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Four Flaws: Reflections on the Canadian Approach to Private International Law

NATHAN HUME

Introduction

In *Tolofson v. Jensen*, Justice Gerard La Forest wrote for the Supreme Court of Canada that "[t]he niceties of the technical mechanisms by which judges arrive at decisions are far less important than the underlying policy considerations that give them life."[1] This article responds to this quotation by criticizing the line of jurisprudence of which *Tolofson* forms an integral part — the Court's judgments on private international law since its momentous decision in *Morguard Investments Ltd. v. De Savoye*.[2] In the past sixteen years, the Court has significantly altered the landscape of private international law in Canada. While some familiar features remain, and although this process has been described as the "constitutionalization" of private international law, in many ways this subject has become increasingly foreign and confusing.[3] This article aims to demonstrate that the Court's *Morguard*-era jurisprudence is flawed, and argues that its problems derive largely from the hubris expressed by La Forest J.'s claim. Focusing on elusive notions of order, fairness, comity, and, most recently, efficiency, the Court has failed to maintain the clarity and rigour ordinarily expected of our highest court. This article emphasizes the Court's language and reasoning, rather than the results reached, to identify the most troubling elements of these decisions and suggesting new ways to approach, understand, and even remedy them.

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1 *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at para. 68 [*Tolofson*].

2 *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 [*Morguard*].

3 Elizabeth Edinger, "The Constitutionalization of the Conflict of Laws" (1995) 25 Can. Bus. L.J. 38.

To this end, this article engages four major problems with the Court's new "Canadian approach to private international law."[4] First, the Court has failed to adopt a clear and consistent vocabulary in which to discuss the conceptual and doctrinal issues addressed in these cases. Rather than obscure a careful analysis, its shifting descriptions both expose and perpetuate misunderstandings in this area of law. Second, the Court has peppered its decisions with references to influential judgments of the United States Supreme Court, even going so far as to adopt the language of "full faith and credit" from that country's Constitution, without fully considering the context of such jurisprudence and the implications of importing it to Canada. Concise and rhetorically appealing, when severed from the conceptual approach employed in the United States, this phrase supports a deferential dynamic in private international law that conflicts with understandings of Canadian federalism that emphasize provincial interests and diversity. Third, despite its purported domestic provenance, the Court has employed a highly stylized vision of the contemporary international order as the primary basis for revising the traditional rules of private international law. Its emphasis on international economic integration marginalizes other aspects of the contemporary international arena and does not align with many elements of the Canadian federation. Finally, by selecting only those characteristics of the federal system that resonate with its streamlined understanding of the international order, the Court has constructed a skeletal model of the Canadian federal system that lacks an independent role within its analysis of private international law, is inconsistent with established jurisprudence, and has begun to exert a perplexing influence on the evolution of Canadian federalism.

Taken together, these criticisms demonstrate that the "constitutionalization" of private international law has weakened provincial legislative powers in a manner that has undermined constitutional text and eroded the quality of the Court's decisions. Further, they prove that this process is not inevitable, that the Canadian Constitution contains resources to slow or even halt this trend, and that the Court is capable of remedying the technical problems presented by its judgments. The doctrinal and conceptual changes instigated by the Court are neither the natural results of trends in international

[4] *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at para. 55 [*Amchem*].

economic relations nor the necessary expressions of the Canadian Constitution. They are the products of a particular vision of, and approach to, international law and should be analyzed and engaged as such.

This article adopts a critical perspective on this approach to demonstrate the irony of the quotation from La Forest J. Despite his assertion, technical niceties are no less important than policy considerations — the former are the means by which we determine and revise the meaning of the latter, and they are paramount in achieving general objectives, such as order and fairness, however defined. The second part of this article describes the analytical method employed in this article, which emphasizes close textual scrutiny to distinguish the Court's rhetoric from its reasoning. The third part introduces the relevant case law to establish context and support for the criticisms. Finally, the fourth part analyzes in greater detail the four flaws that I introduce in this article and points towards potential remedies.

Method

Three elements inform the method used in this article. First, I focus almost exclusively on decisions of the Supreme Court of Canada. Second, I read these judgments closely and emphasize the strategies actually employed by the Court rather than those it purports to employ. Finally, while this article is not primarily an exercise in comparative analysis, I draw on American case law and academic commentary to explain and complement the Court's use of such resources.

To concentrate on the Court's recent judgments on private international law strikes a balance between conciseness and comprehensiveness. Although other Canadian courts have made interesting and influential decisions concerning some issues addressed in this article, the Court occupies a unique role atop Canada's judicial hierarchy and has played a singular role in developing this area of law.[5] Lower courts have engaged and applied the Court's new vision for private international law, but the Court has made the changes that are the subject of this analysis and now it has developed a body of case law sufficiently large and rich to bear comprehensive critique.

[5] See, for example, *Braintech v. Kostiuk* (1999), 171 D.L.R. (4th) 46; and *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577.

I train this critique on the language and arguments used by the Court because a strategy of close reading and careful analysis reveals the lacunae, ambiguities, and assumptions latent in the Court's reasoning. Such a strategy entails taking the text seriously but not too seriously. In these decisions, the Court often has relied on rhetoric that fails to align with its reasoning. By concentrating on the precise words employed by the Court, my analysis seeks to isolate the problematic aspects of the Court's new approach from those that can be rehabilitated. In addition, an emphasis on the technical aspects of its vocabulary and argumentative strategies will generate a more helpful understanding of the policy considerations that the Court is trying to promote.

Finally, the Court's own approach to private international law necessitates some recourse to comparative materials. Its willingness to cite judgments of the United States Supreme Court, often with little explanation of the context, is a striking element of its recent jurisprudence. In this area, the Court's most notorious import is the notion of "full faith and credit" from the Full Faith and Credit Clause of the American Constitution.[6] The manner in which the Court has embraced the language of full faith and credit has introduced significant and systemic weaknesses to Canadian private international law. A closer consideration of how this constitutional provision has been interpreted and employed in the United States will engage whether and how full faith and credit might operate in Canada and, more generally, will demonstrate the importance of careful analysis when embarking on comparative constitutional expeditions.

These three elements will frame a novel and hopefully useful perspective on the recent changes in Canadian private international law. This critique emerges from the Court's own judgments and emphasizes the provisional nature of the Court's new approach to private international law. It involves more than a fluent summary of the new approach or a simple reconciliation of the holdings in the ten cases discussed. Rather, by bearing down on the metaphors, analogies, and patterns of reasoning utilized by the Court, it provides a more robust, although less flattering, model of the Court's new approach than those presently available. Edifying discussions of these cases abound. Peter Hogg delivers a brief overview of their most evident constitutional implications, while other authors, including John Swan, Elizabeth Edinger, and Vaughan Black, offer

6 Constitution of the United States of America, Article IV.1.

more detailed analyses.[7] Although distinct, these prior efforts have sought to identify and protect some coherent core within the new approach to private international law. They have attempted to reconcile the various elements of the Court's decisions and rehabilitate or preserve the fading vision unveiled in *Morguard*. In contrast, this article argues that their diverse interpretations merely provide multiple perspectives on a mirage.

As they may appear to share some characteristics, it is valuable at this stage to distinguish my analysis from that of Robert Wai in his article entitled "In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law."[8] Analyzing the first four decisions in which the Court developed its new approach, Wai makes an argument that may seem to resonate with my criticism of the Court's inadequate international vision. He claims that the Court, under the guidance of La Forest J., based its initial reforms of Canadian private international law on a particular ideology of liberal internationalism premised on the three policy objectives of international commerce, inter-state cooperation, and cosmopolitan fairness.[9] However, despite any apparent similarities, our methods and assumptions produce divergent readings of the relevant cases.

Although Wai professes to focus on the language used by the Court in the first four judgments composing the new approach, in practice, he largely refrains from closely scrutinizing their text. This tactic enables him to promote his underlying assumption — that

7 John Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985) 63(2) Can. Bar Rev. 271; H. Patrick Glenn, "Foreign Judgments, the Common Law and the Constitution: *De Savoye v. Morguard Investments Ltd.*" (1992) 37 McGill L.J. 537; John Swan, "Federalism and the Conflict of Laws: The Curious Position of the Supreme Court of Canada" (1995) 46 South Carolina L. Rev. 923; Edinger, *supra* note 3; Janet Walker, *The Constitution of Canada and the Conflict of Laws* (Ph.d. dissertation, Worcester College, CambridgeUniversity, 2001); Robert Wai, "In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law" (2001) 39 Can. Y.B. Int'l L. 117; Elizabeth Edinger and Vaughan Black, "A New Approach to Extraterritoriality: *Unifund Assurance Co. v. ICBC*" (2003) 40(2) Can. Bus. L.J. 161; Stephen G.A. Pitel, "Enforcement of Foreign Judgments: Where *Morguard* Stands after *Beals*" (2003) 40(2) Can. Bus. L.J. 189; Joy Goodman and Jeffrey A. Tapis, "*Beals v. Saldhana* and the Enforcement of Foreign Judgments in Canada" (2003) 40(2) Can. Bus. L.J. 227; and Peter Hogg, *The Constitutional Law of Canada* (Scarborough: Carswell, 2004), Chapter 13.

8 Wai, *supra* note 7 at 117.

9 *Ibid.* at 207.

the Court's transformation of private international law was informed by a coherent vision, the contents of which Wai derives not from the Court's own words but, rather, from a theoretical notion of international "consciousness."[10] In contrast, this article's careful consideration of the language employed by the Court dispels any such assumption of foundational coherence and exposes Wai's use of external historical and theoretical materials as a means to patch the cracks in the Court's understanding of private international law and the international system more generally. Wai wrote his article in 2001, so he did not have the benefit of the Court's six more recent decisions. Nonetheless, the intervening years have not altered the fate of his analysis because the obscurity and ambiguity that characterize the new approach have been present since *Morguard,* which is the first case in this line.

In addition, this article is both less and more ambitious than Wai's article. It is less ambitious in that it elucidates relatively little positive content for the internationalist vision that appears to motivate the Court. The Court's language alone reveals little about the assumptions and beliefs that have inspired this vision. It is more ambitious because, rather than seek to reinforce the new approach with external materials, this article challenges the Court's analyses from within, by turning the text of its judgments against itself and identifying internal inconsistencies alongside more workable elements.

Rather than ignore problems in pursuit of coherence, my approach exploits doctrinal ambiguities and linguistic inconsistencies to identify the threats, as well as the opportunities, that they introduce. A principled approach can prove helpful in dissolving the problems presented by anachronistic and formalistic analyses.[11] However, by failing to provide an explicit, consistent, and coherent account of the principles motivating its new approach to private international law, the Court risks plunging this entire area of law into speculation, which likely would scuttle the Court's own objectives. Further, the Court's new approach presents more profound questions of legitimacy than does its principled approach to hearsay evidence. Rather than simply revitalizing the common law, which remains subject to the discipline of Parliament and the provincial

[10] *Ibid.* at 143.

[11] See, for example, the Court's recent jurisprudence on the principled approach to the common law rule against hearsay evidence. *R. v. Khan,* [1990] 2 S.C.R. 531; and *R. v. Starr,* [2000] 2 S.C.R. 144.

legislatures, the Court has been revising the conceptual basis upon which the Canadian Constitution, which simultaneously empowers and restrains those institutions, must be understood. By retreating from the textual resources of the Constitution, the Court has imperilled the legitimacy of its new approach by placing it prior to interpretation and insulating it from broad public debate. This critique posits that the major risk presented by these decisions stems not from the lower courts and academic commentators who struggle to make sense of the emerging jurisprudence but, rather, from the Court's continuing failure to provide a clear and consistent explanation of the concepts and principles influencing those decisions.[12]

A Brief History of the Canadian Approach to Private International Law

This section introduces, in chronological order, the facts and general characteristics of each of the ten cases that compose the Court's new approach to private international law. These opinions do not exhaust the Court's post-*Morguard* judgments that involve these issues. However, they have engendered the most significant changes in relevant law and rhetoric. In addition, the opinions not considered directly are either addressed in the analysis of another case or concern matters peripheral to those addressed herein.[13]

MORGUARD INVESTMENTS LTD. V. DE SAVOYE

Although the implications of the four flaws have become more apparent in recent cases, the problems of the new approach were present in *Morguard,* the Court's first decision in this line of cases. *Morguard* involved a dispute over the enforcement in British Columbia of an Alberta default judgment. The defendant was served notice of suit by letter in British Columbia in accordance with the

12 Compare with Wai, *supra* note 7 at 206.

13 See, for example, *Global Securities Corp. v. British Columbia (Securities Commission),* [2000] 1 S.C.R. 494 [*Global Securities*], which is discussed later in this article; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of),* [2001] 3 S.C.R. 907 [*Holt Cargo*] (the properly engaged *in rem* maritime jurisdiction of the Federal Court of Canada is not disrupted by foreign bankruptcy proceedings or orders of a Canadian bankruptcy court. Under Canadian bankruptcy law, the interest of foreign trustees in bankruptcy is subject to the valid interests of secured creditors). *Antwerp Bulkcarriers, N.V. (Re),* [2001] 3 S.C.R. 951 [*Antwerp Bulkcarriers*] (the properly engaged *in rem* maritime jurisdiction of the Federal Court of Canada is not disrupted by foreign bankruptcy proceedings or orders of a Canadian bankruptcy court).

Alberta rules for service *ex juris,* did not respond, and resisted enforcement of the resulting judgment.[14] The Court reviewed the traditional English common law rules governing the recognition and enforcement of foreign judgments, which required that the defendant either be present in the foreign forum at the time of the judgment or agree to the foreign court's exercise of jurisdiction, and rejected them with strategic moves that have since characterized the Canadian approach to private international law.

Throughout *Morguard,* the Court relied upon alluring, but ambiguous, language by introducing comity, order, and fairness as the conceptual foundation of its new approach to private international law. The Court also displayed its willingness to embrace American jurisprudence, as it not only relied upon a nineteenth-century decision of the United States Supreme Court for its preferred definition of comity but also imported the notion of "full faith and credit" from that country's Constitution to Canadian jurisprudence. In addition, the Court unveiled both its distinctive vision of the international realm and its simplistic, structural model of the Canadian federal system. Drawing upon these manoeuvres and certain previous, influential decisions, it concluded that a court must recognize and enforce a judgment issued by the court of another province that had a real and substantial connection with the dispute.[15] The real and substantial connection test operates to determine both whether a provincial court has jurisdiction *simpliciter* — adjudicative jurisdiction over the initial dispute — and whether a subsequent provincial court must enforce the resulting judgment.

Morguard expressly was not articulated in constitutional terms. This is not surprising since the recognition and enforcement of judgments had never before borne constitutional overtones in Canada.[16] By noting the lack of argument on this point in *Morguard,* the Court appears to have flagged it for consideration in future cases, where the constitutional implications of the new approach were paramount. Although this initial investigation of *Morguard* has been brief, it is discussed frequently later in this article, as subsequent decisions rely heavily upon it. However, before revisiting the recognition and enforcement of judgments, the Court turned its

[14] *Morguard, supra* note 2 at para. 2–4.

[15] *Ibid.* at para. 45–50; *Moran v. Pyle National (Can.) Ltd.,* [1975] 1 S.C.R. 393 at para. 28; and *R. v. Libman,* [1985] 2 S.C.R. 178 at para. 74 [*Libman*].

[16] *Morguard, supra* note 2 at para. 52

attention to another area of private international law — *forum non conveniens* and the anti-suit injunction.

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

Amchem Products Inc. v. British Columbia (Workers' Compensation Board) involved cross-border procedural wrangling between defendant companies from the United States, the United Kingdom, and Québec and a similarly sprawling group of plaintiffs.[17] The defendants, none of which had connections with British Columbia, but most of which carried on business in Texas, were companies engaged in the production and sale of asbestos products. The plaintiffs, the majority of whose claims had been subrogated to the British Columbia Workers' Compensation Board, had sued the defendants in Texas state court for allegedly tortious conduct in the United States. The defendants applied in the Supreme Court of British Columbia for an anti-suit injunction to restrain the Workers' Compensation Board from continuing the Texas proceedings, and the court granted the injunction on the condition that they attorn to the jurisdiction of BC courts if the plaintiffs brought new claims in the province.[18] On appeal, the Supreme Court of Canada articulated new tests both for motions of *forum non conveniens* and for anti-suit injunctions and held that the trial judge erred by granting the anti-suit injunction in this case. Framing its analysis, the Court took judicial notice of the fact that, in recent decades, "the business of litigation, like commerce itself, has become increasingly international."[19] The Court also expressed concern with the practical implications of modern commerce, in particular, the difficulty of identifying a single forum with the strongest connection to a dispute.[20]

The Court's new test for *forum non conveniens* provides an apparently simple solution to this complex problem — the party applying for a motion of *forum non conveniens* must prove that another forum is clearly more appropriate than the Canadian forum selected.[21] The relative appropriateness of different fora depends on

17 *Amchem, supra* note 4.

18 *Ibid.* at paras. 3–10.

19 *Ibid.* at para. 25.

20 *Ibid.* at paras. 25–26.

21 *Ibid.* at para. 37.

the factors that connect them with the case, such as the location of witnesses, the law governing any relevant transactions, the places where the parties reside or carry on business, and whether either party has a reasonable expectation in the juridical advantages provided by a particular forum.[22] The simplicity of this approach is belied both by the lack of guidance on how to evaluate these factors and by the final factor itself, as the Court held that a party has reasonable expectations in the juridical advantages provided by a forum where its case has a real and substantial connection with that forum.[23] In effect, the test asks lower courts to determine the connection between a case and a forum by looking to the connection between the forum and the case.

Whereas *forum non conveniens* involves an act of deference by the forum, an anti-suit injunction restricts litigation in a foreign jurisdiction. It impinges on the autonomy of a foreign court, even though it operates by binding a litigant *in personam*.[24] To discipline the use of this more intrusive measure, the Court articulated a two-part test. First, the party seeking an anti-suit injunction must prove that another forum is clearly more appropriate than the foreign forum in which the initial litigation has been brought. If the foreign court could reasonably have decided, under the Canadian doctrine of *forum non conveniens* described earlier, that no alternative forum was clearly more appropriate, then the Canadian court should deny the application for the anti-suit injunction.[25] If not, then the Canadian court must determine whether, in light of the contacts between the other party, the facts, and the foreign forum, it would be unjust to deprive that party of legitimate juridical or other advantages available in that forum.[26] To ascertain the injustice of such deprivation, the judge must weigh the applicant's loss if the injunction is denied against the other party's loss if the injunction is awarded. Again, to identify each party's legitimate advantages, the judge must consider their reasonable expectations of litigating in the competing fora, which arise from the connections between those jurisdictions, the subject matter of the litigation, and the parties.[27]

[22] *Ibid.* at para. 33.

[23] *Ibid.* at para. 37.

[24] *Ibid.* at paras. 28 and 67.

[25] *Ibid.* at para. 58.

[26] *Ibid.* at para. 59.

[27] *Ibid.* at para. 60.

Amchem is the first case in which the Court explicitly recognized that it was fashioning a distinctive understanding of these issues. To craft this test for anti-suit injunctions, the Court adapted principles enunciated by the Judicial Committee of the Privy Council in *SNI Aérospatiale v. Lee Kui Jak,* but Justice John Sopinka counselled that, in applying such principles, the Court must maintain "due regard for the Canadian approach to private international law."[28] He cited La Forest J.'s opinion in *Morguard* as exemplifying this approach, since it "stressed the role of comity and the need to adjust its content in light of the changing world order."[29] This description posits comity and private international law as distinct from the evolving international order, the empirical changes of which demand responses from the courts. The Canadian approach to private international law does not recognize a reciprocal relationship between the realities of the "international order" and the doctrines employed by national legal systems — causality flows in only one direction. Considered in full, the Court's decision in *Amchem* reveals its intent to rework the entire realm of private international law, while entrenching some of the analytical techniques that it has used to achieve this goal.

HUNT V. T. & N. PLC

Decided just months after *Amchem, Hunt v. T. & N. plc* gave the Court an opportunity to revisit the constitutional issues unresolved by *Morguard.*[30] The plaintiff in *Hunt* sought the production of documents located in Québec for use in his tort action against the defendant companies in the Supreme Court of British Columbia. The defendants refused on the ground that the Québec *Business Concerns Records Act* prevented such disclosure, and the BC courts denied the plaintiff's application for an order compelling production of the documents, citing comity and a lack of jurisdiction to determine the constitutionality of another province's legislation.[31] The Court decided, first, that the superior courts in a province can determine the constitutionality of the legislation of any other province and, second, that the Québec statute was constitutionally inapplicable to other provinces because it ran contrary to the "constitutional

[28] *Ibid.* at para. 55. *SNI Aérospatiale v. Lee Kui Jak,* [1987] 3 All E.R. 510.

[29] *Amchem, supra* note 4 at para. 55.

[30] *Hunt v. T & N plc,* [1993] 4 S.C.R. 289 [*Hunt*].

[31] *Ibid.* at paras. 5–14. *Business Concerns Records Act,* R.S.Q., c. D-12,

imperatives" of order and fairness by disrupting litigation and commerce in other provinces.[32] Both the result and the reasoning reinforced the trends initiated in *Morguard* by imbuing order and fairness with constitutional essence and prioritizing the unity and efficiency of Canada's common market over conceptual clarity.

Hunt provided opportunities to retrench the essential elements of the Court's new approach while advancing on other doctrinal fronts. However, the Court pragmatically checked its ambition by stating that it "need not consider the implications, if any, of *Morguard* on choice of law and other aspects of conflicts law."[33] The suggestion that *Morguard*'s radical implications could somehow be contained soon proved quaint, as the Court turned its attention to choice of law in its next private international law decision.

TOLOFSON V. JENSEN

In addition to the pithy quotation that opens this article, the Court's decision in *Tolofson v. Jensen* contained a number of statements about the Canadian approach to private international law that bring the four flaws into sharper relief.[34] Complicated and contentious, *Tolofson* has attracted both critics and defenders concerned largely with its implications for their preferred vision of Canadian federalism.[35] *Tolofson* was a consolidation of two cases, both of which involved car accidents between persons from different provinces. In *Tolofson* proper, the accident occurred in Saskatchewan between the plaintiffs, who resided and brought suit in British Columbia, and the defendant, who resided in Saskatchewan. Although the plaintiffs brought the action within the period provided by the applicable BC statute of limitations, the applicable Saskatchewan statute of limitations had run.[36] In *Lucas v. Gagnon*, the ancillary case, the accident took place in Québec between plaintiffs resident in Ontario and a defendant resident in Québec. Again, the plaintiffs in *Lucas* brought suit in their home province of Ontario.[37] The Court took this opportunity to resolve two issues. First,

[32] *Hunt, supra* note 30 at paras. 61–67.

[33] *Ibid.* at para. 59.

[34] *Tolofson, supra* note 1.

[35] See, for example, Swan, *supra* note 7; and Jason Herbert, "The Conflict of Laws and Judicial Perspectives on Federalism: A Principled Defence of *Tolofson v. Jensen*" (1998) 56 U.T. Faculty L. Rev. 3.

[36] *Tolofson, supra* note 1 at paras. 6–8.

[37] *Ibid.* at paras. 12–16.

the law to be applied in a tort claim is the *lex loci delicti* — the law of the place where the activity that gave rise to the claim occurred.[38] Importantly, the Court did not find that the *lex loci delicti* rule was mandated by the Constitution but that it "has the advantage of unquestionable conformity with the Constitution."[39] Second, for conflict of law purposes, statutes of limitations are to be considered substantive, rather than procedural, law.[40]

Shortly after reviewing the judicial history of the two cases and the doctrinal history of choice of law in tort, the Court noted expressly that its analysis in *Tolofson* was simply an application of the *Morguard* principles to choice of law.[41] By affirming that the considerations of order and fairness operate beyond the narrow realm of the recognition and enforcement of judgments, the Court not only departed from the cautious stance adopted in *Hunt,* but it also set a collision course with established precedent on other issues, as demonstrated in more recent cases, such as *Unifund Assurance Co. v. Insurance Corp. of British Columbia* and *British Columbia v. Imperial Tobacco Canada Ltd.*[42]

SPAR AEROSPACE LTD. V. AMERICAN MOBILE SATELLITE CORPORATION

The Court returned to the Canadian approach to private international law in 2002 with its decision in *Spar Aerospace Ltd. v. American Mobile Satellite Corporation.*[43] During the interim, the Court delivered a few related judgments but did not introduce any significant innovations to this body of jurisprudence.[44] In contrast, the Court's judgment in *Spar Aerospace,* while professing reluctance

[38] *Ibid.* at para. 43. In brief concurring reasons, Sopinka J. and Major J. preserved the possibility of an exception to this rule in inter-provincial cases where application of the *lex loci delicti* would be unjust. However, La Forest J. for the majority of the Court recognized a need for such discretion only in certain international disputes. See *ibid.* at paras. 50 and 102–3.

[39] *Ibid.* at para. 71.

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

[41] *Ibid.* at para. 39.

[42] *Unifund Assurance Co. v. Insurance Corp. of British Columbia,* [2003] 2 S.C.R. 63 [*Unifund*]; and *British Columbia v. Imperial Tobacco Canada Ltd.,* [2005] 2 S.C.R. 473 [*Imperial Tobacco*].

[43] *Spar Aerospace Ltd. v. American Mobile Satellite Corp.,* [2002] 4 S.C.R. 205 [*Spar Aerospace*].

[44] See, for example, *Global Securities, supra* note 13; *Holt Cargo, supra* note 13; and *Antwerp Bulkcarriers, supra* note 13.

to address constitutional issues, raised concerns for the future of the Court's new approach. The dispute arose out of a subcontract pursuant to which the plaintiff, an Ontario company, agreed to build a satellite at its Québec plant for one of the defendants, all four of which were companies incorporated in different American states. Following the satellite's failure and the subcontractor's refusal to pay certain amounts, the plaintiff sued the defendants in Québec for damages, losses, and expenses. All of the defendants contested the jurisdiction of the Québec court, and two of them filed motions for *forum non conveniens.*[45] The Québec Superior Court rejected these motions and affirmed its jurisdiction on the ground that the plaintiff had made a *prima facie* case that it had suffered the alleged damage in Québec, which is a basis for jurisdiction under Article 3148(3) of the Quebec Civil Code.[46] After the Québec Court of Appeal dismissed the defendants' appeal, the Court, in a decision written by Justice Louis LeBel, affirmed the decision of the trial judge while making some curious comments about the Canadian approach to private international law.

The Court's decision in *Spar Aerospace* was complicated by two factors. First, the Court had to address for the first time the relationship between its new approach to private international law, which it had rooted in the structure of the Constitution, and the civil law tradition of Québec. Second, because the chief justice declined to certify a constitutional question, the decision was framed as a matter of statutory interpretation, which strained the Court's analysis of the relationship between the constitutional principles of comity, order, and fairness, the real and substantial connection test, and the relevant provisions of the Quebec Civil Code.[47] Perhaps because the Court engaged constitutional concerns only indirectly, this decision further obscured certain aspects of the new approach.

Confusion is evident in the two prongs of its decision that are most relevant to this analysis. First, the Court found that, although the real and substantial connection test established in *Morguard* and *Hunt* does not operate as an independent "constitutional criterion" in Québec, it is a "constitutional imperative" reflected in the rules of Book Ten of the Quebec Civil Code for asserting jurisdiction over non-resident defendants.[48] Second, the Court found

[45] *Spar Aerospace, supra* note 43 at paras. 3–7.

[46] *Ibid.* at paras. 9–10. *Civil Code of Québec,* S.Q. 1991, c. 64, art. 3148.

[47] *Spar Aerospace, supra* note 43 at para. 44.

[48] *Ibid.* at paras. 50, 51, 54, and 63.

that, even if the real and substantial connection test did apply directly to discipline the assertion of jurisdiction over foreign defendants, it would be satisfied in this case.[49] The Court's reasoning begs at least two important questions: how a "constitutional imperative" differs from a "constitutional criterion" in nature, origin, and, most importantly, operation; and, why, if the real and substantial connection test applies only in the inter-provincial context, it is relevant to the assertion of jurisdiction over these foreign defendants. The Court appears to have been driven by a desire to restrict the real and substantial connection test to inter-provincial jurisdictional disputes.[50] Yet, in order to establish a purely domestic provenance for this test, the Court had to emphasize unrepresentative rhetoric from earlier judgments.

Despite attracting unanimous support in *Spar Aerospace,* this narrow interpretation of the new approach did not flourish in subsequent decisions. Within a year, the Court issued two decisions that demonstrated the challenges posed by the spread of the Court's undisciplined analysis of private international law.

UNIFUND ASSURANCE CO. V. INSURANCE CORP. OF BRITISH COLUMBIA

In *Unifund,* the Court extended the reach of its new approach to extraterritorial provincial legislative authority.[51] The facts of the case are easily summarized — its implications, less so. The dispute arose from a car accident in British Columbia, in which a negligent BC resident injured two Ontario residents. The latter recovered no-fault benefits of approximately $750,000 under the Ontario *Insurance Act* from Unifund Assurance Company (Unifund), which was their licensed Ontario insurer, and common law damages of about $2,500,000 from a suit in the Supreme Court of British Columbia against the negligent driver and others.[52] The BC courts then deducted the no-fault benefits awarded in Ontario from the BC judgment, pursuant to the BC *Insurance (Motor Vehicle) Act,* and ordered the Insurance Corporation of British Columbia (ICBC), the defendants' insurer, to pay the net amount.[53] Unifund then applied in Ontario for the appointment of an arbitrator under a

[49] *Ibid.* at para. 64.

[50] *Ibid.* at paras. 51–54.

[51] *Unifund, supra* note 42.

[52] *Insurance Act,* R.S.O. 1990, c. I.8,

[53] *Insurance (Motor Vehicle) Act,* R.S.B.C. 1996, c. 231,

provision of the Ontario *Insurance Act* in an action against ICBC for the reimbursement of the amount deducted. ICBC resisted the application on the ground that Unifund lacked a cause of action because the Ontario *Insurance Act* did not apply to ICBC.[54] The Ontario Superior Court stayed Unifund's application on grounds of *forum non conveniens*, but the Ontario Court of Appeal reversed it and held that an arbitrator should be appointed to determine any issues of jurisdiction and law.[55] On appeal, the chief justice certified a constitutional question — whether the provision of the Ontario *Insurance Act* requiring reimbursement of no-fault benefits in such circumstances was constitutionally inapplicable in this case because it would not accord with territorial limits on provincial jurisdiction — which engendered perhaps the most troubling judgment of the ten cases considered herein. Not only did *Unifund* produce the first dissenting opinion in the *Morguard* era of private international law, but it also raised serious questions concerning the status of important precedent and the repercussions of the Canadian approach to private international law for Canadian federalism.

The majority held that Ontario lacked "legislative jurisdiction" over ICBC, on the grounds that ICBC had an insufficient connection with the province and that it did not attorn to such jurisdiction by signing an instrument known as a "Power of Attorney and Undertaking."[56] It dismissed the issue of *forum non conveniens* as moot — the province's legislative jurisdiction was determinative because Unifund's action was entirely statutory.[57] The opinion reinforced the trend towards inconsistent and ambiguous language by elevating economic efficiency to a level approximating that occupied by comity, order, and fairness in earlier decisions.[58] The majority also employed, without explaining, the concept of applicability to circumscribe provincial legislative jurisdiction — a choice that recent decisions suggest may have significant ramifications for the Canadian federal system.[59]

While the majority engaged the constitutional question intently, Justice Michel Bastarache, in dissent, focused on the technical issues addressed by the lower courts. He found that, before appointing

[54] *Unifund, supra* note 42 at paras. 4–15.

[55] *Ibid.* at paras. 19–20.

[56] *Ibid.* at paras. 82 and 91.

[57] *Ibid.* at paras. 104 and 106.

[58] *Ibid.* at para. 71.

[59] See, for example, *ibid.* at para. 56.

an arbitrator under an Ontario statute, the lower courts should have established jurisdiction over the dispute on the ground of attornment and held that ICBC had failed to prove that Ontario was *forum non conveniens*.[60] In addition to a broad interpretation of the Power of Attorney and Undertaking, Bastarache J. offered generous statements of the relevant law.[61] In one perplexing excerpt, he wrote that "[t]he jurisdiction *simpliciter* inquiry is one based on order, fairness and efficiency in the context of the needs of modern federalism."[62] The implications, if any, of this newly minted triumvirate remain unclear because neither judgment discussed it in detail and the Court has yet to revisit it.

These two opinions demonstrate the four flaws of the Canadian approach perhaps more vividly than any other *Morguard*-era decision. Although the Court's next case involving private international law generated more vociferous criticism, this reaction had more to do with the perceived unfairness of its result than with the quality of the Court's reasoning. On the latter basis, *Unifund* is far more problematic and requires much more consideration, criticism, and rehabilitation if its dangerous tendencies are to be contained.

BEALS V. SALDHANA

The dispute in *Beals v. Saldhana* arose from a mundane real estate deal gone wrong and gave rise to one of the most striking cases since *Morguard*.[63] The defendants, two couples from Ontario who had purchased a vacant lot in Florida for US $4,000, agreed to sell the lot to the plaintiffs, who were residents of the United States, for US $8,000. Unfortunately for the defendants, the purchasing documents contained errors, and the plaintiffs sued for misrepresentation and rescission of the contract. The defendants filed a defence to the initial complaint, but the Florida court entered a default judgment against them after they failed to respond to the three amended complaints. Subsequently, they did not respond to notice of a jury trial to establish damages and sought legal advice only after receiving notice of the US $260,000 judgment that had been issued against them. The hapless Canadian couples opted to resist enforcement in Ontario rather than challenge or appeal the judg-

60 *Ibid.* at paras. 122, 134, and 139.

61 *Ibid.* at paras. 110 and 127.

62 *Ibid.* at para. 125.

63 *Beals v. Saldhana,* [2003] 3 S.C.R. 416 [*Beals*].

ment in Florida. The Ontario Court (General Division) dismissed the plaintiffs' action for enforcement of the judgment, which had grown through interest to approximately CDN $800,000, on grounds of fraud and public policy, but the Ontario Court of Appeal allowed their appeal.[64] Ultimately, the Court upheld the decision of the Ontario Court of Appeal in a judgment that generated substantial controversy as commentators tried to fathom its implications and ascertain its relationship to the preceding cases in this line.[65]

This controversy engulfed the Court itself, as *Beals* yielded two dissenting judgments that split the Court four to three. The majority held that Canadian courts will recognize and enforce foreign judgments when the foreign court has a real and substantial connection with either the defendant or the subject matter of the litigation and none of the three traditional defences — fraud, duress, and public policy — apply.[66] Since these defences also apply to domestic judgments, the majority effectively applied the same rule to the recognition and enforcement of foreign judgments as it adopted for domestic judgments in *Morguard*. In dissent, Justice Ian Binnie, with whom Justice Frank Iacobucci concurred, accepted that the real and substantial connection test should operate as a framework for the recognition and enforcement of foreign judgments, but cautioned that the Court should have refrained from articulating a rigid test in this case because the notification procedures used in the Florida proceedings violated the defence of natural justice and rendered the judgment unenforceable.[67] Also in dissent, LeBel J. conceded that the real and substantial connection test should apply to foreign judgments, albeit with substantial modifications, and agreed with Binnie J. that the Florida notification procedures failed to satisfy the requirements of natural justice.[68]

Forced to apply the *Morguard* analysis to the recognition and enforcement of foreign judgments — an issue addressed by commentators, encountered by lower courts, and arguably anticipated by the Court since *Morguard* — the justices produced a curious collection of reasons. The contrasting visions offered by these opinions provide an opportunity to re-evaluate the Canadian approach to private international law. Unfortunately, while the majority resolved

64 *Ibid.* at paras. 5–11.

65 See, for example, Pitel, *supra* note 7; and Goodman and Talpis, *supra* note 7.

66 *Beals, supra* note 63 at paras. 37 and 40.

67 *Ibid.* at para. 86.

68 *Ibid.* at paras. 134, 183, and 252.

the pressing question of whether the real and substantial connection test applied to the recognition and enforcement of foreign judgments, the justices clarified little more than the flaws already identified in the Court's approach and thus failed to check *Morguard*'s influence before it spread further into areas of law traditionally associated with public international law and federalism.

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS IN CANADA V. CANADIAN ASSOCIATION OF INTERNET PROVIDERS

Society of Composers, Authors and Music Publishers in Canada v. Canadian Association of Internet Providers (*SOCAN*) soon provided another example of the risks presented by the expansion of the new approach.[69] The issue considered in this case was parliamentary extraterritorial legislative competence, namely Parliament's ability to enact laws that apply beyond Canada's territorial boundaries. Since this issue bears some similarity to provincial legislative competence and Binnie J. once again wrote the majority judgment, *SOCAN* offered a valuable opportunity to reconsider the judgments in *Unifund*. In addition, *SOCAN* offered a rare glimpse of the genealogy of the Canadian approach, as Binnie J.'s opinion incorporated a tantalizing citation to the Court's earlier judgment in *R. v. Libman*.[70] In concurring reasons, LeBel J. continued his efforts to contain *Morguard*'s influence to the inter-provincial realm. Although he avoided some of the majority's missteps, he made some of his own, and his judgment failed to attract additional support.

The dispute in *SOCAN* concerned the federal *Copyright Act*,[71] as the Society of Composers, Authors, and Music Publishers in Canada applied to the Copyright Board for approval of a tariff on downloaded music, which Internet service providers (ISPs) would pay. The Canadian Association of Internet Providers, which represents a broad group of ISPs, resisted this application, and the Copyright Board found that, by providing only the infrastructure for the transmission of information, ISPs did not "communicate" or "authorize" the communication of copyrighted musical works under the *Copyright Act*.[72] On a motion for judicial review, the majority of

69 *Society of Composers, Authors and Music Publishers in Canada v. Canadian Association of Internet Providers*, [2004] 2 S.C.R. 427 [*SOCAN*].

70 *Libman*, *supra* note 15.

71 *Copyright Act*, R.S.C. 1985, c. C-42.

72 *SOCAN*, *supra* note 69 at paras. 3–5.

the Federal Court of Appeal excluded ISPs from liability where they perform a purely intermediary role, but found that when they create a cache of information in Canada to improve the efficiency of Internet transmissions they become a communicator and a party to a copyright infringement.[73] On appeal, the justices distilled the dispute into two discrete issues: whether Parliament has the legislative competence to impose its copyright law on Internet transmissions that originate or terminate outside of Canada and whether Parliament exercised that competence under the *Copyright Act* such that the ISPs could be liable for violating copyrights in music simply by acting as a conduit for information.

The majority, drawing on *Morguard* and *Unifund,* held that, in accordance with international comity and the principles of order and fairness, Parliament is presumed, in the absence of clear words to the contrary, to legislate only with respect to Internet communications that have a real and substantial connection with Canada and that the relevant section of the *Copyright Act* provides an exception for ISPs that use caching to enhance efficiency. Concurring in the result, LeBel J. criticized Binnie J.'s use of the real and substantial connection test, asserted Parliament's plenary power to legislate with extraterritorial effect, and gauged Parliament's legislative intent to determine that a communication occurs in Canada when the host server is physically located in the country.

Focused on Parliament's extraterritorial legislative competence, *SOCAN* provided some insight into the internationalist vision that has animated much of the Court's new approach to private international law. In particular, the majority suggested certain conceptual links between this approach and elements of a relatively established model of public international law. While such implied connections do not resolve the uncertainties surrounding the new approach, they may assist in generating a new round of inquiry that encourages the Court to employ more precise and consistent language and reasoning.

BRITISH COLUMBIA V. IMPERIAL TOBACCO CANADA LTD.

The Court returned to the topic of provincial legislative competence in *Imperial Tobacco,* and its unanimous judgment vindicated concerns that the Canadian approach to private international law could have unanticipated consequences for Canadian federalism.

[73] *Ibid.* at para. 6.

The case involved a challenge to the constitutionality of the BC *Tobacco Damages and Health Care Costs Recovery Act*, which enables the BC government to recover from the manufacturers of tobacco products the health care expenses it incurs to treat individuals exposed to such products.[74] In 2000, the Supreme Court of British Columbia struck down the provincial government's first legislative attempt to recoup these costs as legislation in pith and substance relating to extra-provincial rights and, thus, *ultra vires* the province.[75] In response, the new statute limited the provincial government's cause of action to health care expenditures arising from exposure to a tobacco product that was caused or contributed to by a tort committed by the manufacturer in British Columbia or a breach of duty owed by the manufacturer to persons in British Columbia.[76] Nonetheless, the plaintiffs argued that the new statute was constitutionally invalid because, *inter alia,* it violated territorial limits on provincial legislative competence. The Court upheld the BC legislation but, in doing so, moved further towards a model of the Canadian federation that appears unsuited to contemporary conditions.

In finding that the *Tobacco Damages and Health Care Costs Recovery Act* complies with the territorial restrictions on provincial legislative competence, the Court added an explicit territorial dimension to the pith and substance test. Now, once a court has determined the pith and substance of provincial legislation and identified a relevant provincial head of power, it must consider whether the legislation's pith and substance respects the territorial limitations on this head of power. This part of the test varies depending on whether the pith and substance of the legislation is tangible or intangible. If it is the former, then the court can determine whether such a tangible matter is located inside or outside the province by looking at its physical location. If it is the latter, then the court must examine the relationships among the enacting province, the subject matter of the legislation, and the persons made subject to it to determine whether the legislation has a meaningful connection to the enacting province and pays respect to the legislative sovereignty of other territories.[77]

[74] *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30.

[75] *Imperial Tobacco, supra* note 42 at para. 15, citing *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, 2000 BCSC 312.

[76] *Ibid.* at para. 6, citing section 2 of the *Tobacco Damages and Health Care Costs Recovery Act, supra* note 74.

[77] *Ibid.* at para. 36.

Although the substance of this new test and the manner in which the Court introduced it are familiar from previous decisions, the Court failed to explain the rationale of either prong. It did not identify the mechanism by which strong relationships between the enacting province, the subject matter, and the subjects of the legislation generate a "meaningful connection" between the legislation and the enacting province. Nor did it demonstrate that the second prong, which appears purely rhetorical, contains any independent content. Rather, the Court summarily concluded that the pith and substance of the BC legislation was to create a civil cause of action, that the legislation "can easily be said to be meaningfully connected to the province," and that it respects the legislative sovereignty of other jurisdictions.[78]

The *Tobacco Damages and Health Care Costs Recovery Act* survived the Court's new test due to the tailored definition of the government's cause of action, but this additional restriction on provincial legislative competence appears unsuited to a contemporary world characterized by interdependent jurisdictions and polycentric problems. The Court's decision in *Imperial Tobacco* rashly extended the *Morguard* principles. By establishing this new constitutional test in a case that did not require careful consideration of its operation, the Court compounded the uncertainty presented by the new approach since its effects both on the scope of provincial legislative authority and on the coherence of the Court's jurisprudence remain unclear.

CASTILLO V. CASTILLO

The final case considered in this article is *Castillo v. Castillo,* in which the parties and the members of the Court split over the interpretation of the Alberta *Limitations Act,* and which involved some of the most fundamental conceptual and constitutional issues presented by the Court's new approach.[79] The case arose from yet another car accident — a single-vehicle crash in California, in which a husband and wife from Alberta were the only parties. Two years less a day after the accident, the wife sued her husband in Alberta for damages. The California statute of limitations expired on the wife's claim one year after the accident, while Alberta law provided

[78] *Ibid.* at paras. 32, 37, and 38

[79] *Castillo v. Castillo,* [2005] 3 S.C.R. 870 [*Castillo*]. *Limitations Act,* R.S.A. 2000, c. L-12.

a two-year period for the same claim.[80] As the *lex loci delicti,* California law governed the substance of her claims. The wife argued that, pursuant to section 12 of the Alberta *Limitations Act,* the limitations period provided by Alberta law applies exclusively when a remedial order is sought in Alberta, such that Alberta's two-year period would replace California's one-year period in this case.[81] The husband argued that section 12 only imposes the Alberta limitations period when it is shorter than the period applicable under the law of the jurisdiction whose substantive law governs the case, such that California's one-year period would apply.

The confusing state of the Canadian approach to private international law forced the justices to make a difficult choice in *Castillo.* The eight-justice majority adopted what appears to be the more prudent approach by interpreting section 12 to avoid the constitutional question of whether it exceeds the territorial limitations on provincial legislative competence.[82] The majority found that the pith and substance of section 12 is to determine the time limits within which Alberta courts can entertain actions governed by the substantive law of another jurisdiction and that to do so is a valid exercise of the provincial government's power over the administration of justice in the province pursuant to section 92(14) of the *Constitution Act, 1867.*[83] The majority anchored this conclusion on an implicit distinction between its characterization of the effect of section 12 — to close the door of the Alberta courts to claims for which the Alberta limitations period would have expired, if it had applied directly — and the effect of statutes of limitation noted in *Tolofson* — to extinguish a cause of action. Thus framed, section 12 appeared as a procedural law with no extraterritorial effect, and the majority had no need for either the *Imperial Tobacco* test or its general constitutional analysis of private international law. However, this interpretation arguably eroded the Court's judgment in *Tolofson.*

[80] *Castillo, supra* note 79 at para. 1.

[81] Section 12 of the Alberta *Limitations Act,* R.S.A. 2000, c. L-12, which reads: "The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction."

[82] *Castillo, supra* note 79 at para. 10.

[83] *Ibid.* at paras. 5 and 6. *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, section 92(14).

Concurring in the result, Bastarache J. performed a thorough statutory analysis before engaging in a constitutional discussion that reinforced both the weaknesses of the *Imperial Tobacco* test and the general confusion that surrounds the new approach. He found that, pursuant to either of the parties' interpretations, section 12 is a substantive law because it applies Alberta limitation periods to causes of action that, pursuant to Alberta choice of law rules, are governed by the substantive laws of other jurisdictions.[84] As a law that, in pith and substance, relates to civil rights that arise outside the province, Bastarache J. analyzed section 12 as an exercise of Alberta's legislative competence under section 92(13) of the *Constitution Act, 1867*, and applied the *Imperial Tobacco* test. He did not parse the test and simply concluded that section 12 neither provided a meaningful connection between Alberta, the parties, and the relevant rights, nor respected the legislative sovereignty of other jurisdictions.

However, Bastarache J. did not simply fail to improve the *Imperial Tobacco* test. His fuzzy constitutional discussion, in which he described fairness as both a requirement underlying Canadian federalism and a policy consideration[85] and conflated the international legal system and Canadian federalism by claiming that the same territorial principle organizes both the international legal order and federalism in Canada,[86] juxtaposed with his more rigorous statutory interpretation sharpened concern for the analytical strategy that the Court has used to develop the Canadian approach to private international law. Describing *Tolofson*, Bastarache J. claimed that La Forest J. categorized limitations periods as substantive, not as a matter of common law, but "by their very nature" because they determine the rights of both parties in a cause of action.[87] A similar description could apply to the Court's efforts throughout the *Morguard* era to identify the principles, requirements, and factors that underlie the Canadian Constitution. The Court has sought to divine the nature of the Constitution — its fundamental characteristics — by reference first to reason and then to the language of the Constitution. There is a practical reason for this preference. The constitutional text, which is a product of negotiation and compromise, is unlikely to yield the orderly set of concepts that the Court has sought and repeatedly attempted to articulate. Metaphors

84 *Castillo, supra* note 79 at paras. 31, 34, and 35.

85 *Ibid.* at paras. 32 and 45.

86 *Ibid.* at para. 27.

87 *Ibid.* at para. 36.

abound, but do not assist. For example, one could argue that the Court has been peeking under the textual hood of the Constitution to view the conceptual motor that makes it run, or that it has used the text of the Constitution as a springboard to reach loftier ideas. Regardless, whether described as looking beneath, behind, or beyond the constitutional text, the Court has been engaged since *Morguard* in an increasingly abstract exercise that presents questions of both effectiveness and legitimacy.

Concern for the effectiveness of the Court's method arises from its lack of progress in improving the fairness and order of Canadian private international law. Since *Morguard,* the Court's analysis of the constitutional aspects of private international law has grown gradually less disciplined, as it has departed further from the text of the Constitution into a conceptual realm of its own making. For example, the dominant trend in its more recent decisions has been the proliferation of nexus tests that have no clear textual source but that have been influenced by the various principles underlying the Canadian federal system, supported by references to the international legal system and entrenched by questionable characterizations of prior decisions. Since the Court has not yet explained the operation of, and differences between, these tests, they remain, in large part, unpredictable and unworkable.

In this fashion, concerns for the effectiveness and the legitimacy of the Court's analysis overlap. By retreating from the text of the Constitution into a realm of ambiguous concepts, the Court has not only deprived itself of useful jurisprudential tools but also diminished the scope for meaningful scrutiny, criticism, or debate. Since *Morguard,* the Court has focused on the elaboration of unwritten concepts embedded in the Canadian federal system. Although presented as being integral to this system, these concepts have not been expressly adopted pursuant to any democratic process. They are prior to the Constitution — they underlie,[88] and are reflected in,[89] its text — and thus are not products of political compromise but, rather, parts of a particular understanding of the Canadian federation. The Court has not been interpreting the Constitution. Instead, it has been elaborating the implications of its own vision. By doing so, the Court has risked subverting its relationship with the Constitution. If the text admits the Court to a more fundamental system, then it may liberate, rather than restrain

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

[89] *Ibid.* at para. 35.

or discipline, the Court. In order to justify its conclusions regarding private international law, the Court's ultimate reference has not been to the text of the Constitution but, rather, to the principles and other concepts that it has posited behind this text and which others can access and assess only through the Court's decisions. As a result, the development to date of the Canadian approach to private international law has resembled a monologue more than a conversation.

The Four Flaws

In an effort to rehabilitate Canadian private international law, this section engages in greater detail the four flaws introduced earlier: the Court's use of inconsistent and ambiguous terminology throughout the *Morguard* era; its cryptic references to American jurisprudence; its reliance on a stylized and largely unexplained vision of the international realm; and its adoption of a skeletal model of the Canadian federal system. This section identifies their sources in the text of the relevant judgments and considers their consequences for both private international law and Canadian constitutional law. It analyzes their chronological development to demonstrate their presence from the outset of the new approach, to trace their evolution, and to better explain their implications.

Before proceeding, it will be valuable to explain certain aspects of this analysis. First, these defects are attributed to the Court's Canadian approach to private international law as a whole rather than to any particular case. This focus is consistent with the incremental manner in which the Canadian approach has evolved. Second, these four flaws are not intended to exhaust the infirmities of the cases that compose the Court's new approach to private international law. Other analyses may identify, and subsequent cases may reveal, additional problems in these cases. Third, while the four flaws are distinct, since they arise from discrete characteristics of the judgments and portend different consequences for Canadian jurisprudence, they are also interdependent in various ways. For example, although the Court's weak model of the federal system can be isolated from the other flaws, it simultaneously supports, and has been supported by, the Court's reliance on American jurisprudence and its vision of the international order. Finally, although these facets of the Canadian approach are described as flaws, it is not because they constitute departures from some ideal approach to private international law but, rather, because they present

significant problems for future cases. This pragmatic understanding of the four flaws does not assume that the Canadian approach to private international law possesses some uncorrupted core or that a perfect approach is attainable. Instead, it insists on identifying elements of the existing approach that present doctrinal and practical difficulties in hopes of informing a constructive response.

INCONSISTENT AND AMBIGUOUS LANGUAGE

In *Morguard,* the Court purported to lay the conceptual foundation of comity, order, and fairness upon which it would construct a new approach to private international law that resonated with both enlightened cosmopolitanism and established domestic arrangements. However, due to the kaleidoscopic relationships between these concepts, this foundation has proven not simply unstable but illusory. Such conceptual inconsistency is the most insidious flaw of the Court's new approach to private international law because it has prevented the Court from articulating a robust vision of its own project, while also hampering external attempts to interpret, utilize, and improve the Court's model.

A careful analysis of the language used by the Court in these ten cases demonstrates not only that it has struggled to provide a clear and concise description of the basic concerns that motivate its new approach but also that it has succeeded in establishing a consistent vocabulary when addressing other matters. In particular, the Court has entrenched terminology concerning federal interests — as distinct from provincial views — that privileges the former and contributes to a larger trend in the new approach towards political and legal uniformity within the Canadian federation.[90] Although worrisome, this contrast suggests that positive change may be achieved by refining the conceptual model of the new approach and relaxing the rigid language that threatens to squeeze the diversity from its understanding of Canadian federalism.

Such improvements may be difficult to craft, if only because these patterns have been accreting since *Morguard,* in which La Forest J. first presented the notions of comity, order, and fairness and characterized comity as a national interest. He began by positing boldly that comity is "*the* informing principle of private international law" and adopted a definition of comity from *Hilton v. Guyot,* a late-nineteenth-century decision by the Supreme Court of the United States:

[90] See text accompanying notes 90–91, 109, and 133–35 in this article.

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard to both international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws.[91]

Armed with the understanding that comity entails recognition of the legitimate acts of another state in light of both international duty and convenience, the Court then declared that "what must underlie any modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice."[92] Thus, it infused comity with a concern familiar from public international law — respect for territorial jurisdiction — and considerations arising from contemporary economic conditions that it insisted must ground any effective understanding of private international law — order and fairness. As explored in more detail later in this article, the relevant economic considerations, such as the increased flow of capital, services, and wealth across state lines, can be seen as products of the territorial limitations on state jurisdiction.[93] In *Morguard,* the Court assumed that these doctrinal changes were necessary responses to contemporary conditions, although it provided no empirical evidence to support such a claim. Unfortunately, this sense of urgency distracted from, or perhaps even justified, the Court's various attempts to establish a solid conceptual foundation for the new approach.

Throughout *Morguard,* the Court demonstrated its nonchalance with regard to technical niceties by describing comity alternatively as an idea, a doctrine, a principle, and even a set of rules.[94] It implied that nomenclature is of little importance in this area of law by suggesting that courts could refer directly to the "reasons of justice, necessity and convenience" rather than to the rules of comity, which are either interchangeable with, or some sort of proxy for, these reasons.[95] In addition, as comity is the informing principle of private international law, it also possesses some intimate relationship

91 *Morguard, supra* note 2 at para. 29 [emphasis added], and para. 31, citing *Hilton v. Guyot,* 159 U.S. 113 (1895) at 163–64.

92 *Morguard, supra* note 2 at para. 32

93 See generally the discussion later in this article.

94 *Morguard, supra* note 2 at paras. 30, 32, and 35.

95 *Ibid.* at para. 35.

with the principles of order and fairness, which "must underlie a modern system of private international law."[96] Thus, the Court began juggling a number of categories — ideas, doctrines, principles, and rules — as well as a set of concepts — comity, justice, necessity, convenience, order, and fairness — before clearly defining and delineating them. In *Morguard,* at least, the Court held this loose framework together by reiterating the importance of facilitating exchange across legal and political boundaries, but the lack of a coherent theoretical model continues to haunt Canadian private international law.

Later in the judgment, La Forest J. established a basis for the obverse linguistic problem presented by the new approach — its rigid insistence on a hierarchy among federal and provincial concerns — by writing that comity "is in the interest of the whole country, an interest recognized in the Constitution itself."[97] He identified comity as an interest of Canada, rather than of the provinces, and grounded this interest in the Constitution, while refraining from identifying any particular provision or element as its locus. In subsequent decisions, the Court has largely refrained from using the term "interest" with respect to provinces and, instead, has relied on euphemisms that imply lesser status and importance.[98] This quotation suggests that the trend towards increased constraints on the legitimate scope of provincial actions as distinct considerations can be traced to the first iteration of the new approach.

In *Hunt,* the Court further entrenched the first flaw by elaborating upon the arguments and strategies introduced in *Morguard.* For example, the Court elevated order and fairness to the indeterminate status of "constitutional imperatives"[99] while also describing them as principles,[100] notions,[101] requirements,[102] and standards.[103] This proliferation of categories contributed only confusion by weakening the conceptual framework of the new approach and impeding external efforts to improve matters. In addition, by

96 *Ibid.* at para. 32.

97 *Ibid.* at para. 48.

98 See text accompanying notes 109 and 133–35 in this article.

99 *Hunt, supra* note 30 at para. 56.

100 *Ibid.* at para. 41.

101 *Ibid.* at para. 57.

102 *Ibid.* at para. 59.

103 *Ibid.* at para. 56.

stating that order and fairness, as constitutional imperatives, "apply to the provincial legislatures as well as to the courts," the Court left a number of important questions unresolved, including how such imperatives operate if they do not also apply to Parliament and whether, and, if so, how, order and fairness may apply to Parliament other than as constitutional imperatives.[104] The Court attempted to address these questions in *SOCAN,* but they remain contestable and unresolved.

Although the Court in *Hunt* sought to reduce uncertainty by establishing some content for new and unfamiliar terms, much of its effort only displaced confusion by obscuring other parts of its analysis. First, it provided some clarity by stating that "the ideas of 'comity' are not an end in themselves, but are grounded in notions of order and fairness to participants in litigation with connections to multiple jurisdictions."[105] This declaration reveals comity not as the cornerstone of the Canadian approach to private international law, as suggested in both *Morguard* and *Amchem,* but as a collection of ideas. Further, it bolsters the argument that the Court's "Canadian" approach is grounded not in concerns unique to or even characteristic of the Canadian federation but, rather, in elements common to all litigation involving multiple jurisdictions, whether inter-provincial or international. While it blurs the conceptual relationship between these ideas of comity, order, and fairness, this statement also indirectly clarifies the considerations motivating the Court's efforts in this area.

Second, the Court discussed the real and substantial connection test in some detail. The Court described its nature in negative terms — the test is not meant to be rigid — and framed its purpose broadly — to ensure some limits on claims to jurisdiction.[106] The Court also provided some practical guidance by suggesting that a good place to start identifying the connections that will satisfy this test are those connections employed under the traditional rules for the recognition and enforcement of judgments, such as consent and presence but simultaneously hinted that such traditional tests may be less reliable in light of *Morguard.*[107] In addition, it gave practical content to the new status enjoyed by order and fairness.

104 See, for example, Edinger, *supra* note 3 at 53.

105 *Hunt, supra* note 30 at para. 57.

106 *Ibid.* at para. 58.

107 *Ibid.*

As "constitutional imperatives," they can operate to discipline traditional common law rules.

Third, the Court condemned the Québec *Business Concerns Records Act* as constitutionally inapplicable to litigation in other provinces because "[t]he resultant higher transactional costs for interprovincial transactions constitute an infringement on the unity and efficiency of the Canadian marketplace, as well as unfairness to the citizen."[108] By pairing its concern for fairness with "unity and efficiency," the Court revealed that its understanding of the constitutional imperative of order is informed by an understanding of economic efficiency that is closely related to legal and regulatory harmony. The Court would not revisit the relationship between these two concepts until *Unifund*, in which both Binnie and Bastarche JJ. failed to clarify its constitutional implications. Further, by using the phrase "as well as," the Court positioned fairness as a consideration secondary to order. The fluctuating content of, and relationships among, even these purportedly foundational concepts demonstrates the evolving, provisional nature of the new approach.

The Court in *Hunt* also provided the sole example in the *Morguard* era of a direct reference to provincial interests. Framing its decision that the act was constitutionally inapplicable to other provinces, the Court declared that "[a] province undoubtedly has an interest in protecting the property of its residents within the province, but it cannot do so by unconstitutional means."[109] The Court has since refrained from acknowledging that provinces are capable of possessing interests — a trend that, when viewed in the context of all four flaws, reinforces the argument that the Court's Canadian approach to private international law is hostile to robust provincial powers.

While the Court's decision in *Tolofson* also suggested an aversion to legal diversity within the Canadian federation, this aspect of the judgment is better addressed in the section concerning the model of federalism employed by the new approach because it involves the Court's reasoning more than its rhetoric. However, in *Tolofson*, the Court did take an important step in the development of the conceptual framework for the new approach by clarifying the relationship between the principles of order and fairness. In dismissing alternative approaches to its preferred choice of law rule for tort — the *lex loci delicti* — the Court stated that "[w]hile, no doubt,

[108] *Ibid.* at para. 65 [footnote omitted]. *Business Concerns Records Act*, R.S.Q., c. D-12.

[109] *Hunt, supra* note 30 at para. 61.

as was observed in *Morguard,* the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice."[110] A hierarchy had begun to emerge from the primordial swamp of concepts that had first generated the new approach. Private international law is informed by comity, which is supported by fairness, which, in turn, relies on order. Although questions concerning these concepts remained, the Court's decision in *Tolofson* suggested that progress could be made on this front.

Unfortunately, the Court lost its grasp on this emergent conceptual framework during its eight-year hiatus from developing the Canadian approach, as it appeared uniquely troubled by causal and spatial relationships in *Spar Aerospace.* Early in its judgment, the Court was unable to decide whether comity underlies,[111] animates,[112] or guides the application[113] of private international law. While lively language may relieve the tedium of reading — and writing — lengthy decisions, it tends to inhibit rather than assist clear reasoning. The Court reminded readers that the principles of comity, order, and fairness are vaguely defined,[114] interrelated,[115] and not directly binding[116] but did not explain how such amorphous concepts can be useful in guiding the application and inspiring the interpretation of particular rules of private international law.[117] Similarly, LeBel J. wrote for the Court that the real and substantial connection test is "subsumed under,"[118] "captured in,"[119] "respected,"[120] and "reflected"[121] in the provisions of Book Ten. Not only does this avalanche of imagery fail to explain the need for any relationship between the test and the particular rules employed

110 *Tolofson, supra* note 1 at para. 57.

111 *Spar Aerospace, supra* note 43 at paras. 14 and 15.

112 *Ibid.* at para. 21. LeBel J. describes the three principles of comity, order, and fairness as being "at the heart of the private international legal order."

113 *Ibid.* at para. 17.

114 *Ibid.* at para. 23.

115 *Ibid.* at para. 14.

116 *Ibid.* at para. 23.

117 *Ibid.* at paras. 17 and 23.

118 *Ibid.* at para. 56.

119 *Ibid.* at para. 57.

120 *Ibid.* at para. 62.

121 *Ibid.* at para. 63.

in Québec, each new description makes an analysis of this relationship more difficult.

In the same spirit, *Spar Aerospace* marked the rhetorical birth of the "*private* international legal order" and the emergence of the "constitutional criterion" as distinct from the "constitutional imperative." In previous cases, the Court had referred to an unmodified "international legal order,"[122] which presumably differed from the even more generic "world order."[123] Although a distinct *private* international legal order is conceivable, the Court did not explain or support it with citations. The same argument applies to the relationship between a "constitutional imperative" and a "constitutional criterion." The Court acknowledged that, in this particular case, while the real and substantial connection test is such an imperative, it is not an independent criterion, without providing guidance or explanation as to their respective origins and functions.[124] As noted throughout this analysis, the proliferation of categories suggests confusion within the Court as to the purpose and operation of its new approach to private international law.

The two judgments in *Unifund* only compounded this criticism. Binnie J., for the majority, and Bastarache J., in dissent, revisited some of the issues unresolved in *Hunt* and, together, dashed any semblance of coherence that had survived *Spar Aerospace*. For example, Bastarache J., castigating the lower courts for failing to establish jurisdiction *simpliciter*, wrote that "[t]he jurisdiction *simpliciter* inquiry is one based on order, fairness and efficiency in the context of the needs of modern federalism."[125] Without citation or explanation, he inserted efficiency alongside the two enigmas familiar from decisions past. In effect, he went one step further than the Court in *Hunt*, in which it implied only that considerations of efficiency influenced its understanding of order.[126] As this troika has yet to be expressly considered by the Court, its implications for future cases remain unclear.

Analyzing the potential for legislative conflict among the provinces, Binnie J. made a similar mistake while writing for the majority:

[122] *Tolofson, supra* note 1 at para. 37.

[123] *Morguard, supra* note 2 at para. 33.

[124] *Spar Aerospace, supra* note 43 at para. 50.

[125] *Unifund, supra* note 42 at para. 125.

[126] *Hunt, supra* note 30 at para. 65. See also text accompanying note 108 in this article.

> [O]rder in the federation would be undermined if every provincial jurisdiction took it upon itself to regulate aspects of the financial impact of the British Columbia car crash in relation to its own residents at the expense of the British Columbia insurer ... Such "competing exercises" of regulatory regimes "must be avoided." The cost of such regulatory uncertainties undermines economic efficiency.[127]

Whereas Bastarache J. suggested that economic efficiency had entered the pantheon of constitutional principles, Binnie J. hewed closer to the Court's position from *Hunt* and merely hinted that it has some role to play in the elaboration and application of the *Morguard* principles. Like Bastarache J., the majority neither cited nor explained its invocation of economic efficiency. In addition, it failed to present empirical evidence to support its claim that regulatory diversity and overlap, which it characterized as "regulatory uncertainties," generate economic inefficiency and imperil the very order of the federation. For example, the majority neglected to explore the extent to which insurance companies and other entities can address such uncertainties through contracts and actuarial planning. It also refrained from explaining the relationship between order in the federation and economic efficiency, save for implying that the two concepts bear a similar relationship to regulatory uncertainty.

The majority enhanced existing analytical ambiguities by failing to pin a single, consistent label on order and fairness. In this judgment alone, the majority described order and fairness as general policy objectives,[128] principles,[129] requirements that generate a single organizing principle,[130] constitutional imperatives,[131] and a mechanism to regulate extraterritoriality concerns.[132] Related concerns, discussed later in this article, include the majority's unexplained use of the concept of constitutional "applicability" in contrast to "validity" as well as its introduction of a "sufficient connection" test, in contrast to the established "real and substantial connection" test. Such vacillation conveys the complexity of this material. However, it also renders the various elements of the Court's

127 *Unifund, supra* note 42 at para. 71.

128 *Ibid.* at para. 28.

129 *Ibid.* at para. 56.

130 *Ibid.* at para. 68.

131 *Ibid.*

132 *Ibid.* at para. 73.

vision less distinct, suggests that the Court has made substantial changes to the law without a firm conceptual footing, and heightens the need for greater precision in subsequent decisions.

Such inconsistent terminology appears especially suspect in light of the regular and reliable language the Court has used to privilege federal "interests" over provincial concerns.[133] While discussing provincial legislation in *Unifund*, Binnie J. wrote that "within our federal structure, it is not only *the view of the enacting legislature* that must be considered, but *the collective interest of the federation as a whole in order and fairness.*"[134] This sentence characterizes provincial concerns, whatever they may be, as parochial "views," while elevating order and fairness to the more legitimate status of federal "interests." The majority failed to consider explicitly the possibility that provinces may possess interests, let alone interests in inter-provincial and international order and fairness. This approach not only portends problems for the imported concept of full faith and credit, which relies on notions of governmental interest, but also strengthens fears that the Court is introducing language and a mode of analysis that may generally undermine legal and political diversity among the provinces.[135]

The majority judgment in *Beals* continued the Court's reliance on rhetorical flourishes and conceptual uncertainty to develop the new approach. For example, in adapting the real and substantial connection test to the recognition and enforcement of foreign judgments, Justice John Major described comity as a doctrine central to the modernization of the common law rules of private international law, invoked "the principles of international comity,"[136] referred to the balance that comity requires "between order and fairness as well as the real and substantial connection" when enforcing foreign judgments[137] and described comity and fairness to the defendant as "countervailing goals."[138] However, he did not explain how comity dictates a balance between order and fairness while also operating as an independent counterpoint to fairness or how fair-

[133] See text accompanying notes 98 and 109 in this article.

[134] *Unifund, supra* note 42 at para. 74 [emphasis added].

[135] See, for example, the discussion later in this article.

[136] *Beals, supra* note 63 at paras. 20, 27, and 29.

[137] *Ibid.* at para. 40.

[138] *Ibid.* at para. 52.

ness, which previously had been a principle underlying comity, can now conflict with it.[139]

Major J. also described *Morguard* as having established two principles to determine the proper exercise of adjudicative jurisdiction — the need for order and fairness and the existence of a real and substantial connection.[140] This description appears to depart from the analysis employed in *Morguard* and *Hunt*, which posited the real and substantial connection test as the restriction on jurisdiction required by the considerations of order and fairness, which operate both within the structure of the Canadian federation and the contemporary understanding of comity.[141] Rather than independent principles, the Court generally has presented order, fairness, and the real and substantial connection test as interrelated. For example, the majority in *SOCAN* identified the real and substantial connection test as a means of ensuring that any assertion of legislative jurisdiction conforms with the objectives of order and fairness.[142] Perhaps an attempt to engage *Spar Aerospace*, where the Court identified the real and substantial connection test as a constitutional imperative, distinct from a constitutional criterion that applies directly to all assertions of jurisdiction,[143] this unexplained promotion of the real and substantial connection test raises questions concerning the clarity of the Court's own vision and the long-term viability of the Canadian approach to private international law.

The unanimous judgment in *Imperial Tobacco* demonstrated the difficulty the Court will face when remedying this flaw. Despite framing the relevant part of the judgment as responding to the constitutional question of whether the BC *Tobacco Damages and Health Care Costs Recovery Act* is *ultra vires* the provincial legislature by reason of extraterritoriality, Major J. repeatedly cited the Court's decision in *Unifund*. Thus, to determine whether the BC statute was valid, he relied upon a case concerning the applicability of provincial legislation.[144] Articulating the meaningful connection test, which determines whether the intangible pith and substance of

[139] See, for example, *Morguard*, *supra* note 2 at para. 32; and *Tolofson*, *supra* note 1 at para. 57.

[140] *Beals*, *supra* note 63 at para. 21.

[141] *Morguard*, *supra* note 2 at paras. 51–52; and *Hunt*, *supra* note 30 at paras. 56 and 58–59.

[142] *SOCAN*, *supra* note 69 at para. 60.

[143] *Spar Aerospace*, *supra* note 43 at paras. 50 and 54.

[144] See, for example, *Imperial Tobacco*, *supra* note 42 at paras. 25, 27, and 35.

provincial legislation is located "in the province," such that it may be valid pursuant to section 92(13) of the *Constitution Act, 1867*, he cited *Unifund* as illustrating the role that "the relationships among the enacting territory, the subject mater of the law, and the person[s] sought to be subjected to its regulation play in determining the validity of legislation alleged to be impermissibly extra-territorial in scope."[145] However, the paragraph to which he referred was concerned not with the validity of provincial legislation but, instead, with "[t]he potential *application* of provincial law to relationships with out-of-province defendants,"[146] and the majority did not seize this chance to explain the relationship between these terms.

In addition, he continued the Court's efforts regarding the opening words of section 92 of the *Constitution Act, 1867*: "In the province." Whereas in the pre-*Morguard* case of *Re Upper Churchill Water Rights Reversion Act, 1980,* the Court described the territorial limitation on provincial legislative competence as "contained in" section 92 and in *Unifund* Binnie J. wrote that this limitation "flows from" those opening words, Major J. claimed that those words "represent a blanket territorial limitation on provincial powers."[147] This subtle progression is encouraging since the Court appears increasingly aware of the operation of its new approach to private international law. The text of the Constitution does not operate as a container for, or a source of, these new tests. Rather, it represents a limitation that emerges from the Court's unfolding vision of the international order.

The majority in *Castillo* seemed reluctant to engage such abstract issues, as the eight justices avoided analyzing the constitutionality of the challenged provincial statute by interpreting it to remove concerns about extra-territoriality. According to the majority, section 12 of the Alberta *Limitations Act* is "perfectly valid provincial legislation under section 92(14) of the *Constitution Act, 1867*" because its intent and effect is to determine the time limits within which Alberta courts may hear actions rather than to manipulate causes of action arising under the laws of another jurisdiction.[148] Major J. did not explain how a statute that determines which limitations

[145] *Ibid.* at para. 35, citing *Unifund, supra* note 42 at para. 63.

[146] *Unifund, supra* note 42 at para. 63 [emphasis added].

[147] *Re Upper Churchill Water Rights Reversion Act, 1980,* [1984] 1 S.C.R. 297 at para. 45 [*Churchill Falls*]; *Unifund, supra* note 42 at para. 51; and *Imperial Tobacco, supra* note 42 at para. 26.

[148] *Castillo, supra* note 79 at paras. 5, 6, and 8.

period applies to a claim is not itself a substantive law and did not expressly admit to narrowing *Tolofson* from a decision concerning the "conflict of laws field" to one about "choice of law" alone.[149] In addition, by writing that a foreign jurisdiction cannot obligate an Alberta court to hear a case that Alberta, "as a matter of its own legislative policy, bars the court from hearing," he managed to emphasize the provincial prerogative without mentioning provincial interests.[150] However, while this pragmatic approach avoided further complicating the constitutional analysis, it did not reveal a strategy to rehabilitate the conceptual infirmities of the new approach.

Bastarache J.'s concurrence demonstrated the need for such a strategy. His analysis of the constitutionality of section 12 of the *Limitations Act* displayed two of the conceptual problems introduced earlier. First, he used multiple ambiguous categories by describing fairness as both a requirement that underlies Canadian federalism and as a policy consideration that guides the application of the real and substantial test for jurisdiction *simpliciter*.[151] Although "requirement" connotes more rigidity and less discretion than "policy consideration," Bastarache J. did not explain how these two categories differ. Nor did he attempt to locate their place in the cosmos of the new approach. Second, he discussed order and fairness as "requirements that underlie Canadian federalism," without noting that, in *Tolofson,* La Forest J. not only described them as principles that instead underlie private international law but also established the pre-eminence of order in the new approach.[152] Bastarache J. cited *Morguard* and *Hunt* for his description of order and fairness, but the Court did not adopt such a clear stance in those cases. In *Morguard,* La Forest J. did not address the constitutional aspects of the new approach, and, in *Hunt,* he characterized order and fairness variously as requirements,[153] constitutional imperatives,[154] principles,[155] notions,[156] and standards.[157] Bastarache J. also cited *Imperial*

149 *Ibid.* at para. 5; and *Tolofson, supra* note 1 at para. 86.

150 *Castillo, supra* note 79 at para. 5.

151 *Ibid.* at paras. 32 and 45.

152 *Ibid.* at para. 32; and *Tolofson, supra* note 1 at para 57.

153 *Hunt, supra* note 30 at para. 59.

154 *Ibid.* at para. 56.

155 *Ibid.* at para. 41.

156 *Ibid.* at para. 57.

157 *Ibid.* at para. 56.

Tobacco, in which the unanimous Court, in reliance upon the majority opinion in *Unifund,* similarly described order and fairness as requirements underlying Canadian federalism. However, as noted earlier, the paragraph in *Unifund* to which the Court referred in *Imperial Tobacco* did not address the role of order and fairness in the Canadian constitutional scheme generally. Rather, it concerned the applicability of provincial legislation and simply mentioned the purposive character of order and fairness and the need to apply them flexibly.[158] In addition, the majority in *Unifund* declined to go further and stated that "[i]t would be unwise in this case to embark on a general discussion of 'order and fairness.'"[159]

Despite this assertion, the Court's failure to provide such a discussion of the conceptual framework for its new approach is problematic. Since *Morguard,* the lack of a clear and consistent account of the concepts that comprise the new approach has deprived the justices, not to mention litigants and lower courts, of guidance in subsequent cases. As a result, the conceptual terrain of the new approach is more muddled than it need be. The lack of a lucid framework does not simply preserve a lackluster status quo. It perpetuates and deepens confusion by encouraging judges to rely on, and propagate, ambiguous precedent.

Examples of this flaw abound in these ten cases. However, the Court's continuing struggle to establish a coherent conceptual model for its new approach is best demonstrated by tracing the language that it has used to describe comity, order, and fairness throughout these cases. While these three concepts influence much of the Court's new approach, it is impossible to determine precisely how they do so. Although comity first emerged as the informing principle of private international law, and order and fairness as the underlying principles, their roles and relationships have become less determinate. Now, comity and fairness share billing as countervailing goals, while fairness simultaneously balances with order — any hierarchy that earlier judgments have attempted to establish has since dissolved. By failing to discipline the language that it has used to discuss these concepts — not to mention the other elements of its vision — the Court has compromised the effectiveness, transparency, and predictability of its new approach to private international law. The Court must use language more

[158] *Imperial Tobacco, supra* note 42 at para. 27, citing *Unifund, supra* note 42 at para. 56.

[159] *Unifund, supra* note 42 at para. 81.

carefully in future cases to repair the damage caused by these indiscretions.

In contrast, the Court's implicit ranking of federal interests and provincial views has remained relatively constant throughout the development of the new approach. The Court wavered in *Hunt* by admitting the possibility of provincial interests, but it since has ignored this language and continues to privilege federal interests. Although the majority in *Castillo* invoked Alberta's legislative policy as a bulwark against foreign laws, it did not engage the issue of provincial interests or their relationship, if any, with federal interests. While this trend suggests the Court is capable of providing the clarity and coherence necessary to resolve the conceptual inconsistencies of the new approach, it also demonstrates the Court's insensitivity to a separate set of substantive concerns. By refusing to recognize provincial interests as being relevant to private international law, the Court not only contributes to a centralized model of Canadian federalism that conflicts with strong notions of legal diversity, but it also contradicts significant features of the American jurisprudence to which the Court has cited. The former problem is addressed in the final section of this article, and the latter is the subject of the next section.

THE PECULIAR USE OF AMERICAN JURISPRUDENCE

The Court's intermittent and obscure use of American jurisprudence has done little to advance its own approach to private international law and perhaps has confused matters more than improved them. This criticism draws on two aspects of the Court's decisions since *Morguard* — its cryptic references to decisions by the United States Supreme Court and its awkward embrace of "full faith and credit." The first aspect emerges from the few cases in which the Court has drawn expressly on the judgments of the United States Supreme Court relating to the conflict of laws, as this field is known in the United States. As noted earlier, the Court in *Morguard* adopted a definition of comity articulated in the venerable case of *Hilton v. Guyot.*[160] In itself, this citation was not problematic since the Court simply identified its chosen understanding of comity. However, in subsequent cases, the Court has cited decisions of the United States Supreme Court for more precise points of law, with little or no explanation. This more troubling practice suggests that the Court

[160] *Morguard, supra* note 2 at para. 29, citing *Hilton v. Guyot,* 159 U.S. 113 (1895).

is engaged in something other than a sincere exercise in comparative law.

Applying its new anti-suit injunction test in *Amchem,* the Court invoked the nineteenth-century precedent of *Pennoyer v. Neff* for the proposition that the Due Process Clause of the Fourteenth Amendment of the US Constitution limits the power of each state to assert jurisdiction over non-resident defendants.[161] It also cited *International Shoe Co. v. Washington* and *Helicopteros Nacionales de Colombia, S.A. v. Hall,* which are more recent decisions, for the contemporary test required by the Due Process Clause for general personal jurisdiction over a non-resident defendant where the assertion of jurisdiction is grounded not in the action but in the defendant's overall contacts with the forum.[162] However, the Court did not engage the nuances of the American jurisprudence. Subsequent cases have eroded the specific value of *Pennoyer* as precedent by extending the jurisdictional implications of the Due Process Clause to assertions of jurisdiction over *resident* defendants. For example, following the United States Supreme Court's decision in *Shaffer v. Heitner,* all assertions of state court jurisdiction in the United States must satisfy the requirements established in *International Shoe.*[163] Contrary to the suggestions of the Court's brief analysis, *Pennoyer,* which is famous as an articulation of the traditional power theory of personal jurisdiction, arguably does not form part of a smooth body of case law alongside *International Shoe* and *Helicopteros Nacionales.*

The majority in *Unifund* also cited *Pennoyer* as the point at which the "federal structure of the United States" first may have internalized a "concern for state comity, or reciprocal respect" similar to the territorial limitation familiar from international law and, more recently, from Canadian constitutional law.[164] Binnie J. would have done well to heed his own warning — that "cases dealing with extraterritorial application from the courts of Australia and the United States should ... be read with an eye to the differences in our constitutional arrangements" — because the opinion he wrote failed to

[161] *Amchem, supra* note 4 at para. 65; and *Pennoyer v. Neff,* 95 U.S. 714 (1877).

[162] *Amchem, supra* note 4 at para. 65. *International Shoe Co. v. Washington* 326 U.S. 310 (1945) [*International Shoe*]; and *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408 (1984) [*Helicopteros Nacionales*].

[163] *Shaffer v. Heitner,* 433 U.S. 186 (1977) [*Shaffer*].

[164] *Unifund, supra* note 42 at para. 61.

engage these differences to any positive effect.[165] Although *Pennoyer* was an important decision in the evolution of the American approach to jurisdiction *simpliciter,* the majority did not expressly consider either the facts or the holding of the case, preferring simply to excerpt some helpful dicta. Nor did it consider *Pennoyer*'s current value as precedent, which, as noted earlier, may be contested in light of subsequent judgments.[166] The majority also did not argue that the Full Faith and Credit Clause of the US Constitution internalized such a concern for inter-state comity, despite the fact that La Forest J. seemed to invoke this provision for precisely that point in *Morguard.*[167]

Equally puzzling was the majority's treatment of *International Shoe.* In an abbreviated discussion of the constitutional differences between Canada and the United States, the majority suggested that the minimum contacts analysis adopted by the United States Supreme Court in *International Shoe* does not consider the collective interest of the US federation in order and fairness.[168] Not only did it fail to note that *International Shoe* addressed personal jurisdiction rather than the issue considered in *Unifund* — extraterritorial legislative competence — the majority completely neglected the evolution and operation of the minimum contacts test. To begin, the test articulated in *International Shoe* did not simply require minimum contacts with the forum but insisted that a defendant have "certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[169] Further, in subsequent decisions, the United States Supreme Court has identified five factors that determine the requirements of fair play and substantial justice, including the burden of inter-state litigation on the defendant, the inter-state interest in efficient dispute resolution, and the states' common interest in furthering substantive social policies.[170] Less pithy than order and fairness, these factors nonetheless appear to address some of the same concerns that motivate the Court's new approach to

165 *Ibid.* at para. 75.

166 See, for example, *Shaffer, supra* note 163; and *Burnham v. Superior Court of California, County of Marin,* 495 U.S. 604 (1990).

167 *Morguard, supra* note 2 at paras. 39–41.

168 *Unifund, supra* note 42 at para. 74.

169 *International Shoe, supra* note 162.

170 See, for example, *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980).

private international law, and the majority would have contributed more by considering, rather than ignoring, them.

Finally, by citing *Allstate Insurance Co. v. Hague* for the proposition that, in the United States, "state laws are given generous application to disputes with limited connections to the enacting jurisdiction," and then quickly moving on, the majority missed an opportunity to elaborate the relationship between its new applicability analysis and the traditional rules for choice of law.[171] In *Allstate,* the United States Supreme Court held that the selection of Minnesota insurance law to govern an accident that occurred in Wisconsin did not violate either the Due Process Clause or the Full Faith and Credit Clause because "Minnesota had a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair."[172] The Due Process Clause and the Full Faith and Credit Clause constrain state choice of law rules — they do not determine directly the content of these rules. Binnie J. would have been more accurate if he had written that, in the United States, state laws *can be* given generous application to disputes with limited connections to the enacting jurisdiction. The majority also chose not to explain how the concept of applicability, which appears to apply prior to the choice of law analysis, differs from the constitutional restrictions on choice of law employed in *Allstate,* let alone those established in *Tolofson.* The Court's half-hearted approach to comparative analysis suggests that it is drawing on American jurisprudence not for guidance in resolving difficult points of law but simply to add a sheen of legitimacy to results that it would have reached absent such reference.

The second aspect of this second flaw only reinforces this observation since the Court has repeatedly invoked, but failed to analyze carefully, the Full Faith and Credit Clause. The Court's judgment in *Morguard* first conjured the concept of full faith and credit as a vague presence lurking behind the Canadian constitutional artifice. Although the Court insisted that it need not read a full faith and credit clause into the Canadian Constitution, it decided that, in the context of the Canadian federation, comity and private international law require each province to give full faith and credit to judgments made by another province that has properly exercised

[171] *Unifund, supra* note 42 at para. 74.

[172] *Allstate Insurance Co. v. Hague,* 449 U.S. 302 (1981) at 320 [footnote omitted] [*Allstate*].

jurisdiction over the action.[173] However, beyond reciting those magic words, the Court did not explain what the doctrine entailed. The Court's willingness to import the language of full faith and credit is ironic in light of its repudiation of the traditional English rules, especially since it did not carefully analyze the operation of this doctrine in American jurisprudence to determine whether the living tree of the Canadian Constitution would accept such a graft from a foreign source.

The difficulties presented by the adoption of this language became apparent in *Tolofson,* where the Court rejected flexible approaches to choice of law, which it called "public policy" arguments, in favour of the more rigid and purportedly predictable rule of *lex loci delicti.* The Court framed its analysis of public policy arguments largely as a response to an American doctrine that it labelled the "proper law of the tort" approach, but which is more commonly known as governmental interest analysis.[174] The Court cited a number of decisions by the New York Court of Appeals, in which the latter repudiated the traditional *lex loci delicti* rule and developed a new approach to the choice of law for certain matters. In the first decision, *Babcock v. Jackson,* the New York Court of Appeals employed what it referred to as a "grouping of contacts" test, in which it weighed the contacts between each state and the action to determine which state had the greatest interest in applying its law to the specific issue presented in the case.[175] In the subsequent decisions of *Neumeier v. Keuhner* and *Schultz v. Boy Scouts of America,* among others to which the Court did not refer, the New York Court of Appeals refined this test and renamed it the governmental interest analysis.[176] Roughly, governmental interest analysis requires the forum court to ascertain the contacts between the tort and any jurisdiction whose laws might apply. The character of the legal issue at stake determines which contacts are relevant. Contacts between a jurisdiction and the tort give rise to a governmental interest in having its substantive law apply to the legal issue under consideration. Finally, the forum court must weigh the competing governmental interests to determine which jurisdiction's law applies

[173] *Morguard, supra* note 2 at paras. 39–41.

[174] *Tolofson, supra* note 1 at paras. 53–55.

[175] *Babcock v. Jackson,* 240 N.Y.S.2d 743 (N.Y. 1963) at 747–50 [*Babcock*].

[176] *Neumeier v. Keuhner,* 335 N.Y.S.2d. 64 (N.Y. C.A. 1972) [*Neumeier*]; and *Schultz v. Boy Scouts of America,* 491 N.Y.S.2d 90 (N.Y. C.A. 1985) [*Schultz*].

to the issue.[177] Without engaging the conceptual operation of governmental interest analysis, and despite acknowledging its effectiveness in promoting justice and fairness, the Court flatly denied its utility in Canada because its flexibility would introduce "extreme uncertainty."[178]

While governmental interest analysis does rely on judicial discretion to define and weigh those interests, the manner in which the Court spurned it veered dangerously close to the traditional, and largely discredited, doctrine of vested rights.[179] Under this theory, legal rights arise at the point of the relevant legal event, whether it be a tort, the death of a testator, or the signing of a contract, and do not vary with the forum in which suit is brought. Many American courts have rejected the vested rights approach to choice of law, thinking it unfair, and even "wooden," since it fails to consider whether the rules selected produce fair and reasonable results.[180] However, in *Tolofson,* the Court decided that the risks presented by the governmental interest approach outweigh any "unfortunate results" that its focus on territorial jurisdiction may perpetuate.[181] As a result, subsequent opinions resonate with the rigid vested rights approach. For example, when Bastarache J., dissenting in *Castillo,* wrote that section 12 of the Alberta *Limitations Act* "disregards the legislative sovereignty of other jurisdictions within which the substantive rights at issue are situated," he reinforced an emphasis on territoriality shared by this traditional doctrine and the new approach to private international law.[182]

In addition, the Court's rejection of governmental interest analysis undermined the viability of full faith and credit within the new

[177] See, for example, *Babcock, supra* note 175; *Neumeier, supra* note 176; *Schultz, supra* note 176. In contrast, pursuant to the "proper law" approach created by Robert A. Leflar and mentioned, but not adopted, by the New York Court of Appeals in *Babcock,* when competing jurisdictions have equal interests in applying their laws to a case, the forum court would break the tie by selecting the law that would produce, in the court's opinion, the more desirable substantive result. Robert A. Leflar, *American Conflicts Law,* 4th edition (1986) at sections 9 and 11, cited in Peter Hay et al., *Conflict of Laws: Cases and Materials,* 11th edition (New York: Foundation Press, 2000) at 518.

[178] *Tolofson, supra* note 1 at para. 54.

[179] Swan, "Federalism and the Conflict of Laws: The Curious Position of the Supreme Court of Canada," *supra* note 7 at 948–56.

[180] See, for example, *Babcock, supra* note 175; *Allstate, supra* note 172 at 317, n. 22.

[181] *Tolofson, supra* note 1 at para. 57.

[182] *Castillo, supra* note 79 at para. 50.

approach. The Court did not engage this issue, but both its choice of law analysis in *Tolofson* and its rhetoric throughout the *Morguard* era conflict with the concept of full faith and credit embraced in *Morguard* and *Hunt*. In American case law, the operation of the Full Faith and Credit Clause depends on whether the forum court has been asked to enforce a sister state judgment or apply a sister state law. In the former situation, the Full Faith and Credit Clause requires the other states to give the judgment the same effect that it would have had in the issuing state, so long as the issuing state had sufficient contacts with the dispute to exercise jurisdiction in accordance with the Due Process Clause and the court that delivered the judgment was competent under the law of that state.[183] In contrast, where a court is asked to apply the law of another state, it must consider the contacts between the dispute and the competing states to determine the interest that each state has in applying its law to the type of issue presented.[184] Although the case law of the United States Supreme Court no longer requires the weighing of these interests, they must surpass an implicit threshold for the law of the interested state to be applied constitutionally to any particular case.[185] At least for the purposes of choice of law, the Full Faith and Credit Clause provides a constitutional locus to consider competing state interests. It is one site at which the courts can strike the balance between deference and assertion among the states and thereby determine the degree of legal heterogeneity within the American federation.[186]

In contrast, the Court's model of full faith and credit, which emerges from the "integrating character" of the Canadian Constitution, does not engage an understanding of provincial interests analogous to that of state interests in the American analysis.[187] The Court does not enforce the judgment of a court or apply the law of a jurisdiction to vindicate that jurisdiction's interests. Rather, it has insisted that provincial courts take jurisdiction "not to administer

183 *Fall v. Eastin*, 215 U.S. 1 (1909).

184 *Allstate, supra* note 172 at 308.

185 *Carroll v. Lanza*, 349 U.S. 408 (1955); *Nevada v. Hall*, 440 U.S. 410 at 424 (1979); and *Allstate, supra* note 172 at 308, n. 10.

186 See, for example, *Allstate, supra* note 172 (compare the reasoning and the conclusions of the plurality, concurrence, and dissent, which employed the Due Process Clause, the Full Faith and Credit Clause, contacts, and governmental interests to varying effect).

187 *Hunt, supra* note 30 at para. 56, citing *Morguard, supra* note 2 at para. 39.

local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order."[188] In effect, it has defined such convenience as adhering strictly to territorial limits on legislative competence. Despite its brief reference in *Hunt* to a province's interest in protecting the property of its residents within the province, the Court generally has not presented provincial interests as valid and distinct from those interests embodied in the narrow set of structural characteristics that it has enumerated to define the Canadian federation.[189] Unequipped with a concept of provincial interests, the Court's Canadian version of full faith and credit favours deference, unification, and the homogenization of Canadian legal diversity. Perhaps because it lacked this analytical tool, when the Court attempted to address issues of extra-provincial legislative effect in *Unifund, Imperial Tobacco,* and *Castillo* it struggled to articulate a coherent and satisfying doctrine.[190]

The Court's engagement with American jurisprudence reveals surprisingly little about the operation of the Canadian approach to private international law. While the Court has invoked some of the most significant American conflict of laws judgments, it has not expressly considered their conceptual or doctrinal underpinnings. Rather, it has employed unrepresentative samples and descriptions of American jurisprudence to propel its own project of "modernizing" Canadian private international law. The Court has used American judgments not for their content — whether as a vehicle to import foreign law or as a contrast to domestic rules and concepts — but as a rhetorical device to reflect upon the models of Canada and private international law that it has been crafting since *Morguard.* This "mirroring" method of comparative law may provide an appearance of cosmopolitanism, legitimacy, and effectiveness to the new approach, but it contributes nothing of substance.

AN INADEQUATE INTERNATIONALIST VISION

In contrast, the Court's vision of the international order does much of the substantive work in its new approach to private international law. However, this vision is not adequate to perform such a charge. As this section demonstrates, its content has long been

188 *Tolofson, supra* note 1 at para. 83.

189 *Hunt, supra* note 30 at para. 61. See also the discussion later in this article.

190 See the discussion later in this article.

obscure, and recent cases suggest that it is less distinctive and more confusing than previously appeared. The Court's internationalist vision seemed to spring fully formed from La Forest J.'s judgment in *Morguard,* where he first ventured that the traditional, common law rules of private international law were inadequate to address a contemporary international order in which "[a]ccommodating the flow of wealth, skills and people across state lines has become imperative."[191] In a similar vein, he wrote that "the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in an orderly fashion."[192] These early statements reveal an interesting nuance of the Court's position. States, with their territorial jurisdiction at public international law, both generate and must resolve the problems posed by inter-state flows of persons, capital, services, and goods.

La Forest J.'s opinion in *Morguard* also demonstrated the Court's willingness to use words such as "imperative" to convey a sense of urgency and present its preferred result — rules of private international law that promote smooth cross-border transactions — as being the necessary or natural product of historical developments — in this case, "[m]odern means of travel and communications."[193] From the outset of the new approach, the Court has insisted that private international law must adapt to the empirical reality of the contemporary international order.[194] The Court has used similar rhetoric throughout these ten cases, and this tendency appears related to its penchant for structural reasoning. In *Morguard,* the Court also made observations about the contemporary international order without reference to a single case or secondary source.[195] While such bold claims may provide some sense of the content of the Court's internationalist vision, their more direct effect has been to undermine the Court's own suggestions that its new approach is driven by concerns unique to the Canadian federation.

A related argumentative strategy that La Forest J. used in the early decisions of the new approach was to establish the need to adapt traditional rules to the dictates of the contemporary international order before considering their effectiveness on the domestic level.

191 *Morguard, supra* note 2 at para. 34.

192 *Ibid.* at para. 31.

193 *Ibid.* at para. 33.

194 *Ibid.*

195 See, for example, *ibid.* at para. 30.

In *Hunt,* he demonstrated the weakness of the common law rules for the recognition and enforcement of judgments first by identifying their anachronistic, and even unfair, emphasis on sovereignty and independence in the modern era of international commerce.[196] Only after establishing their inappropriateness on the international level did he consider their "inutility" within the federation by writing that, "*[i]n any event,* I indicated that the traditional rules emphasizing sovereignty seem to 'fly in the face of the obvious intention of the Constitution to create a single country.'"[197] La Forest J. further entrenched this pattern in *Tolofson,* even though this case presented purely domestic facts. He also articulated the rationale for this tactic by noting that, although the structural problem of interjurisdictional disputes can arise in a federal system, "it is instructive to consider the matter first from an international perspective since it is, of course, on the international level that private international law emerged."[198] While an international perspective can provide traction on these issues, reliance upon such a perspective also may privilege considerations unique to the international realm while marginalizing distinctive elements of the Canadian federal system.

In *Tolofson,* the Court also addressed the doctrinal and practical considerations that motivate this internationalist approach. First, it posited that the underlying reality of the international order is the territorial limits of domestic law at public international law and derived the need for *lex loci delicti* directly from this principle of exclusive territorial jurisdiction.[199] Although its analysis recognized some inter-relationship between *public* international law and the "reality" of the international order, the Court insisted that *private* international law accommodate this reality.[200] Subsequent cases have further developed the relationship between public and private international law.[201]

Second, the Court focused expressly on the challenge of maintaining a global economic order by protecting legal expectations and the stability of transactions.[202] It identified the more routine

196 *Hunt, supra* note 30 at para. 53.

197 *Ibid.* at para. 54 [emphasis added] [footnotes omitted], citing *Morguard, supra* note 2 at 1099.

198 *Tolofson, supra* note 1 at para. 36.

199 *Ibid.* at paras. 37 and 43.

200 *Ibid.* at para. 37.

201 See text accompanying notes 242–65 in this article.

202 *Tolofson, supra* note 1 at para. 44.

considerations as certainty, ease of application, and predictability, all of which can be tied back to the principle of exclusive territorial jurisdiction through the notion of "well-grounded legal expectations," which it defined as having events governed by the law of the place where they occurred.[203] Such elaboration renders the circular relationship between individual expectations, fairness, and order more apparent since these expectations, which fairness seeks to protect, are defined to promote international order as characterized by the Court. Individual expectations are paramount, but they amount to nothing more than an indirect affirmation of international order. Thus, order, which the Court had also linked to concerns for economic efficiency and regulatory homogeneity, became the primary concern of its new approach.[204]

In contrast to this willingness to raise international concerns, LeBel J., writing for the Court in *Spar Aerospace,* sought to contain the implications of the new approach to the domestic sphere. To support the conclusion that the real and substantial connection test does not apply independently to discipline the assertion of jurisdiction by provincial courts over defendants not resident in Canada, he emphasized that both *Morguard* and *Hunt* were decided in the context of "*interprovincial* jurisdictional disputes" and insisted that their specific findings cannot easily be extended beyond this context.[205] More troublesome were statements in subsequent paragraphs that "federalism was the real concern underlying both decisions" and that the real and substantial connection test "was specially crafted to address the challenges posed by multiple jurisdictions within a federation."[206] These assertions demonstrate a failure to delve beneath the Court's own rhetoric and consider the patterns of reasoning that have generated the new approach to private international law. A careful analysis of these cases reveals that, although *Morguard, Hunt,* and *Tolofson* involved inter-provincial disputes, the impetus for the development of the Canadian approach was the Court's stylized model of the international realm. In *Spar Aerospace,* the Court obscured these origins by excerpting only those portions of the decisions that invoked the structure of the Canadian federation and the need to adapt existing rules to its unique context.

203 *Ibid.*

204 *Ibid.* at para. 57. See also text accompanying note 110 in this article.

205 *Spar Aerospace, supra* note 43 at para. 51 [emphasis added].

206 *Ibid.* at paras. 53 and 54.

In *Beals*, a majority of the Court rejected the parochial implications of *Spar Aerospace* and acknowledged, at least indirectly, the international pedigree of the Canadian approach to private international law. As discussed in the following section, while establishing its particular vision of the international order, the Court also entrenched a minimalist model of the Canadian federation that emphasized only those elements consistent with its internationalist vision, such as inter-provincial mobility and the common market, and discounted those aspects that might jar with such a harmonious presentation, such as substantive legal diversity. Thus, in retrospect, the declaration in *Morguard* that "[t]he considerations underlying the rules of comity apply with much greater force between the units of a federal state" appears more mundane than visionary, as the Court has worked to render the Canadian federation, at least for the purposes of private international law, little more than a concentrated version of the international order.[207] In deciding that the reasoning from these earlier inter-provincial cases was "equally compelling" and "equally applicable" to the international context of *Beals*, such that Canadian courts should apply the same test for the recognition and enforcement of foreign judgments as for inter-provincial judgments, the majority essentially reflected this internationalist vision back on itself.[208] The Court's moves can be traced quite easily. It relied upon a narrow understanding of reasonable expectations that depended on fairness, which, since *Tolofson*, has been defined by reference to a definition of order that appears motivated by concern for the certainty and predictability of transactions.[209]

In dissent, LeBel J. emphasized fairness to the defendant but did so in a manner that revealed an implicit distrust of foreign legal systems. First, he insisted that the real and substantial connection test should be modified to acknowledge the additional hardship imposed on a defendant required to litigate in a foreign country and described it as "[a] test which balances hardship to the defendant (with due regard to the interests of the plaintiff) against the factors connecting the action to the forum — including links to either party or any other aspect of the action."[210] He identified

[207] *Morguard, supra* note 2 at para. 35.

[208] *Beals, supra* note 63 at paras. 25 and 29.

[209] *Ibid.* at para. 25; and *Tolofson, supra* note 1 at paras. 44 and 57. See also text accompanying notes 108 and 110.

[210] *Ibid.* at paras. 134 and 187.

certain burdens associated with defending foreign litigation, such as inconvenient travel and the risks posed by an unfamiliar legal system, but did not consider empirical evidence of their relevance to foreign and domestic litigation.[211] He also failed to explain how to distinguish hardship to the defendant from the various factors linking the parties and the action to the forum, when enhanced connections between the defendant, the subject matter, and the foreign jurisdiction would appear to reduce the hardship of foreign litigation.[212] Second, LeBel J. noted that, when one party is forced to litigate in a foreign jurisdiction, "the parties will not be on a level playing field."[213] This metaphor not only implies an element of impropriety in international litigation that is not remedied, but merely justified, by a bundle of connections between the action and the foreign forum, but also suggests that the conditions of international litigation are static. However, if Canadian courts begin to recognize and enforce foreign judgments more readily, parties arguably are likely to adapt. Canadians may become more informed about the laws and procedures in foreign jurisdictions; foreign plaintiffs may become increasingly concerned with the Canadian legal system; and legal markets, both domestic and foreign, may respond to this new demand by producing more competent, multilingual, and affordable lawyers capable of representing parties effectively in international litigation.

Finally, LeBel J. argued, contrary to the majority opinion, that a plaintiff seeking to enforce a foreign judgment in Canada should bear the burden of proving the fairness of the originating legal system.[214] As with much of his dissent, this position seems inconsistent with the understanding of comity that has driven the evolution of the Canadian approach to private international law, since it favours the interests of Canadian defendants in resisting enforcement and may undermine international commerce by discouraging foreign parties from contracting with Canadians due to the increased difficulty and cost of enforcing foreign judgments in Canada. Whereas the majority perceived a difference of degree between domestic and foreign judgments, LeBel J. presented a difference of kind. Foreign judgments are "another matter altogether" and warrant a reversal of the burden of proving the fairness of the originating

211 *Ibid.* at paras. 188–90, citing *Morguard, supra* note 2 at 1100.

212 *Beals, supra* note 63 at paras. 183 and 196.

213 *Ibid.* at para. 196.

214 *Ibid.* at para. 195.

legal system.[215] Viewed as a whole, LeBel J.'s reasoning may encourage individuals to remain uninformed about foreign jurisdictions and to undermine international comity by shielding such hapless litigants from the enforcement of foreign judgments.

In *SOCAN*, where the Court analyzed the legitimate extraterritorial reach of federal copyright legislation, the majority resisted the insularity of LeBel J.'s dissent in *Beals* and revealed more of the internationalist vision that has propelled its new approach. The majority judgment, written by Binnie J., relied on a particular conception of the territorial principle that has influenced many of the Court's moves during the development of the new approach because copyright law, like criminal law, "respects the territorial principle" — namely, in accordance with practice established under international treaties, each state has the jurisdiction to regulate copyrights within its territory.[216] This approach to defining copyright jurisdiction requires a definition of national territory, which the majority derived from the territorial principle that emerged from the Court's judgments in *Morguard, Tolofson,* and even *Unifund.*[217]

Motivated by the observation that Canada has a "significant interest in regulating the flow of information in and out of the country," the majority rejected the Copyright Board's position that Canada could exercise copyright jurisdiction only over originating host servers physically located in Canada.[218] Unfortunately, the doctrinal basis for this rejection remains unclear, as Binnie J. noted that Canada's jurisdiction is not limited to such servers "[a]s a matter of international law and practice, as well as the legislative reach of our Parliament."[219] Since the majority did not ground its analysis in the Canadian Constitution, this reference to Parliament's "legislative reach" as a consideration distinct from international law and practice is confusing.

The majority began its analysis of Parliament's legislative reach by declaring that Parliament, unlike the provincial legislatures, is competent to enact laws with extraterritorial effect.[220] This seems

[215] *Ibid.* at para. 193–95. Compare the majority position (*ibid.* at para. 60–62).

[216] *SOCAN, supra* note 69 at para. 56.

[217] *Ibid.* at para. 79.

[218] *Ibid.* at paras. 52 and 62.

[219] *Ibid.* at para. 52.

[220] *Ibid.* at para. 54.

not only to conflict with the Court's decisions in *Hunt* and *Global Securities Corp. v. British Columbia (Securities Commission),* in which the Court found valid a BC regulation that allowed provincial securities regulators to collaborate with foreign authorities, but also to step beyond the majority opinion in *Unifund,* which did not address provincial legislation with international effects.[221] Further, in the pre-*Morguard* case of *Hydro-Québec v. Churchill Falls (Labrador) Corp.,* the Court recognized expressly that, so long as the pith and substance of provincial legislation is "in the province," a province may enact laws that have extraterritorial effects.[222] Without addressing these issues, Binnie J. cited *Tolofson* for the assertion that, although Parliament enjoys such broad competence, it is presumed not to legislate with extraterritorial effect because "[i]n our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected."[223] Thus, he reinforced the connection drawn in *Hunt, Tolofson,* and *Unifund* between regulatory uncertainty and economic disorder.

Such reasoning placed the definition of the territorial principle at the center of its analysis, and the majority resolved this issue in a confusing manner. Relying on *Morguard* and *Unifund,* Binnie J. wrote that

> [t]he applicability of our Copyright Act to communications that have international participants will depend on whether there is a sufficient connection between this country and the communication in question for Canada to apply its law consistent with "the principles of order and fairness ... that ensure security of [cross-border] transactions with justice."[224]

Applying the reasoning from cases involving inter-provincial disputes to the analysis of federal legislative competence, this quotation suggests that, despite the majority's earlier assertion that international comity does not limit Parliament's legislative competence,[225] the constituent elements of comity — order and fairness — somehow govern the applicability of federal legislation to communications with international elements. Some of the confusion

221 See *Global Securities, supra* note 13.

222 *Churchill Falls, supra* note 147 at para. 52.

223 *SOCAN, supra* note 69 at 54, citing *Tolofson, supra* note 1 at 1051.

224 *Ibid.* at para. 57, citing *Morguard, supra* note 2 at 1097.

225 *Ibid.* at para. 55.

arises from the term "applicability," which appeared in *Hunt* and caused problems in *Unifund,* but it is the Court's tangled use of these various concepts throughout the development of the new approach that deserves most of the blame.

The true extent of this problem became most evident when Binnie J. combined the territorial principle with the language of the real and substantial connection test from *Morguard* to determine when a communication has a relationship with Canada that is sufficient to support the application of Canadian copyright law in accordance with international comity, order, and fairness.[226] Earlier in the opinion, Binnie J. cited *Libman,* which addressed Parliament's territorial criminal jurisdiction at international law, for the "relevant territorial principle" that Canadian criminal jurisdiction is limited to offences for which a significant portion of the constitutive activities took place in Canada.[227] Although he also relied upon *Unifund* as a precedent for this manoeuvre, the majority in *Unifund* did not actually adopt the real and substantial connection test. Instead, it employed the more generic "sufficient connection" test.[228] More important than any operational distinction between these tests was the majority's failure to explain why, if international comity does not limit parliamentary legislative competence, it bothered to determine the conditions under which Canadian copyright law can apply to international transactions in accordance with both international comity *and* the objectives of order and fairness.

In light of its reliance on the territorial principle, the Court's judgment in *Libman,* and the presumption against extraterritorial effect, a plausible interpretation of the majority's analysis in *SOCAN* is that it used the real and substantial connection test, not to justify directly the application of Canadian copyright law to international transmissions but, rather, to determine when such transmissions occur within Canada, such that the application of Canadian law coheres with the territorial principle. This interpretation aligns with the majority's understanding of international comity as the guarantor of an international economic order that depends generally on territorially confined regulation and resonates with the Court's decision in *Libman.* Just as an offence is seen as occurring in Canada whenever the offence has a real and substantial link to the country, an Internet transmission is deemed to occur in Canada

[226] *Ibid.* at para. 60.

[227] *Ibid.* at para. 58, citing *Libman, supra* note 15 at para. 74.

[228] *Unifund, supra* note 42 at para. 82.

when the transmission has a real and substantial connection with it. This interpretation also coheres with language used by the majority — the real and substantial connection only "support[s] the application" of the *Copyright Act* to international transactions in adherence with certain considerations[229] — and the basis for such application is its consistency with the territorial principle. Since such communications can be seen as occurring within Canada, the courts can apply the *Copyright Act* to them consistent with the demands of international comity and without determining whether Parliament intended the act to have extraterritorial effect. Finally, this interpretation is bolstered by the fact that the majority never considered whether Parliament rebutted the presumption against extraterritorial effect. Since all of the relevant transactions would either originate or terminate in Canada, they would have a real and substantial connection with the country and thus would fall within Canada's copyright jurisdiction and avoid the need for extraterritorial effect.

However, the majority's earlier assertion that the applicability of the *Copyright Act* to international communications depends on the existence of a sufficient connection between Canada and the communication appears to address not the conditions under which a communication occurs within the country, such that a court need not consider whether Parliament intended extraterritorial effect, but, rather, the conditions under which Canadian copyright legislation is capable of being applied legitimately to cross-border communications.[230] Just as in *Unifund,* the majority's unexplained use of "applicability" introduced conceptual complexity.[231] If the *Copyright Act* is applicable only where there is a connection between Canada and the communication, such that its application accords with international comity and is consistent with order and fairness,[232] but international comity does not restrict Parliament's legislative competence,[233] then the source of this limitation and the manner in which it operates remain unknown. Fortunately, the majority's reference to *Libman* illuminates both concerns as well as certain other aspects of the Canadian approach to private international law.

229 *SOCAN, supra* note 69 at para. 60.

230 *Ibid.* at para. 57.

231 See text accompanying notes 297–308 in this article.

232 *SOCAN, supra* note 69 at para. 60.

233 *Ibid.* at para. 55.

Libman involved a fraudulent stock-selling scheme in which individuals in Toronto telephoned residents of the United States and used misleading information to persuade them to purchase shares in two mining corporations by sending money to either Panama or Costa Rica.[234] The defendant was charged with fraud and conspiracy to commit fraud under the *Criminal Code*.[235] Noting that in international law the primary basis for criminal jurisdiction is territorial, the Court held that, for an offence to be subject to the jurisdiction of Canadian courts on a territorial basis, a significant portion of the events constituting this offence must have taken place in Canada.[236] Relying on academic commentary rather than case law, the Court found that this threshold is met where there is a "real and substantial link" between Canada and the offence.[237] The Court was not required to elaborate on this test because it found "ample links" on which to base criminal jurisdiction over the defendant.[238] As articulated in *Libman*, the real and substantial link test is not simply an external restriction on Parliament's otherwise unlimited power to legislate extraterritorially. Nor is it an indirect means of redefining the meaning of Canadian territory, so as to eliminate the need to consider whether Parliament intended to legislate extraterritorially whenever an offence possesses such a link with Canada. Rather, it forms a constitutive element of Parliament's legislative competence under public international law. The real and substantial link test legitimates the exercise of Parliament's authority on the international level.

The real and substantial connection test can be understood as performing the same function for Canada's copyright jurisdiction. It delineates the realm of transactions to which Canada may apply its *Copyright Act* without infringing public international law. Just as criminal jurisdiction is ordinarily based on territoriality, "[c]opyright law respects the territorial principle."[239] Just as the real and substantial link test determined the limits of the territorial principle for criminal jurisdiction, the real and substantial connection test "reflects the underlying reality of 'the territorial limits of law under the international legal order' and respect for the legitimate actions

[234] *Libman, supra* note 15 at paras. 2–5.

[235] *Criminal Code*, R.S.C. 1970, c. C-34, section 423(1)(d).

[236] *Libman, supra* note 15 at paras. 11 and 74.

[237] *Ibid.* at para. 74.

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

[239] *Libman, supra* note 15 at para. 11; and *SOCAN, supra* note 69 at para. 56.

of other states inherent in the principle of comity."[240] And, just as the outer limits of the real and substantial link test, which operate as a proxy for territorial criminal jurisdiction, "may ... be coterminous with the requirements of international comity," a real and substantial connection ensures that the *Copyright Act* applies in accordance with international comity and the objectives of order and fairness.[241]

Before examining the concepts at play in *Libman* in greater detail, it is useful to note that the style of reasoning employed by the Court in this case is very similar to that adopted in both *Morguard* and *Tolofson*. La Forest J. wrote all three decisions, and, although they address different issues, they share certain general characteristics. For example, La Forest J. began each analysis with a discussion of historical approaches in England and Canada to the issue presented, whether the gist of the offence for criminal jurisdiction, the physical presence in the originating jurisdiction for the recognition and enforcement of the foreign judgments, or the double actionability rule for choice of law.[242] Then, he identified empirical conditions that rendered such traditional approaches inadequate, such as technological innovations that facilitate new forms of cross-border crime or the emergence of a global economic order dependent on smooth flows of goods, capital, and persons.[243] Finally, he identified the need to change the traditional approach and employed a similar vehicle in each case — a nexus test based on links or connections and an evolving notion of international comity.[244] The presence of this pattern in a public international law decision that preceded the Court's judgment in *Morguard* by five years supports the argument that the Canadian approach to private international law derives much of its content from a particular vision of the international system.

The Court's reasons in *Libman*, read together with these other cases, reveal important components of this vision. First, the international system is composed of self-interested territorial states under public

240 *Libman, supra* note 15 at para. 74; and *SOCAN, supra* note 69 at para. 60, citing *Tolofson, supra* note 1 at para. 37.

241 *Libman, supra* note 15 at para. 76; and *SOCAN, supra* note 69 at para. 60.

242 *Libman, supra* note 15 at paras. 23–33; *Morguard, supra* note 2 at paras. 12–20; and *Tolofson, supra* note 1 at paras. 24–29.

243 *Libman, supra* note 15 at paras. 37, 63, and 77; *Morguard, supra* note 2 at paras. 34–35; and *Tolofson, supra* note 1 at para. 40.

244 *Libman, supra* note 15 at para. 74; *Morguard, supra* note 2 at para. 45–47; and *Tolofson, supra* note 1 at para. 41.

international law. Second, technological and economic changes can create new challenges and threats for these discrete units. Third, such external pressures cause a convergence of national values and interests. Finally, enlightened self-interest enables territorial states to coordinate and cooperate in addressing such novel conditions. Although not as thorough as the model of internationalism presented by Robert Wai, this description hews more closely to the Court's own language and reasoning, thus reducing the risk of conceptual contamination from the author's own views.[245]

This rough sketch reveals three assumptions essential to the Court's model of the international realm. First, as suggested earlier, the Court views international law as distinct from empirical reality. It generally does not envision a mutually constitutive relationship between material developments and international legal doctrine.[246] Second, the Court assumes that territorial states have the ability to coordinate and cooperate with one another, despite unequal financial resources and institutional capacity. Finally, the Court presumes that self-interest under contemporary conditions will produce a particular form of cooperation characterized by action within each state's legitimate sphere of domestic activity and deference beyond it. As La Forest J. wrote in *Libman,* "[i]n a shrinking world, we are all our brothers' keepers."[247] Such benign unilateralism relies upon a set of background norms and entitlements that enable the Court to distinguish between legitimate action and wrongful interference.

The similarities between *Libman, Morguard,* and *SOCAN* might tempt observers to conclude that the Court has come full circle in developing the Canadian approach to private international law. Others may perceive the Court as caught in a downward spiral, tumbling from the clarity of its early judgments through the confusion of more recent decisions. However, a close analysis of the Court's texts suggests that both metaphors are inapt. The majority judgment in *SOCAN* is more usefully and evocatively described as just one step further into the hall of mirrors that the Court has been exploring since *Morguard.* Any glimpse of a promising concept is fleeting; each interpretation recedes into another; and, upon closer analysis, the entire endeavour appears founded upon a reflection of a reflection.

[245] See text accompanying notes 8–12 in this article.

[246] See text accompanying notes 199–201 in this article.

[247] *Libman, supra* note 15 at para. 78.

Binnie J. inspired this complaint by writing that the real and substantial connection test "reflects the underlying reality of 'the territorial limits of law under the international legal order' and respect for the legitimate actions of other states inherent in the principle of international comity."[248] A mechanical approach to this comment best separates the two strands of his logic. In his first line of reasoning, the international legal order, by which he meant public international law, determines the territorial limits of law, which, in turn, generates the real and substantial connection test.[249] According to the second line, respect for the legitimate actions of other states motivates the principle of international comity, which also projects the real and substantial connection test. Thus, the territorial principle and international comity together give rise to the real and substantial connection test. However, on closer consideration, the two concepts do not make distinct contributions. Rather, a more accurate description of the real and substantial connection test is that it delineates the territorial boundary between a state's jurisdiction — actions within which are considered legitimate — and the realm of activity in which the requirements of international comity somehow discipline state action. Unpacked, Binnie J.'s description of the test reveals the interdependence of these three concepts. The territorial principle and international comity generate the real and substantial connection test, just as the real and substantial connection test produces them.

The weakness of the majority's understanding can be further clarified by scrutinizing Binnie J.'s claim that "respect for the *legitimate* actions of other states" is inherent in the principle of international comity.[250] International comity does not require deference to all actions taken by other states but only for those actions taken legitimately. However, some set of norms independent from the concept of comity must provide the criteria necessary to distinguish legitimate actions from illegitimate ones. In *Morguard,* where the Court identified international comity as "the informing principle of private international law," it posited order and fairness as the

248 *SOCAN, supra* note 69 at para. 60, citing *Tolofson, supra* note 1 at 1049.

249 In the paragraph of *Tolofson* from which Binnie J. excerpted, La Forest J. wrote: "On the international plane, the relevant underlying reality is the territorial limits of law under the international legal order. The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit." *Tolofson, supra* note 1 at para. 37.

250 *SOCAN, supra* note 69 at para. 60 [emphasis added].

considerations that provide the positive content of comity.[251] In *Tolofson*, the Court asserted the pre-eminence of order.[252] In *Unifund*, Binnie J. reintroduced a concern, first raised in *Hunt*, that regulatory overlap may disrupt economic efficiency, and, in *SOCAN*, he expressly linked the common law presumption against extraterritorial effect to preventing the "chaotic situations" that would result from failure to respect the territorial limits on legislative jurisdiction.[253] The Court's concern for international comity is ultimately reduced, through its understanding of order as avoiding regulatory uncertainty, to an emphasis on adhering to the territorial principle. Fairness, which is now the subordinate principle of international comity, adds nothing to this analysis because the Court has deprived it of independent substance by defining it as respect for well-grounded legal expectations, which, in turn, are deemed to consist of the expectation that states will adhere to the territorial principle.[254] Both strands of the majority's reasoning in *SOCAN* can be understood as relying on this "underlying postulate of public international law."[255]

Importantly, this pattern of reasoning also appears in *Libman*. In this case, La Forest J. noted that English courts developed the territorial principle in criminal law in response to two practical considerations: "[F]irst, that a country has generally little direct concern for the actions of malefactors abroad; and secondly, that other states may legitimately take umbrage if a country attempts to regulate matters taking place wholly or substantially within their territories."[256] Similarly, in determining whether a transaction falls within Canadian territory for purposes of criminal jurisdiction, the Court must "take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence."[257] The legitimacy to which the Court refers in both quotations is the legitimacy provided by adherence to the territorial principle under public international law. In turn, the "limits of

[251] *Morguard, supra* note 2 at paras. 29, 32, and 35.

[252] *Tolofson, supra* note 1 at para. 57.

[253] *Unifund, supra* note 42 at para. 71; and *SOCAN, supra* note 69 at para. 54, citing *Tolofson, supra* note 1 at para. 44.

[254] See, for example, *Tolofson, supra* note 1 at para. 44. See also text accompanying notes 202–3 in this article.

[255] *Tolofson, supra* note 1 at para. 37.

[256] *Libman, supra* note 15 at para. 65.

[257] *Ibid.* at para. 71.

territoriality" are defined by the real and substantial link test, the outer limits of which "may ... be coterminous with the requirements of international comity."[258] In addition, both the territorial principle and "the notion of comity" have evolved in response to external pressures, such as a new means of communication.[259] At this early stage, the Court's language was more cautious and its analysis was not yet burdened with the concepts of order, fairness, and efficiency, but its discussion of the legitimate interests of other states implicated the same set of interlocking relationships that appear in the new approach to private international law.

Such parallels do not necessarily bode well for the new approach, for the relationship between the territorial principle and private international law is not as solid as the Court might hope. According to the Court, the territorial limit of law is the underlying postulate of public international law. However, the existence of public international law is the necessary condition for the legitimacy of the territorial principle. For territorial states to exist legitimately, some set of norms also must exist to legitimate them. Neither can be said to exist without the other — the territorial limits to state jurisdiction at international law generate new threats to territorial states, which require adaptation of the territorial principle, which, in turn, generates new threats, and so on. While the exact dimensions of states' territorial jurisdiction may vary with subject matter and time, this conceptual connection between territorial states and public international law does not. The system of territorial states requires a normative system to legitimize it, and this normative system would not exist without the system of territorial states.

The illusory nature of its conceptual foundation is not the only problem facing the majority's analysis in *SOCAN* and the Canadian approach more generally. The surreptitious manner in which the Court has entrenched the theoretical apparatus of public international law within its model of private international law suggests that its decisions since *Morguard* have not been establishing a truly novel approach to the latter. Rather, these cases have begun to obscure the boundaries between the two bodies of law, which has facilitated the colonization of private international law by the concepts and concerns of its public counterpart. Similarly, as discussed in the following section, the majority's decision in *Unifund* evidences blurring between public international law and Canadian constitutional

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

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

law. The opacity of the new approach has allowed these problems to develop largely unnoticed and may have made them difficult to resolve absent significant changes to both Canadian private international law and Canadian federalism.

Unfortunately, LeBel J.'s concurrence in *SOCAN* cannot help to address such matters, since he continued to claim that the real and substantial connection test has no application to international issues, as it was developed in the inter-provincial context.[260] His insistence on the domestic provenance of the real and substantial connection test may have carried the day in *Spar Aerospace,* but it is inconsistent with the majority decisions in both *Beals* and *SOCAN.* LeBel J. acknowledged that the Court applied the test to the enforcement of foreign judgments in *Beals,* but he argued that "it is not a principle of legislative jurisdiction; it applies only to courts."[261] Not only is this statement contrary to the holding of the majority in *Unifund,* but it also conflicts with the dictum from *Hunt* that order and fairness are constitutional imperatives that apply to the provincial legislatures as well as the courts.[262] LeBel J.'s concurrence provided no traction on the interaction between the new approach to private international law and the traditional rules of public international law because he denied the very possibility of their intersection.

The opinions in *Imperial Tobacco* and *Castillo* have shown the importance of gaining such traction since the Court's understanding of public international law increasingly influences the evolution of the Canadian federal system. For example, when the unanimous Court in *Imperial Tobacco* identified the second purpose of the territorial limitations on provincial legislative competence contained in section 92 of the *Constitution Act, 1867,* as being "to ensure that provincial legislation ... pays respect to 'the sovereignty of the other provinces within their respective legislative spheres,'" it echoed not only *Unifund,* to which it cited, but also *SOCAN,* where Binnie J. asserted that international comity entails "respect for the legitimate actions of other states."[263] The use of such similar language and the circular reasoning of respecting respective spheres suggests that similar considerations apply to inter-provincial legislative overlaps

[260] *SOCAN, supra* note 69 at para. 135.

[261] *Ibid.* at para. 147.

[262] *Hunt, supra* note 30 at para. 56.

[263] *Imperial Tobacco, supra* note 42 at para. 36, citing *Unifund, supra* note 42 at para. 51; and *SOCAN, supra* note 69 at para. 60.

and international legislative overlaps, but does not explain the origin or effect of these considerations. Concurring in *Castillo*, Bastarache J. went further by invoking "the territorial principle that organizes the international legal order *and* federalism in Canada."[264] According to him, the principle that the majority in *Unifund* described as "developed in the context not of provinces but of sovereign states" now may provide the logic for Canada's federal structure.[265] The Court's model of the international system no longer merely influences the trajectory of the Canadian approach to private international law — it can increasingly be found at the heart of Canadian federalism.

AN INSUFFICIENT MODEL OF THE CANADIAN FEDERAL SYSTEM

Although clarifying its internationalist vision should remain a priority for the Court, the fourth flaw of the Canadian approach to private international law requires its immediate attention. The creation of a skeletal model of the Canadian federation raises concerns not only for the Court's method — its willingness to elide those details inconsistent with its abstract ideas — but also for the rigid legal landscape promised by much of the Court's rhetoric. Emerging from the structural analysis employed in *Morguard*, this model consists of only those elements of the federal system that align with the Court's particular vision of the international order. While it may appear to bolster the Court's analysis, in fact it introduces systemic weaknesses into the new approach that have since spread to other areas of law.

As described earlier, the Court in *Morguard* introduced its model of the Canadian federal system only after making its internationalist argument. It claimed that the traditional rules for the recognition and enforcement of foreign judgments, which emphasized sovereignty and comity, should never have been imported to govern the inter-provincial enforcement of judgments, because the structure of the Canadian Constitution implies an intention to create a single country. It also insisted that the considerations influencing the enforcement of foreign judgments apply with much greater force among the provinces than among independent states.[266] The Court derived this "obvious intention" of the Constitution by

[264] *Castillo, supra* note 79 at para. 27 [emphasis added].

[265] *Unifund, supra* note 42 at para. 60.

[266] *Morguard, supra* note 2 at paras. 34–36.

canvassing a narrow selection of its elements: the right to inter-provincial mobility under section 6 of the *Canadian Charter of Rights and Freedoms*,[267] the elimination of barriers to inter-provincial trade by section 121 of the *Constitution Act, 1867*, exclusive federal authority over trade and commerce under section 91(2) of the *Constitution Act, 1867*, the peace order and good government clause, and the unified structure of the Canadian judicial system.[268] For good measure, La Forest J. also cited certain "sub-constitutional factors," such as a uniform code of legal ethics and the rise of inter-provincial law firms.[269] Unfortunately, the Court failed to engage those aspects of the Canadian Constitution that support a contrary interpretation, such as the various heads of exclusive provincial authority under section 92 of the *Constitution Act, 1867*, the provisions relating to education under section 93, and various "sub-constitutional factors" such as first ministers' conferences and the remaining practical burdens to inter-provincial professional mobility. The Court's emphasis on those elements of the Constitution that align with its model of an integrating world economy suggests that, although La Forest J. wrote of the importance of forcing private international law to "conform to the federal structure of the Constitution," the Court, in fact, was adapting its understanding of the federal structure to its model of the international order and private international law.[270]

Just as *Hunt* constitutionally entrenched the holding from *Morguard* and sharpened the Court's internationalist vision, it also reiterated the Court's structural analysis of the federation by excerpting the entire passage concerning the Constitution's "obvious intention" to create a single country and enumerating the same list of factors.[271] However, despite enjoying a second opportunity, the Court failed to address the question begged by this assertion: precisely what does a single country entail?

The Court in *Hunt* also reinforced the relevance of the phrase "full faith and credit" for the Canadian approach to private international law by citing *Morguard* for the assertion that the structure of the Canadian federation possesses an integrating character that

267 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, section 6.

268 *Morguard, supra* note 2 at paras. 36–37.

269 *Ibid.*

270 *Ibid.* at para. 39.

271 *Hunt, supra* note 30 at para. 54, citing *Morguard, supra* note 2 at para. 36.

demands full faith and credit for the judgments of other provinces.[272] As the Court did not articulate a full faith and credit analysis, the Canadian doctrine, unlike its American counterpart, may operate as a mere rhetorical flourish. However, the Court did identify certain aspects of the relationship between the constitutional imperatives of order and fairness and provincial legislative powers. Whereas a provincial legislature cannot "override" the requirement of full faith and credit inherent in the structure of the Constitution — for example, by enacting a law precluding the recognition and enforcement of a judgment issued by a province with proper jurisdiction — order and fairness would not prevent it from passing legislation that has "some effect" on litigation in other provinces. The Court did not state that order and fairness merely reaffirm the established limitations on provincial legislative authority under section 92. It left open the possibility that order and fairness, as independent constitutional imperatives arising directly from the structure of the Constitution, may impose additional restrictions on provincial legislative competence.

In addition to its basic structural analysis, the Court in *Hunt* performed certain other influential manoeuvres. First, the Court found that the challenged Québec statute was constitutionally inapplicable to other provinces, without identifying the doctrinal basis for this conclusion and while suggesting that the act also was *ultra vires* Québec. It openly rejected two of the proffered bases for the act and, although it identified section 92(13) as "the most promising constitutional basis for the Act," refrained from deciding expressly whether the act was a valid exercise of Québec's power over property and civil rights in the province.[273] Nonetheless, La Forest J. wrote of the act near the end of the decision that "[t]he essential effect then, and indeed the barely shielded intent, is to impede the substantive rights of litigants elsewhere,"[274] which implies that the Court did find the act *ultra vires* Québec. However, in the same paragraph, the Court criticized the act's inhibiting effects on litigation in other provinces as being contrary to the constitutional imperatives of order and fairness: "The resultant higher transactional costs for interprovincial transactions constitute an infringement on the unity and efficiency of the Canadian marketplace, as well as

[272] *Ibid.* at para. 56.

[273] *Ibid.* at paras. 47–50.

[274] *Ibid.* at para. 65.

unfairness to the citizen."[275] After invoking these concerns, rather than striking down the Québec statute, the Court read it down: a remedial technique familiar from cases involving *Charter* rights and federal-provincial legislative conflicts.[276] This decision obscured any nascent distinction between the validity of a provincial statute — an analysis that the Court failed to complete — and its applicability — an analysis that it failed to explain — while connecting the concepts of applicability, extra-territorial legislative effect, and efficiency in a manner that has informed recent decisions.

Second, the Court engaged in an extended discussion of the Canadian judicial system that reinforced the basic elements of the Court's model of the Canadian federal system. Motivated by doctrinal and practical concerns, the Court found that provincial superior courts have the power to determine the constitutionality of another jurisdiction's legislation.[277] It bolstered this finding with the conclusory assertion that, in such cases, both jurisdictions "are part of the same Canadian federation and governed by the same Constitution" and that their authority and responsibility stem from their inherent jurisdiction to enforce the Constitution.[278] As for itself, the Court found that, as a general court of appeal for Canada, it sits atop this system and exercises a "unifying jurisdiction" over the provincial courts.[279] The Court can resolve inconsistent decisions of provincial superior courts with regard to the constitutionality of legislation, whether domestic or foreign, take judicial notice of the laws in each province, rather than wait for issues of constitutionality to arise, and determine the proper interpretation of a provincial law, in addition to its constitutionality.[280] In addition, as discussed earlier, the Court's implicit privilege of a national polity, both represented and perpetuated by the entire judicial system, is difficult, if not impossible, to reconcile with a workable notion of full faith and credit.[281]

[275] *Ibid.* [citations omitted].

[276] See, for example, *R. v. Butler* [1992] 1 S.C.R. 452; and *MacKay v. R.* [1965] S.C.R. 798 [*MacKay*].

[277] *Hunt, supra* note 30 at paras. 26–29.

[278] *Ibid.* at paras. 32 and 36.

[279] *Ibid.* at para. 46; and *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3 at s. 101.

[280] *Hunt, supra* note 30 at paras. 42, 45, and 46. See also Walker, *supra* note 7 at 85–87.

[281] *Ibid.* See also discussion later in this article.

In *Tolofson,* the Court paid much more attention to its internationalist vision than its federal model. Although the Court insisted that the approach it prescribed for the international realm had to adapt to constitutional imperatives and other structural elements of the Canadian federation, the only distinct feature it identified was the "superintending role" of the Court itself.[282] The Court presented the federal system not as an independent pillar on which the new approach rests but as a secondary consideration that strengthens conclusions drawn immediately from its internationalist vision.[283] By repeatedly ignoring those aspects of the Canadian federation that do not fit within this simple model of a unified single market, the Court established a shallow understanding of the Canadian Constitution that, at least for purposes of private international law, merely reflects the Court's vision of the international order.

The Court's emphasis on legal uniformity resonated throughout its decision in *Tolofson.* In its brief discussion of "Federal Problems," the Court cited the High Court of Australia for the proposition that it is "manifestly absurd" that the same facts could give rise to different results solely due to the forum in which the claim is brought.[284] The Court then asserted that "[t]he nature of our constitutional arrangements — a single country with different provinces exercising territorial legislative jurisdiction — would ... support a rule that is certain and that ensures that an act committed in one part of this country will be given the same effect throughout the country. This militates strongly in favour of the *lex loci delicti* rule."[285] While this aspect of Canada's federal structure is consistent with the uniform application of the *lex loci delicti* rule, the Court overstated its case. The United States is another country whose constituent states exercise territorial legislative jurisdiction. However, these states do not uniformly employ the *lex loci delicti* rule to determine the applicable law in tort cases.[286] This necessary characteristic of a federal system — multiple domestic jurisdictions — does not militate in favour of any particular choice of law rule. Rather,

282 *Tolofson, supra* note 1 at para. 38.

283 *Ibid.* at para. 51.

284 *Ibid.* at para. 68, citing Wilson and Gaudron JJ. in *Breavington v. Godleman* (1988), 80 A.L.R. 362 (H.C.) at 379.

285 *Ibid.* at para. 70.

286 See, for example, *Allstate, supra* note 172; and *Babcock, supra* note 175.

the Court's emphasis on the international order and the avoidance of forum shopping dictated its structural analysis of this issue.

Tolofson provides further evidence that the Court's particular understanding of order and fairness has entrenched an orientation in the new approach that is implicitly hostile to legal diversity in Canada. In dismissing the governmental interest approach to choice of law, the Court characterized sharp substantive legal differences between jurisdictions as "'public policy' problems" but assured readers that such problems tend to disappear over time, particularly among provinces.[287] This remarkable claim implies that the evolution of law, both international and domestic, tends towards uniformity or at least harmony. As evidence for this sweeping statement, the Court cited the repeal of the Saskatchewan guest passenger statute, the amendment of the Saskatchewan statute of limitations, and the similarities between provincial insurance schemes.[288] As the Court did not rely on judicial precedent, consider any other area of law, or cite any secondary historical or philosophical sources, this statement is better interpreted as being prescriptive rather than descriptive.

In a brief departure from this homogenizing, internationalist trend, the unanimous Court in *Spar Aerospace* emphasized the domestic provenance of the Canadian approach to private international law. In addition to insisting that the findings of *Morguard* and *Hunt* could not easily be extended beyond the context of interprovincial jurisdictional disputes, LeBel J. wrote that "federalism was *the* real concern underlying both decisions" and that the real and substantial connection test "was specially crafted to address the challenges posed by multiple jurisdictions within a federation."[289] However, the latter assertions not only appear inconsistent with subsequent decisions, such as *Beals* and *SOCAN,* they also seem disingenuous since the Court ignored large portions of *Morguard* and *Hunt.* Although he wrote for the entire Court in *Spar Aerospace,* LeBel J.'s interpretation of the new approach has proven untenable in later cases and has not won the continued support of the other justices. Nonetheless, he appears to have influenced subsequent decisions in at least one respect — by encouraging a revisionist approach to precedent.

[287] *Tolofson, supra* note 1 at paras. 57–58.

[288] *Ibid.*

[289] *Spar Aerospace, supra* note 43 at paras. 51, 53, and 54 [emphasis added].

The majority in *Unifund* demonstrated this influence, both by adopting a novel test for the applicability of provincial legislation and by the manner in which it did so. In their 2003 article "A New Approach to Extraterritoriality: *Unifund Assurance Co. v. I.C.B.C.*," Elizabeth Edinger and Vaughan Black examine certain problems presented by the majority's innovations.[290] However, by analyzing *Unifund* largely in isolation from the other cases that form the new approach, they fail to identify the extent of the threats posed by this judgment, which introduced yet another indeterminate nexus test while raising concerns over the remedies and analytical strategies employed by the justices.

To establish the sufficient connection test for the extraterritorial applicability of provincial legislation, the majority identified the beginning of section 92 of the *Constitution Act, 1867*, as the textual basis for the test, organized its analysis around four somewhat abstract "propositions," and asserted, in circular fashion, that a territorial restriction on provincial legislative competence is fundamental to Canadian federalism because the latter requires mutual respect among the provinces for their respective sovereignties.[291] While perhaps rhetorically appealing, such broad claims mask the practical and doctrinal problems presented by the majority's innovation. In particular, the majority did not distinguish between provincial legislative competence, which determines whether a province's legislation *can* apply to a case, and choice of law analysis, which determines whether a province's legislation *does* apply. Further, it did not examine the relationship between the real and substantial connection test and the sufficient connection test, save to imply that the latter generally requires a more robust connection between the enacting province, the subject matter of the legislation, and the out-of-province party.[292] Finally, the majority declined to engage in a general discussion of order and fairness on the grounds that to do so would be unwise in a case presenting this specific issue.[293] Unfortunately, not only would this argument preclude a broader analysis in every case, but such an analysis could have greatly enhanced this opaque, yet important, decision.

As Edinger and Black observe, the sufficient connection test operates as a new constitutional restriction on the applicability of

290 Edinger and Black, *supra* note 7.

291 *Unifund, supra* note 42 at paras. 51–56.

292 *Ibid.* at paras. 58 and 80.

293 *Ibid.* at para. 81.

provincial legislation, in addition to the orthodox pith and substance test for the validity of such legislation.[294] They also note that it may further limit the extraterritorial scope of provincial powers and recognize that the majority's undisciplined analysis exposes the pith and substance test to the increasingly radical *Morguard* approach.[295] However, as their article largely concerns doctrinal damage control, they do not engage the deeper conceptual confusion evinced and entrenched by the majority's use of applicability, which is a term familiar from decisions involving federal-provincial legislative conflicts, but which has not featured regularly in the new approach to private international law.[296]

As in *Hunt,* the majority in *Unifund* employed applicability without carefully and consistently distinguishing it from validity. For example, by summarizing ICBC's applicability argument as asserting that "the Ontario Act must be confined to its proper constitutional sphere, and its reach cannot validly be extended to an out-of-province insurer to govern the outcome of the present dispute,"[297] the majority used the concept of validity to explain applicability. It further obscured any emergent differences between these concepts by characterizing the issue in another set of cases as whether, in light of the subject matter of the challenged legislation, the relationship between the enacting jurisdiction and the out-of-province entity "was 'sufficient' to support the *validity or applicability* of the legislation in question."[298] In a further attempt to imbue applicability with an independent conceptual foundation, the majority emphasized that order in the federation would be undermined if each province attempted to regulate the financial implications of this car crash that "'such competing exercises' of regulatory regimes 'must be avoided'" because "[t]he cost of such regulatory uncertainties undermines economic efficiency."[299] Although these references to validity, applicability, and efficiency are reminiscent of *Hunt,* they resonate even more strongly with a pre-*Morguard* decision that approached similar issues from a different perspective.

294 Edinger and Black, *supra* note 7 at 176.

295 *Ibid.* at 176–78.

296 See text accompanying notes 108 and 273–76 in this article.

297 *Unifund, supra* note 42 at para. 67.

298 *Ibid.* at para. 65 [emphasis added].

299 *Ibid.* at para. 71.

Nineteen years before *Unifund,* a unanimous Court in *Churchill Falls* identified a territorial limitation on provincial legislative competence in the opening words of section 92 and in the particular heads of power implicated in this case. The reference question concerned whether the challenged legislation was *intra vires* the Newfoundland legislature, and the Court resolved the issue by adapting to the analysis of overlapping provincial legislation the orthodox test for determining whether an act of Parliament or a provincial legislature encroaches on a head of power reserved to the other order of government — the pith and substance test. In accepting the legitimacy of incidental extra-provincial effects, the Court rejected the view, which it attributed to Viscount Haldane's judgment in *Royal Bank of Canada v. The King,* that "any provincial enactment not wholly confined to the Province would on that account be *ultra vires.*"[300] Since the dispute giving rise to *Churchill Falls* involved a federally incorporated company, the Court also engaged the doctrine of inter-jurisdictional immunity, which, *inter alia,* protects such companies against even the incidental effects of provincial laws that affect matters that are an essential part of their very management and operation.[301] It cited Peter Hogg's constitutional law treatise for the proposition that inter-jurisdictional immunity constituted the sole exception to the general application of *intra vires* provincial laws.[302] The standard justifications for inter-jurisdictional immunity stem not from the words of section 92 but from a desire to protect parliamentary legislative objectives against the uncertainty and inefficiencies resulting from overlapping regulatory regimes — a rationale familiar from *Unifund*'s discussion of applicability.[303]

300 *Ibid.* at para. 51. *Royal Bank of Canada v. The King,* [1913] A.C. 283 [*Royal Bank*].

301 *Commission de la Sante et de la Securite du Travail v. Bell Canada,* [1988] 1 S.C.R. 749 at paras. 28, 199, and 313 [*Bell* #2].

302 *Churchill Falls, supra* note 147 at para. 35. Apart from federally incorporated companies, the Court has invoked inter-jurisdictional immunity to protect federal authority over matters as widely varied as federal works and undertakings, federal elections, "Indians and lands reserved for the Indians," and has suggested, but not yet held, that it may shield all exclusive federal powers. See, for example, *Commission du Salaire Minimum v. Bell Telephone Co. of Canada,* [1966] S.C.R. 767 at paras. 19 and 36; *McKay, supra* note 276 at paras. 20–25; *Cardinal v. Attorney-General of Alberta,* [1974] S.C.R. 695; *Kruger and Manuel v. R.,* [1978] 1 S.C.R. 104; *Ordon Estate v. Grail,* [1998] 3 S.C.R. 437 at para. 81; and *Paul v. British Columbia (Forest Appeals Commission),* [2003] 2 S.C.R. 585 at para. 15

303 See, for example, *Bell* #2, *supra* note 301 at paras. 310–35, and text accompanying note 299 in this article.

Despite these similarities, the majority in *Unifund* did not even mention inter-jurisdictional immunity and discussed *Churchill Falls* only as the case that approved the venerable decision of *Ladore v. Bennett*.[304]

However frustrating, such omissions are consistent with the revisionist approach to precedent displayed in *Spar Aerospace* and perpetuated by the majority in *Unifund*. In *Churchill Falls*, the Court rejected *Royal Bank*'s emphasis on physical presence, but it did so expressly by stating that, for *Royal Bank* to have any continuing authority, it must be read as containing "at least an implied finding that the pith and substance of the Act in question was in relation to extra-provincial rights."[305] In direct contrast, Binnie J. wrote that "the problem in *Royal Bank* was not physical presence as such, but that there was an insufficient connection" between Alberta, as the enacting jurisdiction, the out-of-province bondholders, and their money, which was deposited in the bank's head office in Québec.[306] However, rather than openly address the interpretation adopted in *Churchill Falls*, he simply recharacterized the holding of *Royal Bank* to cohere with the Court's current preference for nexus tests. The majority's sole reference to *Churchill Falls* only exacerbated this inconsistency by again ignoring the pith and substance test and stating that *Ladore* involved a connection between the enacting province and the subject of the legislation sufficient to support the application of the latter.[307] Further, the majority's decision not to engage the doctrine of inter-jurisdictional immunity seems apt in light of the Court's decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, which held that no doctrine of inter-jurisdictional immunity protects provincial works or undertakings from otherwise valid federal regulations.[308] Although plausible, the majority did not seek to distinguish its use of the operational aspect of this doctrine — applicability — to insulate provincial legislatures against incidental encroachment from one another.

The majority never acknowledged this revisionism. Rather, it described an "evolving sophistication in respect of the true scope of

[304] *Ladore v. Bennett*, [1939] A.C. 468 [*Ladore*].

[305] *Churchill Falls*, *supra* note 147 at para. 51.

[306] *Unifund*, *supra* note 42 at paras. 63–64.

[307] *Ibid.* at para. 66.

[308] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at para. 99.

the territorial limitation" and characterized this evolution as a necessary adaptation to the modern condition of interdependence and the same principles of order and fairness that have revitalized other aspects of private international law.[309] In *Churchill Falls,* this territorial limitation was neatly "contained" in section 92. Now, it "flows from the opening words" of that provision.[310] This rhetorical shift is appropriate, as the contemporary Court appears to have less control over the trajectory of its analysis than it previously had.

However, the remedial technique employed by the majority in *Unifund* renders such fluidity especially problematic. As in *Hunt,* the majority invoked applicability to prune the offending implications of the Ontario *Insurance Act.* Familiar from the Court's *Charter* and inter-jurisdictional immunity jurisprudence, reading down a statute nonetheless raises concerns of legitimacy since it effectively amounts to judicial revision of the challenged statute. While the Court has overcome this concern in these other contexts, it is compounded here by two factors. First, the Court is reading down the statute surreptitiously, by means of the proxy of "applicability," rather than announcing its preferred tool. Second, the Court's action is inspired not by close scrutiny of constitutional text or precedent but, rather, by the Court's own stylized model of the international system.

The concern motivating this criticism is not simply doctrinal — a question of whether provincial laws with extraterritorial effects will be struck down or read down. Nor is it purely practical, despite problems of predictability and transparency raised by the Court's slippery analysis and inconsistent language. Rather, the new approach increasingly presents a more systemic concern, as it appears hostile towards provincial powers and interests. Apart from its ultimate effects on the test for the validity of provincial legislation, the majority opinion in *Unifund* employed language that privileged federal "interests" over provincial "views," and the new applicability analysis operates as an additional constraint on provincial legislative authority.[311] Edinger and Black, who were focused on the opinions in *Unifund* rather than on the new approach as a whole, did not address this broader criticism.

The four cases decided in the wake of *Unifund* have only heightened concerns that the ongoing expansion of the Canadian approach

309 *Unifund, supra* note 42 at paras. 63, 66, and 68–72.

310 *Churchill Falls, supra* note 147 at para. 45; and *Unifund, supra* note 42 at para. 51.

311 *Unifund, supra* note 42 at para. 74.

to private international law ironically risks serious damage to the Canadian federal system. In *Beals,* the majority sought to repudiate LeBel J.'s federal orientation. Whereas, for the entire Court in *Spar Aerospace* and dissenting in *Beals,* LeBel J. insisted that "federalism was *the* central concern" underlying *Morguard* and *Hunt.* Major J. wrote for the majority in *Beals* that "[f]ederalism was *a* central concern" motivating these decisions.[312] In the context of these more recent judgments, this one article exposes an important shift in the Court's orientation. As argued earlier, the majority in *Beals* found the *Morguard* analysis equally compelling on the international level because the Court's structural analysis of private international law emphasizes only those aspects of the federation that favour integration and unity and ignores those elements of jurisprudence, historical practice, and constitutional text that could support a more vigorous interpretation of provincial powers and interests.

Although *SOCAN* engaged the international scope of Parliament's legislative authority, the majority judgment in this case cast an interesting light on the majority opinion in *Unifund.* The majority in *Unifund* did not have direct recourse to the territorial principle of international law. Rather, it referred to the "ancient doctrine" of territorial limits, which admittedly developed in the international context, for the conceptual means to circumscribe provincial legislative competence.[313] Nonetheless, these two opinions demonstrated an identical rationale — territorial restrictions on legislative competence are essential to the maintenance of order in the contemporary world — as well as the same remedial technique — applicability.[314] The majority in *SOCAN* even invoked *Unifund* as support for its adoption of the sufficient connection test to limit the applicability of federal statutes.[315] In fact, it described *SOCAN* as part of a line of cases that began in *Morguard* and includes *Hunt, Spar Aerospace,* and *Unifund,* in which the Court adopted, developed, and applied the real and substantial connection test.[316] By suggesting that the sufficient connection test and the real and substantial connection test are distinct manifestations of the same ideal analysis, *SOCAN* supports the argument that, by privileging its abstract models over the text of

[312] *Spar Aerospace, supra* note 43 at para. 53 [emphasis added]; and *Beals, supra* note 63 at paras. 30 and 165 [emphasis added].

[313] *Unifund, supra* note 42 at paras. 58–60.

[314] *Ibid.* at para. 71; and *SOCAN, supra* note 69 at paras. 54–57.

[315] *SOCAN, supra* note 69 at para. 57.

[316] *Ibid.* at para. 60.

the Constitution, the Court has purged any distinctive Canadian content from its new approach. Further, it has done so in a manner that has introduced the doctrinal framework for a new system of watertight compartments — a development contrary to the modern, flexible federalism familiar since *R. v. Hodge* and the *AG Ontario v. AG Canada (The Local Prohibition Reference).*[317]

In *Imperial Tobacco,* the Court established the meaningful connection test as a new layer of the traditional pith and substance test for the validity of provincial legislation. Now, the dominant feature of provincial legislation not only must fall under one of the heads of provincial legislative competence but also must respect the territorial limitations on that head of power.[318] Although the Court invoked the opening words of section 92 of the *Constitution Act, 1867* — "[i]n each Province" — it did not derive this new restriction from these words. Rather, as Major J. explained, the words "represent a blanket territorial limitation on provincial powers," which, in turn, "reflect [sic] the requirements of order and fairness underlying Canadian federal arrangements."[319] This statement demonstrated the manner in which the Court has used the Constitution to develop and entrench its new approach to private international law. The text of the Constitution has not inspired the Court's model of the federal system, which emerges directly from the Court's jurisprudence, but has merely legitimated this model by reflecting important aspects of it. In articulating this new test, the Court was not interpreting section 92 but determining the purposes of the requirements reflected by the restrictions that were in turn represented by the text of this provision.[320] Unfortunately, while the decision in *Imperial Tobacco* illuminated certain characteristics of the Court's approach, the substantive innovations adopted by the Court only served to obscure this area of the law.

The meaningful connection test is a nexus test with two prongs. The Court must consider the relationships among the enacting province, the subject matter of the provincial legislation, and the persons made subject to it in order to determine whether the legislation has a meaningful connection to the enacting province and whether it

317 *Hodge v. R.* (1883), 9 A.C. 117 (PC); and *AG Ontario v. AG Canada (The Local Prohibition Reference)* [1896] A.C. 348 (PC).

318 *Imperial Tobacco, supra* note 42 at para. 36.

319 *Ibid.* at para. 27.

320 *Ibid.* at para. 27 and 36.

pays respect to the legislative sovereignty of other territories.[321] However, this new test is unworkable because none of its parts function in a clear and predictable manner. As the Court cribbed the relevant relationships directly from *Unifund,* the difference between a "meaningful connection" and a "sufficient connection" is unclear.[322] Further, the Court did not explain how the relationships between the enacting province, the subject matter of the legislation, and the intended subjects of the law generate a meaningful connection, and the absence of any notion of provincial interests, akin to that employed in the American governmental interest approach, deprives the meaningful connection test of any obvious orientation.[323] The Court also failed to demonstrate that the second prong of the test performs any independent work. Citing *Unifund,* Major J. described the second prong as ensuring that "provincial legislation ... pays respect to 'the sovereignty of the other provinces within their respective legislative spheres.'"[324] This description also echoed the majority opinion in *SOCAN,* since it requires respect only for actions performed within the "respective legislative spheres" of the other provinces, without specifying the external norms that determine the scope of such spheres.[325] The mere recognition of limits on provincial legislative competence is not sufficient to determine where those limits lie.

Unfortunately, the Court's attempt to establish the constitutional origins of the meaningful connection test provides little guidance, as the analysis in *Imperial Tobacco* perpetuated a revisionist approach to precedent. Although the Court relied upon *Unifund* for the content of its new nexus test, it sought to present *Unifund* and *Churchill Falls* as employing the same analysis, without distinguishing the issue addressed in *Imperial Tobacco* and *Churchill Falls* — the validity of provincial legislation — from that decided by the majority in *Unifund* — the applicability of such legislation. It simply noted that the Court's conclusion in *Churchill Falls* concerning the location of the relevant contractual rights "illustrates the role, pointed out by Binnie J. in *Unifund,* at paragraph 63 that 'the relationships among

[321] *Ibid.* at para. 36.

[322] *Ibid.* at para. 35, citing *Unifund, supra* note 42 at para. 63.

[323] See text accompanying notes 180–90 in this article.

[324] *Imperial Tobacco, supra* note 42 at para. 27, citing *Unifund, supra* note 42 at para. 51.

[325] *SOCAN, supra* note 69 at para. 60. See also text accompanying notes 250–55 in this article. .

the enacting territory, the subject matter of the law, and the person[s] sought to be subjected to its regulation' play in determining the validity of legislation alleged to be impermissibly extraterritorial in scope."[326] However, writing for the Court in 1984, Justice William McIntyre did not refer to relationships that were not identified as being relevant to provincial legislative competence until 2003. Rather, he noted first that the plaintiff had the contractual right to receive delivery of the contested hydro-electric power in Québec and, thereafter, to dispose of it for use in any province and observed next that the parties to the contract submitted to the jurisdiction of the courts of Québec and that "ordinarily the rule is that rights under contracts are situate [sic] in the province or country where the action may be brought."[327]

Further, despite the Court's assertion in *Imperial Tobacco,* Binnie J. did not employ these relationships in *Unifund* to determine the validity of provincial legislation. In fact, he noted expressly that the appellant in the latter case did not challenge the validity of the Ontario *Insurance Act.* [328] In addition, the paragraph of the majority opinion in *Unifund* to which the Court referred concerned the potential extraterritorial application of a provincial law, not its validity.[329] Although the majority briefly suggested that the same set of relationships and the same threshold of a "sufficient" connection had been used in previous cases to determine both the applicability and the validity of provincial legislation, the Court did not cite to this paragraph in *Imperial Tobacco* and did not address the implication that the sufficient connection test, distinct from the meaningful connection test, could determine the validity of provincial legislation.[330] Thus, this reference to *Unifund* not only reinforced the Court's reliance on revisionism, but also exposed the manner in which the Court cobbled the meaningful connection test from pieces of previous judgments that did not necessarily support its conclusion.

Nonetheless, by establishing this restriction on provincial legislative competence, the Court also strengthened the preference implicit in the new approach for neatly contained provincial powers

326 *Imperial Tobacco, supra* note 42 at para. 35, citing *Unifund, supra* note 42 at para. 63.

327 *Churchill Falls, supra* note 147 at para. 55.

328 *Unifund, supra* note 42 at para. 67.

329 *Ibid.* at para. 63.

330 *Ibid.* at para. 65. See also text accompanying note 298 in this article.

and interests. The meaningful connection test did not emerge from the opening words of section 92 but from the dual purposes of the territorial limitations contained in this provision, which reflect the requirements of order and fairness that the Court placed behind the constitutional text in 1990. As fairness is subordinate to order, and order is driven by a concern for the avoidance of overlapping legislative and regulatory regimes, these requirements operate solely in favour of the strict compartmentalization of provincial legislative powers. The new approach does not presently provide conceptual resources to resist this impetus, as its various factors, considerations, and requirements effectively reduce to adherence to the territorial limits on legislative power. By extending the reach of *Morguard,* the Court is forcing itself to choose between the rigidity and efficiency promised by its new approach to private international law and the looseness and flexibility offered by the modern understanding of Canadian federalism. Further, by recasting previous decisions, such as *Churchill Falls, Royal Bank,* and *Ladore,* in terms introduced by the new approach, the Court has compromised the legitimacy of its decisions by reducing the transparency of its analysis and has threatened the quality of future judgments by tainting resources that could support alternative arguments and other models of the federation.

The majority opinion in *Castillo* provides an example of revisionism eroding one of the principal decisions of the new approach. In *Tolofson,* the Court categorized limitation laws as substantive because of the effect they have on litigant's rights — they extinguish one party's right to sue and imbue the other party with a right not to be sued.[331] The majority in *Castillo* found that section 12 of the Alberta *Limitations Act,* which applies Alberta's limitations periods to each case seeking a remedial order in Albertan courts "notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction," was a valid exercise of Alberta's legislative power over the administration of justice in the province pursuant to section 92(14) of the *Constitution Act, 1867.*[332] By doing so, the majority implicitly characterized section 12 of the Alberta statute as procedural. Its analysis suggests that this provision does not directly affect litigants' rights but only regulates the operation of provincial courts.[333]

[331] *Tolofson, supra* note 1 at paras. 79–87.

[332] *Castillo, supra* note 79 at paras. 2 and 5.

[333] *Ibid.* at paras. 6 and 9.

However, the plain language of section 12 does not purport simply to close the doors of Alberta courts to claims on which the relevant Alberta limitations period would have run had the claims been governed by Albertan substantive law.

The majority did not grapple with this distinction expressly and, instead, made three unrelated claims before concluding that section 12 was valid. First, it noted that the California statute of limitations had expired before the Alberta action had begun and that section 12 did not profess to revive a time-barred action.[334] While this statement is correct, it only identifies one ground on which section 12 cannot be found unconstitutional. Second, Major J. wrote that the Court in *Tolofson* "did not (and did not purport to) deny the province's legislative authority over 'the administration of justice *in the province.*'"[335] The substance of this claim is uncontroversial, as *Tolofson* dealt with common law choice of law rules, but it does not align with the text of section 12, which does not mention administrative matters. Third, Major J. wrote that "a foreign jurisdiction, by adopting a limitation period longer than that of Alberta, cannot validly impose on Alberta courts an obligation to hear a case that Alberta, as a matter of its own legislative policy, bars the court from entertaining."[336] This statement is notable both for its reference to provincial policy, which presumably reflects provincial interests, and for its characterization of foreign jurisdictions as aggressively imposing their limitation periods on Alberta, although such foreign rules apply only if Albertan choice of law rules, informed by the principles of order and fairness, select them. Although the majority was able to interpret the Alberta *Limitations Act* to avoid the constitutional issues addressed in *Imperial Tobacco,* its opinion introduced questions concerning the status and scope of *Tolofson* and entrenched an interpretation of the statute that the Alberta legislature may not have approved.

In contrast, Bastarache J. embraced the Court's analysis and holding in *Tolofson,* applied the meaningful connection test to the Alberta statute, and inadvertently demonstrated the prudence of the majority's compromise by confirming the confusion surrounding the constitutional implications of the new approach. Unwilling to read down the statute in a manner unsupported by its text, he remained faithful to *Tolofson* by focusing on the effect of the law and

334 *Ibid.* at para. 4.

335 *Ibid.* at para. 5 [emphasis in original].

336 *Ibid.*

insisted that section 12 of the Alberta *Limitations Act* is substantive because its dominant purpose is to render Alberta limitation periods applicable to cases concerning rights governed by the laws of other jurisdictions.[337] He then analyzed it as an exercise of Alberta's power under section 92(13) of the *Constitution Act, 1867*, applied the meaningful connection test, and declared the provision constitutionally invalid because it infringes the territorial limitations on provincial legislative competence contained in section 92.[338]

His analysis highlighted the inadequacies of the majority's approach as well as the negative implications of the new approach for the Canadian federal system. As a practical matter, Bastarache J.'s application of the meaningful connection test further complicated its operation. Although he elaborated the first branch of the meaningful connection test by stating that a real and substantial connection is less robust than a meaningful one, the majority opinion in *Unifund* already had implied the existence of such a hierarchy between the real and substantial connection and the sufficient connection tests.[339] Next, he found that section 12 failed the second branch of the meaningful connection test for the same reasons that it failed the first branch and because it "simply disregards" the legislative sovereignty of the jurisdictions in which the substantive rights to which it applies are located.[340]

These statements offer no means to ascertain the validity of provincial legislation independent of those provided by the first branch. However, Bastarache J. did not simply maintain the status quo from *Imperial Tobacco*. Summarizing the impact of the territorial limitations on provincial legislative authority, he wrote that provinces "must legislate within their territorial limits and ensure that there is a meaningful connection between the enacting province, the legislative subject-matter and the persons made subject to their laws."[341] Although he may have been attempting to restate its second branch, this formulation suggests that the meaningful connection test somehow operates alongside the territorial limits on provincial legislative competence rather than determining whether challenged legislation complies with those limits.[342] Regardless of which interpretation

[337] *Ibid.* at paras. 34 and 35.

[338] *Ibid.* at paras. 46, 50, and 52.

[339] See *ibid.* at para. 45; and *Unifund, supra* note 42 at para. 58.

[340] *Castillo, supra* note 79 at para. 50.

[341] *Ibid.* at para. 51.

[342] *Imperial Tobacco, supra* note 42 at para. 36.

adheres most closely to his intention, the practical and conceptual operation of the meaningful connection test remain unclear.

In similar fashion, Bastarache J. also obscured the constitutional origins of the territorial limitations on provincial legislative competence. First, as noted earlier, he claimed that the territorial principle, which motivated the Court in *Tolofson,* organizes both the international legal order and federalism in Canada — it is not merely a matter of comity but "a constitutional limit on the legislative jurisdiction of the provinces."[343] Bastarache J. did not cite to any authority for this claim, which clearly relied upon the Court's understanding of the international legal order to shape the federal system, and only discussed *Tolofson* — the holding of which dealt with the choice of law rules applicable in a tort case involving two Canadian provinces, rather than with issues of international law or provincial legislative competence — at a general level. Second, he wrote that "[t]he legislative power of the provinces is territorially limited as a result of the words '[i]n each Province' appearing in the introductory paragraph of s. 92 ... *as well as* by the requirements of order and fairness that underlie Canadian federalism."[344] Contrary to the unanimous decision in *Imperial Tobacco,* which he joined and cited, this description places the introductory phrase of section 92 alongside order and fairness and suggests that those limits emerge from both the constitutional text and the requirements underlying the political and legal systems established by this text.[345] However, later in his concurrence, Bastarache J. characterized the territorial limits on provincial legislative competence as "contained in s. 92," which departs from the fluid imagery adopted in *Unifund* and implies that the text of the Constitution is a sufficient, if not the sole, source for these limits.[346] Both descriptions of section 92 are inconsistent with his assertion that the same territorial principle organizes both the international legal order and the Canadian federal system. If the opening words of this provision are a source of the territorial limits on provincial legislative competence, and those words do not derive their meaning from the requirements of order and fairness, as they did in *Imperial Tobacco,* then his claim concerning the

[343] *Castillo, supra* note 79 at paras. 27 and 39.

[344] *Ibid.* at para. 32 [emphasis added].

[345] *Imperial Tobacco, supra* note 42 at paras. 26 and 27. See also text accompanying notes 318-20 in this article.

[346] *Castillo, supra* note 79 at para. 46; and *Unifund, supra* note 42 at para. 51.

constitutional status of the territorial principle appears either incomplete or incorrect.

Perhaps Bastarache J. sought to give the relevant constitutional text a more significant role in the new approach than had previous decisions. However, the approach that the Court has developed since *Morguard* is not compatible with a close textual analysis of the Constitution. Section 92 of the *Constitution Act, 1867*, does not invoke a "territorial principle" and no provision of the Constitution refers to the requirements of the international legal order. These are elements of the Court's own vision of the international system, which it has woven into the Canadian constitutional quilt. Unfortunately, the manner in which it has done so has undermined the democratic role that constitutional text is intended to play. The structural analysis employed since *Morguard* does not engage constitutional text as the Court's medium, which both enables and constrains the Court. Rather, it has treated this text as a prism through which the Court can view principles, requirements, and imperatives that lie behind the written Constitution.

Just as Bastarache J. characterized La Forest J.'s actions in *Tolofson* as discerning the very nature of limitations periods, the Court since *Morguard* has been attempting to divine the very nature of the Canadian federal system.[347] It has been looking through the text to work directly with the elements that purportedly organize the system established by this text. This essentialist approach is incompatible with the proper role of the Court because it removes the constraints imposed by the constitutional text, which plays a significant role in both restraining and legitimating the Court's actions. Even assuming, as the Court has done elsewhere, that "to fill out the gaps in the express terms of the constitutional scheme" is a helpful description of the judicial role in constitutional interpretation, the preceding analysis shows that the Court has created more constitutional uncertainties than it has resolved. In the absence of textual resources, the Court has proven unable to articulate a clear and consistent understanding of the relationship between the text of the *Constitution Act, 1867*, and the various tests, principles, factors, and other devices that the Court has used to construct its model of the Canadian federal system.[348]

[347] *Castillo, supra* note 79 at para. 36.

[348] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 at para. 95. See also para. 97, in which the majority offered an "alternative explanation" of *Morguard, supra* note 2, and *Hunt, supra* note 30, that relies on

Further, this approach is bound to fail because it misconceives the character of the *Constitution Act, 1867*, which is not the product of logic or the embodiment of some abstract set of principles but the result of deliberation and compromise. It is an imperfect document that forms an important part of the evolving Canadian constitutional settlement.[349] In *Morguard*, the Court made the initial strategic mistake of attempting to adapt the Constitution to contemporary international conditions in the absence of useful guidance from either constitutional text or precedent. The Court is ill suited to such radical innovation since it generally lacks access to the empirical data and public sentiment necessary to craft developments that both respond to rapidly changing political and material conditions and possess popular support.[350] Rather, as it has shown in other contexts, the Court is better equipped to encourage or oblige other actors to perform such delicate tasks.[351]

Nonetheless, both the majority and the concurring opinion in *Castillo* contained encouraging elements. The majority emphasized the importance of provincial policy in resisting the encroachment of foreign laws, and the concurrence attempted to bolster the role of text in the Court's analysis. Neither element is yet supported by

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the preamble of the *Constitution Act, 1867* ("the Court was merely giving effect to the '[d]esire' of the founding provinces 'to be federally united into One Dominion'"). However, the Court did not cite to this provision in either *Morguard* or *Hunt* and has not relied on that provision as a source of the various principles, factors, requirements, and imperatives it has invoked in the cases considered herein. Further, this alternative explanation begs the same question that was raised by the Court's original rhetoric: what does becoming "federally united into One Dominion" entail? See text accompanying notes 271–72 in this article.

349 See, for example, David Cameron and Richard Simeon, "Ontario in Confederation: The Not-So-Friendly Giant," in Graham White, ed., *The Government and Politics of Ontario*, 5th edition (Toronto: University of Toronto Press, 1997), 158 at 161-62; Ian Robinson and Richard Simeon, "The Dynamics of Canadian Federalism," in James Bickerton and Alain-G. Gagnon, eds., *Canadian Politics*, 3rd edition (Peterborough: Broadview Press, 1999), 239 at 245–46; and James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 2002) at 30–41 and 140–45.

350 For a descriptive account of the judicial role in incremental constitutional adjustment and maintenance in American constitutional practice, see David A. Strauss, "Common Law Constitutional Interpretation" (1996) 63 U. Chi. L. Rev. 877.

351 See, for example, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 109–11 and 186; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 97–101; and *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at paras. 11, 36, and 39–51.

the new approach. However, as this analysis has shown, the new approach is a pastiche rather than a monolith. Further, as shown by the majority opinion in *Castillo,* members of the Court are willing to amend or ignore even recent jurisprudence to address emergent concerns. Perhaps the Court will be able to make room in its model of the federal system for concepts that counter the trend towards deferential courts and constrained provincial legislatures, such as a "double aspect doctrine" that is applicable to the provinces in order to enable them to continue to regulate matters, such as the environment, which cannot be hemmed neatly into territorial or jurisdictional spheres. More abstractly, the Court may realize that the single country that it posited as the "objective" of the Constitution entails not the avoidance of legislative overlap but the encouragement of cooperation, competition, and the mobility of ideas, people, and capital in a manner that fosters the substantive improvement of law in response to emerging problems.

Regardless of the form it takes, a more comprehensive understanding of federalism would be more complex than the Court's present model and likely would unsettle certain aspects of the prevailing Canadian approach to private international law. Fortunately, both the Constitution and the Court's jurisprudence contain materials that could be used to improve this model. If the Court chooses to depart from the structural analysis with which it has grown so comfortable, it could invoke those provisions that support strong provincial powers or relax its interpretation of the opening words of section 92.[352] If, instead, it continues to rely on structural analysis, the Court could simply invoke a different set of underlying principles.[353]

Conclusion

This article opened with a quotation from *Tolofson,* in which La Forest J. identified the technical aspects of judicial decisions as being far less important than the policy considerations that motivate them, and I have sought to demonstrate the errors of this assertion. Not only are the technical means by which judges make their decisions equally important to judges in subsequent cases as the policy reasons that inform them, the latter cannot be achieved ef-

[352] See text accompanying notes 266–70 in this article.

[353] See, for example, *Reference re Secession of Quebec, supra* note 351 at paras. 49–60; and *Reference re Remuneration of Judges of the Provincial Court (P.E.I.), supra* note 348 at paras. 10, 83, and 92–109.

fectively absent sufficient attention to the former. The Court's attempts to render Canadian constitutional and private international law fairer and more orderly have been hamstrung by the four flaws discussed in this article. Unable to articulate a clear conceptual regime or constitutional vision, reliant on revisionism and inapt references to foreign precedent, the Court has failed to establish a firm foundation for its new approach to private international law, which continues to mutate and generate unexpected developments — characteristics unlikely to enhance order and fairness in the federation.

Writing for the Court in *Imperial Tobacco,* Major J. provided a quotation that bookends this analysis nicely. Dismissing the appellants' argument that the BC *Tobacco Damages and Health Care Costs Recovery Act* also violated the rule of law, he wrote "in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box."[354] The Court appears not to have recognized that the same argument can be used to question the legitimacy of the innovations that it has adopted in developing the new approach to private international law. Inspired by a particular vision of the international legal order, it has embarked on a remarkable program of constitutional experimentation that most recently has imposed novel territorial restrictions on provincial legislative powers. It has achieved and explained these changes not by reference to constitutional text as such but by invoking various principles, such as order, fairness, and territoriality, that underlie the Canadian Constitution. Whether the Court considers these particular principles "amorphous" remains unclear. As shown by the preceding discussion of the four flaws, this analytical strategy has compromised the coherence of the Court's decisions while insulating them from direct textual criticism and correction via the ballot box.

The Canadian federal system is by no means fixed or finished. However, to ensure that this system evolves in a manner consistent with both democratic practice and contemporary political, legal, and economic pressures, the Court must decide cases in terms that are open to public scrutiny — an approach that should entail increased reliance on constitutional text as well as renewed efforts to employ unwritten principles only in a fashion that enhances public participation in the constitutional process. The structural analysis

[354] *Imperial Tobacco, supra* note 42 at para. 66.

presently favoured by the Court precludes such debate both by arrogating to the Court the right to determine which principles, requirements, and imperatives underlie the Constitution and by treating constitutional text as a mere gateway to this abstract realm. This method devalues the most powerful democratic means by which citizens can both empower and constrain their political and legal institutions because it considers constitutional text relevant only to the extent that it reflects those principles enshrined by the Court.

This article has sought to demonstrate that the new approach requires serious reflection and repairs. In its haste to modernize the Canadian rules of private international law, the Court has regularly sacrificed conceptual clarity in favour of attractive phrases. Although the Court's loose language and casual use of American jurisprudence relate more directly to the Court's analytical process, while its narrow internationalist vision and reductionist model of the federal system inform more immediately the substance of the new approach, all four flaws have contributed to its present condition. The method employed in this article — close textual review of the Court's major decisions — has identified and examined these flaws by exploring the ambiguities, inconsistencies, and rhetorical strategies in the Court's reasoning. It was not intended to identify quick solutions but, instead, to frame the four flaws in a way that makes them tractable, so as to guide further inquiry towards possible solutions. However, even if the Court maintains its emphasis on underlying principles, tailored improvements to address these specific flaws may preserve the gains it has generated by displacing certain anachronistic rules of private international law while limiting the damage it has done to constitutional analysis and perhaps preventing further harm. Hopefully, the arguments presented here can assist this process by spurring more thorough debate and rendering Canadian federal arrangements more amenable to transparent and democratic adjustment.

Sommaire

Quatre défauts: Une réflexion sur l'approche canadienne au droit international privé

Cet article trace l'évolution de l'approche canadienne au droit international privé à partir de Morguard Investments Ltd. c. De Savoye *jusqu'à* Castillo v. Castillo. *Il cerne quatre défauts majeurs qui ont des conséquences*

significatifs tant pour le droit international privé que pour le fédéralisme canadien, dont: (1) l'emploi d'une terminologie ambiguë et contradictoire qui mine les fondements conceptuels de cette approche tout en déguisant son impact potentiel; (2) l'utilisation par la Cour de la jurisprudence américaine en matière de droit international privé pour justifier une orientation déférentielle en droit international privé canadien; (3) la vision de la Cour de l'ordre international et sa compréhension du droit international public, qui ont des effets sur le système fédéral canadien; et (4) le modèle de la constitution canadienne révélée dans ces cas, qui pourrait avoir de sérieux effets négatifs sur les intérêts provinciaux. L'article affirme que ces défauts peuvent être rémédiés, que les textes constitutionnels et des opinions récentes révèlent des ressources utiles à cette fin, et que, peu importe la façon dont la Cour s'y prend pour adresser ces problèmes, l'approche future du Canada au droit international privé doit avant tout être claire, uniforme et compréhensive.

Summary

Four Flaws: Reflections on a Canadian Approach to Private International Law

This article traces the evolution of the Canadian approach to private international law from Morguard Investments Ltd. v. De Savoye *to* Castillo v. Castillo *and identifies four major flaws that have significant implications for both private international law and Canadian federalism: (1) ambiguous and inconsistent terminology that undermines the conceptual foundation of this approach while obscuring its potential impact; (2) the Court's use of American conflict of laws jurisprudence to reinforce a deferential orientation in Canadian private international law; (3) the Court's vision of the international order and understanding of public international law, which has begun to affect the Canadian federal system; and (4) the model of the Canadian Constitution employed in these cases, which may have broad negative consequences for provincial interests. The article argues that these flaws are remediable, that both constitutional text and recent opinions contain resources useful to this end, and that, however the Court decides to address these problems, subsequent iterations of the Canadian approach to private international law should emphasize clarity, consistency, and comprehensiveness.*