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THE CHIMERA OF THE REAL AND SUBSTANTIAL CONNECTION TEST

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I. INTRODUCTION

This paper was first presented at a symposium held at the University of British Columbia Faculty of Law on November 5 and 6, 2004 to honour the late Mr. Justice Kenneth Lysyk, a former faculty member and Dean of Law at U.B.C. Among Ken Lysyk's teaching and scholarly interests was the conflict of laws, and one of us (Edinger) had the good fortune to learn the subject from him as a student. Although he wrote predominantly in the constitutional field, a number of his articles and comments focus on conflicts issues. Ken Lysyk's gifts as a scholar were made for the conflict of laws. In these pieces his analysis is lucid, careful, and incisive; he lays out the policy context with imagination and balance, and he writes superbly. One case comment in particular, which deals with the methodological Gordian knot of the "incidental question", still stands, nearly 40 years later, as a classic exposition of the subject.[1]

For this paper we chose a topic that combines both of Ken Lysyk's favourite subjects. We set out to examine how the Supreme Court of Canada has used the "real and substantial connection" test in the conflict of laws and in related areas of constitutional law. This test has been adopted for a variety of purposes. We suggest that it serves some of these purposes better than others. In addition, we suggest that the test, as it is presently structured, serves none of its purposes especially well.

The law makes frequent use of criteria that turn on an overall appreciation of a variety of factual elements. The law cannot do without such criteria, and often they function as the core concept for an area of law. Negligence, in the sense of the reasonable person standard, embodies the notion of a standard of care. Foreseeability of harm is a criterion central to finding a duty of care in tort. Intention is the key concept in the formation of contracts. In many cases, a complex weighing of factual indicators may be necessary in order to decide

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[1] K. Lysyk, "Case comment on *Schwebel v. Ungar*", Case Comment (1965) 43 Can. Bar Rev. 363.

whether a person has been negligent, whether a person owed a duty of care to another,[2] or whether the parties' words and actions show an intention to be bound. In criteria such as negligence, foreseeability and intention, the breadth of the concept enables the evaluation to be done comprehensively and leaves the judge (or, in the case of negligence, the jury) free to give the factual elements whatever weight seems appropriate.

The "real and substantial connection" test is another such test (or actually, we would argue, several such tests using the same verbal formula for distinct purposes). We contend that the test does its job, or jobs, less well than the three criteria just mentioned, primarily because the standpoint from which the evaluation is performed is much less well-defined than it is in the others. A secondary reason is that the variety of contexts in which the test is employed makes its underlying rationale even harder to pin down.

II. A LITTLE HISTORY

As far as judicial decisions go, the provenance of the "real and substantial connection" idea in Anglo-Canadian private international law can be traced back to *Bonython v. Commonwealth of Australia* in 1951.[3] The question was how to identify the proper law of the contract if the parties had not chosen one. Until then, courts usually chose the law of the place where the contract was made as the governing law. Where that led to unattractive results, they tended to say that parties had implicitly intended their agreement to be governed by some other system of law, such as the law of the place where the contract was to be performed.[4] In *Bonython*, the court abandoned any presumptive use of a specific connection, like the place of contracting, as well as the recourse to implied intention, which was usually a transparent fiction. Instead, Lord Simonds formulated the test for the proper law, failing a choice by the parties, as " ... the system of law by reference to which the contract was made or that with which the transaction has its closest and most real

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[2] Foreseeability alone may not be decisive. Proximity, a more complex criterion that includes foreseeability as a major element, is now typically used in common law Canada. See *infra* note 257 and accompanying text.

[3] (1950), 81 C.L.R. 486, [1951] A.C. 201, (P.C.) [*Bonython* cited to A.C.].

[4] For example, *Lloyd v. Guibert* (1865-66), L.R. 1 Q.B. 115 (Ex. Ch.) at 121 asked "to what general law is it just to presume that [the parties] have submitted themselves in the matter"; see Lawrence Collins, ed., *Dicey and Morris on the Conflict of Laws*, 13th ed. (London: Sweet & Maxwell, 2000) at para. 32-004 [*Dicey and Morris*].

connexion".[5] This formula has been used by English courts ever since, and was adopted by the Supreme Court of Canada in 1967.[6]

The formula in fact goes back much further than the *Bonython* case. Lord Simonds picked it up from Cheshire.[7] Cheshire, in turn, derived it from Westlake, who wrote that the proper law of the contract (a phrase he also coined)[8] is the law of " ... the country with which the transaction has the most real connection ... ".[9] And Westlake's idea was an adaptation of the central notion of the German jurist Friedrich Carl von Savigny, who wrote in 1849 that choice of law was a matter of discerning " ... where is the true seat of each obligation ... ".[10]

The "closest and most real connection" test, it will be noted, is a comparative one. The task of the judge is to assess whether the totality of the connections with a particular legal system outweigh the totality of the connections with any other legal system. In this exercise, each connection is to be given its due weight but exactly how the connections are to be weighed against each other is left undefined. Logically, the importance of each connection ought to be assessed bearing in mind the purpose of the exercise, namely, to identify the system of law from which the rules governing the particular agreement can most appropriately be drawn. That does not take the analysis very far, but at least it points in the general direction where the pros and cons for one decision or another can be found.

The "real and substantial connection" test, in those precise terms, made its first appearance in 1967 in *Indyka v. Indyka* in the House of Lords.[11] The test was the Law Lords' solution to the then very restrictive rules for deciding whether a foreign divorce was recognized in England. The primary rule was

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[5] *Bonython*, *supra* note 3 at 219.

[6] *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443, 62 D.L.R. (2d) 138.

[7] See *Dicey and Morris*, *supra* note 4 at 32-005 citing G.C. Cheshire, *Private International Law*, 3rd ed. (Oxford: Clarendon Press, 1947) at 312, and Geoffrey Chevalier Cheshire, *International Contracts* (Glasgow: Jackson, Son & Company, 1948) at 15.

[8] John Westlake, *A Treatise on Private International Law: with Principal Reference to its Practice in England*, 7th ed. by Norman Bentwich (London: Sweet & Maxwell, 1925) at 304.

[9] *Ibid.* at 302.

[10] Friedrich Carl von Savigny, *A Treatise on the Conflict of Laws*, 2d ed., trans. by William Guthrie (South Hackensack, N.J.: Rothman Reprints, 1972) at 194. Westlake, *ibid.*, refers at 304 to the proper law being the "truest seat of the transaction in question".

[11] [1969] 1 A.C. 33, [1967] 2 All E.R. 689 (H.L.) [*Indyka*]. The phrase was first used in Upjohn J.'s judgment in *Re Helbert Wagg & Co. Ltd.*, [1956] Ch. 323 at 341, [1956] 1 All E.R. 129 (Ch. D.) [*Wagg* cited to Ch.], where he discussed the problem of a contractual choice of a proper law that has no real and substantial connection with the transaction.

that a divorce would be recognized if it was granted in the husband's domicile,[12] and as a corollary to this a third-country divorce would be recognized if it was recognized by the law of the husband's domicile.[13] Since, at the time, a wife's domicile was in law identical to her husband's, the wife could not, in the eyes of English law, validly obtain a divorce in her own home country if it was not the husband's domicile and its divorces were not recognized by the husband's domicile. English courts had been given jurisdiction to grant a divorce to wives who were not domiciled in England if they had been ordinarily resident in England for three years, and the Court of Appeal had decided that a foreign divorce should be recognized if the facts, transposed to England, would have satisfied the English jurisdictional rule.[14] This was often called recognition on the ground of "reciprocity", although the test was based on parity of jurisdictional practice rather than actual reciprocity of recognition. *Indyka*[15] decided that even if none of the existing tests for recognition was satisfied, a divorce must be recognized if a "real and substantial connection" existed between the petitioner and the country in which the divorce was granted. *Indyka* was followed in Canada.[16]

The "real and substantial connection" test was envisaged in *Indyka* as a means of moving from particular rules to a general principle. The existing recognition rules based on domicile and on "reciprocity"[17] were seen as unduly restrictive and productive of injustice, especially for wives. The new test was designed to reduce the problem of "limping"[18] marriages that were regarded as dissolved in some countries but not in England. However, two features of the test deserve to be noted. One is that, unlike the "closest and most real connection" test for the proper law of a contract, it is not comparative. It does not ask whether the petitioner had her or his *most* real and substantial connection with the foreign country, just whether she or he had *a* real and substantial connection. The strength of the connection is not assessed by comparing it with similar, alternative connections with other countries, but is assessed on an absolute scale of adequacy. This is problematic because it is always easier to say whether A is more than B than

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[12] *Le Mesurier v. Le Mesurier*, [1895] A.C. 517 (P.C.).

[13] *Armitage v. A.G.*, [1906] P. 135 (Probate Division).

[14] *Travers v. Holley*, [1953] P. 246, [1953] 2 All E.R. 794 (C.A.).

[15] *Supra* note 11.

[16] The cases are given in Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, 5th ed., looseleaf (Markham, Ont.: LexisNexis Butterworths, 2004) at para. 17.2.a , n. 8.

[17] *Indyka, supra* note 11 at 58.

[18] *Ibid.* at 59.

to say whether A is sufficient. An assessment of sufficiency requires an answer to the question, "sufficient in relation to what?"

That question leads to the second feature of the test as used in *Indyka*.[19] Unlike the search for the proper law of the contract, where one can see in a general way the pros and cons of deciding for one law or another, the pros and cons of recognizing a particular connection as sufficient to give jurisdiction are much less apparent. The answer to the question "sufficient in relation to what?" is elusive here. Deciding whether person X's connection to country A is sufficient to justify recognizing the divorce X obtained there is a matter of balancing, on the one hand, the interest of A and other states in regulating X's status against, on the other hand, X's interest in having the status that he or she wants and being able to secure the status at a reasonable cost. There is no readily accessible scale of values according to which this exercise can be performed. Judges are left to make the decision on a more or less intuitive sense of whether it seems fair under the circumstances to insist that X should have gone to a country other than A to get a divorce. The flexibility of the *Indyka* test made it so uncertain that legislation has superseded the test in England.[20] The main *Divorce Act* recognition rule has also largely done so in Canada.[21]

The "real and substantial connection" idea was also used in three other jurisdictional contexts before the Supreme Court of Canada enshrined it as a central jurisdictional principle in 1990. In 1973 the Supreme Court of Canada used the test in a products liability case in which the manufacturer was in Ontario but the victim had suffered harm in Saskatchewan. The court held that the alleged tort was committed in Saskatchewan so as to support service *ex juris*. In the course of its reasoning the court suggested that, in deciding on the locus (or loci) of the tort, the question at bottom was whether the tort had a real and substantial connection with the province.[22] In the late 1970s and early 1980s, the House of Lords used the phrase in *forum non conveniens* cases, explaining that the "natural forum" for a proceeding was the jurisdiction with which the litigation had its most "real and substantial connection" (a

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[19] *Supra* note 11.

[20] See *Dicey and Morris*, *supra*, note 4 at para. 18-064.

[21] R.S.C. 1985, c. 3 (2nd Supp.), s. 22(1) authorizes recognition of a foreign divorce on the basis of either party's ordinary residence in the foreign country for one year immediately preceding the petition. A connection less than that would be unlikely to meet the "real and substantial" test, although sometimes it does: see, *e.g.*, *Wlodarczyk v. Spriggs* (2000), 200 Sask. R. 129, 12 R.F.L. (5th) 241, 2000 SKQB 468.

[22] *Moran v. Pyle National (Canada) Ltd.* (1973), [1975] 1 S.C.R. 393 at 408-09, 43 D.L.R. (3d) 239 [*Moran* cited to S.C.R.].

comparative test, this time).[23] And in 1985 the Supreme Court of Canada, speaking through La Forest J., decided that an offence takes place in Canada for the purposes of criminal jurisdiction if there is a "real and substantial link" between the offence and Canada.[24] He suggested that the "outer limits" of the test might " ... well be coterminous with the requirements of international comity."[25]

III. *MORGUARD INVESTMENTS LTD. V. DE SAVOYE*

In 1990, *Morguard Investments Ltd. v. De Savoye*[26] used the concept of a real and substantial connection to transform the conflicts landscape and to effect a merger of the conflict of laws and constitutional law. Considered an important common law conflicts case the moment it was decided, *Morguard* achieved its landmark status three years later when *Hunt v. T&N plc* revealed that *Morguard* had always been a constitutional case:

> *Morguard* was not argued in constitutional terms, so it was sufficient there to infuse the constitutional considerations into the rules that might otherwise have governed issues of recognition and enforcement of judgment. But the issue was very clearly raised in this case and in fact a constitutional issue was framed. Now, as perusal of the last cited passage from *Morguard* reveals, the constitutional considerations are just that. They are constitutional imperatives, and as such apply to the provincial legislatures as well as to the courts ... .[27]

Morguard is now treated as if it actually decided the constitutional issue not decided, in fact, until *Hunt*. This discussion will conform to that practice.

Until *Morguard*, the relationship between conflicts rules and constitutional law had been a one-way street, with all the traffic running from conflicts to constitutional law.[28] Common law conflicts *situs* rules had been employed in various constitutional cases to locate things or matters for purposes of

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[23] *Rockware Glass Ltd. v. MacShannon*, [1978] A.C. 795 at 829, [1978] 1 All E.R. 625 (H.L.) [*Rockware* cited to A.C.]; *The Abidin Daver*, [1984] A.C. 398 at 415, [1984] 1 All E.R. 470 (H.L.) [*Abidin Daver* cited to A.C.]; *Spiliada Maritime Ltd. v. Cansulex Ltd.*, [1987] A.C. 460 at 477-78, [1987] 3 All E.R. 843 (H.L.) [*Cansulex* cited to A.C.].

[24] *R. v. Libman*, [1985] 2 S.C.R. 178 at 213, 21 D.L.R. (4th) 174 [*Libman* cited to S.C.R.].

[25] *Ibid.* In a similar vein, Windeyer J. said in *The Queen v. Foster* (1959), 103 C.L.R. 256 at 311, 32 A.L.J.R. 446 (H.C.) [*Foster* cited to C.L.R.] that Australian statutes should not be construed as extending to matters having no "direct, real and substantial connexion" with Australia.

[26] [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 [*Morguard*].

[27] [1993] 4 S.C.R. 289 at 324, 109 D.L.R. (4th) 16 [*Hunt* cited to S.C.R.].

[28] See generally, Elizabeth Edinger, "Territorial Limitations on Provincial Powers" (1982) 14 Ottawa L.R. 57.

determining the legislative jurisdiction to regulate or tax. But those rules were not perceived to have become constitutional rules[29] by that use and there had been virtually no suggestion that the common law conflicts rules might themselves be subject to constitutional scrutiny of any kind. *Morguard*[30] converted the one-way street into a two-way thoroughfare by employing the relatively old concept of a real and substantial connection both as a constitutionally-mandated new conflicts rule for recognition and enforcement of Canadian judgments, and as a new constitutional principle or standard against which provincial conflicts rules for assuming jurisdiction were to be measured. So the concept of a real and substantial connection was extended into a new area of the conflict of laws and allowed to escape into constitutional law.

The simple issue in *Morguard* was whether the common law rules for recognition and enforcement of foreign judgments should be extended in some way and if so, what the basis of that extension should be. The Alberta judgment in question was final and conclusive but the Alberta court had not had jurisdiction in the international sense because the defendants had not been served in Alberta and had not submitted in any way to the jurisdiction of the Alberta court. The British Columbia courts had held that the Alberta judgment should, nevertheless, be recognized, and had employed the reciprocity principle derived from *Travers v. Holley*[31] as the basis for their extension of the common law rules.

The Supreme Court agreed that the Alberta judgment should be recognized, but rejected reciprocity as a basis for that recognition. Instead, *Morguard* embraced the idea of comity as an operating principle. Comity, according to the Court, implied order and fairness, and those values were found to be embodied in the federal principle.[32] The federal principle was held to impose a constitutional obligation on provincial courts to give full faith and credit to judgments emanating from other provincial courts, provided only that jurisdiction in the originating court had been properly and appropriately

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[29] Although there was some concern that *Interprovincial Co-operatives v. The Queen*, [1976] 1 S.C.R. 477, 53 DLR (3d) 321 might have constitutionalized *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1 (Ex. Ch.) [*Phillips*].

[30] *Supra* note 26.

[31] *Supra* note 14.

[32] The federal principle has a long history in Canadian constitutional case law as an interpretive principle. The *Patriation Reference* (*Reference Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, (*sub nom. Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)*) 125 D.L.R. (3d) 1 [*Patriation Reference* cited to S.C.R.]), signaled a new role for it as a justiciable principle. There is no consensus on an ideal federal system, however, so the federal principle is an empty vessel which can be filled with whatever version of federalism the user wishes to see implemented.

assumed. Jurisdiction, the Court said, would have been properly and appropriately assumed if there had been a real and substantial connection between the action[33] and the province. *Morguard* thus discovered in the constitution of Canada both a full faith and credit clause and a due process clause. They were described as correlatives and both employed as the constitutional standard the same concept, the idea of a real and substantial connection.

Morguard was rife with ambiguity and uncertainty. Two main problems were related to the concept of a real and substantial connection. First, the traditional common law rules for recognition and enforcement of foreign judgments were expressly preserved and no attempt was made to integrate the concept of a real and substantial connection into either the existing framework of those rules or into the framework for the assumption and exercise of jurisdiction. Second, and flowing from the first problem, with respect to the concept of a real and substantial connection, the question left unaddressed and so unanswered was where, on the continuum between minimal and maximal connections, the Court thought the concept should rest. The phrase itself and the Court's discussion of *Indyka*[34] suggested that a close connection was contemplated. "Real" presumably meant nothing more than not a fiction. The critical term, therefore, was "substantial". The assumption was that the term "substantial" was intended to convey a connection of "considerable importance, size or worth",[35] but conflicts scholars recognized immediately that the existing common law rules for recognition and enforcement of foreign judgments did not necessarily require a substantial connection. Personal service could amount to tag jurisdiction and submission could be technical.[36]

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[33] In *Morguard* (*supra* note 26) itself, various terms and phrases identify different things (not limited to the action) to which the province must be connected. We now know that it is the connection between either the action and the province or the defendant and the province, assuming that the law has been settled by a dissenting judgment in the Supreme Court in a case where the majority did not discuss this particular issue. See *Unifund Assurance Co. of Canada. v. Insurance Corporation of British Columbia*, [2003] 2 S.C.R. 63 at para. 126, 227 D.L.R. (4th) 402, 2003 SCC 40, Bastarache J. [*Unifund* cited to S.C.R.].

[34] *Supra* note 11.

[35] *Compact Oxford English Dictionary*, 2d ed. rev., *s.v.* "substantial".

[36] Tag jurisdiction refers to service on a defendant whose presence within the jurisdiction is transitory. Even objection to jurisdiction could amount to submission if the defendant ventured too far and asked the court to decline jurisdiction as a matter of discretion: *Henry v. Geoprosco International Ltd.*, [1976] Q.B. 726, [1975] 2 All E.R. 702 (C.A.). And even a letter to the court might be found to constitute submission: *Overseas Food Importers & Distributors Ltd. v. Brandt* (1981), 126 D.L.R. (3d) 422, 27 B.C.L.R. 31 (C.A.). The British Columbia Court of Appeal has only recently decided that it is not submission for B.C. defendants to argue *forum non conveniens* in the foreign court: *Mid-Ohio Imported Car Co. v. Tri-K Investments Ltd.* (1995), 129 D.L.R. (4th) 181, 13 B.C.L.R. (3d) 41 (C.A.) [*Mid-Ohio*].

Many also probably remembered that, in application, the "real and substantial" connection required by *Indyka*[37] gradually became attenuated.[38] Similarly, jurisdiction based on personal service on a defendant found within the province did not necessarily require a very high degree of connection. It was also uncertain whether the Court was of the opinion that the service *ex juris* rules in all the provinces needed to be made narrower or whether it was only the rules in Prince Edward Island and New Brunswick, which allowed service on defendants anywhere in North America without requiring any connection to the province beyond that of the plaintiff, that offended the new constitutional standard. The Court's approval of and reliance on *Moran*,[39] a service *ex juris* case dealing only with the jurisdiction *simpliciter* component of the jurisdiction decision, suggested that the service *ex juris* rules in the other seven common law provinces would, for the most part anyway, pass constitutional scrutiny. How, if at all, the discretionary component in the jurisdiction decision fit into the real and substantial connection analysis was not discussed. And finally, the Court's reference to the due process clause in the American Constitution suggested a minimal connection standard.

Morguard[40] cannot, therefore, be described as promoting both order and fairness. Rather, order, in the sense of certainty, was sacrificed to indeterminacy for the sake of fairness. The hope was that the Court would sort out the indeterminacies over time and order would be restored. That has not happened for the jurisdictional component of the correlative pair, though until the recent decision in *Beals v. Saldanha*,[41] it could be said that the use of the real and substantial connection test for purposes of recognition and enforcement had engendered no real controversy. Lower courts continued to employ the traditional common law rules where applicable and to require more than a minimal connection when employing *Morguard* as a supplementary rule.[42]

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[37] *Supra* note 11.

[38] See *supra* note 20.

[39] *Supra* note 22.

[40] *Supra* note 26

[41] *Infra* note 172 and accompanying text. It is possible that *Beals* has subsumed the common law rules for recognition and enforcement into the *Morguard* standard such that there is now only one standard for evaluation of the jurisdiction of the foreign court: the existence of a real and substantial connection.

[42] Two British Columbia cases in which the connection was held to be too tenuous were *Braintech Inc. v. Kostiuk*, [1999] 9 W.W.R. 133, 171 D.L.R. (4th) 46, 1999 BCCA 169 [*Braintech*], leave to appeal to S.C.C. refused, [2000] 1 S.C.R. vii; and *Mid-Ohio Imported Car Co. v. Tri-K Investments Ltd.* (1993), 34 C.P.C. (3d) 369, 5 B.C.L.R. (3d) 271 (S.C.). The Court

IV. *AMCHEM PRODUCTS INC. V. BRITISH COLUMBIA (WORKERS' COMPENSATION BOARD)*

In March 1993, the Court delivered judgment in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*,[43] a case involving pure conflicts issues arising in asbestos-related tort litigation. Specifically, it concerned the principles governing the discretion to issue anti-suit injunctions. An action had been commenced in Texas by the Workers' Compensation Board of British Columbia, by way of subrogation, on behalf of a large number of current or former B.C. residents (or their estates) suffering from injuries which they alleged had been caused by exposure to asbestos. The defendant asbestos companies were mostly American corporations. None of them were Texas corporations but most of them carried on business in that state. They all preferred to be sued in British Columbia. Anti-suit and anti-anti-suit injunctions[44] were issued in British Columbia and Texas.

The Court had not had occasion to consider jurisdictional discretionary issues since *Antares Shipping Corp. v. The Ship "Capricorn"*[45] in 1976. *Antares* was decided only three years after *Atlantic Star v. Bona Spes*,[46] the House of Lords decision precipitating the avalanche of English cases which modified the principles governing the exercise of discretion in England and culminated in *Spiliada Maritime Corp. v. Cansulex*[47] and *SNI Aérospatiale v. Lee Kui Jak*.[48] During this period of rapid development in England, courts in

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of Appeal in *Mid-Ohio* held that the defendants had attorned and did not discuss the finding of the trial judge concerning the lack of a real and substantial connection (*supra* note 36).

[43] [1993] 1 S.C.R. 897, 102 D.L.R (4th) 96 [*Amchem* cited to S.C.R.].

[44] An anti-anti-suit injunction is one directing the party enjoined to refrain from seeking an anti-suit injunction in the foreign court.

[45] [1976] 2 S.C.R. 422, 65 D.L.R. (3d) 105 [*Antares*].

[46] [1974] A.C. 436, [1973] 2 All E.R. 175 (H.L.).

[47] *Supra* note 23. The reform of the discretionary principles was limited to those governing the exercise of discretion following service in England. The principles governing stays were moved from an abuse of process test to a doctrine of *forum non conveniens*. Those governing anti-suit injunctions remain at the abuse of process end of the scale though there was reconsideration of them. It cannot be said that the discretionary principles accompanying service *ex juris* were totally unaffected, however, because in *Spiliada*, Lord Goff finally made the Scottish principle applicable to both. The Scottish principle, drawn from *Sim v. Robinow* ((1892), 19 R. 665 at 668 (Ct. Sess.)), requires that the court be satisfied " ... that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice." *Spiliada* and *Aérospatiale*, *infra* note 48, are not the last English cases to deal with stays and anti-suit injunctions but they remain the leading cases.

[48] [1987] A.C. 871, [1987] 3 All E.R. 510 (P.C.) [*Aérospatiale*].

Canada had been extremely busy with jurisdiction cases involving the formulation and application of the discretionary principles. The results were somewhat mixed with respect to adoption of the English cases, but the Supreme Court of Canada had refused leave to appeal in all such cases. *Amchem*[49] did not adopt the English formulations of the discretionary principles governing stays and anti-suit injunctions developed by the House of Lords and the Privy Council, but the decision did confirm the existence in Canada of reasonable facsimiles.

Unlike *Morguard*,[50] *Amchem* contains no constitutional overtones but the Court did assert that it considered *Morguard* to have enunciated a uniquely Canadian approach to the conflict of laws:

> ... the principles outlined in *SNI* [51] should be the foundation for the test applied by our courts. These principles should be applied having due regard for the Canadian approach to private international law. This approach is exemplified by the judgment of this court in *Morguard*, *supra*, in which La Forest J. stressed the role of comity and the need to adjust its content in light of the changing world order. [52]

The phrase "real and substantial" occurs only once in *Amchem* and is not used in a way which enlightens us about the concept.[53] Nevertheless, it is arguable that *Amchem* cast some light on the intended operation of *Morguard* and the concept of the real and substantial connection.

Amchem held that in order to decide whether to issue an anti-suit injunction, a Canadian court must first consider whether the foreign court can be considered *forum conveniens*, the most appropriate or the natural forum for the action, but only after the foreign court has been given an opportunity to decide for itself whether it is an appropriate forum and to decline jurisdiction if it is not.

> In this step of the analysis, the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to *forum non conveniens* outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the

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[49] *Supra* note 43.

[50] *Supra* note 26.

[51] *Aérospatiale*, *supra* note 48.

[52] *Amchem*, *supra* note 43 at 930. Whether the Supreme Court actually had a more sensitive and advanced view of comity than the House of Lords is speculative.

[53] *Ibid.* at 920-21. Discussing the need for service *ex juris*, Sopinka J. commented that "Residence outside of the jurisdiction may be artificial. It may have been arranged for tax or other reasons notwithstanding the defendant has a real and substantial connection with this country."

> application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions.[54]

The actual legal basis for the foreign court's jurisdictional decision is not considered. Thus the fact that it does not use the doctrine of *forum conveniens* is irrelevant. The only question is whether, in the circumstances, the result of the foreign court's jurisdictional decision is consistent with Canada's discretionary principles. The Court was thus obliged to explain Canadian principles governing the discretion to stay local actions.

In applying this approach to the Texas proceedings, the Court accepted that during this period Texas courts did not have, and so could not have applied, a doctrine of *forum conveniens*. Nevertheless, the Court held that the decision of the Texas court to retain jurisdiction should be respected, and the anti-suit injunction issued by the B.C. court should be set aside because the jurisdiction of the Texas court would have been controlled by the due process clause found in the 14th Amendment. Application of the 14th Amendment, with its constitutional requirement of minimum contacts for jurisdiction, was held to be "... consistent with our rules of private international law relating to *forum non conveniens*."[55] Yet, according to the Court, the only connection relied on by the Texas court was the personal presence of the defendants by virtue of their carrying on business there. This is a very strong connection but *forum conveniens* ordinarily requires a broader examination of connections. It is not clear from the reasons whether the Court actually reviewed the circumstances connecting the action with Texas or simply deferred to the Texas court on the assumption that it had correctly applied a particular version of the due process clause.

So *Amchem*[56] throws some light on *Morguard*,[57] but the light is very dim. Because the Court in *Amchem* expressly equates the due process clause with our doctrine of *forum conveniens* and because the Court in *Morguard* was intent on creating an equivalent due process clause in Canada by requiring jurisdiction to have been properly and appropriately assumed, it is arguable that the Court in *Morguard* must have intended the term "substantial" to be given its dictionary meaning. That would indicate that a maximal connection was required to establish a real and substantial connection. That argument is based on an assumption that the Court in *Morguard* and the Court in *Amchem* were working from a common understanding of the scope and operation of the American due process clause.

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[54] *Ibid.* at 931-32.

[55] *Ibid.* at 938.

[56] *Supra* note 43.

[57] *Supra* note 26.

V. *HUNT V. T & N PLC.*

In November 1993 another asbestos-related case, *Hunt v. T & N plc*,[58] resolved the ambiguity about the constitutional status of *Morguard*[59] but provided no assistance regarding the degree of proximity required to satisfy the real and substantial connection test. In fact, the Court expressly declined to elaborate, insisting that it had not intended to impose a rigid test but only to " ... capture the idea that there must be some limits on the claims to jurisdiction."[60] Speaking for the Court, La Forest J. added:[61]

> 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 a 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.

Earlier in the reasons, however, the Court had commented on the appropriateness of the assumption of jurisdiction by the British Columbia court on the basis of the *Moran*[62] type connection between the action and British Columbia and on the absence of a *forum non conveniens* analysis. One might justifiably argue that the Court in *Hunt* was employing a narrow minimum connection test in evaluating the assumption of jurisdiction in British Columbia despite what it had said in *Amchem* about the due process clause and *forum conveniens*.

In addition to confirming the constitutional status of the principles enunciated in *Morguard*, *Hunt* strengthened the idea of a connection between the real and substantial connection test and extraterritoriality hinted at in *Morguard*, by using *Morguard* to hold Quebec legislation constitutionally inapplicable to an action in B.C. instead of using *Churchill Falls (Labrador) Inc. v. Newfoundland (A.G.)*[63] to hold it *ultra vires* as exceeding the territorial limits on provincial legislative jurisdiction. In fact, this was an application of the full faith and credit principle enunciated in *Morguard*, but it looked like a decision about extraterritoriality.

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[58] *Supra* note 27.

[59] *Supra* note 26.

[60] *Hunt*, *supra* note 27 at 325.

[61] *Ibid.* at 326.

[62] *Supra* note 22.

[63] [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1 [*Churchill Falls*].

Hunt[64] arose from a request for production of documents in a tort action in British Columbia. The plaintiffs sought damages from the defendant asbestos manufacturers for injuries alleged to have been caused by the negligent manufacture of asbestos, negligent failure to warn and conspiracy to suppress the dangers. The defendant Quebec corporations declined to comply with the British Columbia order for production of documents, relying for protection on the Quebec *Business Concerns Records Act*.[65] That statute prohibited Quebec companies from removing documents from the province.[66] The plaintiffs persuaded the Supreme Court to state a constitutional question, even though notice had not been given. The British Columbia Court of Appeal had refused to deal with the constitutional issue for that reason. The question asked whether the Quebec statute was " ... *ultra vires* the National Assembly of Quebec or constitutionally inapplicable because its pith and substance is a derogation from extraprovincial rights?"[67]

After a brief discussion of the pith and substance of the Quebec *Records Act* in which it doubted that the act could be said to be in relation to s. 92(14) but conceded that s. 92(13) was "more promising", the Court segued into a lengthy *Morguard*[68] analysis without ever reaching any conclusion on the validity of the statute. The Quebec *Records Act* was ultimately held to be constitutionally inapplicable to the proceeding in British Columbia or to any future proceedings in any Canadian jurisdiction. The Court held that a statute which absolutely prohibits compliance with orders to produce documents in actions in other Canadian jurisdictions in which jurisdiction is properly and appropriately assumed is a breach of the obligation to give full faith and credit within Canada, which flows from the principles of order and fairness enunciated in *Morguard*. That obligation cannot be finessed by a pre-emptive strike.

So, while *Hunt* might be said to do no more than elevate the *Morguard* principles to constitutional status, no mean feat in itself, and to apply the full faith and credit component of the correlative pair of constitutional principles, its effect was undoubtedly much more significant. It sharpened the focus on the possible connection between the *Morguard* principles and the principles determining extraterritoriality and undoubtedly paved the way for the fusion

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[64] *Supra* note 27.

[65] R.S.Q. c. D-12 [*Records Act*]

[66] The Quebec legislation was intended to protect Quebec companies from American litigation. Ontario and Canada enacted similar provisions as did some other nations.

[67] *Hunt*, *supra* note 27 at 297.

[68] *Supra* note 26.

(or confusion) of those principles in 2003 in *Unifund Assurance Co. v. I.C.B.C.*[69]

VI. *TOLOFSON V. JENSEN*

As was noted earlier, the real and substantial connection test can be said to have its beginnings in the "closest and most real connection" choice of law rule used to find the proper law of a contract. No less a figure than Professor John Morris suggested more than 50 years ago that the common law should adopt an analogous "proper law of the tort" theory[70] in place of the unsatisfactory common law rules that the case law had produced until then. Yet, when the opportunity to do so arose in *Tolofson v. Jensen*,[71] the Supreme Court, speaking again through La Forest J., would have none of it. Like Sherlock Holmes's dog that did not bark in the nighttime, this is a curious incident.[72]

Tolofson was the consolidated appeal from two decisions, one from British Columbia and the other from Ontario. In both cases the plaintiffs were residents of the forum province who had been injured as passengers in a car registered in the province and driven by another resident of the province. Each accident happened in another province, to which the plaintiff and the driver had traveled together. In the British Columbia case the accident occurred in Saskatchewan, which had a shorter limitation period than British Columbia, and imposed a gross negligence requirement in claims by passengers against drivers rather than the British Columbia standard of simple negligence. In the Ontario case the accident occurred in Quebec, the law of which barred any civil action for personal injuries suffered in automobile accidents and replaced it with no-fault insurance benefits. In both actions, therefore, the question was whether the issues of liability were governed by the law of the province where the action was brought (the *lex fori*) or the province where the accident took place (the *lex loci delicti*).[73]

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[69] *Supra* note 33.

[70] J.H.C. Morris, "The Proper Law of a Tort" (1951) 64 Harv. L. Rev. 881.

[71] [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289 [*Tolofson*].

[72] Arthur Conan Doyle, *Memoirs of Sherlock Holmes*, ed. by Christopher Roden (Oxford: Oxford University Press, 1993) at 23.

[73] The British Columbia case raised another very important question in private international law, namely, whether statutes of limitation should be treated as procedural rules governed by the *lex fori* or substantive rules as to liability. The court opted for the latter characterization, overruling long-standing precedent according to which statutes of limitation were procedural if they were drafted as a bar to the remedy rather than an extinguishment of the right.

The existing choice of law rule was notoriously bad. It required the application of both the *lex fori* and the *lex loci delicti*,[74] the former determining liability but the latter negating the right of action if, according to the law of the place of the wrong, the defendant's act was wholly without liability, either civil or criminal.[75] The Supreme Court held unanimously that the existing rule should be replaced, not by any kind of "closest connection" rule, but by a rule referring exclusively to the *lex loci delicti*. In doing so the court set its face against developments in the United States and England, in each of which the tort choice of law rule had been modernized to allow the application of the system of law with the most significant connections, overall, to the claim and to the parties.[76] Only Australia shares the Canadian view that a strict *lex loci delicti* rule is the best approach.[77]

Why did the Supreme Court of Canada adopt a quasi-mechanical rule for tort choice of law when, for questions of jurisdiction and foreign judgments, it had embraced a test that gave the greatest possible latitude to the judge to reach a fair result by giving appropriate weight to the whole range of factors that connect a claim with different jurisdictions? Here, and only here, the court gave decisive weight to a theory of strict territoriality of law, and it did so in the name of certainty. La Forest J. declared, " ... [w]hile, no doubt, as was observed in *Morguard*,[78] the underlying principles of private international law are order and fairness, order comes first ... ".[79] That legal rights arising out of an accident should always be governed by the law of the province in which the accident took place was said to accord with the reasonable expectations of the parties.[80] Such a rule also promoted the goal—which the

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[74] *Phillips*, *supra* note 29.

[75] *McLean v. Pettigrew*, [1945] S.C.R. 62, [1945] 2 D.L.R. 65, following *Machado v. Fontes*, [1897] 2 Q.B. 231 (C.A.).

[76] *Babcock v. Jackson*, 12 N.Y. 2d 473, 191 N.E. 2d 279 (C.A., 1963), introduced a flexible rule, followed in many but not all states, according to which the applicable law is selected by reference to the state interests and policy objectives that would be served by applying one jurisdiction's rule rather than another's. In England a statutory rule now requires the application of, usually, the law of the place of the injury unless, having regard to the significance of the factors connecting the tort with each jurisdiction, applying the law of another jurisdiction would be substantially more appropriate: *Private International Law (Miscellaneous Provisions) Act* 1995 (U.K.), c. 42, s. 11.

[77] *John Pfeiffer Pty Ltd. v. Rogerson* (2000), 203 C.L.R. 503, 74 A.L.J.R. 1109 (H.C.); *Régie National des Usines Renault v. Zhang* (2002), 210 C.L.R. 491, 76 A.L.J.R. 551 (H.C.).

[78] *Supra* note 26.

[79] *Tolofson*, *supra* note 71 at 1058.

[80] *Ibid.* at 1050-51. See Janet Walker, "'Are We There Yet?' Towards a New Rule for Choice of Law in Tort" (2000) 38 Osgoode Hall L.J. 331, for a use of *Tolofson* as a starting

court hinted might be a constitutional requirement—" ... that an act committed in one part of this country will be given the same legal effect throughout the country."[81] (If it is constitutionally mandatory, all provinces, including Quebec, must have identical—and therefore judicially determined—choice of law rules, a radical proposition whose implications the court did not explore.)[82] In international as distinct from interprovincial cases, there might be some room for applying a law other than the *lex loci delicti* where, for instance, all the parties come from the same province, but in interprovincial cases the *lex loci delicti* rule must be absolute.[83]

It may well be, in fact, that *Tolofson* will have little impact on choice of law outside the field of automobile accidents. The territoriality theory used in *Tolofson* can hardly apply to decisions about which law governs a contract or whether somebody has capacity to marry, to name just two examples. La Forest J. had to admit that it might not even work for other kinds of tort claims:

> There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There, territorial considerations may become muted; they may conflict and other considerations may play a determining role.[84]

Certainty may have been front and centre in *Tolofson*, but it has been relegated well to the rear in the Supreme Court's other decisions on private

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point for arguing that the parties' reasonable expectations are properly central to the development of tort choice of law principles generally.

[81] *Tolofson*, *ibid.* at 1064.

[82] The proposition is endorsed, as promoting the efficiency of the federal structure, by Jason Herbert, "The Conflict of Laws and Judicial Perspectives on Federalism: A Principled Defence of *Tolofson v. Jensen*" (1998) 56 U. Toronto Fac. L. Rev. 3.

[83] *Tolofson*, *supra* note 71 at 1055-63. The rationale for treating international cases differently was, with respect, left quite unclear, and lower courts have had trouble defining the circumstances in which they should do so. *Somers v. Fournier* (2002), 214 D.L.R. (4th) 611, 60 O.R. (3d) 225 (C.A.), putting a brake on a trend in the trial courts, indicates that an exception to the *lex loci delicti* principle should rarely be made even in international cases.

[84] *Tolofson*, *ibid.* at 1050. For an exploration of how *Tolofson* applies to the "interprovincial activity" of publishing and broadcasting, see Craig Martin, "*Tolofson* and Flames in Cyberspace: The Changing Landscape of Multistate Defamation" (1997) 31 U.B.C. L. Rev. 127. *Tolofson*'s emphasis on territoriality is defended by Catherine Walsh, "Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims" (1997) 76 Can. Bar Rev. 91, and doubted by J.P. McEvoy, "Choice of Law in Torts: The New Rule" (1995) 44 U.N.B. L.J. 211 at 226-28.

international law, both before and after *Tolofson*.[85] In the current state of the law, questions of whether a court can take jurisdiction and whether it ought to enforce a foreign judgment are all answered in terms of whether the necessary "real and substantial connection" exists, an evaluation in which not only facts but also relevant social and judicial policies must be given their due in the context of assessing which result best comports with "order and fairness". In many cases the outcome will be impossible to predict with confidence. Actually, notwithstanding the stress laid on it in *Tolofson*, we suggest that certainty matters less in choice of law than it does in the other areas. In planning transactions or embarking on litigation, issues of choice of law are seldom a vital element, whereas the questions of where to sue and whether an eventual judgment will be enforceable in Canada are the ones on which, as a practical matter, everything usually turns.

VII. *SPAR AEROSPACE LTD. V. AMERICAN MOBILE SATELLITE CORP.*

The next decision to consider is *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*[86] This is the only case to date in which the Supreme Court has dealt directly with the impact of *Morguard*[87] on the exercise of *in personam* jurisdiction by domestic courts against non-resident defendants. *Hunt*[88] had made it clear that the "properly restrained jurisdiction" idea in *Morguard* was a constitutional imperative. Lower courts, especially in the common law provinces, were soon faced with a steady run of cases in which non-residents who were properly served *ex juris* (to use the common law term) argued that they were nevertheless not subject to the court's jurisdiction because no "real and substantial connection" existed between the province and the claim against them, and so the judicial authority of the province could not constitutionally be exercised with respect to them.

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[85] *Supra* note 71.

[86] [2002] 4 S.C.R. 205, 220 D.L.R. (4th) 54, 2002 SCC 78 [*Spar Aerospace*]. The court had decided three other conflicts cases between the decision in *Tolofson* and this case. *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 207 D.L.R. (4th) 577, 2001 SCC 90, concerned the discretion to exercise or decline *in rem* jurisdiction against a ship. *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 207 D.L.R. (4th) 385, 2001 SCC 92, decided a question relating to the transfer of bankruptcy proceedings from one province to another. *Re Antwerp Bulk Carriers N.V.*, [2001] 3 S.C.R. 951, 207 D.L.R. (4th) 612, 2001 SCC 91, dealt with the interrelationship of *in rem* maritime jurisdiction and bankruptcy jurisdiction over the same asset. None turned to an appreciable degree on the "real and substantial connection" question.

[87] *Supra* note 26.

[88] *Supra* note 27.

Essentially, three questions arise: to what extent will traditional jurisdictional rules, both for jurisdiction over residents and over non-residents, satisfy this constitutional norm? What is the relationship between the constitutionally required "real and substantial connection" and the concept of *forum non conveniens*? And how real and how substantial does the "real and substantial connection" have to be? The answer to the last question largely depends on the answers to the other two.

A. TRADITIONAL JURISDICTIONAL RULES AND THE "REAL AND SUBSTANTIAL CONNECTION"

On the question of how far the traditional jurisdictional rules comport with the constitutional norm, the lower courts have taken somewhat differing views. The British Columbia Court of Appeal held that *Morguard*[89] did not call into question the long-standing rules that give courts the power to exercise jurisdiction over persons who attorn to the jurisdiction or who are present, even transitorily, in the province.[90] The constitutional question, in other words, only needed to be asked in relation to situations of service *ex juris*. At about the same time the Ontario Court of Appeal approached the question of jurisdiction *simpliciter* (the power to take jurisdiction as distinct from the discretion whether to exercise it) in a more comprehensive fashion that did not give any presumptive validity to the traditional bases for jurisdiction. The court decided a group of five personal injury actions brought against non-residents of Ontario. The defendant was Canadian in the lead case, *Muscutt v. Courcelles*,[91] and the defendants in all the others were foreign. In each of the five cases, the non-resident defendant had properly been served *ex juris* under the Ontario civil procedure rule permitting such service wherever the plaintiff's claim is based on "damage sustained in Ontario" from a tort or breach of contract committed elsewhere.[92]

The court first rejected the argument that the relevant rule of court was *ultra vires* the province. The rule, it said, was only procedural and did not of itself confer jurisdiction.[93] The principles of jurisdiction were matters of common law, which, since *Morguard*, includes the "real and substantial connection" limit on the exercise of judicial jurisdiction. The court proceeded to expound eight factors to be considered in determining whether a court had

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[89] *Supra* note 26.

[90] *Teja v. Rai* (2002), 209 D.L.R. (4th) 148, [2002] 2 W.W.R. 499, 2002 BCCA 16.

[91] (2002), 213 D.L.R. (4th) 577, 60 O.R. (3d) 20 (C.A.) [*Muscutt*].

[92] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 17.02(h).

[93] *Muscutt*, *supra* note 91 at paras. 46-48.

jurisdiction *simpliciter*—in other words, whether the exercise of jurisdiction was consistent with the constitutional minimum standard. The factors were as follows:

1) The connection between the forum and the plaintiff's claim. This reflects the forum's " ... interest in protecting the legal rights of its residents and affording injured plaintiffs generous access for litigating claims against tortfeasors."[94]
2) The connection between the forum and the defendant. "If the defendant has done anything within the jurisdiction that bears upon the claim advanced by the plaintiff, the case for assuming jurisdiction is strengthened."[95]
3) Unfairness to the defendant in assuming jurisdiction. "The principles of order and fairness require further consideration, because acts or conduct that are insufficient to render the defendant subject to the jurisdiction may still have a bearing on the fairness of assumed jurisdiction. Some activities, by their very nature, involve a sufficient risk of harm to extraprovincial parties that any unfairness in assuming jurisdiction is mitigated or eliminated."[96]
4) Unfairness to the plaintiff in not assuming jurisdiction. "The principles of order and fairness should be considered in relation to the plaintiff as well as the defendant."[97]
5) The involvement of other parties to the suit. "The twin goals of avoiding a multiplicity of proceedings and avoiding the risk of inconsistent results are relevant considerations."[98]
6) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis. This stems from the proposition that *Morguard*[99] made clear, namely that " ... precisely the same real and substantial connection test [as it applies to the recognition and enforcement of extra-provincial judgments] applies to the assumption of jurisdiction against an out-of-province defendant."[100]

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[94] *Ibid.* at para. 77.

[95] *Ibid.* at para. 82.

[96] *Ibid.* at para. 86.

[97] *Ibid.* at para. 88.

[98] *Ibid.* at para. 91.

[99] *Supra* note 26.

[100] *Muscutt*, *supra* note 91 at para. 38.

7) Whether the case is interprovincial or international in nature. "The decisions in *Morguard*,[101] *Tolofson*[102] and *Hunt*[103] suggest that the assumption of jurisdiction is more easily justified in interprovincial cases than in international cases, ... " because of the emphasis these cases placed on the demands of the Canadian federal system.[104]
8) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere. In interprovincial cases it is unnecessary to consider the standards that prevail in other jurisdictions, but " ... in international cases, it may be helpful to consider international standards, particularly the rules governing assumed jurisdiction and the recognition and enforcement of judgments in the location in which the defendant is situated."[105]

Applying the eight criteria just noted, the court held that there was no jurisdiction in the four cases involving non-Canadian defendants,[106] but there was jurisdiction in *Muscutt* itself.

It should be mentioned here that the Ontario Court of Appeal's eight-factor approach to jurisdiction *simpliciter* is much more elaborate than the approach usually taken in other provinces. In British Columbia, which also gets a large number of jurisdictional cases, the Court of Appeal has tended to view jurisdiction *simpliciter* more along the line of finding a minimum factual connection between the action and the province,[107] and this view has not been much affected by the Ontario cases.[108]

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[101] *Supra* note 26.

[102] *Supra* note 71.

[103] *Supra* note 27.

[104] *Muscutt*, *supra* note 91 at para. 95.

[105] *Ibid.* at para. 102.

[106] Jurisdiction existed in *Muscutt*, *ibid.* It did not exist in *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 213 D.L.R. (4th) 643, 60 O.R. (3d) 76 (C.A.); *Gajraj v. DeBernardo* (2002), 213 D.L.R. (4th) 651, 60 O.R. (3d) 68 (C.A.); *Lemmex v. Sunflight Holidays Inc.* (2002), 213 D.L.R. (4th) 627, 60 O.R. (3d) 54 (C.A.); and *Leufkens v. Alba Tours International Inc.* (2002), 213 D.L.R. (4th) 614, 60 O.R. (3d) 84 (C.A.). The reasoning behind these decisions need not be discussed for the present purposes.

[107] *Furlan v. Shell Oil Co.*, [2000] 7 W.W.R. 433, 77 B.C.L.R. (3d) 35, 2000 BCCA 404, leave to appeal to S.C.C. refused, [2001] 1 S.C.R. xii; *AG Armeno Mines & Minerals Inc. v. PT Pukuafu Indah*, [2000] 7 W.W.R. 209, 190 D.L.R. (4th) 173, 2000 BCCA 405.

[108] See *Marren v. Echo Bay Mines Ltd.* (2003), 226 D.L.R. (4th) 622, 13 B.C.L.R. (4th) 177, 2003 BCCA 298 at para. 15, where Huddart J.A. denied there was a substantive difference between the British Columbia and Ontario approaches, but did not use the eight-factor analysis, and *Roth v. Interlock Services Inc.*, (2004) C.C.E.L. (3d) 171, 33 B.C.L.R. (4th) 60, 2004 BCCA 407.

B. "REAL AND SUBSTANTIAL CONNECTION" AND *FORUM NON CONVENIENS*

Turning to the relationship with *forum non conveniens*, if the Ontario Court of Appeal's approach to jurisdiction *simpliciter* is right, the distinction between the power to take jurisdiction and the discretion whether to exercise it has become very hard to discern, even if the court affirmed that it is important to distinguish the two.[109] The difficulty stems from the fact that the "order and fairness" side of *Morguard*[110] predominates over the "real and substantial connection" side. Only the first two of the eight factors are strictly factual in nature; all the rest are designed, more or less explicitly, to assess the consequences of taking jurisdiction from the point of view of whether doing so would further the ends of justice.

C. HOW REAL AND SUBSTANTIAL IS "REAL AND SUBSTANTIAL"?

It is plain from what has just been discussed that the question of how "real and substantial" the connection has to be cannot be given a hard and fast answer. As Sharpe J.A. put it in *Muscutt*, " ... it is not possible to reduce the real and substantial connection test to a fixed formula."[111] The complexity of the test is due to the variety and variable weighting of the factors, not to mention the policy considerations that, according to the Ontario Court of Appeal, affect the weighting.

D. THE DECISION IN *SPAR AEROSPACE*

The decision in *Spar Aerospace*[112] was issued less than two weeks after those in the five Ontario Court of Appeal cases. It deals with the same issues, but in the context of the jurisdictional rules in the *Civil Code of Québec*,[113] and in a commercial rather than a personal injury case. At the material time, Spar, a company headquartered in Ontario, owned a manufacturing plant in Quebec where it had built the communication payload for a satellite as subcontractor for Hughes Aircraft of California. Hughes provided the satellite to Motient Corp., which was based in Virginia. Motient had engaged three other American companies to conduct ground station testing of the satellite, and in the course of the testing the satellite was seriously damaged. As a consequence, Hughes Aircraft refused to pay Spar the incentive payments provided for under the subcontract. Spar brought an action in the Quebec

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[109] *Muscutt*, *supra* note 91 at para. 42.

[110] *Supra* note 26.

[111] *Muscutt*, *supra* note 91 at para. 75.

[112] *Supra* note 86.

[113] C.C.Q. [*Civil Code*].

Superior Court against Motient and the three American firms that did the testing, claiming that Spar had suffered economic injury by their fault and seeking just under one million dollars in damages for loss of the incentive payments, loss of future profits caused by loss of reputation, and expenses incurred in investigating the damage to the satellite.

The defendants argued[114] that the court lacked jurisdiction because Spar's claims did not satisfy the requirements for jurisdiction found in art. 3148 of the *Civil Code*.[115] The grounds at issue were two of the ones in paragraph (3), namely, that "damage was suffered in Québec" or that "an injurious act occurred in Québec". The defendants argued, further, that if the plaintiff's claim met the requirements of art. 3148 it did not meet the constitutional requirement that there be a real and substantial connection with Quebec. A third argument was that the court should decline jurisdiction on the ground of *forum non conveniens*, a ground introduced into Quebec law[116] by art. 3135 of the *Civil Code*. The Superior Court and the Quebec Court of Appeal had upheld the Superior Court's jurisdiction. The Supreme Court of Canada affirmed that conclusion.

On the first issue, whether the claims satisfied the requirements set out in art. 3148(3), the court, speaking through LeBel J., held that Spar's allegations did amount to damage suffered in Quebec.[117] The Court said the size of the damage should not play a role at this stage, because that would constitute a premature examination of the merits of the plaintiff's case.[118] There was evidence to support the motions judge's decision that Hughes' withholding the incentive payments, although they were payable in Ontario, caused damage to the plaintiff's Quebec facility.[119] The judge had also had evidence before her that supported her conclusion that the Quebec facility had built its own reputation, independent of Spar's Ontario base, so that injury to this reputation was damage suffered in Quebec.[120]

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[114] In this summary the defendants are treated as one, although different defendants took slightly different positions before the Supreme Court.

[115] *Supra* note 113.

[116] Until the new Civil Code came into force in 1994, *forum non conveniens* was commonly regarded as inapplicable to the law of Quebec (*Aberman v. Solomon*, [1986] R.D.J. 385, 1 Q.A.C. 40), although the Court of Appeal subsequently changed its mind on the issue (*La Garantie, Cie. d'assurance de l'Amérique du Nord v. Gordon Capital Corp.*, [1995] R.D.J. 537 (Qc. C.A.)).

[117] The court rejected the "injurious act" ground because it was applicable only to acts producing liability without fault: *Spar Aerospace*, *supra* note 86 at paras. 38-43.

[118] *Ibid.* at para. 32.

[119] *Ibid.* at para. 34.

[120] *Ibid.* at paras. 33, 35.

Next, the court addressed the argument that such jurisdiction was incompatible with the constitutional limits established by *Morguard*[121] and *Hunt*.[122] LeBel J. agreed " ... that it is a constitutional imperative that Canadian courts can assume jurisdiction only where a 'real and substantial connection' exists."[123] However, he said, the constitutional imperative was based upon the obligations owed by one Canadian province to another; "... [F]ederalism was the central concern underlying both decisions [*Morguard* and *Hunt*]."[124] Nothing in the Supreme Court's earlier decisions supported the argument that, in an international case, the "real and substantial connection" criterion was required in addition to the jurisdiction provisions found in the *Civil Code*.[125]

Pausing here, this conclusion is, with respect, highly debatable. The constitutional limits on provincial judicial authority have always been assumed to rest on the provinces' lack of extraterritorial legal capacity,[126] not simply on an obligation of restraint that is owed when the legal system of another province is in play but is not owed when the system is that of a truly foreign country.[127]

LeBel J. nevertheless went on to consider whether the *Civil Code* provisions were incompatible with a "real and substantial connection" requirement. He held that they were not. It was arguable that the notion of a "real and substantial connection" was already satisfied by the terms of art. 3148, because it was doubtful that a plaintiff who met any of its requirements would be considered not to have satisfied the criterion.[128] In any event, the inclusion of *forum non conveniens* as part of the jurisdictional rules " ... serves as an important counterweight to the broad basis for jurisdiction set out in art. 3148."[129] So the requirement for a "real and substantial connection" was

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[121] *Supra* note 26.

[122] *Supra* note 27.

[123] *Spar Aerospace*, *supra* note 86 at para. 51.

[124] *Ibid.* at para. 53.

[125] *Ibid.* at para. 54; See *Civil Code*, *supra* note 113.

[126] As reflected in *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(13), reprinted in R.S.C. 1985, App. II, No. 5 ("property and civil rights *in the province*" [emphasis added]).

[127] Elizabeth Edinger, "*Spar Aerospace*: A Reconciliation of *Morguard* With the Traditional Framework for Determining Jurisdiction" (2003) 61 Advocate (B.C.) 511 at 515. See also Vaughan Black & Janet Walker, "The Deconstitutionalization of Canadian Private International Law?" (2003) 21 Sup. Ct. L. Rev. (2d) 181 at 190-95.

[128] *Spar Aerospace*, *supra* note 86 at para. 56.

[129] *Ibid.* at para. 57.

" ... reflected in the overall scheme established by Book Ten [of the *Civil Code*[130]]."[131]

This is an intriguing line of argument. If taken literally, it means that an excessive territorial reach in the jurisdictional grounds can be cured, from a constitutional point of view, by the availability of a *forum non conveniens* ground for declining jurisdiction. This theory bypasses the distinction between jurisdiction *simpliciter*, which is a matter of law, and *forum non conveniens*, which is a matter of discretion. LeBel J.'s reasoning suggests that there is nothing wrong with allowing actions to be started on a jurisdictional basis short of a "real and substantial connection" as long as the defendant is able to make a *forum non conveniens* argument and so insist at that stage that a "real and substantial connection" is present. The cases until *Spar Aerospace*[132] have assumed that jurisdiction *simpliciter* is a question of the defendant's right to object to the court's jurisdiction altogether, which is logically anterior to the question whether the court should decline jurisdiction on *forum non conveniens* grounds. This view is correct, as subsequent comments in the Supreme Court of Canada (albeit in the context of a dissent) confirm.[133]

In any event, the outcome of this part of *Spar Aerospace* was that damage occurring in Quebec was held to be a constitutionally adequate basis for the Quebec court to take jurisdiction. This contrasts with the conclusion of the Ontario Court of Appeal in 4 of the 5 cases in the *Muscutt*[134] group—precisely the international cases—that damage occurring in Ontario was not by itself sufficient to meet the constitutional standard.

The third point in *Spar Aerospace* was the application of *forum non conveniens* discretion. Essentially, the court upheld the motions judge's view that the defendants could not point to any one American jurisdiction that was a clearly more appropriate forum than Quebec. The witnesses, the parties and the evidence were located in various states.[135] LeBel J. stressed the use of the adverb "exceptionally" in art. 3135 of the *Civil Code*, which provides the *forum non conveniens* discretion. He said,

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[130] *Supra* note 113.

[131] *Spar Aerospace*, *supra* note 86 at para. 63.

[132] *Supra* note 86.

[133] *Unifund*, *supra* note 33 at para. 133. This case is discussed below, text accompanying notes 148-170.

[134] *Supra* note 91.

[135] *Spar Aerospace supra* note 86 at paras. 70-73. In a curious aside, at para. 73, LeBel J. noted that Motient had had representatives staying at Spar's Quebec facility for more than a year while Spar was building the payload, and suggested that if it was willing to have employees there for a year it was in a weak position to argue that Quebec was *forum non conveniens*.

> ... by ignoring the 'exceptionality' requirement, courts may unwittingly create uncertainty and inefficiency in cases involving private international law issues, resulting in greater costs for the parties. In my opinion, such uncertainty could seriously compromise the principles of comity, order and fairness, the very principles the rules of private international law are set out to promote.[136]

What has *Spar Aerospace*[137] contributed to answering the three questions posed earlier in this section? On the question of how the traditional rules for jurisdiction have been affected by the constitutional requirements of *Morguard*[138] and *Hunt*,[139] *Spar Aerospace* minimizes, or even denies, the role of the "real and substantial connection" concept in overriding the existing rules for the jurisdiction of domestic courts. It has to be said that, of the two approaches, that in *Spar Aerospace* is much to be preferred. It reduces the opportunity for arguments on jurisdiction *simpliciter* and maximizes the ability of provinces to enact jurisdictional rules that function predictably. However, it remains to be seen how compelling its reasoning will be outside Quebec.[140] The civil law tradition regards the jurisdiction granted to the courts by the *Civil Code*[141] as a clear mandate for the courts to act, whereas the common law has tended to see jurisdiction in terms of a power, reflected in procedural rules, which the court may choose to use or not to use. It is easier to give presumptive validity to clear statutory bases for jurisdiction as *Spar Aerospace* did than to give presumptive validity to the implicit jurisdiction that the common law courts use.[142] As the Ontario Court of Appeal noted, the rules of court do not of themselves confer jurisdiction, it is inherent in the

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[136] *Ibid.* at para. 81.

[137] *Supra* note 86.

[138] *Supra* note 26.

[139] *Supra* note 27.

[140] Even in Quebec, there are signs that, despite *Spar Aerospace*, the "real and substantial connection" may be assuming greater importance in the application, if not the constitutional validity, of art. 3148(3): Joy Goodman & Jeffrey A. Talpis, "*Beals v. Saldanha* and the Enforcement of Foreign Judgments in Canada" (2004) 49 Can. Bus. L.J. 227 at 240-41.

[141] Before the present *Civil Code* (*supra* note 113) came into force in 1994, the territorial competence of the courts was based on rules drawn from the Quebec *Code of Civil Procedure*.

[142] Three provinces have enacted, but two have not yet brought into force, the Uniform Law Conference's *Uniform Court Jurisdiction and Proceedings Transfer Act*, which does put territorial jurisdiction on a statutory footing: S.B.C. 2003, c. 28 (not in force at the time of writing); *Court Jurisdiction and Proceedings Transfer Act* S.N.S. 2003 (2nd Sess.), c. 2 (not in force at the time of writing); S.S. 1997, c. C-41.1. The relationship between its provisions and the "real and substantial connection" test are explored by Stephen G.A. Pitel, "Enforcement of Foreign Judgments: Where *Morguard* Stands After *Beals*" (2004) 40 Can. Bus. L.J. 189 at 208-11.

court's authority. There is little to draw on when defining the territorial limits of that inherent authority other than the *Morguard*[143] "real and substantial connection" itself.[144]

For similar reasons, *Spar Aerospace*[145] was able to give a much clearer answer than the Ontario Court of Appeal to the question of how the constitutional limits on jurisdictional authority relate to the *forum non conveniens* doctrine.[146] The *Civil Code*[147] separates them very clearly. The opposite is true in the common law jurisdictions, where the territorial limits on judicial competence are left implicit and, as a consequence, the "real and substantial connection" test plays by default a more prominent role. Because the test, especially as applied by the Ontario Court of Appeal, is so policy-driven and reliant on the ideals of "order and fairness", it has tended to evolve into a rule that has many features in common with the discretion of *forum non conveniens*.

On the remaining question—how real and substantial does the connection have to be—the Supreme Court's answer in *Spar Aerospace* is: not very, as far as the rules for jurisdiction *simpliciter* go, at least if those rules are tempered by discretion. It is doubtful whether this aspect of the reasoning in *Spar Aerospace* will hold up over time. As already noted, this aspect of *Spar Aerospace* elides the distinction between rules and discretion by suggesting that a jurisdictional rule that is too broad, because it does not require a real and substantial connection, will still pass muster as long as the court has the discretion to decline jurisdiction if the connection is lacking.

VIII. *UNIFUND ASSURANCE CO. OF CANADA. V. INSURANCE CORPORATION OF BRITISH COLUMBIA*

In July 2003, the Court delivered judgment in *Unifund Assurance Co. v. I.C.B.C.*[148] The full significance of the decision remains unclear.[149] Its

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[143] *Supra* note 26.

[144] Even if the civil law treatment of jurisdiction influences the outcome of the "real and substantial connection" inquiry in practice, it is impossible to accept that the constitutional limits on jurisdiction are different in theory as between Quebec and other provinces: Black & Walker, *supra* note 127 at 196-98.

[145] *Supra* note 86.

[146] The court was, with respect, less clear in *Amchem*, *supra* note 43, where it equated the United States' "minimum contacts" due process doctrine with the Canadian idea of *forum conveniens*. The former is, in fact, the American equivalent to the Canadian concept of jurisdiction *simpliciter*, not *forum conveniens*, which American courts (in most states) also use and keep quite distinct from minimum contacts.

[147] *Supra* note 113.

[148] *Unifund*, *supra* note 33.

potential for transformation of the conflict of laws and of constitutional law is enormous. By using the *Morguard*[150] concept of a real and substantial connection to explain a disparate selection of cases, the Court laid a foundation for arguments that the distinct rules employed in those disparate cases should all be replaced by a "rule" consisting of the concept or standard of the real and substantial connection. Whether the Court intended such a result is speculative but we will not know unless and until it seizes an opportunity to tell us.[151]

Unifund[152] started with an automobile accident in British Columbia. A negligent British Columbia truck driver seriously injured two visiting Ontario residents. Litigation ensued in British Columbia and damages of approximately 2.5 million dollars were awarded to the Ontario plaintiffs. The Ontario plaintiffs were insured by Unifund Assurance, a Newfoundland company carrying on business in Ontario but not in British Columbia. As required by the Ontario *Insurance Act*,[153] Unifund paid the insureds' statutory accident benefits (SABs) in the amount of $750,000. The British Columbia *Insurance (Motor Vehicle) Act*[154] authorized ICBC to deduct the SABs already paid from the damage award payable and that was so ordered by the British Columbia Court of Appeal. To recover the $750,000 it had paid to its insureds, Unifund commenced an action against ICBC in Ontario, pursuant to the Ontario act's inter-insurer reimbursement provisions. The only cause of action Unifund relied on was that created by the Ontario statute. At trial, ICBC argued that Ontario had no jurisdiction or was *forum non conveniens*, and that, in any event, the matter was governed by British Columbia law and not by the law of Ontario.

The trial judge held Ontario to be *forum non conveniens*. The Ontario Court of Appeal held that the trial judge should have appointed an arbitrator

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[149] See Elizabeth Edinger & Vaughan Black, "A New Approach to Extraterritoriality: *Unifund Assurance Co. v. ICBC*" (2004) 40 Can. Bus. L.J. 161, for a more complete discussion.

[150] *Supra* note 26.

[151] The appeal in *British Columbia v. Imperial Tobacco Canada Ltd.* (2004), 239 D.L.R. (4th) 412, 29 B.C.L.R. (4th) 244, 2004 BCCA 269 was argued in June 2005. The British Columbia Court of Appeal held that *Churchill Falls*, *supra* note 63, was still the relevant and applicable case for determining the validity of a provincial statute attacked on grounds of extraterritoriality, but two of the three judges also discussed *Unifund*, *supra* note 33, and one of those two completed a full *Unifund* analysis as "an aid" to application of the pith and substance test set out in *Churchill Falls*.

[152] *Supra* note 33.

[153] R.S.O. 1990, c. I.8.

[154] R.S.B.C. 1996, c. 231.

pursuant to the act and let the arbitrator decide the issues. ICBC appealed again and persuaded the Court to state a constitutional question:

> Is s. 275 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, constitutionally inapplicable to the appellant because its application in the circumstances of this case would not accord with the territorial limits on provincial jurisdiction?[155]

A case involving issues of jurisdiction *simpliciter*, *forum non conveniens* and constitutional applicability offered the Court a rare opportunity to clarify the concept of the real and substantial connection. The opportunity was not taken. The concept is now more indeterminate than ever and is, possibly, poised to invade other areas of law.

The Court unanimously agreed that the issues should not have been remitted to an arbitrator, but beyond that issue there was little agreement. Even the reasons for agreeing that the arbitral appointment was an error differed. There were two equally effective reasons for holding that the Ontario Court of Appeal had erred. There would be no authority to appoint an arbitrator unless (1) the court had jurisdiction *simpliciter* and (2) the *Insurance Act* was constitutionally applicable. The dissent focussed on the first alternative, almost but not quite to the exclusion of the second, and the majority addressed only the second. Four judges[156] held the Ontario *Insurance Act* to be constitutionally inapplicable and did not address the jurisdictional issues and three judges,[157] in dissent, engaged in an extensive discussion of the jurisdictional issues and, almost as an afterthought, held the Ontario *Insurance Act* to be valid and applicable on the basis of the *Churchill Falls*[158] test and also held there to be a sufficient connection. But there was one common denominator. Both the majority and the dissent relied on *Morguard*. [159] It is the possible implications of that aspect of the case which makes *Unifund*[160] so disturbing.

The dissent employs and discusses the real and substantial connection test enunciated in *Morguard* in what must now be termed the "traditional" way as the standard governing jurisdiction *simpliciter*. *Spar Aerospace*[161] is discussed

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[155] *Unifund*, *supra* note 33 at para. 22.

[156] McLachlin C.J.C., Binnie, Iacobucci, and LeBel JJ.

[157] Bastarache, Major and Deschamps JJ.

[158] *Supra* note 63.

[159] *Supra* note 26.

[160] *Supra* note 33.

[161] *Supra* note 86.

with apparent approval,[162] thereby making clear its relevance to the common law and reinforcing the *Spar Aerospace*[163] version of a real and substantial connection in relation to jurisdiction *simpliciter* as a "less stringent" standard. But the dissent makes no comment on the relationship between the *Spar Aerospace* minimalist version of a real and substantial connection and the *Muscutt*[164] maximal version even though *Muscutt* is discussed and one aspect of it approved.

Because the dissent found that ICBC had attorned, there was no need to apply either the *Spar Aerospace* or the *Muscutt* versions of the real and substantial connection test to find jurisdiction *simpliciter*.

The majority, on the other hand, employed *Morguard*[165] in a wholly new context. They held that where the legislation of different provinces overlaps and conflicts, resolution of the conflict may be achieved only by application of the constitutional principles enunciated in *Morguard*. Those principles were converted to four propositions.

1) The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;
2) What constitutes a 'sufficient' connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;
3) The applicability of an [sic] otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements; and
4) The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.[166]

The majority applied each of those propositions to the facts in *Unifund* and held that there was not a sufficient connection for the Ontario *Insurance Act*[167]

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[162] It would have been surprising if it were not discussed with approval. The judgment there was unanimous. Nevertheless, it was a Quebec case dealing with the civil law so discussion of it in *Unifund*, *supra* note 33 at paras. 124-126, is a useful bridge for common law applications.

[163] *Supra* note 86.

[164] *Supra* note 91. The eight *Muscutt* factors (see above text accompanying notes 94-105) overlap almost completely with the factors ordinarily considered for *forum non conveniens*. Ontario courts following *Muscutt* must consider the factors to determine whether there is *a* real and substantial connection and then must reconsider to determine whether Ontario is has *the most* real and substantial connection.

[165] *Supra* note 26.

[166] *Unifund*, *supra* note 33 at para. 56.

to apply so as to provide Unifund with a statutory cause of action against the British Columbia insurance company in relation to an accident in British Columbia. In consequence, ICBC retained its windfall.

Even if the majority had done no more than has been related, *Unifund* would have been problematic in two ways. First, the indeterminate, flexible nature of the connection required and the unknown and flexible content of the principles of order and fairness[168] make prediction and hence planning virtually impossible. Second, while the overlap and conflict between the British Columbia and Ontario insurance statutes are not unique by any means, there is an enormous volume of statutory applicability cases for which this new use of *Morguard*[169] may be invoked and there is nothing in *Unifund*[170] to suggest that the decision is limited to interprovincial "paramountcy" contexts.

But the majority did more, and that more dramatically increased the problematic nature of the decision. The "more" was to discuss and explain a wide range of Canadian and Australian cases in terms of a real and substantial connection,[171] recognizing that " ... different degrees of connection to the enacting province may be required according to the subject matter of the dispute." Some of those cases were extraterritoriality validity cases and some were conflicts cases. The 64 million dollar question is whether the Court intended to replace specific conflicts and constitutional rules with the principles of order and fairness and a real and substantial connection and, even if it did not so intend, whether *Unifund* will be so used.

IX. *BEALS V. SALDANHA*

The latest application by the Supreme Court of Canada of the "real and substantial connection" test in a private international law context is found in *Beals v. Saldanha.*[172] It is the first case since *Morguard*[173] itself in which the court has dealt with the recognition and enforcement of a foreign judgment. The focus of the appeal was on three defences to enforcement, fraud, natural justice and public policy. The parties had agreed at trial and before the Ontario

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[167] *Supra* note 153.

[168] The majority thought "[i]t would be unwise in this case to embark on a general discussion of 'order and fairness'" (*Unifund*, *supra* note 33 at para. 81.).

[169] *Supra* note 26.

[170] *Supra* note 33 at para. 65.

[171] See *e.g. ibid.* at paras. 63 to 66.

[172] [2003] 3 S.C.R. 416, 234 D.L.R. (4th) 1, 2003 SCC 72 [*Beals*]. See Pitel, *supra* note 142; Goodman & Talpis, *supra* note 140.

[173] *Supra* note 26.

Court of Appeal that the foreign court, a state court in Florida, had a real and substantial connection with the action. The Supreme Court nevertheless invited argument and gave extensive reasons on a question that *Morguard*[174] had left open, namely, whether the "real and substantial connection" test for an extra-provincial court's jurisdiction extended to judgments from outside Canada. (Virtually everybody, including lower courts, had come to assume that it did.) In the course of its reasons the court also offered further analysis of what a "real and substantial connection" means.

The material facts were as follows: in 1981 two Ontario couples, the Thivys and the Saldanhas (the defendants), had invested US$4,000 in a lot in Florida, sight unseen. Without having visited the lot they sold it three years later for US$8,000 to residents of Florida, the Bealses (the plaintiffs),[175] having received the plaintiffs' unsolicited offer from a Florida real estate agent. The plaintiffs started to build a house on the lot but never finished it. They discovered that the lot they had built on was not the lot they had actually purchased from the defendants. They sued the defendants in state court in Florida, alleging breach of contract and fraud, and seeking rescission of the contract, damages "in excess of [US]$5,000", treble damages and other relief. They also sued the Florida real estate agent who had acted in the sale and a Florida title insurance company. The claims against the Florida defendants were settled. The claim against the defendants resulted in a judgment in default because the defendants had not filed a defence to the final version of the plaintiff's complaint. Ms. Thivy had filed a statement of defence to an earlier version of the complaint but she had not realized it was necessary under Florida law to refile the defence when the complaint was further amended in order to avoid judgment in default.

The defendants received notice that they had been held in default and that a hearing would be held at which a jury would assess the damages. They did not respond to the notice. The hearing was held in December 1991. The jury awarded the plaintiffs damages of US$210,000 in compensatory damages, US$50,000 in punitive damages, and post-judgment interest at 12 percent per annum. These damages were far higher than the defendants had thought they had risked by not participating in the proceedings. For the first time, they sought legal advice from an Ontario lawyer. The lawyer advised them that the Florida judgment could not be enforced in Ontario because they had not attorned to the Florida court's jurisdiction.[176] On the strength of this advice,

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[174] *Supra* note 26.

[175] Another couple were joint purchasers but later sold their interest to the Bealses.

[176] This advice would have been correct before *Morguard*, but that case had been on the books for about a year before the lawyer gave this advice. Although it had involved a Canadian judgment, its potential to apply to truly foreign judgments was clear.

they did not take steps in Florida to have the judgment set aside or to appeal it. In 1993 the plaintiffs commenced an action in Ontario to enforce the judgment. By the time of the hearing of that action in 1998, the judgment, with interest, amounted to CDN$800,000.

The trial judge held that the judgment was not enforceable because it was based on fraudulent evidence put before the Florida jury as to what the plaintiffs' damages were.[177] The Ontario Court of Appeal held the judgment was enforceable.[178] The Supreme Court of Canada, by a majority of 6 to 3, dismissed the appeal. The Thivys were bound by the judgment because the wife's filing a defence, albeit not to the final complaint, meant that she and her husband had attorned to the Florida court's jurisdiction in the eyes of the Ontario court.[179] All the defendants were bound because the Florida court had had jurisdiction based on a real and substantial connection between the litigation and the state. None of the defences raised against enforcement had been made out. The dissenting judges would have refused to enforce the judgment because the circumstances of the litigation amounted to a violation of natural justice.[180]

Although the details of the judges' treatment of the defences of fraud, natural justice and public policy are beyond the scope of this paper, the impact that adopting the "real and substantial connection" ground for jurisdiction has on the general approach to such defences is relevant to our topic. The defendants argued, among other points, that the greater readiness of Canadian courts to enforce default judgments from truly foreign countries, on the basis of *Morguard*'s[181] expanded notion of jurisdiction, made it necessary to subject such judgments to greater scrutiny than was the rule when the jurisdictional rules were more restrictive.[182] To adhere to the narrowly defined defences, while at the same time greatly broadening the range of jurisdictional connections, risked doing injustice to Canadian defendants who could not defend a lawsuit in a foreign country, or for good reason chose not to.[183]

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[177] *Beals v. Saldanha* (1998), 42 O.R. (3d) 127, 27 C.P.C. (4th) 144 (Gen. Div.).

[178] *Beals v. Saldanha* (2001), 54 O.R. (3d) 641, 202 D.L.R. (4th) 630 (C.A.).

[179] *Beals*, *supra* note 172 at paras. 7, 34.

[180] *Ibid.* at para. 125, Binnie J. and at para. 264, LeBel J.

[181] *Supra* note 26.

[182] *Beals*, *supra* note 172 at para. 31.

[183] One way to minimize this problem is to exclude the expanded notion of jurisdiction from cases in which this risk is relatively high. Jacob S. Ziegel, "Enforcement of Foreign Judgments in Canada, Unlevel Playing Fields, and *Beals v. Saldanha*: A Consumer Perspective" (2003) 38 Can. Bus. L.J. 294, suggests that *Morguard* should not apply where a foreign business or professional plaintiff is suing a Canadian defendant in connection with a consumer

The majority, whose judgment was given by Major J., acknowledged that the question was " ... whether those defences, when applied internationally, are able to strike the balance required by comity, the balance between order and fairness as well as the real and substantial connection, in respect of enforcing default judgments obtained in foreign courts."[184] The existing, narrow defences " ... are the most recognizable situations in which an injustice may arise but are not exhaustive."[185] Additional defences might be needed in "unusual situations", but no such situation arose in this case.[186] In other words, applying—and rejecting—the traditional defences led to a just result in this case. Binnie J., with Iacobucci J. concurring, dissented because he thought the traditional concept of natural justice had been violated in this case. It was therefore unnecessary to consider whether the defences needed to be re-examined.[187] LeBel J., who also dissented, accepted the defendants' argument that the defences of fraud and natural justice ought to be reformulated " ... to ensure an appropriate recalibration of the balance between respect for the finality of foreign judgments and protection of the rights of Canadian defendants."[188] He thought that the defence of natural justice, when viewed more broadly than heretofore, applied. He suggested, in obiter, that alongside fraud, natural justice and public policy it might be necessary to introduce a defence that enforcement of the judgment would "shock the conscience of Canadians" because it amounted to an abuse of the courts' process or bring the administration of justice in Canada into disrepute.[189]

Both the majority and the dissenting judges agreed that the *Morguard*[190] "real and substantial connection" test for determining whether a foreign court had jurisdiction applied in the international context as well as in the interprovincial one. Notwithstanding that the constitutional "full faith and credit" dimension of *Morguard* did not apply to the international setting, the need to modernize the old common law rules was just as relevant internationally as it was domestically. The judges were also unanimous that a

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transaction or some other matter that is unrelated to professional or business activities of the defendant.

[184] *Beals*, *supra* note 172 at para. 40.

[185] *Ibid.* at para. 41.

[186] *Ibid.* at para. 42.

[187] *Ibid.* at para. 86.

[188] *Ibid.* at para. 217.

[189] *Ibid.* at para. 218.

[190] *Supra* note 26.

real and substantial connection was established in this case, so that the defendants' concession on the issue of the Florida court's jurisdiction has been a proper one. However, they recognized, with varying degrees of emphasis, that what was an adequate connection in an intra-Canadian case was not necessarily adequate in an international one.

The majority commented in some detail on the exact operation of the "real and substantial connection" test for jurisdiction. Major J. said, "[a] substantial connection with the subject matter of the action will satisfy the real and substantial connection test even in the absence of such a connection with the defendant to the action."[191] At another point in his judgment he said,

> [t]he "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.[192]

The majority noted that the application of these principles " ... may give rise to different considerations internationally ... ",[193] but did not elaborate beyond an admonition that " ... any unfairness that may arise as a result of the broadened application of [the "real and substantial connection"] test be taken into account."[194]

Binnie J. stressed the "significant differences" between enforcement of a truly foreign judgment and a judgment from elsewhere in Canada, and said that "[w]e should not backtrack on the importance of that distinction."[195] He accepted that the " ... legal rules are not going to be identical ... " as between foreign judgments and Canadian judgments, but he seemed to regard the distinction as playing out mainly in the enhanced scope given to the defences to enforcement (a topic he did not explore further) rather than in the criteria for deciding what is a sufficient basis for jurisdiction.[196]

LeBel J. devoted the most attention to how the "real and substantial connection" test needed adjusting for international situations. Like Major J., he went into some detail on what the test means: "'The real and substantial

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[191] *Beals*, *supra* note 172 at para. 23.

[192] *Ibid.* at para. 32.

[193] *Ibid.* at para. 28.

[194] *Ibid.* at para. 30.

[195] *Ibid.* at para. 85.

[196] *Ibid.* at para. 86.

connection'" test is simply a way of asking whether it was appropriate for the originating forum to take jurisdiction over the matter."[197] He added, "[t]he test should ensure that, considering the totality of the connections between the forum and all aspects of the action, it is not unfair to expect the defendant to litigate in that forum."[198] LeBel J. made it clear that applying the test involves looking not just at objective connections, but also at the particular situation of the defendant, because " ... it is important to take into account the burdens that defending in the foreign forum would impose on a defendant, in order to determine whether it is reasonable to expect the defendant to accept them."[199] The justification for requiring the defendant to accept the foreign court's jurisdiction was strongest where the defendant was linked to the foreign country,[200]

> [b]ut there may be good reasons why jurisdiction should be recognized even where there is little or no connection to the defendant, particularly when other considerations, such as fairness to the plaintiff and the importance of administering the justice system in an efficient manner, are taken into account along with the interests of the defendant. ... In such circumstances, a test that recognizes jurisdiction based on a connection to the subject matter of the action seems better suited to identifying whether the forum is a reasonable place for the action to be heard.[201]

A key element in international cases was the potential hardship caused the defendant by having to litigate in a country that is not easy to get to or is under a legal system the defendant does not know. This was quite different from the intra-Canadian situation:

> [T]he hardship imposed on a defendant who has to appear in another province within the Canadian federation will generally be minimal and will usually be outweighed by a genuine connection between the forum and the defendant, the subject-matter of the action or the damages suffered — all of which are invoked as bases of jurisdiction in provincial service *ex juris* statutes and in the *Civil Code of Québec*, S.Q. 1991, c. 64, and each of which, as I noted in *Spar, supra*, at para. 56, appears to be an example of a real and substantial connection.[202]

In international cases, however, "[i]t should ... be part of the plaintiff's burden in establishing a *prima facie* case of enforceability to prove that the

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[197] *Ibid.* at para. 175.

[198] *Ibid.* at para. 182.

[199] *Ibid.* at para. 176.

[200] *Ibid.* at para. 178.

[201] *Ibid.* at para. 179.

[202] *Ibid.* at para. 187.

system from which the judgment came is reasonably fair."[203] Judges also had consider whether the foreign system, even if not unfair *per se*, " ... is different enough from ours that a Canadian defendant may encounter considerable difficulties understanding her rights and obligations and the steps she needs to take to defend herself."[204]

It has already been noted that all the judges agreed there was a real and substantial connection with Florida in this case. Aside from the fact that the plaintiffs lived there, the subject matter of the action was real estate in Florida and the defendants, having bought and resold land there, could hardly complain if they were sued there in respect of the sale.[205] Much of what they said about the "real and substantial connection" test is therefore technically obiter dicta, but it was clearly intended to amplify the test beyond the rather general terms in which *Morguard*[206] had postulated it. What emerges from the judges' comments, especially LeBel J.'s, is the degree to which the "real and substantial connection" test is a purposive one.[207] It is not a connecting factor in the traditional sense. It is an assessment, to repeat LeBel J.'s words (there is nothing in the majority's judgment to suggest disagreement with this), of whether under all the circumstances " ... it is not unfair to expect the defendant to litigate in that forum."[208]

The same three questions[209] asked earlier about *Spar Aerospace*[210] can be asked about *Beals*, this time in the context of foreign judgments. First, what is the relationship between the "real and substantial connection" test and the traditional basis for jurisdiction? Whereas *Spar Aerospace* (and LeBel J. in *Beals*)[211] suggested a presumptive deference to the grounds set out in the *Civil Code*,[212] the majority judgment in *Beals* implies that the old common law grounds for recognizing foreign judgments, except those based on consent, have no presumptive validity on their own; they are subsumed under the new test. Major J. said,

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[203] *Ibid.* at para. 195.

[204] *Ibid.* at para. 196.

[205] *Ibid.* at paras. 33-34, 84, 199.

[206] *Supra* note 26.

[207] LeBel J. uses the term, *Beals*, *supra* note 172 at paras. 135, 163.

[208] *Ibid.* at para. 182.

[209] See *Supra* notes 141-142 and accompanying text.

[210] *Supra* note 86.

[211] *Supra* note 202

[212] *Supra* note 113.

> [t]he presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties. Although such a connection is an important factor, parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court.[213]

Secondly, what is the relationship between the "real and substantial connection" test and *forum non conveniens*? Even LeBel J., who framed it explicitly as a fairness test, was at pains to note that "[w]hen the issue is jurisdiction ... the court should restrict itself to asking whether the forum was *a* reasonable place for the action to be heard, and should not inquire into whether another place would have been more reasonable."[214] In other words, it is not enough for the defendant to show that the foreign court was *forum non conveniens* by pointing to another country that would have been a more appropriate forum. The defendant must show that the foreign court was an unreasonable forum for the action in absolute terms. The distinction is easy to state; however, *Beals* seems to leave us with a "real and substantial connection" test that is just as purposive as the *forum non conveniens* test, even if the purposes are distinct. For this reason, the difference between the two tests may tend to blur in practice.

Thirdly, how real and substantial must the connection be? Even more than *Spar Aerospace*,[215] *Beals* shows that this question is inapposite because there is no scale on which the strength of the connection can be measured. It is not the degree of connection that matters, it is the kind of connection, and the requisite kind of connection depends on the nature of the case and the particular characteristics of the parties.

X. *SOCAN V. CANADIAN ASSOCIATION OF INTERNET PROVIDERS*

The most recent appearance of the "real and substantial connection" test in the Supreme Court of Canada is on yet another stage, namely, that of the territorial reach of Canadian copyright law. The plaintiff in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*[216] was a collective society that administers "performing rights" in Canada on behalf of Canadian member composers, authors and publishers, as well as foreign composers, authors and publishers who have authorized it to do so under a system of reciprocal agreements with

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[213] *Beals*, *supra* note 172 at para. 37.

[214] *Ibid.* at para. 184 [emphasis in original].

[215] *Supra* note 86.

[216] [2004] 2 S.C.R. 427, 240 D.L.R. (4th) 193, 2004 SCC 45 [*SOCAN*].

counterpart societies elsewhere. In 1995 the Society of Composers, Authors and Music Publishers of Canada (SOCAN) proposed to the Copyright Board that a new tariff be created which would be applicable to Internet telecommunications of any copyrighted music in SOCAN's repertoire. Communicating works to the public by telecommunication has, since 1988, been expressly included in the rights that belong exclusively to the copyright owner.[217] Those who would be liable to pay royalties, according to the proposal, included Internet service providers (ISPs), who make the Internet accessible to subscribers for the purposes of downloading and uploading material.

The Copyright Board, which has authority to give tariffs the force of law, decided that ISPs could not be made liable for royalties because the *Copyright Act* contains a specific exemption to the effect that those who are only a conduit for telecommunication, but who do not choose what is being communicated, are not themselves communicating works to the public by telecommunication.[218] Upon judicial review, both the Federal Court of Appeal and the Supreme Court of Canada upheld this part of the board's decision.[219] Tariff 22, in other words, could only impose a royalty obligation on those who actually caused copyrighted works to be communicated to the public over the Internet—the content providers, not the ISPs.[220]

The aspect of the decision that is relevant here is the analysis of how Tariff 22 could be made to apply territorially. Copyright law, like all major forms of intellectual property law, is a creation of statute and is strictly territorial in operation. Each country attaches copyright to works according to its own laws and provides remedies for infringement that takes place within the country. A series of international conventions have laid down minimum levels of copyright protection that each country agrees to give to works from abroad. The most important of these is the *Berne Convention*[221] of 1886, and the

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[217] *Copyright Act*, R.S.C. 1985, c. C-42, s. 3(1)(f).

[218] *Ibid.*, s. 2.4(1)(b).

[219] The Supreme Court varied the Federal Court of Appeal's decision by holding that the "caching" of material by ISPs (creating a copy of frequently accessed Internet material on their own server to improve speed) was part of the function of providing the means of transmission within s. 2.4(1)(b) and so did not expose the ISPs to liability either.

[220] The court recognized the possibility that an ISP which knew its facilities were being used to transmit works in breach of copyright, and failed to take reasonable steps to stop the infringement by the content provider, might be "authorizing" the infringement and so itself be an infringer on that account: *SOCAN*, *supra* note 216 at paras. 127-128.

[221] *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 1161 U.N.T.S. 3 (as revised on 24 July 1971 at Paris) [*Berne Convention*].

Copyright Act[222] reflects its rules, including its revisions up to the Paris Act of 1971.[223] Under it, states must extend the same rights to foreign copyright owners as they do to their own nationals, and those rights must conform to defined minimum standards.[224] The World Intellectual Property Organization (WIPO) has developed further conventions to deal with developments that the *Berne Convention* framework cannot accommodate. One of these is the *WIPO Copyright Treaty*[225] of 1996, to which the United States and Japan are so far the only parties from among the major industrialized countries. The *Berne Convention* includes a broadcasting right among the protected rights,[226] but the wording does not clearly embrace Internet transmission. The *WIPO Copyright Treaty* supplements the *Berne Convention* by providing copyright owners with a further right of "authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."[227]

The *Berne Convention* and the *Copyright Act* include precise rules on the connection a work must have with a treaty country in order to enjoy copyright protection in Canada.[228] Neither, however, includes rules to determine whether those rights have been infringed in a particular country, because most types of infringement are easy to localize. Infringements of the rights of reproduction, performance in public, or publication[229]take place in Canada if the reproduction, performance or publication occurs here. Radio and television, which were the reason for introducing a specific telecommunication right into the *Copyright Act*, are effectively localized according to whether their broadcasts are subject to Canadian regulatory authority. But the Internet

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[222] *Supra* note 217.

[223] See *ibid.* s. 2 (definition of "Berne Convention country").

[224] *Berne Convention*, *supra* note 221, art. 5.

[225] *WIPO Copyright Treaty*, 20 December 1996, 36 I.L.M. 65 (entered into force 6 March 2002).

[226] *Berne Convention*, *supra* note 221, art. 11*bis*(1)(i).

[227] *WIPO Copyright Treaty*, *supra* note 225, art. 8. An Agreed Statement concerning art. 8 says that "... the mere provision of physical facilities for enabling or making a communication" is not a communication for the purposes of the article (Agreed Statements concerning the *WIPO Copyright Treaty*, online, World Intellectual Property Organization <http://www.wipo.int/treaties/en/ip/wct/statements.html>).

[228] These are based mainly on the author being a national of a treaty country or the place of first publication of the work being in a treaty country: *Copyright Act*, *supra* note 217, s. 5(1); *Berne Convention*, *supra* note 221, arts. 3-4.

[229] *Copyright Act*, *ibid.* s. 3(1).

operates without geographical boundaries or government regulation of its content, and so localizing the telecommunication becomes a difficult issue. A Canadian computer user can download content from anywhere on the planet and can upload content so that it is available anywhere on the planet. The host server from which the content is downloaded or to which it is uploaded may be located anywhere, and Canadian host servers can be used by computer users in any country as the source or repository of content.

The Copyright Board decided that telecommunication of a work takes place at the location from which a transmission originates. Tariff 22 could therefore apply if infringing content originated from a server located in Canada. The Board left open for future determination whether infringement would also take place in Canada if material on a server outside Canada was aimed specifically at end users in Canada. The Federal Court of Appeal held that the Board was incorrect in relying on the location of the host server; a "real and substantial connection" test was a preferable basis for localizing the telecommunication. The Supreme Court of Canada agreed.

The issue was not one of private international law but of interpretation of the *Copyright Act*.[230] Parliament can choose to legislate extraterritorially but is presumed not to have done so, in accordance with the principle of territoriality, one of the basic premises of international law.[231] Nothing in the relevant statutory provisions indicated a legislative intention to extend Canadian copyright protection extraterritorially. The question, therefore, was how to define the telecommunication right so as to confine its operation to Canada. Binnie J., who on this point spoke for all the judges except LeBel J., explained why the "real and substantial connection" test was the answer. After citing *Morguard*[232] and the other cases down to *Beals*,[233] he said:

> From the outset, the real and substantial connection test has been viewed as an appropriate way to 'prevent overreaching ... and [to restrict] the exercise of jurisdiction over extraterritorial and transnational transactions' (La Forest J. in *Tolofson*,[234] at p. 1049). The test reflects the underlying reality ... and respect for the legitimate actions of other states inherent in the principle of international comity (*Tolofson*, at p. 1047). A real and substantial connection to Canada is sufficient to support the application of our *Copyright Act* to international Internet

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[230] *Supra* note 217.

[231] *SOCAN*, *supra* note 216 at paras. 54, 144.

[232] *Supra* note 26.

[233] *Supra* note 172.

[234] *Supra* note 71.

> transmissions in a way that will accord with international comity and be consistent with the objectives of order and fairness.[235]

Binnie J. canvassed various instances of international practice which, he said, confirmed the acceptability of using the place of reception, as well as the place of transmission, as a possible basis for applying national laws to infringements of copyright.[236] He also attached some weight to the Supreme Court's earlier decision that a criminal offence is committed in Canada if it has a real and substantial connection with the Canadian territory.[237] To say that Canada can choose to exercise copyright jurisdiction in respect of both transmissions originating Canada and transmissions received in Canada was therefore consistent with Canadian precedent and with national and international copyright practice.[238] He added:

> This conclusion does not, of course, imply imposition of automatic copyright liability on foreign content providers whose music is telecommunicated to a Canadian end user. Whether or not a real and substantial connection exists will turn on the facts of a particular transmission (*Braintech*).[239] It is unnecessary to say more on this point because the Canadian copyright liability of foreign content providers is not an issue that arises for determination in this appeal, although ... the Board itself intimated that where a foreign transmission is aimed at Canada, copyright liability might attach.[240]

It is true that this conclusion means that Internet transmissions might be subject to the copyright laws of both the state of transmission and the state of reception, but the answer to that lies in international agreements, " ... not in national courts straining to find some jurisdictional infirmity in either State."[241]

It will be up to SOCAN and, ultimately, the Copyright Board to work out just how the *Copyright Act*[242] is to be applied to Internet transmissions. There are, of course, enormous practical difficulties in imposing liability on content

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[235] *SOCAN*, *supra* note 216 at para. 60 [bracketed text in original].

[236] *Ibid.* at paras. 64-76.

[237] *Ibid.* at paras. 58, 76.

[238] *Ibid.* at para. 76.

[239] *Braintech*, *supra* note 42. There, a Texas judgment was not enforced because the passive posting by the defendant of material on an Internet bulletin board, which could have been viewed by users in Texas, was held not to be a real and substantial connection so as to give the Texas court jurisdiction in a libel proceeding based on that material.

[240] *SOCAN*, *supra* note 216 at para. 77 (pinpoint omitted).

[241] *Ibid.* at para. 78.

[242] *Supra* note 217.

providers who have no connection with Canada. Even aside from that, it is hard to imagine that the "real and substantial connection" test as such can be incorporated into the tariff. It would appear hopeless to enact a rule along the lines of: "A royalty shall be payable by any person, anywhere in the world, who posts copyright material on the Internet if its communication has a real and substantial connection with Canada". Such a rule would lack even the most rudimentary degree of certainty of application—which is, after all, a fundamental part of "order and fairness".

In the end, the situs of the host server may have to be the basic criterion after all. The *SOCAN*[243] decision goes to great trouble to tell the Copyright Board that the reach of the *Copyright Act*[244] is not limited to material communicated via host servers in Canada, but it does not compel the Copyright Board to go further, and any attempt to go further may encounter severe definitional and practical difficulties.[245] For this reason, LeBel J., who differed from the majority on this issue, thought that " ... importing the real and substantial connection test that was developed in a very different context is ... inappropriate to determine whether a communication occurred within Canada."[246] He thought the Board's criterion, based on the presence of the host server in Canada, " ... has the virtue of simplicity; it best accords with the principle of territoriality and harmonizes our copyright law with international treaty principles; and it diminishes privacy concerns."[247]

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[243] *SOCAN*, *supra* note 216.

[244] *Supra* note 217.

[245] Unless, of course, Parliament decides to remove the statutory exemption that (as confirmed by this case) ISPs currently enjoy. ISPs are the only entities located in Canada who might feasibly be made liable for communicating to Canadian users the infringing works uploaded to foreign servers by foreign content providers. A Draft Protocol on the interpretation of the WIPO Treaties 1996 provides that "making available" (see *supra* note 227 and accompanying text) takes place within a country if the act of transmission by the content provider takes place there, if the server is there, or if "the reception point or points at which an item of subject matter which is available on-line is or may be accessed" is there (J.A.L. Sterling, "Draft Protocol on Interpretation of the WIPO Treaties 1996" in *International Copyright Protection System* (9 February 2004) art. 2(c), online: Queen Mary Intellectual Property Research Institute <http://www.qmipri.org/piwt.html>). Even if a country can impose liability on the basis of "reception points" in its territory, this is of little use if the only party liable is the one who has made the material available (i.e. the content provider), who can be anywhere in the world. To impose liability on the basis of the "reception point", the service provider would have to be made liable, something that the Draft Protocol expressly contemplates (Sterling, *ibid.*, art. 2(b)).

[246] *SOCAN*, *supra* note 216 at para. 135.

[247] *Ibid.* at para. 156.

XI. CONCLUSION

A. PRIVATE INTERNATIONAL LAW

In our view, what the Supreme Court of Canada's jurisprudence on the "real and substantial connection" illustrates is that—in law as in most things—the perfect is the enemy of the good. To consider first its role in private international law, the "real and substantial connection" test was adopted in *Morguard*,[248] and has been used since, as a flexible, purposive test for the permissible extent of judicial jurisdiction, in the context of both foreign courts and our own courts. The problem is that the test aims to achieve comprehensiveness through almost total flexibility. The Supreme Court has not seen fit to reduce the relevant factual and policy considerations to a set of rules; instead, it has encapsulated the considerations in two verbal formulas, "real and substantial connection" and "order and fairness". The content of these formulae must be supplied by a judge's sense of where, under all the circumstances, it is fair to ask people to litigate. The Court may have assumed that precedents would gradually accumulate which would make the application of the test more certain, but after 15 years there is little evidence that this is happening.

What distinguishes the "real and substantial connection" test for jurisdiction from a concept like negligence or foreseeability is that it lacks (for want of a better term) a clear psychological standpoint. Asking what a reasonable person would do in these circumstances, or what a reasonable person could foresee, requires the judge to put her or himself in the position of the mythical, but understandable, reasonable person and assess the facts from that point of view. The "real and substantial connection" test, however, requires the judge to adopt the view, not of a hypothetical person viewing the facts, but of an administrator whose mandate is to balance fairly the interests of the parties and legal systems involved. In our view, this is a judgment more suited to final courts of appeal than to motions or trial judges. As the Supreme Court itself said in *Tolofson*, the underlying principles of private international law are order and fairness, but order comes first.[249] When it comes to questions of jurisdiction, in the contexts of both domestic and foreign judgments, it is often more important that the system should give a predictable answer than that it should give an ideal answer. Predictable answers are what the "real and substantial connection" test is least good at.

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[248] *Supra* note 26.

[249] *Supra* note 71 at para. 56.

Morguard,[250] *Amchem*,[251] *Spar Aerospace*,[252] and *Beals*[253] were all concerned in different ways with the role that the "real and substantial connection" idea plays in jurisdiction. *Morguard* told us that it was a matter of properly restrained jurisdiction, compatible with our federal system. *Amchem* told us that if a foreign court conformed with the Canadian sense of properly restrained jurisdiction, a Canadian court should not attempt to interfere by means of an anti-suit injunction. *Spar Aerospace* told us that, yes, a real and substantial connection was essential to support a province's jurisdictional practices, but that maybe this did not matter in international cases (however defined), and in any event, provinces that spell their jurisdictional rules out clearly will be left fairly free to determine what kind of connection is sufficient. *Beals* confirmed that the "real and substantial connection" test for foreign judgments was not tied to Canadian constitutional requirements, so that it does apply to international judgments, and that if this causes problems they can be addressed by expanding the role of the defences to enforcing foreign judgments. Each Supreme Court decision has shone more light on the complexity of the situation without in any way reducing that complexity. The nature of the "real and substantial connection" test and its relationship to traditional jurisdictional rules, *forum non conveniens*, and the defences to enforcing foreign judgments are all just as open to debate now as they were immediately after *Morguard*.

The one area of private international law in which this kind of criterion had previously shown itself to be useful, choice of law, is the one area where the Supreme Court, in *Tolofson*,[254] has so far rejected it. *SOCAN*[255] can be considered a unilateral choice of law case because it decided when the Canadian law of copyright could be made to apply to international Internet transmissions. However, the "real and substantial connection" test here functioned, not as a rule, but as an expression of the maximum reach of the *Copyright Act*[256] and, as already suggested, will have to be reduced to rules that Canadian and foreign Internet users can understand and use to plan their activities.

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[250] *Supra* note 26.

[251] *Supra* note 43.

[252] *Supra* note 86.

[253] *Beals*, *supra* note 172.

[254] *Supra* note 71.

[255] *SOCAN*, *supra* note 216.

[256] *Supra* note 217.

The structure of the "real and substantial connection" test means that it is hard to make simpler or more concrete. How, then, can we develop greater certainty in the rules for the enforcement of foreign judgments and the rules for the jurisdiction of Canadian courts? We suggest that the answer lies either in legislation or in the development of judge-made categories of acceptable jurisdictional grounds. The great virtue of the "real and substantial connection" test is that it identifies the nub of the legal problem, but its great drawback is that it telescopes together all the possible issues within that problem. When a decision has to be made, these issues are all potentially in play every time. This makes the test poorly suited to be a practical instrument for decision making. It needs to be supplemented, if not replaced, by rules that can more readily be applied in concrete situations.

Some lessons can be learned from the experience that Canadian law has had with the notion of proximity in the tort of negligence. Over a long series of cases the Supreme Court of Canada has affirmed that, in the absence of clear precedent, the first step in deciding whether a duty of care is owed is to decide whether there is a relationship of proximity between defendant and plaintiff. This is very similar to the "real and substantial connection" idea. The court, however, has had constant difficulty in articulating just what proximity means. It has now admitted that, in and of itself, proximity has little or no fixed content. In the latest case in which it dealt with the issue, McLachlin C.J.C. and Major J. said:

> [R]easonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.[257]

"Proximity", in other words, is not a legal principle. It does not have what it takes to be a principle, namely, the ability to guide decisions along reasonably predictable lines. Rather, proximity is a rubric for a set of factual categories in which the courts have imposed a duty of care. The categories are where the business end of the law is to be found.

So far, the Supreme Court has deployed the "real and substantial connection" test as if it were a principle. We suggest that it is not a principle

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[257] *Cooper v. Hobart*, [2001] 3 S.C.R. 537 at para. 31, 206 D.L.R. (4th) 193, 2001 SCC 79. The ins and outs of the court's approach to proximity are traced by Lewis Klar, "Foreseeability, Proximity and Policy", Case Comment on *Cooper v. Hobart, Edward v. Law Society of Upper Canada* (2002) 25 Advocates' Q. 360.

in itself but, like proximity, a collective expression for a set of principles, the actual rules of decision. At the moment, the specific rules are hardly more than an array of single instances. The different categories—the working rules—remain to be distilled. Of course, the law may carry on as it does now, sticking with an all-embracing, structureless concept and relying on the good sense of the judge to get to the right result. But litigants and first instance judges would probably welcome some firmer guidance, whether from appellate courts or the legislature, than the law currently provides.

B. CONSTITUTIONAL LAW

There is no doubt that the combined effect of *Morguard*[258] and *Hunt*[259] was to create justiciable constitutional principles. The cases were cited in the *Remuneration Reference*[260] as examples of the gap-filling properties of the Preamble to the *Constitution Act, 1867*[261] in relation to the division of powers.

> One example where the Court has inferred a fundamental constitutional rule which is not found in express terms in the Constitution is the doctrine of full faith and credit. Under this doctrine, the courts of one province are under a constitutional obligation to recognize the decisions of the courts of another province... .[262]

No mention was made in the *Remuneration Reference* of the correlative due process principle governing assumption of jurisdiction, developed in *Morguard*, but there is no doubt that it too resides somewhere in the Preamble, like the full faith and credit clause which spawned it and like the principle of judicial independence and its progeny the compensation committees, created by the Court in the *Remuneration Reference* in reliance on cases like *Morguard* and *Hunt*.

The original *Morguard* principles and the recent expanded use of them in *Unifund*[263] have opened up constitutional law in ways probably not foreseen by the Court in 1990 when it just wanted to open up the conflicts rules for recognition and enforcement a little bit.

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[258] *Supra* note 26.

[259] *Supra* note 27.

[260] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577 [*Remuneration Reference*].

[261] *Supra* note 126.

[262] *Remuneration Reference*, *supra* note 260 at para. 97.

[263] *Supra* note 33.

Fifteen years after *Morguard*,[264] confusion still reigns in relation to the constitutional validity of service *ex juris* rules. No court has dealt satisfactorily and completely with the constitutional challenges which have been floated. Such rules are undoubtedly legislation in relation to s. 92(14), "Administration of Justice in the Province".[265] And they are not immune from constitutional challenge because they are procedural.[266] The abolition in the mid-70s of the traditional *ex parte* proceeding in which plaintiffs sought leave to issue a writ to be served *ex juris*, and the replacement of it by a without leave process, have effectively transformed the old rules, however they might have been characterized, into jurisdictional rules. Two alternative readings of *Morguard* present themselves. Either each circumstance authorizing service *ex juris* must describe a connection satisfying *Morguard* in the abstract, or it is the whole process of determining jurisdiction involving application of both rules and discretion which must be measured against *Morguard*. The courts have been operating on the first alternative but have been assuming that they can make the rule valid by the way in which they apply it. That has never been the law. An invalid law cannot be made valid by its application even though, conversely, a particular application of a valid rule may be constitutionally impermissible.

If *Spar Aerospace*[267] is taken seriously by the common law constitutional world, this particular uncertainty may finally be resolved. *Spar Aerospace* held certain grounds for service *ex juris* in the *Civil Code*[268] to constitute real and substantial connections. Those grounds are virtually identical to some of the circumstances described in the common law provinces as circumstances in which a writ may be served *ex juris* without leave. If they constitute real and substantial connections for Quebec, they must also constitute real and substantial connections in the common law provinces, and so must be constitutionally valid.

Spar Aerospace highlights the flexibility of the concept. That flexibility is both its strength and its weakness. A real and substantial connection for purposes of assumption of jurisdiction need not require the same degree of proximity as that required for recognition and enforcement of a judgment. But use of the same phrase lulls one into thinking the tests will be identical.

The provincial rules for recognition and enforcement are also subject to constitutional scrutiny. The fact that they are still primarily common law rules

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[264] *Supra* note 26.

[265] *Constitution Act, 1867*, *supra* note 126 at s. 92(14).

[266] Though the Ontario Court of Appeal suggested they were in *Muscutt*, *supra* note 91.

[267] *Supra* note 86.

[268] *Supra* note 113.

will not protect them. If challenged pursuant to *Morguard*,[269] will the Court apply the *Spar Aerospace*[270] degree of proximity or something closer to *Amchem*?[271] Has *Beals*[272] modified the common law rules for recognition and enforcement so that they already comply with *Morguard*?

Unifund[273] presents a whole new realm of uncertainties. Even if the use of the real and substantial connection is confined to the single circumstance of conflicting overlapping provincial statutes, the Court expressly declared it to constitute a variable standard of proximity and offered no clues as to when and why the standard might shift. Everything is relative. And then there is the uncertainty whether, on the basis of the majority musings in *Unifund*, the real and substantial test will be extended to questions of applicability of provincial statutes generally and to questions of territorial validity.

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[269] *Supra* note 26.

[270] *Supra* note 86.

[271] *Supra* note 43.

[272] *Beals*, *supra* note 172.

[273] *Supra* note 33.