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Characterization of Limitation Statutes in Canadian Private International Law: the Rocky Road of Change

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Comment

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Characterization of Limitation Statutes in Canadian Private International Law: the Rocky Road of Change

Prior to the Supreme Court of Canada's decision in *Tolofson* v. *Jensen*[1] limitations statutes were characterized, *prima facie*, as procedural for purposes of Canadian private international law. The principal authority for this characterization was the 1835 case of *Huber* v. *Steiner*[2] in which an action was brought on a promissory note made in France in 1813 and payable in 1817. The defendant argued that the French Code de commerce applied and that the right of action was extinguished by the provision that "all actions . . . prescribe themselves by five years reckoning from the day of protest. . . ." Tindal C.J. recognized the general rule that

> so much of the law as affects the rights and merits of the contract, all that relates "ad litis decisionem," is adopted from the foreign country; so much of the law as affects the remedy only, all that relates "ad litis ordinationem," is taken from the "lex fori" of that country where the action is brought.[3]

Applying this right/remedy distinction, Tindal C.J. was not satisfied that the French prescriptive law extinguished the contractual right and held that it merely limited availability of a remedy before the French courts.

Subsequently, in *Leroux* v. *Brown*,[4] the familiar legislative formula "no action shall be brought" was characterized as procedural rather than substantive. In that case, an oral contract for the supply of poultry and eggs had been entered into in France for delivery to the plaintiff in England. The contract, with a duration of one year, was to commence at a future uncertain time, i.e. not to be performed within one year. By the law of France the contract was enforceable but, before the English court,

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1. [1994] 3 S.C.R. 1022 [hereinafter *Tolofson*].
2. (1835), 132 E.R. 80 (C.P.).
3. *Ibid.* at 83.
4. (1852), 138 E.R. 1119 (C.P.) [hereinafter *Leroux*].

the defendant pleaded the English *Statute of Frauds*[5] provision that "no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof. . . ."[6] Though the reasoning of the members of the court is essentially an exercise in literal statutory construction, the characterization issue was addressed by Jervis C.J. with the words, "I am of opinion that the 4th section applies not to the solemnities of the contract, but to the procedure;"[7] and Maule J. stated: "It is parcel of the procedure and not of the formality of the contract."[8]

For a period in excess of 150 years, private international law in England and common law Canada was certain: limitation periods were, *prima facie*, procedural. The only real question was whether the statute in issue proscribed the right as well as the remedy.[9]

In *Tolofson*, the plaintiff, a resident of British Columbia and an infant at the time of the accident, had been seriously injured in an automobile accident in Saskatchewan. Eight years later, the plaintiff commenced action in British Columbia against both the British Columbia driver of the vehicle in which he was a passenger (his father) and the Saskatchewan driver of the other vehicle. Under British Columbia law, the *lex fori*, the action was not proscribed, but under the law of Saskatchewan, the *lex loci delicti*, the action was barred as not having been commenced within twelve months from the date of injury.[10] In its decision in *Tolofson*, the Supreme Court rejected the "traditional" forum-biased Anglo-Canadian

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5. (1677) 29 Car. II, c. 3, s. 4.
6. *Leroux*, *supra* note 4 at 1129.
7. *Ibid.*
8. *Ibid.* at 1130.
9. In the Canadian context, see for example: *Limitations of Actions Act*, R.S.A. 1980, c. L-15, s. 44; *Limitations Act*, R.S.B.C. 1979, c. 236, s. 9 (am. 1990 c. 33); *Limitations of Actions Act*, R.S.M. 1987, c. L150, s. 53; *Limitations Act*, S.N. 1995, c. L-16.1, s. 17(1); Art. 2921 C.C.Q.; and *Limitations of Actions Act*, R.S.S. 1978, c. L-15, s. 46 all of which expressly provide that the right of a person is extinguished after the expiration of the applicable limitation period.

Morris notes that there is Scottish, Australian and American authority supporting the characterization of special statutes such as *Fatal Accidents Acts* as substantive. The reason for this characterization is the linkage with the right created under the statute which specifically reforms the common law as opposed to the position of general limitations legislation. See: J.D. McLean, *Morris: The Conflict of Laws*, 4th ed. (London: Sweet & Maxwell, 1993) at 386.
10. *Vehicles Act*, R.S.S. 1978, c. V-3, s. 180(1): "no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained."

choice of law rule in tort[11] in favour of the rule of *lex loci delicti* for intra-Canadian torts with a discretionary exception in favour of the *lex fori* for international torts. Accordingly, under the new rule, the substantive law of Saskatchewan, as the *lex loci delicti*, applied to determine the substantive rights of the parties and the law of British Columbia, as the *lex fori*, governed procedural matters with respect to the litigation. The characterization of limitations legislation was, therefore, unavoidably in issue.

La Forest J., for the Court,[12] acknowledged two justifications at common law for the "procedural" characterization of limitations legislation in Anglo-American private international law. First, "that foreign litigants should not be granted advantages that were not available to forum litigants" and second, that a right of action at common law "endured forever."[13] The first justification is a mirror of the usual concern of forum shopping. The common law rationale is not that a foreign plaintiff will seek to take advantage of a longer limitation period in the forum but would be advantaged by a longer foreign period not available to domestic litigants. The forum shopping concern is that the procedural characterization permits a plaintiff whose cause of action has been proscribed in the natural forum, if one exists, to seek a forum with an unexpired limitation period. The second common law justification was rightly described by La Forest J. as "mystical"[14] and superseded by contemporary Canadian jurisprudence recognizing a mutuality of interest of both plaintiff and defendant in limitation periods such that expiration of a limitation period vests a protective right in the defendant.[15]

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11. The traditional test developed from the case of *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1 (Ex. Ch.) in which Willes J. stated the rule as follows (at 28–29):

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.

This rule was modified by the English Court of Appeal decision in *Machado* v. *Fontes*, [1897] 2 Q.B. 231 such that "not . . . justifiable" in the second condition meant "not innocent", thereby permitting a plaintiff to recover, even if there was no civil liability, if the act giving rise to complaint was in violation of a criminal or quasi-criminal law. It was this formulation of the rule that was applied by the Supreme Court of Canada in *McLean* v. *Pettigrew*, [1945] S.C.R. 62.

12. On the issue of limitations, La Forest J. wrote for a unanimous court of seven justices. Sopinka and Major JJ. each wrote brief separate reasons for decision in which they would not foreclose an exception to the *lex loci delicti* rule for choice of law in relation to intra-national torts. See *Tolofson*, *supra* note 1 at 1027–28.

13. *Tolofson*, *supra* note 1 at 1069.

14. *Ibid.*

15. Citing *Perrie* v. *Martin*, [1986] 1 S.C.R. 41 and *Yew Bon Tew* v. *Kenderaan Bas Mara*, [1983] 1 A.C. 533 (P.C.).

The core justification for a "substantive" characterization is found in La Forest J.'s statement that

> [t]he notion that foreign litigants should be denied advantages not available to forum litigants does not sit well with the proposition, which I have earlier accepted, that the law that defines the character and consequences of the tort is the "lex loci delicti". [16]

While textually in response to the first common law rationale for a "procedural" characterization, this statement is particularly significant because it alludes to the fundamental premise that informs other issues in private international law, such as the incidental question and renvoi. That premise is that the law identified by the applicable connecting factor or choice of law rule, the *lex causae*, determines the rights and liabilities between the parties to the greatest extent possible. Private international law, as a system, is subverted by tools, such as characterization, when applied purposely to defeat the application of the appropriate foreign law by expanding the scope of the *lex fori*. A prime example of a court recognizing this reality is the decision of the British Columbia Court of Appeal in *Block Bros. Realty* v. *Mollard*.[17] The British Columbia defendants responded to the claim of an Alberta real estate agent by arguing that the plaintiff agent was not licensed in British Columbia and, therefore, prevented from bringing an action by virtue of British Columbia legislation that an unlicensed agent "shall not maintain an action in any court for the recovery of compensation. . . ."[18] The court, per Craig, J.A., established the principle that "legislation should be categorized as procedural only if the question is beyond any doubt. If there is any doubt, the doubt should be resolved by holding that the legislation is substantive."[19] This principle clearly favours the widest scope for the *lex causae* and properly narrows that of the *lex fori* to procedural laws, truly and narrowly defined. It is consistent with the very purpose for the existence of private international law.

Significantly, the "substantive" characterization adopted by the Supreme Court in *Tolofson* is consistent with the promotion of uniformity of result. As La Forest J. noted, it is the characterization generally accepted in civil law systems[20] and has been statutorily introduced in the

16. *Tolofson, supra* note 1 at 1070.
17. (1981), 122 D.L.R. (3d) 323 (B.C.C.A.) [hereinafter *Block Bros.*].
18. *Real Estate Act*, R.S.B.C. 1979, c. 356, s. 37.
19. *Block Bros., supra* note 17 at 328.
20. See, for example Art. 3131 C.C.Q.: "prescription is governed by the law applicable to the merits of the dispute" and Swiss *Statute on Private International Law* (1990), 29 I.L.M. 1244, art. 148(1): "The law applying to a claim governs time-barring and extinction thereof."

United Kingdom through the *Foreign Limitations Act, 1984*.[21] In addition, four of the Hague Conventions: *Convention of 4 May 1971 on the Law Applicable to Traffic Accidents*;[22] *Convention of 2 October 1973 on the Law Applicable to Products Liability*;[23] *Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*;[24] and *Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*[25] expressly provide that the applicable law under the convention governs issues of "prescription and limitation of actions."[26]

Unfortunately, this legal consistency to which *Tolofson* joins Canada is not shared in the United States where limitation period legislation is permissibly characterized for full faith and credit purposes as procedural. This approach was reaffirmed by the United States Supreme Court in 1988 in *Sun Oil* v. *Wortman*,[27] in which Justice Scalia concluded that

> [t]he historical record shows conclusively, we think, that the society which adopted the Constitution did not regard statutes of limitations as substantive provisions, akin to the rules governing the validity of contracts, but rather as procedural restrictions fashioned by each jurisdiction for its own courts.[28]

The Court refused to hold that a more modern approach, i.e. to characterize limitations periods as substantive, is constitutionally required under full faith and credit, and stressed the permissive nature of the constitutional provision. Accordingly, it is open to each state of the United States to adopt either a "substantive" or "procedural" characterization of sister state limitations legislation. The procedural characterization was also recently affirmed by the High Court of Australia in *McKain* v. *R.W. Miller*

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21. (U.K.) 1984, c. 16. See also: The Law Commission, *Classification of Limitation In Private International Law* (Law Com. No. 114)(London: H.M.S.O., 1982).
22. Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, (1988) Am. J. Comp. L. 589.
23. Hague Convention of 2 October 1973 on the Law Applicable to Products Liability, (1973) 21 Am. J. Comp. L. 150, (1972) 1 I.L.M. 1283.
24. Hague Convention of 2 October 1973 On The Recognition and Enforcement of Decisions Relating to Maintenance Obligations, (1973) 21 Am. J. Comp. L. 156.
25. Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods, (1985) 24 I.L.M. 1573.
26. For an example of a convention which includes a distinct limitation period, see *United Nations Convention on Limitation Periods in the International Sale of Goods* (1974), 13 I.L.M. 952.
27. 108 S.Ct. 2117 (1988). See also: American Law Institute, *Restatement of the Law (2d) Conflict of Laws*, arts. 142–143.
28. *Ibid.* at 2123.

& Co. (South Australia) Pty. Ltd.[29] In that case, the High Court refused to revisit the distinction between limitations legislation which extinguishes a right and that which merely bars a remedy; rather, the Court stated that the distinction is "firmly and clearly established as a principle of law . . . [with] no warrant for discarding it."[30]

The decision in *Tolofson* introduced an immediate period of chaos in respect of pending insurance claims and ongoing litigation as parties, insureds, insurers, and their counsel took advantage of the decision, or attempted to do so, to accept or withdraw settlement offers and to amend pleadings. This consequence is not only supported by anecdotal evidence[31] but is also reflected in the case reports for the first eighteen months following the December 1994 release of *Tolofson*. The situation was well summarized by Goodfellow J. of the Supreme Court of Nova Scotia in *Hendsbee* v. *Khuber and Stockmal*:

> It is unfortunate that the Supreme Court of Canada did not acknowledge the dire consequences that will fall upon many litigants as a result of the change in the law. . . .[32]

In *Hendsbee*, the Nova Scotia resident plaintiff, while a passenger in a taxi, had been injured on 21 February 1993 in an automobile accident in Saskatchewan. The action was commenced in Nova Scotia on 22 February 1994, one year and one day after the date of the accident. Under the law of Nova Scotia, the applicable limitation period was two years but, as we have seen in *Tolofson*, under Saskatchewan law, the applicable limitation period was twelve months. *Tolofson* was released on 15 December 1994. On application by the defendant, Goodfellow J. dismissed the action and held that if the pleadings of the plaintiff disclosed "such facts that establish his claim is statute barred, then such amounts to a failure to disclose a good cause of action. . . ."[33] His sense of justice offended by the result, Goodfellow J. suggested to counsel that an appeal be filed with the Court of Appeal on the basis of the doctrines of judicial

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29. (1992), 66 A.L.J.R. 186.
30. *Ibid.* at 200 (per Brennan, Dawson, Toohey and McHugh JJ.).
31. This "immediate chaos" characterization is supported by discussions with civil litigation and insurance practitioners. In addition, I can also relate, from my own experience, that, both on the day of its release and on the following day, I was contacted by a number of concerned lawyers to discuss the practical effects of *Tolofson*. In one instance of which I am aware, a lawyer acting on behalf of an insurer immediately faxed a withdrawal of a settlement offer to the lawyer representing the plaintiff in an out-of-province automobile accident situation. Though referred to separate counsel for advice on the efficacy of the withdrawal, I am informed that the matter was finally settled for an agreed amount less than the original offer of settlement.
32. (1995), 148 N.S.R. (2d) 270, at 281 (S.C.) [hereinafter *Hendsbee*].
33. *Ibid.* at 278.

extension or estoppel arising from the plaintiff's reliance on the previous state of the law.

For its part, the Nova Scotia Court of Appeal dealt with the aftermath of *Tolofson* in *Brown* v. *Marwieh*.[34] In defending an action arising out of a motor vehicle accident in Alberta, the defendant had pleaded application of the Alberta statute of limitations.[35] The chambers judge disallowed this defence because of the accepted procedural characterization of limitations statutes and this ruling was upheld by the Court of Appeal.[36] There was no further appeal to the Supreme Court of Canada by the defendant. Then came the decision in *Tolofson*. On a new application by the defendant to resurrect the limitations defence, the chambers judge and later the Court of Appeal, applied the doctrine of cause of action estoppel. In other words, the matter was *res judicata* as the very issue of the limitations defence had been finally determined between the parties and was no longer a live issue in the litigation.

These two cases, from one province, aptly illustrate the unsettling effects of *Tolofson* on ongoing litigation. In *Hendsbee*, the pleadings filed by the plaintiff no longer disclosed a cause of action; in *Brown*, the issue of applicability of the limitation period under the *lex loci delicti* had already been determined adversely to the interests of a defendant still within the judicial system. The former defendant benefited from the retrospective change in the law created by *Tolofson*; the latter did not. The key factor was the stage which the litigation had developed to by the time *Tolofson* was released.

There are other examples. In *Dipalma* v. *Gavin Estate*,[37] the defendants applied, following release of *Tolofson*, to amend their statement of defence to plead expiration of the limitation period under the *lex loci delicti*, the law of Saskatchewan. The cause of action arose out of a motor

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34. (1996), 145 N.S.R. (2d) 220 (C.A.).
35. *Limitation of Actions Act*, R.S.A. 1980, c. L-15, s. 51(b).
36. (1994), 125 N.S.R. (2d) 389 (C.A.).
37. (1995), 176 A.R. 326 (Q.B.) (Master). In another Alberta case, *Ferdais* v. *Vermeer Manufacturing Co.* (1995), 167 A.R. 380 (Q.B., Master), a products liability claim by an Alberta plaintiff against a North Dakota manufacturer and its insurer for injuries sustained in Alberta had been dismissed by the North Dakota court on the basis of *forum non conveniens*. The dismissal was made subject to the condition "that defendants waive any statute of limitations defence that did not exist prior to the dates" the action was commenced in North Dakota (at 385). In defence to the subsequent action commenced in Alberta, the defendant manufacturer pleaded the Alberta limitations legislation but its insurer did not. On an application by the defendants for summary judgment, Master Funduk dismissed the action against the manufacturer but not that against the insurer. Master Funduk recognized that whether characterized as procedural, as under the former state of the law, or as substantive, as under *Tolofson*, the Alberta limitations period applied, Alberta being both the forum and the *locus delicti*.

vehicle accident in Saskatchewan and was commenced in Alberta by the Alberta plaintiff against the Saskatchewan defendants. The two-year Alberta limitation period had not expired when the action was commenced but the twelve-month period under Saskatchewan law had expired. The application to amend was dismissed by the master because of the obvious prejudice to the plaintiff which could not be compensated for by costs or adjournment. The master commented:

> It appears the defendants at one time were prepared not to make an issue of the expired Saskatchewan limitation but rather were prepared to attorn to the Alberta court's jurisdiction, and allow the case to be dealt with on the merits . . . By refusing the amendment they now seek, the court only puts them back into the position they apparently had previously accepted. . . .[38]

A similar motion to amend pleadings was dismissed in the Ontario case of *Hanlan* v. *Sernesky*[39] in which the motions judge, Kozak J., bluntly stated:

> The plaintiffs have been prejudiced by the judgment of the Supreme Court in *Tolofson* and this Court has been persuaded that the proposed amendment, which would bring into play the ruling in that case, would occasion prejudice that could not be compensated by costs or an adjournment.[40]

In *Miller* v. *Parkway Rental Ltd.*[41] the Ontario plaintiff moved for summary judgment on the basis of a 1991 settlement offer which had not been accepted before *Tolofson* was released. The cause of action arose in relation to a motor vehicle accident in Nova Scotia. The issue for determination was whether the offer was a common law offer, and, therefore, subject to the principles of offer and acceptance, or an offer regulated by the Rules of Civil Procedure.[42] In dismissing the motion, and holding the offer to be a common law offer, MacDonald J. observed:

> Given that the plaintiff's case may be in jeopardy as a result of *Tolofson* v. *Jensen* [citation omitted], the reasons for the attempt on the part of the plaintiff to assert the formal validity of the offer in question becomes transparent.[43]

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38. *Ibid.* at 328.
39. [1996] O.J. No. 2433 (QL)(Gen. Div.)
40. *Ibid.* at para. 16.
41. [1996] O.J. No. 295 (QL) (Gen. Div.) [hereinafter *Miller*].
42. *Ontario, Rules of Civil Procedure*, r. 49 equivalent to the former practice of payment into court.
43. *Miller*, *supra* note 41.

The impact of *Tolofson* on limitations has also been recorded in decisions in the courts of British Columbia,[44] Québec,[45] and the Northwest Territories.[46]

Limitations legislation in Canada is generally silent on matters of private international law. The limitations statutes of seven provinces; Nova Scotia, Prince Edward Island, New Brunswick, Ontario, Manitoba, Saskatchewan, and Alberta,[47] contain no provisions either characterizing limitations for the purpose of private international law or establishing rules for the applicability of foreign or domestic limitations legislation. However, the laws of three provinces do contain such provisions. The Québec *Civil Code* provides that "prescription is governed by the law applicable to the merits of the dispute."[48] The British Columbia *Limitation Act* contains the unusual and now superseded provision that when the substantive law to govern a matter is not that of British Columbia and the foreign limitations period is characterized as procedural, a court may apply either the limitations law of British Columbia or of the foreign jurisdiction "if a more just result is produced."[49] The *Limitations Act* of Newfoundland, in force as of 1 April 1996, expressly states that it "applies to actions in the province to the exclusion of the [limitations] law

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44. *Toope* v. *Syversten* (1995), 5 B.C.L.R. (3d) 174 (S.C.) re characterization of limitation periods in the context of confirming a maintenance order under reciprocal enforcement legislation. The limitation period under British Columbia law, the enforcing jurisdiction, was one year; that under the law of Ontario, the originating jurisdiction, two years. The Ontario order was confirmed.

45. *Gordon Capital Corp.* v. *Laurentienne Générale*, [1995] A.Q. No. 529 (QL)(C.A.) in relation to consideration of *forum non conveniens*. The action was stayed and the Court questioned the constitutional validity of the extra-territorial application of Art. 2190 C.C.L.C. in light of the substantive characterization of limitations legislation.

46. *Stewart* v. *Stewart Estate*, [1996] N.W.T.J. No. 48 (QL)(S.C.). Civil action arising from out of territory motor vehicle accident dismissed because of applicability of *locus delicti's* limitations period.

47. *Limitations of Actions Act*, R.S.N.S. 1989, c. 258; *Statute of Limitations*, R.S.P.E.I. 1988, c. S-7; *Limitations of Actions Act*, R.S.N.B. 1973, c. L-8; *Limitation Act*, R.S.O. 1990, c. L.15; *Limitation of Actions Act*, R.S.M. 1987, *supra*, note 9; *Limitations of Actions Act*, R.S.S. 1978, *supra*, note 7; and *Limitation of Actions Act*, R.S.A. *supra*, note 9, respectively. A Bill introduced in the New Brunswick Legislature in 1987 would have reformed the characterization of limitations laws by expressly declaring such laws to be substantive for the purposes of conflict of laws. The Bill received second reading and died on the order paper. See: Bill 103, *Limitations Act*, 5th Sess., 50th Leg., N.B. (1987) in *Journals of the House of Assembly of the Province of New Brunswick* (1987) at 2642 and 2674.

48. See also *supra* note 20.

49. *Limitations Act*, R.S.B.C., *supra* note 9, s. 13.

of all other jurisdictions."[50] This provision is arguably open to a constitutional challenge as being in relation to extra-provincial property and civil rights and, arguably, should be read down.[51] Until such a judicial pronouncement, limitations legislation of the *locus delicti* is effectively avoided under Newfoundland law. This Newfoundland statute, it should be noted, is an enactment of the model *Limitations Act* approved by the Uniform Law Conference of Canada in 1982.[52] No doubt, the Conference will revisit this matter in light of *Tolofson*. Finally, at the federal level, the *Federal Court Act*,[53] in general, merely incorporates by reference the provincial limitations or prescription law of the province in which the cause of action arose. Accordingly, the Act is silent on private international law issues.

Conclusion

In *Tolofson*, the Supreme Court of Canada modernized the characterization of limitations legislation for the purposes of private international law. In rejecting the traditional "procedural" characterization of limitations and adopting a "substantive" characterization, the Court moved Canadian law closer to uniformity with the private international law principles of other legal systems. Yet at the same time the immediate impact of the decision was to create a temporary chaos for litigants, insurance claimants and insurers. Had the reform been introduced as a statutory amendment there would, no doubt, have been public notice of the impending change in the law and an express transitional provision bringing the change in characterization into effect as of a given date. Stability and certainty in the law would have been maintained. Instead, the Court's decision in *Tolofson* constituted a retrospective change in the law and had immediate effect on both pending claims and litigation. As

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50. *Limitations Act*, S.N., *supra* note 9, s. 23.

51. See *Constitution Act, 1867*, s. 92 (13). Reading down s. 23 of the *Limitations Act, ibid.*, would limit provincial jurisdiction over property and civil rights to intra-provincial applications.

52. See *Uniform Law Conference of Canada, Proceedings of the Sixty-Fourth Annual Meeting* (Ottawa: Uniform Law Conference of Canada, 1983) at 33 and 341.

53. R.S.C. 1985, c. F-7, s. 39

(1) Except as expressly provided for by any other Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings in the court in respect of any cause of action arising in that province.

(2) A proceeding in the court in respect of a cause of action arising otherwise than in a province shall be taken within 6 years after the cause of action arose.

a common law rule, the characterization of limitations in private international law was certainly within the proper jurisdiction of the Court to reform. As Iacobucci J. stated in *R.* v. *Salituro*:

> The courts are the custodians of the common law, and it is their duty to see that the common law reflects the emerging needs and values of our society.[54]

Yet, at the same time, the following words of McLachlin J. in *Watkins* v. *Olafson* seem apposite:

> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases . . . Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.[55]

Given that there are approximately 700,000 automobile accidents in Canada annually and that 4.5 to 8 per cent of these accidents involve nonresident drivers[56] and therefore raise issues of private international law, it might have been prudent for the Court to have heeded its own words in *Watkins* and awaited legislative intervention. The fact that legislatures have not acted may, in turn, be taken as evidence of some measure of satisfaction with the former rule characterizing limitations

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54. [1991] 3 S.C.R. 654 at 678.

55. [1989] 2 S.C.R. 750 at 760–61.

56. The insurance industry does not maintain a statistical category of nonresident drivers/vehicles because that factor is not considered risk-significant. The latest year for which total accident statistics is available is 1992 in which year there were 689,379 accidents. (Source: Transport Canada, "Traffic Collision Data" in *Road Safety* - TRAID(V04)(7 June 1996).

An informal sample survey of provincial Departments of Transportation revealed the following statistics for the year 1994. In Ontario, the number of drivers involved in accidents was 405,024 with 373,282 from Ontario (92.16%), 10,155 from out of province (2.5%) and 21,587 of unknown residence (5.33%). Assuming two-vehicle accidents [405,024 ÷ 2 = 202,512] and that nonresident drivers are involved in accidents with Ontario drivers, the number of accidents involving nonresidents is approximately 5%; i.e. [10,155 ÷ 202,512 = 5.0%]. In New Brunswick, the number of accidents recorded by the Maintenance and Traffic Branch of the Department of Transportation for 1994 was 13,574 and the number of accidents involving out of province drivers, 1,106 (8.1%). In British Columbia, the Traffic Accident System Database, Research & Evaluation Department, Motor Vehicle Branch, Ministry of Transportation and Highways records the number of drivers/vehicles involved in accidents in B.C. in 1994 as 181,548 involving 8,357 nonresident drivers (4.6%). In Saskatchewan, the Department of Highways reports that 4.7% of the 26,425 accidents involved nonresident drivers.

legislation as procedural.[57] That the rule has been altered to a substantive characterization is, in the final analysis, a welcome development though it could have been implemented without the judicially-created chaos.

57. Assuming that the forum is not also the *locus delicti*, one negative effect of a shift to a substantive characterization of limitations legislation is to raise the transaction costs incurred in determining the matter. When characterized as procedural, there was little or no cost involved in determining the applicable limitation period; yet, the substantive characterization will require a determination of the content of the applicable *lex loci delicti*, thereby, at least marginally, raising transaction costs.

For a law and economics perspective on limitations legislation see R. Posner, *Economic Analysis of Law* (4th ed.) (Boston: Little, Brown and Company, 1992) at 587–88:

"If the purpose of the statute of limitations is to reduce the error costs associated with the use of stale evidence, there is strong argument for applying the statute of the state where the case is tried because that statute presumably reflects the competence of the courts of that state to deal with stale evidence. But if the purpose of the statute is just to enable people to plan their activities with greater certainty, there is an argument for applying the statute of limitations of the injurer's state, because it is the injurer who is subjected to the uncertainty."

Note that Posner's comparative advantage approach to the analysis of conflicts issues does not fit well with the situation where the place of injury is not the place of residence of the injurer.

Transaction costs may also be incurred in litigating the proper characterization of sub rules associated with the applicable limitation period. Consider, for example, *Stewart* v. *Stewart* (1996), 47 C.P.C. (3d) 82 (B.C.S.C.) in which the court held that the proper characterization of legislation permitting the extension of a limitation period is substantive but that the method designated by that legislation to effect the extension is procedural. In *Stewart*, an expired limitation period under the *lex delicti* (Sask.) was held extended when, consistent with the *lex fori*, a partial payment had been made but the notice required under the *lex delicti* had not been filed.