
The Uncertainty Factor in Canadian Private International Law

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The author criticizes the principle of proximity that in Canadian private international law uses the test of real and substantial connection to determine the jurisdiction of Canadian and foreign courts, *forum non conveniens*, the law applicable to certain legal relationships, and the recognition and enforcement of foreign judgments. He calls this principle the factor of uncertainty as it does not allow business people to predict the outcome of any international litigation and therefore does not always protect their justified expectations. Too much freedom is given to the courts. In international business, it is imperative for the parties to a transaction to be able to determine with some certainty which court will hear any dispute that may arise between them and which law is applicable to its merits. The flaw with the real and substantial connection test is that it does not predict a single definite result when taking into account the many connecting factors that may be present in a particular case.

After reviewing some relevant objectives of private international law and the application of the real and substantial connection test in Canada, the author pleads in favour of a return to clear and predictable rules of private international law that leave little room for interpretation by the courts. He recognizes, however, that in exceptional circumstances the principle of proximity could perform a corrective function to avoid a totally unjust end result. This he calls limited principled flexibility, which holds predictability in check.

L'auteur critique le principe de proximité qui en droit international privé a recours au test du lien réel et substantiel pour établir la compétence juridictionnelle et constitutionnelle des tribunaux canadiens et étrangers, le *forum non conveniens*, la loi qui s'applique au fond d'un litige et la reconnaissance et l'application des jugements étrangers. Il nomme le principe de proximité le facteur d'incertitude car celui-ci ne permet pas aux personnes qui se livrent au commerce international de prévoir à l'avance ce qui pourrait se passer en cas de litige. Les tribunaux bénéficient de trop de latitude. En matière de commerce international, il est essentiel pour les parties de savoir avec un certain degré de certitude devant quel tribunal tout litige sera présenté ainsi que le droit applicable. La faiblesse du lien réel et substantiel réside dans le fait qu'il n'aboutit pas nécessairement à un seul résultat prévisible dans son interprétation des multiples facteurs propres à chaque cas.

Après avoir examiné certains objectifs du droit international privé et l'application au Canada du test du lien réel et substantiel, l'auteur conclut par un plaidoyer en faveur de règles claires et précises afin d'éviter toute surprise désagréable. Cependant, il reconnaît que dans des cas exceptionnels le test du lien réel et substantiel peut jouer un rôle rectificatif pour éviter un résultat tout à fait injuste. Il s'agit alors d'un principe de flexibilité restreinte qui fait échec à la prévisibilité.

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To be cited as: (2007) 52 McGill L.J. 555

Mode de référence : (2007) 52 R.D. McGill 555

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Introduction

In the last forty years, in various areas of private international law, the legislatures and the courts have abandoned clear and unambiguous rules for new rules that are based on the principle of proximity as a general constitutional requirement of order and fairness as well as a test for *forum non conveniens*.

This principle posits that:

1. An action must be brought before the court of the province, territory, state, or country with which the parties, the action, or the matter have a real and substantial connection.¹
2. Once it has jurisdiction, the court must apply the law that has the *most* real and substantial connection with the issue to be decided.²
3. A foreign judgment will be recognized and enforced only if the original court had jurisdiction based on a real and substantial connection with the parties and/or the action.³

This reducing approach, which amounts to a nonrule, has at least the merit of simplicity in its enunciation, if not in its application. It is opposed to the view that in order to protect the justified expectations of the parties, the courts should apply clearly formulated and unambiguous rules that allow individuals and their legal counsel to assess the probable outcome of any potential litigation. In light of globalization, this form of determinism has become most relevant in international business transactions that usually involve complex issues in several legal systems.

In contrast, the real and substantial connection test adopts a non-determinist approach for solving private international law cases. This is why it is suggested that the principle of proximity should be called the uncertainty factor!⁴

The application of the real and substantial connection test does not predict a single definite result when taking into account the many connecting factors present in a particular case. It can produce a variety of outcomes depending on their evaluation by different courts and makes it difficult, if not impossible, to achieve predictability and uniformity of result. Thus, a systematic application of the real and substantial

¹ See *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 52 B.C.L.R. (2d) 160 [*Morguard*]; *Hunt v. T&N PLC*, [1993] 4 S.C.R. 289, [1994] 1 W.W.R. 129, 85 B.C.L.R. (2d) 1 [*Hunt*].

² See e.g. art. 3113 C.C.Q.

³ See *Morguard*, *supra* note 1.

⁴ See Paul Lagarde, "Le principe de proximité dans le droit international privé contemporain" (1986) 196 Rec. des Cours 13; Joost Bloom & Elizabeth Edinger, "The Chimera of the Real and Substantial Connection Test" (2005) 38 U.B.C. L. Rev. 373; Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, looseleaf, 6th ed. by Janet Walker (Markham: LexisNexis/Butterworths, 2005) vol. 1 at para. 1.15.

connection test introduces an unavoidable element of uncertainty into private international law that is contrary to the objective of predictability of results so needed in international business.

Furthermore, the principle of proximity encourages forum shopping and prolongs litigation. Where there is an element of uncertainty, the door is open for a resourceful lawyer to attempt to change the application of the law; a clear rule of law, by contrast, promotes settlement.⁵

Although a certain amount of flexibility is necessary since private international law rules cannot be completely deterministic, in recent years, the courts have gone too far in relying on the real and substantial connection test to resolve private international law cases. In some instances they have not reached the ultimate goal of protecting the justified expectations of the parties. This is especially true in common law Canada, which uses the real and substantial connection test more than Quebec.

When jurisdiction, contracts, and foreign judgments are at issue, the result of the case will often depend on chance since, in the absence of prescribed connecting factors, the courts are usually analyzing and weighing facts. This is particularly evident in borderline cases. Their decisions can easily be biased. The principle of proximity gives too much power to the courts, rendering them, in a sense, omnipotent.

Consequently, private international law jurisprudence, in which courts apply the real and substantial connection test, is in disarray because the courts are often at odds with one another. It is difficult for appellate courts to make order out of chaos due to the nature of review, which involves mixed questions of law and fact. How do the courts determine the weight to be given to this or that factual element in order to select a truly relevant real and substantial connection? Fortunately, in Quebec, the *Civil Code of Quebec* ("Code") lists the factors and the order in which they are to be taken into consideration when it uses this test.⁶

A brief review of some of the objectives of private international law will be followed by an examination of a number of legislative and jurisprudential applications of the real and substantial connection test with respect to jurisdiction *simpliciter*, *forum non conveniens*, choice of law, and foreign judgments. This analysis will lead to the conclusion that the real and substantial connection test should be applied sparingly.

I. Some Objectives of Private International Law

Protecting the justified expectations of the parties is an objective that is particularly important in private international law cases involving international

⁵ See *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289 [*Tolofson* cited to S.C.R.] at 1061, LaForest J.

⁶ See arts. 3107, 3113 C.C.Q.

business transactions, as “it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state.”⁷ Unfortunately, this objective is often compromised by the uncertainty factor. Decisions regarding choice of jurisdiction, choice of law, and enforcement of foreign judgments should not rely on a court’s arbitrary determination of whether, *in its opinion*, a particular connection with this or that jurisdiction or law is more important than another.

Clearly formulated and unambiguous rules of private international law are more likely to protect the justified expectations of the parties. Where the rules are vague, they encourage litigation and forum shopping since “tout se plaide” and each party hopes that the court will rely on the factors that favour his or her position.

It is not easy for a court to protect the justified expectations of the parties. This is why “the parties are free within broad limits to choose the law to govern the validity of their contract,”⁸ and to choose the court that will hear any disputes arising between them. However, the uncertainty factor reappears if the parties have not addressed these issues and the law does not contain clear rules applicable to them. Predictability, certainty, and uniformity of results or of legal consequences are objectives that ensure the protection of the justified expectations of the parties and discourage forum shopping. A decision should not depend on the fortuitous place of trial or the dubious selection of the applicable law by the courts.

II. Legislation and Jurisprudential Applications

A. *Jurisdiction simpliciter and forum non conveniens*

On the national level, both in Quebec with respect to personal actions of a patrimonial nature and in common law Canada with respect to actions *in personam*, the exercise of jurisdiction by the provincial superior courts must conform to the constitutional principles of comity, order, and fairness. These constitutional principles require a real and substantial connection between the forum province and either the parties or the subject matter of the action.⁹

For instance, the exercise of jurisdiction in Ontario based on service *in juris* on a person who happens to briefly pass through the province,¹⁰ or in Quebec based on a contract of which only a very minor obligation was to be performed in Quebec,¹¹ may violate the principles of order and fairness if there is no real and substantial

⁷ American Law Institute, *Restatement of the Law Second, Conflict of Laws* (St. Paul: American Law Institute Press, 1971) at para. 6.g.

⁸ *Ibid.*

⁹ See *Hunt*, *supra* note 1; *Spar Aerospace Ltd. v. American Mobile Satellite*, 2002 SCC 78, [2002] 4 S.C.R. 205 at para. 23, 220 D.L.R. (4th) 54, LeBel J. [*Spar*].

¹⁰ See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 16.01.

¹¹ See art. 3148(3) C.C.Q.

connection between the forum and either the parties or the subject matter of the action. The assumption of jurisdiction would be unconstitutional even though it might be permissible under the laws of Ontario or Quebec. Constitutional jurisdiction based on the two elements of order and fairness is called jurisdiction *simpliciter*.

Where there is a real and substantial connection between the parties or the subject matter of the action and the forum, a provincial superior court may assert jurisdiction on the defendant even if he or she does not consent to the jurisdiction of the court and cannot be served in the jurisdiction.¹² The rules of procedure or rules of court create a rebuttable presumption of a real and substantial connection that is subject to evidence to the contrary.¹³ Although the requirement of a real and substantial connection is an absolute limit, it is neither strictly defined nor rigidly applied. Courts employ a flexible approach.¹⁴

The test for jurisdiction *simpliciter*, which was recently enunciated by the Ontario Court of Appeal in *Muscutt v. Courcelles*¹⁵ and four other companion decisions dealing with jurisdiction based on damages sustained in the jurisdiction, involves the assessment of eight factors encompassing much of the analysis once undertaken in determinations of *forum non conveniens*.

These factors are as follows:

1. The connection between the forum and the plaintiff's claim;
2. The connection between the forum and the defendant;
3. Unfairness to the defendant in assuming jurisdiction;
4. Unfairness to the plaintiff in not assuming jurisdiction;
5. The involvement of other parties to the suit;
6. The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
7. Whether the case is interprovincial or international in nature; and
8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.¹⁶

The application of these factors to the five cases was essentially subjective and the decisions could have gone either way. Already in 1987, in England, Lord Templeman, in the context of *forum non conveniens*, had acknowledged that "[t]he factors which

¹² See Castel & Walker, *supra* note 4 vol. 1 at para. 11.5.

¹³ See *ibid.*

¹⁴ See *Morguard*, *supra* note 1; *Hunt*, *supra* note 1; *Tolofson*, *supra* note 5; *Spar*, *supra* note 9 at para. 52, Le Bel J.

¹⁵ (2002), 60 O.R. (3d) 20, 213 D.L.R. (4th) 577 (C.A.) [*Muscutt* cited to O.R.]; Janet Walker, "Beyond Real and Substantial Connection: The Muscutt Quintet" [2002] Ann. Rev. Civil Litg. 61.

¹⁶ *Muscutt*, *ibid.* at paras. 77-110.

the court is entitled to take into account in considering whether one forum is more appropriate are legion. The authorities do not, perhaps cannot, give any clear guidance as to how these factors are to be weighed in any particular case.”¹⁷

However, the determination of whether a provincial superior court has jurisdiction *simpliciter* is a question of law. The standard of review is correctness.¹⁸ Therefore, although the court is required to address a list of factors in order to determine whether there exists a real and substantial connection between the court and either the parties or the subject matter of the action, the decision is not an exercise of judicial discretion as in the case of *forum non conveniens*, where the court focuses on the particular facts of the parties and the case.¹⁹

Today, the jurisdiction *simpliciter* test conflates the question of jurisdiction and *forum non conveniens*. These should be kept separate, since only the latter involves discretion and because different consequences for the litigation flow from a dismissal in the case of lack of jurisdiction *simpliciter* and from a stay in the case of *forum non conveniens*.²⁰

There is no mechanical method for determining the scope of jurisdiction *simpliciter* under the principles of order and fairness or for the exercise of jurisdiction based on the doctrine of *forum non conveniens*. In both cases, the real and substantial connection test is used, but for different purposes. Also in both cases, it is assumed that there are competing forums. However, the constitutional requirement is not very exacting because of its generality and the flexible way in which it is applied at this stage of the proceedings. In most cases, a real and substantial connection will be found easily. Conversely, when determining whether or not the forum is a convenient one, the test is more rigorous and it is difficult to predict the outcome of the inquiry, which depends on a more specific analysis of the facts of the case.

The blending of the analysis for jurisdiction *simpliciter* and for *forum non conveniens* has created an integrated jurisdictional determination that is quite confusing and unhelpful.²¹

In Quebec, with respect to jurisdiction *simpliciter*, the Supreme Court of Canada in *Spar*²² observed that the principles of comity, order, and fairness are not binding rules in and of themselves. They only inspire the interpretation of the various private

¹⁷ *Spiliada Maritime v. Cansulex Ltd.*, [1987] A.C. 460 at 465, [1986] 3 All E.R. 843 (H.C.).

¹⁸ See *Muscutt*, *supra* note 15 at para. 43; *Khan Resources v. WM Mining LLC* (2006), 79 O.R. (3d) 411 at para. 7, 208 O.A.C. 204 (C.A.) [*Khan*].

¹⁹ See *Muscutt*, *supra* note 15; *Khan*, *ibid.* A discretionary decision on the convenient forum is entitled to deference on appeal and will be set aside only if the judge erred in principle. See *Towne Meadow Development v. Israel Discount Bank Ltd.* (2005), 77 O.R. (3d) 761 at para. 14, 10 B.L.R. (4th) 185 (C.A.) [*Towne Meadow*].

²⁰ See *Castel & Walker*, *supra* note 4 vol. 1 at paras. 11.5, 13.8.c.

²¹ See *Oakley v. Barry* (1998), 166 N.S.R. (2d) 282, 158 D.L.R. (4th) 679 at 699 (C.A.). See also *Castel & Walker*, *supra* note 4 vol. 1 at para. 13.8.c.

²² *Supra* note 9.

international law rules in force in Canada. The Quebec rules of private international law found in the *Civil Code of Quebec* and the *Code of Civil Procedure* are designed to ensure that there is a real and substantial connection between the action and the province of Quebec; these rules guard against improper seizing of jurisdiction. Therefore, in *Spar*, the real and substantial connection requirement was not held to be an additional criterion that had to be satisfied in determining the jurisdiction of the Quebec court.

On the basis of the wording of article 3148(3) C.C.Q., the Court opined that “[it is] doubtful that a plaintiff who succeeds in proving one of the four grounds for jurisdiction would not be considered to have satisfied the ‘real and substantial connection’ criterion, at least for the purposes of jurisdiction *simpliciter*.”²³ Thus, in both common law Canada and Quebec, it is assumed that the relevant rules as to the international jurisdiction of the court meet the constitutional test of a real and substantial connection until proof of the contrary. This precedes the possible reliance on the doctrine of *forum non conveniens*.

Let us briefly examine some specific Quebec rules of jurisdiction in cases containing foreign elements, assuming that all of them meet the constitutional requirement. In the part of the *Civil Code of Quebec* that covers the international jurisdiction of Quebec authorities (i.e., the courts), article 3148(4) allows the parties to agree to submit all existing or future disputes between themselves to Quebec or foreign authorities. Although no mention is made of the principle of proximity, article 3135 dealing with *forum non conveniens* and article 3136, which provides for the jurisdiction of Quebec courts in exceptional circumstances, seem to admit by necessary implication that in some instances Quebec courts may decline or acquire jurisdiction depending on the connection with Quebec.²⁴ The danger is that in borderline cases “where there is no one forum that is the most appropriate, the domestic forum wins out by default ... provided it is an appropriate forum.”²⁵

It is to be regretted that in personal actions of a patrimonial nature, in the presence of an express choice-of-jurisdiction clause recognized by the Code,²⁶ the courts have allowed the parties to argue that the selected forum is *forum non conveniens*.²⁷ The same is true in common law Canada.²⁸

²³ *Ibid.* at para. 56, LeBel J. See also *ibid.* at paras. 23, 50, 51, 55.

²⁴ See *ibid.* See also *Lexus Maritime c. Oppenheim Forfait GmbH*, J.E. 98-1592, [1998] A.Q. No. 2059 at para. 18 (C.A.) (QL) (listing ten requirements, none of which are individually determinative).

²⁵ *Amchem Products v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 931, 77 B.C.L.R. (2d) 62.

²⁶ Art. 3148(4), 3148, para. 2 C.C.Q.

²⁷ See *Transat Tours Canada c. Impulsora Turistica de Occidente*, 2006 QCCA 413, [2006] J.Q. no. 2519 (QL), aff'd 2007 SCC 20, 281 D.L.R. (4th) 385 [*Transat Tours*]. See also Gérald Goldstein & Ethel Groffier, *Droit international privé* (Cowansville, Qc.: Yvon Blais, 1998) vol. 1 at paras. 147, 149.

²⁸ See Castel & Walker, *supra* note 4 vol. 1 at para. 13.7.

There seems to be no difference between Quebec and common law Canada with respect to the factors to be taken into account in determining the appropriate forum for whatever purpose. The real and substantial connection test reigns supreme. However, in *GreCon Dimter v. J.R. Normand Inc.*,²⁹ the Supreme Court of Canada acknowledged that, in Quebec as in the rest of Canada, the doctrine of *forum non conveniens*³⁰ only has a suppletive function, and is distinct from jurisdiction *simpliciter*.

Since many of the elements taken into consideration for determining jurisdiction *simpliciter* and *forum non conveniens* overlap, it will be interesting to see if the test for jurisdiction *simpliciter* based on the flexible application of the eight factors in *Muscutt* will also be applied to *forum non conveniens* to determine whether there is a clearly more appropriate forum elsewhere with a stronger connection between the action and the present forum. While the *forum non conveniens* analysis explicitly considers the suitability of alternative forums, the increasing recognition of the importance of ensuring that there is some forum available to the plaintiff to pursue a meritorious claim suggests that there is an underlying connection between it and jurisdiction *simpliciter*.³¹

B. Choice of Law

Contrary to the situation with respect to choice of jurisdiction, with choice of law the search is for the law that is the *most* really and substantially connected with the issue before the court.³² This makes intuitive sense, because to subject the validity of an international contract to any law that may have a real and substantial connection with it would clearly defeat the reasonable and justified expectations of the parties. Only one law can apply to a particular aspect of an international contract.

On the constitutional level, it would seem that the application of the law of the forum solely because it is the law of the forum could violate the constitutional principles of order and fairness, as there must be a real and substantial connection

²⁹ 2005 SCC 46, [2005] 2 S.C.R. 401, 255 D.L.R. (4th) 257.

³⁰ See art. 3135 C.C.Q.

³¹ In *Newton v. Larco Hospitality Management* (2004), 70 O.R. (3d) 427 (Sup. Ct.), aff'd (2005), 75 O.R. (3d) 42 (C.A.), Brennan J. distinguished between jurisdiction *simpliciter* and *forum non conveniens*, though some of the factors he used for *forum non conveniens* could easily be part of the factors used for jurisdiction *simpliciter*. For instance, the loss of a substantial juridical advantage could be part of unfairness to the plaintiff, a factor used for jurisdiction *simpliciter*. In *Towne Meadow*, *supra* note 19, the motion judge relied on *Muscutt*, *supra* note 15 to decide whether Ontario was the convenient forum. See also *Coutu v. Gauthier Estate*, 2006 NBCA 16, 296 N.B.R. (2d) 35, 264 D.L.R. (4th) 319 at para. 52ff. [*Gauthier*]; *Insurance Corporation of British Columbia v. Unifund Assurance*, 2002 SCC 40, [2003] 2 S.C.R. 63, 227 D.L.R. (4th) 402. In Quebec, see *Transat Tours*, *supra* note 27 at para. 43. The ten criteria used for *forum non conveniens* to a great extent overlap with jurisdiction *simpliciter*. For possible reform, see Castel & Walker, *supra* note 4 vol. 1 at para. 11.19.

³² See Castel & Walker, *ibid.* vol. 2 at para. 31.2.c.

between the subject matter of the action and the law of the forum.³³ More generally, from a constitutional point of view, it has not yet been decided whether the courts must ascertain the proper law of a contract, tort, or extracontractual obligation, or any other legal relationship, by applying the test of the *most* real and substantial connection.

The *Civil Code of Quebec* leaves little room for the application of the principle of proximity by the courts. It is more deterministic. Only on occasion does it provide for the application of the law "most closely connected" ("loi ... qui ... présente ... les liens les plus étroits"), and then only as a subsidiary rule with respect to trusts:

3107. Where no law is expressly designated by, or may be inferred with certainty from, the terms of the act creating a trust, or where the law designated does not recognize the institution, the applicable law is that with which the trust is most closely connected.³⁴

The order in which the inquiry must proceed indicates which factual elements are most important and therefore determinative. Little is left for the courts to do except find where the relevant places are located. The second paragraph of article 3107 is quite clear and unambiguous:

To determine the applicable law, account is taken in particular of the place of administration of the trust, the place where the trust property is situated, the residence or the establishment of the trustee, the objects of the trust and the places where they are to be fulfilled.

Of course, difficulty arises where two or more of these factual elements point to different legal systems.

In common law Canada, the validity of a trust *inter vivos* of interests in movables is governed by the internal law of the place expressly or impliedly designated by the settlor. In the absence of designation, the validity of the trust depends upon the internal law of the place with which, as to the matter at issue, the trust has its most significant relationship or its closest and most real connection.³⁵

With respect to obligations and the content of juridical acts, including conventional matrimonial or civil union regimes,³⁶ the *Civil Code of Quebec* in article 3111 allows the parties to designate the law that governs such acts. However, a juridical act containing no foreign element remains subject to the mandatory provisions of the law of the country that would apply if none were designated. As in the case of trusts, article 3112 states:

If no law is designated in the act or if the law designated invalidates the juridical act, the courts apply the law of the country with which the act is most closely connected, in view of its nature and the attendant circumstances.

³³ See *Tolofson*, *supra* note 5 at 1065-66.

³⁴ Art. 3107, para. 1 C.C.Q.

³⁵ See Castel & Walker, *supra* note 4 vol. 2 at para. 28.2.b.

³⁶ See art. 3122 C.C.Q.

The Code adds in article 3113:

A juridical act is presumed to be most closely connected with the law of the country where the party who is to perform the prestation which is characteristic of the act has his residence or, if the act is made in the ordinary course of business of an enterprise, his establishment.

The clear indications of which connecting factors the courts must consider in selecting the applicable law does not completely eliminate uncertainty, as the article creates only a presumption.

In article 3082, the *Civil Code of Quebec* has adopted what has been described as an “escape clause”³⁷ that allows the courts, in exceptional circumstances, to set aside the normally applicable law. It reads as follows:

Exceptionally, the law designated by this Book is not applicable if, in the light of all attendant circumstances, it is clear that the situation is only remotely connected with that law and is much more closely connected with the law of another country. This provision does not apply where the law is designated in a juridical act.

This article introduces a measure of uncertainty into legal relationships. Fortunately, it cannot be used to avoid the mandatory rules of Quebec or a law designated by the parties in a juridical act, for instance a contract, will, or trust.³⁸ Also, it does not apply where there is built-in flexibility, as in articles 3079 and 3112 C.C.Q., or where there exist alternative choice-of-law rules, as in articles 3126 and 3128 C.C.Q.³⁹ Uncertainty could also result from the application of article 3076, dealing with Quebec laws of necessary application that trump normal private international law rules, and article 3079, which covers foreign laws of necessary application and provides:

Where legitimate and manifestly preponderant interests so require, effect may be given to a mandatory provision of the law of another country with which the situation is closely connected.

In common law Canada, in the absence of express or implied choice that must be bona fide, legal, and not intended to evade the mandatory provisions of the system of law with which the transaction objectively is most closely and really connected, the courts have applied the proper law of the contract to its essential validity, interpretation, effect, and performance. The proper law is the system of law with which the transaction has the closest and most real connection.⁴⁰

³⁷ Goldstein & Groffier, *supra* note 27 vol. 1 at para. 46.

³⁸ See *ibid.*

³⁹ See J.A. Talpis & J.-G. Castel, “Le Code civil du Québec: Interpretation des règles du droit international privé” in *La Réforme du Code civil*, vol. 3 (Sainte Foy, Qc.: Presse de l’Université Laval, 1993) 807 at paras. 82-87.

⁴⁰ See Castel & Walker, *supra* note 4 vol. 2 at paras. 31.2.a, d. It includes domestic contracts. See *ibid.* at para. 25.3.f.

In light of the potential number of connecting factors, the proper law approach amounts to a nonrule, leaving the courts with too much discretion in the ascertainment of the applicable law. Because it involves a complex analysis of multiple factors of varying significance, the determination of the proper law is too fact-specific and discretionary for effective appellate review despite the fact that it is a question of mixed fact and law subject to appeal.

With respect to torts, it would seem that in *Tolofson*, Justice LaForest left the door open to the application of a law other than the *lex loci delicti* in the case of international torts.⁴¹ Accordingly, it might sometimes be appropriate to apply another law to a wrongful act committed outside Canada when the *lex loci delicti* has little or no connection with the parties or the issue in question and its application would give rise to serious injustice. However, the Ontario Court of Appeal in 2002 expressed doubts as to the existence of an exception to the *lex loci delicti* rule to avoid a possible injustice in exceptional cases.⁴² As the policy behind *Tolofson* is to emphasize the importance of certainty, ease of application, and predictability of the choice-of-law rule in order to achieve fairness and meet the reasonable expectations of the parties, it is reasonable to expect that in some international torts situations Canadian courts would refrain from applying the principle of proximity: “While, no doubt, ... the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice.”⁴³

In Quebec, it is doubtful whether the escape clause in article 3082 C.C.Q. could be used to avoid the application of the rules found in article 3126 C.C.Q. dealing with civil liability arising from injurious acts, which already contains several exceptions to the *lex loci delicti* rule.

C. Foreign Judgments

In *Morguard*, the Supreme Court of Canada held that the courts of British Columbia were required by the principles of order and fairness implicit in the Canadian constitution to enforce a default judgment from Alberta on a matter that had a real and substantial connection to Alberta.⁴⁴ Thus, the relevant test in determining whether the original court was the appropriate forum based on the principles of order and fairness is whether there was a real and substantial connection between the province whose court gave the judgment and the defendant or matter.

The Supreme Court did not elaborate on the specific requirements of the real and substantial connection test. However, in a subsequent decision, it acknowledged that

⁴¹ *Supra* note 5 at 1062-63.

⁴² *Wong v. Lee* (2002), 58 O.R. (3d) 398, 211 D.L.R. (4th) 69.

⁴³ *Tolofson*, *supra* note 5 at 1058. LaForest J. also writes, “One of the main goals of any conflicts rule is to create certainty in the law” (*ibid.* at 1061).

⁴⁴ *Supra* note 1. See also *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, 250 D.L.R. (4th) 224 (C.A.).

it is not possible to define the exact limits of what constitutes a real and substantial connection and that no test can perhaps ever be rigidly applied: “Whatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.”⁴⁵

The real and substantial connection test is so broad that, as already mentioned, there are very few situations in which it would not be met. All that is needed is the existence of a *significant* connection between the cause of action and the foreign court.⁴⁶ This shows how artificial the requirement is in reality. Furthermore, what is order or fairness, other than what a judge believes full faith and credit, and properly restrained jurisdiction, to mean in the circumstances of a particular case?

Eventually, in *Beals v. Saldanha*,⁴⁷ the principles that underpin the constitutional requirement of a real and substantial connection were extended to cover judgments rendered outside Canada when the original court had reasonable grounds for exercising jurisdiction. These reasonable grounds are determined in accordance with the principles of order and fairness not as a matter of constitutional law but as a matter of comity. As a result, this requirement, which should be called jurisdiction *qua simpliciter*, has become the only test used to ascertain whether the foreign court had jurisdiction to render the judgment sought to be recognized and enforced in Canada. It is too general and too easy to pass.

Applying this test, the Supreme Court of Canada in *Beals* recognized and enforced a foreign default judgment against persons served *ex juris* who had not consented to the jurisdiction of the issuing court. This is one of the most unjust decisions that has resulted from the application of the real and substantial connection test because the court did not revise the defences to enforcement in order to safeguard the defendants from the particular kinds of unfairness that arise in cross-border litigation.

Justice LeBel is right when in his dissenting opinion he states that the real and substantial connection test applied to judgments rendered outside Canada must be fair to defendants, which was not the case in this instance.⁴⁸

⁴⁵ *Hunt*, *supra* note 1 at 326.

⁴⁶ See *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416 at para. 32, 234 D.L.R. (4th) 1 [*Beals*]; *Oakwell Engineering Ltd. v. Enernorth Industries* (2005), 76 O.R. (3d) 528, 7 B.L.R. (4th) 256 (Sup. Ct.) [*Oakwell* (Sup. Ct.)], *aff'd* (2006), 81 O.R. (3d) 288, 19 B.L.R. (4th) 11 [*Oakwell* (C.A.) cited to O.R.].

⁴⁷ *Ibid.* See also J. Walker, “Beals v. Saldanha: Striking the Comity Balance Anew”, Case Comment, (2005) 5 Can. Int'l. Law. 28; Joy Goodman & Jeffrey A. Talpis, “Beals v. Saldanha and the Enforcement of Foreign Judgments in Canada” (2004) 40 Can. Bus. L.J. 240; *Worthington c. Atlas Turner*, [2004] R.J.Q. 2376 (C.A.) [*Worthington*].

⁴⁸ *Beals*, *ibid.* at paras. 174, 187, 195, 196, 199, 217, 218, 265. See also the discussion of *Beals* in *Pro Swing v. Elta Golf*, 2006 SCC 52, [2006] 2 S.C.R. 612, 273 D.L.R. (4th) 663. But see *Oakwell* (C.A.), *supra* note 46 at para. 15

Will the courts apply the eight factors elaborated in *Muscutt* for determining jurisdiction *simpliciter* to the recognition and enforcement of foreign judgments? If that were the case, this approach would be very close to that found in article 3164 of the *Civil Code of Quebec*, which provides:

The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the country whose authority is seized of the case.

This article provides for jurisdictional reciprocity, also called the mirror principle,⁴⁹ which includes *forum non conveniens* and *lis alibi pendens*.⁵⁰ The mirror principle is subject to the further general requirement that the dispute between the parties is substantially connected with the country where the judgment was rendered. The word “country” seems to indicate that it applies only to judgments rendered in foreign countries.

Article 3164 C.C.Q. is too wide. It creates uncertainty and does not permit predictability. It does not answer how a Quebec court is to determine whether or not the dispute was substantially connected with the original country before it applies to the decision the Quebec jurisdiction rules by analogy. Nevertheless, this test, where applicable, is consistent with the constitutional requirement of a real and substantial connection.⁵¹

It should be noted that article 3168 C.C.Q. lists the *only* six grounds that are relevant for assessing the jurisdiction of foreign courts in personal actions of a patrimonial nature. Professor Goldstein is right to maintain that the restrictive language of article 3168 prevents the broadening of the list of jurisdictional criteria by having recourse to article 3164.⁵² The use of the word “only” makes it clear that article 3168 cannot be supplemented by the mirror principle, including the *forum non conveniens* and *lis alibi pendens*.⁵³ Yet, in some instances, it might be advisable to apply article 3164 in the context of article 3168 minus the *forum non conveniens* and *lis alibi pendens*.

⁴⁹ See Patrick Glenn, “Droit international privé” in *La Réforme du Code civil*, *supra* note 25 vol. 3, 671 at paras. 116-18.

⁵⁰ The latter is also called the “little mirror” (Castel & Walker, *supra* note 4 vol. 1 at para. 14.13).

⁵¹ See *Cortas Canning & Refrigerating v. Suidan Bros.*, [1999] R.J.Q. 1227 (Sup. Ct. (Civ. Div.)); *Fellen c. Barnett Bank of South Florida, N.A.*, [1994] R.J.Q. 932 (C.A.).

⁵² See Goldstein & Groffier, *supra* note 27 vol. 1 at para. 178; Geneviève Saumier, “The Recognition of Foreign Judgments in Quebec: The Mirror Crack’d” (2002) 81 Can. Bar Rev. 677. *Contra* Glenn, *supra* note 49 at para. 127; Talpis & Castel, *supra* note 39 at para. 487; Jeffrey Talpis, *If I am from Grand-Mère, Why Am I Being Sued in Texas? Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (Montréal: Thémis, 2001).

⁵³ See *Worthington*, *supra* note 47. *Contra HSBC Bank Canada c. Hocking*, 2006 QCCS 330, [2006] R.J.Q. 804 at paras. 83-86.

Conclusion

The courts, especially the Supreme Court of Canada, have gone too far in their application of the principle of proximity. In so doing, they have led the way to uncertainty. There must be a return to the clear and predictable rules of the past.⁵⁴

The search for the real and substantial connection leaves too much freedom to the courts, which can easily manipulate the facts to suit their views. For instance, especially in borderline cases, they may be tempted to choose what they believe to be the “better” forum or law by taking jurisdiction or applying the *lex fori* and justifying their choice after the fact by selecting the appropriate connecting factors leading to this solution. That said, it would be difficult for the courts to do this where the majority of important connecting factors point to another jurisdiction or law or where such factors are set in the forum law, as it is the case in Quebec in some choice-of-law situations.

As already mentioned, predictability is a significant objective in international business transactions. The parties want to know in advance what is likely to happen should a dispute arise between them.⁵⁵ True, in a contract they may be able to select in advance the applicable law and, to some extent, the court that would have jurisdiction over them; but that is not always the case. What if the court selected by the parties has no jurisdiction *simpliciter*?

Only where the application of the relevant private international law rule results in the designation of a jurisdiction or law that has no or very little connection with the issues before the court should the principle of proximity be invoked in order to perform a *corrective* function so as to avoid a totally unjust end result. Such an approach could be called *limited principled flexibility*, and would hold predictability in check.⁵⁶

Clearly formulated rules leaving little room for interpretation or analysis by the courts should be encouraged. In the international business field, the traditional method based on determinism adopted in most cases by the *Civil Code of Quebec*, rather than the uncertainty factor inherent in the principle of proximity illustrated by the constitutionally mandated real and substantial connection test, is more likely to give effect to the justified expectations of the parties.

⁵⁴ See e.g. American Law Institute, *Restatement of the Law of Conflict of Laws* (St. Paul: American Law Institute, 1934); Joseph H. Beale, *A Treatise on the Conflict of Laws* (New York: Baker, Voorhis & Co., 1935). For a historical background of conflict of laws, see Castel & Walker, *supra* note 4 vol. 1 at paras. 1.12-1.15.

⁵⁵ For instance, in *Gauthier*, Drapeau C.J. of the New Brunswick Court of Appeal pointed out that the difficulty in some instances for counsel to know where to begin an action would make the solution to do so in several connected jurisdictions, a solution beyond the financial means of most plaintiffs (*supra* note 31 at paras. 77-78).

⁵⁶ *Cf.* art. 3082 C.C.Q. (escape clause).

The *Court Jurisdiction and Proceedings Transfer Act*, prepared by the Uniform Law Conference of Canada⁵⁷ and now adopted by British Columbia,⁵⁸ Saskatchewan,⁵⁹ and the Yukon,⁶⁰ introduces some certainty and predictability into common law Canada. When it deals with proceedings *in personam*, the new legislation provides for jurisdiction where there is a real and substantial connection between the forum province or territory and the facts on which the proceeding against the person is based.⁶¹ It then gives guidance to the meaning of "real and substantial connection" by listing the connections that will be presumed to meet the real and substantial connection test.⁶² The legislation also codifies the doctrine of *forum non conveniens* by listing the factors that are relevant to the court's discretion after considering the interest of the parties to the proceeding and the ends of justice.⁶³ Jurisdiction *simpliciter* and *forum non conveniens* are kept separate.

Yet even in this legislation, the move toward certainty and predictability remains incomplete. The list of connections presumed to meet the real and substantial connection test is not exhaustive in that the plaintiff has the right to prove other circumstances that constitute a real and substantial connection. Also, the defendant has the right to prove that connections are not real and substantial.⁶⁴ The result is that courts still have considerable discretion in applying the real and substantial connection test.

Comity, order, and fairness, which are supposed to guide the determination of the private international law issues of jurisdiction *simpliciter*, *forum non conveniens*, choice of law, and the recognition of foreign judgments,⁶⁵ are not always well served by the principle of proximity.⁶⁶ In Quebec, and more so in common law Canada, private international law rules should be clear and only in exceptional circumstances should the court apply the principle of proximity⁶⁷ as the uncertainty factor inherent in this principle renders illusive the objectives of certainty and predictability that are

⁵⁷ *Proceedings of the Seventy-Sixth Annual Meeting, 1994*, Appendix C, 140 as am. by *Proceedings of the Seventy-Seventh Annual Meeting, 1995*, Appendix D, 155. See also Castel & Walker, *supra* note 4 vol. 1 at para. 11.19.

⁵⁸ *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28.

⁵⁹ *An Act respecting Court Jurisdiction and the Transfer of Court Proceedings*, S.S. 1997, c. C-41.1 [Court Jurisdiction, Sask.].

⁶⁰ *Court Jurisdiction and Proceedings Transfer Act*, S.Y. 2000, c.7.

⁶¹ *Court Jurisdiction*, Sask., *supra* note 59, ss. 4(e), 9.

⁶² *Ibid.*, s. 9.

⁶³ *Ibid.*, ss. 10(1), (2).

⁶⁴ *Ibid.*

⁶⁵ See Spar, *supra* note 9 at para. 21, LeBel J.

⁶⁶ See Jean-Gabriel Castel, *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworths, 1997) at para. 17; Bloom & Edinger, *supra* note 4 ("the test, as it is presently structured, serves none of its purposes especially well" at 373); *ibid.* ("Predictable answers are what the 'real and substantial connection' test is least good at" at 416); *ibid.* at 418-19. See also Tolofson, *supra* note 5 at 1046-47, 1055-58, La Forest J.

⁶⁷ Cf. art. 3108 C.C.Q.

so important in international trade transactions. Judicial discretion must not form the core of Canadian private international law rules if justice to the parties is to be achieved. What is needed is workable certainty consistent with some flexibility.
