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A. INTRODUCTION

When I undertook to write this Paper I had a fairly clear idea of what I would say, even though two long-awaited decisions of the Supreme Court of Canada had not yet been delivered and were expected to make a significant change in the law.¹ I thought that I knew what the range of possible decisions might be and what kind of choices the Supreme Court faced. I have been proved wrong in all my assumptions and expectations to an extent that I could never have imagined.² The Supreme Court has delivered a judgment that is one of the most unexpected and extraordinary judgments that I have ever read. I shall offer an analysis of it later but first I want to explore some important issues that will provide a basis for an analysis of that judgment.

There is always a tension in federal states between the need or political pressure for a strong central authority and the expression of local values. A constitution will give expression to these values and provide a balance (perhaps not happy or stable) between the forces in tension. One expression of the tension that exists in Canada is called the “division of powers,” meaning the allocation of legislative authority between the Canadian Parliament and the provincial legislatures. It is natural (though many of us may wish that it were not) for Canadians to debate the appropriate division of powers and to accept

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² In the paper delivered at the Conference I wrote: “If the Court adopts an analysis of what the law should be that bears little or no relation to what I think it might or should do, it will not be the first time or, I suppose, the last time that I have been wrong.” I can only say now, “Wow, was I wrong!”

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both that provincial values may differ and that it is inevitable that provincial values must be asserted against federal or centralizing values. Americans and Australians have not, at least recently, had quite so much occasion to debate this issue, but only because those federal states have found a more stable balance than Canada has. If federalism can establish the respective roles of the central and local legislatures, then ideas of national sovereignty or internationalism can determine what subjects are within the authority of nation states. Federalism and internationalism are expressions that describe the theories and ideas that underlie a federal state or the international order. Each nation-state takes a position on the extent to which it will accept controls or limits on its sovereignty and, in so doing, develops its position on its internationalism. The World Trade Organization and the North American Free Trade Agreement have, for example, raised concerns (particularly in the United States Congress) about the extent to which the United States' national sovereignty may have been compromised or limited. The resolution of that issue will reflect American views of what kind of internationalism is compatible with American sovereignty. American federalism reflects the choice among the values that the American federation could have made. Canadian federalism can differ from American federalism because our values and the choices we make are different. All that distinguishes the component parts of federal states from nation states in the international order is the fact that the former are subject to a constitution, a Supreme Court to administer it and, if necessary, some form of compulsory compliance. If, as I maintain, federal values and conflicts issues are inextricably mixed, so too are international values and conflicts. My point is not to analyze any version of federalism or internationalism; it is merely to argue that whatever position on federalism (or internationalism) we take at the legislative level determines what solutions are appropriate at the judicial level where conflicts decisions are made.

I shall make the further and more radical claim that, once we see conflicts law as an expression of federalism, the problems that are now seen as the preserve of conflicts will be seen simply as an aspect of sovereignty, a sovereignty that, between Canadian provinces, is limited by a constitution, enforced by the Supreme Court and by the need for each province to respect and behave responsibly toward other provinces and meet the demands of justice to litigants. Conflicts rules, i.e., choice of law rules, are rules to achieve uniformity of decisions regardless of the place where the action is brought. They exist because it is thought improper that the results of cases should differ from province to province or from nation-state to nation-state.

3. This last fact will become relevant and may even be challenged by the coming referendum on Quebec sovereignty. The American Civil War was a response to the challenge to federalism posed by secession.
As rules existing to achieve at the judicial level what is denied at the legislative level, conflicts rules express a view of federalism or internationalism that is inconsistent with federal states and the international order because they are based on the acceptance of the legitimacy of differences. This inconsistency is the basis for my argument that choice-of-law rules violate one, if not the principal, feature of federalism.

B. CONFLICTS AND FEDERALISM

Let us go back to an Elysian time before conflict of laws was invented, before there were choice-of-law rules and the arcana of characterization, *renvoi*, etc., and consider what circumstances would force us to develop a system of conflict of laws and what any system that we did develop would look like. Our paradise is not quite a state of nature and people live in a federal structure with a constitutional division of powers, a Supreme Court and a fully developed system of private law. Simply to provide a context for our exploration, we can assume that there are two provinces (Ontario and Quebec), and a Supreme Court of Canada to supervise the division of powers between the two provinces and between the provincial legislatures and the Parliament of Canada, and to impose any other constitutional values. The constitution is, coincidentally, the same as that of Canada.

In this simple picture a dispute arises: the owner of a car, a resident of Montreal, lends his car to a friend to permit him to visit his mother in Quebec City. The friend, however, does not go to Quebec City but drives into Ontario and there injures an Ontario resident. The Ontario resident sues the owner and driver in Ontario for damages for her injuries. The owner and driver are served *ex juris* in Quebec. The driver is impecunious and drops out of the action. The owner initially challenges the right of the Ontario court to hear and adjudicate the dispute. The owner loses on that issue: the Ontario Court (General Division) holds that Ontario is an appropriate forum for the resolution of the dispute and that the owner is not being unfairly treated by being sued in Ontario. This decision is appealed all the way to the Supreme Court of Canada. That court disposes of the appeal in the following terms:

We think that the appropriate rule to apply in deciding whether Ontario may properly assert jurisdiction over a foreign defendant in circumstances like the instant case is the following: where a foreign defendant knowingly puts into the hands of another a thing that is inherently mobile which he or she knows may be taken into a neighboring province and which he or she knows or ought to know both that as a result of his or her giving permission a pedestrian or other user of the highway may well be injured and

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4. For those not familiar with Canadian geography, Quebec City is east of Montreal while Ontario is west of it.
that it is reasonably foreseeable that the thing would be taken where the driver took it, then the forum in which the plaintiff suffered injury 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. We draw an analogy to the case of the manufacturer, perhaps resident in Quebec, who is sued by a consumer, perhaps resident in Ontario, for alleged defects in the product. Such a manufacturer, by tendering its products in the market place directly or through normal distributive channels, 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 it reasonably ought to have had in its contemplation when it so tendered its goods. If this rule is applicable to defective goods placed in the interprovincial flow of commerce, it is as applicable to things which, by their very nature, may be taken from one province to another and whose operation is known to carry a risk of injury to others.

This rule may, however, be limited. If a manufacturer can establish, for example, that it has taken steps to prevent its products going into a province where it would be exposed to risks that it thinks excessive, and if it has no reasonable expectation that its products would end up there, it might be much harder to justify the assertion of jurisdiction by that province. Similarly, if an owner of a motor vehicle sets explicit limits (and has no reason to believe that those limits will not be respected) on where a person to whom he or she lends the vehicle may take it, he or she may equally be protected from an action in the province where the vehicle is, in breach of the restriction, taken and causes injury. What is important now is to note that the rule we have stated need not be mechanically applied for circumstances may arise where the factors we have listed may not justify the assertion of jurisdiction.

Finally, we note that the mere fact that the Ontario courts may, in the particular circumstances we have considered, appropriately take jurisdiction does not dispose of the question whether the risk of loss should be borne by the plaintiff or defendant. It is inevitable that the right of a province to assert jurisdiction will be broader than its right to apply its own law. It is proper and fully in accordance with the standards of responsible judicial behavior to permit a court to assert a jurisdiction over a defendant without necessarily assuming that the application of the lex fori will be similarly justified.

At the conclusion of the ensuing trial, the trial judge gives the following judgment:

The plaintiff relies on the Ontario Highway Traffic Act which states:
192(1) The owner of a motor vehicle . . . is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle . . . on a highway unless the motor vehicle . . . was without the owner's consent in the possession of some person other than the owner or the owner's chauffeur, and the driver of a motor vehicle . . . not being the owner is liable to the same extent as the owner.5

The plaintiff points out that the expectation created by the specific purpose of the loan of the car, that it would be used only in Quebec, has been held by Ontario courts not to exclude the operation of section 192. These courts have generally held that it is the giving of permission to drive rather than the restrictions upon that permission that is important in exposing the owner to liability. The defendant argues that, since Quebec law6 does not impose liability on the owner in these circumstances (i.e., where the driver does not comply with the inferred limitation on the permission he has been given), an owner should not be subjected to liability in Ontario.7

I am faced in this case with the classic situation in which two people, both without fault, argue that the other should bear the loss caused by the wrongful act of a third person. Both claims are strong. The plaintiff, seriously injured in an accident by a person without assets, seeks recovery from the person on whom the law of the province where she lived and where the accident happened puts the risk of loss. The defendant, on the other hand, is caught by surprise by being subjected to liability in circumstances that he had never expected and which impose on him a risk which, given the provisions of Quebec law, he had not contemplated.

In resolving this issue, I must have special regard for the law of Ontario, the province of whose courts I am a member and with the legislature of which I share a responsibility to forward the values of Ontario society. I am acutely conscious of my responsibility to be both aware of

6. At this point I have entered the realm of imagination. My assumption that Quebec would not impose liability on the owner is made for the purpose of illustrating the problem I want to discuss. The assumption that the laws of two provinces or two states could reasonably differ on the particular point I have raised is, I hope, a reasonable one. That fact is all that I need to make the point.
7. Though the attribution of views to Ontario and Quebec is partly imaginary, the issue that I have chosen as my example, (vicarious liability and the possibility that two provinces or states may differ) is explored in the Restatement (Second) of Conflict of Laws (1971) in the Illustrations to § 174. The startling omission of any analysis of the case in which the two parties may reasonably have strong claims to protection under their respective laws is indirect evidence to support the argument that the Restatement (Second) is founded on a false premise, an argument that I will elaborate upon below.
and sympathetic to the values of Quebec and of the rights of its residents not to be unfairly subjected to the law of another province. Giving the matter the best thought that I can, I hold that I have to forward the loss distribution values of Ontario and impose the risk of loss on the defendant. I accordingly give judgment for the plaintiff.

This decision is appealed to the Ontario Court of Appeal, which dismisses the appeal. The defendant seeks and obtains leave to appeal to the Supreme Court of Canada.

Meanwhile, an exactly similar case has been before the courts of Quebec. An Ontario plaintiff, injured in the same way as the plaintiff in the Ontario case I have just discussed, has brought action in Quebec against a Quebec resident and owner of a car lent to a friend who has caused the plaintiff injury in Ontario. Since the action was brought in Quebec, there was no issue of the right of the Quebec courts to assert jurisdiction over the defendant and the action proceeded directly to trial. The trial judge in Quebec gave judgment for the defendant and explained her decision to do so on the following grounds:

I am conscious of the fact that, from the plaintiff’s perspective, his claim to be compensated by the defendant is strong; after all he never left his home province and under its laws he would have been entitled to shift the risk to the defendant. I note, however, that even in Ontario, the right of a person injured by a person driving a car to shift his or her loss on to the owner of the car is not absolute. It is clear, for example, that under Ontario law as interpreted by the Ontario courts a person who does not have the owner’s permission to drive the car, a thief or joy-rider perhaps, will not expose the owner to liability if he or she injures another. The two provinces differ, not at any deep level of principle, but at a more superficial level of where the line is to be drawn between that situation in which the owner will be vicariously liable for the torts of the person driving his or her car and that in which the owner will not be so liable. In this situation I accordingly find for the defendant and dismiss the action.

This decision is appealed to the Quebec Court of Appeal and the appeal is dismissed. The plaintiff seeks and obtains leave to appeal to the Supreme Court of Canada.

The judges of the Ontario and Quebec courts have, as it will, I think, be readily admitted, behaved responsibly. Not only did each court behave responsibly, but the Supreme Court’s defence of the assertion of long-arm jurisdiction by the Ontario court was justified on grounds that are responsive

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8. This fact situation is loosely based on the decision in O’Connor v. Wray, [1930] S.C.R. 231.
to all the values that are relevant to such a decision, values that we can accept as part of Canadian federalism. In fact, the judgment of the Supreme Court that I have written for it is closely based on its judgment in Moran v. Pyle National (Canada) Ltd. 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 was negligently manufactured and that her husband was 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. Justice Dickson, giving the judgment of the 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 the Province of Saskatchewan.” In holding that the tort was committed in Saskatchewan, Justice Dickson 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 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 the important interest a state has in injuries suffered by persons within its territory. It 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.

10. R.S.S., ch. 109 (1965). This act is Saskatchewan’s wrongful death statute.
12. Id. at 408.
Two things are interesting about this test. The first is that it moves from a discussion of what would at first glance 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 jurisdiction. The second is that the language of Justice Dickson almost exactly parallels that of the United States Supreme Court in World-Wide Volkswagen Corp. v. Woodson.14

I have argued that Moran brought into Canadian law a constitutional limit on provincial jurisdiction similar to that based on the Fourteenth Amendment to the United States Constitution.15 Support for that claim is found in another judgment of the Canadian Supreme Court, De Savoye v. Morguard Investments Ltd.16 and in the leading Canadian text on Canada’s constitutional law, Constitutional Law of Canada.17 On the issue of service ex juris, Hogg states:

The service ex juris rules purport to expand the jurisdiction of the courts to which they apply. Are they subject to constitutional restraints? The answer must be no for rules enacted or authorized by the Parliament of Canada, because ... the Parliament’s legislative power is not subject to a territorial limit. But rules enacted or authorized by a provincial Legislature must come within the provincial legislative power over “the adminis-

13. Id. at 408-09.
14. 444 U.S. 286 (1980). Justice White, 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, 357 U.S. at 253, 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.

Id. at 297-98.
tration of justice in the province” in s. 92(14) of the Constitution Act, 1867. As the words “in the province” emphasize, the service ex juris rules must not exceed the territorial limit on provincial legislative power. . . .

This analysis shows that we can establish justifications for the assertion of jurisdiction and limits on any individual assertion on grounds that depend on two factors: the constitutional limits on provincial power, and fairness to the defendant.

What about the two decisions applying the lex fori? What are the justifications for those? As I shall argue, Canadian choice of law rules are conspicuous for the absence of any principle or justification for their application. I have, in any event, imagined that we are in a world that does not know about choice of law rules. The simplest justification for each result is that each court applied its own law and did so in a situation in which it was constitutionally proper to do so. The constitutional limits on provincial power under the Canadian constitution derive from the general grant of power to the provinces. The grant of power and the sovereignty to any one province is limited (1) to ensure the equal sovereignty or power of all provinces, and (2) to establish the separate spheres of the federal Parliament and provincial legislatures. Is there any constitutional basis for asserting that either court behaved improperly? I think that the answer must be that both courts behaved properly. Neither court arrogated to itself a power that improperly extended

18. The Constitution Act, 1867, the source of provincial power under the Canadian constitution, provides:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say,—

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.


There may be constitutional limits on the powers of the provinces to pass rules providing for service out of the jurisdiction. The constitutional limit might be one requiring a substantial connection between the defendant and the forum province of the kind which makes it reasonable to infer that the litigant has voluntarily submitted himself or herself to the risks of litigation in the courts of that forum province.

ONTARIO CIVIL PRACTICE 294 (1994).

20. See Constitution Act, 1867, § 92(13), supra note 18. In Canada, the general grant of power or residual power is in the Parliament of Canada. Provincial power is taken from that grant.
provincial power beyond the limits of section 92(13). There is judicial support for this statement. In *Sa Majesté du Chef du Québec v. Ontario Securities Commission*\(^{21}\) the issue was the power of the Ontario Securities Commission to require the Government of Quebec to make a follow-up offer to minority shareholders of a corporation listed on the Toronto Stock Exchange. The Government of Quebec, in an effort to support the provincial asbestos mining industry, bought the controlling interest in the principal asbestos mining corporation in Quebec, and did not make a follow-up offer to the minority shareholders. Those shareholders sought to have the Ontario Securities Commission enforce its rule that such an offer should have been made. The power of the Commission to make an order against the Government of Quebec was challenged. The Government of Quebec argued that the Commission did not have jurisdiction because (1) the application of Ontario law to the transaction in question would be unconstitutional by reason of its extraterritorial effect, (2) the Commission cannot regulate the actions of the Quebec Government in relation to the transaction in issue, and (3) the Quebec Government has Crown immunity from the Ontario Securities Act\(^{22}\) in relation to the transaction. The argument of the minority shareholders was that the Commission was entitled to enforce its rules against any party who chose to take advantage of the market for shares maintained by the Toronto Stock Exchange. In upholding the power of the Commission *vis-à-vis* the Government of Quebec, Justice McKinlay, giving the judgment of the Court, said:

> There can be no doubt that both [provincial] objectives represent "compelling governmental interests." The question posed by the appellant's argument is, "Which is the more compelling?" For Quebec to comply with the 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.\(^{23}\)

> It is implicit in what Justice McKinlay has said that provinces, while acting within the scope of the power conferred by section 92(13), may differ

\(^{22}\) R.S.O., ch. 466 (1980, as amended June 30, 1987).
in the way in which they balance competing social interests. Indeed, such a situation is surely to be expected in a federal system and, given the civil law origins of Quebec law and Ontario's common law heritage, will exist in countless ways.

Just as Moran and Morgard can be seen as introducing or applying a "due process" test to the assertion of jurisdiction, they each give at least indirect support for applying a similar test to the application of forum law. Justice Dickson's justification of Saskatchewan's power to make the defendant appear in its courts also justifies the application of forum law to determine the issue of liability in a case in which Saskatchewan and Ontario have different products liability standards. While my imaginary Supreme Court judgment says that a province may assert a long-arm power that is wider than its power to apply forum law, that difference is at least partly a function of the fact that, for purposes of establishing jurisdiction, the plaintiff's allegations have to be taken as true. There is nothing unusual in having one verbal formula stating the relevant criterion yet permitting differences in its application. In other words, what satisfies the due process test for jurisdiction may not satisfy it for the application of forum law: "fairness" and "unfair surprise" may connote different things when the consequences of the decision differ.

Constitutional theory suggests that it is proper for an Ontario court to make a value judgment that will not be the same as one made by a Quebec court on the same facts. What then should the Supreme Court do when the two appeals are heard? The initial concern is whether the role of the Supreme Court is different from that of a provincial court of appeal with respect to the

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25. What is, of course, unusual about the judgment of Justice McKinlay is that she decided a case with geographically complex facts, i.e., a conflicts case, without reference to any choice of law rules. In other words, she did what my imaginary courts did. I believe that this was possible because in the anachronistic world of conflicts, there is no choice of law rule to govern stock exchanges or follow-up offers.

26. In Interprovincial Co-Operatives Ltd. v. The Queen in Right of the Province Manitoba, [1976] 1 S.C.R. 477 (1975), decided very shortly after Moran, Chief Justice Laskin explicitly regarded Moran as offering a criterion for choice of law. See id. at 501. The facts were that Manitoba passed legislation to compensate fishermen whose business had been damaged by the discharge of pollutants into rivers that flowed from Saskatchewan and Ontario into Manitoba and took a statutory assignment of any cause of action that the fishermen might have had against those who caused the pollution. The defendant appellants had plants in Saskatchewan and Ontario and pollution from their plants had been carried by the natural flow of the rivers into Manitoba. Each defendant had a license from its provincial authority to discharge pollutants as it did. Manitoba brought an action against the appellants under the legislation claiming an injunction and damages equal to the amount of compensation paid by the province to the fishermen. The legislation specifically provided that it was not a defense to the Manitoba action that the discharge of the pollutants was permitted under the legislation in force in the other provinces. The validity of the Manitoba legislation was challenged. The Supreme Court, by a very narrow majority, held that the Manitoba legislation was ultra vires the province. Id.
tolerance of different results, what I shall refer to as a tolerance for diversity. In other words, does the Supreme Court’s role permit it to impose on the provinces a single solution to the problem of the extent of the hypothetical car owner’s vicarious liability? There are statements that the Supreme Court has such a role. Such a role was recognized in *Interprovincial Co-Operatives Ltd. v. The Queen in Right of the Province of Manitoba.*

There are other cases (for example, *Bank of Montreal v. Metropolitan Investigation and Security Ltd.* and *Aetna Financial Services Ltd. v. Feigelman*) in which the Supreme Court has stated its special role in the Canadian constitution. The special role asserted in these cases must be carefully distinguished from the role of the Supreme Court vis-à-vis provincial law. The Supreme Court of Canada has a power that the United States Supreme Court does not have. The Supreme Court of Canada acts as final court of appeal on all matters of provincial law and may determine what the law of a province shall be. The Canadian Supreme Court is not limited, as is the United States Supreme Court, to the review of state court determinations of state law for their conformity to the United States Constitution. For example, if faced with a decision like that of the Minnesota court in *Allstate Insurance Co. v. Hague,* the Supreme Court of Canada could consider whether the correct decision was made under Minnesota law and, if it thought appropriate, could...

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27. *Id.*

28. [1975] 2 S.C.R. 546 (1974). The Manitoba Court of Appeal ordered two banks to account for and pay money to a receiver of an insolvent corporation that did business in Manitoba. When the Manitoba proceedings were started, the funds claimed in those actions were already subject to orders made by Quebec Superior Court. The Supreme Court held that the Manitoba courts could not deal with matters that were already subject to orders in the courts of another province. The Court said:

> Since the two banks were already subject to the Quebec garnishment when the Manitoba proceedings began, the Manitoba judgment calls upon them to be faithless to the competent order of a sister judicial district. This Court, with a reviewing and controlling authority over both the Courts of Manitoba and of Quebec, cannot be expected to support such a call. Unless this Court is in a position (and it is not in these appeals) to rule on the validity of the Quebec garnishment, it cannot with any propriety approve an order of one provincial Court that purports to deal with assets already captured by the competent order of another provincial Court, and particularly an order of the Court of the province where those assets are situated.

*Id.* at 557 (emphasis added).

It is odd that it nonetheless took Canadian courts until 1990 to accept the logic of this case and of *Moran.*

29. [1985] 1 S.C.R. 2. This case dealt with the power of a province to issue a Mareva injunction when the defendant, proposing to move assets out of one province, nevertheless had assets in another province. The Supreme Court held that it would be inappropriate to treat interprovincial disputes like international ones, and denied the injunction. *Id.*

reverse the decision, thereby avoiding the constitutional issue faced by the United States Supreme Court.\textsuperscript{31}

The three cases I have mentioned involve quite a different power. In the first of these cases, \textit{Interprovincial Co-Operatives Ltd.}, Justice Pigeon who wrote the decision that disposed of the matter,\textsuperscript{32} seemed to say that the Supreme Court has a special role in the Canadian constitution that permits it to resolve the kind of dispute that arose between Manitoba, Ontario, and Saskatchewan.\textsuperscript{33} What are the criteria that the Supreme Court will apply and what is their source? Justice Pigeon asserts that the Parliament of Canada has such power to establish the criteria and, under the Constitution Act, 1867, section 91(12) dealing with “Sea Coast and Inland Fisheries,” could legislate with respect to interprovincial pollution. The other source of uniformity (as opposed to the diversity that I have already suggested is the alternative) is the common law. Justice Pigeon says that he does not see how, at common law, one province can authorize the pollution of another.

There are serious problems with each of these sources of uniformity. The first depends on the existence of a federal power. In a case like \textit{Interprovincial Co-Operatives}, it may be that there is a federal power with respect to interprovincial waterways and that it would be appropriate for the Parliament of Canada to enact legislation dealing with the pollution of such water. No federal head of power obviously deals with interprovincial traffic and, at least as regards the vicarious liability of owners of vehicles that cross provincial boundaries, such regulation would not likely come under the “peace, order and good government” clause of section 91 of the Constitution Act, 1867. If there were federal legislation dealing with the vicarious liability of owners of cars that cross provincial boundaries, a single, national standard would be appropriate. In the absence of federal legislation, does the task of developing such a standard fall to the Supreme Court? Rather than offer a categorical answer to this question, I shall point out the serious problems which it raises. Accepting that the determination of the vicarious liability of owners of vehicles involved in intra-provincial traffic accidents is wholly within the legislative power of each province and has no federal component, what degree of “interprovincialness” takes the matter into the federal power or into a realm

\textsuperscript{31} An interesting statement of the power and scope of review of the Supreme Court may be found in Logan v. Lee, 39 S.C.R. 311, 313 (1907).

\textsuperscript{32} [1976] I S.C.R. at 477. The decision was 3:3:1. Two judges agreed with Justice Pigeon that Manitoba could not validly legislate with regard to interprovincial pollution and that any controls over such pollution had to be based either on a power in the Parliament of Canada or on the common law. (I deal more fully with this argument later.) Two judges agreed with Chief Justice Laskin that Manitoba could legislate in the circumstances. The seventh judge, Justice Ritchie, held, applying tort choice of law rules, that Ontario and Saskatchewan could authorize pollution in Manitoba. Justice Ritchie agreed in the result with Justice Pigeon.

\textsuperscript{33} \textit{Id.} at 511-14.
where the Supreme Court itself may fashion the appropriate criteria? Is it necessary that the car crosses a provincial boundary? What if the people involved come from different provinces, but the car remains in one?

The idea that the common law is a source of uniformity is no more satisfactory. There is the obvious problem posed by the fact that Quebec is not a common-law province: the common law is not the basis for its private law. Difficulties arise from the fact that many common-law rules simply can no longer be applied. Should a dispute over the apportionment of liability for a tort between tort-feasor and victim or contribution between joint tort-feasors be dealt with under the common law? What about the rights of married women? Even the common-law rules of vicarious liability are inappropriate for modern loss distribution schemes: a car owner would only be vicariously liable for the torts of the driver if the latter were the former's servant acting within the course and scope of his employment. We have legislation because the common law is inappropriate. It is, after all, only coincidence that the common law of nuisance arising from pollution of watercourses could be thought of as a remotely plausible set of criteria for determining the liability of a polluter to those down-stream riparian owners damaged by the pollution. If the provinces may enact legislation to replace the common law and if they may differ in the choices that they make in doing so, where can any common standard be found?

It is important to note that the usual power of the Supreme Court to make authoritative determinations of provincial law would permit it, on the facts that I have taken for my example, to say that either provincial Court of Appeal misinterpreted its own provincial law. The Supreme Court could, by so doing, covertly ensure that both courts reached the same result and that uniformity was achieved, but that would not deal with the issue that, if the provincial laws were stubbornly different, some single solution must be imposed to achieve uniformity because that is a constitutional value to be sought.

We come at last to the solution to the issue that I initially raised. In my imaginary problem, it is my argument that the Supreme Court should dismiss both appeals. As I have argued, both courts behaved responsibly, each province is entitled to choose a different solution to the question of who should bear the risk of loss, there is no basis for the assertion of a national interest in a single solution or a federal value and, what is more important, we have reached this point without ever breathing a word of any choice of law rule. Have I made a mistake, have I ignored some point that I should have considered? Are any values that are important in a legal system violated? Is the Supreme Court asked to do anything that it would find offensive? If these

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34. It is odd that in Interprovincial Co-Operatives, Justice Pigeon, a judge appointed from Quebec, did not consider the possible inapplicability of common law principles to a dispute between Quebec and either Ontario or New Brunswick, the two provinces that border it.
questions are answered in the negative, what purpose can any set of rules of the conflict of laws have?

If what I have said is valid and if my reasoning process has dealt with all the issues that must be considered and resolved in my two imaginary cases, we have an important statement of what kind of federalism is necessary or appropriate. I can make the statement very briefly: federalism is based on the right of each of the component parts of a federation to differ on how various legal problems should be resolved. This right extends to the decisions of provincial courts to differ in their decisions, even when they differ in the results reached in identical cases. No federal value is threatened or invoked when the Supreme Court leaves the decisions of each province alone, when it does not seek to impose on both a single value. Federalism does not require choice of law rules because their justification must be that such differences should not exist. Moreover, the assertion that there are federal values at stake that require or justify a single result entails unpalatable consequences: either a transfer of power from the provinces to the center (the Parliament of Canada or the Supreme Court itself), or the application of some underlying principle which, like the common law, might be thought to underlie the law of most, though not all, provinces. Such an underlying principle has, *ex hypothesi*, been rejected by at least one of the involved provinces when there are different decisions on the same facts and there is no obvious basis for choosing the law of one province to "trump" that of the other.\(^{35}\)

If some concept of federalism cannot provide an adequate or acceptable justification for the imposition of uniform results on two provincial courts then the whole panoply of conflicts rules cannot be justified or sustained. As I have said, the purpose of conflicts rules, *i.e.*, choice of law rules, is to achieve uniformity of decisions regardless of the place where the action is brought. The unexplained and unexamined horror of forum-shopping provides the standard justification for them, as *Tolofson/Gagnon* so vividly demonstrates. In this search for uniformity, choice of law rules violate one, if not the principal, feature of federalism.\(^{36}\) This conclusion applies as much to the

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35. ALBERT A. EHRENZEIG, A TREATISE ON THE CONFLICT OF LAWS (1962). This treatise was the most prominent exponent of the idea that the only issue in conflicts law was the application of the *lex fori*. See also ALBERT A. EHRENZEIG, PRIVATE INTERNATIONAL LAW: A COMPARATIVE TREATISE ON AMERICAN INTERNATIONAL CONFLICTS LAW, INCLUDING THE LAW OF ADMIRALTY (1967) (arguing that the law of admiralty, as a system of private law for the resolution of disputes between people of different nationalities, can function as an alternative to conflicts and choice of law rules).

36. Conflicts rules as I have used them here have nothing to do with the need to prove foreign law to determine the rights of parties without choice of law rule rules. Both provincial courts in my example had to know the content of the foreign law they had to consider, and, as I think is obvious, either court could have adopted the other province's rules as its rule of decision without a choice of law rule, but simply as the appropriate value to be forwarded in the case or to achieve justice between the parties. I would agree that in many of the examples discussed in
choice of law rules in the Anglo-Canadian (or Anglo-Australian) common-law tradition as it does to the American rules. Examples of American law favoring uniformity at the expense of federalism can be found in the writings of Brainerd Currie,37 David Cavers,38 and Robert Leflar,39 and in the concepts of “interest analysis,”40 and “comparative impairment.”41 All con-

the illustrations to § 174 of the Restatement (Second) of Conflict of Laws (1971), courts should reach the same result because both would share the same values. Those cases are, however, the easy ones.

38. David F. Cavers, The Choice of Law: Selected Essays, 1933-1983 (1985); David F. Cavers, The Choice of Law Process (1965). It is unfortunate that Cavers did not follow his great insight into choice of law, viz., that it does not exist. Cavers did ask why conflicts cases could not be decided like any other cases. He wrote:

The choice of that law [the rule for decision in any case of geographically complex facts] would not be the result of the automatic operation of a rule or principle of selection but of a search for a just decision in the principal case.


Earlier in the article, he had said:

Not infrequently, in the administration of domestic law, there arise situations in which two lines of authority pointing in opposite directions, seem open to a court. Those situations may at times be clarified by the precipitant of judicial intuition, but more often they bring to the fore finest the manifestations of judicial intellect. They demand a penetrating analysis of the controversy and the transaction out of which it arose, an exacting inquiry into and appraisal of the competing rules, a deliberate weighing of the equities. In such a case there may be consequent on the decision the growth of one rule, the stunting of the other. But regardless of whether this be so, there is very definitely a heightening of the court’s responsibility to the parties. The decision cannot be attributed to the wisdom of judges of times past, for it must disregard the wisdom of judges equally dead and equally wise. Compare the situation which a novel conflicts case presents. Two rules of law are invoked; usually the selection of either will determine the case in favor of the party urging its choice. That selection will probably not contribute materially to the development of the rule so chosen. In that sense the case differs from its domestic analogue. From the standpoint of the parties, however, is there not a comparable responsibility upon the court? Their transaction, because of its interstate character, has placed them in a position where each may, with some justification, urge the protection of a recognized rule of law. The choice between these rules, even as a precedent for future choices, may not be of great social significance. But does this discharge the court from a painstaking examination of the same factors whose materiality would be admitted were the case a purely local one, together with those additional factors which the interstate character of the transaction raises into prominence?

Id. at 187-88 (footnotes omitted).


40. The writing on this topic is voluminous. See, e.g., Cramton et al., Conflict of Laws: Cases—Comments—Questions (3d ed. 1981).

flicts rules entail the claim that the tolerance of diversity of legal results in
different jurisdictions (that I have defended) is unacceptable. This claim can
only be justified by a concept of federalism that is both inconsistent with the
right of the parts of a federation to differ and unable to provide criteria for the
decisions that must be made in individual cases. The conclusion that I have
drawn from my analysis of the two hypothetical cases will be the principal
focus of my examination of the recent judgment of the Supreme Court,
though, as will be clear, developing any analytical focus for that judgment is
a formidable task.

C. THE JUDGMENT OF THE SUPREME COURT IN TOLOFSON AND GAGNON

1. The Background to the Judgment

The facts before the Supreme Court were standard in Canada: the
plaintiffs in each case were injured in an accident that occurred in one
province but sued in the province in which they lived. In Tolofson v. Jensen,
a father and his son, residents of British Columbia, were involved in a traffic
accident in Saskatchewan in which the son was injured. The other driver, the
defendant, was a resident of Saskatchewan. The son sued his father and Mr.
Jensen in British Columbia. Under Saskatchewan law, the son, as a gratuitous
passenger in his father’s vehicle, had to establish “wilful or wanton miscon-
duct” on the part of his father. The British Columbia courts assumed that
he could not establish this. The other defendant, Mr. Jensen, had a different
defense based on the fact that under Saskatchewan law the son’s action was
brought out of time. In Lucas v. Gagnon, Mrs. Gagnon and two children,
all residents of Ontario, were injured in an accident that occurred in Quebec.
As in Tolofson, there was another defendant, Mr. Lavoie, a resident of Quebec
who, with Mr. Gagnon, was sued in an action brought in Ontario. While the
claim of Mrs. Gagnon and the children against Mr. Lavoie was abandoned,
Mr. Gagnon cross-claimed against Mr. Lavoie, so that Mr. Lavoie’s liability
remained a live issue before the Court of Appeal. The plaintiffs had received
the payment to which they were entitled under Quebec law from the Quebec
no-fault insurer, the Régie d’assurance automobile du Québec. In Gagnon, the
defence of both defendants was that any civil cause of action for injuries
arising from a motor vehicle was abolished by Quebec legislation.

44. Saskatchewan had a one year limitation period, even though the son was a minor.
Vehicles Act § 180.
45. Automobile Insurance Act, S.Q., ch. 68, § 4 (1977). This legislation established a no-
fault system of compensation for traffic accidents. In return for compensation determined without
In *Tolofson*, the British Columbia Court of Appeal had given judgment for the plaintiff. The court refused to apply the Saskatchewan standard of care on the ground that, under the choice of law rule adopted by Canadian courts, it was irrelevant to an action brought in British Columbia where the standard of care was ordinary negligence. The court refused to apply the Saskatchewan limitation period on the ground that the Saskatchewan rule was procedural and, as such, irrelevant or inapplicable in an action brought in British Columbia.\(^{46}\) In *Gagnon*, the Ontario Court of Appeal gave judgment against Mr. Gagnon on the ground that, as in *Tolofson*, the Quebec rule abolishing any civil cause of action was inapplicable under the Ontario choice of law rules to an action brought in Ontario against an Ontario resident. Mr. Lavoie, however, being a resident of Quebec was entitled to the protection of Quebec and was not liable to Mr. Gagnon in the cross-claim.\(^{47}\)

The background to the decisions in both courts of appeal was extensively analyzed by the Supreme Court.\(^{48}\) The Canadian choice of law rule in torts was based on the English case of *Phillips v. Eyre*.\(^{49}\) In giving judgment in that case Justice Willes said:

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.\(^{50}\)

This statement created two rules that were truly extraordinary in their effect, in their capacity to be manipulated by courts, and perhaps paradoxically, in the rigidity with which they were applied. Until the decision of the Supreme Court that I am now considering, the rules appeared to be as firmly established as they were one hundred and twenty-five years ago when they were first created.

The effect of the rules of *Phillips v. Eyre* is well illustrated in the appellate judgments in *Tolofson* and *Gagnon*. Provided that the action is maintainable in the *lex fori*, it is only necessary that the action be "not . . . justifiable"\(^{51}\) in the foreign jurisdiction. What the phrase "not . . . justifi-

\(^{46}\) *Tolofson*, 89 D.L.R. (4th) 129.
\(^{48}\) *Tolofson*/*Gagnon*.
\(^{49}\) 6 L.R. Q.B. 1 (Eng. 1870).
\(^{50}\) *Id.* at 28-29.
\(^{51}\) *Id.* at 29.
The effect of the rules of *Phillips v. Eyre* is well illustrated in the appellate judgments in *Tolofson* and *Gagnon*. Provided that the action is maintainable in the *lex fori*, it is only necessary that the action be “not . . . justifiable” in the foreign jurisdiction. What the phrase “not . . . justifiable” meant was always a subject of intense debate. It has been held that an act is “not . . . justifiable” if it is criminal, if it gives rise to liability for property damage, even if not for physical injury, if it exposes the defendant to any civil liability, even if the amount of damages is a tiny fraction of the liability under the *lex fori*, or, in perhaps the extreme case, if the defendant simply did something that the court thought was bad. The first rule, requiring actionability by the *lex fori*, has been applied with what can only be characterized as savagery. *Anderson v. Eric Anderson Radio & T.V. Pty.-Ltd.* is an example of this approach. *Anderson* involved the particularly nasty and difficult problem of contributory negligence. The plaintiff had been injured in a traffic accident in the Australian Capital Territory by the negligence of an employee of the defendant company. He sued for damages in New South Wales. The Australian Capital Territory had apportionment legislation while New South Wales had retained the old common law rule under which the contributory negligence of the plaintiff was an absolute defence to the action. The trial judge had directed the jury that they might

53. *Id.* at 29.
57. McLean v. Pettigrew, [1945] S.C.R. 62. The judgment in the Supreme Court Reports is in French; in 1945, concerns about bilingualism were, shall I say, muted. *See [1945] 2 D.L.R. 65* (McLean, translated into English, and accompanied by an annotation by John D. Falconbridge). The action was brought in Quebec for damages for personal injuries caused by a traffic accident in Ontario. Ontario had then its notorious guest-passenger rule preventing any recovery by a guest. (The facts are almost identical to those in Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963).) Under Phillips v. Eyre, [6 L.R.-Q.B. 1 (Eng. 1870) the question was whether the defendant’s actions were justifiable. Justice Taschereau giving the Supreme Court’s judgment in McLean v. Pettigrew of the Supreme Court said:

It is true that the Magistrate [in Ontario] acquitted the appellant [defendant] of a charge under [the Ontario Highway Traffic Act], but that decision evidently does not have the authority of *res judicata* and cannot bind the civil Courts. . . . For my part, I am of the opinion . . . that the appellant did not drive his car with the “due care and attention” required by [the Act]. For, it seems certain to me, that if he had shown due care and the necessary attention, this accident would have been avoided.

59. *Id.* The problem of the common law rule regarding contributory negligence is nasty because it is impossible to discover any rational reason for the rule. If a rule cannot be rationally explained, it cannot be elaborated and its proper scope debated. Guest passenger rules encounter the same difficulty. *See infra*, note 112.
liability.58 The High Court was not moved by the fact that the common-law rule had been widely rejected in much of the common-law world, including, of course, the Australian Capital Territory, or by the thought that, whatever purpose the common-law rule might have had, that purpose might not be forwarded by its application on the facts of the case.

In the Canadian cases decided since McLean v. Pettigrew (which, by the curious and mysterious processes of the common law, had become the "leading case,"59 the judges had struggled with the felt obligation to be faithful to the law established by the Supreme Court and the insistent demands of fairness and justice. What I had hoped was the break-through into a new world (if not the Elysian fields) occurred in Grimes v. Cloutier.60 The facts represent the standard problem in motor vehicle tort liability in Canada, the pattern reproduced in Tolofson and Gagnon. At the date of Grimes, Ontario followed the common-law tort regime for compensation of those injured in traffic accidents. Quebec had adopted a no-fault scheme in which tort claims were prohibited and all compensation was paid by the Régie d'assurance automobile du Québec.61 The scale of compensation paid by the Régie was considerably lower than would be expected from a common-law tort judgment.

In Grimes62 the plaintiff was an Ontario resident injured in an automobile accident in Quebec. The defendants, Quebec residents, were the owner and driver of the other automobile involved in the accident. The driver was charged with and later convicted of careless driving in breach of the Highway Traffic Code of Quebec. The judge at trial felt bound by McLean v. Pettigrew,63 and applied Ontario law, awarding the plaintiff substantial

58. Id. What particularly bothers me about this case is, of course, the inescapable suspicion that if the jury had been told that they could not apportion they would have held the defendant 100% at fault. The least the High Court could have done would have been to order a new trial. Perhaps the Court simply did not have that power.

59. The case was on appeal from the Quebec Court of Appeal and, while the judgment referred to the leading English text and cases, might have been distinguished on that ground. The decision in McLean v. Pettigrew was, moreover, inconsistent with at least two decisions of the Privy Council: Walpole v. Canadian Northern Ry., 70 D.L.R. 201 (P.C. 1922), and McMillan v. Canadian Northern Ry., 70 D.L.R. 229 (P.C. 1923).


damages, more than would have been paid had the Régie provided compensation. The defendants appealed.

The Court of Appeal's judgment in *Grimes*, written by Justice Morden, had, in my opinion, the potential to achieve a "paradigm shift," a change in Canadian conflicts rules little short of revolutionary and, moreover, one that provided a much better base for building new rules than anything else in Canada or, I may say, in the United States. My view of the effect of the judgment was not shared by other Canadian judges who took the judgment as a much more routine decision, a decision firmly in the pattern established by *Phillips v. Eyre* and *McLean*. The practical result is that, in spite of *Grimes* as much as because of it, the Canadian forum-centered approach continued until the recent decision of the Supreme Court.

Justice Morden was concerned that *McLean* required him to treat the Quebec rule as irrelevant, as the Ontario rule in *McLean* was held to be. The solution he adopted was to conclude that Justice Taschereau would have drawn a distinction had the plaintiff resided in the "non-liability" jurisdiction rather than in the "liability" jurisdiction as she did. Having established that it would be possible to distinguish *McLean*, Justice Morden said:

> In applying *Phillips v. Eyre*, as I have, I do so because, as I have indicated, it is authoritative precedent and its application results in what I consider to be a just decision on the facts of this case. I . . . note the important relationship between Quebec law and the facts of this case—the accident took place in Quebec, it was covered by the Quebec automobile compensation scheme, and the appellants, residents of Quebec, are legally entitled to the protection of that scheme and had reasonable expectations that they would have this protection. On the other hand, it is difficult to believe that the respondent would have had any reasonable expectation that Ontario law would apply to the exclusion of Quebec law with respect to any driving accident she might have in Quebec. There is the additional striking feature, on the facts of this case, that the respondent has applied for and received the benefits available to her under this scheme as provided for under the concluding clause of s. 8 of the Quebec statute.

> In these circumstances, to ignore the Quebec legislation, which relieves the defendants of civil liability, would be unfair to the appellants and, also,

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64. 6 L.R. Q.B. 1 (Eng. 1870).
an "officious intermeddling with the legal concerns of a sister province." 67

I contend that Justice Morden abandoned traditional conflicts analysis and offered instead a radically new basis for deciding conflicts cases. If it is remembered that the traditional jurisdiction selecting rules are formally unconcerned about the purpose of the underlying rules and that the discussion (let alone the pursuit) of any tort goals never explicitly occurs, mention of the parties' expectations and the risk that Ontario might meddle "officiously" in the affairs of another province is revolutionary.

Notice that we are not now forced to choose between "the law of Ontario" or "the law of Quebec"; rather, we choose to consider the torts values that are at stake. We consider, not whether the plaintiff will get no compensation or a great deal, but what the appropriate level might be. The questions that we could raise here are many and interesting. It is my argument that all these questions have nothing to do with conflict of laws. Instead they deal with the balancing of competing claims of parties involved in a tort action when that action involves two jurisdictions.

The second part of Justice Morden's statement is, if possible, even more radical. It suggests—the vituperative epithet "officious" is beautifully appropriate—that an Ontario court that awarded substantial damages against the defendants, ignoring Quebec law in the process, would be doing something that is wrong. Justice Morden does not indicate just what the wrongful nature might be or what criteria he has in mind. I suggest that the only criteria that can be used are those derived from the Canadian Constitution, specifically the Constitution Act, 1867, section 92(13). 68 Justice Morden had already mentioned that the application of McLean on the facts of Grimes might be "constitutionally suspect." As I have mentioned, section 92(13) of the Constitution establishes the principal basis for provincial legislative authority. In so doing, it necessarily sets limits to and provides a basis for balancing competing claims of provincial sovereignty.

The courts of appeal in Tolofson 69 and Gagnon 70 read Grimes 71 as standing for nothing more than the proposition that, when the defendant comes from a no-liability jurisdiction, he or she should not be made liable in an action brought in another province. This understanding of Grimes was the basis upon which the Supreme Court proceeded to deal with Tolofson and Gagnon. 72

68. See supra note 17.
72. At the risk of providing an example of the maxim that "Hell hath no fury like an
2. The Decision

The Supreme Court allowed both appeals. The claims of all the plaintiffs were dismissed. The rule articulated by Justice La Forest who wrote the judgment of the court was that the *lex loci delicti* was now the mandatory choice of law rule for torts in Canada. In articulating the new rule, Justice La Forest is uncompromising and it is worth stating his words at some length:

From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. . . . Though the parties may, before and after the wrong was suffered, have travelled from one province to another, the defining activity that constitutes the wrong took place wholly within the territorial limits of one province, in one case, Quebec, in the other Saskatchewan, and the resulting injury occurred there as well. That being so it seems to me, barring some recognized exception, to which possibility I will turn later, that as Willes J. pointed out in *Phillips v. Eyre*, *supra*, at p 28, “civil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law”. In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences.

I have thus far framed the arguments favoring the *lex loci delicti* in theoretical terms. But the approach responds to a number of sound practical considerations. The rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often

result if the principle of territorial jurisdiction were not, at least generally, respected. Stability of transactions and well grounded legal expectations must be respected. Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.73

The adoption of the vested rights argument deals, so Justice La Forest assumes, with the claim that the values of either British Columbia or Ontario might be relevant to the decision. His short answer is that they are completely irrelevant. As regards the argument of the British Columbia Court of Appeal that the Saskatchewan rules limiting the time within which an action may be brought are rules of procedure and, therefore, applicable only to an action brought in Saskatchewan and irrelevant in a British Columbia action, Justice La Forest is equally uncompromising. He holds that such rules are not rules of procedure, but substantive rules and, as such, governed by the choice of law rule he has stated, namely, that the lex loci delicti applies. It follows from this decision that McLean v. Pettigrew74 is overruled and that any decision based on Phillips v. Eyre75 is rejected. These results are seen as consistent with the decisions of the Court in Moran,76 Morguard77 and Hunt v. T&N, plc.78

Apart from the adoption of the vested rights theory and such theoretical support as it provides, the principal justification, indeed the only justification for the result is in the second paragraph, namely, that the rules requiring the application of the lex loci delicti will provide certainty.

Justice La Forest draws support for the rule that the lex loci delicti governs foreign torts from a number of places. The first is a preliminary report to a the Hague Convention on Traffic Accidents in 1967.79 The second is a statement by Justice Fuld in Babcock v. Jackson:80 “The traditional choice of law rule, embodied in the original Restatement of Conflict of Laws . . ., and until recently unquestioningly followed in this court . . . has been that the substantive rights and liabilities arising out of a tortious

74. [1945] 2 D.L.R. 65 (McLean, translated into English, and accompanied by an annotation by John D. Falconbridge).
75. 6 L.R. Q.B. 1 (Eng. 1870).
79. Mémorandum Duoit in ACTES ET DOCUMENTS DE LA ONZIÈME SESSION. That document states: “And in fact, courts in nearly all the member States have ruled in favor of recourse in principle to the lex loci actus in cases of automobile collisions occurring abroad.” Id. at 20 (translation). Note that the latin phrase, lex loci actus, does not necessarily denote the same place as the lex loci delicti.
occurrence are determinable by the law of the place of the tort."  

The third is the judgment of the High Court of Australia in Breavington v. Godleman, holding that the appropriate choice of law rule in torts for Australia was the lex loci delicti. 

Certainty, in turn, will discourage, if not prevent, forum-shopping, the great evil to be suppressed. Certainty will, moreover, make settlements easier to negotiate and discourage frivolous claims. There is no reason to draw a distinction between conflicts in the international sphere and those within Canada, hence, the adoption of the lex loci delicti is as appropriate in Canada as it is internationally. Finally, Justice La Forest notes that the lex loci delicti reflects the constitutional limits on provincial sovereignty and that its application will avoid many problems that would otherwise arise. He outlines what these problems might be by observing:

However, it is arguable that it is not constitutionally permissible for both the province where certain activities took place and the province of the residence of the parties to deal with civil liability arising out of the same activities. Assuming both provinces have legislative power in such circumstances, this would open the possibility of conflicting rules in respect of the same incident.

He declines to deal with these problems, noting only that "the wiser course would appear to be for the Court to avoid devising a rule that may possibly raise intractable constitutional problems."

Existing choice of law rules do not touch the issue of the Saskatchewan limitation period raised in Tolofson. Whether an action was time-barred or not has traditionally been determined at the characterization stage of an action, a stage that, at least in theory, occurs before the application of choice of law rules. The issue, "Is this action time-barred?" is characterized as a matter of procedure and, as such, a time bar is relevant only if is part of the lex fori. Justice La Forest rejected the common-law view that, because the running of a limitation period affects only the right of action, not the existence of the cause of action, it is a matter of procedure only. Instead he expressed a preference for the European view that a limitation period destroys substantive rights. He held that the Saskatchewan limitation period was a matter of

81. Id. at 281 (citations omitted).
83. In Tolofson, Justice La Forest refers briefly to American law. He observes that Babcock v. Jackson is similar to McLean v. Pettigrew, and describes the American approach as based on the "proper law of the tort"—a statement that is, of course, simply and flatly wrong. Tolofson/Gagnon, [1994] 3 S.C.R. at 1055.
84. Id. at 1066.
85. Id. ¶ 71.
substantive law and, therefore, applicable as part of the *lex loci delicti*. Justice La Forest was encouraged in this view by recent legislation in the United Kingdom, Foreign Limitation Periods Act, 1984, which reversed the common-law rule and made limitation periods rules of substance not

3. A Criticism of the Judgment's Conflicts Analysis

In the next section of this paper, I shall deal with the relation between the values that the *Tolofson/Gagnon* judgment seems to adopt and those of Canadian federalism. In particular, I shall deal there with the relation of *Tolofson/Gagnon* to the Supreme Court's own decisions in *Moran, Morguard* and *Hunt*. I shall now deal briefly with the analysis of Canadian, English and American conflicts rules that the *Tolofson/Gagnon* judgment offers.

A judgment written in 1994 that adopts so unequivocally the vested rights theory of conflicts is so unexpected that it is as if one encountered a practicing alchemist: What can one possibly say?

Unfortunately, judgments of the Supreme Court of Canada cannot be ignored and I must seek some understanding of what the Court meant. I have set out the arguments that Justice La Forest uses as support for his view that the *lex loci delicti* governs all foreign torts. It is the theoretical basis for this rule that disturbs me, for it seems to be based on the vested rights theory, a theoretical basis for conflict of laws that was once popular, but which has been rejected in Canada, England and the United States for fifty years. Justice La Forest quotes the statement of Justice Willes in *Phillips v. Eyre*: "[C]ivil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law." Justice La Forest continues: "In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences." The statement made by Justice Willes has always been taken as a classic example of the vested rights theory, but no one (at least to my knowledge) had ever suggested until now that it was anything other than an interesting fact in the history of conflicts theory. While Dicey, in his leading conflict of laws text, stated the vested rights theory as a "general principle," changes in the theory were detectable as early as the fifth

86. This statute reversed the decision of the Privy Council in *Yew Bon Tew v. Kenderaan Bas Mara*, [1982] 3 All E.R. 833.
87. See supra notes 81-83 and accompanying text.
89. Id.
90. It is also, of course, inconsistent with the more famous quotation from the case set out above. See supra note 52 and accompanying text.
91. A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT
least to my knowledge) had ever suggested until now that it was anything other
than an interesting fact in the history of conflicts theory. While Dicey, in his
leading conflict of laws text, stated the vested rights theory as a "general
principle," changes in the theory were detectable as early as the fifth
edition in 1932. The theory was abandoned by the sixth edition, the first
edition under John Morris, and by the eighth edition, the category of
"General Principles" had been abandoned as well. Falconbridge discusses
Dicey's vested rights theory and its evolution. Falconbridge suggests that
Dicey never took the theory very seriously and, as evidence of that fact, refers
to Dicey's statement that, "English judges never in strictness enforce the law
of any country but their own, and when they are popularly said to enforce a
foreign law, what they enforce is not a foreign law, but a right acquired under
the law of a foreign country." Falconbridge, Essays on the Conflict of Laws (1954). The most explicit statement of the vested rights theory was made by Beale
in the first Restatement of Conflict of Laws in 1934. Hancock argues that
Beale first stated the theory in 1902. A similar theory, the obligation
to govern torts, is no less emphatic than that of Justice La Forest. What is
startling about Justice La Forest's judgment in Tolofoin v. Mexican National Railroad. Beale's statement of the choice of law rule to
determine. This is, as if nothing has happened since 1870 and that it assumes that the vested rights theory is, despite sixty years of criticism, still valid or even plausible. As I
above. See supra note 52 and accompanying text.

93. A.V. DICEY, A DIGEST OF THE LAWS OF ENGLAND WITH REFERENCE TO THE CONFLICT
OF LAWS (1896) ("GENERAL PRINCIPLE No. I.—Any right which has been duly acquired under
the law of any civilized country is recognized and, in general, enforced by English courts, and
no right which has not been duly acquired is enforced or, in general, recognized by English
courts."). A related principle stated: "GENERAL PRINCIPLE No. V.—The nature of a right
acquired under the law of any civilized country must be determined in accordance with the law
under which the right is acquired." Id.

94. A.V. DICEY, A DIGEST OF THE LAWS OF ENGLAND WITH REFERENCE TO THE CONFLICT
96. A.V. DICEY & J.H.C. MORRIS, DICEY AND MORRIS ON THE CONFLICT OF LAWS (J.H.C.
Falconbridge was recognized, both in England and the United States, as one of the principal
conflicts writers of his day.
98. Id. at 13 (quoting A.V. DICEY, CONFLICT OF LAWS 18 (5th ed. 1932)).
99. RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).
100. MOFFATT HANCOCK, TORTS IN THE CONFLICT OF LAWS 33-34 (1942).
101. 194 U.S. 120 (1904). See also Western Union Tel. Co. v. Brown, 234 U.S. 542 (1914);
FALCONBRIDGE, supra note 97, at 14; HANCOCK, supra note 100, at 30-31.
102. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (1934) ("The law of the place of
the wrong determines whether a person has sustained a legal injury.").
theory "leads into a complete circle; for we can only know what are vested rights if we know beforehand by which local law we are to decide as to their complete acquisition."\textsuperscript{102} McLeod, another Canadian author, describes the vested rights theory as "of little use."\textsuperscript{103}

Even if the Supreme Court did not intend to resuscitate the vested rights theory, its adoption of the \textit{lex loci delicti} as the new choice of law rule is no less startling. To cite Babcock \textit{v. Jackson} and the judgment of Justice Fuld as \textit{authority} for the former adoption of the \textit{lex loci delicti} in American law and to ignore the criticism of that choice of law rule in Justice Fuld's judgment is inexplicable.\textsuperscript{104} It may not be clear what Babcock \textit{v. Jackson} decided, but it is certain that it gave no support to the continuation of the \textit{lex loci delicti} in American law. To cite, as Justice La Forest does, only Richards \textit{v. United States},\textsuperscript{105} Dym \textit{v. Gordon}\textsuperscript{106} and Neumeier \textit{v. Kuehner},\textsuperscript{107} in addition to Babcock, as examples of American choice of law is to misunderstand completely everything that has happened in the United States regarding the conflict of laws in the last thirty years.

What is even more disquieting is the fact that the nature of American choice of law rules since Babcock is not understood. Justice La Forest states: "A means of [avoiding forum shopping] has been attempted in the United States through an approach often referred to as the proper law of the tort."\textsuperscript{103} The notion of the "proper law of the tort" is pernicious: it is like a weed that cannot be eradicated. The idea was first suggested in 1959 by John Morris, the editor of \textit{Dicey & Morris}, as a choice of law rule analogous

\textsuperscript{102} J-G. CASTEL, \textit{CANADIAN CONFLICT OF LAWS} 27 (2d ed. 1986) (quoting SAVIGNY 147 (Guthrie trans., 2d ed. 1880)).

\textsuperscript{103} JAMES G. McLEOD, \textit{THE CONFLICT OF LAWS} 20 (1983).

\textsuperscript{104} Justice La Forest refers to New York Court of Appeals as being "strongly divided." Tolofson/Gagnon, [1994] 3 S.C.R. at 1055.

\textsuperscript{105} 369 U.S. 1 (1962). Justice La Forest cites Richards for the extraordinary proposition that, while some courts suggest "according controlling effect to the law of the jurisdiction which, because of its relationship and contact with the occurrence and the parties, has the greatest concern with the issue raised in the litigation, . . . . the vast majority still apply the law of the place of the injury." Tolofson/Gagnon, [1994] 3 S.C.R. at 1056. (citing Richards \textit{v. United States}, 369 U.S. 1, 11-14 (1962).

\textsuperscript{106} 209 N.E.2d 792 (N.Y. 1965) (a case that no one familiar with the developments in the New York courts in the ten years after Babcock would have regarded as anything other than an aberration). The Court of Appeals could reasonably be said to have repudiated Dym \textit{v. Gordon} in Tooker v. Lopez, 249 N.E.2d 394 (1969).

\textsuperscript{107} 286 N.E.2d 454 (1972). Neumeier \textit{v. Kuehner} is an "unprovided-for" case. CRAMTON ET. AL., \textit{CONFLICT OF LAWS} 298 (3d ed. 1981). The Court of Appeals faces the logic of interest analysis where that analysis breaks down. What it does in that situation can hardly be taken as an authority for what it should or would do in a case closer to the compelling facts of Babcock. Like Dym \textit{v. Gordon}, Neumeier \textit{v. Kuehner} is an aberration.

to the “proper law of the contract.” 109 Like that rule it was a jurisdiction-selecting rule, a choice of law rule that chose the law of a jurisdiction to “govern” a case of tort liability. Morris built on some American cases that foreshadowed Babcock and the revolution that followed it, cases that do not need to be mentioned or analyzed here. Babcock and the Second Restatement repudiated all jurisdiction-selecting rules and adopted instead an approach that chose a law to deal with a specific issue. 110 It is flatly wrong to say that American law adopted the “proper law of the tort.” It is no excuse for the Supreme Court that some members of the House of Lords made exactly the same mistake in Chaplin v. Boys. 111 In fact, given what has been said in both this country and the United States since the judgments in Chaplin v. Boys were written, it is even less forgivable for the Supreme Court to have made the mistake that it did than it was for the House of Lords.

If the theoretical basis of the judgment and the reasons for selection of the lex loci delicti as the choice of law rule to be applied are not compelling, the consequences are frankly appalling. The overruling of McLean v. Pettigrew suggests that the Supreme Court would now dismiss the plaintiff’s claim in that case. It may well be that there are no more “guest passenger” rules in Canada, but there are many rules that one would like to have the opportunity to argue should not be applied when the facts include foreign facts. Justice La Forest implies (unless I have gravely misunderstood him) that it is irrelevant to the application of the local law of a foreign state that it might not apply to parties foreign to it. Given the result in both Gagnon and Tolofson, this conclusion seems inescapable. There were examples that the Supreme Court could have followed in examining, at least, the issue of the scope of a provincial law when there are foreign facts. In Babcock, for example, Justice Fuld analyzed the purposes of the Ontario guest-passenger rule and concluded that it did not apply to New York residents. 112 It was such analysis that


110. The Restatement’s tort rule provides: “The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principle stated in § 6.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1969) (emphasis added). Canadians have flirted with both the “proper law of the tort” theory and a curious (and perverted) understanding of cases like Babcock. See John Swan, Case Comment, Paradigm Shift or Pandora’s Box?—Grimes v. Cloutier; Prefontaine v. Frizzle, 69 CAN. BAR REV. 538 (1990) (explaining the Canadian position).

111. [1969] 2 All E.R. 1085 (Eng.).

112. The final statement of the rule was in the Highway Traffic Act, R.S.O. 1960, ch. 172, § 105(2). The rule was repealed in 1987 (S.O. 1966, ch. 64, § 40(2)) to permit a passenger to sue when gross negligence was established. This restriction was removed in 1977 (S.O. 1977, ch. 54, § 16), putting a passenger in the same position as any other plaintiff except for the fact that the reverse onus provisions applicable in an action by, for instance, a pedestrian, do not apply to one brought by a passenger. The original guest passenger provision made Ontario
created the problems in *Neumeier v. Kuehner*, for if the purpose of the Ontario rule was to protect Ontario owners, drivers or insurers and if the New York rule was to protect New York residents, what purpose would be served by applying the New York rule when the driver (the owner and presumably the insurer) came from New York and the injured passenger came from Ontario?

It is the risk that the application of a law under a choice of law rule of the *lex loci delicti* will be purposeless that highlights the difference between the analysis that all courts undertook in my examples and what the Supreme Court has done. If the risk of purposeless application of rules is the hallmark of traditional, jurisdiction-selecting conflicts rules, these rules are condemned out of their own mouths, as it were, as inappropriate in a legal order committed to the reasoned elaboration of the law. I can think of no more deadly criticism of a judicial decision than that it applies or articulates rules that require the application of other rules without regard to their purpose.

If it follows from the Supreme Court’s judgment that the application of the *lex loci delicti* is to be made in some blind-folded way, we have lost an opportunity to do something exciting because of the special role of the Supreme Court in Canadian law. I have mentioned that that court can authoritatively determine provincial law. In *McLean v. Pettigrew*, for example, the Supreme Court could have ignored *Phillips v. Eyre* and all conflicts rules and dealt with the applicability of the Ontario legislation by a process of interpretation: the Supreme Court could have determined, *as a matter of Ontario law*, that the guest-passenger provisions of the Highway Traffic Act did not apply to an accident between two Quebec residents.

known to generations of American law students. A class of Texas law students, when asked who Sir John A. Macdonald was, admitted that they had never heard of him. When given the hint that he was a Canadian, one student tentatively suggested that he might have been the author of the Ontario guest passenger legislation. According to one story of the legislation, it was brought in by Mitch Hepburn (the Prime Minister of Ontario from 1934 to 1942) who had been sued by a hitch-hiker he picked up. ALLEN M. LINDEN, CANADIAN TORT LAW 613-14 (1982). This story suggests that the principal purpose of the provision might have been to protect Ontario premiers from ungrateful constituents. Linden illustrates very clearly the difficulty of attributing any purpose to the legislation since the judicial treatment was characterized by a long sustained effort to reduce the scope of the immunity. It cannot make sense to ignore the fact that even in the place where the legislation must be applied by the courts, they seek to limit its scope.

113. It will always be no more than a risk, since the failure to consider the purpose of a rule does not always make its application unjustifiable.

114. The facts are set briefly set out, *supra*, note 57. [1945] 2 D.L.R. 65 (*McLean*, translated into English, and accompanied by an annotation by John D. Falconbridge). See also *supra* note 57 and accompanying text (briefly setting out the facts of *McLean*).

115. In *O’Connor v. Wray*, [1930] S.C.R. 231 the Supreme Court, in an appeal from the courts of Quebec, had interpreted, with no reference to any evidence, a provision of the Ontario Highway Traffic Act, R.S.O. 1927, ch. 251 dealing with the vicarious liability of the owner of a car. The Court held that it did not have the effect of imposing liability under Ontario law. In this sense, my original example is not based on this case. For a sustained argument that
From the Supreme Court's point of view, the problem of *McLean v. Pettigrew* is quite different from that in *Babcock*. The New York Court of Appeals had to draw an inference that the proper scope of the Ontario legislation did not extend to the facts before it; the Supreme Court, on the other hand, could have authoritatively determined what that scope should be. In *Tolofson* and *Gagnon*, the Supreme Court could, at least, have considered the purposes of the Quebec and Saskatchewan rules and whether they would be forwarded by their application to the facts. It simply cannot be accepted that the presence of foreign facts is irrelevant to the interpretation of a domestic rule of any jurisdiction.

Had the Supreme Court done what it could have done, what should have been the results in the two cases? In *Tolofson* the issue as between the father and his son was the application of the Saskatchewan guest-passenger rule. The Supreme Court could have simply held that, whatever the purpose of the legislation was, it would not be forwarded by its application to British Columbia residents. To support this conclusion, the Court could have noted that by the time the litigation was decided the legislation had been repealed and, what is more important, that the legislation was never popular and was avoided by courts whenever possible. The issue of Mr. Jensen's liability is more complicated. Discussion of limitation periods in conflicts has, as illustrated by the *Tolofson/Gagnon* judgment, always been mired in deep confusion. Again, the issues are relatively simple: the idea is to protect the defendant from stale claims. This value may be subordinated to other values, for example, the need to protect minors. We have what looks like a true conflict, the purposes of both Saskatchewan and British Columbia law would be forwarded by their application on the facts. I shall take the easy way out by observing that, on the facts as they are given, it may not be inappropriate to let the choice of forum determine the outcome. In other words, we have the situation in which I left the Supreme Court in my example. This result would be anathema to Justice La Forest because he founds his whole judgment on his abhorrence of forum shopping. I cannot explore this issue to the extent that it deserves, but I note that, as my example illustrates, the possibility of forum shopping is part of the price we pay for a federal structure and, of course, for the existence of nation states. As I tried to show, eliminating forum shopping entirely within a federation like Canada has a very high cost. It is simply silly to imagine that forum shopping will not exist between nation states. Indeed, what is so bad about it? Provided that the defendant has the kind of protection suggested in *Moran*, who is caught by unfair surprise or who is improperly benefitted?

The issue in Gagnon is interestingly different. Mrs. Gagnon had been compensated to the level provided by Quebec law.\textsuperscript{116} Had an insurer compensated her under Ontario law or, I assume, under the law of any American state with a common-law tort regime, Mrs. Gagnon would have been required to execute a release to receive the insurance payment. Had the payment been made on behalf of the children, court approval would have been required. Had either of those steps been taken when the Régie made its payment, there could have been no action in Ontario. If the plaintiffs had to sue the Régie, the issue of their right to compensation would have been res judicata, and, again, no further action would have been possible. On this analysis, Gagnon is not a choice of law issue, but one analogous to the recognition of a foreign judgment. The action was permitted to proceed only because the plaintiffs received the payment without executing a release in favor of the defendants and their insurers. I see no injustice in Mrs. Gagnon’s being told that she cannot eat her cake and keep it too.

If we ignore this aspect of the judgment and consider the choice of law aspect, the issue is similar to that in Tolofson. What issues are at stake under each of the provincial laws and how should they be interpreted? It is not completely clear that an action against an Ontario insurer by an Ontario resident must fail if brought in Quebec. Quebec legislation can properly protect the Régie and Quebec drivers and owners, but must it extend to out-of-province parties? If it does properly so extend, we may again have a situation in which an action in a province other than Quebec may succeed even if one in Quebec may not. With regard to Ontario, the operation of the scheme\textsuperscript{117} developed by Ontario and Quebec suggests that the application of Quebec law can be justified. Under the agreement between the government of Ontario and the Régie, a person insured under an Ontario policy may recover from the Ontario insurer to the amount recoverable by the Régie.\textsuperscript{118} That insurer is

\textsuperscript{116} It will be convenient to ignore the situation of the children; the outlines of the argument are unchanged.

\textsuperscript{117} The scheme is recorded in an agreement between the Minister of Consumer and Commercial Relations and the Régie in 1978. See Tolofson/Gagnon, [1994] 3 S.C.R. at 1036.

\textsuperscript{118} The standard Ontario owner’s policy provides (Section B — Accident Benefits, Subsection 2 — Death Benefits and Loss of Income payments, Part III — Supplemental Benefits Respecting Accidents Occurring in Quebec) that:

With respect to bodily injury, as a result of an accident, to a person insured in Quebec the Insurer agrees to make payments under this Part in the same amount and form and subject to the same conditions as if such person were a resident of Quebec as defined in the Automobile Insurance Act (Quebec) and the regulations made under that Act and entitled to payments under that Act and those regulations.

The legal problem arising from the combination of the administrative agreement, supra, note 119 and the policy provisions is that they do not necessarily preclude a claim by an injured person who is not a party to the policy from suing the driver at common law for personal injury damages.
entitled to recover from the Régie what it has paid. If any risk existed that the Régie might be liable for more than the Quebec limits, then the application of Quebec law is not purposeless and, in fact, can be seen as forwarding a policy of Quebec that Ontario could quite properly support. If the Régie would not be liable, the application of the limit under the policy must be justified on different grounds that are not immediately obvious.\(^{119}\)

Separating tort or compensation issues from insurance issues is difficult. It is one thing for Quebec to assert that Quebec people (ignoring the problems we may have in deciding who those may be) are limited in recovery for their injuries and another for this value choice to be imposed on Ontario people who drive in Quebec. If, however, the risk of the application of Quebec law were that plaintiffs received no compensation at all, I think that an Ontario court should not follow that result when the defendant has insurance to protect him from exactly this result. If, on the other hand, the question is how much compensation the plaintiffs should receive, the issues are more evenly balanced. Again, however, I see no great objection or risk of subverting any relevant values if here too an Ontario court were to award compensation to the Ontario standard. After all, obvious Ontario values are at stake.

I have mentioned that Justice La Forest’s judgment is based on his horror of forum-shopping and his search for rules that will provide certainty. While the former concern seems grossly over-stated and almost irrational, the latter is, of course, an important part of what it means to seek justice and the reasoned elaboration of rules. To believe that certainty comes from rigid rules is to believe what is patently untrue. Certainty is a very complex value. We must know how to make a valid will, incorporate a company, and make an enforceable contract, and the rules that let us do those things represent one aspect of certainty. The adoption of standards of reasonableness, fairness or good faith don’t necessarily bring uncertainty: such concepts may provide the only possible basis for certainty, a certainty that may look very different from the first kind. In any event, the idea of certainty that the Court seems to have in mind in Tolofson/Gagnon is inconsistent with its own judgments in cases that are too numerous to mention.\(^{120}\) The Supreme Court should be more careful in using words like “certainty.”\(^{121}\)

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119. Nothing in the judgment of Justice La Forest supports an argument that the result would be different if, as in Babcock v. Jackson and McLean v. Pettigrew, no local residents were involved in the accident.

120. I can mention the vivid conflict of views of certainty and judicial responsibility in Scott v. Wawanessa Mutual Insurance Company, [1989] 1 S.C.R. 1445. Justice La Forest delivers an excellent judgment that refuses to accept the idea that words must have a single, unequivocal meaning but must be understood in their context. The context includes the purposes that underlie the rules. Id. at 148-62 (La Forest J., dissenting).

121. In a passage that I omitted from a quotation from Justice La Forest’s judgment, supra text accompanying note 73, in which he stated the theoretical basis for his choice of the lex loci
D. The Supreme Court and Federal Values

My argument that it would be proper for the Supreme Court to dismiss both appeals in my example was principally based on two decisions of the Supreme Court: *Moran*¹²² and *Morguard*.¹²³ The former articulated a sensitive and careful test for the assertion of jurisdiction by one provincial court over a resident of another. That test was also capable of justifying the application of one provincial law to the resident of another province, even if that application resulted in a liability where either none existed or was less extensive in the province of the defendant’s residence. In Justice La Forest’s *Morguard* judgment, and in a sharp departure from previous decisions in Canada, the Court held that the law to govern the enforcement of foreign judgments should now become part of or reflect Canadian constitutional values. Before *Morguard*, the Canadian rules for the enforcement of foreign judgments¹²⁴ were extremely restrictive. The details of those rules do not matter now. What is important is that the Supreme Court simply reversed the established law and made the issue of the recognition and enforcement of interprovincial judgments one that had constitutional dimensions. The court articulated both a full faith and credit principle and, rather less explicitly, the linked due process requirement. I believe that the effect of the judgment is that the judgment of a court meeting the due process standard shall be recognized because the characteristics of the Canadian federation require such interprovincial co-operation. The result of *Morguard* is that one provincial court must enforce the judgment of another provincial court when that latter court was an appropriate court to have taken jurisdiction over the defendant.

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¹¹³ delicti, he said:

There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they may conflict and other considerations may play a determining role.

*Tolofson/Gagnon*, [1994] 3 S.C.R. at 1050. I do not know what factors might bring a case within this exception or these exceptions. I do know that if such a case does arise, the Supreme Court has given no useful guidance on what criteria might be relevant to decide it. The short concurring judgment of Justice Major, with whom Justice Sopinka agreed, suggests that Justice might require further exceptions. *Tolofson/Gagnon*, [1994] 3 S.C.R. at 1078. The existence of such exceptions can hardly be said to create certainty.

124. The judgment of another province was as much a “foreign” judgment as one from the United States or France.
Morguard is, of course, a vivid demonstration that the vested rights theory is inconsistent with what a court has to do. Morguard proceeds on the assumption that, as Justice La Forest explicitly states, the enforcing court must review the assertion of jurisdiction by the rendering court and decide if it meets the tests for enforcement. The enforcing court may not simply enforce the judgment because it was given by the court where the claim arose. The constitutional power of the enforcing court illustrated by Hunt is a further example of the argument that the vested rights theory is inconsistent with the theory that the Supreme Court had been developing.

The language used by the Supreme Court in articulating the new test in Morguard was, unfortunately, not as clear as it might have been. Justice La Forest was, however, quite clear that he saw the job of the Supreme Court as one of developing, outside the explicit language of the constitution, a new constitutional principle. The dispute over the constitutionality of Morguard has, in my opinion, been overtaken by the judgment of the court in Hunt. Hunt dealt directly with the constitutional power of a province to control access to business records. The plaintiff appellant sought damages allegedly arising from cancer caused by his inhalation of asbestos fibers contained in products manufactured by the defendants who were the major producers, distributors and manufacturers of asbestos in Quebec. The plaintiff sued in British Columbia and, in the course of discovery, sought production of documents from the defendants. The defendants objected to production on the ground that they were prohibited from doing so by Quebec legislation.

Both British Columbia courts denied the plaintiff his claim to production. The Supreme Court reversed those decisions, holding (1) that it was proper for the British Columbia courts to consider the constitutionality of the Quebec legislation, (2) that the Quebec legislation did not meet the minimum standards of order and fairness required of Canadian legislatures, and (3) that the Quebec legislation was unconstitutional on the ground that it denied full faith and credit to the laws of other provinces and impeded proceedings in

126. Canadians, like the British and the Australians, enacted various blocking statutes in an attempt to deny American courts access to information for antitrust actions. See, e.g., Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1985); the Australian Foreign Proceedings Act, 1976; the United Kingdom’s Protection of Trading Interests Act, 1980. This legislation is not, at least in Canada, subject to constitutional challenge.
128. Hunt, [1993] 4 S.C.R. at 289. In Canadian law, the procedure for raising constitutional questions has special requirements. It had been doubted that a constitutional question could be raised as incidental to another issue.
another province. The Court said that the intention of the Quebec legislation and result in the B.C. litigation were contrary to the decision in *Morguard*. 129

While all the implications of *Hunt* are, obviously, unclear, it is at least now apparent that the Supreme Court considers that the proper judicial attitude or approach to issues of interprovincial curial conduct has an explicit constitutional dimension. *Hunt* holds that not only are provincial blocking statutes like the Quebec and Ontario legislation unconstitutional when they operate extra-provincially, but that it will be proper for provincial courts to consider in any case before them whether, for example, the limits on provincial jurisdiction implicitly set by *Morguard* have been met. 130 In other words, not only will an action brought in Ontario be subject to an application for an order staying or dismissing the action on the ground that Ontario is a *forum non conveniens*, but an application may be brought for a declaration that the assertion of jurisdiction by the plaintiff under provincial long arm jurisdiction may be unconstitutional. The other obvious example of the constitutionality of *Morguard* is that each province now has a constitutional obligation to recognize the judgments of other provinces where the rendering court, the court whose judgment has been brought for enforcement, has met the *Morguard* requirements. These requirements can be roughly summarized as the responsible assertion of jurisdiction.

It would have followed from the acceptance of these requirements that more than one court might have been the appropriate court in any particular litigation, that a court might have to enforce a judgment that it would itself not have given, 131 and that more than one provincial law could be properly applied to determine the liability of the defendant to the plaintiff. The test in *Moran*, as in *Worldwide Volkswagen*, 132 must permit a defendant to claim that it should not be subject to the Saskatchewan courts or to Saskatchewan law. The Supreme Court would have a responsibility to police these decisions applying these constitutional tests, but nothing in any case suggests that the application of either provincial law would be constitutionally invalid. If this consequence follows, there can be no *a priori* reason for the belief that all courts must reach the same conclusion on the law to be applied. It is certain that, as a matter of fact, most courts will agree for the reasons implicit in the

129. Id.

130. Id.

131. The Quebec courts would have to recognize and enforce the judgment of the Ontario courts in the original example that I explored. There is nothing odd or difficult about this consequence; it is entailed by the constitutional values that *Morguard* articulated and is not more difficult to explain or rationalize than is the enforcement by a court of the decision of an administrative tribunal that the court disagrees with on the merits.

discussion of vicarious liability in the Restatement (Second) of Conflict of Laws.\textsuperscript{133}

Discussion of choice of law rules, and specifically, the justification for the application of the \textit{lex fori} was missing from the judgment in Morguard and was not explicitly dealt with in Moran. I have argued that Moran establishes a test that can as easily justify the application of Saskatchewan law, the \textit{lex fori}, as it justifies the assertion of jurisdiction by the Saskatchewan courts. In principle, it is hard to see how the two questions could be answered in radically different ways. Tolofson and Gagnon direct all choice of law issues into a radically different direction. Once the fairness and appropriateness of taking jurisdiction has been determined, a Canadian court must forget all the previously vague and uncertain analysis and apply a rigid, mechanical, and purposeless rule.

Morguard and its companions articulated a view of federalism, a rational, sensitive and fair set of rules and principles that restrained both the jurisdiction of any provincial court and its right to apply its own law. Tolofson/Gagnon has dismissed that whole set of ideas and has insisted that there can be only one correct answer to any multi-jurisdictional problem. This idea represents a radically different idea of federalism. It is interesting that Justice La Forest finds comfort for his view in the judgment of the High Court of Australia in Breavington \textit{v. Godleman}.\textsuperscript{134} The views of the High Court state a view of federalism that seems to be inconsistent with that which must underlie a federal state by denying the right of judges to differ in their expression of state values while preserving the right of state legislatures to differ.

E. CONCLUSION

Until the decision in Tolofson/Gagnon, I would have said that Canadian law, guided by the Supreme Court, and in particular, by the judgments of Justice La Forest in Morguard and Hunt was in the process of developing a flexible and powerful approach to interprovincial cases. This approach was, in turn, based on a view of Canadian federalism that reflected the consequences of a division of powers and limited provincial sovereignty. Now I do not know what to say. Without any apparent intention to change its mind—indeed the Court seems to see Tolofson/Gagnon as a natural development of the other cases—the Supreme Court has, if not reversed itself, given a judgment that cannot co-exist with the others. Either the ideas implicit in the earlier cases will be abandoned after Tolofson/Gagnon, or, and this is the far preferable alternative, the latter judgment will be regarded as a decision confined to its special facts or one that need not be expansively applied.

\textsuperscript{133} See supra note 7.
\textsuperscript{134} 169 C.L.R. 41 (1988).