THE CONSTITUTION OF CANADA AND THE CONFLICT OF LAWS

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A thesis submitted in partial fulfilment of the
requirements for the degree of Doctor of Philosophy

Worcester College
Trinity Term 2001

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This thesis explains the constitutional foundations for the conflict of laws in Canada. It locates these constitutional foundations in the text of key constitutional documents and in the history and the traditions of the courts in Canada. It compares the features of the Canadian Constitution that provide the foundation for the conflict of laws with comparable features in the constitutions of other federal and regional systems, particularly of the Constitutions of the United States and of Australia. This comparison highlights the distinctive Canadian approach to judicial authority—one that is the product of an asymmetrical system of government in which the source of political authority is the Constitution Act and in which the source of judicial authority is the continuing local tradition of private law adjudication.

The distinctive Canadian approach to judicial authority provides the foundation for federal arrangements that have obviated the need for explicit mechanisms for coordinating legal systems. It has fostered a distinctive view of court jurisdiction and of the means for determining both whether a particular court has jurisdiction to decide a matter and whether the court should exercise that jurisdiction. It has provided the foundation for a unified court system within the Canadian federation—one in which there is a strong commitment to the shared responsibility of Canadian courts to promote access to justice, to prevent forum shopping, and to resolve multiplicities of proceedings so as to secure the same respect for the administration of justice between jurisdictions as exists within jurisdictions. This approach to judicial authority has also encouraged Canadian courts to draw on their inherent jurisdiction to permit the vindication of the rights of members of the Canadian public through civil litigation, notwithstanding the lack of direct application of the Charter of Rights and Freedoms and in spite of the apparent jurisdictional impediments.

I am grateful for

my advisor's patience,
my family's support,
my colleagues' encouragement,
and my friend's inspiration,

without which
this would not have been written.

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I. THE REVELATION—THE PARADOX

A. Introduction

This thesis argues that Canadian conflict of laws rules differ from the conflict of laws rules of other common law countries because such rules emanate from the legal tradition in which they operate. The particular character of these rules emerges when various features of similar common law systems are compared.

1. The revelation—the paradox

In 1990, well over a century after Confederation, the Supreme Court of Canada recognized the significance of the Constitution of Canada for Canadian conflict of laws rules. This occurred in the decision in Morguard Investments Ltd v De Savoye,[1] a decision that has come to be regarded as the cornerstone of the current approach to the conflict of laws in Canada.[2] The jurisprudence following the Morguard decision has revolutionized the Canadian conflict of laws rules. There is scarcely a development of importance in the field that does not make reference to the "principles of order and fairness"—the so-called "Morguard principles"—that were enunciated in the judgment. Virtually every aspect of the conflict of laws has been influenced by these principles or entirely reshaped to meet their requirements.[3]

In the *Morguard* decision, Mr. Justice La Forest observed on behalf of a unanimous court that "the English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country";[4] and "the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution".[5] Despite these clear statements, the *Morguard* case had not been argued in

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[1] *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, 76 DLR 4th 256 (*Morguard*).

[2] V Black 'The Other Side of *Morguard*: New Limits on Judicial Jurisdiction' (1993) 22 Can Bus L J 4; V Black and J Swan 'New Rules for the Enforcement of Foreign Judgments: *Morguard Investments Limited v De Savoye'* (1991) 12 Advocates Q 489; J Blom 'Comment' (1991) 70 Can Bar Rev 733; J Blom 'The New Common Law on the Enforcement of Foreign Judgments' (1993) 8 Banking L Rev 265; J Blom 'The Enforcement of Foreign Judgments: *Morguard* Goes Forth into the World' (1997) 28 Can Bus L J 373; P Boles 'In the Wake of *Morguard* — Developments in the Enforcement of Personal Extra-Provincial Judgments' (1992) 7 Nat'l Creditor Debtor Rev 9; J-G Castel 'Recognition and Enforcement of a Sister-Province Default Money Judgment: Jurisdiction Based on Real and Substantial Connection' (1991) 7 Banking L Rev 111; S Coakeley P Finkle and L Barrington '*Morguard Investments Ltd. v. De Savoye*: Emerging International Implications' (1992) 15 Dalhousie L J 629; E Edinger '*Morguard v De Savoye*: Subsequent Developments' (1993) 22 Can Bus L J 29; B Finkle and C Labrecque 'Low Cost Legal Remedies and Market Efficiency: Looking Beyond *Morguard'* (1993) 22 Can Bus L J 58; P Finkle and S Coakeley '*Morguard Investments Limited*: Reforming Federalism from the Top' (1991) Dalhousie L J 340; HP Glenn 'Foreign Judgments, the Common Law and the Constitution: *DeSavoye v Morguard Investments Limited'* (1992) 37 McGill L J 537; HP Glenn, "Recognition of Foreign Judgments in Quebec" (1997) 28 Can Bus L J 404; G Saumier 'Judicial Jurisdiction in International Cases: The Supreme Court's Unfinished Business' (1996) 19 Dalhousie L J 447; C Walsh 'Canadian private international law after *De Savoye v Morguard Investments*' (1992) 8 Sol J 1; GD Watson and F Au 'Constitutional Limits on Service Ex Juris: Unanswered Questions from Morguard' (2000) 23 Advocates' Q 167; J Woods 'Recognition and Enforcement of Judgments Between Provinces: The Constitutional Dimensons of *Morguard Investments Ltd'* (1993) 22 Can Bus L J 104.

[3] E Edinger 'The Constitutionalization of the Conflict of Laws' (1995) 25 Can Bus L Rev 38; and J Walker '*Morguard* at the Millennium: A Survey of Change' in *From the Headlines: High Profile International Law Issues That Impact Practices of Canadian Lawyers* (Canadian Bar Association of Ontario Toronto 2000).

[4] *Morguard* (n 1 above) 271.

[5] *Morguard* (n 1 above) 272.

constitutional terms and so was not decided in those terms. However, a few years later, in a case concerning interprovincial litigation that *had* been argued in constitutional terms, La Forest J., again on behalf of a unanimous court, confirmed that "the constitutional considerations" addressed in the *Morguard* decision were "just that"—they were "constitutional imperatives."[6] As La Forest J. observed, "the traditional conflicts rules, which were designed for an anarchic world that emphasized forum independence, must be assessed in light of the principles of our constitutional law."[7] That is the project of this thesis: to consider the ways in which the principles of Canadian constitutional law shape Canadian conflict of laws rules.

In a field, such as the conflict of laws, one that is concerned with relationships between legal systems, it is remarkable that the particular requirements for the relationships between the legal systems in Canada was not considered in greater detail much earlier. When the drafters of the American Constitution crafted "a more perfect union"[8] between the several states, they regarded it as essential to provide explicitly for the relationship between the legal systems in the new federation. The relationship between the legal systems in the new American federation was so important that the drafters of the Constitution put the article providing for it immediately after the three articles establishing the powers of the three branches of government.[9] Similarly, when the architects of European integration drafted the Treaty of Rome, they included an article establishing the requirement that Member States would simplify the formalities governing the reciprocal recognition and enforcement of judgments.[10] The Conventions that were negotiated pursuant to this provision were considered so important to the functioning of the common market that participation in them was a requirement of membership in the Community.[11]

While La Forest J. described in the *Morguard* decision the various constitutional and sub-constitutional arrangements and practices that he thought made such provisions unnecessary in the Canadian Constitution, he observed that the experience in the United States and Europe suggested that these arrangements were nevertheless inherent in a federation.[12] It

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[6] *Hunt v T&N plc* [1993] 4 SCR 289, 109 DLR 4th 16, 40 (*Hunt*).

[7] *Hunt* (n 6 above) 38.

[8] Preamble, United States Constitution.

[9] In the United States Constitution, Articles I-III provide for Legislative Power, Executive Power and Judicial Power, respectively, and Article IV.1 of the United States Constitution provides in part that "Full faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." A similar requirement to give full faith and credit is found in section 118 of the Australian Constitution, which provides, "Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State."

[10] Article 220 of the Treaty Establishing the European Economic Community, 1957 provides in part that "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:...the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards." Treaty Establishing the European Economic Community 25 Mar 1957, 298 UNTS 11 1973, Gr Brit TS No 1 (Cmd 5179 — II) art 220; A Briggs *Civil Jurisdiction and Judgments* (2nd ed LLP London 1997).

[11] The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1978] OJ L304/1 is now Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters OJ L12/1 (Brussels I Regulation).

[12] *Morguard* (n 1 above) 272. References to federalism in connection with Europe are shorthand for the regional integration in Europe and not meant to indicate any particular view on the progress or direction of that integration.

is remarkable then that the particular nature of the requirements of Canadian federalism for the conflict of laws are only now being considered.

Indeed, it is especially remarkable that the implications of federalism for the conflict of laws are only now being considered in view of the fact that the principal areas of jurisprudential and academic comment in Canadian constitutional law have historically been those relating to the ways in which the Canadian Constitution departs from the Constitution of that of the United Kingdom. Since federalism plays no part in the English conflict of laws rules, it would seem likely that the implications of federalism for the conflict of laws would have been considered.[13] If federalism is the reason for Canadian conflict of laws rules to depart from the English conflict of laws rules, why are the needs of federalism only now being considered?

This remarkable feature of the Canadian conflict of laws—that before the revelation in the *Morguard* decision the conflict of laws operated within a federation for nearly a century and a quarter with little concern for its constitutional context—must be explained in the course of any effort to explain the significance of the Canadian Constitution to the conflict of laws. How could such a fundamental feature of the context in which a conflict of laws regime operates be overlooked for so long? Equally puzzling, though, is that despite the plea by the Supreme Court of Canada for the reassessment of the existing conflict of laws rules in light of the principles of Canadian constitutional law, there has been little revision of conflict of laws doctrine directed at meeting the requirements of specific provisions of the Constitution as interpreted by the Courts.

There has been considerable evolution in Canadian conflict of laws rules based on "the principles of order and fairness"—principles that were said to be "constitutional imperatives"— and the courts of the common law provinces in Canada have not expressed any real doubt that the Constitution does provide a foundation for conflict of laws rules. However, there has not been, as might be expected, a series of authoritative pronouncements interpreting particular sections of the Constitution Act 1867[14] and determining their application to questions of the conflict of laws. The lack of explicit application to the conflict of laws of constitutional provisions is in direct contrast with the tradition in the American jurisprudence of treating the due process clauses of the Fifth and Fourteenth Amendments as the basis for court jurisdiction.[15] It is also in direct contrast with the steps taken in Europe to establish a special regime for cross-border situations within the Community through the Brussels Convention (and latterly the Brussels I Regulation), and in Australia through the Cross-vesting scheme.[16]

Perhaps most remarkable has been the reluctance of Canadian courts to defer to some overriding obligation to meet externally imposed requirements in their efforts to do justice between the parties in the cases before them, as might be expected by the introduction of "constitutional imperatives." While the principles of order and fairness that were pronounced in the *Morguard* decision have frequently been cited in support of important developments in the law for which there has not appeared to be any ready authority in the jurisprudence, these developments have also been endorsed as sound common law developments and either

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[13] Hence La Forest J's observation that "the English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country:" *Morguard* (n 4 above) 271.

[14] The British North America Act 1867 (UK) 30 & 31 Vic c 3 was renamed The Constitution Act 1867 in 1982. The terms "British North America Act" (BNA Act) and "Constitution Act 1867" are used in this thesis to describe the 1867 enactment and the amendments to it.

[15] The Due Process clauses are discussed in the chapter on Constitutional Rights.

[16] The Cross-vesting scheme is discussed in the chapter on Federalism and the Conflict of Laws.

justified or criticized on that basis. As Professor Castel noted in the "Conclusion" to the chapter on "The Constitution and the Conflict of Laws" in the 1997 edition of his text "On the dawn of the 21st century, the Supreme Court of Canada must not usher Canadian conflict of laws rules into a period of strict law characterized by fixed, rigid rules, designed to achieve order rather than fairness. *If a choice must me made,* fairness should prevail over order."[17] In short, while Canadian courts and commentators have not rejected the suggestion that the Constitution establishes requirements for the conflict of laws, neither have they abandoned their traditional common law approach to conflict of laws questions.

These features of Canadian constitutional law are remarkable: that the fundamental imperatives that the Constitution establishes for an area of law are not derived from specific provisions in the principal constitutional texts, that these imperatives have not been seen to give rise to different rules for interprovincial and international situations, and that they have not prompted courts to alter substantially their commitment to fairness in the individual case. The situation begins to seem paradoxical: How could the introduction of previously unrecognized yet overriding imperatives not serve to interrupt or interfere with the process of doing justice between the parties, but rather enhance it and thereby support the traditional private law objectives of the conflict of laws?

2. The conflict of laws: private law or public law?

One reason why the conflict of laws may not have been recognized earlier as having a basis in the Constitution earlier is that Canadians have followed the traditional common law approach of treating the conflict of laws as a subject of private law. Although it might seem obvious to persons familiar with other federal or regional systems that the conflict of laws would serve what might be described by Canadians as a public law function—that of maintaining federal relations—to Canadians this has been far from the case. The conflict of laws has been described in Canada as a study of the effect to be given to relevant foreign elements in civil disputes[18]—relevant foreign elements that affect whether the court can and should assume jurisdiction, whether it should apply a foreign law and what effect, if any, should be given to the judgment of a court in another jurisdiction.

For litigants, the answers to these questions are understood in terms of the effect that they have on the outcome of the dispute—as very much a *private law* matter—and litigants expect the answers to promote the same concerns for fairness that are served by domestic procedural rules. However, the reference point for jurists might be slightly different. Jurists resolving conflict of laws questions might implicitly refer, at least in part, to an institutional view of the proper relationship between the legal systems connected to the dispute by the relevant local and foreign elements. As a result, jurists might take what could be described as a *public law* approach to conflict of laws questions. This is sometimes described as a concern for "comity." But "comity," and other unifying theories of the conflict of laws—theories that would promote anything other than a fair outcome in the instant case—have been treated with some suspicion by many in the English common law tradition. For example, the authors of successive editions of *Cheshire and North's Private International Law* have continued to express the following view of theory in the conflict of laws:

> What, in the light of the theories and approaches discussed above [that comprise the "American Revolution"], is the theoretical or doctrinal basis of English private international law? ....on what principle are the rules constructed? Is there one overriding principle from which they can all be deduced? ....Clearly such theoretical analyses are unsupported in English private international law. They are

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[17] J-G Castel *Canadian Conflict of Laws* (4th ed Butterworths Toronto 1997) 67 (emphasis added).

[18] J-G Castel and J Walker *Canadian Conflict of Laws* (5th ed Butterworths Toronto 2001) ¶1.6.

> alien to the common law tradition and if offered in argument would be a matter of surprise to an English judge. The instinct of an English lawyer is to test a proposed rule by its practical bearing on normal human activities and expectations. It is by this method that in his opinion the purpose of the law, which at bottom is to promote justice and convenience, can best be furthered. He is nothing if not an empiricist and a pragmatist. ....Private international law is no more an exact science than is any other part of the law of England; it is not scientifically founded on the reasoning of jurists, but it is beaten out on the anv il of experience.[19]

But what of the instincts of the Canadian lawyer? Must she alienate herself from the common law tradition in order to pursue an explanation for the approach taken in Canada to the conflict of laws that would go beyond summarizing discrete rules beaten out on the "anvil of experience"? Fortunately for her, as the decision of the Supreme Court of Canada in the *Morguard* case and other cases suggest, it seems unlikely that a Canadian judge would be surprised if, in addition to justice and convenience, it was argued that the purpose of the conflict of laws was also to foster the interests of Canadian federalism, and that a particular result could find support in those interests.

In the characteristic Canadian tradition of compromise, there has been resistance to the suggestion that one must choose between English empiricism[20] and American theory[21]—between a view of the conflict of laws as either purely private law or purely public law. Canadian courts have sought to reconcile their desire to show their considerable respect for other courts and their profound commitment to comity with their desire to do justice between the parties in the instant case. As was suggested in the quotation from Professor Castel's text above, Canadian courts have not readily conceded that a choice must be made between "order" and "fairness."

Accordingly, in altering the rules for the enforcement of judgments in the *Morguard* decision, the Supreme Court of Canada did not propose a rationale concerned primarily with the competing interests between each of the litigants and that explained why one should be favoured over the other. For example, it did not offer an explanation as to why plaintiffs should benefit from more generous rules for jurisdiction at the expense of defendants. Nor did the Supreme Court propose a rationale concerned primarily with the competing interests between litigants collectively and the civil justice system itself explaining why the needs of the civil justice system must prevail over a fair resolution of the dispute. The change in the law introduced in the *Morguard* decision was not explained as a result of balancing competing interests at all. It was not described as an important objective that would require some

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[19] P North and JJ Fawcett *Cheshire and North's Private International Law* (13th ed Butterworths London 1999) 31-32.

[20] It is not clear whether this resistance to theory is itself a product of the fact that, before the entry of the United Kingdom into the European Community, the English conflict of laws dealt only with purely international situations. The participation of the United Kingdom in the European Union seems to be giving rise increasingly to discussions of theory, which might ultimately affect even the conflict of laws. One early and interesting example is T Hartley 'Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community' (U Michigan L School, Michigan 1985) (Hartley).

[21] Although there have been some instances of considering the relative merits of Old World and New World approaches. See, for example, J Willis 'Two Approaches to the Conflict of Laws: A Comparative Study of the English Law and the Restatement of the American Law Institute' (1936) 14 Can Bar Rev 1; and E Hayes '*Forum Non Conveniens* in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation' (1992) 26 U British Columbia L Rev 41.

sacrifice. Rather, the Supreme Court proposed a rationale for the change based on a view that change was *possible* because it could be effected without any loss of fairness to the parties.[22]

Some would say that the interest in order and the interest in fairness are bound to be in tension and can never be wholly reconciled. However, the relevant question is not whether such a reconciliation is ultimately feasible, that is, whether the Supreme Court's proposal was realistic—the question is whether the commitment to such a reconciliation is characteristic of the Canadian approach to the conflict of laws. It is entirely possible that Canadian Confederation is itself not ultimately feasible, but in the very few instances in which referenda have ever played a part in Canadian politics, the question has arisen not from logic or pragmatism, that is as a question of whether Confederation made sense or whether in fact it would succeed. The question was whether Confederation was worth pursuing.

When the conflict of laws is conceived of as a matter of public law, *ie,* as law intended to foster the proper relationship between legal systems, it might seem likely to entail the kind of analysis that is undertaken in federal states in resolving the issues that sometimes arise in the course of private law disputes that relate to the division of powers between federal and regional authorities. It should not be surprising then that in the United States, where the conflict of laws is treated in some sense as public law, that there is a continuum between the subjects of constitutional law, the conflict of laws and procedural law as it is presented in the texts and the law school curricula. In the United States, the conflict of laws might be described as the part of constitutional law that is particularly relevant to dispute resolution in cross-border cases; or, put somewhat differently, it might be said that in the United States, the conflict of laws lies at the intersection between constitutional law and procedural law in private law disputes with connections to more than one jurisdiction.

Of course, some of the conflict of laws rules and principles that have been drawn from the common law and developed for application in international situations also form part of the American tradition of the conflict of laws. However, the bulk of the jurisprudence and the commentary in the conflict of laws in the United States is driven by constitutional law principles as applied to conflict of laws questions as they arise within the American federation. The rules for international situations seem then to have been derived from these domestic rules with necessary modifications. "The American Revolution"—a period of scholarship and jurisprudence in which Americans questioned traditional conflict of laws rules and in which they explored and developed special approaches to issues of the conflict of laws were devised to suit the needs of the American federation—reflects the essentially public law approach taken in the United States to the conflict of laws.[23] In simple terms, whether they are engaged in choice of law analysis or jurisdiction analysis, American courts regard the matters before them as matters relating to the allocation of government power within the federation in situations in which that power operates through private law adjudication.

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[22] *Morguard* (n 1 above). The underlying requirement of fairness to the parties has so clearly marked the tenor of the developments in the conflict of laws in Canada that in the one instance where the Supreme Court suggested that "order" should prevail over "fairness" in the individual case, the courts below moved steadily to revise the feature of the rule that would compromise fairness to the parties: *Tolofson v Jensen* [1994] 3 SCR 1022, 120 DLR (4th) 289 (*Tolofson*); J Walker "Are we there yet?: Towards a New Rule for Choice of Law in Tort" (2000) 38 Osgoode Hall Law Journal 331 ("Are we there yet?").

[23] DF Cavers 'A Critique of the Choice of Law Process' (1933) 47 Harvard L Rev 173; DF Cavers *The Choice of Law Process* (U Michigan P Ann Arbor 1965); WW Cook *The Logical and Legal Bases of the Conflict of Laws* (Harvard U P Cambridge Mass1942); B Currie 'Notes on Methods and Objectives in the Conflict of Laws' [1959] Duke L J 171; B Currie *Selected Essays on the Conflict of Laws* (Duke U P Durham 1963); A Ehrenzweig 'The Second Conflicts Restatement. A Last Appeal for its Withdrawal' (1965) 113 U Pa L Rev 1230; A Ehrenzweig *A Treatise on the Conflict of Laws* (West St. Paul 1962).

The challenge for the Canadian conflict of laws in developing the law in accordance with its constitutional foundation, like the challenge faced in other areas of the law based on the Canadian Constitution, has been to resist the conclusion that this process inevitably leads to adopting the same approach as that taken in the United States. While scholars such as Moffat Hancock[24] and John Swan[25] are to be commended for their groundbreaking work in urging the Canadian legal community to recognize the constitutional foundation for the conflict of laws, the vision of the constitutional foundation that they advanced did not seem to capture the spirit of the Canadian Constitution sufficiently to inspire courts and other scholars to develop the approach further. In simple terms, when Canadian courts consider questions of jurisdiction or choice of law, they do not see themselves as engaged in the same kind of analysis as that which is engaged in by American jurists, nor do Canadian courts see this analysis as furthering the same objectives. This is because the Canadian Constitution is different from the American Constitution, not just in the particular provisions it contains, but also in the way in which it operates.

To say that the approach that has been taken by Canadian jurists to questions of the conflict of laws is different from the distinctive and coherent approach taken by American jurists is not to say that the Canadian approach is not distinctive or coherent.[26] Despite the fact that Canada is a federation, Canadian jurists have not treated the conflict of laws as a branch of constitutional law and, until recently, they have not regarded Canadian federalism as establishing any particular requirements for the way in which conflict of laws questions should be approached. They have treated as matters of constitutional law virtually all conflicts between the subject matter jurisdiction of courts and the prescriptive jurisdiction of legislatures, both in cases of "vertical" conflicts and in those of "horizontal" conflicts;[27] and they have applied a version of the English conflict of laws rules (that is, those devised for international conflicts of laws) to issues of personal jurisdiction and applicable law. The treatment of constitutional law and the conflict of laws as separate areas of law in Canada is one of the distinctive features of Canadian law that can be traced to the view that the role of private law in governance is to support effective dispute resolution in local communities according to local standards and that this function is fundamentally different from the role of public law, which is to implement national or international standards of conduct.

As this suggests, distinctions between the ways in which the conflict of laws operates within various federal or regional contexts must ultimately be explained as a function of different perspectives taken in those federal or regional systems on the role of private law adjudication in governance. In other words, the fundamental point of comparison between various federal and regional arrangements for illuminating the particular relationship between the Canadian Constitution and the conflict of laws must be that of the nature of the relationship between the judiciary and the other branches of government, particularly the legislature, in the ongoing evolution of federal government. In the final analysis, an inquiry

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[24] M Hancock 'Tort Problems in Conflict of Laws Resolved by Statutory Construction: The Halley and Other Older Cases Revisited' (1968) 18 U Toronto L J 331.

[25] J Swan 'Canadian Constitution, Federalism and the Conflict of Laws' (1985) 63 Can Bar Rev 269; J Swan 'Federalism and the Conflict of Laws: The Curious Position of the Supreme Court of Canada' (1995) 46 South Carolina L Rev 923.

[26] And it is perhaps this informal consensus among Canadian jurists that, given the difficulty of articulating the contours of that vision, has prompted scholars such as S Kierstead in *Conflict of Laws in Canada: The Case for an Interpretive Approach* LLM Thesis (University of Toronto Toronto 1993) (Kierstead) to conclude that "the Supreme Court of Canada holds the key to integrating federalism concerns with cases of geographic complexity."

[27] For the distinction between "vertical" and "horizontal" conflicts, see AT von Mehren and DT Trautman *The Law of Multistate Problems* 995, 1038-41 (Little Brown Boston 1965).

into the requirements of the Canadian Constitution for the conflict of laws can only be pursued by examining the differing roles that the courts play in various federal and regional systems.

As a result, the search for an explanation to the revelation and the paradox of the constitutional foundation for the Canadian conflict of laws could also serve to illuminate aspects of the nature of federalism, particularly of the role of the courts in sustaining a federation. In other words, even if the conflict of laws is treated as a branch of private law in the Canadian legal tradition, it will be necessary to consider what public law function is served by private law adjudication. This requires an examination of the role of private law adjudication in governance. Since the public law function of the conflict of laws has been considered in detail only in the United States, it will be necessary to reassess what equivalent "public law function" the conflict of laws serves in the Canadian legal tradition.

3. The Canadian Constitution

To reassess "traditional conflicts rules...in light of the principles of our constitutional law" it is necessary to identify the relevant principles of constitutional law that could form the basis for the assessment. Where are these principles to be found, and of what do they consist? The conceptual difficulties presented by this question alone might suffice to explain why the constitutional foundation of the Canadian conflict of laws has not yet be considered in any comprehensive way even though it has now been acknowledged.

The leading text on the Canadian Constitution is entitled *Constitutional Law of Canada* and not simply "The Constitution of Canada." This could be because, as its author, Professor Peter Hogg, explains, unlike "[i]n most countries [where] the bulk of the constitutional law is contained in a single constitutional document, which can be and usually is described as 'the Constitution'....in Canada...there is no single document comparable to the Constitution of the United States, and the word 'Constitution' accordingly lacks a definite meaning."[28]

Although the word "Constitution" may lack a definite meaning, according to Professor Hogg, the term "Constitutional Law" does not. The definition he has provided for "constitutional law" is "the law prescribing the exercise of power by the organs of a State. It explains which organs can exercise legislative power (making new laws), executive power (implementing the laws) and judicial power (adjudicating disputes), and what the limitations on those powers are."

This description has been accepted as beyond controversy, but it is important to observe in it the influence of American constitutional law in treating the three branches of government the same. The basis for this influence is the evident and justified[29] admiration for American constitutional law of Canadian constitutional lawyers. The influence of American constitutional thought on the analytic approach taken to the Canadian Constitution is further evident in Professor Hogg's description of the Canadian Constitution. In explaining the nature of the Canadian Constitution in the current edition of his text, he begins with a description of the United States Constitution as follows:

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[28] P Hogg *Constitutional Law of Canada* (4th ed Carswell Toronto 1996) (Hogg) 2.

[29] Such admiration has precedents: for example JG Bourinot's observation that: The model taken by Canadian statesman was almost necessarily that of the most perfect example of federation that the world has yet seen, though they endeavoured to avoid its weaknesses in certain essential respects." JG Bourinot *The Federal Constitution of Canada* (W Green Edinburgh 1890) 135-136. Admittedly, in 1890, in modern constitutions, in particular federal constitutions, the main precedents were the United States (1789) and the Swiss (1948) Constitutions.

> Naturally, the brilliant men who framed that document borrowed from their British traditions, as well as from other sources. But they wanted a document that would be complete in itself, for the previous constitutional rules had been irrevocably repudiated, and the new document was to be the foundation stone of the new nation. Accordingly, they set out the essentials of the entire scheme of government, legislative, executive and judicial—in one impressive document.[30]

When compared with the United States Constitution, the British North America Act 1867,[31] which "did no more than was necessary to accomplish confederation," is a far more modest and less comprehensive statement of "the law prescribing the exercise of power by the organs of a State." Viewed in this way, the Canadian Constitution seems deficient—it is full of gaps and anomalies. However, it could be a mistake to approach Canadian constitutional law by focusing on a single central text as the necessary starting point because it requires the adoption of a perspective on constitutional law that is not really Canadian. It would entail cobbling together inferences to fill in the gaps and reading things into the seemingly incomplete text without due regard for the way in which the particular inclusions in the text of the British North America Act 1867 and exclusions from it might be a product, deliberate or otherwise, of a different constitutional tradition. This is not to say that the relevant features of the Canadian Constitution cannot be found articulated in particular texts or in particular moments in history. Key texts and critical moments exist. However, they are not necessarily articulated in central texts such as those that comprise the American Constitution.

As an early Canadian legal scholar, Herbert Smith, said of the distinctiveness of the Canadian Constitution

> ...there is one difference which does not appear in black and white, and it is perhaps the most vital of them all. The Constitution of the United States is to be read literally, and the British North America Act is not. Of this essential doctrine there is only one hint to be found in the actual text of the statute, and that is the statement in the preamble that the Constitution of the Dominion is to be "similar in principle to that of the United Kingdom." Under the cover of these words there has been imported into Canada the whole system of conventional understandings....[32]

It is a challenge for Canadian constitutional lawyers (as it would be for any lawyer) to resist treating the principal texts—the Constitution Act 1867 and the Canadian Charter of Rights and Freedoms[33]—as the principal basis for of their scholarship. It is even more of a challenge, when resisting the temptation to read the text of the Constitution Act literally, to find reference points for interpreting features of the Constitution that are not set out on the text other than those that are merely derivative of "conventional understandings" imported from the United Kingdom, a country whose constitutive circumstances are different from Canada's. This is particularly challenging because, as Professor Smith pointed out, the most obvious indication in the text of the Constitution Act that some of the relevant features of the Canadian Constitution may be found beyond the text is the statement that the Constitution was intended to be "similar in principle to that of the United Kingdom."

Perhaps Canadian constitutional lawyers should look beyond the text and beyond the British constitutional traditions for guidance. However, it would have been odd for the drafters of the British North America Act, an enactment of the United Kingdom Parliament, to

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[30] Hogg (n 28 above) 2.

[31] BNA Act (n 14 above).

[32] H Smith *Federalism in North America* (Chipman Law Publishing Co Boston 1923) (Smith) 106-107.

[33] The Canadian Charter of Rights and Freedoms, being Schedule B of the Canada Act 1982 (UK) c 11.

recommend that Canadians use any other tradition to interpret their Constitution or fill in its gaps. Nevertheless, it is still surprising that the resistance to any meaningful legal pluralism persisted well into the 1960s with works such as Professor Wheare's *Federal Government,* which contained chapters outlining "When Federal Government is Appropriate" and "How Federal Government Should be Organized."[34] The suggestions that federal governments operate according to a single normative model and that variations from it in existing examples constitute defects or deviations has tended to impede serious inquiry into the reasons for differences between federal systems.

Still, Canadian lawyers—jurists, practitioners and scholars—seem to be aware, if only dimly, as Professor Hogg was aware in entitling his text *Constitutional Law of Canada* and not "the Canadian Constitution," that there is more to the Canadian Constitution than the law that is set down in key texts. Indeed, in describing the term "constitutional law", Professor Hogg includes another description of it offered by two other Canadian authors, who said that the Constitution was "a mirror reflecting the national soul,"[35] and Professor Hogg adds to this that the constitutional law "must recognize and protect the values of the nation."[36]

Accordingly, for the purposes of this thesis, the "Canadian Constitution," will generally be used to refer to the law, some of which is derived from understandings, texts and events other than those that emerged from Confederation and, therefore, are not conventionally understood as Canada's main constitutional documents, but nevertheless represent law that "reflects the national soul" and that "recognizes and protects the values of the nation." To the extent that the traditional conflict of laws rules can be reassessed in light of the law that reflects the national soul, it will be possible for the first time to begin to articulate the basic tenets of the *Canadian* conflict of laws.

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[34] KC Wheare *Federal Government* (OUP London 1963).

[35] Which Professor Hogg cites to RI Cheffins and RN Tucker *The Constitutional Process in Canada* (2nd ed McGraw-Hill Ryerson Toronto 1975) 4.

[36] Hogg (n 28 above) 1.

B. Comparative analysis

1. Possible bases for comparison

If the Canadian Constitution establishes particular requirements for the conflict of laws, then the principle focus for those requirements must be in the way that they promote the particular aims of the Canadian federation. Since the nature of those aims has been articulated only partially in an authoritative text, it could be helpful to compare Canadian federal arrangements with the arrangements in other federal and regional systems in the ways that those arrangements affect the conflict of laws. Even if the potentially relevant features of the Canadian Constitution were deliberately omitted from the text of the Constitution Act 1867 or the Canadian Charter of Rights and Freedoms, it could still be helpful to compare the Canadian Constitution, broadly speaking, to other Constitutions. How does Canadian federalism differ from the federal arrangements in, for example, the United States, or Australia, or from the regional arrangements in Europe so as to require different conflict of laws rules?

For example, could the particular division of powers between federal and regional governments be significant for the conflict of laws? The division of powers has been regarded as the heart of the British North America Act 1867 and, before the advent of the Canadian Charter of Rights and Freedoms, the Division of Powers was the basis for the standard syllabus in constitutional law courses in Canada. Clearly, the constitutional provisions for the exercise of legislative and executive power by the federal and the provincial governments are relevant to the conflict of laws. But studying the Division of Powers alone seems unlikely to provide a complete or compelling explanation for many important questions, such as why the relationship between the Constitution and the conflict of laws has been recognized explicitly in other federations, such as the American federation, but has been overlooked in Canada. For example, the fact that divorce is a matter of federal law in Canada but a matter of State law in the United States and Member State law in Europe does not seem likely to yield any useful insight into why the United States Constitution would require fixed rules for handling conflicts of laws to be written into the Constitution itself where in Canada such requirements would be indicated only by constitutional arrangements that give rise to implicit imperatives.[37] Nor does it explain why the recognition of constitutional requirements for the conflict of laws in other federal and regional systems produces the obligation to curtail an interest in fairness between the parties for the sake of institutional objectives dictated by the needs of federalism, where its recognition in Canada has served only to foster a fresh concern for fairness between the parties or, at least, has not obliged courts to compromise that fairness. These kinds of questions would seem to require a comparison that addresses more fundamental differences between federal systems than those relating to the particular division of powers found in each federation.

If differences between the division of powers in federal and regional arrangements are unlikely to provide an adequate explanation, then perhaps a comparison of the stated objectives of conflict of laws rules within the federal or regional arrangements could be more informative. This might seem to be a more promising line of inquiry, but it is unlikely ultimately to be fruitful because these stated objectives are themselves particularized products of the differences between Constitutions and not bases for those differences. For example, the touchstones for American conflict of laws rules may be "the traditional notions of fair play and substantial justice,"[38] and the authority for the Brussels I Regulation may include "the free movement of persons" and "the sound operation of the internal market,"[39] and the Canadian

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[37] *Morguard* (n 1 above) 272.

[38] *International Shoe Co v State of Washington* 326 US 310, 66 S Ct 154 (1945).

[39] Brussels I Regulation (n 11 above).

courts may aspire to meet the requirements of "the principles of order and fairness", but how can these touchstones be compared? Does "fair play" in the American tradition represent the same concern as "fairness" does in the Canadian tradition? Do the requirements of "fair play" and "fairness" relate primarily to fairness in the way the government treats defendants, as they seem to in the American jurisprudence, or to fairness between the parties, as they seem to in the Canadian jurisprudence? Is the "fairness" in question mainly concerned with the right to move freely between places within the federal or regional system, as might be the case in the European context, or is this "fairness" concerned with protecting other kinds of rights? Is "the sound operation of the internal market" in the European Union likely to give rise to conflict of laws rules similar to those based on "substantial justice" in the United States or "the principle of order" in Canada? All of these questions seem interesting but none of them seems likely to yield an explanation for the differences in conflict of laws rules without reference to some other basis for comparing the assumptions underlying the regimes in the various federal systems. What are those assumptions? To what do they relate? How have they been formed, and what sustains them?

The answer can only be that if the conflict of laws is the study of the relationship between legal systems as it affects the adjudication of disputes, then the constitutional requirements of any federal system for its conflict of laws must be those which reflect "the national soul" or "the values of the nation" as these shape the relationship between the legal systems within the federation in the adjudication of disputes. To compare these, however, whether or not their spirit has been captured in catch-phrases such as "the traditional notions of fair play and substantial justice" or "the principles of order and fairness," means ultimately to find a feature of "the law prescribing the exercise of power by the organs of a State," as it was described by Professor Hogg, in respect of which each set of requirements represents a particular approach or perspective on governance. Ultimately, the features of the Constitution of a federation that form the foundation for the conflict of laws rules must be sought in the view taken by that nation of the role that private law adjudication plays in governance, and, in particular, in managing the relationships between the legal systems within the federation.

2. Existing scholarship

To propose to compare the role of private law adjudication in the management of federal relations identifies a daunting challenge—daunting because there is a fundamental lack of scholarship in three critical areas.

First, the challenge is daunting because the role of private law adjudication in governance generally, and the role of the courts in federalism in particular, do not comprise an established body of jurisprudence and commentary outside the United States. Historically, outside the United States, the subject of federalism has consisted almost exclusively of the examination of the relationship between the political authorities within a federation. Rarely, has there been any examination of the role of judicial authority in defining the legal systems and their relationships to one another within a federation. As Brian Opeskin and Fiona Wheeler noted in the Preface to their recent book, *The Australian Federal Judicial System,*[40]

> In the United States, the intricacies of the federal judicial system have long attracted the attention of law students, scholars and practitioners alike. There, the importance of the subject matter is attested by the weight and influence of successive editions of works such as Charles Wright's *The Law of Federal Courts,* and Erwin Chemerinsky's *Federal Jurisdiction.* Yet, while some might take the view that in the United States too much has been written on the subject, in

[40] B Opeskin and F Wheeler (edd) *The Australian Federal Judicial System* (Melbourne U Press Melbourne 2000) xi (footnotes omitted) (Opeskin & Wheeler).

> Australia the converse is true. In some ways this is surprising. The hypnotic fascination of Australia's constitutional drafters with the United States model is nowhere more clearly evident that in Chapter III of the Australian Constitution, which finds close parallels w ith Article III of its American counterpart.
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> Despite some early Australian interest in the subject...Chapter III has long been a neglected subject of legal scholarship.[41]

The challenge of studying the interplay between the Canadian Constitution and the conflict of laws is daunting then because it does not involve simply combining and comparing ideas developed in two areas of established legal scholarship. It involves a kind of interdisciplinary study in which the subject matter of one of the areas of law—the relevant constitutional law—remains largely uncharted.

Second, the challenge is daunting because, as might be expected in view of the novelty of the subject of the book edited by Opeskin and Wheeler, there is almost a complete lack of systematic comparative scholarship on federal judicial systems. A recent Canadian work of note is Ronald Watts's *Comparing Federal Systems,* which compares eleven contemporary federations "chosen for their particular relevance to issues that are currently prominent in Canada and for the lessons they may provide."[42] However, apart from a brief section on judicial interpretation of constitutions, the work does not include comparative analysis of the court systems or the role of the institutional design of the judicial branch of government in sustaining effective means of maintaining the relations between the legal systems within federations, or of its role in governance in general.[43] This is not entirely surprising in that Professor Watts is a political scientist and not a lawyer. What is surprising is that only one or two of the 29 member organizations in the International Association of Centers of Federal Studies, which are primarily located in academic facilities, appear to be located in law faculties. Although it might not be surprising that political scientists would focus on the political organs of government, it is surprising that comparative federalism relating to court systems and the judicial branch of government would tend to be so neglected by lawyers.

In a rare concerted study of the subject, an invitational conference held in 1994 on Courts and Jurisdiction in Federal Systems in the United States, Canada and Australia, produced a collection of papers on a variety of topics that were published in a special issue of the South Carolina Law Journal. In the introduction to the issue it was noted,

> While federalism has been explored in innumerable contexts, few scholars have chosen to look at the court systems of federated or confederated nations as a key to understanding particular views of the federal-state relationship. Arguably, however, governmental power most closely touches upon the lives of citizens through the exercise of judicial authority. The allocation of court jurisdiction between a central government and its component states results from an intentional decision concerning the manner in which justice can be effectively administered in

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[41] "Article III" and "Chapter III" provide for the judicial power of the federation in the United States Constitution and the Australian Constitution respectively. The "too-much written" includes studies such as: M Redish *Federal Jurisdiction: Tension in the Allocation of Judicial Power* (Bobbs-Merrill New York 1980); M Redish *The Federal Courts in the Political Order* (Carolina Academic Press Durham N Carolina 1991); WH Bennett *American Theories of Federalism* (U Alabama Press Kingsport Tenn 1964); and R Carp and R Stidham *The Federal Courts* (Congressional Quarterly Washington DC 1985), which, understandably, focus on issues that are peculiarly important to the American federal system. The "early Australian interest" though not cited includes JWF Finnis *The Idea of Judicial Power* DPhil Thesis Oxford 1965 (Finnis) and T Simos *Federal Judicial Power in Australia* BLitt Thesis Oxford 1958.

[42] R Watts *Comparing Federal Systems* (2nd ed Queen's U Press Kingston 1999) (Watts) *xi.*

[43] International Association of Centers of Federal Studies' website at http://www.iacfs.org/.

> a federal nation. Those decisions, or series of decisions, eloquently reveal national needs and public perceptions of the proper role of federal and state courts.[44]

While this collection of papers represents an inspiring effort to identify features of the respective legal systems that would form interesting bases for comparison, the torch has yet to be been taken up in a sustained and systematic comparison of the way in which the "values of the nations" or "national souls" are reflected in differing "national needs and public perceptions of the proper role of federal and state courts."

Third, the challenge is daunting because the lack of scholarship in Canada is a function in large measure of the singular lack of law on the subject. Canadians have not generally shared the "hypnotic fascination of Australia's constitutional drafters with the United States model" described by Opeskin & Wheeler, nor did the drafters of the Canadian Constitution seek to emulate the United States model. Accordingly, it is not suggested that it should be surprising that, in comparison with the United States, little jurisprudence and scholarship has been devoted to the "intricacies of the federal judicial system" in Canada. However, despite any intentional differences that might exist between the texts of the United States Constitution and the Canadian Constitution, such an enormous body of constitutional jurisprudence and scholarship in a neighbouring common law federation such the United States cannot help but have had a significant influence in the evolving understanding of the subject of constitutional law in Canada and of the appreciation of the Canadian Constitution—as has already been noted. What *is* surprising, then, is that the fact that the Canadian Constitution *has no equivalent at all* to the basic constitutional provisions for the courts found in Article III of the United States Constitution and section 71 of the Australian Constitution, seems to have been the subject of little if any comment among constitutional scholars. In other words, the observation by Opeskin and Wheeler that a great deal has been written about Article III and very little about Chapter III, might be transposed to the Canadian context by saying it is surprising that so little has been said about the fact that the Canadian Constitution has no Article III or Section 71.

As mentioned above, in his text on the subject, Professor Hogg observed, "The B.N.A. Act did not follow the model of the Constitution of the United States in codifying all of the new nation's constitutional rules. On the contrary the B.N.A. Act did no more than was necessary to accomplish confederation."[45] Professor Hogg went on to note the main gaps, including the lack of an amending formula, specific provisions for the office of the Governor General (whose powers are conferred in the Act), provisions for the system of responsible government, provisions establishing a Supreme Court, and provisions entrenching civil rights. He then noted that the Canada Act 1982 filled some of these gaps by introducing an amending formula and a Charter of Rights and Freedoms. Missing from this list of gaps, though, is the granting authority for the courts.

Why has this gap not invited comment? Could it be that there is sufficient comfort among constitutional lawyers with the fact that the source of judicial authority, and, therefore, the definition of its nature and scope, lies outside the text of the Constitution that the point has not been found noteworthy? Or has the influence of the American model of constitutional law been so strong that constitutional scholars have inadvertently read such a provision into the text, assuming that its omission was just an oversight? Have they taken the view expressed by the British scholar, Trevor Hartley when he observed, "It goes without saying that a federation has to have a constitution and this must surely be in written form. (A largely unwritten constitution of the British type would hardly be feasible outside the very special circumstances

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[44] H Johnson "Introduction" (1995) 46 South Carolina L Rev 641.

[45] Hogg (n 28 above) 3.

of the United Kingdom.)"?[46] In so doing, have Canadian constitutional lawyers simply assumed that a provision such as a grant of judicial power must exist somewhere in the Constitution and, when it failed to emerge as a point of controversy, their attention was drawn elsewhere to other provisions that have come to be the focus of litigation and judicial consideration?

There is no doubt that Canadian courts have played a vital role in shaping the contours of the Canadian judicial system, and in this way Canada is not very different from other common law countries. However, where as Opeskin and Wheeler noted regarding the Australian legal system that "...history has demonstrated the vitality and dynamism of Chapter III of the Constitution in shaping the contours of the Australian judicial system,"[47] the scholarly application of this vitality and dynamism in Canada has not benefited from a focal point in a specific textual provision or series of provisions. No such grant of authority exists upon which jurisprudential and academic commentary might also be based. In what seems to be the only comparative study of the American and Canadian federal systems, a little book published in 1923, containing almost no scholarly references, Herbert Smith noted two factors that could have contributed to the lack of scholarship in the field of comparative federalism in Canada at the time. They were, the lack of adequate legal training[48] and the absence of textual provisions, either in the Constitution or in legislation, that Canadian courts could interpret as a means of generating a body of jurisprudence on the subject. According to Professor Smith, as a result of the absence of provisions in the text, "this part of the Constitution can never form the subject of litigation in a court of law. The courts can only interpret the statute, and for them it must mean exactly what it says.... For these reasons we must recognize that a very large part of the Canadian Constitution—perhaps the most important part—lies entirely beyond the power of judicial definition."[49]

Clearly this is not entirely true. The Supreme Court of Canada found a "full faith and credit"—like obligation in the Canadian Constitution that it said did not need to be included in the text.[50] However, the lack of a focal point for judicial and academic consideration makes the constitutional foundation of the conflict of laws a challenging subject to address. Still, there exists a largely uncollected corpus of assumptions and tendencies in Canadian jurisprudence and scholarship that reflect a consensus on the role of judicial authority in the course of private law adjudication in the governance of Canada and in the management of federal relations. This consensus, despite its lack of articulation in an authoritative text, seems unassailable—almost as unassailable as the basis for the kind of affirmation contained in the American Declaration of Independence: "We hold these Truths to be self-evident..." Further, it is both as firmly entrenched as a provision in a constitutional text might be in a legal tradition that bases itself on constitutional texts, and as well defined and distinctive as might be a clearly worded provision.

To explain this distinctive approach to judicial authority rather than merely to affirm its existence, and to make its distinctiveness meaningful to Canadians and to others without

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[46] Hartley (n 20 above).

[47] Hogg (n 28 above) xii.

[48] Professor Smith blamed this on "the narrowly provincial spirit in which bar regulations are framed" and complained that "most of the provincial bar societies combine to penalize the student who desires to study outside his own province, with the result that in many cases the provincial law schools are scarcely more than dependencies of the local bar organization, and much of the instruction provided is little more than supplementary lecturing for young clerks who spend the greater part of their day in offices." Smith (n 32 above) 104-105.

[49] Smith (n 32 above) 107-108.

[50] *Morguard* (n 1 above).

the benefit of reference points in textual provisions or jurisprudential or academic interpretation of them, it is necessary to have recourse to a range of reference points, including those in legal history and legal theory. While it is relatively unusual in Canada in private law scholarship, particularly in the conflict of laws, to consider non-legal materials, it is not unprecedented.

In 1992, an American scholar, Alan Watson, wrote a book entitled *Interstate Choice of Law and Early-American Constitutional Nationalism: An Essay on Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws,* which traced the doctrine of comity as it came to be articulated in Story's writings. He argued that the doctrine, though important to American federalism, developed in a way that was mere "happenstance"—not planned and not a product of "the psyche of the nation."[51] He traced the doctrine from its roots in the writings of Huber, though its evolution in English and Scottish law to Story's *Commentaries on the Conflict of Laws.* This work was "the main vehicle for the acceptance of this different view of comity, but Story had simply misunderstood Huber." A more interesting account of the history of comity in the United States was offered by Canadian legal historian Blaine Baker, who under the guise of a review essay of Professor Watson's book,[52] offered the central propositions of an essay that he, Professor Baker, had written many years earlier—an essay that had initiated an inquiry that he had later abandoned. Professor Baker described his account as follows:

> My alternate history begins by situating Story's treatment of insterstate conflicts of law in the context of intergovernmental and intercourt conflicts that preoccupied early-American federalists, and animated antebellum [pre-Civil War] constitutional rhetoric. It proceeds by reconstructing Story's theory of sovereignty that privileged individuals rather than states or nations, and it characterizes that theory as an opposing position to statist tendencies in antebellum law and government. *Commentaries on Conflicts* was written in an American crucible of constitutional nationalism, market culture, and republican lawyering that emphasized vesting and protecting private rights, circumscribing state institutions, and standardizing pluralistic, regional norms. ...Story's interstate conflicts rules were quasi-constitutional norms designed to regulate the conduct of states and nations, with a view to preventing them from entrenching unduly on the privately acquired rights of interstate traders... .Contrary to Watson's conclusions in *Comity of Errors*, Story's interstate choice-of-law doctrine was neither happenstance nor autonomous from the time and place in which it was conceived. It emerged directly from the psyche of New England federalism....

Apparently, Professor Baker's original paper had prompted enthusiastic responses from his mentors, who ranked among the leading American conflict of laws scholars and who encouraged him to pursue his research. However, he postponed further study indefinitely because he was intimidated not by "surplus of scholarly competition" but by a lack of resources including a "lack of historiography on the conflicts of laws." As interesting a study as was the one Professor Baker had begun, it is in some ways more interesting that he identified Story's sensitivity to the needs of the federal state in which Story found himself as a

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[51] A Watson *Interstate Choice of Law and Early-American Constitutional Nationalism: An Essay on Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws* (U Georgia Press Athens, GA 1992) 84.

[52] B Baker 'Interstate Choice of Law and Early-American Constitutional Nationalism: An Essay on Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws—Review Essay' (1993) 38 McGill LJ 454 (Baker).

key factor in securing the persuasiveness of Story's version of comity.[53] The conflict of laws regime that Story advocated in writing his *Commentaries* was compelling because it accorded with the American Constitution and, in this way, it reflected "the national soul." While this thesis seeks to generate a comparable account of the link to the Canadian conflict of laws, the scholarly literature that would help to link "contemporary psyche of New England" with Story's *Commentaries* was so sparse that Professor Baker felt incapable of developing an account of that link.

Central to this thesis is the belief that it is possible to provide an account of the Canadian conflict of laws that emerges from the psyche of Canadian federalism, and the belief that it is possible to trace the link between the two in a compelling way. Clearly, the lack of interdisciplinary scholarship[54] that would assist in explaining the constitutional foundation for the Canadian conflict of laws prevents any study that seeks to identify relevant reference points in legal history and legal theory from hoping to address those points with the kind of rigour or in the degree of detail that would meet the standards for scholarship appropriate to the fields of legal history and legal theory. To insist on such standards of rigour and detail could lead only to abandoning the inquiry. The best that could reasonably be hoped for would be that the points touched upon would be articulated in a way that was not markedly inconsistent with prevailing views and that these points would be canvassed in sufficient detail to contribute effectively to the understanding of the nature of judicial authority in Canada and the way in which it shapes the conflict of laws. If an appreciation of this dimension of the conflict of laws can assist in constructing a narrative of the conflict of laws that even remotely approaches the effectiveness of Story's, it is certainly worth pursuing, however tentative and clumsy it might be in this early iteration. And yet the promise that such a narrative could be written surely exists, if only figuratively, in decisions such as the *Morguard* decision in which Canadian courts unanimously agree to overturn well-established rules for the sake of principles that they considered to be of such fundamental importance that they were described as "constitutional imperatives."

If the promise of a study of this aspect of the conflict of laws, even conducted as a work of historical scholarship in the United States, could be received so enthusiastically by leading American scholars of the conflict of laws interested in current developments and future trends in that country, then it would seem wrong at a time when the Canadian conflict of laws is in such a formative period to permit the intimidating lack of scholarship in the area to delay pursuit of such a study here. Such a study could assist not only in improving insight into the operation of Canadian conflict of laws but also in identifying areas of inquiry in Canadian constitutional law and in comparative analysis with the Constitutions of other federal and regional systems that might fruitfully be pursued. The emerging interest in such

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[53] According to Professor Baker, "the controlling question therefore should be why Story misrepresented Ulrich Huber's earlymodern Dutch conflicts scholarship, rather than merely whether or how he misstated it": Baker (n 52 above).

[54] Some comparative studies sound promising, such as W Tetley 'A Canadian Looks at American Conflict of Law Theory and Practice, Especially in the Light of the American Legal And Social Systems (Corrective vs. Distributive Justice)' (1999) 38 Columbia J Transnational L 299 but they seek only to highlight discrete social implications of certain features of the legal system and to suggest that their adoption might be worthwhile. For example, Professor Tetley argues that Canadians might benefit from a better understanding of American tort law and conflict of laws rules because "the corrective justice approach to tort compensation helps keep the taxes of Americans lower than those of other countries (*eg,* Canada), where a more distributive justice model requires higher taxation to fund more comprehensive social programmes." Despite its utility, this kind of comparison does not explain why the substantive law rules or the conflict of laws rules are different.

scholarship is suggested by the publication of collections of essays such as that edited by Opeskin & Wheeler.[55]

The comparison between the established interest in the exercise of political authority within federations and the emerging interest in the exercise of judicial authority in intra-federal contexts is analogous to the comparison between the established interest in political relations as a subject of international law and the largely unexplored subject of comity. In this way, a study of the relationship between the Constitution of Canada and the conflict of laws that compares it with the corresponding relationship in other federal systems could be described as a comparative study of "intra-federal comity"—except, of course, that the field of "intra-federal comity" is itself, largely unexplored. However, in some ways, a comparative study of the role of private law adjudication in maintaining federal relations promises to be less speculative than the study of international comity because it operates in a context in which the courts and the legislatures have the capacity to make law that is bilaterally and multilaterally binding. Enforceable rules can be articulated, tested and revised. Rationales for such rules can be developed and criticized both for the efficacy in producing politically and legally sound results and for their theoretical good sense. Although it may be as yet undeveloped as a field, the study of intra-federal comity has promise.

Further, a *comparative* study of intra-federal comity could help to explain a range of distinctions that arise between conflict of laws regimes which have, until now, been assumed to be merely the product of differences of opinion. For example, few have ever tried to explain why forum shopping is tolerated in the United States as a "national pastime" when it is considered harmful to federalism in Australia and Canada. Similarly, no one has yet produced a cogent explanation for the virtually unanimous determination by Canadian courts that Canada's version of full-faith and credit should automatically be applied to foreign judgments in the same way it is applied to Canadian judgments when it seems equally obvious to Europeans that the benefits of generous rules for the enforcement of European judgments should be confined to litigants domiciled in Member States.[56]

In a rapidly shrinking world, in which there is increasing pressure to establish closer and more sophisticated relations among legal systems within countries and regions and between countries and regions, it is increasingly important for there to be a good understanding of the various models that exist for relations among legal systems. There have been lengthy and detailed negotiations at The Hague in recent years concerning proposals for a multilateral judgments convention.[57] However, in seeking consensus on particular rules of the conflict of laws, it does not appear that anyone has thought to engage in an examination of the role that the rules might play within the context of the legal system in which they operate. To the extent that a particular rule serves a critical function in a particular legal system, understanding that function could help to explain how best to meet the needs of the legal system served by that rule within a larger system, and it could help to explain why such a rule would be well-suited or ill-suited for inclusion in a larger system.

To try to construct a supra-national or multilateral system, such as a judgments regime, that purported to regulate relations between legal systems that each take different approaches to the regulation of relations between legal systems without also trying to understand the

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[55] Opeskin & Wheeler (n 40 above).

[56] See Article 4 of the Brussels I Regulation (n 11 above).

[57] See Hague Conference on Private International Law "Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters" adopted by the Special Commission, 30 October 1999, revised 6-22 June 2001, available online at www.hcch.net/e/conventions/draft36e.html. (Hague Judgments Convention)

rationale for these different approaches would seem likely to degenerate into political wrangling. Negotiations that did not address directly the concerns of the nature and extent of the commitment of the constituent legal systems to the particular rules being negotiated would seem likely to be fraught with frustrations and misgivings.

A comprehensive study of that sort of all the conflict of laws rules is beyond the scope of this thesis. Nevertheless, it is possible to identify particular rules that have been at issue recently in Canada and to offer, as an illustration of the kind of analysis proposed, an explanation of the constitutional function served by those rules, or of the way in which those rules reflect deeply held attitudes toward the role of private law adjudication in government.

This kind of analysis would seem critical to any serious effort to compare or to rationalize conflict of laws regimes. Efforts to compare and to harmonize conflict of laws rules in civil law countries, such as have been undertaken over the years by the Hague Conference on Private International Law, have relied on the assumption that there exist similar constitutional structures underlying the conflict of laws rules to be harmonized. Where this is the case, it is possible simply to treat particular conflict of laws rules as alternative attempts to solve particular problems in the conflict of laws, and to compare their relative effectiveness in doing so. Similarly, efforts to compare and to harmonize conflict of laws rules in common law countries have tended to occur in the ordinary course of common law analysis as a function of the assumption that the common law is and should be the same from one common law country to another subject only to the variations warranted by the facts of particular cases.

Since the American conflicts revolution there has been less tendency to compare American conflict of laws rules with those that operate elsewhere. Nevertheless, some examples do exist. In the late 1950s through the early 1970s, the Parker School of Foreign and Comparative Law published a series of Bilateral Studies in Private International Law.[58] In most of the volumes, which involve bilateral comparisons with civil law countries, the analysis focuses on the comparison of discreet conflict of laws rules. However, in the only volume to compare American conflict of laws rules with those of another common law country, Australia, the author, Zelman Cowen, makes a telling observation about the study in the Foreward. He says

> Australian Private International Law has grown up very much under the shadow of the English law as elaborated by English Court of Law. But Australia is a federation, and the framers of the Commonwealth Constitution drew heavily on American precedents and experience. Many private international law problems arising within Australia lead or should lead to reference to American experience. This is the case with such matters as full faith and credit clauses which are

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[58] The following series was published by Oceana in New York: A Nussbaum *American-Swiss Private International Law* (1st ed 1951, 2d ed 1958); GR Delaume *American-French Private International Law* (1st ed 1953, 2d ed 1961); RD Kollewijn *American-Dutch Private International Law* (1st ed 1955, 2d ed 1962); PJ Eder *American-Colombian Private International Law* (1956); M Domke *American-German Private International Law relations cases, 1945-1955* (1956); Z Cowen *American-Australian Private International Law* (1957) (Cowen); A Ehrenzweig, C Fragistas and A Yiannopoulos *American-Greek Private International Law* (1957); A Philip *American-Danish Private International Law* (1957); PG Garland *American-Brazilian Private International Law* (1959); A Etcheberry Orthustéguy *American-Chilean Private International Law* (1960); I Seidl-Hohenveldern *American-Austrian Private International Law* (1963); A Ehrenzweig, S Ikehara and N Jensen *American-Japanese Private International Law* (1964); R Lombard *American-Venezuelan Private International Law* (1965); H Nial *American-Swedish Private International Law* (1965); W Goldschmidt and J Rodriguez-Novás *American-Argentine Private International Law* (1966); T Ansay *American-Turkish Private International Law* (1966); G Van Hecke *American-German Private International Law* (1968); U Drobnig *American-German Private International Law* (2d ed 1972).

> common to both constitutional schemes; it should be the case also in many matters arising between state which are not subject to specific constitutional mandates.[59]

The suggestion that Australian private international law ought to be developed through reference to American precedents because the Australian constitution is similar to that of the United States would seem to be consistent with the argument made in this thesis. On critical reflection, though, if the Australian Constitution has some fundamental bearing on conflict of laws rules, how is it that the rules in Australia functioned for so long by reference not to the American rules but to the English rules? Would there not have been a natural tendency for the rules to develop along the lines of the American rules? Perhaps, then, if the Constitution has some fundamental bearing on conflict of laws, the text of the Constitution is not exhaustive of that constitutional foundation. Accordingly, while Professor Cowen's suggestion that the conflict of laws rules are shaped by the constitution of a federation may be correct, it would seem that, at least in the case of Australia, this constitutional foundation is not articulated exhaustively in the text of the Constitution. If it were so, would the special relevance of American precedents not long since have been obvious?

3. Federalism and the conflict of laws

The "American Conflicts Revolution" and, more recently, the decisions of the High Court of Australia,[60] and of the Supreme Court of Canada, have suggested that needs of federal systems provide the main impetus to reassess traditional conflict of laws. This is because the traditional conflict of laws rules were fashioned to operate in the international sphere between largely autonomous legal systems. Reassessing the capacity of traditional conflict of laws rules to serve the needs of federal systems could also improve our understanding of federal systems. To the extent that this is true, this kind of reassessment could have fairly broad application. Independent nation states no longer constitute the standard basis for relations between legal systems, if, indeed, they ever did. Of the 180 or so sovereign states currently existing in the world, there are some 24 federal systems, containing about 40% of the world's population and encompassing some 480 constituent states.[61] In addition, several variants on federal systems are emerging in which governments at two or more levels provide a combination of central and local government. Some of these involve devolution of power from previously unitary systems to local government, as is occurring in the United Kingdom,[62] while others involve the ceding of sovereign authority to a supranational authority such as is occurring in Europe. Finally, the proliferation of multilateral conventions with increasingly specific requirements for the legal standards applied within sovereign states—some of which will inevitably come to conflict with one another—suggest that no formal step needs to be taken by a country toward participation in a federal system for the country to be faced with the need to reassess traditional conflict of laws rules within the context of a multi-level government.

If federal government, broadly construed, is becoming pervasive, it might be asked whether there is any particularly useful insight into it to be gained from a comparative analysis that takes Canadian federalism as its focal point. The answer is that there could well be some advantage, in view of "the revelation and the paradox," to choosing Canada as a model in which the conflict of laws has functioned for so long without regard to its constitutional foundation and in which the conflict of laws has continued to develop since that revelation without the need to compromise its traditional principles. Such an example would seem

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[59] Cowen (n 58 above) Foreward.

[60] *Breavington v Godleman* (1988) 169 CLR 41, 80 ALR 362 (*Breavington*).

[61] Watts (n 42 above) 4.

[62] Which is attracting increasing interest as a subject of scholarship. See V Bogdanor *Devolution in the United Kingdom* (OUP Oxford 1999).

capable of providing a contrast with other approaches to the subject, particularly the American approach, that would highlight the local particularities of each and the essential features of both, and that would demonstrate that there is no one single kind of conflict of laws regime appropriate to federations and that conflict of laws regimes, like political regimes develop to meet the particular needs and aspirations of the federation in which they operate.

C. Points of Comparison

1. Points of comparison

The elasticity and the potential scope for comparative analysis of the relations between legal systems within federations is as extensive as the combination of systems is complex. Other studies of this subject could be directed at almost any combination of constitutions and conflict of laws regimes. The appropriate scope for such a study—and the appropriate scope for this study—is best determined as a function of the capacity of the reference points to yield insight into the features of the Constitution that forms the focal point for the analysis and into the effect that these features have on the conflict of laws in that federal system.

An over-inclusive study—one that provides a sweeping and general survey of similar and contrasting characteristics in other legal systems[63]—may be useful in some contexts, but is unlikely to provide the kind of insight sought in this thesis. Reference to legal systems that are very different from the legal system that forms the focal point of the analysis necessarily entail speculation on the "values of the nation" or the "national soul" with which the author and the reader are unlikely to have sufficient familiarity to verify. It is important in a study such as this to be able to recognize the validity of a connection drawn between a conflict of laws rule and a fundamental concern in the country's legal traditions, or at least to be able to surmise that there is some validity to the connection. Making comparisons over too broad a range reduces the likelihood that a reader will be able to confirm or appreciate the validity of these connections.

An under-inclusive study, however—one in which important points or sources of comparison have been overlooked, or a related subject of obvious interest has not been addressed—does not present similar concerns. To the extent that a particular discussion or comparison in this study piques a reader's interest in topics or points that have not been addressed, it would represent only the natural tendency of fertile comparative analysis to encourage further thought on the subject. Persons whose backgrounds are primarily in legal systems that are reference points and not focal points for the analysis in this study might find themselves provoked to consider familiar features of their own legal system in a slightly different light. Similarly, having read this comparative analysis, Canadian constitutional lawyers might see their own subject from a slightly different perspective. Just as it might be hoped that this kind of study would provoke observations in response based on a specialized knowledge of constitutional law that would further illuminate the Canadian conflict of laws, so too it might be hoped that scholars in other legal systems would similarly be prompted to contribute to a dialogue in respect of the constitutional law and the conflict of laws in their country as compared with the Canadian law in these fields.

In any event, it would be mere pretence to attempt to produce an authoritative taxonomy of comparative reference points. Such reference points would vary with the legal systems to be compared. However, in view of the tentative and sporadic nature of the current scholarship, any genuine effort to identify bases for comparison that could help to illuminate

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[63] Eg DP Xydis *Constitutions of Nations* (rev 3d ed M Nijhoff The Hague 1965-70), which catalogues and reproduces the written constitutions of countries.

the particular features of constitutions that affect the conflict of laws would seem worthwhile. The respectable body of literature in the United States on the subject, though interesting, is not particularly helpful in this effort because the subject matter is confined to American federalism, the arguments put forward are based on American scholarship and ideals, and the very topics identified and the issues raised are particular to the American context. This is not in any way a criticism of that literature, but merely an indication of the limited usefulness it has for illuminating the effect of the Canadian Constitution on the Canadian conflict of laws.

Any proposed list of comparative reference points is bound to be criticized, revised, and supplemented with additional points. The nature and composition of such comparative reference points needs to be open-ended enough to touch upon the range of issues that are relevant to the systems compared and yet sensitive enough to capture points that are genuinely of interest in each of those systems, or at least, to the system that forms the focal point for the analysis. The points of comparison that illuminate the special features of one system will not necessarily coincide with the points of comparison that illuminate the special features of other systems. Even among the points that are relevant to the special features of any two federal systems and that appear superficially similar, there will be differences in the significance of each feature to each of the two systems and the complexity of its design and operation within the system. For example, as will be noted, the design and operation of full faith and credit in the American federation is considerably more complex than in the Australian federation; and the jurisdiction of the federal courts in the Australian federation is considerably more complex than it is in the Canadian federation.

Although there is no fixed formula for determining which points of comparison are relevant, five were identified in researching this thesis. Before introducing the three points of comparison that will be considered in detail this thesis, it is worth discussing briefly the two points of comparison that will not be considered in detail: the mechanisms for the coordination of legal systems within the federation that were instituted by the founders; and the nature of legislative federalism within the federation. While the length restrictions on this thesis preclude adequate consideration of five points of comparison, it is hoped that the presentation of these two points in outline will not impair the coherence of the basic analysis.

Common mechanisms for the coordination of legal systems within federal or regional systems include things such as provisions for full faith and credit, as exist in the United States, and specialized mandates for appellate review of the way in which the courts manage the relations between the constituent legal systems in the federal or regional system. However, the constitutional mechanisms for the coordination of legal systems within the Canadian federation have tended to reduce or eliminate both the need for specialized federal conflict of laws rules such as full faith and credit and the need for a specialized mandate for appellate review or reference authority such as is found in the procedure for referring questions relating to the Brussels I Regulation to the European Court of Justice. As a result, the mechanisms for coordination found in the Canadian system could be of greater comparative interest in a study that takes another legal system as its focal point than *vice versa.* Accordingly, this point of comparison is presented only in outline.

In similar fashion, the nature of the division of legislative powers in Canada has tended to create a situation in which, the provincial legislative authorities enjoy such comprehensive and autonomous authority in matters of private law that they approximate independent countries for the purposes of the conflict of laws. Again, this means that the Canadian division of legislative powers may be of more interest in a comparative analysis that takes another legal system as its focal point. Accordingly, it too is presented only in outline.

Together, these features of the Canadian legal system help explain why the need for specialized conflict of laws rules was not obvious earlier in Canada's history. In a larger study, both of these topics might be thought integral, if only because in the federal and regional

systems that provide some of the most interesting points of comparison—the American and the Australian federal systems and the European regional system—these two topics would be of central importance. However, in this thesis, a brief outline of them must suffice.

2. Mechanisms for coordination: Full faith and credit and appellate review

The main kinds of mechanisms for the coordination of legal systems within federations have been those that provide for the recognition and enforcement of the judgments of courts throughout the federal system; and those that provide for appellate review to coordinate the approaches taken by the courts to the rules for the recognition and enforcement of judgments and for court jurisdiction within the federal system.

A mechanism for the recognition and enforcement of judgments was considered so important for the American federation that the framers of the United States Constitution placed it in Article IV.1, immediately following the three articles granting the powers to the three branches of government.[64] At the time the United States Constitution was drafted, there was an urgent practical reason for entrenching this provision in the Constitution and for giving it such prominence: the failure of the courts of the several states to give effect to one another's judgments had made them havens for judgment debtors from neighbouring states.[65] However, the existence of a pressing objective at the time should not overshadow the more profound implications of the desire to entrench in the Constitution a mechanism for relations between the legal systems within the federation. As Robert Jackson explained, there was a desire to distinguish the relations between legal systems within the federation from those that were emerging between nations and that "proceeded from contrary assumptions." Traditional common law rules "extend recognition to foreign statutes or judgments by rules developed by a free forum as a matter of enlightened self-interest [but] the constitutional provision extends recognition on the basis of the interests of a federal union which supersedes freedom of individual State action by a compulsory policy of reciprocal rights to demand and obligations to render faith and credit."[66] According to Robert Jackson, the full faith and credit clause "was placed foremost among those measures which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence, but without aggrandizement of federal power at the expense of the states."[67]

The particular exigencies that made full faith and credit a pressing objective of the framers of the United States Constitution may have evolved, but the tension between state sovereignty and federalism has continued to be expressed in judicial determinations relating to court jurisdiction, applicable law and the recognition of judgments. Accordingly, the full faith and credit clause continues to play an important role in the functioning of the American federal system.

Australia also adopted a full faith and credit provision in its Constitution. However, where this provision has operated in the United States to establish "a compulsory policy of reciprocal rights to demand and obligations to render faith and credit,"[68] according to Michael Pryles and Peter Hanks, the lack of hostility to the recognition of judgments from other states

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[64] These provisions are reproduced in note 9 above.

[65] M Pryles and P Hanks *Federal Conflict of Laws* (Butterworths Sydney 1974) 61 (Pryles); JD Sumner 'The Full-Faith-and-Credit Clause— Its History and Purpose' (1955) 34 Oregon L Rev 224, 227.

[66] R Jackson 'Full Faith and Credit—The Lawyer's Clause of the Constitution' (1945) 45 Columbia L Rev 1, 30 (Jackson).

[67] Jackson (n 66 above) 17.

[68] Jackson (n 66 above).

has enabled the full faith and credit provision to be interpreted more generously in Australia.[69] In both the United States and Australia, the constitutional directive of full faith and credit has superseded most of the common law rules on judgments provided the judgment is effective in the issuing state[70] but, in practice, a greater degree of preclusive effect is accorded judgments within Australia than within the United States and the conditions under which preclusive effect is accorded are broader.

The current scheme for the enforcement of civil judgments of the courts of the Australian states and territories throughout Australia is set out in Part 6 of the Service and Execution of Process Act 1992 (Cth), a statute passed pursuant to the authority of Parliament under section 51(xxiv) of the Constitution to provide for the execution throughout the Commonwealth of the judgments of the courts of the States.[71] Basically, the only requirement for enforcement is that the judgment be enforceable in the place where it was issued. Challenges to enforcement seem largely to be limited to this ground and the various traditional common law bases for challenging enforcement do not apply.[72] The scheme is widely used and seldom challenged[73] and it serves to unite the various constituent jurisdictions into one for the purposes of the recognition and enforcement of judgments.

Canada's Constitution Act 1867 contains no provision for full faith and credit. As Mr. Justice La Forest explained in the *Morguard* decision, there exist,

> various constitutional and sub-constitutional arrangements and practices [that] make unnecessary a "full faith and credit" clause such as exists in other federations, such as the United States and Australia. The existence of these clauses, however, does indicate that a regime of mutual recognition of judgments across the country is inherent in a federation

Despite the absence of a full faith and credit clause in the Constitution Act 1867, the acknowledgement in the *Morguard* decision of these "constitutional and sub-constitutional arrangements and practices" and the importance of to the Canadian federation of more generous rules for giving effect to Canadian judgments caused the decision to be regarded the "the most important decision on the conflict of laws ever rendered by the Supreme Court of Canada".[74]

Until 1990, the common law rules of the conflict of laws were largely derivative of the English rules. According to the Supreme Court of Canada, they had remained remarkably

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[69] Pryles (n 65 above) 67-68.

[70] Pryles (n 65 above) 71.

[71] Replacing the Service and Execution of Process Act 1901 (Cth). Judgments can be enforced upon registration, including those of any body having the status of a court, and those for decrees for specific performance and injunctions. There is no time limit on registration

[72] Objections to the enforcement of a judgment should generally be determined in the issuing court: *The Queen v White, ex parte TA Field Pty Ltd* (1975) 133 CLR 113, 117, s 109 of the 1992 Act. WMC Gummow 'Full Faith and Credit in Three Federations' (1995) 46 South Carolina L Rev 979, 999.

[73] The Law Reform Commission regarded the lack of judicial consideration of the scheme to be an indication of the efficiency of the scheme: Australia Law Reform Commission *Service and Execution of Process* (The Commission Sydney 1984) 245.

[74] J Ziegel "Introduction" (1993) 22 Cdn Bus L J 2. J Blom described the decision as "seminal" in 'Conflict of Laws - Enforcement of Extraprovincial Default Judgment - Real and Substantial Connection: *Morguard Investments Ltd v De Savoye'* (1991) 70 Can Bar Rev 733; P Finkle and S Coakley described it as a "landmark decision" in 'Morguard Investments Limited: Reforming Federalism from the Top' (1991) 14 Dalhousie L J 340; and C Walsh said that it "reshapes the legal geography of a region" in 'Canadian Private International Law after *De Savoye v Morguard Investments*" (1992) 8-2 Sol Jo (New Brunswick) 1.

constant: foreign judgments were enforced on the bases enunciated by Buckley LJ in *Emanuel v Symon.*[75] Little or no allowance was made for special considerations that might apply within the federation and the same jurisdictional requirements and restrictions were applied to judgments issued by Canadian courts as those issued by the courts of other countries. Thus, despite the federal context, the provincial superior courts treated themselves, effectively, as the courts of independent states with no greater obligation to one another at common law than that of international comity.

The facts of the *Morguard* case were simple and compelling. Mr. De Savoye assumed the obligations of the mortgagor on properties located in Alberta. He moved to British Columbia. The mortgages fell into default. Morguard Investments commenced an action against him in Alberta and served him in British Columbia. Morguard obtained orders against him for the sale of the properties and for the deficiencies between the proceeds of the sale and the amounts owing on the mortgage. Morguard sought to enforce those orders in British Columbia. Under the traditional rules, a default judgment could not be enforced against a defendant served outside the province who had not agreed to dispute resolution in the courts in which the matter had been decided and who had made no appearance. Morguard would have been required to proceed against De Savoye afresh in British Columbia.

The courts in British Columbia and on appeal to the Supreme Court of Canada agreed unanimously that the judgment of the Alberta court should be enforced by the courts of British Columbia. They regarded the judgment as enforceable notwithstanding the fact that De Savoye was a resident of British Columbia, not Alberta, and that he did not respond to service by submitting to the jurisdiction of the Alberta court. One reason for this was, as La Forest observed in his judgment on behalf of the Supreme Court of Canada, "it is difficult to imagine a more reasonable place for the action for the deficiencies to take place than Alberta."[76]

In the result, the Supreme Court decided that the rules for recognizing and enforcing judgments had to be expanded to permit the enforcement of a judgment of a court of a province with a real and substantial connection to the matter throughout Canada regardless of whether the defendant was present in the province when the action was commenced or agreed to submit to it's courts' jurisdiction. Despite the compelling nature of the facts and the unanimity of the courts' opinions - it was, in this sense, an easy case - the significance of the decision was not missed even when it was decided. La Forest J. reviewed the background to the current state of the law of interprovincial judgments and observed that "[t]he common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts of the 19th century. ... The English approach, we saw, was unthinkingly adopted by the courts of this country, even in relation to judgments given in sister-provinces"[77] According to La Forest J. the continued application in Canada of the English rules would,

> ...fly in the face of the obvious intention of the Constitution to create a single country...[which] presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction. A common citizenship ensured the mobility of Canadians across provincial lines, a position reinforced today by s. 6 of the Canadian Charter of Rights and Freedoms.... In particular, significant

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[75] That is, "(2.) where he [the defendant] was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained." *Emanuel v Symon* [1908] 1 KB 302, 309 (CA) as cited in *Morguard* (n 1 above) 262.

[76] *Morguard* (n 1 above) 277.

[77] *Morguard* (n 1 above) 268.

> steps were taken to foster economic integration. One of the central features of the constitutional arrangements incorporated in the Constitution Act, 1867 was the creation of a common market. Barriers to interprovincial trade were removed by s. 121. Generally trade and commerce between the provinces was seen to be a matter of concern to the country as a whole; see Constitution Act, 1867, s. 91(2). The "Peace, Order and Good Government" clause gives the federal Parliament powers to deal with interprovincial activities...and the combined effect of s. 91(29) and s. 92(10) does the same for interprovincial works and undertakings.
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> These arrangements themselves speak to the strong need for the enforcement throughout the country of judgments given in one province. But that is not all. The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges -- who also have superintending control over other provincial courts and tribunals -- are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments. Any danger resulting from unfair procedure is further avoided by subconstitutional factors, such as, for example, the fact that Canadian lawyers adhere to the same code of ethics throughout Canada.[78]

It is interesting that the foregoing analysis proceeds from the assumption that giving effect to judgments throughout the federation was regarded by La Forest J. as necessary to federalism; and the focus of the analysis, therefore, was on the "constitutional and sub-constitutional arrangements" that ensured that this could be done without any concern for compromising justice in the individual case. As La Forest J. noted "the Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation." The implications of this approach to the recognition and enforcement of judgments in Canada is that it was unnecessary to provide for an *obligation* to give effect to Canadian judgments because there would not be any pressing countervailing considerations that would cause courts to hesitate to do so. This is in sharp contrast with the situation in the United States in which, as mentioned above, the "disintegrating influence of parochialism in jurisprudence" was thought to be an inevitable feature of the federation, and in which the "compulsory policy" of full faith and credit was regarded as a necessary integrative force that was to be tolerated by courts and litigants because it was a form of integration that best preserved state's rights.

The most important point to note is that while constitutional provisions creating mechanisms for the coordination of legal systems within the federation such as those providing for the enforcement of judgments would seem to be an obvious point of comparison between federal systems, they have not played a major role in the operation of the Canadian federation. Such coordination has occurred without explicit provisions as a product of other features of Canada's constitutional traditions.

As with the mechanisms for coordination, the role of appellate review and of Supreme Courts in harmonizing the interpretation of the mechanisms for coordination has been more critical to other federal systems than in Canada. The Supreme Court of Canada has shown real leadership in the development of conflict of laws rules in Canada. However, appellate review has not served the same kind of integral institutional role or organizational function that it serves in other federal systems.

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[78] *Morguard* (n 1 above) 271.

The collaborative nature of the common law enterprise in Canada makes the extensive reasons provided by the Supreme Court of Canada rulings welcome as guidance in deciding difficult cases in the conflict of laws. The kind of guidance that is provided by Supreme Court of Canada is often described *pro forma* as binding authority. However, it is relatively rare for the ostensibly coercive effect of this binding authority to be demonstrated by Canadian judges expressing regret that they are obliged to follow a precedent that does not support what they regard as the right result under the circumstances. There simply is not the willing deference to the coercive effect of *stare decisis* that appears to exist elsewhere in the common law. Professor Glenn described the early common law approach to *stare decisis* as follows:

> Absent a hierarchy of courts, common law judges were engaged in a common, shared exercise. They did not command one another, presently or in the future. Their decisions thus *could not bind* and this historical reality prevailed well into the nineteenth century. Cases had whatever authority they had because they were part of a body of common experience. They could not be rules to be followed and were hence examples of the type of reasoning which had thus far prevailed. As such they did not preclude further argument and reasoning, but invited it....[79]

While this is a description of the common law as it was in the eighteenth century and before, the spirit of this approach seems to have became embedded in Canadian legal traditions and it seems to continue to influence the approach taken to the conflict of laws today. The adherence to Supreme Court of Canada rulings reflects the recognition that the opportunities for careful deliberation on clearly articulated issues with the benefit of the fullest research and best argument are more likely to occur in Supreme Court of Canada appeals than elsewhere. As one Canadian scholar, Shelley Kierstead suggested in advocating an "interpretive" rather than a legislative approach to conflict of laws in Canada "the Supreme Court holds the key to integrating federalism concerns with conflicts cases."[80] However, the deference shown Supreme Court rulings seems to be more a product of the quality of the rulings that are possible under the best conditions than of blind acceptance of its superior position in the judicial hierarchy. This becomes clear when, in the wake of leading decisions, lower courts faced with cases in which a wooden application of a Supreme Court ruling would produce injustice, do not hesitate to depart from the precedent to ensure that justice is done between the parties.[81]

Accordingly, while appellate review plays a significant role in the maintenance of federal relations generally, and while the leadership of the Supreme Court of Canada has been enormously beneficial to the collaborative work of Canadian courts in developing the rules for the relationships between legal systems, this role in Canada has not had the same degree of specific significance that it has had in other federations. While the relatively greater significance of this role in other federations may be of considerable interest, length restrictions do not permit further consideration of it here.

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[79] HP Glenn 'The Common Law in Canada' (1995) 74 Can Bar Rev 261, 263.

[80] Kierstead (n 26 above).

[81] One example of this is discussed in the section on "The Burden of Proof in Motions for Stays" in the chapter on Federalism and the Courts with reference to what appears on its face to be a clear rejection by the Ontario Court of Appeal of a determination by the Supreme Court of Canada in *Frymer v Brettschneider* (1994) 19 OR (3d) 60, 28, 28 CPC (3d). In another example, the Supreme Court set out a fixed and rigid rule for choice of law in tort that rejected the flexibility once used by the courts to ensure that they could do justice in the case before them. While the Court's effort to achieve decisional harmony was readily accepted, the inflexibility in the particular rule established was not. *Tolofson v Jensen* (n 22 above); *Hanlan v Sernesky* (1997) 35 OR (3d) 603 (Gen Div); *affd* (1998) 38 OR (3d) 479 (CA) (*Hanlan*); "Are we there yet" (n 22 above).

3. Legislative federalism

Just as Canadian federal arrangements have tended to obviate the need for a full faith and credit clause, so too does the structure of legislative federalism in Canada serve to reduce instances of concurrent legislative or prescriptive powers of the governments within the federation that could give rise to conflicts between their laws.

The desire of the founders of Confederation to eliminate the potential for overlap or conflict between the federal and the provincial powers can be seen in the approach they took to the division of powers. Unlike the American and Australian federations, legislative federalism in Canada was not achieved by means of the states (or in Canada's case the provinces) ceding specific areas of authority to the federal government and reserving residual matters to themselves.[82] Both levels of government were established simultaneously. Canadian federalism proceeded by dividing legislative authority between the federal and provincial governments. For this purpose, two lists were drawn up—one with the matters over which the federal government would have exclusive legislative authority, and the other with the matters over which the provincial governments would have exclusive legislative authority. Dennis O'Sullivan described this approach to federalism in 1879 in the second edition of the Manual of Government in Canada as follows:

> A federal union then means two perfectly independent co-ordinate powers in the same state. The powers of each are equally sovereign and neither are derived from the other. The state governments are not subordinate to the general government, nor the general government to the state governments. They are co-ordinate governments standing on the same level and deriving their powers from the same sovereign authority. In their respective spheres neither yields to the other. Each is independent in its own work; incomplete and dependent on the other for the complete work of government.[83]

In addition to the "two list" approach to the division of powers, the Canadian division of powers differs from the model adopted by the United States and Australia in which the residuary power "remains" with the regional authorities. It has traditionally been viewed as natural for a federation to come into being through the delegation of powers from the proposed constituent regional authorities to the central authority. That is, the process of federation has traditionally been seen as involving the creation of a second, integrating layer of government over existing independent sovereignties, which retain whatever powers are not ceded to it. However, in Canada, the operation of a residuary power is less pronounced and, arguably, its placement is less certain.

While there is no explicit provision for a residuary power, it is generally thought that the federal government was granted a kind of residuary power in its authority to make "Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." The extent of the "Peace, Order and Good Government" power, or "POGG" power is a function of the breadth of the enumerated heads of power as interpreted by the courts. The

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[82] The Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Section 107 of the Australian Constitution similarly provides that "Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

[83] D O'Sullivan *A Manual of Government in Canada*, or, *The Principles and Institutions of our Federal and Provincial Constitutions* (JC Stuart Toronto 1879).

greater the scope of the enumerated heads, the less likelihood that authority to regulate a given field will be found in the POGG power. However, the significance of the "POGG" power as a residuary clause is subject to the inclination of the courts to determine that particular matters fall within the enumerated heads of the legislative authority of the provinces and to the interpretation of the grant to the provinces in section 92.13 of exclusive authority to make laws in relation to "property and civil rights in the province."

"Property and civil rights" in section 92.13 does not relate to "civil liberties" or to the proper restraint on the exercise of government authority over individuals in society. Rather, it is derived from section 8 of the Quebec Act 1774, in which it referred generally to private law. The Quebec Act provided that the private law of what is now the province of Quebec would be the French civil law. The phrase "property and civil rights" also appeared in early legislation of what is now the province of Ontario in 1792 which provided that the private law would be English law. As Professor Hogg has noted, at the time of Confederation this term would have been regarded as "a compendious description of the entire body of private law which governs the relationships between subject and subject, as opposed to the law which governs the relationships between the subject and the institutions of government."[84] Accordingly, apart from the allocation of discrete areas of private law to the federal government, the provinces enjoy a kind of autonomy in private law matters similar to that of sovereign states. As a result, the English rules for the conflict of laws were, for many years considered generally to be suitable for application to questions of the conflict of laws between provinces.

Accordingly, the grant of authority over "property and civil rights" in section 92.13 has operated as a kind of secondary residuary power. From the time of the early Privy Council determinations relating to the division of powers,[85] which favoured the provincial powers, the jurisprudence has supported a federation that is generally more decentralized than that of the United States or Australia[86] and more decentralized than might be expected from reading the text of the constitutions of the three federations.[87] In addition to enhancing provincial autonomy in private law matters, the interpretation of section 92.13 has tended to sharpen division between private law, which falls primarily under the authority of the provinces and public law, including criminal law, which falls primarily under the authority of the federal government.

Since these constitutional arrangements sought to eliminate federal-provincial conflicts in respect of legislative power, disputes over the division of powers have focused on the interpretation of these constitutional arrangements. Disputes over whether federal or provincial law should apply have been treated as questions of constitutional law, and conflict of laws principles have not been regarded as relevant. But what about disputes over whether the law of one province or another should apply to a given set of facts?

The founders of Confederation sought to reduce or eliminate conflicts between provincial legislative authorities as well. They did so by providing that the provincial legislative authorities would not be competent to legislate extraterritorially. The opening paragraph of Section 92, which grants the provinces their exclusive legislative jurisdiction, begins with "In each Province the Legislature may..." and the paragraphs describing the heads of legislative authority contain the phrase "in the province" as a means of limiting the

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[84] P Hogg (n 28 above) 538.

[85] *Citizen's Insurance Co v Parsons* (1881) 7 App Cas 96 (PC); and see *Hodge v The Queen* (1883) 9 App Cas 117 (PC).

[86] See CD Gilbert *Australian and Canadian Federalism 1867-1984* (Melbourne UP Carleton Victoria 1986).

[87] See P Hogg (n 28 above) 111.

competence of the legislature to the territory of the province. Before the "revolution" in the conflict of laws commenced by the Supreme Court of Canada decision in *Morguard,* a small body of jurisprudence and commentary on the Canadian Constitution and the conflict of laws suggested that the kinds of cases that raised issues of the conflicts between the jurisdictions of the provincial legislatures could be treated as conflict of laws questions. Having done so, they concluded that any suggestion that the conflict of laws rules in Canada were governed by the Constitution must be a reference to the extraterritorial incompetence of the provincial legislatures and that section 92.13 was the principal constitutional source of law governing the conflict of laws.[88]

Apart from the academic commentary on the few cases that have considered the extraterritorial incompetence of provincial legislatures,[89] it does not appear that Canadian courts or scholars have found this approach to the connection between the Constitution and the conflict of laws to be a compelling one. This is, in part, because the limit on extraterritorial competence in section 92 applies specifically to the authority of the legislature to make laws. There is nothing to indicate that section 92 was intended to apply to the courts' authority to identify which law governs civil disputes before them. The conflation of these two forms of authority was drawn from the approach in the American legal tradition, which is exemplified by writers who suggest that there is a unity between matters of choice of law and of jurisdiction, or, in the constitutional context, between matters of prescriptive jurisdiction and adjudictory jurisdiction. For example, Stanley Cox argued that:

> Power to assert jurisdiction means power to bind, not literally, but via final judgment. New York's power to bind is only meaningful as power to apply law to the actions of the defendant. It is meaningless to discuss some abstract power over the person of the defendant as if such power exists in isolation from what the court will really do with the suit. If the defendant is before the court for decision on the merits, this necessarily means that there has been a determination, or perhaps more accurately an assumption, that it is proper for this court to bind the defendant by the law applied to the merits.[90]

Walter Heiser elaborated on the effect of this for conflict of laws analysis as follows:

> the constitutional limitation on state court assertions of personal jurisdiction would be the same as for choice-of-law determinations. Although the fact that choice of forum really means choice of law may not inexorably lead to the conclusion that the due process tests for these two inquiries should be the same, that conclusion is both logical and highly desirable.[91]

The Canadian approach to private law adjudication, however, endorses a fundamental distinction between political and judicial authority and rejects any underlying unity between these two kinds of authority, which informs so much of the American tradition of private law adjudication.

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[88] See T Hertz 'The Constitution and the Conflict of Laws: Approaches in Canadian and American Law' (1977) 27 U Toronto L J 1; E Edinger 'Territorial Limitations on Provincial Powers' (1982) 14 Ottawa L Rev 57; J Swan 'The Canadian Constitution, Federalism and the Conflict of Laws' (1985) 63 Can Bar Rev 269; R Sullivan 'Interpreting the Territorial Limitations on the Provinces' (1985) 7 Supreme Ct L R 511.

[89] *Royal Bank of Canada v The King* [1913] AC 283 (PC); *Ladore v Bennett* (1939) AC 468 (PC); *Interprovincial Co-operatives Ltd v Dryden Chemicals Ltd* [1976] 1 SCR 477, (1975) 53 DLR (3d) 321; and *Re Upper Churchill WaterRights* [1984] 1 SCR 297, 8 DLR (4th) 1.

[90] SE Cox ' The Interested Forum' (1997) 48 Mercer L Rev 727, 729-30.

[91] W Heiser 'A "Minimum Interest" Approach to Personal Jurisdiction' (2000) 35 Wake Forest L Rev 915, 955-956.

The Supreme Court of Canada did recognize in *Tolofson v Jensen*[92] the constitutional significance of choice of law determinations. The *Morguard* decision had triggered a fundamental change in the law of jurisdiction and judgments and brought about a marked increase in the opportunities for plaintiffs to choose favourable fora for the resolution of their disputes. This proportionately increased the potential for opportunistic choices of forum that would seek to manipulate the outcome of the dispute by obtaining the application of a favourable law. This practice, commonly known as "forum shopping," presented what the Supreme Court of Canada described in the *Tolofson* decision as a "structural problem."[93] It presented a problem because, unlike the approach taken in the American legal description as described above, as La Forest J. observed,

> ...the Court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order. ....
>
> To permit the court of the forum to impose its views over those of the legislature endowed with power to determine the consequences of wrongs that take place within its jurisdiction, would invite the forum shopping that is to be avoided if we are to attain the consistency of result an effective system of conflicts of laws should seek to foster.[94]

In the *Tolofson* case,[95] the Court considered which law should apply to traffic accidents in which the plaintiffs commenced actions in the provinces of their residence rather than in the provinces where the accidents had occurred in an effort to evade restrictions on their actions under the law of the place where the accident had occurred. The court held that the law that should apply in respect of interprovincial torts was the law of the place where the tort occurred (the *lex loci*). As La Forest J. explained on behalf of the majority,

> The nature of our constitutional arrangements -- a single country with different provinces exercising territorial legislative jurisdiction -- would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country. This militates strongly in favour of the *lex loci delicti* rule.

Canadian courts readily accepted the fundamental requirement of decisional harmony[96] but they expressed concern about the need to enforce a rigid rule. La Forest J had observed "[w]hile, no doubt, as was observed in the *Morguard* decision, the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to

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[92] *Tolofson* (n 22 above).

[93] The importance of decisional harmony was linked to the Constitution by the High Court in Australia in *Breavington* (n 60 above), but this link was subsequently doubted in *McKain v Miller,* (1991) 174 CLR 1, (1992) 104 ALR 257 and *Stevens v Head* (1993) 176 CLR 433, 67 ALJR 343. And see *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.

[94] *Tolofson* (n 22 above) 320, 322.

[95] J McEvoy 'Choice of Law in Torts: The New Rule' (1995) 44 U New Brunswick LJ; P Kincaid '*Jensen v Tolofson* and the Revolution in Tort Choice of Law' (1995) 74 Can Bar Rev 537; RM Junger 'Case Comment: *Tolofson v. Jensen'* (1996) 23 Man LJ 689; J Swan 'Choice of Forum and Choice of Law: The Implications of the New Criteria for Judicial Control' (1996) 18 Advocates Q 1: C Walsh 'Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims' (1997) 76 Can Bar Rev 91.

[96] Although some commentators decried the "constitutionalization" of the rule. See J-G Castel 'Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?' (1995) 33 Osgoode Hall L J 35.

justice",[97] but brief concurring judgments questioned whether such rigidity was necessary. As Major J. pointed out, "La Forest J. has recognized the ability of the parties by agreement to choose to be governed by the *lex fori* and a discretion to depart from the absolute rule in international litigation in circumstances in which the *lex loci delicti* rule would work an injustice;" and he and Sopinka JA suggested that flexibility might occasionally be warranted in the interprovincial setting. Canadian courts have since strained against the apparent rigidity of the requirement to apply the *lex loci,* and in cases involving torts with connections to other countries, they have increasingly applied where they felt it appropriate the personal law of the parties instead of the *lex loci.*[98] This year, in *Lau v Li,* the Ontario Superior Court of Justice determined that this flexibility should also apply in interprovincial cases:

> Injustice is not simply a platitude: judges are called upon to exercise their discretion whenever patent injustice is staring them in the face. While I recognize that the *lex loci delicti* rule applies in cases involving domestic litigation, its application to this particular case w ould work a dire injustice.[99]

In sum, the nature of legislative federalism in Canada has eliminated much of the federal-provincial conflicts and left the balance to be resolved through the application of specialized constitutional law doctrines.

4. Judicial authority

The most significant point of comparison for the Canadian judicial system is the nature of judicial authority. While it is conceivable that some other feature might figure more prominently in a study that takes another legal system as its main subject, the distinctiveness of the Canadian approach to judicial authority affects every other feature of the judicial system to be compared. Judicial Authority is considered in Chapter II, which begins by comparing the provisions for the three branches of government in the Constitutions of the United States, Australia and Canada and by identifying the special source of judicial authority in the Canadian Constitution, which exists beyond the text of the Constitution itself in the continuing tradition of the courts of common law and equity. To a reader who is not familiar with Canadian constitutional law, a basic textual analysis such as this might be expected to be found in any rudimentary text on the subject and, accordingly, despite its centrality to this thesis, it could seem pedantic in its detail. However, remarkable as it seems, no such analysis of the source of judicial authority exists in the general literature on constitutional law in Canada and, accordingly, it is set out at length here.

The second part of Chapter II moves on to consider the tradition that gave rise to the provisions of the texts of the Constitutions of the United States, and Canada as they relate to judicial authority. An effort is made to explain the aspirations—the intent and purpose of the Constitutional provisions—in terms of the politics and ideas of the times when they were drafted and in terms of the nature of the common law and legal institutions of the times. This is important because it is not only necessary to understand what the founders of the three federations hoped to achieve in establishing a federation but also, given the nature of private

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[97] *Tolofson* (n 22 above) 311.

[98] *Hanlan v Sernesky* (n 81 above). V Black 'Crash: The Ontario Court of Appeal Bumps into *Tolofson*' (1998) 41 CCLT (2d) 170; *Wong v Wei* (1999) 45 CCLT (2d) 105 (BCSC); *Buchan v Non-Marine Underwriters, Members of Lloyd's London* (1999) 44 OR (3d) 685; *Gill (Guardian ad litem of) v Gill* [2000] 2000 BCSC 870; *Wong v Lee* (2000) 50 OR (3d) 419; *Lebert v Skinner Estate* (2001) 53 OR (3d) 559 (SC).

[99] *Lau v Li* (2001) 53 OR (3d) 727 (SC). Australian courts might also do so if the recommendations of the Australia Law Reform Commission to eliminate the flexible exception are adopted ALRC, *Report 92: The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (ALRC Canberra 2001).

law adjudication at the time, how the relations between legal systems—the conflict of laws—might have contributed to those aspirations. In the third part of Chapter II, features of these various approaches to judicial authority are linked to current issues in the conflict of laws to explain why different approaches might be taken to these issues in the various federal and regional systems.

5. Federalism and the courts

The distinctive approach to judicial authority in the Canadian legal tradition provides the foundation for the distinctiveness of the other features of federalism and the conflict of laws, which are considered in Chapters III and IV. In Chapter III, the structure of the court system in the federation, which has been the main focus for several studies of the judicial system in the United States[100] and in Australia.[101] The rationale for the federalized judiciary in the United States is contrasted with that for the unified court system in Canada and the initiatives that have been undertaken to integrate the court system in Australia. Observations are made on the social, political and logistical considerations that attended the establishment of these institutional arrangements and on the extent to which the constitutional purpose they were designed to serve were given priority over other important objectives of the administration of the civil justice system such as fairness of the outcome and administrative efficiency.

The rationale for the structure of the court system is then used to explain differences in the approaches to questions such as whether forum shopping should be tolerated and in what form, and what constitutes the appropriate test for declining jurisdiction and the appropriate response to parallel litigation. Some of the features of the different approaches to conflict of laws questions can be verified in existing legislation, case law and commentary, but other features involve ongoing developments, and so are necessarily speculative. Although it is not an exact science, suggestions regarding the emerging trends discussed are evident in the prevailing attitudes of jurists and members of the legal community even if they have not been articulated clearly in binding precedent.

6. Constitutional rights

Finally, Chapter IV—"Constitutional Rights" examines the effect on conflict of laws rules of the various approaches to constitutional rights and the ways in which the law protecting the interests of members of the public affects the rules governing personal jurisdiction and choice of law. It begins by contrasting the direct influence of the due process guarantees contained in the American Bill of Rights on the law relating to insterstate court jurisdiction in the United States with the indirect influence of the values expressed in the guarantees relating to legal rights and mobility rights in the Canadian Charter of Rights and Freedoms on various aspects of the conflict of laws in Canada. Then the difference between the approaches taken to the protection of individual rights and collective rights by and from governments is considered in two areas of the conflict of laws that are presently in flux as a result of the increasing trend to vindicate rights in the courts—multi-jurisdiction class actions and the foreign public law exception. By examining the current indications of the likely directions of the law in these areas, it is possible to see the potential for the kinds of insights gained in systematic study of the issues raised in this thesis to help to explain such trends and to anticipate future developments in these areas.

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[100] Works cited at note 41 above.

[101] For example, in Australia, Pryles (n 65 above); Australian Constitutional Commission *Australian Judicial System Advisory Committee Report* (Canberra, 1987); J Crawford *Australian Courts of Law* (3rd ed OUP Melbourne 1993); and Opeskin & Wheeler (n 41 above).

II. JUDICIAL AUTHORITY

A. The Text

1. The lacuna

The "Constitution of Canada" usually refers to the enactment of United Kingdom Parliament originally called the British North America Act,[1] which was "patriated" in 1982 as the Constitution Act 1867. Today, this also includes the Canadian Charter of Rights and Freedoms,[2] which also forms part of the 1982 legislation. In a country with a written constitution, a study of the way in which the Constitution shapes the conflict of laws would seem likely to consist primarily of a study of the history and practice of interpreting the provisions of the Constitution as they apply to the conflict of laws, as is largely the case in the United States and Australia. The texts of the constitutions in these countries contain provisions that have been applied to establish conflict of laws rules. In the United States, the conflict of laws is often regarded as closely related to constitutional law[3] and the "Full Faith and Credit" clause of Article VI and the "Due Process" clauses of the Fifth and Fourteenth Amendments are the foundation for specific requirements for conflict of laws rules.

The Constitution Act 1867 contains features that are relevant to the conflict of laws in Canada, but it lacks the feature that it would most be expected to include in respect of the conflict of laws: a grant of judicial power. If the conflict of laws is comprised of rules for the adjudicative jurisdiction of the courts of constituent legal systems and the management of conflicts arising in the application of the prescriptive jurisdiction of constituent legislative and executive authorities, then a clearly articulated grant of judicial authority would seem to be a necessary foundation for such rules. No such grant exists in the Canadian Constitution.

This lacuna at the critical point in the text of the Canadian Constitution has received almost no judicial or academic commentary. Legal analysis usually proceeds from the contents of a text and relatively rarely draws on omissions for its interpretation. Under the *expressio unius est exclusio alterius* maxim of statutory interpretation,[4] inferences may be drawn from obvious gaps or lacunae in provisions in a text, particularly where certain things in a standard list have not been included; but as a constitutional document—the second modern federal constitution to be drafted in a common law country—it would not readily be expected that the text of the Canadian Constitution would simply fail to provide for the authority of one of the three branches of government. Indeed, following the *expressio unius* approach, the apparent lack of a grant of judicial power would suggest that the founders of Confederation intended either that there would be no courts in Canada or that they would not have any official authority. Since it is widely accepted that constitutional conventions are necessary to fill the gaps in the provisions in the Constitution Act,[5] lawyers have tended to read the Act rather less

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[1] British North America Act 1867 30 & 31 Vic c 3.

[2] Canadian Charter of Rights and Freedoms, Constitution Act 1982, Schedule B, Canada Act 1982 (UK) c 11.

[3] Leading constitutional treatises, such as L Tribe *American Constitutional Law* (3rd ed Foundation Press Mineola NY 2000) (Tribe) contain discussions of issues that might be described as issues of the conflict of laws—such as which law would apply in a federal court sitting in a particular state; and leading works in the conflict of laws such as L Brilmayer *Conflict of Laws: Foundations and Future Directions* (Little, Brown Boston 1991) contain detailed analyses of the effect of specific constitutional provisions.

[4] FAR Bennion *Statutory Interpretation: A Code* (3rd ed Butterworths London 1997).

[5] P Hogg *Constitutional Law of Canada* (4th ed Carswell Toronto 1996) (Hogg) 17-25.

closely than it otherwise might be read, but this lacuna seems too significant to overlook or to treat as an oversight on the part of the drafters.

2. Three branches of government?

Comparison with other written constitutions highlights the lack of a grant of judicial power as an extraordinary feature of the Canadian Constitution. As the oldest written national constitution still in effect and the precedent for the drafters of the Canadian Constitution, the United States Constitution continues to provide the main comparative reference point for understanding and interpreting the text of constitutions in common law federations. In the 1860s, when the text providing for the confederation of Canada was being written, the Constitution of the United States might well have been even more compelling a precedent as it had then been functioning for almost a century as the only written constitution in a common law federation.[6]

It might seem that the most likely starting point for comparing the texts of the constitutions as they relate to the conflict of laws, would be the provisions that have generated the most jurisprudence and commentary in the United States on the constitutional underpinnings of the conflict of laws—those found in the full faith and credit clause of Article IV and in the due process clauses of the Fifth and Fourteenth Amendments.[7] However, to find the "missing provision," it is necessary to look beyond the operative provisions of the United States Constitution that shape the American conflict of laws. It is necessary to look at the basic provisions for the three branches of government in the United States and compare them with such provisions in the Canadian Constitution.

The text of the United States Constitution is comprised of seven articles, the first three of which provide for the three branches of government: Article I vests legislative power in the House of Representatives and the Senate; Article II vests executive power in the President; and Article III vests judicial power in the courts. The remaining four articles contain provisions for the other necessary operational features of government: Article IV provides for the relationship between the states: Article V establishes procedures for amending the Constitution; Article VI addresses the matter of public debt and the supremacy of the Constitution; and Article VII outlines the terms for ratifying amendments.

The Australian Constitution, which was modelled on the United States Constitution, has eight chapters, the first three of which also provide for the three branches of government—The Parliament, The Executive Government and the Judicature. The remaining five provide for: Finance and Trade, The States, New States, Miscellaneous, and Alteration of the Constitution. Here are the contents of the two constitutions:

United States Constitution		Australian Constitution	
Article I	Legislative Power	Chapter I	The Parliament
Article II	Executive Power	Chapter II	The Executive Government
Article III	Judicial Power	Chapter III	The Judicature
Article IV	Relations Among States and the Rights of States' Citizens	Chapter IV	Finance and Trade
Article V	Amendment Procedures	Chapter V	The States
Article VI	Public Debt and the Ultimate Authority of the Constitution	Chapter VI	New States

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[6] The Swiss Constitution, which was drafted in 1848, is for a federal government but not for a common law legal system.

[7] Which is discussed in the chapter on Constitutional Rights.

Article VII	Terms of Ratification of Amendments	Chapter VII	Miscellaneous
		Chapter VIII	Alteration of the Constitution

Both constitutions begin with three sets of provisions for the authority of the three branches of government. This demonstrates the supremacy of the Constitution, as embodied in the text, over the three branches of government. It does so by establishing that the source of the authority of each branch is traceable to the grant in the relevant section of the Constitution, and no further. No branch is above the Constitution. It also demonstrates the formal equality of position within the Constitution of the three branches of government. Regardless of the particular nature of the checks and balances between the three branches, as provided in the Constitution or as derived from other sources, and regardless of the relative practical power of each of the three branches, the provisions for them are each placed within a separate section and all the sections are placed at the beginning of the Constitution. Further, the development of the jurisprudence and commentary on the nature of the authority of each branch of government is not a purely common law matter or simply a matter of convention and reason but is subject to the limits of the interpretation that can be borne by the text in granting and describing the scope of the authority.

3. The structure of the Canadian Constitution

The distinctiveness of the Canadian Constitution is not obvious because it is a lengthy document and it is not normally reproduced with a table of contents. To discern its basic structure would require leafing through the many pages and taking note of the headings of the various parts. It would not occur to most lawyers to do this because they are usually concerned with the division of legislative powers between the federal and provincial governments or the Charter almost to the exclusion of the rest of the text. Indeed, with the addition of the large and complex subject of the Charter of Rights and Freedoms to the standard introductory courses and texts on constitutional law, there has generally been further reduction in the coverage of the Constitution Act 1867.

Still, if a table of contents of were produced, it would highlight the basic structure of the Constitution as follows:

Part I	Preliminary
Part II	Union
Part III	Executive Power
Part IV	Legislative Power
Part V	Provincial Constitutions
Part VI	Distribution of Legislative Powers
Part VII	Judicature
Part VIII	Revenues; Debts; Assets; Taxation
Part IX	Miscellaneous Provisions
Part XI	Admission of Other Colonies

Reproduced in this way, the distinctive structure of the Canadian Constitution becomes clear: the grants of authority to the various branches of government do not comprise the first three parts. It is not significant that the parts of the Canadian Constitution that provide for the various branches of government do not begin until Part III; both the United States Constitution and the Australian Constitution contain preliminary provisions before the provisions for the three main branches of government. Nor is it significant for this thesis that the first branch to be provided for in the Canadian Constitution is the Executive and not the Legislature as is the case in the other two Constitutions. It is significant, however, that when the Canadian Constitution does arrive at the point where the grants of power are made to the various

branches of government, in Parts III and IV, that there are only two grants of power—one to the Executive and one to the Legislature. There is no comparable grant of power to the Courts.

Part VII, entitled "Judicature," does not follow immediately upon the grants of power to the Executive and the Legislature but its title has an obvious asymmetry with the parts granting power to the Executive and the Legislature, Parts III and IV, which are styled "Executive *Power*" and "Legislative *Power*" (emphasis added). Parts V and VI of the Constitution, which come between the provisions for the executive and legislative branches of government in Canada and the provisions for the courts, also contain explicit provisions for the granting of "powers". Part V, entitled "Provincial Constitutions" is divided into to sets of sections, one providing for "Executive Power" and the other providing for "Legislative Power". Part VI, entitled "Distribution of Legislative Powers" contains the oft-considered provisions of sections 91 and 92, which are given the titles "Powers of the Parliament" and "Exclusive Powers of the Provincial Legislatures" respectively. As a result, it would seem unlikely that the drafters would choose the heading "Judicature" to describe the provisions of Part VII, instead of the words "Judicial Power". It was clearly not the result of any general hesitation to frame the provisions for the branches of government in terms of the vesting of particular kinds of power because the term "power" is used in various parts of the Canadian Constitution except in provisions for the Courts.

4. Vesting power in the branches of government

The distinctiveness of the provisions of the Canadian Constitution become clear upon examining the provisions contained in the comparable parts of the United States Constitution and the Australian Constitution. The text of each of the first three articles of the United States Constitution begins by providing for the *vesting* of the power of each branch:

> Article I - All legislative powers herein granted shall be *vested* in....
>
> Article II - The executive power shall be *vested* in....
>
> Article III - The judicial power of the United States shall be *vested* in....
> (emphasis added)

Similarly, the first sections of each of the first three Chapters of the Australian Constitution begin by providing for the *vesting* of the power of each branch as follows:

> Chapter I - The Parliament
> Part I - General
> *Legislative Power*
> 1. The legislative power of the Commonwealth shall be *vested* in....
> ....
> Chapter II - The Executive Government
> *Executive Power*
> 61. The executive power of the Commonwealth is *vested* in....
> ....
> Chapter III - The Judicature
> *Judicial Power and Courts*
> 71. The judicial power of the Commonwealth shall be *vested* in....
> (emphasis added)

Although the United States Constitution and the Australian Constitution allocate power to the three branches of government, Part VII of the Canadian Constitution, which provides for the courts, contains no provision vesting judicial power in the courts. The provisions in the Canadian Constitution for the other two branches of government—the Executive and the Legislature—contain grants of power. Part III-Executive Power, begins with section 9, which provides:

> 9. The Executive Government and Authority of and over Canada is hereby declared to continue and be *vested* in the Q ueen.
> (emphasis added)

Part IV-Legislative Power, begins with sections 17 and 18, which provide:

> 17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.
>
> 18. *The privileges, immunities, and powers to be held, enjoyed, and exercised* by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof. (emphasis added)

While the provisions for legislative power in the Canadian Constitution do not begin with the *vesting* of power *per se* that is featured in the provisions for legislative power of the other two constitutions, Part IV is, nevertheless, entitled "Legislative Power" and section 18 does provide for the powers that are "to be held, enjoyed and exercised" by the bodies described in the section.

5. The judicature provisions

The part of the Canadian Constitution that contains provisions for the courts, which is called Part VII. Judicature, provides:

VII. Judicature

96. *Appointment of Judges*— The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in N ova Scotia and New Brunswick.

97. *Selection of Judges in Ontario, etc*—Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

98. *Selection of Judges in Quebec*—The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99. (1) *Tenure of office of Judges*— Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

(2) *Termination at age 75*— A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that tim e he has already attained that age.

100. *Salaries, etc., of Judges* —The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

> 101. *General Court of Appeal, etc.*— The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Part VII of the Canadian Constitution, is more elaborate than Article III of the United States Constitution, but it is similar in composition to Chapter III of the Australian Constitution *with the omission of a provision granting judicial power*. The contents of Chapter III of the Australian Constitution are:

> Chapter III - The Judicature
>
> 71. Judicial power and Courts
> 72. Judges' appointment, tenure, and remuneration
> 73. Appellate jurisdiction of High Court
> 74. Appeal to Queen in Council
> 75. Original jurisdiction of High Court
> 76. Additional original jurisdiction
> 77. Power to define jurisdiction
> 78. Proceedings against Commonwealth or State
> 79. Number of judges
> 80. Trial by jury

The section in the Australian Constitution that is "missing" from the Canadian Constitution, Section 71-Judicial power and Courts, provides:

> 71. The judicial power of the Commonwealth shall be *vested in* a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

The provisions for the courts in the Canadian Constitution and the Australian Constitution are both described as "Judicature" provisions, and they both provide for a range of ancillary matters relating to the operation of the courts: including the appointment, selection, tenure, and salaries of judges of the superior courts and for the establishment of the Supreme Court of Canada and the Federal Courts. However, unlike the judicature provisions of the Australian Constitution, there is no provision in the Canadian Constitution to vest power in the courts as is done by section 71 of the Australian Constitution and by Article III, section 1 of the United States Constitution.

The idea that such an omission would have been intended has seemed so unlikely to some Canadian lawyers that they have sought to discover such a provision as an implicit feature of other provisions of the Canadian Constitution, in particular of the grant of exclusive legislative authority to the provincial governments for the "administration of justice."[8] However, there are indications elsewhere in the text of the Constitution, that the omission of a provision vesting judicial power was not an oversight.

6. The preamble

The first indication that the omission of a grant of judicial authority was deliberate is found in the provisions that precede Part I of the Canadian Constitution. These provisions are not

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[8] Section 92.14 is discussed in the section on 'Cooperative Federalism' in the chapter on Federalism and the Courts.

described in any particular manner in the text of the Constitution, but they seem to serve the function of a preamble. There are four clauses:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:
>
> And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:
>
> And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:
>
> And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

The first and third clauses are relevant to the analysis of the relationship between the Constitution and the conflict of laws. The first clause specifies that the kind of union sought by the provinces was "one with a Constitution similar in Principle to that of the United Kingdom". Although this may seem surprising in view of the fact that the Constitution of the United Kingdom is neither written nor federal, [9] it is likely that the words "in Principle" were intended to account for necessary differences between them. No similar stipulation exists in either the United States or the Australian Constitutions, which contain no reference to precedents.[10] This would be expected in view of the fact that the United States Constitution was drafted as the basis for a country founded on a revolutionary break in ties with the preceding government. The Canadian provision could be seen to underscore the anti-revolutionary nature of the founding of Canada. Confederation was not meant to break with tradition and re-conceive the structure and function of government. The founders of Confederation were particularly intent on distinguishing their vision from any that could give rise to the kind of strife ongoing at that time as a result of the American Civil War.

The declaration that this would be a "Constitution similar in Principle to that of the United Kingdom" was also meant to serve a gap-filling purpose by indicating that the text should not be read as providing comprehensively for the nature and functioning of the organs of government in Canada as would be expected in the case of a Constitution for a country like the United States, which had made a clear break with the previously existing form of government. Instead, the BNA Act was intended to operate in the way that legislation usually operates in the common law: by addressing the points of law that require legislative provisions

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[9] JG Bourinot found the preamble puzzling for this reason: JG Bourinot, *The Federal Constitution of Canada* (W Green Edinburgh 1890) 135.

[10] The portion of the United States Constitution that precedes Article I, provides: 'We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' The Preamble to the Australian Constitution provides: '(9th July 1900) WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:
And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:
Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:'

and leaving other points to continue to evolve through the operation of the common law. The Canadian Constitution differs from other constitutions, revolutionary or otherwise, by not being intended to operate as a self-contained, original, authoritative instrument to provide for the entire machinery of government in Canada.

One effect of this piecemeal or tailored approach to drafting is that it establishes an inherent primacy to the role of the courts in the authoritative interpretation of the constitutive text that provides the foundation for government. In other words, this approach, in and of itself tends, in practice, to suggest that the foundation of government in Canada at the time of Confederation continued as a common law tradition subject only to modification by the text of the British North America Act and the legislation authorized by it. This would be in contrast to the *tabula rasa* approach taken to constitutional government in the framing of the United States Constitution as a complete code. As a result, at the very least, the historic tension between Parliamentary or Legislative sovereignty and judicial review, which are key features of the Anglo-American traditions of government, could not have been expected to play out in quite the same way in the Canadian Confederation.

Whether or not the special role that the courts might play in interpreting the Constitution was contemplated at that time, the fact that the Canadian Constitution was intended not to be comprehensive or exhaustive in its provisions for government is clear in the third clause of the preamble, which is the most significant for the analysis in this thesis:

> And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

This clause states that the Constitution Act 1867 provides only for the legislative and executive branches of government. This is so despite the expectations created by the United States Constitution and endorsed by the Australian Constitution that every Constitution should at a minimum provide for the three main branches of government.

7. Continuing judicial authority

Support for the view that the founders intended to craft a constitution that would provide for legislative authority in Canada and for the nature of executive government and that would not provide in any original, constitutive, or comprehensive way for judicial authority in Canada is found in a further provision of the Constitution Act 1867. Even if it is possible to resist the temptation fostered by the constitutions of the United States and Australia to read in a provision *creating* judicial authority, it would still seem improbable that there would be no provision for judicial authority anywhere in the Canadian Constitution, even if the provision was not a constitutive one. Indeed such a provision exists and it supports the view that the Canadian Constitution is based on an asymmetrical approach to the three branches of government. The relevant portions of section 129 state:

> 129. Except as otherwise provided by this Act ... all Courts of Civil ... Jurisdiction, ... existing therein at the Union, shall continue ... as if the Union had not been made; subject nevertheless ... to [authorized and applicable legislation].[11]

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[11] Section 129 reads: Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to

Any lingering doubt as to whether the text of the Canadian Constitution was intended to be the source for a grant of judicial authority is resolved against such a proposition by section 129. Section 129 clarifies that the Canadian Constitution did not *create* or *establish* the superior courts in Canada, nor did it operate to *vest power* in them. It simply *continued* them. In continuing the authority of the courts, section 129 does not immunize them from the effects of legislation but it appears to confine the influence of such legislation to incremental incursions on the otherwise common law tradition of determining the authority of the courts. It is therefore unlikely, for example, that it would be permissible to replace the inherent jurisdiction of the common law courts to control their own process with any form of comprehensive codification.[12]

One of the relatively rare occasions in which Canadian courts considered the nature and source of their authority occurred soon after the Supreme Court of Canada was established. In 1874, the Federal Government passed legislation providing a process for dealing with challenges to elections, which conferred authority on the provincial superior courts to try controverted elections cases. In a challenge to the election of a member of the Federal Parliament brought in a Quebec riding, the legislation was alleged to be *ultra vires* on the grounds that a provincial superior court could not have jurisdiction to determine a federal matter such as a controverted federal election. It was argued that only a court created pursuant to the federal authority in section 101 would have such jurisdiction. This was rejected by the Supreme Court of Canada in a decision 1879, which affirmed the continuing nature of the jurisdiction of the provincial superior courts.

> The preamble of the British North America Act indicates...that their [the founders'] first duty was to endow the federal union of the Provinces with a constitution based on the same principles as that of the United Kingdom. One of the essential elements of the British Constitution, as of every regular government, is the creation of a judicial power, such power and the legislative and executive powers forming the three indispensable elements of every government. Have they committed a mistake of such a very grave nature as never to have thought of the creation of a judicial power? ....
>
> [Section 101] does not in terms establish a judicial power; it only gives the right to establish, as circumstances and requirements might demand, a Court of Appeal and additional tribunals for the better execution of the laws. According to the terms of this section there were tribunals already existing for the execution of federal laws, since this power is given to be exercised only "from time to time," in the words of the section, that is to say, in the event of the existing tribunals becoming, for any reason, incapable of executing the federal laws. If this section was not intended to recognize the existence of a federal judicial power, it would have been differently drawn—it would have been just as easy to have directed the immediate creation of a court of appeal, or of any other tribunal, as to have allowed their creation at some future time. *If this was not done, it was, doubtless, because the judicial power, whose existence was preserved by sec. 129, was recognized as being still sufficient for the requirements of the country for a long time, and the power to create new tribunals was prudently left to be exercised in the future according to circumstances.* (emphasis added)[13]

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be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

[12] The courts of Quebec, pursuant to their civil law tradition, are amenable to the codification of their process.

[13] *Valin v Langlois* (1879) 3 SCR 1.

The continuous authority of the provincial superior courts is affirmed in the provincial enactments for the superior courts. In Ontario, the relevant provision is section 11(2) of the Courts of Justice Act, which provides: The Superior Court of Justice has all the jurisdiction, power and authority *historically* exercised by courts of common law and equity in England and Ontario.[14] While this section refers to "judicial power" it does not take the form of a grant—it does not *vest* power in the Superior Court. It merely affirms or endorses the authority of the Court. The wording of section 11(2) through its affirmation of the traditional authority of the courts clarifies that this authority is not and cannot be comprehensively or exhaustively encompassed by a textual provision because it is founded on the historic exercise of jurisdiction, power and authority. It cannot be confined to the power exercised during a particular period in time, or "frozen" because no cut-off date for defining the *historic* exercise of authority is specified. Further, by framing the statement of authority in expansive terms, by describing it as "*all* the jurisdiction...", rather than simply "*the* jurisdiction...", the drafters confirmed that the provision does not operate to establish the outer limits of that authority, but merely to affirm its existence.

It might seem odd that the only provision describing the courts' authority is to be found in provincial legislation. It is surprising because provincial legislation is subject to the paramountcy both of federal legislation and of the Constitution; and it might be expected that any provision relating in a fundamental way to a grant of authority to one of the three branches of government would be found in a more authoritative context. However, the location of this provision in provincial enactments can be explained in part by the fact that the Courts of Justice Act and its counterpart in other provinces pre-date Confederation. In any event the apparent anomaly exists only from the perspective of the approach to government fostered by the United States precedent—one that would suggest that each of the three main branches of government *should* be created by the Constitution and vested with their powers in it. Further, the location of this provision in provincial legislation would seem anomalous only if it was regarded as a grant of power rather than as an acknowledgement or affirmation of it. Accordingly, although the approach to Constitutional interpretation fostered by the United States precedent would encourage the reader to treat section 11(2) as a grant of authority, the open-ended nature of the affirmation confirms that section 11(2) was not intended as an exhaustive grant of judicial power, but simply as an acknowledgement of the authority of the court, whose source was elsewhere—primarily in the common law.

Among the most distinctive features of the Canadian Constitution apparent from the text of the Constitution, then, is the asymmetrical arrangement of the three main branches of government and the unusual reliance alternately on codified and common law sources for their authority. Unlike the constitutional arrangements provided by the texts of the United States and Australian Constitutions, the authority of the legislative and executive branches of government alone are provided for in the Canadian Constitution. The courts' authority was not *created* by the British North America Act but rather was *continued* by it. The source of court authority is explicitly acknowledged in the Canadian Constitution to be found elsewhere—in the traditions of the courts of common law and equity in England and the provinces. As the Supreme Court of Canada recently noted, "[i]n addition to s. 129 providing for the post-Confederation continuation of provincial superior courts, s. 96 also impliedly contemplates

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[14] Courts of Justice Act, RSO 1990, c C-34. Alberta's Judicature Act, RSA 1980 c J-1 s 8 provides in even more emphatic terms: "The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided."

their continued existence. The constitutional fact of their continued existence endorses their general jurisdiction and, in effect, guarantees a traditional core of superior court jurisdiction..."[15]

One further semantic anomaly seems to confirm the distinctive nature of judicial authority of the superior courts. In the United States and Australia, the fulfilment of the role of the courts is routinely described as an exercise of judicial *power* and yet, in Canada, the expression "judicial power" is rarely used. It is far more common for Canadians to refer to the courts as having the *authority* to act in a particular way rather than the *power* to do so. In the absence of a provision in the Constitution Act for this, the concept of either judicial "power" or judicial "authority" does not have the same degree of focus or specificity as seems to have in the United States and in Australia. While it is difficult to articulate with precision the difference between the two terms "power" and "authority", there is a sense in which the use of the term "power" connotes a specific allocation of the capacity or entitlement to achieve objectives that are specified for the entity granted the power, where the use of the term "authority" connotes a more flexible allocation of the responsibility to achieve objectives through means that are determined in a more autonomous way. This difference in terminology is a subtle one, but it is arguably yet another reflection of the difference between the text-based approach of the Constitutions of the United States and Australia to judicial authority and the tradition-based approach of the Canadian Constitution to judicial authority.[16]

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[15] *Canada (Canadian Human Rights Commission) v Canadian Liberty Net* [1998] 1 SCR 626, 157 DLR (4th) 385.

[16] JWF Finnis *The Idea of Judicial Power* (DPhil Thesis Oxford 1965).

B. The Tradition

1. The intent and purpose of the constitutional provisions

While it may standard practice in seeking to understand a principle, such as judicial authority, to examine the relevant textual provision, having identified a distinctive approach in the text of the Constitution Act 1867, it remains to be asked what this difference means. To understand what it means to say that there is a principle of judicial authority in the Canadian Constitution even though there is no grant of judicial power in the text of the Constitution Act—to understand the meaning of the particular approach taken in the Canadian Constitution to judicial authority—it is necessary to consider the intention and the purpose of the provision. It is not necessary to elaborate on interpretive theories to appreciate that these things—the intention and the purpose—are not found in the words of the text itself. To understand their meaning it is necessary to refer to the circumstances in which the provision was drafted and the circumstances in which it operates. Not only are things like the intention and the purpose of a provision helpful in understanding the provision, they can often provide a way to choose between alternative interpretations and they can also make a particular meaning for the provision compelling.

It is not necessary for the purposes of this analysis to enter into the debate in statutory interpretation over whether the intention or the purpose of a provision should prevail in determining the meaning of a legal text. Whether an appreciation of "the intent of the framers," which is favoured as authoritative in much of the American constitutional jurisprudence, or whether a "purposive approach" to interpretation, which has been favoured in many Canadian decisions as authoritative, should prevail,[17] the aim in referring to these external indicia of the meaning of the text is simply to identify some consistent features in the intention and the purpose that will elucidate the Canadian approach to judicial authority. It might be said that the distinction between the approaches taken by the framers of the Canadian Constitution and United States Constitution over the need to provide for judicial power itself represents a subtle but profound divergence in views about the role of private law adjudication in government: but to say that it represents a divergence in views is to presume a consistency between the views of the drafters of the Canadian and United States Constitutions and the views of those who currently interpret the Constitutions. However, since the aim here is to identify points of consistency between the intent and the purpose, it is important to begin by recognizing that the framers wrote what they did in a particular time and place, and to note some salient features of that time and place to understand why they took the approach they did, before trying to identify the more durable aspects of their intention.

2. The politics and ideas of the times

The political history of the times in which the constitutions of the United States and Canada were written is relatively well known, but the key events bear repeating to emphasize the effects of the most inspiring and pressing circumstances that attended the founding of each country. In the United States, independence from colonial rule, on the one hand, was matched on the other hand by local conditions that entailed both independent-spirited local communities in the form of the several states (who were, however, from the perspective of aspirations for political union, essentially like-minded) and, what was then viewed as an open

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[17] M Kirby 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) Melbourne U L Rev 1; S Choudry 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 Indiana L J 819. The different emphases in these traditions are arguably themselves a product of the different approaches to the role of the courts in governance.

land without prior existing law.[18] The framers of the United States Constitution were in a position to formulate a proud vision and write it on a clean slate. Their great challenge, in seeking independence was to form a democratically supported government that had sufficient legitimacy to be distinguished from mob rule. This required them to draft a constitution that would replace the monarch as the ultimate and unchallenged authority.

In Canada, a defensive union between the colonies in British North America that would resist the Manifest Destiny of the United States to rule North America was matched with the independent-spirited local community in Quebec, which had a well-established law and distinctive aspirations for political union. The vision of the founders of Canadian Confederation of their union, by comparison, was that of expedience and compromise. Indeed, it is arguable that this difference in local conditions alone, the difference between mapping out the relationship between legal systems for a land that is "uninhabited" and doing so for a land that is already occupied by communities with their own well-established legal systems is important to the approach taken to the conflict of laws. It engenders a sense of need for compromise and the importance of flexibility to adjust and refine the system to accommodate exigencies not yet fully appreciated. Far from providing the conditions under which it would be possible for "The People" to announce a series of proud aspirations for which they would "ordain and establish" the Constitution, as was the case in the United States, the conditions in Canada prompted the founders merely to recite the desire of the Provinces to be united in a way that would conduce to their welfare and promote the interests of the Empire, and the fact that this made it *expedient* to provide for legislative authority and to declare the nature of executive government. [19]

In addition to the political history of the times in which the United States and Canada were founded, much has been written about the history of the political *ideas* of the times. Again, the main features are worth noting because they speak not only to the differences in the political exigencies of the circumstances of the founding of the federations but also to the political aspirations attendant on the founding of the federations. For example, the influence of the French Revolution and the Enlightenment, and in particular the theories of government and the separation of powers of the French writer Montesquieu[20] on the great American social and political aspirations has been the subject of considerable recent scholarship.[21] While political theory did not seem to play a prominent role in the institutional design of the Canadian

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[18] Better understanding of the cultures of the peoples of North America when the Europeans arrived has shown that the view that North America was a *terra nullis* is objectionable, but this was the view held at the time.

[19] The preamble to the United States Constitution is reproduced above in note 10. The preamble to the Canadian Constitution is reproduced in the text prior to that note.

[20] C Montesquieu 'L'Esprit des Lois, Book XI' in M Curtis (ed) *The Great Political Theories* (2nd ed Avon New York 1981) 433-438. This is not to suggest that the only influential writers of the day on this subject were French—of course, among others, Locke too considered the separation of legislative and executive powers: J Locke, *Two Treatises of Civil Government* (1690, reprinted Dent London 1924). These issues are reviewed in C Saunders 'The Separation of Powers' in B Opeskin & F Wheeler (edd) *The Australian Federal Judicial System* (Melbourne U Press Melbourne 2000) (Opeskin & Wheeler) 4. "The sketchy records of the Federal Convention of 1787 contain only two specific references to Locke and one to Blackstone; Montesquieu's name, on the other hand, appears eight times, and it may be conjectured that the political circumstances of the time favoured reference in general debate to French rather than English authorities." Finnis (n 16 above) A1.

[21] MH Hoeflich *Roman and Civil Law and the Development of Anglo-American Jurisprudence in the Nineteenth Century* (U Georgia Press Athens, GA 1997); M Reimann (ed) *The Reception of Continental Ideas in the Common Law World* (Duncker & Humblot Berlin 1993); GS Wood *The Creation of the American Republic 1776-1787* (U North Carolina Press Chapel Hill 1969); HP Glenn *Legal Traditions of the World: Sustainable Diversity in Law* (OUP Oxford 2000) (Glenn) 230 *n*80.

federation, which aspired only to expedience, it is widely accepted that the American Civil War had a significant influence on the founders of the Canadian federation in persuading them that a strong central government would help to avoid similar civil strife.[22]

3. The common law and legal institutions of the times

While the political exigencies and aspirations, attendant at the founding of the American and the Canadian federations have been the subject of much study and comment, relatively little attention has been paid to the nature of the law itself and the legal institutions that were the models for the judicial systems of the proposed federations. Common law reasoning can create a deceptive impression of the stability of the common law tradition—one that encourages the view that the choices made about legal institutions when the United States, Canada and Australia were founded were based on essentially the same options understood in the same way. However, this is far from the case. Not only have substantive legal rules evolved over time—the common law itself has evolved and it evolved significantly between the time the American federation was founded and the time the Canadian federation was founded. Accordingly, when we consider the differences in the institutional design of the federations, particularly as they relate to the courts, it is important to bear in mind the nature of the common law at the relevant time. While it is not necessary to embark on a detailed study in legal anthropology or history, or in comparative law, certain basic observations on the history of the legal institutions are critical to appreciating the decision-making process of the founders of these federations.

The common law tradition in the latter half of the eighteenth century, when the framers of the United States Constitution were contemplating their legal institutions did not have, as it does today, a well-developed body of documented jurisprudence comprising detailed doctrines and well-established principles in clearly demarcated areas of law. The process of developing all this was only beginning. It was only just then that Blackstone was beginning to write his Commentaries.[23] At that time, the common law was not, and had never been, primarily a body of substantive law. By and large, the common law was little more than a series of highly formalized procedures for aggrieved persons to engage representatives of the state to grant specified forms of relief in a narrow set of circumstances so as to assist in maintaining a measure of peace in the community. Dispute resolution therefore served as a loose means of social control by providing a facility for aggrieved persons to seek redress in a peaceful and orderly manner and, at the same time, by exerting a cautionary effect on those who might be required to answer to it. Private law adjudication was intended to supplement, not to replace other less formal and more direct local means of social control.[24] In contrast with the grand project of establishing a legal order, a project that was to take hold in the civil law, the common law at that time was more like a state-sponsored dispute resolution service that maintained peace within local communities thereby making their members more receptive to other forms of positive governance.

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[22] Although it is suggested that this influence led the founders of the Canadian federation to engage in misguided efforts to secure the success of their federation through an apparent emphasis on centralized government: P Monahan *Constitutional Law* (Irwin Concord Ontario 1997).

[23] W Blackstone *Commentaries on the Laws of England* (1765-69, reprinted U Chicago Press Chicago 1979) (Blackstone).

[24] In this regard, it is interesting to reflect on the contrast between the fascination that the American public has shown for stories of frontier justice (and the tension between the official representative of law and order—the sheriff—who insists on such procedural formalities as trials, and the angry townsfolk—the mob—who are impatient to seek justice on their own terms) and the distaste with which the Canadian public tends to view such stories.

As the British historian, van Caenegem suggests, this approach to law probably had its roots in the Norman Conquest of England and in the means that were developed to meet the challenge of the French rule of an English population.[25] A Canadian legal scholar, Patrick Glenn, explains that the key features were a corps of loyal judicial officers, who could speak the local language (English) and who could read and write so as to be able to follow instructions and be held accountable through their records; and the use of juries as a means of co-opting the support of the local population. Apart from this, the rest was a matter of obvious expedience and efficiency. A small, mobile judiciary would ride circuit at relatively little expense to the Crown and the judges would be authorized to act on writs of instructions from the Crown as to what relief should be ordered in the event that the jury affirmed that the requisite factual circumstances existed and the lawyers demonstrated in their pleadings that the formal requirements for relief had been met.[26]

The judiciary were not mandated to implement a fixed body of substantive law that would establish a sense of the community's identity, as was the case in the civil law at that time. They were not there to deliberate on the justice of the particular balance of rights and obligations between the parties as advocated by counsel so as to advance and refine the state of the law, as would later become the case in common law trials. They were there simply to determine whether the case as presented by the jury and argued by counsel merited the relief available under the writ. They were there to perform the public service of providing authoritative dispute resolution in the most efficient and expeditious manner possible. The minimum standards of procedural and substantive fairness would be set by the need to maintain respect for the administration of justice so that community support for the system would continue.

There was no structured form of appeal as this would have undermined the efficiency of the dispute resolution function served by these courts. It was not necessary to get the result 'right' in any formal or abstract sense in that there were no externally imposed legal rules or standards that needed to be met. All that was needed was to achieve fairness in the estimation of those present so that there would be confidence in the administration of justice and so that aggrieved persons who were not satisfied with less formal means of dispute resolution would choose it over less peaceful and orderly means of dispute resolution. There was no judicial hierarchy, as there was in the civil law, to police the adequacy of the justice dispensed by these courts. Since the Act of Settlement 1700, judges enjoyed security of tenure, but the incentive to good adjudication was the desire to maintain the confidence of the public and, with it, the willingness of the public to go to court rather than pursue other means of redress. The learning that occurred in the common law in the centuries preceding the American Revolution by this collegial body of judges and by the counsel who appeared before them related to the operation of the writ system and not to the interpretation, advancement or development of a substantive law, which eventually came about through the mechanism of *stare decisis.*

To understand the common law as it was understood by the founders of the United States, and not as we understand it today or as it was understood by the founders of the Canadian federation, it is necessary to imagine it before some of the key developments of the nineteenth century. One of the key developments was the elimination of the formal requirement of a writ to commence an action.[27] At the time the founders of the United States were contemplating the legal system for their country, it was necessary for a person who

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[25] RC van Caenegem *Birth of English Common Law* (2nd ed Cambridge U Press Cambridge 1988).

[26] Glenn (n 21 above) 206-210.

[27] Uniformity of Process Act 1832 2 & 3 Will IV c 39. JH Baker *An Introduction to English Legal History* (3rd ed Butterworths London 1990) 79-81.

wished to commence an action to obtain the formal permission of the state to do so. It was only after the United States legal system was established that this requirement was abandoned and the importance of a "right" of action and access to justice emerged. Only then did it come to be accepted that anyone with a complaint that seemed to merit relief was entitled to have the writ issued regardless of technical impediments that might previously have operated to prevent them from doing so.

This change in the writ system had far reaching implications for the common law tradition as a whole. Plaintiffs now stated the factual basis for their entitlement to relief and the legal basis became a matter of adjudication.[28] This was called "fact pleading" or, in the United States, "code pleading." The concept of a "meritorious" claim evolved from one that met the formal requirements of the writ system to one in which relief was warranted on a broader substantive law basis. This change in the nature of adjudication coincided with the transformation of the role both of judges and lawyers. The judges ceased merely to preside over the procedural aspects of trials and began to decide cases by determining the proper application of substantive legal principles to the facts; and the lawyers now had a much broader scope to argue in favour or against relief based on the "merits" of the case. The move to fact pleading also transformed the role of juries, who by this time had largely ceased to be responsible for providing the evidence. It was now suitable for them to begin to be responsible for adjudicating on the evidence, but not on the law, which was rapidly becoming too complex for laypersons. These changes also brought about the need for appellate review because determinations on the law by a judiciary that was disciplined only through its collegiality needed authoritative organization of its determinations to sustain the confidence of the public.

The important point to note about this transformation is that it occurred largely after the framers of the United States Constitution made their authoritative declarations of the will of the American people with regard to the nature of their institutions of government. The common law tradition that the Americans at least partly rejected in establishing their own traditions was not the common law tradition that prevailed at the time of Canadian Confederation.[29] It is not difficult to imagine in retrospect how the need to obtain the court's permission to seek relief might have seemed unsuitable to Americans. Perhaps even more significantly, though, it is not difficult to imagine as the idea of precedent and *stare decisis* began to emerge and take hold, how the idea of a common law, the contents of which were determined in England, might have seemed to reinforce colonial rule.

4. The civil law and American innovation

It is important to appreciate the nature of the common law and legal traditions at the time when the Americans introduced their own innovations; but it is also important to appreciate the nature of the civilian tradition at the time in order to understand the source of those innovations. The civilian tradition at the time was comprised of a series of increasingly detailed codifications of substantive law that mapped out the rights and obligations between persons in society in a way that reflected the collective aspirations of the community. While the first large-scale systematic and rational codification of the law—the Napoleonic Code—was not to be completed until some decades later in 1804, the idea was emerging that law could unite a community and demarcate it from others by establishing for its members a sense of identity that could operate as a kind of governing power. As Professor Glenn has observed,

> ...in some places in the civilian tradition people speak about the 'State of law' rather than the rule of law, since law is inextricably linked with the modern state;

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[28] As a result of the Common Law Procedure Act 1852 15 & 16 Vic c 76.

[29] Nor does the common law tradition that has evolved in Canada resemble the one that evolved in England during the height of the Empire, with its strict sense of disciplined and hierarchical *stare decisis*.

> it created the state; it depends on it for its enforcement; it guarantees the continuing efficacy and integrity of the state. The formal construction of the state is very important for the ongoing development of legal institutions. As states develop, and develop into democratic institutions, functions of legislation and execution develop, and separate themselves from the more rudimentary form of government which is dispute settlem ent.[30]

Like the civil law countries at the time and, in certain respects, unlike the founders of Canada who favoured "the more rudimentary form of government which is dispute settlement," the Americans drew on the ideas emerging in Continental Europe and blended them with the legal system it was building on the common law foundation. The Americans saw how substantive legal rules could serve a function beyond that of mere precedents to assist in dispute resolution. Substantive legal rules could operate as a form of social organization. Private law could function not merely through adjudication as a means of quelling disruptive disputes but also as a prospective form of rulemaking that would help to prevent such disputes and to direct the members of a community to conduct themselves in particular ways. The civil justice system could do more than merely resolve disputes and maintain peace between the state and the local communities within it, as it was then doing in the common law; it could organize the institutions of government as it was doing on the European Continent.

The founders of the United States were inspired to combine not only what they regarded as the best of the disparate features of British and Continental *political* institutions, but also what they regarded as the best of both *legal* traditions in fashioning the new American legal institutions. While they retained the common law method of adjudicating disputes that existed at the time in Britain, they recognized that the possibility of developing substantive law from precedent could function in the same way as codified laws to define political communities. As Professor Glenn described it, In many respects United States law represents a deliberate rejection of common law principle, with preference being given to more affirmative ideas clearly derived from civil law. ...the common law was reconceptualized as a local, official product, as a 'means of fitting the common law into an emerging system of popular sovereignty.'[31]

The genius in this combination of common law and civil law for the American people was its capacity to reflect their democratic ideals. The judiciary had long since acted as an arm of the government to implement public law (*eg,* criminal law) standards. It would now become possible, beyond this "top down" form of implementing law, for the courts to engage in a "bottom up" form of lawmaking in which they served as a forum for ordinary members of the community advocating on behalf of particular community standards for particular situations. Civil litigation could create an opportunity for the people to persuade community representatives, marshalled as a jury, of the wisdom of the authoritative endorsement or sanction on behalf of the community of a particular course of conduct and of a particular balance of rights and obligations between members of the community. The courts could facilitate a kind of radical participatory democracy in which ordinary citizens could engage in lawmaking. The common law of each State could serve as a kind of surrogate to a civil code, defining a community and establishing its identity and making irrelevant the idea that was to develop elsewhere in the common law that legal rules should be shared and harmonized, subject to local conditions.

Certain implications of these conditions for the kind of civil justice system that would emerge soon become obvious, including the importance of notions like the democratic

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[30] Glenn (n 21 above) 134.

[31] Glenn (n 21 above) 230, citing MJ Horwitz *The Transformation of American law, 1870-1960: The Crisis of Legal Orthodoxy* (OUP New York 1992) 20.

accountability of judges and the right to trial by jury (regardless of the adjudicative efficacy of such traditions). But beyond these specific consequences for private law adjudication, it becomes clear that the founders sought to establish a civil justice system that would not merely serve as a means to maintain peace in the community, but that would constitute a "power" in much the same way as the authority to legislate or administrate in the interests of the community were governmental "powers." The judicial power that was vested in the courts of the United States was clearly greater than that contemplated by the civil law tradition in which the substantive legal rules are made by the legislature, and it was greater than that contemplated by the common law tradition at that time in which the substantive legal rules did not have "the force of law" but were merely aids to decision-making by the courts whose primary function was to resolve disputes. Vesting judicial power in the courts enhanced democratic government by affording the opportunity for continuous engagement with a lawmaking authority by aggrieved members of the community. Features such as democratic accountability in the judiciary and the extensive use of juries were necessary to ensure that this branch of government was democratic not only in the sense that it permitted the participation of members of the community, but also in the way in which the decision-making involved in the exercise of judicial power represented the aspirations of the community.

To what extent do these intentions of the founders of the United States for the role of judicial power in government survive in the purposes that appear to be served by the exercise of judicial power today? They appear to continue to occupy a place of central importance in the American vision of government. Depictions and recountings of judicial proceedings, both fictional and actual, in both public law and private law controversies occupy a good deal more of the available media than do comparable presentations of other forms of governmental deliberations and actions—and certainly disproportionately more than would account for the experiences of average members of the community. Although it is true that common law judicial proceedings, at least fictionalized presentations, are more dramatic than the work of the other branches of government, and more dramatic than the everyday life of most people, this does not change the fact that for most Americans, judicial proceedings capture the imagination and constitute a major form of inspiration in the pursuit of their ideals of governance.

5. Quebec's social constitution and the Quebec Act

The role that was intended for the judiciary in Canada was a very different one from this, as is the role that it serves today. When, almost a century after the founding of the United States, the Confederation of the Canadian provinces was being considered, both the civil law and the common law had evolved considerably. The procedural reforms of the nineteenth century that are described above had been adopted in Canada[32] so that the way was paved in the adjudication of disputes for greater concentration on the merits of cases and the evolving body of substantive law. The full impact of *stare decisis* had yet to assert itself as a recognition of the common law's capacity to become a body of law defining a community, but it is not clear that that would have been regarded as an important feature of the common law in Canada. The development of the notion of a "right" of action and the increased access to justice may have served to assuage those who might have been dissatisfied with the system of justice under the old writ system but, in any event, in the absence of the kind of strong political dissatisfaction that led to revolution in the United States, there was not much impetus to re-cast as law-making powers the institutions that seemed well equipped to secure for Canadians the prospects for peace, order and good government.

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[32] Primarily in the Common Law Procedure Act 1852, which was part of the law of the pre-confederation colony called Canada.

In some ways, the evolution in the legal institutions that occurred in the civil law tradition between the founding of the American federation and founding of the Canadian federation was more influential on the founders of Confederation in their intentions for the judiciary than was the evolution in the common law legal traditions. By the time that the founders of Canadian Confederation were contemplating the union of the provinces in British North America, the political significance of civil codes had become well recognized. The process of codification and, even more so, the project of creating a civil code was understood to be more than just an occasion to state with accuracy the legal rules that the community regarded as appropriate for governing the relationships between its members. A civil code was not simply a restatement. According to Professors Brierly and Macdonald "Given its ambition to present the directory principles of private law in an abstract and canonical form, a Civil Code is appropriately described as a *social constitution*—a text documenting the compact between people by which the fundamental terms of civil society are established."[33]

The creation of a civil code entailed more than merely fixing or articulating in an authoritative fashion the existing law. It was the product of the consensus of the representatives of a community about the norms that should govern the dealings between members of the community. As a "social constitution", or *projet de sociéte* ("social blueprint") a civil code was an inherently progressive statement of the law. It embodied the community's aspirations for the relations between its members. This is, of course, not to suggest that it would be uniformly remedial throughout. Clearly, upon careful deliberation, community representatives charged with the responsibility of drafting a Code would find some legal rules or areas of the law to be in greater need of reform than others. Nevertheless, the contrast between a restatement of legal rules that have already been endorsed or are operative in the community and a civil code as a social constitution remains an apt one.

By the time of Confederation, the political implications of civil codes as social constitutions had been demonstrated in Europe. They were an effective means to unify communities or to achieve a close affiliation between communities by establishing common rules for the rights and obligations between persons within them. This was particularly so where a code articulated shared community aspirations for relations between persons within them whether the shared aspirations aimed merely to harmonize the existing laws of two communities or whether it sought to revise the laws of both. In France, the Napoleonic Code of 1804 helped to cement a political unity between the customary legal system in the north of France and the Romanized legal system in the south of France, and the ideologies of the *ancien régime* and the revolutionary era.[34]

The political significance of civil codes was appreciated in Quebec. In 1866, one year before the Confederation of the colonies of British North American, the Civil Code of Lower Canada was enacted. Unlike the Napoleonic Code, this Code did not seek to unify disparate legal systems but to secure the integrity and distinctiveness of Quebec within Confederation. This aspiration was important for the people of Quebec, and the Civil Code subsequently proved so successful in support of the people's sense of nationhood that by the early twentieth century the Code had achieved "such a place in Quebec's cultural identity that it became almost an untouchable icon."[35] The Civil Code was another demonstration of the Quebecois' sense of unity and distinctiveness that supported the division of the two provinces of Ontario

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[33] JEC Brierly, RA Macdonald and M Boodman *Quebec Civil Law: An Introduction to Quebec Private Law* (Emond Montgomery Toronto 1993) (Brierly) 34 (emphasis added).

[34] FH Lawson, 'A Common Lawyer Looks at Codification' (1960) 2 Inter Am L Rev 1.

[35] Brierly (n 33 above) 46.

and Quebec when the former conjoined province of Canada was federally united with the provinces of New Brunswick and Nova Scotia at Confederation.[36]

The distinctiveness of the Quebec legal system with its codified private law within the new common law federation represents a special feature of Confederation that has continued to shape the political and legal institutions of the country. However, this distinctiveness was neither a product of the confederation of the provinces nor a revelation that occurred on the eve of that union. It was the confirmation of a tradition established a century earlier in a series of events that defined Canada's political and legal traditions. To understand this tradition, it must be recalled that although the English "beat" the Canadiens in the brief battle in 1759 on the Plains of Abraham just outside Quebec City and took control over the fort, by the next spring, they were themselves so beaten by wintering in a place to which they had laid siege that the Canadiens were able to march from Montreal with their Native allies and "beat" them with similar dispatch, again on the Plains of Abraham. While reinforcements from England allowed the English to secure military control over the Canadiens in 1760, both had learned from the battles of the Plains of Abraham and the winter in between that they faced more formidable adversaries in Canada than one another and it was prudent to pursue a peaceful co-existence. The final surrender of the French in Canada was obtained only by conceding to the Canadians the right to practise their religion and to "preserve the entire peaceable property and possession of the goods...."[37] The terms of the Articles of Capitulation 1760 set the tone for Canadian government and its distinctive view of judicial authority that continues today.

British rule was confirmed three years later in the Treaty of Paris 1763 but that Treaty purported to offer rather less generous terms to the Canadians, allowing them peaceful possession of their property under their laws only for eighteen months to allow them to sell and leave, after which time, those who remained would be subject to British laws. However, the purported restrictions in the rights of Canadiens to continue to enjoy the application of their own law to matters of property and civil rights was rejected both by the English courts as a matter of honour and by the advisors to Parliament as a matter of prudence. According to Lord Mansfield in *Campbell v Hall,*[38] "Articles of capitulation, upon which the country is surrendered, and treaties of peace by which it is ceded, are sacred and inviolate, according to their true intent and meaning." According to Advocate General Marriott in his recommendations for the Quebec Act,

> the Treaty made with the sovereign state of France...does not supersede the Capitulation made with the inhabitants; because I consider capitulations, in the eyes of the law of nations, to be not only national, but personal compacts and made with the inhabitants themselves, for the consideration of their ceasing resistance. It is consistent, with the honour and interests of this kingdom that they should be religiously observed...."[39]

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[36] The Constitutional Act 1791 31 Geo III c 31 had divided Canada into Upper Canada (the area that is now within the province of Ontario) and Lower Canada (the area that is now within the province of Quebec) but the Act of Union 1840 3 & 4 Vic c 35 had reunited Upper and Lower Canada.

[37] Article XXXVII of the Articles of Capitulation provided that "The Lords of the Manors, the Military and Civil officers, the Canadians, as well in the Towns as in the country, the French settled, or trading, in the whole extent of the colony of Canada, and all other persons whatsoever, shall preserve the entire peaceable property and possession of the goods...[lands], merchandizes, furs, and...even their ships...—"Granted as in the XXVIth article." A Shortt and AG Doughty *Documents Relating to the Constitutional History of Canada 1759-1791* v 1 (SE Dawson Ottawa 1907) 25 (Shortt and Doughty).

[38] *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045 (QB).

[39] Shortt and Doughty (n 37 above) 472.

Peaceful governance of the colony following the capitulation required the alliance of two leaders—one English and one Canadien who had previously fought against one another in battle; and it entailed Governor James Murray's resistance to the demands that were made by the British merchants, who had migrated north from the American colonies, to establish a democratic assembly to which only they could be elected, and to institute trial by juries to which only they could be appointed. At a time when various methods of governance were under consideration for Canada, democracy (at least, in the form in which it was proposed at that time) was thought unlikely to serve the colony well. In time, Governor Murray was replaced by Sir Guy Carleton who eventually succeeded in securing for Canadiens—the people now called "French Canadians"—the passage of the Quebec Act in 1774.

The Quebec Act granted, among other things, the right of the Church to collect tithes, the right to continue the traditional means of land holding and, more generally, the application in matters between private persons, of the "laws of Canada," *ie,* the law of the Canadiens. At the time, this generally meant the Coutume de Paris, which had been recorded in 1580, and which represented Quebec's first "code".[40] But eventually, it came to mean the application of Quebec's own civil code, the Civil Code of Lower Canada. The Quebec Act has been described as an Act that "holds a special place" in history because "it was the first Imperial statute to create a constitution for a British colony...[one] which even appears to embody the principles of the later Commonwealth...[and one which] recognized the complexity of the relations between the two groups which together were to constitute the beginnings of the Canadian people."[41]

One need only reflect for a moment on the timing of the Quebec Act— just two years before the American Revolution—to appreciate the English pragmatism that inspired its design. It was a time of increasing upheaval in the American colonies. The Act granted the Canadians the right to settle in lands that in 1763 the English had ordered the American colonists to refrain from settling so as to appease the Native peoples,[42] and it simultaneously secured their loyalty to Britain in the impending conflagration with the American colonists. The Quebec Act secured greater rights for French Roman Catholics in Canada than existed elsewhere in its empire but it was also the last of the "Intolerable Acts" that galvanized the American colonies to pursue independence.

Thus, the period that constituted the defining moment in American history—that of the American Revolution—is arguably equally significant to Canadians but for very different reasons. The events that forged the traditions that have come to mark the character of the United States also forged traditions for Canadians that have become equally characteristic. The Quebec Act was a leading example of the approach that was taken on various occasions by the British to "conquered" or "ceded" colonies, in contrast to the approach that was taken to "settled" colonies. In the former, as in the case of Quebec, the practice that emerged was for the existing law to continue until altered by legislation. In the latter, that is, in cases in which the colony being settled was regarded as not having any suitable law in force at the time, the law that the settlers brought with them applied.[43] Matters involving relations between persons and the state, such as those governed by the criminal law, remained to be governed by British law, but the British otherwise regarded it as compatible with their governance to leave

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[40] Brierly (n 33 above) 8.

[41] H Neatby *The Quebec Act: Protest and Policy* (Prentice-Hall Scarborough, Ontario 1972) 1 (Neatby).

[42] It was no longer necessary to refrain from settling those lands because epidemics of smallpox that had been spread, both unintentionally and intentionally, among the Indians had decimated the population in many areas.

[43] Blackstone (n 23 above) 108-109; J Crawford *Australian Courts of Law* (3rd ed OUP Melbourne 1993) 14.

questions of "property and civil rights" as they were described in the Quebec Act to be governed by the existing local law.

The approach the British took to the Quebec legal system and to other conquered colonies was not newly devised by them for the governance of their empire. On the contrary, ironically, the approach taken by the British to the establishment of the legal system in Quebec echoed the approach taken by the Normans to the rule of England. It was an approach that permitted the local substantive law to apply in private law matters but instituted common law procedure for the adjudication of civil disputes. Judicial governance (if it can be called that) in the common law did not involve the imposition of specific legal rules but the application of existing customary norms by a reputable dispute resolution facility sponsored by the government.[44]

Accordingly, while the approach taken to the early governance of Canada through the Quebec Act was inflammatory to the Americans, and while it was a matter of political and military pragmatism to the British, it established key features of the Canadian legal and political traditions that have continued to shape the governance of Canada throughout its history. In many ways, for the subject matter of this thesis—the judicial system—the Quebec Act, as a realization of the undertakings in the Articles of Capitulation, is the key constitutional document.[45] It could be said to articulate the special mandate for the courts that was continued in the Constitution Act 1867. Although the Quebec Act did not bestow judicial powers upon a body it created with the same grand formality of the United States Constitution, it has the same foundational significance in establishing the basic approach to a key institution—the courts—as does the United States Constitution, and, accordingly, it deserves to be counted among such documents in Canadian history. The challenges and strategies that are illustrated by the events surrounding its passage and that have since come to characterize Canadian *political* traditions are well known. They include: the resistance of American domination, the willingness to compromise to accommodate differences between the founding peoples, the commitment to cultural diversity and the emphasis on cooperative efforts to face common difficulties such as those posed by a harsh climate and the governance of a vast territory. However, key features of Canadian *legal* traditions were also defined at this time, including the commitments to: the continuity of legal traditions; the application of local law in areas of private law; and the even-handed application to all persons, regardless of cultural diversity, of public law with a strong emphasis on procedural fairness. Perhaps most importantly, though, was the establishment of the idea that legal traditions securing peaceful relations in the community would suffice and local political government, which was not established by the Quebec Act, could safely be left to be established in due course. "The more rudimentary form of government which is dispute settlement," which was described by Professor Glenn[46] as characteristic of the early common law period, served Canadians well, and core features of this approach to governance have continued to enjoy the confidence of Canadians. As Canadian historian Hilda Neatby observed,

> The Quebec Act has been praised by some as a just and humane piece of legislation because it recognized the claim of the Canadians to be judged in certain matters by their own traditional laws and customs and to continue the practice of their own religion without being officially rated as second-class citizens. Also, by

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[44] The logistical requirements for the discharge of this governmental responsibility are divided between the provincial authority over the courts and the federal authority over the judiciary: Chapter II on Federalism and the Courts, 'A Unified Judiciary.'

[45] HM Neatby *The Administration of Justice Under the Quebec Act* (U Minnesota P Minneapolis 1937).

[46] Glenn (n 20 above).

> refraining from imposing or granting an elective assembly, it left them for a time, governed by a generally benevolent oligarchy and relatively free from taxation.[47]

It seems likely that to the founders of Canadian Confederation who, years later, were contemplating the plan for Confederation, the work of the courts in the adjudication of disputes would not be regarded as a "judicial *power*" at all. No, the courts, applying local law, had maintained peace in the community long before there had been any local "government" in Canada. To the extent that this was so, the absence of a provision in the Constitution for "judicial power" would not have seemed a deliberate omission at all because the courts were not part of the "government." Alternatively, to the extent that it was thought that the work of the courts might have had the potential to operate as a judicial *power*, it would have been a subject on which the founders of Confederation would want to tread lightly. As a "power" that could operate as an adjunct to legislative power, it could constitute a further area of divisiveness and controversy in the negotiations of the many compromises that would make Confederation possible. At the time, Sir John A Macdonald believed, perhaps wrongly, that the American Civil War could have been avoided if the framers of the American federation had achieved a more centralist balance of powers between the Federal government and the several states. Accordingly, there would have been no desire to emphasize the capacity of private law adjudication to operate as a political force in promoting the autonomy of the provinces by describing it as a "judicial power." Equally, to the extent that this could be a role played by the courts in their adjudication of matters of public law, (either in their capacity to resolve disputes between persons and the state or to resolve constitutional matters) it might have seemed unwise to emphasize to those who wished to promote provincial autonomy that the courts could operate as a power of the federal government.

There is a sense in which the blend of civil law and common law traditions in Canada was as innovative as it was in the United States.[48] Where the Americans used continental political structure to harness the common law adjudicative method into a powerful force for community definition and participatory democracy, the Canadians took the heart of the civil law, its code, and wove it into the loose and informal political governance that had characterized the times and places before and beyond the full control of the British Empire.

6. Judicial authority, judicial power and models of private law adjudication

To what extent does this divergence of views on "judicial authority" survive today in views of the role of private law adjudication? According to Professor Glenn,

> The lasting power of the common law came from its lack of concern with the immediate. It told no-one what they had to do, but provided a forum within which their obligations could be determined, in a way which commanded great respect and which was faithful to multiple contexts. In the multicultural society which is Canada, the common law must accommodate diversity which is perhaps greater than that of medieval England....[49]

The commitments to diversity and to this particular approach to judicial authority seem not merely to have survived, but also to pervade most aspects of private law adjudication in Canada. Still, it is possible to describe at this point the broad contours of this view today.

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[47] Neatby (n 41 above) 2.

[48] W Tetley 'Mixed Jurisdictions Common Law vs Civil Law (Codified and Uncodified)' (1999) 4 Uniform L Rev (NS) 591 discusses the blending of legal traditions.

[49] HP Glenn 'The Common Law in Canada' (1995) 74 Can Bar Rev 261, 276.

In an article on civil justice reform, a Canadian procedural scholar, Thomas Cromwell, suggested that in setting an agenda for court reform it was important to begin by articulating the role of the courts. He said "one of the basic questions is whether the dispute-resolving or the right-vindicating role of the courts should be given primacy".[50] In a similar vein, an American procedural scholar, Kenneth Scott described the "Two Models of the Civil Process" as the "conflict resolution model" and the "behaviour modification model". He said of the social role of the conflict resolution model ""[I]n the interests of preserving the peace, society offers through the courts a mechanism for the impartial judgment of personal grievances, as an alternative to retaliation or forcible self-help."[51] Of the result reached in any particular case he said:

> To facilitate the acceptance of the outcome and resort to the process, the rules should be seen as "fair" in terms of prevailing community values... ... [I]t is more important for society that the dispute be settled peaceably than that it be settled in any particular way. ... [Further,] this model is strongly inclined to let sleeping dogs lie. It does not welcome anyone stirring up trouble or "fomenting litigation" and it takes a dim view of officious interm eddlers.

Kenneth Scott contrasted this with the "behavior modification model" which he said "sees the courts as a way of altering behavior by imposing costs on a person." The behaviour modification model seeks to discourage wrongful conduct by requiring wrongdoers to internalize the costs of their wrongful conduct and to encourage persons who have been wronged to come forward with claims so as to establish and enforce community standards. As he explained, "[t]he fact that the cost imposed on the defendant takes the form of a payment to the plaintiff is significant only in that it affords the needed incentive for the plaintiff to bring the action and activate the machinery."

The Canadian tort scholar, Ernest Weinrib contrasted the "functional" approach to law, which he said was particularly well entrenched in American legal scholarship from an approach that sought to understand the intrinsically intelligible purpose of private law.[52] According to Professor Weinrib, the functional or economic approach to law emphasizes distributive justice and measures the adequacies of such things as procedures, legal analysis, the relief awarded in terms of their efficacy in promoting societal goals beyond the law itself. This approach would appear to correspond with the notion of judicial power in which the courts operate as another law making branch of government. Adjudication is not an end in itself, but a means to legitimize the lawmaking function as the democratic process does for the legislative branch.

The corrective justice theory of private law, however (which he favoured) sees disputes as properly resolved in accordance with an intrinsically coherent understanding of the relationship between the parties created by the issue of liability raised in their dispute. As he described it, this is essentially a juridical, and by this he meant non-political, view of private law, which would appear to correspond to the role intended for the courts in Canada. It entails an autonomous form of reasoning that produces inherently justifiable results. It is different from a view of private law in which legal disputes are resolved and legal rules are established by identifying the relevant extrinsic goal or social objective affected by the resolution of the dispute, and by reaching a resolution or crafting a legal rule that best serves that objective. That approach—the one here associated with "judicial power"—according to Professor

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[50] T Cromwell 'Neither Out Rar Nor In Deep: The Zuber Commission and the Problems of Civil Justice Reform (1988) 37 U New Brunswick L J 94.

[51] KE Scott 'Two Models of the Civil Process' (1975) 27 Stanford L Rev 937, 937-38.

[52] E Weinrib *The Idea of Private Law* (Harvard U P Cambridge 1995) (Weinrib).

Weinrib, is also associated with current efforts to link law with economics and other disciplines and to recast the goals of private law adjudication in terms of the societal interests informing these other disciplines.

It is difficult in the marketplace of scholarly ideas that exists in North America to correlate with exactitude the views contrasted by Professor Weinrib with American and Canadian approaches to private law. However, it is interesting to note that there was a striking correlation between the reception Professor Weinrib's views received and the adjudicative culture of his reviewers. Where the English journal reviews considered his views in a measured fashion, identifying aspects they regard as excessive or defective, reviews in the American journals rejected his thesis in the strongest of terms. One compelling explanation for this correlation seemed to be that the American reviewers regarded the model of private law he favoured as fundamentally misdescribing private law. For example, a reviewer in the Yale Law Journal characterized Professor Weinrib's work as "Law for Law's sake" and then concluded that Professor Weinrib's indifference to "the purposive concerns about predictability, accident reduction, and compensation that animate present-day debate among both tort scholars and reformers of all stripes—is likely to limit the appeal of this idiosyncratic but interesting volume."[53]

To the American reviewers of Weinrib's work, and, perhaps equally to the framers and interpreters of the United States Constitution, the aspirations of the "dispute resolution" model might seem to be a bit of a mystery. And yet this approach appears to have endured in the Canadian adjudicatory tradition. In it, the adjudication of private disputes stands largely apart from the central, pro-active forces governing society—those that establish and implement standards of conduct democratically approved and applicable to all. The mainstream function of societal regulation that operates in a prospective and remedial way is the responsibility of the legislative and executive parts of the government. The adjudication of disputes is independent of this function both in terms of its aims and in terms of its source of authority. Unlike the governing institutions—the legislature and the executive—the courts do not seek through their rulings primarily to implement government policy or to bring to bear the coercive forces of governmental authority to enforce officially sanctioned community standards. Rather, in this tradition, the courts are more interested in resolving disputes in a peaceful and orderly fashion than in bringing about a resolution that would have specific implications for the conduct of persons in situations similar to the litigants'. This is not an absolute distinction—the courts in both models both resolve disputes and "make law"—but the point of emphasis varies from one to the other.

The dispute resolution model is unlike the public litigation model favoured in the American legal tradition in which the courts constitute a separate but equal branch of government. Like the other branches, they assert the will of the people through the resolution of disputes in accordance with standards that support the interests of the community, or at least a perceived majority of the community. In this way, as Professor Weinrib observed, under the "functional" or, as it has been called here, the "public litigation model,"

> All law is public, in that the legal authorities of the state select the favoured goals and inscribe them into a schedule of collectively approved aims. The various methods for elaborating the community's purposes—legislation, adjudication, administrative regulation, and so on—are merely different species of the generically single activity of translating goals into a legal reality."[54]

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[53] RL Rabin, 'Law for Law's Sake' (1996) 105 Yale LJ 2261.

[54] Weinrib (n 52 above) 7.

7. The separation of powers and inherent authority

In the view of government described by the public litigation model, where the judiciary and the legislature are engaged in similar activities, it becomes very important to demarcate spheres of authority through doctrines such as the political questions doctrine, and by limiting the role of the courts to adjudicating "cases or controversies". In this regard, the distinction between the views taken of the role of adjudication between, for example, the United States and Australia on the one hand, and Canada, on the other hand, can be seen in the different opinions over whether the courts should have authority to provide advisory opinions.

In the United States and in Australia the rendering of advisory opinions has been viewed as a matter for the executive and not for the courts.[55] However, the Supreme Court of Canada Act includes a provision for referring questions to the Court that has been upheld[56] and has been used on many occasions. Advisory opinions are usually sought to determine the constitutional validity of legislation. References may be made by the provincial governments to the provincial courts of appeal pursuant to enabling legislation in each of the provinces and by the federal government to the Supreme Court of Canada pursuant to the Supreme Court Act. Both levels of government can refer either federal or provincial legislation to the courts for a determination of its constitutionality. Section 53 of the Supreme Court Act, provides that "the Governor in Council may refer to the court for hearing and consideration important questions of law or fact" and that upon such a reference "it is the duty of the Court to hear and consider it and to answer each question so referred." On occasion the Court has refused to answer questions for reasons of non-justiciability or the lack of judicially manageable standards. While the opinions are officially "advisory" only and bind only the parties to the appeal[57] they have been accorded the same weight as judicial opinions.[58]

Constitutional lawyers in the United States and Australia explain the prohibition on advisory opinions not in terms of any practical difficulties they present but in terms of the violation of the separation of powers which, in their view, is critical to government. However, after some 74 reference opinions, Canadians are confident that advisory opinions do not have a deleterious effect on government and that they are useful in saving private litigants from the cost of determining validity and in obviating the need for test cases. [59] Accordingly, the difference in views must be a product of some fundamental divergence in the view of the mandate of the courts, *ie*, in the view of judicial authority. In fact, most discussions of "judicial power" in the literature seem to resolve themselves into a discussion of the separation of powers. The existence of the jurisdiction to give advisory opinions in Canada and the lack of it in the federal courts of United States and Australia appears to represent a divergence in approach to the roles of the three branches of government. Beyond judicial independence, the "separation of powers," seems to be an additional layer of constitutional concern that arises only in countries in which the courts, like the executive and the legislature, represent a "power" of the government.

In the civil law the concern that gives rise to the "separation of powers" is even stronger. It might better be described as the "segregation of powers." As John Bell explained,

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[55] Correspondence in 1793 between the President and Secretary of State and the judges of the Court: Note, 'Advisory Opinions on the Constitutionality of Statutes' (1956) 69 Harvard L Rev 1302, Tribe (n 3 above) 73-77 and Hogg (n 5 above) 211. *Re Judiciary and Navigation Act* (1921) 29 CLR 257.

[56] *AG Ontario v AG Canada* (Reference Appeal) [1912] AC 571 (Reference Appeal).

[57] Reference Appeal (n 56 above).

[58] Hogg (n 5 above) 213.

[59] H Smith *Federalism in North America* (Chipman Law Publishing Co Boston 1923) (Smith) 110.

> The judicial role in governance (not indirectly through its determination of civil disputes but directly through judicial review) is distinguishable in the common law and civil law traditions. In the common law tradition, the judicial mandate to ensure that the executive acted lawfully required judicial independence. In the civil law tradition, the separation of powers was intended to prevent the judiciary, an institution that was treated with some caution from pre-Revolutionary times, from interfering with the executive.[60]

Professor Glenn elaborates on this point, observing that "there are problems ... with the notion of judicial independence in the civilian tradition. Given the ancien regime, nobody wants a 'gouvernement des juges", so the primacy of the codes, and legislation in general, is reinforced by ongoing scepticism towards, and even surveillance of (through control of the career structure) the civilian judiciary."[61] The civilian approach to the role of the judiciary illustrates the existence of a broad range of attitudes taken to it. Further, it helps to clarify that the existence of an advisory jurisdiction or prohibition against such a jurisdiction might best be understood in terms of the different adjudicative traditions and the divergence in views on the role of the courts in government.

The separation of powers represents both a challenge and a source of strength to the courts in Australia where the scope for intervention by the legislature in the institutional design and operation of the courts is much greater. On the one hand, the Federal Court has been said in recent times to be engaged in "defying the will of parliament" by engaging in judicial review based on a "self-interpreted duty to protect human rights" "that represents the lawyerisation of public policy, the distrust of public administration and the embrace of the American disease."[62] This view resembles the sentiments supporting the segregation of the courts in the French Republic. On the other hand, the separation of powers has come to be regarded as having the potential for serving as an alternative to a code of entrenched constitutional rights for securing basic features of judicial process.[63] According to Gavan Griffith and Geoffrey Kennett,

> Implications from Chapter III not only protect the general independence of the courts and prevent the power to punish for breaches of the law from being allocated to non-judicial bodies, but also prevent Chapter III courts from being required to act inconsistently with judicial method. In this they go some way to guaranteeing freedoms which are arguably as important to a free society as any right to democratic participation.[64]

The protection that Chapter III courts enjoy from "being required to act inconsistently with *judicial method*" or "judicial process" seems intended to be as broad and open-textured as the doctrine of abuse of process applied by Canadian courts to control their own process. In fact, in the decision of the High Court of Australia in *Nicholas v The Queen,* Gaudron J held that as a feature of "judicial process," which is regarded as an integral part of "judicial power," a "court cannot be required or authorised to proceed in any manner which involves an abuse of

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[60] J Bell *French Constitutional Law* (Clarendon Oxford 1992) 20; C Saunders 'The Separation of Powers' in Opeskin & Wheeler (n 20 above) 5.

[61] Glenn (n 21 above) 134.

[62] P Kelly 'Defiant Court Provoking Political Wrath' *The Australian* (5 Sept 01). MD Kirby 'Attacks on Justice - A Universal Phenomenon' (1998) 72 Aus L J 559.

[63] F Wheeler 'The Doctrine of the Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 Monash U L Rev 248; G Winterton, 'Separation of Judicial Power as an Implied Bill of Rights' in G Lindell (ed) *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press Annandale 1994).

[64] G Griffith and G Kennett 'Judicial Federalism' in Opeskin & Wheeler (n 20 above) 61.

process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute."[65]

While the English judiciary was said to need independence from the executive to fulfil its mandate of ensuring that the executive acted lawfully, the French judiciary was said to need to be separated from the executive so as to ensure that it did not interfere with the executive,[66] and the American judiciary has needed to be independent from both the executive and the legislature to be in a position to defend the Constitution, which, by the authority of the People, stood above any of the institutions of government. However, the concern to be independent of the legislature and protected from its power to bring about institutional change in the courts in its management of the federation seems to be a special feature of Australian Constitutional law.[67]

This is evident in the distinct effects of the doctrine of the separation of powers on the vitality of the Federal court and the state courts. Although the scope and integrity of the judicial power of the courts exercising federal jurisdiction under Chapter III, as set out in the *Boilermakers'* case,[68] was a key means of defining the separation of powers and protecting judicial independence, it has been a matter of some concern that the position of state courts is not similarly protected. The High Court introduced in the decision in *Kable v Director of Public Prosecutions (NSW)*[69] the idea that state courts operating under federal jurisdiction could not be required to act in a way that was "incompatible" with serving that function, but many of the state courts themselves are not explicitly entrenched in the state constitutions and there were differences of view among the court in *Kable* as to their protected status.[70] As a result, at least in theory, even if the judiciary felt confident, pursuant to the traditions of judicial independence inherited from Britain, that they were relatively safe from interference from the executive, this did not provide assurance that the state courts in which they sat might not be subject to abolition or that the jurisdiction of those courts might not summarily be reduced or eliminated.

The lack of constitutionally entrenched protection for the jurisdiction and independence of state courts was a key factor justifying the striking down of large parts of the legislative scheme for the cross-vesting of the judicial authority of Australian courts and diminishing the capacity of the scheme to integrate the Australian judicial system. However, as much as the considerable legislative power is regarded as a force from which the courts need to be protected, so too has it been a force that has served to reorganize the federal judicial system, initially in vesting federal jurisdiction in state courts, then in establishing the cross-vesting scheme, and now in repairing the damage suffered to the scheme by referring state powers to the federal government so that matters will not be split between federal and state courts.[71]

No such concern affects the Canadian superior courts, which operate with a degree of autonomy that seems more profound than could be achieved even by a constitutionally-

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[65] *Nicholas v The Queen* (1998) 193 CLR 173 at 209; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*).

[66] The separation of powers in the French Republic is discussed at (n 61 above) and surrounding text.

[67] C Saunders 'The Separation of Powers' in Opeskin & Wheeler (n 20 above) 1.

[68] *R v Kirby: Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[69] *Kable* (n 65 above).

[70] S Parker 'The Independence of the Judiciary' in Opeskin & Wheeler (n 20 above) 74-76.

[71] B Opeskin 'Cross-vesting of Jurisdiction and the Federal Judicial System' in Opeskin & Wheeler (n 20 above) 331-332.

entrenched mandated. Their role in respect of the legislature and the executive has been described with approval as a "dialogue" in which legislation and government action are not-infrequently declared unconstitutional by the courts and subsequently re-designed to meet the legislative objectives in a way the does not violate Charter rights.[72] The autonomy and security of the courts' mandate has formed the basis for the accepted view that they enjoy an inherent jurisdiction that is often contrasted with the comparatively narrow and carefully circumscribed statutory jurisdiction of the Federal Courts. The capacity of Canadian courts to exercise discretion in the interpretation of legislation and their own mandate is so firmly entrenched in their traditions that the suggestion that they might need protection from the obligation to act in a way that might be incompatible with their institutional role would seem odd. Further as a result of the radical separation in their source of authority from that of the legislature and the executive, there seems to be little if any foundation for concern that legislative action might inappropriately restrict their mandate.

Robert Pushaw Jr described the historical basis for the different approach to "inherent" authority taken in the United States:

> Americans rejected the British notion of "inherent powers" in the sense that the government, as sovereign, possessed vast intrinsic authority--in particular, that courts were part of the executive branch and thus entitled to share in the king's prerogatives. Rather, in the United States "the People" were sovereign, and they ratified a written Constitution that divided the national government into independent legislative, executive, and judicial departments, with each branch restricted to areas specifically delegated. This enumeration appears to foreclose the assertion of powers not listed. Nonetheless, the Constitution has always been construed as allowing the federal government to imply powers needed to effectuate the affirmative grants in Articles I, II, and III. Such "inherent powers" must be defined precisely, however, to prevent their arbitrary and unrestrained exercise.[73]

Similarly, in Australia in exercising authority not expressly granted by statute, the Federal Courts have emphasized that this authority is their "implied jurisdiction" and not "inherent jurisdiction." As Kirby J observed in *Cabal v United Mexican States*[74]

> Such implied jurisdiction and powers are sometimes, inaccurately in my view, called the "inherent" powers of the Court...The relevant implications would be derived from the provisions of the Constitution so as to ensure that the exercise by the Court of its constitutional jurisdiction and powers was not rendered futile or ineffective and so as to fulfil the constitutional purpose of affording to all persons, subject to the authority of the Constitution, the protection and j ustice of the law.

The distinctions between the approaches to judicial authority have implications for many aspects of the Constitution as it applies to the work of the courts in private law adjudication generally and in the effect of this work on the relations between the legal systems in the federation. Some of these aspects of the Constitution are explored in the two remaining chapters of this thesis, beginning with the structure of the court system and then moving on to the role of the courts in securing basic rights. Before turning to them, however, it is worth considering some of the more immediate implications of the Canadian approach to judicial authority for the nature of court jurisdiction and how it is determined in Canada.

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[72] P Hogg and A Bushell 'The *Charter* Dialogue between Courts and Legislatures: Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All' (1997) 35 Osgoode Hall L J 75.

[73] RJ Pushaw Jr 'The Inherent Powers of Federal Courts and the Structural Constitution' (2001) 86 Iowa L Rev 735, 740-741.

[74] *Cabal v United Mexican States* 2001/M39 (HC)

C. Judicial Authority and the Conflict of Laws

1. Rules for service out and codifications of court jurisdiction

An important effect of the Canadian approach to judicial authority on the conflict of laws is the way in which it founds a distinctive approach to court jurisdiction and to the means by which Canadian courts determine their jurisdiction. The striking autonomy of the courts in Canada has fostered an approach to court jurisdiction in which the discretionary, case-specific analysis, of a sort that is ordinarily associated with determinations of *forum non conveniens,* seems virtually to occupy the field in jurisdictional determinations, supplanting traditional notions relating to the fixed outer limits of the courts' competence. This is coming to have subtle but important implications for matters as diverse as the role of rules of court in determining the scope of court jurisdiction, the inclination of courts to endorse multi-province class actions and the perspective of Canadians on multilateral judgments arrangements. However, to understand how this has come about and what precise effect it has, it is necessary to trace the evolution of this in the conflict of laws doctrine.

Historically, in the common law, it was thought that the rules for service outside the territory of the forum determined the scope of the courts' personal jurisdiction. The jurisdiction of common law courts is still explained as a function of service of process by some leading scholars. For example, the authors of *Cheshire & North's Private International Law* have said in the current edition that "...the most striking feature of the English common law rules relating to competence in actions *in personam* is their purely procedural character. Anyone may invoke or become amenable to the jurisdiction, provided only that the defendant has been served with a claim form."[75] However, despite the lack of direct explanation in the jurisprudence or commentary, the relationship between service and personal jurisdiction in Canada has ceased to be governed by the limits of service of process. Service outside the territory of the forum now functions much as service within it, that is, primarily as a means of ensuring that parties receive timely notice of a proceeding so that they have the opportunity to participate. The grounds on which a person may be served outside the territory of the forum do not form fixed and absolute limits for the jurisdiction of the courts but, instead, provide a rough guide to the kinds of cases in which persons outside the territory will be regarded as subject to the jurisdiction of the courts. How has this change come about?

When the Supreme Court of Canada decided in *Morguard Investments Ltd v De Savoye*[76] that personal jurisdiction in Canada was a function of the Constitution, it seemed to some that this would give rise to a codification of personal jurisdiction in which the grounds for personal service outside the territory of the forum would be reassessed and either endorsed or rejected in light of the constitutional requirements set out in the *Morguard* decision. For example, in 1994, the Uniform Law Conference of Canada adopted the Court Jurisdiction and Proceedings Transfer Act in which it proposed:

> ...for the first time in common law Canada, [to] give the substantive rules of jurisdiction an express statutory form instead of leaving them implicit in each province's rules for service of process. In the vast majority of cases this Act would give the same result as existing law, but the principles are expressed in different terms. Jurisdiction is not established by the availability of service of process, but by the existence of defined connections between the territory or legal system of the enacting jurisdiction, and a party to the proceeding or the facts on which the proceeding is based.

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[75] P North & JJ Fawcett *Cheshire and North's Private International Law* (13th ed Butterworths London 1999) 285.

[76] *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, 76 DLR (4th) 256 (*Morguard*).

As the Commissioners went on to explain:

> This provision would bring the law on jurisdiction into line with the concept of "properly restrained jurisdiction" that the Supreme Court of Canada, in *Morguard* ...If the present Act is adopted, rules of court will still include rules as to service of process, but these will no longer be the source and definition of the court's territorial competence. Their role will be restricted to ensuring that defendants, whether ordinarily resident in or outside the jurisdiction, receive proper notice of proceedings and a proper opportunity to be heard.[77]

While there has been no objection to this view, the Act has not been declared in force in any province. If the Commissioners were correct in saying that court jurisdiction is not determined by the rules for service outside the territory of the forum or should not be determined in that way, and if the Constitution sets requirements for court jurisdiction, provided that the bases for court jurisdiction outlined in the Act are constitutionally acceptable, why would there be resistance or indifference to the implementation of the Act? The answer to this lies in the way court jurisdiction in Canada developed in accordance with its distinctive constitutional mandate.

2. Assumed jurisdiction and judgments regimes

Initially, the jurisdiction of common law courts and the scope for the service of documents were thought to be coterminous. Personal jurisdiction was a function of the power of the state to arrest defendants in both criminal and civil matters and to detain them until they had answered the complaint.[78] Since this was confined to defendants who were present in the territory of the forum and who could be served with the notice of proceeding, it was said that the courts had authority to decide any matter involving a defendant who could be served with the courts' originating process.

The scope of personal jurisdiction, however, was never entirely limited to persons who could be served with notice of the proceeding. In addition to jurisdiction based on state powers of arrest, courts also had jurisdiction over persons who were willing to come before them and thereby demonstrate their consent to the court's assumption of jurisdiction. That is, defendants were always free to waive the right to ignore a notice of proceeding issued by a court that did not have the authority to summon them to appear, and to submit to its jurisdiction. They could waive this right simply by appearing in the proceeding and defending the claim on the merits. This practice is sometimes called "submission" or "attornment" and it has always provided an independently sufficient foundation for the jurisdiction of the court to render a judgment binding on the defendant.

Even today, in an era of expanded bases for personal jurisdiction, if the court does not have the authority to decide the case on any other basis and yet the parties are still willing to have the court decide their case, the court is not required to turn them away. The court can decide the case and issue a judgment that will bind the defendant simply on the basis that the defendant has attorned to the court's jurisdiction by appearing in the matter to defend on the merits. Further, common law courts rarely, if ever, inquire of their own motion whether they have personal jurisdiction to decide a case and, generally, they will make such an inquiry only upon a motion by the defendant. The doctrine relating to consent-based jurisdiction and the

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[77] Uniform Law Conference of Canada 'Uniform Court Jurisdiction and Proceedings Transfer Act' in *1994 Proceedings* (Uniform Law Conference, Edmonton Alberta 1994) 48 (Uniform Court Jurisdiction Act).

[78] A von Mehren 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983) 63 Boston U L Rev 279. In the United States this entailed the use of the *capias ad respondendum*: *International Shoe Co v Washington* 326 US 310, 66 S Ct 154 (1945) (*International Shoe*).

principles of estoppel underlying it have remained relatively stable over time: having consented to the authority of the court to resolve the dispute, defendants are estopped from subsequently challenging that authority.

Although the law relating to consent-based jurisdiction has remained constant, the law relating to presence-based jurisdiction changed over the years as physical arrests in civil matters were replaced by service of process and it became clear that there were many meritorious complaints that could appropriately be determined by the court if defendants could be served outside the territory of the forum. Courts began to exercise "assumed" jurisdiction over matters involving defendants from other places, usually on bases prescribed by statute.

Because assumed jurisdiction lacked the support of the coercive powers of the state in which the court sat and because it involved an assertion of authority over persons who, due to their presence in another country, it might be subject to the authority of another sovereign, it was available only with leave[79] and would not generally yield an internationally enforceable judgment. If a defendant served outside the territory of the forum ignored the notice of proceeding, the court was said to lack "jurisdiction in the international sense" and its judgment would not be given effect by courts in other provinces and countries. This gave defendants virtually a veto over the plaintiff's choice of forum.

There were two notable departures from this traditional common law approach prior to 1990 when special regimes for the recognition and enforcement of judgments were created to facilitate federal or regional political systems: the full faith and credit obligation to enforce judgments within the United States in which jurisdiction was based on minimum contacts between the defendant and the forum; [80] and the establishment of a Convention for the mutual recognition and enforcement of judgments by the courts of the member states of the European Union.[81] It was thought necessary to the operation of these federal and regional systems that the courts of states or countries within them give effect to the judgments of the courts of other states or countries within the system in circumstances where jurisdiction was based on the requisite connection between the matter and the forum even when the defendant did not consent; and that by eliminating the requirement of the defendant's consent for enforceable judgments in cases of service outside the territory of the forum, it became necessary to build new safeguards into the law to prevent situations of unfairness in which defendants were forced to litigate in distant fora having little connection to the matter. This involved reviewing the various possible connections between the matter and the forum to determine whether they would support an appropriate exercise of jurisdiction. In the United States the long-arm statutes providing for service out either listed the permissible bases for service outside the state[82] or simply provided for service outside the state in accordance with the Constitution.[83] In Europe, the drafters of the Brussels and Lugano Conventions identified the bases otherwise available in Member States and listed the objectionable bases as prohibited for use in matters

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[79] This is no longer required in some Canadian provinces for matters with certain specified contacts with the forum: Rule 17.02 Rules of Civil Procedure (Ontario) RRO 1990 Reg 194 *as am.*

[80] *International Shoe* (n 78 above).

[81] Pursuant to Article 220 the Treaty Establishing the European Economic Community 1957, Member States negotiated the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1978] OJ L304/1, which is now Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters OJ L12/1 (Brussels I Regulation) and the Lugano Convention which has similar operation within the European Free Trade Association

[82] For example, Illinois Annual Statutes c 110 s 2-209.

[83] California Code of Civil Procedure.

involving defendants of other member states.[84] In both systems it was recognized that there needed to be a correlation between the bases on which courts would assume jurisdiction to decide a matter and the bases they would endorse by enforcing the judgments of other courts that relied on them to assume jurisdiction.

The 1990 decision of the Supreme Court of Canada in *Morguard Investments Ltd v de Savoye*,[85] wrought a similar change in the law of jurisdiction and judgments in Canada. To accommodate the needs of modern commerce and of the Canadian federation, the Supreme Court of Canada decided that Canadian courts needed to adopt a new approach. Concerning the needs of modern commerce, the Supreme Court of Canada explained that,

> ...the business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.
>
> ...what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.[86]

Concerning the needs of the Canadian federation, the Court observed

> The considerations underlying the rules of comity apply with much greater force between the units of a federal state.
>
> ...the English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country.
>
> ...various constitutional and sub-constitutional arrangements and practices make unnecessary a "full faith and credit" clause such as exists in other federations, such as the United States and Australia. The existence of these clauses, however, does indicate that a regime of mutual recognition of judgments across the country is inherent in a federation.[87]

To meet the needs of modern commerce and the Canadian federation the Supreme Court of Canada held that Canadian courts must regard a court issuing a judgment as having jurisdiction to do so when there was a real and substantial connection between the matter and the forum. In the years following the Supreme Court's decision in the *Morguard* case, there was some uncertainty about which of these rationales for change was the operative one—the one that served the needs of modern commerce or the one that serves the needs of the Canadian federation. Although the court had not pronounced definitively on the constitutional basis for the change in the law, it clarified in a subsequent decision[88] that "the constitutional considerations raised are just that. They are constitutional imperatives."

3. Jurisdiction *simpliciter* and *forum non conveniens*

The effect of special rules for the recognition and enforcement of judgments on personal jurisdiction had been recognized in the United States and in Europe, and it was immediately recognized in Canada that a change in the law of judgments had important implications for the

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[84] Article 4 Brussels I Regulation (n 81 above)

[85] *Morguard* (n 76 above).

[86] *Morguard* (n 76 above) 270.

[87] *Morguard* (n 76 above) 271.

[88] *Hunt v T&N plc* [1993] 4 SCR 289, 109 DLR 4th 16 (*Hunt*).

law of jurisdiction as well.[89] These implications were described by the Supreme Court of Canada in the *Morguard* decision as requiring courts to treat jurisdiction and judgments as correlatives.[90] After the *Morguard* decision, it was clear that the constitutional principles of order and fairness required the exercise of restraint in the assumption of jurisdiction and that this requirement would be met only when there was a "real and substantial connection" between the matter and the forum. But what would suffice as a "real and substantial connection"? Would each of the situations enumerated in the rules of the provinces for service outside the province meet this test? Were these situations exhaustive of the scope of the jurisdiction of the provincial superior courts permitted under the Constitution? If Canadian courts were to take the European approach to this question, each of the grounds for service outside the province would be examined by the legislators and approved or rejected. If Canadian courts were to take the American approach to this question, there would be similar guidance given by the Supreme Court.

Canadian courts took neither approach. Instead, as later recommended by the Supreme Court of Canada in *Tolofson v Jensen*[91] they pursued an approach that treated determinations of appropriate forum as an integral feature of the constitutionally valid assumption of jurisdiction. As the Court explained in the *Tolofson* decision,

> To prevent overreaching...courts have developed rules governing and restricting the exercise of jurisdiction over extraterritorial and transnational transactions. In Canada, a court may exercise jurisdiction only if it has a "real and substantial connection" (a term not yet fully defined) with the subject matter of the litigation.
> ....
>
> In *Morguard*, a more accommodating approach to recognition and enforcement was premised on there being a "real and substantial connection" to the forum that assumed jurisdiction and gave judgment. *Contrary to the comments of some commentators and lower court judges, this was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction....*
>
> The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these. However, though some of these may well require reconsideration in light of *Morguard*, the connections relied on under the traditional rules are a good place to start. More than this was left to depend on the gradual accumulation of connections defined in accordance with the broad principles of order and fairness....
>
> Since the matter has been the subject of considerable commentary, I should note parenthetically that *I need not, for the purposes of this case, consider the relative merits of adopting a broad or narrow basis for assuming jurisdiction and the consequences of this decision for the use of the doctrine of forum non conveniens.... Whatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.*
> (emphasis added)

Accordingly, in Canada, the grounds for service outside the jurisdiction do not constitute a definitive statement of the scope of personal jurisdiction. Whether the grounds for service

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[89] V Black 'The Other Side of *Morguard*: New Limits on Judicial Jurisdiction' (1993) 22 Can Bus L J 4.

[90] *Morguard* (n 76 above) 274.

[91] *Tolofson v Jensen* [1994] 3 SCR 1022, 120 DLR (4th) 289 (*Tolfoson*).

outside the jurisdiction are narrow or broad, they are subject to the case-specific determination by the court that they meet the requirements of order and fairness. Some courts have come to describe these two elements of the jurisdictional determination as jurisdiction *simpliciter* and *forum non conveniens.* Regardless of how they are described, it is clear from the final sentence of the quotation above from the *Tolofson* decision that there is no mechanical means of determining the scope of jurisdiction under the principles of order and fairness. Although rules for service outside the jurisdiction provide an initial indication of jurisdiction, an exercise of discretion based on the doctrine of *forum non conveniens* is an integral feature of jurisdictional determinations mandated by the Constitution.

This is different from the approach to jurisdiction that operates in Europe under the Brussels Regulation, which contains a list of permitted bases for jurisdiction and a list of prohibited bases and which does not provide for the exercise of discretion in the process. Based on the approach outlined by the Supreme Court of Canada in the quotation from *Tolofson* above, it would be misguided to attempt to identify which bases enumerated in the rules for service are constitutionally acceptable in all situations and which are not constitutionally acceptable. Discretionary determinations based on the facts of the case are an integral feature of the determination of constitutionally acceptable assumptions of jurisdiction. Although it is conceivable that a statutory regime could be established that would direct the court's to use their discretion regarding the assumption of jurisdiction, no simple cut and dried rules for jurisdiction could be codified. It seems unlikely that codified rules would be regarded with confidence in their capacity to provide both for the myriad of situations in which jurisdictional questions arise and for the changing circumstances under which they arise.

4. Access to justice and multiplicity

Since the *Morguard* decision was released, counsel have tried on various occasions to persuade the courts in Canada that they do not have jurisdiction to decide a case because there is no real and substantial connection between the matter and the forum. In such cases, courts often decide not to exercise jurisdiction but they are generally not prepared to acknowledge that this is because they lack jurisdiction. Instead, the courts have preferred to make their determination on the basis of an exercise of discretion pursuant to the doctrine of *forum non conveniens.* For example, in such cases, the reasons have focused on the inappropriateness of assuming jurisdiction in the particular case.[92] In rare cases in which the courts have appeared to accede to the submission that they *could* not hear the case, a close reading of the reasons generally reveals that the courts have, in fact, conducted an analysis of appropriate forum but even though they have stated their decisions in terms of the constitutionality of assuming jurisdiction as if the reason for declining was that they lacked jurisdiction *simpliciter.*[93]

As a result of the determination that the constitutional principles of order and fairness govern personal jurisdiction in Canada, it has been suggested by some that the determination of jurisdiction *simpliciter* and the determination of *forum non conveniens* are separate and sequential: the court first determines whether the case falls within the outer limits of the scope of jurisdiction, that is, whether it *can* decide the case; and then the court exercises discretion pursuant to the doctrine of *forum non conveniens* to determine whether to decline to hear the case because there is another clearly more appropriate forum elsewhere (that is, to determine whether it *should* decide the case). Although this view readily followed from the traditional common law approach—that is, that the decision-making process in jurisdictional determinations is bifurcated and sequential—it seems not to explain adequately the reasoning

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[92] *SDI v Chameleon Technologies* (1994) 34 Carswell's Practice Cases (3d) 346 (Ont Gen Div).

[93] *MacDonald v Lasnier* (1994) 21 OR (3d) 177 (Gen Div); *Wilson v. Moyes* (1993) 13 OR (3d) 202, additional reasons (October 12, 1993), Doc. 10318/92 (Ont Gen Div).

process undertaken by Canadian courts. In particular, the implicit suggestion that jurisdiction *simpliciter* is a fixed and rigid threshold requirement to personal jurisdiction that depends upon demonstrating a "real and substantial connection" between the cause of action or the parties and the forum does not seem to describe accurately the principles on which the courts seem to operate.

One indication that this is not an accurate statement of the decision-making process is that the parties have always been free to litigate matters having no real and substantial connection to the forum provided they are willing to do so. A common law court, generally speaking, will review its own jurisdiction as it is affected by connections between the matter and particular legal systems only when asked to do so by one of the parties. Indeed, the factual elements of a dispute that could give rise to conflict of laws issues become legally relevant only when one of the parties raises an issue that makes them relevant. Therefore, the notion that the lack of a real and substantial connection between the matter and the forum would inevitably and automatically deprive a common law court of jurisdiction to decide the matter is inconsistent with the timeworn acceptance of jurisdiction based on the consent of the parties.

Beyond this, the suggestion that jurisdiction *simpliciter* is a fixed and rigid limit to personal jurisdiction that depends upon demonstrating a "real and substantial connection" between the cause of action or the parties and the forum does not seem to hold true in terms of the approach taken by Canadian courts because it is fundamentally at odds with two commitments that lie at the heart of the Canadian adjudicative traditions. These are the commitments to ensuring access to justice and to preventing a multiplicity of proceedings. The ability of the courts to meet these commitments would be undermined by imposing fixed limits on personal jurisdiction, and the recent jurisprudence suggests that any accurate articulation of the law of jurisdiction must accommodate the primacy that these commitments have consistently been accorded by Canadian courts.

With respect to access to justice, there is a small but growing body of jurisprudence that suggests that Canadian courts will be prepared to assume jurisdiction and to refuse to exercise discretion to decline to hear a case that has relatively tenuous connections to the forum, where fairness between the parties requires them to do so, particularly in situations where a plaintiff is otherwise unable to pursue a claim. For example, according to the Nova Scotia Court of Appeal in *Oakley v Barry,* a case in which the health and financial resources of the plaintiff did not permit her to travel to a more appropriate forum, "the concept of fairness in determining jurisdiction should be considered from the point of view of both the respondent (the injured person), as well as the appellants (the defendant doctors). While this issue, as well as the issue of juridical advantage, are matters that are usually considered on a *forum non conveniens* issue, it is appropriate and relevant to consider them in this case involving jurisdiction *simpliciter*."[94] To the extent that it has seemed wrong to Canadian courts to pre-empt the issue of fairness, particularly where this could impair access to justice, it has seemed that the issue should not be left to a separate and subsequent determination of forum. After all, once the court has determined that it *cannot* hear the case, it is hardly likely to go on to determine that it *should,* nevertheless, hear the case.

Canadian courts seem to treat the issue of whether they *should* hear the case as the decisive factor in determining whether they *will* hear the case. This suggests that the analysis of appropriate forum could, in time, eclipse that of jurisdiction *simpliciter*.[95] In other words,

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[94] *Oakley v Barry* (1998) 158 DLR (4th) 679 (NS CA) (Oakley). *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL).

[95] Except in situations raising issues of subject matter jurisdiction, where another forum has exclusive jurisdiction, as for example, when the dispute relates to title to foreign land

that the law of jurisdiction in common law Canada seems to be reaching the point where what has been regarded as two distinct analyses—those of jurisdiction *simpliciter* and *forum non conveniens*—are merging into an analysis of appropriate forum.[96] It is worth noting that although the equivalent civil law jurisdiction of "forum of necessity" is relatively new,[97] it was incorporated into article 3136 of the Quebec Civil Code,[98] which provides: "Even though a Quebec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Quebec, where proceedings cannot possibly be instituted outside Quebec or where the institution of such proceedings outside Quebec cannot reasonably be required." This suggests that even where jurisdiction has been codified in Canada, the importance of judicial discretion is recognized. While substantively similar results have been reached in recent years in the English courts,[99] it seems unlikely that the decisionmaking process would be described in terms of the exercise of judicial discretion of a sort that could eclipse the statutory regulation of jurisdiction.

Just as a bifurcated approach to jurisdictional determinations (that is, one that divides the analysis into separate determinations of jurisdiction *simpliciter* and *forum non conveniens*) could frustrate the ability of Canadian courts to ensure access to justice, so too could it frustrate their ability to prevent a multiplicity of proceedings. As Professor Hogg noted in his text *Constitutional Law of Canada*:

> If service out of the jurisdiction is unconstitutional with respect to those parties who lack a substantial connection with the forum province, this may prohibit the joinder of some parties as co-defendants or third parties in complex litigation, which would require additional proceedings against those parties in other jurisdictions (where the substantial connection rule would be satisfied). This is a serious drawback of the substantial connection rule, which should be avoided where possible by an expansive definition of substantial connection for the purpose of joining additional parties....[100]

In view of the degree of concern expressed by Canadian courts and commentators about the prospect of a multiplicity of proceedings, the real and substantial connection test must operate differently from the American "minimum contacts doctrine" which accords pre-emptory significance to issues of fairness to the defendant. As was demonstrated in the *Oakley* decision,[101] fairness to the defendant, while an important consideration for Canadian courts, does not inevitably override concerns relating to access to justice and mulitiplicity. The real and substantial connection test for jurisdiction is a flexible test that, based on all of these considerations, seeks to establish minimum standards for jurisdiction to ensure the litigation does not proceed in an inappropriate forum but is not frustrated by being impeded in a forum accessible to the plaintiff.

The difficulties experienced in consolidating multi-party proceedings in a single forum to prevent parallel proceedings and inconsistent results have affected class proceedings and

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[96] *Duncan (Litigation guardian of) v Neptunia Corp* [2001] OJ No 1441 (SC); *Contra. Lemmex v Bernard* (2000) 51 OR (3d) 164 (SC).

[97] It is contained in the Swiss Private International Law Statute 1988.

[98] The Quebec Civil Code is also exceptional in providing for forum *non conveniens* in Article 3135, which provides: "Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide."

[99] *Connelly v RTZ Corporation plc* [1997] 3 WLR 373 (HL); *Lubbe v Cape plc* [2000] 1 WLR 1545 (HL).

[100] P Hogg *Constitutional Law of Canada* (4th ed Carswell, Toronto 1996) ¶13.5(b) *n* 76.

[101] *Oakley* (n 94 above).

caused courts in certification motions to reconsider the nature of the real and substantial connection required for jurisdiction. For example, in *Harrington v Dow Corning Corp*[102] in a British Columbia class proceeding that proposed to include plaintiffs from other provinces who took steps to join a sub-class, an objection was raised that the court did not have jurisdiction to determine the claims that had no real and substantial connection to the province other than the fact that they came within the definition of the plaintiff class. The British Columbia Supreme Court rejected this argument, holding that "It is that common issue which establishes the real and substantial connection necessary for jurisdiction." In other words, once the British Columbia court had determined that a claim that contained an issue in common with the claims of other members of a plaintiff class—an issue that had a real and substantial connection to the forum—then it would be possible to assume jurisdiction to decide further claims that had no connection to the forum other than the fact that they were most conveniently tried together with the claims that were connected to the forum because they shared the common issue.[103]

5. Appropriate forum, comity and the enforcement of judgments

The commitment of Canadian courts to case-specific discretionary analysis of forum is so strong that it has also emerged in the reasoning relating to the enforcement of judgments. Thus, the evolution of the current approach to court jurisdiction appears to have come full circle. Where the scope of court jurisdiction was influenced by the need for a judgments regime within a federation and the implications this regime had for a correlative scope for jurisdiction to adjudicate, the resulting approach to jurisdiction appears now to be reflected in determinations of whether a judgment should be enforced. Regardless of whether jurisdiction *simpliciter* is described in terms of "a real and substantial connection," or "minimum contacts," or an article in a codified regime, it was once regarded as the decisive factor in respect of the enforceability of a foreign judgment. It did not matter whether a foreign court *should* have exercised discretion to decline to hear the case—that was not a relevant consideration. It is, therefore, striking to consider the analysis in *Braintech v Kostiuk*[104] of the importance of the appropriateness of the foreign forum to the obligations of comity reflected in the enforcement of the judgment. In the *Braintech* case, The British Columbia Court of Appeal explained its refusal to enforce the Texas judgment by saying that "British Columbia is the only natural forum and Texas is not an appropriate forum. That being so, comity does not require the courts of this province to recognize the default judgment in question."[105]

6. Codifying court jurisdiction and judicial authority

It has been suggested that the asymmetrical approach in Canada to the three branches of government in which the Constitution continued the tradition of judicial authority rather than vesting judicial power in the courts would preclude the comprehensive codification of court jurisdiction. Some instances of this have been identified. The first was the courts' resistance to treating the rules for service out as a kind of surrogate code, even when it was suggested that since court jurisdiction was based on the Constitution, there might be some need to identify the ultimate limits of that jurisdiction. The second was the resistance to the adoption of a statute governing court jurisdiction proposed by the Uniform Law Conference despite the fact

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[102] *Harrington v Dow Corning Corp* (1996) 22 BCLR (3d) 97 (SC) affd (2000) 193 DLR (4th) 67 (CA) leave to appeal to SCC refused 6 Sept 2001.

[103] The issues raised by multi-jurisdiction class proceedings are discussed in greater detail in the chapter on Constitutional Rights.

[104] *Braintech v Kostiuk* (1999) 171 DLR (4th) 46 (BC CA) leave to appeal to SCC refused SCC Bulletin 2000, 453.

[105] But see *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 (28 August 2001).

that the operation of the statute appears to replicate the reasoning process currently employed by Canadian courts.

Section 10 of the proposed Act—"Real and substantial connection", contains a list of grounds that are similar to those found in most of the provinces' rules for service outside the jurisdiction and that the Act says might be considered to be real and substantial connections to the jurisdiction sufficient to found jurisdiction. The list is preceded by a paragraph that clarifies that the grounds contained in the list are not to be treated as exhaustive of the grounds for personal jurisdiction. It is open to the plaintiff to persuade the court that some other ground should suffice and to seek leave to serve the defendant outside the jurisdiction. The paragraph also clarifies that the grounds contained in the list are not to be treated as definitive of the requirements for the exercise of jurisdiction. Rather, the existence of any of the connections contained in the list merely creates the presumption that there exists a real and substantial connection to the forum.[106] Section 11 of the Act codifies the law of *forum non conveniens* providing for discretion to decline to exercise jurisdiction on the ground that a court of another state is a more appropriate forum in which to hear the proceeding and offering relevant criteria for consideration in the exercise of discretion. Given the fact that these two sections replicate the current process of determining jurisdiction, it seems unlikely that there could be a practical objection to the codification, and the objection must lie in the sense in which it is inconsistent with Canadian legal traditions to codify court jurisdiction.

The resistance to the comprehensive codification of court jurisdiction would seem also to affect Canada's participation in a multilateral judgments convention such as that presently being negotiated under the auspices of the Hague Conference on Private International Law. As Ronald Brand explained[107] the American position on the various provisions of any multilateral treaty on adjudicatory jurisdiction is, in part, dictated by the United States Constitution, which requires that jurisdiction be determined in a way that affords due process to defendants, the particularities of which have been developed in the jurisprudence of the United States Supreme Court.[108] Since court jurisdiction in Canada has likewise been held to be based on the Canadian Constitution, it would seem that Canada would also be constrained to limit its support for a multilateral judgments convention to one that accorded with the Canadian Constitution. The nature of the constraints established by the Canadian Constitution would differ from those established by the American Constitution in that the asymmetrical relations between the branches of government would seem to make it impossible to eliminate entirely the inherent authority of the courts to regulate their own jurisdiction in accordance with their adjudicative traditions.

In addition to this constitutional limit in the *form* of the jurisdictional rules that could be implemented in Canada, there would be constitutional limits on the substance of the jurisdictional rules that could be implemented. As has been discussed earlier, the courts' "exemption", as it might be described, from direct regulation by the Canadian Constitution is a result of the different role that Canadians regard the courts as playing in the governance of the country from that played by the other branches of government. As was noted in the

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[106] The drafters omitted from the list cases in which jurisdiction is founded on damage sustained in the forum and cases in which the defendant is a necessary or proper party to claims against persons served in the forum. While these bases could serve as real and substantial connections, they would not be presumed to be so.

[107] R Brand 'Due Process, Jurisdiction and a Hague Judgments Convention' (1999) U Pittsburgh L Rev 661 (Brand); SE Cox, 'Why Properly Construed Due Process Limits on Personal Jurisdiction Must Always Trump Contrary Treaty Provisions' (1998) 61 Alb L Rev 1177; H Maier, 'A Hague Conference Judgments Convention and United States Courts: A Problem and a Possibility' (1998) 61 Alb L Rev 1207.

[108] *Pennoyer v Neff* 95 US 714, 24 L Ed 565 (1877) and *International Shoe* (n 78 above).

discussions above of Canadian constitutional traditions, these traditions differ from those in the United States where the Fifth and Fourteenth Amendments of the United States Constitution "exist to protect individuals from excessive exercises of governmental authority. In a discussion of judicial jurisdiction, this means the Due Process Clauses restrict the extent to which courts may exercise jurisdiction over a defendant."[109] These traditions differ because, as has been suggested, in Canada, civil dispute resolution is not so much a *form* of governance as a *pre-requisite* to governance. As a result, Canadians do not tend to harbour the same suspicions about excessive exercises of civil jurisdiction by their courts that they might harbour about other governmental interventions, or as the suspicions that are evidently directed at the courts in American legal traditions. While the concern for fairness to the defendant, and the consequent limitations on court authority, clearly influence the scope of adjudicatory jurisdiction, they are not the primary determinants of adjudicatory jurisdiction described by Brand. As has been noted, Canadian jurists instinctively pursue a broadly based analysis that is more concerned with convenient forum than with jurisdiction *simpliciter*. The underlying question in determining jurisdiction tends to be not whether any given court should be capable of assuming jurisdiction *at all* (and thereby engage in state intervention in private affairs), but whether it is appropriate for a particular court to be the one whose jurisdiction is invoked in light of the availability of other fora.[110]

The obligation of the United States to support minimum safeguards for defendants has not had the effect of making its delegation at the Hague Conference negotiations incapable of accepting proposals by other delegations for bases of jurisdiction that would be unfair to defendants. Nor has the Canadian Constitution required its delegation to insist on exorbitant bases of jurisdiction. Rather, since in the American tradition, civil dispute resolution is a form of governance in which standards of conduct are set proactively and by which the market is regulated by requiring those who do not meet those standards to internalize the costs of failing to do so, its role is best served by maximizing the scope of the situations to which these standards are applied. On the inter-jurisdictional plane, such an approach to private law adjudication fosters an inherently expansive approach to court jurisdiction, which must then be regulated by constitutional restrictions. In contrast, since, in the Canadian tradition, civil dispute resolution is a form of governance only in the sense that it is a means to maintain a cohesive community that is conducive to the kind of proactive governance provided by the other branches of government, it is important both that the assumption of jurisdiction over a dispute is fair to defendants lest the administration of justice fall into disrepute and undermine the public confidence that is integral to community cohesiveness, and that the availability of an accessible forum for authoritative dispute resolution ensures that aggrieved persons who cannot obtain agreement from potential defendants on a form or a forum for the resolution of their dispute are not deprived of access to a state-sponsored forum.

The expansiveness fostered by this approach to private law adjudication generates less controversy. The expansiveness in the American tradition derives from the interest of the community of the forum in benefiting from the opportunity of civil disputes to generate and refine community standards and to enforce those standards on the conduct of persons that have at least minimum contacts with the forum. Thus, the expansiveness of the American tradition of adjudicatory jurisdiction relates also to an expansive approach to the application of local law because civil dispute resolution is a means of developing and implementing local community standards. Any expansiveness in the Canadian tradition, in contrast, is derived solely from a desire to facilitate peaceful dispute resolution. Accordingly, although there is a

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[109] Brand (n 107 above) 663.

[110] In *Oakley* (n 94 above) the Nova Scotia Court of Appeal held that fairness to the plaintiff, who would not have been able to sue in the defendant's forum, which might otherwise have been regarded a more appropriate forum, should be considered in determining jurisdiction *simpliciter*.

public interest in the availability of a suitable forum for dispute resolution, there is no public interest in the assumption of jurisdiction in particular cases,[111] nor does the assumption of jurisdiction imply any public interest in the application of local law. A determination of appropriate forum has a great deal to do with logistics, litigation convenience and the relative capacities of the parties to travel and transport witnesses and evidence. It has very little to do with the reasons for applying one law or another (except in the rare situation in which it affects litigation convenience).[112] Therefore, when Professor Brand suggests that the descriptions of the bases of jurisdiction in the proposed judgments convention, other than those flowing from the defendant's consent, unduly emphasize connections between the matter and the forum rather than the defendant and the forum, he is, perhaps unwittingly, identifying a subtle but profound difference in focus between the approach to jurisdiction taken in the United States and that taken in Canada. In short, transposed onto the international plane, the obligation to ensure access to justice in the Canadian tradition is the same as it is in local cases except that it operates as a collective responsibility between potentially appropriate fora to ensure that there exists somewhere a suitable forum for the resolution of civil and commercial disputes.

Still, there would remain an important "bottom line" for representatives of Canada at The Hague arising from a constitutional structure such as Canada's in that a regime that purported to replace a fundamentally common law (*ie,* tradition-based) approach to court jurisdiction, with a comprehensively codified regime that placed absolute limits on discretion (such as might have occurred in the form of a double convention) would be not only unpalatable in the context of the Canadian legal system, but also arguably unconstitutional. Such a regime would be implemented by legislative bodies whose ultimate source of authority is the text of the Canadian Constitution. These legislative bodies are probably incapable of replacing in a wholesale fashion the tradition-based common law authority for the courts that pre-dates the Constitution and is "continued" by it with substantive provisions based on legislative authority derived from the legislatures' constitutional authority. While the Canadian legislatures are "merely" creatures of the Canadian Constitution, the courts are not; and the provisions of the Canadian Constitution that do address judicial authority appear to contemplate that the legislative impact on court jurisdiction will be in the nature of incremental statutory incursions on that jurisdiction and not a complete occupation of the field.[113] Further, as with the "due process" clauses in the United States Constitution, this is not simply a quirk of the text—it reflects the Canadian tradition of judicial authority.

Similarly unconstitutional would be any convention that purported to establish a scheme requiring Canadian courts to act in a way that was fundamentally at odds with their traditional jurisdictional mandate, such as a scheme containing rules that focused so heavily on fairness to the defendant that they seriously compromised access to justice. It is a firmly established principle of Canadian constitutional jurisprudence that the federal government may not pass legislation that trenches on the legislative authority of the provinces, even in order to implement treaties, which it has sole authority to conclude.[114] This is a product of the division of legislative powers in Canadian federalism. But the limits on both the federal and the

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[111] Just as in domestic cases, parties are free, even encouraged, to seek alternative means of resolving their disputes. See, for example, Rule 24.1- Mandatory Mediation, Rules of Civil Procedure, RRO 1990 Reg 194.

[112] As the Supreme Court of Canada explained in its leading decision on choice of law in tort *Tolofson* (n 91 above), citing '*Valin v Langlois* (n 13 above), where Ritchie CJ emphasized that these courts 'are not mere local courts for the administration of the local laws.'

[113] The Uniform Court Jurisdiction Act (n 77 above) codifies court jurisdiction but it is not in force in any of the provinces.

[114] *A-G Can v A-G Ont* (Labour Conventions) [1937] AC 326 (PC).

provincial governments' authority to pass legislation affecting judicial authority are more fundamental. These limits are a product not of the division of legislative powers but of the asymmetrical nature of the establishment of legislative and judicial authority in the Canadian Constitution.

III. FEDERALISM AND THE COURTS

A. Judiciaries in Federations

The subject matter of the previous chapter—the nature of judicial authority in the Canadian Constitution, the asymmetrical arrangements regarding the three branches of government, and the way in which this reflected a distinctive approach to the role played in government by private law adjudication—is so elemental that it informs every aspect of the conflict of laws. The remaining two chapters of this thesis operate at a slightly different level. They consider particular features of the design and operation of the federal and regional systems that are shaped by the approach that is taken to judicial authority and the role of private law adjudication in governance.

The first of these features is the structure of the national court system. How does the design of the Canadian court system reflect a Canadian approach to judicial authority? How does the design of the Canadian court system support Canadian approach to federalism? What effects does this have on the Canadian regime for the conflict of laws? In this chapter, the structure of the Canadian court system is compared with that of the two other major common law federations, the United States and Australia, in order to correlate differences in the court structures with the different approaches to judicial authority, and to consider the differences in the ways in which these different court structures facilitate federal government.

Canada, the United States and Australia are described as federations because they are governed by central and regional authorities in such a way that everyone in the country is subject to both.[1] Persons in unitary states, such as the United Kingdom and New Zealand, are also governed by central and regional authorities, but the powers of the regional authorities in unitary states are derived from the power of the central authority and subordinate to it. Thus, the powers of municipalities and county councils have been delegated to them and, at least in theory, can be altered or removed by the central authority. In federal states, however, both the regional and central authorities are established by the Constitution and their powers are derived directly from it. While they are commonly described as different "levels" of government, the regional authorities are not subordinate to the central authority and, therefore, their relative status could more accurately be described as "coordinate". Although their powers may vary in number and significance, the authority of both levels of government is secured by the Constitution.

In a country, such as the United States, that regards the adjudication of disputes as an expression of judicial power, all three main "branches" of government—the legislature, the executive, and the judiciary—are essential to the functioning of government. In a federation in which the courts are thought to exercise governmental power a court system must be provided for both the central and the regional, or state, authorities. While the process of dividing the legislative and executive powers of a unitary state between two coordinate authorities is not without complexity, the object of the exercise is relatively straightforward. However, when it comes to structuring a court system for a federation, the project is complicated by the fact that the courts in a federation are also required to adjudicate disputes relating to the division of legislative and executive powers between the central and regional authorities, and the division of these powers between one regional authority and another. Thus, the structure of the court system or systems within a federation has important implications for the way in which conflicts between the substantive laws and the legal systems of the component parts of the federation are managed. The structure of the court system must facilitate three objectives:

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[1] P Hogg *Constitutional Law of Canada* (4th ed Carswell Toronto 1996) 98 (Hogg); DV Smiley *The Federal Condition in Canada* (McGraw-Hill Ryerson Toronto 1987) 2 (Smiley).

diversity in matters subject to the regional authorities; unity in matters subject to the central authority; and harmony between the two. It must sustain the dynamic between the inherently centrifugal and centripetal forces of a federation in a way that reflects the fundamental commitments of the legal system.

B. A Federalized Judiciary

1. The American Federal Courts

The American system serves as a good point of departure for comparative analysis, both because its basic rationale is articulated clearly in the United States Constitution and in the academic commentary, and because it was the most significant precedent at the time the Canadian model was developed. Accordingly, even where the efficacy of aspects of the United States Constitution is difficult to assess in operation, it is possible to appreciate the intent of the design. Still, the American historian Henry Bourguignon has observed that the notes of the debates at the 1787 Constitutional Convention do not reflect any long and thoughtful reflection on over the third branch of government. It is almost as if "Article III of the Constitution was practically an afterthought for the delegates."[2]

In view of the state of the legal traditions at the time, particularly in respect of common law adjudication, it is possible that the founders of the major common law federations simply did not appreciate the potential strength and significance of the role that the courts could play in federal government. The influence of judicial review on government would not have been anticipated at the time, much less the emerging influence of litigation in private law matters on behalf of consumers and other groups. More than this, though, it is almost as if the framers, in setting out the terms of reference of the constituent governments, in each case, saw their task as one of establishing the rules of engagement or the terms of a debate—rules that would remain static within a system that would not itself be subject to evolution. The framers clearly did not anticipate the way in which the structure and the terms of reference for the branch that was mandated to resolve controversies and uncertainties in the operation of their plan—that is, the courts—would themselves form a constitutive factor in the operation of the federation as a whole. Indeed, it would not be expected that the founders of these federations would appreciate the significance of the progressive development of governmental institutions or the ways in which institutional design could frustrate or facilitate change. This is a dimension of the role of the judiciary in a federal or regional system that is only now beginning to be appreciated.[3]

Although the framers of the United States Constitution could not be expected to have anticipated the evolutionary role that a judiciary might play in a federation, they did consider it important to have a division of judicial powers between the central and regional authorities to support each of the legislative and executive powers of the central and regional governments. Based on considerations of symmetry, Wenceslas Wagner argued that the viability of the co-existence of state and federal governments in a federal state "logically" required that each "have at its disposal every branch of the three governmental powers." [4] According to Dr. Wagner, "the laws of a [federal] legislative body will never be effective if they are not carried

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[2] HJ Bourguignon 'The Federal Key to the Judiciary Act of 1789' (1995) 46 South Carolina L Rev 647, 652 (Bourguignon); E Surrency *The History of the Federal Courts* (Oceana Publications, New York 1987) 13 (Surrency).

[3] 'Constitutions and institutions, once created, themselves channel and shape societies:' RL Watt *Comparing Federal Systems* (2nd ed Queen's University Kingston 1999) 15. A Cairns 'The Governments and Societies of Canadian Federalism' (1977) 10 Can J Poli Sci 695; Smiley (n 1 above) 3-11.

[4] WJ Wagner *The Federal States and their Judiciary* (Mouton 's-Gravenhage 1959) 131 (Wagner).

into effect by an executive power and construed and protected by a judiciary" and the lack of a judiciary at one level of government "must result in an impairment of the rights and scope of powers of the one lacking its own means of enacting, executing, and applying laws."[5] Rejecting the suggestion by another commentator, that "(a)ll federal courts might be abolished and the courts of the states authorized to apply the federal law ...",[6] Dr. Wagner asserted that no such state exists and that "sooner or later" that "would mean the end of the federal state".[7] Relying on an Australian legal scholar, WH Moore, for support[8] he concluded that a federal judiciary is indispensable.

The principles underlying the federalized judiciary were conceived in a relative short period in which there were few precedents on which the framers could rely and relatively little opportunity to benefit from the experience of federal government in operation. As Professor Johnson observed, "By its Declaration of Independence, the United States found itself simultaneously independent of the British Crown, sovereign within its borders, and accountable in the diplomatic community of nations."[9] Accordingly, the structure of the American court system was conceived and established in the course of a brief and well-documented series of debates, "without the heavy hand of tradition dictating the form of its structure."[10]

Despite this, there was some debate over the structure of the court system. As Professor Bourgignon, observed, "We often forget today how plausible the argument was for using state courts as the only trial courts, with only appeals to a Supreme Court to assure uniform application of federal law. Lower federal courts were, in the eyes of many, problematical, and a nation could have been created without them."[11] This model would have resembled that later adopted in Europe with national courts applying European law and a reference procedure to the European Court of Justice to promote uniform interpretation of European law. Still, despite the differences of opinion in the new American federation on the appropriate structure for the court system, the debate over the federal judicial system was not fought out between two camps with entrenched and opposing views. Rather, it was a product of uncertainty as to how best to accommodate the divided loyalties of the debate's participants (most of whom were lawyers) to the state court systems in which they had practised, and to the strong federal union which they hoped to create.[12]

In simple terms, while it was inherent in American republicanism that the courts should have local loyalties, this was a potentially divisive force within a federation. Some participants, such as James Madison, argued as Dr. Wagner later did that "an effective Judiciary establishment commensurate to the legislative authority, was essential. A government without a proper Executive & Judiciary would be the mere trunk of a body

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[5] Wagner (n 4 above) 131-132.

[6] CH Kinnane, *First Book on Anglo-American Law* (2nd ed Bobbs-Merrill Indianapolis 1952) 473-474*n*6.

[7] Wagner (n 4 above).

[8] 'Judicial power is an essential element of government and the administration of laws. It follows that a federal government which is capable of effectuating its powers must have its own judicature...' WH Moore *The Constitution of the Commonwealth of Australia* (Maxwell Melbourne 1910) 179; and it was said in E Whitlam 'Thirteenth Legal Convention of Law Council of Australia, Hobart, February 28 1963' (1963) 36 Australian L J 237 that judges who interpret and apply statutes should be appointed by governments responsible to the legislatures that pass the statutes.

[9] H Johnson 'Introduction' (1995) 46 South Carolina L R 641.

[10] Surrency (n 2 above) 1.

[11] Bourguignon (n 2 above) 666.

[12] Bourguignon (n 2 above) 701.

without arms or legs to act or move."[13] At the Congressional debates over a federal judiciary that led to the Judiciary Act of 1789, Madison said that some state courts "are so dependent on State Legislatures, that to make the Federal Laws dependent on them, would throw us back into all the embarrassments which characterized our former situation"[14] under the Articles of Confederation.

Other participants in the debates were concerned that a federal judiciary would "absorb and destroy the Judiciaries of the several States"[15] making judicial dispute resolution less accessible, and they resented the implicit "improper distrust of the impartiality and justice of the tribunals of the states."[16] Still others, suspicious of an independent judiciary, were concerned that members of a judiciary created with independence both from the people and from the legislature might "soon feel themselves independent of heaven itself".[17] Indeed, it may be imagined that the first leaders, though supportive of the new political union, were leery in the wake of colonialism of permitting courts of the newly established federal government to intrude in the everyday affairs of individual citizens. Even before the founders of the United States drafted the Constitution, the American colonies had made the dramatic move to reject the authority of English common law in favour of an indigenous state-based common law developed by local courts. For the American people, the centralized and distant authority of the English common law that was developed in the courts of England by judges who were not part of their community was itself a source of colonial rule. For them it was demeaning for their courts to apply the English common law. As was observed by a prominent American in a letter written in 1789, "the dignity of America requires that (the common law) be ascertained, and that where we refer to laws they should be the laws of our own country."[18]

Nevertheless, apart from their established loyalties to the state court systems that had existed, in some cases, for well over a century, there were concerns about the potential parochialism of the various state legislatures and courts with respect to non-residents. As Professor Bourgignon explained:

> After the Revolutionary War ended, great disillusionment set in as leaders throughout the states saw the abuses committed by the very state legislatures they had regarded as protectors against British tyranny. Many of the founding fathers like Madison, as they came to Philadelphia in 1787, were aware of the democratic excesses of the state legislatures. Some viewed state legislative assemblies as little more than mob rule. The states had, for instance, passed laws for the confiscation of property and for the printing of paper money with the fiat that it was to be accepted by creditors as legal tender.[19]

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[13] M Farrand Records of the Federal Convention of 1787 (rev ed Yale UP New Haven 1937) 124.

[14] United States Congress, 1 Annals of the Congress (1789) 784, 812 as cited in Bourguignon (n 2 above) 687.

[15] G Mason 'Objections to the Constitution of Government Formed by the Convention (1787)' in HJ Storing (ed) 2 *The Complete Anti-Federalist* (U Chicago P Chicago 1981) 11 (Storing).

[16] *Letters of Centinel* in Storing (n 15 above) 148 as cited in Bourguignon (n 2 above) 665.

[17] Brutus 'The Essays of Brutus (1788)' in Storing (n 15 above) 438 cited in Bourguignon (n 2 above) 664.

[18] 'Letter from Gunning Bedford, Jr. to George Read (June 24, 1789)' in M Marcus et al (edd) 4 *Documentary History of the Supreme Court of the United States, 1789-1800: Organizing the Federal Judiciary: Legislation and Commentaries* (Columbia U P New York 1992) (Marcus).

[19] Bourguignon (n 2 above) 649.

Acts of economic aggression against persons from out of state[20] were initiated by the state legislatures and carried out by the state courts. At least one state, Virginia, prohibited the execution of federal functions by its judges.[21] The state judiciaries seemed unlikely to be cohesive forces in the new Union and the need for a federal judiciary seemed inevitable.[22] In the new American republic, in an era born of the violent rejection of the authority of the English Parliament in favour of local popular rule, and in which state courts were instrumental in effecting schemes for thwarting the recovery of property and payment by non-residents, the prospect of state courts according respect to a distant federal authority must have seemed dubious at best. Under these conditions, the creation of lower federal courts emerged as a necessary evil. In the American legal tradition, the authority to issue a court order enforceable by the state, was a *power* to be *vested* in a particular court. If the central authority —the United States—was to be effective, if the laws it passed were to be expected to be applied in the various states, then its judicial power would have to be vested in a system of federal courts established in the state communities whose legislatures and courts might otherwise effectively rebuff its laws.

2. Diversity jurisdiction

In adopting the premise that each government required its own judiciary to ensure its effectiveness, the framers of the United States Constitution faced a further challenge—that of interstate justice. If the courts were expected to give effect to local loyalties, it would be necessary to create some mechanism for ensuring that litigants from out of state were treated fairly in disputes with local persons.[23] The "local loyalties" in question here were not merely loyalties to the legal rules established by the local legislature or the legal standards established in the local common law.[24] Rather, the local loyalties in question here extended to the favouring of the claims or defences made by local persons in their disputes with persons from out of state.

Despite the fact that a concern for local loyalties producing local bias would call into question the reputation of the administration of justice,[25] the framers gave it credence by addressing it through the creation of "Diversity Jurisdiction" in section 2 of Article III of the United States Constitution, which provides in part that "The Judicial Power shall extend to all cases....between Citizens of different states...." The judicial power devised to overcome local biases within the federation is the power over cases "between citizens of different states"—or "diversity jurisdiction". Justices Marshall and Story explained the basis for diversity jurisdiction as follows:

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[20] The importance to foreign investment of ensuring that the courts would require local debtors to meet their obligations to foreign creditors gave rise to the provision in article 4 of the Treaty of Paris of 1783 (Treaty of Peace, Sept 3 1783, US-Great Britain, 8 Stat 80 at 82 that creditors would 'meet with no lawful Impediment to the Recovery of the full Value...of all bona fide Debts heretofore contracted.' The inclusion of this provision was driven by a pragmatic interest in encouraging continued foreign investment. KR Johnson 'Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for the Federal Jurisdiction over Disputes Involving Non-Citizens' (1996) 21 Yale J Int'l L 1, 8.

[21] 'Letter from Caleb Strong to Robert T Paine (May 24, 1789)' in Marcus (n 18 above) 395-396.

[22] AR Amar 'A Neo-Federalist View of Article III: Separating the Two-Tiers of Federal Jurisdiction' (1985) 65 Boston U L Rev 205.

[23] P Borchers, 'The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for *Erie* and *Klaxon*' (1993) 72 Texas L Rev 79.

[24] Although even this sort of parochialism would be rejected by Canadian courts as unthinkable.

[25] The potential for bias against foreigners continues to be a firmly held belief. KM Clermont and T Eisenberg 'Xenophilia in American Courts' (1996) 109 Harvard L Rev 1120 provides empirical findings challenging the validity of the continuing conern about bias against foreigners.

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.[26]
>
> The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.... No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts.[27]

In addition to giving credence to the concerns about judicial independence, diversity jurisdiction tended to create its own problems by removing to federal courts matters to which the judicial power of the various states might otherwise be applied. This fosters the very concern that prompted the initial resistance to the creation of federal courts: that they might "absorb and destroy the Judiciaries of the several States" leaving one of the levels of the federal government, the state government, without the effective "judicial power" that was thought to be critical to its existence.

Accordingly, in 1959 Chief Justice Warren suggested that "it is essential that we achieve a proper jurisdictional balance between the federal and the state court systems, assigning to each system those cases most appropriate in the light of basic principles of federalism." In response, the American Law Institute (ALI) undertook an eight year study, focusing on "that most controversial of the heads of federal jurisdiction, the diversity of citizenship of parties"[28] and acknowledging that "(n)ow as always this controversy lays bare fundamental issues regarding the nature and operation of our federal union." Despite this seemingly broad mandate, the ALI did not question the need for diversity jurisdiction but confined itself to clarifying the rules for invoking diversity jurisdiction in order to prevent abuse. The rationale for diversity jurisdiction—that it "assure a high level of justice to the traveler or visitor from another state"—was taken as a given and the ALI sought only to limit the cases in which federal jurisdiction was claimed to those with "some functional connection with the fact that the parties are of diverse citizenship."[29]

The pressing logistical concerns giving rise to the ALI review of diversity jurisdiction included the "continually expanding workload of the federal courts and the delay of justice resulting therefrom."[30] This continually expanding workload was partly a product of the belief that federal courts are better than state courts. As the ALI noted in the Study,

> Without disparagement of the quality of justice in many state courts throughout the country, it may be granted that often the federal courts do have better judges, better juries, and better procedures. Life tenure gives a degree of independence to a federal judge that a state judge facing re-election may find it hard to maintain,

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[26] *United States v Deveaux* 5 Cranch 61, 87 (US 1809); P Bator et al (edd) *Hart and Wechsler's the Federal Courts and the Federal System* (3rd ed Foundation Press Westbury, NY 1988) Ch XIII.

[27] *Martin v Hunter's Lessee* 1 Wheat 304, 347 (US 1816); H Friendly 'The Historic Basis of the Diversity Jurisdiction' (1928) 41 Harvard L Rev 483.

[28] American Law Institute *Study of the Division of Jurisdiction between State and Federal Courts* (American Law Institute Philadelphia 1969) 1 (*ALI Study*).

[29] *ALI Study* (n 28 above) 2.

[30] *ALI Study* (n 28 above) 1.

> and in some types of cases this difference might be very significant. Federal jurors, drawn from a larger area and thus more broadly based, may give sounder verdicts.[31]

While the ALI Study was prompted in part by the overcrowded dockets of federal courts, engendered by their relatively greater prestige, the obvious solution to this—that of increasing the resources allocated to the federal courts—was not among the ALI's recommendations. Rather, the ALI's recommendations reflected the historic commitment to maintaining the vitality of the state courts to support Hamilton's political axiom that "judicial and legislative authority should be co-extensive."[32] Accordingly, despite the pressing practical concerns, the underlying premise of co-extensive judicial and legislative authority were not questioned. According to the ALI, "(e)ven if general diversity jurisdiction means that more cases are tried in better courts, this would not justify taking away from the state courts cases arising under state law that are properly the business of the states" despite the fact that "it must be presumed that the incursion on state power that it [diversity jurisdiction] represented was considered adequately justified."[33]

Like the ALI, the Director of the Court Research Department of the National Center for State Courts discounted the existence of *actual* prejudice against persons from out of state and the "potential deterrence to free movement and business activity." He observed that "empirical evidence on the influence of fear of prejudice on lawyers' choice of forum has been mixed."[34] However, the ALI accepted that the "guarantee of efficient, competent and disinterested justice" provided by a federal court for interstate travellers and business warranted the establishment of diversity jurisdiction and the continued support for it.

> Ever since 1789 the federal government has pledged to travelers away from their home states the even-handed justice of its own courts. This pledge is so woven into the fabric of our society that it is taken for granted. It should not lightly be withdrawn. ...the bias that was formerly thought to operate against out-of-staters as such seems still to exist to some degree with respect to persons from a more distant part of the country. The diversity jurisdiction thus may give protection from real or imagined prejudice....[35]

Even if the potential for actual prejudice was slim, and the concerns it raised about the administration of justice has given rise to efforts to promote conditions in which it must necessarily be slim, the potential for it and the importance of diversity jurisdiction as a response is "so woven into the fabric of society" that it continues to be affirmed despite the inefficiencies in the administration of justice that it might create.

3. The common law and the federation

The fundamental commitment to diversity jurisdiction is further underscored by the response to the concern that the removal of cases from state courts to federal courts through diversity jurisdiction would deprive the state courts of the opportunity to develop their law. As mentioned above, the common law in the United States was the law of the local community. Each state had its own common law. While the ALI Study might have helped to balance the dockets of the federal and state courts to ensure their continuing viability, it did not need to address the potential effect of diversity jurisdiction on the development of the common law of

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[31] *ALI Study* (n 28 above) 100.

[32] A Hamilton *The Federalist,* No. 81 (Belknap Press Cambridge, Mass 1966).

[33] *ALI Study* (n 28 above) 100-101.

[34] V Flango 'Litigant Choice Between State and Federal Courts' (1995) 46 South Carolina L Rev 961, 965.

[35] *ALI Study* (n 28 above) 106.

the states because this had already been addressed by legislation and by the United States Supreme Court.

Almost from their inception, the Federal Courts were required by the Rules of Decision Act[36] to apply the statutes of the states in which they sat. Thus, the Federal Courts were established only to provide a neutral forum for the resolution of disputes under their diversity jurisdiction and not to constitute an opportunity for the application and development of federal law. However, beyond the obligation to apply the statutes of the states in which they sat, they were initially free to develop a federal common law on matters that were governed by the common law. Since the developing federal common law with respect to matters which, but for diversity jurisdiction, would be before state courts did not bind the state courts, competing federal and state common law presented opportunities for forum shopping within the state through artificial claims to federal jurisdiction. To prevent this federal-state forum shopping, the Supreme Court ruled in *Erie Railroad v Tompkins*[37] that federal courts sitting in diversity jurisdiction and determining matters of state law must apply the common law of the state in which they sit.

The *Erie* doctrine has sometimes proved awkward to apply because when there is no clear precedent in state law or when the precedent is not binding, the Federal Court must speculate on how a state court might have ruled.[38] Some states have a certification procedure by which a federal court can obtain an advisory opinion on state law from the state's highest court[39] but other states prohibit advisory opinions. In addition, decisions by Federal Courts on points of state law are not accorded precedential value for future federal or state courts. In 1941 the *Erie* doctrine became even more awkward to apply when the United States Supreme Court ruled that the principle applied also to choice of law rules.[40] Thus, while the *Erie* doctrine curbed forum shopping between federal courts and the courts of the states in which they sat, it encouraged forum shopping between the states with which the various litigants had minimum contacts.

The continued commitment to the unity of judicial and legislative power is reflected in the history of the *Erie* doctrine. It was a remedial measure intended to address the complexities and opportunities for abuse produced by federal jurisdiction and its operation has prompted further remedial measures to address the complexities and opportunities for abuse that it produces. Rather than question the underlying premises that give rise to the need for a federalized judiciary, the history of federal jurisdiction in the United States has addressed the concerns it generated as they arose. In hindsight, the apparent inevitability of these concerns suggests that a federation of sovereign legislatures, each with its own judiciary is itself problematic when judicial power is assigned both to the regional and central authorities and it is directed to be exercised by court systems independent of one another but subsumed under each of those authorities. The resulting difficulties are sharpened when the judicial power at

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[36] 28USC §1652 (first enacted in 1789) reads: 'The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.'

[37] *Erie Railroad v Tompkins* 304 US 64, 58 S Ct 817 (1938), overruling *Swift v Tyson* 41 US 1, 10 L ED 865 (1842).

[38] This meant that Friendly J. would have 'to determine what the New York courts would think the California courts would think on an issue about which neither has thought.': *Nolan v Transocean Air Lines* 276 F 2d 280 (2nd Circ, 1960).

[39] *Clay v US* 377 US 1000, 84 S Ct 1930 (1964).

[40] *Klaxon Co v Stentor Electric Manufacturing Co* 313 US 487, 61 S Ct 1020 (1941); *Griffin v McCoach,* 313 US 498, 61 S Ct 1023 (1941), reaffirmed in *Day v Zimmerman Inc v Challoner* 423 US 3, 96 S Ct 167 (1975).

the two levels of government, like the corresponding legislative power, is mandated respectively to promote the independence of the regional authorities and the strength of the central authority. The practical difficulties of diversity jurisdiction have prompted the following critical appraisal:

> If the Constitution as a whole were to be rewritten at the present day, it is almost inconceivable that this feature would be preserved. The historical reasons for its institution are intelligible, and in 1787 they were necessarily decisive. No state at that period would have consented to surrender its own judicial system, and at the same time no state would have believed that its own citizens could obtain equal justice in the courts of another. Similarly the federal government could not have trusted the state courts to adm inister federal and state law s with an impartial mind. Two complete and parallel systems therefore had to be created in order to meet both points of view....Whether the United States will ever remodel her Constitution in recognition of the passing of old enmities remains to be seen. The process of amendment is so complicated and the changes involved would be so far-reaching that no statesman in our time is very likely to attempt it. Yet it is undeniable that in the increased cost of justice and in the grave loss of judicial efficiency that flows from the conflict of jurisdictions the nation pays heavily for retaining in the twentieth century an institution based on the petty jealousies of the eighteenth.[41]

That this critical appraisal was written in 1923 before the ALI study and the *Erie* doctrine demonstrates the continuing commitment to a federalized judiciary, in which the tension between regional and central authorities is played out in two independent court systems, reflects the firm commitment in American constitutional law and the American adjudicative tradition to private law adjudication as a power to be exercised on behalf of each level of government and as an integral feature of that government.

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[41] H Smith *Federalism in North America* (Chipman Law Publishing Co Boston 1923) 126-127.

C. A Unified Court System

1. The Canadian Superior Courts

Is would seem to be more a matter of good luck than good judgment that the founders of Canadian Confederation neatly avoided the practical problems produced by treating the courts as a "judicial power"—such as those involved in establishing a federalized judiciary and diversity jurisdiction simply by leaving the courts out of the federal arrangements they proposed. By resisting the populist, or republican, view of the courts as necessary incidents of the particular governments with which they are associated, the founders of Canadian Confederation seemed to avoid much of the jurisdictional complexity of a federalized court system.

Unlike the federalized court system established by the United States Constitution, the court structure contemplated by the Canadian Constitution makes a sharp distinction between the broadly construed inherent jurisdiction of the provincial superior courts and the narrowly construed statutory jurisdiction of the federal courts. It is the provincial superior courts, the authority of which were "continued" in section 129 of the Constitution[42] that are the "Canadian courts" or "the courts of Canada." They are the successors to the Royal Courts of Justice and, while their colonial roots seem to be a matter of indifference to the Canadian legal community, the legacy of these origins in the form of their plenary jurisdiction is regularly emphasized in the jurisprudence. For example, Ontario Court of Appeal described the jurisdiction of the Canadian superior courts as follows:[43]

> .... As a superior Court of general jurisdiction, the Supreme Court of Ontario has all of the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the Court's jurisdiction is unlimited and unrestricted in substantiv e law in civil matters. ... Starke J. ... said:
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> > It appears clear that the Supreme Court of Ontario has broad universal jurisdiction over all matters of substantive law unless the Legislature divests from this universal jurisdiction by legislation in unequivocal terms. The rule of law relating to the jurisdiction of superior Courts was laid down at least as early as 1667 in the case of *Peacock v. Bell and Kendall* (1667), 1 Wms. Saund. 73 at p. 74, 85 ER 84:
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> > > ...And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specifically appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.

2. The Federal Court of Canada

In contrast, the federal courts in Canada, though not inferior courts, have a limited jurisdiction that has been analogized to the jurisdiction of inferior courts by the Supreme Court of Canada, as follows:[44]

> It is well settled... that as a general rule provincial superior courts have plenary and inherent jurisdiction to hear and decide all cases that come before them, regardless of whether the law applicable to a particular case is provincial, federal or constitutional....

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[42] This is discussed in the chapter on Judicial Authority in the section on 'The Text.'

[43] *80 Wellesley St East Ltd v Fundy Bay Builders Ltd* [1972] 2 OR 280, 25 DLR (3d) 386 (CA).

[44] *Ordon Estate v Grail* [1998] 3 SCR 437, 166 DLR (4th) 193.

> As a statutory court, the Federal Court of Canada has no jurisdiction except that assigned to it by statute. In light of the inherent general jurisdiction of the provincial superior courts, Parliament must use express statutory language where it intends to assign jurisdiction to the Federal Court. In particular, it is well established that the complete ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court (rather than simply concurrent jurisdiction with the superior courts) requires clear and explicit statutory wording to this effect.

The source of the jurisdiction of the federal courts is found in section 101, which is the last of the Judicature sections in Part VII of the Constitution. This section provides, in part "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for ... the Establishment of any additional Courts for the better Administration of the Laws of Canada."A plain reading of the grant of authority to the Parliament of Canada to establish federal courts suggests that it is merely permissive because it is qualified by the phrase providing that it be exercised "for the *better* Administration of the Laws of Canada" and therefore, that the need for federal courts was not obvious to the founders of Canadian Confederation. The authority to create federal courts was exercised only in 1875, and it has never been fully exercised in respect of the "Laws of Canada". Where the federal legislation in question does not stipulate a forum for adjudicating disputes, the provincial superior courts have jurisdiction.[45] Even, where the federal legislation in question *does* stipulate a forum, as it does in the Criminal Code[46] and the Divorce Act,[47] it frequently stipulates the provincial superior courts as the forum.

When the federal Parliament did exercise its authority under section 101 to establish the Exchequer Court of Canada in 1875, the court was empowered to determine only matters of revenue and the Crown in right of Canada. Gradually, the court's jurisdiction was enlarged to include matters of intellectual property, maritime law, tax and citizenship. In 1971 it was replaced by the Federal Court of Canada, which continues to have exclusive jurisdiction in certain specialized areas such as maritime law, and patent and copyright. The court consisted of 14 judges until 1983, when its numbers were increased to 21, and in 1985, to 25. The court is based in Ottawa but it sits in various places throughout the country. In addition to the Federal Court of Canada, the Tax Court of Canada was created in 1983 to replace the Tax Review Board in adjudicating income tax appeals.[48]

Although the mandate to establish the Federal Court of Canada has a superficial resemblance to the mandate in the United States Constitution to establish the United States Federal Courts, there are important differences between the adjudicative functions of these courts and the roles that they are expected to play in the maintenance and development of the federation. The most obvious differences have emerged in the interpretation of the mandate of the Federal Court of Canada by the Supreme Court of Canada, which serves as a court of appeal from the Federal Court of Appeal. The Federal Court of Canada serves an important function in adjudicating disputes that fall within its subject matter jurisdiction, but the Supreme Court of Canada's concern for the jurisdictional complexities that might emerge from the operation of parallel court systems has fostered a restrictive interpretation of the Federal Court's jurisdiction.

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[45] Hogg (n 1 above) 159.

[46] Criminal Code of Canada RSC 1985 c C-46 ss 468, 798.

[47] Divorce Act SC 1986 c 4 s 3.

[48] Tax Court of Canada Act RSC 1985 c T-2.

In a series of cases, the Supreme Court determined that the Federal Court's mandate was limited to the adjudication of disputes involving matters that fall within the classes of subjects on which the Federal Parliament is authorized to legislate and on which the federal Parliament has, in fact, legislated.[49] Further, the Supreme Court has determined that the Federal Court has neither pendent[50], nor ancillary jurisdiction.[51] Pendent jurisdiction and ancillary jurisdiction are important features of the jurisdiction of the United States Federal Courts and they account for a substantial portion of its caseload. Pendent jurisdiction would allow the Federal Court to decide issues or claims that did not otherwise fall within its mandate provided that they arose in a case that did fall within its mandate. In other words, pendent jurisdiction would permit joinder of claims the subject matter of which would otherwise be beyond the Court's jurisdiction. Ancillary jurisdiction would permit joinder of claims that would otherwise be beyond the Court's jurisdiction by reason of the parties involved.

At one time, the lack of ancillary jurisdiction threatened to force cases to be split between the Federal Court and the provincial superior courts because the Federal Court had exclusive jurisdiction over claims against the Federal Crown. Although a claim against the Federal Crown had to be brought in the Federal Court, a counterclaim by the Federal Crown that related to laws other than "the laws of Canada" had to be brought in one of the provincial superior courts. Recognizing ancillary jurisdiction was one possible response because it would have allowed the whole claim to be brought in the Federal Court. However, the Supreme Court of Canada chose not to read such a jurisdiction into the grant in section 101 of the Constitution. Instead, the difficulty was left to be addressed by amendments to the Federal Court Act[52] that made its jurisdiction over the proceedings against the federal Crown concurrent with the provincial superior courts rather than exclusive of them as previously had been the case. The result was that a case that would once have been split between the two courts could be brought in one proceeding, but the proceeding would have to be brought in a provincial superior court and not in the Federal Court.

This response to the emerging jurisdictional conflicts was telling. As Professor Hogg noted, choosing to restrict the jurisdiction of the federal courts in favour of the provincial superior courts in this way so as to reduce the incidence of parallel proceedings indicated a fundamental ambivalence over the constitutional importance of a federalized court system. According to Professor Hogg:

> ...Canada does not need a dual court system. The provincial courts have general jurisdiction over all causes of action; the judges of the higher courts are federally appointed; the consistency of the decisions is guaranteed by appeal to the Supreme Court of Canada. The existence of a parallel hierarchy cannot fail to give rise to wasteful jurisdictional disputes and multiple proceedings.[53]

Why is there such ambivalence about the mandate of federal courts in Canada? As courts with a comparatively narrow subject matter jurisdiction, they are able to develop special expertise in the kinds of matters that can come before them, but beyond that they do not appear to serve

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[49] *Quebec North Shore Paper Co v Canadian Pacific* [1977] 2 SCR 1054 (1976) 71 DLR (3d) 111; *McNamara Construction v The Queen* [1977] 2 SCR 654, 75 DLR (3d) 273.

[50] *Roberts v Canada* [1989] 1 SCR 322, 57 DLR (4th) 197; *Quebec Ready Mix v Rocois Construction* [1989] 1 SCR 695, 60 DLR (4th) 124; but see *ITO International Terminal Operators v Miida Electronics* [1986] 1 SCR 752, 28 DLR (4th) 641.

[51] *R v Thomas Fuller Construction* [1980] 1 SCR 695, (1979) 106 DLR (3d) 193.

[52] Federal Court Act SC 1990 c 8, which amended section 17 of the Federal Court Act.

[53] Hogg (n 1 above) 177; Hogg 'Federalism and the Jurisprudence of Canadian Courts' (1981) 30 U New Brunswick L J 9.

an integral function in maintaining and developing Canadian federalism. The kind of suspicions of parochialism directed at the courts of the American states are not levelled at the provincial superior courts. Accordingly, there is no foundation for a mandate for the Federal Court of Canada similar to that of the United States Federal Courts under their diversity jurisdiction. The approach taken to judicial power the United States, in which state courts serve the interests of the local communities, can create an inherent divisiveness that requires federal courts to maintain the cohesiveness of the federation. In the absence of a potentially divisive mandate for the Canadian provincial superior courts no such need arises. It is inconsistent with the Canadian approach to judicial authority to establish a court to fulfil such a mandate. How then does the structure of the Canadian court system reflect the intention that the provincial superior courts function so as to maintain the cohesiveness of the federation?

3. Cooperative federalism: Sections 96-100 and 92.14

How could the interests of the central authority of a federal government be ensured adequate representation in a system of courts of inherent jurisdiction comprising only a series of provincial superior courts? How could parties from across the country be assured of even-handed treatment before such courts? Based on the American experience described above, such aspirations would seem unrealistic within a single court system of province-based courts. However, the Canadian superior courts, although described as the *provincial* superior courts, were not established merely to "administer local laws."[54] They are Canada's courts, and their mandate to serve as a unified court system within the federation is supported by a unique cooperative arrangement[55] for the shared responsibility of the federal and provincial governments over them. This shared responsibility is reflected in the allocation of authority both to the provinces and to the federal government for the maintenance and operation of the courts. These grants of authority are found in section 92.14 and in the Judicature sections, sections 96-101 of the Constitution Act.

The Canadian superior courts are described as *provincial* superior courts because they are based in the provinces and administered by the provinces pursuant to the exclusive grant found in section 92.14 of the Constitution of authority to the provinces to make laws for the administration of justice. Section 92.14 provides

> 92. In each Province the Legislature may exclusively make Laws in relation to ....
>
> 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.

The grant of authority over the "administration of justice" does not include all matters associated with the courts and the judiciary as is indicated by the list of subjects following it (that is, "the Constitution Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters...). In particular, it does not include the selection, appointment, and tenure of the judges, or the jurisdiction or authority of the courts. Instead, it refers to the logistical aspects of the *administration* of justice, such as the building and maintenance of courthouses, the provision of court staff, and the management and maintenance of court documents and records.

While the grant in section 92.14 has a logistical and administrative focus the features of the administration of justice to which it refers are not entirely segregated from the substance

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[54] Each province has inferior courts, which are described as "provincial courts", with limited jurisdiction and a mandate to adjudicate provincial regulatory offences and certain family matters such as custody and support.

[55] Or "collaborative" as it was described by Professor Lederman in WR Lederman 'The Independence of the Judiciary' (1956) 34 Can Bar Rev 1139, 1161.

of the court's authority to dispense justice. In the absence of a strong and divisive sense of state sovereignty, it has not been so necessary to divide spheres of influence in such a fixed and rigid way. Accordingly, while the authority over the rules of civil procedure granted to the provinces in section 92.14 of the Constitution establishes the foundation for legislation providing for matters relating to the courts, such as Ontario's Courts of Justice Act,[56] and while both the Rules of Civil Procedure and the statutes explicitly acknowledge the inherent jurisdiction of the court to exercise its discretion to control its own process[57] as do the United States Federal Rules of Civil Procedure,[58] Canadian legislation, such as the Courts of Justice Act, permit rules to be made even where they will alter the substantive law.[59]

Thus, the mandate in section 92.14 for the provinces to provide for the operational aspects of the administration of the civil justice system does not encompass substantive features of court jurisdiction in a way that could fragment the Canadian court system. However, it does not operate in the context of a clear division between the procedural and substantive features of the responsibilities for the court system that would reflect a firm division in the mandates of the federal and provincial governments. The division between the mandates of the two governments is probably better described as a shared responsibility for the courts with the responsibility of each level of government focused on a different aspect, than it is described as a division of powers between the two governments over the court system. This description is consistent with the rejection by the founders of Confederation of the unity between political and judicial authority in each level of government within the federation that was embraced by the framers of the United States Constitution. Such a unity of political and judicial authority would require a clear segregation of spheres of influence. It reflects the fact that the provisions of the Canadian Constitution for the shared responsibility over the court system are responsibilities for the *court system* (and not for the *judiciary* or the *judicial branch* of government itself), which was continued rather than created by the Constitution Act.

This distinctive Canadian approach is also reflected in the provisions of the "Judicature" part of the Constitution Act 1867, sections 96-100, which pursue an unusual means of safeguarding against parochialism in the courts and against hostility to the interests of the federal government—which concerns may have arisen as a result of experience with the American constitutional model. The Canadian superior courts are "provincial" superior courts in the sense that they are administered by the provinces but, as was confirmed by the Supreme Court of Canada as recently as 1994, they "are not mere local courts for the administration of the local laws...[but] are the Queen's Courts...."[60] Any concern that they might be affected by local loyalties and prejudices was eliminated by the fact that the judges that preside over them are not elected by the local public and they are not appointed by the provincial Lieutenant Governors. Instead, pursuant to section 96, of the Constitution Act 1867, the judges that sit in

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[56] Courts of Justice Act, RSO 1990, c C-34 (Ontario Courts of Justice Act).

[57] Section 106, Ontario Courts of Justice Act (n 56 above); Rule 1.04(1) of the Ontario Rules of Civil Procedure RRO 1990 Reg 194 provides that 'These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.' United States Federal Rules of Procedure, Rule 1 provides in part that the rules 'shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.'

[58] Section 66(2), Courts of Justice Act (n 56 above) provides "The Civil Rules Committee may make rules for the courts described in subsection (1), even though they alter or conform to the substantive law...."

[59] The United States Federal Rules have consistently been held not to alter the substantive law: *Weiner v Bank of King of Prussia* 358 F Supp 684 (ED Pa, 1973); *In re Stein* 43 F Supp 845 (ND Ill 1942). *Complete Auto Transit, Inc v Bass* 93 SE 2d 912, 229 SC 607 (SC, 1956).

[60] *Hunt v T&N plc* [1993] 4 SCR 289, 109 DLR (4th) 16, citing Ritchie CJ in *Valin v Langlois* (1879) 3 SCR 1, 19.

the provincial superior courts are appointed by the Governor General of Canada and, pursuant to section 100, their salaries are "fixed and provided by the Parliament of Canada." Since, pursuant to section 99, the judges are appointed until age 75 and hold office during good behaviour, being removable by the Governor General only upon address of the Senate and House of Commons, they enjoy considerable independence from government generally. In addition, the fact that their appointments are made by the Governor General of Canada and not by the provincial Lieutenant Governors has ensured that parochial interests would play no part in their appointment.[61]

This shared responsibility for the courts and the judiciary has ensured that the provincial superior courts have functioned as the successors to the Royal Courts of Justice not only in the sense of their independence from government and their inherent and plenary jurisdiction, but also in the sense that they have not been confined to operating as if within the particular province in which they sit but have been free to operate as Canada's courts. There is little indication that such safeguards against biases in favour of one level of government or another were ever necessary in any practical sense or whether the intent that the provincial superior courts be independent of both levels of government has been so firmly entrenched in the Canadian legal tradition that it is not questioned. Regardless, these provisions for cooperative federalism in responsibility for maintaining a branch of the government whose authority is constitutionally recognized as continuing from the pre-Confederation era reflect the continuing appreciation of the special role for the Provincial Superior Courts as Canada's main court system. As the Supreme Court observed of the courts in 1982, "They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under section 92(14) of the Constitution Act and presided over by judges appointed and paid by the federal government (sections 96 and 100 of the Constitution Act)."[62]

There does not appear to be any history of concern on the part of the Federal Government that the only plenary courts in Canada are those of the provinces; and there does not appear to be any history of concern on the part of the provinces that the judges who preside over these courts are selected, appointed and remunerated by the Federal Government. It seems less likely that this is the result of the anticipated gains in efficiency afforded by a unified judiciary and the avoidance of contests of jurisdiction between federal and regional courts than it is a result of the continuation by the courts that existed at the time of Confederation of the legal traditions that had secured the confidence of the public in them. But what gave the founders of Confederation confidence that, unlike the courts of the American states, the provincial superior courts could be relied upon to sustain the Canadian federation and to obviate the need to create a separate federal judiciary to serve this function?

The founders of the Canadian federation relied upon three features of the system they were establishing. First, the provincial superior courts, as successors to the English courts of common law and equity, were experienced in operating with plenary jurisdiction. They could be relied upon to address virtually all kinds of justiciable questions because their authority had not historically been circumscribed within a fixed area of competence. In contrast with courts in the United States and those in civil law jurisdictions, the question of subject matter jurisdiction has generally arisen for the provincial superior courts only in respect of the narrow range of matters on which the Federal Court of Canada enjoys exclusive jurisdiction. Apart from this, questions related to subject matter jurisdiction have generally been associated in

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[61] To ensure that they would be knowledgeable of the law of the province in which they are appointed, sections 97 and 98 provided for judges to be appointed from the bars of the province in which they were to hold office.

[62] *A-G (Canada) v The Law Society of British Columbia* [1982] 2 SCR 307, 327, 137 DLR (3d) 1.

Canada with the determination of the respective *legislative* authorities of the federal and provincial governments as questions of constitutional law—not as features of the law of judicial jurisdiction.

Second, by dividing the spheres of legislative authority as they did between the federal and provincial governments, the founders minimized the friction between these legislative spheres of operation. In particular, by allocating responsibility for almost all private law to the provinces, the founders minimized the federal-provincial conflicts likely to arise in the course of private law disputes. In most private law disputes, the relevant applicable law is provincial law—the law of the province in which the dispute had arisen or, if the dispute has connections to more than one province, possibly the law of another province—but generally not federal law. This enabled the Canadian courts to continue to follow the approach that was emerging in the English courts to relations on the international plane between legal systems in the conflict of laws. The provinces are largely autonomous legal systems in private law much like independent countries. Further, by concentrating most public law in the federal government, the founders ensured that uniform standards would continue to prevail and there would be no sudden change from the approach that had prevailed when most public law matters were regulated by a colonial authority. This authority would simply devolve upon the Dominion Parliament.[63]

Third, the founders of Confederation gained further assurance that the single court system could adequately discharge the function of sustaining the federation through the availability of appellate review by the Judicial Committee of the Privy Council. The availability of Privy Council appeals meant that the most important and contentious issues of federalism could be subject to review by a superior commonwealth adjudicative authority. Difficult questions could be considered in a forum that was beyond the potential for parochial loyalties. Any institutional bias that might emerge from the prospect of having the Attorneys General of the provinces appearing before a federal appointee, or the federal government seeking relief or defending a claim in a court of one of the provinces would not arise in an appeal before the Privy Council.

Unlike the federalized design of the courts in the United States, this design has assisted the federal and provincial governments in their cooperative support of a single court system that has no loyalties to either, and it has done so in a way that is relatively stable. This suggests that the foundation for cooperation must lie in something more profound than institutional arrangements alone. Indeed, the suggestion that the provincial superior courts might have a tendency to be influenced by partisan loyalties would be readily dismissed in the Canadian legal tradition that these arrangements seem to be no more than safeguards against a hypothetical risk. The autonomy of the provincial superior courts from government, which they have continued to enjoy through the establishment and evolution of Confederation, is more fundamental than that created by the separation of powers and the safeguards of judicial independence that exist, for example, in the United States and Australia. Arguably, this obviates the concerns that gave rise in the United States to the need to establish a federalized judiciary in the first place. In sum, it might be suggested that the effectiveness of the unified court system supported by the shared federal-provincial responsibility for establishing and maintaining the courts and the judiciary is both a product of the historical autonomy of the Canadian courts and a contributing factor to its continuance. Professor Glenn has described the unitary court structure in Canada as a function of the rejection of the unity of judicial authority and the other governmental authorities, and as a function of the profound distinction in

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[63] The Federal Parliament once had the power to disallow provincial laws, but it has lapsed into desuetude. The power resolved federal provincial conflicts without resort to the courts, which thereby reduced the need for the courts act as the umpires of Canadian federalism.

Canadian legal traditions between the role of the courts in government and the lawmaking authorities. As he explained:

> Underlying the preservation of a unitary court structure in a State which is confederal or federal in character is the thesis that neither the executive nor legislature merits a corresponding judicial authority. There are neither separate administrative courts nor separate administrative courts nor separate and exclusively competent provincial and Federal courts. The possibility of making law thus is not seen as having any bearing on the judicial authority which may eventually come to apply law or review its application. Put more affirmatively, the common law and its judges precede legislative authority and retain ultimate authority over its division in the confederation or federation.[64]

[64] HP Glenn, 'The Common Law in Canada' (1995) 74 Can Bar Rev 261, 272.

D. An Integrated Court System?

1. The initial compromise

The evolution of the Australian court system illustrates a recurring issue in the analysis of constitutional texts and traditions: that of the tension between the text of a constitution and the tradition of interpreting it in the jurisprudence and academic literature. This tension raises questions about the precision with which the drafters captured the spirit of the constitutional aspirations, both for the kind of federalism they sought to achieve and for the role of the courts in sustaining that kind of federalism. These questions are not, however, questions of technical skill in drafting. Rather, inconsistencies between the apparent meaning of the text and the effect that it has been given reflect the related tension between the text of the constitution as a representation of the constitutional aspirations of a country at a particular moment in time and the evolving aspirations of a country for its constitution over time.

Clearly, the constitutional histories of the United States, Canada or Australia could provide suitable opportunities to explore these tensions. Each constitution was developed in fairly recent history and, to varying degrees, the history of its drafting has become the subject of scholarly accounts; and, yet, the history of each country's constitution is also long enough to begin to reveal distinctions between inherent tendencies and passing responses to changing circumstances. Thus, the interpretative history of each of the constitutions is now long enough to begin to discern enduring interpretive trends and themes among judicial decisions that might have been affected by the particularities of the cases in which the issues arose.

The constitutional history of Australia, however, is particularly interesting with respect to the tensions that surround the text of the Constitution in the way that it relates to the structure of the court system. It was drafted at a time when the founders of the country were in a position to assess the operation of various Constitutions (in particular those of the United States and Canada) and to borrow from those then relatively recent precedents. Having agreed upon the desired structure and operation of their federation, the architects of the Australian court system could adopt provisions that had produced that result elsewhere. In addition, authoritative commentary on the intentions of the drafters was published at the time[65] and because some of the drafters themselves became members of the High Court, they were in a position to test the effects of the provisions they had drafted in cases coming before them. Finally, throughout the history of the Australian federation there has been a lively tradition of debate regarding the interpretive approach that should be taken to the Constitution.[66]

Like the drafters of the American and Canadian Constitutions, the drafters of the Australian Constitution relied on various precedents, adapting the provisions to suit their vision of the country.[67] However, two of the delegates to the first National Australian Convention in March of 1891 arrived with complete drafts based largely on the United States Constitution[68] in anticipation of the consensus that would be reached regarding the provisions

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[65] J Quick and RR Garran *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson Sydney 1901) (Quick & Garran); and J Quick and LE Groom *The Judicial Power of the Commonwealth* (CF Maxwell Melbourne 1904).

[66] M Kirby 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) Melbourne U L Rev 1.

[67] The drafters also drew on aspects of the Swiss and German constitutions: 'Models for a Nation' in H Irving *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge U P Cambridge 1997).

[68] G Sawer *The Australian Constitution* (Aus Govt Pub Svc Canberra 1988) 10 (Sawer). According to Sawer, Kingston's draft was probably based on Clark's, and therefore, effectively, the Convention developed the basic text of the Australian Constitution from Clark's United States-based draft.

suitable for the Australian Constitution. With respect to the judiciary, Inglis Clarke raised an amendment to the resolution concerning the judiciary in the initial committee of the whole but then left the matter to the select committee on the judiciary, which he came to chair.[69] The report of his committee consisted primarily of quotations from the American Constitution,[70] and the report was simply incorporated into that of the Committee on Constitutional Machinery. The chapter on the judiciary in that report, which was prepared under the leadership of Samuel Griffith, was itself accepted almost without comment. This pattern continued through the subsequent sessions later on in the decade so that in the end, the structure of the federal court system was based on the American model with only minor variations, largely attributable to Australia's ties to Britain.[71]

By today's standards, the dispatch with which the text of the Australian Constitution was completed might suggest that it was only ever intended to provide a general guide to the workings of government; and there are indications that the country's founders were less concerned than their American counterparts about articulating definitively the way in which the Constitution would ultimately operate.[72] That the framers anticipated and relied upon the impact of subsequent interpretation to carry on their work was suggested by Sir Richard Baker in 1891, when he said, "I do not care in what way you frame the Constitution, the people of Australia will mould and modify it in accordance with their ideas and sentiments for the moment, although the outward form may remain the same.[73] RB Haldane similarly observed when the Constitution was being considered by the United Kingdom Parliament, that it was a "mere framework" that would have to be completed by "traditions and doctrines...with tendencies which are not expressed."[74]

Why would the framers of the Australian Constitution be less exacting and feel less likely to be bound by the text than their American counterparts? Why would they be prepared to specify the details of all three branches of government unlike their Canadian counterparts? The answers to these questions have influenced the approach taken to interpreting the Australian Constitution, but they lie largely beyond it. Such an approach suggests that despite the adoption of a constitution resembling the United States Constitution, much of the commitment to parliamentary sovereignty remained, and the Australians retained a high degree of confidence in the capacity of the legislature to adjust legislative, executive and judicial power on an ongoing basis. While the allocation of federal powers may have necessitated a constitution for the new federation, there did not seem to be a particular driving force or urgent need to be accommodated in the federal arrangements devised. By way of contrast, it may be suggested that the American republic needed a constitution as a central reference point for government to ensure that all three branches continued to recognize the sovereignty of the people; and that the Canadian confederation needed a constitution to ensure the continued vitality of the constituent communities within the federation. In contrast, while the Australians needed a framework for federal government, there was no similarly pressing

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[69] EM Hunt *American Precedents in Australian Federation* (AMS Press New York 1968) 187 (Hunt).

[70] Hunt (n 69 above) 188.

[71] 'American Influence on the Australian Judiciary' in Hunt (n 69 above) 185-199; "In the end, however, one fact at least remains. Australia could have followed England, abandoning federal principles; or, adopting them, she could have followed Canada or Switzerland or Germany. She did not do so. The framework into which she fitted a pattern that was new in many details, and more intricate than anything that had preceded it, was that of the American Constitution" (256).

[72] No relevant comparison can be made here to the founders of Canadian Confederation because, as it will be recalled that, in effect, they left the judiciary out of the Constitution Act.

[73] WG McMinn *A Constitutional History of Australia* (OUP Melbourne 1979) 119 (McMinn).

[74] McMinn (n 73 above)

concern to fix for all time particular requirements for their federation. On the contrary, the history of Australian constitutional development, before and after drafting the Constitution has shown a high degree of interest in renewal and renovation and considerable capacity for it—so much so that, as will be discussed, the rigidity of some constitutionally entrenched provisions has been regarded as merely an impediment to this process rather than an articulation of an enduring feature of the Australian vision of government.

This approach is clearly evident in the establishment of the judiciary. The drafters of the Australian Constitution accepted that the general structure of the United States Constitution was a suitable precedent for the Australian Constitution and it was adopted with minor adaptations. They accepted the proposition underlying Article III of the United States Constitution that any central authority that sought to forge a single country out of separate states that had established themselves as independent sovereignties would need a "judicial power" to do so. Accordingly, section 71 of the Australian Constitution vests this judicial power in the High Court and in "such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction." However, in accepting the concept of "judicial power" the Australians did not conceive of it concretely, like the Americans, as requiring expression in the form of discrete personnel and physical plant. It did not seem necessary to the Australians to establish a separate court to fulfil the mandate of each judicial jurisdiction. Rather, the Australians settled upon the highly practical solution, described in 1956 by Chief Justice Dixon as the "autochonous expedient,"[75] of permitting the existing state courts, under specified circumstances, to *exercise* federal judicial power, thereby obviating the need to establish federal courts.[76] As the Australian constitutional scholar Leslie Zines explained, "whereas the Australians readily accepted that in their legislative and executive field the Commonwealth and states were separate and, largely, co-ordinate, the federal judiciary was not seen as competing with the judicial power of the states or as a threat to state 'sovereignty'.[77] As a result leading constitutional authorities such as Sir Owen Dixon[78] and Zelman Cowen[79] would come to criticize the initial decision to create a federalized judiciary more than the difficulties that subsequently arose from efforts to facilitate its operation. Thus, these constitutional arrangements for the judiciary seem to reflect a degree of confidence in the good faith exercise of authority similar to that which left the Canadian judiciary largely unregulated by the Canadian Constitution in their private law authority—a good faith exercise that would permit members of the judiciary to exercise more than one jurisdiction, provided that, in contrast with the Canadian tradition, the jurisdiction being exercise was clearly articulated.

2. The emergence of the Federal Court

At roughly the same time as the Federal Court of Canada was established, the federal Parliament in Australia acted upon its mandate in section 71 to create the Family Court and the Federal Court with specialized mandates in the areas of law over which the federal Parliament has legislative authority under the Constitution. From the time of the early proposals for the

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[75] *The Queen v Kirby* (1956) 94 CLR 254, 268; O Dixon 'The Law and the Constitution' (1935) 51 LQR 590, 606 (Dixon).

[76] Judiciary Act of 1903, pt VI s 39(2).

[77] L Zines 'Federal, Associated and Accrued Jurisdiction' in B Opeskin and F Wheeler (edd) *The Australian Federal Judicial System* (Melbourne U P Melbourne 2000) 265 (Opeskin & Wheeler).

[78] Dixon (n 75 above) 597.

[79] Z Cowen *Federal Jurisdiction in Australia* (1959) at x-xi; B Opeskin 'Cross-vesting of Jurisdiction and the Federal Judicial System' in Opeskin & Wheeler (n 77 above) 303 (Opeskin *Cross-vesting*).

Court in 1964,[80] it was clear that this initiative was not intended to replicate the American federalized judiciary containing two complete and separate court systems. Rather, it was thought that the state courts would continue to exercise federal jurisdiction but the Federal Court would have jurisdiction over specified areas of federal law such as tax and intellectual property, much as has the Federal Court of Canada. Indeed, the Federal Court of Australia now exercises jurisdiction at first instance over a range of subjects that sounds remarkably similar to the range of subjects adjudicated upon by the Federal Court of Canada. These include bankruptcy, antitrust and consumer protection, anti-discrimination orders, intellectual property, taxation, admiralty, corporations law, and judicial review of administrative action, and of certain federal tribunals. As in Canada these areas of competence are not generally found in the Court's statute, but in the federal legislation dealing with each subject.

Faced with the challenges of split cases, the choice made for the Australian court system was not to eliminate the exclusive jurisdiction of the Federal Court in most matters (as was done in Canada) but to establish the "associated"[81] and "accrued"[82] jurisdictions to operate in similar fashion to the pendant and ancillary jurisdictions of the United States Federal Courts. When the resulting expansion of Federal Court jurisdiction threatened to undermine the vitality of the state courts, the High Court acknowledged the problem as follows:

> Lurking beneath the surface of the arguments presented in this case are competing policy considerations affecting the role and status of the Federal Court and the Supreme Courts of the States. There is on the one hand the desirability of enabling the Federal Court to deal with attached claims so as to resolve the entirety of the parties' controversy. There is on the other hand an apprehension that if it be held that the Federal Court has jurisdiction to deal with attached claims, State courts will lose to the Federal Court a proportion of the important work which they have hitherto discharged....[83]

The High Court nevertheless resolved the issue in favour of the interests of litigants in "the speedier determination of entire controversies between parties without undue duplication of proceedings,"[84] giving this interest precedence over apprehensions that a broadened mandate for the federal courts would diminish the effectiveness of the Constitution in maintaining a viable federation. Echoing the initial compromise of the "autochthonous expedient," this decision reflected the determination to ensure that the formal structures of the court system would accommodate the practical requirements of litigation.

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[80] G Barwick, The Australian Judicial System: The Proposed New Federal Superior Court (1964) 1 Fed L Rev 1; M Crock and R Mccallum 'Australia's Federal Courts: Their Origins, Structure and Jurisdiction' (1995) 46 South Carolina L Rev 719, 748 (Crock & Mccallum).

[81] Federal Court of Australia Act 1976 s 32(1) provides that "To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked."

[82] Accrued jurisdiction exists over a non-federal claim on the grounds that the Federal Court is empowered to hear the entire "matter," even if it involves parties not before the court on the federal matter, provided that it is not severable from the federal claim, such as when the two claims arise out of common transactions and facts, and the federal claim must form a substantial aspect of the matter. LJW Aitken 'The Meaning of 'Matter': A Matter of Meaning--Some Problems of Accrued Jurisdiction' (1988) 14 Monash U L Rev 158 and B Opeskin 'Federal Jurisdiction In Australian Courts: Policies and Prospects' (1995) 46 South Carolina L Rev 765 (Opeskin *Federal Jurisdiction*) 803-804.

[83] *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 157, 513 (*Philip Morris).*

[84] *Philip Morris* (n 83 above) 548.

Combined with an increasingly specific jurisdictional mandate based on an expanding legislative jurisdiction of the Commonwealth Parliament, the Federal Court continues to grow in scope and significance.[85] There appears to be support for this progressive integration. Despite some acknowledgement of the concern that the waxing significance of the Federal Court will tend to bring about a corresponding waning significance of the state courts, the inevitable centralization in litigation that would follow from the growth of the Federal Court does not seem to be regarded as inherently problematic. Rather, Australian commentators seem to speak of the increasingly important role of the Federal Court with a degree of pride[86] that is striking in contrast with the responses evoked in the United States and Canada by the challenges of a federalized judiciary. In the United States, the response was to refine the jurisdiction of the Federal Courts so as to maintain a balance between the two court systems; and, in Canada, the response was to curtail the jurisdiction of the Federal Court so as to ensure that the provincial superior courts would remain the principle Canadian courts.

3. The rejection of diversity jurisdiction

In contrast with the tradition in the United States, the expansion of federal jurisdiction in Australia has not been a product of the concerns that gave rise to diversity jurisdiction. There does not seem to be a willingness in Australia to endorse, even *pro forma,* a concern about the potential for parochialism in state courts, such as was noted by the ALI in respect of the quality of adjudication in American state courts. And, as was demonstrated by the adoption of the autochthonous expedient, there did not appear to be the same tradition of concern about bias that gave rise to diversity jurisdiction in the United States. Although diversity jurisdiction was adopted by the framers of the Australian Constitution it was not made part of the jurisdiction of the federal courts *per se* in the Australian Constitution, but rather part of the High Court's original jurisdiction, pursuant to section 75.

In 1922, the High Court described diversity jurisdiction as "a piece of pedantic imitation of the Constitution of the United States, and absurd in the circumstances of Australia, with its State Courts of high character and impartiality"[87] and ruled out its application to corporations. The concern that diversity jurisdiction placed an unjustified burden on the High Court,[88] led to the recommendation in 1974 that it be eliminated by constitutional amendment.[89] In 1976, changes to the Judiciary Act assisted the High Court in reducing its workload by authorizing it on application or its own motion to remit matters and parts of matters to lower courts with jurisdiction to hear them.[90] This authority has helped the Court to ensure that various forms of original jurisdiction, including diversity jurisdiction do not impede its ability to discharge its role as the final interpreter of the Constitution and as the Court of Appeal from state supreme courts and the federal courts. It is vital to the working of the High Court as a leading common law court that it should be able to concentrate on constitutional issues and on the fundamental issues of law that come before it in the exercise

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[85]The Federal Court has increased in size since it began to operate in 1977 so that it has more than twice as many judges than the Federal Court of Canada for not much more than half the population.

[86] Crock & Mccallum (n 80 above) 757.

[87] *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290, 330, 339; *Cox v Journeaux* (1934) 52 CLR 282

[88] Z Cowen and L Zines *Federal Jurisdiction in Australia* (2nd ed OUP Melbourne 1978) Ch 2; and L Zines 'Federal, Associated and Accrued Jurisdiction' in Opeskin & Wheeler (n 77 above) 284-285.

[89] Australian Constitutional Convention *Proceedings of the Australian Constitutional Convention* (Govt. Printer Melbourne 1976) 204-205.

[90] Judiciary Act, s 44(1).

of its appellate jurisdiction."[91] In 1988, the Australian Constitutional Commission again recommended the repeal of diversity jurisdiction[92] and as commentators have noted "the High Court has made it clear that it does not wish to hear claims between residents of different states that could be initiated in state supreme courts. The High Court does not wish to hear matters relating to traffic accidents simply because the litigants reside in different states."[93] As a single court that sits en banc, in comparison with the many United States Federal Courts, it would be bound to face greater pressure on its caseload through diversity jurisdiction greater than that experienced by the United States Federal Courts and there appears to be a lack of concern in the caselaw and commentary for the need to address the apprehensions of bias, such as existed in the American state courts against persons from out of state that would warrant the existence of diversity jurisdiction.

4. The cross-vesting scheme

Despite the pride in the growth of the Federal Court of Australia, the increasing relevance of the federalized aspects of court jurisdiction in Australia gave rise to a range of difficult legal questions. Geoffrey Sawer wrote in 1987 that, "a complex body of technical law, dealing mainly with questions of procedure, has grown up around these distinctions, and its consequences account for more than half of the constitutional decisions of the High Court of Australia."[94] From a practical perspective, unless the distinctions between state and federal jurisdiction had a meaningful impact on the quality of dispute resolution or the operation of the constitution, it would be difficult to justify the transaction costs in terms of litigation unrelated to the merits of claims of the distinctions between state and federal jurisdiction. It would be expected that such a situation would continue only if there was some practical or principled basis for it or if it could not readily be improved.

Further, with the development of the Federal Courts a range of other concerns emerged. As mentioned above, the High Court endorsed accrued jurisdiction to address concerns relating to the ability to have all the issues in a dispute decided in one court. In addition, where the jurisdiction of federal and state courts was concurrent, this raised the potential for forum shopping. Finally there was the concern that with the steady increase in the caseload of the Federal Courts, the State Supreme courts would suffer a decline in their role and function.[95] Some of the challenge was met in the area of family law through a legislative device authorized by the Constitution in section 51 (xxxvi) which permitted the state legislatures to refer matters for legislation to the federal legislature, which, in turn, placed them within the jurisdiction of the federal courts. This helped to overcome a split between the jurisdiction of the Family Court and the State Supreme Courts.[96] Helpful though this was, it solved only part of what was becoming a problem of substantial proportions.

During the Australian Constitutional Convention sessions in the 1970's it was suggested that measures be explored to vest the jurisdiction of the state courts in one another

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[91] Commonwealth of Australia Parliamentary Debates H of R, 2944 (June 3, 1976); Opeskin *Federal Jurisdiction* (n 82 above) 771-772; and PH Lane *Lane's Commentary on the Australian Constitution* (2nd ed LBC Information Services Sydney 1997) 577.

[92] Australian Constitutional Commission *Final Report of the Constitutional Commission* (Australian Gov't Publishing Service Canberra 1988) 381 (Constitutional Commission, *Final Report*).

[93] Crock & Mccallum (n 80 above) 732-733 citing *Commissioner for Rys v Peters* (1991) 102 ALR 579.

[94] Sawer (n 68 above) 128.

[95] Australian Judicial System Advisory Committee *Report of the Australian Judicial System Advisory Committee* (The Committee Sydney 1987) 28 (Advisory Committee Report).

[96] Opeskin *Cross-vesting* (n 79 above) 309.

and in the federal courts to overcome these difficulties. In 1985 the proposal was endorsed and a Standing Committee of the Solicitors General led by the Solicitor-General of Australia, Gavan Griffith, prepared a legislative scheme involving concurrent enactments by each of the States and the Commonwealth of the Jurisdiction of Courts (Cross-Vesting) Act 1987 that was put into operation by 1 July 1988.

The scheme was an ingeniously simple means to address a highly complex and seemingly intractable series of problems. It virtually eliminated the practical effects of jurisdictional divisions between courts by providing that the jurisdiction of the Supreme Courts of each State and Territory would be vested in the Supreme Court of all the other States and Territories and in the Federal Courts, and by vesting as much as was possible of the jurisdiction of the Federal Courts in the courts of the States and Territories. The scheme also ensured that matters would be decided in appropriate fora by providing for the transfer of a matter to a more appropriate forum either on the application of a party or by the court itself should it be commenced elsewhere.[97] The scheme mandated the transfer mechanism in situations involving related proceedings in different courts, those in which the receiving court would have had jurisdiction without the cross-vesting scheme, those involving the interpretation of another jurisdiction's law, and when it was otherwise in the interests of justice. No appeal lay from a decision to transfer[98] as it was intended to be "a 'nuts and bolts' management decision."[99]

When the cross-vesting scheme was first contemplated, there was some question about the constitutional validity of the vesting of state court jurisdiction in the federal courts. Various views prevailed among the legislators[100], courts[101] and academics.[102] The expression

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[97]The operative provision in the cross vesting legislation reads as follows:
5. (1) Where - (a) a proceeding (in this sub-section referred to as the 'relevant proceeding') is pending in the Supreme Court of a State or Territory (in this sub-section referred to as the 'first court'); and
(b) it appears to the first court that—

> (i) the relevant proceeding arises out of, or is related to, another proceeding pending in ... [another Australian court] and it is more appropriate that the relevant proceeding be determined by ... [the other Australian court];
> (ii) having regard to— ...
> > (C) the interests of justice, it is more appropriate that the relevant proceeding be determined by ... [the other Australian court], as the case may be; or
> (iii) it is otherwise in the interests of justice that the relevant proceeding be determined by ...[the other Australian court],

the first court shall transfer the relevant proceeding to . . .[the other Australian court], as the case may be.

[98] A Mason & J Crawford 'The Cross-vesting Scheme' (1988) 62 Aus L J 328; and G Griffith, D Rose & S Gageler 'Further Aspects of the Cross-vesting Scheme' (1988) 62 Aus L J 1016.

[99] *Bankinvest AG v Seabrook* (1988) 14 NSW L R 711, 714 (CA) (*Bankinvest*). In the Australian Capital Territory and Western Australia, it was suggested that traditional private international law principles should apply: *Waterhouse v Australian Broadcasting Corp* (1989) 86 ACT R 1, but this has been criticized: P Nygh *Conflict of Laws in Australia* (6th ed Butterworth Sydney 1995) 91-92; G Moloney and S McMaster *Cross-vesting of Jurisdiction: A Review of the Operation of the National Scheme* (Australian Institute of Judicial Administration Melbourne 1992) 103.

[100] The Australian Constitutional Convention Judicature Sub-Committee said in 1984, on the strength of an opinion by Professor Zines that the scheme did not require a constitutional amendment to secure its validity: Opeskin *Cross-vesting* (n 79 above) 317 but, on the advice of the Advisory Committee on the Judicial System, recommended a constitutional amendment to prevent any such challenge: Australian Constitutional Commission (1988) I, 371-373, II, 1013-1015.

[101] *Grace Bros Pty Ltd v Magistrates of the Local Courts of New South Wales* (1989) ATPR 40-921 (Gummow J) as cited in B Opeskin *Cross-vesting* (n 79 above) 317 *n*56.

of concern about constitutional validity was always framed in terms of regret and one commentator expressed the dominant view that "it should not justify the termination of that legislation's operation."[103] Nevertheless, after more than a decade of successful operation, the High Court ruled that state court jurisdiction could not be vested in the Federal Court because there was no counterpart to the section 71 authority of the Federal Parliament to vest federal jurisdiction.[104] The vesting of federal jurisdiction in the state courts and of each of the state's courts jurisdiction in one another continues but the vesting of state court jurisdiction in the federal court must now be sought through other means if it is to be achieved.[105] Even though some acknowledged that the decision was technically correct, it was almost universally understood as having seriously deleterious effects on the operation of the federal judicial system.

The same kind of ingenuity that gave rise to the scheme immediately began to develop ways to move forward from that impasse. Indeed, only part of the scheme was impaired and the more limited solutions to the jurisdictional problems that operated before the advent of cross-vesting were immediately revived for consideration, including those based on the bringing within federal legislative jurisdiction areas currently subject to state legislative powers, referring aspects of other areas that remain subject to state legislative power, and relying on accrued jurisdiction.[106]

5. Towards an integrated court system

The history of cross-vesting illustrates the ongoing tension between the initial decision by the framers to adopt a federalized judicial system in the American model and the continuing experience with the logistical complexities and difficulties it has presented. It indicates a trend toward the convergence of court jurisdiction in a unified judiciary, if not in formal terms, then in practical terms through an integrated court system. Once the High Court had facilitated the growth of federal jurisdiction by endorsing accrued jurisdiction in the federal courts, more than an abstract commitment to the rights of states to have their own court systems would have been necessary to preserve the vitality of the state courts. Such a commitment has not enjoyed the same degree of support in Australia as it has in the United States. Quite apart from the logistical difficulties and procedural complexities presented by the maintenance of a federalized judicial system, there appears to have been ambivalence about its merits when it was adopted. As Quick and Garran commented in 1901, it was practicable "to secure the proper administration of the judicial business of the Commonwealth" by vesting federal jurisdiction in state courts, thus making it possible to "dispense with unduly cumbersome judicial machinery"; and it was not considered problematic to do so because "the

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[102] B O'Brien 'The Constitutional Validity of the Cross-vesting Legislation' (1989) 17 Melbourne U L Rev 307 (O'Brien).

[103] O'Brien (n 102 above) 316.

[104] *Re Wakim; Ex parte McNally* (1999) 163 ALR 270. The scheme withstood a similar challenge to its jurisdiction in *Gould v Brown* (1998) 193 CLR 346 when the court's six members were evenly divided.

[105] In particular, by referring legislative authority in areas of difficulty, such as corporations law, to the Federal Parliament to bring it within the Federal Court's jurisdiction other than through cross-vesting.

[106] Despite the lament by one judge of the federal court that the learning associated with these old techniques 'could be more usefully applied as doorstop material than to the workings of a modern judicial system.' *Cambridge Gulf Investments Pty Ltd v Dandoe Pty Ltd* [1999] FCA 1142 (French J). The option of constitutional amendment to change the fundamental features of the federalized court system was considered by the Judicature Sub-Committee of the Australian Constitutional Convention in 1983 but not recommended then in light of the promise of the cross-vesting scheme.

judicial department of the Commonwealth is more national, and less distinctively federal, in character, than either the legislative or executive departments.[107]

The operation of the cross-vesting scheme avoided the more obvious tensions that might have arisen over the relative strengths and merits of the federal and state courts by making available to litigants any appropriate venue for their dispute. In the absence of recommendations similar to those made in the ALI study of diversity jurisdiction[108] that there is a fundamental constitutional need to maintain the balance between the federal and state courts, it seems likely that there will be an ongoing expansion of the federal court jurisdiction through the ongoing expansion of federal legislative jurisdiction and through the referral of state legislative powers to the federal government.

In view of the striking example of the capacity of the legal community and government to collaborate on fundamental issues affecting the judicial system, it might seem surprising that a unified judiciary was not pursued as a matter of constitutional amendment. In 1985, the Judicial System Advisory Committee considered the merits of a federalized judiciary,[109] but was concerned that it might be difficult for the two levels of government to share responsibility for a single court system. The committee was also concerned that it might be difficult in a time of increased federal regulation for the federal government to discharge such responsibility through jurisdiction vested in state courts, particularly where the constitution and structure of those courts could not be reformed. In view of the success of shared responsibility for a single court system in Canada, it is not obvious why this would present a difficulty; nor is it obvious why such a challenge could not be met by governments within a federation that were capable of achieving such substantial cooperative innovations as the cross-vesting scheme. Nevertheless, the challenge would entail considerable reform and would likely be sought only if it was the most convenient means of addressing the jurisdictional complexities experienced.

The more significant impediment to locating a unified court system in the state courts seems to be the latter concern—that of continuing to vest jurisdiction in state courts where the constitution and structure of the courts cannot be reformed. While the Commonwealth Parliament may vest jurisdiction in state courts, it is said that it must take the courts as it finds them; and while judicial independence and the separation of powers are part of the common law foundation for the state court systems, these features are not entrenched in the state constitutions.[110] Recently, the High Court held to be invalid legislation that required a state court to act in a way that was incompatible with the judicial function it discharged as a court vested with federal jurisdiction under Chapter III of the Constitution and as part of an integrated judicial system.[111] Whether, in time, rulings such as this would prompt the states to implement institutional safeguards to place their courts on the same footing as the federal courts is unclear. Whether the implementation of such safeguards would prevent the drift of matters and prestige toward the federal courts is also unclear. It is unclear, in view of the apparent desire to overcome the jurisdictional complexities of a federalized system and the

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[107] Quick and Garran (n 65 above) 803-804.

[108] Note 28 above.

[109] Advisory Committee Report (n 95 above) 30-34; Constitutional Commission *Final Report* (n 92 above) V 1 s 6.16

[110] The Victorian Constitution provides for its Supreme Court and a procedure for diminishing its jurisdiction in Part 3 and the New South Wales Constitution provides for security of tenure for judges in Part 9.

[111] *Kable v Director of Public Prosecution (NSW)* (1996) 189 CLR 51.

resulting incentive to integrate the court systems, whether this occurs formally or functionally, and whether it operates through the state courts or federal courts or both.

While the focus of the Australian court system, which once rested on the state courts, seems to be shifting to the federal courts, there appears to be a continuing interest in a unified, or at least an *integrated* judiciary to promote the needs of litigation within the system. This interest seems to exist in tension with the constitutional provisions for a federalized judiciary based on the American model. Patrick Glenn suggested that "the fact that Australia's court systems are different in kind from those of the United States appears to be a result of the effort to reconcile federalism and an underlying, unified concept of the common law."[112] In a speech to the American Bar Association in 1943, Sir Owen Dixon commented on the considerations giving rise to a single common law throughout Australia despite the fact that the model adopted by the framers of the Australian Constitution would seem likely to re-produce the state-based common law that exist in the United States. He said,

> We conceive a State as deriving from the law, not the law as deriving from a State. A State is an authority established by and under the law, an authority possessing legislative and other power restricted territorially and qualified in point of subject matter. We do not of course treat the common law as a transcendental body of legal doctrine, but we do treat it as antecedent in operation to the constitutional instruments which first divided Australia into separate Colonies and then united her in a federal Commonwealth.
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> The British conception of the complete supremacy of Parliament developed under the common law; it forms part of the common law and, indeed, it may be considered as deriving its authority from the common law rather than as giving authority to the common law.[113]

The description of the common law as "antecedent in operation to the constitutional instruments which first divided Australia into separate Colonies and then united her in a federal Commonwealth" resembles the approach taken in the Canadian legal tradition to the role of the courts in private law adjudication. The resemblance is somewhat deceptive unless it is noted Sir Owen Dixon did not say that the *makers* and *developers* of the common law, *ie*, the courts, are regarded as in some way antecedent to the other branches of government described as the "State" (*ie*, those that have "legislative and other power restricted territorially and qualified in point of subject matter"). The relevant distinction from the approach to the mandate of the courts in government that might be inferred from the adoption of the federalized model for the judiciary found in the United States Constitution, is that the tradition of parliamentary supremacy, which was replaced in the United States with the supremacy of the Constitution, continued in Australia despite the adoption of a Constitution modelled on the United States Constitution.

While the framers of the Australian Constitution were attracted by the logic and symmetry of the structure of the United States Constitution, they have not shared the American suspicion of government or of the judiciary that would warrant maintaining a federalized judiciary in the face of inefficiency and inconvenience for litigants. This is illustrated by the willingness to reject diversity jurisdiction as unnecessary, and by the considerable innovation in the court structure within the federation throughout the first century of its operation. While the framers of the Australian Constitution adopted the *form* of the

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[112] HP Glenn, 'Divided Justice? Judicial Structures in Federal and Confederal States' (1995) 46 South Carolina L J 819, 822.

[113] O Dixon, 'Address to the Section of the American Bar Association for International and Comparative Law' (1943) 17 Aus L J 138.

American judicial system, the Australian legal community has continued to adapt it to meet the needs of the Australian legal traditions, demonstrating a remarkable capacity for effective review and reform of their national institutions. From the autochthonous expedient to the cross-vesting scheme, there has been a strong commitment to considerations of practicality and convenience for members of the community in the institutional design of the court system. In the absence of a practical reason for impairing the efficiency of the system, impediments such as those relied on by the High Court in the *Wakim* decision to strike down portions of the cross-vesting scheme have been regarded as unfortunate technical difficulties. The Australian court system has operated within institutional structures that have the specificity and formality of the American judicial system, but also the flexibility and the continuing commitment to functionality of a common law-based system such as exists in the Canadian court system; and when these two have come into conflict, the problems have been addressed through cooperative inter-governmental legislative initiatives that would seem unlikely to be achieved in either the United States or Canada.

E. Federal Court Systems and the Conflict of Laws

What effect does the structure of a court system within a federation have on the conflict of laws? What aspirations for a conflict of laws regime are likely to be found in a federal system that favours a particular structure for its court system?

The structure of the Canadian court system has certain basic consequences for the conflict of laws. For example, any conflicts that might arise between federal and provincial law in Canada—"vertical" conflicts—are not regarded as conflict of laws questions at all, but as questions of *constitutional* law, and they are subject to a series of doctrines and interpretative techniques that have evolved to deal with Canadian federalism. When a court is called upon to decide a matter in which the potentially applicable conflicting laws consist of a federal law and a provincial law, the applicable law is determined through the specialized set of principles developed for constitutional analysis that reflect the purely public law interests and aspirations relating to the governance of Canada, and not to the private law concerns that otherwise guide the resolution of conflict of laws questions. For example, the issues often focus on whether the "pith and substance" of the subject matter regulated by a law that is sought to be applied, is one that properly falls within the scope of the matters allocated to the exclusive legislative authority of the government that has passed the law, whether it is the provincial government or the federal government. Similarly, questions of the jurisdiction of the federal courts and the provincial superior courts are determined by interpreting the statutory jurisdiction of the federal court—and not through the application of conflict of laws principles.

As a result, conflict of laws questions in Canada relate only to the jurisdiction of the provincial superior courts vis-à-vis one another or the jurisdiction of Canadian courts vis-à-vis that of foreign courts; or to the effect to be given to judgments issued in other provinces or countries; or to the applicable law in respect of the conflicting laws of other provinces or countries. Thus, in Canada, where conflict of laws rules operate in an federation with an integrated or unified court system, its scope seems to be confined to what might be described as "horizontal" conflicts.

1. Forum shopping

In a federation, such as Canada, with a unified court system, it is the responsibility of the courts comprising such a system to coordinate the relations between legal systems—to develop and comply with rules and protocols for managing conflicts of jurisdiction and of applicable law. This is a very different situation from that which exists in a federation with a federalized judiciary, particularly one in which the principal responsibilities of the courts of

the constituent states are to their states, and the responsibility for managing the relations between the legal systems of the various states falls mainly upon the federal courts (which were established for this purpose). Absent the local loyalties that are appropriate for the courts of constituent states in a federation with a federalized judiciary, there is no foundation for the concern that excessive loyalty could lead to parochialism or bias against the interests of persons from out of state. There is no need for a second, federal court system, vested with diversity jurisdiction to ensure that opposing parties from different states are treated fairly. In a federation with a unified court system the responsibility for managing federal relations is a joint one shared by all the superior courts in the country, even though they are established in the provinces.

A key objective of a conflict of laws regime in a country that has a unified or integrated court system appears to be the prevention of forum shopping. As with many connections drawn in this thesis, it is not obvious which is the cause and which is the effect: does the unified court system, composed of coordinate provincial superior courts in a rather flat hierarchy necessitate the courts' assumption of responsibility to prevent forum shopping between them; or, does their shared commitment to preventing forum shopping permit them to operate without a second tier of federal courts? Regardless which enables or necessitates which, the two seem to be linked.

While some interest in regulating or preventing forum shopping seems to be part of every conflict of laws regime, varying appreciations of the term "forum shopping" seem to indicate varying degrees of tolerance for the advantages gained in forum selection and varying levels of concern for the extent of institutional intervention that should be maintained to prevent it. In Canada, the term "forum shopping" refers to the opportunistic selection of an otherwise inappropriate forum to gain an advantage in the litigation. The term "forum shopping" is inevitably used as a pejorative term or as a condemnation, and it invariably signals the need for intervention by the court to prevent it. For example, in *Tolofson v Jensen,* the Supreme Court of Canada stated simply on an issue of choice of law before it that it was rejecting a particular approach because it "would invite the forum shopping that is to be avoided if we are to attain the consistency of result an effective system of conflict of laws should seek to foster." [114] In another case in which costs sanctions were imposed against counsel who had obtained a *Mareva* injunction to seize in Ontario the moveable assets of a defendant served at an executive office in Ontario in a matter that was otherwise unrelated to Ontario, the Court criticized counsel for "the opportunistic selection of an entirely inappropriate forum in which to litigate this dispute."[115] The Quebec Court of Appeal was equally of the view that "the authorities...are clear that forum shopping is to be discouraged to avoid parties seeking out a jurisdiction simply to gain a juridical advantage when they have little or no connection with that jurisdiction."[116]

In contrast, many commentators in the United States have advocated tolerance of the practice of forum shopping and they openly approve of the conditions that facilitate it and provide an incentive to engage in it. For example, Friedrich Jeunger suggested that the goal of decisional harmony is unattainable and that efforts to achieve it by preventing forum shopping frustrate efforts to achieve "material justice" which involves the refusal of the forum to apply substandard foreign law and thereby frustrate plaintiff counsel's laudable efforts to maximize their clients' recovery.[117] Some have argued that forum shopping helps "to ensure that states

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[114] *Tolofson v Jensen* [1994] 3 SCR 1022; 120 DLR (4th) 289, 322 (*Tolofson v Jensen*).

[115] *SDI Simulation Group Inc. v Chameleon Technologies Inc* (1994) 34 CPC (3d) 346 (Ont Gen Div).

[116] *Recherches Internationales Quebec v Cambior* JEL/1998-0728.

[117] F Jeunger 'What's Wrong with Forum Shopping?' (1994) 16 Sydney L Rev 5 (Jeunger).

play their laboratory role in bringing about growth and change in the law."[118] Others have argued that the regulatory role played by civil litigation and the private attorneys general role played by plaintiffs justify the incentives that are provided by opportunities to engage in forum shopping[119] and that rules that are designed to prevent forum shopping merely operate to benefit defendants. Members of the United States Supreme Court have also advocated tolerance for forum shopping by saying, for example, that "the defendant has no constitutional entitlement to the best forum or, for that matter, to any particular forum,"[120] and by endorsing efforts to take advantage of longer limitations periods through forum shopping.[121]

Given the laissez-faire attitude of United States Supreme Court to forum shopping between states, commentators have struggled to explain why the *Erie* doctrine was established to prevent forum shopping between state courts and federal courts. The *Erie* doctrine requires Federal Courts in their exercise of diversity jurisdiction to apply the law of the state that would otherwise hear the case so as to prevent litigants from engaging in federal-state forum shopping by contriving a means to have their matter decided in the Federal Courts so as to gain the benefit of substantive legal rules developed in the Federal Courts that would not otherwise be applied to their case. The *Erie* doctrine inhibits the development of federal common law rules, which could exist as a distinct body of substantive law that might produce a more favourable outcome than the law that might otherwise apply to a particular case. In view of the *Erie* doctrine, it is puzzling that the United States Supreme Court made no effort to prevent or to discourage forum shopping between state courts, despite the fact that the choice of law rules applied in many states favour the application of forum law.

George Brown suggested that forum shopping in these two situations has very different implications for the operation of the American federation. Unlike federal-state forum shopping that is addressed by the *Erie* doctrine, "in the context of state-state forum-shopping there is essentially no threat to the vertical balance between the national government and the states and not much threat to the horizontal balance among the states."[122] As he explained, "the apparent paradox created by the Court's position on forum shopping merely reflects the triumph of states' rights over defendants rights and adherence to a federalism reading of *Erie*."[123]

If Professor Brown is right in suggesting that forum shopping needs variously to be prevented and permitted according to the different contexts in which it can occur in a federal system, then this would suggest that the existence of a climate of censure or tolerance is not a matter of mere preference but a product of the attitude taken to the role of civil litigation in governance and toward the role of the courts within a federation in maintaining federal relations. For example, it would suggest that the 1993 debate between Friedrich Juenger and

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[118] GD Brown 'The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?' (1993) 71 North Carolina L Rev 649, 664 (Brown). L Brilmayer and RD Lee 'State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws' (1985) 60 Notre Dame L Rev 833.

[119] L Weinberg 'Against Comity' (1991) 80 Georgetown L J 53, 70.

[120] *World-Wide Volkswagen Corp v Woodson* 444 US 286, 301, 100 S Ct 559 (1980). *Keeton v Hustler Magazine* 465 US 770, 104 S Ct 1473 (1984). The result in the *Keeton* case should be contrasted with the efforts to prevent forum shopping in defamation cases in *Olde v Capital Publishing Ltd Partnership* (1996) 5 Carswell's Practice Cases (4th) 95 (Ont Gen Div), (1998) 108 Ontario Appeal Cases 304 (CA) and in *Shevill v Presse Alliance SA (C68/93)* [1995] 2 AC 18 (EC).

[121] *Sun Oil Co v Wortman* 486 US 717, 108 S Ct 2117 (1988), which is in direct contrast with the ruling by the Supreme Court of Canada in *Tolofson v Jensen* (n 114 above).

[122] Brown (n 118 above) 712.

[123] Brown (n 118 above) 649.

Brian Opeskin[124] over forum shopping was not based merely on "A Difference of Opinion" as the introduction to it was framed. Rather the depth of feeling expressed in what seemed to be irreconcilable positions regarding the effect of forum shopping on the quality of justice and on federal relations reflected differences between the legal traditions and the federal structures within which the views were developed. In response to Professor Juenger's claim that the competitive federalism fostered by forum shopping enhanced "material justice" by maximizing plaintiff recovery and minimizing the application of substandard foreign law, Mr. Opeskin argued that decisional harmony was essential to the rule of law itself; and while Mr. Opeskin agreed that this was a remote prospect in international litigation, it was a necessary and attainable goal within the federation. The sensible question following this reading of the debate would seem to be not whether it was salutary or not for a legal system to permit forum shopping, but instead, what view of the role of private law adjudication would regard forum shopping as capable of making a useful contribution and what kinds of relations between legal systems would be supported by it.

In the Canadian legal tradition, where private law adjudication fulfils a pre-political role in governance, there is no place for forum shopping,[125] but in the American legal tradition, where private law adjudication in state courts supports state sovereignty, it is to be tolerated and perhaps even encouraged. In Australia, there has been a certain tension surrounding the practice. On the one hand, in the judgments of the High Court it is said that the Constitution established a "unitary system of law" entailing "a comprehensive legal system in which the substantive law applicable to govern particular facts or circumstances is objectively ascertainable or predictable and internally consistent or reconcilable."[126] On the other hand, in some cases such an objective has failed to dictate the outcome in the face of traditional doctrine developed in and for international litigation.[127]

2. Juridical advantage

The Canadian antipathy to forum shopping has been expressed in the distinctive approach taken to two aspects of the law of *forum non conveniens*—the evolution of the treatment of juridical advantage and the management of the burden of proof in motions for stays. The Supreme Court of Canada drew the line between acceptable forum selection and "forum shopping" as follows:

> The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate.[128]

While this definition does not seem particularly remarkable, the distinctive features of the Canadian conflict of laws regime emerge when this definition comes to be applied in

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[124] Juenger (n 117 above); B Opeskin 'The Price of Forum Shopping: A Reply to Professor Juenger' (1994) 16 Sydney L Rev 14; and F Juenger 'Forum Shopping: A Rejoinder' (1994) 16 Sydney L Rev 28.

[125] A Canadian conflict of laws scholar, John Swan seems to be alone in having expressed the view that "the possibility of forum shopping is part of the price we pay for a federal structure..." J Swan 'Federalism and the Conflict of Laws: The Curious Position of the Supreme Court of Canada (1995) 46 South Carolina L J 923, 953.

[126] *Breavington v Godleman* (1988) 169 CLR 41, 121 (Deane J).

[127] As in *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; and *Stevens v Head* (1993) 176 CLR 433.

[128] *Amchem Products Inc v British Columbia (Workers Compensation Board)* [1993] 1 SCR 897, 102 DLR (4th) 96, 104 (*Amchem*).

particular situations and when substance is given to the terms "unfair advantage" and "otherwise inappropriate forum." Further, these distinctive features become clearer by considering the means by which forum shopping is prevented and the extent to which its prevention takes priority over other objectives of the conflict of laws regime.

The Supreme Court of Canada endorsed the approach taken by the English courts, which provided that a court should grant a stay where "there is another available forum which is clearly or distinctly more appropriate" for the trial of the action. However, the Supreme Court recommended that Canadian courts depart from the practice in the English courts of determining in two stages whether a stay should be granted. Under the two-stage test, the court determines first whether there is a clearly more appropriate forum elsewhere and, if there is, whether it should nevertheless decline to grant a stay for reasons of justice.[129] The Supreme Court of Canada rejected this approach because:

> ...there is no reason in principle why the loss of juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identify ing the appropriate forum.
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> The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reasons of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping." On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.[130]

In taking the view that the loss or gain of a juridical advantage should follow the determination of appropriate forum based on the connections between the matter and the various available fora, the Supreme Court of Canada demonstrated a strong commitment to forum neutrality. To appreciate the strength of this commitment, it is necessary to consider more closely the nature of the advantages that could influence a court to deny a stay.

It has been said that a stay will not be granted where this would unjustly deprive the plaintiff of a "legitimate personal or juridical advantage" but the terms "personal" and "juridical" have not been defined in the jurisprudence. It would seem that a personal advantage would be likely to be the opposite of a personal prejudice: a factor enabling a litigant to present his or her case; and a juridical advantage would seem to be the kind of advantage that would accrue by virtue of a feature of the substantive or procedural law that favoured one's case. In the case before the Supreme Court of Canada in the *Amchem* decision, it appears that the only advantages that were likely to be at issue were juridical advantages. Personal advantages were not likely to be at issue because the case involved parties of substantial resources who were capable of pursuing or defending the claim in various potential fora. In fact, the plaintiff had opted to sue in a foreign forum, thereby rendering irrelevant the kinds of considerations that might affect impecunious plaintiffs who would might be denied access to justice if they were denied their choice of a local forum. Under these conditions, the Supreme Court of Canada felt that it was wrong to consider any factors beyond the connections to the potentially appropriate fora.

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[129] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 478 (HL) (*Spiliada*).

[130] *Amchem* (n 128 above) 110.

However, in *Oakley v Barry*[131]—a case in which the granting of a stay would have prevented the plaintiff from pursuing her claim—considerations of personal advantages came to the fore. Regardless of the stated structure of the analysis (that is, as one-stage or two-stage) the outcome is seems to have been determined by the fact that the loss of the personal advantage would have denied the plaintiff access to justice in what seemed to have been a meritorious claim that would have been treated similarly in both for a from a juridical standpoint[132] Accordingly, it would seem that a sharp, if not well-articulated, distinction is made between personal advantages, which may be decisive in the determination of whether to grant a stay (by reason of the strong commitment to access to justice) and juridical advantages, which follow the suitability of the forum (by reason of the strong commitment to forum neutrality and to the prevention of forum shopping).

3. The burden of proof in motions for stays

Related to the view that plaintiffs should not be encouraged to engage in forum selection that could be outcome determinative is the view that courts should not be encouraged to approach determinations of forum with presumptions about entitlements to advantages on the parts of litigants that would skew their analysis of all the factors connecting the matter to the various alternative fora. In a motion for a stay, a presumption regarding the entitlement of a plaintiff or defendant to the advantages of a forum to which he or she has a personal connection is seen in the stipulation and placement of a burden of proof.

In the United States, the presumptions in *forum non conveniens* motions relate primarily to the connections between the plaintiff and the forum. For example, in *Piper v Reyno* the United States Court of Appeals for the 3rd Circuit held that the plaintiff's choice of forum should be given considerable weight:

> A plaintiff is generally conceded the choice of forum so long as the requirements of personal and subject matter jurisdiction, as well as venue, are satisfied. He should not be deprived of the advantages presumed to come from that choice unless the defendant clearly adduces facts that "either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience . . . or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems." A court must balance these private and public interest factors, "(b)ut unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.[133]

The Court of Appeals also noted (but in that case rejected) the possibility that the weight given to a plaintiff's choice of forum would be affected by whether it was the plaintiff's home forum—the choice being given greater weight if it was the plaintiff's home forum and less weight if the plaintiff had chosen a forum that was not his or her home forum.[134]

Apart from the access to justice considerations addressed in the previous section on "Juridical Advantage", the influence of the *plaintiff's* connections to a particular forum has not been regarded as relevant to the burden of proof in motions for stays in the common law jurisprudence outside the United States. The significance of the plaintiff's connections (or lack of them) to a local forum are made relevant for courts in the United States by the approach to

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[131] *Oakley v Barry* (1998) 158 DLR (4th) 679 (NS CA) (*Oakley v Barry*).

[132] *Ie,* it was not a 'single-forum' case: *Airbus Industrie GIE v Patel* [1998] 2 WLR 686, [1998] 2 All ER 257 (HL) (*Airbus*).

[133] *Reyno v Piper Aircraft Co* 630 F2d 149 (CA PA, 1980) 159 (*Reyno*) (footnote omitted).

[134] *Reyno* (n 133 above) 159.

civil litigation in which the courts serve as democratic lawmaking facilities in which plaintiffs are encouraged to assert their entitlement to the benefit of local standards regardless of the connections between the defendant and the forum.[135] In that system, plaintiffs are favoured in challenges to their choices of forum for the same reason that forum shopping is tolerated: because the plaintiffs are improving the law. However, elsewhere in the common law, the focus in presumptions or burdens of proof has been on the connections between the *defendant* and the forum.

The question of the burden of proof in motions for stays based on *forum non conveniens* has received a degree of attention in the Canadian jurisprudence that is disproportionate to its impact on the outcome of the cases in which the issue is raised; and the discussions have indicated a fairly distinctive perspective on this issue. The matter was addressed in the *Amchem* decision of Sopinka J. who sought to distinguish the approach to be taken by Canadian courts from that taken by the English courts. The House of Lords had held in *Spiliada Maritime Corp v Cansulex Ltd*[136] that in England, where service has been made on a defendant within the jurisdiction, the burden would be on the defendant to show that some other forum was the appropriate one in which to try the action. However, where service had been effected on a defendant outside England, the burden of proving that England was the appropriate forum in which to try the action would be on the plaintiff by virtue of the requirement to obtain leave before service can be effected. The English approach would appear to support traditional notions of territorial sovereignty, which may be appropriate for non-federal states operating entirely in an international context, but which were softened in the Canadian legal tradition by the emphasis on dispute resolution as a rudimentary form of government. The Supreme Court of Canada suggested that "The special treatment which the English courts have accorded to *ex juris* cases appears to be based on the dictates of Ord. 11 of the English rules which imposes a heavy burden on the plaintiff to justify the assertion of jurisdiction over a foreigner."[137] Since the rules of many of the provinces no longer require leave, this distinction was challenged, and it was suggested that it should be left to follow those rules. However, the Supreme Court emphasized that "The burden of proof should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties."[138]

Almost every Canadian court that has since considered the issue of the burden of proof has seemed to regard it as necessary first to insist that it would rarely matter and that it had not in fact affected the their view of the case before them. The need to insist on the insignificance of the burden of proof suggests that, in determining appropriate forum, Canadian courts are particularly concerned to be even-handed and to demonstrate that they are not beginning the analysis with any fixed presumptions or expectations about where the matter should be heard based on connections between the forum and the parties. While the Court of Appeal for Ontario also stressed in *Frymer v Brettschneider*,[139] that it had made no difference to the outcome of the appeal in which the judgment of the motions court was unanimously upheld, in a rare lengthy and divided judgment, the Court re-considered the placement of the burden of proof in motions for stays based on *forum non conveniens.* According to the majority:

> ...Rule 17.06 is only of marginal significance in the appreciation of the scope of *forum non conveniens* in Ontario and cannot be usefully resorted to as a means of

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[135] See for example, the arguments made and referred to in Jeunger (n 117 above).

[136] *Spiliada* (n 129 above).

[137] *Amchem* (n 128 above) 111.

[138] *Amchem* (n 128 above) 111.

[139] *Frymer v Brettschneider* (1994) 19 OR (3d) 60, 115 DLR (4th) 744 (CA) (*Frymer*).

> altering the fundamental principles upon which the doctrine in its broader scope should properly rest. ... the Ontario law relating to *forum non conveniens* is not found in Rule 17.06, but in the jurisprudence which has, over the years, elaborated on the rationale for the doctrine and the principles which should govern its application.
>
> ....
>
> If the plaintiff chooses to bring a foreigner into the jurisdiction, typically in a case of service *ex juris*, the burden will be on the plaintiff to establish that Ontario is the appropriate forum if the choice of forum is challenged by the defendant. This, in my view, accords with the principles of comity upon which the doctrine of *forum non conveniens* rests.[140]

That the law of *forum non conveniens* is not subsumed under the relevant rule of court is evident in the practice of the courts in granting stays on grounds of *forum non conveniens* even in cases of service in the jurisdiction, which rely not on the rule for authority but on the court's inherent authority to control its own process. Thus, the statement reflects the distinctive freedom that Canadian courts feel to emphasize that the authority for their rules are to be found in tradition as much, or perhaps more, than they are to be found in legislative pronouncements or regulatory measures. Despite the debate about how the decisions of the Court of Appeal and the Supreme Court could be reconciled,[141] it seems that since the defendant's location often coincides with a range of other factors likely to be of significance to determining appropriate forum, such as where the wrongful conduct occurred, where the evidence and witnesses are likely to be found (and where the defendant's assets are likely to be located for collection purposes). Where this is the case, the burden of proof will be relevant and it will appropriately be placed on the plaintiff to explain why the defendant's home forum is not clearly more appropriate. To the extent that the balance of convenience to the parties and the logistical efficiencies of the litigation do not favour the defendant's home forum, then the burden of proof will tend to be much less significant. This supports the suggestion that Canadian courts have tended to operate virtually without concern for the burden of proof, and without the presumptions regarding appropriate forum based on the location of the parties that the existence of a burden would reflect.

Moreover, debate about where the burden of proof should be placed may be misguided if the distinctive feature of the Canadian perspective on the matter is that Canadian courts are not comfortable in relying on a burden of proof at all. This feature was recognized by the drafters of the Uniform Law Commission of Canada's proposed Court Jurisdiction and Proceedings Transfer Act, who were of the view that in the *Amchem* decision, Sopinka J. had effectively rejected the foundation for the establishment of presumptions in such motions. In their commentary on the provision for declining jurisdiction, they said:

> 11.2. The discretion in section 11 to decline the exercise of territorial competence is defined without reference to whether a defendant was served in the enacting jurisdiction or *ex juris*. This is consistent with the approach in Part 2 as a whole, which renders the place of service irrelevant to the substantive rules of jurisdiction. It is also consistent with the Supreme Court's statement in the *Amchem* case that there was no reason in principle to differentiate between declining jurisdiction where service was in the jurisdiction and where it was *ex juris*.[142]

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[140] *Frymer* (n 139 above) 753.

[141] GD Watson and C Perkins (edd) 'Rule 17 – Service Outside Ontario' *Holmested & Watson: Ontario Civil Procedure* (Carswell Toronto 1984+); J Walker 'A Tale of Two Fora: Fresh Challenges in Defending Multijurisdictional Claims' (1996) 33 Osgoode Hall L J 549.

[142] Uniform Law Conference of Canada 'Court Jurisdiction and Proceedings Transfer Act' in *1994 Proceedings* (ULCC Ottawa 1994) (ULCC Act).

Eliminating the burden of proof, and with it, the presumption that cases should be tried in certain fora because the defendant is located there, has occurred elsewhere only in specialized regimes *within* federations. In motions for interstate transfers both within the United States, under 28 USC §1404(a) and within Australia under the cross-vesting legislation, the courts have held that there should not be any burden of proof because the decision to transfer is more in the nature of an administrative one, like a change of venue, than it is in the nature of a decision requiring a full-fledged judicial determination.[143] Thus, Canadian courts have tended to pursue an approach otherwise reserved for venue changes within a federation and even though they have not distinguished this situation from that of *forum non conveniens* determinations in situations in which the alternative forum is in another country. The Canadian approach to judicial authority has given rise to an approach to alternative fora that does not willingly accommodate the potential effect on adjudication of the kinds of community interests and local biases that, in the Canadian legal tradition, would be associated with political governance. In the absence of such interests and biases, there is no reason to take into account in determining appropriate forum anything other than the balance of contacts between the matter and the alternative fora and the relative capacities of the parties to litigate in the alternative fora. The autonomy of the Canadian courts from the other branches of government and of private law adjudication from the other forms of government facilitated a unified court system within the federation. So too has it given rise to a forum neutral approach to forum *non conveniens* that resembles in substance the approach taken in the Australian cross-vesting scheme and in the United States Federal Courts to transfers between venues. Beyond this, it seems to have eliminated the distinction between intra-federal and international forum determinations so as to harmonize the principles applied in the two contexts.

4. Multiplicity

Finally, there appears to be a distinctive Canadian approach emerging to parallel proceedings,[144] which can better be understood by appreciating the implications of the court structure within the Canadian federation and the perspective on judicial authority that supports it. In the Canadian view of private law adjudication, the commencement of a second proceeding on the same matter in a different forum almost inevitably seems to represent some form of abuse—either as an abusive tactic to avoid an orderly determination by the first forum of whether it is an appropriate forum, or as an act of despair at the opportunistic choice by the opposing party of a court that is either unwilling or incapable of making a principled determination of whether it is an appropriate forum. However, when parallel proceedings are commenced in two courts that take similar, even-handed approaches to the determination of appropriate forum, such as, for instance, in the courts of Canada or the United States, it might be more difficult to resolve which should go forward where a stay or an injunction is not available to resolve the multiplicity on the traditional grounds of *forum non conveniens* alone. Where the multiplicity cannot be resolved in that way, the parallel litigation will foster a race to judgment and the potential for one court to have its proceeding abruptly terminated by the tender of a judgment from the other court. The defendant in each forum will have a strong incentive to frustrate the resolution of the matter in that forum and little incentive to participate in good faith. Nevertheless, there seems to be no basis in the Canadian approach to

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[143] *Bankinvest* (n 99 above) and surrounding text.

[144] The situations of "parallel proceedings" considered here are not those in which a plaintiff commences claims against a defendant in the same matter in more than one forum, or those in which more than one claimant seeks the same relief in a matter from one or more defendants: E Sherman 'Antisuit Injunction and Notice of Intervention and Preclusion: Complementary Devices to Prevent Duplicative Litigation' [1995] Brigham Young U L Rev 925. Further, the question of what constitutes the same matter so as to establish the existence of parallel proceedings is also not addressed.

private law adjudication to restrict to domestic litigation the edict that "[a]s far as possible, a multiplicity of legal proceedings should be avoided."[145]

Accordingly the need to find a principled way to resolve instances of parallel proceedings has arisen with the more liberal regime for the mutual recognition and enforcement of judgments. Before that, defendants with assets in countries applying the traditional Anglo-American enforcement rules generally had considerable *de facto* control over a plaintiff's choice of forum. Indeed, in many cases, defendants had a virtual veto over many of the fora that a plaintiff might choose. Under those rules for the enforcement of judgments a plaintiff was generally limited in pursuing an action that would yield a judgment that was enforceable elsewhere, either to the defendant's home forum or to one to which the defendant has consented.[146] It would seem relatively unusual for defendants to object to litigating in their home forum and to prefer to travel elsewhere to commence an action. It was also relatively unusual for defendants to object to litigating in a forum to which they had consented and to claim to be entitled to travel elsewhere to commence an action. If a plaintiff chose some other forum, the judgment would be enforceable only within it and a defendant would be free to wait until the plaintiff commenced another proceeding in one of the other two fora mentioned above to obtain an internationally enforceable judgment. This usually obviated the need for the defendant to commence a parallel proceeding to pre-empt the result.

Defendant control over the scope of choice of fora available to the plaintiff in transnational litigation was standard in the law of most countries until fairly recently. It continues to be the norm in cases in which the judgments are enforced outside Canada[147] or outside the federal or regional judgments regime in which they are obtained, *ie,* outside the United States[148] and Europe.[149] The departures from the traditional model of recognition and enforcement of judgments for federal and regional systems altered the conditions under which fora are chosen and thereby facilitated the prospect of parallel proceedings. By increasing the range of plaintiff choice in forum selection, they increased the opportunities for plaintiffs to manipulate the outcome of dispute resolution through the choices they made and also increased the range of opportunities for defendants to respond by choosing a different forum and commencing a parallel action. This increase resulted whether their choice was itself manipulative or was a response to a manipulative choice by the plaintiff. Each of these departures from the traditional model has emerged in a slightly different federal or regional context, and each has given rise to a slightly different mechanism for dealing with parallel proceedings.

For example, although Canadians might regard the wastefulness and the risk of inconsistent results in parallel litigation as fundamental concerns warranting action, there has been a marked ambivalence about the need to prevent parallel proceedings from going forward in the United States. This ambivalence seems to be a result of the tension in the American legal tradition between the desire to avoid a multiplicity of proceedings and the obligation of a court to give effect to the policies of the forum in the course of adjudicating private party

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[145] Section 138, Ontario Courts of Justice Act (n 56 above).

[146] That is, a forum to which the defendant either *implicitly* consented, as when the action was a counterclaim to an action begun by the defendant in that other forum, or *explicitly* consented, as when the defendant had entered into an agreement to resolve disputes in that forum.

[147] *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, 76 DLR (4th) 256 (*Morguard*).

[148] These rules have also been applied to foreign judgments in many American states under the Uniform Foreign Money-Judgments Recognition Act, 13 ULA 263 (1962).

[149] The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1978] OJ L304/1 is now Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters OJ L12/1 (Brussels I Regulation).

disputes. This tension has resulted in carefully circumscribed limits on the capacity of the courts to take steps to resolve situations of parallel proceedings. In considering whether to grant a stay to resolve a competition between fora, the United States Supreme Court has held that in cases in which the parallel proceedings are in federal and state courts in the United States, "federal courts have the power to dismiss or remand cases based on abstention principles *only where the relief being sought is equitable or otherwise discretionary.*"[150] Where the relief being sought is mandated by statute, the court must not abstain from hearing the case. There is some doubt about whether this restriction should prevent a court in the United States from granting a stay in favour of a *foreign* proceeding already underway in international situations.[151] Still, in deciding whether they should grant a stay, American courts have rarely distinguished situations of parallel litigation from situations in which a stay is sought on the basis of *forum non conveniens.*[152] The concerns raised by parallel litigation for American courts seem limited to the threat that it poses to judicial efficiency. While this restriction might seem to support a rule requiring deference to the forum in which the proceedings were first commenced, courts have tended to engage in a case-specific review, in which they do not defer to a foreign proceeding commenced first if the local proceeding has progressed further by the time the stay was sought.[153]

In considering whether to grant an injunction, it has been said that courts in some parts of the United States have been more troubled by parallel litigation than courts in other parts of the United States. Two approaches have emerged: one that is based on "comity" and one that is based on "vexatiousness." In the comity-based approach, courts have avoided interfering whenever possible in a proceeding before another court and they have refrained from issuing anti-suit injunctions unless it was necessary to do so in order to protect the jurisdiction of the American forum or to prevent the evasion of important public policies.[154] Under the comity-based approach, the emphasis on non-interference in foreign proceedings has meant that parallel proceedings are often tolerated and they are not regarded as a sufficient basis on which to issue an anti-suit injunction.[155] The version of comity that provides the rationale for this approach is one that requires deference to another court's obligation to discharge the policies of the forum with respect to the claim made by the plaintiff before it.

In the approach based on vexatiousness or oppressiveness, the courts are prepared to enjoin proceedings in another court where those proceedings would frustrate local polices, where they are vexatious or oppressive, where they threaten the local forum's jurisdiction, or where they could produce delay, inconvenience, expense, inconsistency or a race to

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[150] *Quackenbush v Allstate Ins Co* 517 US 706, 730-31 (1996). (emphasis added)

[151] *Posner v Essex Ins Co* 178 F 3d 1209, 1223 (11th Cir 1999); *Goldhammer v Dunkin' Donuts* 59 F Supp 2d 248, 252 (D Mass 1999); *Evergreen Marine Corp* v *Welgrow Int'l Inc* 954 F Supp 101, 104 *n*1 (SDNY 1997); *EFCO Corp v Aluma Sys USA Inc* 983 F Supp 816, 824 (SD Iowa 1997); *Abdullah Sayid Rajab Al-Rifai & Sons v McDonnell Douglas Foreign Sales Corp* 988 F Supp 1285, 1291 (ED Mo 1997).

[152] *American Cyanimid Co v Picaso-Anstalt* 741 F Supp 1150, 1154 (D NJ 1990) (*American Cyanimid*).

[153] *American Cyanimid* (n 152 above).

[154] For example, *Laker Airways v Sabena, Belgian World Airlines* 731 F 2d 909, 926-27 (DC Cir 1984) (*Laker Airways v Sabena*). This is the standard in the DC Circuit as indicated in the *Laker* decision, and in the Second, Third and Sixth Circuits as indicated in *China Trade and Dev Corp v Ssangyong Shipping Co* 837 F 2d 33, 35, 37 (2d Cir 1987) (*China Trade*), *Compagnie Des Bauxites de Guinea v Ins Co of N America,* 651 F 2d 877 (3d Cir. 1981) cert denied, 457 US 1105 (1982); and *Gau Shan, Ltd v Bankers Trust Co,* 956 f 2d 1349 (6th Cir 1992).

[155] *China Trade* (n 154 above).

judgment.[156] Under the vexatiousness-based approach, the duplicative nature of foreign proceedings and the potential for "unwarranted inconvenience, expense and vexation" are relevant considerations[157] as is the potential for inconsistent results[158] in determining whether or not to grant an injunction apart from the general considerations relating to appropriate forum. It does not seem that this approach is unconcerned with comity so much as it is concerned with a different version of comity—one that is more like that found in the English jurisprudence discussed below.

The approaches taken in the United States to parallel proceedings would appear to be very similar to those that were endorsed in Canada under the pre-*Morguard* rules, yet in many ways they are quite different. The approaches taken in the United States demonstrate the characteristic common law confidence in the courts' ability to determine which is the appropriate forum and to act, either by granting a stay or an injunction, to resolve a competition between proceedings where warranted. However, the perceived obligation of non-interference that is derived from the deep-seated commitment to forum independence and the recognition of the duty of the courts to assert local policies of the forum[159] seems to be far less compelling to Canadian courts and they are therefore apt to tolerate parallel litigation. Indeed, the use of the term "comity" in the United States to describe a form of respect shown through non-interference is different from the appreciation of the term suggested by the cooperation and mutual support normally associated in Canada with the term "comity" as it is used to describe, for example, the currently expanded scope for the recognition and enforcement of judgments.[160] Therefore, it would seem likely that the higher level of interest in Canadian courts in resolving a multiplicity of actions and avoiding the risk of inconsistent results would prompt Canadian courts to search out a more orderly and certain means of doing so. For this, they might consider the European approach.

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[156] For example, *Kaepa, Inc v Achilles Corp* 76 F 3d 624 (5th Cir 1996) (*Kaepa*). This is the standard in the Fifth Circuit as indicated by the *Kaepa* decision, and in the Seventh, Eighth and Ninth Circuits as indicated in *Allendale Mutual Ins Co v Bull Data Sys* 10 F 3d 425, 431 (7th Cir 1993) (*Allendale*); and in the decisions in *Cargill, Inc v Hartford Acc and Indem Co,* 531 F Supp 710 (D Minn 1982) (*Cargill*) and *Seattle Totems Hockey Club v The National Hockey League* 652 F 2d 852 (9th Cir), cert denied, 457 US 1105 (1982) (*Seattle Totems*).

[157] *Kaepa* (n 156 above); The decision in *Allendale* (n 156 above) indicates that the difference between the two standards was the desire to have evidence of an impairment to comity arising from an anti-suit injunction before refusing an injunction on that basis.

[158] *Seattle Totems* (n 156 above); *Cargill* (n 156 above).

[159] An interesting analogue to this exists in the 'public interest factors' endorsed by the U.S. Supreme Court as relevant in deciding whether to grant a stay based on the doctrine of *forum non conveniens*: *Gulf Oil Corp v Gilbert* (1947) 330 US 501 at 508-509. These included: the need to manage court congestion, to prevent undue burden on the public for jury duty, to facilitate the local interest in having localized controversies decided at home, and in resolving a matter in a forum which will be in a position to apply its own law. The Canadian jurisprudence on the granting of stays based on the doctrine of *forum non conveniens* suggests that public interest factors such as this are unlikely to be considered, let alone to outweigh factors that relate primarily to the relative convenience to the parties and the relative logistical and administrative efficiency of resolving the matter in the alternative fora.

[160] *Morguard* (n 147 above); *United States of America v Ivey* (1996) 26 OR (3d) 533 (Gen Div), (1996) 30 OR (3d) (CA) leave to appeal to SCC refused SCC Bulletin 1997 1043, in which the Court observed that the principle of comity should inform the development of the law in the area of the foreign public law exception to the enforcement of judgments and that 'In an area of law dealing with such obvious and significant transborder issues, it is particularly appropriate for the forum court to give full faith and credit to the laws and judgments of neighbouring states.' This is a view of comity that emphasizes active support and cooperation more than restraint and deference.

The obligations under the Brussels Convention, now the Brussels I Regulation,[161] to enforce the judgments of other member states creates a potential for parallel proceedings that is not fully addressed by provisions that prohibit the exercise of various forms of exorbitant jurisdiction. In the absence of a mechanism for declining jurisdiction on a discretionary basis, the obligation to give effect to the judgments of member states "without any special procedure being required" eliminates many of the ways in which courts might otherwise have prevented the inconsistent results of parallel litigation that is facilitated by the Regulation. In order to address the concerns of multiplicity and inconsistent results, the drafters of the Convention established a simple rule for situations of parallel proceedings, or "*lis pendens.*" This rule requires all courts other than the court first seised to stay of their own motion proceedings on the same matter that are brought before them until such time as the court first seised has decided the matter or has determined that it cannot decide the matter.[162]

The "first-seised" rule is an effective means of eliminating both the potential for inconsistent results and the tactical manoeuvring that is associated with the race to judgment. In fact, the sequence in which the courts are seised has been considered by Canadian courts to be a factor supporting the outcome in at least two cases involving parallel proceedings, although it has only been a supporting factor and not the decisive factor.[163] However, without any principled means of assuring that cases are heard in the most appropriate fora, the first-seised rule has been criticized as replacing the unseemly race to judgment with an equally unseemly "race to the courthouse". It has not, therefore, prevented the underlying abuse that is associated with parallel proceedings in that it has encouraged pre-emptive strikes by litigants wishing to engage in forum shopping. As a result, the first-seised rule has also been criticized for curtailing pre-litigation efforts to seek a negotiated result by diverting energy from negotiations to the "race to file." In sum, the benefits of order and certainty that are gained by embracing a simple, mechanical rule such as the first-seised rule of the Brussels I Regulation come at a considerable price in terms of the interests that Canadian courts have shown in discouraging opportunistic forum selection and ensuring that matters are determined in appropriate fora. As has been observed, the first-seised rule "achieves its purpose, but at a price. The price is rigidity, and rigidity can be productive of injustice."[164] There is at least one Canadian case in which a court was not persuaded to defer to the court first seised.[165] This raises the question whether it is possible to benefit from the assurances provided by the first-seised rule without incurring its drawbacks.

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[161] Brussels I Regulation (n 149 above).

[162] Special accommodations are made for situations in which a forum other than the forum first seised has exclusive jurisdiction. Formerly, the provisions for parallel litigation were found in Articles 21-23 of the Brussels and Lugano Conventions (n 149 above). Now they are found in Articles 27-30 of the Brussels I Regulation (n 149 above). Article 27.1 provides in part "Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court." Article 28 provides for related proceedings; article 29 provides for proceedings entailing exclusive jurisdiction; and article 30 provides for when a court will be deemed to be seised.

[163] For example *Canadian National Railway Co v Sydney Steel Corp* (1998) 164 DLR (4th) 747 (NS CA) (*Sysco*); and *472900 BC Ltd v Thrifty Canada* (1998) 168 DLR (4th) 602 (BCCA) (*Thrifty*).

[164] *Airbus* (n 132 above).

[165] *Sysco* (n 163 above).

A Committee of the International Law Association has proposed a method for resolving parallel proceedings[166] that would combine the orderliness of the European first seised rule with the case-specific sensitivity of appropriate forum analysis that is undertaken by common law courts under the doctrine of *forum non conveniens.* The method would require courts in different jurisdictions seised of the same matter to give the court first seised exclusive carriage of the matter, but only for the purposes of determining appropriate forum. This determination would then be undertaken in the way that *forum non conveniens* determinations are made in common law courts. A similar approach to resolving situations of parallel proceedings, though more elaborate and detailed, was included in the Preliminary Draft Convention on Jurisdiction and Judgments, which was published in 1999 by the Special Commission of the Hague Conference on Private International as part of the process of negotiating a multilateral convention on the recognition and enforcement of judgments.[167] These proposed methods would probably seem attractive to the Canadian legal community because they would supply the orderliness lacking in the common law system—an orderliness that would prevent the race to judgment in most situations, and they would entail a principled determination of appropriate forum that is lacking in the European system—a determination that would operate to discourage the race to file in most situations. Further, these proposed methods might afford the best results that could be obtained in situations of international parallel litigation.

Still, there is a sizeable and increasing minority of situations in which the mechanisms described in these proposals might not succeed in eliminating the underlying unfairness and abuse. For instance, in one such situation, unfairness can arise because although both courts ostensibly apply a principled approach to a determination of appropriate forum, their standards for granting stays of proceedings differ enough, either in stringency or in the nature of the factors considered, for one court not to be content to be bound by the determination of the other. While a less generous approach to the granting of stays might be suitable in one legal system, it could still be frustrating to a court faced with a parallel proceeding in another legal system that would grant a stay if presented with the situation faced by the first court. For example, although a stay may be granted pursuant to article 3135 of the Quebec Civil Code[168] on a discretionary basis on considerations resembling those that apply in stays based on the doctrine of *forum non conveniens,* the standard for doing so seems more stringent than that which applies in common law jurisdictions. Accordingly, a situation could arise in which the Quebec court would refuse a stay in circumstances in which another court in Canada would regard a stay of the Quebec proceeding to be warranted. Under circumstances in which the other Canadian court regarded itself a clearly more appropriate forum, should that court decline to exercise jurisdiction merely because the Quebec court had refused to grant a stay?[169]

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[166] International Law Association Committee on International Civil and Commercial Litigation 'Third Interim Report: Declining & Referring Jurisdiction in International Litigation' in Proceedings of the 69th Bienniel Conference (ILA London 2000) (ILA Report).

[167] Article 21, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission, 30 October 1999 (which has since been revised to accommodate subsequent developments in the negotiations) available online at www.hcch.net/e/conventions/ draft36e.html.

[168] Article 3135 of Book Ten of the Québec Civil Code, which provides for the International Jurisdiction of Quebec Authorities says that 'Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.'

[169] Courts in Ontario and in Nova Scotia on at least two occasions have not been willing to grant stays solely on the basis that Québec courts have refused to grant stays in parallel proceedings. *Guarantee Co. of North America v Gordon Capital Corp* (n 180 below) and *Sysco* (n 163 above). However, it should be noted that

In another example, although the courts of both the United States and the United Kingdom apply the doctrine of *forum non conveniens,* their views of what constitutes an appropriate forum and which factors are relevant for determining which forum is appropriate differ in ways that have given rise to heated trans-Atlantic debates.[170] As mentioned above, in the section describing the "comity" standard applied in the United States, the obligation to serve the interests of the forum might prevent the granting of a stay in a court in the United States under circumstances in which a stay would be thought warranted by an English court.

In another situation, unfairness can arise because the defendant cannot travel to the jurisdiction in which the matter has been commenced in order to seek a stay in that forum. Admittedly, concerns about the hardships of litigating in distant fora have usually been raised in cases involving plaintiffs who find it difficult to travel to commence a claim. However, the hardships of responding to a notice of a distant proceeding and of retaining and instructing local counsel in a distant forum are also capable of producing unfairness in the determination of appropriate forum. Moreover, being aware of the difficulty that an opposing party might have in responding to a notice of a distant proceeding could encourage an opponent to seek an unfair advantage by commencing a claim in just such an inaccessible forum. Even among the common law provinces of Canada, where the harmonizing effect of the Supreme Court of Canada tends to ensure that the doctrine of *forum non conveniens* is applied in a fairly uniform manner, there could still be a risk that the difficulty of responding to a claim commenced in a court thousands of miles away could be used to secure a default judgment in an unmeritorious claim simply because the defendant is not able to challenge the choice of an inappropriate forum from such a distance.

How should the potential for such situations of unfairness be addressed? The general approach to parallel proceedings that is taken by the English courts applying the common law outside Europe is fairly standard for common law courts.[171] The courts have acknowledged that the commencement of parallel proceedings in another country could constitute a form of interference in local proceedings that could warrant the granting of an injunction.[172] However, the analysis in cases of parallel proceedings remains focused, as it does in the United States, on the determination of appropriate forum, and the existence of parallel proceedings operates simply as another factor to be considered. Nevertheless, the experience of the English courts in addressing situations of parallel proceedings within the Brussels and Lugano regimes—which involves other courts within a regional regime that take a different approach to the question of appropriate forum—is more instructive. As discussed earlier, the Brussels regime contains its own mechanism for eliminating parallel proceedings but, in rare cases, where litigants demonstrate the potential to evade the effects of this mechanism, the existence of the enhanced regime for the recognition and enforcement of judgments will tend to aggravate the abuse underlying the parallel proceedings.

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the Québec proceedings in *Guarantee,* were subsequently stayed by the Québec Court of Appeal and the dispute in *Canadian National Railway* was ultimately settled by the parties.

[170] *British Airways Board v Laker Airways Ltd* [1985] AC 53; *Laker Airways v Sabena* (n 154 above).

[171] L Collins (ed) *Dicey and Morris on the Conflict of Laws* (13 ed, 2000) 400; *The Abidin Daver* [1984] AC 398, 411-12; P North & JJ Fawcett eds, *Cheshire & North's Private International Law* (13 3d, 1999) 347-350. Although, there seems to be some recognition that in matters such as those involving divorce decrees the potential for inconsistent results presents a greater concern: *de Dampierre v de Dampierre* [1988] AC 92 (HL); *Henry v Henry* (1995) 185 CLR 571 (HC).

[172] *South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provincien'* [1987] AC 24 (HL) 40-41; *CSR v Cigna Insurance Australia Ltd.* (1997) 189 CLR 345 (HC).

As the decision of the English Court of Appeal in *Turner v Grovit*[173] demonstrates, the response that can be evoked by such abuse reflects a version of comity quite different from the deferent version contemplated by the American jurisprudence. In *Turner v Grovit,* the Court of Appeal upheld an injunction restraining proceedings commenced subsequently in Spain and it observed that where proceedings are "launched in another Brussels Convention jurisdiction for no purpose other than to harass and oppress a party who is already a litigant here" the court has the power to enjoin the plaintiff in the foreign proceeding from continuing the abuse, and the granting of an injunction "entails not the slightest disrespect to the Spanish court" because it "would underpin and support the proper application of the Brussels Convention." Since, in the view of the English court, the Spanish court was obliged to stay its proceeding pursuant to the Convention, there was no reason to wait to find out whether the Spanish court would do so,[174] and it was unfair to put Turner to the trouble of going to Spain to seek this result. The result in the *Turner* case illustrates a view of comity in the granting of injunctions that reflects a different alignment of the underlying relationships between litigants and courts. In this view of comity, the granting of an injunction is not a matter of choosing whether to assist the local court in discharging its duty to grant a hearing to the plaintiff before it or whether to assist the foreign court to do the same for the plaintiff before it. Rather the injunction is granted on the strength of the courts' common interest in preventing an abuse, one which could equally arise in proceedings before either court, and one which should be resolved, once it is determined which proceedings are abusive, by whichever court is better placed to do so, either by a stay or an injunction, as required.

Where courts operate within a regime of enhanced recognition and enforcement of judgments—one in which they take the same approach to the determination of appropriate forum—their shared interest in cooperating to eliminate parallel proceedings could reduce their concern to make their own independent determination of appropriate forum. Thus, Canadian courts might be more willing to defer to determinations of appropriate forum by other Canadian courts and they might even be prepared to regard litigants as bound by such determinations. For example, where another Canadian court has already denied a stay, that determination might be regarded as sufficient to warrant a stay of the local proceeding.[175] Similarly, one Canadian court might be less likely to take affront to the granting of an injunction by another Canadian court in a parallel proceeding to restrain the proceeding before the first court. Historically, Canadian courts have demonstrated considerable reluctance to take such pre-emptive steps in matters that they feel should be decided by other courts[176] but this could change should this seem necessary to prevent an abuse—for instance, in situations in which the approach to comity taken in *Turner v Grovit* would seem applicable.

In time, Canadian courts will undoubtedly develop fairly sophisticated responses to the various strategies that emerge from the greater flexibility in forum selection available under the current rules that facilitate the recognition and enforcement of judgments. These will include means of identifying which of the proceedings should go forward and means for terminating the proceeding that should not go forward. Still, as they refine their approach,

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[173] *Turner v Grovit* [2000] 1 QB 345 (CA).

[174] Just as, in the view of the English Court of Appeal, no reason to wait to see whether the Italian court would give effect to a clause providing for London arbitration in a contract between the parties in *The 'Angelic Grace'* [1995] 1 Lloyd's Rep 87 (CA).

[175] As was the case in *Thrifty* (n 163 above) but not in *Sysco* (n 163 above).

[176] *Hunt* (n 60 above), in which the British Columbia courts hesitated to pronounce on the constitutionality of a Quebec blocking statute that impeded litigation before them. On appeal to the Supreme Court of Canada, the court found that the British Columbia courts had jurisdiction to make such a determination and that the statute was constitutionally inapplicable to litigation in Canadian courts.

Canadian courts are likely to come to regard the traditional mechanisms of independent fora—stays, injunctions, and negative declarations—in the final analysis, to be fairly crude tools for addressing the increased complexity of the issues of jurisdiction and forum that give rise to parallel litigation. This could provide fresh impetus to develop a mechanism for transfers of proceedings, such as those that operate in the Australian cross-vesting scheme, [177] and in the American Federal Courts under 28 USC §1404, and as were proposed by the Uniform Law Conference of Canada in Part 3 of the Uniform Court Jurisdiction and Proceedings Transfer Act.[178] Clearly these are more effective means of addressing many of the concerns that give rise to parallel proceedings and make them difficult to resolve.[179]

The foregoing survey of the experiences of federal and regional systems with mechanisms for parallel litigation identifies some of the concerns that might apply to Canadian courts and some of the features of the models to which Canadian courts might refer in developing an approach tailored to their needs. When these concerns and features are considered in the context of the growing jurisprudence on parallel proceedings in Canada, the significance of certain elements of a Canadian approach begins to emerge. In the Canadian common law jurisprudence on parallel proceedings five decisions stand out: two involving parallel proceedings in a common law province and in Québec, a third involving parallel proceedings in Ontario and Japan, and two others involving the courts of British Columbia and Ontario. Taken in chronological order, they seem to follow the pattern similar to that indicated by the various issues and concerns noted above.

In 1994, in *Guarantee Co of North America v Gordon Capital Corp*,[180] a dispute over a claim on an insurance bond, the Ontario courts refused to stay a proceeding commenced two weeks after a proceeding on the same matter was commenced in Quebec, holding that the prior commencement of proceedings in Quebec was not *per se* a reason to grant a stay and that a stay should be refused because it had not been shown that Quebec was clearly the more appropriate forum. The court saw no reason why both proceedings could not continue. Significantly, there was no suggestion that the granting of an injunction restraining the Québec proceedings necessarily followed from the refusal of a stay of the Ontario proceedings. This decision appears to reflect the traditional approach taken in common law courts and, in particular, the "comity"-based approach that is followed by some of the United States courts in which parallel proceedings are generally tolerated. Interestingly, the Québec Superior Court had refused a stay sought on the grounds of *forum non conveniens* in November 1993, because the Civil Code provision in Article 3135 for the granting of discretionary stays on this basis had not yet come into force, but in 1995 the Court of Appeal relied upon the authority in this article to stay the matter.[181] Also worth noting is that the Québec Civil Code contains a provision in Article 3137 specifically recognizing the independent significance of parallel proceedings.[182] Unlike the provision in the Brussels I Regulation, Article 3137 permits a Québec court to stay its proceeding but does not require it to do so.

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[177] See discussion above of 'The Cross-Vesting Scheme.'

[178] ULCC Act (n 142 above).

[179] It should also be noted that the Leuven/London Principles, discussed above, provide in Article 5 for transfer or 'referral' as it is described in the Prinicples.

[180] *Guarantee Co of North America v Gordon Capital Corp* (1994) 18 OR (3d) 9 (Gen Div), leave to appeal to Div Ct refused (1994) 24 CPC (3d) 277 (Gen Div), leave to appeal to SCC refused SCC Bulletin 1994 1515.

[181] *Gordon Capital Corp c Garantie, Cie d'assurance de l'Amérique du Nord* CSM 500-05-009714-930, [1995] RDJ 537 (CA).

[182] Article 3137 provides: "On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action between the same parties, based on the same facts and having the same

In 1997, in *Hudon v Geos Language Corporation,*[183] the Ontario Divisional Court upheld the granting of an anti-suit injunction to restrain proceedings commenced in Japan by Geos Language Corporation for a declaration that it was not liable to Hudon. Hudon had commenced an action in Ontario, and Geos had sought a stay of the proceeding. The court noted that the determination by the Ontario court that Ontario was an appropriate forum although it was not clear that it was a factor in deciding whether an anti-suit injunction should be issued and that it was not necessary for Hudon to seek a stay of the Japanese proceeding in order to qualify for an order restraining Geos from continuing it. Although the Ontario court hesitated to make a ruling on the point, it identified as an issue the possibility of treating one court's determination of appropriate forum as binding on the litigants in both proceedings. Further, the Court seemed moved by considerations that were similar to those in the *Turner* case[184] in that it regarded the subsequent Japanese proceedings as an effort to take advantage of a forum that either was unlikely to be persuaded to relinquish jurisdiction or that would be a difficult forum for the plaintiff to reach to seek a stay.

In 1998, in *Canadian National Railway Co v Sydney Steel Corp,*[185] which involved a dispute over the supply of steel rails, the Nova Scotia Court of Appeal upheld a decision of the Chambers judge refusing to stay a local proceeding in favour of a proceeding commenced subsequently in Quebec. The Court of Appeal made this decision despite the fact that the Quebec courts had refused a stay and had decided that they should determine which forum was the appropriate forum because they had determined that Quebec law should apply.[186] The Court of Appeal was not persuaded that estoppel applied to the determination of appropriate forum by the Quebec court (which was interlocutory under Quebec law) or that comity required the Nova Scotia court to defer to that determination. Instead, the Court of Appeal observed: "if any deference is to be shown, it would be to the jurisdiction in which proceedings were first commenced." While the Court of Appeal permitted the multiplicity to continue, it demonstrated sensitivity to the kinds of concerns that could ultimately lead to the development of a mechanism for resolving parallel proceedings. Implicit in its reasoning was the recognition of the importance of resolving a multiplicity of proceedings and of the importance of establishing a common standard for determining appropriate forum so that it would be suitable for one court to defer to the decision of another.

The real breakthrough for the common law courts in Canada, however, came in the 1998 decision of the British Columbia Court of Appeal in *472900 BC Ltd v Thrifty Canada*[187] when it overruled a relatively longstanding precedent[188] that had emphasized the traditional approach of forum independence. In the *Thrifty* case, a dispute had arisen over the franchise agreement between 472900, a British Columbia company, and Thrifty, an Ontario company. Thrifty sued 472900 in Ontario, and, five days later, 472900 sued Thrifty in British Columbia. 472900 asked the Ontario court to stay its proceeding in favour of the British Columbia proceeding but this was refused because there was a clause in the parties' agreement attorning to the Ontario courts and the case could be tried in either forum "without great difficulty for

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object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority."

[183] *Hudon v Geos Language Corporation* (1997) 34 OR (3d) 14 (Div Ct) (*Hudon v Geos*).

[184] *Turner v Grovit* (n 173 above).

[185] *Sysco* (n 163 above).

[186] *Sydney Steel Corp c Canadian National Railway* (8 Sept 1997) 500-05-026912-962 (C.S.), appeal dismissed (13 March 1998) 500-09-005566-971 (CA).

[187] Thrifty (n 163 above).

[188] That in *Avenue Properties Ltd v First City Development Corp* (1986) 32 DLR (4th) 40 (BC CA).

either side." An application for leave to appeal the Ontario decision was denied. Thrifty then sought a stay of the British Columbia proceeding and, on appeal to the British Columbia Court of Appeal, the stay was granted as a matter of comity between the provinces of Canada, with the explicit acknowledgement that the matter of appropriate forum had already been considered by the Ontario courts and that this factor was relevant in the determination. Although the *Thrifty* decision focused primarily on providing reasons for the result the Court had reached rather than on the method that might be adopted by courts in the future for resolving situations of parallel proceedings, the result would appear to advocate a process resembling that which was proposed in the Leuven/London principles. The *Thrifty* decision is a particularly compelling precedent because it was established in a situation in which a court was *ceding* jurisdiction to another court explicitly for the purposes of resolving a multiplicity and not a situation in which a court was claiming jurisdiction for itself.

Finally, in *Westec Aerospace Inc v Raytheon Aircraft Co,*[189] which involved a commercial dispute between Westec, a British Columbia company and Raytheon, a Kansas company, over a contract to supply computer software and hardware while Westec's offer to settle was still outstanding, Raytheon commenced an action in Kansas for a declaration that it had not breached its contract with Westec and that Westec had not suffered any damage caused by Raytheon. Westec then commenced an action in British Columbia against Raytheon for breach of contract. Raytheon sought a stay of the British Columbia proceedings, which was refused by the chambers judge but granted by the Court of Appeal. Citing the decision in the *Thrifty* case, the Court endorsed the following test:

> Where parallel proceedings are alleged, as they are in the case at bar, Thrifty Canada invites the following analysis:
> (1) Are there parallel proceedings underway in another jurisdiction?
> (2) If so, is the other jurisdiction an appropriate forum for the resolution of the dispute?
> (3) Assuming there are parallel proceedings in another appropriate forum, has the plaintiff established objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the British Columbia action that is of such importance that it would cause injustice to him to deprive him of it?[190]

Like the *Thrifty* decision, the decision of the British Columbia Court of Appeal is a compelling one in that it invokes comity not merely to encourage tolerance of multiplicity but to resolve it. The decision in the *Westec* case goes even further than the decision in the *Thrifty* case in two respects: first, the Court was prepared to cede jurisdiction to a *foreign* court and not just to another Canadian court; and, second, the Court deferred to a proceeding in which the applicant was not seeking substantive relief but a negative declaration. The Court explicitly rejected arguments concerning "unstated and unsavoury assumptions about the quality of American justice" which it would not accept "without cogent proof that Westec could not get fair treatment" in the Kansas court. The Court also explicitly rejected arguments that the Kansas proceedings were to be regarded abusive simply because they were commenced while an offer was outstanding and because they sought only declaratory relief. The Court found the allegations of concerns regarding the deleterious effect of this approach on the settlement process overstated and it observed that both of these arguments were answered by the fact that Kansas was an appropriate forum.

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[189] *Westec Aerospace Inc v Raytheon Aircraft Co* (1999) 84 ACWS (3d) 479 (BC SC), leave to appeal granted 86 ACWS (3d) 697 (BC SC), reversed (1999) 173 DLR (4th) 498 (BC CA) (*Westec* CA), appeal adjourned with reasons SCC Bulletin, 2001 152, appeal dismissed without reasons SCC Bulletin 2001 742.

[190] *Westec* CA (n 189 above) 507.

The Supreme Court of Canada was due, in the *Westec* appeal, to consider directly for the first time the relevance of parallel proceedings to determinations of appropriate forum. However, hopes for an authoritative pronouncement from the Court were disappointed when the appeal was dismissed without reasons. As the record shows, Raytheon had obtained summary judgment in its Kansas declaratory action and there was, therefore, no longer a situation of parallel proceedings on which to base the appeal. Despite the fact that the *Westec* appeal was dismissed without reasons by the Supreme Court of Canada, it would seem that certain fundamental principles are emerging from the jurisprudence that, when compared with other federal and regional systems, seem likely to form the foundation for a *Canadian* approach to parallel litigation—one that reflects the distinctive approach to the relationships between legal systems taken by Canadian courts.

First, the common law courts in Canada seem to be converging on a view that, unlike the traditional tolerance for parallel litigation, regards multiplicity as inherently at odds with the principles of order and fairness that underlie the constitutional imperatives for the law of jurisdiction and judgments in Canada.[191] In a legal tradition where private law adjudication forms a separate pre-political form of governance, there are no divisive allegiances to independent governments that would warrant tolerance of inconsistent results and prevent inconsistent results from undermining the confidence in the administration of justice. Given such a view, multiplicity would not be just another factor in the analysis of appropriate forum but could provide an independent basis for granting a stay or an injunction. To be sure, this view would also imply the need for a rapprochement of standards between the common law provinces and Quebec. Further, it would imply a reconsideration of some of the *dicta* in the 1993 decision of the Supreme Court of Canada in *Amchem Products Inc v British Columbia (Workers' Compensation Board)* which suggested that the consequences of the commencement of parallel litigation "would not be disastrous" [192] and should be tolerated where both fora were appropriate.

Second, the view of interprovincial comity that seems to be emerging in Canada is one that calls for considerable collegiality and cooperation among courts—rather than deference in the sense of non-interference.[193] It is one that would result in a situation in which it should not matter which court decides the issue of appropriate forum, provided that both courts applied the same test for determining appropriate forum. Under these circumstances, it might be possible to develop a unique approach to resolving situations of parallel litigation—one that relied on the court *second* seised to determine whether it, or the court first seised, was the more appropriate forum, in contrast with the European approach and the methods proposed by the Committee of the International Law Association and the Special Commission of the Hague Conference. While this approach would obviate the concerns about the "race to file" that were raised in the *Westec* case, it would need to be couched in specific terms that would reduce the potential for abuse. For example, deference to the court second seised in making the determination of appropriate forum might be accompanied by requiring the plaintiff in the second proceeding to show that he or she could not or should not have to defend in the first forum. Permitting a challenge to a plaintiff's choice of forum to proceed in this way could accommodate concerns raised by the fact that some defendants cannot travel to request a stay from the first forum.[194] Indeed it might make the commencement of a second proceeding seem simply to be a preferable means of dealing with those situations than applying for an

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[191] *Morguard* (n 147 above).

[192] *Amchem* (n 128 above) 914.

[193] *Hunt* (n 60 above).

[194] Which would raise issues of access to justice that were simply the obverse of those canvassed in *Oakley v Barry* (n 131 above).

injunction. It would be preferable both because it would occur in a context in which the courts had acknowledged the importance of cooperating to resolve the dispute over forum (and so would not risk raising sensitive issues of comity) and because it would involve the commencement of a proceeding which, thereby, would demonstrate the availability of the alternative forum.

Finally, further procedural requirements might need to be introduced to protect against abuse. They could include, for example, the requirement that a plaintiff commencing a parallel proceeding seek a determination of the issue of appropriate forum as a prerequisite to making the claim, and that the plaintiff notify the first court of the second proceeding, so that the first court would be apprised of the determination ongoing in the second court. To be sure, the mechanism would benefit from refinement as courts became more experienced with it. In addition, it could be improved by enhanced mechanisms for direct communication and co-operation between courts. Such mechanisms have been suggested by the Uniform Law Conference's proposed transfer process this process would, for example, permit the trial of an issue in an alternative forum, thereby securing trial in the most appropriate forum even in situations where this might vary within a single case, such as in respect of liability and of damages.

While the growing appreciation of the significance of an effective response to parallel proceedings and the emerging approach to them in Canada is subject to ongoing refinement, it appears to reflect an underlying approach to jurisdiction that is best understood through the particular structure of the court system and the particular Canadian perspective on the role of the courts within the federation. A feature of this perspective that has not yet been discussed at length is the lack of a decisive approach to the distinction between interprovincial and international cases. In both the United States and in Australia, a range of mechanisms operate as a distinct regime for parallel proceedings within the federation from those involving foreign proceedings. However, apart from the proposals of the International Law Association and the Special Commission of the Hague Conference, in the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, there is no established approach to international parallel proceedings yet in place. It would not be expected that there would be one in the absence of a multilateral arrangement for the recognition and enforcement of judgments because it would be the arrangement itself that would foster parallel proceedings and necessitate such a response. Nevertheless, the *Westec* case involved international parallel litigation and there was no acknowledgement that the applicable principles should vary from those that might suitably be applied to interprovincial cases. The *Thrifty* case, which was used as a precedent by the British Columbia Court of Appeal, involved interprovincial parallel litigation.

As is evident from the *Westec* case, Canadian courts are likely to carry over to international cases the principle that multiplicity is not just a factor in the analysis but an independent basis for a judicial response (and in this way, possibly, to distinguish their approach from other existing approaches). However, Canadian courts seem unlikely to regard it necessary to avoid multiplicity at all costs, such as forcing a local plaintiff to resolve the matter in an inappropriate foreign forum. Canadian courts have shown that they are prepared to regard the issuance of an injunction as a logical corollary to the refusal of a stay[195] but it is not clear whether this would occur in every case or only in cases where the Court determined for other reasons that the commencement of the foreign proceeding was an abuse. In addition, it seems likely that Canadian courts will often be prepared to respect a foreign court's determination of which proceeding should go forward, as they did in *Westec* when the denial of the stay in Kansas was cited as a reason for granting a stay in British Columbia. In this

[195] In *Hudon v Geos* (n 183 above).

regard, it is possible that the rule of sequence that might develop in Canada in international parallel litigation between common law courts will not relate to the order in which the courts are seised but will relate instead to the order in which they are asked to determine which is the more appropriate forum. However, in the absence of a mulitilateral judgments regime that harmonized standards for jurisdiction, there could continue to be a residual category of international cases in which the approach of the foreign court to jurisdiction is sufficiently at odds with the Canadian approach, that it will not be suitable to forego more primitive mechanisms such as those involving the refusal to enforce foreign judgments, the issuance of anti-suit injunctions, and even the tolerance of parallel proceedings.

IV. CONSTITUTIONAL RIGHTS

The preceding chapters of this thesis have considered the significance for the conflict of laws of various features of the Constitution of Canada. Comparisons have been made with corresponding features of the constitutions of other federal systems and these have been linked to the distinctive approaches currently taken to questions of the conflict of laws. The nature of judicial authority and the structure of the court system within the federation have been considered in some detail. Other features, such as the mechanisms for coordinating legal systems—those that provide for the enforcement of judgments throughout the federal system and appellate review—and the nature of legislative federalism, have been considered only in outline. However, a key feature of the Canadian Constitution that has yet to be considered for its influence on the conflict of laws is the Canadian Charter of Rights and Freedoms.[1]

How do the rights that the government guarantees to members of the public affect which court may decide a matter? How do such rights affect which law may be applied? How do such rights establish a basis on which persons can insist that judgments from other courts be enforced or denied enforcement? It might seem odd that so little attention has been paid so far in this thesis to the influence of the guarantees of rights in the Constitution on the rules of the conflict of laws. Questions of "due process" form the core of the jurisprudence in the United States, where the continuum between constitutional law and the conflict of laws has received the greatest recognition. Would it not be inevitable, then, that the central focus of a study of the relationship between the Canadian Constitution and the conflict of laws would also be concerned with constitutional rights?

Odd though the question may seem, it is hoped that the foregoing chapters have suggested, if not articulated, an answer: in a legal tradition such as that of the United States in which private law adjudication constitutes an exercise of governmental power vested in the judiciary, conflict of laws rules must accord individuals the right either to avail themselves of the exercise of that power or to be protected from that exercise of power. In contrast, in a legal tradition such as that of Canada in which private law adjudication constitutes a publicly sponsored facility for dispute resolution, conflict of laws rules will tend to be fashioned differently, that is, in accordance with the need to ensure that the facility is readily available and that dispute resolution in it enjoys the confidence of the community. However, despite the fact that the foregoing chapters might have provided a basis for anticipating this answer, it is one that must be canvassed in greater detail to be fully appreciated. This will be done in the first two parts of this chapter.

Part A summarizes the history of the direct application of the due process guarantees to the law of judicial jurisdiction in the United States; and Part B reviews the sections of the *Canadian Charter of Rights and Freedoms* that, given a different approach to judicial authority might have been regarded as directly applicable to questions of the conflict of laws but which have been regarded in Canada simply as reflecting the fundamental values of the Canadian legal tradition, and so as merely an indication of principles that apply regardless of their articulation in the *Charter*.

The implications of the rights of members of the public for the conflict of laws are not exhausted by questions relating to whether constitutional rights bear directly on conflict of laws rules. It is true that the law relating to these kinds of rights is regarded as public law in the Canadian legal tradition, and generally thought to be unrelated to the kinds of issues raised

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[1] Canadian Charter of Rights and Freedoms, Constitution Act 1982, Schedule B, Canada Act 1982 (UK) c 11.

in the field of the conflict of laws. However, as the role of civil litigation evolves to address the rights of members of the public and of persons in their dealings with government, it is increasingly coming to encompass matters that were once thought in places outside the United States to be the responsibility of the public authorities—those related to setting and enforcing standards for goods and services provided to consumers. For example, consumer groups themselves are seeking compensation through civil actions from those who have caused them loss or harm, and they are thereby ensuring that providers of goods and services act responsibly. Even governments are seeking to make innovative use of the civil litigation process for these ends.

Safeguarding the welfare of consumers and other members of society might once have been thought to occur exclusively within the field of administrative action and to involve civil litigation only in judicial review. However, the rights of consumers and other members of the public are increasingly being vindicated through civil actions, and these grounds are increasingly multi-jurisdictional in nature. As civil litigation takes on these new public law roles and enters these new public law areas, will it become subject to the same guiding principles with respect to the conflict of laws as those that operate in the United States? It does not appear that this will be the case. As will be discussed in the third part of this chapter, which consider two such areas of change—the development of class actions, and the evolution of the foreign public law exception—it seems that the established traditions of private law adjudication in Canada and elsewhere continue to shape the approach taken to the conflict of laws issues that arise.

A. Due Process

The guarantees of rights contained in the United States Constitution have been held to be the explicit basis for determining the jurisdiction of American courts to adjudicate matters with interstate elements for over a century. In the United States the Bill of Rights—in particular, the due process guarantees—have provided the framework for the doctrines prescribing the jurisdictional reach of the courts of sub-federal political units over disputes with connections to other sub-federal units. Although the jurisprudence has been influenced by the text of the due process clauses and by the happenstance of the facts of leading cases, there remains a basic consensus about the constitutional principles relating to the conflict of laws—principles that are fundamentally different from those emerging in Canada.

1. Linking personal jurisdiction to the due process clause

In its 1877 decision in *Pennoyer v Neff*,[2] the United States Supreme Court considered the jurisdiction of an Oregon court to order the seizure and sale of land in Oregon in satisfaction of a default judgment it had issued against a California resident. The jurisdiction of the court had been based on constructive service by a notice in an Oregon newspaper. A default judgment was issued against Neff and his land was seized and sold to Pennoyer. The Supreme Court held that the court had no jurisdiction over Neff as a result of

> ... two well established principles of public law respecting the jurisdiction of an independent State over persons and property ... that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory ... [and] that no State can exercise direct jurisdiction and authority over persons and property without its territory."

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[2] *Pennoyer v Neff* 95 US 714, 24 L Ed 565 (1878). Prior to this, similar factual bases for challenges could found an exception to the constitutional requirement to afford full faith and credit to a judgment, though on grounds of international comity: *D'Arcy v Ketchum* 52 US (11 How) 165, 174-76 (1850).

The Court relied on the territorial principle of international law and not on the due process clause of the Constitution of the United States because, as one commentator explained, "[a]lthough the court in *Pennoyer* tied the limits on state jurisdiction to the due process clause, it did so only in dictum, since the fourteenth amendment was not in effect at the time the state purported to exercise jurisdiction."[3] However, in time, judicial jurisdiction came to be regarded as determined by the due process clause of the fourteenth amendment, which provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." On this basis, courts exercising exorbitant jurisdiction were thought to be acting unconstitutionally only when the judgment was enforced because it was thought that only then was the defendant's liberty or property was endangered.[4] Still, due process was thought simply to require service within the state, which had previously been a requirement of the territorial principle of international law, and so the attribution of a Constitutional foundation had little substantive effect on the law. The limits of jurisdiction accorded with the physical power of the state operating through the now obsolete "capias ad repondendum" writ, which authorized the sheriff to secure the defendant's physical presence at the hearing.[5]

Common law courts elsewhere also regarded the defendant's presence in the territory sufficient to found jurisdiction.[6] As Justice Holmes explained "[o]rdinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure...[but] we dispense with the necessity of maintaining the physical power, and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute."[7] In common law countries, the physical presence of the defendant in the territory of the forum at the commencement of the action, evidenced by personal service, has continued to operate as a sufficient independent basis for the jurisdiction of local courts over disputes arising anywhere.[8] Despite the persistence of the "power" theory of jurisdiction,[9] enhanced mobility increased the possibility that physical presence would be transient and that neither the claim nor the proceeding would have other meaningful ties to the jurisdiction and unfairness would result.[10]

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[3] M Redish 'Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation' (1981) 75 Northwestern U L Rev 1112, 1115; C Crosskey 'Charles Fairman, 'Legislative History,' and the Constitutional Limitations on State Authority' (1954) 22 U Chicago L Rev 1.

[4] *York v Texas* 137 US 15, 20; 11 S Ct 9 (1890); EQ Keasby 'Jurisdiction over Non-Residents in Personal Actions' (1905) 5 Columbia L Rev 436, 454-55. T Cooley 'The Remedies for the Collection of Judgments Against Debtors Who are Residents or Property Holders in Another State or Within the British Dominions' (1883) 22 Am L Reg (ns) 697, 701. EQ Keasby 'Jurisdiction Over Foreign Corporations' (1898) 12 Harvard L Rev 1, 2.

[5] *International Shoe v State of Washington, Office of Unemployment Compensation and Placement,* 326 US 310, 66 S Ct 154 (1945) (*International Shoe*).

[6] L Collins (ed) *Dicey & Morris on the Conflict of Laws* (13th ed Sweet & Maxwell London 2000) 263-264 (*Dicey*).

[7] *Michigan Trust Co v Ferry* 228 US 346, 353 (1913).

[8] *Nielsen v Braland* 264 Minn 481, 119 NW 2d 737 (1963). *Perkins v Benguet Consolidated Mining Co* 342 US 437, 72 S Ct 413 (1952) However, temporary presence permits jurisdiction only for claims arising locally ("specific jurisdiction" rather than "general jurisdiction"): *Helicopteros Nacionales de Colombia SA v Hall* 466 US 408, 104 S Ct 1868 (1984).

[9] A von Mehren 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983) Boston U L Rev 279, 285-287 (von Mehren).

[10] *Peabody v Hamilton* 106 Mass 217 (1870); *Burnham v Superior Court of California, County of Marin* 495 US 604, 110 S Ct 2105 (1990) (*Burnham*); and *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283, [1972] 2 All ER 689 (CA) (attendance at Ascot, but Denning LJ considered the appropriateness of the

The territorial principle of international law, and the jurisdiction that derived from the physical power of the sovereign over individuals present in the territory of the forum[11] were not obviously consistent with the due process ideals of protecting the individual from the arbitrary exercise of the powers of government. But the requirement of personal service operated both to supply evidence of a defendant's presence in the jurisdiction as required by the territorial principle and to provide notice as required by due process. As a result, the questions of jurisdictional due process and procedural due process remained conflated in the jurisprudence.

In this way, the territorial principle, or "power theory" continued to shape the law of jurisdiction despite the link with the Constitution and the law evolved more or less as it did in other common law countries. However, the link with the Constitution focused the authority for the development of the jurisprudence on the United States Supreme Court and, thereby, centralized and unified significant advances. The effect of this concentration of authority in the Supreme Court began to be felt decisively with the 1945 decision in *International Shoe Co v Washington*[12] and the Court's revolutionary departure from the territorial principle for determining jurisdiction.

The Court was asked in the *International Shoe* case to determine the jurisdiction of a Washington court to adjudicate the recoverability of contributions to the unemployment compensation fund from an out-of-state corporation's local salesmen. Because the company had no office in Washington state and filled its orders in Missouri, the facts of the case did not satisfy the current standards for "doing business" in the state. The company could not, therefore, be regarded as having been served within the jurisdiction though service was effected personally on one of the salesmen and by mail to the company's Missouri office. In a major shift of focus, the court ceased to be concerned with the defendant's presence in the forum at the time of the litigation and, instead, addressed the defendant's contacts with the state in the course of the events giving rise to the cause of action. The Court's traditional interest in the defendant's compellability became an interest in whether a relationship to the jurisdiction was sufficient to warrant accountability to its courts. In an oft-cited passage, the Supreme Court held that jurisdiction was established by "sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there ... [and the] obligation ... sued upon arose out of those very activities."

Certain features of the foundation of the minimum contacts doctrine are worth noting. On the facts of the *International Shoe* case, the contacts required for the assumption of jurisdiction were the same as those required for the application of forum law. The court's jurisdiction to decide the case was coterminous with the state's jurisdiction to tax the defendant. In a legal tradition that regarded these as two distinct questions, the facts of the *International Shoe* case would be regarded as curious and, as a result, might prompt courts to engage in subsequent interpretive explanations as to the precise nature of the ratio given the unusual circumstances. However, in the United States, where the courts are regarded as an integral part of government, the coincidence of these issues appears to have been accepted as normal and a suitable basis for a leading decision. This unusual coincidence of bases for assuming jurisdiction and for applying local law was compounded in *International Shoe* by the fact that the claimant was a government agency, and so the sense in which the jurisdictional test related to the defendant's accountability to the government of the forum is

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English forum); *Grace v MacArthur* 170 F Supp 442, 443 (DC Ark 1959) (presence based on overflight of Arkansas).

[11] *McDonald v Mabee* 243 US 90, 91, 37 S Ct 343 (1917).

[12] *International Shoe* (n 5 above).

highlighted. Once again, this does not appear to have given rise to a perceived need for explanation by jurists or commentators, although, in a legal system in which accountability to the government and the resolution of private law disputes is seen as proceeding on different bases it would be unlikely for these issues to be authoritatively determined in a single decision based on one set of facts. Finally, in the circumstances of the *International Shoe* case, the "fairness" in the jurisdictional determination was fairness to the defendant, as might be expected when the basis for jurisdiction is said to be the due process clause. While fairness to the defendant is a regular feature of the law of judicial jurisdiction, in some legal systems, it is not inevitably the primary determinant, but is just one of several considerations.

2. Applying the minimum contacts doctrine

In time, statutes for "long arm jurisdiction" were enacted in the American states on one of two models. Those, like the Illinois[13] statute, enumerate a series of categories in which jurisdiction may be exercised over a defendant not present in the State and require the court in the event that the defendant challenges jurisdiction, to decide whether the defendant's activities fit the description in the statute and whether the assumption of jurisdiction satisfies the "traditional notions of fair play and substantial justice" referred to in the *International Shoe* decision. Others recognized that the result in any given case was now a function of constitutional interpretation subject to the direction of the Supreme Court, and they simply authorized any exercise of jurisdiction not inconsistent with the Constitution.[14]

The Supreme Court continued to provide authoritative guidance on "minimum contacts" but the qualitative evaluation of contacts with the jurisdiction has remained at the heart of jurisdictional analysis and the need for fact-specific determinations tended to impede increased coherency or sophistication in the jurisprudence. As Professor von Mehren pointed out, with the advent of a fairness-based theory of jurisdiction new considerations emerged,[15] including, "the parties' relation to the forum community independent of the underlying controversy, the underlying controversy's litigational relation to the forum community, and the controversy's substantive relation to the forum". In particular, since it was no longer incumbent on the plaintiff to litigate in a forum that could compel the defendant, it became possible in some claims involving special classes of plaintiffs and defendants, such as insured and insurers in *McGee v International Life Insurance Co,*[16] to base jurisdiction on the plaintiff's relationship to the forum, provided this was rationalized as fair based on the nature of the defendant's business.

The Supreme Court did, however, begin to review some kinds of jurisdiction once assumed under the territorial principle. The *in rem* or quasi *in rem* basis for asserting jurisdiction, which was based on the presence of assets in the state, was questioned in *Hanson v Denckla.*[17] The Supreme Court refused to endorse the assumption of jurisdiction by a Florida court solely on the strength of the defendant having received in trust money from Florida because "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and privileges of its laws."[18] Thus, in broadening the restrictive jurisdictional bases

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[13] Illinois Annual Statutes, c. 110, s. 2-209.

[14] California Code of Civil Procedure, s. 410.10: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

[15] von Mehren (n 9 above) 289-90.

[16] *McGee v International Life Insurance Co* 355 US 220, 78 S Ct 199 (1957) (*McGee*).

[17] *Hanson v Denckla* 357 US 235, 78 S Ct 1228 (1958) (*Hanson*).

[18] *Hanson* (n 17 above) 252-53.

under the territorial principle, the idea of "purposeful availment" was introduced as a caveat to ensure that this was done in a way that was fair to the defendant. In *McGee* it had appeared that the territorial principle had given way to some form of assessment of the balance of convenience between plaintiff and defendant of litigating in the forum, but the reasoning in the *Hanson* decision seemed to rework the old territorial principle by examining the bases under which the defendant might incur an obligation to respond to the process of the forum. This prompted one commentator to observe that following *Hanson* "the conceptual structure established in *Pennoyer* remains substantially intact."[19] Nevertheless, in 1977, in *Shaffer v Heitner*[20] the Supreme Court decisively rejected *quasi in rem* jurisdiction, which, in that case, was based on the deemed holding of stock by a Delaware corporation in that state. In doing so, the Supreme Court emphasized the importance of fairness to the defendant in the due process analysis, saying[21]

> ...the fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would only serve to allow state-court jurisdiction that is fundamentally unfair to the defendant.
>
> We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.

In 1980, in *World-Wide Volkswagen Corp v Woodson,*[22] the court clarified that despite the adoption of a standard for jurisdiction that focused on the relative convenience or efficacy of adjudication in one forum as opposed to another, due process was still concerned with the issues arising from state sovereignty that resembled those arising from situations involving national sovereignty. On behalf of a majority, White J. acknowledged both defining interests in jurisdiction, saying,[23]

> ...[t]he concept of minimum contacts ... can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.
>
> .... Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Accordingly, the Court confirmed in *World-Wide Volkswagen* the two distinct areas of interest regarding interstate jurisdiction under the fourteenth amendment - that of fairness to the defendant and that of interstate federalism. The Court acknowledged that product liability cases might present special problems in that products may enter the "stream of commerce" and

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[19] G Hazard 'A General Theory of State Court Jurisdiction' (1965) Supreme Court Rev 241.

[20] *Shaffer v Heitner* 433 US 186, 97 S Ct 2569 (1977) (*Shaffer v Heitner*).

[21] *Shaffer v Heitner* (n 20 above) 212.

[22] *World-Wide Volkswagen Corp v Woodson* 444 US 286, 301, 100 S Ct 559 (1980) (*WW Volkswagen).*

[23] *WW Volkswagen* (n 22 above) 291-92.

cause injury in states other than those in which they were manufactured or sold, but as the Court explained:[24]

> [T]he foreseeability that is critical to due process is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there ... The Due Process Clause ... gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

Since that time, the Supreme Court has reviewed and upheld the much-criticized "tag" jurisdiction based on the defendant's temporary presence in the territory of the forum. As Stevens J. observed in a minority opinion, the facts of the *Burnham* case did not necessarily provide a clear test of the adequacy of the defendant's presence as an independently sufficient basis for jurisdiction because there were other contacts between the matter and the state.[25] Apart from this, the decisions do not seem to have further clarified or advanced the law. Nor has the academic commentary seemed to explain or rationalize the relationship between due process and interstate jurisdiction. Some writers have suggested collapsing the distinction between jurisdiction and choice of law,[26] others have suggested severing the ties between the Constitution and interstate jurisdiction,[27] and still others have suggested developing protocols with Venn diagrams to show which contacts might count and when.[28]

In contrast with the ambitious aspirations of some decades ago,[29] the law of interstate jurisdiction does not seem to have been advanced by basing it on the due process guarantees of the United States Constitution. As was explained in respect of the continued commitment to diversity jurisdiction, the link between due process and personal jurisdiction does not seem to have been made so as to improve the law so much as it has been to affirm a commitment to a particular view of the role of private law adjudication in governance. On the one hand, it has operated to focus the fairness considerations in the assumption of jurisdiction on the defendant and the defendant's contacts with the forum; and on the other hand, it has operated to temper and to clarify the limits of state sovereignty and the cases in which the courts of a state can assume jurisdiction and apply forum law.

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[24] *WW Volkswagen* (n 22 above) 297.

[25] *Burnham* (n 10 above).

[26] H Maier and T McCoy 'A Unifying Theory for Judicial Jurisdiction and Choice of Law' (1991) 39 Am J Comp L 249.

[27] J Conison 'What does Due Process Have to do with Jurisdiction?' (1994) 46 Rutgers L Rev 1071.

[28] L Brilmayer 'How Contacts Count: Due Process Limitations on State Court Jurisdiction' (1980) Supreme Court Rev 77.

[29] A Ehrenzweig 'From State Jurisdiction to Interstate Venue' (1971) 50 Oregon L Rev 103; and G Hazard, 'Interstate Venue' (1979) 74 Northwestern U L Rev 711.

B. The Charter—Order and Fairness

Despite the relatively brief history of jurisprudence interpreting constitutionally entrenched rights in Canada, the contrast between the Canadian approach to the significance of constitutional rights to the conflict of laws and the American tradition of rights-based conflict of laws doctrine is striking. Indeed the distinctiveness of the Canadian approach in this area in light of the lengthy and well-established American jurisprudence is such that it seems to arise from fundamental and well-settled features of the Canadian legal tradition so that it could assert itself in spite of a lack of cogent explanation in the jurisprudence. Nevertheless, a compelling explanation for this difference can be found in the different approaches taken to judicial authority in the two traditions.

In simple terms, constitutional rights—which are generally thought to be rights that are opposable to the government—are not thought in Canada to be applicable to the work of the courts in private law adjudication because private law adjudication is not seen as a governmental intervention in private affairs. Persons are not seen as having the right in respect of the government to insist that a court assume jurisdiction or to insist that it decline jurisdiction. While the Supreme Court of Canada has determined that the law of personal jurisdiction must conform to the principles of order and fairness, the courts are the arbiters of these principles, which apply to the relationship between the litigants, and not, as in the United States, between litigants and the courts. To appreciate the difference between the two approaches, it is worth beginning, as was done in the chapter on Judicial Authority, with the texts of the potentially relevant provisions that secure the constitutional rights of persons in their dealings with government in order to see how these substantive rights might relate to the conflict of laws, and then to consider why they have not been regarded as directly applicable.

1. Legal rights and mobility rights

Some of the rights guaranteed by the Canadian Charter of Rights and Freedoms resemble the guarantees of the United States Bill of Rights, which provides the guiding principles for the conflict of laws rules in the United States. In particular, the legal rights guaranteed in section 7 and the mobility rights guaranteed in section 6 would seem likely to be relevant to determinations of the constitutionality of conflict of laws rules

Section 7 of the Charter is the first of the eight sections of the Charter providing the guarantees of "legal rights." It is the functional equivalent in Canada to the "due process clause" in the United States Constitution. Section 7 provides that "Everyone has the right to *life, liberty and security of the person* and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[30] Although there are many similarities between section 7 and the due process clauses of the Fifth and the Fourteenth Amendments, there is one obvious difference that affects the potential application of section 7 to the conflict of laws. Unlike the due process guarantees in the United States Constitution, which declare that "No person shall be ... deprived of life, liberty or property, without due process of law; nor shall property be taken for public use without just compensation," section 7 of the Canadian Charter does not guarantee property rights.

The omission of property rights from the Charter was a deliberate departure from the approach taken in an instrument previously established to secure the rights of Canadians: the

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[30] The other seven sections—8-14—comprising the "legal rights" relate largely to guarantees in the context of the criminal justice system: section 8- search and seizure, section 9- arbitrary detention, section 10- information on arrest, right to counsel, *habeus corpus,* section 11- procedural rights in penal matters, section 12- cruel and unusual treatment or punishment, section 13- self-incrimination, section 14- right to interpreter.

Canadian Bill of Rights.[31] Enacted in 1960, the Canadian Bill of Rights conferred in section 1(a) the right to the "enjoyment of property" and the right not to be deprived of property "except by due process of law." It also conferred in section 2(e) the right to "a fair hearing for determination of one's rights."[32] However, unlike the Charter, which, as part of the Constitution is "the supreme law of Canada"[33] the Bill of Rights is an ordinary federal statute. It is, therefore, subject to amendment or repeal by the government of the day; and it binds only the federal government and would not constrain the actions of the provincial governments, particularly in matters of "property and civil rights."

Why were property rights omitted by the framers of the Charter when they previously had been included in the Bill of Rights? One explanation has been that since the rights secured by section 7 of the Charter were not intended to be limited to the procedural benefits of natural justice,[34] there was concern that the inclusion of a right to property in a guarantee intended not to be limited to procedural matters could bring about the situation that occurred in the "*Lochner* era"[35] in the United States during which socially progressive legislation was invalidated because it was held to infringe property rights. Another explanation, which may be discernible from the arguments made already in this thesis is that the Charter, which was intended primarily to be opposable to government action, is more clearly associated with public law matters and less with the regulation of private law matters, and so has tended be regarded in Canada as properly directed more at "human rights" than "civil rights."

The inapplicability of the Canadian equivalent of the due process guarantees to property rights seems to reduce considerably the scope for the application of the Charter to the civil litigation and, therefore, the conflict of laws. As was noted in the discussion of due process above, it was the potential for a court to make an order depriving a defendant of property as a result of the adjudication of a claim against the defendant that engaged the constitutional right to due process in the assumption of jurisdiction. To the extent that the property placed at risk by an exercise of personal jurisdiction over the defendant was not protected by a constitutional guarantee, it would seem unlikely that constitutional restraints on the exercise of jurisdiction would apply to civil litigation.[36]

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[31] Canadian Bill of Rights SC 1960 c 44.

[32] However, it has been held that this right is only the equivalent of natural justice. *Duke v the Queen* [1972] SCR 917, 923, 28 DLR (3d) 129.

[33] Section 52(1) Canadian Charter of Rights and Freedoms 1982.

[34] *Re BC Motor Vehicle Act* [1985] 2 SCR 486, 24 DLR (4th) 536, 549-551.

[35] The period from the U.S. Supreme Court decision in *Lochner v New York* 198 US 45, 25 S Ct 539 (1905) and 1937 when it was overruled and the US Supreme Court resolved the concern by exercising judicial restraint in matters it regarded as better left to the democratic process.

[36] A narrow exception was once considered for economic or property rights the loss of which touch on an individual's "dignity and self-worth." *The Queen v Fisherman's Wharf Ltd* (1982) 135 DLR (3d) 307 (NB QB) (lien placed on a chattel's seized from take-out restaurant for non-payment of sales taxes). *Wilson v BC Medical Services Commission* [1989] 2 WWR 1, 53 DLR (4th) 171 (CA), rev'g [1987] 3 WWR 48, 36 DLR (4th) 31, leave to appeal to SCC refused 3 Nov 1988 (constitutionality of legislation that directed where in the province new British Columbia doctors could establish their practices). MD Lepovsky, 'Constitutional Law - Charter of Rights and Freedoms, Section 7 - A Problematic Judicial Foray into Legislative Policy-Making: *Wilson v BC Medical Services Commission*' (1989) 68 Can Bar Rev 615, 623. GJ Brandt, "Canadian Charter of Rights and Freedoms - Right to Property as an Extension of Personal Security - Status of Undeclared Rights" (1983) 61 Can Bar Rev 398, 403 *n*26. Further, the Supreme Court has held that since "life, liberty and security of the person" are attributes of natural persons only, section 7 does not apply to corporations: *Irwin Toy v Que.* [1989] 1 SCR 927, 1004, 58 DLR (4th) 577. However, a corporation does have standing to challenge the validity of legislation and thereby avoid a conviction: *R v Wholesale Travel Group* [1991] 3 SCR 154, 84 DLR (4th) 161.

The mobility rights guaranteed in sections 6(1) and (2) also appear likely to be relevant to questions of the conflict of laws. These provisions state:

> **6.** (1) Every citizen of Canada has the right to enter, remain in and leave Canada.[37]
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
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> (*a*) to move to and take up residence in any province; and
> (*b*) to pursue the gaining of a livelihood in any province.

These provisions are unusual among Charter guarantees in that they seem to address the connection between economic activity and personal welfare concerns, but they have not been regarded, like the provisions for freedom of movement in the Treaty of Rome, as having direct effect so as to enable them to be invoked in private litigation. They seem to operate on the level of social and economic management rather than as an assurance to individuals of their rights and freedoms.[38] Thus, the due process-like guarantee in section 7 does not apply directly to conflict of laws rules because it does not protect property rights, and the mobility rights of section 6 do not apply because they cannot be invoked directly by individuals against governments.[39]

2. Applying the Charter—Charter values

The values expressed in these guarantees have tended nevertheless to shape conflict of laws rules in the Supreme Court of Canada jurisprudence. In the *Morguard* decision, La Forest J. identified the rights found in sections 6 and 7 of the Charter as relevant considerations even though they were not directly applicable.

> A common citizenship ensured the mobility of Canadians across provincial lines, a position reinforced today by s. 6 of the Canadian Charter of Rights and Freedoms.
> ....
> Whether the Canadian counterpart to the due process clause, s. 7 of the Charter, though not made expressly applicable to property, might at least in certain circumstances, play a role is also unnecessary to determine.
> ....
> There may also be remedies available to the recognizing court that may afford redress to the defendant in certain cases such as fraud or conflict with the law or public policy of the recognizing jurisdiction. Here, too, there may be room for the operation of s. 7 of the Charter.

Later, in *Hunt v T&N plc,*[40] when a Quebec blocking statute was applied to avoid discovery obligations in litigation in British Columbia, and a challenge to its constitutionality in the British Columbia was resisted on the basis that the litigant should be required to travel to Quebec to challenge the constitutionality of Quebec legislation, the Supreme Court of Canada

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[37] This section appears to have been drawn from Article 12 of the *International Covenant on Civil and Political Rights* 21 UN GAOR Supp 16, UN Doc A/6316 at 52 (1966) Can TS 1976 No 47.

[38] JB Laskin, 'Mobility Rights under the Charter' (1982) 4 Supreme Court L Rev 89, 93 (Laskin). He cites AE Safarian, *Canadian Federalism and Economic Integration* (Information Canada, Ottawa, 1974) and M Trebilcock (ed) *Federalism and the Canadian Economic Union* (U Toronto P Toronto 1983).

[39] The potential applications of the mobility guarantees, for example, to laws giving preference to local residence in hiring for major industries are considered in Laskin (n 38 above) and in DA Schmeiser and KJ Young 'Mobility Rights in Canada' (1983) 13 Manitoba L J 615; and P Bernhardt 'Mobility Rights: Section 6 of the Charter and the Canadian Economic Union' (1987) 12 Queen's L J 199.

[40] *Hunt v T&N plc* [1993] 4 SCR 289, 109 DLR (4th) 16 (*Hunt*).

held that the constitutionality of the legislation of another province could be decided by a provincial superior court because, "Above all, it is simply not just to place the onus on the party affected to undertake costly constitutional litigation in another jurisdiction."[41] Similarly, in *Tolofson v Jensen,*[42] La Forest J. criticized conflict of laws rules calling for the application of the *lex fori* because they would encourage forum shopping and "inhibit mobility," which implied that mobility is regarded as a fundamental right in itself to be protected.

> If we are to permit a court in a territorial jurisdiction to deal with a wrong committed in another jurisdiction solely in accordance with the law of that court's jurisdiction, then some rule must be devised to displace the *lex loci delicti*, and that rule must be capable of escaping the spectre that a multiplicity of jurisdictions may become capable of exercising jurisdiction over the same activity in accordance with their own laws. This would not only encourage forum shopping but have the underlying effect of inhibiting mobility.[43]

These observations regarding the social values reflected in Charter guarantees have come to form the basis for a view that "Charter values" might be relevant to the determination of a matter even where no specific guarantees apply. For example, in a dissenting opinion in the Court of Appeal for Ontario[44] concerning the enforceability of a judgment that was sought to be impeached, Weiler JA expressed the view that that "courts are required to decide cases in a manner consistent with Charter principles although the Charter does not directly apply." As Weiler JA explained,

> ...La Forest J. in *Morguard*...raises the question of the extent to which the principles of fundamental justice contained in s. 7 of the Charter of Rights and Freedoms should inform the enforcing court's decision to enforce a foreign judgment.
>
> In *Morguard*, La Forest J. makes reference to s. 7 of the Charter recognizing that the section is not concerned with property but with life, liberty and security of the person. The reference suggests the underlying principles of fundamental justice contained in s. 7 may be a consideration for the enforcing court. It is important to note that natural justice is a subset of these principles.... Courts are required to decide cases in a manner consistent with Charter principles although the Charter does not directly apply....Principles of fundamental justice encompass more than notice and an opportunity to be heard. The comment of La Forest J. that the foreign judgment must have been obtained through "fair process" is also indicative that more than notice and an opportunity to be heard is at stake.[45]

The emergence of a doctrine of Charter values followed upon a long, complex and relatively indecisive debate concerning the application of Charter guarantees to the common law and to the process of private law adjudication. In the early years of the Charter, as with all new legal regimes and remedies, the ability to achieve a particular result through Charter-based litigation depended on questions such as whether the defendant/respondent was obliged to conform to the Charter's requirements, whether the plaintiff could rely on Charter guarantees, and whether there existed procedural mechanisms for airing the claim and providing an appropriate remedy. Since the Charter was intended to function differently from ordinary

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[41] *Hunt* (n 40 above) 34.

[42] *Tolofson v Jensen* [1994] 3 SCR 1022, 120 DLR (4th) 289 (*Tolofson*).

[43] *Tolofson* (n 42 above) 309.

[44] In *Beals v Saldanha* (CA 29 June 2001) *(Beals)*.

[45] *Beals* (n 44 above) ¶¶121, 124.

statutes, the answers to these questions were not obvious in some situations, particularly in those that might affect the application of the Charter to conflict of laws rules. The jurisprudence interpreting three provisions in the Charter—provisions for the supremacy of its guarantees (s 52), for the enforcement of its guarantees (s 24(1)), and for the scope of its application (s 32)—formed the basis in the text of the Charter for the analysis of these issues.

The supremacy of the Charter is secured by section 52(1), which provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect." Since most conflict of laws rules are common law based, the question whether "law" would include rules of the common law and judicial orders became significant in determining whether existing and emerging conflict of laws doctrine must be consistent with the provisions of the Charter. In addition, while the process of declaring a law "of no force and effect" may be obvious for laws such as criminal laws, it is not as obvious how it would operate with, for example, rules for court jurisdiction or choice of law. Accordingly, one early commentator observed that this appeared to create an arbitrary distinction between common law and statutory law and between the way the Charter would operate in the common law provinces and the way in which it would operated in Quebec, where private law is codified.[46]

The Supreme Court of Canada overcame this conundrum in the *RWDSU Loc 580 v Dolphin Delivery Ltd*,[47] by holding that "the Charter will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom."[48] The Court further suggested that there was a distinction to be made between the application of the Charter to private causes and "the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."[49] To the extent that disputes in the conflict of laws give rise to broadly-based concerns of access to justice or deterrence to interprovincial mobility, even though the issues do not attract direct Charter review, it is arguable that the common law should be developed in a manner consistent with Charter values. The Supreme Court noted in *Hill v Church of Scientology* the importance of distinguishing "between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action." As the Court explained

> The most that the private litigant can do is argue that the common law is inconsistent with Charter values. It is very important to draw this distinction between Charter rights and Charter values. Care must be taken not to expand the application of the Charter beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to Charter scrutiny. Therefore, in the context of civil litigation involving only private parties,

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[46] A Domes 'The Courts, the Common Law and the Constitutional Imperative: Beyond *Dolphin Delivery*' (1989) 27 Alta L Rev 430, 442; B Slattery 'The Charter's Relevance to Private Litigation: Does *Dolphin* Deliver?' (1987) 32 McGill L J 905.

[47] *RWDSU Loc 580 v Dolphin Delivery Ltd* [1986] 2 SCR 573, 33 DLR (4th) 174 (*Dolphin Delivery*).

[48] *Dolphin Delivery* (n 47 above) 195.

[49] *Dolphin Delivery* (n 47 above) 198, referring to *New York Times v Sullivan* 376 US 254, 84 S Ct 710 (1963).

> the Charter will "apply" to the common law only to the extent that the common law is found to be inconsistent w ith Charter values.[50]

This distinction reflects the more fundamental distinction between the common law, as a by-product of the adjudicative process in civil disputes, and positive law in the form of legislation that is the product of the democratic process to which Charter obligations are intended to apply. To the extent that this is the explanation for the difference between the common law and statute law, the distinction would seem to be so fundamental that it would seem to follow as a matter of course that Charter guarantees would be opposable to the actions of the legislature and the executive but not to dispute resolution in the courts.

This distinction was also emphasized in the foundational interpretations of the relief available for Charter violations. Section 24(1) provides that "anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." Where conflict of laws rules are common law rules, this provision would raise a question regarding the appropriate forum for such an application when the infringement had been produced by a court order. What court would be a "court of competent jurisdiction" to review a court order in regard to the court's jurisdiction or which law it should apply? In finding the Charter applicable to the common law only when it is the basis of governmental action, McIntyre J. rejected the notion that the judicial rulings and court orders constitute governmental action subject to Charter review. In his words,

> While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the *Charter*. The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so, they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the *Charter* precludes the making of the order, where a *Charter* right would be infringed, it would seem that all private litigation would be subject to the *Charter*.[51]

If resolving a constitutional question engages a *lis* between a private litigant and the government before a court as a neutral arbiter, it would seem odd to suggest that a court order could give rise to a Charter violation. It is hard to imagine what forum would be appropriate for the resolution of such a claim and how the outcome would differ from a simple appeal. In the rare instances in which the Charter has been invoked in complaints relating to actions by the courts,[52] the Charter was applied to the actions of government officials undertaken in the course of performing their duties in the administration of justice rather than to the rulings of

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[50] *Hill v Church of Scientology* [1995] 2 SCR 1130, 126 DLR (4th) 129, 156-157.

[51] *Dolphin Delivery* (n 47 above) 196. The Courts are "neutral arbiters" is considered in H Weschler 'Toward Neutral Principles of Constitutional Law' (1959) 73 Harvard L Rev 1.

[52] In *R v Rahey* [1987] 1 SCR 588, 39 DLR (4th) 481, an unreasonable delay in a judicial ruling was held to be an infringement of the Charter but it was not the ruling *per se* that was the infringement but the court's administration of its duties. In *BCGEU v British Columbia (A-G)* [1988] 2 SCR 214, 53 DLR 4th 1, the Chief Justice of the British Columbia Court issued an injunction against picketers at the courthouse and the injunction was upheld by the Supreme Court of Canada with the concurring judgment finding justification based on an implicit Charter guarantee of access to the courts.

courts regarding the scope of their authority and the means by which cases should be determined. The suggestion that courts could infringe Charter rights through their determinations relating to jurisdiction or applicable law in a way that would give rise to the need to establish a tribunal with supervisory jurisdiction simply does not seem to make sense in the Canadian legal tradition.

This feature of the Canadian legal tradition is perhaps clearest in the interpretation of section 32 of the Charter, which provides that that the Charter's guarantees are borne by "the Parliament and government of Canada in respect of all matters within the authority of Parliament ... and ... the legislature and government of each province in respect of all matters within the authority of the legislature of each province." Initially, some commentators suggested that the *Charter* bound only the public sector and, therefore, had no application in litigation between private parties[53] while others thought that the Charter should be treated as an instrument of social change and argued that it could also be invoked in determining the rights and obligations of private parties *inter se*.[54] These two groups were described as the "public only" and "private too" camps.

In *RWDSU, Local 580 v Dolphin Delivery Ltd*[55] the Supreme Court of Canada decided that the guarantee of freedom of expression found in section 2(b) of the Charter could not form the basis for relief from an injunction to prevent secondary picketing because the burden of Charter guarantees are not to be borne by private persons. Section 32 states the applicability of the Charter to "government" plainly enough, and the courts have had little difficulty in interpreting the phrases "Parliament *and* government" and "legislature *and* government" to include government actors regardless of the nature of their authority.[56] Professor Hogg suggested that "[t]he characteristic of action taken under statutory authority [and subject to the Charter] is that it involves a power of compulsion that is not possessed by a private individual or organization"[57]...it is the exertion of a power of compulsion granted by statute that causes the Charter to apply." A court order could only be subject to review for Charter compliance if it was seen to constitute the mobilization of coercive state authority—as is the case in the American jurisprudence interpreting the due process guarantees of its Bill of Rights.[58]

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[53] K Swinton 'Application of the Canadian Charter of Rights and Freedoms (s. 30, 31 & 32)' in WS Tarnopolsky and GA Beaudoin (edd) *Canadian Charter of Rights and Freedoms: Commentary* (Carswell Toronto 1982); AA McLellan and BP Elman 'To Whom Does the Charter Apply? Some Recent Cases on Section 32' (1986) Alta L Rev 361.

[54] D Gibson 'The Charter of Rights and the Private Sector' (1982) 12 Man L J 213; D Gibson 'Distinguishing the Governors from the Governed: The Meaning of 'Government' under Section 32(1) of the Charter' (1983) Manitoba L J 505; K Norman 'The Charter for the Public Sector and for the Private Sector, Human Rights Codes: a False Dichotomy, Leading to the Wrong Result' (1984) 5 CHRR C/84-5; JA Manwaring 'Bringing the Common Law to the Bar of Justice: A Comment on the Decision in the Case of *Dolphin Delivery Ltd*' (1987) 19 Ottawa L Rev 413.

[55] *Dolphin Delivery Ltd* (n 47 above).

[56] The Charter applies to cabinet decisions made pursuant to its prerogative powers: *Operation Dismantle v. The Queen* [1985] 1 SCR 441, 18 DLR (4th) 481; and to contracts made by the government pursuant to its ordinary common law powers: *Douglas Kwantlen Faculty Assn. v Douglas College* [1990] 3 SCR 570, 585, 77 DLR (4th) 94 and *Lavigne v OPSEU* [1991] 2 SCR 211, 313, 81 DLR (4th) 545.

[57] P Hogg *Constitutional Law of Canada* (4th ed Carswell Toronto 1992) ¶34.2(d). The Charter has been applied to an arbitrator's order in a wrongful dismissal case requiring a letter of reference to be written for the complainant employee: *Slaight Communications v Davidson* [1989] 1 SCR 1038, 59 DLR (4th) 416; and to a citizen's arrest authorized by statute *R v Lerke* (1986) 43 Alta LR (2d) 1, 25 DLR (4th) 403 (CA).

[58] In *Dolphin Delivery* (n 47 above), the Supreme Court cited Professor Swinton (n 53 above) 49-50: "The automatic response to a suggestion that the Charter can apply to private activity, *without connection to government*, will be that a Charter of Rights is designed to bind governments, not private actors. That is the

Beyond this kind of indirect application, while neither the text of the Charter nor the history of its interpretation would suggest that it applies directly to determinations of the conflict of laws there has been a recognition of the need for the courts apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. To the extent that conflict of laws rules and rulings affect access to justice and the right not to be subjected to abusive court processes, the courts are becoming amenable to arguments that it is unacceptable for them to engage in wooden applications of formalistic doctrine indifferent to the practical effect this may have on the individual litigants before them.

The evolution of the jurisprudence interpreting the scope of the application of Charter guarantees demonstrates that the adoption of Charter guarantees are a natural step in the evolution of constitutional rights in Canada. In this tradition, such guarantees apply to government action and are overseen by the courts.[59] This may be why, when the Supreme Court of Canada has described the constitutional requirements for the conflict of laws, it has preferred the terms "order and fairness" to "constitutional rights." This is because the constitutional requirements of order and fairness relate to issues that are more basic or fundamental than those to which Charter guarantees apply. It reflects the view in the Canadian legal tradition that the courts are guided in their resolution of private law disputes by constitutional requirements that are more fundamental than Charter guarantees and that relate to constitutional rights that exist apart from the specific obligations owed by the government to members of the public. The existence of these basic rights can arguably be traced to a formative time in Canadian history before local legislative and executive government in which the courts secured the rights of persons before them. Access to the courts and the due administration of justice in matters of private law were regarded as fundamental rights distinct from and preceding other kinds of rights relating to legislative and executive government.

The continuing vitality of those rights and their significance in the Canadian legal tradition, as distinguished from the rights guaranteed by the governments in Canada, has given rise to a distinct approach to the evolving role of civil litigation in vindicating the collective rights of members of the public. This has meant that Canadian courts have not felt compelled to concern themselves in adjudicating claims relating to collective rights with the kinds of jurisdictional limitations governing the legislative and executive branches of government, despite the fact that in other legal traditions the vindication of such collective rights has been thought to be affected by such jurisdictional limitations. Two areas in which this has been seen most clearly in the jurisprudence are those concerning the availability of multi-jurisdiction class actions, and the evolution of the foreign public law exception, both of which will be discussed in the balance of this chapter.

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nature of a constitutional document: to establish the scope of government authority and to set out the terms of the relationship between citizen and the state and those between the organs of government." (emphasis added) GP Crann 'How Far Does the Chart Reach? A Theoretical Review of the Section 32(1) Debate and Canada's Emerging 'Governmental Action' Doctrine' (1988) U Toronto Fac L Rev 156, 164 *n*37; P Hogg 'The Dolphin Delivery Case: The Application of the *Charter* to Private Action' (1987) 51 Sask LR 273, 279.

[59] The mandate of the courts has come to be described as a "dialogue" between the courts and the government: P Hogg and A Bushell 'The *Charter* Dialogue between Courts and Legislatures: Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All' (1997) 35 Osgoode Hall L J 75; C Manfredi and J Kelly "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L J 513; P Hogg and Bushell 'Reply to Six Degrees of Dialogue' (1999) 37 Osgoode Hall L J 529.

C. Constitutional rights and the conflict of laws

The Canadian legal community was slower than the American legal community to embrace class actions. This reflected the different view Canadians have had of private law adjudication. Canadians were anxious that class actions would foster American-style entrepreneurial lawyering, and that the aggregation of claims would itself act as a springboard for changes to substantive legal rights.[60] There was a concern that the role that the courts have always played in pre-political governance might be compromised by the use of litigation in the service of group claims.

Despite this, the everyday lives of persons in Canada and elsewhere are increasingly affected by government regulation and by the consumer markets in which persons obtain goods and services. This is changing the face of civil litigation in many countries. The role of civil litigation was once confined primarily to the resolution of discrete disputes between private persons, leaving the complaints of groups of persons largely to be answered through legislative or regulatory action by governments. Except in special circumstances, collective rights tended to be regarded as protected primarily by the government and as opposable only to the government. In the United States, where civil litigation is a form of interaction with government, both as a means for persons to establish rights and as a means for government to intervene in private affairs, it was easily accepted that an individual could assert in civil litigation a right on behalf of a group of similarly situated persons. This was a natural development on the tradition of advancing the law through litigation as well as legislation.

Nevertheless, groups of persons are increasingly relying on civil litigation in Canada to vindicate their rights when they have suffered loss or harm; and the regulation of the conduct of providers of goods and services to the public and securing the rights of the public to be protected from loss or harm is increasingly being undertaken through class actions. As Chief Justice McLachlin explained in *Western Canadian Shopping Centres v Dutton,* "the class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties."[61] The evolution of the jurisprudence relating to apparent jurisdictional limits in the operation of multi-jurisdiction class actions illustrates some of the distinctive features of the Canadian legal tradition. This is considered in the first part of this section.

In addition, not only are members of the public increasingly turning to civil litigation to assert rights that they might once have relied on governments to secure, so too are governments themselves turning to civil litigation as a means of determining the rights of groups of citizens and of seeking recovery for loss or harm suffered by them. This is resulting in a similar reconsideration of conflict of laws rules as they affect claims brought by governments on behalf of the public in local courts against persons in other countries, or in foreign courts against persons in those countries. Again, such a reconsideration is virtually inevitable as a bi-product of the collective nature of the claim because the markets for goods and services and the chains of distribution routinely cross intra-federal and national borders. Such claims would once have been met with almost insurmountable opposition either at the jurisdictional stage or at the stage of enforcing a foreign judgment pursuant to the foreign public law exception. However, recently, the courts are making inroads into this exception to facilitate recovery in this way. The second part of this section will consider the differences between the approaches taken in the various federal and regional systems to the effect of fundamental rights on personal jurisdiction have thus been highlighted also in recent developments in respect of the foreign public law exception. These differences reflect the

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[60] S Simpson 'Class Action Reform: A New Accountability' (1991) 10 Adv Soc J 19; *Anderson v Wilson* (1999) 44 OR (3d) 673, 175 DLR (4th) 409 (CA) leave to appeal to SCC refused SCC Bulletin 1999 1519.

[61] *Western Canadian Shopping Centres v Dutton* 2001 SCC 46, ¶26 (*Dutton*).

distinctive features of the various constitutions and adjudicative traditions that have been identified in other contexts in previous chapters.

1. Multi-Jurisdiction Class Actions

A key jurisdictional question that has arisen in the United States, Canada and Australia in connection with the development of class actions regimes is whether the courts of one region of a federation have the authority in class actions or group proceedings to determine the claims of a class of plaintiffs that presumptively includes the residents of other regions in the federation.

A class action regime has been operating in the American federal court system, under Federal Rule of Civil Procedure 23 (FRCP 23) for more than third of a century, but class actions regimes are much newer in other federal systems.[62] Still it is virtually inevitable that the question would arise as to whether the adjudication of a claim in a class action could bind a class broader than that defined by the ordinary territorial scope of the court's jurisdiction. This is because in a federation, such as Canada, the consumer market for goods and services provided by the private sector, and the public who benefit from goods and services provided by the federal government, often include persons from several provinces or from across the country. Accordingly, collective claims for relief for injury or loss suffered by consumers or members of the public are likely to include claimants from several provinces. As has been noted, "mass injury does not always honour provincial or national borders."[63] Thus, it has been necessary to determine whether a decision in a class action could bind persons whose claims, though properly falling within the description of claims before the court, were not otherwise substantially connected to the territory of the forum, and so who might otherwise have been required to seek to have their claims adjudicated by a different court.

The court's authority to issue a judgment binding on persons, such as local residents, who would ordinarily seek their remedy from the court is usually contained in the provisions of the regime itself. For example, section 27(3) of the Ontario Act provides that "A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding...."[64] Based on this provision, persons who have not excluded themselves from the class and yet who might seek to litigate the matter in a separate action, are regarded as bound by the decision of the court in the class proceeding and, therefore, precluded from doing so. Since, pursuant to the division of legislative powers in the Canadian Constitution,

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[62] W Branch *Class Actions in Canada* (Western Legal Publications Vancouver 1996+) and M Eizenga, M Peerless and C Wright *Class Actions Law and Practice* (Butterworths Toronto 1999+). In Canada: Quebec— *Code of Civil Procedure,* RSQ 1977, C-25, arts 999-1051; Ontario— *Class Proceedings Act* SO 1992, c. 6, *Law Society Amendment Act (Class Proceedings Funding),* SO 1992, c. 7; M Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (Canada Law Book Aurora Ontario 1993); British Columbia— *Class Proceedings Act 1995* SBC 1995, c. 21; J Sullivan, *A Guide to the British Columbia Class Proceedings Act* (Butterworths Toronto 1997; Manitoba—Manitoba Law Reform Commission, *Class Proceedings* (MLRC Winnipeg 1999) (Manitoba LRC Report); Alberta— Alberta Law Reform Institute, *Class Actions* (Consultation Memorandum No. 9) (ALRI Edmonton 2000); Saskatchewan— M Ruby and M Roberts, "National Class Actions - Future Trend Or Temporary Phenomenon?" in *Class Actions: Exploding onto the Scene* (Law Society of Upper Canada Toronto April 2001); Federal Court of Canada Rules Committee, "Class Proceedings in the Federal Court of Canada: A Discussion Paper" (Ottawa, 9 June 2000). In Australia: Federal Court—*Federal Court of Australia Act 1976* (Cth) Pt IVA, *Femcare Ltd v Bright* [2000] FCA 512. M Swain 'Class Actions in New South Wales' (NSW Parliamentary Library Briefing Paper 22/96; Victoria—*Supreme Court (General Civil Procedure) Rules 1996,* Order 18A Group Proceeding, *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Limited* [2000] VSCA 103

[63] Report of the Attorney General's Advisory Committee on Class Action Reform (Toronto 1990) 39.

[64] Class Proceedings Act SO 1992, c. 6; Federal Court of Australia Act, *supra*, Victoria Supreme Court (General Civil Procedure) Rules 1996, Order 18A (n 62 above).

this legislation was enacted as provincial legislation (which has only incidental extraterritorial effect), it has been suggested that the preclusive effect prescribed by it has no extra-provincial scope of application. If this is so, it is not possible for a provincial superior court to entertain a multi-province class action. May a provincial superior court do so?

Before addressing this question, it is important to note that the issue of the viability of multi-jurisdiction class actions does not arise in every regime. There are at least three ways in which class actions regimes may prevent this question from arising.

First, the jurisdiction of the court in which a class actions regime is established might itself be defined in such a way as to clarify that even though the courts can bind class members who have not taken any steps to join the litigation, they cannot bind persons who might ordinarily seek relief in other courts. For example, Title III of Book Ten of the Québec Civil Code provides comprehensively for the "International Jurisdiction of Québec Authorities." None of the articles it contains appears to give Québec courts clear authority to determine the claims of persons who, as plaintiffs, have not taken steps to commence or join a proceeding that is otherwise within the Québec courts' jurisdiction. Accordingly, it might be assumed that a Québec court's determination of a claim in a class action would not purport to bind such persons.

Second, in some courts, such as the English courts, the class actions regime provides that plaintiff groups will be comprised of persons falling within the description who take steps to join the group. Under ordinary principles of estoppel, persons who take the initiative to participate in litigation are generally regarded as bound by the result whether or not they might have sought to have their dispute resolved in a different court. In the inter-jurisdictional or private international law context, such persons would be regarded as having "submitted" or "attorned" to the jurisdiction of the court deciding the class action and they would be bound by the order of that court. Accordingly, again no such question would arise.

Third, the designers of class actions regimes in some places have found attractive the model in which potential plaintiffs are presumptively bound by the proceeding unless they take steps to "opt out" of the class as defined, but they have been concerned about the uncertainty that could arise from the operation of this model on a multi-jurisdictional scale.[65] In these places, legislators have reversed the presumption for potential plaintiffs who would ordinarily seek relief in other courts and they require them to take steps to "opt in" to the class. Thus, for example, while, the Ontario Class Proceedings Act makes no special provision for non-resident class members[66] the British Columbia Class Proceedings Act does so by adopting an opt in requirement for non-residents. The British Columbia Act provides that a British Columbia resident may commence an action on behalf of a class of residents[67] who will be bound unless they opt out and then provides that non-residents may participate in the proceeding by opting in to a sub-class, and thereby establishing the basis for estoppel.[68] This was the approach also once favoured in international class actions commenced in the United States because the capacity of a court to issue a judgment precluding a potential plaintiff from

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[65] BC AG, *Class Action Legislation for British Columbia; Consultation Document* (BC AG Vancouver 1994) c 12 "Interjurisdictional Issues," 22.

[66] An Ontario court remains free to include in the certification order the requirement that non-residents opt in to the class.

[67] British Columbia, *Class Proceedings Act* (n 62 above) s 2.

[68] British Columbia, *Class Proceedings Act* (n 62 above) ss 6 and 16. Federal Court of Canada—Uniform Law Conference of Canada Uniform Class Proceedings Act 1996 s 16; New Jersey, New York, Pennsylvania, Connecticut, Missouri and New Hampshire—TA Dickerson *Class Actions: The Law of 50 States* (Law Journal Seminars-Press New York 1988) Uniform Law Conference of Canada Uniform Class Proceedings Act 1996 s 16; Manitoba—Draft Bill s 16 in Manitoba LRC (n 62 above).

suing in another court depends upon whether the other court will recognize its capacity to do so, and there is generally no common law obligation in the absence of a treaty to recognize or enforce foreign judgments.[69]

Given the ways in which the issue may be prevented from arising, it would seem that the issue of the efficacy of a multi-jurisdiction class action would be likely to be tested only in common law legal systems, and particularly within federations, in which the regime providing for class actions makes no specific provision for territorial limits on the authority of the courts to bind members of the class who had actively sought to join the proceeding.

Further complicating the handling of the question of the jurisdiction of the court to bind non-resident plaintiffs is the fact that the ultimate determination of the question is made by another court within the federal system. For example, the question whether a Canadian provincial superior court such as the Ontario Superior Court has jurisdiction to issue a judgment binding on absent class members in other provinces would not be determined by the Ontario court. Rather, it would be determined by a court in another province in which an absent class member might seek relief. That court would consider for itself whether the Ontario court's judgment binds the absent class members in the province and precludes them from re-litigating the cause of action or the issues decided by the Ontario court in the class proceeding.[70] Accordingly, in conflict of laws parlance, this question is one of the recognition and enforcement of judgments rather than a question of jurisdiction. Brockenshire J. relied on this reasoning in his judgment in the *Nantais* case when he said that his capacity to certify a multi-province class was an issue that seemed "to be something to be resolved in another action (by a non-resident class member) before another court in another jurisdiction".[71]

The segregation of questions of jurisdiction and judgments was once standard in common law conflict of laws, but in *Morguard Investments Ltd v De Savoye*[72] the Supreme Court of Canada held that Canadian courts must treat these two questions as correlatives and apply a single jurisdictional standard.[73] Nevertheless, the position of absent class members is virtually unique with respect to the alignment of plaintiffs with enforcement actions and defendants with recognition actions. Judgments binding absent class members may be likened to default judgments: like persons who become bound by a judgment that they have taken no steps to avoid, absent class members become bound by the result obtained in a class

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[69] *Bersch v Drexel Firestone Incorporated* 519 F2d 974, 996-997, *n*48 (1975) (*Bersch*). In *In re Silicone Breast Implant Products Liability Litigation,* (MDL 926) 94-WL-578353 (1994, ND Ala) claimants from Ontario, Quebec and Australia were presumptively eliminated although they were permitted to opt in. The action was subsequently dismissed on *forum non conveniens* grounds with respect to these claims (887 F Supp 1469 (1995 ND Ala).

[70] Notwithstanding the recent liberalization discussed below of the rules for recognizing and enforcing judgments, Canadian courts still follow the traditional common law approach which permits the enforcing court to review the jurisdiction of the issuing court. This appears to be unique among federal/regional systems. Under the Brussels Regulation, European courts do not review the compliance of European courts issuing judgments with the jurisdictional standards of the Regulation as a pre-condition to enforcing their judgments. They give effect to those judgments "without any special procedure being required" as a separate requirement of the Regulation. American courts may review the jurisdiction of the issuing court only under circumstances in which the issuing court has not determined itself to have jurisdiction (i.e., when the defendant has neither challenged the jurisdiction or appeared to defend on the merits.) The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1978] OJ L304/1 is now Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters OJ L12/1 (Brussels I Regulation).

[71] *Nantais, supra.*

[72] *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, 76 DLR 4th 256.

[73] *Morguard* (n 72 above) 1094 and 1103.

proceeding by taking no steps to opt out of the class. Accordingly, although the standards applied for giving effect to default judgments usually concern themselves with fairness to defendants, the certification of multi-province class actions raises the question of the standards for giving effect to default judgments that are fair to plaintiffs. Should the standards for plaintiffs resisting default judgments differ from those for defendants resisting default judgments? Is denying defendants the opportunity to litigate a claim in which a foreign default judgment has been entered against them more significant a deprivation or less significant a deprivation than denying plaintiffs an opportunity to litigate a claim that a foreign court has certified as a class proceeding? The answer to this is to be found in the underlying approach to civil litigation in the Canadian legal tradition. This approach is illuminated in the context of class actions by the approach taken to certification of class proceedings in Canada. Certification criteria seem likely to reflect core aspirations for class proceedings because the certification hearing is the occasion in which each case is assessed for its capacity, once certified, to further the objectives of class proceedings.[74]

Since the inception of class proceedings in British Columbia and Ontario, courts in those provinces have relied on the three objectives described by the Ontario Law Reform Commission as criteria for determining whether it is preferable for the matter to go forward as a class proceeding. However, these three objectives—access to justice, judicial economy and behaviour modification—have not been relied upon equally in Canada or elsewhere. In particular, the objective of behaviour modification has been fundamentally controversial as an objective in itself and the response to it has been one indication of a marked difference in approach to the role of civil litigation in society and the expectations of persons in their rights and duties to participate in it. An emphasis on behaviour modification as an objective for class proceedings could have a marked effect on the way the rules of court jurisdiction affect certification. If it was accepted that a class proceeding should be begun solely for the sake of behaviour modification the proceeding would be pursued for the general good of the public, much like public interest litigation, and the compensatory benefits for a plaintiff class would be a mere by-product and of secondary concern in formulating rules such as those affecting the scope of the litigation.

Drawn from the American jurisprudence and commentary on class proceedings, behaviour modification was questioned by the Ontario Law Reform Commission as a suitable objective for class proceedings. According to the Ontario Law Reform Commission whether behaviour modification is a suitable objective of class proceedings represents "a fundamental philosophical dispute relating to the functions that may be legitimately served by civil actions." On considering the deterrent effects of awards in class proceedings, the OLRC noted that

> it has been argued that the only proper function of civil actions is to achieve the peaceful resolution that might otherwise lead injured parties to take the law into their own hands. One commentator has identified this philosophy as the "Conflict Resolution Model". Although most persons agree that conflict resolution is an important function to the civil process, many have suggested that civil actions, including class actions also play an important role in encouraging adherence to social norms by imposing appropriate costs on wrongdoers and depriving them of the fruits of their misconduct. This philosophy has been identified as the "Behaviour Modification Model."[75]

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[74] Ontario Law Reform Commission, *Report on Class Actions* (Ministry of the Attorney General Toronto1982) 309 (*Report on Class Actions*).

[75] *Report on Class Actions* (n 74 above) 114-115 (footnotes omitted).

The use of the civil justice system to deter wrongful conduct by requiring defendants to "internalize" the costs of engaging in it is a central feature of the "Behaviour Modification model" which has gained widespread acceptance in the United States. As one commentator explained, those who favour this approach to civil litigation, see "the courts and civil process as a way of altering behavior by imposing costs on a person. Not the resolution of the immediate dispute but its effect on the future conduct of others is the heart of the matter."[76] As the Ontario Law Reform Commission observed, the Canadian tradition of private law adjudication recognizes that there may be cases in which, in the absence of effective legal regulation (either because of a gap in the law or the particular nature of the situation), wrongdoing may be peculiarly attractive or profitable. In those cases, the law provides for exemplary remedies or the disgorging of profits.[77] It is arguable that class proceedings that operate to overcome barriers to access to civil remedies can serve a useful function in this area where the barrier to the civil remedy has had the effect of encouraging carelessness or indifference, for example, in the manufacture of consumer products.

Interestingly, the view taken in the United Kingdom of this possible role for group proceedings was even stronger. Behaviour modification was rejected outright as having any role for class proceedings in the United Kingdom. According to the Scottish Law Commission, civil suits are meant to compensate victims of wrongful conduct and not to deter such conduct in the future. As the Commission said in its report on *Multi-Party Actions:*

> the function of civil litigation and the broad aims of reform should be regarded as being substantially the same in multi-party litigation and other litigation. We say this because it may be argued that the culpability of a defender ... is so abnormal that the court should seek to punish such conduct. In other words, that there is a public element in the litigation which requires, or permits, the court to adopt the aim of "behaviour modification" or punishment. We reject this view of a public element in multi-party actions. It has been said by the English Court of Appeal that a claim for damages should not be used as a pretext for what essentially amounts to a public inquiry; the sole proper object of such claims is to obtain compensation. The principal aims of reform remain the traditional aims for reformers of court procedures: the reduction of com plexity, delay and expense.[78]

And, in its 1988 report, *Grouped Proceedings in the Federal Court,* the Australian Law Reform Commission recognized that grouped proceedings "could render substantive law more enforceable and thus encourage a greater degree of compliance with laws the purpose of which is to prevent or discourage activities which cause loss or injury to others" but articulated its recommendations in terms of the ways in which such a procedure would enhance access to justice and judicial economy and not in terms of the modification of behaviour."[79]

Turning from behaviour modification to the other two objectives, it should be noted that judicial economy, although a more easily accepted objective, is ambiguous in the context of class actions because the aggregation of individually non-viable claims that might not otherwise be brought does not promote judicial economy in any absolute sense. Accordingly, in Canada the concern for access to justice has far more reliably indicated the likelihood that the matter will be certified as a class proceeding than the other two.

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[76] KE Scott 'Two Models of the Civil Process' (1975) 27 Stanford L Rev 937, 939.

[77] *Report on Class Actions* (n 74 above) 140-145.

[78] Scottish Law Commission, *Multi-Party Actions* (HMSO Edinburgh 1996) at ¶2.23(footnotes omitted) (*Multi-Party Actions*).

[79] Australia Law Reform Commission *Grouped Proceedings in the Federal Court* (Govt Publishing Service Canberra 1988) ¶¶ 67,62.

Accordingly, in considering the merits of denying plaintiffs the opportunity to litigate a matter in which they were a member of a class and did not opt out, as would be expected, the analysis has been conducted primarily in terms of the implications it has for access to justice. As noted above in respect of the underlying view in the British legal tradition of civil litigation as a means of redress for harm suffered, these implications will tend to be assessed differently given fundamental expectations concerning the desire of individuals to seek redress through litigation. However, assuming as is done in the Canadian legal tradition, that those who have suffered harm or loss would be generally willing to obtain compensation in this way provided it is the most economically feasible, the question becomes one of whether the right of individuals to litigate independently should be favoured over the right of those who might not obtain compensation in this way if they were not presumptively included in a plaintiff class.

While the unfettered right of an independent action for those who desire it would seem to be a fundamental entitlement, such a right has been appraised in the context of the interests served by class proceedings regimes. The kinds of claims that are regarded as suitable for certification are generally the kinds of claims in which the dubious viability of individual claims tends to make it more likely that there will be persons with meritorious claims who will either forego or be prevented from pursuing them by the disproportionate expense involved than there will be persons who, in not responding to a certification notice, will be deprived of an independent right of action that they would wish to exercise. Properly formulated, then, the access to justice balance would appear to be between those who might lose an independent right of action by failing to assert their desire to retain it and those who might be excluded from the claim (and thereby lose the opportunity to recover) by failing to assert their desire to join the claim.

Understood in this way, it has been difficult for courts to see the merits of restricting class actions to a single jurisdiction. Since the certification process entails a judicial determination that a class proceeding is the preferable means of pursuing the claim in terms of the core aspirations of Canadian legal traditions, it must be taken that it is generally in the interests of all claimants that the matter proceed in this way in matters that are certified.

It is probably the case that persons who appear to fall within the definition of the class as certified and who feel that they have been prejudiced by inclusion could come forward and argue that they should not have been included and should have a separate right of action, but this would likely be open to plaintiffs prejudiced by being included in certifications that were limited to a single province as well. If the class definition wrongly included persons whose atypical claims make inclusion prejudicial, they could argue that they should not be regarded as having been included. Otherwise, it would seem that their only likely complaint would be that they were prejudiced by the way the matter was prosecuted. But the legislation accounts for this as well by giving the court the authority to review the plan for litigation at the time of certification and by requiring that any resolution, whether litigated or negotiated, be subject to judicial scrutiny.

Arising as a question of the law of judgments within a federation, it might be thought that the answer would turn on the specialized law surrounding the jurisdiction of coordinate courts within the particular federation in question. For example, it might be assumed that in the United States, the effectiveness of a certification by a state court of a multi-state plaintiff class would be a simple function of the full faith and credit obligation found in Article IV of the United States Constitution. Further, it would seem likely that the capacity of courts in other federations, such as Canada or Australia, would seem similarly governed so that little could be learned by the courts of one federation from the jurisprudence on this question from the courts of another federation. Although the outcome has tended to be guided by the court's anticipation of whether the class action is likely to fulfil the basic objectives of the tradition of civil litigation, such as those relating to fairness and efficiency in the resolution of

claims, a review of leading decisions on multi-jurisdiction class actions shows that the reasons for endorsing or rejecting multi-jurisdiction class actions have been fashioned in the terms of the local adjudicative traditions. This clear from a comparison of the leading decisions on the question in the United States, Canada and Australia.

In the 1985 United States Supreme Court decision in *Phillips Petroleum Co v Shutts,*[80] the court endorsed a multi-state class action under a state class action regime similar to that established in the federal courts under Federal Rules of Civil Procedure 23. The court held that the Kansas court had jurisdiction to determine the claims of class members who were residents of other states and whose claims had arisen in other states and thereby to preclude them from litigating those claims in the courts of their own states. The preclusive effect pursuant to full faith and credit clause of Article IV depended on the determination that the assumption of jurisdiction over absent plaintiffs met the requirements of due process.

The minimum contacts doctrine had extended the scope of jurisdiction based on the defendant's presence to situations in which the defendant, though not present in the forum State, has had sufficient contacts with it for the exercise of jurisdiction. There remained, however, only the two bases of jurisdiction: consent and minimum contacts. In the *Shutts* case, the court was faced with a situation that differed in three respects from the traditional situations raising questions of jurisdiction: it was to be exercised against a plaintiff instead of a defendant, it was to be exercised on the basis of fairly tenuous contacts with the forum, and it was to be exercised without the plaintiff's consent. The court began by considering the prospect of endorsing the validity of a judgment issued against a non-participating plaintiff, rather than a non-participating defendant. The Court was quite familiar with the considerations affecting the fairness of enforcing default judgments against defendants but the binding effect of the equivalent of a default judgment against a plaintiff was new. As Rehnquist J observed, "Reduced to its essentials, petitioner's argument is that unless out-of-state plaintiffs affirmatively consent, the Kansas courts may not exert jurisdiction over their claims."

Recalling that the underlying purpose for the minimum contacts test was "to protect a defendant from the travail of defending in a distant forum" on pain of suffering a default judgment against him or her, the court contrasted this with the situation of an absent plaintiff class member. Extinguishing a class member's claim amounted to the deprivation of a chose in action, which was "a constitutionally recognized property interest",[81] but the court saw the key issue as that concerning the burdens imposed by the litigation itself. Were the interests affected by inclusion in a class proceeding and the burdens placed on absent class members the same as the interests affected and burdens borne by being named a defendant in a nonclass proceeding. The Court concluded that the burdens were less because absent plaintiff class members' interests were represented by the representative plaintiff, who took responsibility for hiring counsel, and absent class members were "almost never subject to counterclaims or cross-claims, or liability for fees or costs...or coercive or punitive remedies."

> Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection. In most class actions an absent plaintiff is provided at least with an opportunity to "opt out" of the class, and if he takes advantage of that opportunity he is removed from the litigation entirely.
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> ....
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> Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not

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[80] *Phillips Petroleum Company v Shutts* 472 US 797, 807, 105 S Ct 2965 (1985).

[81] *Shutts* (n 80 above).

> afford the former as much protection from state-court jurisdiction as it does the latter.[82]

The Court concluded that due process did not require that the Court exercise jurisdiction only over absent plaintiffs who affirmatively opt in to the class and that it refrain from deeming them members if they did not opt out. The minimum contacts requirement for jurisdiction could be met by procedural protections such as notice and an opportunity to participate in the litigation in person or through counsel, an opportunity to remove oneself from the class, and adequate representation of one's interest by the representative plaintiff. The court did not try to extend or revise its notion of minimum contacts so that it could be met in the circumstances of a multi-state class action as was later done by Canadian courts in similar situations.[83] Instead, it dispensed with the requirement of minimum requirements and looked beyond the traditional notions of jurisdiction based on the sovereign entitlement of courts to adjudicate claims either arising in their territory or between persons in their territory to the practical questions of whether the interests of absent class members were likely to be served by presumptive inclusion in a class action.

Interestingly, the procedural safeguards that replaced the jurisdictional requirements did not differ from those for local class proceedings. The requirements of notice, the opportunity to opt out, and adequate representation relate to whether a class action, multi-jurisdiction or otherwise, meets the basic requirements of the local adjudicative traditions—it is not a special concern that arises for multi-jurisdiction classes. Accordingly, in meeting the challenge of determining the validity of multi-state class actions, the United States Supreme Court demonstrated that there is little guidance to be found in either the territoriality principle of international law or in the minimum contacts test of interstate jurisdiction. Rather, in addressing the preclusive effect of an interstate certification the court considered the exigencies of the adversary system and party prosecution to form the basis for its determination of what would constitute acceptable procedures in class actions.

The focus of the jurisdictional analysis in *Shutts* was the consent of the absent plaintiff class member: in terms of due process, the concern was whether the process was fair to the plaintiff who would thereby be deprived of a chose in action. The "minimum contacts" test for jurisdiction, which required the contacts to be such that the person might reasonably anticipate being haled into the forum to litigate a matter there such as when they have "purposefully availed" themselves of the benefits of the forum, were not meaningful in this context, even though they too focus on a kind of implied consent. As the court in the *Shutts* decision observed, "Any plaintiff may consent to jurisdiction. ... The essential question, then, is how stringent the requirement for a showing of consent will be."[84] The court then proceeded to

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[82] *Shutts* (n 80 above) 809-810 (footnotes omitted).

[83] *Harrington v Dow Corning Corp* (1996) 22 BCLR (3d) 97 (SC) affd (2000) 193 DLR (4th) 67 (CA) leave to appeal to SCC refused SCC Bulletin 2001 1540.

[84] *Shutts* (n 80 above) 812. The finding of what amounts to constructive consent has been criticized: "The *Shutts* consent finesse, whereby consent can be inferred from a failure to opt out, does violence to the general theory of consent: D Wood 'Adjudicatory Jurisdiction in Class Actions' (1987) 62 Indiana L J 597; and "...the rationale has an obvious bootstrapping quality: 'Absence of power to compel appearance is logically inconsistent with power to compel a binding choice through compuslory filing of a paper with the court.' ... In fact, of course, Shutts announced a rule of forfeiture (i.e., "you are precluded if you do not take affirmative step X.'" HP Monaghan "Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members" (1998) Columbia L Rev 1148, 1169-70. A finding of consent also presupposes awareness that the certification *would* bind the non-resident absent plaintiff: A Miller and D Crump 'Jurisdiction and Choice of Law in Multistate Class Actions after *Phillips Petroleum v Shutts*' (1986) 96 Yale L J 1, 17. Admittedly this question disappears upon an authoritative ruling such as that by the United States Supreme Court in *Shutts* endorsing certification of a multi-state class action.

explain why, in view of the interest at stake, the notice and its opt-out provision satisfied the requirements of due process.

The constitutional definition of the jurisdiction of the superior courts of the Canadian provinces is different from that of the American state courts. While Canadian courts have been similarly untroubled by constitutional impediments, the rationale for endorsing multi-jurisdictional class proceedings has been different. The "minimum contacts" doctrine at the hear of the American jurisprudence concerning personal jurisdiction has tended to emphasize connections between the forum and the parties and, in that regard, to be particularly concerned with fairness to the parties. In contrast, the Canadian jurisprudence has tended to emphasize connections between the forum and the case as a whole and, in this way, to demonstrate an interest generally in the due administration of justice. The different points of emphasis in the law of personal jurisdiction in the United States and in Canada are unlikely to result in major differences in the jurisdictional requirements or the ways in which the interests of the parties are protected but they could give rise to subtle differences in the principles supporting the recognition of a judgment of the Ontario court as binding on plaintiffs from other provinces: where the decision in the *Shutts* case permits interstate proceedings by citing the reduced burdens placed on absent non-resident plaintiffs and the correspondingly reduced requirements of due process, a Canadian court might prefer to support interprovincial proceedings by stressing the ways in which these proceedings promote access to justice and judicial economy, and prevent inconsistent results

As noted above, the question of the validity of a multi-province class proceeding has arisen principally in Ontario. The codification of the jurisdiction of the Québec Courts appears to preclude the certification of a multi-jurisdiction class,[85] and the British Columbia legislators created an opt-in mechanism for non-residents to avoid it, but the Ontario Class Proceedings Act is silent on a plaintiff class can be certified to include persons resident outside Ontario and whose causes of action have arisen outside Ontario.

In recent years, the Ontario courts have certified plaintiff classes that presumptively include persons resident in other provinces and whose causes of action have arisen in other provinces despite vigorous opposition. On the first occasion, the class members, who had been implanted with faulty pacemaker leads, were all known and the plaintiff's counsel was able to contact them, thereby reducing the concerns that they would be arbitrarily deprived of an independent right of action. The court considered the *Shutts* requirement of including a provision for opting in provision in the notices sent to non-residents "to avoid any doubt as to jurisdiction" but ultimately ruled that "it seems eminently sensible for all the reasons given by La Forest J. in the *Morguard* decision, and the policy reasons given for passage of the Act, to have the questions of the liability of these defendants determined as far as possible once and for all, for all Canadians."[86] On denying leave to appeal, the Divisional Court took the view that the questions of jurisdiction and judgment were separate because "whether the result reached in Ontario court in a class proceeding will bind members of the class in other provinces who remained passive and simply did not opt out, remains to be seen. The law of *res judicata* may have to adapt itself to the class proceeding concept."[87]

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[85] Title III of Book X of the Québec Civil Code, which comprises articles 3134-40, provides exhaustively for the "International Jurisdiction of Québec Authorities". There does not appear to be any provision for jurisdiction over a passive group member whose cause of action arose outside Québec.

[86] *Nantais v Telectronics Proprietary (Canada) Ltd* (1995) 25 OR (3d) 331, 347; (1995) 25 OR (3d) 347 (Div Ct) (*Nantais*).

[87] *Nantais* (n 86 above) 350.

In the next multi-jurisdiction certification, expert evidence adduced by one of the defendants that the certification order would not be regarded by courts in British Columbia or Québec as binding on residents that might otherwise commence claims there was rejected because the experts were not asked to consider a case in which there was a real and substantial connection between the matter and the Ontario court.[88] Soon after, the Manitoba Law Reform Commission reported that it was likely that a multijurisdiction certification would be held to be binding in a Manitoba court.[89] On another certification motion, the proposed plaintiff class included employees who had been dismissed from a nationwide retailer and the court[90] ordered that damages be determined in references conducted by members of the bar in the provinces of the claimants' residences.

Finally, in *Wilson v Servier Canada Ltd*[91] the Ontario courts addressed the constitutional issue more directly. The defendants argued that the jurisdictional authority for class proceedings was contained in the provincial legislation for class proceedings because the provinces alone have authority to pass laws in relation to civil procedure. Provincial legislation cannot operate extraterritorially in its "pith and substance"[92] because it is passed pursuant to a grant of authority under the Constitution to legislate "within the province".[93] According to this reasoning, extraterritorial legislative incompetence would affect judicial competence as well: If the Ontario courts derive their jurisdiction to determine class actions from the Ontario legislation, then they must confine the scope of the plaintiff classes they certify to persons whose claims would ordinarily be capable of being brought in the Superior Court of Ontario.

This argument failed because unlike the constitutions of the United States and Australia, the Canadian Constitution Act 1867, which is the source of legislative and executive authority in Canada and which provides for the scope of such authority, merely continues rather than creates the authority of the Superior Courts of the provinces. Accordingly, in the absence of an explicit legislative restriction on the scope of the fundamental authority of the courts, it is not relevant that provincial legislation passed to provide guidance with respect to the manner of exercising the courts' authority is itself limited in scope.

Even if the territorial scope of the provincial legislation was not the source of a limitation on the courts' authority, however, arguably the question remained whether there existed an inherent restriction on the authority of a provincial superior court to adjudicate a dispute that has arisen in another province between persons resident in that province who had

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[88] *Carom v Bre-X Minerals Ltd.* (1999) 43 OR (3d) 441, 30 CPC (4th) 133 (Gen Div).

[89] Manitoba Law Reform Commission, *Class Proceedings* (MLRC Winnipeg 1999) 31.

[90] *Webb v K-Mart Canada Ltd* (1999) 45 OR (3d) 425 (SCJ), leave to appeal refused 45 OR (3d) 639. The jurisdictional question, though potentially more challenging in *Parsons v Canadian Red Cross Society* (1999) 49 OR (4th) 281, 40 CPC (4th) 151 because it involved the governments of other provinces as defendants, was deftly avoided in the approval of a pan-Canadian agreement that included the settlement of companion class actions in Québec and British Columbia. The defendant governments intervened in the proceedings for the purposes of participating in the settlement.

[91] *Wilson v Servier Canada Ltd.* (2000) 50 OR (4th) 219, leave to appeal to Div Court refused 52 OR (4th) 20, leave to appeal to SCC refused SCC Bulletin 2001 1539.

[92] *Re Upper Churchill Water Rights* [1984] 1 SCR 297, 332 8 DLR (4th) 1. Although "incidental or consequential effects on extra-provincial rights will not render the enactment ultra vires": *Ibid.*

[93] Section 92.14 of the Constitution Act 1867 provides that "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

not affirmatively consented to its jurisdiction. How could such a dispute be said to have a "real and substantial connection" to the forum? If the "real and substantial connection test" was the same as the test for "minimum contacts" surely the court would have to look elsewhere for a basis to assume jurisdiction. As La Forest J explained in the *Tolofson* decision the real and substantial connection test is, in some respects, broader than the "minimum contacts" doctrine.[94]

Canadian courts and commentators alike have wondered whether the court intended the connection to be between the cause of action and the forum or the litigants and the forum. However, it is widely accepted that the test is not confined to pre-litigation contacts between the defendant and the forum as prescribed by the minimum contacts doctrine. The capacity of a court to entertain such claims in a class action was considered in the British Columbia courts in *Harrington v Dow Corning* where, despite the willingness of non-resident plaintiffs to opt in to a sub-class as provided for by the legislation (and thereby consent to the court's jurisdiction over their claims), the defendant argued that the court lacked jurisdiction to decide their cases. The court disagreed.

> The demands of multi-claimant manufacturers' liability litigation require recognition of concurrent jurisdiction of courts within Canada. In such cases there is no utility in having the same factual issues litigated in several jurisdictions if the claims can be consolidated. I do not think that *Nitsuko* and *Con Pro* stand in the way of concurrent jurisdiction as they do not deal with claims inside and outside the province which raise the same common issue. *It is that common issue which establishes the real and substantial connection necessary for jurisdiction.* (emphasis added)[95]

On appeal to the British Columbia Court of Appeal, the majority emphasized the appropriateness of British Columbia as a forum for the resolution of the common issue.

The suggestion that a real and substantial connection could be established by the existence of a common issue in a class action is a radical departure from previous approaches to personal jurisdiction. It disregards questions of sovereignty and contacts with either the events giving rise to the case or the parties in favour of promoting access to justice and preventing a multiplicity of actions. There is no precedent for it in the American tradition of personal jurisdiction or the history of personal jurisdiction as it relates to class proceedings. While there appears to be no precedent for it either in the Canadian law of personal jurisdiction or in the law of class proceedings, it is an approach that does not appear to have been subject to challenge.

Finally, in a stunning move that underscores the extent of the mandate that Canadians feel comfortable in according the courts in absence of legislation, the Supreme Court of Canada has ruled that Canadian Courts should, in the absence of class proceedings legislation, fashion appropriate procedures on an *ad hoc* basis and carry on to adjudicate the claims. According to the Supreme Court in *Western Canadian Shopping Centres v Dutton*:[96]

> Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies the parties ex ante certainty as to their procedural rig hts. ....

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[94] *Tolofson* (n 42 above).

[95] *Harrington* (n 83 above).

[96] *Dutton* (n 61 above).

> Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them... However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice.

The extraordinary proposition implicit in this ruling is that legislative authorization is not required for courts to aggregate claims in this way and to adapt the law of *res judicata* to facilitate the efforts of class proceedings to meet the changing needs of Canadians in civil litigation. Following from this, barriers to such adaptation arising from jurisdictional limits on legislative power are similarly inapplicable to the commencement of multi-jurisdiction class actions in Canada. In simple terms, the kind of state sovereignty that concerned the United States courts and engaged the traditional jurisdictional analysis has seemed largely irrelevant to Canadian courts. Where apparent jurisdictional limits have seen to impede access to justice and the prevention of a multiplicity of proceedings, Canadian courts have been prepared, even on relatively thin rationales, to overlook them. Their principle concern seems to have been to ensure that the common issues were adjudicated in an appropriate forum. Beyond that, they seem to have been prepared to take a pragmatic approach and to allow any question of prejudice to be addressed as and when it arose. They have not been concerned with issues of provincial sovereignty or with the jurisdictional constraints that apply to other branches of government, except as they have a direct bearing on the process of adjudicating the claim.

2. Foreign public law

Just as the rights of persons as members of a collective are increasingly being vindicated through civil litigation in the form of group proceedings in which private persons act as the representatives of the collective, so too are governments becoming involved in the vindication of the rights of groups through civil litigation. The evolving approach to this phenomenon in crossborder actions further illustrates the differences already identified in the constitutional underpinnings of the conflict of laws.

Following the traditional rule regarding foreign public laws and claims, common law courts have not recognized or enforced, directly or indirectly, claims based on the public laws of a foreign state. Although they will apply foreign law to claims brought before them, they will not apply foreign penal laws, revenue laws or other public laws. Although they will enforce most of the judgments of foreign courts, they will not enforce judgments in which the claims are based on foreign penal laws, revenue laws or other public laws. In most common law countries this is called "the foreign public law exception" or the "exclusion of foreign law,"[97] and in the United States this is called the "revenue rule."[98]

While the rule has a single origin in the common law, it has developed differently in the various common law countries, particularly as it arises with respect to foreign revenue laws; and the rationales ascribed to it have been shaped by their various adjudicative traditions in ways that suggest increasing divergences in scope and application of the rule in years to come. In particular, there has been an interesting interplay between two rationales for the rule—those in which it is said that the rule prevents the courts from being drawn into situations in which they will be placed in the position either of giving effect to the sovereign will of a foreign government, or situations in which they might embarrass the local sovereign in its diplomatic affairs by passing judgment on the sovereign acts of a foreign government.

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[97] *Huntington v Attrill* [1873] AC 150 (PC).

[98] *Moore v Mitchell* 30 F 2d 600 (2d Cir, 1929) affd on other grounds, 281 US 10, 50 S Ct 175 (1930).

In *USA v Harden*[99] the Supreme Court of Canada was asked to enforce an American tax judgment in Canada. In refusing to do so, it cited the dual rationales given for the foreign public law exception by the House of Lords in *Government of India (Ministry of Finance) v Taylor*.[100] The first rationale is that this would tantamount to giving local effect via the courts to the sovereign will of a foreign power. As the Court explained:

> ... enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes and that an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties.

The second rationale given by the House of Lords and adopted by the Supreme Court of Canada in the *Harden* decision is that of Hand J. in *Moore v Mitchell*[101]—that courts are incompetent to deal with questions that require passing on revenue provisions of other states. Rather, such questions:

> ... are entrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbours.... No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notion of what is proper.

The first rationale addresses concerns for sovereignty and comity; the second rationale addresses concerns for manageable judicial standards. At its inception, arguably the rule was not primarily concerned with comity or sovereignty but with the maintenance of manageable judicial standards in private law disputes, that is, with questions of justiciability. The rule required the court to segregate issues that would necessitate an inquiry into a foreign sovereign's policy and to determine the claim without regard to those issues. Thus, in the seminal decision in *Holman v Johnson*[102] when Lord Mansfield held that "no country ever takes notice of the revenue laws of another" this was intended to prevent the parties from introducing issues of the policy of a foreign sovereign into the determination of their rights or obligations to one another. The rights and obligations between Holman and Johnson in the case before the court were held to be governed by French law. The court rejected Johnson's attempt to cite Holman's knowledge of Johnson's intention to violate English customs duties as a basis for avoiding his obligation to pay Holman for the tea he had bought from Holman.

The court in *Moore v Mitchell*[103] simply took the requirement to segregate issues of the policies of foreign sovereigns to its logical conclusion: if the viability of a claim depended upon a determination entailing inquiry into the policies of a foreign sovereign the claim must fail. Thus, taxes levied in a deceased's former residence, would not be recoverable in estate proceedings in another jurisdiction. If the basis of the right sought to be vindicated consisted solely in the taxing law of a different jurisdiction, it would be impossible to determine its validity without engaging in an assessment of the policy of a foreign sovereign and this the court was not equipped to do. The segregation of the issues necessitating inquiry into the policy of a foreign sovereign similarly proved fatal to the claim in *Her Majesty the Queen in*

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[99] *United States of America v Harden* [1963] SCR 366 (*Harden*).

[100] *Government of India (Ministry of Finance) v Taylor* [1955] AC 491, 511-512 (HL) (*Taylor*).

[101] *Moore* (n 98 above) 604.

[102] *Holman v Johnson* (1775) 98 Eng Rep 1120, 1121. *State ex rel Oklahoma Tax Commission v Rodgers* 193 SW 2d 919, 926 (Mo CA 1946).

[103] *Moore* (n 98 above).

Right of the Province of British Columbia v Gilbertson.[104] The basis of the claim put forward by the plaintiff, the province of British Columbia, was a British Columbia judgment against the defendants for logging taxes. The *Gilbertson* case could readily have been decided on the basis of the non-justiciability of the right in question (that is, because it was founded in, and not simply measured by, a tax). However, because the claimant was a foreign sovereign seeking enforcement of a judgment for a non-commercial debt, the corut in the *Gilbertson* case was prompted to refer to the comity/sovereignty rationale for the revenue rule.

Pursuant to the revenue rule as pronounced in *Holman v Johnson* and *Moore v Mitchell,* courts would determine only the rights and obligations of the parties *inter se* that were not purely derivative of the sovereign authority of a foreign state. In some cases this proved fatal to the claim, in others it did not, and in still other cases, the revenue rule prevented only a portion of the claim from being entertained. However, two indicia of the character of the rule as a foreign revenue rule continued to be used: first, that the plaintiff in the claim was a foreign sovereign, and, second, that the beneficiary of recovery was a foreign sovereign. In recent years, with the expansion of government regulation and participation in the economy and with the expansion of government involvement in assisting groups in recovering collective losses, the revenue rule has come under increasing scrutiny as it impedes this evolution in crossborder claims, particularly as this related to these two indicia.

Academics have consistently suggested that the rule has been applied too mechanically and too broadly.[105] The editors of *Dicey & Morris* and others have recommended confining the ambit of the rule by reference to the distinction between sovereign and patrimonial claims, saying that "Where ... the foreign government has a patrimonial claim ... the claim will be enforced."[106]

While the concerns relating to manageable judicial standards have evolved over time in a fairly uniform fashion, the concerns relating to sovereignty and comity have not. There has been marked advances in the law in Canada on this front. The decisions in the *Morguard,*[107] *Hunt*[108] and *Tolofson*[109] cases have strengthened the view that the courts as adjudicative bodies that stand apart from the machinery of the enforcement of governmental laws and policies. In adjudicating civil claims, whether brought by a private individual or a government, they are not merely giving effect to government policy. Their role was seen in *Hunt* by the Supreme Court as giving the superior courts the authority to strike down provincial legislation aimed at frustrating civil proceedings in another province. As La Forest J. observed: "The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal

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[104] *Her Majesty the Queen in right of the Province of British Columbia v Gilbertson* 597 F 2d 1161 (9th Cir 1979).

[105] J-G Castel 'Foreign Tax Claims and Judgments in Canadian Courts' (1964) 42 Can Bar Rev 277, 292, updated in J-G Castel *Canadian Conflict of Laws* (1974) Vol 1, 63-93 also (4th ed, 1997) 96-97; P Nygh *Conflict of Laws* (6th ed Butterworths Sydney 1995) 277; *Dicey* (n 6 above) 94.

[106] *Dicey* (n 6 above) 92; B Silver 'Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments' (1992) 22 Georgia J Int'l & Comp L 609, 617; F Strebel, 'The Enforcement of Foreign Judgments and Foreign Public Law' (1999) 21 Loyola LA Int & Comp LJ 55, 57; F Kovatch Jr 'Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule' (2000) 22 Houston J Int'l L 266, 267.

[107] *Morguard* (n 72 above).

[108] *Hunt* (n 40 above).

[109] *Tolofson* (n 42 above).

Courts of Justice as courts of general jurisdiction.[110] They are not mere local courts for the administration of the local laws."[111] The Québec blocking legislation in question in the *Hunt* case could not operate to impair the determination of the rights and obligations of the parties to the proceedings before the British Columbia courts. In the *Tolofson* decision, the Supreme Court noted that: "The court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order."[112]

This emphasis on the capacity of the courts to determine as fully as possible the rights and obligations of the parties to civil disputes before them has particular relevance to cases such as the *Harden* case,[113] in which a foreign government is the claimant. The decisions in the *Morguard, Hunt* and *Tolofson* cases, have underscored the distinction referred to in the *Taylor* decision[114] between sovereign and the patrimonial claims of a foreign government. These cases clarify that the mere fact that the claimant is a foreign government does not suffice to engage the revenue rule or its equivalents. It would only be the sovereign nature of the claim that would do so. The entertainment of a patrimonial claim by a foreign government, or the enforcement of a judgment of a patrimonial nature, does not interfere with local sovereignty. A court must examine the substance of the claim or judgment to determine whether entertaining or enforcing it would be giving effect to the will of a foreign sovereign.

This was illustrated in the *Ivey* decision[115] in which the Ontario court, citing the decision of the High Court of Australia in the *Heinemann* case,[116] adopted the following clarification of the foreign public law exception provided in the *Heinemann* decision: It would be more apt to refer to "public interests" or, even better, "governmental interests" to signify that the rule applies to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government."[117] In the *Heinemann* case, the action, though framed in breach of contract and of fiduciary duty, was "in truth an action in which the United Kingdom Government seeks to protect the efficiency of its Security Service...." The court in the *Ivey* decision distinguished the claim made in the *Heinemann* case from the one before it as follows:

> The claim advanced here cannot fairly be characterized as an attempt by a foreign state to assert its sovereignty within the territory of Ontario. C.E.R.C.L.A. represents the judgment of Congress as to an appropriate regime of civil liability for environmentally hazardous substances in certain circumstances. The defendants chose to engage in the waste disposal business in the U nited States and the judgments at issue here go no further than holding them to account for the cost of remedying the harm their activity caused.[118]

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[110] *Hunt* (n 40 above) 311-312 quoting Estey J. in *(A-G) Canada v Law Society of British Columbia* [1982] 2 SCR 307, 326-27.

[111] *Valin v Langlois* (1879) 3 SCR 1, 19.

[112] *Tolofson* (n 42 above) 1070.

[113] *Harden* (n 99 above).

[114] *Taylor* (n 100 above).

[115] *USA v Ivey* (1996), 26 OR (3d) 533 (Gen Div), affd (1996) 30 OR (3d) 370 (CA) (*Ivey*).

[116] *AG v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 (*Heinemann*).

[117] *Heinemann* (n 116 above) 42.

[118] *Ivey* (n 115 above) 548-59.

The decisions in the *Morguard, Hunt* and *Tolofson* cases also emphasized the increasing importance of interjurisdictional cooperation between courts even in cases in which private law claims are brought by governments. As the Ontario court explained in the *Ivey* decision:

> Environmental law is but one of the many areas where the traditional remedies of the common law have effectively been supplanted by detailed statutory and regulatory regimes. ... There is a public element to all statutes and to virtually all suits brought by a government. If these judgments are to be refused enforcement on the grounds that they represent an assertion of foreign sovereignty, it is difficult to see how enforcement could ever be accorded a civil judgment in favour of a foreign state.
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> The principle of comity which underpins the recent pronouncements of the Supreme Court of Canada in *Morguard* and *Amchem*, *supra*, and *Tolofson c. Jensen,* [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289, should, in my view, inform the development of this area of the law. What is sought to be enforced here is a judgment requiring parties who engaged in environmentally hazardous activity for profit to make good the cost actually incurred to eliminate that environmental hazard. There is clearly a public purpose at stake, but in my view, the presence of that public purpose does not defeat the plaintiff's case. Given the prevalence of regulatory schemes aimed at environmental protection and control in North America, considerations of comity strongly favour enforcement. In an area of law dealing with such obvious and significant transborder issues, it is particularly appropriate for the forum to give full faith and credit to the laws and judgments of neighbouring states.[119]

Accordingly, in modernizing the rule, questions such as whether the rule should continue to be applied routinely to claims brought by foreign governments and claims in which the beneficiary of the recovery is a foreign government, and what rationale would account for the rule in a way that would permit its evolution have been answered differently depending in the United States and Canada.

In *US v Trapilo,*[120] as in the cases considered above in connection with manageable judicial standards, the court segregated the issues of the policy of the foreign sovereign that were sought to be put in issue in a claim for taxes evaded by a smuggling operation. In the *Trapilo* decision, the foreign sovereign was Canada and the policy that the court avoided addressing by applying the revenue rule was the policy underlying the tax scheme that formed part of the factual substratum in the case. The segregation of the policy issues in the *Trapilo* case did not prevent the conspiracy to defraud the Canadian government from being cognizable under the federal wire fraud statute.

When Canada brought a claim in the United States[121] pursuant to the Racketeer Influenced Corrupt Organizations (RICO)[122] legislation for losses in revenues incurred in a

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[119] *Ivey* (n 115 above) 549.

[120] *US v Trapilo*, 130 F 3d 547 (2d Cir 1997) *cert* denied 525 US 812 (1998); *US v Miller* 26 F Supp 2d 415 (NDNY 1998); *US* v *Pierce* (2d Cir, 2000), not yet reported. The *Pierce* convictions were overturned because no evidence of the Canadian tax was presented at the trial and the court could not take judicial notice of the relevant Canadian law. As in Canadian courts, foreign law is generally treated as a fact that must be proved in evidence.

[121] *A-G Canada v RJ Reynolds Tobacco Holdings, Inc* 103 F Supp 2d 134 (NDNY 2000) (*Reynolds*).

[122] 18 USC §1962.

smuggling operation by a tobacco manufacturer,[123] the court was prepared to treat Canada as a "person" who had standing under the legislation to sue.[124] This seemed consistent with the policy under the inclusion of civil remedies of providing incentives in the form of treble damages awards for private attorneys general to take the initiative to pursue claims that would assist public law enforcement agencies in the prevention and punishment of racketeering and corrupt activities. Although the Court criticized the Revenue Rule, observing that "...the origins of the Revenue Rule and its continued applicability are subject to serious question (at least with respect the enforcement of foreign tax *judgments* as opposed to unadjudicated tax claims),"[125] it nevertheless felt constrained to dismiss the action as a result of the operation of the rule.

In a subsequent ruling by another court in the Eastern District of New York in a claim raising the same issue concerning the smuggling of cigarettes into Europe, the court criticized this finding and refused to apply the revenue rule to strike the claim.[126] The court adopted the reasoning of the Second Circuit in *Trapilo,* when it said "[w]hether our decision today indirectly assists our Canadian neighbors in keeping smugglers at bay or assists them in the collections of taxes, is not our Court's concern." As the court went on to explain:

> The court's emphasis is clear: the object of the prosecution in that case was to vindicate the interest of the United States by punishing the use of the wires in the scheme to defraud Canada of its money or property. By exercising its jurisdiction over such a prosecution, the court assumed its instrumental role in effectuating the will of Congress as expressed in the civil RICO statute. As in *Pierce,* the fact that Plaintiff's recovery here, should they succeed in demonstrating liability, will be measured in terms of lost tax revenue does not amount to a usurpation of congressional authority. In fact, the opposite is true. The object of the civil RICO statute is to punish racketeering activity, whatever form it may take. If that end is realized, this court's exercise of its jurisdiction will have been in the service of a clearly expressed congressional objective. As in *Pierce,* the fact that some collateral benefit may accrue to the EC in its efforts to defeat smuggling and recoup lost tax revenues cannot serve as a basis for declining jurisdiction.

This approach to the Revenue Rule invokes a principled indifference to the policies and interests of foreign sovereigns. Where the policies of a foreign sovereign happen to coincide with local policies, such as those that would favour the vindication of local public interests in permitting the pursuit of claims such as those under RICO, then the foreign sovereign's policies would be facilitated; where they happen to be at odds with local policies, they would not be facilitated. But regardless of the finding the court made, the principal concern in applying the Revenue Rule remains the extent to which adjudicating a case is consistent with the court's "instrumental role in effectuating the will of Congress." Any incidental benefit that might accrue to a foreign sovereign in its interests is purely incidental.

This is a very different approach from that taken to the reform of this doctrine underway in Canada. In a series of cases, Canadian courts have granted restitutionary remedies to the United States as plaintiff in connection with a breach of American regulatory standards. First, in *USA v Ivey*[127] the United States obtained enforcement of a judgment based on an administrative order for the costs of an environmental clean-up operation pursuant to the

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[123] 18 USC §1964.

[124] 18 USC §1961(3).

[125] *Reynolds* (n 121 above) 140.

[126] *European Community v RJR Nabisco, Inc* 150 F Supp 2d 456, 484-485 (EDNY 2001).

[127] *Ivey* (n 115 above).

Comprehensive Environmental Response, Compensation and Liability Act 1980 ("CERCLA").[128] The defendant argued that enforcement should be refused because the judgment was based on either a penal law, or a revenue law or a public law of a foreign state. The court held that the judgment was not penal because "the measure of recovery is directly tied to the cost of the required environmental clean-up" and the liability was "restitutionary in nature and ... not imposed with a view to punishment of the party responsible."[129] The court also held that the judgment was not for taxes because "it is difficult to imagine how a claim for reimbursement of costs incurred as a result of the actionable conduct of the defendant could be viewed as a tax."[130] Finally, the court held that the public law exception should not apply both because this was not an attempt by a foreign state to assert its sovereignty within the territory of Ontario (but rather to hold the defendants to account for harm they caused in the United States) and because "in an area of law dealing with obvious and significant transborder issues" comity favoured enforcement.

Then in *USA v Friedland*[131] the United States obtained an injunction freezing the assets of a person the United States wished to pursue in a CERCLA proceeding. While the United States was seeking interim relief and not asking the Canadian court to adjudicate the claim, the claim had not been adjudicated when the relief was sought and granted. The injunction was later dissolved because the applicant had failed to give full and frank disclosure of the nature of its case but the court declined to opine on whether it had jurisdiction to grant interim relief on behalf of a foreign proceeding. Subsequently, in *USA v Levy*[132] the United States sought injunctive relief in Ontario including an order tracing and freezing the defendants' assets to support interlocutory relief granted by the US court to a court appointed receiver in proceedings in the United States District Court for restitutionary relief and the recovery of funds paid by U.S. consumers to the Canadian defendants in the course of the defendants' fraudulent lottery ticket telemarketing scheme. The rejected the submission that the relief sought was for the enforcement of the US penal, revenue or public laws and should be refused. Then, in *US (SEC) v Cosby,*[133] the United States Securities and Exchange Commission sought an order enforcing the disgorgement portion of the relief granted in a default judgment of the Southern District of New York. The defendant objected that under a concurrent criminal indictment for the same delict, the United States Attorney General had sought a forfeiture order that would supersede any disgorgement order requiring the SEC to turn over the funds it obtained to the authorities prosecuting the criminal complaint. Following an unreported precedent of the British Columbia Supreme Court in *USA (SEC) v Shull*[134] the court held that the criminal proceedings initiated by the U.S. Attorney General were distinct from the civil proceedings brought by the SEC. The existence of the criminal proceedings based on the same events did not prevent the SEC from pursuing enforcement remedies in British Columbia. Further, the fact that the SEC judgment in the US District Court also imposed "civil penalties" did not prevent the British Columbia court from enforcing the disgorgement order even if the portion of the judgment ordering "civil penalties" was not enforceable.

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[128] Comprehensive Environmental Response, Compensation and Liability Act, 1980 42 USC, s 9607 (a).

[129] *Ivey* (n 115 above) 544.

[130] *Ivey* (n 115 above) 545.

[131] *USA v Friedland,* unreported (Ont Gen Div, 5 Nov 1996) available on Quicklaw at [1996] OJ No 4399.

[132] *USA v Levy* (1999) 45 OR (3d) 129 (Gen Div).

[133] *US (SEC) v Cosby*, unreported (BC SC, 29 March 2000) available on Quicklaw at [2000] BCJ No 626.

[134] *US (SEC) v Shull,* unreported (BC SC, 5 August 1999) available on Quicklaw at [1999] BCJ No 1823.

Accordingly, the foreign public law exception continues to apply in Canada where a claim raises concerns of justiciability in circumstances in which a court would unavoidably be drawn into an analysis of the merits of the sovereign right on which the claim is based; and Canadian courts in cases like the ones cited above have demonstrated that they, like the American courts in the *Trapilo* and *Miller* decisions are becoming adept at segregating non-justiciable issues and determining claims as far as is possible without embarking on analyses which they are not competent to pursue. Beyond this, claims and judgments entailing relief that are compensatory or restitutionary in nature, such as those under consideration in *Cosby*, are not generally subject to the foreign public law exception even where the claimant or the ultimate recipient of the award is a foreign sovereign, unless the policies of the foreign sovereign served by the adjudication of the claim are clearly inconsistent with local policies. Whether such occasions will need to be identified through such devices as blocking legislation remains unclear.

Where Canadian courts discern a shared concern by governments to assist groups of persons in vindicating the kinds of rights that would once have been determined in private law matters, and where the courts do not see particular conflicts arising with local policies, they are likely to resist the application of the foreign public law exception to impede the adjudication of claims before them. The view of comity as cooperation between courts is preferred in Canada to the principled indifference to foreign sovereign policies evident in recent cases considering the Revenue Rule in the United States. Once again, this difference reflects the sense in which Canadian courts regard themselves as operating not as an instrumentality for the effectuation of the policies of the local legislative and executive government, but as a pre-political form of governance distinct from the jurisdictionally confined operation of local government.

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