

## COMMENTARIES

### *Castillo v. Castillo*: Closing the Barn Door

Can a province pass legislation to give effect to its own limitation periods even in matters governed by foreign law? This was the question considered by the Supreme Court of Canada in *Castillo v. Castillo*.<sup>1</sup>

#### (a) Just the Facts

The facts of *Castillo v. Castillo* were simple enough. An Alberta couple was involved in a car accident in California. The wife sued her husband in Alberta after the expiry of the California limitation period but before the expiry of the Alberta limitation period. Since the 1994 Supreme Court of Canada decision in *Tolofson v. Jensen*,<sup>2</sup> Canadian courts have applied the limitation period of the applicable law. In tort claims, they have applied the law of the place where the tort occurred.<sup>3</sup> Therefore, this claim was barred by the California limitation period.

However, after the release of the decision in *Tolofson*,<sup>4</sup> Alberta passed legislation that was intended to alter this approach to limitation periods in Alberta courts.<sup>5</sup> Section 12 of the Alberta Limitations Act provided that “[t]he limitations law of the Province shall be

1. (2005), 260 D.L.R. (4th) 439, [2005] 3 S.C.R. 870.

2. [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289.

3. The plaintiff appeared to rely on s. 12 of the Alberta Limitations Act, R.S.A. 2000, c. L-12 to gain access to the courts rather than asking the court to consider applying the law of Alberta to a claim between two Alberta residents under the narrow exception contemplated in *Tolofson* to the application of the law of the place where the tort occurred. Had the Alberta court applied the personal law of the parties (*i.e.*, Alberta law) to the claim, it would not have hesitated to apply its own limitations period. Whether the connection between the parties and the forum might evoke sympathy for the plaintiff’s efforts to rely on the local law remains unclear. Whether it should play a part in determining the applicable law is discussed in J. Walker, “Are We There Yet?: Towards a New Rule for Choice of Law in Tort” (2000), 38 Osgoode Hall L.J. 331. And see *Neilson v. Overseas Projects Corporation of Victoria Ltd.*, [2005] HCA 54, in which the High Court of Australia resorted to *renvoi* to apply the personal law of the parties in a claim in tort.

4. *Tolofson*, *supra*, footnote 2.

5. Limitations Act, *supra*, footnote 3.

applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction." Accordingly, the plaintiff said that despite the expiry of the California limitation period, her claim was not barred in Alberta.

No one agreed. Well, at least, none of the judges who heard the argument agreed. From the single judge at first instance on up through the three judges at the Court of Appeal to the nine-member panel of the Supreme Court of Canada, every judge decided that the California limitation period should apply and that the action should be dismissed as statute-barred. They all accepted the view expressed in *Tolofson*<sup>6</sup> that limitation periods should be treated as matters of substantive law and that the limitation period of the applicable foreign law operates to extinguish a claim even when the limitation period of the forum has not yet expired. No one was persuaded that s. 12 of the Alberta legislation could revive a claim that was barred by the applicable law. On the facts of the case, the ability of s. 12 to close the doors of the courts of Alberta to cases brought after the limitation period of the governing law had passed was as superfluous as closing the proverbial barn door after the horse had bolted. As a result, the Supreme Court held that there was no reason to decide whether s. 12 had an impermissibly extraterritorial effect that would render it constitutionally invalid.

Still, the case had caught the court's attention. Having granted leave, the court turned to the related *obiter* question:<sup>7</sup> Could s. 12 operate to bar an action that was not barred under the applicable law? All but Bastarache J. held that it could. All agreed that s. 92(14) of the Constitution Act, 1867 authorized Alberta to legislate in this way. The members of the majority were of the view that the limitation periods of the applicable law and of the forum could co-exist peacefully provided that the shorter period was given precedence. For the majority at the Supreme Court, Major J. explained that

if the law in the place the accident occurred provides for a limitation period longer than that of Alberta . . . the effect of s. 12 would be to close the door of the Alberta court against the claim's being heard in that jurisdiction

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6. *Tolofson, supra*, footnote 2.

7. This comment does not address the precedential value of a Supreme Court of Canada decision focused only on a question that does not arise on the facts of the case before it, but this comment does consider the importance of having available to the court facts that raise the issues addressed.

(though it may be capable of pursuit elsewhere). This is because a foreign jurisdiction, by adopting a limitation period longer than that of Alberta, cannot validly impose on Alberta courts an obligation to hear a case that Alberta, as a matter of its own legislative policy, bars the court from entertaining.<sup>8</sup>

This comment questions that view.

(b) Limitation Periods: A Substantial Question

The starting point for this analysis is the explanation by La Forest J. in *Tolofson* of the reason for characterizing limitation periods as matters of substance. As Bastarache J. noted, “La Forest J. recognized that limitation periods are, *by their very nature*, substantive, precisely because they are determinative of the rights of both the parties in a cause of action: they destroy the right of the plaintiff to bring suit and vest a right in the defendant to be free from suit.”<sup>9</sup> In short, like other substantive legal rules, limitation periods strike a balance between the rights and obligations of the parties to one another.

Despite this, there are two features of limitation periods that could make it possible to confuse them with matters of procedure.

First, limitation periods operate differently from many substantive legal rules because the balance that they strike between the parties’ rights and obligations is not responsive to the particular facts of the case. Limitation periods strike a balance between the right of the plaintiff to have a reasonable period of time in which to decide whether to commence an action, and the right of the defendant to be free from the need to respond to a claim after a reasonable period of time. Further, limitation periods strike a balance between the obligation of the plaintiff to commence an action within a reasonable period of time and the obligation of the defendant to remain ready to respond within that time.

However, the length of time that is considered reasonable is fixed by statute without regard to the circumstances of the individual case. The length of time is not responsive to any hardship it might create in the individual case for a defendant who must retain records for the full period during which the limitation period runs, nor does it provide a remedy for prejudice that might be suffered in the individual case when an action is commenced near the end of the period and the defendant has not retained such records. It is not

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8. Castillo, *supra*, footnote 1, at p. 443.

9. *Ibid.*, at p. 452 (emphasis added).

responsive to any prejudice it might create in the individual case for a plaintiff who must commence an action within the time permitted despite wishing to consider whether to sue longer, nor does it provide a remedy for plaintiffs who suffer hardship by being barred from commencing actions.<sup>10</sup> Courts do not consider these questions on a case-by-case basis, but merely apply the time limits provided by the statute. In this way, the result of determining a limitations question does not derive from — and is not measurable against — concerns for fairness as between the particular parties to the dispute as is generally the case with many other substantive legal rules in private law matters.

Second, limitation periods resemble matters of procedure because they arise as a concern only in connection with the adjudication of the claim, and they serve the needs of the adjudicative process. The importance of this is particularly obvious in the civil law system where the judge has the primary responsibility for marshalling the evidence and establishing the record. With the passage of time it becomes increasingly difficult for a judge to discharge this responsibility effectively. However, limitation periods are also important in the adversarial system where the parties are charged with presenting the evidence but where it remains necessary for the trier of fact to assess the evidence presented. Limitation periods encourage the prompt commencement of claims and thereby reduce the occasions on which the adjudicative process becomes speculative and uncertain.<sup>11</sup> Since limitation periods serve the needs of the adjudicative process they resemble procedural rules.

Despite these two features of limitations law, it is important to recognize, as Bastarache J. recommended, that a limitations question is “by its nature” substantive. This is because it is neither sensible nor desirable for us to conceive of legal rights as capable of being separated from legal remedies. The idea that someone

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10. Apart from situations in which the claim could not reasonably have been discovered before the limitation period had passed. However, a delay in the discovery of the facts giving rise to the claim is generally considered to warrant delaying the commencement of the limitation period and does not affect the length of time it runs: *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, application to vary judgment granted on rehearing [1988] 1 S.C.R. 1206; *Novak v. Bond*, [1999] 1 S.C.R. 808, 172 D.L.R. (4th) 385.

11. Hence, they serve not only the potential defendant's need to be certain when a claim can no longer be brought and the plaintiff's need to be encouraged to be diligent in pursuing the claim, but also the court's evidentiary concerns in hearing the case: *Novak, ibid.*

could have a legally recognized right for which the courts afford no access to a remedy is an awkward one for our current legal system. A legal historian might be able to identify a time during the era of the courts of law and of equity when it was sometimes necessary for claimants to take their legal rights from one court to the other to find a court in which they might receive a remedy. Under those circumstances it would make sense to think of the claimants as retaining rights for which the court could not provide a remedy so that they could pursue a remedy in a different court. This idea still has value in legal systems in which judicial authority is divided between two or more courts and where a ruling by one court that it cannot hear the claim should not prejudice the claimant from taking the claim to another court. Similarly, the idea continues to serve a purpose in the doctrine of non-merger of a cause of action in a foreign judgment,<sup>12</sup> where refusing to recognize a foreign judgment on jurisdictional grounds does not preclude a claimant from seeking relief on the underlying cause of action in the local court.

However, these situations seem far removed from the situations that ordinarily arise in a legal system like Canada's with its strong commitment to the inherent authority of the courts of plenary jurisdiction — a commitment that is infused with a robust sense of *ex debito justitiae*. In Canada, the many features of the legal system that promote access to justice and that establish a liberal approach to novel claims all reflect the belief that available legal remedies should encompass recognized legal rights. The logical corollary to the belief that there should be a remedy for every right is the reluctance to recognize legal rights for which we have decided that there shall be no remedy.

This is not to say that a gap between right and remedy should never arise. It is sometimes necessary to impose restrictions on the court's authority that are unrelated to adjudicative efficacy or fairness to the parties. Examples of these externally imposed restrictions can be found in state immunity legislation,<sup>13</sup> and in legislation implementing international treaties such as the Warsaw Convention<sup>14</sup> and the New York Convention on the Recognition and Enforcement of

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12. J. Walker, *Castel & Walker: Canadian Conflict of Laws*, 6th ed, (Markham, Butterworths, 2005+), para. 14.4.

13. *State Immunity Act*, R.S.C. 1985, c. S-18.

14. Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, October 12, 1929).

Foreign Arbitral Awards.<sup>15</sup> But these restrictions on the scope of judicial authority to fashion appropriate remedies for recognized legal rights are different from those that arise through the operation of limitation periods. These restrictions are carefully circumscribed limits that respond to well-defined external obligations, for example, those found in statutes implementing international legal obligations that are unrelated to the adjudicative process. These obligations override the ordinary concerns of courts with questions of fairness to the parties and adjudicative efficacy.<sup>16</sup>

(c) The Territorial Reach of Limitation Periods

The view that rights and remedies should be coterminous with one another has important implications for the authority to establish these limits and for the way in which we apply them. If we agree that limitation periods are a matter of substantive law, then they come within the purview of provincial legislation. The authority to make limitations laws is founded on the constitutional grant in s. 92.13 of exclusive authority to the provinces to legislate in matters relating to property and civil rights within the province. If limitation periods are matters of substance that are established by the provinces under this constitutional grant of authority, it follows that they apply to matters governed by the laws of those provinces. For example, Québec limitation periods apply to matters governed by the law of Québec, Alberta limitation periods apply to matters governed by the law of Alberta, and so on.

This is not a function of a discrete common law rule on choice of law. It is the logical consequence of treating limitation periods as an integral feature of the rights and obligations of the parties to a dispute. If a restriction on recovery, such as that created by a limitation period, is part and parcel of the substance of the parties' rights and obligations, it follows that the limitation period found in the law governing the rights and obligations is the one that applies to them. The right to make the claim is subject to the limitation period found in the law establishing the right. The obligation to answer the claim is subject to the limitation period found in the law establishing the obligation. It is the law of the province that governs the rights and obligations of the parties in respect of the claim and

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15. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958).

16. See *Castel & Walker, supra*, footnote 12, ch. 10.

it is that law that establishes the limitation period as a feature of those rights and obligations. This is true even when the dispute is decided in a court other than a court in the place of the governing law.

Accordingly, it is not necessary to go into the larger question of how the concept of territoriality should be understood in an era in which the significance of physical transactions has been diminished by the increasing prevalence of electronic communications. It is not necessary to take on the challenge of considering how the territorial restrictions on provincial legislative authority can be reconceived to meet the needs of the 21st century. None of this is necessary because in treating limitation periods as a matter of substance it is necessary only to recognize that limitations legislation has as broad a reach as the substantive law governing the claim it affects — law that is constitutionally mandated by s. 92.13.<sup>17</sup>

(d) Rounding up the Misconceptions

The question raised by the enactment of s. 12 of the Alberta Limitations Act is whether *in addition* to the limitation period that forms an integral part of the substantive law of another jurisdiction governing a claim, the province may impose a further restriction on the time within which plaintiffs may commence actions in the Alberta courts. To answer this question, we must address three basic misconceptions in the *Castillo* judgment: those concerning the substantive/procedural distinction, the application of foreign law, and federalism.

First, the diplomatic victory won by suggesting that the Alberta statute could co-exist peacefully with the Supreme Court of Canada ruling in *Tolofson*<sup>18</sup> could only be achieved at the expense of sound reasoning. If limitation periods strike a balance of the rights and obligations of the parties — one that forms an integral part of those rights and obligations — then it is not possible to apply two limitation periods to the same claim. A claim can be extinguished only once. At any given moment, either the plaintiff has the right to bring the claim, or the defendant has the right to be free of the obligation to answer it. The horse is either in the barn or out the door.

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17. For a recent discussion of the question of “extraterritoriality” in Supreme Court of Canada jurisprudence, see E. Edinger, “*British Columbia v. Imperial Tobacco Canada Ltd.*: Extraterritoriality and Fundamental Principles” (2006), 43 C.B.L.J. 301.

18. *Castillo*, *supra*, footnote 1, at p. 443.

It does not help to stipulate that it will be the defendant rather than the plaintiff who benefits. Whether the plaintiff gets the benefit of the longer of the two limitation periods or the defendant gets the benefit of the shorter of the two limitation periods, the proposal to apply two limitation periods entails the possibility of applying a law other than the law governing the claim to an integral feature of the substance of the rights and obligations of the parties. Accordingly, if there is any role for s. 12, it must be different from the substantive law role contemplated for limitation periods as we currently understand it. The second limitation period cannot serve the role of demarcating the substantive rights and obligations of the parties. It must serve some other purpose.

Second, it does not improve the understanding of these issues to build sentiment for the result reached by observing that “a foreign jurisdiction, by adopting a limitation period longer than that of Alberta, cannot validly impose on Alberta courts an obligation to hear a case that Alberta, as a matter of its own legislative policy, bars the court from entertaining”.<sup>19</sup> This is undoubtedly true and it has the vague appeal of appearing to wave the flag of provincial autonomy within Canadian federalism. However, the observation is premised on a fundamental misunderstanding of the reason why courts apply foreign law. It is unlikely that even a legal historian could identify a time in which it was thought that foreign law was applied because a “foreign jurisdiction” imposed an obligation upon the local courts to do so. In fact, the well-established foreign public law exception operates specifically to intervene in the normal choice of law process where applying foreign law would result in serving the bidding of a foreign sovereign.<sup>20</sup> In short, courts do not apply foreign law because they are forced to do so by foreign governments.

On the contrary, the question whether the Alberta court rejects a limitations defence based on a local limitation period because the time has not passed under the law that governs the rights and obligations of the parties is a question of whether the court is bound to treat the local limitation period as preemptory. The question is whether the Alberta courts can be forced to close their doors to an otherwise viable claim by a local limitations law. It is difficult to see

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19. *Castillo, ibid.*, at p. 443.

20. *See Castel & Walker, supra*, footnote 12, at para. 14.7.



how this would be consistent with the view expressed in *Tolofson*,<sup>21</sup> that “the court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order”.<sup>22</sup> But it is a question worth asking.

Third, although the validity of s. 12 was considered as a question of whether s. 12 could operate to alter the rule enunciated in *Tolofson*,<sup>23</sup> this is not the real question. Of course, pursuant to the applicable constitutional authority, a province can legislate to alter the common law. Of course, if s. 12 is constitutionally valid, it would fall within the exclusive jurisdiction of the province under s. 92.14 to make laws in relation to the administration of justice in the province. However, the question is not whether s. 12 could operate to alter the rule enunciated in *Tolofson*.<sup>24</sup> The question is whether the rule in question is merely a common law rule or whether it is a rule based on constitutional principles from which provincial legislation cannot derogate. It may be helpful here to clarify that the rule at issue is not the one characterizing limitation periods as substantive. The practice of treating limitation periods as substantive is not a rule produced by a constitutional requirement, in the sense of advancing fundamental national interests, so much as it is the product of a basic approach to the law and to legal remedies that prevails in Canada and elsewhere in the common law and civil law world<sup>25</sup> — hence Bastarache J.’s insistence that limitation periods are *by their nature* substantive.

The real question raised is probably better traced to the earlier decision of the Supreme Court of Canada in *Hunt T & N plc*<sup>26</sup> in which the court considered whether provincial legislation could operate to interfere with the ordinary process through which claims

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21. *Tolofson*, *supra*, footnote 2.

22. *Ibid.*, at para. 82.

23. *Ibid.*

24. *Ibid.*, as is argued by Gerald Robertson in his comment on the decision of the Court of Queen’s Bench in “*Castillo v. Castillo: Limitation Periods and the Conflict of Laws*” (2002), 40 Alta. L. Rev. 447, and as appears to have been the basis for similar enactments in Newfoundland and Labrador (Limitations Act, S.N.L. 1995, c. L-16.1, s. 23) and Saskatchewan (Limitations Act, S.S. 2004, c. L-16.1, s. 27).

25. Accordingly, the question is put here rather differently from the way it was considered by Paul Michell in his thoughtful analysis of these issues before the Supreme Court rendered its decision in: “Limitation Periods, Choice of Laws, and the Constitution: *Castillo v. Castillo*” (2005), 42 C.B.L.J. 97.

26. [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16.

come to be heard in appropriate fora. In other words, can a province introduce a separate superadded restriction that would further reduce access to its courts to claims that are not time-barred under the law that governs them?

(e) Closing the Door

Can Alberta close the doors of its courts to claims governed by other laws for which it is an appropriate forum? What fundamental feature of federalism is supported by recognizing the authority of a province to do so?

To answer this, it might help to consider the kinds of cases and litigants against whom the doors of the Alberta courts would be closed. For example, what of the case that was not before the Supreme Court — the one that would have raised the issue that the court chose to consider? What if, in Mr. and Mrs. Castillo's situation, the California limitation period had been two years and the Alberta limitation period had been one year? Would it have been the intention of legislators to tell them that the doors of the courts of Alberta, their home province, were closed to them? It is true that this is a claim that arose outside Alberta, but it seems difficult to identify the pressing social reason to close the doors of the Alberta courts and send these two Alberta residents all the way to California to litigate their dispute. It seems equally difficult to identify a pressing social reason to encourage them to take their claim to another province where the courts would apply the limitation period of the governing law.

Perhaps though, this is unfair, an extreme case, and not the best test of the social purpose of a statutory restriction on foreign claims. Perhaps the Alberta legislature or the courts would be inclined to fashion an exception for local residents. Perhaps they would reserve the s. 12 restriction on access to the courts to adjudicate foreign claims to foreign claims between foreign parties. Could it have been the intention of Alberta legislators to close the doors of the Alberta courts to persons from out of province litigating claims arising outside Alberta? The question whether foreign plaintiffs should have the same access to the courts as local plaintiffs has been considered in the United States.<sup>27</sup> The concern may be understandable in a legal system facing pressing practical concerns with overcrowded

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27. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

dockets and a strain on community resources from the routine use of juries in civil trials.<sup>28</sup> However, in the absence of factors that would serve to attract plaintiffs who would select Alberta as a forum opportunistically, in order to achieve an unfair advantage in the litigation, and in the absence of signs that the Alberta courts are under significant strain as a result of claims brought by persons from out of province, it is unclear what pressing social interest would be served by closing the doors of the Alberta courts to them. Alberta and Texas may have much in common in their economies, but they rank rather differently on forum shoppers' lists of top destinations.

Perhaps this too is unfair — an odd case — and not the best test of the social importance of a statutory restriction on claims that might be brought in the Alberta courts. Perhaps the intention of the legislators was merely to enhance the protections for local defendants in situations in which plaintiffs, in the ordinary course, would choose to litigate in the defendants' courts so as to obtain locally enforceable judgments. Legal historians would be able to identify a period in the common law when courts afforded this sort of protection to local defendants through their reluctance to grant relief in situations in which there would be no liability under local law. The first limb of the rule in *Phillips v. Eyre*,<sup>29</sup> which formed the basis of the prevailing common law choice of law rule until about the time that the Supreme Court of Canada decided *Tolofson*,<sup>30</sup> contained such a caveat. That limb was based on *The Halley*,<sup>31</sup> a case in which the English court was reluctant to hold a shipowner liable for the negligence of a compulsory pilot who was responsible for a collision in Belgian waters even though there would have been liability under Belgian law. The *Halley* decision gave rise to the requirement in *Phillips v. Eyre* for recovery in tort that "the wrong must be of such a character that it would have been actionable if committed in (the forum)".<sup>32</sup> There might have been some utility in a rule that would protect local defendants from liability under foreign law in an era in which it would generally be necessary to pursue defendants in their home courts. However, after several decades of being

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28. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

29. *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1.

30. *Tolofson*, *supra*, footnote 2.

31. *The Halley* (1868) LR 2 PC 193.

32. *Phillips v. Eyre*, *supra*, footnote 29, at pp. 28-29.

denounced as excessively parochial, the requirement was eliminated in *Tolofson*.<sup>33</sup> Furthermore, this would be an odd sort of protection in the many situations in which the plaintiff would simply revert to another forum. Could it have been the intention of the legislators to close the doors of the Alberta courts to cases involving Alberta defendants only to create a situation in which they would be required to travel to defend elsewhere?

Perhaps in the end, none of these considerations fueled the legislative initiative to restrict access to the Alberta courts. Perhaps it was no more than an interest in protecting the courts themselves from the challenges of adjudicating claims that were older than the fixed time limit set by the Alberta legislation. Search as one might, though, through the jurisprudence and the academic commentary it is difficult to find mention of the special challenges faced by Alberta courts, or any other courts, in dealing with claims that are especially old by virtue of the application of a long foreign limitation period. After all, the local limitation period to be imposed is not an ultimate limitation period.

Without an obvious practical reason for the Alberta legislators to set different standards for access to the Alberta courts than the standards that apply to the other courts in Canada, we are left to ask whether they would be permitted to do so merely because it is their prerogative. The constitutional requirements supporting the convergence or rationalization of jurisdictional standards, such as the principles of order and fairness, are unwritten. To some, these constitutional requirements could seem to emerge from whole cloth in the interpretations of the Supreme Court of Canada. Where this is so, the inclination to assert different standards in order to demonstrate independence is understandable. Like the majority's reasons for the decision in *Castillo*, the Alberta Law Reform Institute's rationale for s. 12 seems to reflect this sentiment. According to the institute: "Applying the limitations law of Alberta ensures the application of a just limitations system in accordance with accepted Alberta principles because the Alberta law reflects what Alberta believes is the fairest balance between the conflicting interests of

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33. In speaking of the application of the *Halley* branch of the rule in *Phillips v. Eyre* to interprovincial torts in Canada, Hancock wrote in 1942, "One would look far to find a more striking example of mechanical jurisprudence, blind adherence to a verbal formula without any regard for policies or consequences." M. Hancock, *Torts in the Conflict of Laws* (Chicago, University of Michigan Press, 1942), p. 89.

claimants and defendants.”<sup>34</sup> Neither the decision in *Castillo*, nor the institute’s report appear to contain any analysis of the particular ways in which the interests of the Alberta courts or the parties before them would be impaired by applying the limitation periods of the governing law or how applying the Alberta limitation periods instead would prove beneficial. Having considered the effect of the law in various situations in this comment, the practical benefits of the application of s. 12 would seem to be far from obvious.

Rules governing access to the courts reflect profoundly held views about the legal system and its role in society. Efforts to harmonize such rules sometimes meet with strong opposition when they seem to involve the imposition of foreign standards. For example, in 2005, when the American Law Institute Reporters presented to the institute a proposal for a federal statute to harmonize the law on the recognition and enforcement of foreign judgments,<sup>35</sup> a motion was made to disapprove it on grounds that this was a matter that should continue to be governed by the law of individual states.<sup>36</sup> Also in 2005, the European Court of Justice ruled that the English courts could not exercise discretion to decline jurisdiction over a local defendant on the grounds that a non-European court would be a more appropriate forum even if the jurisdiction of no other contracting state is in issue or the proceedings have no connecting factors to any other contracting state. The European Court of Justice regarded the use of the doctrine of *forum non conveniens* as incompatible with the functioning of the regime governing jurisdiction of member states courts,<sup>37</sup> but this has generated considerable concern among English lawyers about the future of their common law traditions governing access to the English courts in cross-border matters.<sup>38</sup>

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34. Alberta Law Reform Institute, *Limitations* (Report No. 55, 1989) at p. 98.

35. American Law Institute, *Recognition and Enforcement of Foreign Judgments: A Proposed Federal Statute* (Philadelphia, American Law Institute, 2005).

36. “Motion by Guy Miller Struve, K. King Burnett, and Houston Putnam Lowry to Disapprove the Reporters’ Recommendation that Congress Enact a Federal Statute Governing The Recognition and Enforcement of Foreign Judgments”, American Law Institute, 82nd Annual Meeting, May 16, 2005, available online at <<http://www.ali.org/>>.

37. *Owusu v. Jackson*, Case C-281/02, March 1, 2005 (E.C.J.).

38. A. Briggs, “The Impact of Recent Judgments of the European Court on English Procedural Law and Practice”, University of Oxford Faculty of Law, *Legal Studies Research Paper Series*, Working Paper No 11/2006, available online at <<http://papers.ssrn.com/>>.

A discussion of the merits of these two developments and the questions they raise for the value of maintaining local standards and procedures is well beyond the scope of this comment. However, it would seem that the more helpful analysis of these questions in Canada and abroad would be one that considered the practical implications for litigants in crossborder cases and the impact on established practices relating to access to the courts and not one that was driven only by abstract concerns about sovereignty. Perhaps, in the end, the analogy of the barn door is inapt if it suggests that an opportunity to resist initiatives promoting workable integration of the Canadian legal system has been missed. In that regard, this may be one door that should be kept open.

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