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The Strange Cases of Alberta's Guarantees Acknowledgement Act A Study of Choice-of-Law Method

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I. *Introduction*

Fifty years ago John Willis wrote *Two Approaches to the Conflict of Laws: A Comparative Study of the English Law and the Restatement of the American Law Institute*.¹ There he described two different — perhaps even opposed — conceptions of the problem posed by cases involving geographically complex facts. It is a goal of this article to assess the status and the vices and virtues of those two approaches in Canada today. Such a task is not a mere updating of Willis' piece, though that alone might be a useful exercise. In the first place, Willis' analysis takes place largely at the level of conflict-of-laws theory. He is concerned with the way in which one's understanding of the jurisprudential nature of conflict of laws affects one's approach. Of such matters there is virtually no discussion in Canadian courts today. For instance, argument over whether a Canadian conflict of laws is based on a vested rights theory or a local law theory rarely occurs today in either courtroom or classroom. But the disputes over theory of the 1930s are now reflected in disputes over judicial methodology: What facts are relevant to a choice-of-law decision? What questions should be asked and in what order? What sort of arguments can be made and what authorities should be appealed to? In addition to analyzing the state of Willis' two approaches today I want to comment on why the terms of the debate between those approaches have become so predictable.

First, however, it will be necessary to describe the two approaches, and Willis' words are still a good starting point.

There are two ways in which a court might approach the decision of cases involving a foreign element. This is a practical problem, it might say, to be solved in a practical way. What is the interest for which protection is claimed? Is it such that the wishes of a community, whether foreign community or our community, as expressed in some law, should be treated as paramount over the wishes of the parties before us?²

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1. (1936), 14 Can. Bar Rev. 1.
2. *Id.*, at 1.

In Willis' eyes, this "practical" approach — or, as he later dubbed it, "the approach of justice and convenience"³ — attempted, in a direct and explicit fashion, to take account of such matters as fairness and hardship. A court employing it could inquire directly into the interests of the competing communities involved and the fairness and hardship of the competing resolutions of the dispute before it. The current embodiment of this "practical" approach, at least in the area of choice-of-law methodology, is found in the so-called "modern approaches" familiar to students of American conflicts law. I prefer to group these methodologies under the label of "the interpretive approach", for, as I and others have argued elsewhere, they have a long though sometimes forgotten history that makes the term "modern approach" inappropriate.⁴ The term "interpretive approach" also has the advantage of describing what courts employing this choice-of-law approach are called upon to do. They must inquire into the purposes of the competing legal rules and, by employing techniques of legal interpretation, decide which of those rules should be construed so as to apply in the territorially complex case before them. They must take account of the content of competing legislative or common law rules and construe them in a fashion that is not essentially different from that which they use to construe laws in a purely domestic setting.

Willis dubbed the second approach "conceptual":

The other possible approach is not practical but conceptual — the deduction of consistent rules from a consistent legal theory of the "nature" of the conflict of laws. When a given system of law deduces the answer to the question whether an English branch of a dissolved Russian bank can be sued in England from the "nature" of a branch of a foreign corporation, or solves the problem of whether there is a good marriage between A and B, whose French domiciliary law requires the consent of their parents for a valid marriage, when that marriage is celebrated in England where no such consents are required, by determining whether consent of parents goes to form or capacity, its approach is conceptual.⁵

In current choice-of-law methodology the conceptual approach is represented by the "jurisdiction-selecting"⁶ method. Courts employing such a method to determine the governing law are required to take the following steps. First the dispute is "characterized" under a certain legal

3. *Id.*, at 4.

4. See Black, "One if by Land, Two if by Sea: Old Directions in Maritime Law", in *New Directions in Maritime Law 1984*, D. Sharpe and W. Spicer (eds.) (Toronto: Carswell, 1985) at 26-32 and Horowitz, *Choice-of-law Decisions Involving Slavery: Interest Analysis in the Early Nineteenth Century* (1970), 17 U.C.L.A. L. Rev. 587.

5. Willis, *supra*, note 1, at 2.

6. David Cavers invented this term. See Cavers, *A Critique of the Choice-of-Law Problem* (1933), 47 Harv. L. Rev. 173 at 193.

label. That is, the court decides whether the case before it should be classified as a torts case, a trusts case, a family matter or one of the other accepted classifications. Next, the choice-of-law rule appropriate to that class of case is selected and applied. This application generally involves the finding of several connecting factors — links between various jurisdictions and those facts which are deemed by the choice-of-law rule to be significant — and then the application of the rule which states that certain factors or combinations of factors indicate that the law of a given jurisdiction should apply. In theory it is only once this process is complete that the court learns the content of the competing laws, and at this stage the only law that is relevant is that of the jurisdiction which has been selected by the application of the choice-of-law rule.

Each of these two methodologies has its group of adherents and in the days since Willis wrote much ink has been spilled in arguments between those camps. In the United States the jurisdiction-selecting approach embodied in the First Restatement⁷ came under a concerted analytical attack by those who favoured taking content into account in some explicit fashion.⁸ Following some interesting skirmishes the interpretivist camp more or less won the day. Though most American courts now espouse some variety of interpretive approach to choice-of-law problems⁹ there has in recent years been something of a counter-revolution in the law reviews.¹⁰ This challenge to protract the battle has been accepted by those in the interpretivist camp.¹¹ In this country, however, the jurisdiction-selecting approach still holds sway in most courts and most law reviews, though some attempt has been made to counter it, notably by Professor John Swan.¹²

7. *Restatement (First) of Conflict of Laws*, (Philadelphia: American Law Institute, 1934).

8. The principal attacks on the old order were Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924), 33 Yale L.J. 736; Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924); Yntema, *The Hornbook Method and the Conflict of Laws* (1928), 37 Yale L.J. 468; Cavers, *A Critique of the Choice-of-Law Problem* (1933), 47 Harv. L. Rev. 173; and the essays of Brainerd Currie which eventually came to be collected in his *Selected Essays on the Conflict of Laws*, (Durham: Duke Univ. Press, 1963).

9. See Weintraub, *The Future of Choice of Law For Torts: What Principles Should Be Preferred?* (1977), 41 No. 2 Law & Contemp. Probs. 146 at 146, note 1 for documentation of the fact that over half of the American State Courts have rejected the traditional choice-of-law rule for torts.

10. For examples of American scholars attacking choice-of-law methods which take explicit account of the purposes of the competing laws, see Twerski, *Neumeier v. Kuehner: Where Are the Emperor's Clothes?* (1973), 1 Hofstra L.J. 104; Brilmayer, *Interest Analysis and the Myth of Legislative Intent* (1980), 78 Mich. L. Rev. 393; Korn, *The Choice-of-Law Revolution: A Critique* (1983), 83 Col. L. Rev. 722; Juenger, *Conflict of Laws: A Critique of Interest Analysis* (1984), 32 Am. J. Comp. L. 1; and Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge* (1984), 35 Mercer L. Rev. 555.

11. See, e.g., Kay, Review Essay (1985), 73 Cal. L. Rev. 525.

12. Swan, *Tort Liability in the Conflict of Laws: The Case For and Outline of a New Approach*

One limitation of much of the scholarship on both sides of the battle lines has been its abstract character — its tendency to talk in theoretical terms unsupported by examples. At best this is ameliorated by using one or two examples and then asserting that they are representative. The problem with this style of debate is that it is bound to be inconclusive. Any method is bound to have its defects and it has always been easy for the proponents of one view to seize on a questionable judicial decision which employed the opponents' method and then write a comment which not only criticizes that case but purports as well to refute the opposing method once and for all. A remarkable proportion of the scholarship in this area has taken the form of extended comments on single cases. More than once a single decision has been the cause of a whole scholarly symposium.¹³ Supposedly questionable decisions employing some variety of the interpretive approach have been the occasion for multiple attacks from the jurisdiction-selecting camp. One can emerge from all of this with the feeling that, in spite of the fact that each faction appears able to point to apparently devastating examples of the flaws in its opponent's views, neither side has really proven much. After all, nobody is perfect. We can all have an off day. But one or two bad cases are no reason for giving up on a more general method, especially when there are equivalent examples of failure on the other side.¹⁴

Here I want to attempt a slightly more systematic approach: the examination of all of the reported conflicts cases under a given statute. This somewhat expanded sample might have the advantage of rendering an argument for a choice-of-law method somewhat more convincing than does the examination of one or two cases. As an opponent of the traditional jurisdiction-selecting approach and a firm adherent to the belief that the only acceptable approach to a choice-of-law case is one

(1967), 3 U.B.C.L. Rev. 185; and Swan, *Annual Survey of Conflict of Laws* (1976), 8 Ottawa L. Rev. 182.

13. *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws* (1963), 63 Colum. L. Rev. 1212; *Symposium: Comments on Reich v. Purcell* (1968), 15 U.C.L.A. L. Rev. 551 (1968); *Symposium on Cipolla v. Shaposka — An Application of "Interest Analysis"* (1971) 9 Duq. L. Rev. 347; *Symposium on Foster v. Leggett* (1972), 61 Ky. L.J. 367; *Symposium: Neumeier v. Kuehner: A Conflicts Conflict* (1973), 1 Hofstra L. Rev. 93; *Comments on The Bremen v. Zapata Offshore Co.* (1973), 6 Vand. J. Transnat'l L. 363; *Conflict of Laws Symposium* (1973), 25 S.C.L. Rev. 169; *Symposium: Choice-of-Law Theory After Allstate Insurance Co. v. Hague* (1981), 10 Hofstra L. Rev. 1; *Symposium: Choice of Law* (1981), 14 V.C. Davis L. Rev. 841.

14. For examples of two exceptions to this observation, one in favour of a modern, interpretive approach and the other critical of (or at least unimpressed by) such approaches, see Sedler, *Choice of Law in Michigan: A Time to go Modern* (1978), 24 Wayne L. Rev. 829; and Corr, *Modern Choice of Law and Public Policy: The Emperor Has The Same Old Clothes* (1985), 39 U. Miami L. Rev. 647.

that includes an overt examination of the content and policies of the competing laws, I think that the advantage of looking at a series of judicial decisions makes the case for an interpretive approach much more strongly.

II. *The Guarantees Acknowledgement Act*

The Statute I have in mind is Alberta's Guarantees Acknowledgement Act.¹⁵ It has the advantage of being a relatively brief and straightforward piece of legislation which has received considerable judicial treatment in non-conflicts cases and has also given rise to a varied but manageable number of choice-of-law cases over the last 15 years. Like most statutes it contains no express conflict-of-laws provisions, thus leaving the question of its territorial scope entirely up to the courts.

The G.A.A. is a short (seven sections) and simple enough statute, the general purpose of which would be no great mystery to most lawyers. The Act requires personal guarantors¹⁶ of certain kinds of principal debts¹⁷ to attend before a notary public, acknowledge that they have executed the guarantee in question and submit to an examination by the notary. If the notary is convinced the guarantor is aware of the contents of the guarantee and understands it, he or she issues and signs a certificate to that effect. The notary is also required to have the guarantor sign the certificate, acknowledging that he or she is the person named in it. The certificate is then required to be attached to the guarantee. The Act provides that no guarantee has any effect unless the guarantor appears before the notary and makes the required acknowledgement.

The G.A.A. thus supplements the normal Statute of Frauds requirements for formal validity of guarantees. Presumably it has a comparable principal purpose, namely, in the phrase usually associated with the Statute of Frauds, the prevention of certain fraudulent practices. The Act does not go so far as to require potential guarantors to obtain independent legal advice but it goes some way to ensure that they contract with some measure of informed consent. Although the G.A.A. contains no express choice-of-law provisions it does have one sub-section which at least contemplates the existence of other jurisdictions outside Alberta. Its definition of "notary public" is as follows:

- 2 In this Act,
 (b) "notary public" means,

15. R.S.A. 1980, c. G-12. Hereafter, the G.A.A.

16. Corporate guarantors are excluded: *Id.*, s. 2(a).

17. Guarantees of contracts for the sale of goods or of interests in land are excluded: *Id.*, s. 1(a)(ii).

- (i) with reference to an acknowledgement made in Alberta, a notary public in and for Alberta, and
- (ii) with reference to an acknowledgement made in a jurisdiction outside Alberta, a notary public in and for that jurisdiction.¹⁸

This definition appears to assume that there will be times when the Act will apply to certificates completed in other provinces or countries. And since it provides for the making of the mandated acknowledgement in other jurisdictions it may be reasonable to assume that it contemplates its application to the execution of guarantees in those jurisdictions.

A noteworthy feature of the G.A.A. is that since its passage in 1939 it has been amended seven times.¹⁹ Though none of these amendments represents a substantial departure from the thrust of the Act, they do indicate that the legislature has not been content merely to pass the Act and then forget about it; rather, presumably in response to the usual inputs into the legislative process (lobby groups, reports by government counsel regarding the statute's treatment in the courts), the legislature has been prepared to tinker with the G.A.A. to remedy perceived defects. In addition, two reports of Alberta's Institute of Law Research and Reform have considered the G.A.A.,²⁰ and, as the following passage from a decision of Alberta's Court of Queen's Bench shows, such reports do not go unnoticed by courts.

This legislation is unique to Alberta and is not to be found in any other province of Canada. Several years ago the legislation was considered in detail by the Law Research and Reform Commission of this province.

The report of that body was that on balance the legislation did have value and should be retained. It has no doubt been used in many instances by guarantors to avoid their obligations to creditors; and creditors, in particular out-of-province creditors who have not seen fit to obtain advice of Alberta counsel, have learned to their dismay that their guarantees are unenforceable in Alberta.²¹

18. This was added by S.A. 1968, c. 36, s. 2.

19. The G.A.A. was first enacted by S.A. 1939, c. 74. There are no available legislative debates on it, and the legislative record reveals it made the passage from first reading to assent in a week. Since then it has been tinkered with in S.A. 1940, c. 25; S.A. 1947, c. 45; S.A. 1953, c. 49; S.A. 1967, c. 26; S.A. 1968, c. 36; S.A. 1969, c. 41; and S.A. 1970, c. 51. On March 10, 1987 Bill 230 was introduced in the Alberta Legislative Assembly proposing further amendments to the G.A.A. but this Private Member's Bill died on the order paper.

20. Institute of Law Research and Reform, *Report No. 5, Guarantees Acknowledgment Act (1970)* and *Report No. 44, The Statute of Frauds and Related Legislation (1985)*. Thus far there has been no legislative response to the 1970 Report (although its first recommendation — that the G.A.A. be retained — had been complied with).

21. *C.I.B.C. v. Country Lane Furniture Warehouse (Wataskiwin) Ltd. et al.* (1981), 15 Alta. L.R. (2d) 127 at 128. For an example of a judicial reference to the 1985 Report see *First Investors Corp. Ltd. v. Mehra et al.* (1986), 71 A.R. 140 (Q.B., Master).

The passage is interesting because, although the case in which it appeared presented no conflict-of-laws issue, the court singled that area out as one of special significance. As we shall see directly, conflict-of-laws cases under the G.A.A. have raised difficult problems. Although judges have encountered difficult questions in conflicts cases under the G.A.A., and have said so explicitly, there has been virtually no response from other institutions with a law reform mandate. Neither of the two reports of the Institute of Law Research and Reform makes mention of the conflicts issues which might arise, and in some cases have arisen, under the statute. Nor have legislative amendments been made in response to conflict-of-laws issues. The only conceivable exception here is the definition of "notary public" mentioned at note 18. This judicial monologue on the conflicts issues stands in sharp contrast to the relatively vigorous discussion and amendment of other aspects of the G.A.A.

Before turning to an examination of the conflicts jurisprudence under the G.A.A. I want to make an observation about the non-conflicts cases that have been decided under it. It is my impression that courts in those non-conflicts cases have not been particularly hostile to the Act. They have not endeavoured to interpret it out of existence or otherwise frustrate its general thrust. Nor, on the other hand, have they been inclined to extend the statute into areas where one might not expect it to go. There have been the expected disputes about whether a given agreement is in fact within that statute — for example, is the agreement in question a guarantee or is it an indemnity?²² Or, if it is a guarantee, is the underlying principal contract one for the sale of goods (in which case the Act does not apply) or for the provision of services (in which case it does)?²³ Other cases have focussed on the statute's breadth of coverage. Does it bind the Crown?²⁴ Should a mere clerical non-compliance — for example the failure to fill in the date on the Notary's Certificate — void the guarantee? And if courts would be prepared to excuse a mere technical non-compliance (as they in fact have been) then how much

22. *Crown Lumber Ltd. v. Engel et al.* (1961), 36 W.W.R. 28 D.L.R. (2d) 762 (Alta. S.C., App. Div.).

23. *Goodyear Tire & Rubber Co. of Canada Ltd. v. Knight et al.* (1960), 33 W.W.R. 287 (Alta. S.C., App. Div.); *Crown Lumber Ltd. v. Engel et al.* (1961), 36 W.W.R. 128; 28 D.L.R. (2d) 762 (Alta. S.C., App. Div.); *Canadian Acceptance Corp. Ltd. v. Evanson et al.*, [1971] 1 W.W.R. 457 (Alta. S.C., T.D.); *Ampex of Canada Ltd. v. Thomson et al.* (1979), 11 Alta. L.R. (2d) 303 (Q.B.); *Robert Simpson Co. Ltd. v. Balalaika Restaurants Ltd. et al.* (1980), 12 Alta. L.R. (2d) 41, 109 D.L.R. (3d) 520; 27 A.R. 344 (Q.B.); *Keillian West Ltd. v. Sportspage Enterprises Ltd. et al.* (1982), 23 Alta. L.R. (2d) 99; 40 A.R. 586 (Q.B.); and *Westeel-Rosco Ltd. v. Edmonton Tinsmith Supplies Ltd. et al.* (1985), 68 A.R. 24; 43 A.L.R. (2d) 136 (Q.B.).

24. *Federal Business Development Bank v. Willms et al.*, [1985] 6 W.W.R. 380 (Alta. Q.B.) and *Prov. Treasurer (Alta) v. Woycenko (J.) & Sons et al.* (1986), 73 A.R. 229 (Q.B., Master). It does not.

deviation will be permitted? In reading these cases it has been my impression that courts have given the G.A.A. a responsible, purposive reading. Moreover, as a general rule there has been a tendency for later courts to follow the reasons set down in the decisions that are technically binding on them. Some coherent jurisprudence has been developed under the Act. There are, for example, recognized leading cases which are cited repeatedly on certain points.²⁵ I appreciate that these observations are not supported. To do so would involve the discussion of about 100 reported decisions. Even then I would be hard pressed to "prove" anything, for my assessment is a pretty vague one. The point is simply that a reading of the non-conflicts cases under the G.A.A. leaves me with the broad impression that they are no worse (and no better) displays of adjudicative justice than are other run-of-the-mill cases that fill our law reports. What I will attempt to show, however, is that such an appraisal certainly does not apply to the reported choice-of-law decisions under the G.A.A.

III. *The Cases*

In this section I will examine the ten conflict-of-law decisions under the G.A.A. I do not propose to offer an extensive case comment on each, but I do want to do a little more than just summarize the decisions. I will offer a brief critique of the cases and endeavour to evaluate how well they succeed on their own terms. That is, since the reported cases adopt the traditional, jurisdiction-selecting approach, I will try to appraise how faithfully they succeed within that frame of reference. As well I will make some observations about how well the decisions conform to values that both choice-of-law camps advocate, such as fidelity to precedent and internal consistency. I will not attempt at this stage to show how an interpretive approach would have done a better job. That will come later.

There is one initial problem: what is a choice-of-law case? The question is not answered as easily as some assume. For instance, a reading of *Teachers Investment and Housing Co-operative v. S.H. Properties Ltd.*²⁶ reveals that the defendant guarantor claimed to be from Phoenix, Arizona, yet the plaintiff nowhere argues that the law of Arizona applies and that consequently it would not matter that the defendant might not have complied with the G.A.A.'s formalities. Furthermore, the court does not bring up the issue on its own.²⁷ Similarly, in *Ampex of Canada Ltd.*

25. *General Tire & Rubber Co. of Canada v. Finkelstein* (1967), 52 W.W.R. 555; *Edmonton Airport Hotel Co. v. Credit Foncier Franco-Can.*, [1965] S.C.R. 441, *aff'g* 48 W.W.R. 641, which affirmed 46 W.W.R. 221 and, more recently, *C.I.B.C. v. Country Lane Furniture Warehouse (Wetaskiwin) Ltd. et al*, *supra*, note 21.

26. (1984), 55 A.R. 241 (Q.B.).

27. As it should not, at least under the traditional, jurisdiction-selecting approach. There are

*v. Thomson et al.*²⁸ the out-of-province creditor did not argue the inapplicability of the Act, and again the court did not raise the issue of its own accord. In that case the principal debtor and the guarantors were all Albertans and the guarantee was executed in that province, so one might think that any argument for the G.A.A.'s inapplicability was doomed to fail and was best left unarticulated. We shall see, however, that in some similar situations creditors have been successful in arguing that due to "foreign" factual elements failure to comply with the G.A.A. did not invalidate the guarantee.²⁹ The argument for applying foreign law in the *Ampex* case was at least a plausible one, but it was not advanced. So the question arises, are the disputes in *Teachers Investment* and *Ampex* choice-of-law cases? The usual response is that they are not, that a conflict-of-laws case is one which the parties and court consciously recognize and treat as such. For the most part I am content to adopt this approach. Thus the cases that follow are those that are treated (and, happily, indexed) as such. But I cannot resist the temptation to question the traditional method by including one³⁰ case which seems to me to contain significant multi-jurisdictional elements, even though it is not treated as a choice-of-law case by the parties. I trust the significance of this choice will become clear in due course.

1. *Sharn Importing Ltd. v. Babchuck*, [1971] 4 W.W.R. 517, 21 D.L.R. (3d) 349 (B.C.S.C.).

The first reported choice-of-law decision arising under the G.A.A. was a case with few Alberta contacts. Moreover it was not a case tried in Alberta. In *Sharn* the defendant guarantor, an experienced businessman whose principal activity was the promotion of mines, was a resident of British Columbia and the creditor was a corporation with its plant and head offices in Quebec. The guarantee, however, was given to cover the debt of a corporation (a shoe store) of which the defendant was president, principal shareholder and managing director, and this debtor corporation had its main retail outlet in Edmonton. One fact was in doubt: the place of execution of the guarantee. It was the defendant's contention that the

other indications in the case that the defendant had connections with Edmonton as well, so it may well be that a plea for the application of Arizona law would be unlikely to succeed here, but that does not weaken my general point.

28. *Ampex of Canada Ltd. v. Thomson et al.* (1979), 11 Alta. L.R. (2d) 303 (Q.B.).

29. See, eg., the discussion of *O'Donovan et ux. v. Dussault et al.*, *supra*.

30. *Avco Delta Corporation Canada Ltd. et al. v. MacKay*, [1976] 4 W.W.R. 312 (Alta. Dist. Ct.). See the discussion, *infra*. In addition there is a choice-of-law dispute under the G.A.A. in which a preliminary application has been decided: *Associate Capital Services Corp. v. Multi Geophysical Services Inc. et al.* (1986), 44 Alta. L.R. (2d) 186; 73 A.R. 364 (Q.B.). No final judgment has been reported in that case and it will not be discussed in this paper.

guarantee had been signed in Edmonton, from where it had undoubtedly been mailed to the plaintiff, and that the *lex loci contractus* should govern. Thus, the defendant contended, the G.A.A. applied and the fact of non-compliance rendered his guarantee void. The court eventually decided that the *lex loci contractus* was not Alberta. It found that the guarantee had been signed and therefore executed by the defendant while present in B.C. and that that was enough to dispose of his argument that non-compliance with the G.A.A. invalidated the contract. In the court's view³¹ the mere fact that the underlying debt might have Alberta connections was not enough to place the defendant in a position to argue for the application of the G.A.A. The territorial connections of the underlying debt were irrelevant to choice-of-law considerations bearing on a guarantee of such a debt. The defendant did not even get across the threshold.

The court's finding on the issue of place of formation of the contract is curious because in terms of traditional contract-formation doctrine we would not normally think that the place of signing was determinative of the place of execution. The guarantee was undoubtedly mailed from Edmonton to the plaintiff creditor's office in Quebec, and traditional rules would dictate that, no matter where the guarantee was in fact signed, the contract was not complete until it was placed in the mailbox in Edmonton. After all, the defendant could have signed the guarantee but then changed his mind and ripped it up or simply failed to post it. If that had happened no one would think that there was a completed contract. Only communication of the acceptance to the plaintiff would act to complete the contract. Consequently there should have been no doubt that, no matter where the document was signed, the contract was executed in Alberta. The court did not even deal with this argument.

The court, however, was prepared to consider the result that should follow if it was wrong in finding that the suretyship was signed (and therefore, in its view, completed) in British Columbia. It was prepared to accept for the sake of argument the defendant's contention that the contract was executed in Alberta. It stated that even if this were the case it would reject the defendant's argument, which was based on the first presumption under sub-rule 3 for Rule 127 of *Dicey & Morris*, that the *lex loci contractus* should prevail. Instead it would apply the second presumption under that rule:

If a contract is made in one country and is to be performed either wholly or partly in another, it may sometimes be presumed to have its closest and most real connection with the law of the country or of one of the countries

31. [1971] 4 W.W.R. 517 at 519; 21 D.L.R. (3d) 349 at 351 (B.C.S.C.).

where performance is to take place (*lex loci solutionis*). This presumption is strongest where all parties have to perform in one country.³²

The court found that either B.C. or Quebec was the place where performance — that is, payment by the guarantor should the principal debtor fail to repay — was to take place. It expressly rejected the defendant's submission that factual connections pertaining to the underlying contract, such as the fact that the shoe business for which the guarantee was given was in Alberta, should be taken into account in determining the proper law of the contract. It thought that the parties' intentions were a vital factor in determining the governing law³³, but that their intentions regarding the principal contract were irrelevant to their intentions on the law governing the guaranty. In addition the court found further support for the application of either Quebec or B.C. law in the presumption in favour of the law upholding the validity of the contract. That is, if a contract is valid by the law of *either* the place where it was made *or* the place where it was to be performed it should be upheld.

So, according to the B.C. Supreme Court, the mere fact that a contract of guarantee is executed in Alberta is not sufficient to attract the application of the G.A.A. Provided there are a sufficient number of foreign connections with the contract, compliance with the formalities required by that statute appears unnecessary.

2. *O'Donovan et ux. v. Dussault et al.*, [1973] 3 *W.W.R.* 634, 35 *D.L.R.* (3d) 280 (*Alta. S.C., A.D.*).

The first encounter of an Alberta Court with conflicts problems under the G.A.A. arose in a case similar in many respects to *Sharn*. *O'Donovan* concerned a guarantee mailed from Alberta to an out-of-province creditor to secure the debt of an Alberta corporation. As in *Sharn* the guarantor who sought to plead his non-compliance with the G.A.A. and thus escape payment was an experienced businessman, a fact emphasized by the court.³⁴ And as in *Sharn* the court did not permit him to escape. Reaching this result was more difficult in *O'Donovan* than it had been in *Sharn* because here the guarantor was not a foreigner but an Alberta resident and the signing of the guarantee in that province was no fortuitous event.³⁵ One might have thought that when out-of-province creditors dealt with Alberta guarantors the result might be the protection of the latter.

32. *Dacey & Morris on the Conflict of Laws*, (8th ed. London: Stevens, 1967) at 712. The extract is quoted in *Sharn* at 523 (W.W.R.) and 354 (D.L.R.).

33. *Supra*, note 31 at 524 (W.W.R.) and 355 (D.L.R.).

34. [1973] 3 *W.W.R.* 634 at 640-1; 35 *D.L.R.* (3d) 280 at 286 (*Alta. S.C., T.D.*).

35. I am not entirely sure what makes one event more fortuitous than another. The word is

In *O'Donovan* the trial judge had found that the G.A.A. applied and had excused the defendant. The Appellate Division reversed. It did so on the basis of its finding that the law of the creditors' residence, Saskatchewan, was the applicable law. This finding involved some fancy moves on the part of the court. The first of these was to find that the contract was made in Saskatchewan. The guarantors, whose Alberta corporation had previously been advanced money by the plaintiffs, executed a promissory note for repayment and a guarantee for that debt in Alberta and mailed them together, with duplicates of each, to the creditors' residence in Prince Albert, Saskatchewan. That mailing also included a piece of paper for the creditors to sign as witnesses, which they did, mailing the signed duplicates back to the guarantors in Alberta. Having recited these facts the court found that both the principal debt and the guarantee became effective when the plaintiffs signed as witnesses in Saskatchewan.

This finding is strange indeed. Well recognized, traditional rules of offer and acceptance dictate that the note and guarantee were both executed when they were placed in the mailbox in Alberta.³⁶ The contracts certainly did not need either the creditors' signatures as witnesses or the return of the duplicates to become effective. The documents mailed from Alberta were not offers, they were acceptances.

The court in *O'Donovan* took a different view of the rules of contract formation than the *Sharn* court did. *Sharn* had departed from the traditional postal acceptance rule by moving the time of formation back to the signing of the document. The court in *O'Donovan*, which did not refer to the decision in *Sharn*, went the other direction, moving the time of formation ahead to the offerors' acknowledgement that they had

one which is used by courts in conflicts cases from time to time. In fact it was employed by the B.C. court in *Sharn*: "The execution of the contract in Alberta, if it was executed there, was entirely fortuitous, because the defendant happened to be visiting Alberta at the relevant times, and this fortuitous event could not reasonably have been intended by the parties to fix the proper law of the contract." (At 524 (W.W.R.) and 355-6 (D.L.R.)). The court appears to mean that the event was fortuitous because it was unexpected, or at least considerably less likely to occur than certain other events. It is by that measure that I call the Alberta signing of the guarantee in *O'Donovan* "not fortuitous": at no relevant time were the signers outside Alberta.

36. It is arguable that both the principal contract and the guarantee were in fact formed earlier. The court notes, at 635 (W.W.R.) and 281 (D.L.R.), that the deal was first worked out over the telephone. "The money was advanced immediately but before it was received it was agreed between the plaintiffs and the defendants that the loan would be for six months and would be personally guaranteed by the individual defendants." Under the traditional approach it is open to argue that both the principal contract and the guarantee were made over the telephone and, though they might not become enforceable until there was compliance with the Statute of Frauds, the contract was formed in the jurisdiction in which the acceptance of the offer was heard. The court did not explore this route.

received the acceptance of their offer. The decision in *O'Donovan* also differed from that in *Sharn* in other ways. It assigned different weight to certain factual findings in its determination of the governing law. The Alberta court, for instance, thought that the law governing the underlying contract was of importance in finding the law governing the guarantee. And since, by the same deviation from the orthodox rules of contract formation, the Alberta court had found that the place of formation of the principal debt was Saskatchewan, this fact could be used to add a Saskatchewan contact to the task of choosing the governing law for the guarantee. That fact — place of formation of the underlying contract — was then found to be dispositive of the matter. No reasons were offered for departing from *Sharn's* view that the "location" of the underlying contract was irrelevant to determining the law governing the guarantee. Unlike *Sharn*, where the court was prepared to hold that place of formation was not a governing matter, the court in *O'Donovan* first manipulated the law to bring the place of formation out of Alberta into Saskatchewan and then found that one fact determined the proper law of the contract.³⁷

Nevertheless *O'Donovan* resembled *Sharn* in one significant respect: non-Albertan creditors, who had likely never heard of this singular Alberta statute, were not required to ensure that their Alberta guarantor complied with it.

3. *Avco Delta Corporation Canada Ltd. et al. v. MacKay*, [1976] 4 *W.W.R.* 312 (*Alta. D.C.*), aff'd [1977] 5 *W.W.R.* 4, 76 *D.L.R.* (3d) 541, 4 *A.R.* 565 (*A.D.*).

Four years after *O'Donovan* the Appellate Division of Alberta's Supreme Court had a second encounter with a guarantee by an Albertan of a promissory note found to be made without the province, but this time it did not recognize that it might be dealing with a conflict-of-laws case. In contrast to the findings in the previous two cases, the court in *McKay* had no doubt that it was dealing with a guarantee that had been executed in Alberta. Moreover the courts, both at trial and on appeal had no doubt that a guarantee executed by an Albertan in Alberta was governed by the Act, and both courts found the guarantee unenforceable for non-compliance.³⁸ Yet *MacKay*, like *O'Donovan*, was a dispute involving

37. Another recent example of a provincial appellate court manipulating the mailbox rule to avoid applying a statute which would void an otherwise acceptable commercial agreement is *Province of Nova Scotia v. Weymouth Sea Products Ltd. et al.* (1983), 61 *N.S.R.* (2d) 411 (*N.S.S.C., A.D.*), aff'g. 59 *N.S.R.* (2d) 181 (*N.S.S.C., T.D.*).

38. The Appellate Division in fact released the guarantor on other grounds, but it would have been prepared to find non-compliance with the G.A.A. sufficient reason for dismissing the plaintiff's suit.

guarantee by an Albertan of a promissory note which was payable outside of Alberta. This fact — the law governing the underlying contract — had been considered significant in *O'Donovan* but in *MacKay* was not even treated as raising a choice-of-law issue. *MacKay* had more foreign contacts than *O'Donovan* since in *MacKay* the principal contract was clearly executed outside of Alberta. No manipulation of contract-formation orthodoxy was necessary to locate the principal contract outside of Alberta. The second time around, however, the Appellate Division was not prepared to protect the creditor.

The decision is in accord with the traditional approach to conflicts which treats choice of the applicable law as a matter to be raised by the parties. The creditor in *MacKay* did not choose to argue that Alberta law might be inapplicable to this guarantee of a “non-Alberta” debt, so the courts were right not to raise the matter on their own.

4. *Greenshields Inc. v. Johnston et al.*, [1981] 3 *W.W.R.* 313, 28 *A.R.* 1, 119 *D.L.R.* (3d) 714 (Q.B.), aff'd [1982] 2 *W.W.R.* 97, 17 *Alta. L.R.* (2d) 318, 35 *A.R.* 487, 131 *D.L.R.* (3d) 234 (C.A.).

Like *O'Donovan*, *Greenshields* was a case of a non-conforming guarantee given by an Alberta resident to cover the debts of his Alberta company, but this time the guarantee was incontestably executed in Alberta.³⁹ Moreover the creditor had an office in Edmonton and received the guarantee there. The only reason for thinking that a foreign law might govern the transaction was the fact that the document contained the following provision:

This guarantee shall be construed in accordance with the laws of the province of Ontario.⁴⁰

The trial court, citing and following Castel's *Introduction to Conflict of Laws*, was prepared to hold the contract formally valid if it met the requirements of either the place where it was made or those of the proper law.⁴¹ Since it obviously could not be held valid on the former ground it remained for the court to use the latter. Could the clause cited above have

39. At least no attempt was made to argue that the contract of guarantee was formed outside of Alberta. Given the ingenuity of the courts in *Sharn* and *O'Donovan* one wonders whether, even with the overwhelming Alberta contacts in *Greenshields*, it might have been possible to construe the guarantee as having been formed in Ontario.

40. [1981] 3 *W.W.R.* 313 at 319; 28 *A.R.* 1 at 6; 119 *D.L.R.* (3d) 714 at 719 (*Alta. Q.B.*).

41. At 319 (*W.W.R.*), 6-7 (*A.R.*) and 719 (*D.L.R.*). It is curious that the court chose not to refer to Castel's major text, *Canadian Conflict of Laws*, (Toronto: Butterworths, 1975). The *Introduction to Conflict of Laws* (Toronto: Butterworths, 1978) is a short student handbook which describes itself as “not a scholarly work” (p. iii) and which advises the reader to consult the general text for fuller discussion. Had the court in *Greenshields* done this it would have found that the matter was not as simple as the student version makes it out to be.

the effect of making the law of Ontario the proper law of this Alberta-centered agreement?

Perhaps the first point to note is that the provision in question does not claim to make the proper law of the contract that of Ontario. It merely stated that the agreement should be *construed* in accordance with those laws. It is certainly possible for an agreement to have a proper law in one jurisdiction yet refer to the rules of construction of another jurisdiction.⁴² The court, however, did not appear to recognize this possibility; it treated the provision quoted above as though it purported to make the law of Ontario the proper law of the contract.

The issue then became one of deciding whether or not the clause should be given effect. The trial court thought it should, and the Court of Appeal agreed. The appellate court's reasons are a brief adoption of those given at trial, so it is to the reasons for judgment in the court of first instance that we must turn. Medhurst, J. quoted two tests which might be used to determine this question. One was taken from *Dicey and Morris on the Conflict of Laws*:

No court, it is submitted, will give effect to a choice of law . . . if the parties intended to apply it in order to evade the mandatory provisions of that legal system with which the contract has its most substantial connection and which, for this reason, the court would, in the absence of an express or implied choice of law, have applied.⁴³

The second test was that given by Lord Wright in *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*⁴⁴ That test states that a choice of law clause will be given effect "provided that intention expressed is *bona fide* and legal, and providing there is no reason for avoiding the choice on the ground of public policy".⁴⁵

Having quoted both tests the court dealt only very briefly with the first. Medhurst, J. did no more than to assert: "It cannot be said that this choice of law clause was inserted for the purpose of evading the Alberta statute."⁴⁶ He made no effort to inquire into whether Alberta's G.A.A. was, in these circumstances, a mandatory provision that would otherwise be applicable. Medhurst, J. only pursued the *Vita Food* test of whether the contractual provision was contrary to Alberta's public policy. He found that the clause did not violate any essential principle of justice and

42. For a discussion of this see *Cheshire and North's Private International Law* (10th ed., 1979) at 239-40.

43. 321 (W.W.R.), 8 (A.R.) and 720 (D.L.R.). The quotation is from *Dicey and Morris on the Conflict of Laws*, *supra*, note 32 at 699.

44. [1939] 2 D.L.R. 1; [1939] A.C. 277 (P.C.).

45. The quotation is from [1939] A.C. 277 at 290. It is reproduced in *Greenshields* at 320 (W.W.R.), 7 (A.R.) and 720 (D.L.R.).

46. *Id.*, 323 (W.W.R.), 10 (A.R.) and 722 (D.L.R.).

was not in any way morally repugnant and that consequently the clause did not offend the rules of public policy and should be given effect.

The effect of the application of this test is to permit any parties — or at least those persons signing guarantees with some non-Alberta connections, no matter how tenuous⁴⁷ — to avoid the G.A.A. by the mere insertion of a choice-of-law clause. The G.A.A. can be contracted out of. It is noteworthy that, since *Greenshields*, the House of Lords has expressed disapproval of the *Vita Foods* test and limited the ability of parties to avoid the applicability of mandatory statutes through choice-of-law clauses.⁴⁸

5. *Jorges Carpet Mills Inc. v. Bondar et al.*, [1981] 4 W.W.R. 470 (Alta. Q.B.).

Jorges Carpet Mills is similar to *O'Donovan* in that it was a decision of an Alberta court concerning a non-complying guarantee signed in Alberta by Alberta residents for the debts of their Alberta corporation and then mailed from Alberta to a foreign creditor. Although the Court of Queen's Bench relied on the same authority cited by the Appellate Division in *O'Donovan — The Assunzione*⁴⁹ — this time it emphasized the Alberta factual connections rather than the foreign ones and held that the G.A.A. applied, thus invalidating the guarantee. The court thought that the place of making was a significant connecting factor but, unlike the courts in *Sharn* and *O'Donovan*, it relied on traditional analysis to determine that place:

The two guarantees were signed in the province of Alberta and became effective upon being placed in the mail in Calgary by the personal defendants for transmittal back to the plaintiff in Georgia. In short the guarantees were made in Alberta.⁵⁰

In addition the court emphasized the residence of the guarantors and the fact that the guarantees would necessarily have to be enforced in Alberta (a factor overlooked by the court in *O'Donovan*). In *O'Donovan*

47. The only real extra-Alberta connections in this case were the plaintiff's head office in Toronto and the fact the bond orders in the underlying contract were placed through that office.

48. *The "Morviken"*, [1983] 1 Lloyd's Rep. 1. *The "Morviken"* was followed in *Agro Co. of Canada Ltd. et al. v. Owners and all Others Interested in the Ship "Regal Scout" et al.* (1983), 148 D.L.R. (3d) 412 (F.C., T.D.). In that case Cattnach, J. held that certain provisions of Canada's *Carriage of Goods By Water Act*, R.S.C. 1970, c. C-15 applied regardless of evidence of contractual intent to exclude them. The provisions were construed as mandatory and consequently the fact that the proper law of the contract might be that of Japan could make no difference *on this point*.

49. [1954] P. 150; [1954] 1 All E.R. 278 (C.A.).

50. [1981] 4 W.W.R. 470 at 475 (Alta. Q.B.).

the Appellate Division, in counting up the relevant geographical factual connections with the case, had stressed those aspects of the principal contract that were connected with the foreign jurisdiction. There were many such aspects in *Jorges Carpet Mills* for here, unlike *O'Donovan*, the defendants had earlier made several trips to the foreign jurisdiction in connection with the principal contract.⁵¹ Moreover, the principal debt and the guarantee for that debt were in United States dollars, and authority relied on in both *O'Donovan* and *Jorges Carpet Mills* supports the practice of counting currency of payment as a relevant connecting factor in determining the governing law. The court in *Jorges Carpet Mills*, however, returned to the approach in the *Sharn* case and paid little attention to the territorial aspects of the principal debt. Contacts which had been considered relevant in *O'Donovan* were ignored here.

6. *Bank of Montreal v. Snoxell et al. (1982), 44 A.R. 224, 143 D.L.R. (3d) 349 (Q.B.).*

Snoxell differs from the cases we have considered so far in that it was not a choice-of-law decision. It concerned the enforcement of a foreign judgment. In *Snoxell* the Alberta court was prepared to permit the enforcement of a British Columbia judgment against an Alberta resident guarantor who had executed the non-conforming guarantee in his home province.

Quite correctly, at least in orthodox terms, the Alberta court saw nothing to offend Alberta's public policy in the enforcement of this judgment. It should not have gone into the merits of the B.C. decision and it did not do so. It is quite correct for a forum court to enforce a foreign judgment which represents a result opposed to what the forum court would have decided had it heard the original action on the merits. The same conclusion was reached in a similar case the following year when the Alberta courts were asked to enforce a Montana judgment.⁵²

Snoxell is interesting for our purposes, however, because it contains some *dicta* on the choice-of-law issue. The Alberta Court noted that had the original action on the merits been brought in the defendant guarantor's home province the result would have been different: "Had the plaintiff brought its action in Alberta the guarantee would have been found to be unenforceable."⁵³ This statement is at odds with the Court of

51. *Id.*, at 473.

52. *First Interstate Bank of Kalispell, N.A. v. Seeley et al. (1983), 54 A.R. 285 (Q.B.).* *Snoxell* was a case under Alberta's Reciprocal Enforcement of Judgments Act, R.S.A. 1980, c. R-6, while *First Interstate Bank of Kalispell* was a suit on a foreign judgment, but the same principles applied to the enforcement of each. The Montana Court in *Kalispell* had applied Montana law to the enforcement of a non-complying guarantee given by an Albertan.

53. 143 D.L.R. (3d) 349 at 350 (Alta. Q.B.).

Appeal's decision in *Greenshields* which, curiously enough, the court in *Snoxell* purported to follow. The contract of guarantee at issue in *Snoxell*, though it had been executed in Alberta by an Albertan, contained a clause similar to the one in *Greenshields*. The clause read:

This CONTRACT shall be construed in accordance with the laws of the Province of British Columbia. . . .⁵⁴

The guarantee also contained a forum selection clause in favour of the B.C. courts, though the clause did not purport to exclude the jurisdiction of other courts. In addition the guarantee contained a clause which would appear to make it even more of a non-Albertan guarantee than the one considered in *Greenshields*, namely, a statement that it should be deemed to be made in British Columbia. Given all of this, the court's remark that the guarantee would have been found unenforceable had the original suit been brought in Alberta is difficult to reconcile with authority. It is particularly difficult because the court in *Snoxell* quotes an extract from the *Greenshields* trial decision to the effect that a contract will be formally valid if it meets the requirements of either the place where it was made or the proper law of the contract. Had the court been willing to give effect to the provision stating that the guarantee, though executed in Alberta, should be deemed to have been made in B.C. it could have found that the agreement complied with the formalities of the *lex loci contractus*. But even if the court had not been prepared to take this route it could have followed the *Greenshields* route and found that the agreement was valid in that the proper law of the contract, as determined by the express provision in the agreement, was that of British Columbia. Thus the guarantee should have been valid no matter where the suit was brought. Finally, there was no apparent reason for the court to make the remark about the guarantee's unenforceability in Alberta and it is difficult to guess why it did so.

7. *Kenton Natural Resources Corp. v. Burkinshaw et al. (1983), 47 A.R. 321 (Q.B.)*.

It is remarkable that Alberta law was found not to govern in *Kenton* since it concerned a guarantee given by Albertans in Alberta to a creditor which was an Alberta corporation. The foreign elements in the case were almost totally limited to certain factual connections unrelated to the contract of suretyship but rather connected to the principal debt, and most previous cases had held that the character of the principal debt should not be persuasive in determining the governing law of the

54. *Id.*, at 352.

guarantee. But then *Kenton* is not noteworthy for following previous conflicts cases under the G.A.A. In fact, although the court cites a number of previous decisions and learned conflicts authorities, it makes no mention of any cases, conflicts or otherwise, previously decided under the G.A.A.

The case concerned an agreement for the sale of a number of mineral leases in Tennessee. The plaintiff was the prospective purchaser, an Alberta company, and the defendants were Exotic Minerals Inc. (a Nevada corporation which was acting as selling agent of the leases) and the two Alberta principals of Exotic. When the deal failed to close due to the inability of the vendor to make acceptable title the plaintiff brought suit against Exotic for the return of its deposit. It also sued the personal defendants as guarantors of Exotic's performance who in their defence pleaded non-compliance with the G.A.A.

The court thought that the guarantee agreement would be valid if it was in accordance with the proper law of the contract, the law having the closest and most real connection with the transaction. To determine this connection Stratton, J. was prepared to count up the factual contracts which various aspects of the contracts had with various jurisdictions. In Alberta's favour were the facts that the transaction (both the guarantee and the principal contract) was negotiated and concluded in that province; the plaintiff had its head office in Calgary; the guarantors were Albertans who carried on their business there; the agreement was partly performed there (pre-payment of the purchase price); and ownership of the Tennessee leases was already held partly by Canadian interests. In Tennessee's favour were the following facts (note that, unlike the situation with the Alberta connections, most of them concern only the principal transaction): the land in the leases was located in Tennessee; those leases were partly owned by Americans; the balance of the purchase price was payable in U.S. funds; the agreement could not close without the favourable opinion of a Tennessee attorney; the land in question would be drilled by a U.S. corporation; and the land records office was located in Tennessee. Having considered the above the court simply concluded:

As between the laws of Tennessee and Alberta I have concluded that the law of Tennessee is the proper law of the contract. I am satisfied that Tennessee law is the legal system with which the subject transaction had its closest and most real connection and a just and reasonable businessman involved in dealing in oil and gas interests in properties would have selected Tennessee law if it had considered that problem at the time of entering into the Agreement.⁵⁵

55. 47 A.R. 321 at 331 (Q.B.).

Since this objective counting of contacts apparently demonstrated that the parties, had they turned their minds to the problem, would have selected a law other than Alberta's, that disposed of the defence that the G.A.A. had to be complied with.

8. *Williston Basin State Bank v. Shearer et al. (1983), 28 Alta. L.R. (2d) 341, 38 C.P.C. 303 (Q.B.).*

This case concerned a guarantee delivered in blank form from North Dakota to Edmonton, signed there by an Alberta resident (who failed to comply with the G.A.A. formalities) and then personally returned to the out-of-province creditor. The court, however, was not asked to rule on the applicability of the G.A.A. The dispute was an application to dismiss the claim on the guarantee on the grounds that it was a contract made in Alberta and that the plaintiff, because it was not registered as an extra-provincial company, was barred from commencing or maintaining any action on such a contract. In spite of the fact that the applicability of the G.A.A. was not in issue, *Williston Basin State Bank* is of interest here because it, like *Snoxell*, contains some *dicta* on the matter. In fact for my purpose here the *dicta* on the G.A.A. are the most interesting part of the case, and hereafter I will treat them as though they were the basis of the decision.

The court wrote:

It is important to realize that there is no certificate as is required by the Guarantees Acknowledgement Act of Alberta attached to the guarantees. This would indicate to my satisfaction that the bank was not intending at the time it had guarantees executed to use Alberta law or to regard the guarantees as having been made in Alberta.⁵⁶

To buttress this finding the court went on to find that the contract had not in fact been made in Alberta. In so doing it followed contract orthodoxy. It noted that, although the guarantor signed the guarantee in Alberta, the contract was not complete until it was personally delivered to the creditor in North Dakota, and consequently that contract of guarantee was formed in North Dakota.

Insofar as I may be permitted to treat the *obiter dicta* as *ratio* and thus to view *Williston Basin State Bank* as a decision about the G.A.A., three points seem worthy of note. First, unlike the courts in *Sharn* and *O'Donovan*, the judge in this case followed traditional rules for determining the place where a contract is made. Second, it is interesting that the court notes that failure to complete a G.A.A. certificate may be evidence that the parties did not intend to have Alberta law apply. This

56. 29 Alta. L.R. (2d) 341 at 344; 38 C.P.C. 303 at 307 (Q.B.).

suggestion is new. It treats a failure to act as though it were a choice-of-law clause. Finally, the court gives prominence to the factor of place of contracting. Although this may be explained by its need to resolve the main issue (the right of unregistered foreign companies to sue in Alberta), to the extent that it has implications for the G.A.A. issue it suggests that since the contract was executed out of Alberta, compliance with the G.A.A. was not necessary.

9. *Lehndorf Property Management Ltd. v. McGrath et al.*, [1984] 3 *W.W.R.* 187, 25 *B.L.R.* 164 (B.C.S.C.).

With this case and the following one we return to the courts of British Columbia. In *Lehndorf* persons executing a guarantee in B.C. made the "mistake" of including in it a clause which read: "It is recorded that the laws of the Province of Alberta shall apply to this Guarantee and Indemnity."⁵⁷ In spite of the clause no attempt was made to comply with the G.A.A. Noting that some factual connections existed between the principal contract and Alberta,⁵⁸ the court was prepared to give effect to the parties' choice of law, find that Alberta law governed and hold that the guarantee was of no effect.

Even judging by the criteria of traditional analysis and consistency with previous decisions under the G.A.A., *Lehndorf* poses a number of problems. Several earlier decisions — *Kenton*, *O'Donovan*, even the decision of the B.C. court in *Sharn* — had showed courts' willingness to hold guarantees valid if they complied with either the *lex loci contractus* or the proper law of the contract. Since the guarantee in *Lehndorf* was valid by the internal law of British Columbia where it was made, it could easily have been upheld by this rule. That is precisely what the court in *Sharn* had been prepared to do. Counsel for *Lehndorf* tried this argument but this time around the court rejected it. Wetmore, L.J.S.C. acknowledged that compliance with the law of the place of execution was sufficient to make a contract formally valid; in fact, contrary to authority, he appeared to suggest that compliance with the formalities of the place of contracting was not merely sufficient but necessary.⁵⁹ The court's reason for rejecting the applicability of that argument in this instance was a matter of characterization. It thought that the requirements of the G.A.A. were substantive, not formal, and that consequently no reference to the law of the place of contracting was

57. [1984] 3 *W.W.R.* 187 at 189; 25 *B.L.R.* 164 at 166 (B.C.S.C.).

58. "The lease which is guaranteed is for property in Alberta and the principal debtor, the lessee, is an Alberta company": *Id.*, 189 (*W.W.R.*) and 166 (*B.L.R.*).

59. *Id.*, at 189 (*W.W.R.*) and 167 (*B.L.R.*).

possible. The "alternative-reference" test advanced by Lehndorf was applicable only to matters relating to formal validity of contracts.

In considering the question of whether or not the G.A.A.'s requirements were substantive or merely formal the court made a significant mistake of reasoning: it collapsed the substance/procedure distinction and the substance/formality distinction. The court wrote:

The issue then is simply whether the requirement of a notarial certification and the consequences of its absence, as provided in the Alberta statute is a mere formality or procedural requirement on one hand, or a matter of substance on the other.⁶⁰

The court followed this statement with a quotation from the judgment of Stevenson, J. A. in the Alberta Court of Appeal decision in *Greenshields* in which the judge said that the requirements of the G.A.A. were substantive. It then quoted the part of the G.A.A. which provides that non-complying guarantees are of no effect and noted that "this goes beyond mere procedure, such as, for example, a limitation statute which does not extinguish a cause of action: it simply removes its enforceability from the courts".⁶¹

In orthodox choice-of-law methodology there is a clear difference between the substance/procedure distinction and the substance/formality distinction. Writers who support the traditional approach have emphasized the importance of this difference.⁶² Briefly, if a matter is characterized as procedural (as opposed to substantive) then, regardless of the law chosen to decide the dispute, the procedural law of the forum will apply. Similarly, no non-forum law characterized as procedural will be given effect. If a contractual matter is characterized as a question of formality (as opposed to substance) then regardless of whether the contract is valid by the proper law it may be valid if it complies with the formality requirements of the place of contracting. This is what the B.C. court in *Sharn* had done. The court in *Lehndorf* conflated these two distinctions as the quotation at note 60 shows. The Alberta Court of Appeal in *Greenshields* had most certainly not held that the G.A.A. was substantive as opposed to *formal*. There was no conceivable need for it to have done so since it had already held the contract as valid because it complied with the proper law. It had held that the G.A.A.'s requirements were substantive as opposed to *procedural* and it did so in order to reject the defendant's argument that, even if the proper law of the contract was the law of Ontario, the G.A.A. should govern since it was procedural and

60. *Id.*, at 189-90 (W.W.R.) and 167 (B.L.R.).

61. *Id.*, at 190 (W.W.R.) and 167-8 (B.L.R.).

62. Falconbridge, *Essays on the Conflict of Laws* (2nd ed. Toronto: Canada Law Book Co., 1954) at 94-105.

consequently should always be applied in any case before an Alberta forum. Consequently, the court in *Lehndorf* was dead wrong in relying on *Greenshields* for the holding that the requirements of the G.A.A. were not requirements of formation. Similarly, the court's argument that the G.A.A.'s requirements were not matters of formality could receive no support from the fact that the consequences of non-compliance were that the guarantees should have no effect. Many provisions previously characterized as formal have this effect. The court was adopting a test used in the substance/procedure distinction, not in the substance/formality distinction.⁶³

In any event, there are problems with ever holding that parties have chosen a law that renders their contract invalid, especially when it is a rule of formation.⁶⁴ This issue had recently been dealt with by the B.C. Supreme Court in *Nike Infomatic Systems Ltd. v. Avac Systems Ltd. et al.*⁶⁵ An issue arose as to whether the parties might have selected Alberta law to govern part of their franchise agreement and whether that law might render that part of the contract void.⁶⁶ The court's response to this argument was that "this interpretation could mean that the parties had signed a worthless piece of paper. The law, where not compelled by the intractable facts, tries to uphold contracts . . .".⁶⁷ In the interests of common sense the court in *Lehndorf* might well have taken this track and decided that the parties were referring to Alberta law as to the effect of guarantees but not to Alberta's law of contract formation. In fact it appears to have considered this point but rejected it on the grounds that the G.A.A. was, in its view, substantive, not formal.

63. The complexities of the substance/procedure distinction are potentially hazardous. The distinction has a different significance in conflicts cases that it does in non-conflicts cases and it may be dangerous for a court in a non-conflicts case to rely on a finding with respect to this decision reached by a court faced with a choice-of-law problem. For an example of a court in a non-conflicts G.A.A. case adopting the *Greenshields* finding regarding the substance/procedure distinction see *Alberta v. Ronsdale Construction et al.* (1984), 58 A.R. 115 (Q.B.) at 125-6.

64. For an example of an American court dealing with this interesting problem see *A.S. Rampell, Inc. v. Hyster Co.*, 3 N.Y. 2d 369; 165 N.Y.S. 2d 475; 144 N.E. 2d 371 (1957).

65. [1980] 1 W.W.R. 528; 105 D.L.R. (3d) 455; 16 B.C.L.R. 139; 8 B.L.R. 196 (S.C.). The G.A.A. was pleaded in *Nike*, but no submissions were made on this point and the court did not comment on it.

66. The choice-of-law clause in question read: "This Agreement is to be governed by and construed according to the laws of the Province of B.C. If, however, any provision in any way contravenes the law of any state or jurisdiction where this agreement is to be performed, such provision shall be deemed not to be a part of this agreement therein." *Id.*, at 528 (W.W.R.), 456-7 (D.L.R.), 141 (B.C.L.R.) and 199 (B.L.R.). The defendant argued that since certain provisions of Alberta's Franchises Act, 1971 had not been complied with, the offending parts of the contract should be struck out. The plaintiff argued that B.C. law applied to those parts.

67. *Id.*, at 534 (W.W.R.), 460 (D.L.R.), 145 (B.C.L.R.), and 203 (B.L.R.). The court in *Lehndorf* did not refer to *Nike*.

10. *Morguard Trust Company v. Affkor Group Ltd et al. (1984), 55 B.C.L.R. 1 (C.A.)*.

Morguard was an appeal from a judgment against two Alberta residents who had executed a guarantee in Alberta⁶⁸ in respect of a mortgage given to the plaintiff on land located in British Columbia. The plaintiff had foreclosed on the property and had obtained judgment against the guarantors.

The British Columbia Court of Appeal referred to the closest-and-most-substantial-connection test and then listed the B.C. contacts with the case: the mortgaged land was in B.C.; the mortgagor was a B.C. company; the mortgage was executed in B.C. on B.C. standard forms; the mortgage was registered in Victoria and payments on it were to be made there. The Court of Appeal expressly approved of the *Sharn* case,⁶⁹ which, it should be recalled, had explicitly rejected the notion that elements of the principal contract should be relied on in determining the proper law of the guarantee. (In *Sharn* the principal contract was closely tied to Alberta, and the court may have wanted to avoid the application of Alberta law.) Nevertheless the Court also explicitly approved of the notion that the same law that applied to the principal debt should govern the guarantee of that debt.⁷⁰ Given the overwhelming connections between the principal contract (the mortgage) and British Columbia the court concluded that B.C. law was the proper law of the contract. Consequently, it did not matter that these Alberta guarantors had not complied with the provisions of the G.A.A. The British Columbia creditor was protected.

IV. *General Comments*

It will surprise no one that my view is that, taken as a group, the decisions we have just seen are crummy. First and foremost, by my count at least, half of them reach the wrong result. Guarantees that should have been avoided due to non-compliance with the G.A.A. are enforced, and vice versa. An account of my reasons for saying this will follow in the next section. For the moment I will baldly assert that the results are no better than might be reached by flipping a coin.

Secondly, even after these ten cases, one cannot say that the courts have sorted out how the G.A.A. will apply in future multi-jurisdictional disputes. Proponents of the jurisdiction selecting approach cannot argue

68. Or at least this was apparently the case. It was asserted at (1984), 55 B.C.L.R. 1 (C.A.) at 6 by counsel for the guarantors that this was the only reasonable inference from the facts, and the court does not appear to have departed from this view.

69. *Id.*, at 7.

70. *Id.*, at 7.

that, after some initial hesitation and difficulties, courts have at length arrived at a consensus as to how the Act will operate in a choice-of-law case. We have seen bodies of facts forced into spastic postures as the traditional rules of contract formation are first pulled one way, then another, and then applied in an orthodox fashion; the G.A.A.'s provisions have been treated as formal, then as substantive, and then as formal again; the geographical orientation of the underlying principal obligation has been treated as irrelevant in some disputes and determinative in as many others. Any one of these factors would alone be sufficient to give rise to legitimate concern about ability to predict what will happen in the next case. When they are taken together they produce almost total unreckonability. This has consequences for persons who wish to plan transactions. Possibly the most prudent route for a solicitor would be to advise the completion of a certificate in any case with the remotest Alberta connections. (At least notaries public would benefit from this.) However, since some of these decisions (*e.g. Kenton, Morguard, O'Donovan*) tell us that such a certificate is not always necessary, there will clearly be considerable wasted transaction costs here. The courts in those cases are telling us that a certificate would be superfluous. A reader of *Greenshields* might think that these costs could be minimized by simply inserting in the guarantee a clause to the effect that it should be governed by the law of some jurisdiction other than Alberta. That would supposedly eliminate the need for compliance with the G.A.A. Such a tactic, however, would be no guarantee of success. There are costs in determining the content of the laws of foreign jurisdictions and, as the creditors in *Lehndorf* found out, dangers in neglecting to do so. Moreover, the *dicta* in *Snoxell* suggest that Alberta courts may not always pay attention to such choice-of-law clauses. The task of getting the traditional rules to reach predictable results while still conforming to *stare decisis* seems Sisyphean.

The indeterminacy here is much like that which prevailed in the United States before most states went over to an interpretive methodology. Writing in 1948, Elliott Cheatham arrived at an evaluation of the American courts' handling of this problem which is equally applicable to Alberta today.

Contracts are of the most diverse types and qualities, and yet the typical opinion of an American court seeks to deal with them by laying down a single rule applicable to all questions of validity for all types of contracts. The method is unworkable and leads to evasion in two ways. One escape is through changing from case to case the meaning of the key term in the rule (*i.e.*, place of making) with the result that there are several rules in fact masquerading under the one rule in form. The other method is to change the rule itself from case to case, with each opinion referring to one of the

rules and ignoring the others. A candid New York judge has pointed out that in his state there are at least four rules going along together but independently, each one seemingly ignorant of the existence of the others.⁷¹

Finally, the decisions we have seen may well have spawned confusion in other areas of the law. It seems to me that there is an obvious detriment to the general (*i.e.*, non-conflicts) law in the manipulation of doctrines such as the mailbox rule in order to reach apparently just results in these cases. Some relatively clear waters are muddied and no compensating advantage is gained. I do not mean to imply that, even apart from conflicts cases, I consider the post-box rule to be some embodiment of perfect justice to be tampered with only at our peril. Evidence to the contrary is plentiful. Nevertheless, as a guideline for determining when (as opposed to where) contracts are completed and consequently how certain risks are allocated, the rule may at least provide parties who know about it in advance some increased ability to operate with ability to foresee likely consequences of their actions. I see no point in lessening the already limited usefulness of such a rule.

To conclude this part let me quote Professor Robert Sedler's overview of the consequences of the Michigan courts' traditional, jurisdiction-selecting approach to choice of law in torts.

Choice of law in Michigan is in a shambles. It is impossible to predict when the Michigan Court of Appeals or the federal courts in Michigan will again decide to resort to "manipulative techniques", or when one panel of the court of appeals will refuse to follow the lead of another panel or of the federal courts in employing them. . . . The results in conflicts torts cases are neither sound nor predictable. It is all one big mess.⁷²

Canadian choice-of-law approaches leave us in the same mess.

V. *The Interpretive Approach*

The interpretive methodology would treat choice-of-law decisions arising under the G.A.A. as being not essentially different from domestic cases. The question of the Act's territorial application is *structurally* identical to questions regarding the scope of its applicability in non-conflicts cases. Consequently, what is required is a determination of the G.A.A.'s purpose and an attempt to fulfill that policy as best as can be done, taking into account the purposes of other relevant laws. This last task — that of deciding when the G.A.A. must yield in the face of an argument that some other rule should govern — does give rise to concerns in interstate

71. Cheatham, Book Review (1948), 48 Colum. L. Rev. 1267 at 1268 (footnotes omitted).

72. Sedler, *supra*, note 14 at 847. Since this article Michigan has espoused the interpretive approach. See: *Sexton v. Ryder Truck Rental Inc.*, 413 Mich. 406; 320 N.W. 2d 843 (1982).

cases that are of a different flavour than those in purely domestic situations. Courts must attend to the interaction of different legal systems. But this can be done without the interposition of jurisdiction-selecting choice-of-law rules. The place to start, as in a domestic case, is with some formulation of the purpose of the law in question.

Brief mention of the likely purpose of the G.A.A. was made earlier, but elaboration is required here. Most legally trained persons would have little difficulty in formulating some rough statement of the policy of the G.A.A. The evidentiary, cautionary and channeling functions⁷³ of legal formalities are familiar to most lawyers and, within obvious bounds, relatively uncontroversial. The cautionary role seems greatest here since evidentiary concerns would already be addressed by the requirement that guarantees be in writing. And if someone really should find the purpose of the G.A.A. difficult to ascertain, the usual aids are available. For instance the 1970 Report on the Act by the Alberta Institute of Law Research and Reform contains that body's view of the legislation's goal:

The common purpose of the Guarantees Acknowledgement Act and of the Statute of Frauds is the prevention of fraudulent practices. More particularly, the Guarantees Acknowledgement Act is designed to protect the ordinary individual who, through lack of experience or understanding, might otherwise find himself subject to onerous liabilities at law, the nature and extent of which he did not properly appreciate when he entered into the undertaking in question. The statute seeks to provide this protection by requiring that the person giving the guarantee must appear before a notary public and that the latter must satisfy himself by examination that the guarantor is aware of the contents of the guarantee and understands it.⁷⁴

Interestingly, this selection from the Institute's Report has been referred to by Alberta courts in several non-conflicts cases under the G.A.A. In *Teachers' Investment and Housing Co-operative v. S.H. Properties Ltd. et al.*⁷⁵ for example, the court quoted part of the above

73. The terms are taken from Lon Fuller's *Consideration and Form* (1941), 41 Col. L. Rev. 799 at 800-01.

74. The Institute of Law Research and Reform, *Report No. 5, Guarantees Acknowledgment Act* (1970), at 2-3. The word "fraudulent" is arguably being used here in the wider, equitable sense. I do not mean to suggest that prior to the Report the courts would have been or were unable to formulate a view of the G.A.A.'s policy on their own. See, for example, the judgment of Dechene, J. in *General Tire & Rubber Co. of Canada v. Finkelstein* (1967), 62 W.W.R. 380 (Alta. S.C.).

75. (1984), 55 A.R. 241 (Q.B.). Other cases to mention the Report of the Institute of Law Research and Reform are *Keillian West Ltd. v. Sportspage Enterprises Ltd. et al.* (1982), 23 Alta. L.R. (2d) 99 (Q.B.) at 103; *C.I.B.C. v. Country Lane Furniture Warehouse (Wetaskiwin) Ltd. et al.*, *supra*, note 21; *Teachers' Investment and Housing Co-operative v. S.H. Properties Ltd.*, *infra*, note 76; and *Alberta v. Ronsdale Construction Inc. et al.* (1984), 58 A.R. 115 (Q.B.) at 133.

passage and expanded on it: "Clearly the Act is designed to protect the inexperienced, the ignorant, the unwary and the ordinary individual by insuring that he is aware at least of the general nature of the obligation undertaken by him."⁷⁶

As well the court took note of an ancillary purpose of the G.A.A. Since a certificate issued under the Act is conclusive proof that the Act has been complied with,⁷⁷ the existence of such a certificate may also be of benefit to a creditor:

In my view the Act . . . serves not only to give basic protection to the ordinary individual, but also, once a Notary Public is satisfied that guarantor understands the essential nature of the obligation he has entered, and issues the Certificate required, then the creditor is spared from spurious pleas of *non est factum*.⁷⁸

It should be noted that the statements about the G.A.A.'s purpose in the *Teachers' Investment* case were not a mere scholarly aside. They served a function. There were irregularities in the notary's certificate in that case and there was a real question whether the Act had been complied with. The court used its view of the purpose of the G.A.A. and its finding that the defendant was "a businessman who to the knowledge of the Notary Public, had previously given other personal guarantees"⁷⁹ to arrive at the decision that in this case a mere technical non-compliance should not avoid the guarantee.

It is revealing that no such inquiry into the purpose of the G.A.A. has ever appeared in any of the conflicts decisions under the Act. Not one of the conflicts decisions I have examined makes any express statement about the Act's purpose being relevant to the question before it. The most that could be noted is that *some* of the choice-of-law decisions made explicit reference to the fact that the guarantor was experienced in business matters, but the implication of such remarks was never made clear.

I would like to sketch out briefly how the ten cases summarized above might have been dealt with by courts prepared to take an interpretive approach to choice-of-law issues. I do not suggest that the arguments that will follow are exhaustive. Rather, they are meant to be representative of the type of discourse that would emerge under this approach. And I

76. *Teachers' Investment and Housing Co-operative v. S.H. Properties Ltd. et al.* (1984), 55 A.R. 241 (Q.B.) at 248.

77. G.A.A., *supra*, note 15, s. 5.

78. *Supra*, note 76 at 248. The court did not suggest that compliance with the Act would absolutely exclude a plea of *non est factum*, but it did opine that the plea would then be successful in only the most exceptional circumstances.

79. *Id.*, at 247.

certainly do not maintain that the resolutions I will suggest are an embodiment of perfect justice. I do think that the results I will proffer are fairly fair and I will point out why, even if some of them are wrong, they are vastly preferable to the dispositions reached under the jurisdiction-selecting approach.

The first case to arise, *Sharn*, would have been an easy one. The fact that the guarantor was a resident of another jurisdiction should, I think, have left little doubt as to the appropriate resolution. Having ascertained the facts the court would inquire into the purpose of the G.A.A. Assuming the policy of the Act would be roughly as spelled out above,⁸⁰ the only question that *Sharn* presents is whether that purpose is somehow forwarded or satisfied by requiring B.C. residents giving guarantees to Quebec creditors to comply with the Act. I submit that the G.A.A. should not apply here. It does not seem likely that the Act's purpose is to protect B.C. guarantors, whether from B.C. creditors, from Quebec creditors (as in this case) or even from Alberta creditors. Of course there are no express words in the G.A.A. to lead us ineluctably to this conclusion. On the question of its geographical scope the Act, like most others, speaks "in terms of unqualified generality".⁸¹ It does not tell us whether the guarantors it is referring to are Albertans, Hawaiians or Martians. There are no explicit instructions as to whether the creditors to be included are only Albertans or are any creditors anywhere in the world. It is the function of the conflict of laws to answer that question and it is the goal of the interpretive method to answer it directly, by the ordinary rules of statutory construction. In non-conflicts cases those rules of construction had told us that the chief purpose of the Act was to protect potential guarantors and the only new question here is, what guarantors? Albertans? British Columbians? Both? I think the correct answer, and the one that a court addressing this question directly would

80. It will be noted that here I speak of "purpose" and "policy" in the singular and that I have just finished speaking of two purposes: one to protect unsophisticated guarantors and the other to make spurious pleas of *non est factum* and the like more difficult to maintain. Opponents of the interpretive approach might have foreseen potential for disaster in trying to accommodate two policies and might suspect me of deceit in trying to make one of those purposes disappear. I think, however, that the two purposes will not conflict and, moreover, that the second one may legitimately be dropped here. The first purpose arises in cases where the Act has not been complied with and where the guarantor is attempting to use that non-compliance to void the guarantee. The second arises where the guarantor is trying to plead *non est factum* or misrepresentation and the creditor is relying on the fact that the Act *has* been complied with. These will not normally arise in the same dispute, or at least not in the same part of one dispute. Cases with which we are concerned present only the issues concerning the scope of the first-mentioned purpose.

81. Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method* (1958), 25 U. Chi. L. Rev. 227. Much of the discussion that will follow is based directly on Currie's insights, but its repetition here is integral to my argument.

be likely to reach, is Albertan guarantors. Like all the jurisdictions with which conflicts issues over the G.A.A. have arisen, Alberta believes in freedom of contract, in the security of commercial transactions, in vindicating the reasonable expectations of promisees. Unlike any of those jurisdictions, however, Alberta has singled out a certain class of commercial transaction for special protection. It is conceivable that Alberta's legislators hoped to protect B.C. guarantors as well as Albertan ones, but exceedingly unlikely. If B.C. was not concerned to protect them why should Alberta think differently? If, in its purely domestic transactions, British Columbia is prepared to let its guarantors take their chances without the benefit of notaries public, what reason has Alberta to think otherwise?

Should it make any difference then that, as in *Sharn*, the guarantee is executed in Alberta or that the principal debt has Alberta connections? No. Admittedly there are many Alberta legislative provisions intended to apply to foreigners who enter the province — standards of conduct on the road, for instance, or zoning regulations. The question of whether an Albertan rule of law should be spatially limited on the basis of residence of the actor, place of acting or some other factor is one which will have to be considered for each statute. With the G.A.A. a strong argument can be made that the main factor should be residence of the guarantor. B.C. guarantors should be permitted to roam the world without having to comply with the G.A.A., even when mailing guarantees from Alberta. Thus an interpretive approach to *Sharn* would lead to the same result as the jurisdiction-selecting approach did, but it would be supported by different sorts of reasons — reasons which stated that it was not the policy of the G.A.A. to apply to B.C. guarantors.

The second case, *O'Donovan*, would have been far more difficult. What result should follow when a resident Albertan gives a non-complying guarantee to a foreign creditor? This is what Brainerd Currie called a true conflict and it presents the toughest case that will arise under the Act. Indeed it presents a problem which may admit of no entirely satisfactory solution using judicial resources alone. Alberta's policy of providing some cautionary protection for certain of its citizens confronts directly the policies of foreign states which are content to enforce guarantees without the protection of the G.A.A. (or any statute like it) and to leave the protection of possibly vulnerable guarantors up to common law doctrines of *non est factum*, undue influence, misrepresentation and so on. Unlike *Sharn*, *O'Donovan* presents a situation in which, whatever way the case is decided, one jurisdiction's policy will be preferred to the other's. On one hand, even though courts in domestic cases had construed the G.A.A. to protect Albertan guarantors against

Albertan creditors, even when those creditors may not have known about the G.A.A., it might be unfair to impose on foreigners the costs of failure to ascertain Alberta's domestic law. This is particularly the case when one might discern in other aspects of Alberta's domestic policy, both legislative and judicial, a policy of encouraging foreigners to invest in Albertan enterprises. On the other, if Alberta is truly anxious to protect its resident guarantors from their own ignorance, why should not foreign creditors be held to the same standards as domestic ones? There may be no readily available scale of mensuration for deciding which of these policies should be preferred and which subordinated. Here the interpretive approach finds no precise domestic analogue for the task that confronts it. The conflict seems insoluble and one is inclined to think that no amount of reference to the policy of the G.A.A. — however clearly it might have been spelled out in non-conflicts decisions under the Act — will provide much guidance.

It is worth noting that even though the currently accepted jurisdiction-selecting approach does not pose this difficult issue explicitly it is nevertheless present there as well. The actual decision in *O'Donovan*, though it spoke of ascertaining the proper law of the contract, had the effect of deciding that Alberta's policy of protecting its creditors should be subordinated to Saskatchewan's policy of freedom of contract when Albertan guarantors dealt with Saskatchewan lenders through the mails. The true conflict was "resolved" even though the court appeared to be doing no more than idly applying neutral rules in order to discover the proper law of the contract. In favour of jurisdiction-selecting rules one could argue that, if the problem really is beyond judicial resolution but must nevertheless be resolved, it might be preferable to do so by appeal to apparently neutral (even if arbitrary) rules. If the courts have no scales in which to balance these policies and interests it might be best not to pretend otherwise and to have recourse instead to an abstract set of meta-laws.

I think the response here depends on how highly one values judicial candour. Courts prepared to adopt an interpretive approach here at least have available to them language which appears to have *some* connection to the real issues at stake. A court faced with the facts in *O'Donovan* as a case of first impression might, after looking at the whole of the G.A.A. and at previous decisions under it, decide that the Act's policy was rather weak and "suitable only for home consumption".⁸² Such a court might also be concerned to protect innocent foreigners against devious Alberta borrowers who knowingly seek out foreign investors who have little

82. *Id.*, at 261.

reason to be aware of the G.A.A. and induce those investors into taking non-complying and unenforceable guarantees. It could thus decide that it would be unfair to prejudice the foreign creditor. Alternatively it could decide that the Act reveals a deep concern for innocent Albertan guarantors and that the better choice would be to construe it expansively. I think either course is open here and, unless a court would be prepared to embark on some type of loss-sharing (some "half-enforcement"), there is no middle ground. Let us then assume the worst about an interpretive approach and assume that the court in *O'Donovan* makes a highly arbitrary, "political" decision to prefer the local creditor at the expense of the foreigner. (Though I am not prepared to go to the stake on the issue, this is the result I prefer.) In so doing the court would give reasons to the effect that foreign creditors who wish to exploit Albertan guarantors must at least comply with the not-terribly-onerous provisions of Alberta's G.A.A. Failure to do so, even through honest ignorance, will result in the non-enforceability of the guarantee.

From the perspective I have adopted a number of the later cases look virtually identical to *O'Donovan*. *MacKay*, *Jorges Carpet* and *Williston Basin State Bank* are each cases of resident Albertans giving guarantees to foreign creditors. Thus, whatever the result in *O'Donovan*, an interpretive approach in that case would have afforded considerable guidance in the later ones. *O'Donovan* could have become a leading decision on this point. (It should be recalled that what actually happened was that in two cases, *O'Donovan* and *Williston Basin State Bank*, the foreign creditor was permitted to enforce the guarantee while in the other two cases the effect of the decisions was to protect the Alberta guarantor at the expense of the foreign creditor.⁸³) Yet the reasons offered in the three *O'Donovan*-like cases that followed *O'Donovan* in time purport to distinguish those cases from *O'Donovan* in some way — or, failing to mention *O'Donovan* at all, stress different elements. Do any such differences truly exist that would, under an interpretive approach to the Act, produce disparate results?

MacKay, the first case to arise after *O'Donovan*, does not appear to differ from it in any significant respect. (It should be recalled that the

83. Admittedly in *MacKay* the guarantor was released on other grounds and the holding on the G.A.A. is only an alternative ground of decision, but this fact does not weaken my point here. The effect of decisions under the jurisdiction-selecting approach appears to bear only a random relationship to the policy of the laws in question. For persons keeping track of my assertion that at least half of the actual decisions reach the wrong result I note here that either *O'Donovan* and *Williston State Bank* are wrong or *MacKay* and *Jorges Carpet Mills* are, for all four are in essence the same case and there is no excuse for the 2/2 split. If we recall the *dicta* in *Snoxell* we have another case that sides with *MacKay* and *Jorges Carpet*.

MacKay case was the one which was not treated as raising a choice-of-law issue so the reasons offered there do not purport to distinguish it from *O'Donovan*.) Thus, if the Alberta Court of Appeal in *O'Donovan* had laid down an explicit rule that Albertans who mail non-conforming guarantees from Alberta to foreign creditors are to be permitted to plead the G.A.A. successfully I can see no reason for a subsequent Alberta court in *MacKay* to differ. Even if counsel for the guarantor did not raise the issue of the Act's application in space the court take judicial notice of local law and raise the issue on its own.⁸⁴

Jorges Carpet Mills does not differ from *O'Donovan*. Under a purposive approach there would be little likelihood of the court in *Jorges Carpet Mills* reaching a different result than an Appellate Court would have reached in our hypothetical *O'Donovan*. One of the principal factors by which the court in *Jorges Carpet Mills* distinguished that case from *O'Donovan*, namely the place of making of the contract, would be treated far differently under an interpretive approach. Under such an approach the traditional contract formation rules, which were first devised not to determine *where* a contract was completed but rather to determine *when* it was completed, would be of little relevance. If the transaction is negotiated by a series of letters, telephone conversations and telexes passing back and forth between an Albertan guarantor and a

84. It is interesting to note, however, that should the Alberta court in *O'Donovan* have gone the other way and, giving explicit reasons to that effect, decided that it was not within the policy of the G.A.A. to protect the local guarantor who mailed a guarantee to a foreign creditor, then an interpretive approach to *MacKay* would have presented some new difficulties. Since interpretive methodology does not treat a multi-jurisdictional case as being structurally distinct from a purely domestic one it should not be entirely up to the parties to raise issues regarding the application of foreign law. As in a domestic case the court could conceivably raise the issue of its own accord. But what would happen in a case such as *MacKay* where the parties do not raise the issue of the possible applicability of foreign law and hence do not inform the court of the content of that law? This appears to present a difficulty that is different from the one that arises in a purely domestic case where the parties fail to raise issues as to the non-applicability of that statute but where the court, for its own reasons, thinks the statute does not apply. In a purely domestic situation the court has direct access to the rest of the local law. If a certain statute does not apply then the court knows what law does apply. In a multi-jurisdictional situation an Alberta court which thought that the G.A.A. did not govern a given dispute but which had been given no information as to the content of the law in the jurisdiction whose rule should apply would appear to be in a quandary. The traditional rules which treat foreign law as a question of fact would appear to be at an advantage here. (See Castel, *Proof of Foreign Law* (1972), 22 U.T.L.J. 33.) I think, however, that an approach which treats foreign law as a question of law presents no insuperable problems. The Americans, at least in Federal Courts, have been moving this way since 1966: see Brown, *44.1 Ways to Prove Foreign Law* (1984), 9 Mar. Law. 179. In fact in the situation we are hypothesizing here it would not be the least bit difficult for an Alberta court to ascertain B.C.'s law of guarantee formation. The court faced with the decision we are imagining could easily decide that, since the G.A.A. did not govern the situation and since B.C. did not require notarial certificates for guarantees, the suretyship in question should be enforceable.

foreign creditor, then the place of formation, as determined by the traditional rules, gives us little guidance in fulfilling the purpose of a statute like the G.A.A. I am not suggesting that those rules be changed, simply that they are practically irrelevant to this issue. The crux of the matter is Albertan guarantors communicating at a distance with foreign creditors. Thus, if a purposive, interpretive approach to *O'Donovan* had produced reasons for judgment to the effect that the foreign creditor was to be protected, it would be incorrect for a subsequent court in a case like *Jorges Carpet Mills* to reach a different result by virtue of the traditional contract formation rules. Similarly, if *O'Donovan* opted for protection of the Alberta guarantor, *Jorges Carpet Mills* would have to do the same.

Williston Basin State Bank,⁸⁵ however, may be a tougher case, at least if we continue to assume that the proper result in *O'Donovan*, *MacKay* and *Jorges Carpet Mills* is to protect the Alberta guarantor at the expense of the foreign creditor. There is a plausible and rational basis for distinguishing it from the above cases. In all of the above instances the guarantees were mailed from Alberta to the foreign creditor. All communication was at a distance. The defendant guarantors were stay-at-home Albertans. In *Williston Basin State Bank* the guarantee, though mailed in blank from North Dakota to Alberta, once completed was personally delivered by the guarantor outside of Alberta. Would an Alberta court which had done what I suggest in *O'Donovan* be prepared to "extend" the scope of the statute and protect Albertans who contract outside Alberta? Again I do not think that the essential difference of a case like *Williston Basin State Bank* depends on the rather arbitrary contract formation rules. The distinction is a much more functional one. Here the guarantor stepped outside the province and dealt face to face with the foreign creditor on the creditor's home turf. To make the argument that counsel for the Bank might advance, are Albertans to be permitted to roam the world (perhaps even disguising the fact of their Albertan residence) giving non-complying guarantees and then retreat home to plead successfully the provisions of the G.A.A.? Certainly a line has to be drawn here, particularly since residence may be a nebulous concept. We would be reluctant to permit an "Albertan" who spent six months of the year in Florida to plead the G.A.A. as a defence for some guarantee substantially negotiated in that state. My view of *Williston Basin State Bank* is that, at least from the facts that appear in the reported decision, it does not appear to differ greatly from *O'Donovan*, *MacKay*

85. It should be recalled that for the purposes of this paper I am elevating the *dicta* in this case to the status of *ratio*. The case was not decided on the G.A.A. issue. Nevertheless, the court made it clear that Alberta law did not apply and that it would not have held the guarantee void for non-compliance and it is this point that interests us here.

and *Jorges Carpet*. The guarantee was mailed by the foreign creditor into Alberta and this foreign creditor should be subjected to the same standards as were the plaintiffs in the other three cases. There are other facts I would want to know, however, before being confident in this conclusion. For instance, who initiated the transaction? Did the foreign bank advertise in Alberta and entice Albertans across the border (in which case we might be unwilling to excuse compliance with G.A.A.) or did this Albertan go in search of foreign capital on his own initiative (in which event we would be less likely to permit him to hide behind the Act)? In any event a line must be drawn somewhere. At a minimum, even if Alberta courts should decide that the policy of the G.A.A. requires the protection of Albertans wherever they might roam, it would be necessary to arrive at some definition of what constitutes an Albertan. My point is that it is this sort of question which is really at stake here and that it can be addressed in a purposeful, rational manner, just as the Albertan courts in non-conflicts cases under the G.A.A. have had to face the issue of what constitutes a guarantee.

There is another order of problem here. Would it be constitutionally permissible for Alberta to offer its residents this sort of protection against foreign creditors? I will address that issue in a later section.

Greenshields is a far easier case. There an Albertan gave a guarantee to a company which was doing business in Alberta. Assuming *O'Donovan, etc.* had chosen to protect the Albertan guarantor there would be no doubt that the same should be done in *Greenshields*. Even assuming the Appellate Division in *O'Donovan* had decided to go the other way, giving the Act a restrained interpretation and favouring the foreign creditor, there would be little reason for preferring the creditor in the *Greenshields* case. True, as the court pointed out, the creditor's head office was in Toronto and consequently it was in some limited sense a foreigner. But the plaintiff creditor had chosen to open a place of business in Edmonton and there is little reason not to subject it to local conditions of doing business. Not to do so would be to treat it better than Albertan corporations. *Greenshields* was essentially a case of an Albertan guarantor giving a guarantee to another Albertan and there could be little doubt that the Act was meant to apply to such situations.

There is one element of *Greenshields* that has not yet been mentioned, the choice-of-law clause. Should the parties' selection of Ontario law⁸⁶ alter things in any way? I think that an interpretivist approach would lead to the answer that, in this case, it should not. The question a choice-of-law clause presents is whether it is permissible for parties to whom the G.A.A. would otherwise apply to exclude its operation by an express

86. If that is what they in fact did. See the text at note 42.

contractual provision. That is precisely what a choice-of-law clause seeks to do. As far as I can tell Alberta's courts have never had to deal with any case in which a creditor inserted in a guarantee a clause to the effect that the guarantee should be binding regardless of failure to comply with the G.A.A., but if such were the case I think there could be little doubt about the appropriate judicial response. Though the Act nowhere expressly states that it cannot be contracted out of, it seems likely that a court would hold that it could not. If it is found to be part of the policy of the Act that it should apply regardless of parties' intentions to exclude it then there is little question about what to do with a choice-of-law clause in a case like *Greenshields*.

This approach by no means entirely nullifies the operation of choice-of-law clauses. They will be perfectly effective in areas in which parties are otherwise free to contract. For example there would be nothing to stop parties from using such a clause to exclude the operation of Alberta's Sale of Goods Act and opting instead for the sales law of, say, Quebec or Montana. This should be so regardless of whether the transactions have "contacts" with those jurisdictions.

Kenton is probably the simplest case of the bunch. It is incomprehensible that the G.A.A. was held not to apply to this transaction. It was a dispute involving a guarantee given by one Albertan to another. In this sense it is like *Greenshields* but here there is not even a choice-of-law clause to cloud the issue. Virtually the only foreign elements concerned the underlying principal debt. Given the policy of the G.A.A. is it likely that it was not intended to apply when one Albertan gave another a guarantee for some venture that happened to be carried on largely outside of Alberta? What does the location of the underlying transaction have to do with the policy of protecting Albertans from entering into guarantee obligations without some assurance that they understand the nature and extent of such obligations? Nothing.

In saying this I am not oblivious to how closely the giving of a guarantee will usually be tied to the underlying debt. In the majority of cases the principal obligation will be, in either a technical or non-technical sense, conditional on an accompanying guarantee. For many purposes we would need to look at both transactions together. To examine one without the other would be to strip it of its context. Nevertheless, even if the principal debt and the guarantee are viewed as, in some sense, a single, composite transaction, that is no reason to consider aspects of the "non-guarantee" part of such a transaction as relevant to the applicability of the G.A.A. The over-riding focus for that issue is still the residence of the guarantor. An interpretive approach would therefore require compliance with the G.A.A. in *Kenton*.

Lehndorf is a curious case. It appears that, in connection with a lease of Alberta property, a standard-form Alberta guarantee was executed by two British Columbia residents in their own province. Lehndorf is a property management firm with offices in major cities in both provinces and it seems that, in conjunction with a lease of Alberta property which was handled by one of the Alberta branches, documents (including an Alberta standard-form guarantee) were forwarded to a B.C. office which was to have them completed by guarantors in that province. The guarantee document contained a choice-of-law clause in favour of Alberta but no attempts were made to have the guarantors comply with the G.A.A. Should the Act apply? The question may be approached by first asking whether, even in the absence of a choice-of-law clause, the G.A.A. would pertain to this transaction. As in *Sharn* there would be no reason to believe that the G.A.A.'s policy would be forwarded by applying it to British Columbia guarantors. If their own domestic law is content not to protect them in this way there is no call for Alberta's law to do so.

The question remains, however, whether the choice-of-law clause changes this. It has been argued that parties otherwise subject to the G.A.A. should not be permitted to use choice-of-law clauses to evade it, but it by no means follows that persons otherwise beyond the Act should not be permitted to contract *into* it. But was that what the parties in *Lehndorf* intended to do? At first glance there is something a trifle odd about assuming that parties who never made any move to comply with the G.A.A. intended to have it govern their transactions. It is a bit like a case of an oral agreement which no one ever attempts to commit to writing but which includes the phrase, "this agreement shall be subject to the Statute of Frauds". One is tempted to think that — at least with respect to the G.A.A. — the parties here did not entirely appreciate what they were doing. The problem is then essentially one of contract law.⁸⁷ Should these parties be visited with the (probably) unintended consequences of their literal words? The problem is not like one in which parties unknowingly contract to do something which is illegal or otherwise against public policy. We have no difficulty in finding such contracts unenforceable. But it is not otherwise a part of the public policy of either Alberta or British Columbia that B.C. guarantors comply with the G.A.A. The facts in the reported decision do not tell us everything we

87. It is just conceivable that the clause was somehow arranged by the wily B.C. guarantors at the expense of the unsuspecting creditor. The guarantors would then know at the time of the signing of the agreement that a literal application of the words of the guarantee would make it a worthless piece of paper. Contract law has sufficient tools to control this abuse of bargaining power and to protect the reasonable expectations of the creditor here.

would want to know in order to solve this problem conclusively, but I am inclined to think that a purposeful reading of the Act and a sensitive approach to contract interpretation would lead to the conclusion that the parties never intended to make compliance with the G.A.A. a part of their transaction and that the guarantee should be enforceable without compliance.

Of course there are problems with declining to accede to the parties' request for Alberta law here. Contracting persons may often choose the law of a given jurisdiction without knowing every detail of its ramifications, and the after-the-fact relieving of one of the parties from the unforeseen negative consequences of its choice smacks of re-allocation of a consciously allocated risk. Nevertheless the stronger argument in *Lehndorf* seems to be that any apparent opting into the G.A.A. was a sort of common mistake and that compliance with the Act should not be required. An interpretive approach at least permits courts to deal with this as a question of contract law (which it is) instead of a "subtle argument on an area of conflict of laws"⁸⁸ requiring reference to some distinction between substance and procedure.

The final case in the series, *Morguard*, is another tough one. It is like *O'Donovan*, *MacKay*, *Jorges Carpet* and *Williston State Bank* in that it concerns a guarantee given by an Albertan and mailed (evidently) from Alberta to B.C. The difference is that now we are before a B.C. court. If *O'Donovan* had refused to protect the Albertan then the result in *Morguard* would be simple. B.C. would have no reason to differ. To do so would be to give a more extended interpretation to the Alberta statute than the Alberta courts had and consequently to treat B.C. creditors more harshly than Alberta courts were prepared to do.

But what if *O'Donovan* had decided that it was the purpose of the G.A.A. to excuse Albertans who mailed non-complying guarantees to foreigners? Need a B.C. court employing an interpretive approach to the problem follow that lead when it is presented with the same problem? In other words, must a B.C. court accord the G.A.A. the same broad interpretation that an Alberta court had given it? As with the constitutional issue adverted to above, there are unanswered questions here, though again they are issues which exist but are masked under the jurisdiction-selecting approach to the problem. The question is dealt with at length by Professor John Swan in *The Canadian Constitution, Federalism and the Conflict of Laws*⁸⁹ and I agree with his conclusion⁹⁰ that B.C. courts in this situation, though they should take into account the

88. *Lehndorf*, *supra*, note 57, at 188 (W.W.R.) and 165 (B.L.R.).

89. (1985), 63 Can. Bar Rev. 271. *See especially* 315-18.

90. *Id.*, at 318.

same factors that the Alberta courts should, must be free to come to a different conclusion.⁹¹ Thus *Morguard*, like *O'Donovan*, would be a case of first impression and a B.C. court would have to balance its general policy of bargain enforcement against Alberta's policy of protecting its guarantors. Whichever policy was preferred the B.C. court would need to support it with candid reasons.

VI. *General Comments*

Though the above analysis is hardly free from difficulties it is submitted that the series of hypothetical decisions I have just sketched out is vastly preferable to the existing series. Firstly, as to the correctness of the results, *Greenshields*, *Kenton* and *Lehndorf* were wrongly resolved in the original decisions and an interpretive approach would in all likelihood have avoided that. Moreover, in the actual decisions, *O'Donovan* and *Williston Basin State Bank* went one way while *MacKay* and *Jorges Carpet Mills*, went the other. Since they are essentially the same case two of the actual decisions must have been wrong. I tend to believe that *O'Donovan* and *Williston Basin State Bank* were the incorrect ones, but it does not matter for my present purposes that some persons might prefer the results in those cases to those in the others. My point is that they are all the same case and an interpretive approach would have led to the same result in each.

Of course it is possible that the interpretive approach might, through its consistency, have led to the "wrong" result in each, wrong in the sense that Alberta's legislators would have preferred the opposite resolution. Yet that still would have been preferable to the result in the reported decisions. If, for example, an interpretive approach in *O'Donovan* had given rise to reasons which stated that it was the purpose of the G.A.A. to protect Albertans who dealt with foreign creditors, then, should the legislature think such a disposition inappropriate, it could easily amend the Act. It will be recalled that the G.A.A. has in fact been amended a number of times. The legislature has evidently responded to pressure from interest groups, to decisions from the courts and to the Law Reform Institute and it could easily respond again here if it thought the court was wrong. Advocates of jurisdiction-selecting rules might respond that the same is true of their approach, that if the legislature did not approve of, say, *O'Donovan*, it could make that clear in an amendment to the Act. But this is incorrect. *O'Donovan* and the rest of the reported conflicts cases adopt a style of discourse to which legislatures are not adapted.

91. That, of course, leads to the conclusion that B.C. courts might very well differ from the Alberta courts on this issue and that consequently there would be a possibility for plaintiffs to forum shop. This should be addressed by rules governing jurisdiction.

Legislators are unaccustomed to amending jurisdiction-selecting choice-of-law rules. If they disagreed with the result in *O'Donovan* it would not be easy to amend the G.A.A. by saying, "the common-law proper law of the contract rule shall not apply to the G.A.A.". (Especially since, *ex hypothesi*, they would believe that the rule would have led to the "right" result in *Jorges Carpet Mills*.) Nor are law reform bodies inclined to take on the common-law choice-of-law rules. It does not seem quite within the mandate of a law reform institute charged to investigate the G.A.A. to assume the task of reformulating the choice-of-law rules which courts might have applied to it. Those rules seem part of a body of law *external* to the legislation under consideration. And it should be recalled that in neither of its two reports on the Act did the Alberta Institute of Legal Research mention the choice-of-law decisions under the G.A.A. — in spite of the fact that judicial decisions had referred to that area as a troubling one.⁹² On the other hand, if courts should adopt an interpretive mode and advance a purposeful construction of the territorial sphere of the Act, that is precisely the sort of language that legislators and law reform institutes could respond to. Similarly, it is the sort of language that dissatisfied lobbyists can understand and challenge. It is for this reason that I said that results under the interpretive approach, even though they might be "wrong", are preferable to those in the jurisdiction-selecting style, which are not only more likely to be wrong but less likely to be legislatively corrected.

My second reason for preferring the interpretive approach is that the series of hypothetical responses outlined above is a far more internally consistent and progressively developed line of jurisprudence than we saw in the actual cases. Later decisions respond to and perhaps modify or build on earlier ones. Consistency of result is achieved. Persons reading the interpretive series of cases might truly be able to predict the outcome in the next. More importantly, potential lenders and guarantors could actually plan their transactions with some degree of certainty. Of course, the response to these assertions is that the actual series of cases we got were decisions of a number of different judges in two different provinces over a period of 15 years and that to compare their admitted waverings, misunderstandings of earlier decisions and *sub rosa* changing of the rules with the easily concocted response of one person is simply not sporting. Fair enough. I can do nothing to balance the scales. I can only reply that the actual jurisprudence developed in non-conflicts cases under the G.A.A. seems responsive, relatively consistent and more or less clear and that I see no reason why judges taking a purposeful, interpretive

92. See: *C.I.B.C. v. Country Lane Furniture Warehouse (Wetaskiwin) Ltd. et al.*, *supra*, note 21 at 128.

approach to multi-jurisdictional cases should do much worse than they have done in domestic ones. It is the judicial approach that has generated the inconsistency, not the underlying legal problem.

Finally, the approach I have set out requires no monkeying with doctrines such as the post-box rule. Consequently, this method of resolution of multi-jurisdictional disputes sends no unnecessary tremors across contiguous areas of private law.

It is fair to note that the comparison of the two methodologies is incomplete in that there appear to be numerous permutations which have not been examined here. What, for example, do we make of the case where two resident Albertans negotiate and complete a contract of guarantee in a foreign state but neglect to comply with the G.A.A.? Such a dispute has not arisen in the reported decisions but could easily present itself tomorrow and a full discussion of the problem should consider it. I do not propose to take up all of those hypotheticals in detail here. In fact I think there are far fewer possible permutations than the traditional approach would have us think. If we consider the numerous factors listed in the reported, jurisdiction-selecting cases — residence of the guarantor and of the creditor, currency of payment, place of contracting (variously determined), the place where the guarantees would have to be enforced, several different aspects of the underlying debt — those permutations run into the hundreds. Moreover, if we were to consider in detail how the traditional mode would fare in each of those permutations we would be guessing in the dark. I honestly have not the slightest idea how the traditional jurisdiction-selecting rules would respond to the case of two Albertans contracting outside of Alberta. I doubt that anyone has. So any hypothetical discussion of the full range of possible problems would be so conjectural as to be useless.

In any event, the interpretive mode has reduced the problem to one key factor: the residence of the guarantor. Some other factors may be relevant (*e.g.* the creditor's residence) but most are not. To take the example just mentioned, I think that an interpretive approach would hold place of contracting to be of minimal importance here. If a substantial part of the negotiations took place in Alberta, then we would want to afford the guarantor the protections of the G.A.A., and the fact that the guarantee was completed elsewhere would matter little. The Act should govern in spite of the fact that the guarantee might be executed in another jurisdiction. (Some support for this could be gathered from a source which a jurisdiction-selecting rule would ignore: the G.A.A.'s definition of "notary public"⁹³ which contemplates that at least in some

93. R.S.A. 1980, c. G-12, s. 2(b).

circumstances certificates will be completed outside of Alberta.) This would have its limits, however. If two Albertans first encountered one another in another country and negotiated and executed a guarantee there, then, in spite of undiminished concern for the guarantor, we would not want to defeat the reasonable expectations of the Alberta creditor who thought he or she had left that jurisdiction's control over commercial matters far behind. Again my main point is that an interpretive approach permits us to draw the line between these instances by paying some attention to the purpose of the law to be applied, and since the line must be drawn in any event we might as well do it rationally.

Before making any concluding remarks it is necessary to examine a problem that was put off earlier.

VII. *The Constitutional Dimension*

There remains the possibility that courts employing interpretive choice-of-law methodology might give the G.A.A. an effect that is beyond Alberta's legislature to enact. The provincial power to make law here is limited to matters of Property and Civil Rights *in the Province*,⁹⁴ and to suggest that the G.A.A. should protect a guarantor such as the one in *Williston Basin State Bank* who personally delivered a guarantee in North Dakota may be to proffer an extension of the statute which is *ultra vires* a provincial legislature. That possibility has previously been mentioned and deferred. I will now address the constitutional implications of interpretive methodology. A solution to those implications, however, is far beyond the scope of this paper. I will simply sketch the outlines of the problem and indicate its relationship to the two strains of choice-of-law methodology.

The first point is that precisely the same issues arise under the traditional approach, though jurisdiction-selecting rules appear to have the capacity to mask them. The court in *Jorges Carpet Mills*, for example, used the common law rules regarding the proper law of the contract to protect an Albertan guarantor at the expense of a foreign creditor. Since it was adopting the traditional methodology the court did not speak as though it was giving the G.A.A. an extended geographical interpretation, but the result is the same as if it had. The fact that the result was justified by the rule regarding the proper law of the contract can make no difference to the constitutional question, for such rules have no constitutional force. Nor are they congruent with the tests which have been used to determine the constitutionally permitted geographical range

94. *The Constitution Act, 1867*, s. 92(13) (emphasis added).

of provincial legislation.⁹⁵ The issue is hardly a hypothetical one. It has been convincingly argued elsewhere that recent choice-of-law decisions employing the traditional methodology have had the effect of giving provincial statutes an unconstitutionally broad territorial scope.⁹⁶

But to say that the issue exists as well under the traditional approach does not lessen its importance now that an interpretive methodology forces us to face it squarely. Alas, the decisions rendered on this issue by our courts of last resort have been inconsistent. We are confronted here with legacy of *Royal Bank of Canada v. The King*,⁹⁷ *Ladore v. Bennett*,⁹⁸ and *The Queen v. Thomas Equipment*.⁹⁹ The recent decision in the Supreme Court of Canada in *Churchill Falls (Labrador) Corporation Ltd. et al. v. Attorney General of Newfoundland et al.*¹⁰⁰ purported to offer some resolution to this problem, but when we try to apply the solutions suggested by that case to issues arising under the G.A.A. no clear answers emerge.

The *Churchill Falls* decision at least makes it plain that the test for constitutionality is not tightly tied to the relevant common-law choice-of-law rule. Instead what the Court offered is something closer to a rational-connection test. Writing for the Court, MacIntyre, J. said:

Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*. Where, however, the pith and substance of the provincial enactment is the derogation from or elimination of extra-provincial rights then, even if it is cloaked in the proper constitutional form, it will be *ultra vires*.¹⁰¹

This quotation does not tell us whether a given set of private rights is extra- or intra-provincial. MacIntyre, J. proceeded on the assumption that such rights could and should be assigned a *locus*, and thought that in contract disputes two factors could assist in that task. One was the place of performance. The Court thought that since the contract before it gave Hydro-Quebec the right to receive delivery of power in that province, that indicated the civil rights in dispute were located in Quebec.¹⁰²

95. Though some judges have employed common-law choice-of-law rules to test for compliance with s. 92(13): See the dissent of Laskin, C.J.C. in *The Queen v. Thomas Equipment*, [1979] 2 S.C.R. 529, 96 D.L.R. (3d) 1 and the singular judgment of Ritchie, J. in *Interprovincial Co-operatives v. The Queen*, [1976] 1 S.C.R. 477; 53 D.L.R. (3d) 321.

96. Swan, *supra*, note 89 at 296-311.

97. [1913] A.C. 283; 9 D.L.R. 337; 3 W.W.R. 944 (P.C.).

98. [1939] A.C. 468; [1939] 3 D.L.R. 1; [1939] 2 W.W.R. 566 (P.C.).

99. [1979] 2 S.C.R. 529; 96 D.L.R. (3d) 1.

100. (1984), 8 D.L.R. (4th) 1 (S.C.C.).

101. *Id.*, at 30.

102. *Id.*, at 31.

Secondly, the Court held that “ordinarily the rule is that rights under contracts are situate in the province or country where the action may be brought”.¹⁰³ In *Churchill Falls* both of these tests pointed to the same jurisdiction, but that will not always be the case and the Court did not inform us what the relationship between the tests might be.¹⁰⁴ Clearly this test will not enable us to deal effectively with issues arising under the G.A.A. If the courts were to follow the interpretations sketched out above and to endeavour to protect Albertans against foreign creditors then (absent choice-of-forum clauses) the *Churchill Falls* test would hold this extended application of the G.A.A. valid in most cases. The place of performance would normally be Alberta for that would be the guarantor's residence and likewise Alberta would be the place — though often not the only place — where an action on the guarantee could be brought.

Yet this is likely to be precisely the sort of case in which an interpretive approach might test the constitutional limits of legislative power. *Williston Basin State Bank*, for instance, posed the issue of an Alberta resident leaving his home province and dealing face to face with foreigners. And even if the facts in that case had demonstrated some sufficient Alberta nexus for the transaction, we can easily imagine fact situations in which Alberta's legislative capacity to protect wandering residents might be called into serious question. What, for instance, would we think of Alberta's ability to protect its “residents” who might spend half a year in Florida and negotiate and complete an agreement of suretyship there?

It is beyond the scope of this paper to sketch out a suggested judicial standard for determining the territorial breadth of provincial legislative competence. The Americans have been wrestling with the problem for years without arriving at a satisfactory solution. In more recent times some helpful preliminary suggestions have been offered by Canadian scholars.¹⁰⁵ An interpretive approach would doubtless have the effect of prompting this hitherto almost dormant constitutional beast to raise its head. Given the problems the Americans have had here, one could almost prefer the traditional jurisdiction-selecting analysis which at least

103. *Id.*, at 31-2.

104. For a critique of the Supreme Court's reasons on this point see Edinger, *Case Comment* (1983), 63 Can. Bar Rev. 203 at 212-13.

105. E. Edinger, *Territorial Limitations on Provincial Powers* (1982), 14 Ottawa L. Rev. 57 and J. Swan, *supra*, note 8. Relying on what in his view is the soundest of the American approaches, Swan suggests that we could consider the constitutional capacity of a provincial court to apply its own law by inquiring whether doing so would impair a predominant interest of a sister province or violate a national interest (p. 309). This seems preferable to anything our Supreme Court has come up with so far.

has the advantage of letting sleeping dogs lie. But it can be no justification for preferring one common law methodology to another that one has the virtue of quietly violating constitutional boundaries that are likely to be difficult to delineate.

VIII. *Conclusion*

I have (1) pointed out significant and unanswerable defects in current Canadian choice-of-law methodology in contracts cases, (2) offered a plausible alternative that could set us on the road to healthier conflicts jurisprudence and (3) stated that therefore courts should take the earliest possible opportunity to modify the existing law by adopting an interpretive approach. It seems to me that the advantages I have demonstrated here would be found in any contracts/conflicts case, regardless of whether the competing substantive rules are statutory or judge-made in origin.

Even while I assert this, however, I appreciate that change in this area is slow and incremental and that, since the arguments in this paper are not novel (only the example has been changed), it may be that I have done little more than to indicate which side of a well-known and somewhat arrested academic debate appeals to me. An interesting and perhaps discouraging aspect of this debate is that little has been added since John Willis, Walter Wheeler Cook and David Cavers took it up 50 years ago.¹⁰⁶ I know from experience that I will have changed the minds of no one in the jurisdiction-selecting camp. Indeed, in their eyes I have will done little more than to rehearse routine arguments and demonstrate yet again the folly of interpretive approaches. To such persons the defects that I sought to minimize will appear enormous, and the cost of avoiding them will seem well worth incurring the price of any flaws in the jurisdiction-selecting system. My opening claim to have set the debate on firmer empirical ground by examining all the reported decisions under a given statute will only serve to make the case against interpretive methodology all the more strong.

Why has there been so little progress in this debate? It may be that whether one inclines to the jurisdiction-selecting or the interpretive camp is less a matter of rational argument and proof than of psychological predisposition. I think that Moffatt Hancock, a significant member of the interpretivist school, was doing more than idle name-calling when he labelled members of the jurisdiction-selecting school "rule fetishists".¹⁰⁷

106. See notes 1 and 8, *supra*.

107. See: *Some Choice-of-Law Problems Posed by Anti-Guest Statutes: Realism in Wisconsin and Rule-Fetishism in New York* (1975), 27 Stan. L. Rev. 775.

And we interpretivists may incline to be sloppy and sentimental romantics, insufficiently appreciative of the need to control judicial tyranny with clear, "bright-line" rules.

I have no wish, however, to conclude this debate by reducing it to a crude, amateur-behaviouralist explanation. Whatever the reason for the entrenched, predictable nature of the arguments on either side of the issue, the tension between clear, rigid rules and flexible but imprecise policies must be accommodated in other areas of the law and it can be accommodated here.

There may in fact be areas of the conflict of laws where rules of the jurisdiction-selecting sort have their place and where their claimed virtues of certainty, predictability and neutrality truly operate. If, for instance, the domestic substantive law of a given area is characterized by a jurisprudence of strict, mechanical rules with little apparent need for explicit appeal to principle, policy or instrumentalist arguments, it may be that mechanical choice-of-law rules will do the job in such areas. Certainly interpretive approaches to multi-state cases will be difficult when the analogous domestic jurisprudence provides no clues as to the policies of the competing rules.

I think, however, that jurisdiction-selecting approaches are likely to be particularly inappropriate where, when we consult the purely domestic application of the underlying rules, we find that courts have been receptive to purposive arguments. Such decisions tell us that in those cases judges have found in both necessary and possible to abandon formalistic adjudication. In the domestic application of the G.A.A., for instance, courts have managed to inquire into the policy of the statute. They have found it useful to develop flexible standards. For instance, a mere technical failure to comply will not invalidate a guarantee. On the other hand the mere fact of compliance will not always be enough. The following passage from a recent, non-conflicts G.A.A. decision shows how courts are prepared to engage in particularized factual inquiries:

Section 4 of the Act dictates the *purpose* of the examination. There *must* be an examination, although the extent of the examination may vary from case to case, depending on the circumstances. What is critical is that the extent of the examination is governed by the purpose of the examination, and in any particular case, the notary must be satisfied that guarantor is aware of the contents of the guarantee and understands it.

In some cases the examination might be most cursory and satisfy the requirements of the Act. For example, I doubt a notary would need do much to satisfy himself if the guarantor was a superior court judge or a sophisticated businessman who had granted numerous guarantees in the past.

On the other hand, the examination might require considerable caution by the notary when the guarantor is someone he does not know and does

not know that person's educational, business and other background. What is being guaranteed may also affect the extent of the guarantee.¹⁰⁸

This indicates that, in the domestic context in which the statute must operate, courts feel obliged to use flexible, particularistic standards to determine its scope of operation. Those courts have indicated that they felt it necessary, in order to reach acceptable results, to embark on detailed factual inquiries. This being so in the purely domestic sphere, when the statute must be construed in territorially complex cases it seems unlikely that just results or consistent jurisprudence will be achieved by tying the law's application to rigid, mechanical rules which permit no inquiry into the sort of facts which relate to the Act's purpose. If an interpretive approach is called for anywhere, it is called for here.

108. *Economy Floor Coverings v. Anthony's Italian Restaurant Inc. et al.* (1986), 42 Alta. L.R. (2d) 361 (Q.B.) at 368-9.