

CURRENT JURISDICTIONAL AND RECOGNITIONAL ISSUES IN THE CONFLICT OF LAWS

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CONTENTS

I. Introduction	499
II. The <i>Morguard</i> Reorientation.	499
III. Convergence: International and Interprovincial	508
IV. Becoming More Worldly in a Changing World	517

I. INTRODUCTION

In honour of the 40th Consumer and Commercial Law Workshop and the 50th volume of the Canadian Business Law Journal we have been asked to provide a retrospective of developments in the conflict of laws that highlights emerging issues. We have chosen to present it in a conversational fashion in which each of us presents a perspective and the other two offer their comments.

II. THE *MORGUARD* REORIENTATION

1. Form Follows Function (Blom)

In this look back at the last 40 years, the development I want to highlight is the way in which the ordering principles of Anglo-Canadian private international law have changed.¹ What used to be a field with a markedly conceptual structure has become one that, at least ostensibly, has reoriented itself based on its purposes rather than its doctrinal apparatus. In the last few decades, a relatively rule-bound subject has become more of a policy-driven subject.

Of course, there is nothing unique or recent about this transition. Much of the development of law, especially common law, since the mid-19th century can be seen in terms of a shift in emphasis from

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1. The ordering principles of Québec private international law were and are largely embodied in codified rules, although the content of those rules changed extensively with the coming into effect in 1994 of Book Ten (Private International Law) of the Civil Code of Québec, L.R.Q., c. C-1991. The Supreme Court of Canada decisions discussed here have affected the courts' approach to the codified rules to some extent but, since the principles are more or less fixed by the code, the shift in orientation has been less profound than in the common law jurisdictions of Canada.

means — that is, doctrine — towards ends.² But in private international law, perhaps because of its esoteric aura, the conceptual foundations tended to be more resistant to erosion than they were in other parts of the law.³

It was in 1990 that the Supreme Court of Canada, in *Morguard*,⁴ gave Canadian private international law the decisive push for change. The power of the decision lay less in what it actually decided, which was that the grounds for recognizing foreign money judgments should be enlarged, than in the way the court justified the change. Two related ideas were emphasized. One was comity. Although the term “comity” suggests little more than voluntary deference as between sovereign entities, La Forest J. said it should be viewed, rather, as a practical necessity. “[I]t is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws . . .”⁵ The other idea was that private international law is more about enabling than restricting. Its rules “are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.”⁶

These two ideas have introduced a new dynamic into the law.⁷ On the whole, they have encouraged Canadian courts to give more effect

2. Roscoe Pound, who himself was following in Holmes’s footsteps, observed more than a century ago that law “must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation”: “Mechanical Jurisprudence” (1908), 8 Colum. L. Rev. 605, at p. 605.
3. A notable exception before 1990 was divorce. The concept of domicile used to be central to determining jurisdiction to grant a divorce and to recognizing foreign divorces, but the results it produced were so at odds with social attitudes and conditions that by the mid-1980s it had been entirely sidelined by legislative and judicial action. Jurisdiction in divorce now depends on ordinary residence, not domicile (Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 3), and foreign divorce decrees are recognized by statute on the basis of ordinary residence (Divorce Act, *ibid.*, at s. 22(1)) and, at common law, on the basis of a real and substantial connection between either party and the jurisdiction in question (*Indyka v. Indyka*, [1969] 1 A.C. 33, [1967] 2 All E.R. 689 (H.L.); see also *El Qaoud v. Orabi* (2005), 12 R.F.L. (6th) 296, 2005 NSCA 28).
4. *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256, [1990] 3 S.C.R. 1077. The impact of the decision was assessed in a symposium in (1993), 22 C.B.L.J. 1, pp. 2 to 131.
5. *Ibid.*, at p. 1096 (S.C.R.), p. 269 (D.L.R.), quoting *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-164.
6. *Ibid.*, at p. 1096 (S.C.R.), p. 269 (D.L.R.).
7. A third, very important, underlying idea was the link between private international law and the Canadian constitutional framework. Generally speak-

to foreign laws and legal decisions, when doing so is seen to promote interjurisdictional freedom of movement or transactions. At the same time, courts have had to bear in mind *La Forest J.*'s qualification to this general orientation, namely, the "order and fairness" part of the equation. Its significance is harder to define because it points in two directions. "Order" highlights the need to control and the right of a state to do so, whereas "fairness" suggests the need not to control too much.

How, then, has this new dynamic played out? And have developments since *Morguard* been successful in the sense that the law seems to be working better than it did before?

The most radical changes stemming from *Morguard* have been in the area of foreign judgments. The range of judgments that Canadian courts will recognize and enforce has been dramatically extended. Take, first, money judgments. Before 1990, a judgment in an undefended foreign action could be enforced only if the defendant had previously agreed to accept the foreign court's jurisdiction. Now, such a default judgment is enforceable as long as the litigation had a real and substantial connection with the foreign jurisdiction.⁸ The rule applies both to interprovincial and international cases,⁹ although interprovincially it is a constitutional obligation on the province¹⁰ whereas internationally it is a matter of common law.

The main beneficiaries of this change are foreigners and fellow Canadians from other provinces (plaintiffs) who do business with or otherwise have dealings with persons resident in a Canadian jurisdiction (defendants). A plaintiff now has a much greater ability to sue the defendant in the plaintiff's own jurisdiction because, even if the judgment is in default of appearance, it will be enforced in the defendant's jurisdiction. This, it can be assumed, encourages people from other jurisdictions to have dealings with Canadians and so benefits Canadians and promotes the goals identified in *Morguard*.

At the same time, there is a price to be paid for this liberalization and it falls mainly on Canadian defendants. The "real and substantial connection" test is elastic, indeed it was meant to be so. Commenting on the use of the test in the jurisdictional (as distinct

ing, however, this has given Canadian private international law not so much a new impetus as a new set of constraints.

8. *Morguard*, *supra*, footnote 4.

9. *Beals v. Saldanha* (2003), 234 D.L.R. (4th) 1, [2003] 3 S.C.R. 416, 2003 scc 72.

10. *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at p. 324, 109 D.L.R. (4th) 16 at pp. 40-41. See Elizabeth Edinger, "The Constitutionalization of the Conflict of Laws" (1995), 25 C.B.L.J. 38.

from the foreign judgment) context, La Forest J. said in *Hunt* that “the assumption of, and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness not a mechanical counting of contacts or connections.”¹¹ Canadian defendants who are sued elsewhere must therefore always assume that they are exposed to the risk of any money judgment being enforceable against their assets at home, except in the very few cases where the circumstances do not meet even the furthest stretch of the test.¹² This situation is manageable as between two Canadian jurisdictions,¹³ but obliging Canadian defendants to defend virtually any action brought against them in the United States or other foreign countries is proving onerous, especially given the narrowness of the defences to enforcement that the common law provides.¹⁴

The other potentially far-reaching change, again resulting from the dynamic set up by *Morguard*, is the ability to enforce non-monetary orders, which previously could not be enforced at all even if they were made in defended proceedings. In the *Pro Swing* case,¹⁵ the Supreme Court lifted the bar to enforcing non-monetary orders but, by a majority, refused enforcement in the particular case and defined only in the most general terms the circumstances under

11. *Hunt, ibid.*, at p. 326 (S.C.R.), p. 42 (D.L.R.).
12. Very few decisions show a foreign judgment being refused recognition because there was no real and substantial connection with the originating jurisdiction. One of the few is *Braintech, Inc. v. Kostiuik* (1999), 171 D.L.R. (4th) 46 (B.C.C.A.), leave to appeal to S.C.C. refused 182 D.L.R. (4th) vi, commented on by Vaughan Black and Michael Deturbide, “*Braintech, Inc. v. Kostiuik: Adjudicatory Jurisdiction for Internet Torts*” (2000), 33 C.B.L.J. 427.
13. As is implicit in the uniform Enforcement of Canadian Judgments and Decrees Act, promulgated by the Uniform Law Conference of Canada in 1997, online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1e4>>, which in s. 6(3)(a) eliminates any defence that the original court lacked jurisdiction over the defendant. The Act, or an earlier version of it without the non-monetary order provisions, has been adopted in seven provinces and Yukon: see the table online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/us/Table_3_En.pdf> (The table omits the Enforcement of Canadian Judgments and Decrees Act, S.N.S. 2001, c. 30.)
14. See *Beals, supra*, footnote 9; *Old North State Brewing Co. v. Newlands Services Inc.*, [1999] 4 W.W.R. 573, 83 A.C.W.S. (3d) 374 (B.C.C.A.); Jacob S. Ziegel, “Enforcement of Foreign Judgments in Canada, Unlevel Playing Fields, and *Beals v. Saldanha*: A Consumer Perspective” (2003), 38 C.B.L.J. 294; Stephen G.A. Pitel, “Enforcement of Foreign Judgments: Where *Morguard* Stands After *Beals*” (2004), 40 C.B.L.J. 189; Joy Goodman and Jeffrey A. Talpis, “*Beals v. Saldanha* and the Enforcement of Foreign Judgments in Canada” (2004), 40 C.B.L.J. 227.
15. *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612, 273 D.L.R. (4th) 663, 2006 SCC 52. See Vaughan Black, “Enforcement of Foreign Non-Money Judgments: *Pro Swing v. Elta*” (2006), 42 C.B.L.J. 81 (commenting on the Ontario Court of Appeal decision).

which enforcement should be granted. The court regarded the question essentially as one of exercising an equitable (in the equity vs. law sense) discretion.¹⁶ It is open to question how much value, in terms of promoting cross-border activity, is offered by introducing the possibility of enforcement when its exercise is so uncertain.¹⁷ The new rule will, however, advance cross-border justice to the extent that Canadians who are the subject of foreign injunctions or orders to account for profits¹⁸ can no longer count on taking shelter from these orders behind the border.¹⁹

Compared to foreign judgments, the impact of the *Morguard* dynamic on jurisdiction, though far-reaching in analytical terms, has been modest in practical terms. It has narrowed, rather than broadened, the ability of the courts to take jurisdiction. The service *ex juris* rules in most provinces were extremely liberal already. There are some cases in which Canadian courts would previously have said they did have jurisdiction, based on the service *ex juris* rules, but they now say that they do not, based on the lack of a real and substantial connection, which *Morguard* introduced as a constitutional limit on the provinces' judicial jurisdiction.²⁰ Because the real and substantial connection test is driven, as La Forest J. said, by considerations of order and fairness,²¹ it has proved easier to define as an adjudicative process than as a concept.²² The notion of comity makes its own addition to the mix by inviting the consideration of

16. See especially *Pro Swing Inc, ibid.*, at para. 31.

17. The parameters for the enforcement of non-monetary orders are somewhat clearer under s. 6 of the Enforcement of Canadian Judgments and Decrees Act, *supra*, footnote 13.

18. Including those from other provinces. This is governed by statute in the provinces that have enacted the uniform Enforcement of Canadian Judgments and Decrees Act, *ibid.*

19. This will be particularly significant in an area like intellectual property, where such orders are often the primary remedy. The orders in *Pro Swing* related to an Ontario online seller's ceasing infringement of a U.S. trade-mark and accounting for profits.

20. *Morguard, supra*, footnote 4, at p. 1109 (S.C.R.), p. 278 (D.L.R.); *Hunt, supra*, footnote 10, at p. 324 (S.C.R.), pp. 40-41 (D.L.R.); *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at p. 1049, 120 D.L.R. (4th) 289 at p. 304. The two grounds for service *ex juris* that most frequently have been held to fail the real and substantial connection test are that damage was sustained in the province or that the non-resident defendant was a necessary or proper party to an action against a resident defendant. See *Van Breda v. Village Resorts Ltd.* (2010), 316 D.L.R. (4th) 201, 2010 ONCA 84, leave to appeal to S.C.C. granted July 8, 2010, Court File No. 33692.

21. See above, text accompanying footnote 11.

22. See the elaborate analysis in *Van Breda, supra*, footnote 20, which modified the earlier, equally elaborate one in *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577, 60 O.R. (3d) 20 (C.A.), *supp. reasons* 213 D.L.R. (4th) 661.

larger questions relating to the relationship between legal systems.²³

The real and substantial connection criterion is said to be the same, whether one is determining the limits on a Canadian court's own jurisdiction or deciding whether a foreign court had jurisdiction for purposes of recognizing its judgment.²⁴ This conceals, however, an unresolved asymmetry between the two uses of the test, because the reach of the real and substantial connection test is tempered in the jurisdictional context by the doctrine of *forum non conveniens*,²⁵ whereas in the foreign judgment context it is not.²⁶

As for choice of law, in the one recent case to come before the Supreme Court, the effect of *Morguard* was, paradoxically, to shift the law to a doctrinally more rigid position than before.²⁷ Unlike in the other areas, the need for order was seen as trumping the need for flexibility.²⁸

The "purposive" reorientation initiated by *Morguard* therefore presents a mixed picture. It has certainly made the law conceptually less hidebound in the areas of foreign judgments and jurisdiction, although the same cannot be said, yet, of choice of law. The ability of non-Canadians to sue Canadians in the plaintiff's own jurisdiction has been greatly enhanced, whereas, for Canadians suing foreigners, access to the plaintiff's home court has, in some respects, been reduced. Mixed, too, is the picture as between benefits and costs. The

23. As in the issue of how parallel proceedings should be handled in *forum non conveniens* cases: see *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, [2009] 1 S.C.R. 321, 303 D.L.R. (4th) 385, 2009 scc 11. See also (on the B.C. Court of Appeal decision) Vaughan Black and John Swan, "Concurrent Judicial Jurisdiction: A Race to the Court House or to Judgment? *Lloyd's Underwriters v. Cominco Ltd.*" (2008), 46 C.B.L.J. 292; and the symposium on the case (2009), 47 C.B.L.J. 165, at pp. 166-224.

24. *Morguard*, *supra*, footnote 4, at p. 1103 (S.C.R.), p. 274 (D.L.R.); *Van Breda*, *supra*, footnote 20, at para. 103.

25. The idea that *forum non conveniens* is an "important counterweight" to the rules of jurisdiction *simpliciter* was relied upon in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 220 D.L.R. (4th) 54, 2002 scc 78, at para. 57.

26. This asymmetry underlies LeBel J.'s urging (in dissent, but not on this point) that a "context-sensitive jurisdiction test ought to take into account the difficulty of defending in a foreign jurisdiction," in *Beals*, *supra*, footnote 9, at para. 171. See also Pitel, *supra*, footnote 14, at pp. 207-208.

27. *Tolofson*, *supra*, footnote 20.

28. "[O]rder comes first. Order is a precondition to justice." *Tolofson*, *ibid.*, at p. 1058 (S.C.R.), p. 311 (D.L.R.), *per* La Forest J. The primacy of order was also linked to the court's tentative view that the constitution may implicitly require uniform choice of law solutions throughout the provinces; see *ibid.*, at pp. 1065-1066 (S.C.R.), pp. 316-317 (D.L.R.). A prescient discussion of the constitutionalization of choice of law rules is J. Swan, "Perspectives of a Conflicts Lawyer" (1983), 7 C.B.L.J. 410, at pp. 416-419.

reorientation of the law on foreign judgments and jurisdiction has been bought at the price of greater uncertainty, stemming from the inherently malleable real and substantial connection test. Overall, however, even after two decades, the balance between concepts and goals is still evolving and it is probably still too early to say for sure whether or not the changes are a success. And, in any case, a full assessment would require looking at how the law has changed elsewhere as well as here.

2. Conflicts of Law as a Trade Issue (Black)

It is undeniable that judicial reasoning in the field of Canadian private international law has been characterized by a shift to a justificatory approach dominated by instrumental reasoning. Joost Blom is also right in pointing out that the conflicts field is not unique in showing marks of such a change in style. With the adoption of a purposive approach to the Canadian Charter of Rights and Freedoms²⁹ and a law and economics orientation to tort law,³⁰ it would be surprising if judicial argumentation in private international cases did not betray signs of a similar swing to policy-driven argumentation — though Blom is right again in pointing out that this area resisted that trend longer than most others did.

What I emphasize by way of addition to this observation is a *particular* purpose that has become the darling of private international law thinking in the Supreme Court of Canada — the promotion of free trade. The Supreme Court's reasoning in conflicts cases can be called a mode of economic analysis of law, but it is hardly the Posnerian transactional analysis that has characterized some of its judgments in torts.³¹ Rather, it is the embracing of a single over-riding economic goal: “[T]he need in modern times to facilitate the flow of wealth, skills and people across state lines . . .”³² That phrase has been quoted approvingly in scores of judgments since *Morguard*. Its effect has been most pronounced in disputes dealing with foreign judgments. In both *Beals v. Saldanha* and *Pro-Swing Inc. v. Elta Golf Inc.*, *Morguard*'s flow-of-wealth mantra was

29. The genesis of the purpose approach is *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at p. 156, 11 D.L.R. (4th) 641.

30. Many examples could be offered here, such as *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, 121 D.L.R. (4th) 193.

31. In addition to *Winnipeg Condominium Corp.*, *ibid.*, see the judgment of La Forest J. in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 289.

32. *Morguard*, *supra*, footnote 4.

quoted with approval by the Supreme Court of Canada.³³ Its effect in both cases was that doctrines that stood in the way of enforcement of foreign judgments were stigmatized as protectionist, with all of the negative baggage that accompanies that term.

The arrival of policy-responsive reasoning in the realm of Canadian private international law is to be celebrated. However, even setting aside concerns we might have about the institutional capacity of courts to pursue a free trade agenda, the one-dimensional nature of the values they have espoused give cause for concern. Free trade may on balance be a good thing, but that is far from uncontested. *Morguard's* words were uttered in the wake of the Mulroney victory in the free trade election, but it is worth recalling a majority of Canadians voted for parties that opposed the Canada-U.S. Free Trade Agreement. *Morguard's* decision that private law should be reconfigured as a handmaiden to the elimination of international barriers to free trade may have been welcome to elite opinion, but its failure to give a nod to values that, at least in some cases, operate to justify international trade restrictions has been less helpful. When free trade arrangements are implemented by treaties there are sometimes areas — labour, culture, the environment, consumer protection, public morals — where other concerns are recognized and where limits to market activity can be set. *Morguard* showed little awareness of any such countervailing forces. To take one example, Jacob Ziegel's analysis of *Beals v. Saldanha* in this journal emphasized the way in which, at its core, that was really a consumer protection case.³⁴ Had *Morguard* acknowledged that consumer protection concerns can sometimes operate to justify laws that have the effect of creating limits to free trade, the result in *Beals* might have been different. At the very least, its reasoning would more comprehensively have dealt with the difficult value choices that the internationalization of market activity presents.

3. Purposiveness and Idealism (Walker)

I agree entirely with Joost Blom that the past four decades³⁵ in private international law have witnessed a fundamental

33. *Beals, supra*, footnote 9, at paras. 21 and 26; *Pro Swing, supra*, footnote 15, at paras. 7 and 78.

34. Ziegel, *supra*, footnote 14.

35. And particularly the last two decades, following the decision in *Morguard, supra*, footnote 4, the impact of which was analyzed in detail in volume 22 of the C.B.L.J., *supra*, footnote 4; J. Ziegel, "Introduction" (1993), 22 C.B.L.J. 1, at p. 2; V. Black, "The Other Side of *Morguard*: New Limits on Judicial Jurisdiction" (1993), 22 C.B.L.J. 4; E. Edinger, "*Morguard v. De Savoye*: Subsequent

reconsideration of the way in which we approach conflict of laws rules.³⁶ Some might say that such a reconsideration naturally tends to give the impression that the law has “reoriented itself based on its purposes rather than its doctrinal apparatus.” Fundamental reconsideration of a subject tends to prompt a return to first principles and this often involves the rejection of rules that were established in other places and times in favour of rules that are explained in terms of their responsiveness to current needs and aspirations. In this way, the jurisprudence *seems* more purposive.

But Blom is right to suggest that there is more to it than this. Vaughan Black has noted the general shift in judicial reasoning, and Blom has pointed out that the new purposiveness is a mixed picture. The greater flexibility afforded plaintiffs through greater opportunities to obtain judgments enforceable in Canada in courts other than those of the defendant’s residence is to be contrasted with a reduced flexibility in choice of law rules. This is designed to ensure that order is not sacrificed for the sake of fairness.³⁷

I agree also that, despite the emphasis on practical justice, the most radical of the changes to the law brought about by the reorientation has not necessarily had the effects intended. It is difficult to imagine that the liberalization of rules for the recognition and enforcement of judgments was intended to create a situation in which persons with assets in Canada would be required to respond to all notices of foreign proceedings, even in places with which they have little connection and in courts to which they have not agreed, simply because there was some connection³⁸ between the matter and the forum. But the enforceability in Canada of foreign default

Developments” (1993), 22 C.B.L.J. 29; P. Finkle and C. Labrecque, “Low-Cost Legal Remedies and Market Efficiency: Looking Beyond *Morguard*” (1993), 22 C.B.L.J. 58; J. Wood, “Recognition and Enforcement of Judgments Between Provinces: The Constitutional Dimensions of *Morguard Investments Ltd.*” (1993), 22 C.B.L.J. 104.

36. So much so that when I began teaching private international law in the part-time LL.M. program at Osgoode Professional Development in the late 1990s, I would survey the incoming class to find out: (a) who had taken a course on the subject in law school; and (b) who had taken the course as a subject in law school in the previous decade — on the premise that in either case, so much had changed that it would necessary to “begin at the beginning.”

37. See above, *supra*, footnote 28; Interestingly, this trend has not been confined to the Supreme Court of Canada. In *Wong v. Lee* (2002), 58 O.R. (3d) 398, 211 D.L.R. (4th) 69 (C.A.), the Court of Appeal for Ontario opted to return to a more restrictive interpretation of the flexibility permitted in the Supreme Court decision in *Tolofson*, *supra*, footnote 20, on the question of choice of law in tort than it had taken in *Hanlan v. Sernesky* (1998), 38 O.R. (3d) 479, 78 A.C.W.S. (3d) 484 (C.A.), affg 35 O.R. (3d) 603, 73 A.C.W.S. (3d) 936 (Gen. Div.).

38. Although the standard for the necessary connection is a “real and substantial”

judgments against non-local defendants who have not consented to the forum has not, so far, been moderated to address the concerns arising from judgments markedly different from those that could be anticipated in default proceedings in Canada.³⁹ Under these circumstances, it would seem that no claim, regardless how small or frivolous, can safely be left to go undefended, even in a jurisdiction where a meritorious defence seems likely to fail or the costs of a successful defence are unrecoverable. The, as yet, largely unexplored extension of this generosity to foreign non-monetary judgments⁴⁰ exacerbates the concerns it creates.

One can only imagine that the liberalization of the rules for recognizing foreign judgments is the product of a vision of international judicial relations under the auspices of comity in which all civil justice systems closely resemble our own, or, at least, that they must be treated that way. I will consider further, in the third part of this article, the extent to which this might be idealism or a vestige of the previous formalism that has yet to be revisited.

III. CONVERGENCE: INTERNATIONAL AND INTERPROVINCIAL

1. What's so Great about Uniformity? (Black)

As with many other aspects of Canadian private international law, much changed in the realm of judicial jurisdiction with *Morguard*.⁴¹ That case established a constitutional constraint on the extraterritorial assertion of jurisdiction by the provinces' courts. Such assertions must be fair and orderly.

That seems simple enough. Two decades later, however, key questions about this new limit remain unanswered. Currently the most high-profile of these relates to the standard judges must employ to gauge the values of order and fairness: the real and substantial connection test. Many courts have wrestled with this, most prominently the Ontario Court of Appeal in *Muscutt*.⁴² While

connection, this has been interpreted in many provinces as a relatively low threshold that is then adjusted by the court's discretion to decline jurisdiction on grounds of *forum non conveniens*. However, the exercise of discretion to decline or to refuse to decline jurisdiction is not reviewable at the enforcement stage (see *Canada Post Corp. v. Lépine*, [2009] 1 S.C.R. 549, 304 D.L.R. (4th) 539 *sub nom. Société canadienne des postes v. Lépine*). Accordingly, a connection that would not be regarded as sufficient to exercise jurisdiction by a Canadian court could, nevertheless, be sufficient for a judgment that would be enforceable in Canada.

39. *Beals*, *supra*, footnote 9.

40. See *supra*, footnotes 15-19 and accompanying text.

41. *Supra*, footnote 4.

42. *Muscutt*, *supra*, footnote 22.

influential, that decision was not universally welcomed,⁴³ prompting a revisiting and retuning of the *Muscutt* test in 2010.⁴⁴ While some of the battles over the substantial connection criterion may seem like mere academic skirmishes, there are real differences among the provinces with respect to what exercises of adjudicatory jurisdiction are permitted under this yardstick. The most prominent of these is “touristic jurisdiction.” Some provinces — Ontario and Nova Scotia, for instance — think that their residents can visit or work in another land, get tortiously injured there, return home to convalesce and then sue the tortfeasor in the province of their convalescence.⁴⁵ Some other provinces think this goes too far. British Columbia and Newfoundland and Labrador apply the real and substantial connection test in such a matter as to afford defendants protection against such exercises of judicial power.⁴⁶

While the Supreme Court of Canada is now poised to sort this out,⁴⁷ this is ultimately just a matter of line drawing. I focus here on more fundamental features that have come to characterize thinking about the territorial jurisdiction of Canada’s courts. The shift to a consequentialist orientation has already been noted. Within this orientation I observe two other features. The first is an increased attention by judges and legislators to the way jurisdiction is exercised by courts around the world. Canada is participating in a developing international consensus about those standards. The second is the homogenization of jurisdictional practice within Canada. Uniformity is emerging as an explicit desideratum, and the variation that is permitted by provincial authority over the administration of justice is coming to be regarded as pernicious.

Before exploring those themes I bring on stage one other development in the field of court jurisdiction — a statute. The Uniform Law Conference of Canada has long been active in the

43. See in particular the criticisms J. Blom and E. Edinger, “The Chimera of the Real and Substantial Connection Test” (2005), 38 U.B.C.L. Rev. 373, and T. Monestier, “A ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2007), 33 Queen’s L.J. 179, and *Stanway v. Wyeth Canada Inc.* (2009), 314 D.L.R. (4th) 618, 2009 BCCA 592, leave to appeal to S.C.C. refused 317 D.L.R. (4th) vii, [2010] S.C.C.A. No. 68.

44. *Van Breda*, *supra*, footnote 20.

45. *Ibid.*; *Muscutt*, *supra*, footnote 22; *Penny (Litigation Guardian of) v. Bouch* (2009), 310 D.L.R. (4th) 433, 2009 NSCA 80, leave to appeal to S.C.C. refused 314 D.L.R. (4th) vi, [2009] S.C.C.A. No. 379.

46. *Roed v. Scheffler*, 2009 BCSC 731, 178 A.C.W.S. (3d) 783; *Broman v. Machida Mack Shewchuk Meagher LLP*, 2010 BCSC 760, 189 A.C.W.S. (3d) 702; *Fewer v. Ellis*, 2010 NLTD 35, 295 Nfld. & P.E.I.R. 32.

47. I refer to its July 2010 decision to entertain appeal in *Van Breda*, *supra*, footnote 20.

enforcement of foreign judgments. That continued after *Morguard*, with the promulgation of uniform legislation dealing with recognition of judgments both within Canada and from foreign countries.⁴⁸ But *Morguard* also prompted something new from the ULCC: the Court Jurisdiction and Proceedings Transfer Act (CJPTA), a model statute dealing comprehensively with the territorial jurisdiction of the provinces' courts.⁴⁹ CJPTA, in force in three provinces and on its way in others,⁵⁰ is largely a consolidation and restatement of standards long found in the common law and rules of court, as conditioned by *Morguard*'s substantial connection test. In that respect the divide between those provinces that have adopted CJPTA and those that retain their jurisdictional law in rules of practice and the common law is not especially sharp, and generalizations can still be made about the jurisdiction of the common law provinces.

However, CJPTA also brought some innovations. The most important of these was the abandonment of tag jurisdiction — jurisdiction based solely on service on the defendant while present within the territory of the court.⁵¹ Although such an exercise of judicial power was acknowledged as legitimate in *Morguard*,⁵² there is an emerging consensus around the world that jurisdiction based on this and nothing more is unfair. What is needed, if jurisdiction is to be based on a connection between the court and the defendant, is some stronger affiliation between defendant and forum — namely residence, which is what CJPTA has adopted.⁵³

Elimination of tag jurisdiction is not the only respect in which CJPTA demonstrates influence by developments beyond Canada's borders. As the Supreme Court of British Columbia noted earlier this year in *Josephson v. Balfour Recreation Commission*, CJPTA's new forum of necessity provision "was drawn from article 3 of the Swiss Federal Code on Private International Law."⁵⁴ In addition, the whole of Part 3 of CJPTA, which establishes a system for transferring ongoing litigation between provinces, is based closely on a model act promulgated by the ULCC's American

48. See *supra*, footnote 13.

49. Uniform Law Conference of Canada, *Proceedings of the Seventy-Sixth Annual Meeting* (Ottawa, Uniform Law Conference of Canada, 1994), at p. 140.

50. Saskatchewan (S.S. 1997, c. C-41.1), British Columbia (S.B.C. 2003, c. 28) and Nova Scotia (S.N.S. 2003 (2nd Sess.), c. 2).

51. As in *Doyle v. Doyle* (1974), 52 D.L.R. (3d) 143, 6 Nfld. & P.E.I.R. 110 (Nfld. S.C.).

52. *Supra*, footnote 4, at pp. 1103-1104 (S.C.R.).

53. CJPTA, *supra*, footnote 49, at s. 3(d).

54. *Josephson (Litigation Guardian of) v. Balfour Recreation Commission*, 2010 BCSC 603, 188 A.C.W.S. (3d) 695, at para. 86.

counterpart, the National Conference of Commissioners on Uniform State Legislation. Attention to the international scene is not confined to CJPTA. It is found in the *Muscutt* test for giving content to the real and substantial connection test, and was expressly preserved in *Muscutt*'s 2010 reformulation in *Van Breda*. There the court insisted that, in assessing the propriety of an Ontario court's assertion of jurisdiction in a given case, it would be "helpful to know how foreign courts treat like cases."⁵⁵

The second emerging feature of both legislative and judicial thinking about court jurisdiction is that differences among the provinces should be eliminated, or at least minimized. Perhaps the clearest statement of this is the commentary to *CJPTA*, which lists a primary goal of that statute as being "to replace the widely different jurisdictional rules currently used in Canadian courts with a uniform set of standards for determining jurisdiction . . ."⁵⁶ The commentary goes on to offer one, and just one, reason why uniform rules on court jurisdiction is a desideratum: it is an "essential complement"⁵⁷ to the compulsory intra-Canadian enforcement of judgments that emerges from *Morguard*.

The striving for uniformity is not limited to *CJPTA*. In *Van Breda* the Court of Appeal for Ontario modified the law of that province with the express goal of bringing "Ontario law into line with the emerging national consensus on appropriate jurisdictional standards."⁵⁸ It adopted the concept of the forum of necessity found in s. 6 of *CJPTA* and art. 3136 of the Québec Civil Code and it borrowed *CJPTA*'s notion of category-based presumptions of legitimate jurisdiction. The principal justification offered for this was that "it would bring Ontario into line with one of the central features of *CJPTA*."⁵⁹

There is no space here for extended commentary on these trends, but a couple of questions may be raised. The first relates to the unilateral nature of Canada's participation in the developing international harmony on jurisdiction. While there is no doubt that such a consensus is forming, both in academic writing and multilateral conventions, what distinguishes its implementation here is that those provinces that have brought *CJPTA* into force have

55. *Van Breda, supra*, footnote 20, at para. 107.

56. *CJPTA, supra*, footnote 49, Commentary, at p. 141. For extended argument in favour of uniformity see J. Walker, "Must there be Uniform Standards for Jurisdiction within a Federation?" (2003), 119 *Law Q. Rev.* 567.

57. *Ibid.*

58. *Van Breda, supra*, footnote 20, at para. 69.

59. *Ibid.*, at para. 74.

unilaterally abjured a long-standing basis of jurisdiction. When the United Kingdom dropped tag jurisdiction by entering the Brussels regime it received a *quid pro quo*: other European Union countries eliminated their exorbitant bases of court jurisdiction against U.K. residents. That is, in Europe the new consensus about jurisdiction was implemented by way of a mutually agreed upon restraints. With CJPTA there was no comparable trade-off — apart, that is, from such satisfaction that Canadians may gain from knowing that by eliminating tag jurisdiction they are pursuing a fairer, more internationally-approved approach to the proper limits of adjudicatory power.

As far as uniformity goes, the obvious question is, what about the countervailing virtues of federal variety which would allow for expression of regional differences? It is obvious that the substantial connection test, as a constitutional standard, should be applied uniformly across the country. But that test is simply a limit. The value of uniformity within that limit is another matter, neither constitutionally compelled nor obviously beneficial. *Morguard* forged a link between its lowered barriers to enforcement of Canadian judgments and its new check on jurisdiction. If the provinces were to be compelled to recognize one another's judgments then there had to be constraints on the power that gave rise to those judgments. But that does not mandate uniformity of jurisdictional practice among the provinces. This can be seen from a glance at the American model expressly referred to in *Morguard*. There the full faith and credit clause of the federal constitution mandates free flow of sister-state judgments.⁶⁰ As a corollary, the due process clause constrains jurisdiction.⁶¹ Crucially, however, the due process clause has never been interpreted so as to require all the states to adopt identical rules of court jurisdiction. Within the limit set by that standard American states exercise a variety of long-arm rules.

This could be so in Canada, but CJPTA's claim that uniformity is "essential" is gaining wide currency. Decisions like *Van Breda*, without any articulation of the supposed harms that might flow from provincial variety of jurisdictional practice, have pursued uniformity as a proclaimed goal. Modifying judge-made law to conform to another jurisdiction's statute, as the *Van Breda* court did, seems commendable if the statute can be shown to be a good thing.

60. *Morguard*, *supra*, footnote 4, at pp. 1098 and 1102 (S.C.R.), pp. 270 and 273 (D.L.R.).

61. *Ibid.*, at pp. 1109-1110 (S.C.R.), pp. 278-279 (D.L.R.).

Doing so only in the name of interprovincial uniformity is something else again.

2. Consistency if Necessary but not Necessarily Consistency (Walker)

Like Vaughan Black, I too would say that one of the most significant developments in the last few decades has been the interest in harmonizing jurisdictional standards with other countries and within Canada. I would also agree that harmonization ought not to be treated as a desideratum that gives rise to the need to change rules for the sake of uniformity without regard to the implications of the proposed changes.

However, I am less troubled by the interest in harmonization than Black seems to be. There may be benefits to the potential for innovation, both within a federation and across legal systems, and this will necessarily create inconsistencies in the law of jurisdiction. Sometimes, those innovations, such as forum of necessity jurisdiction, will come to be embraced by other jurisdictions. However, it is also the case that when comparative analysis reveals a jurisdictional basis to be an outlier, it may be good to reconsider its role in supporting the needs of the legal system. The fact that it is anomalous may signal the need for reconsideration.⁶²

For example, in the case of presence-based jurisdiction, a robust doctrine of *forum non conveniens* had already all but eliminated its practical scope in the extreme cases of tag jurisdiction.⁶³ As a result, its formal elimination in the jurisprudence seemed likely to come only by way of *obiter* comments, as it did in the Supreme Court's decision in *Beals*.⁶⁴

In replacing *presence* with *residence* as the standard for jurisdiction in the defendant's forum, it remains to be clarified whether *residence* is intended to refer to a single place, or whether it

62. Whether "uniformity" among Canadian provinces should follow the approach taken in U.S. federalism, with its margin of appreciation pursuant to the "due process" standards (under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)), or the seemingly more strictly enforced harmonization pursuant to the recent jurisprudence of the European Court of Justice (e.g., *Owusu v. Jackson* (2005), Case C-128/01), is a larger question for Canadian federalism than could be addressed here: J. Walker, "The Constitution of Canada and the Conflict of Laws" (D. Phil Thesis, University of Oxford, 2001) [unpublished].

63. Jurisdiction based on transient presence (*Maharanees of Baroda v. Wildenstein*, [1972] 2 Q.B. 283, [1972] 2 All E.R. 689 (C.A.)) is described in the American jurisprudence as "tag jurisdiction" (*Burnham v. Superior Court of California*, 495 U.S. 604 (1990)).

64. *Supra*, footnote 9, at paras. 32 and 37.

could include several places. This will be particularly significant for corporate defendants, especially in view of the historical inclusion of the term of “carrying on business” in many of the rules for service out, and its importation into the CJPTA, the scope of which has been questioned.⁶⁵ If courts regard the fact that a defendant does some business in the forum as sufficient to support jurisdiction even where the claim has arisen elsewhere, this will result in a significant expansion of judicial jurisdiction — an expansion that would be at odds with prevailing international standards.⁶⁶

Picking up on Black’s astute observation that “touristic” jurisdiction has become a prominent example of divergence in the law from one part of Canada to another, I would add that I am less confident that it marks a genuine divergence in local policies in various regions so much as it represents an area of persistent debate and uncertainty. An area of similarly persistent debate has been that of interprovincial medical malpractice claims in which the concern to provide access to justice for those whose financial and physical health prevent them from traveling to pursue their claims is pitted against the disruption to the practices of doctors who, as a result, might have to travel to defend against such claims.⁶⁷ Where such

65. *Williams v. TST Porter*, 2008 BCSC 1315, 87 B.C.L.R. (4th) 179; *Purple Echo Productions, Inc. v. KCTS Television*, 2006 BCSC 1653, 61 B.C.L.R. (4th) 166, rev’d on other grounds 165 A.C.W.S. (3d) 456, 2008 BCCA 85.
66. Paul Dubinsky, “The Reach of Doing Business Jurisdiction and Transacting Business Jurisdiction Over Non-U.S. Individuals and Entities” (New York, New York Law School, 1998), online: United States State Department <www.state.gov/www/global/legal_affairs/dubinsky.html>.
67. See, e.g., Josephson, *supra*, footnote 54; *Kahlon v. Cheecham*, [2010] O.J. No. 1584, 2010 ONSC 1957; *Evans (Litigation Guardian of) v. Canil*, [2009] O.J. No. 3600, 82 C.P.C. (6th) 216 (S.C.J.); *Penny*, *supra*, footnote 45; *Bartz v. Canadian Baptist Bible College Inc.*, [2009] N.S.J. No. 163, 2009 NSSC 115; *O’Connor v. Chapman*, [2007] B.C.J. No. 2986, 2007 BCSC 657; *Mueller v. Resort Investors International, ulc*, [2006] O.J. No. 4952, 153 A.C.W.S. (3d) 1093 (S.C.J.); *Miller v. Harding*, [2006] O.J. No. 3412, 150 A.C.W.S. (3d) 816 (S.C.J.); *Sampson v. Olsen*, [2005] S.J. No. 751, 2005 SKQB 501; *Deakin v. Canadian Hockey Enterprises*, [2005] O.J. No. 705, 7 C.P.C. (6th) 295 (S.C.J.); *Georges v. Basilique de Sainte-Anne-de-Beaupre*, [2004] O.J. No. 3762, 7 C.P.C. (6th) 205 (S.C.J.); *Markandu (Litigation Guardian of) v. Benaroch* (2004), 71 O.R. (3d) 377, 242 D.L.R. (4th) 101 (C.A.); *Armstrong v. Servier Canada Inc.*, [2002] B.C.J. No. 1939, 2002 BCSC 1248; *Leufkens v. Alba Tours International Inc.*, [2002] O.J. No. 2129, 213 D.L.R. (4th) 614 (C.A.), *supp. reasons* 213 D.L.R. (4th) 661; *Lemmex v. Bernard*, [2002] O.J. No. 2131, 213 D.L.R. (4th) 627 (C.A.); *Sinclair v. Cracker Barrel Old Country Store, Inc.*, [2002] O.J. No. 2127, 213 D.L.R. (4th) 643, *supp. reasons* 213 D.L.R. (4th) 661 (C.A.); *Muscutt*, *supra*, footnote 22; *O’Brien v. Canada (Attorney General)*, [2002] N.S.J. No. 57, 210 D.L.R. (4th) 668, *leave to appeal to S.C.C. refused* 217 D.L.R. (4th) vi, [2002] S.C.C.A. No. 155 *McNichol Estate v. Woldnik*, [2000] O.J. No. 5027, 52 O.R. (3d) 49 (S.C.J.), *aff’d* 13 C.P.C. (5th) 61, 108 A.C.W.S. (3d) 274 (C.A.), *leave to appeal to S.C.C. refused* [2002] 2

jurisdictional questions resist resolution even through the most skilful handling in the jurisprudence, it may be wondered whether answers might better be sought in context-specific doctrines or legislation than in the continued refinement of common law rules of general application.

3. Why Jurisdiction *Simpliciter* Matters (Blom)

I agree with Vaughan Black's argument that securing uniformity of jurisdictional rules among the provinces and territories is not of itself a crucial goal. And, for the foreseeable future, it will not be achieved from sea to sea, because the rules for territorial competence in the Civil Code of Québec⁶⁸ are quite different from those in the other provinces, and the role of *forum non conveniens*, as enshrined in the Code,⁶⁹ may be somewhat different, too.⁷⁰

Although the rules of jurisdiction *simpliciter* consume a lot of judicial and scholarly ink, it is worth asking how significant they really are. In cases where the defendant disputes jurisdiction it hardly matters in practical terms what the rules are, because the

S.C.R. viii; *Bulloch-MacIntosh v. Browne*, [1998] O.J. No. 5684, 84 A.C.W.S. (3d) 674 (Gen. Div.); *Oakley v. Barry*, [1998] N.S.J. No. 122, 158 D.L.R. (4th) 679 (C.A.), leave to appeal to S.C.C. refused 175 N.S.R. (2d) 400n, 233 N.R. 397n; *Dennis v. Salvation Army Grace General Hospital*, [1997] N.S.J. No. 19, 156 N.S.R. (2d) 372 (C.A.), leave to appeal to S.C.C. refused 163 N.S.R. (2d) 79n, 223 N.R. 77n; *Hunt v. Durdle*, [1996] N.S.J. No. 327, 153 N.S.R. (2d) 223 (S.C.); *Quaia v. Sweet*, [1995] A.J. No. 576, 30 Alta. L.R. (3d) 365 (Q.B.); *MacDonald v. Lasnier*, [1994] O.J. No. 2923, 21 O.R. (3d) 177 (Gen. Div.); *Kelly v. K Mart Canada Ltd.*, [1994] B.C.J. No. 1098, 47 A.C.W.S. (3d) 1195 (S.C.); *Monahan (Guardian ad Litem of) v. Trahan*, [1992] N.S.J. No. 456, 36 A.C.W.S. (3d) 767 (S.C.T.D.); *Clark v. Naqvi*, [1989] N.B.J. No. 1003, 63 D.L.R. (4th) 361 (C.A.); *Robinson v. Warren*, [1982] N.S.J. No. 34, 55 N.S.R. (2d) 147 (S.C.A.D.).

68. *Supra*, footnote 1, at arts. 3134 to 3151.

69. *Ibid.*, at art. 3135.

70. *Ibid.*, at art. 3135, which refers to the "exceptional" character of the discretion and this word was emphasized by the court in *Spar Aerospace Ltd.*, *supra*, footnote 25, at para. 77. Although the court saw this character reflected in case law from common law jurisdictions, notably *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96, the practice of the common law courts in the last couple of decades has not reflected a view that declining jurisdiction is "exceptional." There may, however, be straws in the wind of a trend in that direction; see *Young v. Tyco International of Canada Ltd.* (2008), 300 D.L.R. (4th) 385, 2008 ONCA 709, at para. 28 ("the standard to displace the plaintiff's chosen jurisdiction is high," *per* Laskin J.A.); *Purple Echo Productions, Inc. v. KCRS Television*, 2008 BCCA 85, 76 B.C.L.R. (4th) 21, at para. 59 ("the *prima facie* entitlement of [the plaintiff] to its chosen forum," *per* Chiasson J.A.). Compare *Olney v. Rainville*, 2009 BCCA 380, 95 B.C.L.R. (4th) 118, at para. 42.

forum non conveniens discretion is ultimately the deciding factor.⁷¹ Nevertheless, the content of the rules is important. In cases in which the defendant does not appear, the substantive jurisdiction *simpliciter* rules and the associated procedural rules control the plaintiff's access to a default judgment. If courts grant default judgments against non-resident defendants on too thin bases of jurisdiction, the result may be out of keeping with standards of justice generally accepted elsewhere. Canadian courts will be seen as overreaching. If the judgment debtor has assets in the originating Canadian jurisdiction they will be exposed to seizure on inadequate grounds.

Then there is the question of the judgment creditor's ability to enforce the judgment elsewhere. Within Canada, in the provinces that have enacted the uniform Enforcement of Canadian Judgments and Decrees Act, the judgment is enforceable without the defendant's having any right to raise the original court's lack of jurisdiction.⁷² Even elsewhere in Canada it will be difficult to challenge the originating court's jurisdiction. If the rules of the originating court for jurisdiction *simpliciter* satisfy minimum constitutional requirements, a court in another province has no choice but to recognize it since the minimum standard of jurisdiction for recognition purposes is the same. As for courts in other nations, the fact that they may choose not to recognize the judgment is more than just a problem for the judgment creditor; it also has broader implications for the reputation of the Canadian legal system in the courts of other countries.⁷³

One potentially important development is the gradual emergence of a distinction between the regular rules of jurisdiction and the exceptional possibility of a "forum of necessity" that can also support jurisdiction *simpliciter*. The latter concept, as Black notes above, is found in the Civil Code of Québec,⁷⁴ the CJPTA,⁷⁵ and now, if this aspect of *Van Breda*⁷⁶ stands, in the common law (and,

71. In *Spar Aerospace Ltd.*, *supra*, footnote 25, at para. 57, the court portrayed art. 3135, the *forum non conveniens* discretion, as an integral part of the means by which the jurisdictional rules in the Civil Code of Québec ensure that the real and substantial connection is satisfied.

72. *Supra*, footnote 13.

73. "I reject the surprisingly insular argument made by some scholars that we should ignore foreign law when considering and applying the real and substantial connection test": *Van Breda*, *supra*, footnote 20, at para. 107, *per* Sharpe J.A.

74. *Supra*, footnote 1, at art. 3136.

75. CJPTA, *supra*, footnote 49, at s. 6.

76. *Supra*, footnote 20, at para. 100.

presumably, constitutional law)⁷⁷ of jurisdiction. If this distinction develops further, we may see further moves to streamline⁷⁸ the regular rules for jurisdiction *simpliciter* for the sake of cutting down the scope for jurisdictional contests, even at the price of not occupying every nook and cranny of the available constitutional room. The forum of necessity would become the means of dealing with the marginal but nevertheless compelling cases.

IV. BECOMING MORE WORLDLY IN A CHANGING WORLD

1. The Subject Matter has Changed, but Has the Subject . . . and Have We? (Walker)

To round out this trilogy of reflections on the most significant developments and trends over the past four decades, I will highlight the changing nature of the cross-border disputes in which conflict of laws issues arise as a significant agent for change in the subject. And to the extent that the world in which the conflict of laws operates has evolved, I will ask whether our evolving approach to the subject has kept pace with it.

It has been my impression that the conflict of laws is a world that was once dominated by family law matters and more generally by questions of choice of law and it is now concerned more with a fuller range of private law matters, one that more closely reflects the spectrum of disputes in local cases, and more generally with questions of jurisdiction and judgments. To determine whether this is more than mere conjecture, I decided to compare the leading casebooks on the subject. There may be little scientific validity in a study based on comparing casebooks, but this is the way that the subject is presented to students and to non-specialists, and, accordingly, it is one reflection of the way in which we understand it. I compared the leading Canadian casebook in 1970 (a work published in 1968),⁷⁹ with the leading Canadian casebook in 2010.⁸⁰

77. The constitutional viability of the “forum of necessity” concept is untested, but the emphasis in the leading Supreme Court cases on “order and fairness” as the dominant considerations in jurisdiction *simpliciter* (see above, text accompanying footnote 11) suggests that it has a reasonable chance of surviving the test.

78. The CJPTA, *supra*, footnote 49, at s. 10, presumptions of a real and substantial connection, which were taken up in *Van Breda, supra*, footnote 20, at paras. 72 to 80, can be seen as an initial streamlining.

79. J.-G. Castel, *Canadian Conflict of Laws: Cases, Notes and Materials*, 2nd ed. (Toronto, Butterworths, 1968).

80. Nicholas Rafferty, et al., eds., *Private International Law in Common Law Canada: Cases, Text, and Materials*, 3rd ed. (Toronto, Emond Montgomery, 2010).

Interestingly, the books were of similar length — 1096 pages in 1968 and 1066 in 2010,⁸¹ but the contents were quite different. In 1968 family law subjects occupied 278 pages out of 619 pages concerning the special rules applicable to the various areas of private law. This compared with the situation in 2010 in which family law subjects occupied 148 pages out of 439 concerning the various areas of private law. In other words, by this measure, family law once occupied 45% of the space devoted to the various areas of private law and it now occupies only 34%. The focus on family law among the areas of private law is considerably less than it once was.

The impression concerning the overall extent of attention paid to the particular areas of private law compared with the other subjects combined was also borne out. In terms of the pages occupied by each, the ratio has gone from 619-477 pages or 56-44% in 1968 in favour of areas of private law to 439-627 pages or 41-59% in 2010. If pages were votes in an election, we might say that the particular areas of private law in the subject as a whole had gone from a majority to a minority position.

Conversely, the increase in the space allotted to jurisdiction and judgments was also significant. The 149 pages devoted to these subjects in 1968 grew to 314 pages in 2010. In other words, where only 14% of the subject as a whole was once concerned with jurisdiction and judgments, the portion of the subject as a whole has since increased to 29%.

But it is the direct comparison between the relative allocations of pages to the two subjects that is the most striking. By 2010, the 278 pages allotted to family law in comparison with the 149 pages allotted to jurisdiction and judgments in 1968 had become 148 pages for family law in comparison with the 439 pages for jurisdiction and judgments in 2010. Not only has the strong emphasis shifted from one to the other, but also the differential between them has increased, despite the slight reduction in the overall page-length of the book. What was once a little more than twice as much space devoted to family law has become three times as much devoted to jurisdiction and judgments.

Has this shift in the kinds of cases and issues addressed, possibly reflecting a changing world in which the conflict of laws operates, changed the conflict of laws itself? Could it help to explain some of the observations made by Blom and Black? And could it help to explain other impressions of the ways in which the subject has

81. This page count excludes the preliminary material and the index.

evolved and might evolve in the years ahead. I think the answer to these questions is “Yes.”

In the case of Blom’s observations that doctrine-driven, formalistic analysis had given way to more purposive, or functional and pragmatic analysis, there may be an explanation in the case law in which these approaches have been developed. The rights and obligations of parties to family law disputes were once subject to rather formalistic analyses (in tension with public policy interventions) even in local cases; and family law disputes often arose from decisions made without regard to their potential legal consequences. For example, one would not expect a conflict of laws issue arising from a couple’s decision to relocate to another country or to seek a divorce in a place other than the place in which they were married to have been anticipated and to have been the subject of deliberate choices in the way that one might hope would be the case for a large international business relationship—even if the impact of the outcome on the parties in both cases was significant. An approach to conflict of laws analysis that was based on a wider range of cases might tend to reflect less a tension between formalistic reasoning and equitable exceptions and more a legal framework intended to foster purposive decisions in respect of the cross-border issues that might arise.

And, in the case of convergence, as discussed by Black, to the extent that the case law on which the doctrine is developed reflects a reduced proportion of cases giving rise to areas of significant local policy related to diverse cultural norms, the rules may naturally tend to converge. Moreover, the interest in promoting convergence to facilitate cross-border dealings may also be more evident.

But what does it mean to say that this changing world could create the need to become more worldly? Many things, but the short space remaining permits me to mention only two. First, as consumers and small businesses increasingly enter into the global marketplace for goods and services, the challenge of adapting the perspective of the conflict of laws to deal with the participation of this new sector of the economy will require a host of changes. Rules made with sophisticated parties in mind, parties who benefit from legal advice and representation tailored to the particular transaction or relationship, may need to give way, or to be supplemented by rules that serve the needs of those with less sophistication and those who are less likely to benefit from such resources. Rules that take party autonomy for granted may need to be refashioned into rules that encourage party autonomy but otherwise support the reasonable

expectations of persons who have not negotiated specialized terms for their dealings. And, perhaps even greater challenges will be posed by the blurring of distinction between the two groups — consumers and commercial parties (*e.g.*, Is a person who buys a basic computer online for a home office a consumer or a business?).⁸² And still greater challenges will be posed by the irresistible force/immovable object clash between the imperatives of inconsistent international obligations, such as those of the New York Convention,⁸³ and mandatory laws, such as those based on the European Council Directive on Commercial Agents,⁸⁴ that are designed to protect consumers and small businesses.⁸⁵

Second, becoming more worldly will mean recognizing that not all judicial systems are like our own. In countries like Canada that have high regard for their civil justice system and for their willingness to eschew parochialism, it is difficult to imagine allowing for differences in other legal systems without engaging in criticism of them. In procedural matters, it is difficult to imagine allowing for hardships and injustices that could occur by reason of the cross-border nature of a matter even if the legal system on each side of the border is internally beyond reproach. And yet the failure to do so could give rise to a range of difficulties for defendants required to travel to defend against any and all claims regardless of the size or merit lest they be enforceable judgments of amounts unmitigated by their participation in the proceeding.⁸⁶ In substantive matters, it is difficult to imagine permitting important local policies to supersede those that would otherwise apply by reason of ordinary choice of law principles. And yet the failure to do so means either compromising such policies, or cloaking their vindication in the less than candid characterization of the matter as one of “procedure.”⁸⁷

82. *Dell Computer Corp. v. Union des Consommateurs*, [2007] 2 S.C.R. 801, 284 D.L.R. (4th) 577, 2007 scc 34.

83. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [1986] Can T.S. No. 43, 330 U.N.T.S. 3, adopted June 10, 1958 in New York.

84. Commercial Agents (Council Directive) Regulations 1993 (EU Council Directive 86/653/EEC).

85. *Accentuate Ltd. v. Asigra*, [2009] EWHC 2655, [2009] 2 Lloyd's Rep. 599 (Q.B.).

86. J. Walker, “Striking the Comity Balance Anew” (2002), 5 Can. Intl. Law. 28.

87. Such as characterizing limitation periods as a matter of procedure: “*Courts should apply local procedural law*. Limitations law is based on a foundation of legal philosophy and concepts of fairness. 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 claimants and defendants.” Alberta Law Reform Institute, *Limitations*, Report No. 55 (Edmonton, The

The Supreme Court of Canada has shown valour in discretion by tailoring its reasons on at least two occasions recently to avoid sweeping rulings that might have unnecessarily broad implications and unintended consequences.⁸⁸ On both occasions, the foreign legal systems in which differences from our own might have prompted such caution were among those with which we have the greatest familiarity — legal systems in the United States. Perhaps one measure of worldliness that might guide our evolving understanding of comity in the years ahead is appreciating that, in dealings with good neighbours, not only that there are bases for agreement, but also for principled differences.

2. What's Up, What's Down in Conflicts (Blom)

Janet Walker is quite right to point to the fact that Canadian private international law has changed in vital ways due to shifts in the kind of interjurisdictional legal issues that are litigated. Teaching the subject today, I spend far more time on jurisdiction and foreign judgments than I did when I started teaching the subject in 1972, and far less time on choice of law. This is partly because *Morguard*⁸⁹ and subsequent Supreme Court of Canada cases have created a whole new law of jurisdiction and foreign judgments, as discussed in Vaughan Black's and my portions of this paper. But it is also because choice of law has shrunk in importance. Family law, as Walker notes, features far less in the cases, and this is especially true of the choice of law side. This is partly because, in the last 40 years, Canadian domestic law has been liberalized both in the law of marriage⁹⁰ and divorce,⁹¹ and the rules for recognizing foreign divorces, which used to be an enormous problem, has now been eased by statute⁹² to the point where very few recognition cases are taken to court.

Also important in the changing landscape is the greater role of international conventions. What used to be particularly troublesome areas have been addressed by internationally coordinated law reform. The problem of how to deal with custody fights, when children have been brought into or kept in the province

Institute, 1989), p. 98, discussed in *Castillo v. Castillo* (2005), 260 D.L.R. (4th) 439, 2005 scc 83.

88. *Pro Swing Inc.*, *supra*, footnote 15; *Teck Cominco*, *supra*, footnote 23.

89. *Supra*, footnote 4.

90. The prohibited degrees are now confined to siblings, half-siblings, and persons who are lineally related: Marriage (Prohibited Degrees) Act, S.C. 1990, c. 46.

91. Divorce Act, *supra*, footnote 3.

92. *Ibid.*, at s. 22.

to avoid the jurisdiction of another country's court, has been greatly reduced in scope by the beneficial effect of the Hague Convention on Child Abduction.⁹³ In commercial areas, too, international conventions or régimes cover much more ground than they used to. Judicial co-operation in cross-border insolvencies, for example, has now been strengthened and facilitated by amendments to Canadian bankruptcy law⁹⁴ that are based on an UNCITRAL Model Law.⁹⁵ International conventions now provide uniform rules for litigation arising out of contracts of international carriage of passengers and goods by sea⁹⁶ and by air.⁹⁷ Although it has resulted from convergence rather than from agreement, personal property security legislation has become much more uniform across Canada and as between Canada and the United States.

Now and then, any conflicts teacher gets a twinge of apprehension that the entire subject may be obsolescent. A vision rises before his or her eyes of inter-jurisdictional problems all getting worked out as domestic legal régimes become more similar, remaining differences are smoothed out by internationally agreed rules, and courts become more adept at handling the few cases that still need to be brought before them. Happily, however, for those who love the subject, this vision is still far from being realized. As Walker notes, the regulatory state and new kinds of cross-border activity continue to throw up new challenges. To name just one instance, the novel phenomenon of competing class actions with overlapping multi-jurisdictional classes, which the Supreme Court of Canada has notably highlighted,⁹⁸ has opened up a whole new frontier to be explored.

3. Our American Friends (Black)

It is clear that alterations in the types of cases that tend to get litigated can alter the configuration of fields of law. In addition to the shift pointed out by Janet Walker, a striking feature of important

93. Hague Convention on the Civil Aspects of International Child Abduction (1980, 1983] Can. T.S. No. 35, 1343 U.N.T.S. 22514, which is law in every Canadian jurisdiction; see, e.g., Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 46. Québec passed an Act paralleling the convention while extending its rules to interprovincial cases: An Act respecting the civil aspects of international and interprovincial child abduction, R.S.Q., c. A-23.01.

94. Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as am., Part XIII (added in 1997 and 2005).

95. UNCITRAL Model Law on Cross-Border Insolvency (1997), online: UNCITRAL <<http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf>>.

96. Marine Liability Act, S.C. 2001, c. 6.

97. Carriage by Air Act, R.S.C. 1985, c. C-26, as am.

98. *Canada Post*, *supra*, footnote 38, at paras. 56-57.

cases in the conflicts over the past decade is not just that they involve a change from wholly intra-Canadian matters to international transactions, but that they involve a *particular* foreign country — the United States of America. The significant cases on enforcement of foreign-country judgments — *Beals*,⁹⁹ *Pro Swing*¹⁰⁰ and those at the provincial appellate level¹⁰¹ — all involve the United States. The same can be said for our leading decisions on co-ordinating international litigation, *Amchem*¹⁰² and *Teck Cominco*.¹⁰³

Considering the level of Canada-U.S. interaction, this is to be expected. Still, given that all of Canada big international conflicts cases seem to involve just one of the world's 200 countries — one which has a justice system that in many respects differs from those found elsewhere — it is worth pausing to speculate on how that situation may have distorted Canadian private international law.

Of course judge-made doctrine in this area does not draw distinctions depending on which foreign country we may be dealing with. We do not have one rule for enforcing American judgments and another for enforcing judgments from other countries; our choice-of-law rules may vary according to whether an intra-Canadian or international case is under consideration, but in the latter instance they do not alter according to which foreign country is involved. However, as the following words from a recent Ontario judgment reveal, courts in conflicts cases are not unaware of the special status of the United States.

Canada is a country closely tied to the United States in many ways. The U.S. is our closest neighbour and one of our largest trading partners. The flow of trade, commerce and people across our borders is immense and much has been done to facilitate this important relationship.¹⁰⁴

What is striking about this passage is not just its alignment with the role of private international law as a facilitator of international trade — that has become standard practice — but the singling out of the United States as unique.

99. *Supra*, footnote 9.

100. *Supra*, footnote 15.

101. *Old North State Brewing Co.*, *supra*, footnote 14; *United States of America v. Ivey* (1996), 30 O.R. (3d) 370, 139 D.L.R. (4th) 570 (C.A.), leave to appeal to S.C.C. refused [1997] 2 S.C.R. x, 145 D.L.R. (4th) vii; *Braintech, Inc.*, *supra*, footnote 12; *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, 250 D.L.R. (4th) 224 (C.A.); *United States of America v. Yemec* (2010), 320 D.L.R. (4th) 96, 2010 ONCA 414.

102. *Supra*, footnote 70.

103. *Supra*, footnote 23.

104. *Molson Coors Brewing Co. v. Miller Brewing Co.* (2006), 83 O.R. (3d) 331, 152 A.C.W.S. (3d) 418 (S.C.J.), Lederman J.

Canada puts considerable resources into organizations devoted to private international law, the chief two being The Hague Conference on Private International Law and UNCITRAL. These have yielded some results, yet it is in the nature of multilateral negotiations that things move slowly. Our sole bilateral treaty in this field, a judgment enforcement treaty with the United Kingdom,¹⁰⁵ is a little-used anachronism. It should, however, remind us of the role that bilateral arrangements can play. There was nothing in the Canada-U.S. Free Trade Agreement dealing with private international law. The matter has been left to judges, and as *Teck Cominco* and *Currie*¹⁰⁶ demonstrate, crafting Canadian conflict-of-laws doctrine to respond to the particular problems generated by the U.S. justice system can strain the institutional capacity of courts. It might be better if the non-judicial branches of Canadian government attended to these peculiar problems, leaving the courts with the job of sorting out the more traditional cases that arise from our interaction with the rest of the world.

105. The Canada-United Kingdom Civil and Commercial Judgments Convention Act, R.S.C. 1985, c. C-30, enacts this nationally, and it is implemented as well in provincial legislation.

106. *Supra*, footnotes 23 and 101 respectively.