THE DECONSTITUTIONALIZATION OF CANADIAN PRIVATE INTERNATIONAL LAW?

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I. INTRODUCTION

In the early 1990s, the Supreme Court of Canada handed down four incontestably significant decisions in the field of private international law: *Morguard Investments Ltd. v. De Savoye*,[1] *Amchem Products Inc. v. British Columbia (Workers Compensation Board)*,[2] *Hunt v. T&N plc*[3] and *Tolofson v. Jensen*.[4] Coming as they did after a lengthy period in which the Supreme Court had issued no major judgments in that field, these decisions constituted a radical reconfiguration of the subject. They addressed a broad range of topics: judicial jurisdiction, enforcement of judgments, provincial blocking statutes, *forum non conveniens*, antisuit injunctions, and choice of law in tort. Moreover, they did so in judgments characterized both by a willingness to reconsider previous case law in light of basic, structural principles, and by a wide-ranging scholarly and comparative analysis that took into account the economic requirements of a changing world trading order. In

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[1] [1990] 3 S.C.R. 1077 [hereinafter "*Morguard*"].

[2] [1993] 1 S.C.R. 897 [hereinafter "*Amchem*"]. This was the only one of the four in which someone other than La Forest J. wrote the judgment of the Court. *Amchem* was written by Sopinka J.

[3] [1993] 4 S.C.R. 289 [hereinafter "*Hunt*"].

[4] [1994] 3 S.C.R. 1022 [hereinafter "*Tolofson*"].

addition, they demonstrated a new preparedness to let constitutional concerns play an express role in the articulation of the rules of Canadian private international law. Constitutional law, both in the form of reference to the written terms of the federal constitution and by way of a general attention to the practical requirements of federal relations, had long played a fundamental role in private international law in the United States. But the same was not true in Canada before the Supreme Court's 1990 judgment in *Morguard*. In many respects, *Morguard* and its companion cases of the early 1990s seemed to constitutionalize the rules of private international law in Canada.

Following those four decisions, things on the private international law front became curiously quiet at the Supreme Court. The few decisions that were released by the Court in the field were circumscribed in scope and did not attempt to make significant changes in the law.[5] This is not because those four major decisions left the law clear, uncontroversial or lacking in questions of national importance. Indeed, those decisions so reshaped the field as to raise nearly as many important questions as they answered. They gave rise to a measure of uncertainty in practice and in scholarly debate, and to several not easily reconcilable rulings at the trial and appeal court level. Despite numerous applications for leave to appeal,[6] in the

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[5] See *Westec Aerospace Inc. v. Raytheon Aircraft Co.*, [2001] 1 S.C.R. iv; *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907; and *Antwerp Bulkcarriers, N.V. (Re)*, [2001] 3 S.C.R. 951.

[6] *Moses v. Shore Boat Builders Ltd.* (1993), 106 D.L.R. (4th) 654 (B.C.C.A.), leave to appeal to S.C.C. refused [1994] 1 S.C.R. xi [hereinafter "*Moses*"]; *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143 (C.A.), leave to appeal to S.C.C. refused [1997] 2 S.C.R. xiv; *United States of America v. Ivey* (1996), 30 O.R. (3d) 370 (C.A.), leave to appeal to S.C.C. refused [1997] 2 S.C.R. x [hereinafter "*Ivey*"]; *Mutual Trust Co. c. St-Cyr*, [1996] R.D.J. 623 (C.A.), leave to appeal to S.C.C. refused [1997] 1 S.C.R. xi; *Dennis v. Salvation Army Grace General Hospital* (1997), 156 N.S.R. (2d) 372 (C.A.), leave to appeal to S.C.C. refused [1997] 2 S.C.R. xiii; *Patterson v. Vacation Brokers Inc.* (1997), 100 O.A.C. 36 (C.A.), varied on reconsideration (1997), 103 O.A.C. 1 (C.A.), leave to appeal to S.C.C. refused [1998] 1 S.C.R. xv; *Cook v. Parcel, Mauro, Hultin & Spannstra, P.C.* (1997), 31 B.C.L.R. (3d) 24 (C.A.), leave to appeal to S.C.C. refused [1997] 2 S.C.R. vii; *Leonard v. Houle* (1997), 36 O.R. (3d) 357 (C.A.), leave to appeal to S.C.C. refused [1998] 1 S.C.R. xi; *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679 (N.S.C.A.), leave to appeal to S.C.C. refused [1998] 2 S.C.R. v; *Braintech Inc. v. Kostiuk*, [1999] 9 W.W.R. 133 (B.C.C.A.), leave to appeal to S.C.C. refused (2000), 182 D.L.R. (4th) vi; *Eastern Power Ltd v. Azienda Comunale Energia & Ambiente* (1999), 178 D.L.R. (4th) 409 (Ont. C.A.), leave to appeal to S.C.C. refused [2001] 1 S.C.R. xi;

latter half of the 1990s the Supreme Court of Canada did not pursue matters such as whether the real and substantial connection test applies to judgments from other countries as well as to those from other provinces, whether the real and substantial connection test replaces the rules for service out (or the provisions on the international authority of Québec courts found in the Québec Civil Code),[7] the relationship between jurisdiction *simpliciter* and *forum non conveniens*, or, indeed, the factors that go into determining whether the real and substantial connection test is satisfied.

Against that background, those who follow the development of private international law in Canada sat up and took note when in April 2001 the Supreme Court granted leave to appeal the decision of the Québec Court of Appeal in *Spar Aerospace Ltd. c. American Mobile Satellite Corp.*[8] *Spar* appeared to present the opportunity for the Court to resolve a number of the questions that had troubled practitioners and divided appeal courts in the late 1990s. Indeed, regardless of the result that the Supreme Court might reach in *Spar*, it was difficult to see how it could decide the case in a manner that would not reduce the uncertainties in Canadian private international law. However, it managed to do just that. The decision in *Spar*[9] shed little light on the important areas of uncertainty that had arisen from *Morguard* and the other major cases of the early 1990s, and it contrived to introduce some new ones. In this article, we review the three main findings in the judgment — those concerning the interpretation of article 3148(3) of the Québec Civil Code, the relevance of the real and substantial connection test to jurisdictional determinations based on the Québec Civil Code, and the role of *forum non conveniens* in jurisdictional determinations by Québec courts — and we consider the ways in which these findings

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Strukoff v. Syncrude Canada Ltd. (2000), 80 B.C.L.R. (3d) 294 (C.A.), leave to appeal to S.C.C. refused [2001] 1 S.C.R. xviii; *Harrington v. Dow Corning Corp.* (2000), 193 D.L.R. (4th) 67 (B.C.C.A.), leave to appeal to S.C.C. refused (2001), 202 D.L.R. (4th) vii; *Society of Lloyd's v. Meinzer* (2001), 55 O.R. (3d) 688 (C.A.), leave to appeal to S.C.C. refused, Supreme Court of Canada, *Bulletin of Proceedings* (June 14, 2002), at 915; *O'Brien v. Canada (Attorney General)* (2002), 210 D.L.R. (4th) 668 (N.S.C.A.), leave to appeal to S.C.C. refused (2002), 217 D.L.R. (4th) vi.

[7] *Civil Code of Québec*, S.Q. 1991, c. 64 [hereinafter "the Québec Civil Code," "the Civil Code," "the Code," or "C.C.Q."].

[8] [2000] R.J.Q. 1405, affg [1999] Q.J. No. 4580 (S.C.) [hereinafter "*Spar*"].

[9] *Spar Aerospace Ltd. v. American Mobile Satellite Corp.* (2002), 220 D.L.R. (4th) 54 [hereinafter "*Spar*"].

have created further uncertainty in the law. In doing so, we argue that the efforts of the Supreme Court to reflect the bijuridical foundation of Canadian federalism in the rules governing jurisdiction and judgments may, if not further clarified, serve to undo some of the important achievements of the Court in establishing a cohesive regime for jurisdiction and judgments.

II. THE DECISION

The facts at issue in *Spar* may be stated quite briefly. Spar Aerospace Ltd., a corporation with its head office in Ontario, brought an action in Québec against four U.S. corporate defendants for harm allegedly caused by them to a satellite in orbit. Spar did not own the satellite at the time it was damaged, and there was no contractual relationship between Spar and any of the defendants. The satellite had been built by Spar and then sold to a buyer in the United States who, as a result of injury to the satellite, had refused to make full payment for it, thus causing economic loss to Spar. The defendants had been engaged by the buyer to test the satellite. It was Spar's contention that the malfunctioning of the satellite was not due to any defects in its construction but rather to the defendants' faulty testing of it.

Because Spar was headquartered in Toronto and all of the defendants were located in the United States, the choice of Québec as a place to bring the action might seem an unusual one. However, Spar had an incentive to sue in that province because the Québec courts may well be more receptive to claims for pure economic loss than the courts in the other jurisdictions available to Spar.[10] Spar hoped that the fact that the satellite had been manufactured at Spar's factory in Québec would provide a basis on which to ground that exercise of jurisdiction by the Québec courts.

Not surprisingly, the defendants sought to resist the jurisdiction of the Québec court. They brought a motion claiming that the court could not exercise jurisdiction. In the alternative, they asked the judge to decline jurisdiction pursuant to article 3135 of the *Civil Code of Québec*, which permits the courts to do so in exceptional cases where they consider that the courts of another country are in a

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[10] Spar's injury in this case would appear to be relational contractual pure economic loss and thus not recoverable at common law under the test adopted in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210.

better position to decide. These motions were dismissed in relatively brief judgments both at first instance and before the Québec Court of Appeal.

The judgment of the Supreme Court of Canada dismissing the appeal was rather more detailed. Writing for a unanimous seven-judge court, LeBel J. set out the issues as follows: (1) Did the Québec courts have jurisdiction under the terms of the Civil Code? (2) Should the real and substantial connection test (as articulated in *Morguard*) be used in determining whether jurisdiction exists under the Civil Code? (3) Even if Québec courts had jurisdiction, should they have declined to exercise it pursuant to article 3135 of the Civil Code?

Before addressing those questions in detail, LeBel J. offered a peroration headed "Overview of General Principles of Private International Law,"[11] which was thick with scholarly references dating as far back as Ulrich Huber's 1689 essay "De conflictu legum diversarum in diversis imperiis." A lengthy background discussion such as this, concerning what La Forest J. in *Tolofson* called "the structural rules of conflict of laws or private international law,"[12] seems to have become de rigeur in leading Supreme Court of Canada decisions in private international law. In *Spar*, it served to introduce comity into the analysis as a first-order principle on par with the constitutional principles of order and fairness, but it did little to illuminate the subsequent analysis of the issues or inform the result.

Justice LeBel then turned to the specific issues enumerated above. The first presented a simple matter of statutory interpretation. Article 3148(3) of the *Civil Code of Québec* authorized court jurisdiction in four circumstances, two of which were potentially applicable in *Spar*: (1) where damage was suffered in Québec, and (2) where an injurious act occurred in Québec. The Québec Court of Appeal had held that jurisdiction was supportable on both of those grounds.

In the view of the Supreme Court, jurisdiction in *Spar* could be maintained only under the former provision. Spar might be said to have suffered damage in Québec for three reasons. First, although its head office was in Ontario, the factory in Quebec had built the satellite, and if the satellite was thought to be faulty, then the reputation of that factory could be said to have suffered an independent harm.[13] Secondly, the first point was strengthened by

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[11] *Spar*, *supra*, note 9, at para. 14.
[12] *Tolofson*, *supra*, note 4, at 1031.
[13] *Spar*, *supra*, note 9, at para. 33.

the fact that the contract between Spar and the American buyer identified Spar as being located in the Québec municipality where the factory that would build the satellite in question was located (even though, as noted, Spar's head office was in Ontario).[14] Thirdly, that factory might be said to suffer harm as a result of the buyer's withholding payment for the satellite.[15] Justice LeBel did not elaborate on why this should be so, but one infers that the fact that the head office in Ontario would not be receiving contractual payment for a good manufactured at one of its operations in another jurisdiction (Québec) was held to constitute damage suffered in that other jurisdiction.

As for the second possible jurisdictional basis under article 3148(3), the Supreme Court disagreed with the Québec Court of Appeal's conclusion that it was satisfied on the facts of the case. Justice LeBel held that for there to be an injurious act in Québec, there must be a damage-causing event in that province, and Spar's pleadings disclosed no allegation of such an event.[16]

Justice LeBel then turned to the second question: should the real and substantial connection test be used in determining whether a Québec court has jurisdiction under the Civil Code? From a constitutional point of view this question was the most important aspect of *Spar*. Justice LeBel answered it by saying that there was nothing in the leading decisions noted above that supported the appellants' contention that the constitutional real and substantial connection criterion is required in addition to the jurisdiction provisions such as article 3148 found in Book 10 of the C.C.Q.[17]

The Court's reasoning on this point is crucial, but it is far from clear. One reason for this result is that the appellants had been refused leave to state a constitutional question. Unlike many parties who challenge provincial adjudicatory jurisdiction for failure to comply with the real and substantial connection test,[18] the defendants in *Spar* appear not to have given notice to the Attorney General of Québec in the proceedings below. They sought to correct this omission by seeking leave from the Supreme Court of Canada to

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[14] *Id.*, at para. 35.
[15] *Id.*, at para. 34.
[16] *Id.*, at para. 36.
[17] *Id.*, at para. 54.
[18] See, for example, the leading Ontario case of *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), where notice was given and where the Attorney General of Ontario appeared to defend the constitutionality of the impugned jurisdictional provision.

state a constitutional question, but this application had previously been denied. As a consequence, LeBel J. held that the appellants were precluded from arguing whether there was a constitutional limit on adjudicatory jurisdiction that corresponded to the real and substantial connection test. He went on to note that in such circumstances the Court should confine its reasons to the non-constitutional aspects of the case before it.[19] In theory this makes sense, but much of the remainder of LeBel J.'s reasoning on this point deals with matters that, at least following *Morguard* and *Hunt*, have been considered to be matters of constitutional law. At times LeBel J. explicitly couched his reasoning in constitutional terms — for example, when he said, "I agree with the appellants that *Morguard* and *Hunt* establish that there is a constitutional imperative that Canadian courts can assume jurisdiction only where a 'real and substantial connection' exists."[20]

On one view, such statements could be treated as indications in *obiter* of how the Court might have approached the case had it allowed the appellants leave to state a constitutional question. However, LeBel J.'s discussion of these constitutional matters seems to represent the heart of his reasoning on the second question. Further, it is hard to imagine how the reasons would have differed if the Court had granted leave to state a constitutional question. The reasoning in *Spar* seems to be every bit as constitutional as that in cases like *Muscutt v. Courcelles*,[21] where an Attorney General had been given proper notice and was present, and where the Court explicitly recognized itself as pronouncing on constitutional law. Moreover, the reasoning in *Spar* seems to be every bit as constitutional as that in *Morguard*, which was argued in common law terms but later held in *Hunt* to have elucidated constitutional principles. In short, the *pro forma* observation by LeBel J. that it would be wrong in *Spar* to render a decision that touched on constitutional law does not seem to have prevented the judgment

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[19] *Spar*, *supra*, note 9, at para. 44.

[20] *Id.*, at para. 51.

[21] *Supra*, note 18. On the same day that it decided *Muscutt v. Courcelles*, the Ontario Court of Appeal handed down decisions in four other cases in which it applied the real and substantial connection test to deny Ontario jurisdiction in the international sphere: *Lemmex v. Bernard* (2002), 60 O.R. (3d) 54 (C.A.); *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 (C.A.); *Sinclair v. Cracker Barrel Old Country Store, Inc.* (2002), 60 O.R. (3d) 76 (C.A.); and *Leufkens v. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84 (C.A.).

from having potentially profound implications on the view taken of the constitutional underpinnings of the Court's findings.

As for that analysis itself, LeBel J. offered two reasons for concluding that the real and substantial connection test did not limit Québec's assertion of judicial jurisdiction in this case. The first was that the real and substantial connection test emerging from *Morguard* and *Hunt* applied only to the exercise of adjudicatory jurisdiction over defendants in other provinces and not against defendants in other countries. In so concluding, LeBel J. made no reference to provincial court of appeal decisions such as *Muscutt v. Courcelles* or *Cook v. Parcel, Mauro, Hultin & Spannstra, P.C.*,[22] which proceeded as though the test did operate in the truly international sphere.

Second, and apparently as a separate and sufficient justification for the Court's ruling on this point, LeBel J. reasoned that — whatever might be the position in other provinces — it was apparent from the design of the jurisdiction provisions of the Civil Code that it was intended to ensure that the real and substantial connection test was met. In other words, the drafters of the Code had borne the real and substantial connection test in mind, so there was no role left for the courts to review whether that test was satisfied in any individual assertion of jurisdiction. As long as a purported exercise of jurisdiction was authorized by the Civil Code — *i.e.*, as long as question (1) above was answered in the affirmative — the real and substantial connection test would be met. In short, because the Code's drafters had intended to comply with the Constitution, the courts should conclude that they had succeeded.

On the third question the Supreme Court concluded that the judge at first instance had not erred in refusing to decline jurisdiction pursuant to article 3135. Justice LeBel ruled that declining jurisdiction was an exceptional matter and that a precondition for doing so was the existence of another forum which "was clearly more appropriate than Quebec."[23] He found that on the facts in *Spar* no such other jurisdiction existed and that the standard for reviewing the discretion of the trial judge was not met.

Accordingly the appeal was dismissed.

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[22] *Supra*, note 6. And recall that the Supreme Court had denied leave to appeal in this case.

[23] *Spar*, *supra*, note 9, at para. 70.

III. COMMENTARY

1. Article 3148(3) C.C.Q.

The Court's ruling on the interpretation of article 3148(3) was relatively straightforward, even if it varied the decision below. The ruling clarified that the second clause of article 3148(3), "damage was suffered in Québec," provides for jurisdiction in situations in which the damage complained of occurred in that province. This is different from Ontario r. 17.02(h), "damage sustained in the Province,"[24] even though the description of these bases of jurisdiction seems similar. Rule 17.02(h) addresses situations in which a person injured *outside* the forum arrives in the forum and suffers subsequently within the forum.[25] The fact that there is a distinction between these bases of jurisdiction is not important in and of itself, but the potential for confusion between them is one reason why it might be sensible to treat the common law doctrine of real and substantial connection and the provisions for judicial jurisdiction in the Québec Civil Code as distinctive expressions of the constitutional principles of order and fairness, even if those principles apply throughout Canada.

2. The Real and Substantial Connection Test

The Court's ruling on the application of the real and substantial connection test to the jurisdictional provisions of the Civil Code is the most significant part of *Spar*. As suggested in our summary of this part of the judgment, it seems unlikely that a simple disclaimer that the decision was not rendered in constitutional terms could prevent it from having constitutional significance. Moreover, it is far from clear that another court faced with a properly initiated constitutional challenge to a purported exercise of judicial jurisdiction (either in Québec or in a common law province) could successfully distinguish *Spar* on the grounds that the Supreme Court prefaced its reasons in *Spar* by saying that it would not rule on matters of constitutional law.

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[24] Ontario, *Rules of Civil Procedure*.
[25] *Muscutt v. Courcelles*, *supra*, note 18.

(a) Interprovincial Jurisdiction vs. International Jurisdiction?

Both arms of the Supreme Court's ruling on the real and substantial connection issue are surprising and, in our view, problematic. As noted, the first reason cited by LeBel J. for why the real and substantial connection test should not be held to circumscribe the adjudicatory jurisdiction he had previously held to exist pursuant to article 3148(3) of the Civil Code was that the test operated only when jurisdiction was asserted in an interprovincial context, and not when it was asserted internationally, which was the case in *Spar*.[26] That comes as a shock.

No one questions that international borders are different from interprovincial ones and that this is significant for private international law doctrine. In *Spar*, LeBel J. quoted passages to that effect from *Morguard* and *Hunt* — passages that had been used to justify, respectively, (1) treating the enforcement of judgments from other provinces differently from the enforcement of truly foreign judgments, and (2) giving a more limited effect to blocking statutes in the interprovincial than in the international realm.[27] He relied on those passages for his conclusion that the real and substantial connection test, as a regulator of court jurisdiction, operated only in the interprovincial realm.

That conclusion is surprising for three reasons. First, although LeBel J. was correct in observing[28] that the strict ratio of *Morguard* is confined to the intra-Canadian realm, much of the reasoning in *Morguard* was devoted to addressing the needs of cross-border

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[26] By way of tangential commentary, we note that LeBel J. did not expand on what distinguishes an international from an interprovincial matter; he simply said that the substantial connection test should not be applied beyond "the context of interprovincial jurisdictional disputes" (*Spar*, *supra*, note 9, at para. 51). It should be obvious, however, that there may be cases which would require courts to define what element of "internationality" is relevant for the purposes of *Spar*'s interprovincial/international distinction. Consider the following: one Canadian citizen seeks to invoke the jurisdiction of the British Columbia courts against another Canadian citizen in respect of events that allegedly took place in Ontario, but the defendant now lives in New York and must be served there. Does such a case present an issue of interprovincial jurisdiction, where the real and substantial connection test might be applicable? Or is it an international matter where, according to *Spar*, the real and substantial connection test does not apply? *Spar* provides little help on this point.

[27] *Spar*, *supra* note 9, at paras. 52 and 53.

[28] *Id.*, at para. 52.

dealings, both of an interprovincial and of an international nature. For example, in one oft-cited passage, La Forest J. commented:

> The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.[29]

The reappraisal recommended in this passage would seem to apply equally to cross-border issues arising within Canada and to those arising internationally.

Secondly, whether or not the strict ratio of *Morguard* was intended to apply to international jurisdiction, in the years following the release of the decision, Canadian courts have applied it to international jurisdiction almost without exception. As the Ontario Court (General Division) observed in 1995, "[w]hile there is no doubt that considerations relating specifically to Canadian federalism played an important role in the Supreme Court's decision in *Morguard*, principles of broader application were also at work."[30] Citing decisions from across the country that had applied the real and substantial connection test to the enforcement of foreign judgments,[31] the Ontario Court observed in that decision that the defendant in the case before it was relying on "what appears to be the only reported decision which refuses to extend *Morguard* beyond the judgments of other Canadian courts."[32] That decision was overturned on appeal.[33] Accordingly, by 1995 the consensus view that the *Morguard* principles apply internationally seems to have been regarded as conclusive on the question. In fact, the Supreme Court of Canada had denied leave to appeal in a case that held that a British Columbia court could not assert jurisdiction over an American firm

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[29] *Morguard*, *supra*, note 1, at 1098.

[30] *United States of America v. Ivey* (1995), 26 O.R. (3d) 533, at 541.

[31] *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.); *Moses*, *supra*, note 6; *Fabrelle Wallcoverings & Textiles Ltd. v. North American Decorative Products Inc.* (1992), 6 C.P.C. (3d) 170 (Ont. Gen. Div.); *McMickle v. Van Straaten* (1992), 93 D.L.R. (4th) 74 (B.C.S.C.); *Stoddard v. Accurpress Manufacturing Ltd.* (1993), 84 B.C.L.R. (2d) 194 (S.C.); *Clancy v. Beach* (1994), 92 B.C.L.R. (2d) 82 (S.C.); *Allen v. Lynch* (1993), 111 Nfld. & P.E.I.R. 43, 348 A.P.R. 43 (P.E.I.T.D.).

[32] *United States of America v. Ivey*, *supra*, note 30, at 543, citing *Evans Dodd v. Gambin Associates* (1994), 17 O.R. (3d) 803 (Gen. Div.).

[33] *Evans Dodd v. Gambin Associates*, [1997] O.J. No. 1330 (C.A.).

because the real and substantial connection test was not met; this case received no mention in *Spar*.[34]

Thirdly, no such distinction is made in the jurisdictional tests established in Book 10 of the Québec Civil Code. Title Three of Book 10 provides simply for the "International Jurisdiction of Québec Authorities." It does not provide separately for the jurisdiction of the Québec courts in respect of Canadian defendants from other provinces. Nor did the Supreme Court suggest that the articles should be interpreted differently in cases involving foreign defendants from the way they are interpreted in cases involving defendants from other provinces. To suggest that the real and substantial connection test applies intra-federally and not internationally, then, is to suggest that there are two jurisdictional regimes in common law Canada — one for interprovincial cases and one for international cases — where there is only one regime in Québec for both interprovincial and for international cases. A strange asymmetry such as this would require some further explanation and justification for it to be easily accepted.

Spar's holding on this point is doubly interesting insofar as such earlier cases which had given some effect to the interprovincial/international distinction in the jurisdictional context had given that distinction an effect opposite to the one accorded it in *Spar*. In *Muscutt v. Courcelles*,[35] the Ontario Court of Appeal, while holding that the real and substantial connection test operated in both the international and interprovincial arenas, thought that the test would be more easily satisfied in the interprovincial than in the international context. That ratio could give rise to a situation where a plaintiff could successfully assert Ontario jurisdiction against a defendant in Alberta (because the real and substantial connection test was met) but could not assert such jurisdiction against an otherwise similarly situated defendant in Mexico (because the test was not satisfied). As the holding in *Spar* demonstrates, LeBel J. thought the interprovincial/international distinction cut the other way. That is, because *Spar* says that the real and substantial connection test does not operate at all in the international context, defendants in foreign countries are *more* amenable to the judicial jurisdiction of a Canadian province than are defendants in other provinces, because they are subject to suit in cases that meet the

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[34] *Cook v. Parcel, Mauro, Hultin & Spannstra, P.C.*, *supra*, note 6.
[35] *Supra*, note 18.

bare requirements of the Civil Code even if, on the facts of the case, the connection was neither real nor substantial.

Leaving aside the facts that *Spar*'s holding on this point is based on a questionable use of authority and runs counter to existing case law (case law which received no mention in *Spar*), there are two arguments that the test *must* function at the international level to set the standards for the exercise of the jurisdiction of a superior court of a Canadian province. The first is found in passages in *Morguard* that suggest that the constitutional source of the limits on such jurisdiction is to be found in the "in the province" limitation in section 92(13) and (14) of the *Constitution Act, 1867*.[36] This reading of *Morguard* is supported by La Forest J.'s statement in that case that "[t]he private international law rule requiring substantial connection with the jurisdiction where the action took place is supported by the constitutional restriction of legislative power 'in the province'."[37] Although this argument is qualified by La Forest J.'s statement that *Morguard* "was not argued in constitutional terms and it is unnecessary to pronounce definitely on the issue,"[38] it finds support in La Forest J.'s approval of the writings of Peter Hogg and others on this point,[39] and by his approval of the Québec decision *Dupont c. Taronga Holding Ltd.*[40] Under this reading of *Morguard*, when the real and substantial connection test is used to regulate judicial jurisdiction (as opposed to enforcement of a foreign judgment) it is simply a test which operationalizes the "in the province" limits on the provinces under the constitutional division of powers.

If that analysis governs, then it is difficult to locate the basis for *Spar*'s differential treatment of interprovincial and international assertions of court jurisdiction. After all, if Québec's Civil Code could not authorize adjudicatory jurisdiction over a defendant in another Canadian province where that would amount to legislating with respect to matters *outside* Québec, then it is hard to see how the

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[36] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5:

92. In each Province the Legislature may exclusively make Laws in relation to . . .

. . .

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province. (emphasis added)

[37] *Morguard*, *supra*, note 1, at 1109.

[38] *Id.*

[39] *Id.*

[40] (1986), 49 D.L.R. (4th) 335 (Qué. S.C.), cited in *Morguard*, *id.*, at 1109.

Code could authorize such jurisdiction over an otherwise similarly situated defendant in Texas. Texas is every bit as much outside Québec as Ontario is. Conceivably then, *Spar*'s holding on this point amounts to a disapproval of this reading of *Morguard* — that is, to a holding that the source of the real and substantial connection test (when that test is used to regulate jurisdiction) is not the territorial limitation in sections 92(13) and (14) of the *Constitution Act, 1867*.

The second argument against asymmetry differs from the first in that it rejects the proposition that the source of the judicial jurisdiction of the superior courts in Canada is to be found in the section 92 provisions for provincial legislative jurisdiction, but it too relies on passages in *Morguard*. These passages suggest that the constitutional source and scope of judicial jurisdiction of the superior courts in Canada is to be found in the unique nature of our constitutional arrangements and our legal traditions. For example, in *Morguard* La Forest J. noted that "various constitutional and sub-constitutional arrangements and practices make unnecessary a 'full faith and credit' clause such as exists in other federations, such as the United States and Australia."[41] The framers of the U.S. Constitution regarded full faith and credit to be so fundamental a principle that they enshrined it in article IV, section 1, immediately after the three articles that vested power in the three branches of government. It is remarkable then, that such a fundamental constitutional provision could operate in Canada without even needing to be made explicit in the Canadian Constitution. However, it does so because the nature of judicial authority in Canada is not itself prescribed by the text of the *Constitution Act, 1867 per se*, but by the legal traditions of the courts, which became constitutional principles (of the small "c" variety) when they were affirmed and continued in section 129 of that act.[42]

There has been no indication in our legal traditions that Canadian courts see any reason why they should treat the need to accommodate the flow of wealth, skills and people across state lines differently in cases involving provincial borders from those involving international borders. Nor has there been any indication that Canadian courts have more respect or less respect for the

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[41] *Morguard*, *id.*, at 1100.

[42] Walker, *The Constitution of Canada and the Conflict of Laws* (D. Phil. Thesis, Oxford University, 2001) [unpublished, available at http://research.osgoode.yorku.ca/Walker]; Castel and Walker, *Canadian Conflict of Laws* (5th ed., 2002), c. 2.

decentralized legal power that exists internationally than they have for that which exists interprovincially. There may be different forms of injustice that can arise in cross-border disputes involving legal systems with different legal traditions from those that can arise in cross-border disputes involving legal systems within Canada.[43] However, these differences have not been shown to have any bearing in principle on the scope of the jurisdiction of the provincial superior courts.[44] Under this second argument, it is precisely because the authority of the Canadian superior courts is not derivative of legislative authority, that their jurisdiction in cross-border disputes is not different in interprovincial matters from international matters.

We do not propose to reconcile these two approaches to judicial jurisdiction in this article. We simply make the point that whichever argument is adopted, there seems to be no principled basis for distinguishing the interprovincial jurisdiction of Canadian courts from their international jurisdiction. *Spar*'s conclusion on this point comes as a true surprise.

(b) Common Law and Civil Law Standards for Jurisdiction

As noted in part III(2)(a), the Supreme Court in *Spar* made no mention of the fact that provincial appellate courts had said that the real and substantial connection test did apply in the international sphere. Perhaps it proceeded that way because of its second reason for its holding on this point — namely, that because the drafters of the Civil Code must have had the real and substantial connection test in mind, there was no further work for courts to do by way of overseeing assertions of jurisdiction to ensure that such a connection

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[43] And these are currently under consideration by the Supreme Court in the appeal of *Beals v. Saldanha* (2001), 54 O.R. (3d) 641 (C.A.). The Supreme Court heard oral argument on the appeal in February 2003.

[44] We must qualify this. In *Muscutt v. Courcelles*, *supra*, note 18, the Ontario Court of Appeal, while holding that the real and substantial connection test applied in both the international and interprovincial spheres, did suggest that the international/interprovincial distinction might be one factor that a court could take into account in assessing whether the test was satisfied. In fact, it found that distinction to be an important one in that case. The facts of *Muscutt* would suggest that the different result in that *interprovincial* case from the results in its *international* companion cases may be explained by the fact that the defendant's insurer was subject to a national regulatory scheme that required the defendant to defend in the province where the claim was made.

exists in individual cases. This appears to stand as an independent justification for the result in *Spar*, and it would seem to follow that such reasoning applies even in the interprovincial arena. That is, when jurisdiction under the Civil Code is claimed against a defendant in another Canadian province, a court may not subject the words of the Code to scrutiny under the real and substantial connection test. Justice LeBel writes that

> it is apparent from the explicit wording of art. 3148, as well as the other provisions of Book Ten [of the *Civil Code of Québec*], that the system of private international law is designed to ensure that there is a "real and substantial connection" between the action and the Province of Quebec and to guard against the improper assertion of jurisdiction.[45]

The Court's emphasis on the special nature of the Civil Code seems to imply that this part of its holding applies only to Québec. In other words, not only does the real and substantial connection test not constrain *any* province's adjudicatory jurisdiction in the international context, it does not constrain the adjudicatory jurisdiction of Québec courts even in the intra-Canadian context.

Justice LeBel's argument based on the special nature of the Civil Code might be interpreted in a couple of ways. The first is that, due to the intent of its designers, the Civil Code occupies a different position vis-à-vis the real and substantial connection test from that of the service *ex juris* rules of the common law provinces. The latter are subject to scrutiny under the test, but the Civil Code, due to its drafters' intent, is not. The second reading is that, while the Civil Code's provisions are in theory subject to the real and substantial connection test, in *Spar* LeBel J. has applied the test once and for all — that is, has considered all possible assertions of jurisdiction that could be supported under all of the provisions of the Code and has found that they all pass muster, with the result that in the future no successful challenge to the Code under the real and substantial connection test can be made. Both of these interpretations are troubling. As for the first, it would be astoundingly deferential for a court to claim that just because legislative drafters intended to conform to a certain standard, it must be assumed that they have done so. Moreover, why would such an assumption be made for the Civil Code and not for the service *ex juris* rules of the common law provinces? And as for the second interpretation, the fact patterns of

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[45] *Spar*, *supra*, note 9, at para. 55.

private international law cases arise in such varied, complex and unusual permutations that it seems presumptuous for any court to claim that it has foreseen and considered them all.

A less troubling reading of this aspect of *Spar* may be based on LeBel J.'s statement that "the criterion of a 'real and substantial' link is a common law principle that should not be imported into the civil law."[46] In and of itself, this would not affect the view that Canadian private international law rested on a constitutional foundation. While the constitutional principles in question — those of order and fairness — are binding on all Canadian courts, the real and substantial connection test, which the Court had formulated in *Morguard* as a means of giving effect to these principles in jurisdictional determinations, is a purely common law doctrine. Therefore, it is neither a replacement for the Civil Code provisions for jurisdiction nor a superadded condition applying to the exercise of jurisdiction based on those provisions. Rather, the real and substantial connection test is the common law counterpart to the *Québec Civil Code* provisions. Both are legal rules that give effect to the principles of order and fairness in jurisdictional determinations.

This makes sense. The case law concerning judicial jurisdiction in the common law provinces has developed largely independently from the drafting of the Civil Code provisions and their subsequent interpretation. It is, therefore, sensible to permit *expressions* of the jurisdictional standards in the common law provinces to differ from those in Québec. A Supreme Court directive that the common law test should be imposed on Quebec, or vice versa, could produce more confusion than improvement in the law. Of greater moment is whether the application of the two tests should produce the same result in any given case regardless of whether the question is being decided by a common law court or a Québec court.

With respect, it must. It seems unlikely that the constitutional foundations of Canadian private international law would support an approach in which the jurisdiction of, for example, the British Columbia courts could be broader or narrower than that of the Québec courts. Moreover, there does not appear to be any precedent for a federal system that fosters, in the interests of federalism, differences in the limits on the jurisdictional reach of the courts of the constituent legal systems. Indeed, the jurisprudence of the United States Supreme Court and the provisions mandating the

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[46] *Id.*, at para. 49.

European Court of Justice to regulate the interpretation of the Brussels Regulation[47] suggest that federal or regional relations require the jurisdictional rules applied by constituent legal systems to be harmonized. Nor does there appear to be any reason to suggest that the particular nature of the Canadian federation warrants the establishment of such a precedent. The traditional common law rules, which provide for different jurisdictional standards to be exercised by local courts from those that may found an enforceable judgment when exercised by foreign courts, were said to "fly in the face of the obvious intention of the Constitution to create a single country."[48] If these standards must be correlative within a federation, it is hard to imagine how the standards for the exercise of jurisdiction could be permitted to vary from one province to another.

Perhaps this is what was intended by LeBel J. when he said that "it is arguable that the notion of a 'real and substantial connection' is already subsumed under the provisions of art. 3148(3)"[49] and that "the requirement for a 'real and substantial connection' between the action and the authority asserting jurisdiction is reflected in the overall scheme established by Book Ten."[50] If it is, then perhaps the Supreme Court has found a uniquely Canadian approach to the constitutionalization of private international law — one that reflects the bijural nature of our federation.

3. Forum Non Conveniens and the Deconstitutionalization of Canadian Private International Law

This is the feature of the judgment, however, that gives the most pause, even if it was treated in an apparently uncontroversial manner by the Court. If the recognition that the jurisdiction of the Canadian superior courts is founded in the Constitution implies that the jurisdiction of the superior courts is the same in all the provinces, then there must be some means by which the courts can ensure that it is exercised similarly in the cases before them. In the common law provinces, the real and substantial connection test, like

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[47] EC, Council Regulation 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. L. 12/1.

[48] *Morguard*, *supra*, note 1, at 1099.

[49] *Spar*, *supra*, note 9, at para. 56.

[50] *Id.*, at para. 63.

the minimum contacts doctrine in the United States,[51] operates to ensure that regardless of the apparent reach of judicial jurisdiction based on the service-out provisions of a state or province, the court exercises jurisdiction in accordance with its constitutional authority. Thus, the rules merely "provide a rough guide to the kinds of cases in which persons outside Ontario will be regarded as subject to the jurisdiction of the Ontario courts,"[52] and they do not determine the issue of jurisdiction. As it might be explained in terms of U.S. constitutional doctrine, it would be wrong to suggest that a rule for service out could be challenged as unconstitutional "on its face" because the exercise of jurisdiction on the basis of a particular rule for service out would always be subject to an ameliorating interpretation that would ensure that it was not unconstitutional "as applied."

But when should the courts conduct this fact-specific interpretation of the bases of jurisdiction required to ensure that they exercise appropriately restrained jurisdiction? Should it be undertaken in the course of a challenge to jurisdiction *simpliciter* or in a request for discretionary relief based on *forum non conveniens* grounds? There is some suggestion that the Supreme Court thought that the moderating influence of *forum non conveniens* analysis would serve this purpose. In *Hunt*, La Forest J. expressed the following view:

> I need not, for the purposes of this case, consider the relative merits of adopting a broad or narrow basis for assuming jurisdiction and the consequences of this decision for the use of the doctrine of *forum non conveniens*. . . . Whatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness.[53]

In contrast, the Court of Appeal for Ontario has proposed detailed flexible tests for determining jurisdiction *simpliciter* that seem intended to serve this purpose.[54] However, those tests seem to bear a

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[51] *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement*, 326 U.S. 310, 66 S. Ct. 154 (1945).

[52] Walker, "Rule 17 — Service Outside Ontario" in Watson and Jeffreys, *Holmested and Watson: Ontario Civil Procedure* (2001), at 17-9; as quoted in *Muscutt v. Courcelles*, *supra*, note 18, at 37.

[53] *Hunt*, *supra*, note 3, at 326.

[54] *Muscutt v. Courcelles*, *supra*, note 18.

marked resemblance to the kind of analysis otherwise conducted under the auspices of *forum non conveniens.*

To the extent that *forum non conveniens* ought to operate to ensure that jurisdiction is exercised in accordance with the constitutional requirements of order and fairness, it is of concern that *Spar* may be taken to stand for the proposition that the scope of operation for the doctrine of *forum non conveniens* in Québec would be different in principle from the scope of operation for the doctrine in the common law provinces. It is true that LeBel J. said that "the doctrine of *forum non conveniens*, as codified at art. 3135, serves as an important counterweight to the broad basis for jurisdiction set out in art. 3148."[55] However, having said that "[t]here is abundant support for the proposition that art. 3148 sets out a broad basis for jurisdiction,"[56] he then couched much of the review of the determination in the court below in terms of "the exceptional nature of the doctrine as reflected in the wording of article 3135 *C.C.Q.*"[57] If La Forest J. was right that *forum non conveniens* must complement the rules of jurisdiction *simpliciter* to ensure that the courts exercise due restraint in the assumption of jurisdiction, then it would seem inappropriate to speak of articles 3148 and 3135 as inherently broad and inherently narrow respectively. On the contrary, to the extent that the exercise of judicial jurisdiction must conform to the constitutional principles of order and fairness, these articles would have to be interpreted in any given case in as broad or narrow a fashion as was necessary to achieve that end.

To say that article 3148 sets out a broad basis for jurisdiction may be unobjectionable on its own. However, to follow this with the proposition that article 3135 is inherently narrow is to suggest that the principles of order and fairness are not only expressed differently in the law of Québec from the way that they are expressed in the law of the common law provinces, but also that they set different limits on exercise of jurisdiction by Québec courts from the limits they set for the exercise of jurisdiction by common law courts in Canada. While it may be true that the principles of order and fairness are "vaguely defined,"[58] it seems essential that, as constitutional principles, they must operate in a uniform fashion throughout

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[55] *Spar*, *supra*, note 9, at para. 57.
[56] *Id.*, at para. 58.
[57] *Id.*, at para. 82.
[58] *Id.*, at para. 23.

Canada. Accordingly, any interpretation of the scope of *forum non conveniens* in Québec that does not advert to the role it must play in ensuring that the courts exercise jurisdiction in accordance with uniform standards expressive of the principles of order and fairness would appear to deconstitutionalize Canadian private international law.

IV. Conclusion

Despite the concerns that have been expressed in this article, *Spar* represents a welcome return by the Supreme Court to the vital issues of private international law, and the decision focused much-needed attention on the relationship between the distinctive features of the *Québec Civil Code* and the constitutional requirements of the Canadian federation on the subject of judicial jurisdiction. It remains to be seen, in terms of interprovincial matters, whether the Court has devised an approach that is tailored to the special needs of Canadian federalism, or whether *Spar* ultimately operates to undermine the fundamental requirements of the Constitution for the rules of private international law. It also remains to be seen, with respect to international matters, whether the Court's observations can be reconciled with the overwhelming trends and tendencies evident in the Canadian jurisprudence of the past decade. Regardless of the direction taken by the Court, there is much work to be done in clarifying and advancing the law in this area. It is encouraging then, that with the *Spar* decision in 2002 the Supreme Court has begun to retrieve these issues from the realm of speculation and to address them directly.