d) 360 (C.A.).

¹⁴³ *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 893.

¹⁴⁴ [1990] 3 S.C.R. 1077.

in a judicial sale. They then obtained deficiency judgments against De Savoye in Alberta for the unpaid balance of the mortgages and sued to enforce those judgments in British Columbia. Both the Supreme Court of British Columbia and the British Columbia Court of Appeal recognized the Alberta deficiency judgments, which caused De Savoye to appeal to the Supreme Court of Canada.

The appeal was dismissed. The Supreme Court rejected the nineteenth-century common law's reluctance to recognize and enforce foreign judgments, a reticence reflecting the principle of territoriality. Modern times, however, required that the flow of wealth, skills and people across boundaries be facilitated. Comity was even more important in a federal state such as Canada, where sister provinces should give "full faith and credit" to the judgments rendered by courts of the other provinces of the same federation, as long as the rendering court had properly exercised its jurisdiction. It was "anarchic and unfair" that a person should be able to avoid legal obligations arising in one province simply by moving to another.

The Court also held that principles of order and fairness must underlie a modern system of private international law, but that order comes before fairness. Moreover, in order to secure recognition and enforcement of a judgment rendered in another province, there must be or have been a "real and substantial connection" between the court which rendered the judgment and the action. In the case at bar, there was such a connection between Alberta and the cause of action, as well as the damages suffered, because the real estate in question was located in Alberta, the relevant contracts had been concluded in Alberta by parties then resident there and the foreclosure and deficiency actions were tried there. The Alberta court therefore properly had jurisdiction, so that recognition and enforcement of its deficiency judgments in British Columbia was also proper.

2. *Hunt v. T. & N. Plc.*¹⁴⁵

Hunt sued in British Columbia for damages relating to the cancer he allegedly contracted, while employed as an electrician in British Columbia, by inhaling asbestos fibres contained in products manufactured and sold by respondents, Québec corporations involved in the production and distribution of asbestos. Unable to obtain certain documents from the respondents by request or by serving them with demands for discovery, Hunt moved for an order from the British Columbia Supreme Court compelling the respondents to produce the documents. The respondents in turn obtained an order from the Québec Provincial Court prohibiting the sending of the documents out

¹⁴⁵[1993] 4 S.C.R. 289.

of Québec, in accordance with Québec's *Business Concerns Records Act*.¹⁴⁶ Hunt then sought an order from the British Columbia Supreme Court, striking out the respondents' statement of defence for failure to comply with the British Columbia Rules of Court "without lawful excuse".¹⁴⁷ When both the British Columbia Supreme Court and the British Columbia Court of Appeal dismissed Hunt's motion, on the ground that they had no jurisdiction to determine the constitutionality of Québec statutes, he appealed to the Supreme Court of Canada.

La Forest J. decided that the two British Columbia courts had erred in believing they were prohibited by conflict of law rules from considering the constitutional validity of the statutes of another jurisdiction, especially those of another province of the Canadian federation. Nevertheless, a provincial court should hear constitutional challenges to the legislation of another province only where a real interest of the court's own province was affected. The Supreme Court of Canada had the same jurisdiction, within Canada's unitary court system, to rule on the constitutionality of provincial legislation and could take judicial notice of all laws of every province, even if not proved in evidence in the courts below, provided the laws were pleaded in first instance.

The Supreme Court further held that the old common law rules on the recognition and enforcement of foreign judgments were rooted in an outmoded world view, which emphasized sovereignty and independence, often at the cost of unfairness. Greater comity was needed in the modern era, when international transactions involved a constant flow of wealth, people and products across borders. Moreover, courts in each province of Canada were required to give "full faith and credit" to the judgments of courts in other Canadian provinces, as decided by the Court in its previous decision in *Morguard*.¹⁴⁸

La Forest, J. held Québec's "blocking statute" in this case inapplicable, because it was contrary to minimum standards of order and fairness, as well as opposed to comity, inasmuch as its purpose was to impede litigation in other provinces. It thus was an anachronism inimical to interprovincial litigation, especially as Canadian courts were required to assume jurisdiction only where they had a real and substantial connection with the parties and the action. LaForest, J. found it unnecessary, however, to determine whether the statute was wholly unconstitutional because relating to extraprovincial matters, whether it could be "read down" so as to apply to jurisdictions outside Canada, or to consider the public policy issue raised by the case.

¹⁴⁶R.S.Q., c. D-12.

¹⁴⁷B.C. Reg. 221/90, Rule 2(5).

¹⁴⁸[1990] 3 S.C.R. 1077.

3. *United States of America v. Ivey*¹⁴⁹

A judgment was rendered by the United States District Court for the Eastern District of Michigan, holding the appellants (parties involved in the waste disposal business in Michigan) liable, under United States federal environmental law, to pay the costs of cleaning up a Michigan waste disposal site which they had operated or controlled. The Ontario Court (General Division) ordered enforcement of the judgment in Ontario, against the Ontario appellants who controlled the waste management business in Michigan.¹⁵⁰ The appellants appealed.

The appeal was dismissed. The Ontario Court of Appeal first found that the United States legislation in question¹⁵¹ was not a penal or a revenue statute. Nor was the United States seeking extra-territorial application of its public law in this case, but rather was merely seeking to enforce a United States judgment holding the appellants liable for cleanup costs incurred in the United States on property situated in that country. This cost recovery action, although asserted by the United States Government, was of a commercial or private law, rather than a public law, character. Ontario had a similar statute reinforcing common law compensation remedies, and international comity supported the mutual enforcement of such statutes as between the two jurisdictions. The trial judge had properly applied *Morguard*,¹⁵² and the appellants had conceded the application of the "real and substantial connection test". The Michigan judgment was therefore recognized and enforced in Ontario, because of Michigan's real and substantial connection with the appellants and the action. The American proceedings were also held to satisfy the requirements of natural justice.

4. *Mutual Trust Co. v. St-Cyr*¹⁵³

The respondents, residents of Québec, invested as co-owners in shares of real estate property located in Ontario. When the developer went bankrupt, the investors remained personally liable on the mortgages to the financial institutions who were the mortgagees. Six of the investors were held liable on the mortgages by judgments rendered in Ontario, and their counterclaims seeking annulment of the sales and mortgages were dismissed in first instance and appeal in

¹⁴⁹(1996) 93 O.A.C. 152, leave to appeal dismissed May 29, 1997, [1996] S.C.C.A. No. 582.

¹⁵⁰(1995) 26 O.R. (3d) 533 (Gen. Div.).

¹⁵¹*The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)*, 42 U.S. Code sects. 9601-9675.

¹⁵²[1990] 3 S.C.R. 1077.

¹⁵³[1996] R.D.J. 623 (C.A.), leave to appeal denied, June 26, 1997, [1997] S.C.C.A. No. 65.

Ontario. The Mutual Trust Co. then sought to enforce that judgment against the six investors in Québec. The investors defended the motion and launched counterclaims. Mutual Trust moved to dismiss the defences and counterclaims, but the Québec Superior Court refused the dismissal, resulting in Mutual Trust's appeal.

The appeal was allowed. The former provisions of arts. 178 to 180.1 of the Code of Civil Procedure,¹⁵⁴ held applicable to the first five investors, provided that a decision rendered by the court of another province had the effect of *res judicata* in Québec, as long as the defendant was personally served or had appeared in the rendering court (unless the object of the dispute was an immovable situated in Québec, which was not the case in the present action). A Québec court would also refuse recognition and enforcement of a decision rendered by a court in another province if a Québec court had exclusive jurisdiction over the subject-matter of the action under Québec law or if some mandatory rule of Québec law applied. Here the defendants were personally served and had submitted to the jurisdiction of Ontario's courts, and Québec courts did not have exclusive jurisdiction over the action. Moreover, the Ontario judgments did not offend any mandatory rule of Québec, and non-recognition of those judgments by Québec courts would have violated the principle of "full faith and credit" announced by the Supreme Court of Canada in *Morguard*¹⁵⁵ and *Hunt*.¹⁵⁶ Applying those decisions, Rousseau-Houle, J.A. found that there was a real and substantial connection between the damage incurred and the Ontario court, as the contracts of sale and the mortgages concerned were concluded, and the immovables in question were situated, in Ontario.

As regards the sixth investor, the rules of the Civil Code of Québec 1994¹⁵⁷ on recognition and enforcement of foreign judgments applied, as the Ontario proceedings against him were commenced after the coming into force of the Code. Art. 3155 C.C.Q. enacted a presumption in favour of recognition and enforcement, which was only rebuttable in a few enumerated cases, *inter alia*, if the foreign court lacked initial jurisdiction.¹⁵⁸ The sixth investor's defence fell within none of the enumerated exceptions of article 3155, and he too had submitted to the Ontario court's jurisdiction by appearing and defending the action there. The Ontario decision against him respected all procedural requirements, had *res judicata* effect in Québec,

¹⁵⁴ S.Q. 1965, 1st Sess., c. 80 as amended.

¹⁵⁵ [1990] 3 S.C.R. 1077.

¹⁵⁶ [1993] 4 S.C.R. 289.

¹⁵⁷ S.Q. 1991, c. 64, in force January 1, 1994.

¹⁵⁸ Art. 3155 C.C.Q. recognizes only a few exceptions to recognition and enforcement of foreign decisions, such as lack of jurisdiction of the foreign authority, lack of finality of the decision, contravention of fundamental principles of procedure, *lis pendens* or *res judicata*, Québec international public order and foreign taxation laws.

and its result was not manifestly incompatible with Québec's public order as understood in international relations. The decision thus qualified for recognition and enforcement in Québec, as did those rendered against the first five investors.

5. *Patterson v. Vacation Brokers Inc.*¹⁵⁹

An order for costs was rendered against Patterson in United Kingdom proceedings. The Ontario Court (General Division) ordered the registration of the order, under the *Reciprocal Enforcement of Judgments (U.K.) Act*¹⁶⁰ and the Convention to which it gave effect in Ontario.¹⁶¹ Patterson sought to introduce fresh evidence, to the effect that the United Kingdom order had been obtained fraudulently by the respondent, and further submitted that the order for costs should not have been registered under the provisions of the Ontario Act.

The appeal was dismissed. First, the Ontario Court of Appeal found that the new evidence which Patterson sought to adduce was hearsay as against the respondent, and that there was no evidence that the respondent had been actuated by malice. Secondly, the order for costs in this case was not excluded from the Convention as a proceeding for the recovery of a fine or penalty, because those terms did not encompass an order such as the one concerned, which was intended to indemnify a litigant for his expenses in defending an action. Finally, the appeal court dismissed Patterson's argument that the original order was not final, and therefore not susceptible of registration in Ontario under the terms of the Convention, because the new evidence was grounds for setting aside the judgment in the United Kingdom. A motion to set aside an order for costs was neither an appeal nor an application for leave to appeal within the meaning of the Convention, and, in any event, no such motion had yet been made in the United Kingdom. Patterson's arguments that he had partially paid the costs in question and that the order fell outside the scope of the Convention because it related to immovable property, were also dismissed. In an addendum to the court's oral decision,¹⁶² the Court of Appeal held that interest on the costs was to be governed by the law of the rendering court, namely that of the United Kingdom, and thus calculated from the date of the United Kingdom order, rather than the date the costs were finally assessed.

¹⁵⁹(1997) 100 O.A.C. 36, application for leave to appeal to Supreme Court dismissed on January 29, 1998, [1997] S.C.C.A. No. 575.

¹⁶⁰R.S.O. 1990, c. R.6.

¹⁶¹Convention between Canada and the United Kingdom of Great Britain and Northern Ireland providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters.

¹⁶²(1997) 103 O.A.C. 1.

6. *Droit de la famille* — 2610 (*M.H. v. N.J.Q.*)¹⁶³

This was an appeal from a Québec Superior Court judgment granting the appellant husband's application for a divorce and granting the respondent wife a weekly alimentary pension, half the proceeds of the sale of a residence registered in both spouses' names, and the partition of the earnings in the Québec Pension Plan attributable to the appellant for the period during which the parties cohabited. The parties were married in Pakistan in 1963 and subsequently lived in Québec for several years before separating. Under Pakistani law, their matrimonial regime was separation as to property. At trial, the husband's counsel exhibited a document purporting to be a Pakistani divorce judgment. Lemieux, J., however, refused to recognize this alleged divorce. Dissatisfied with Lemieux, J.'s subsequent divorce judgment, the husband appealed to the Québec Court of Appeal, arguing, *inter alia*, that the Pakistani divorce should have been recognized and that the Québec Superior Court should have declined jurisdiction over the proceedings.

The appeal was dismissed. Rothman, J.A. reminded the husband that it was *he*, and not the respondent, who had instituted the divorce proceedings in Québec's Superior Court. Nowhere in the Québec proceedings did he "allege, produce or even mention any divorce proceedings in Pakistan".¹⁶⁴ The apparent Pakistani divorce document (produced only at the stage of argument by counsel) was neither authenticated nor identified by any witness, nor had any evidence been adduced as to Pakistani divorce law. Nor was it clear when the proceedings were instituted in Pakistan or on what basis. Nor had the appellant shown any desire to desist from his Québec divorce proceedings by reason of proceedings in Pakistan. Recognition of the Pakistani document had thus been rightly denied.

7. *Old North State Brewing Co. v. Newlands Services Inc.*¹⁶⁵

Newlands Services Inc, the appellant, a supplier of brewing equipment having its principal place of business in British Columbia, contracted to install brewing equipment for Old North State Brewing Co., a North Carolina company. The contract provided for application of the law of British Columbia and for the parties to attorn to the jurisdiction of British Columbia courts. After some difficulties arose in the performance of the contract, Old North State sued Newlands in a United States District Court in North Carolina. Although personally served, Newlands elected not to

¹⁶³ [1997] R.D.F. 209 (C.A.).

¹⁶⁴ *Ibid.* at 211.

¹⁶⁵ (1998) 155 D.L.R. (4th) 250 (B.C.C.A.).

attorn to the jurisdiction of that court either by filing a defence or by appearing in the action. The North Carolina court subsequently rendered a default judgment against Newlands for breach of contract, breach of warranty and unfair trade practices, in the total amount of \$1,175,827.99 U.S. (including principal, interest and triple damages). The British Columbia Supreme Court recognized and enforced the judgment on the basis that the British Columbia jurisdiction clause in the contract was a concurrent, rather than an exclusive, choice of forum clause. Newlands launched an appeal against the order enforcing the North Carolina decision, and, pending the hearing of that appeal, applied to the British Columbia Court of Appeal for a stay of execution of the enforcing judgment.

The British Columbia Court of Appeal granted a stay of execution. Hall, J.A. found that in principle, the mere fact that triple damages, ordered by a foreign court, might not be available as a remedy in a Canadian court, was not a bar to recognition and enforcement of that judgment in Canada. He also held, however, that: "...in light of the fact that the parties appear to have stipulated, by agreement, for a choice of law and the forum of British Columbia, it may perhaps be observed that to ignore that agreement and subject the appellant to potential triple damages in the jurisdiction of North Carolina might be thought to be a species of injustice to the appellant....It seems to me arguable that the promotion of international commerce would be adversely affected if the express terms of a contract, agreed to by informed parties could be intentionally ignored."¹⁶⁶ The stay of execution also was appropriate on the balance of convenience, in view of Newlands' lack of financial solidity. Newlands was ordered, however, to post \$25,000. as security against a possible condemnation for costs on its appeal, because its failure to contest the jurisdiction of the North Carolina court might well have consequences as regards costs even if its appeal were successful. The British Columbia Court of Appeal dismissed a subsequent application by Old North State to increase the amount of that security.¹⁶⁷

8. *Susin v. Delazzer*¹⁶⁸

The appellant, having obtained a default judgment against the respondent in Ontario, sought to have the judgment registered in Nova Scotia under the province's *Reciprocal Enforcement of Judgments Act*.¹⁶⁹ The Nova Scotia Supreme Court granted an order registering the judgment, but without granting any award for pre-judgment interest, which the

¹⁶⁶*Ibid.*, (1998) 155 D.L.R. (4th) at 255 and 256.

¹⁶⁷(1998) 158 D.L.R. (4th) 765 (B.C.C.A.).

¹⁶⁸(1997) 164 N.S.R. (2d) 10 (C.A.).

¹⁶⁹R.S.N.S. 1989, c. 388.

Ontario judgment had awarded. The Nova Scotia judge also granted the appellant a sum of post-judgment interest from the date of registration at the rate provided for by Nova Scotia's *Interest on Judgments Act*.¹⁷⁰ The appellant appealed.

The Nova Scotia Court of Appeal decided that the registering judge had erred in refusing to enforce the pre-judgment and cost component of the Ontario judgment, because sect. 6(b) of Nova Scotia's *Reciprocal Enforcement of Judgments Act*, empowering the registering court to exercise "the same control and jurisdiction over the judgment as it has over judgments given by itself", did not confer jurisdiction to vary a foreign judgment. Nor did the registering judge have jurisdiction to do so under sect. 41(i) of Nova Scotia's *Judicature Act*,¹⁷¹ because that provision applied only to proceedings in Nova Scotia for the recovery of a debt or damages, and did not extend to proceedings for the registration of a foreign judgment.

The registering judge had been correct, however, in ordering that post-judgment interest be paid on the judgment as registered at the interest rate provided for by the *Interest on Judgments Act*, on the ground that such a judgment, as of the date of its registration, acquired "the same force and effect" as a domestic judgment, pursuant to sect. 6(a) of the *Reciprocal Enforcement of Judgments Act*. Hallett, J.A. further noted that sect. 7 of that Act allowed the respondent, within one month of receiving notice of his right to do so, to apply to the Nova Scotia Supreme Court to have the registration set aside, on any of the grounds enumerated at subsect. 3(5) of the Act.

9. *Morrisette v. Performax Systems Ltd.*¹⁷²

Morrisette entered into an agreement with Performax Systems Ltd. to distribute the latter's products in Québec. The agreement provided for Manitoba law to apply. Morrisette subsequently repudiated the agreement and took suit in Québec Superior Court against Performax and three individual defendants (the corporation's officers) claiming they were jointly and severally liable with Performax for false representations and other delicts. Obtaining a default judgment for damages in Québec (including \$2000 for trouble and inconvenience) against all of the defendants, Morrisette then sought enforcement of the judgment in Manitoba and obtained summary judgment from the Manitoba Court of Queen's Bench, from which all the defendants appealed. When Morrisette sued to enforce

¹⁷⁰R.S.N.S. 1989, c. 233.

¹⁷¹R.S.N.S. 1989, c. 240.

¹⁷²(1997) 115 Man. R. (2d) 55 (C.A.).

the summary judgment in Manitoba, two of the individual defendants also sought re-opening of the case, arguing that they had had no connection with the company. The Court of Queen's Bench refused the re-opening, from which the two defendants concerned appealed.

The Manitoba Court of Appeal dismissed the appeal from the summary judgment against Performax, upholding the trial judge in granting "full faith and credit" to the Québec judgment. Scott, C.J.M., however, allowed the appeal of the personal defendants against the summary judgment, finding that they lacked any "real and substantial connection" with Québec, as required by the tests propounded in *Morguard*¹⁷³ and *Hunt*.¹⁷⁴ It then became unnecessary to rule on their appeal from the refusal to re-open the case, which was dismissed accordingly.

On the question of the enforceability of the Québec award of damages for trouble and inconvenience (alleged to be a head of damages unknown in Manitoba law, which governing the agreement), the Court of Appeal held that because no evidence had been adduced in the Québec proceedings concerning the difference between Québec and Manitoba law, the Québec Superior Court had been entitled to presume that Manitoba law was identical to Québec law and to award the damages in question.

10. *Heiser v. Kempo*¹⁷⁵

Heiser, a lawyer, represented the plaintiffs and Kempo, another lawyer, represented the defendants in a trial in Alberta's Court of Queen's Bench. The main issue in that trial was whether a judgment ordered by the same judge some weeks earlier should have been set aside for having been obtained by fraud, allegedly perpetrated by Heiser. The Alberta judge ruled that there had been no such fraud and the defendants were ordered to pay Heiser costs on a solicitor/client basis, amounting to \$3,500 plus disbursements. That judgment was not appealed in Alberta, but the costs were never paid. Over five years later, Heiser sued in British Columbia to enforce his Alberta costs judgment, and Kempo repeated in his statement of defence that the judgment had been obtained by fraud. Heiser then applied for and was granted summary judgment to enforce the Alberta costs award by a British Columbia Supreme Court justice, resulting in an appeal by Kempo.

The appeal was dismissed. There was no credible evidence that the Alberta judgment was obtained by fraud, as the allegation was only based on Kempo's belief that Heiser made an intentional misrepresentation to the

¹⁷³[1990] 3 S.C.R. 1077.

¹⁷⁴[1993] 4 S.C.R. 289.

¹⁷⁵(1998) 43 B.C.L.R. (3d) 200 (B.C.C.A.).

Alberta judge. Therefore, following the Supreme Court's decision in *Morguard* with respect to full faith and credit, the British Columbia Court of Appeal held that the Alberta costs judgment should be recognized and enforced in British Columbia.

VII. Conclusion

Canada has experienced a veritable revolution in private international law and conflicts of law since 1990. The Supreme Court of Canada has, in a series of decisions, recast Canada's law on conflicts in a number of areas, as has the Québec National Assembly in enacting the Civil Code of Québec 1994:

1) In *Tolofson v. Jensen*,¹⁷⁶ the Supreme Court held that the *lex loci delicti*, or the law of the place where the tort was committed, is now the conflicts rule governing interprovincial and international torts, subject to a few exceptions. The principle of double actionability, inherited from English conflicts law, has been abandoned and replaced in Canadian common law by the law of the place of the tort. In Québec, the same private international law rule can be found in article 3126 of the C.C.Q., although the second paragraph of that article provides one specific exception; namely, that where the plaintiff and defendant have their domiciles or residences in the same country, then the law of that country applies. A similar exception has already been judicially fashioned in one of Canada's common law provinces in *Hanlan v. Sernesky*¹⁷⁷ (an international case). The exception may not apply in interprovincial cases, however, as the *lex loci delicti* (Québec law) was applied in such a case in *Leonard v. Houle*,¹⁷⁸ despite the common residence of the parties in Ontario.

The general rule of the *lex loci delicti* enunciated by the Supreme Court in *Tolofson* has been followed and applied both prospectively and retroactively by Canadian courts of appeal when faced with choice of law questions in tort cases, as surveyed in these case summaries.¹⁷⁹ Moreover, the Supreme Court seems to be unwilling to vary or expand on the *Tolofson* decision, as it has refused leave to appeal three provincial court of appeal decisions involving inter-provincial torts or delicts.¹⁸⁰

¹⁷⁶[1994] 3 S.C.R. 1022.

¹⁷⁷*Supra* note 44.

¹⁷⁸*Supra* note 60.

¹⁷⁹See *Stewart v. Stewart*, *supra* note 32; *Bakker v. Van Adrichem*, *supra* note 37; *Cowley v. Brown Estate*, *supra* note 49; *Brill v. Korpaach Estate*, *supra* note 52; *Michalski v. Olson*, *supra* note 54; *Leonard v. Houle*, *supra* note 60.

¹⁸⁰*Brill v. Korpaach Estate*, *supra* note 52; *Michalski v. Olson*, *supra* note 54; *Leonard v. Houle*, *supra* note 60.

2) Under the *lex loci delicti* conflicts rule propounded by the Supreme Court in *Tolofson*, limitation periods are now treated as substantive, rather than as procedural, matters in Canada, and this principle has been applied with remarkable consistency by the provincial courts of appeal, resulting in the application of the proper law of the tort, rather than the *lex fori*, to the limitation issue.¹⁸¹ The rule that “prescription” (i.e. time limitation) is governed by the “law applicable to the merits of the dispute” is also enshrined at art. 3131 of the Civil Code of Québec 1994.

3) In matters of jurisdiction, the Supreme Court has established the general rule that there must exist a “real and substantial connection” between the action or the parties on the one hand, and the court or tribunal hearing the dispute, on the other. Such a rule comports with the notion of comity, with Canada’s federal constitutional structure, and with the modern demands of globalization. In Québec, the Civil Code of 1994, at arts. 3134 to 3154 C.C.Q., contains rules on the “international jurisdiction of Québec authorities”, which rules are based on a variety of connecting factors requiring, in effect, a similarly genuine link between the Québec court and the action and/or the parties.¹⁸²

This “real and substantial connection” has become entrenched as the general criterion of validity of jurisdiction of all Canadian courts dealing with conflicts cases, both federal and provincial, irrespective of the applicable substantive law.¹⁸³ As in choice of law cases, the Supreme Court has repeatedly upheld this test of jurisdiction, as framed in its *Morguard* and *Hunt* decisions, in refusing leave to appeal cases decided by the various courts of appeal on that basis.¹⁸⁴

Canadian conflicts law generally gives effect to jurisdiction clauses, both domestic and foreign,¹⁸⁵ which can sometimes have unfortunate consequences, particularly where a real and substantial connection is lacking as between the designated forum and the cause of action or the parties. Ambiguous forum clauses are easily overcome, however, and non-exclusive ones are properly held non-binding.¹⁸⁶

¹⁸¹ *Stewart v. Stewart*, *supra* note 32; *Bakker v. Van Adrichem*, *supra* note 37; *Brill v. Korpaach Estate*, *supra* note 52; *Michalski v. Olson*, *supra* note 54.

¹⁸² See, e.g., *Bitton v. Margo Movers International Inc.*, *supra* note 87.

¹⁸³ See e.g. *Oakley v. Barry*, *supra* note 103; *Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.*, *supra* note 135.

¹⁸⁴ *Sarabia v. The “Oceanic Mindoro”*, *supra* note 69; *Dennis v. Salvation Army Grace Hospital*, *supra* note 101; *Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.*, *supra* note 135.

¹⁸⁵ *Sarabia v. The Oceanic Mindoro*, *supra* note 69; *Old North State Brewing Co. v. Newlands Services Inc.*, *supra* note 165. See also in Québec, *Lamborghini (Canada) Inc. v. Automobili Lamborghini S.P.A.*, *supra* note 74.

¹⁸⁶ *Schleith v. Holoday*, *supra* note 73; *472900 BC Ltd. v. Thrifty Canada Inc.*, *supra* note 79.

4) The doctrine of *forum non conveniens*, founded (like jurisdiction generally) on the “real and substantial connection” requirement, is now often considered by Canadian courts, following *Morguard* and *Amchem*,¹⁸⁷ as well as under article 3135 of the Civil Code of Québec.¹⁸⁸ The C.C.Q. also has a provision — art. 3136 — codifying the doctrine of *forum conveniens*, which has been found to be not simply the juridical opposite of *forum non conveniens*.¹⁸⁹ The party seeking a stay of proceedings on *forum non conveniens* grounds has the onus of showing that there is another jurisdiction which is “clearly more appropriate”. This burden of proof rule has been applied consistently since *Amchem*.¹⁹⁰

5) In *Morguard Investments v. De Savoye*, the Supreme Court stated that such a “real and substantial” connection was also a precondition to the recognition and enforcement by Canadian courts of foreign judgments. The principle is now regularly applied in recognition proceedings in Canada’s common law provinces.¹⁹¹ A “substantial connection” test of the link between the foreign “authority” and the dispute now also exists as a general principle of Quebec civil law in respect of the recognition of foreign judgments, having been codified at article 3164 of the 1994 C.C.Q.¹⁹²

¹⁸⁷ *Sarabia v. The “Oceanic Mindoro”*, *supra* note 69; *Maxwell Humm v. Mauran*, *supra* note 70; *Schleith v. Holoday*, *supra* note 73; 472900 B.C. v. *Thrifty Ltd.*, *supra* note 79; *Georgetown Wire Co. v. Gemini Structural Systems Inc.*, *supra* note 81; *Craig Broadcast Systems Inc. v. Frank N. Magid Associates, Inc.*, *supra* note 84; *Canadianoxy Holdings Ltd. v. Gerling Global General Insurance Co.*, *supra* note 89; *Shannon v. Insurance Corp. of British Columbia*, *supra* note 91; *Cunningham v. Hamilton*, *supra* note 97; *Dennis v. Salvation Army Grace General Hospital*, *supra* note 101; *Canadian Life and Health Insurance Compensation Corporation v. Blue Cross of Atlantic Canada*, *supra* note 93; *ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH*, *supra* note 110; *Nicholas v. Nicholas*, *supra* note 129; *Corridon v. Dwyer*, *supra* note 130; 679927 Ontario Ltd., v. *Wall*, *supra* note 142.

¹⁸⁸ *Droit de la famille* — 2094 (J.B. v. S.W.B.), *supra* note 114; *Droit de la famille* — 2555, *supra* note 115.

¹⁸⁹ *Lamborghini (Canada) Inc. v. Automobili Lamborghini S.P.A.*, *supra* note 74.

¹⁹⁰ *Maxwell Humm v. Mauran*, *supra* note 70; *Georgetown Wire Co. v. Gemini Structural Systems Inc.*, *supra* note 81; *Craig Broadcast Systems Inc. v. Frank N. Magid Associates, Inc.*, *supra* note 84; *Shannon v. Insurance Corp. of British Columbia*, *supra* note 91; *Cunningham v. Hamilton*, *supra* note 97; *Dennis v. Salvation Army Grace General Hospital*, *supra* note 101; 679927 Ontario Ltd v. *Wall*, *supra* note 142; *Droit de la famille* — 2555, *supra* note 115.

¹⁹¹ *Morrisette v. Performax Systems Ltd.*, *supra* note 172.

¹⁹² Art. 3164 C.C.Q. reads: “The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Quebec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the country whose authority is seized of the case.” Art. 3155(1) C.C.Q. makes the jurisdiction of the foreign authority “under the provisions of this Title” (i.e. title Four, which includes, *inter alia*, art. 3164 C.C.Q.) the first criterion of recognition and enforcement of foreign decisions. See also *Mutual Trust Co. v. St-Cyr*, *supra* note 153.

6) The Supreme Court in *Morguard* also essentially constitutionalized the principle of "full faith and credit", obliging Canadian courts to recognize and enforce judgments rendered in any other Canadian jurisdiction whose courts had a real and substantial connection with the subject-matter of the action or the parties.

The "full faith and credit" principle has not been restricted in its application to cases involving judicial decisions from other Canadian provinces and territories, however, but has been extended to decisions from the courts of other countries having jurisdiction in the international sense.¹⁹³

There is perhaps one exceptional case when Canadian courts will not, even after *Morguard*, recognize or enforce foreign judgments, and that is in family matters, when the domestic court finds that enforcing the foreign court order is not in the best interests of the child. Such has been the outcome even where an outstanding court order from another country or province exists and none of the parties alleges any lack of a real and substantial connection between the action or parties and the rendering court.

7) Closely connected with the "full faith and credit" principle of Canadian conflicts law is the constitutional law principle, that Canadian provincial superior courts (and courts of appeal) have jurisdiction to rule on the constitutionality of the legislation of other Canadian provinces, as does, of course, the Supreme Court of Canada, which stands at the apex of the pyramid of Canada's unitary court structure. That principle was elaborated in *Hunt v. T & N plc*, where the Supreme Court found a Québec "blocking statute", which prohibited the export of business documents outside Québec, to be constitutionally inapplicable *vis-à-vis* the courts of British Columbia. This principle has been applied in subsequent litigation in the provincial courts.¹⁹⁴ "Full faith and credit" must indeed be granted by a provincial superior court to decisions of the courts of other provinces and territories of Canada, but only when those decisions are founded on constitutionally valid enactments of the latter jurisdictions.

8) The *Amchem* decision is also the landmark Canadian judgment on anti-suit injunctions, an issue of increasing concern to private international law around the world. The test announced by Sopinka, J. in this regard is designed to balance real and substantial connections with the demands of comity and territoriality, so as to preclude any overreaching by either Canadian or foreign courts, while also facilitating the access to justice for the litigants. The

¹⁹³ *United States of America v. Ivey*, *supra* note 149; *Patterson v. Vacation Brokers Inc.*, *supra* note 159. The foreign judgment must be properly proven, however. See *Droit de la famille-2610*, *supra* note 163.

¹⁹⁴ *Canadian Life and Health Insurance Compensation Corporation v. Blue Cross of Atlantic Canada*, *supra* note 93; *Pearson v. Canadian Radio-Television and Telecommunications Commission*, *supra* note 138.

formulation of the test has been cited with approval by the House of Lords in *Airbus Industrie v. Patel*.¹⁹⁵

9) Finally, the recent conflicts decisions of the Supreme Court of Canada examined in this article have placed a strong emphasis on the principles of order and fairness, signalling to Canadian judges that those ideals must find concrete expression in their judgments in cases involving foreign elements. Judges now do not hesitate to invoke these notions, where appropriate, as part of their *rationes decidendi*.¹⁹⁶ Thus equity has received the highest official sanction as a factor to be taken into account in Canada's private international law.

In brief, it may be said that Canada's conflicts revolution, while perhaps less theoretical and creative than its more famous American counterpart, has been no less dramatic or challenging in its effects on lawyers and judges, and is no less promising in its potential for influencing the continuing development of conflict of laws scholarship and practice in our increasingly international environment.

¹⁹⁵ [1998] 1 Lloyd's Rep. 631 at 640-41 (H.L.) per Lord Goff.

¹⁹⁶ *Oakley v. Barry*, *supra* note 103; *Old North State Brewing Co. v. Newlands Services Inc.*, *supra* note 165.