LOWN AUTHORITY 1

LIMITATIONS ACT

Chapter L-12

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "claim" means a matter giving rise to a civil proceeding in which a claimant seeks a remedial order;

(b) "claimant" means the person who seeks a remedial order;

(c) "defendant" means a person against whom a remedial order is sought;

(d) "duty" means any duty under the law;

(e) "injury" means

(i) personal injury,

(ii) property damage,

(iii) economic loss,

(iv) non-performance of an obligation, or

(v) in the absence of any of the above, the breach of a duty;

(f) "law" means the law in force in the Province, and includes

(i) statutes,

(ii) judicial precedents, and

(iii) regulations;

(g) "limitation provision" includes a limitation period or notice provision that has the effect of a limitation period;

(h) "person under disability" means

(i) a represented adult as defined in the *Adult Guardianship and Trusteeship Act* or a person in respect of whom a certificate of incapacity is in effect under the *Public Trustee Act*, or

(ii) an adult who is unable to make reasonable judgments in respect of matters relating to a claim;

(i) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, but excludes

(i) a declaration of rights and duties, legal relations or personal status,

(ii) the enforcement of a remedial order,

(iii) judicial review of the decision, act or omission of a person, board, commission, tribunal or other body in the exercise of a power conferred by statute or regulation, or

(iv) a writ of habeas corpus;

(j) "right" means any right under the law;

(k) "security interest" means an interest in property that secures the payment or other performance of an obligation.

RSA 2000 cL-12 s1;2002 c17 s4;2008 cA-4.2 s138

Application

2(1) This Act applies where a claimant seeks a remedial order in a proceeding commenced on or after March 1, 1999, whether the claim arises before, on or after March 1, 1999.

(2) Subject to sections 11 and 13, if, before March 1, 1999, the claimant knew, or in the circumstances ought to have known, of a claim and the claimant has not sought a remedial order before the earlier of

(a) the time provided by the *Limitation of Actions Act*, RSA 1980 cL-15, that would have been applicable but for this Act, or

(b) two years after the *Limitations Act*, SA 1996 cL-15.1, came into force,

the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

(2.1) With respect to a claim for the recovery of possession of land as defined in the *Limitation of Actions Act*, RSA 1980 cL-15, subsection (2) shall be read without reference to clause (b) of that subsection.

(3) Except as provided in subsection (4), this Act is applicable to any claim, including a claim to which this Act can apply arising under any law that is subject to the legislative jurisdiction of the Parliament of Canada, if

(a) the remedial order is sought in a proceeding before a court created by the Province, or

(b) the claim arose within the Province and the remedial order is sought in a proceeding before a court created by the Parliament of Canada.

(4) This Act does not apply where a claimant seeks

(a) a remedial order based on adverse possession of real property owned by the Crown, or

(b) a remedial order the granting of which is subject to a limitation provision in any other enactment of the Province.

(5) The Crown is bound by this Act.

RSA 2000 cL-12 s2;2007 c22 s1

Limitation periods

3(1) Subject to section 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

(2) The limitation period provided by subsection (1)(a) begins

(a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a),

(b) against a principal when either

(i) the principal first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a), or

(ii) an agent with a duty to communicate the knowledge prescribed in subsection (1)(a) to the principal, first actually acquired that knowledge,

and

(c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:

(i) when the deceased owner first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a), if the deceased owner acquired the knowledge more than 2 years before the deceased owner's death;

(ii) when the representative was appointed, if the representative had the knowledge prescribed in subsection (1)(a) at that time;

(iii) when the representative first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a), if the representative acquired the knowledge after being appointed.

(3) For the purposes of subsection (1)(b),

(a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;

(b) a claim based on a breach of a duty arises when the conduct, act or omission occurs;

(c) a claim based on a demand obligation arises when a default in performance occurs after a demand for performance is made;

(d) a claim in respect of a proceeding under the *Fatal Accidents Act* arises when the conduct that causes the death, on which the claim is based, occurs;

(e) a claim for contribution arises when the claimant for contribution is made a defendant in respect of, or incurs a

liability through the settlement of, a claim seeking to impose a liability on which the claim for contribution can be based, whichever first occurs;

(f) a claim for a remedial order for the recovery of possession of real property arises when the claimant is dispossessed of the real property.

(4) The limitation period provided by subsection (1)(a) does not apply where a claimant seeks a remedial order for possession of real property, including a remedial order under section 69 of the *Law of Property Act*.

(5) Under this section,

(a) the claimant has the burden of proving that a remedial order was sought within the limitation period provided by subsection (1)(a), and

(b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by subsection (1)(b).

(6) The re-entry of a claimant to real property in order to recover possession of that real property is effective only if it occurs prior to the end of the 10-year limitation period provided by subsection (1)(b).

(7) If a person in possession of real property has given to the person entitled to possession of the real property an acknowledgment in writing of that person's title to the real property prior to the expiry of the 10-year limitation period provided by subsection (1)(b),

(a) possession of the real property by the person who has given the acknowledgment is deemed, for the purposes of this Act, to have been possession by the person to whom the acknowledgment was given, and

(b) the right of the person to whom the acknowledgment was given, or of a successor in title to that person, to take proceedings to recover possession of the real property is deemed to have arisen at the time at which the acknowledgment, or the last of the acknowledgments if there was more than one, was given.

(8) If the right to recover possession of real property first accrued to a predecessor in title of the claimant from whom the claimant acquired the title as a donee, proceedings to recover possession of

the real property may not be taken by the claimant except within 10 years after the right accrued to that predecessor.

RSA 2000 cL-12 s3;2007 c22 s1

Concealment

4(1) The operation of the limitation period provided by section 3(1)(b) is suspended during any period of time that the defendant fraudulently conceals the fact that the injury for which a remedial order is sought has occurred.

(2) Under this section, the claimant has the burden of proving that the operation of the limitation period provided by section 3(1)(b) was suspended.

1996 cL-15.1 s4

Persons under disability

5(1) The operation of the limitation periods provided by this Act is suspended during any period of time that the claimant is a person under disability.

(2) The claimant has the burden of proving that the operation of the limitation periods provided by this Act was suspended under this section.

RSA 2000 cL-12 s5;2002 c17 s4

Minors

5.1(1) In this section,

(a) "guardian" means a parent or guardian having actual custody of a minor;

(b) "potential defendant" means a person against whom a minor may have a claim.

(2) Except as otherwise provided in this section, the operation of limitation periods provided by this Act is suspended during the period of time that the claimant is a minor.

(3) A potential defendant may cause the limitation periods provided by this Act to run against a minor by

(a) delivering a notice to proceed in the prescribed form to

(i) a guardian of the minor, if the minor has a guardian, and

(ii) the Public Trustee,

and

(b) paying the Public Trustee's prescribed fee.

(4) Where a potential defendant has complied with subsection (3), the notice to proceed takes effect and the limitation periods provided by this Act begin to run

(a) on the date the notice to proceed is received by the Public Trustee, which must be shown in the notice delivered by the Public Trustee under subsection (6)(a) or (b), or

(b) on the date determined by an order of a judge under subsection (7) or (8).

(5) Where a potential defendant delivers a notice to proceed to the Public Trustee under subsection (3) and pays the Public Trustee's prescribed fee, the Public Trustee must

(a) if the claimant has a guardian, make such inquiries as the Public Trustee considers necessary and practicable regarding the ability and intention of the claimant's guardian to act in the best interest of the minor regarding the claim, or

(b) if the claimant does not have a guardian, apply to a judge of the Court of Queen's Bench, on notice to such persons as may be directed or approved by the judge, for directions.

(6) After making the inquiries referred to in subsection (5)(a), the Public Trustee must do one of the following:

(a) if satisfied as to the guardian's ability and intention to act in the best interest of the minor regarding the claim, deliver to the potential defendant and the guardian a notice in the prescribed form of the Public Trustee's decision not to intervene in the matter;

(b) with the consent of the claimant's guardian, deliver to the potential defendant a notice in the prescribed form stating that the Public Trustee intends to act as litigation representative of the minor in relation to the claim;

(c) if for any reason the Public Trustee thinks it necessary or appropriate to do so, apply to a judge of the Court of

Queen's Bench, on notice to such persons as may be directed or approved by the judge, for directions.

(7) On an application under subsection (5)(b), a judge may make an order

(a) directing the Public Trustee to take no further steps in the matter and stipulating that the limitation periods provided by this Act continue to be suspended with respect to the minor despite subsection (3), or

(b) doing all of the following:

(i) stipulating that the limitation periods provided by this Act begin to run against the minor on a date specified in the order;

(ii) authorizing and directing the Public Trustee to act as litigation representative of the minor;

(iii) giving such authority and directions to the Public Trustee and any other person as may be necessary to ensure that the Public Trustee may effectively prosecute the claim on behalf of the minor.

(8) On an application under subsection (6)(c), a judge may make an order

(a) directing the Public Trustee to take no further steps in the matter and stipulating that the limitation periods provided by this Act

(i) begin to run against the minor on a date specified in the order, or

(ii) continue to be suspended with respect to the minor despite subsection (3),

or

(b) doing all of the following:

(i) stipulating that the limitation periods provided by this Act begin to run against the minor on a date specified in the order;

(ii) authorizing and directing the Public Trustee to act as litigation representative of the minor;

(iii) giving such authority and directions to the Public Trustee, guardian, if any, and any other person as may be necessary to ensure that the Public Trustee may effectively prosecute the claim on behalf of the minor.

(9) On an application by the Public Trustee under subsection (5)(b) or (6)(c), a judge may consider

(a) the apparent seriousness of the minor's injury;

(b) the apparent legal merits of the claim;

(c) the views of the Public Trustee and the guardian, if any, as to whether the minor's best interest will be better served by pursuing or by not pursuing the claim;

(d) the view of the minor regarding the claim, where the judge considers that the minor is able to appreciate the nature of the issue;

(e) where the guardian or the minor is opposed to pursuing the claim, the apparent likelihood that the Public Trustee would be able to prosecute the claim effectively as litigation representative;

(f) whether directing the Public Trustee to take no further steps and stipulating that the limitation periods provided by this Act continue to be suspended with respect to the minor is likely to cause serious prejudice to either the minor or the potential defendant, having regard to any matters that the judge considers relevant, including

(i) the minor's age,

(ii) whether the minor will be, or is likely to be, a person under disability on becoming an adult,

(iii) whether it would be practicable to preserve relevant evidence during the period the limitation periods would be suspended, and

(iv) any harm that may be suffered by the minor as a result of any delay in recovering compensation to which the minor may be entitled;

(g) any other matters the judge considers relevant.

(10) Where the Public Trustee makes an application to the Court of Queen's Bench under this section, no costs may be awarded against any party to the application.

(11) Subsection (4) operates only in favour of a potential defendant on whose behalf the notice to proceed is delivered and only with respect to a claim arising out of the circumstances specified in the notice.

(12) A notice to proceed delivered under this section is not an acknowledgment for the purposes of this Act and is not an admission for any purpose.

(13) Subsections (3) to (12) do not apply

(a) where the potential defendant is a guardian of the minor, or

(b) where the claim is based on conduct of a sexual nature including, without limitation, sexual assault.

(14) Under this section, the claimant has the burden of proving that at any relevant point in time the claimant was a minor.

(15) The Minister may make regulations prescribing

(a) the form, contents and mode of a delivery of a notice to proceed or any other notice referred to in this section;

(b) the fee to be paid by a potential defendant under subsection (3)(b).

(16) This section applies where a claimant seeks a remedial order in a proceeding commenced after this section comes into force, regardless of when the claim arises, except that a defendant who would have had immunity from liability for a claim if the proceeding had been commenced immediately before this section came into force continues to have immunity from liability for that claim.

2002 c17 s4;2009 c53 s99;2011 c14 s16

Claims added to a proceeding

6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.

(2) When the added claim

(a) is made by a defendant in the proceeding against a claimant in the proceeding, or

(b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,

the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

(3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits, and

(c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

(4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding, and

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.

(5) Under this section,

(a) the claimant has the burden of proving

(i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

(ii) that the requirement of subsection (3)(c), if in issue, has been satisfied,

and

(b) the defendant has the burden of proving that the requirement of subsection (3)(b) or (4)(b), if in issue, was not satisfied.

1996 cL-15.1 s6

Agreement

7(1) Subject to section 9, if an agreement expressly provides for the extension of a limitation period provided by this Act, the limitation period is altered in accordance with the agreement.

(2) An agreement that purports to provide for the reduction of a limitation period provided by this Act is not valid.

RSA 2000 cL-12 s7;2002 c17 s4

Acknowledgment and part payment

8(1) In this section, "claim" means a claim for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to a principal debt, rents, income and a share of estate property, and interest on any of them.

(2) Subject to subsections (3) and (4) and section 9, if a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation period begins again at the time of the acknowledgment or part payment.

(3) A claim may be acknowledged only by an admission of the person liable in respect of it that the sum claimed is due and unpaid, but an acknowledgment is effective

(a) whether or not a promise to pay can be implied from it, and

(b) whether or not it is accompanied with a refusal to pay.

(4) When a claim is for the recovery of both a primary sum and interest on it, an acknowledgment of either obligation, or a part payment in respect of either obligation, is an acknowledgment of, or a part payment in respect of, the other obligation.

1996 cL-15.1 s8

Persons affected by exceptions for agreement, acknowledgment and part payment

9(1) An agreement and an acknowledgment must be in writing and signed by the person adversely affected.

(2) An agreement made by or with an agent has the same effect as if made by or with the principal.

(3) An acknowledgment or a part payment made by or to an agent has the same effect as if it were made by or to the principal.

(4) A person has the benefit of an agreement, an acknowledgment or a part payment only if it is made

(a) with or to the person,

(b) with or to a person through whom the person derives a claim, or

(c) in the course of proceedings or a transaction purporting to be pursuant to the *Bankruptcy and Insolvency Act* (Canada).

(5) A person is bound by an agreement, an acknowledgment or a part payment only if

(a) the person is a maker of it, or

(b) the person is liable in respect of a claim

(i) as a successor of a maker, or

(ii) through the acquisition of an interest in property from or through a maker

who was liable in respect of the claim.

1996 cL-15.1 s9

Acquiescence or laches

10 Nothing in this Act precludes a court from granting a defendant immunity from liability under the equitable doctrines of

acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

1996 cL-15.1 s10

Judgment for payment of money

11 If, within 10 years after the claim arose, a claimant does not seek a remedial order in respect of a claim based on a judgment or order for the payment of money, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

1996 cL-15.1 s11

Conflict of laws

12(1) The limitations law of Alberta applies to any proceeding commenced or sought to be commenced in Alberta in which a claimant seeks a remedial order.

(2) Notwithstanding subsection (1), where a proceeding referred to in subsection (1) would be determined in accordance with the law of another jurisdiction if it were to proceed, and the limitations law of that jurisdiction provides a shorter limitation period than the limitation period provided by the law of Alberta, the shorter limitation period applies.

RSA 2000 cL-12 s12;2007 c22 s1

Actions by aboriginal people

13 An action brought on or after March 1, 1999 by an aboriginal people against the Crown based on a breach of a fiduciary duty alleged to be owed by the Crown to those people is governed by the law on limitation of actions as if the *Limitation of Actions Act*, RSA 1980 cL-15, had not been repealed and this Act were not in force.

1996 cL-15.1 s13

LOWN AUTHORITY 2

Indexed as:

Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon

Leroy Jensen and Roger Tolofson, appellants;
v.
Kim Tolofson, respondent, and
Réjean Gagnon, appellant;
v.
Tina Lucas and Justin Gagnon by their litigation guardian Heather Gagnon, Heather Gagnon personally, and Cyrille Lavoie, respondents, and
Sybil Marshall, Victor Marshall, Dianne Margaret Marshall, Rosemarie Anne Marshall, Carmen Selina Frey, Aditha Le Blanc, Clarence S. Marshall, La Société d'experts-conseils Pellemon Inc., Le Groupe Pellemon Inc., Simcoe and Erie General Insurance Co., Les Services de béton universels Ltée and Allstate Insurance Co. of Canada, interveners.

[1994] 3 S.C.R. 1022

[1994] S.C.J. No. 110

File Nos.: 22980, 23445.

Supreme Court of Canada

1994: February 21 / 1994: December 15.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Conflict of laws -- Torts -- Traffic accident -- Injured parties not resident in province where accident occurred -- Actions instituted in home provinces of injured parties -- Whether lex fori or lex loci delicti should apply -- If substantive law that of jurisdiction where accident occurred, whether limitation period substantive law and therefore applicable in forum or procedural law and therefore not binding on court hearing case -- Automobile Insurance Act, L.Q. 1977, c. 68, ss. 3, 4 -- Code

civil du Bas Canada, art. 6 -- Limitation of Actions Act, R.S.S. 1978, c. L-15 -- Vehicles Act, R.S.S. 1978, c. V-3, s. 180(1).

These appeals deal with the "choice of law rule": which law should govern in cases involving the interests of more than one jurisdiction specifically as it concerns automobile accidents involving residents of different provinces. The first case also raises the subsidiary issue of whether, assuming the applicable substantive law is that of the place where the tort arises, the limitation period established under that law is inapplicable as being procedural law and so not binding on the court hearing the case, or substantive law. The second case raises the issue whether the Quebec no-fault insurance scheme applies to situations where some or all the parties are non-residents.

Tolofson v. Jensen

The plaintiff, Kim Tolofson, a 12-year-old passenger in a car driven by his father Roger, was seriously injured in a car accident with Leroy Jensen. The accident occurred in Saskatchewan. The Tolofsons were residents of and their car was registered in British Columbia; Mr. Jensen was a resident of and his car was registered in Saskatchewan. Plaintiff brought an action eight years later in British Columbia on the assumption that the action was statute-barred under Saskatchewan law. Further, Saskatchewan law, unlike British Columbia law, did not permit a gratuitous passenger to recover, absent wilful or wanton misconduct of the driver of the car in which he or she was travelling. Neither defendant admitted liability. The defendants brought an application by consent to seek a determination as to whether the court was forum non conveniens or alternatively as to whether Saskatchewan law applied. The motions judge dismissed the application and ruled that choice of law was inextricably entwined with issues of jurisdiction and forum conveniens, and that choice of law followed these determinations. The Court of Appeal found that the law of the forum should apply.

Lucas (Litigation Guardian of) v. Gagnon

Mrs. Gagnon brought action on her own behalf and as litigation guardian of two children against her husband, Mr. Gagnon, for personal injuries suffered in a Quebec traffic accident involving her husband and Mr. Lavoie. The Gagnons were residents of Ontario; Mr. Lavoie was a resident of Quebec. Mrs. Gagnon discontinued her action against Mr. Lavoie following an Ontario Court of Appeal judgment that a Quebec resident's liability was governed by Quebec law. Mr. Gagnon, however, had cross-claimed against Mr. Lavoie and that cross-claim was not discontinued. Mrs. Gagnon obtained all of the no-fault benefits allowable under the Quebec scheme from Mr. Gagnon's Ontario insurer which was in turn reimbursed by the Régie de l'assurance automobile du Québec. The only legal avenue open to Mrs. Gagnon in seeking damages was to sue in Ontario because she was barred from bringing an action for damages in Quebec by operation of Quebec's Automobile Insurance Act.

The Ontario Court (General Division), on a motion brought by Mr. and Mrs. Gagnon (without notice to Mr. Lavoie) to determine specific points of law, decided that the Ontario court had jurisdiction, that the Ontario court should accept that jurisdiction, that Ontario law applied, and that Mr. Gagnon was entitled to maintain his action against Mr. Lavoie. Mr. Gagnon and Mr. Lavoie appealed on the questions of whether Ontario law applied and whether Mr. Gagnon could maintain his cross-claim against Mr. Lavoie. The Ontario Court of Appeal held that Ontario law applied in the

action against Mr. Gagnon but that the law of Quebec applied with respect to any claim made against Mr. Lavoie since he was not a resident of Ontario and the accident occurred in Quebec.

Held (Tolofson v. Jensen, File No. 22980): The appeal should be allowed.

Held (Lucas (Litigation Guardian of) v. Gagnon, File No. 23445): The appeal should be allowed.

Per La Forest, Gonthier, Cory, McLachlin and Iacobucci JJ.: The rule of private international law that should generally be applied in torts is the law of the place where the activity occurred -- the lex loci delicti. This approach responds to the territorial principle under the international legal order and the federal regime. It also responds to a number of sound practical considerations. It is certain, easy to apply and predictable and meets normal expectations in that ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs.

The former British rule, adopted in McLean v. Pettigrew, that a court should apply its law (lex fori) when adjudicating on wrongs committed in another country, subject to the wrong's being "unjustifiable" in that country, cannot be accepted. This would involve a court's defining the nature and consequences of an act done in another country, which, barring some principled justification, flies against the territoriality principle. In practice, the courts of different countries would follow different rules in respect of the same wrong and invite forum shopping by litigants in search of the most beneficial place to litigate an issue. Applying the same approach to the units of a federal state like Canada would make forum shopping even easier.

No compelling reason exists for following the lex fori. The problem of proof of foreign law has been considerably attenuated given advances in transportation and communication. McLean v. Pettigrew, which applied the lex fori even though the action complained of was not actionable under the law of the place of the wrong, should be overruled. Its application in the federal context raises serious constitutional difficulties.

The nature of Canada's constitutional arrangements -- a single country with different provinces exercising territorial legislative jurisdiction -- supports a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country. This militates strongly in favour of the lex loci delicti rule. In this respect, given the mobility of Canadians and the many common features in the law of the various provinces and the essentially unitary nature of Canada's court system, an invariable rule that the matter also be actionable in the province of the forum is not necessary. This factor should be considered in determining whether there is a real and substantial connection to the forum to warrant its exercise of jurisdiction. Any problems that might arise could be resolved by a sensitive application of the doctrine of forum non conveniens.

Strict application of lex loci delicti also has the advantage of unquestionable conformity with the Constitution. This advantage is not to be ignored given the largely unexplored nature of the area and the consequent danger that a rule developed in a constitutional vacuum may, when explored, not conform to constitutional imperatives.

One of the main goals of any conflicts rule is to create certainty in the law. Any exception adds an element of uncertainty. However, since a rigid rule on the international level could give rise to in-

justice, the courts should retain a discretion to apply their own law to deal with such circumstances, although such cases would be rare. Indeed, if not strictly narrowed to situations that involve some timely and close relationship between the parties, an exception could lead to injustice.

The underlying principles of private international law are order and fairness, but order comes first for it is a precondition to justice. Considerations of public policy in actions that take place wholly within Canada should play a limited role, if at all. Arguments for an exception based on public policy are simply rooted in the fact that the court does not approve of the law that the legislature chose to adopt. The law of the land, however, is not usually ignored in favour of those who visit. The perception that the parties intend the law of their residence to apply is not valid.

On the international level, the rule that the wrong must be actionable under Canadian law is not really necessary, since the jurisdiction of Canadian courts is confined to matters where a real and substantial connection with the forum jurisdiction exists. The fact that a wrong would not be actionable within the territorial jurisdiction of the forum if committed there might be a factor better weighed in considering the issue of forum non conveniens or whether entertaining the action would violate the public policy of the forum jurisdiction.

Saskatchewan's substantive law applies in Tolofson v. Jensen. This includes its limitation rule. In any action involving the application of a foreign law the characterization of rules of law as substantive or procedural is crucial because the substantive rights of the parties to an action may be governed by a foreign law, but all matters of procedure are governed exclusively by the law of the forum. The forum court cannot be expected to apply the procedural rules of the foreign state whose law it wishes to apply. The forum's procedural rules exist for the convenience of the court, and forum judges understand them.

The bases of the old common law rule, which held that statutes of limitation are always procedural, are out of place in the modern context. The limitation period in this case was substantive because it created an accrued right in the defendant to plead a time bar. The limitation defence was properly pleaded here and all parties proceeded on the assumption that, if Saskatchewan law applied, it was a valid defence. It should not be rejected by a British Columbia court as contrary to public policy. The extent to which limitation statutes should go in protecting individuals against stale claims involves policy considerations unrelated to the manner in which a court must carry out its functions and the particular balance may vary from place to place.

In Lucas (Litigation Guardian of) v. Gagnon, Quebec law applies, both by virtue of Quebec's no-fault insurance scheme and through the operation of lex loci delicti. Barring other considerations, the legislature clearly intended that these provisions should apply to all persons who have an accident in Quebec regardless of their province of residence. This policy is clearly within the province's constitutional competence. The new Civil Code, which was not in effect at the time of the accident, did not change the situation of the parties. Even had it been operative, the language of the Automobile Insurance Act clearly overrode the general law. Section 4 removes not only rights of action but also "all rights . . . of any one".

Per Sopinka J. Concurrence with the reasons of La Forest J. was subject to the observations expressed by Major J.

Per Major J.: The question of which province's law should govern the litigation should be determined by reference to the lex loci delicti rule. An absolute rule admitting of no exceptions needed not be established. Parties have the ability to choose, by agreement, to be governed by the lex fori

and a discretion exists to depart from the absolute rule in international litigation where the lex loci delicti rule would work an injustice. Recognition of a similar exception should not be foreclosed in interprovincial litigation.

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By La Forest J.

Overruled: McLean v. Pettigrew, [1945] S.C.R. 62; not followed: Chaplin v. Boys, [1969] 2 All E.R. 1085 (H.L.), aff'd [1968] 1 All E.R. 283 (C.A.); considered: Phillips v. Eyre (1870), L.R. 6 Q.B. 1; Machado v. Fontes, [1897] 2 Q.B. 231; Going v. Reid Brothers Motor Sales Ltd. (1982), 35 O.R. (2d) 201; Ang v. Trach (1986), 57 O.R. (2d) 300; Breavington v. Godleman (1988), 80 A.L.R. 362; Block Bros. Realty Ltd. v. Mollard (1981), 122 D.L.R. (3d) 323; Yew Bon Tew v. Kenderaan Bas Mara, [1983] 1 A.C. 553; Clark v. Naqvi (1990), 99 N.B.R. (2d) 271; referred to: Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077; Hunt v. T & N plc, [1993] 4 S.C.R. 289; Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897; Grimes v. Cloutier (1989), 61 D.L.R. (4th) 505; Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. (1883), 10 Q.B.D. 521; Canadian Pacific Railway Co. v. Parent, [1917] A.C. 195; Red Sea Insurance Co. v. Bouygues, [1994] J.C.J. No. 29; Walpole v. Canadian Northern Railway Co., [1923] A.C. 113; Prefontaine Estate v. Frizzle (1990), 71 O.R. (2d) 385; Moran v. Pyle National (Canada) Ltd., [1975] 1 S.C.R. 393; Babcock v. Jackson (1963), 12 N.Y.2d 473; Richards v. United States, 369 U.S. 1 (1962); Dym v. Gordon, 209 N.E.2d 792 (1965); Neumeier v. Kuehner, 286 N.E.2d 454 (1972); LaVan v. Danyluk (1970), 75 W.W.R. 500; Poyser v. Minors (1881), 7 Q.B.D. 329; Huber v. Steiner (1835), 2 Bing. N.C. 202, 132 E.R. 80; Leroux v. Brown (1852), 12 C.B. 801, 138 E.R. 1119; Nash v. Tupper, 1 Caines 402 (1803); Martin v. Perrie, [1986] 1 S.C.R. 41; Szeto c. Fédération (La), Cie d'assurances du Canada, [1986] R.J.Q. 218.

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APPEAL (Tolofson v. Jensen, File No. 22980) from a judgment of the British Columbia Court of Appeal (1992), 65 B.C.L.R. (2d) 114, 89 D.L.R. (4th) 129, 11 B.C.A.C. 94, 22 W.A.C. 94, [1992] 3 W.W.R. 743, 9 C.C.L.T. (2d) 289, 4 C.P.C. (3d) 113, dismissing an appeal from a judgment of Macdonald J. (1989), 40 B.C.L.R. (2d) 90, Appeal allowed.

APPEAL (Lucas (Litigation Guardian of) v. Gagnon, File No. 23445) from a judgment of the Ontario Court of Appeal (1992), 11 O.R. (3d) 422, 99 D.L.R. (4th) 125, 59 O.A.C. 174, 15 C.C.L.T. (2d) 41, 15 C.C.L.I. (2d) 100, 42 M.V.R. (2d) 67, allowing an appeal, to the extent it held that a cross-claim for contribution and indemnity could not be maintained, from a judgment of Hurley J. (1991), 3 O.R. (3d) 38, 4 C.C.L.I. (2d) 194, 28 M.V.R. (2d) 155, determining that Ontario law applied to the cause of action and that a cross-claim could be maintained against appellant Lavoie. Appeal allowed.

Avon M. Mersey, Elizabeth B. Lyall and Brian F. Schreiber, for the appellants Leroy Jensen and Roger Tolofson.
Noreen M. Collins, for the respondent Kim Tolofson.
Allan Lutfy, Q.C., and Odette Jobin-Laberge, for the appellant Réjean Gagnon.
Robert J. Reynolds, for the respondents Tina Lucas, Justin Gagnon and Heather Gagnon.

Graeme Mew and Adelina Wong, for the respondent Cyrille Lavoie.
Written submission only by Brian J. E. Brock and Lesli Bisgould, for the intervener Clarence S. Marshall.
Written submission only by Peter A. Daley, for the interveners Sybil Marshall, Victor Marshall, Dianne Margaret Marshall, Rosemarie Anne Marshall, Carmen Selina Frey and Aditha Le Blanc.
Written submission only by W. T. McGrenere, for the interveners La Société d'experts-conseils Pellemon Inc., Le Groupe Pellemon Inc., Simcoe and Erie General Insurance Co., Les Services de béton universels Ltée, and Allstate Insurance Co. of Canada.

Solicitors for the appellant Leroy Jensen: McQuarrie, Hunter, New Westminster.
Solicitors for the appellant Roger Tolofson: Russell & DuMoulin, Vancouver.
Solicitors for the respondent Kim Tolofson: Simpson & Company, Vancouver.
Solicitors for the appellant Réjean Gagnon: Lavery, de Billy, Ottawa.
Solicitors for the respondent Cyrille Lavoie: Smith, Lyons, Torrance, Stevenson & Mayer, Toronto.
Solicitors for the respondents Tina Lucas, Justin Gagnon and Heather Gagnon: Reynolds, Kline, Selick, Belleville.
Solicitors for the intervener Clarence S. Marshall: Dutton, Brock, MacIntyre & Collier, Toronto.
Solicitors for the interveners Sybil Marshall, Victor Marshall, Dianne Margaret Marshall, Rosemarie Anne Marshall, Carmen Selina Frey and Aditha Le Blanc: Soloway, Wright, Ottawa.
Solicitors for the interveners La Société d'experts-conseils Pellemon Inc., Le Groupe Pellemon Inc., Simcoe and Erie General Insurance Co., Les Services de béton universels Ltée, and Allstate Insurance Co. of Canada: Fraser & Beatty, North York.

The judgment of La Forest, Gonthier, Cory, McLachlin and Iacobucci JJ. was delivered by

1 **LA FOREST J.**:-- This Court has in recent years been called upon to review a number of the structural rules of conflict of laws or private international law. In Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, and Hunt v. T & N plc, [1993] 4 S.C.R. 289, the Court had occasion to revisit the law governing the jurisdiction of courts to deal with multi-jurisdictional problems and the recognition to be accorded by the courts of one jurisdiction to a judgment made in another jurisdiction. In Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897, the Court also examined the rules governing when a court may refuse jurisdiction on the basis of forum non conveniens.

2 In the two appeals before us we are called upon to reconsider the "choice of law rule", i.e., which law should govern in cases involving the interests of more than one jurisdiction, specifically as it concerns automobile accidents involving residents of different provinces.

3 The precise issue may be distilled from the facts of the two cases under appeal. The plaintiffs, residents of Province A, were passengers in an automobile registered and insured in that province. The driver of the automobile in which they were travelling was a resident of Province A. The passengers were injured in a collision with another automobile in Province B. The driver of that automobile was a resident of Province B, and his automobile was registered in that province. In one of the cases, liability from the operation of the automobile was covered by an insurance contract made in Province B; in the other, it was covered under the terms of Province B's "no-fault" insurance

scheme. The plaintiffs instituted an action for the resulting personal injuries in Province A against both drivers. The issue that arises is what law should be applied in determining the liability of the defendant drivers.

4 The first of these cases also raises the following subsidiary issue. Assuming the applicable substantive law is that of the place where the tort arises, is the limitation period established under that law inapplicable as being procedural law and so not binding on the court hearing the case, or is it substantive law? For its part, the second case raises the issue whether the Quebec no-fault insurance scheme applies to situations where some or all the parties are non-residents.

Background

Tolofson v. Jensen

Facts

5 On July 28, 1979, the plaintiff (respondent) Kim Tolofson was a passenger in a car owned and driven by his father, the defendant (appellant) Roger Tolofson. He was seriously injured when the car was involved in an accident with a vehicle driven by the other defendant (appellant) Leroy Jensen. The accident occurred in Saskatchewan. The Tolofsons were and remain residents of British Columbia and the car in which they drove was registered and insured in that province. Jensen was and remains a resident of Saskatchewan, and his car was registered and insured in that province.

6 The plaintiff Tolofson alleges that he suffered head injuries in the collision which affected his learning capacity and his physical capabilities. He began an action in British Columbia against both defendants seeking damages for these injuries on December 17, 1987, more than eight years after the collision occurred. He was only 12 years old at the time of the accident. The parties both operated on the assumption that the plaintiff's action is barred under Saskatchewan law because it must be brought within 12 months of the accident. Such a suit is not barred in British Columbia. As well, under Saskatchewan law a gratuitous passenger cannot recover unless "wilful or wanton misconduct" can be established against the driver of the car in which he or she was a passenger. This is not the case in British Columbia. Neither defendant admits liability.

7 The defendants then brought an application by consent pursuant to Rule 34 of the Supreme Court Rules of British Columbia before Macdonald J. seeking determination of a point of law, namely, that the court was forum non conveniens or, in the alternative, that the law of Saskatchewan applied with respect to the limitation period and the standard of care for gratuitous passengers. That is the proceeding from which the first of these appeals arises.

Judicial History

British Columbia Supreme Court (1989), 40 B.C.L.R. (2d) 90

8 On October 17, 1989, Macdonald J. dismissed the application. He concluded that while he was impressed with the logic of applying the "proper law of the tort", he was bound by McLean v. Pettigrew, [1945] S.C.R. 62, where this Court upheld an action in respect of a single car accident in Ontario which was successfully brought in Quebec under Quebec law by a passenger, a resident of Quebec, against the owner and operator of the car, also a resident of Quebec. Having considered the authorities, he concluded that choice of law was inextricably entwined with issues of jurisdiction and forum conveniens, and that choice of law followed these determinations.

British Columbia Court of Appeal (1992), 65 B.C.L.R. (2d) 114

9 On the appeal to the British Columbia Court of Appeal, the defendants no longer contended that the British Columbia courts are without jurisdiction or should decline jurisdiction as being forum non conveniens. They argued, however, that Macdonald J. had erred in failing to separate issues of jurisdiction and forum non conveniens from choice of law. In addition, they submitted that the applicable law was that of Saskatchewan. Cumming J.A., who gave reasons for the Court of Appeal, agreed, at p. 120, that "even when the court finds jurisdiction and refuses to stay an action based on forum non conveniens because a juridical advantage is found in the forum, it is still necessary to examine choice of law independently".

10 After an extensive review of the history of choice of law rules and their application in recent Canadian cases, Cumming J.A. reviewed the facts of Lucas v. Gagnon (then at the Ontario Divisional Court level). He concluded that it made no difference that in that case Lucas was a defendant on a cross-claim whereas in the present case Jensen was a co-defendant. He adopted the reasoning of Hurley J. in Gagnon that, not only was he bound by McLean v. Pettigrew even on the facts of the case at bar, but even if he were not so bound, he would hold that the law of the forum should apply since it had the most significant relationship with the parties. In obiter, Cumming J.A. stated that this decision was justified in that it met with the reasonable expectations of all the parties in that the Saskatchewan defendant would have reasonably expected to be subject to a lawsuit initially, and that both the limitation period and the gratuitous passenger laws of Saskatchewan had since been repealed.

Lucas (Litigation Guardian of) v. Gagnon

Facts

11 The Gagnon case is similar to the Tolofson case, except that in the Gagnon case the appellant does not seek to avoid a limitation period and a higher standard of care in the jurisdiction where the accident occurred; he seeks rather to avoid the limits on liability provided in the no-fault regime in effect in Quebec where the accident occurred. While the amount that can be recovered under that regime is greater than can be recovered under the unsatisfied judgment funds in other provinces, it is much less than can be recovered in a tort action against the party at fault. I note that Ontario has entered into an agreement regarding the application of the Quebec no-fault regime to Ontario residents who have an accident in Quebec which, it was argued, has an impact on the result of this case. This was not directly discussed in the courts below, and I shall only make reference to it later.

12 The essential facts, for present purposes, are these. The plaintiff, Mrs. Gagnon, brought action on her own behalf and as litigation guardian of two children against her husband, Mr. Gagnon, for personal injuries suffered in an accident that occurred in the Province of Quebec when there was a collision between an automobile driven by her husband, in which she was a passenger, and an automobile owned and operated by Mr. Lavoie. The Gagnons are all residents of Ontario; Mr. Lavoie is a resident of Quebec.

13 Mrs. Gagnon originally included Mr. Lavoie as a defendant, but after the Ontario Court of Appeal released its decision in Grimes v. Cloutier (1989), 61 D.L.R. (4th) 505, which distinguished McLean v. Pettigrew, supra, and held that a Quebec resident's liability in circumstances like the present case was governed by Quebec law, Mrs. Gagnon discontinued her action against Mr. La-

voie. However, the defendant, Mr. Gagnon, had cross-claimed against Mr. Lavoie and that cross-claim was not discontinued.

14 Mrs. Gagnon obtained 100% of the no-fault benefits (on the Quebec scale) to which she was entitled under the Quebec scheme from Mr. Gagnon's Ontario insurer. The Ontario insurer was reimbursed by the Régie de l'assurance automobile du Quebec ("La Régie"), pursuant to a 1978 agreement between the Régie and Ontario's Minister of Consumer and Commercial Relations. Mrs. Gagnon could not bring an action for damages in Quebec because of the prohibition in s. 4 of the Quebec Automobile Insurance Act, L.Q. 1977, c. 68. Her only option in seeking an award of damages was to sue in Ontario.

15 Mr. and Mrs. Gagnon then brought a motion on an agreed statement of facts for an order under Rule 22 of the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, to determine the following questions: whether the Ontario court had jurisdiction; whether it should accept that jurisdiction; whether Ontario law applied; and whether Mr. Gagnon was entitled to maintain his action against Mr. Lavoie. It is from this proceeding that the appeal to this Court emanates. Mr. Lavoie was not notified of the motion at first instance, did not concur with the questions stated and did not attend.

Judicial History

Ontario Court (General Division) (1991), 3 O.R. (3d) 38

16 The motion was heard by Hurley J. He replied in the affirmative to all the questions set forth in the motion. He began his analysis with Phillips v. Eyre (1870), L.R. 6 Q.B. 1 (Ex. Ch.), which is the starting point for the law in this area. He cited the general rule stated therein to the effect that to found a suit in England for a wrong committed abroad, two conditions had to be met: (1) the wrong would have been actionable if committed in England and (2) was not justifiable by the law of the place where the act was committed. That case, he noted, had been followed by this Court in McLean v. Pettigrew, supra, where the second condition was held to be satisfied by the fact that the wrong was subject to a penal prohibition in the place where the act was committed even though it was not actionable there. McLean involved an action where the plaintiff and defendant were residents of the same province and the action was brought there. The situation was similar here as it related to the Gagnons. Assuming evidence of the second condition in Phillips v. Eyre was established by evidence at trial, he concluded that an action would lie.

17 Though he had made reference to Grimes v. Cloutier, supra, and other Ontario jurisprudence as it affected Quebec residents in relation to accidents that take place in Quebec, Hurley J. still thought the defendant's claim against Mr. Lavoie could be pursued. In his view, the fact that the defendant in the cross-claim was originally a defendant in the action was irrelevant, since he was no longer so. Hurley J. stated, at p. 43:

> If I am not bound to apply McLean then, in my opinion, the reasonable expectations of the plaintiffs and the defendant are that this sort of litigation would take place in Ontario according to the law of Ontario, and I conclude that the defendant's assertion in the action of a claim over against a Quebec driver/owner does not alter those expectations. Rather, in my opinion it would be unfair to allow the addition of that claim over to alter the law applicable from that

> of Ontario, which has the most significant relationship with the parties, to that of Quebec.

Ontario Court of Appeal (1992), 11 O.R. (3d) 422

18 Mr. Lavoie and Mr. Gagnon then appealed to the Ontario Court of Appeal, but only on the questions of whether Ontario law applied and whether Gagnon was entitled to maintain his cross-claim against Lavoie. The late Tarnopolsky J.A. stated the main question as whether Ontario or Quebec law governed both the main action and the cross-claim. He examined whether the decision of McLean v. Pettigrew, supra, should be distinguished on the basis that the defendant to the cross-claim, who was not a party to the main action, was a resident of Quebec and that the accident occurred in Quebec. He also considered, if McLean v. Pettigrew applied to the main action, whether the choice of law with respect to the cross-claim was different having regard to the Court of Appeal's decision in Grimes v. Cloutier, supra.

19 After reviewing the case law, Tarnopolsky J.A. emphasized that McLean v. Pettigrew ought not to be applied rigidly to factual circumstances not closely similar to those in that case. He held that McLean applied to the main action. As for the cross-claim, he found the following, at p. 438:

> In my opinion, given the facts of the case at bar it [would] be unjust if the action against Lavoie were not bound by Grimes v. Cloutier. After all, Lavoie was a Quebec resident driving his car in his own province. Therefore, when an Ontario resident is involved in an accident in Quebec with a Quebec resident, although both the passenger and his or her driver are residents of Ontario, a claim against the Quebec driver must be barred by the Quebec non-actionability law.

20 As a result, Ontario law, including conflict rules developed according to Phillips v. Eyre, supra, was held to apply in the action of the respondents against the appellant Gagnon. Since Lavoie was not a resident of Ontario and the accident occurred in Quebec, the facts and law of Grimes v. Cloutier applied to any claim against him. The action was remitted for trial on that basis.

21 Carthy J.A. agreed with Tarnopolsky J.A. but arrived at the conclusion that the cross-claim should not proceed by a different route. He reviewed s. 2 of the Negligence Act, R.S.O. 1990, c. N.1, and concluded, at p. 440, that, because Lavoie could not, on the authority of Grimes v. Cloutier, have been sued alone, he was not a person who was or "would if sued have been, liable" in respect of the damage suffered by the respondent.

22 Blair J.A., who found the views of his colleagues complementary rather than inconsistent, agreed with both of them.

Historical Highlights of Choice of Law Rule in Tort

23 The genesis of the existing Canadian rule for the determination of choice of law for torts arising outside a court's territorial jurisdiction is the seminal case of Phillips v. Eyre, supra. There the plaintiff brought an action in England for assault and false imprisonment against the defendant who at the time of the torts was governor of Jamaica. The acts of which the plaintiff complained were part of a course of action taken by Jamaican authorities to suppress a rebellion. Later the governor caused an act of indemnity to be passed absolving all persons of liability for any unlawful act committed in putting down the rebellion. Much of the judgment given by Willes J. is devoted to questions concerning whether a colony like Jamaica could constitutionally enact such a statute;

these the court answered in the affirmative. But the major import of the case relates to the final objection of the plaintiff that, assuming the colonial statute was valid in Jamaica, it could not have the effect of taking away a right of action in an English court. Willes J. replied that the objection rested on a misconception of a civil obligation and the corresponding right of action, which later he stated is only an accessory to the obligation and subordinate to it. As in the case of contract, the general rule was that "the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law" (emphasis added) (p. 28). The substantive law, he affirmed, is governed by the law of the place where the wrong has been committed. That, of course, would be Jamaica because the torts were wholly committed there.

24 Willes J. then went on to say that English courts are said to be more open to admit actions founded on foreign transactions than those of other European countries, but he added, at p. 28, that there are restrictions (e.g., trespass to land) that exclude certain actions altogether, and "even with respect to those not falling within that description our courts do not undertake universal jurisdiction" (emphasis added). He then immediately continued with the following frequently cited passage, at pp. 28-29:

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

25 In this passage, Willes J. appears to commingle the law dealing with what we would today call jurisdiction and choice of law. The first rule is strictly related to jurisdiction as is evident from its context, which I have just related. The second rule we would normally think of as dealing with choice of law, which it is apparent from his earlier remarks was the place of the wrong, the lex loci delicti. It was not, however, necessary for Willes J. to engage in this type of modern analysis. All he was doing was expressing a rule of double actionability to permit suit in England; see Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. (1883), 10 Q.B.D. 521, at pp. 536-37.

26 The law was not to remain in this form. In Machado v. Fontes, [1897] 2 Q.B. 231, (an interlocutory appeal heard in a summary way by two judges), Willes J.'s judgment was read in a rather wooden manner to mean something quite different from what he, in my view, had intended. In that case the plaintiff brought action in England for libel alleged to have been published in Portuguese in Brazil. Though the report leaves us to surmise, the names of the parties would indicate that they were Brazilian and, the language being Portuguese, the libel would seem to have taken place there. The court interpreted Willes J.'s language as meaning that an act committed abroad could be brought in England in the same way as if it had taken place in England, so long as it was not justified or excused under the law of the place where it was committed. It was, in other words, actionable under English law even if not actionable where it was committed if it was "unjustifiable" there, for example, if it constituted a criminal act there.

27 The approach taken in Machado v. Fontes was subjected to considerable judicial and academic criticism; see Professor Moffatt Hancock's biting Case and Comment on McLean v. Pettigrew, supra, (1945), 23 Can. Bar Rev. 348. In particular so far as Canadian cases are concerned, Viscount Haldane in Canadian Pacific Railway Co. v. Parent, [1917] A.C. 195, at p. 205, early ex-

pressed some reservations about it. For my part, I would have thought the question whether a wrong committed in Brazil by a Brazilian against another Brazilian gave rise to an action for damages should be within the purview of Brazil, and that its being made actionable under English law by an ex post facto decision of an English court would constitute an intrusion in Brazilian affairs which an English court, under basic principles of comity, should not engage in. I could understand the approach if the parties were both English nationals or domiciled in England and there is some support in English cases for that measure of intervention; see Chaplin v. Boys, [1969] 2 All E.R. 1085 (H.L.), per Lord Hodson, at p. 1094, and Lord Wilberforce, at p. 1104; see also Lord Denning in the same case in the Court of Appeal, [1968] 1 All E.R. 283, at pp. 289-90. I add parenthetically that it could well be argued (though the facts were not conducive to that possibility) that, unlike a motor vehicle accident, the tort of libel should be held to take place where its effects are felt, but the court simply assumed that the place of the tort was Brazil.

28 In England, Machado v. Fontes was ultimately overruled by the House of Lords in Chaplin v. Boys, supra. There the plaintiff, a passenger on a motorcycle, was injured through the negligence of the defendant whose car had hit the motorcycle. The plaintiff and defendant were British soldiers stationed in Malta. In upholding the action, their Lordships adopted a test of double actionability. Substantive British law would be applied if the conduct was actionable both in England and in the place where the conduct occurred, with a residual discretion to depart from the rule where justice warranted. Here the conduct was actionable both in England and in Malta, and there was no ground for a discretion to be exercised. The majority thus determined that the rule in Phillips v. Eyre was a double actionability test. While the ratio of the case is difficult to define with precision (see Red Sea Insurance Co. v. Bouygues, [1994] J.C.J. No. 29 (P.C.)), the summary of the result set forth in the well known text of Dicey and Morris, Dicey and Morris on the Conflict of Laws, vol. 2 (11th ed. 1987), at pp. 1365-66, has been generally accepted:

> Rule 205. -- (1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both
>
> (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and
> (b) actionable according to the law of the foreign country where it was done.
>
> (2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.

29 Nonetheless it was on the insecure foundation of Phillips v. Eyre as interpreted in Machado v. Fontes that the existing Canadian law was erected by this Court's 1945 decision in McLean v. Pettigrew. There, it will be remembered, a driver and his gratuitous passenger, both domiciled in Quebec, had a car accident in Ontario, and the passenger sued the driver in Quebec. Under Ontario law, the claim would not have been actionable. It would, however, have been actionable in Quebec had it occurred there. Applying the prevalent English law, the Court found that since the tort was actionable in Quebec, and the driver's conduct, though not actionable in Ontario, was prohibited under the Highway Traffic Act, R.S.O. 1937, c. 288, s. 47, of that province, it was not "justifiable" in Ontario. It, therefore, upheld the plaintiff's action under Quebec law.

30 The law as enunciated in McLean v. Pettigrew has remained the basic rule in Canada ever since. However, its fundamental weaknesses began to be revealed in a series of Ontario cases beginning in the 1980s. The first requiring discussion is Going v. Reid Brothers Motor Sales Ltd. (1982), 35 O.R. (2d) 201 (H.C.). There the plaintiffs were seriously injured in a collision with the defendant's vehicle in Quebec owing to the negligence of the defendant. All the parties resided in Ontario. In an action in Ontario, Henry J. held that the plaintiffs were entitled to recover damages in accordance with Ontario law despite the fact that the no-fault scheme in Quebec, where the accident took place, extinguished any action in respect of bodily injuries arising out of the accident. Had there been no breach of Quebec law of any kind the action would not have been maintainable in Ontario; see Walpole v. Canadian Northern Railway Co., [1923] A.C. 113 (P.C.). However, in Going, the defendant had been in breach of the Quebec Highway Traffic Code, R.S.Q. 1977, c. C-24. Thus the action was not "justifiable" in Quebec so, following the rule in McLean v. Pettigrew, the plaintiffs could recover under Ontario law. Henry J. noted that the effect was that the defendants, who had no relationship with the plaintiffs apart from the accident, were deprived of the protection of the law accorded them in Quebec where the action occurred; moreover, he added, the rule encouraged forum shopping. Had either the British rule in Chaplin v. Boys, supra, or the American rule (which applied the proper law of the tort), been in effect, that would not have been the case. I note in passing that in this and the cases that followed, reference is made to rules in other countries, but in none of these cases was the rule approached on the basis of Canadian constitutional imperatives.

31 Ang v. Trach (1986), 57 O.R. (2d) 300 (H.C.), even more strongly underlines the deficiencies of the rule in McLean v. Pettigrew. There Ontario residents who were involved in a motor vehicle accident in Quebec with a Quebec resident were held entitled to sue the latter despite the fact that a Quebec resident must surely expect to be governed by Quebec law in such circumstances. As Henry J. observed, the rule, by applying the law of the forum as to liability and assessment, in essence constitutes an extraterritorial extension of the law of the forum. The situation in Going was at least supportable since the parties were all Ontario residents. In Henry J.'s view, the law of the place of the tort, or the proper law (i.e., the place having the most substantial connection with the tort) a concept which has been developed in the United States, would be more appropriate. He voiced the hope, since repeated in many cases including those before us, that the matter would be addressed by the appellate courts or by legislation.

32 Henry J.'s prayer was answered by the Ontario Court of Appeal, at least to the extent to which it could do so, in Grimes v. Cloutier, supra, and Prefontaine Estate v. Frizzle (1990), 71 O.R. (2d) 385. In effect what the court did in the latter two cases was to confine McLean v. Pettigrew to its particular facts. In other situations, it held, the rule of double actionability set forth in Dicey and Morris following Chaplin v. Boys, supra, should be followed. Accordingly, in Grimes v. Cloutier, it dismissed the action of an Ontario resident against a Quebec resident for personal injuries suffered in an automobile accident in Quebec. Since under the Quebec no-fault scheme no action existed in respect of the accident, no action could be brought in Ontario. The same rule was applied in Prefontaine Estate v. Frizzle where a Quebec resident sued an Ontario resident in respect of an accident in Quebec.

33 It was against this background that the present cases arose. In Tolofson, we saw, the British Columbia Court of Appeal followed the rule in McLean v. Pettigrew strictly, holding that the British Columbia plaintiff could sue both the British Columbia defendant and the Saskatchewan defendant in British Columbia under the laws of that province for damages resulting from an automobile

accident that occurred in Saskatchewan. Following the principles enunciated in its earlier decisions, the Ontario Court of Appeal in Gagnon held that the Ontario resident could sue the defendant who was also resident in Ontario, but further held that the latter could not cross-claim for contributory negligence against the Quebec defendant because that claim could not have been pursued in Quebec so the double actionability rule was not satisfied.

34 Under these circumstances it is incumbent on this Court to respond to the prayer originally appearing in the reasons of Henry J. in Ang v. Trach and repeatedly reiterated in subsequent cases.

Critique and Reformulation

35 What strikes me about the Anglo-Canadian choice of law rules as developed over the past century is that they appear to have been applied with insufficient reference to the underlying reality in which they operate and to general principles that should apply in responding to that reality. Often the rules are mechanistically applied. At other times, they seem to be based on the expectations of the parties, a somewhat fictional concept, or a sense of "fairness" about the specific case, a reaction that is not subjected to analysis, but which seems to be born of a disapproval of the rule adopted by a particular jurisdiction. The truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law. Indeed in the present context it wholly obscures the nature of the problem. In dealing with legal issues having an impact in more than one legal jurisdiction, we are not really engaged in that kind of interest balancing. We are engaged in a structural problem. While that structural problem arises here in a federal setting, 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.

36 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. Absent a breach of some overriding norm, other states as a matter of "comity" will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits. Moreover, to accommodate the movement of people, wealth and skills across state lines, a byproduct of modern civilization, they will in great measure recognize the determination of legal issues in other states. And to promote the same values, they will open their national forums for the resolution of specific legal disputes arising in other jurisdictions consistent with the interests and internal values of the forum state. These are the realities that must be reflected and accommodated in private international law.

37 The earlier 19th century English cases, such as Phillips v. Eyre, were alive to the fact that these are the realities and forces to which courts should respond in the development of principles in this area. By the turn of the century, however, the English courts adopted a positivistic rule-oriented approach that has since seriously inhibited the development of rational principles in this area; see Morguard, supra, for an illustration of this in a different context. It is to the underlying reality of the international legal order, then, that we must turn if we are to structure a rational and workable system of private international law. Much the same approach applies within a federal system with the caveat that these internal rules have their own constitutional imperatives and other structural elements. For example, in Canada this Court has a superintending role over the interpretation of all laws, federal and provincial, and can thus ensure the harmony that can only be achieved on the international level in the exercise of comity.

38 All of this is simply an application to "choice of law" of the principles enunciated in relation to recognition and enforcement of judgments in Morguard, supra. There this Court had this to say, at p. 1095:

> The common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century; see Rajah v. Faridkote, supra. This principle reflects the fact, one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state's law has no binding effect outside its jurisdiction.
>
> Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. . . . This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory.

39 As Morguard and Hunt also indicate, the courts in the various states will, in certain circumstances, exercise jurisdiction over matters that may have originated in other states. And that will be so as well where a particular transaction may not be limited to a single jurisdiction. Consequently, individuals need not in enforcing a legal right be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience. This fosters mobility and a world economy.

40 To prevent overreaching, however, courts have developed rules governing and restricting the exercise of jurisdiction over extraterritorial and transnational transactions. In Canada, a court may exercise jurisdiction only if it has a "real and substantial connection" (a term not yet fully defined) with the subject matter of the litigation; see Moran v. Pyle National (Canada) Ltd., [1975] 1 S.C.R. 393; Morguard, supra; and Hunt, supra. This test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. In addition, through the doctrine of forum non conveniens a court may refuse to exercise jurisdiction where, under the rule elaborated in Amchem, supra (see esp. at pp. 921, 922, 923), there is a more convenient or appropriate forum elsewhere.

41 The major issue that arises in this case is this: once a court has properly taken jurisdiction (and this was conceded in both the cases in these appeals), what law should it apply? Obviously the court must follow its own rules of procedure; it could not function otherwise; see Chaplin v. Boys, supra. What is procedural is usually clear enough though at times this can raise difficult issues. In the Tolofson case, for example, the parties have raised the much debated question of whether a statute of limitation is of a procedural or substantive character. I shall deal with that issue later. I will here turn to the more common "choice of law" problem, and the principal issue in these appeals, namely, what is the substantive law that should be applied in considering the present cases?

42 From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts

is the law of the place where the activity occurred, i.e., the lex loci delicti. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they may conflict and other considerations may play a determining role. But that is not this case. Though the parties may, before and after the wrong was suffered, have travelled from one province to another, the defining activity that constitutes the wrong took place wholly within the territorial limits of one province, in one case, Quebec, in the other Saskatchewan, and the resulting injury occurred there as well. That being so it seems to me, barring some recognized exception, to which possibility I will turn later, that as Willes J. pointed out in Phillips v. Eyre, supra, at p. 28, "civil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law". In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences.

43 I have thus far framed the arguments favouring the lex loci delicti in theoretical terms. But the approach responds to a number of sound practical considerations. The rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. Stability of transactions and well grounded legal expectations must be respected. Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.

44 Leaving aside the British practice, which itself is giving increasing deference to the lex loci delicti, the practice of most states until recently favoured exclusive reference to the lex loci. Thus the "mémorandum Dutoit" in Actes et documents de la Onzième session (at p. 20) of the Hague Convention on Traffic Accidents has this to say:

> [Translation] And in fact, courts in nearly all the member States have ruled in favour of recourse in principle to the lex loci actus in cases of automobile collisions occurring abroad. . . .

This statement is supported by an extensive footnote quoting the sources of this law in all the member states. Quebec law, following European tradition, did the same; see art. 6, Civil Code of Lower Canada. This was the case, as well, in the United States. This is attested to in Babcock v. Jackson (1963), 12 N.Y.2d 473, where Fuld J. stated, at p. 477: "The traditional choice of law rule, embodied in the original Restatement of Conflict of Laws ([sec.] 384), and until recently unquestioningly followed in this court . . . has been that the substantive rights and liabilities arising out of a tortious occurrence are determinable by the law of the place of the tort." Similarly Australia has bypassed British precedents by adopting the lex loci delicti as the rule governing the choice of law in litigation within Australia; see Breavington v. Godleman (1988), 80 A.L.R. 362 (H.C.).

45 There may be room for exceptions but they would need to be very carefully defined. It seems to me self evident, for example, that State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country, or for that matter the actions in State B of citizens of State C, and it would lead to unfair and unjust results if it did. The same considerations apply as between the Canadian provinces. What is really debatable is whether State A, or for that matter Province A, should be able to do so in respect of transactions in other states or provinces between its own citizens or residents.

46 It will be obvious from what I have just said that I do not accept the former British rule, adopted in McLean v. Pettigrew, that in adjudicating on wrongs committed in another country our courts should apply our own law, subject to the wrong being "unjustifiable" in the other country. As I see it, this involves a court's defining the nature and consequences of an act done in another country. This, barring some principled justification, seems to me to fly against the territoriality principle. As well, if this approach were generally adopted, it would, in practice, mean that the courts of different countries would follow different rules in respect of the same wrong, and invite forum shopping by litigants in search of the most beneficial place to litigate an issue. Applying the same approach to the units of a federal state like Canada would be even worse. Given the constant mobility between the provinces as well as similar legal regimes and other factors, forum shopping would be much easier.

47 There were in the 19th century context in which the British approach was established a number of forces that militated in favour of the English rule. To begin with Great Britain was the metropolitan state for many colonies and dependencies spread throughout the globe over which it had sovereign legislative power and superintending judicial authority through the Privy Council. Because of its dominant position in the world, it must have seemed natural to extend the same approach to foreign countries, especially when this dominance probably led to the temptation, not always resisted, that British laws were superior to those of other lands (see Chaplin v. Boys, supra, at p. 1100). There was, as well, the very practical consideration that proof of laws of far-off countries would not have been easy in those days, and the convenience of using the law with which the judges were familiar must have proved irresistible. All the social considerations enumerated above are gone now, and the problem of proof of foreign law has now been considerably attenuated in light of advances in transportation and communication, as Lord Wilberforce acknowledged in Chaplin v. Boys. And as he further indicated (at p. 1100), one of the ways in which this latter problem can be minimized in practice is by application of the rule that, in the absence of proof of foreign law, the lex fori will apply. Thus the parties may either tacitly or by agreement choose to be governed by the lex fori if they find it advisable to do so.

48 In sum, I can find no compelling reason for following the law of the forum either as enunciated in Chaplin v. Boys or in McLean v. Pettigrew, supra. The latter case has, of course, the further disadvantage of applying the law of the forum when the action complained of was not even actionable under the law of the place of the wrong. As well, as will be seen, the application of that case in other contexts raises serious constitutional difficulties. I would overrule it.

49 What then can be said of the double actionability rule along the lines adopted in England in Chaplin v. Boys? I have already indicated, of course, that I view the lex loci delicti rule as the governing law. However, because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.

50 If one applies the lex loci delicti rule as the rule for defining the obligation and its consequences, the requirement under the English rule that the wrong must also be a tort when committed under English law seems to me to be related more to jurisdiction than choice of law. There appears to be some merit to the requirement, especially when coupled with a discretion not to enforce the requirement, but it may be wondered whether it is not excessive, particularly if this calls for a meticulous examination of the law. Some breathing room was allowed in Chaplin v. Boys, where the court there retained a discretion to deal with a case without complying with the double actionability rule and it is of interest that in the recent case of Red Sea Insurance Co. v. Bouygues, supra, the Privy Council used the discretion to deal with a contract under the law of the place where the contract was made rather than the law of the forum. However, given the fact that the jurisdiction of Canadian courts is confined to matters in respect of which there is a real and substantial connection with the forum jurisdiction, I seriously wonder whether the requirement that the wrong be actionable in that jurisdiction is really necessary. It may force or persuade litigants who are within the territorial jurisdiction of the court to sue elsewhere even though it may be more convenient for all or most of the parties to sue here. The fact that a wrong would not be actionable within the territorial jurisdiction of the forum if committed there might be a factor better weighed in considering the issue of forum non conveniens or, on the international plane, whether entertaining the action would violate the public policy of the forum jurisdiction. Certainly where the place of the wrong and the forum are both in Canada, I am convinced that the application of the forum non conveniens rule should be sufficient. I add that I see a limited role, if any, for considerations of public policy in actions that take place wholly within Canada. What I have to say about federal issues later strengthens my conviction that the appropriate rule is the lex loci delicti.

Should There Be an Exception Within Canada?

51 I turn then to consider whether there should be an exception to the lex loci delicti rule. As I mentioned earlier, the mere fact that another state (or province) has an interest in a wrong committed in a foreign state (or province) is not enough to warrant its exercising jurisdiction over that activity in the foreign state, for a wrong in one state will often have an impact in another. If we are to permit a court in a territorial jurisdiction to deal with a wrong committed in another jurisdiction solely in accordance with the law of that court's jurisdiction, then some rule must be devised to displace the lex loci delicti, and that rule must be capable of escaping the spectre that a multiplicity of jurisdictions may become capable of exercising jurisdiction over the same activity in accordance with their own laws. This would not only encourage forum shopping but have the underlying effect of inhibiting mobility.

52 A means of achieving this has been attempted in the United States through an approach often referred to as the proper law of the tort. This involves qualitatively weighing the relevant contacts with the competing jurisdictions to determine which has the most significant connections with the wrong. The approach was adopted by the majority in a strongly divided Court of Appeals of New York in Babcock v. Jackson, supra, a case whose facts were very similar to McLean v. Pettigrew, supra. The plaintiff, while a gratuitous passenger in the defendant's automobile, suffered injuries when the automobile was in an accident. Both plaintiff and defendant were residents of New York, but the accident occurred in Ontario where a statute absolved the owner and driver from liability for gratuitous passengers. In an action in New York, the defendant moved for dismissal on the ground that the law of Ontario applied. A majority denied the motion to dismiss. The court stated that while the jurisdiction where the wrongful conduct occurred will usually govern, justice, fairness and best practical results may better be achieved in tort cases with multi-state contacts by according

controlling effect to the law of the jurisdiction which, because of its relationship and contact with the occurrence and the parties, has the greatest concern with the issue raised in the litigation. There has been a tendency to adopt that approach in a number of the American states, although it would appear the vast majority still apply the law of the place of the injury; see Richards v. United States, 369 U.S. 1 (1962), at pp. 11-14.

53 I leave aside for the moment the assumptions that a flexible rule better meets the demands of justice, fairness and practical results and underline what seems to be the most obvious defect of this approach -- its extreme uncertainty. Lord Wilberforce in Chaplin v. Boys, supra, at p. 1103, after setting forth the complexities and uncertainties of the rule thus summarized his view:

> The criticism is easy to make that, more even than the doctrine of the proper law of the contract. . . where the search is often one of great perplexity, the task of tracing the relevant contacts, and of weighing them, qualitatively, against each other, complicates the task of the courts and leads to uncertainty and dissent (see particularly the powerful dissents in Griffith's case of Bell, Ch.J., and in Miller's case of Breitel, J.).

I agree with Lord Pearson too, at p. 1116, that the proposed rule is "lacking in certainty and likely to create or prolong litigation". As illustrating the uncertainty, he referred to Dym v. Gordon, 209 N.E.2d 792 (N.Y.C.A. 1965), in which four members of the court held that the law of Colorado applied while the three dissenters would have applied the law of New York. Even more difficult problems would arise where more than two states had interests in the litigation. I therefore agree with the views expressed by the majority in Chaplin v. Boys.

54 There might, I suppose, be room for an exception where the parties are nationals or residents of the forum. Objections to an absolute rule of lex loci delicti generally arise in such situations; see Babcock, supra; McLean v. Pettigrew, supra. There are several reasons why it is considered appropriate that the home state of the parties apply its own law to them. It is perceived by some commentators to be "within the reasonable expectations of the parties" to apply their home law to them (an assumption with which I disagree). It is considered to be more convenient for both litigants and judges and to accord with forum notions of "public policy" or justice. In Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y.C.A. 1972), the underlying rationale of the "justice" theory was succinctly put by Fuld C.J., at p. 456: "It is clear that . . . New York has a deep interest in protecting its own residents, injured in a foreign state, against unfair or anachronistic statutes of that state." I shall consider the issue of "public policy" first.

55 The imputed injustice of applying the lex loci delicti in the seminal choice of law cases to which I have just referred arose from some aspect of the law of the locus delicti that the court considered contrary to the public policy of the forum, i.e., unfair. In McLean, supra, and Babcock, supra, it was Ontario's notorious gratuitous passenger law. In Chaplin, supra, it was the unavailability of general damages under Maltese law. In LaVan v. Danyluk (1970), 75 W.W.R. 500 (B.C.S.C.), it was the absence of a contributory negligence statute under Washington law. In Tolofson, as between father and son (residents of British Columbia), it is Saskatchewan's guest passenger law and the short limitation period for infants under Saskatchewan law.

56 I remain unconvinced by these arguments. These "public policy" arguments simply mean that the court does not approve of the law that the legislature having power to enact it within its territory has chosen to adopt. These laws are usually enacted on the basis of what are often perceived

by those who make them as reasonable, though they may turn out to be unwise. The residents of the jurisdiction must put up with them until they are modified, and one does not ordinarily ignore the law of the land in favour of those who visit. True, it may be unfortunate for a plaintiff that he or she was the victim of a tort in one jurisdiction rather than another and so be unable to claim as much compensation as if it had occurred in another jurisdiction. But such differences are a concomitant of the territoriality principle. While, no doubt, 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. At all events, similar anomalies occur if we create an exception for domiciliaries. Thus why should we allow an exception for the lex fori to a driver and passenger who lose control of their car and go off the road into a ditch, but not for a similar driver and passenger who crash into a negligently planted telephone pole or a negligently erected road sign? Why should we allow an exception at all where two residents of the forum fortuitously happen to meet each other head-on on the road? Should luck be on your side because you happen to crash into another Ontario resident while driving in Quebec, instead of crashing into a Quebecer?

57 I should add that the "public policy" problems, particularly between the provinces, tend to disappear over time. Even since the launching of the Tolofson case, Saskatchewan has repealed its guest passenger statute and has changed the rule regarding the limitation period of minors. The biggest difference between provinces now is in insurance schemes, and this only creates problems of quantum, not of liability.

58 There are as well more general arguments of convenience for allowing an exception to the lex loci delicti rule. These are summarized in Professor Catherine Walsh's article "'A Stranger in the Promised Land?': The Non-Resident Accident Victim and the Quebec No-Fault Plan" (1988), 37 U.N.B.L.J. 173, at p. 182. She states:

> In this situation [where the defendant is resident in another jurisdiction whose domestic law allows full tort recovery], it is argued, application of forum law neither prejudices the defendant nor impinges on the interests of the jurisdiction where the accident occurred. The litigation, after all, will take place outside Québec and the plaintiff's losses will be paid by the defendant's liability insurer, not the defendant personally. Indeed, from la Régie's perspective, it is likely preferable that non-residents should settle their rights and obligations inter se in their home courts.

59 These considerations are not without weight, but others are advanced that are more doubtful. When all parties are from the forum, so the argument goes, there are many factors, not the least of which are the involvement of the health care system of their home province and the defendant's forum insurer, which are considered justifications for allowing the plaintiffs and defendants to settle their affairs according to the lex fori. I observe, however, that such considerations would "come out in the wash". A province would probably gain in as many cases as it would lose in others; in any event, the national health plan tends to even this out.

60 Those who favour an exception refer to the fact that in the international context, the Hague Convention on Traffic Accidents allows for an exception where all parties involved in the accident are from the forum. Consequently, though Canada is not a signatory to that Convention, it becomes useful to examine the underlying reasons for the adoption of the exception.

61 On an examination of the travaux préparatoires, the reasons for the adoption of the rule seem similar to those expressed in Professor Walsh's article (see the mémorandum Dutoit, supra). There were other reasons as well. One relates to guarding sovereignty: it is considered appropriate that in an accident involving only residents of a single country, that country should apply its law to the resolution of disputes without regard to the place where the tort took place. Whatever relevance that may have in the international sphere, I fail to see its application within a single country.

62 Another reason, more germane here, had to do with judicial convenience. There appears to have been a desire that the Convention should, if possible, limit the number of occasions when judges of the forum would have to apply foreign law; difficulties of proof, the expense and inconvenience involved, and the possibility that the judge might misinterpret the foreign law were all concerns. With the general rule of lex loci delicti, in cases involving parties from two or more jurisdictions, chances are that the lawsuit will take place in the country in which the tort took place. But when all parties are from another state, the likelihood is that the lawsuit will take place in their home jurisdiction. There is some merit to allowing judges in this situation to apply their own law. This factor is, however, of less concern in matters arising within Canada. The laws of our common law provinces, at least, are not that different from each other that their application would give our judges and lawyers significant difficulty. Lord Wilberforce in Chaplin v. Boys (at p. 1100) conceded the same on the international plane and set forth means, already referred to, of accommodating the problems that might be posed, means that could be equally useful here. What is more, in Canada, case law from other provinces is readily available (and now available online), and lawyers called to the bar in several provinces are to be found in every major city in this country.

63 Another point in favour of a strict rule is that it may be difficult to determine the ambit of claims at the outset. The problems this raises could be exacerbated by the fact that having an exception could encourage frivolous cross-claims and joinders of third parties. If it is known that the lex fori will apply, when residents of the forum are the only parties involved in an accident, but that the lex loci delicti will apply the moment any non-forum natural or legal person is joined to the action, are we not encouraging those who wish to be governed by the latter rule to dig up third parties from the locus delicti? Will there be attempts to join, say, the company that erected the road sign they crashed into, or again, a pedestrian who may have momentarily distracted them from their driving? More difficult still, will the defendant join another driver who was "involved" in the accident (like Mr. Lavoie), even though there is a high likelihood that the original defendant (as it is argued is the case with Mr. Gagnon) will be found 100% liable.

64 One of the main goals of any conflicts rule is to create certainty in the law. Any exception adds an element of uncertainty, and leaves the door open to a resourceful lawyer to attempt to change the application of the law. It is idealistic to say that, if there were no truth to the allegations of negligence against a defendant or a third party, such party would be able to have the case against it dismissed by way of summary judgment. The claim may be framed in such a way that there is some doubt as to liability, and that may indeed be the case. Motions judges are reluctant to grant summary judgments in any but the clearest cases. Most matters would have to proceed to trial on the basis that the lex loci delicti applied. If, at the end of the day, only parties from the forum were found liable, would the applicable law "jump" to that of the forum?

65 Problems of this kind extend well beyond the courtroom. Clear application of law promotes settlement. If one has to wait for litigation to see if complications of the kind I have just described arise, then settlement will be inhibited. There is need for the law to be clear. Indeed, if not strictly

narrowed to situations that involve some timely and close relationship between the parties, an exception could lead to injustice. It is one thing for a passenger to sue his or her driver on a trip from one jurisdiction to another. It may be another thing to permit suit in a case where the parties have been away from their own jurisdiction for several years because the likelihood is that the owner of a vehicle would then insure it on the basis of the local situation. A discretion along the lines proposed by Lord Wilberforce in Chaplin v. Boys, supra, could, I suppose, be used, but this scarcely contributes to certainty in the law.

66 On the whole, I think there is little to gain and much to lose in creating an exception to the lex loci delicti in relation to domestic litigation. This is not to say that an exception to the lex loci delicti such as contained in the Hague Convention is indefensible on the international plane, particularly since it is enshrined in a convention that ensures reciprocity. A similar reciprocal scheme might well be arranged between the provinces. As I have noted, however, a rule along the lines of the Hague Convention is not without its problems and does not appear to afford this country most of the advantages that Europeans may gain from it. I note that Quebec has adopted a rule along the same lines in its new Civil Code, but the appropriateness of a judicially created rule seems questionable, especially given the additional matters that require consideration in a federation. To these federal issues I now turn.

Federal Problems

67 I begin by observing that in Breavington v. Godleman, supra, the High Court of Australia favoured the view that, while different approaches might be taken in the international arena, within Australia the choice of law rule should be the lex loci delicti. The judges of that court were, it is true, far from unanimous about the technical basis in support of this approach, many of which, centred as they are on the Australian Constitution, cannot be directly transported to our situation. Nonetheless, so much of the history and the social, practical and constitutional environment is of a nature akin to those with which we are faced in dealing with conflict of laws within this country that their observations must be accorded considerable weight. The niceties of the technical mechanisms by which judges arrive at decisions are far less important than the underlying policy considerations that give them life. Thus I think what Mason C.J. had to say, at p. 372, has clear application to Canada:

> When an Australian resident travels from one State or Territory to another State or Territory he does not enter a foreign jurisdiction. He is conscious that he is moving from one legal regime to another in the same country and that there may be differences between the two which will impinge in some way on his rights, duties and liabilities so that his rights, duties and liabilities will vary from place to place within Australia. It may come as no surprise to him to find that the local law governed his rights and liabilities in respect of any wrong he did or any wrong he suffered in a State or Territory. He might be surprised if it were otherwise. In these circumstances there may be a stronger case for looking to the law of the place of the tort as the governing law for the purpose of determining the substantive rights and liabilities of the parties in respect of a tort committed within Australia.

Also relevant is the following remark in the reasons of Wilson and Gaudron JJ., at p. 379:

> It is not only undesirable, but manifestly absurd that the one set of facts occurring in the one country may give rise to different legal consequences depending upon the location or venue of the court in which action is brought.

A similar sentiment is expressed by Deane J., at p. 404:

> What is essential is that the substantive rule or rules applicable to determine the lawfulness and the legal consequences or attributes of conduct, property or status at a particular time in a particular part of the national territory will be the same regardless of whereabouts in that territory questions concerning those matters or their legal consequences may arise.

68 As I mentioned, these statements are made in the light not only of different views about the common law but also of different theories concerning the constitutional arrangements in Australia. Nonetheless, the policies inhering therein are surely relevant in the development of common law rules for choice of law within our federation.

69 The nature of our constitutional arrangements -- a single country with different provinces exercising territorial legislative jurisdiction -- would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country. This militates strongly in favour of the lex loci delicti rule. In this respect, given the mobility of Canadians and the many common features in the law of the various provinces as well as the essentially unitary nature of Canada's court system, I do not see the necessity of an invariable rule that the matter also be actionable in the province of the forum. That seems to me to be a factor to be considered in determining whether there is a real and substantial connection to the forum to warrant its exercise of jurisdiction. Any problems that might arise could, I should think, be resolved by a sensitive application of the doctrine of forum non conveniens. The doctrine of forum non conveniens would, of course, have far more occasions to be brought into play where a dispute involving the interrelation of Quebec's Civil Code is involved in a suit in some other province, or where a legal issue involving an essentially common law problem arises in Quebec. Even here, however, it must be remembered that many areas of law in Quebec and the other provinces are not so dissimilar as to give difficulties, and the convenience of the parties should not be overlooked.

70 The approach I have suggested also has the advantage of unquestionable conformity with the Constitution, an advantage not to be ignored having regard to the largely unexplored nature of the area and the consequent danger that a rule developed in a constitutional vacuum may when explored not conform to constitutional imperatives. I do not wish to enter largely into this or to come to any final, and indeed in many situations, tentative view. The constitutional problems were not adverted to in the courts below and were largely dealt with in this Court as a mere backdrop to other issues. Importantly, too, (though I am not suggesting their presence was required by law), the Attorneys General were not present.

71 It is useful, however, in understanding why one should not venture far from what is clearly constitutionally acceptable, to give some notion of the nature of these problems. Unless the courts' power to create law in this area exists independently of provincial power, subject or not to federal power to legislate under its residuary power -- ideas that have been put forth by some of the Australian judges in Breavington v. Godleman, supra, but never, so far as I know, in Canada -- then the courts would appear to be limited in exercising their powers to the same extent as the provincial legislatures; see John Swan, "The Canadian Constitution, Federalism and the Conflict of Laws"

(1985), 63 Can. Bar Rev. 271, at p. 309. I note that provincial legislative power in this area would appear to rest on s. 92(13) -- "Property and Civil Rights in the Province". If a court is thus confined, it is obvious that an extensive concept of "proper law of the tort" might well give rise to constitutional difficulties. Thus an attempt by one province to impose liability for negligence in respect of activities that have taken place wholly in another province by residents of the latter or, for that matter, residents of a third province, would give rise to serious constitutional concerns. Such legislation applying solely to the forum province's residents would appear to have more promise. However, it is arguable that it is not constitutionally permissible for both the province where certain activities took place and the province of the residence of the parties to deal with civil liability arising out of the same activities. Assuming both provinces have legislative power in such circumstances, this would open the possibility of conflicting rules in respect of the same incident. I go no further regarding the possible resolution of these problems. What these considerations indicate, however, is that the wiser course would appear to be for the Court to avoid devising a rule that may possibly raise intractable constitutional problems.

72 I shall therefore turn to the specific issues in the two cases under appeal.

Specific Issues

Tolofson v. Jensen

73 On the application of the lex loci delicti principle, it is clear that the substantive law applicable in the Tolofson case is that of Saskatchewan. This immediately disposes of the plaintiff's (respondent's) argument respecting the different standard of care under British Columbia and Saskatchewan law: it is the law of Saskatchewan that applies.

74 The argument concerning the applicable statute of limitation, however, depends upon whether the limitation period prescribed by s. 180(1) of The Vehicles Act, R.S.S. 1978, c. V-3, should be characterized as substantive or procedural. The section reads as follows:

> 180. -- (1) Subject to subsections (2) and (3), no action shall be brought against a person for recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained. [Emphasis added.]

75 Both parties proceeded on the assumption that, if Saskatchewan law applies, this legislation, read in conjunction with The Limitation of Actions Act, R.S.S. 1978, c. L-15, would make the plaintiff's action statute-barred. Not surprisingly, then, the respondent would like the legislation characterized as procedural, in order that the British Columbia provision should apply; the appellant, of course, wishes it characterized as substantive.

76 In any action involving the application of a foreign law the characterization of rules of law as substantive or procedural is crucial for, as Cheshire and North, Cheshire and North's Private International Law (12th ed. 1992), at pp. 74-75, state:

> One of the eternal truths of every system of private international law is that a distinction must be made between substance and procedure, between right and remedy. The substantive rights of the parties to an action may be governed by a

> foreign law, but all matters appertaining to procedure are governed exclusively by the law of the forum.

77 The reason for the distinction is that the forum court cannot be expected to apply every procedural rule of the foreign state whose law it wishes to apply. The forum's procedural rules exist for the convenience of the court, and forum judges understand them. They aid the forum court to "administer [its] machinery as distinguished from its product" (Poyser v. Minors (1881), 7 Q.B.D. 329, at p. 333, per Lush L.J.). Although clearcut categorization has frequently been attempted, differentiating between what is a part of the court's machinery and what is irrevocably linked to the product is not always easy or straightforward. The legal realist Walter Cook has commented (The Logical and Legal Bases of the Conflict of Laws (1942), at p. 166):

> If we admit that the 'substantive' shades off by imperceptible degrees into the 'procedural', and that the 'line' between them does not 'exist', to be discovered merely by logic and analysis, but is rather to be drawn so as best to carry out our purpose, we see that our problem resolves itself substantially into this: How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?

78 This pragmatic approach is illustrated by Block Bros. Realty Ltd. v. Mollard (1981), 122 D.L.R. (3d) 323 (B.C.C.A.). In that case the issue was whether the requirement of s. 37 of the Real Estate Act, R.S.B.C. 1979, c. 356, that a real estate agent be licensed in British Columbia, should be categorized as procedural or substantive. The parties had executed a real estate listing agreement in Alberta for land situated in British Columbia. The plaintiff, an agent licensed in Alberta, sold the land to Alberta residents. The defendant vendor failed or refused to pay the commission. The plaintiff sued in British Columbia. The lex causae was Alberta. The defendant pleaded that the British Columbia licensing requirement was procedural. The court, however, ruled that it was substantive, notwithstanding that the section read: "A person shall not maintain an action . . .", language traditionally relied on for a finding that a statute is procedural because it purported to extinguish the remedy, but not the right. The court expressly relied on policy reasons for its decision. It stated at pp. 327-28:

> If, however, the contract is governed by the law of Alberta and if the contract is valid under the law of Alberta, the characterization of s. 37 as procedural would deprive the plaintiff of the opportunity to enforce his legal rights in a British Columbia Court. The only purpose of s. 37 is to enforce the licensing sections, and it should be examined in this context. I think that legislation should be categorized as procedural only if the question is beyond any doubt. If there is any doubt, the doubt should be resolved by holding that the legislation is substantive.

79 This approach makes sense to me. It is right to say, however, that it is significantly different from the early common law position as it relates to statutes of limitation.

80 The common law traditionally considered statutes of limitation as procedural, as contrasted with the position in most civil law countries where it has traditionally been regarded as substantive. The common law doctrine is usually attributed to the seventeenth century Dutch theorist Ulrich Huber, whose celebrated essay De conflictu legum diversarum in diversis imperiis (1686), became known in England during the reign of William and Mary (see Edgar H. Ailes, "Limitation of Ac-

tions and the Conflict of Laws" (1933), 31 Mich. L. Rev. 474, at p. 487; and Ernest G. Lorenzen, "Huber's De Conflictu Legum" (1919), 13 Ill. L. Rev. 375, reprinted in Ernest G. Lorenzen, Selected Articles on the Conflict of Laws (1947), at p. 136). By the early nineteenth century, the doctrine was firmly established in England and in the United States. From the cases and academic commentary of the time (see, for example, Huber v. Steiner (1835), 2 Bing. N.C. 202, 132 E.R. 80; Leroux v. Brown (1852), 12 C.B. 801, 138 E.R. 1119; Nash v. Tupper, 1 Caines 402 (N.Y.S.C. 1803); Ernest G. Lorenzen, "Story's Commentaries on the Conflict of Laws -- One Hundred Years After" (1934), 48 Harv. L. Rev. 15, reprinted in Selected Articles, supra, at p. 181), one can glean the two main reasons for the ready acceptance of this doctrine in Anglo/American jurisprudence. The first was the view that foreign litigants should not be granted advantages that were not available to forum litigants. This relates to the English preference for the lex fori in conflict situations. The second reason was the rather mystical view that a common law cause of action gave the plaintiff a right that endured forever. A statute of limitation merely removed the remedy in the courts of the jurisdiction that had enacted the statute.

81 Such reasoning mystified continental writers such as M. Jean Michel (La Prescription Libératoire en Droit International Privé, Thesis, University of Paris, 1911, paraphrased in Ailes, supra, at p. 494), who contended that "the distinction is a specious one, turning upon the language rather than upon the sense of limitation acts . . . ." In the continental view, all statutes of limitation destroy substantive rights.

82 I must confess to finding this continental approach persuasive. The reasons that formed the basis of the old common law rule seem to me to be out of place in the modern context. The notion that foreign litigants should be denied advantages not available to forum litigants does not sit well with the proposition, which I have earlier accepted, that the law that defines the character and consequences of the tort is the lex loci delicti. The court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order.

83 Canadian courts have also begun to shatter the mystique of the second reason which rests on the notion that statutes of limitation are directed at the remedy and not the right. This Court has in another context taken cognizance of the right of the defendant to be free from stale claims in Martin v. Perrie, [1986] 1 S.C.R. 41. There the plaintiff sued the defendant doctor for having left an indissoluble suture inside her during surgery ten years earlier. At the time of the surgery, in 1969, the Ontario period of limitation on malpractice suits was 1 year from the time of the medical intervention. The discovery principle of limitation was adopted by statute in 1975. The plaintiff launched her lawsuit within a year of having discovered her problem in 1979. Her argument was that the statue of limitations, being procedural, was necessarily retrospective. Although not explicitly stated, the plaintiff's reasoning seems to have been as follows: if the previous statute of limitation did not bar the right but merely the remedy, then the new statute of limitations created a new remedy (or revived an old one) enabling her to enforce a right that had never been extinguished.

84 The Court circumvented the distinction between the plaintiff's right and her remedy by holding that the termination of a limitation period vests rights in the defendant. Chouinard J., at p. 49, quoted with approval Lord Brightman in Yew Bon Tew v. Kenderaan Bas Mara, [1983] 1 A.C. 553 (P.C.), at p. 563:

> In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable. [Emphasis added.]

While correctly considering that a statute of limitation vests a right in the defendant, the Privy Council in Yew Bon Tew continued to cling to the old English view that statutes of limitation are procedural. Nonetheless the case seems to me to demonstrate the lack of substance in the approach. The British Parliament obviously thought so. The following year the rule was swept away by legislation; the Foreign Limitation Periods Act, 1984, (U.K.) 1984, c. 16, declared that foreign limitation periods are substantive.

85 I do not think it is necessary to await legislation to do away with the rule in conflict of laws cases. The principle justification for the rule, preferring the lex fori over the lex loci delicti, we saw, has been displaced by this case. So far as the technical distinction between right and remedy, Canadian courts have been chipping away at it for some time on the basis of relevant policy considerations. I think this Court should continue the trend. It seems to be particularly appropriate to do so in the conflict of laws field where, as I stated earlier, the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties.

86 Such a step has already been judicially attempted by Stratton C.J.N.B. in Clark v. Naqvi (1990), 99 N.B.R. (2d) 271 (C.A.). In that case Clark, in 1978, received medical treatment from Dr. Naqvi in Nova Scotia. He commenced an action for injuries arising out of that treatment in New Brunswick in 1984. The limitation period in respect of such proceedings in Nova Scotia was one year. The majority of the New Brunswick Court of Appeal held that the action was statute barred (Ryan J.A. dissenting). Referring to both Yew Bon Tew v. Kenderaan Bas Mara and Martin v. Perrie, Stratton J.A. held, at p. 275, that the limitation period was substantive, notwithstanding that it was phrased "[t]he actions . . . shall be commenced within . . .", because it created an accrued right in the defendant to plead a time bar. Hoyt J.A., while concurring in the result, was reluctant to make such a categorical statement. Ryan J.A., dissenting, was unwilling to abandon the traditional common law rule that statutes of limitation are procedural, though he decided the case on different grounds.

87 In my view, the reasoning of Stratton C.J.N.B. is correct. He stated, at p. 276:

> When I read the words used in s. 2(1)(d)(i) of the Nova Scotia Limitation of Actions Act in their grammatical and ordinary sense, I conclude that the limitation period in respect of actions for negligence or malpractice against a registered medical practitioner is one year from the date of the termination of medical services. Moreover, in my view, the section was enacted by the Legislature with the purpose and intention of protecting the medical profession from stale claims when evidence may no longer be available to defending litigants who come within the protection of the section. . . .

88 This is not to say that procedural rules of the forum may not affect the operation of the statute of limitation of the lex loci delicti. Thus, whether or not a litigant must plead a statute of limita-

tion if he or she wishes to rely on it is undoubtedly a matter of procedure for the forum; some rules of court or judicial interpretations of the rules require the pleading of all or certain statutes. Limitation periods included in the various rules of court, such as those for the filing of pleadings, are also undoubtedly matters of procedure. These may be waived with leave of the court or the agreement of the other parties, as often happens. Additionally, a substantive limitation defence such as the one in the case at bar may be waived either by failure to plead it, if this is required, or by agreement.

89 The limitation defence has been properly pleaded in the case at bar and all parties proceeded before us on the assumption that, if Saskatchewan law applies, it is a valid defence. I do not accept that this defence is so repugnant to public policy that a British Columbia court should not apply it. The extent to which limitation statutes should go in protecting individuals against stale claims obviously involves policy considerations unrelated to the manner in which a court must carry out its functions, and the particular balance may vary from place to place. To permit the court of the forum to impose its views over those of the legislature endowed with power to determine the consequences of wrongs that take place within its jurisdiction would invite the forum shopping that is to be avoided if we are to attain the consistency of result an effective system of conflict of laws should seek to foster.

90 For these reasons I conclude that the Saskatchewan limitation rule applies in these proceedings.

Lucas (Litigation Guardian of) v. Gagnon

91 In addition to his argument that the Quebec law governs on the ground that the lex loci delicti was applicable, the appellant maintained that, in any event, Quebec law was the applicable law by virtue of Quebec's no-fault scheme. Since I have already decided that the lex loci delicti should govern, it would be unnecessary to enter into a discussion of the second argument, were it not for the fact that counsel for the respondent took a different view of the effect of Quebec law, in particular having regard to Quebec's new Civil Code.

92 The relevant portions of Quebec's no-fault scheme appear in ss. 3 and 4 of the Quebec Automobile Insurance Act, which read:

> 3. The victim of bodily injury caused by an automobile shall be compensated by the Régie in accordance with this title, regardless of who is at fault.
>
> 4. The indemnities provided for in this title are in the place and stead of all rights, recourses and rights of action of any one by reason of bodily injury caused by an automobile and no action in that respect shall be admitted before any court of justice.

Barring other considerations, it seems clear to me that the legislature intended that these provisions should apply to all persons who have an accident in Quebec regardless of their province of residence, a policy which I noted earlier is clearly within its constitutional competence.

93 This position is buttressed by the fact that, at the time of the accident, this was wholly consistent with art. 6 of the Civil Code of Lower Canada which was in effect at the time of the accident. That provision reads:

6 . . .

> The laws of Lower Canada relative to persons, apply to all persons being therein, even to those not domiciled there. . . .

In my view, then, the appellant is entitled to succeed on this ground as well.

94 The Quebec and Ontario governments certainly thought the Quebec no-fault scheme applied to all accidents in Quebec, whatever the domicile of the persons involved. The interprovincial Memorandum of Agreement between the Régie and the Ontario Minister of Consumer and Commercial Relations, signed in 1978, is predicated on the assumption that the Act covers all victims of accidents in Quebec, whether resident or not. In the agreement, the Minister undertook to amend Schedule E of the Ontario Insurance Act, R.S.O. 1970, c. 224, to require that Ontario residents be indemnified by their respective Ontario insurers for injuries sustained in automobile accidents occurring in Quebec in accordance with Régie benefits and regardless of fault. The agreement begins with recitals describing the application of Ontario and Quebec's respective laws, of which the first and last are the most pertinent:

> 1.1 WHEREAS by virtue of article 8 of the Automobile Insurance Act (L.Q. 1977 C. 68) the victim of an automobile accident that occurred in Québec who is not resident therein is compensated by the Régie to the extent that he is not responsible for the accident unless otherwise agreed between the Régie and the competent authority of the place of residence of such a victim.
>
> . . .
>
> 1.5 AND WHEREAS it is the desire of both parties that the resident of Ontario, other than the uninsured who is a victim of an automobile accident occurring in Québec, be entitled to compensation on the same basis as a resident of Québec and that his legal liability for such an accident be no greater than that of a Québec resident.
>
> Now therefore, in consideration of the mutual covenants hereinafter, the parties hereby agree as follows . . . .

95 The new Civil Code does not change the situation of the parties in the present action; as mentioned, it was not in effect at the time of the accident. In view of its implications for other cases, however, I think it wise to deal with the case on the assumption that the new Civil Code applies. The relevant provision reads as follows:

> Art. 3126. The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the latter country is applicable

> if the person who committed the injurious act should have foreseen that the damage would occur.
>
> In any case where the person who committed the injurious act and the victim have their domiciles or residences in the same country, the law of that country applies.

96 Even assuming this provision were the operative one at the time of the accident, I am convinced the language of the provisions of the Automobile Insurance Act is so clear that it must have been intended to override the general law. Section 3 provides without exception that all automobile accident victims (and one must read here in the province) shall be compensated by the Régie regardless of fault. Then s. 4 provides that these indemnities "are in the place and stead of all rights, recourses and rights of action of any one by reason of bodily injury caused by an automobile and no action in that respect shall be admitted before any court of justice". I observe that the provision removes not only rights of action but "all rights . . . of any one".

97 This method of approach receives support from the case of Szeto c. Fédération (La), Cie d'assurances du Canada, [1986] R.J.Q. 218, before the Quebec Court of Appeal where the court refused the claim of an accident victim against the Régie in respect of an automobile accident between two residents of Quebec in Ontario. That case, of course, arose out of quite different facts, but the manner in which the court dealt with the relation of the Automobile Insurance Act to the general law is of assistance. Paré J.A. (speaking for himself and L'Heureux-Dubé J.A.) (as she then was) had this to say, at p. 220:

> [Translation] It is true that the Automobile Insurance Act must be interpreted so as to override the general law only to the extent that this is clearly stated. The fact remains that the principle underlying it denies in a general way a right of action to all accident victims. The statute thus clearly departs from the general rules of our civil law. The remedies retained by the statute are thus retained only as exceptions and I wonder whether as a consequence the provisions of s. 7 of the Act should not be so treated.

98 I, therefore, conclude that nothing in the provisions cited to us overrides the general rule that the lex loci delicti applies to this case. Indeed I think these provisions buttress this position by providing that Quebec law applies.

Disposition

Tolofson v. Jensen

99 The appeal should be allowed with costs throughout. The appellants' application for a declaration that the proper choice of law to be applied is the law of Saskatchewan and that the Saskatchewan limitation period is substantive should be granted, and the action should be referred to the Supreme Court of British Columbia Chambers for determination.

Lucas (Litigation Guardian of) v. Gagnon

100 The appeal should be allowed and the action of the respondents Tina Lucas and Justin Gagnon, by their litigation guardian Heather Gagnon, and Heather Gagnon personally should be dismissed. Question 2 of the agreed statement of facts should be answered as follows:

2(a) Does Ontario tort law or Quebec law, as set out in the Automobile Insurance Act, apply to this action?

Quebec law, as set out in the Automobile Insurance Act.

2(b) Is the appellant Réjean Gagnon entitled to maintain his cross-claim for contribution and indemnity against the respondent Cyrille Lavoie?

No.

As agreed between these parties, there should be no order as to costs against the respondents Tina Lucas and Justin Gagnon, by their litigation guardian Heather Gagnon, and Heather Gagnon personally, in this Court and the courts below. The respondent Cyrille Lavoie should have his costs against the appellant unless the two agree otherwise.

The following are the reasons delivered by

101 SOPINKA J.:-- Subject to the observations of Justice Major with which I agree, I concur in the reasons of Justice La Forest.

The following are the reasons delivered by

102 MAJOR J.:-- I have had the opportunity to read the reasons of Justice La Forest, and I agree that, in general, the question of which province's law should govern the litigation should be determined by reference to the lex loci delicti (law of the place) rule. I also agree that, in the present appeals, this rule governs which provincial laws should apply.

103 However, I doubt the need in disposing of these appeals to establish an absolute rule admitting of no exceptions. La Forest J. has recognized the ability of the parties by agreement to choose to be governed by the lex fori and a discretion to depart from the absolute rule in international litigation in circumstances in which the lex loci delicti rule would work an injustice. I would not foreclose the possibility of recognizing a similar exception in interprovincial litigation.

qp/d/hbb/DRS/DRS

LOWN AUTHORITY 3

Indexed as:

Castillo v. Castillo

Maribel Anaya Castillo, appellant;
v.
Antonio Munoz Castillo, respondent, and
Attorney General of Alberta, intervener.

[2005] 3 S.C.R. 870

[2005] S.C.J. No. 68

2005 SCC 83

File No.: 30534.

Supreme Court of Canada

Heard: November 16, 2005;
Judgment: November 16, 2005;
Reasons delivered: December 22, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

(52 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Catchwords:

Limitation of actions -- Conflict of laws -- Car accident in California -- Action brought in Alberta court -- Action statute-barred under California limitations law but within limitations period in Alberta -- Whether s. 12 of Alberta Limitations Act can revive an action time-barred by substantive law of place where accident occurred -- Limitations Act, R.S.A. 2000, c. L-12, s. 12.

Constitutional law -- Division of powers -- Administration of justice -- Time limits to entertain actions -- Whether s. 12 of Alberta Limitations Act valid provincial legislation -- Constitution Act, 1867, s. 92(14) -- Limitations Act, R.S.A. 2000, c. L-12, s. 12.

Summary:

The parties, husband and wife, were involved in a single vehicle car accident in California. The wife brought an action against her husband in Alberta where the parties were resident within the province's two-year limitations period but after the California one-year limitations period had expired. The husband sought to have the action dismissed as statute-barred, but the wife argued that, under s. 12 of the Alberta *Limitations Act*, the two-year limitations period applied notwithstanding the expiry of California's one-year limitations [page871] period. Section 12 provides that "[t]he 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." The Court of Queen's Bench dismissed the wife's action as statute-barred under California law, holding that in order to maintain the action in Alberta under s. 12, neither limitation period could have expired prior to the commencement of the action. The Court of Appeal upheld the decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Major, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.: The applicable substantive law governing the accident was the law of California, including its limitations law. Since the California limitations period applied and had expired prior to the commencement of the action, no right of action existed when the wife initiated her claim in the Alberta court. Section 12 of the *Limitations Act* does not purport to revive an action time-barred by the substantive law of the place where the accident occurred. [paras. 3-4] [para. 8]

In view of this interpretation of s. 12, it is unnecessary to determine whether the impugned provision exceeds the territorial limits on provincial legislative jurisdiction. Section 12 is perfectly valid provincial legislation under s. 92(14) of the *Constitution Act, 1867*. The Alberta legislature can, in relation to the administration of justice in the province, determine the time limits within which the Alberta courts can entertain actions, including live actions arising in a foreign jurisdiction and governed by the substantive law of that foreign jurisdiction. [paras. 5-6] [para. 10]

Per Bastarache J.: The legislative jurisdiction of the provinces is limited to matters "[i]n each Province" by the wording of s. 92 of the *Constitution Act, 1867*. Here, s. 12 of the *Limitations Act* is an unconstitutional attempt by Alberta to legislate extra-territorially. This is true for both interpretations of s. 12 proposed by the parties. The California one-year limitation period therefore applies to bar the wife's action. [para. 18] [para. 30] [para. 47] [para. 52]

[page872]

Limitation periods, like s. 12, are substantive in nature and have the effect of cancelling the substantive rights of plaintiffs and of vesting a right in defendants not to be sued. While the pith and substance of s. 12 is related to civil rights pursuant to s. 92(13) of the *Constitution Act, 1867*, s. 12 exceeds the territorial limits of legislative competence contained in s. 92. The impugned provision not only did not provide for a meaningful connection between Alberta, the civil rights affected by s. 12, and the plaintiffs and defendants made subject to it, but it also disregarded the legislative sovereignty of other jurisdictions within which the substantive rights at issue were situated. [paras. 34-35] [para. 46] [para. 50]

Section 12 is, in essence, a choice of law rule that is not premised on any connection, other than the real and substantial connection necessary for the Alberta courts to take adjudicative jurisdiction, but the real and substantial connection established is not sufficient to provide a meaningful connection between the province, the legislative subject matter and the individuals made subject to the law. The real and substantial connection necessary for the courts of a province to take jurisdiction over a claim constitutes a lower threshold than the meaningful connection required for a province to legislate with respect to the rights at issue. Both notions cannot be conflated. [paras. 41-45]

Cases Cited

By Major J.

Followed: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022.

By Bastarache J.

Followed: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; **applied:** *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49; **referred to:** *Ryan v. Moore*, [2005] 2 S.C.R. 53, 2005 SCC 38; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42; *McKay v. The Queen*, [1965] S.C.R. 798; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *Block Bros. Realty Ltd. v. Mollard* (1981), 122 D.L.R. (3d) 323; *Clark v. Naqvi* (1989), 99 N.B.R. (2d) 271; *Unifund Assurance [page873] Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 92, 92(13), (14).

Limitations Act, R.S.A. 2000, c. L-12, s. 12.

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History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (Russell, Berger and Wittmann JJ.A.) (2004), 244 D.L.R. (4th) 603, [2004] 9 W.W.R. 609, 30 Alta. L.R. (4th) 67, 357 A.R. 288, 334

W.A.C. 288, 1 C.P.C. (6th) 82, 6 M.V.R. (5th) 1, [2004] A.J. No. 802 (QL), 2004 ABCA 158, upholding a decision of Rawlins J. (2002), 3 Alta. L.R. (4th) 84, 313 A.R. 189, 24 C.P.C. (5th) 310, [2002] A.J. No. 519 (QL), 2002 ABQB 379. Appeal dismissed.

Counsel:

Anne L. Kirker and Catherine McAteer, for the appellant.

Avon M. Mersey and Michael Sobkin, for the respondent.

Robert Normey, for the intervener.

The judgment of McLachlin C.J. and Major, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. was delivered by

1 **MAJOR J.**:-- The parties are husband and wife. While vacationing in California, they were involved in a single vehicle car accident on May 10, 1998. Both are residents of Alberta. The appellant wife sued the respondent husband in Calgary two years less a day after the date of the accident. The husband sought to have the action dismissed as statute-barred in accordance with the one-year limitation [page874] under California law. The wife argued that, under s. 12 of the Alberta *Limitations Act*, R.S.A. 2000, c. L-12, Alberta's two-year limitations period applied notwithstanding the expiry of California's one-year limitations period, and that her action therefore ought to be allowed to proceed.

2 Section 12 of the Act provides:

> **12** 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.

3 In *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, the Court held that the *lex loci delicti* -- the substantive law of the place where the tort occurred -- applies in a tort action. In that case the plaintiff was injured in a motor vehicle accident in Saskatchewan. His claim became time-barred in that province but he commenced an action in British Columbia where it was not. Our Court held that the Saskatchewan law that governed the action included the Saskatchewan limitations period and dismissed the claim. In the present case, following *Tolofson*, the Alberta Court of Queen's Bench found the applicable substantive law governing the car crash to be the law of California including California's limitations law, which barred the claim ((2002), 3 Alta. L.R. (4th) 84, 2002 ABQB 379). The trial judge held that to determine whether the wife's action should be allowed to proceed required consideration of both California's and Alberta's limitations laws. In order to maintain the action in Alberta, neither limitation period could have expired. The Court of Appeal of Alberta unanimously upheld the trial judge's finding ((2004), 30 Alta. L.R. (4th) 67, 2004 ABCA 158). I agree with their conclusion.

4 Since the California limitations period applied and had expired prior to the commencement of the [page875] action, there was no right of action at the time the appellant initiated her claim in the

Alberta court. Section 12 does not purport to revive an action time-barred by the substantive law of the place where the accident occurred. Had the intention of the legislature been as argued, the legislation would have said so.

5 Section 12 is perfectly valid provincial legislation under s. 92(14) of the *Constitution Act, 1867* (the "Administration of Justice in the Province"). *Tolofson* was a "choice of law" case. The Court's classification of limitation periods for "choice of law" purposes as substantive rather than procedural did not (and did not purport to) deny the province's legislative authority over the "Administration of Justice in the Province". 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.

6 The Alberta legislature can, in relation to the administration of justice in the province, determine the time limits within which the Alberta courts can entertain actions, including live actions arising in a foreign jurisdiction governed by the substantive law of that foreign jurisdiction.

7 In *Tolofson*, as stated, this Court concluded that limitations law, which in the past had frequently been classified as procedural in common law traditions and substantive in civil law traditions, was, in fact, substantive in nature and must be treated as such. Accordingly, when the California limitation period expired on May 10, 1999, the appellant's action against her husband became time-barred, and he acquired a substantive right under California law not to be further troubled by any claims arising out of the car crash.

8 Section 12 does not purport to revive time-barred actions. In this case, the doors of the Alberta court [page876] were still open on May 9, 2000, when the claim was filed but there was no right of action arising under the law of California capable of being pursued by the wife against her husband. They both lived in Alberta but the law governing the consequences of the car crash, California's, had barred the claim a year earlier.

9 Section 12 will operate, of course, if the law in the place the accident occurred provides for a limitation period longer than that of Alberta. In such a case, the claimant might still have a live cause of action against a defendant in Alberta, but the effect of s. 12 would be to close the door of the Alberta court against the claim's being heard in that jurisdiction (though it may be capable of pursuit elsewhere). This result follows from the legislature's use of a "notwithstanding" provision in s. 12, i.e., "[t]he 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".

10 Both the parties and the intervener made submissions on the constitutionality of s. 12 on the assumption that the Alberta legislature had purported to breathe life into an action that was time-barred by the applicable substantive law. As I conclude that s. 12 does no such thing, it is unnecessary to address the constitutional question.

Conclusion

11 The limitations law forming part of the applicable foreign substantive law, in this case California law, applies. As the applicable California limitation is one year, the appellant's action is statute-barred. The appeal is dismissed with costs.

The following are the reasons delivered by

BASTARACHE J.:--

1 Introduction

12 This appeal concerns the proper interpretation and constitutional validity of s. 12 of the Alberta [page877] *Limitations Act*, R.S.A. 2000, c. L-12, which provides:

> **12** 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.

The circumstances in which the question came to be presented to this Court are as follows.

13 While on a holiday, the parties were involved in a single car accident in or around Fresno, California, on May 10, 1998. The respondent was driving. The appellant and respondent are married and, at the time of the accident, were in the process of moving from British Columbia to Alberta. The vehicle they were driving was registered and insured in British Columbia. The parties have admitted that, for the purposes of this action, they were at all material times resident in Calgary, Alberta.

14 On May 9, 2000, the appellant filed a statement of claim in the Court of Queen's Bench of Alberta to recover compensation for the injuries and damages she sustained as a result of the accident. The respondent successfully sought an order for summary dismissal of the claim on the basis that the action was barred under California law, where the applicable limitation period is one year: (2002), 3 Alta. L.R. (4th) 84, 2002 ABQB 379. That decision was upheld by the Court of Appeal: (2004), 30 Alta. L.R. (4th) 67, 2004 ABCA 158. The appellant argues that the purpose and effect of s. 12 is to apply the two-year Alberta limitation period to the exclusion of the California one-year limitation period, thereby allowing the action to proceed.

15 The question before this Court is whether s. 12 effectively excludes the operation of the limitations law of the foreign jurisdiction whose laws otherwise govern the cause of action. Section 12 purports to apply Alberta limitations law "notwithstanding that, in accordance with conflict of [page878] law rules, the claim will be adjudicated under the substantive law of another jurisdiction". The difficulty in interpreting these words results in particular from the decision of this Court in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, which recognized that limitation periods are substantive. As such, the reference to the substantive law of the foreign jurisdiction in s. 12 would normally include that jurisdiction's limitations law. The appellant argues here, however, that the use of the word "notwithstanding" serves to exclude the limitations law of the foreign jurisdiction.

16 If, as the appellant suggests, s. 12 is interpreted as ousting the limitations law of the foreign jurisdiction, then Alberta limitations law applies exclusively in all cases where a remedial order is sought in Alberta. Where, as here, the relevant California limitation period is shorter than Alberta's, the longer Alberta limitation period applies and effectively recognizes a cause of action that California law would have extinguished. If the relevant California limitation period were longer than Alberta's, then the shorter Alberta limitation period would apply so as to bar the action in Alberta. Whether the appellant could file an action in California in such a case is not discussed by the Court of Appeal; this question is no doubt left to a determination of the *forum conveniens* by the court in which the action is eventually brought.

17 If, as the respondent suggests, s. 12 is interpreted so as not to oust the limitations law of the foreign jurisdiction, then the court must apply the California limitation period first, followed by the Alberta limitation period. This is because the Alberta limitation period applies notwithstanding the fact that the claim is adjudicated under the substantive law of the foreign jurisdiction, including its limitations law. Thus, where, as here, the substantive law of California bars the action, the Alberta limitations law does not apply. This is because there is no right upon which a remedial [page879] order can be sought in the Alberta courts, and the conditions of s. 12 are therefore not met.

18 For the reasons that follow, I conclude that either interpretation of s. 12 results in an unconstitutional attempt by the province of Alberta to legislate extra-territorially.

1 The Proper Interpretation of Section 12 of the *Limitations Act*

2.1 *The Plain Language of Section 12*

19 The parties differ as to the meaning of the term "notwithstanding", specifically whether it ousts the limitations law of the foreign jurisdiction. According to P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 356:

> Because the legislature is aware of possible inconsistencies, it sometimes adopts explicit rules establishing an order of priority between different enactments.
>
> A variety of well-known terms is used. The statute will declare that it applies "notwithstanding" provisions to the contrary. If, on the other hand, precedence is to be given to another provision, the statute will operate "subject to" that enactment. Sometimes, a statute will contain a separate section decreeing that its provisions "prevail over any provision of any statute which may be inconsistent therewith".
>
> Two types of difficulty arise with this kind of enactment. The more obvious is the problem of identifying the inconsistency. This is not always a simple matter. Deciding on the mere existence of inconsistency itself gives rise to major issues of interpretation. [Emphasis added; footnotes omitted.]

20 Accepting for the sake of argument only that the use of the term "notwithstanding" establishes an order of priority favouring the application of Alberta limitations law in case of inconsistency, the question is whether an inconsistency arises as a result of the application of both limitations laws. [page880] The Alberta Court of Appeal concluded that the proper interpretation of s. 12 requires consideration of both California's and Alberta's limitations laws. The end result is that in order for an action to proceed in the Alberta courts, neither the foreign limitation period nor the Alberta limitation period can have expired. The Court of Appeal found that s. 12 recognizes that California law governs and therefore creates the cause of action; the effect of s. 12 would then merely be to shorten the time period within which an action can be brought in Alberta: see *Ryan v. Moore*, [2005] 2 S.C.R. 53, 2005 SCC 38.

21 Nonetheless, the operation of both limitation periods may result in an implicit inconsistency. Professor Côté explains that "implicit inconsistency occurs when the cumulative application of the

two statutes creates such unlikely and absurd results that it is fair to believe this was not what the legislature desired" (p. 352). The effect of the Court of Appeal's interpretation would be the following: in actions proceeding before the Alberta courts where foreign law applies, the defendant would always benefit from the shortest available limitation period. There does not seem to be any legislative purpose served by such a result. If it is determined that the application of both limitations laws results in an implicit inconsistency, then the effect of the term "notwithstanding" is to favour the application of Alberta limitations law to the exclusion of foreign limitations law. Such an interpretation is likely more faithful to what the legislature intended. In fact, the legislature's inclusion of the word "notwithstanding" suggests that it contemplated the possibility that inconsistencies would arise in the application of both the forum limitations law and the foreign limitations law.

2.2 *Extrinsic Evidence of Legislative Intent*

22 This Court has consistently held that

> [t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire [page881] context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *The Construction of Statutes* (2nd ed. 1983), at p. 87)

23 The appellant contends that where the plain language of a legislative provision is clear and unambiguous, extrinsic evidence of legislative intent should not be admissible. I do not find the ordinary meaning of s. 12 to be clear and unambiguous. I would also question whether statutory interpretation should ever proceed solely on the basis of the plain language of the legislation, without consideration of the entire context, including the purpose and the scheme of the Act. In approving of Professor Driedger's approach to statutory interpretation, Iacobucci J. recognized that "statutory interpretation cannot be founded on the wording of the legislation alone" (*Rizzo & Rizzo Shoes*, at para. 21; see also R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 9-18). It is now well accepted that legislative history, Parliamentary debates and similar material may be quite properly considered as long as they are relevant and reliable and not assigned undue weight: *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 17.

24 There is very little available extrinsic evidence of the legislative intent behind s. 12. The appellant relies on the Alberta Law Reform Institute, Report No. 55, *Limitations* (1989), which concluded that limitations law was properly classified as procedural and that courts should apply local procedural law. The recommendation in the Report to include s. 12 in the new Alberta *Limitations Act* was premised in part on the uncertainty resulting from the characterization of limitation periods as substantive or procedural, depending upon their particular wording. The Report predated the decision in *Tolofson* by five years. In *Tolofson*, La Forest J. recognized that all limitation periods, regardless of [page882] their particular wording, were substantive, thereby resolving the uncertainty that had motivated the Report and its recommendation.

25 More importantly, there is no evidence on the record that the legislature considered or debated

Tolofson or the Report, which was not tabled at the time the Act was introduced and passed. The government of Alberta opted not to implement the Report's recommendation in 1989. In 1996, s. 12 was introduced by way of private member's bill. The only other extrinsic evidence upon which the appellant relies is a single sentence spoken by Mr. Herard, the member of the Legislature who introduced the bill:

> To remove the often difficult task of categorizing limitations legislation to determine whose law applies to a claim, Bill 205 states that, regardless, limitations law is governed by Alberta law if an action is brought in this province.
>
> (*Alberta Hansard*, vol. I, 23rd Leg., 4th Sess., March 20, 1996, at p. 707)

Such evidence, taken alone, cannot be indicative of legislative intent. In fact, Mr. Herard refers to the difficult task of categorizing limitations legislation, even though La Forest J. authoritatively recognized in *Tolofson* that all limitation periods are substantive in nature.

2.3 *The Presumption Against Changing the Common Law*

26 This principle was recently affirmed by Iacobucci J., speaking for a majority of this Court in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 39:

> To begin with, I think it useful to stress the presumption that the legislature does not intend to change [page883] existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614, for example, Fauteux J. (as he then was) wrote that "a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed". In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077, Lamer J. (as he then was) wrote that "in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law".

27 I do not find the principle to be applicable in this case. As mentioned earlier, the relevant principles of common law were developed by La Forest J. in *Tolofson*. In that case, La Forest J. held that the rule of private international law that should generally be applied in torts is the law of the place where the activity occurred or the *lex loci delicti*. This choice of law rule was largely premised on the territorial principle that organizes the international legal order and federalism in Canada. La Forest J. was also motivated by a number of important policy considerations, including the need for certainty, predictability, and ease of application. The *lex loci delicti* rule has the benefit of being forum-neutral and eliminates potential forum-shopping concerns. La Forest J. explained that "[o] rdinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly" (*Tolofson*, at pp. 1050-51).

28 Also in *Tolofson*, La Forest J. determined that where the governing law is the *lex loci delicti*, the relevant limitation period under that law is applicable and binding on the court hearing the dispute. The reason for this was that limitation periods constitute substantive law. I shall return to

this issue in addressing the constitutionality of the impugned legislation. Generally then, the common law provides that the law of the place of the tort governs and that the limitation period it prescribes is [page884] applicable and binding on the court in which the action proceeds.

29 Section 12 accepts that "in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction". However, it seeks to apply Alberta limitations law "notwithstanding" these rules. The interpretation suggested by the appellant means that Alberta limitations law will displace the foreign limitations law in all cases. In effect, her argument would suggest that s. 12 has determined that limitation periods are procedural. The interpretation suggested by the respondent means that Alberta limitations law will only displace the foreign limitations law in cases where the applicable Alberta limitation period is shorter than its foreign counterpart. Effectively, the respondent argues that though the limitation period of California is part of its substantive law, Alberta can apply a procedural limitation period to determine whether a cause of action subsisting under the laws of California can be adjudicated in Alberta. Since both interpretations alter the common law, the presumption cannot be determinative.

2.4 *The Presumption Against Extra-Territorial Effect*

30 The legislative jurisdiction of the provinces is limited to matters "[i]n each Province" by the wording of s. 92 of the *Constitution Act, 1867*. Unless otherwise explicitly or implicitly provided, legislatures are presumed to respect the territorial limits of their legislative powers: Côté, at pp. 200-203. If possible, legislation should be construed in a manner consistent with this presumed intent. Similarly, it is now accepted that where legislation is open to more than one meaning, it should be interpreted so as to make it consistent with the Constitution: *McKay v. The Queen*, [1965] S.C.R. 798, at p. 803; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078.

31 The parties have proposed two interpretations of s. 12. Although I find the interpretation [page885] suggested by the appellant to be more plausible, there is insufficient indicia of legislative intent to determine which interpretation should be preferred. I will therefore address the constitutionality of both interpretations.

1 The Constitutional Validity of Section 12 of the *Limitations Act*

32 The most recent authority on extra-territoriality is *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49. The 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 of the *Constitution Act, 1867*, as well as by the requirements of order and fairness that underlie Canadian federalism: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1102-3; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at pp. 324-25; *Imperial Tobacco*, at paras. 26-27. The dual purposes of s. 92 are to ensure that provincial legislation has a meaningful connection to the enacting province and to pay respect to the legislative sovereignty of other territories: *Imperial Tobacco*, at para. 36.

33 The first step is to determine the pith and substance of the legislation and to determine under what head of power it falls: *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at p. 332; *Imperial Tobacco*, at para. 36. If the pith and substance is intangible, the court must look to the relationships among the enacting territory, the subject matter of the legislation and the persons made subject to it: *Imperial Tobacco*, at para. 36. The court must also consider whether s. 12 pays respect to the legislative sovereignty of other territories: *Imperial Tobacco*, at para. 36. If

these two conditions are met, then the purposes of s. 92 of the *Constitution Act, 1867* are respected and the legislation is valid.

3.1 *The Pith and Substance of Section 12 of the Limitations Act*

34 The purpose and effect of s. 12 is to render Alberta limitations law applicable whenever a [page886] remedial order is sought in the Alberta courts. Alberta limitations law being ordinarily applicable in cases proceeding before the Alberta courts where Alberta law otherwise governs the claim, the only circumstance in which s. 12 operates is where the Alberta conflict of law rules point to the substantive law of another jurisdiction as governing the cause of action. Typically, in applying this other law, the Alberta court would also apply the limitation period it prescribes, as this Court recognized in *Tolofson* that limitation periods are substantive in nature. The purpose and effect of s. 12 is therefore to render Alberta limitations law applicable in cases where it would not otherwise be -- precisely because the Alberta choice of law rules point to the law of a foreign jurisdiction as the governing law.

35 Limitation periods have the effects of cancelling the substantive rights of plaintiffs and of vesting a right in defendants not to be sued in such cases. The pith and substance of the law must therefore be characterized as relating to civil rights, pursuant to s. 92(13) of the *Constitution Act, 1867*.

36 The appellant contended in oral argument that it was open to the Alberta Legislature to reverse the holding in *Tolofson* that limitation periods are substantive law and that this is what Alberta did by adopting s. 12. I believe this argument rests on a misunderstanding of *Tolofson*. La Forest J. did not decide as a principle of common law that limitation periods should simply be treated substantively. Instead, La Forest J. explained that "the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of *both* parties" (*Tolofson*, at pp. 1071-72 (emphasis in original)). La Forest J. recognized that limitation periods are, *by their very nature*, substantive, precisely because they are determinative of the rights of both parties in a cause of action: they destroy the right of the plaintiff to bring suit and vest a right in the [page887] defendant to be free from suit. The provinces cannot change the nature of limitations law without fundamentally changing the content of limitations law. No implicit intention to that effect could be found in the present case. Indeed, because substantive legislation can be applied by a court so as to affect rights governed by a foreign law, "legislation should be categorized as procedural only if the question is beyond any doubt. If there is any doubt, the doubt should be resolved by holding that the legislation is substantive" (*Block Bros. Realty Ltd. v. Mollard* (1981), 122 D.L.R. (3d) 323 (B.C.C.A.), at p. 328, cited with approval in *Tolofson*, at pp. 1068-69).

37 The procedural/substantive distinction is essentially a label. That label, however, has important constitutional consequences. Where a law is characterized as procedural, it constitutes valid law under s. 92(14) of the *Constitution Act, 1867*, as relating to the administration of justice within the province, so long as it applies to the Alberta courts or to actions proceeding before the Alberta courts. No other enquiry is required. If Alberta can treat limitation periods as procedural, then it can prescribe limitation periods for all actions proceeding before the Alberta courts without ever running afoul of the Constitution. If a law is characterized as substantive, however, it must be justified pursuant to s. 92(13) of the *Constitution Act, 1867*, as relating to civil rights in the province, meaning that the *Imperial Tobacco* analysis for the *situs* of intangibles is engaged. To allow Alberta to treat limitation periods as procedural is, essentially, to allow it to circumvent the *Imperial*

Tobacco meaningful connection test. The effect would be to allow Alberta to legislate extra-territorially. In other words, the question of whether limitation periods are procedural or substantive is not something the province can decide. The reason for this is that the procedural/substantive distinction essentially determines, for purposes of constitutional validity, whether a law falls under s. 92(14) or s. 92(13) of the Constitution. That distinction must be based [page888] on something other than what a province says. It should in my view be based on the actual effects of the law. The effects of limitation periods were made clear in *Tolofson*: they cancel the substantive rights of plaintiffs to bring the suit, and they vest a right in defendants to be free from suit. This is the reality Alberta cannot ignore.

38 This may seem strange in light of the common law's traditional conception of limitation periods as procedural. This conception was relatively unchallenged until the decision in *Tolofson*, although La Forest J. notes at pp. 1071-72 that some common law courts had already begun to chip away at the right/remedy distinction on the basis of relevant policy considerations. In addition, at least one Canadian common law judge had recognized that limitation periods vest a right in the defendant to be free from suit: Stratton C.J.N.B., in *Clark v. Naqvi* (1989), 99 N.B.R. (2d) 271 (C.A.), at p. 275-76, cited with approval in *Tolofson*, at p. 1072. La Forest J. identified the two main reasons for the common law's long and mistaken acceptance of the procedural nature of limitation periods: the view that foreign litigants should not be granted advantages not available to forum litigants, and the mystical view that a common law cause of action gave the plaintiff a right that endured forever (*Tolofson*, at p. 1069). Neither of these is persuasive. I think the principle developed in *Tolofson* should no longer be questioned.

39 Nonetheless, the common law long considered limitation periods as procedural, such that it may [page889] seem strange, at first glance, to conclude that limitations law must be considered substantive and, as regards provincial legislation, must be justified pursuant to s. 92(13) of the *Constitution Act, 1867*, as constituting laws in pith and substance directed at civil rights. The characterization of limitation periods has up until now never raised constitutional concerns. This is the first time this Court has addressed a legislated choice of law rule dealing with limitation periods and had to pronounce on its constitutionality. In dealing with the issue, the Court must first recognize that the provinces cannot legislate extra-territorially. The common law was not similarly concerned with the territoriality principle until the decision in *Tolofson*, where La Forest J. refers to it explicitly. In holding that the proper choice of law rule for torts was the *lex loci delicti*, or the law of the place of the tort, La Forest J. explained that:

> It will be obvious from what I have just said that I do not accept the former British rule, adopted in *McLean v. Pettigrew*, that in adjudicating on wrongs committed in another country our courts should apply our own law, subject to the wrong being "unjustifiable" in the other country. As I see it, this involves a court's defining the nature and consequences of an act done in another country. This, barring some principled justification, seems to me to fly against the territoriality principle. [Emphasis added; p. 1052.]

Turning to the mistaken common law rule that limitation periods are procedural, La Forest J. referred to this same analysis: "The principle justification for the rule [that limitation periods are procedural], preferring the *lex fori* over the *lex loci delicti*, we saw, has been displaced by this case" (p. 1071). In *Tolofson*, La Forest J. was formulating common law choice of law rules. In this case,

the Court is faced with a provincially legislated choice of law rule. It must be remembered that the territoriality principle of which La Forest J. speaks is not merely a matter of comity; it also constitutes a [page890] constitutional limit on the legislative jurisdiction of the provinces.

40 The next question is whether, pursuant to the test developed in *Imperial Tobacco*, the rights to which s. 12 purports to apply are located in the province within the meaning of s. 92 of the *Constitution Act, 1867*. If they are not, s. 12 will be deemed unconstitutional because of its extra-territorial effects.

3.2 *The Meaningful Connection Test*

41 Section 12 only renders Alberta limitations law applicable to actions proceeding before the Alberta courts. It constitutes in this sense a legislated choice of law rule that determines when the Alberta courts will apply Alberta limitations law. The appellant contends that the law on adjudicative jurisdiction and *forum conveniens* will ensure that, in all cases where s. 12 renders Alberta limitations law applicable, a real and substantial connection between Alberta and the cause of action will have been demonstrated. However, a real and substantial connection is not equivalent to a meaningful connection as defined in *Imperial Tobacco*. The two notions cannot be conflated.

42 In order for provincial legislation to be valid, there must be a meaningful connection between the enacting province, the legislative subject matter and the persons made subject to it. By contrast, the existence of a "real and substantial connection" is a more flexible inquiry that is meant to determine which court should hear the case as a matter of convenience. As La Forest J. explained in *Hunt*, at p. 325, the test "was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction". Binnie J. stated in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40, at para. 58, that "a 'real [page891] and substantial connection' sufficient to permit the court of a province to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome".

43 Turning to the doctrine of *forum conveniens*, it is generally concerned with matters of convenience. This is why the real and substantial connection test and the *forum conveniens* doctrine do not necessarily require the same degree of connection between the province, the subject matter of the relevant law and the parties subject to that law, as does the *Imperial Tobacco* test. This led La Forest J. to recognize in *Tolofson*, at p. 1070, that "[t]he court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order."

44 The parties are making arguments that, should they be accepted, would bring this Court to conflate the constitutional threshold for adjudicative jurisdiction and the constitutional threshold for legislative jurisdiction. Such a result is unwarranted and would be contrary to *Imperial Tobacco*. The real and substantial connection necessary for the courts of a province to take jurisdiction over a claim constitutes a lower threshold than the meaningful connection required for a province to legislate with respect to the rights at issue.

45 Section 12 is, in essence, a choice of law rule that is not premised on any connection other than the real and substantial connection necessary for the Alberta courts to take adjudicative jurisdiction. I therefore conclude that the real and substantial connection established is not sufficient to provide a meaningful connection between the province, the legislative subject matter and the individuals made subject to the law. Relying partly on *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20

(C.A.), I concluded in dissenting reasons in *Unifund Assurance*, at para. 133, that "a link with the subject matter of [page892] the claim is sufficient to establish the jurisdiction *simpliciter* of a forum given the flexible approach that has been endorsed by this Court". The flexibility of the approach used to determine jurisdiction is reflected in the unanimous decision of the Ontario Court of Appeal in *Muscutt*, which identifies the factors which ought to be considered:

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.

These factors are not strictly concerned with the connection of the forum to the parties and the cause of action. Instead, these factors reflect important policy considerations such as fairness, comity and efficiency.

46 Since s. 12 does not provide for a meaningful connection between Alberta, the civil rights affected by s. 12, and the plaintiffs and defendants made subject to s. 12, it violates the territorial limits of legislative competence contained in s. 92 of the *Constitution Act, 1867*. The purpose and effect of s. 12 is to apply Alberta law so as to destroy accrued and existing rights situate without [page893] the province, regardless of whether or not Alberta has a meaningful connection to those rights or right-holders.

47 This is true for both proposed interpretations. The interpretation suggested by the appellant means that in all cases where a remedial order is sought in Alberta and where foreign law governs the claim, s. 12 will destroy the substantive right of either the plaintiff or the defendant. Where the Alberta limitation period is shorter than its foreign counterpart, s. 12 will destroy the right of the plaintiff to bring the suit. Where the Alberta limitation period is longer than its foreign counterpart, s. 12 will destroy the right of the defendant to be free from suit.

48 The interpretation suggested by the respondent means that s. 12 only has effect where the Alberta limitation period is shorter than the foreign limitation period. Where the Alberta limitation period is longer than its foreign counterpart, the respondent argues that the cause of action will have ceased to exist under the foreign law and that there will therefore be no claim upon which to sue in Alberta. According to this interpretation, s. 12 only destroys the substantive rights of plaintiffs. Leaving aside the correctness of this interpretation, the fact that s. 12 destroys the substantive rights of plaintiffs to bring suit is sufficient to render it unconstitutional. This is because Alberta is legislating so as to destroy the substantive rights of plaintiffs to bring an action without providing for a meaningful connection between Alberta, the rights in question and the right-holders.

49 The notion that this problem can be overcome because a new action could be started in California, even where the Alberta court has decided that it constitutes the proper forum, is questionable. The question of whether or not the action could proceed in California is not before the Court. Instead, an Alberta court has taken jurisdiction and, in accordance with s. 12, must apply the

substantive law of California to govern the claim. Here, the effect of s. 12 is then to deny the plaintiff the right to bring the suit. Accepting that s. 12 does not provide a [page894] meaningful connection between Alberta and the right upon which the plaintiff is suing, such an interference with the plaintiff's right is unconstitutional.

50 For the reasons given above, s. 12 of the *Limitations Act* also fails the second branch of the *Imperial Tobacco* test insofar as it simply disregards the legislative sovereignty of other jurisdictions within which the substantive rights at issue are situated.

51 This is not to say that the provinces are constitutionally prohibited from modifying the ordinary choice of law rules. However, should they chose to do so, they 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.

Conclusion

52 Since I find that both proposed interpretations of s. 12 are unconstitutional, I need not resolve the issue of the proper interpretation of s. 12. Section 12 of the Alberta *Limitations Act* is invalid and of no force or effect. I therefore agree that the California one-year limitation period applies to bar the plaintiff's action.

Solicitors:

Solicitors for the appellant: Macleod Dixon, Calgary.

Solicitors for the respondent: Fasken Martineau DuMoulin, Vancouver.

Solicitor for the intervener: Alberta Justice, Edmonton.

cp/e/qw/qllls

LOWN AUTHORITY 4

Case Name:

Castillo v. Castillo

Between
Maribel Anaya Castillo, appellant (plaintiff), and
Antonio Munoz Castillo, respondent (defendant)

[2004] A.J. No. 802

2004 ABCA 158

244 D.L.R. (4th) 603

[2004] 9 W.W.R. 609

30 Alta. L.R. (4th) 67

357 A.R. 288

1 C.P.C. (6th) 82

6 M.V.R. (5th) 1

132 A.C.W.S. (3d) 884

Docket No.: 02-0207-AC

Alberta Court of Appeal
Calgary, Alberta

Russell, Berger and Wittmann JJ.A.

Heard: September 8, 2003.
Judgment: filed July 9, 2004.

(29 paras.)

Limitation of actions -- Statutory limitation periods -- Applicability -- Statutory interpretation -- Statutes -- Construction.

Appeal by the plaintiff, Maribel Castillo from the Order by Rawlins J. The defendant, Antonio Castillo was driving a vehicle in California and Maribel was a passenger. They were involved in a single vehicle accident. Maribel was treated for injuries in Alberta, where both parties lived. Maribel sued Antonio in Calgary, claiming damages for her injuries caused by the California accident two years less a day after the accident. Antonio filed a Statement of Defence expressly pleading the action was barred under and by California's Code of Civil Procedure. Antonio applied to summarily dismiss the claim on the basis that the California one year limitation period operated to bar the action and was a complete defence to it. The chambers judge held the action was statute barred because Maribel failed to file her action in time under California law. The issue in the appeal was whether section 12 of the Limitations Act had changed the common law and was paramount such that if the suit was properly brought in Alberta, the California limitation law was irrelevant.

HELD: Appeal dismissed. The common law had not been changed by s. 12 and both it and s. 12 applied to determine this appeal. Section 12 stated that Alberta limitations law would be applied notwithstanding that, in accordance with conflict of law rules, the claim would be adjudicated under the substantive law of another jurisdiction. The section did not indicate that it altered the choice of law rule as set out in jurisprudence, namely, that the limitations law of the place of the tort was to be applied. In this case, therefore, the foreign law barring recovery on the basis of the limitations law of the place of the tort applied. Therefore the tort in this case was not actionable. As the California limitation period had expired, there was no basis upon which to sue. There was no actionable tort in California and without an actionable tort, no action could be commenced in Alberta regardless of any longer limitation period which s. 12 may have provided.

Statutes, Regulations and Rules Cited:

Alberta Limitations Act, s. 12.

Alberta Rules of Court, Rules 159(2), 162(a), 200, 221.

California Code of Civil Procedure.

Appeal From:

On appeal from the Order by Rawlins J., dated April 11, 2002 and filed on June 21, 2002. (2002 ABQB 379, Docket: 0001-07739)

Counsel:

A.L. Kirker for the Appellant

J.T. Eamon for the Respondent

REASONS FOR JUDGMENT

Reasons for judgment were delivered by Wittmann J.A. Concurred in by Russell J.A.. Concurred in by Berger J.A.

WITTMANN J.A:--

Introduction

1 What is the limitation period when a motor vehicle accident, involving Alberta residents only, occurs in California and the Alberta residents commence an action in Alberta? This action was commenced two years less a day after the date of the accident. The California limitation period is assumed to be one year from the date of the accident.

2 This Court is asked to interpret s. 12 of the Limitations Act, R.S.A. 2000, c. L-12, which provides:

> 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.

Facts

3 The parties proceeded on agreed facts. The appellant wife and respondent husband were involved in a single vehicle accident in or around Fresno, California on May 10, 1998. The husband owned the accident vehicle and was driving it with his wife as a passenger.

4 At the time of the accident, the Castillos were vacationing in California and were in the process of moving from British Columbia to Alberta. The accident vehicle was registered and insured in British Columbia. The Castillos had taken up residence in Calgary. No medical treatment was received by the wife in California; she sought and received medical treatment for her accident injuries in Calgary.

5 The wife sued the husband by filing a Statement of Claim in Calgary on May 9, 2000, claiming damages for her injuries caused by the California accident. The husband filed a Statement of Defence November 14, 2000, expressly pleading the action is barred under and by California's Code of Civil Procedure, Pt. 2, Tit. 2, Ch. 3 S340.

6 The husband applied under the Alberta Rules of Court ("ARC") 159(2) to summarily dismiss the claim on the basis that the California limitation period, assumed to be one year for the purpose of the application, operated to bar the action and is a complete defence to it. Alternatively, the husband, under ARCs 200 and 221 or 162(a), sought determination on a point of law, namely, whether California or Alberta law applied to the action.

The Decision Appealed From: (2002), 313 A.R. 189, 2002 ABQB 379.

7 The chambers judge held the action is statute barred because the wife failed to file her action in time under California law, i.e. within one year of the accident. The chambers judge stated a two-stage analysis was necessary. First, was the action filed in time under California law? Second, was the action filed in time under Alberta law? Both are required to maintain the action.

Issue

8 Section 12 of the Limitations Act was enacted in 1996. Prior to that, the Supreme Court of Canada decided Tolofson v. Jensen, [1994] 3 S.C.R. 1022, which changed the common law rule for choice of statute of limitation law in tort. The appellant submits that s. 12 has changed the law set

out in Tolofson and is paramount. That is, if the suit is properly brought in Alberta, the California limitation law is irrelevant. I find that the law in Tolofson has not been changed by s. 12 and that both Tolofson and s. 12 apply to determine this appeal.

Standard of Review

9 The issue is statutory interpretation where no facts are in dispute. Hence, the issue is purely a question of law subject to a standard of review of correctness: Housen v. Nikolaisen [2002] 2 S.C.R. 235, at para. 8.

The Decision in Tolofson v. Jensen

10 Tolofson involved two cases, both motor vehicle accidents between residents of different provinces, but only Tolofson involved a limitation statute issue. Tolofson, the plaintiff, a minor, was seriously injured while a passenger in a car owned and driven by his father. The accident occurred in Saskatchewan. One defendant driver was a Saskatchewan resident while the plaintiff and his father, the other defendant, were British Columbia residents. The action was brought in British Columbia. The action was statute barred in Saskatchewan, but not in British Columbia. The British Columbia Court of Appeal held that the law of the forum, British Columbia, applied to the statute of limitations issue.

11 The major import of Tolofson was to change the choice of law to apply the law of the place of the tort, the lex loci delicti, and not the law of the forum to the statute of limitations issue. LaForest J. at 1073 stated:

> To permit the court of the forum to impose its views over those of the legislature endowed with power to determine the consequences of wrongs that take place within its jurisdiction would invite the forum shopping that is to be avoided if we are to attain the consistency of result an effective system of conflict of laws should seek to foster.

12 The Supreme Court held that the British Columbia court was to apply the Saskatchewan law on limitations to the suit in British Columbia because the proper characterization of the law of limitations was substantive, not procedural. The action was held statute barred.

Whether s. 12 of the Limitations Act Changes the Common Law

13 The appellant submits that s. 12 is to be interpreted as paramount over the common law, or in other words as abrogating Tolofson. On an ordinary reading of the words as a whole and in the context of the published legislative history, the appellant submits that the two year Alberta limitation period, and not the one-year California limitation period, applies in this case. The appellant's submission is supported by Gerald Robertson in his case comment: Castillo v. Castillo: Limitation Periods and the Conflict of Laws (2002) 40 Alta. L. Rev. (No. 2) 447-449.

14 Although legislation is paramount, there is also a presumption against changing the common law. In P. St. J. Langan, Maxwell on the Interpretation of Statutes, 12th ed. (London: Sweet & Maxwell, 1969) at 116:

> [t]here is a presumption that] the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute.

The foregoing was cited with approval by Hunt, J.A., speaking for a unanimous court, in Athabasca Chipewyan First Nation v. Canada (Minister of Indian Affairs and Northern Development), [2001] A.J. No. 609.

15 The Supreme Court of Canada in 2747-3174 Quebec Inc. v. Quebec (Régie des permits d'alcool), [1996] 3 S.C.R. 919 set out guiding principles which must operate when analysing the interaction between statute and the common law and concluded at para. 95 as follows:

> Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law. . . . [Halsbury's Laws of England (3d ed. 1961), vol. 36, at p. 412, at para. 625.]
>
> . . . Acts should not be taken to limit common law rights, or otherwise alter the common law, unless they do so clearly and unambiguously. . . . [Halsbury's Laws of England (4th ed. 1995), vol. 44(1), at p. 876, at para. 1438.]
>
> A new statutory remedy never takes away the old [common law remedy] unless the new is given in substitution of the old or henceforth prohibits either expressly or by necessary implication those concerned from resorting to the old mode of relief.
>
> . . .
>
> . . . where, in any particular case, it appears that the [statutory] rules . . . are left to implication then it is a question to be determined upon an examination of the statute as a whole how far the rights of the parties are to be governed by the rules of law which, apart from the statute, are applicable. . . . [Smith v. National Trust Co. (1912), 45 S.C.R. 618, at pp. 624 (Idington J.) and 641 (Duff J.).]

16 The Court considered the decision in Zaidan Group Ltd. v. London (City) (1990), 71 O.R. (2d) 65 (C.A.); aff'd [1991] 3 S.C.R. 593, and concluded at para. 97 that it supported the following method:

> . . .To determine what interaction there is between the common law and statute law, it is necessary to begin by analysing, identifying and setting out the applicable common law, after which the statute law's effect on the common law must be specified by determining what common law rule the statute law codifies, replaces or repeals, whether the statute law leaves gaps that the common law must fill and whether the statute law is a complete code that excludes or supplants all of the common law in the specific area of law involved.

17 In this case, s. 12 states that Alberta limitations law shall be applied "notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction". The section does not indicate that it alters the choice of law rule as set out in Tolofson, that is, that the limitations law of the place of the tort is to be applied. In a case with facts like Tolofson, therefore, the foreign law barring recovery on the basis of the limitations law of the

place of the tort will apply to the action; the tort is not actionable. There is no ambiguity or uncertainty; s. 12 of the Limitations Act does not alter that aspect of the common law as set out in Tolofson.

18 An example of the application of s. 12 is when the tort is actionable in the foreign jurisdiction. In that situation, s. 12 determines if the action was commenced in time. I agree with the chambers judge who stated at para. 25:

> For example, if the foreign law allowed three years to commence an action, and the action was commenced in Alberta within those three years, but after two years, the claimant would not be statute barred by the foreign jurisdiction, but would be statute barred by Section 12 which requires all actions in Alberta to be subject to Alberta limitations notwithstanding what the foreign jurisdiction prescribes.

Law of the Place of the Tort

19 In applying the lex loci delicti, a defendant may raise any defence available under the law of the place of the tort. When the expiry of a limitation period constitutes a defence, the defendant may rely on that defence.

20 Section 12 does not purport to remove defences which constitute part of the substantive law of the place of the tort. Section 12 applies the Alberta limitations law "notwithstanding that...the claim will be adjudicated under the substantive law of another jurisdiction". The application of the two year Alberta limitation is to be applied but it does not alter the limitation of actions defence available under the foreign law.

21 In this case, if the California law affords a defence because of a one year limitation, it remains available to the defendant to raise as a defence. Section 12 has no application as a defence on these facts. However, if the California law had provided a three year limitation period, s. 12 would apply to provide a defence in this forum, namely, that the two year Alberta limitation applied notwithstanding the three year limit in California.

22 As well, s. 12 only addresses limitation periods, therefore, it does not alter the common law on any other substantive aspect of actionability.

The Tort Must Be Actionable

23 Black's Law Dictionary, 7th ed. defines "actionable" as "That for which an action will lie, furnishing legal ground for an action". The requirement that a tort be actionable was described in general terms by Lord Wilberforce in Chaplin v. Boys, [1969] 2 All E.R. 1085 at 1102, "The broad principle should surely be that a person should not be permitted to claim in England [the forum] in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed." Although that decision, which modified and continued the rule of double actionability, was not followed in Tolofson, the principle of actionability remains.

24 LaForest J. in Tolofson agreed with the statement of Willes J. in Phillips v. Eyre (1870), L.R. 6 Q.B. at 28 that, "Civil liability arising out of a wrong derives its birth from the character of the place [where it occurred], and its character is determined by that law". LaForest J. further added at 1050:

> In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences.

25 Whether a matter is actionable is determined by the place where the matter occurred. This is not confined only to tort. The Supreme Court of Canada reviewed the jurisdiction of courts to deal with multi-jurisdictional problems and the law governing recognition of the law of one jurisdiction by a court in another in Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 and Hunt v. T & N plc, [1993] 4 S.C.R. 289. As those decisions indicate, in certain circumstances, courts will exercise jurisdiction over matters that have originated in foreign states. For example, an action can be brought based on a foreign contract governed by foreign law. The rules of forum conveniens govern when a court will refuse or accept a case, but unless the matter complained of were actionable under the applicable foreign law, there would be no action to sue on. A cause of action would not have come into existence.

26 In this case, assuming the California limitation period has expired, there is no basis upon which to sue. Thus, there is no actionable tort in California. Without an actionable tort, no action can be commenced in Alberta regardless of any longer limitation period which s. 12 may provide.

27 Thus, the defence of an expired limitation period is available to the defendant because the tort is no longer actionable under the law of the place of the tort and that defence is available whether or not the action is commenced in Alberta within the time prescribed in s. 12 of the Limitations Act.

28 This interpretation of s. 12 preserves the principles of Tolofson which sought to recognize the underlying reality of the territorial limits of law under the international legal order. As stated by LaForest J. at 1047 in Tolofson:

> The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states as a matter of "comity" will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits. Moreover, to accommodate the movement of people, wealth and skills across state lines, a byproduct of modern civilization, they will in great measure recognize the determination of legal issues in other states. And to promote the same values, they will open their national forums for the resolution of specific legal disputes arising in other jurisdictions consistent with the interests and internal values of the forum state. These are the realities that must be reflected and accommodated in private international law.

Conclusion

29 Section 12 does not alter the principles set out in Tolofson. The provisions of the Limitations Act and the common law can co-exist without inconsistency or uncertainty. The appeal is dismissed.

WITTMANN J.A.
RUSSELL J.A.:-- I concur.
BERGER J.A.:-- I concur.

cp/e/qw/qlmmm

LOWN AUTHORITY 5

Indexed as:
Dipalma v. Smart

Between
Dominic Dipalma, respondent (plaintiff), and
Larry J. Smart and Will Egan, as administrator ad litem of the Estate of William A. Gavin, deceased, applicants (defendants)

[2000] A.J. No. 1238

90 Alta. L.R. (3d) 171

280 A.R. 1

7 C.P.C. (5th) 65

100 A.C.W.S. (3d) 897

Action No. 9403-08770

Alberta Court of Queen's Bench
Judicial District of Edmonton

Murray J.

Heard: September 29, 2000.
Judgment: October 18, 2000. Filed: October 19, 2000.

(18 paras.)

Counsel:

Peter F.A. Jasper, for the respondent (plaintiff).
Peter B. Michalyshyn, for the applicants (defendants).

REASONS FOR JUDGMENT

1 **MURRAY J.**:-- This is an application made pursuant to the Consent Order of Madam Justice

Sulyma of January 7th, 2000 which in part provided:

> 1 The following issue arising in this proceeding shall be tried before the trial of the main action and forthwith as a preliminary point of law by way of special application on an agreed Statement of Facts:
>
> > 1 Whether the provisions of the Saskatchewan Highway Traffic Act, S.S. 1986, c.H-3.1, s. 88 are rendered inapplicable to the trial of this action by reason of the provisions of the Limitations Act, S.A. 1996, c.L-15.1, as amended.

If it is found that the Saskatchewan Highway Traffic Act provisions are applicable, then recovery by the Plaintiff in this action may be barred.

2 The Agreed Statement of Facts are:

> 1 The Plaintiff commenced proceedings against the Defendant by issuance of a Statement of Claim May 12, 1994 in relation to a motor vehicle accident on or about May 18, 1992.
> 2 The motor vehicle accident occurred in the Province of Saskatchewan.
> 3 The Defendant, Larry J. Smart, was an Alberta resident and was operating an uninsured vehicle which was registered in Alberta but not in Saskatchewan.
> 4 A Statement of Defence of Will Egan, as Administrator ad litem of the Estate of William Gavin, Deceased, was filed August 3, 1994.
> 5 A Statement of Defence of Larry J. Smart was filed September 14, 1994.
> 6 On December 16, 1994, the Supreme Court of Canada decided a series of cases under the style of Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon, [1995] 1 W.W.R. 609 (S.C.C.). This series of cases held, among other things, that the law which defines the character and consequences of a tort is the place where the tort occurred. It was also held that the law with respect to limitation periods is substantive, not procedural.
> 7 As a result of Tolofson, the Defendants applied under Rule 132 of the Alberta Rules of Court for leave to amend their Statements of Defence to add the further paragraph:
>
> In answer to the whole of the Statement of Claim, this Defendant states that the Plaintiff's action as against this Defendant in relation to an accident which the Plaintiff states occurred in the Province of Saskatchewan, is barred in that the action was not commenced within one year of the date of the accident as required by the Highway Traffic Act, S.S. 1986, c. H-3.1, s. 88.
>
> 1 The learned Master in Chambers, in reasons dated November 8, 1995, declined the Appellants' application to amend their Statements of Defence.
> 2 The Honourable Mr. Justice A.T. Murray allowed an appeal from the Master's decision in reasons dated August 23, 1996 and granted the Defendants leave to amend their Statements of Defence as requested.

3 An appeal was taken from the decision of Mr. Justice Murray to the Court of Appeal but was abandoned in May, 1999. Subsequently the Defendants amended their Statements of Defence pursuant to the leave granted by Justice Murray's Order.

4 On March 1, 1999, the Limitations Act, S.A. 1996, c. L-15.1, as amended, ("the Act") came into force. S. 12 states:

> The limitation 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.

3 The Saskatchewan limitation period, as noted, is one year; whereas in Alberta it was, and is, two years. In addition to s. 12, the following sections are relevant:

> s. 1 In this Act,
>
> 1 "claim" means a matter giving rise to a civil proceeding in which a claimant seeks a remedial order;
> 2 "claimant" means the person who seeks a remedial order;
> 3 "defendant" means a person against whom a remedial order is sought;
> 4 "law" means the law in force in the Province, and includes
>
> 1 statutes,
> 2 judicial precedents, and
> 3 regulations; ...
>
> 1 "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right,-
> 2 "right" means any right under the law;-
>
> 1 This Act applies where a claimant seeks a remedial order in a proceeding commenced after this Act comes into force, whether the claim arises before or after the coming into force of this Act.-
> 2 Subject to s. 11, if a claimant does not seek a remedial order within
>
> 1 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> 1 that the injury for which the claimant seeks a remedial order had occurred,
> 2 that the injury was attributable to conduct of the defendant, and
> 3 that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

1 10 years after the claim arose,

whichever period expires first, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

The term "injury" is defined and includes personal injury.

4 The Applicant's position is that it is entitled to immunity under the Saskatchewan Highway Traffic Act because s. 2(1) of the Act, proclaimed some four years and ten months after this action was commenced, expressly states that the Act applies only to actions commenced after it comes into force. The Applicant argues that even if the Act applies, it would have to be read retroactively or retrospectively in order to render the Saskatchewan legislation inapplicable. This, counsel submits, is contrary to the principles of law, there being a presumption against retroactive or retrospective application of a statute unless the language of that statute expresses a clear and unequivocal intention that it have such application. The Applicant points out that the Act was enacted a full year after Tolofson had been decided and several years after it came into effect, and therefore the Legislature had ample opportunity to alter the provisions of the Act to give it retroactive or retrospective effect if that was its intent. Also that the Alberta Law Reform Institute's proposal upon which the Act was modelled, was written in 1989, long before the Tolofson decision.

5 The Respondent argues:

1. that s. 12 of the Act legislates that limitation legislation in Alberta is procedural law, varying the decision in Tolofson, and that the courts of Alberta should apply such local procedural law;
2. that a definition of the term "law" renders the Act applicable to all statutes containing limitation provisions and that the word "whenever" extends the application of the statute to actions already in progress, i.e. actions commenced before s. 12 came into force, but which have not been finally adjudicated upon, as well as those commenced afterward;
3. that unless such an interpretation is specifically prohibited it is the one that should be applied by the courts, there being no such prohibition in the Act;
4. that since s. 12 is clear in classifying the Act as procedural law, this indicates the Legislature's intent that the provisions be applied to existing actions;
5. that the presumption that legislation is not intended to interfere with vested rights does not apply where the meaning of the legislation is clear and points to the word "whenever"; and
6. that when the Respondent initiated these proceedings the legal interpretation in Alberta was that the Plaintiff had a right to rely upon the Alberta limitation period, i.e. a two-year time frame, and that Tolofson in effect had a retroactive effect and should not be applied by the courts of Alberta.

6 Our Court of Appeal in Brill v. Korpaach Estate by her Administrator ad litem of, [1997] A.J. No. 617 determined that when the negligence of a Defendant causes injury to a Plaintiff, it is that injury which is the genesis of all damage and the law of the place of the tort applies despite the fact that the Plaintiff may be in a different jurisdiction when further resulting loss and damage occurs.

Ongoing damage occurring in one jurisdiction with a longer limitation period than the period of the jurisdiction where the injury occurred does not give the Plaintiff the advantage of the longer limitation period.

7 The facts in the Brill case are on all fours with this case with one exception, that being that the Act was proclaimed prior to the judicial resolution of the action. In that case, following Tolofson, the Defendants amended their Statement of Defence to plead the Saskatchewan limitation period and obtained summary judgment on the 24th of February, 1996. The Act was enacted the 1st day of May, 1996. There were amendments in 1997 and 1998 before it was finally proclaimed March 15th, 1999. The amendments did not affect those parts of the Act quoted earlier, and they are not relevant to these proceedings.

8 The courts in Tolofson and Brill both acknowledge that the conclusion they had reached had a harsh effect upon some Plaintiffs but that that harshness was balanced by the underlying principles requiring order, fairness, and certainty. The argument put forward in Brill was not unlike the Respondent's argument in this case. The concept is described by, and dealt with, by Madam Justice Picard at paragraph 13:

> When the negligence of a defendant causes injury to the plaintiff, it is that injury which is the genesis of all damage. Damages, such as the loss of future wages, flow from the injury and the fact that they arise in a different province does not change the place where the tort occurs. In both Jensen and this case, the place of the tort and the injury was Saskatchewan.

The Respondent argues that as long as an action has "life", s. 12 applies to continue the right to a remedial order. The person vested with that right may commence proceedings in any forum which accepts jurisdiction, and the limitations law of that forum will apply even though the substantive law of another jurisdiction is the proper law to be applied pursuant to the conflict of law rules.

9 The law is clear that there is a presumption that statutes do not operate with retrospective effect, unless the provisions are procedural. Mr. Justice La Forest in Angus v. Sun Alliance Insurance Company [1988] 2 S.C.R. 256 at 268 said:

> This case is a good illustration of the policy reasons why statutes should not be given retrospective operation in the absence of an intention to do so that is either expressed in, or is necessarily implied by the statute ...

10 Mr. Justice Dickson in Gustavson Drilling (1964) Ltd. v. M.N.R. [1977] 1 S.C.R. 271 said:

> First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.

Reference is also made to Ruth Sullivan, Driedger on Construction of Statutes, (3rd ed.), (Toronto: Butterworths 1994) Page 512 where the author points out that there is a strong presumption against

the legislation being intended to have retroactive application.

11 This principle against retroactivity is only a presumption and yields to a clear contrary expression by the Legislature. See T.G. Bright & Co. Ltd. v. Institute National des Appellations D'Origine des Vins et Eaux-de-Vie (1981), 130 D.L.R. (3d) 12 (Que. C.A. per L'Heureux-Dube J.A. at Page 18. Lord O'Hagan in the case of Gardner v. Lucas (1878), 3 App. C.A.S. 582 at Pages 600-601:

> In the first place, the opinion which was pronounced by Lord Cranworth in the case of Kerr v. The Marquis of Ailsa, followed up as it has been by similar opinions given by other Judges, is decisive to this effect, that unless there is some declared intention of the Legislature-clear and unequivocal-or unless there are some circumstances rendering it inevitable that we should take the other view, we ought to presume that an Act is prospective and is not retrospective.

His Lordship then went on to consider the reasoning behind this presumption. See also Board of Commissioners of Public Utilities v. Nova Scotia Power Corp. et al (1976), 75 D.L.R. (3d) 72.

12 The suggestion that Tolofson changed the law is discussed by Madam Justice Picard in the Brill case where at paragraph 21 Her Ladyship said:

> The appellant wisely conceded the point that the new law from the Supreme court applies retrospectively as well as prospectively. Theoretically, this effect follows from the ancient principle that decisions of the court do not change old "bad" law but reveal "true" law by correcting past errors.

The Respondents' argument that the Legislature's intent is clear because it mandated that limitations law is procedural is tautological. The Respondent is, in effect, arguing:

1. Procedural provisions are presumed to be retrospective, Driedger on Construction of Statutes (3rd ed.), supra at 543;
2. The Legislature enacted the Limitations Act which says that Alberta limitation periods will apply to any action commenced in Alberta, even if the substantive law will be that of another jurisdiction (s. 12);
3. Since the Legislature says Alberta limitations will apply, even when the substantive law is of another jurisdiction, the Legislature intended limitations law to be procedural;
4. Since limitation periods are procedural, the Limitations Act should be applied retrospectively.

This argument is mere "bootstrapping".

13 Moreover, even if the legislation had been more explicit and stated that limitations law is procedural, that would not be sufficient to rebut the presumption against retrospective operation where that retrospective operation would affect substantive rights. Mr. Justice LaForest, in Angus v. Sun Alliance Insurance Company, supra noted at page 266 that there is a judicially created exception to that presumption for limitation periods:

> Although in some sense "procedural", they will not be presumed to have retrospective

> effect since they may deprive a plaintiff of a right of action which he had at the time of the passage of the legislation ... In a decision more closely related to the present case, this Court has recently held that the extension or alteration of a period of limitation will not deprive a person of the defence he had acquired under the limitation period in existence before the change.
>
> (at para. 22; citations omitted)

14 I do not accept the Respondent's argument that the interpretation to be placed upon s. 12 is that a remedial order is sought when a claim is made and continues to be sought until judgment is entered such as to bring into play s. 12.

15 I agree with the Applicants that s. 2(1) is unambiguous. This section applies where a claimant, in this case the Respondent, seeks a remedial order as defined in s. 1(j) in a proceeding as contemplated in the definition of "remedial order", commenced after the Act came into force. This is so, whether the claim, as defined in s. 1(a) as being a matter "giving rise to a civil proceeding", arises before or after the coming into force of the Act. Section 2(1) prescribes that the Act only applies where such proceedings are commenced after the Act was proclaimed and s. 3(1) sets the prescription period at two years after a claimant knew, or ought to have known, that his right not to be injured, as defined, has been violated.

16 Read in isolation s. 12 contradicts ss. 2(1) and 3(1); the operative time in s. 12 is "whenever" and in 2(1) it is "after the Act comes into force". The common law presumes that the Legislature did not intend to make contradictory enactments, and therefore, the fundamental principle of construction requires that conflicting legislative provisions should be reconciled if possible. See Sullivan, Driedger on Construction of Statutes, (3rd ed.) (page 176) and J.A. MacKeigan v. Royal Commission (Marshall Inquiry) (1989), 61 D.L.R. (4th) 688 at 716 (S.C.C.). These conflicting provisions can be reconciled when one reads the statute as a whole. The result is that Alberta limitation periods apply whenever a remedial order is sought in an action commenced after the Act came into force.

17 In conclusion, while the result appears harsh, the Act does not apply to this action, and the Applicant is entitled to rely upon the limitation period in the Saskatchewan Highway Traffic Act.

18 The parties may speak to costs if they cannot agree.

MURRAY J.

cp/s/qljpn/qlhcs