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Comments

Peter Finkle &
Simon Coakeley*

Morguard Investments Limited:
Reforming Federalism
from the Top

I. Introduction

Nations are not only unified markets, but usually they are at least that. In most discussions about national unity, adequate account is taken of the importance of the free movement of goods, capital and people. Rarely, though, does the discussion encompass the necessity of legally assuring such movement in the domestic marketplace through the practical modality of secure remedies for breaches of obligations in contracts and tort.¹ *De Savoye v. Morguard Investments Ltd*² is a landmark decision by the Supreme Court of Canada that considers the extent of jurisdiction that provincial courts may exercise and the associated concern with the enforceability of judgments issued by one provincial court in other Canadian courts.³ This infrequently addressed aspect of national unity is important not only because of its political dimensions but because it has potentially significant effects on the nature and costs associated with the Canadian domestic marketplace. To grasp fully the import of this decision, it is necessary first to explore the relation between the security of legal undertakings, usually in contract, and the existence and efficiency of the marketplace for goods and services.

Without security of private contracts, it would be difficult to have a national marketplace, or even local ones. The essence of the law of contract, upon which the marketplace depends, is the ability of contractors to obtain redress for a breach of the terms of their agreements. Without this inducement, the motivation to fulfil contracts is restricted to the maintenance of future goodwill — a fragile thread when millions of

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1. See, for example, J. Swan, "The Canadian Constitution, Federalism and The Conflict of Laws" (1985), 63 Can. Bar Rev. 271.

2. [1990] 3 S.C.R. 1077 (hereinafter cited as *Morguard*).

3. For the purposes of this paper, it is assumed that there are no significant differences between the provinces and the two territories, and references to provinces should be read as referring to the territories as well unless the context clearly requires otherwise.

dollars may be at stake. Rights without remedies may be important in some contexts, but in the marketplace such rights are truly hollow. The development and maintenance of a national or international marketplace is, thus, closely related to the provision of contract remedies in situations where a breach has occurred.

Where there are difficulties in securing a remedy for breach of contract, the marketplace is likely to be less unified and potential plaintiffs will attempt to overcome the risk of loss by various means. These may include the use of insurance, various forms of performance guarantees, complex legal arrangements and so forth; all of which substantially increase costs associated with the underlying market transaction. Despite problems faced by potential plaintiffs in breach of contract situations, business will continue. Large players will transact business in the most uncertain of situations because they can secure themselves against risks. Small players, too, will continue to do business in an uncertain market because of sheer necessity, but they will be unable to secure themselves against these marketplace risks. Everyone, in the end, loses because marketplaces characterized by legal (or other) uncertainties are inherently inefficient and needlessly increase the costs of doing business. In all business situations, as the perceived risks and transactional costs increase, so must the potential profit margin.⁴

Another related aspect of this type of uncertainty arises in tort and other proceedings. Actions in tort provide a different type of protection from those in contract, but one that is as vital to the operation of a safe and secure market. The uncertainties created by doubts as to the extent of the jurisdiction that Canadian courts are able to exercise outside their provinces and the enforceability of their judgments in sister provinces do not contribute to market certainty. The same may be said for uncertainty in other types of proceedings concerning personal status and obligations.⁵

An equally serious, though less tangible, concern addressed by the *Morguard* decision involves the symbolic perception of Canada as a federation. Pre-*Morguard*, judgments on actions *in personam* issued by one provincial court were treated in theory, and often in practice, as foreign judgments when offered to secure enforcement in other provincial courts.⁶ Contrast this situation with the approach taken in the United

4. See generally the seminal work on this point of H. M. Markowitz, *Economic Theory and Portfolio Selection*, (Chicago: University of Chicago Press, 1959).

5. While various techniques have been developed to ensure a degree of certainty in the case of marriage, divorce, support payments and custody of children, the existence of these *ad hoc* techniques serves to illustrate the nature of the problem. Succession to moveables, legal inability, etc., are areas which would benefit from an enhanced degree of certainty.

6. Although all provinces, except Québec, have passed *Reciprocal Enforcement of Judgments* legislation, all these do is codify the common law, (see *infra*, text associated with note 16).

States, Australia and other federations that require judgments from courts in one regional unit of the federation to be afforded "full faith and credit" in the courts of other regional units.⁷ Even in the European Community, with its multiplicity of differing legal systems, "full faith and credit" is provided for because it is a recognized aspect of harmonious and unified economic relations. One stance symbolizes, and may actually involve, a wary and distrustful attitude to the procedures and judgments of sister provinces. The other symbolizes, and in most circumstances actually insists on, acceptance of the procedures and judgments of courts in sister states.

It is necessary to explore briefly the law in Canada pre-*Morguard* to comprehend fully the revolution in perspective that this case embodies for our legal system and the Canadian sense of federalism.

II. *The Way We Were*

The jurisdiction of Canadian common law courts, like their progenitors

7. In the United States, Section 1 of Article IV of the Constitution provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 1 of the XIVth Amendment to the Constitution, adopted in 1868, provides in part: . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

The effect of these two provisions has been to place a constitutional limit on the *ex juris*, or long-arm, jurisdiction of the States, under the XIVth amendment, while ensuring that resulting judgments are given effect throughout the United States. See, for example, *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980).

In Australia, section 54 of the Commonwealth of Australia Act, 1900 provides:

The Parliament shall, subject to this Constitution, have the power to make laws for the peace, order and good government of the Commonwealth with respect to:

. . .

(xxxiv.) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States.

Section 118 provides:

Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and judicial proceedings of every State.

As a result of its powers under s. 54, the Commonwealth adopted the Service and Execution of Process Act, 1901-1973, which provides for service of process throughout Australia.

The original member states of the European Community concluded the 1968 *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*. As new states have been admitted to membership in the Community, they have had to make arrangements to join this Convention. It provides detailed rules which govern service of process on all persons domiciled (*i.e.* habitually resident) within a member state of the Community and provides for the enforcement, throughout the Community, of all judgments issued in accordance with the Convention.

in England, is founded on a notion of territoriality. A judgment *in rem* can be handed down by a common law court when the thing in question is situated within the territorial limits of the court. In the case of judgments *in personam*, the person against whom the judgment was sought had also to be within the territorial jurisdiction of the court. While it is an easy matter to determine whether a piece of land lies within a court's territory, it is much less obvious when a person is involved. The traditional common law approach has been that if a person is domiciled (in the common law sense of the word) or served with originating process within the court's territory,⁸ or if the person attorns to the court's jurisdiction — either by appearing or by having agreed to appear, as in the case of a choice-of-court clause in a contract — then the court will have jurisdiction over the case.

In limiting their jurisdiction to matters dealing with their own territory, the English courts also effectively limited the jurisdiction of the courts of other countries in a similar way. Although the English courts would not automatically enforce foreign judgments in England, they would entertain an action based on the foreign judgment against an English defendant if the foreign court had obtained jurisdiction over the defendant according to English rules. Although this sensibly recognised the foreign court's jurisdiction over property located and persons domiciled within its territory, unless the foreign court had been able to effect service of process on a defendant domiciled in England while he was within its territory, the English courts were of the view that any subsequent proceedings could not be enforced in England.

Notwithstanding, or perhaps because of, the somewhat fortuitous nature of *in personam* jurisdiction, as commerce developed and persons began to have greater contact with lands outside the territorial jurisdiction of the English courts, it became difficult for the English courts to dispense their brand of justice in situations which involved foreign defendants. As a consequence, the *in personam* jurisdiction of the English courts was modified by the Common Law Procedure Act⁹ which permitted service *ex juris* with permission of the court. This principle has been adopted by the Canadian common law jurisdictions and

8. See, for example, *Maharanees of Baroda v. Wildenstein*, [1972] 2 Q.B. 283, [1972] 2 All E.R. 689 (C.A.), where the English courts held they had jurisdiction to hear an action brought by an Indian princess against an American art dealer, both resident in France, under a contract made in France, on the grounds that service effected while the defendant was attending Ascot races was sufficient to give the English courts jurisdiction. It should be noted that this would likely no longer obtain now that the United Kingdom has implemented the *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, enacted by the *Civil Jurisdiction and Judgments Act 1982*, c. 27 (U.K.).

9. 15 & 16 Vict. c. 76, ss. 18-19 (U.K.).

considerably extended in many of them where service *ex juris* is permitted as of right under the appropriate Rules of Court.¹⁰

Unfortunately, although not surprisingly, as the English courts began to extend their jurisdiction to hear matters against persons who were not physically in England at the time process was issued, they did not recognize a similarly enhanced jurisdiction in the courts of other territories. This almost astonishingly asymmetrical attitude became the norm in Canadian common law courts.¹¹ On the one hand the common law courts claimed a virtually limitless jurisdiction while on the other, they denied similar jurisdiction to the courts of other jurisdictions, no matter what their legal system.

Regardless of whether service *ex juris* is permitted as of right or by order of the court, proceedings related to the following factors have been recognized as being appropriate for service *ex juris*: property situated within the province; acts, deeds, wills contracts, obligations or liabilities affecting land within the province; relief sought against a person domiciled or ordinarily resident in the province; administration of the estate of a person domiciled in the province; execution of trusts or written instruments dealing with property within the province, or which ought to be interpreted according to the province's law; enforcement of a contract made within the province, or made on behalf of a non-resident by an agent within the province, or which is to be interpreted according to the province's law, or a contract over which the province's courts have jurisdiction; breach of contract within the province; a tort committed within the province; an injunction to have effect in the province; a person outside the province that is a necessary party to an action within the province; an action brought by a mortgagee of property, other than of land, for foreclosure, sale or delivery of possession; an action brought by a mortgagor of property, other than of land, for redemption, reconveyance or delivery of possession; proceedings founded on the judgment of the courts of the province; matrimonial causes; proceedings brought on a foreign judgment. The list is more than extensive.

Prior to *Morguard*, Canadian plaintiffs enjoyed, subject to the discretion of the court, an almost unlimited opportunity to sue before their own province's courts.¹² Provided the defendant had some assets or other interests within the province, the winning plaintiff would probably

10. See, for example, *Alberta Rules of Court*, Alta. Reg. 390/68, s. 30 (with permission of the court); *British Columbia Rules of Court*, B.C. Reg. 221/90, R. 13; *Rules of Civil Procedure*, O. Reg. 560/84, R. 17.

11. See, for example, the comments of La Forest J. at p. 12 of the typescripts in *Morguard*. See, also, *New York v. Fitzgerald*, [1985] 5 W.W.R. 458, 148 D.L.R. (3d) 176 (B.C.S.C.).

12. A multitude of situations could be encompassed by the rather broad terminology of the service *ex juris* provisions. For example, Ontario Rule 17.02(h) allows a plaintiff to serve *ex*

obtain a judgment enforceable against the defendant. Defendants with no interests in the province could usually ignore service *ex juris*, secure in the knowledge that the courts of their own province would almost surely not enforce the judgments of other courts (whether from another province or another country) when those judgments were not issued by a court exercising a valid *in personam* jurisdiction.

In order to limit the reach of their own *ex juris* rules and to afford some protection to defendants, the courts developed techniques to enable them to refuse to exercise their jurisdiction. The principal technique is the doctrine of *forum (non) conveniens*. Under this doctrine a defendant may argue that there is another jurisdiction that is at least as appropriate to hear the matter as the one before which the plea is made. Recently, the Supreme Court of British Columbia held:

The plea of *forum conveniens* is not merely that this Court is not a convenient forum but that there is a more *appropriate* forum elsewhere. [Emphasis in original.]¹³

The Ontario Supreme Court has also suggested that this is not an easy test to meet:

Convenient forum means that the applicant must establish that the foreign jurisdiction is the more appropriate natural forum to try the actions in the sense that the foreign jurisdiction has the most *real and substantial connection* with the lawsuit. [Emphasis added.]¹⁴

Unfortunately, defendants who appeared before the courts to contest jurisdiction sometimes found that they had inadvertently submitted or attorned to the jurisdiction of the very court they were contesting.¹⁵ This situation has been alleviated somewhat by provisions such as Rule 17.06 of the Ontario Rules of Court which provides that the recipient of an *ex juris* service may appear to contest the Ontario court's jurisdiction without having been held to attorn to the court.

In an apparent attempt to facilitate the enforcement of the judgments of other courts, all the common law provinces have enacted *Reciprocal Enforcement of Judgments* legislation.¹⁶ While these *Acts* provide a more

juris for damages suffered within the province as a result of a tort or a breach of contract, wherever committed; this effectively permits residents of Ontario to conduct their tort litigation within their province, regardless whether it is the most logical jurisdiction.

13. *Peterson et al. v. Ab. Bahco Ventilation et al.* (1979), 107 D.L.R. (3d) 49 (B.C.S.C.), at 59.

14. *Galtaco Redlaw Castings Corp et al. v. Brunswick Industrial Supply Co.* (1989), 69 O.R. (2d) 478 (S.C.), at 483.

15. See, for example, *Henry v. Geoprosco International Ltd.*, [1976] Q.B. 726, [1975] 2 All E.R. 702 (C.A.).

16. See, for example, *Reciprocal Enforcement of Judgments Act*, R.S.A. 1980, c. R-6; *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, ss. 30-41.7; *Reciprocal Enforcement of Judgments Act*, R.S.O. 1980, c. 432.

effective means of registering judgments which courts enforce, they do not extend the type or number of such judgments; all they tend to do is codify the pre-existing common law. It should be noted, though, that recognition of foreign divorces, support payments and child custody awards, while not totally free of difficulty, are much more likely to be enforced than other types of judgments.¹⁷ Hence, recognition of other provinces' judgments was granted or withheld as the various provincial courts thought appropriate in various situations.

All of this changed on 20 December 1990.

III. *De Savoye v. Morguard Investment Ltd et al.*¹⁸

The facts of this case are relatively simple. While resident in Alberta, Douglas De Savoye guaranteed mortgages to four condominium units; subsequently he became the mortgagor and the mortgages were assigned to the plaintiffs. De Savoye moved to British Columbia and in 1985 the mortgages fell into default. The plaintiffs commenced an action in Alberta; an order for service *ex juris* was granted and service was effected by double-registered mail. No defence was entered and default judgments were granted, the effects of which were to cause a judicial sale, after which there were deficiencies totalling approximately \$30,000. The Alberta Court of Queen's Bench issued judgments against De Savoye for the deficiencies.

The plaintiffs brought actions on the judgments before the British Columbia Supreme Court; judgment was granted,¹⁹ notwithstanding the fact, as noted by La Forest J. in his judgment, that "The appellant took no steps to appear or to defend the [Alberta] action. *There was no clause in the mortgages by which he agreed to submit to the jurisdiction of the Alberta court, and he did not attorn to its jurisdiction.* [Emphasis added.]"²⁰ On appeal to the British Columbia Court of Appeal, the judgment was upheld.²¹ The defendant then appealed to the Supreme Court of Canada.²²

17. See, for example, *Reciprocal Enforcement of Maintenance Orders Act*, R.S.A. 1980, c. R-7; *Family Relations Act*, R.S.B.C. 1979, c. 121, Part 4.1, ss. 70-70.93; *Reciprocal Enforcement of Maintenance Orders Act*, R.S.O. 1980, c. 433.

18. *Supra*, note 2.

19. *Morguard Investments Limited v. De Savoye* (1987), 18 B.C.L.R. (2d) 262, [1988] 1 W.W.R. 87 (B.C.S.C.).

20. *Supra*, note 2, at 1083.

21. *Morguard Investments Limited v. De Savoye* (1988), 27 B.C.L.R. (2d) 155, [1988] 5 W.W.R. 650, 29 C.P.C. (2d) 52 (C.A.).

22. In light of the fact that this case appeared to be merely a private dispute, it is not surprising that there were no appearances on behalf of the federal or provincial Attorneys General. As will become evident from the following discussion, in retrospect it is unfortunate that the Supreme Court did not have the benefit of argument from such intervenors as the case has developed into one with Constitutional implications.

In determining that the time had come for Canadian law to change, La Forest J. reviewed the historical roots of the English rules and noted the fact that they had been “unthinkingly adopted by the courts of this country, even in relation to judgments given in sister-provinces.”²³ This, he concluded with surprising frankness, was a “serious error.”²⁴ In his view, the courts must look to the underlying principles of private international law, the rules of which are “grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.”²⁵ This flow of wealth, skills and people is obviously of great importance to the Court as the notion is repeated in the judgment and accommodating it is said to have “become imperative.”²⁶ The traditional rules “fly in the face of the obvious intention of the Constitution to create a single country,”²⁷ one of the “central features [of which] was the creation of a common market.”²⁸

La Forest J. notes, as did the courts below, that all superior court judges are appointed by the federal government and subject to the superintending power of the Supreme Court, hence there can be no concerns in the Canadian context about differing levels of justice between the provinces; however he goes a step further and notes that superior court judges “have superintending control over other provincial courts and tribunals.”²⁹ He also notes that there are other “sub-constitutional” elements that ensure that the quality of justice does not differ across the country, such as the fact that all “Canadian lawyers adhere to the same code of ethics throughout Canada.”³⁰

As a result, in La Forest J.’s view, the economic provisions of the Constitution and the constitutional structure of the Canadian judicial system make a Full Faith and Credit clause unnecessary in the Canadian Constitution; the same effect as the ones in the constitutions of other federations such as the United States of America or Australia can be achieved by necessary implication of the current Constitution. Nor is there any need for provincial agreement in the form of reciprocal legislation along the lines of the *European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*.³¹

23. *Supra*, note 2, at 1095.

24. *Ibid*, at 1098.

25. *Ibid*, at 1096.

26. *Ibid*, at 1098.

27. *Ibid*, at 1099.

28. *Ibid*.

29. *Ibid*, at 1100.

30. *Ibid*.

31. See *Supra*, notes 7, 8.

La Forest J. asserts “the courts in one province should give *full faith and credit*, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, *so long as that court has properly, or appropriately, exercised jurisdiction in the action*. [Emphasis added.]”³² This is to ensure fairness to the defendant, which “requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction.”³³

Fair process, it would appear, is not the same as due process under the United States Constitution and it is expressly declared by La Forest J. not to be an issue “within the Canadian federation”, as there are sufficient constitutional and sub-constitutional safeguards to ensure fairness.³⁴ Fair or due process is one thing, properly restrained jurisdiction is quite another, though.

The basic reasoning of the British Columbia Court of Appeal was that the province’s courts ought to recognize the Alberta decision, because the British Columbia courts would have exercised jurisdiction under similar circumstances. As contemplated by the Court of Appeal, this would lead to a reciprocity test: British Columbia courts would enforce Alberta decisions where the basis of the Alberta court’s jurisdiction was one the British Columbia courts would recognize themselves and, presumably, *vice versa*. Interestingly enough, La Forest J. rejects this: “. . . I do not see the ‘reciprocity approach’ as providing an answer to the difficulty regarding *in personam* judgments given in other provinces, whatever utility it may have on the international plane.”³⁵

With a nod of approval to *Indyka v. Indyka*,³⁶ a review of *Moran v. Pyle National (Canada) Ltd*³⁷ led La Forest J. to adopt a “real and substantial connection” test: Dickson J., as he then was, felt that the existence of a real and substantial connection was the test to determine whether the courts of a province were competent to hear a case in tort when it was impossible to determine where the tort had actually taken place. If a court were to gain jurisdiction on this basis, it would be counter-intuitive to suppose that this would not also be sufficient to ensure that the decision subsequently arrived at would be enforceable before the courts of the other provinces and, as with tort, so with contract and, presumably, with other matters as well.

32. *Supra*, note 2, at 1102.

33. *Ibid.*, at 1103.

34. *Ibid.*; see *supra*, p. 347.

35. *Ibid.*, at 1104.

36. [1969] 1 A.C. 33, [1967] 2 All E.R. 689 (HL).

37. [1975] 1 S.C.R. 393, [1974] 2 W.W.R. 586.

Although *La Forest J.* seems to be primarily concerned with the interests of the plaintiff, he is not totally oblivious to the interests of the defendants and concludes:

It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties

The private international law rule requiring substantial connection with the jurisdiction where the action place is supported by the constitutional restriction of legislative power 'in the province'. As *Guérin J.* observed in *Dupont v. Taronga Holdings*. . .³⁸ (translation) 'In the case of service outside of the issuing province, service *ex juris* must measure up to constitutional rules.' The restriction to the province would certainly require at least minimal contact with the province, and there is authority for the view that the contact required by the Constitution for the purposes of territoriality is the same as required by the rule of private international law between sister-provinces.³⁹

The existence of the various *Reciprocal Enforcement of Judgments Acts* in no way limits or is a substitute for the effects of what *La Forest J.* announced. Indeed, in his view these Acts "simply [provided] for the registration of judgments as a more convenient procedure than was formerly available, i.e. by bringing an action to enforce a judgment given in another province. . . There is nothing, then, to prevent a plaintiff from bringing such an action and thereby taking advantage of the rules of private international law as they may evolve over time."⁴⁰

IV. *Unanswered Questions*

While *Morguard* has answered some questions and set the Canadian legal system on a new course, it necessarily leaves many questions unanswered. The experience of the United States with their now equivalent system requiring that sister-states' courts honour each others' judgments suggests that two of these questions are of particular significance. The first is the practical meaning of and limits to the "real and substantial connection" test that the Court articulated as the allowable limit for the exercise of out-of-province jurisdiction. The second hard question is whether or not there are "public policy" exceptions that provincial courts may call upon to avoid enforcing judgments from sister jurisdictions which fly in the face of the legislative policies of the receiving jurisdiction.

38. (1986), 49 DLR (4th) 335 (Que. Sup. Ct), at p. 339.

39. *Supra*, note 2, at 1108, 1109.

40. *Ibid.*, at 1111.

La Forest J. briefly acknowledges that there are issues such as these which will need to be resolved at some point. He holds out the possibility that s. 7 of the *Charter*⁴¹ may come into play at some point and notes:

There are as well other discretionary techniques that have been used by courts for refusing to grant jurisdiction to plaintiffs whose contact with the jurisdiction is tenuous or where entertaining the proceedings would create injustice, notably the doctrine of *forum non conveniens* and the power of a court to prevent an abuse of its process

There may also be remedies available to the recognizing court that may afford redress to the defendant in certain cases such as fraud or conflict with the law or public policy of the recognizing jurisdiction. Here, too, there may be room for the operation of s. 7 of the *Charter*. None of these questions, however, are relevant to the facts of the present case and I have not given them consideration.⁴²

V. *Real and Substantial Connections: A Test with No Limits?*

In the modern commercial world, are there any major Canadian businesses that do not have a "real and substantial connection" with all the provinces? Virtually all products, save those whose distribution is restricted by government, move in interprovincial commerce. All major producers, then, can reasonably anticipate that consumers throughout Canada will have access to their goods in the normal course of business. Presumably, on the basis of *Morguard* and its antecedent, *Moran v. Pyle*, virtually all such businesses have a substantial connection to all provincial jurisdictions regardless of the principal location of their business. For normal commercial enterprises, there do not appear to be any practical limits on the exercise of long-arm jurisdiction by the courts of any province in Canada.

It is possible to respond to this situation by nodding approvingly, but there are implications. The result is not only to make the legal system more procedurally convenient to plaintiffs, but possibly to skew it in a substantive way that may be less obviously desirable. It is not only simple convenience and lowered costs that prompt plaintiffs to commence actions in their own home jurisdictions, it is also because they sometimes believe that there is a better chance to win there. While this home-town advantage in the legal game is not as documentable as that in hockey or basketball, some believe that it exists, and not only in contract cases.

In a tort case for negligence between a local resident and a large Ontario- or Québec-based company, a jury or even a judge from a non-industrialised province would be almost stone-like not to view the

41. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

42. *Supra*, note 2, at 1110.

situation of their compatriot plaintiff with some special sympathy. Indeed, partly out of concern for this possibility, the United States Constitution created special access to a neutral, federal court jurisdiction based on the diversity of state residency in the original suit.⁴³ Without attempting to document the costs to business, which may be impossible to do in any case, one can still suggest that virtually unrestricted long-arm statutes, combined with the associated requirement that full faith and credit be given to judgments based on this type of jurisdiction, might have a substantial impact on defendant businesses. In any case, business must now face the prospect of long-arm jurisdiction made increasingly effective because there is now less doubt about the enforceability of judgments.

While there seem to be no predictable limits to the substantial connection test in cases involving large businesses, the test may also significantly expand provincial court jurisdiction over non-commercial plaintiffs. In considering potential fact situations, it is difficult to imagine a scenario where an actual connection between the plaintiff and the province asserting jurisdiction would not be considered to be real and substantial, and it is easy to imagine fact situations which involve connections with different jurisdictions.

Automobile accidents provide the clearest examples of the possible combinations of connections that can exist among plaintiffs, defendants and provincial jurisdictions. They extend from the simplest situation, where all elements connect with one and only one province to the most complex, where an accident occurs between persons resident in different provinces, in a third province, involving passengers or pedestrians resident in another province, while driving vehicles rented in yet another province. In such a situation, the courts of the jurisdiction in which the accident occurred would see a real and substantial connection, as would the courts of the provinces of residence of each of the parties. In an era of state-funded medicare and other compensation schemes, the amount of public money that is involved in caring for person seriously injured can be substantial.⁴⁴

43. See Section 2 of Article III of the US Constitution. Australia has recently adopted Commonwealth and State legislation to provide for a more coordinated approach to jurisdiction over matters involving different territorial factors. See, for example, Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) and cognate legislation from the different States and Northern Territory.

44. Ontario's current rules of court provide for jurisdiction where a plaintiff suffers damage within the province regardless of where the tort or breach of contract occurred (Rule 17.02(h)). The Ontario courts have held that this is sufficient to give them jurisdiction over automobile accidents occurring outside the province with defendants who are not residents in Ontario. See, for example, *Grimes v. Cloutier et al.* (1988), 69 O.R. (2d) 641 (C.A.).

Consider the possibility that two Québec residents might have an accident while driving their Québec-registered motor vehicles in Manitoba. It would be reasonable for the Manitoba courts to hold that they had jurisdiction over subsequent litigation because there was a real and substantial connection between the litigation and their province. Hence, in line with the Supreme Court's reasoning, there would be no constitutional impediment to the Québec plaintiff commencing an action against the Québec defendant in Manitoba, nor would there be any impediment to the Manitoba courts hearing the case, applying Manitoba law on the *lex loci delicti* principle, and awarding money-damages for pain and suffering, loss of future earnings, etc. in accordance with Manitoba law. Even though Québec takes a rather dim view of tort suits in automobile accident situations, its courts may very well be called upon to afford full faith and credit to such a Manitoba judgment.

VI. *Public Policy Exceptions?*

This, so far indeterminate, expansion of long-arm jurisdiction and its associated constitutional requirement that provinces afford full faith and credit to judgments from sister provinces, gives rise to the near certainty that some provinces will be faced with judgments that offend their public policy, as determined by their legislation. Obvious examples embodied in the above hypothetical scenario, are raised by Québec's longstanding, and Ontario's recently adopted, public policy towards tort claims arising from motor vehicle accidents.⁴⁵ At an even more fundamental level, common law and *droit civil* take diametrically opposed approaches to the effect of contracts signed during a person's minority.⁴⁶

Will provinces be forced to honour judgments that offend their public policy and which are to be executed against their residents, conceivably arising out of incidents that took place within the province? In the United States some flexibility exists with regard to such situations.⁴⁷

45. Automobile Insurance Act, R.S.Q. 1977, c. A-25; *Insurance Act*, R.S.O. 1980, c. 218, as am. S.O. 1990, c. 2.

46. While the common law takes the attitude that a contract signed by a minor is only enforceable against him/her if it is ratified after the party has ceased to be a minor, *droit civil* takes the attitude that a minor can only avoid contracts which are clearly disadvantageous to him/her (Civil Code of Lower Canada, art. 1002).

47. See, for example, *Olshen v. Kaufman*, 385 P. 2d 161 (1963); *Lilienthal v. Kaufman*, 395 P. 2d 543 (1964), Oregon Supreme Court. In these cases, an Oregon resident, who had been found to be a spendthrift and for whom a guardian had been appointed, incurred debts outside the state. Under Oregon legislation, such debts were voidable. The Oregon courts held that, notwithstanding the validity of the debts in the states in which they were incurred, and notwithstanding the valid interests those states had in upholding the debts, the Oregon courts ought to apply the public policy of Oregon and the plaintiffs could not recover in Oregon.

There is, so far, only a hint that the Court recognizes this type of problem, and no suggestion what approaches to it their Lordships would take. All of which is to say that there is work to be done in determining the limits to this formulation.

VII. *Interesting Times*

The restructuring of Canadian federalism has begun from on high. While politicians and constitutional experts discuss constituent assemblies, undertake endless consultations with the public and debate new ideas for sharing powers, the Supreme Court of Canada has acted to provide a new constitutional framework for Canadian law. Quietly, but with so-far uncontested authority, the high court has changed important aspects of the legal relations between sister provinces in ways that would probably have been quite impossible during the normal course of constitutional negotiations.

Would Québec, or for that matter many other provinces, have agreed to a system that, at first blush, requires their courts to honour judgments that are in conflict with legislatively declared public policy in the province? While the Court is legally on firm ground in that a constitutional requirement that provincial courts give full faith and credit to judgments from sister provinces makes good sense in a federation, the political footing for such a decision may be somewhat slippery. How, in the event, will provinces react when they discover that they are now vulnerable to the imposition of judgments on their citizens which are based on policies and laws which they may have specifically rejected but which will be implemented through their courts?

Potential litigants, which includes us all, may be happy that a new element of certainty and mobility has theoretically been given to the law because of the adoption by the Court of the constitutional requirement that provincial courts give full faith and credit to the judgments of other provincial courts. On the other hand, it is conceivable that provincial courts and, for that matter, provincial legislatures, may seek to avoid this new constitutional rule and, in so doing, cast this entire aspect of the legal system into disarray.

Similar uncertainties may accompany the adoption of the "real and substantial connection" standard to determine the extent of jurisdiction which provincial courts may assert beyond their borders. While provinces probably may still use the doctrine of convenient forum to avoid asserting this maximum level of jurisdiction, many courts at the behest of plaintiffs who come before them will test the outward limits of their jurisdiction. This may make for a plaintiffs' paradise or a balance may be found between the interest of the plaintiff and that of the

defendant. At the moment, the words “real and substantial connection” constitute a formula that is much like a new but empty pot: the Court in its future decisions will determine whether the pot will be filled with a witches’ brew or a fresh-tasting, new stew.

A great Chinese philosopher said, perhaps ironically, “May you live in interesting times”. With the *Morguard* case, the Supreme Court of Canada has assured itself that it will, indeed, live in interesting times. A short-run political reaction to *Morguard* would certainly make for interesting times. But even if that does not materialize, the Court in the longer term must put flesh on the basic bones and structure it has created. That, too, will make for interesting times.