

FREEDOM FROM THE CONFLICT OF LAWS IS IN YOUR GRASP

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Abstract

Most lawyers dislike having to deal with Conflicts problems. For solicitors, possible Conflicts issues are dealt with by the addition of choice of law and forum selection clauses to the agreements they draft, even though many solicitors have little idea of the actual effect of those clauses, particularly the first one. Barristers have a much more difficult time. This paper will argue that the traditional choice of law process that Canadian courts have adopted is fundamentally flawed; it is not just wrong in point of detail, it suggests a way of resolving the disputes that come before Canadian courts that ignores, if it is not contrary to, the ordinary methods of resolving disputes. There are two principal ways that the process can achieve results that are hard to defend. The first is that limits – limits imposed by Canadian constitutional law or international law – are ignored. The second is that the process has the capacity, frequently realized, to subvert the values that Canadian law has adopted in cases where the judges do not talk “Conflicts”. In other words, there are cases where the result cannot be defended on the usual grounds that Canadian law exists to forward. Those values, the values that underlie the Canadian law of contracts, torts, property, marriage and divorce, etc., are at risk when counsel or a court “talks Conflicts” instead of focussing on the underlying areas of Canadian constitutional and domestic provincial law.

The paper will focus on a small number of issues and cases that illustrate the form and method of the traditional way courts and commentators approach “Conflicts” problems. It will show how that process makes the consideration by a court of, for example, constitutional, contracts, or torts values, impossible. It will argue and show that there are preferable and easy solutions to hand, once counsel and courts can let go of what they believe Conflicts cases require.

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TABLE OF CONTENTS

1.	Introduction	22
2.	The Characterization of Limitation Periods	30
3.	Where There is No Choice of Law Rule	38
4.	A Principled Basis for Applying One Rule Rather than Another	41
5.	The Problem with The Conflict of Laws	43
6.	The Concern for Uniform Results and the Role of the Supreme Court	52
7.	How to Decide a Conflicts Case	57
8.	Conclusion	59

1. Introduction

The area of the law known as the “Conflict of Laws” or “Conflicts”¹ is unlike any other; it adopts an approach to the resolution of legal problems that is unique. An understanding of that approach requires one to understand a completely idiosyncratic, widely accepted but, in my opinion, ultimately, a wholly irrational and unsatisfactory method of analysis.²

In most cases that come before the courts of a province, all the facts – or, at least, all the relevant facts – have occurred in that province. When there are relevant facts – and the relevancy of a fact depends, of course, on the pleadings and the question before the court – that have occurred outside the province, the rules and

1. The term “private international law” is synonymous with “conflict of laws” or “conflicts”. All the terms are seriously misleading if taken as other than meaningless phrases – meaningless in the sense that words like “dog” and “cat” are meaningless; they serve only to identify a particular animal species – to identify a collection of rules and problems that are traditionally included in texts and index headings under those terms. The rules are not in any sense part of international law – they are simply local rules of each country (or, in Canada, because of the division of powers under the *Constitution Act, 1867*, principally of each province) – and the question whether the rules of two places conflict, *i.e.*, would actually lead to different results, is often not the focus of the inquiry for, as we shall see, the rules are for the most part blindly and mechanically applied with no formal concern for fairness, justice, the achievement of worthwhile social goals or any other conceivable value other than the value represented by the statement that “That’s how it’s always been done”. In no other area of the law is Holmes’s observation that “it’s revolting to have no better reason for a rule than that it was so laid down in the reign of Henry IV” so applicable; “The Path of Law” (1897), 10 Harv. L. Rev. 457, 469.
2. Prosser described the “realm of the conflict of laws [as] a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed or entangled in it”: William Prosser, “Interstate Publications” (1953), 51 Mich. L. Rev. 959, 971.

principles of the Conflict of Laws are used to reach a solution. In some situations the parties may choose to make foreign facts relevant by declaring, for example, that a contract executed in Ontario is to be governed by the law of, for example, New York.³ In other words, the subject matter of the Conflict of Laws consists of cases with relevant geographically complex facts.⁴

The Conflict of Laws deals with three principal questions:

1. In what circumstances, if any, should the presence of geographically complex facts induce a court to consider determining the controversy before it by reference to some law or rule of decision other than that of the place in which the court before which the plaintiff has brought its claim is situated?⁵
2. In what circumstances should the presence of geographically complex facts influence the decision of the court before which

3. New York facts may have been relevant whether the parties had made their declaration or not but, equally possibly, only Canadian and, say, Brazilian facts would have been relevant had the declaration not been made – as, of course, they may still be, notwithstanding the choice of law clause.

4. There is no way to define a “Conflicts” problem other than that it is one in which there are relevant foreign facts. The determination of what facts, foreign or not, are *relevant* to the court’s decision is of course at the heart of the judicial process. Cases where an Ontario court holds that a foreign fact, *e.g.*, the fact that the plaintiff corporation is, for example, incorporated in New Brunswick, though accepted or proved as a fact, is nevertheless irrelevant to its decision, are not Conflicts cases.

5. The “law of a province” includes, of course, applicable Canadian law, *i.e.*, the law enacted by Parliament or by the Parliament of the United Kingdom. The term “Canadian law” does, however, present some unexpected features; there is a Canadian maritime law, applicable throughout Canada, that is based on the common law and applies in all provinces, even in Québec. See, *e.g.*, *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, 77 D.L.R. (4th) 25, [1991] 2 W.W.R. 195 (S.C.C.). There is also an issue, raised and discussed in Québec but not, so far as I know, in the common law provinces of Canada, of the law to be applied in the Federal Court. Is it the law of the province in which the court sits or some other law and, if so, what law? It has, for example, been casually assumed that provincial apportionment legislation, *e.g.*, the *Contributory Negligence Act*, R.S.B.C. 1960, c. 74, s. 2, applies to admiralty actions brought in the Federal Court, *Stein v. “Kathy K” (The)* (1975), [1976] 2 S.C.R. 802, 62 D.L.R. (3d) 1, 6 N.R. 359 (S.C.C.). Since that court is a national court, *i.e.*, one can sue in any Federal Court from Victoria to St. John’s, it might be thought that these issues would have been developed. With legislation like the *Bills of Exchange Act* and *Canada Business Corporations Act*, the law is the law of Canada and not that of any province. The United States law on this point is both voluminous and carefully developed. I shall ignore these problems in this paper.

the plaintiff has brought its claim to take jurisdiction or to decline to take jurisdiction to determine the controversy?

3. What response does (or should) the court make to a claim presented by a party based on a judgment of another court in another jurisdiction in that party's favour? Does it (or should it) matter if that "foreign" judgment is that of another Canadian court or of a court of a foreign country? Does the judgment in favour of the plaintiff in the original proceedings give a cause of action to that party before a provincial, *i.e.*, a local, court so that the foreign judgment can be "transformed" into a judgment of the local court on which a writ of seizure and sale may issue? Does a foreign judgment in favour of the defendant operate as, or similar to, *res judicata* or issue estoppel, preventing the plaintiff from bringing another action on the original claim in a provincial court?

The first question raises the issue of choice of law; the second, judicial jurisdiction; and the third, the recognition and enforcement of foreign judgments. In this paper I shall examine only the first question, choice of law.

The reason that cases with geographically complex facts present special problems is that in a case that has relevant factual connections with, for example, both Ontario and Québec, the presence of non-Ontario facts may suggest an argument that the rights of the parties should be determined with reference to Québec law rather than Ontario law.

Any case of any kind may present geographically complex facts. In practice, the approach of a court in Canada to a criminal case where, for example, the crime was committed outside Canada is determined by the *Criminal Code* in the context of Canada's extra-territorial powers.⁶ Again, problems of extra-territorial taxation and of administrative regulation are typically resolved by the application of statutory rules which cover all the issues presented to the court, though not all issues are resolved by statutory interpretation and some are within the area of our concern.⁷ Similarly, many problems

6. See, *e.g.*, *Criminal Code*, R.S.O. 1985, c. C-46, s. 6(2), "Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada". Some acts, like bigamy, are offences under the *Criminal Code* even if done outside Canada. See s. 290.

7. Notice that the extra-territorial competence of a Canadian province may be limited by the fact that under the *Constitution Act, 1867*, s. 92(13), the provinces may only enact legislation with respect to "property and civil rights in the province". See also s. 92(14), "administration of justice in the

of maritime law, where, of course, there are often geographically complex facts, are determined without reference to any Conflicts rules.⁸

The principal scope for the rules and principles of the Conflict of Laws are cases in the private law field – contracts, property, negotiable instruments, torts, family law, succession, bankruptcy, etc. We shall see that, while some of the potential problems have been resolved by statute, there remains a large area where solutions can only be found in the approaches developed in the common law by the judges and academics.

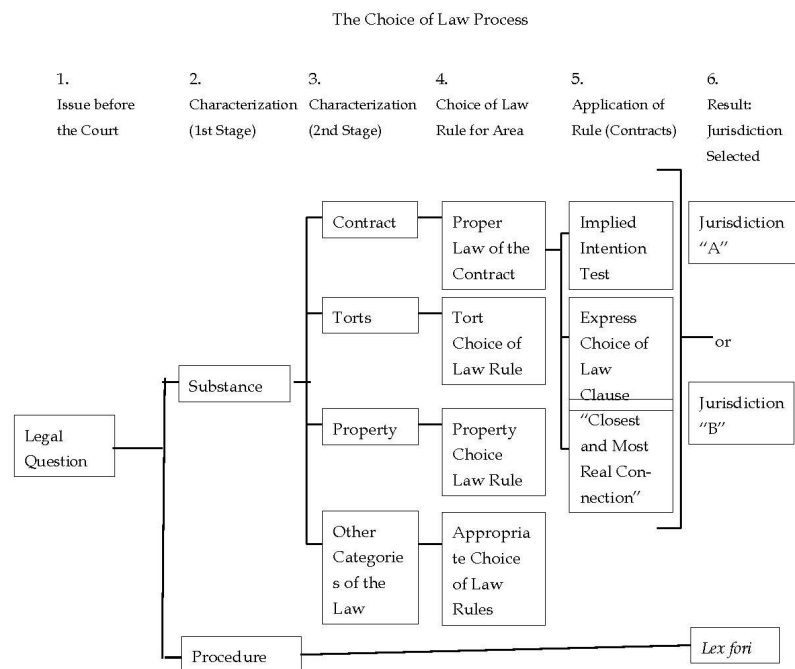
I have said that the only possible way to define a Conflicts problem is that it is a problem with geographically complex facts. In practice, a Conflicts problem will be defined or constituted by the decision of a lawyer to make foreign facts relevant. A solicitor drafting an agreement will consider whether there should be a choice of law or forum selection clause to deal with the potential problems that might arise from the foreign facts. Those facts could include the different places where the parties carry on business or the place, outside Ontario, where the contract is to be performed. In litigation, one party will raise a “Conflicts” issue by alleging in the pleadings, in

province”. I shall return to the significance of these limitations on provincial power later.

8. See, e.g., *Todd Shipyards Corp. v. Altema Compania Maritima S.A.* (1972), [1974] S.C.R. 1248, 32 D.L.R. (3d) 571, 1973 A.M.C. 176 (S.C.C.), and *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustee of)*, 2001 SCC 90, [2001] 3 S.C.R. 907, 207 D.L.R. (4th) 577 (S.C.C.). The decision of the Federal Court of Appeal in *Kent Trade & Finance Inc. v. JP Morgan Chase Bank*, 2008 FCA 399, 305 D.L.R. (4th) 442, (*sub nom. JPMorgan Chase Bank v. Lanner*) [2009] 4 F.C.R. 109 (F.C.A.), leave to appeal refused (2009), 398 N.R. 394 (note), 2009 CarswellNat 1438 (S.C.C.), a case where the law to decide the controversy was clearly Canadian maritime law, is an example of the problems that arise when a court leaps into a Conflicts analysis without thinking. The idea that the choice of law clause in the contract that one creditor had with the debtor could control questions of priority between two creditors to the assets of the debtor is very odd and has to be wrong. See Swan, Case Comment, “The Perils of a Conflicts Analysis: Look Before You Leap”, *Kent Trade and Finance Inc. v. JP Morgan Chase Bank* (2010), 8 *Canadian International Lawyer* 15. Albert Ehrenzweig, *Private International Law: A Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty* (Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1967), explores the contribution of the Law of Admiralty to the development of an approach to Conflicts on which I have based mine. See Swan, Book Review, “A.A. Ehrenzweig, *Private International Law: A Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty*” (1969), 19 U.T.L.J. 479.

the statement of claim or defence, that a foreign fact or law bears on the issue before the court.

Perhaps the easiest way to conceive of Conflicts is that it exists as a kind of meta-law, *i.e.*, it consists of rules operating at a level above – or, in the diagram below, before – the ordinary rules of contracts, torts, trusts, etc., can be applied. The diagram that follows sets out graphically the structure of the traditional analysis of a Conflicts problem.



This structure shows the various steps that have to be taken to reach a result once a lawyer or judge sets off down the Conflicts road. The “legal question” could be anything: can this woman be compelled to testify against this man? Can this gambling debt be enforced here? Is the defendant liable in tort for the injury suffered by the plaintiff? Who can succeed to this deceased’s estate?

A very important feature of this structure – in fact, its principal feature – is that it results in the selection of a jurisdiction, *i.e.*, a province, state or country, whose law is to “govern” the question before the court. This approach is a “jurisdiction-selecting”

approach. In theory, once a court has followed the path set out, it first selects, for example, Québec law to govern a contract or a question of tort liability and does not, at that point in the analysis, look at the particular provision of the *Civil Code* or Québec statute to see how its application might lead to a different result from, for example, an Ontario statute or a principle of the common law. The jurisdiction-selecting approach chooses a jurisdiction by using the “choice of law rules” considered appropriate for each area of the law.

At the heart of this structure is the process called “characterization”. The table shows that characterization operates at two points or stages in the process. The judge has first to decide whether the legal question involved is one of “substance” or “procedure”. This choice then leads inexorably to the next stage. If the characterization of the initial question is “procedure”, then the *lex fori* automatically applies. The *lex fori* is the law of the place where the court, the forum, is. If the characterization of the first question is “substance”, then the court has to go further and choose among the private law categories that might be relevant. That choice leads to the application of a particular choice of law rule, the rule being the one thought appropriate for the relevant legal category.

Conflicts scholars worry about the process of characterization and what they say about it vividly illustrates the irrationality and unsatisfactory nature of the process.

There are some simple aspects of procedure.⁹ A plaintiff suing in Ontario has to comply with the Ontario *Rules of Civil Procedure* with respect to the form of the statement of claim and the rules of pleading. Other questions have much less obvious answers. The law of evidence may look like a question of procedure but the compellability of a witness may involve difficult questions of social policy.

9. There are some surprising results of this characterization. The English, pre-EU, view was that the application of *Hadley v. Baxendale*, [1854] EWHC J70, [1854] EngR 296, [1843-60] All E.R. Rep. 461 (Eng. Exch.), in determining damages for breach of contract, involves only a question of procedure, as opposed to the substantive law of contracts. See, e.g., *J.D’Almeida Araujo Lda. v. Sir Frederick Becker & Co.*, [1953] 2 Q.B. 329, [1953] 2 All E.R. 288 (Eng. Q.B.). This view of the effect of *Hadley v. Baxendale*, was based on a complete misunderstanding of the law of contracts and, in particular, of the role of that case in giving guidance to solicitors on the default risks facing their clients who enter into contracts. The issues of the characterization of remedies or damages are briefly canvassed in Castel and Walker, *Canadian Conflict of Laws*, 6th ed. (Toronto: LexisNexis, looseleaf), §31.7, and in Stephen Pitel and Nicholas Rafferty, *Conflict of Laws*, 2nd ed. (Toronto: Irwin Law, 2016) pp. 237-241.

The second stage of characterization is by far the more important. Notice what has to be done. The choice facing the lawyer or judge is to decide whether to look at some legal problem, for example, as *either* a contracts one *or* a tort one and this choice sends the argument, the decision, down radically different paths. Outside the weirdness that is Conflicts, the choice between contracts and torts tends to have minor consequences. The Supreme Court has, for example, held that in many cases a plaintiff has a choice of suing in either contract or tort.¹⁰ In the ordinary case, we would regard this choice as having perhaps an effect on the limitation period, as in *Central Trust Co. v. Rafuse*,¹¹ or on the measure of damages, as in *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*.¹² There can be difficult problems in dealing with the scope of tort liability when one party's duty to the other may be qualified or affected by a term in the agreement between them,¹³ but the existence of the choice is not seen as having any serious conceptual consequences.

Notice that in cases like these, the choice is focused on a narrow question: can this plaintiff sue this defendant notwithstanding that the limitation period for a claim in contract has run? The alternative characterization of the plaintiff's cause of action as a tort claim, simply extended the limitation period so that, as it turned out, the plaintiff was in time and could sue.¹⁴

In the other case, *V.K. Mason*,¹⁵ the question was the characterization of the plaintiff's cause of action and the effect of that decision on the measure of damages. Once the Supreme Court

10. The defendant has to owe the plaintiff a duty of care as well as a contractual obligation. See *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, 34 B.L.R. 187 (S.C.C.), varied [1988] 1 S.C.R. 1206, 44 C.C.L.T. xxxiv, 1988 CarswellNS 601 (S.C.C.); *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12, 99 D.L.R. (4th) 577, [1993] 2 W.W.R. 321 (S.C.C.), reconsideration / rehearing refused (1993), 14 C.C.L.T. (2d) 233n, 5 C.L.R. (2d) 173n, 1993 CarswellBC 3074 (S.C.C.).

11. [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, 34 B.L.R. 187 (S.C.C.), varied [1988] 1 S.C.R. 1206, 44 C.C.L.T. xxxiv, 1988 CarswellNS 601 (S.C.C.).

12. [1985] 1 S.C.R. 271, 16 D.L.R. (4th) 598, 35 R.P.R. 118 (S.C.C.).

13. See, e.g., *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769, 26 D.L.R. (3d) 699, 1972 CarswellOnt 208F (S.C.C.).

14. As the limitation rules were then, the limitation period for a breach of contract ran from the date of the breach, whether or not the breach was then known to have occurred; the limitation period for a tort ran from the date of discovery. Under the Ontario *Limitations Act 2002*, and other provincial legislation, the time runs for almost all common causes of action from the date of discovery of the claim.

15. *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271, 16 D.L.R. (4th) 598, 35 R.P.R. 118 (S.C.C.).

had characterized the plaintiff's claim as one for misrepresentation and not for breach of contract, as the lower courts had done, the plaintiff's damages would have been reduced to the torts, *i.e.*, the reliance, measure as opposed to the contracts, *i.e.*, the expectation measure. It is ironic that, notwithstanding this characterization, the actual award of damages was probably indistinguishable from the contracts award because Wilson J. allowed the plaintiff to recover its opportunity cost, *i.e.*, what it would have made from the next most profitable contract.¹⁶ In other words, in the highly competitive world of construction tendering, the reliance measure equalled or coincided with the expectation measure.

What is very important about the choices the Supreme Court faced in each of these cases is that the court was expressing its preference for one result over the other. In *Central Trust Co. v. Refuse*,¹⁷ Le Dain J., giving the reasons for judgment of the court, first observed that it was unfair that a plaintiff would find its action barred before it even knew of its solicitors' negligence. The motivation for what Wilson J. did in *V.K. Mason*¹⁸ is harder to find. The difference between her approach and that of the Ontario Court of Appeal was that she did not think that "reasonable business people would have construed the Bank's letter as an absolute and unqualified guarantee, which is what the courts below have effectively held".¹⁹ She went on to hold that "[i]t seems to me that

16. *Supra*. Wilson J. said: (p. 288, S.C.R.)

Although damages for negligent misrepresentation would normally be assessed in terms of actual loss, including lost opportunity, rather than loss of anticipated profit, in this case the commercial context in which the parties operated dictates that Mason's loss should be calculated in the same way in tort as it would be in contract.

17. [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, 34 B.L.R. 187 (S.C.C.) at paras. 76, 77, varied [1988] 1 S.C.R. 1206, 44 C.C.L.T. xxxiv, 1988 CarswellNS 601 (S.C.C.):

But perhaps the most serious concern is the injustice of a law which statutebars a claim before the plaintiff is even aware of its existence.

77 I am thus of the view that the judgment of the majority in *Kamloops* laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia *Statute of Limitations*, R.S.N.S. 1967, c. 168.

18. (1982), 19 B.L.R. 136, 39 O.R. (2d) 630, 1982 CarswellOnt 131 (Ont. C.A.), affirmed [1985] 1 S.C.R. 271, 16 D.L.R. (4th) 598, 35 R.P.R. 118 (S.C.C.)

19. [1985] 1 S.C.R. 271 at 282, 16 D.L.R. (4th) 598, 35 R.P.R. 118 (S.C.C.). No evidence was, of course, led on this point. It is equally possible to believe that

a negligent misrepresentation analysis properly focuses attention on the gravamen of the cause of action in this case, namely the fact that the Bank's representation to Mason was false".²⁰

When, in a Conflicts case, the court engages in characterization, the process generally does not consider what result would be preferable in the senses considered by the Supreme Court in *V.K. Mason* and *Central Trust Co. v. Refuse*. In particular, the competing rules of the two alternative jurisdictions are not examined; to a large extent the process is mysterious. These features of the process are illustrated by Supreme Court's treatment of limitation periods.

2. The Characterization of Limitation Periods

The common law has had statutory limitation periods for about 400 years.²¹ The traditional characterization of a limitation period was as "procedural". This characterization meant that the law to govern the question whether an action was brought in time was that of the forum, the place where the action was brought. The civilian, *i.e.*, European and Québec, approach was different.²² The rules of prescription, the civilian equivalent of limitation periods, was that the law to determine the question was the law to govern the contract, tort or other topic so that the question was one of "substance" so that

a reasonable merchant would have regarded the bank manager's letter as an unequivocal undertaking by the bank, bought with consideration; in other words, a contract.

20. *Supra*, p. 283 (S.C.R.).

21. The "Report on Limitation of Actions" of the Ontario Law Reform Commission, Department of the Attorney General, 1969, p. 11, notes the earliest legislation in 1588 (31 Eliz. I, c. 5), and the first *Limitation Act* (21 Jac. I, c. 16) in 1623. The law in Ontario was radically changed in 2002 with the enactment of the *Limitations Act 2002*, S.O. 2002, c. 24, Sched. B. This legislation left part of the previous *Limitations Act*, R.S.O. 1990, c. L.15, in force but re-named as the *Real Property Limitations Act*. The original statutory rules applied to actions at law; they did not apply to suits in Equity. The equitable limitation period was imposed by the doctrine of laches. In practice, that doctrine required a plaintiff in equity to move very quickly, though in some cases, equitable rights could be asserted many years later. Modern *Limitations Acts* impose one period, applicable to both common law and equity, though the doctrine of laches may still apply to deny a plaintiff an equitable remedy.

22. The different characterizations were said to reflect the different effects of the running of the limitation period. A common law *Limitations Act* prevents the plaintiff suing; it leaves the cause of action intact but unenforceable by a proceeding. See, *e.g.*, *Colautti Construction Ltd. v. Ashcroft Development Inc.*, 2011 ONCA 359, 1 C.L.R. (4th) 138, 281 O.A.C. 201 (Ont. C.A.) at para. 76. The expiry of a civilian prescription period ends the creditor's rights.

the next stage of the choice of law process had to be embarked on, thus starting the inquiry across the diagram set out above by taking into account the area of law involved and the choice of law rule associated with that area.

The treatment of limitation periods in the conflict of laws illustrates just how weird decisions in that area of the law can be. In *J. v. H.*,²³ a German court had to decide whether a claim brought before it was in time. The claim was made on certain promissory notes executed in Tennessee. The German court held that the validity of the notes was governed by the law of that state. One question before the German court was whether the running of the limitation period, six years, under the law of Tennessee and the expiry of the prescription period, three years, under German law, barred the claim in Germany.

In the ordinary world, a world where conflict of laws did not exist, the answer would seem easy; the claim being too late under *both* applicable laws, it should have been dismissed; there was no “conflict” between the laws of the two jurisdictions involved and no need to choose between them. But no; that would be far too simple an answer. The German court held that Tennessee law only applied to actions brought in that state, while German law applied only to claims governed by German law; “the German judge is, therefore, to apply this domestic prescriptive law only to those claims which are subject to the German substantive law”. The result was that the German claim was made in time; there was no limitation period!²⁴

We can stop here and consider for a moment what is the purpose of a *Statute of Limitations*. We can do no better than to repeat what the Ontario Law Reform Commission has said:

Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. These laws are designed to prevent persons from beginning actions once that reasonable time has passed. Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter. Nor is it in the interests of the

23. Reichsgericht, First Civil Senate, January 4, 1882, 7 Entscheidungen des Reichsgerichts in Zivilsachen 21, reproduced in Von Mehren and Trautman, *The Law of Multistate Problems: Cases and Materials on Conflict of Laws* (Boston, Toronto: Little, Brown & Company, 1965) p. 321. [Translation by the authors.]

24. A subsequent German court held a claim on similar facts to be out of time. See *H. v. T.I.C.T. A.G.*, Reichsgericht, Second Civil Senate, July 6, 1934, 145 Entscheidungen des Reichsgerichts in Zivilsachen 121, 128-129, 130, reproduced in Von Mehren & Trautman, *ibid.*, p. 323.

community that disputes should be capable of dragging on interminably. Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgettable or die: documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute. A statute of limitation is sometimes referred to as an "Act of peace".²⁵

Because the German court "talked" Conflicts, it did not consider the purpose of *both* limitation rules or that fact that the plaintiff, unadvised by a lawyer, could hardly have expected to have brought his action in time; the unfairness to the defendant was not, of course, considered. As a consequence, it reached an absurd decision, unjustified by the purpose of both possibly applicable rules.²⁶

The Supreme Court waded into the limitation morass in *Tolofson v. Jensen*.²⁷ The plaintiff sued the defendant in B.C. for injuries

25. "Report on Limitation of Actions" of the Ontario Law Reform Commission, Department of the Attorney General, 1969, p. 9.

26. The House of Lords made an equal hash of foreign limitation periods in *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg AG*, [1975] UKHL 2, [1975] A.C. 591, [1975] 1 All E.R. 810 (U.K. H.L.). The question before the English courts was the effect in England, under s. 8 of the *Foreign Judgments (Reciprocal Enforcement) Act, 1933*, of a German judgment dismissing the plaintiff's claim in that country as statute-barred. A majority of the House of Lords held that the German decision, being *only* on the limitation point, it was not a decision on the merits and, consequently, was not entitled to recognition in England. Lord Wilberforce's explanation of the proceedings makes everything crystal clear: (p. 628, A.C.)

3. In Germany, a three year period of limitation applies to bills of exchange. If the German period is applied to the bills, action upon them is barred by German law. The question litigated in Germany, upon which the German courts have differed, is whether in proceedings before a German court the German period does apply. The basis of the affirmative decision of the District Court of Munich is (briefly) that limitation is under German law, classified as a matter of substance, not of procedure; that as the proper law of the bills is English law, this involves the application by a German court of English law; that under English law limitation is regarded as a matter of procedure; that, applying the doctrine of renvoi (accepted by the German court), reference back has to be made to the *lex fori*, i.e., German law, so that the proceedings were barred.

It would be easy to argue that the plaintiff, having chosen to sue in Germany and being rebuffed there, should not, by suing in England, get a second chance, another bite of the cherry; this simple argument is, of course, behind doctrines like *res judicata* and issue estoppel. The German court was, *ex hypothesi*, an appropriate court to have made its decision. If you talk Conflicts, there's a good chance you'll talk nonsense.

27. [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289, 26 C.C.L.I. (2d) 1 (S.C.C.). The case was decided with *Lucas v. Gagnon* in one judgment.

sustained in an automobile accident that had occurred in Saskatchewan. La Forest J. held that, the accident giving rise to the plaintiff's cause of action having happened in Saskatchewan, the law of that province, the *lex loci delicti*, governed the question of the defendant's liability in tort to the plaintiff, including the question of the applicable limitation period. In the circumstances, the plaintiff's claim was statute-barred under Saskatchewan law, notwithstanding that it was within the limitation period in B.C., the place where the plaintiff lived. In other words, the question whether the claim was out of time was characterized as a question of substance, not procedure. That question of "substance" was further characterized as a "tort" and the applicable tort choice of law rule followed, the *lex loci delicti*, leading to the application of Saskatchewan law.²⁸

The effect of this process is that at no point in its reasoning does the court stop to ask, "which *Limitations Act* should be applied in the circumstances?; which act's purposes might be forwarded?" and "what criteria might be relevant to that question?" A good reason for the application of the shorter Saskatchewan limitation period can be offered, but the choice of law approach (as laid out in the diagram and as applied by the Supreme Court) precludes any consideration of those important questions. This feature of the choice of law process is the direct consequence of the adoption of jurisdiction-selecting rules.

The dubious logic of the Supreme Court's approach in *Tolofson v. Jensen* was vividly demonstrated in *Castillo v. Castillo*.²⁹ The parties, husband and wife, residents of Alberta, were involved in a single vehicle accident in California. The wife sued the husband in Alberta. The limitation period had expired in California but not in Alberta.³⁰

28. I shall not explore here the dreadful consequences of this choice of law rule or the even worse rule it replaced. I have done so in other places. See Swan, "Choice of Law in Torts: The Impact of the Twentieth Century" (1989), 10 Adv. Q. 57; Swan, "Conflict of Laws—Torts—Automobile Accident in Québec—Action in Ontario—Paradigm Shift or Pandora's Box?—*Grimes v. Cloutier*; *Prefontaine v. Frizzle*" (1990), 69 Can. Bar Rev. 538; Swan, "Choice of Law in Torts - A Renvoi": *Gagnon v. Gagnon*, *Williams v. Osei-Twum* (1993), 15 Adv. Q. 356, and Swan, "Federalism and the Conflict of Laws: The Curious Position of the Supreme Court of Canada" (1995), 46 Univ. South Carolina. L. Rev. 923, where I strongly criticize the Supreme Court decision in *Tolofson v. Jensen*.

29. 2005 SCC 83, [2005] 3 S.C.R. 870, 260 D.L.R. (4th) 439 (S.C.C.).

30. None of the reasons for judgment set out the wording of the California law. It is possible that that law, by its own terms, would not apply to out-of-state parties. The trial judge, Rawlins J., said, 2002 ABQB 379, 24 C.P.C. (5th) 310, 3 Alta. L.R. (4th) 84 (Alta. Q.B.) at para. 11, affirmed 2004 ABCA 158, 244 D.L.R. (4th) 603, 1 C.P.C. (6th) 82 (Alta. C.A.):

The plaintiff alleged that the Alberta period applied and relied on the language of s. 12. At the date of the decision the section read:

12. The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.³¹

The Alberta Court of Appeal, dismissing the appeal, held that the broad language of the section should not be given an interpretation which would have trumped the choice of law rule of *Tolofson v. Jensen*. Since the action was barred under California law, it would have to have been brought in time under both California law and Alberta law. An appeal to the Supreme Court was dismissed. The majority, with reasons by Major J., held that, though the Alberta legislation was constitutionally valid as dealing with the "Administration of Justice in the Province",³² a successful action in tort required that the claim be valid in the place where the tort occurred, the *lex loci delicti*. Since the claim could not be maintained in California, it could not be maintained in Alberta.

Think of the California limitations legislation for a moment. We have to assume that that Act was passed to protect those who are the concern of the State of California, its citizens or residents. California might also have a concern that the time of its courts not be taken up with claims it thinks are too stale. The legislation of the State of California cannot be applied extra-territorially; the state has neither interest in nor concern for, *inter alia*, residents of Alberta or for litigation brought in that province. The same restriction applies to the Province of Alberta. The object of anything done by a provincial legislature under s-ss. 92(13) and 92(14) is – has to be – for the benefit of those resident *in the Province*. Any broader focus is beyond the scope of the power conferred on a provincial legislature. If the object of California law is to protect those living or otherwise entitled to the protection of California, it has no business being applied in Alberta when no California residents are involved.

Evidence was not provided to determine the limitation period in California, therefore, this decision is on a point of law, whether California or Alberta limitation law applies and if the limitation period in California is 1 year, as the Applicant alleges, whether the Plaintiff's claim is statute barred.

Only in a "Conflicts" case would a court not look at the actual terms of a relevant statutory provision.

31. *Limitations Act*, R.S.A. 2000, c. L-12.

32. *Constitution Act*, 1867, s. 92(14).

The proper question is not the “law to govern a tort”, but the rule to deal with the narrow question: is *this* plaintiff out of time in *this* action against *this* defendant? That question looks at the purpose of the California legislation and whether or not that purpose would be served or forwarded by its application in this case. It stretches credulity to imagine that California cares whether one Alberta resident sues another in Alberta after the limitation period *under California law* has run, even if the cause of action was based on a tort committed or occurring in California. From this point of view, the decision is as brutally pointless as that of the German court in *J. v. H.*

Bastarache J., concurring in the result, would have held the Alberta provision unconstitutional on the basis that it attempted to do an end run around *Tolofson v. Jensen* which had held that a limitation law was to be characterized as substance, not procedure. He said:

The procedural/substantive distinction is essentially a label. That label, however, has important constitutional consequences. Where a law is characterized as procedural, it constitutes valid law under ss. 92(14) of the *Constitution Act, 1867*, as relating to the administration of justice within the province, so long as it applies to the Alberta courts or to actions proceeding before the Alberta courts. No other enquiry is required. If Alberta can treat limitation periods as procedural, then it can prescribe limitation periods for all actions proceeding before the Alberta courts without ever running afoul of the Constitution. If a law is characterized as substantive, however, it must be justified pursuant to subsection 92(13) of the *Constitution Act, 1867*, as relating to civil rights in the province, meaning that the [*British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473] analysis for the *situs* of intangibles is engaged. To allow Alberta to treat limitation periods as procedural is, essentially, to allow it to circumvent the *Imperial Tobacco* meaningful connection test. The effect would be to allow Alberta to legislate extra-territorially. In other words, the question of whether limitation periods are procedural or substantive is not something the province can decide. The reason for this is that the procedural/substantive distinction essentially determines, for purposes of constitutional validity, whether a law falls under s. 92(14) or s. 92(13) of the Constitution. That distinction must be based on something other than what a province says. It should in my view be based on the actual effects of the law. The effects of limitation periods were made clear in *Tolofson*: they cancel the substantive rights of plaintiffs to bring the suit, and they vest a right in defendants to be free from suit. This is the reality Alberta cannot ignore.³³

33. *Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870, 260 D.L.R. (4th) 439 (S.C.C.) at para. 37. The theory that lies behind Bastarache J.’s analysis is

This paragraph raises many of the same concerns as the decision of the German court or the reasoning of Lord Wilberforce in *Black Clawson International*. If it is wrong to apply Alberta law to a relation in California as being an extra-territorial application of provincial law, surely it is as wrong to apply California extra-territorially! Bastarache J. talked “Conflicts” and never deigned to deal with the only question before the Supreme Court: “what reason – what real, not Conflicts, reason – is there for not allowing this plaintiff to claim against this defendant?”

Bastarache J.’s position is, moreover, very hard to understand under Canadian constitutional law. A province cannot be prevented from changing the private law rules which come within the scope of provincial powers under s. 92, or even from reversing a decision of the Supreme Court.³⁴ If the Alberta *Limitations Act* comes within s. 92(14) and not s. 92(13), it carries with it the inference that the application of a limitation period is a matter of procedure; if it comes with s. 92(13), it can be changed to reflect Alberta’s values. The Alberta *Limitations Act* was amended after *Castillo v. Castillo* to provide:

12(1) The limitations law of Alberta applies to any proceeding commenced or sought to be commenced in Alberta in which a claimant seeks a remedial order.

(2) Notwithstanding subsection (1), where a proceeding referred to in subsection (1) would be determined in accordance with the law of another jurisdiction if it were to proceed, and the limitations law of that jurisdiction provides a shorter limitation period than the limitation period provided by the law of Alberta, the shorter limitation period applies.³⁵

The Ontario *Limitations Act* provides:

23 For the purpose of applying the rules regarding conflict of laws, the limitations law of Ontario or any other jurisdiction is substantive law.

These rules are prime examples of “jurisdiction-selecting rules”. As the decision in *Castillo* illustrates, they have no purpose or, which

the “vested rights” theory of the Conflict of Laws, one abandoned in the common law and repudiated by academics about 100 years ago, though it hung on in the United States for slightly longer. I cannot deal with the various competing theories of Conflicts now – suffice it to say that I reject almost all. It is surprising to find the one rejected long ago, adopted by a judge of the Supreme Court.

34. See, e.g., *McKie v. K.V.P. Co.*, [1949] S.C.R. 698, [1949] 4 D.L.R. 497, 1949 CarswellOnt 117 (S.C.C.), reversed by *The KVP Company Limited Act, 1950*, S.O. 1950, c. 33, where the Ontario legislature dissolved an injunction upheld by the Supreme Court. There is no record that the Supreme Court uttered a cheep of protest.

35. R.S.A. 2000, c. L-12, amended by S.A. 2007, c. 22, s. 1(4).

may be worse, they subvert or obscure the required purpose that any *Limitations Act* has and suggest that a decision on their application can be made without considering what a *Limitations Act* is for.

The question before the court in *Tolofson v. Jensen* was more difficult. If any jurisdiction-selecting rule is inappropriate, then the question is whether, when sued by a B.C. resident, suing in B.C., for injuries arising from an accident in Saskatchewan, the Saskatchewan defendant can rely on his own *Limitations Act* and not be subject to the longer B.C. limitation period. It is important that the plaintiff (and his father) travelled to Saskatchewan where the accident happened. It can easily be argued that an out-of-province driver (or passenger) takes the risk of the law of the place where any accident may occur,³⁶ or, to put the point another way, should a resident of Saskatchewan, acting only in his own province, be exposed to risks arising from the different rules in the place where the plaintiff chooses to bring his claim?

This argument leads to the same result as in *Tolofson v. Jensen* but *it is not a Conflicts argument*; it is one based on the purposes of the Saskatchewan and British Columbia *Limitations Acts* in the particular facts of the case and on concerns for fairness to the defendant.³⁷ This approach offers a basis for making the choice between the two limitation periods in issue. That question is most emphatically not decided by the choice of law process described in the diagram above. The process I have described does not involve characterization or the application of a jurisdiction-selecting rule. It is no more than statutory interpretation in a tort action, an action which has geographically complex facts, and for balancing the claims of the plaintiff and defendant to fair treatment.

It is, of course, easy to imagine far more complicated facts and connections with more than two provinces. More complicated facts may make it more difficult to find a satisfactory solution. If it is argued that a choice of law rule of the type applied in *Tolofson v. Jensen* and *Castillo v. Castillo* is justified because it makes the decision simpler, it would be an equally appropriate response to say that the judge should just flip a coin in any case with, for example, more than two parties and two provinces. That result would at least have the effect of making the litigation much cheaper! The correct response has to be, "I'm sorry, judge, yes, it is a very difficult case but

36. This argument was very powerfully made in *Moran v. Pyle National (Canada) Ltd.* (1973), [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239, [1974] 2 W.W.R. 586 (S.C.C.), a case to be looked at later.

37. The answer could well be different if the defendant had come from British Columbia or from a province with as long a limitation period.

you are paid a lot of money to deal fairly and responsibly with just such problems so get over it!"

Conflicts scholars are strangely determined to hang on to the method of analysis described by the table I have set out. They believe that the use of jurisdiction-selecting rules is the only way to deal with a Conflicts case. They are mistaken; one just has to let go of that belief to find that the problems are often so much simpler.

3. Where There is No Choice of Law Rule

In *Québec (Sa Majesté du Chef) v. Ontario Securities Commission*,³⁸ the Court of Appeal set out the background facts, as taken from the reasons of the majority of the Ontario Securities Commission:

In the mid-1970s more than one-fourth of the world's production of asbestos, a non-metallic mineral with many industrial applications, was mined in Canada and over four-fifths of Canada's production came from Québec; however, almost all of Québec's production was shipped out of that province for processing elsewhere. Determined to expand Québec's manufacturing sectors and in furtherance of that industrial development strategy to patriate a larger share of the processing of asbestos fibre mined in Québec, in 1977 the provincial government announced its intention to acquire control of Asbestos Corporation Limited ("ACL"). In that year ACL, with production of 288,500 short tons, was the second-largest producer both in Canada and in Québec and the only Québec producer not integrated with a parent company's manufacturing operations. In 1978 Société Nationale de l'Amiante ("SNA") was established as a Crown corporation and in June of 1979 SNA acquired authority to expropriate the assets of ACL. In September of that year SNA offered General Dynamics Corporation ("GD") \$42 per share for the control block of stock in ACL and undertook, if successful, to make the same offer to the public shareholders. The offer was rejected. In November of 1981, after protracted negotiations (assisted, perhaps, by its powers of expropriation), SNA purchased a controlling interest in the GD subsidiary that in turn held the ACL control block. In December of 1986, upon GD's exercise of a put option granted to it under the 1981 agreement, SNA bought the rest of the GD subsidiary. No offer has been made to the ACL public shareholders.

ACL was and is a public company whose shares are traded on the Toronto and Montreal stock exchanges. Commission staff say that in all

38. (1992), (*sub nom. Québec v. Ontario (Securities Commission)*) 97 D.L.R. (4th) 144, 10 O.R. (3d) 577, 58 O.A.C. 277 (Ont. C.A.) Lacourcière, Krever & McKinlay J.J.A., leave to appeal refused [1993] 2 S.C.R. x, 101 D.L.R. (4th) viii, 65 O.A.C. 78 (note) (S.C.C.)

of the circumstances of the case, the ACL public shareholders are entitled to an offer for their shares at a price equivalent to that paid by SNA in the 1986 transaction. That price was the equivalent of \$80 per ACL share. The average trading price of ACL shares was \$5.55 in the month of December, 1986 and \$10.02 in the month of May, 1988. Staff are supported by the Committee for the Equal Treatment of Asbestos Minority Shareholders (the “Shareholders’ Committee”), an association representing some scores of ACL minority shareholders resident in Ontario and elsewhere holding in the aggregate approximately 500,000 shares of ACL.

The Commission held that SNA was obliged to make a follow-up offer to the minority shareholders of the corporation. Québec challenged the decision and the Commission’s right to make it. The issue before the Court of Appeal was the jurisdiction of the Commission over the Province of Québec.³⁹

McKinlay J.A. stated the issue:

As stated above, the simple legislative objective involved in this appeal is regulation of the operation of capital markets in Ontario for the protection of all who use them. This includes the protection of persons and corporations dealing in Ontario markets whether or not they are resident in Ontario. Thus, the Province of Québec, when using Ontario markets, is afforded the same protection as all other users. The success of such an objective is vital to the health and growth of commerce in Ontario.

The objective of the Province of Québec in carrying out the transactions involved was announced in 1977 by the Québec Government. Its intent was to create an asbestos manufacturing industry in Québec to complement the asbestos mining industry, thereby creating substantial new employment in regions of Québec where the rate of unemployment exceeded 20%.

There can be no doubt that both objectives represent “compelling governmental interests”. The question posed by the appellant’s argument is, “Which is the more compelling?” For Québec to comply with the

39. In *Sparling v. Québec (Caisse de dépôt & placement)*, [1988] 2 S.C.R. 1015, 55 D.L.R. (4th) 63, 41 B.L.R. 1 (S.C.C.), the respondent was the Director under the *Canada Business Corporations Act*. The appellant, the Caisse, bought more than 10% of the shares of a *CBCA* corporation. The Caisse, an agent of the Crown under Québec law, refused to submit an insider trading report. The respondent sought a declaration that the appellant was required to comply with the Act. In supporting the Director, La Forest J. concluded his reasons by saying, para. 30, “Thus, the Crown, when it purchases a share of a company to which the Act applies, is bound by the entirety of the *Canada Business Corporations Act* in so far as it defines and regulates the rights and obligations of shareholders”.

provisions of the Ontario Act, the cost to it, we are told, would be approximately \$100,000,000. But that \$100,000,000 is saved at the expense of persons who have invested in shares trading on Ontario markets, trusting that all who use those markets will trade in accordance with the rules. I see no way the courts can assist in advancing interprovincial harmony in a situation such as this, since there is no objective way of choosing which governmental interest is more compelling. However, I see no reason why residents of one province should suffer financial loss for the purpose of benefiting another province in advancing its legitimate interests.⁴⁰

In the result, the Ontario Court of Appeal dismissed the appeal and upheld the decision of the Ontario Securities Commission.⁴¹

This decision is not seen by Conflicts academics as a “Conflicts” decision.⁴² Yet it is just such a decision, even though it does not come with an attached choice of law rule – take-over-bids and follow-up offers were unknown concepts when most traditional Conflicts texts and choice of law rules were being written. The case has geographically complex facts and presents the need to choose whether to apply the law of Ontario or that of Québec. The fact that a cause of action is given under statute cannot make a difference.

What is important about McKinlay J.A.’s reasons is that she does not “talk” Conflicts; she talks simply about the basis for deciding whether to apply the law of Ontario or the law of Québec and the consequences of that decision.⁴³ In doing that, she asks, “What

40. *Supra*, footnote 38 (Ont. C.A.).

41. In the end the minority shareholders did not share in the \$100 million fund as they might have hoped. The Ontario Securities Commission subsequently declined to make an order against the Québec government to punish it for what it had done. This decision was ultimately upheld by the Supreme Court; *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132, 199 D.L.R. (4th) 577 (S.C.C.). The end of the minority shareholders’ long and unsuccessful fight may have come with *Hurst v. Société Nationale de l’Amiante*, 2008 ONCA 573, 53 B.L.R. (4th) 10, 93 O.R. (3d) 338 (Ont. C.A.).

42. The case is not mentioned by Stephen Pitel, *et al.*, *Private International Law in Common Law Canada: Cases, Text and Materials*, 4th ed. (Toronto: Emond Montgomery, 2016), or by Stephen Pitel and Nicholas Rafferty, *Conflict of Laws*, 2nd ed. (Toronto: Irwin law, 2016). The former book does not have an index which limits searching to the table of cases and table of contents; the latter has an index but no entry for “take-over-bids”. I cannot find the case mentioned in the extraordinary long list of cases in or in the index to Castel and Walker, *Canadian Conflict of Laws*, 6th ed. (Toronto: LexisNexis) (looseleaf ed.).

43. McKinlay J.A. clearly saw the case as a “Conflicts” case; she referred to an important and then current American approach to Conflicts and to three Conflicts scholars, including me.

should we do?" and provides an answer: "You come into Ontario to use the services of the Toronto Stock Exchange to effect your take-over, you take the consequences and are bound to make a follow-up offer to the minority shareholders". What could be simpler or more straightforward?

4. A Principled Basis for Applying One Rule Rather than Another

An extremely important decision, both on the power of a Canadian provincial court to assert jurisdiction over a foreign defendant and the justification for the application of that court's law, *i.e.*, the *lex fori*, is the judgment of Dickson J. in *Moran v. Pyle National (Canada) Ltd.*⁴⁴ The issue in that case was the right of the Saskatchewan court to assert jurisdiction over an Ontario defendant, the manufacturer of a light bulb. The plaintiff alleged that the bulb had been negligently manufactured by the defendant in Ontario and that her husband had been killed as a result. The issue before the Saskatchewan courts was the effect, on the basis of the facts alleged, of *The Fatal Accidents Act* of Saskatchewan.⁴⁵

Dickson J., as he then was, giving the judgment of the Supreme Court, held that the Saskatchewan courts would not have jurisdiction under the legislation (and under the Canadian constitution regarding the power of a province to legislate extra-territorially) unless the tort was "committed in Saskatchewan". In holding that the tort was committed in Saskatchewan, Dickson J. first noted that there were hints in some cases that a "real and substantial connection test" could justify the conclusion that the tort had been committed in the jurisdiction.

He went on to say:

Cheshire [*Private International Law*] 8th ed. (1970), p. 281, has suggested a test very similar to this; the author says that it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless manufacture, the following rule can be formulated: *where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be*

44. (1973), [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239, [1974] 2 W.W.R. 586 (S.C.C.) [*"Moran"*].

45. R.S.S. 1965, c. 109. This Act was Saskatchewan's "wrongful death" statute.

injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market place directly or through normal distributive channels, *a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.* This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.⁴⁶ (Emphasis added.)

It is, in my opinion, hard to over-emphasize the importance of this decision and the approach of Dickson J., even though its implications have seldom been fully recognized. Three things are interesting and important about this test. The first is that it moves from a discussion of what would, at first sight, appear to be nothing more than a technical examination of an issue that has little relevance to any principled basis for the assertion of jurisdiction by the Saskatchewan courts to an examination of what are clearly important principles justifying a province's long-arm, *i.e.*, service *ex juris*, jurisdiction. The second is that the language of Dickson J. almost exactly parallels that of the United States Supreme Court in

46. *Moran*, pp. 408-409 S.C.R., pp. 250-252 D.L.R. This passage was quoted and relied on in *Fairhurst v. Anglo American PLC*, 2012 BCCA 257, 351 D.L.R. (4th) 168, 24 C.P.C. (7th) 179 (B.C. C.A.), leave to appeal refused (2013), 574 W.A.C. 320 (note), 446 N.R. 393 (note), 336 B.C.A 320 (note) (S.C.C.), where other instances are noted. In *Shah v. LG Chem, Ltd.*, 2015 ONSC 2628, 42 B.L.R. (5th) 42, 125 O.R. (3d) 773 (Ont. S.C.J.), jurisdiction was not taken by the Ontario court when the defendants in a competition law class action had no knowledge that their products were entering the Ontario marketplace. A similar approach was taken in *Yip v. HSBC Holdings plc*, 2018 ONCA 626, 425 D.L.R. (4th) 594, 82 B.L.R. (5th) 1 (Ont. C.A.), leave to appeal refused 2019 CarswellOnt 4700, 2019 CarswellOnt 4701, [2018] S.C.C.A. No. 41 (S.C.C.), one example of many, with respect to claims for secondary market misrepresentation under Part XXIII.1 of the *Securities Act*, when the securities involved were not listed on an Ontario exchange but were bought on the Hong Kong Stock Exchange. In the securities context in the United States, what are called "3F" cases, *i.e.*, foreign transaction, foreign plaintiff and foreign defendant, the courts of the United States are moving to decline jurisdiction. See, *e.g.*, the story at www.nytimes.com/2012/10/05/business/us-justice-vs-foreign-fraud.html. As a demonstration of the general innumeracy of lawyers, these cases were (and may still be) called "F³" cases: the correct abbreviation, 3F, expresses an arithmetic, not a geometric progression.

World-Wide Volkswagen Corp. v. Woodson,⁴⁷ a case dealing with the proper test of the power of an American state to assert a “long arm” jurisdiction over a person from another state under the XIVth Amendment to the US Constitution. The third is that the same acts of the defendant which expose it to the risk of being sued in Saskatchewan, also expose it to the risk of having Saskatchewan law applied to determine the result.

Dickson J. is *not* stating a jurisdiction-selecting rule; he is offering a reason for the application of one law, rather than another. His decision shows that it is not necessary to adopt or follow the path described by the diagram set out earlier; he is, like McKinlay J.A., able to talk pure torts or justice and deal directly and simply with questions of the fair allocation of the risks of engaging in interprovincial trade; he did not need to consider any choice of law rule, any “connecting factor” or the process of characterization.⁴⁸

5. The Problem with The Conflict of Laws

It matters how one starts to think about a legal problem.⁴⁹ The fundamental problem with the way traditional Conflicts cases and

47. 62 L.Ed.2d 490, 100 S.Ct. 559, 444 U.S. 286 (Okla., 1980) White J., delivering the opinion of the court, said:

When a corporation “purposefully avails itself of the privilege of conducting activities with the forum State,” *Hanson v. Denckla*, *supra*, at 253, 78 S.Ct., at 1240, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

48. In *Grimes v. Cloutier* (1989), 61 D.L.R. (4th) 505, 41 C.C.L.I. 186, 69 O.R. (2d) 641 (Ont. C.A.), Morden J.A. denied an Ontario person the right to sue a Québec driver for damages arising from an accident in Québec when that driver was protected by Québec law. He said: “In these circumstances, to ignore the Québec legislation, which relieves the defendants of civil liability, would be unfair to the appellants and, also, an ‘officious intermeddling with the legal concerns of a sister province’: Hancock, *Studies in Modern Choice of Law: Torts, Insurance, Land Titles* (1984), p. 183”.

49. See Angela Swan, “It Matters How You Start to Think About a Contracts

problems are presented and analyzed is that the starting point for analysis is wrong or inadequate. Two recent works dealing comprehensively with Conflicts offer this description of Conflicts:

It is important to appreciate that these three fundamental questions [*viz.*, the ones I set out earlier] are procedural rather than substantive. Rules of private international law do not resolve disputes between parties in the same way that rules of contract or tort do. They regulate the process by which the dispute will ultimately be resolved. In a sense, they are civil procedure rules for cases in which there are factual connections to some jurisdiction other than the forum.⁵⁰

It is important to appreciate the highly procedural nature of these questions [*viz.*, those I have set out]. Conflict of laws rules, in general, do not resolve substantive disputes in the same way that, for example, tort and contract rules do. At the risk of oversimplification, they regulate the process of dispute resolution rather than determine to outcome.⁵¹

These statements of what I assume the authors consider the purpose or role of Conflicts or private international law are seriously misleading. It is not possible to imagine that any tort or other values were, for example, engaged in the decision in *Castillo v. Castillo*.⁵² It was the brutal application of a rule identified by a process – the process of characterization, followed by the invocation of a choice of law rule – wholly special to Conflicts. No judge bothered to ask, “What is the goal of a *Limitations Act*? Would the purpose of the California rule be forwarded by denying *this* plaintiff the right to sue *this* defendant in Alberta?”

The sterility of the choice of law process is vividly illustrated when the leading Canadian text on Conflicts⁵³ says:

In Canada, courts should not hesitate to continue to use the traditional methodology of jurisdiction-selecting rules . . . to solve conflict of laws cases. The centuries-old process has resisted many assaults and on the whole, proved quite successful.

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To say that the courts choose the law applicable to a particular issue without considering how that choice will affect the controversy is not

Problem” in Hilary Young, ed. *Canadian Law of Obligations; Access to Justice* (Toronto: LexisNexis, 2020), p. 3, and (2020), 96 S.C.L.R. (2d) p. 3.

50. Stephen Pitel et al., *Private International Law in Common Law Canada: Cases, Text & Materials*, 4th ed. (Toronto: Emond Montgomery, 2016), p. 3.

51. Stephen Pitel and Nicholas Rafferty, *Conflict of Laws*, 2nd ed. (Toronto: Irwin Law, 2016), p. 1.

52. 2005 SCC 83, [2005] 3 S.C.R. 870, 260 D.L.R. (4th) 439 (S.C.C.).

53. Castel and Walker, *Canadian Conflict of Laws*, 6th ed. (Toronto: LexisNexis) Looseleaf edition.

accurate. The lawyer representing one side or the other in a case characterizes each issue in such a way that it will, by virtue of the relevant conflict of laws rules, ultimately call for the application of a law supporting his or her client's contention. Obviously, he or she has examined the contents of the potentially applicable laws before presenting a favourable characterization to the court. Similarly, before endorsing this characterization and applying the law that it calls for, the court will examine the contents of all potentially applicable laws. If the court feels that it would lead to an unjust result to apply the law called for by the suggested characterization, it will reject the characterization or use other techniques such as *renvoi*,⁵⁴ public policy and so on to apply a different law and reach a different result. Characterization is not a purely mechanical process. If more than one characterization is available for an issue or set of facts, the choice between the characterizations may turn upon the court's desire to achieve justice in the particular case, or its preference for one rule of law over another.

Under the reformulated traditional approach the court is able to concern itself with the contents of the potentially applicable foreign laws among which it has to choose and of the policies behind them before selecting the one state, province or territory whose law will be applied to the particular issue, even though the court does not frame its opinion in those terms.⁵⁵

It is important to understand what Castel and Walker are arguing for. They maintain that it is appropriate to decide Conflicts cases by an analytical process that permits a court (and a lawyer) to say, "For reasons that I do not care to elaborate or even disclose, I think that this dispute should be sorted out by reference to the law of . . .". Or, which comes to the same thing, that it is proper for a court to say, "for reasons we do not care to disclose, we find against you". In other words, the effort to apply rules so that they forward some stated goal or to have judges give reasons – *real reasons*, not just verbal formulæ that look like reasons – has been wholly subverted. It is this effect on legal reasoning, achieved by the choice of law process, that forces one to conclude that the whole structure is fundamentally flawed. The effect of this approach is vividly apparent in *Castillo v. Castillo*.

54. *Renvoi* is logically entailed by choice of law rules but is logically insoluble. There are *ad hoc* limitations on it, principally with respect to contracts. Standard American choice of law clauses worry about it quite unnecessarily. Its principal scope is in succession and marriage. *Renvoi*, characterization and the "incidental question" are described by American scholars as "escape devices", showing how they really function. *Renvoi* is one of the more exotic, if smelly and grotesque, flowers that grow in the Conflicts swamp.

55. Castel and Walker, *Canadian Conflict of Laws* (looseleaf ed.), §1.16, pages 1-70 to 1-71.

Castel and Walker say that “[t]he centuries-old process has resisted many assaults and on the whole, proved quite successful”. It is significant that the authors give no indication of the criteria by which they would determine the success (or failure) of the process. One could with as much justification argue that decisions made by the toss of a coin would be as “successful”; one party would win, one would lose. Indeed, it is hard, consistently with the constraints of the judicial process, *viz.*, that it is a process characterized by the right of the parties to present proofs and reasoned arguments – which means that (i) the standards of reasoning have to be known, and (ii) that this knowledge permits the parties to decide what facts to put before the judge – to imagine what “success” by any definition would look like other than something synonymous with justice, fairness and the achievement of the purposes of the rules competing for application. But achieving justice is more complicated than simply following a mechanical process for deciding cases that has been around for a long time. At the very least it requires one to make sure that equal cases are treated equally and unequal ones, unequally, and to have regard for the goals that the competing rules have; goals that, as Castel and Walker admit or claim, can only be secretly considered. It is hard to argue that the result in *Castillo v. Castillo* represents success in any sense the parties would understand.

If a court does do what Castel and Walker say in the final paragraph of the quotation, *i.e.*, “concern itself with the contents of the potentially applicable foreign laws among which it has to choose and of the policies behind them”, why would the court then choose a jurisdiction-selecting rule? It already has the tools to decide the case *without talking Conflicts*. It can then do what Dickson J. and McKinlay J.A. did.

At a more general level, the question whether a rule or its application can be characterized as “successful” raises important conceptual and philosophical questions. It is impossible to establish the claim that characterization as conceived of by the authors is other than, at best, unconcerned with justice or, at worst, a method wholly inconsistent with any such concern. I do not maintain that the approach advocated by Castel and Walker leads inevitably to wrong results; it is simply indifferent to either the results its application reaches, or the process of getting there, so that it is only by chance that a correct result would be reached. *Tolofson v. Jensen*⁵⁶ was probably correct on the *Limitations Act* point, but the Supreme Court did not see that reason or adopt that argument.

56. [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289, [1995] 1 W.W.R. 609 (S.C.C.).

By “correct result” I mean a result, like those in *Moran v. Pyle National (Canada) Ltd.*,⁵⁷ or *Québec (Sa Majesté du Chef) v. Ontario Securities Commission*,⁵⁸ where the deliberate actions of the defendants exposed them, respectively, to the risk of being subject to the courts and law of Saskatchewan or Ontario. Neither Dickson J. nor McKinlay J.A. “talked” Conflicts; they gave reasons, *real reasons*, based on the values of: (i) the law of torts and how risks, as between plaintiff and defendant are to be allocated, or (ii) the Ontario securities industry and the purpose of those legal regimes.

The dangers of a Conflicts argument can be seen in other cases. In *Greenshields Inc. v. Johnston*,⁵⁹ the plaintiff, an investment dealer and stockbroker, sued the defendant, R.H. Johnston, and his corporation, R.H. Johnston & Associates Ltd., for an amount due on the cancellation by the defendants of a contract for the purchase and sale of bonds, sold by the plaintiff to the corporate defendant. The individual defendant guaranteed the debt of the corporation to the plaintiff. When the guarantee was given, the defendant lived in Alberta, where the plaintiff also had an office; the transactions were effected in Edmonton. The guarantee that the defendant executed provided that the guarantee was to be “construed in accordance with” the law of Ontario. The defendant claimed that the guarantee was void as a result of non-compliance with the Alberta *Guarantees Acknowledgment Act*.⁶⁰ That Act required the guarantor to appear before a notary to acknowledge the guarantee. If this step was not taken, the guarantee was unenforceable.

The trial judge held that the law to “govern” the contract was the law of Ontario by virtue of the choice of law clause in the guarantee and that, the requirements for the recognition of a choice of law clause being met, notwithstanding the failure of the creditor to comply with the Act, the guarantee was enforceable against the guarantor. The Court of Appeal dismissed the appeal.

Now imagine that an Alberta bank, tired of the risks to the enforcement of guarantees posed by the Alberta legislation, re-drafted its standard guarantee to provide, “The parties agree that the

57. (1973), [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239, [1974] 2 W.W.R. 586 (S.C.C.).

58. (1992), (*sub nom.* Québec v. Ontario (Securities Commission)) 97 D.L.R. (4th) 144, 10 O.R. (3d) 577, 58 O.A.C. 277 (Ont. C.A.), leave to appeal refused [1993] 2 S.C.R. x, 101 D.L.R. (4th) viii, 65 O.A.C. 78 (note) (S.C.C.).

59. (1981), 119 D.L.R. (3d) 714, [1981] 3 W.W.R. 313, 28 A.R. 1 (Alta. Q.B.), affirmed (1981), 131 D.L.R. (3d) 234, [1982] 2 W.W.R. 97, 17 Alta. L.R. (2d) 318 (Alta. C.A.).

60. R.S.A. 1970, c. 163. Now the *Guarantees Acknowledgment Act*, R.S.A. 2000, c. G-11.

Guarantees Acknowledgment Act does not apply to this guarantee". Can there be any doubt – the Act does not expressly deal with this point – that the clause would be unenforceable? If the parties cannot, by an express clause, exclude the effect of the Act, how is it possible that a mere choice of law clause can exclude it? The same problem would be raised if a creditor added a clause to a loan agreement providing that, "The *Criminal Code* and, in particular s. 347 (criminal interest), do not apply to this loan". What general counsel to a bank would advise the bank to use such language?

It would be one thing for an Ontario court, dealing with a claim against an Alberta guarantor by an Ontario creditor, perhaps caught unawares by the existence of the *Guarantees Acknowledgment Act*, to enforce the guarantee because, unlike the Alberta courts, the Ontario court is not committed to forwarding the purposes of Alberta legislation. An Alberta court *has to forward the purposes of Alberta law*, which, on the facts, was to protect an Alberta resident from the claims of a creditor. It may well be that the *Guarantees Acknowledgment Act* is unusual legislation but, while it stands unrepealed, an Alberta court is bound to apply it, at least where there is an Alberta guarantor and a creditor doing business in Alberta.⁶¹

This case and my proposed solution to the problem of the application of the *Guarantees Acknowledgment Act* in the circumstances has elicited a very curious and illuminating response from Professors Pitel and Rafferty. They say:

Note that the approach in *Greenshields Inc.* uses the traditional multilateral approach to choice of law. The Alberta statute does not invalidate the contract since it is not governed by Alberta law. The court starts with the choice of law rule, finds Ontario to be the proper law, and applies it. Vaughan Black has argued that a different, unilateral approach should apply.⁶² Under such an approach, the Alberta court would start

61. The *Guarantees Acknowledgment Act*, like some other legislation, causes problems because it is both unusual and is seen by courts as catching creditors by unfair surprise, particularly where the guarantor may not need protection. The guarantor in *Greenshields* admitted that he understood the guarantee, so might not have been entitled to much sympathy. For a discussion of other idiosyncratic legislation that has caused problems in the conflict of laws, see Swan, "Federalism and the Conflict of Laws: The Curious Position of the Supreme Court of Canada" (1995), 46 *University of South Carolina Law Review* 923, at 951, footnote 112.

62. Vaughan Black, "The Strange Cases of Alberta's Guarantees Acknowledgement Act: A Study in Choice-of-Law Method" (1987), 11 Dal. L.J. 208. This article deals with more cases and offers a very comprehensive and useful analysis of not only cases under the *Guarantees Acknowledgment Act* but choice of law more generally. Vaughan Black was a student of mine; his and my approaches to Conflicts are very similar.

with the Alberta statute and interpret its provisions. If the contract in question fell within them, and there was no appearance before a notary public, the statute would invalidate the contract. Ontario law would not enter into the analysis. *One concern with this approach, however, is that starts with the law of the forum without explaining why. This has the potential to undercut the whole notion of choice of law rules.*⁶³ [Emphasis added.]

Two things are startling about this statement. To take the final sentence first, both Vaughan Black and I make our arguments precisely to challenge the whole Conflicts structure; choice of law rules are *never* the appropriate solution to any legal problem. Pitel & Rafferty offer no reason for hanging onto choice of law rules; they do not argue that their application would offer a preferable solution; they just think we should hang onto them because we have always done so.

The more interesting argument is the penultimate sentence. Where else would or could a court start than from its position in a legal system, the *lex fori*? Once the structure that is Conflicts analysis is removed there is, so to speak, nothing between the judge and the real issue in the case. The starting place the judge can now adopt is the recognition that a court can only look at the world from where it is. It is a kind of solipsism, just as we, as individuals, have to look at the world from where we are. This observation does not mean that a court or we can only see the world from one point of view. As an individual matures, she understands that the points of view of others must be considered; so too a court may find the criteria for decision in some law other than its own.⁶⁴ I shall return to this point later.

The Ontario Court of Appeal demonstrated a very different approach in a recent case. The decision illustrates the simplicity attainable when a court does not believe that it has to talk “Conflicts”. The question before the court in *Lilydale Cooperative Limited v. Meyn Canada Inc.*⁶⁵ was the choice of the applicable ultimate limitation period. The defendant had designed and sold some equipment for the processing of chickens to the plaintiff, a buyer in Alberta. The plaintiff waited a long time before bringing its action. It was out of time if the ultimate limitation period, ten years,

63. Stephen Pitel and Nicholas Rafferty, *Conflict of Laws*, 2nd ed. (Toronto: Irwin Law, 2016) p. 297.

64. See, e.g., *Gillespie Management Corp. v. Terrace Properties* (1989), 62 D.L.R. (4th) 221, 39 B.C.L.R. (2d) 337, 17 A.C.W.S. (3d) 522 (B.C. C.A.), where the fact that a contract was illegal under the law of Washington state was a defence to an action for breach of contract brought in B.C.

65. 2015 ONCA 281, 126 O.R. (3d) 378, 335 O.A.C. 7 (Ont. C.A.).

under the Alberta *Limitations Act* applied, but was within the 15-year ultimate limitation period under the Ontario *Limitations Act*. Laskin J.A. discussed various choice of law rules but his final decision was not a “Conflicts” one. He said:

... I see nothing unfair in requiring Meyn to adhere to the substantive law of Ontario, the law of its home jurisdiction in Canada. Meyn, a multi-national enterprise, could have inserted a choice of law clause in its contract with Lilydale. Had Meyn done so, it would undoubtedly have chosen Ontario, the only province in Canada where it operates. It seems to me more than a little ironic that despite its own close connection to Ontario, Meyn would seek to take advantage of Alberta law.⁶⁶

Laskin J.A. does not make the choice because of some choice of law rule; he makes it as an allocation of the risks of the transaction that the defendant could have allocated to the plaintiff but did not.⁶⁷ This case illustrates that a decision on the applicable limitation period can be made on grounds that reflect the values of the law of contracts, not some mysterious choice of law rule.

Sometimes counsels’ or the trial judge’s (or court of appeal’s) leap into a Conflicts analysis hides a very simple solution. In *Etler v. Kertesz*,⁶⁸ the plaintiff sued to recover USD \$500 that he had lent the defendant. The loan had been made in Austria just after the war and provided for repayment in Switzerland. The defendant argued that it was illegal under Austrian law for the parties to have made a contract of loan in United States dollars. (Exchange controls were common in Europe after the war as countries tried to hold on to their hard currency assets for re-construction.) Swiss law did not make the contract illegal. The court held that the Austrian legislation would only be applicable if Austrian law was the proper law of the contract. In the result, the court held that the proper law was Austrian so that the plaintiff could not succeed. The test adopted by the court was to ask with which country, Austria or Switzerland, did the contract have “its closest and most real connection”?

There are, however, additional facts that the court (and counsel), blinded by Conflicts concepts, never considered. Article VIII(2)(b) of the *Bretton Woods Agreement*, the Constitution of the International Monetary Fund, states:

66. *Supra*, para. 28.

67. There were further proceedings between the parties, culminating in *Lilydale Cooperative Limited v. Meyn Canada Inc.*, 2019 ONCA 761, 439 D.L.R. (4th) 385, 310 A.C.W.S. (3d) 614 (Ont. C.A.).

68. (1960), 26 D.L.R. (2d) 209, [1960] O.R. 672, 1960 CarswellOnt 128 (Ont. C.A.).

Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of any member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member.⁶⁹

The Bretton Woods Agreement Act, stated:

On and after the 27th day of December 1945, the first sentence of paragraph 2(b) of Article VIII of the Agreement set out in the First Schedule has the force of law in Canada.⁷⁰

Austria became a member of the International Monetary Fund on 27 August 1948; Canada had joined in 1944. The loan sued on was made in 1949.

It is precisely this fact, or this kind of fact, that the jurisdiction-selecting rule represented by the inquiry into the proper law hides. If counsel had referred to *The Bretton Woods Agreement Act*, there would have been no need to make any inquiry into Austrian or Swiss law because by the *law of Canada*, the law a Canadian court is bound to apply, the contract was unenforceable.

Notice something else about the court's conclusion. The fact that the contract was illegal under its proper law was regarded as the end of the matter. Were it held illegal under Canadian law, the next question would be, "Does the plaintiff have perhaps a claim in restitution or unjust enrichment to prevent the enrichment of the defendant at the plaintiff's expense?" Now, the court might say that the plaintiff was so wicked that he should not have a claim in restitution, but that would, at least now, if not in 1960, be an unusual response and, on the facts of *Etler v. Kertesz*, it was not obvious that the plaintiff was so evil that he should be denied any recovery.⁷¹ Of course, the wording of the Bretton Woods Agreement might force the court to deny the plaintiff a remedy but, whatever the results of this second-stage inquiry, it is one that the court should have embarked upon. The fact that the court talked solely in Conflicts terms simply hid this aspect of the problem and shows just what can happen when one talks of a "governing law" and ignores the simple contracts or restitution issues involved.

69. See <https://moj.gov.jm/sites/default/files/laws/Bretton%20Woods%20Agreements%20Act.pdf>.

70. Now R.S.C. 1985, c. B-7, s. 3.

71. See, e.g., *Patel v. Mirza* (2016), [2016] UKSC 42, [2017] A.C. 467, [2017] 1 All E.R. 191 (U.K. S.C.), on similar facts, and, more generally, *Hall v. Hebert*, [1993] 2 S.C.R. 159, 101 D.L.R. (4th) 129, 15 C.C.L.T. (2d) 93 (S.C.C.); and *Kim v. Choi*, 2020 BCCA 98, 445 D.L.R. (4th) 99, 34 B.C.L.R. (6th) 220 (B.C. C.A.), on Canadian courts' approach to the consequences of illegality.

6. The Concern for Uniform Results and the Role of the Supreme Court

One of the ideas accepted by Conflicts academics and the Supreme Court is the belief that the choice of law process contributes to the goal of uniformity, and, therefore, fairness; the idea that cases with the same facts should be decided in the same way, regardless where they are decided. In *Tolofson v. Jensen*, La Forest J. saw this goal as one to be forwarded. As support from this position he referred to Australian cases which had held that choice of law rules, in particular the rule that the *lex loci delicti* should govern tort liability, would ensure that results would be independent of where they were litigated.

La Forest J. relied principally on the reasons for judgment of the Australian High Court in *Breavington v. Godleman*.⁷² The litigation had been brought in the State of Victoria. The accident which gave rise to the litigation had happened in the Northern Territory where both parties were then living, though both later moved to Victoria. The Northern Territory, much like Québec, limited the damages recoverable by the plaintiff for an automobile accident; the State of Victoria, the *lex fori*, did not.

After quoting Mason C.J. who had argued that only a choice of law rule like the *lex loci delicti* would ensure that cases would be decided the same way in two courts, at least within a federal system, La Forest J. continued:

Also relevant is the following remark in the reasons of Wilson and Gaudron JJ., at p. 379 (A.L.R.):

It is not only undesirable, but manifestly absurd that the one set of facts occurring in the one country may give rise to different legal consequences depending upon the location or venue of the court in which action is brought.

A similar sentiment is expressed by Deane J., at p. 404 (A.L.R.):

What is essential is that the substantive rule or rules applicable to determine the lawfulness and the legal consequences or attributes of conduct, property or status at a particular time in a particular part of the national territory will be the same regardless of whereabouts in that territory questions concerning those matters or their legal consequences may arise.

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The nature of our constitutional arrangements – a single country with different provinces exercising territorial legislative jurisdiction – would seem to me to support a rule that is certain and that ensures that an act

72. [1988] HCA 40, 169 C.L.R. 41, 80 A.L.R. 362.

committed in one part of this country will be given the same legal effect throughout the country. This militates strongly in favour of the *lex loci delicti* rule.⁷³

It is important to put this issue in context. *Breavington v. Godleman* was a tempest in a teacup. There was no need for anyone to worry for a moment about deep issues of justice or federalism. One simple argument to deal with the plaintiff's claim would have been to say that, *both parties being resident in the Northern Territory when the accident occurred*, on what possible basis is it justifiable for the Victorian court to apply its own law, even if the parties had subsequently moved there? Just as in *Castillo v. Castillo*, there was no need to choose between the competing rules; the purpose of only one would be forwarded by its application to the facts. All that a focus on a choice of law rule does is to hide what is going on behind Conflicts mumbo-jumbo. The two courts, one in Victoria and the Northern Territory, would reach the same result on the application of ordinary principles of the common law, statutory interpretation and perhaps constitutional law; they would have no need to consider Conflicts; they would just have to talk torts or, perhaps, statutory interpretation.

If the facts are more complicated so that it is arguable that Victorian law perhaps *should* be applied for some reason, the court may have a more difficult decision but, so what? As I have said, judges have to deal with difficult decisions all the time; that's what they are paid to do. Hiding behind a choice of law rule just means, as I argued before, that the court is saying, "we find against you for reasons we don't want to disclose or that you will not be able to understand". The application of a choice of law rule can never be a satisfactory basis for a decision. If it is argued that the application of a choice of law rule makes the court's task simpler, the logic of this argument would be to accept that it would make more sense and be cheaper to flip a coin.

Moreover, the argument that results *should* always be the same, regardless where the action is brought, flies in the face of the values that underlie federations like those in Canada and Australia. The purpose of a federation – its principal purpose – is the ability of the component parts, even as they are members of a single country, to differ with respect to those matters that are, as in Canada, within their *exclusive* jurisdiction. Ontario can, for example, have its own rules for unmarried but cohabiting couples, Québec can have

73. [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289, [1995] 1 W.W.R. 609 (S.C.C.) at paras. 67 and 69.

another.⁷⁴ The parties' rights may also change if they move from one province to the other. Within each province's power under s. 92(13), is the power to go its separate way. Since these decisions are within the *exclusive* power of the provinces,⁷⁵ there can be no basis for the imposition of a federal solution.⁷⁶ Because the values applied, forwarded or recognized by all Canadian provinces are, as a matter of fact, much the same, the occasions for other than minor differences in those values will seldom occur. When they do, why should we expect one province to subordinate its values to those of the other? Decisions based on those differing values will simply differ.

Consider again the reasons for judgment of the Ontario Court of Appeal in *Québec (Sa Majesté du Chef) v. Ontario Securities Commission*.⁷⁷ McKinlay J.A. admits that the results are likely to be different in Ontario and Québec. Given her analysis, how could they be otherwise? Is there something wrong with this situation? McKinlay J.A. set out cogent reasons for applying Ontario law: the Québec government had chosen to use the facilities of the Toronto Stock Exchange and the Ontario *Securities Act*, to effect its take-over and had to accept the consequences. The application of the Ontario take-over-bid rules cannot have taken the Québec government by surprise. If the Québec government legislates for a different result in Québec, it can do so – it can forward other values – and the Québec Court of Appeal might then say that the government does not have to make a follow-up offer.

If the decision of the Ontario Court of Appeal is satisfactory – as I strongly believe it is – would that court have done a better job if it had adopted a choice of law rule of a jurisdiction selecting type? Such a rule – “take-over-bids and follow-up offers are governed by the law of the place where the bid is made” – might support the result the court reached, but the problem – the disparity between the Ontario

74. See, e.g., *Droit de la famille - 091768*, 2013 SCC 5, (*sub nom. Québec (Attorney General) v. A.*) [2013] 1 S.C.R. 61, 354 D.L.R. (4th) 191 (S.C.C.) at para. 280. The ability of Québec to have its *Civil Code of Québec* is, of course, and was a very important reason for giving the province power to go its own way.

75. *Constitution Act, 1867*, s. 92, “In each Province the Legislature may *exclusively* make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated”.

76. Parliament has never sought to create uniform laws for the common law provinces under s. 94 of the *Constitution Act, 1867*. In any case, any such legislation requires the consent of a province to be enforceable there.

77. (1992), 97 D.L.R. (4th) 144, 10 O.R. (3d) 577, 58 O.A.C. 277 (Ont. C.A.), leave to appeal refused [1993] 2 S.C.R. x, 101 D.L.R. (4th) viii, 65 O.A.C. 78 (note) (S.C.C.).

and Québec rules – would remain if Québec rejects that rule. If the National Assembly had denied the minority shareholders the right to a follow-up offer, how would the choice of law rule work? The National Assembly would be entitled to make decisions dealing with the liability of the Québec government for its acts, even acts “done” in another province. In other words, a choice of law rule would *not* achieve uniformity and I can see no valid basis on which the Supreme Court could impose a uniform solution.

Suppose that there are different judgments from the Ontario and Québec courts of appeal and appeals are brought to the Supreme Court from each court of appeal. What should the Supreme Court do? On the facts assumed by McKinlay J.A., there was an irreconcilable difference between the approaches of the two provinces. Can they be reconciled? I shall make the reasonable assumption that, on the facts, there is no transcendent national approach to take-over-bids; there is no principle within which both results can be accommodated. Such a transcendent value could be discerned on the facts of *Moran v. Pyle National (Canada) Ltd.*⁷⁸ In other words, both Ontario and Saskatchewan could agree that the Ontario defendant took the risk it faced when it chose to ship its goods into Saskatchewan.

Absent some transcendent and constitutionally valid national value, it is possible to argue that the Supreme Court has to dismiss both appeals; it has no basis for reaching a different result from either court of appeal. If this situation exists, it suggests an important limitation on the power of the Supreme Court. This argument shows that the argument for uniformity made by the judges in the Australian context is completely misplaced and should not have been accepted by the Supreme Court.

There are situations where provincial power can justifiably be subordinated to achieve a national consensus. In *Interprovincial Co-operatives Ltd. v. Her Majesty The Queen in right of the Province of Manitoba*,⁷⁹ the legislation of two provinces, Saskatchewan and Ontario, conflicted with that of Manitoba. The headnote set out the bare facts:

In an action brought by the respondent [Manitoba] as assignee of 1590 persons who received financial assistance under *The Fishermen's Assistance and Polluters' Liability Act*, 1970 (Man.), c. 32, it was alleged that the appellants caused damage to Manitoba's fisheries by

78. (1973), [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239, [1974] 2 W.W.R. 586 (S.C.C.).

79. (1975), [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321, [1975] 5 W.W.R. 382 (S.C.C.).

allowing mercury to be discharged from their respective chlor-alkali plants in Saskatchewan and Ontario which mercury was carried into Manitoba by the natural flow of the rivers in which the discharge took place.

The two defendants, one in Saskatchewan, one in Ontario, were authorized, licensed, by their respective provincial governments to discharge the pollutants that caused harm in Manitoba. The reasons for judgment in the Supreme Court are unsatisfactory. A majority position held that Manitoba's legislation was *ultra vires*. A strong dissent held that the legislation was *intra vires*. The majority in favour of striking down Manitoba's legislation was provided by Ritchie J. who adopted much the same reasoning as Bastarache J. in *Castillo v. Castillo*. He said:

What is accepted here is that the provincial legislature purported to nullify the effect of permission duly granted by the regulatory authority of another jurisdiction and I agree with Mr. Justice Matas that in so doing it purported to legislate with respect to conduct and rights of the defendants outside the territorial limits of the Province of Manitoba with the result that the statute of which it forms part has no application to the appellants in the present case.⁸⁰

If the decision of Pyle National (Canada) Ltd. to ship its products into Saskatchewan was sufficient to expose it to the risk of liability in that province,⁸¹ it might have been thought that, since water runs downhill, the Ontario and Saskatchewan polluters took exactly the same risk.⁸² Applying *Moran* in *Interprovincial Co-operatives*, the Supreme Court could easily have said, "If you don't like the risks you face in another province, don't ship your goods there or throw nasty stuff in the water that flows there".

The majority (of the majority) at least had the grace to hold that, if Manitoba could not impose liability on the pulp mills, Saskatchewan and Ontario could not insulate those mills from liability in Manitoba with respect to a common law tort or nuisance claim or under any federal legislation dealing with interprovincial water pollution.

It is very odd to find the highest courts of two well-established federations so focused on uniformity when that goal is contrary to a fundamental value of each federation, *viz.*, the right of each component part of each federation pursue its own, possibly

80. *Supra*, p. 521 (S.C.R.).

81. (1973), [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239, [1974] 2 W.W.R. 586 (S.C.C.).

82. *Moran* was decided on 21 December, 1973; *Interprovincial Co-operatives* was decided on 26 March, 1975. The Supreme Court often has a very short memory.

separate goals. If diversity between the provinces and territories in Canada is to be expected (and accepted), how much more should it be expected (and accepted) internationally?

7. How to Decide a Conflicts Case

If the whole panoply of the choice of law process is fundamentally inappropriate, if the structure described in the table above is removed, how then should lawyers and courts approach cases with geographically complex facts? We return to the point made earlier, *viz.*, the initial acceptance of a starting place in judicial solipsism. Just as we all, as individuals, must start to look at the world from our own, solipsistic point of view, so too a court must start there; like us, it has no choice. The plaintiff has brought its claim before the court; in Ontario it has had to follow the *Rules of Civil Procedure* and use Form 14 as the form of its statement of claim which invokes the *Courts of Justice Act*, and is issued by the court. As I have said, just as we, as individuals, learn to temper our solipsism by acknowledging the validity of others' points of view, adjusting our conduct in the light of their values, interests and opinions, so too a court has to be open to an argument that some rule that is not that of the *lex fori*, may have to be applied once either the plaintiff or defendant has proved the existence of foreign facts and, of course, the content and purpose of that foreign rule.

In practice, litigation starts with the presentation of the facts. The statement of claim will tell the plaintiff's story and that story may describe the facts, including foreign facts, on which the plaintiff will rely in making its case. The defendant may add more facts or deny that the plaintiff's facts are relevant. When the court has to consider the legal problems presented or described by the pleadings, the court has to – or at least can usefully – start by asking, “What is the rule of decision if all the facts had occurred in this province?”

If we assume, for example, that the litigation has started in Alberta, that question can be answered by the court at least starting from the position that guarantees not executed in accordance with the *Guarantees Acknowledgment Act* are invalid. Counsel for the plaintiff creditor can argue that the court should acknowledge the relevant foreign facts, *viz.*, the choice of law clause in the guarantee, and can argue that that choice should be respected. One way to respond to this argument would be for the court to say to the plaintiff, “I, as an Alberta judge, am bound to forward the purpose of Alberta law; can you, please, give me a good reason why I should *not* apply Alberta law but should, instead, apply Ontario law?”

There is nothing wrong in putting an onus on the party who would argue that a province's law should not be applied.

Facts that are different from those in *Greenshields Inc. v. Johnston* may permit an argument to be made that the *Guarantees Acknowledgment Act* should not be applied to protect this guarantor. In this situation, the plaintiff, creditor, may be able to show that the purpose of the legislation would not be forwarded or that some other facts, the extreme and unfair surprise the creditor might face if the guarantee is unenforceable, may trump the application of the act.

At no point in this process does counsel or the court ever have to resort to choice of law rules; the court does exactly what it would do if opposing counsel offered two decisions of other courts or of the Court of Appeal and the trial judge had to choose between them. The court has to justify its choice of one rather than the other. This approach was adopted by Dickson J. in *Moran v. Pyle National (Canada) Ltd.* and by McKinlay J.A. in *Québec (Sa Majesté du Chef) v. Ontario Securities Commission*. These examples show how Conflicts cases cease to be Conflicts cases and become the kinds of cases that Canadian courts have to wrestle with every day.

It is worth noting that the Canadian approach to maritime law is that the court looks at the problem from its own perspective; it does not usually invoke choice of law rules.⁸³

This method of dealing with cases with geographically complex facts will, like every instance of judicial decision-making, lead to the development of principles or rules based on different patterns of facts. The process will generate as much certainty as any process will. We shall be able to abandon spurious concerns for uniformity and fully acknowledge what is at the heart of the division of powers under the *Constitution Act, 1867*.

Of course, there will be easier and harder cases but, as I have said, that is just the judicial experience. The hard cases – allocating a risk of loss between two innocent parties, for example, whether in contract, property, restitution or tort – will still be hard and justice to the parties requires the court to wrestle with strongly competing claims. It cannot be justice or just to slide off from the difficulties by adopting a rule that does not acknowledge the claims of all the parties.

83. See, e.g., *Todd Shipyards Corp. v. Altema Compania Maritima S.A.* (1972), [1974] S.C.R. 1248, 32 D.L.R. (3d) 571, 1973 A.M.C. 176 (S.C.C.), and *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustee of)*, 2001 SCC 90, [2001] 3 S.C.R. 907, 207 D.L.R. (4th) 577 (S.C.C.), and footnote 7, *supra*.

8. Conclusion

The existence of the topic or area of the Conflict of Laws has to be seen as a standing rebuke to both courts and scholars. Statements are made, rules are applied and decisions made that would, outside that area, be dismissed as unfair, unjust or simply nonsense. How can a search for uniformity of result be other than entirely contradictory to the values of a federation? In no other area of the law are results regularly reached by the application of pointless rules, rules expressed in a form that precludes their sensible application. There are pointless rules in other areas of the law – the third-party-beneficiary rule comes to mind – but when the application of that rule causes serious problems it has been subjected to repeated statutory repeal⁸⁴ or judicial limitation,⁸⁵ or it has been completely ignored because it just causes too much trouble and would subvert common and sensible relations and defeat the reasonable expectations of those who rely on the rule *not* being applied.⁸⁶ In every other area of the law, courts go to extraordinary lengths to make sense of the law; to apply it in ways that forward important values; and to treat the parties fairly.⁸⁷ Why then should these goals be ignored when we talk “Conflicts”? If this development disappoints Conflicts scholars, I am sorry; they – and they are all very smart people – will just have to find some other and more worthwhile area of the law to analyze.

There is a related problem. Canadian courts, egged on by the Supreme Court,⁸⁸ seem prepared to accept that almost anyone can

84. See Swan, Adamski and Na, *Canadian Contract Law*, 4th ed. (Toronto: LexisNexis, 2018), section 3.3.6.

85. See, e.g., *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261, [1993] 1 W.W.R. 1 (S.C.C.), where the rule was largely eviscerated.

86. See the whole law of letters of credit, both documentary and stand-by.

87. The cases are far too numerous to mention but look at a case like *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, [1991] 2 W.W.R. 217 (S.C.C.), where the Canadian approach to the enforcement of foreign judgments was based on sensible principles or *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, 379 D.L.R. (4th) 385 (S.C.C.), where Cromwell J. gathered together several separate strands of the law of contracts to show that, indeed, Canada does impose on contracting parties the obligation to perform in good faith. Another good example is *Rosas v. Toca*, 2018 BCCA 191, 422 D.L.R. (4th) 351, 80 B.L.R. (5th) 16 (B.C. C.A.), additional reasons 2018 BCCA 306, 62 C.B.R. (6th) 8, [2019] 4 W.W.R. 316, where Bauman C.J.B.C. saw the doctrine of consideration as causing serious problems which he proceeded to deal with. I had high hopes that, after *Moran* and *Morguard*, the Supreme Court would have done something exciting in *Tolofson v. Jensen*.

sue in Canada. The wider the bases on which Canadian courts will permit foreigners to sue here, the more “foreign” cases there are, the more intense the problems arising from geographically complex facts will be and the harder it will be to find satisfactory solutions.⁸⁹ Problems of choice of law clause and jurisdiction run together.

A significant aspect of the tragedy is, as I have shown, that the courts (or counsel) sometimes do not talk Conflicts; they talk sense, they offer good reasons for the results they reach, yet, even as they make these decisions, these cases are not always seen as “Conflicts” cases but as something else.⁹⁰ The picture of the law is then distorted; lines of Conflicts cases go off in one direction, other lines, which might be profitably developed, are cut short and go nowhere.⁹¹

88. See *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, 343 D.L.R. (4th) 577 (S.C.C.), there were two actions; the other was *Club Resorts Ltd. v. Charron*; *Breedon v. Black*, 2012 SCC 17, [2012] 1 S.C.R. 572, 343 D.L.R. (4th) 577 (S.C.C.), and *Banro Corp. v. Éditions Ecosociété Inc.*, 2012 SCC 18, [2012] 1 S.C.R. 636, 343 D.L.R. (4th) 647 (S.C.C.). The principal reasons were those given in *Van Breda*.

89. See, e.g., *Ibrahim v. Robinson*, 2015 ONCA 21, 380 D.L.R. (4th) 306, 71 C.P.C. (7th) 48 (Ont. C.A.), where the Court of Appeal recognized that Ontario could be a “forum of necessity”. This basis was suggested by Sharpe J.A. in *Van Breda v. Village Resorts Limited*, 2010 ONCA 84, 316 D.L.R. (4th) 201, 98 O.R. (3d) 721 (Ont. C.A.) at para. 100. Cf. *Goodings v. Lubin*, 2018 ONSC 176, 15 C.P.C. (8th) 172, 288 A.C.W.S. (3d) 66 (Ont. S.C.J.).

90. The best example of this attitude is *Québec (Sa Majesté Québec v. Ontario (Securities Commission))* (1992), 97 D.L.R. (4th) 144, 10 O.R. (3d) 577, 58 O.A.C. 277 (Ont. C.A.). Conflicts texts don’t even mention it.

91. *Moran v. Pyle National (Canada) Ltd.* (1973), [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239, [1974] 2 W.W.R. 586 (S.C.C.), just sticks there; it is mentioned in *Tolofson v. Jensen* but only in the context of the jurisdiction of the Saskatchewan court; and it was, of course, ignored in *Interprovincial Co-operative Ltd. v. R.* (1975), [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321, [1975] 5 W.W.R. 382 (S.C.C.).