Uniformity, Diversity and Provincial Extraterritoriality: Hunt *v.* T&N plc

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The Supreme Court of Canada's decision in *Hunt* v. *T&N plc* represents a milestone for both private international law and federalism. The decision confirms that the principles governing recognition and enforcement of foreign judgments, enunciated by the Court in *De Savoye* v. *Morguard Investments Ltd.*, are constitutional imperatives that are binding on the provinces. In *Hunt*, the Supreme Court has also rewritten the rules on the extraterritorial effects of provincial legislation. These effects will now be assessed according to principles of comity, order and fairness instead of by means of an inquiry into whether the pith and substance of a statute relates to matters outside the province. The author argues that the principle of comity is too indeterminate to provide a sound basis for constitutional review of provincial legislation, and that the principle reflects an excessively centralizing view of the Canadian economic union. A "minimal impairment" test, largely implicit in the earlier case law, would strike a better balance between the need for uniformity and the benefits of diversity.

L'arrêt *Hunt* c. *T&N plc* de la Cour suprême du Canada constitue une borne pour le droit international privé et le fédéralisme. Cet arrêt démontre que les principes régissant la reconnaissance et l'exécution des jugements étrangers, énoncés par la Cour dans l'arrêt *De Savoye* c. *Morguard Investments Ltd.*, sont des normes constitutionnelles que les provinces doivent respecter. De plus, l'arrêt nous présente une nouvelle approche à l'examen de la constitutionnalité d'une loi provinciale ayant des effets dans une autre province. Ces effets seront dorénavant considérés selon des normes de courtoisie, d'ordre et d'équité. Si une loi ne les respecte pas, il ne sera plus nécessaire d'examiner si elle est inconstitutionnelle parce que son caractère véritable se rapporte à une matière ne faisant pas partie des compétences de la province. Selon l'auteur, cette approche est trop vague et représente une vision trop centralisatrice de la Constitution. Une analyse de la «violation minimale», qui était implicite dans la jurisprudence antérieure, aurait établi un meilleur équilibre entre le besoin d'uniformité et les bénéfices de la diversité.

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Synopsis

Introduction

A central task of Canadian constitutional law is to balance respect for diversity with the need to vindicate common values and capture the benefits of mutual cooperation.[1] Beginning with the case of *De Savoye* v. *Morguard Investments Ltd.*,[2] the Supreme Court of Canada has recognized that private international law shares these ambitions. The case of *Hunt* v. *T&N plc*,[3] in which the Court has rewritten the rules on the extraterritorial effects of provincial legislation, represents a further transformation of Canadian conflict of laws rules.

Morguard has been the subject of extensive academic commentary[4] and has been described as "by a wide margin, the most important decision on the conflict of laws ever rendered by the Supreme Court of Canada."[5] As will be discussed in Part I, *Hunt* reveals that this attention is fully deserved and that *Morguard*'s impact cannot be overestimated. *Morguard* established that provincial courts should give "full faith and credit" to the judgments of sister provinces' courts, provided that the latter's initial jurisdiction was properly exercised. *Hunt* confirms this rule as a principle of constitutional law which is binding on provincial legislatures, and not merely an interpretation of private international law.

Technically, the holding in *Morguard* applied only to the rules for recognition and enforcement of foreign judgments. However, many commentators realized that Justice La Forest's *obiter dictum* dealing with the proper limits of adjudicative jurisdiction, was equally important.[6] In *Hunt*, La Forest J., again writing for a unanimous Court, revealed that *Morguard* also had a third dimension. This dimension involves a new approach to the territorial limitations on provincial powers as set out in section 92 of the *Constitution Act, 1867*.[7] The effects of provincial statutes on extraprovincial litigation will now be reviewed according to principles of comity, order and fairness. Prior to *Morguard* and *Hunt*, the traditional approach to territorial limits, as illustrated by *Churchill Falls (Labrador) Corp.* v. *Newfoundland*,[8] was to determine whether the

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[1] See *e.g.* C. Taylor, "Shared and Divergent Values" in R.L. Watts & D.M. Brown, eds., *Options for a New Canada* (Toronto: University of Toronto Press, 1991) 53.

[2] [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 [hereinafter *Morguard* cited to S.C.R.].

[3] [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16 [hereinafter *Hunt* cited to S.C.R.].

[4] See "Symposium: Recognition of Extraprovincial and Foreign Judgments: The Implications of *Morguard Investments Ltd.* v. *De Savoye*" (1993) 22 Can. Bus. L.J. 1 [hereinafter "Symposium"]; J. Blom, Case Comment (1991) 70 Can. Bar Rev. 733; P. Finkle & S. Coakeley, "Morguard Investments Limited: Reforming Federalism from the Top" (1991) 14 Dalhousie L.J. 340; V. Black & J. Swan, "New Rules for the Enforcement of Foreign Judgements: *Morguard Investments Ltd.* v. *De Savoye*" (1991) 12 Advocates' Q. 489; H.P. Glenn, "Foreign Judgements, the Common Law and the Constitution: *De Savoye* v. *Morguard Investments Ltd*" (1992) 37 McGill L.J. 537

[5] J. Ziegel, "Introduction" in "Symposium", *ibid.*, 2.

[6] V. Black, "The Other Side of *Morguard*: New Limits on Judicial Jurisdiction" in "Symposium", *supra* note 4, 5 at 6.

[7] (U.K.), 30 & 31 Vict., c. 3.

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

pith and substance of a statute related to matters outside the province.

The case law dealing with the territorial limits on provincial powers has been criticized as inherently inconsistent and unpredictable.[9] Commentators who share this view are likely to welcome the extension of the principle of comity to certain forms of provincial legislation with extraterritorial effects. In Part II, it will be argued that such a reaction would be misguided. The principle of comity is too broad and indeterminate to provide a sound basis for constitutional review of provincial legislation. Careful consideration of the values of economic union to which La Forest J. appealed in *Hunt* suggests that a minimal impairment test would provide a better method of addressing problems of provincial extraterritoriality.

The nature of the proposed minimal impairment test will be examined in Part III. Support for this test can be found most notably in the *Churchill Falls* decision as well as in other recent Supreme Court cases dealing with federalism and international trade law. It is argued that use of the minimal impairment test in *Hunt* would have led to a similar result, but would have provided clearer guidance for future cases. By relying on its decision in *Morguard*, the Supreme Court in *Hunt* needlessly overextended the role of comity and cast doubt upon the relevance of *Churchill Falls*.

I. *Hunt* v. *T&N plc*: An Overview

A. *The Facts*

The issue in *Hunt* arose out of an action brought by the appellant and a number of other plaintiffs, all residents of British Columbia, against certain Quebec companies involved in the manufacturing and distribution of asbestos products. The plaintiffs, who developed cancer as a result of the inhalation of asbestos fibres, alleged that the defendants negligently manufactured the products, failed in their duty to warn and conspired to hide from the public the dangers of asbestos.[10]

After having successfully resisted a challenge to the jurisdiction of the British Columbia Supreme Court, the appellant served a notice of examination for discovery on the Quebec respondents.[11] This demand was resistcd on the grounds that it would have violated the provisions of the Quebec *Business Concerns Records Act*,[12] a "blocking statute" which prohibited the removal from the province of business documents requested for purposes of litigation. The Quebec courts had made several

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[9] Black, *supra* note 6 at 17-18.

[10] *Hunt, supra* note 3 at 297. The nature of asbestos production and distribution is such that most cases of asbestos-related litigation will involve geographically complex facts. Indeed, the Supreme Court of Canada's previous pronouncement on conflict of laws also arose out of an asbestos product liability claim (*Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96 [hereinafter *Amchem* cited to S.C.R.]).

[11] *Hunt, ibid.* at 298.

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

orders requiring the respondents to comply with the statute.[13] The respondents claimed that these orders provided a lawful excuse for not complying with the demand for discovery pursuant to the British Columbia *Rules of Court*. The appellant countered this claim by arguing that the *Act* was either *ultra vires* the National Assembly of Quebec or was constitutionally inapplicable to judicial proceedings in another province.[14]

There is a certain irony to the extraterritorial impact of the Quebec *Act* on the British Columbia litigation. The *Act* was originally intended as a defence to the extraterritorial reach of American antitrust legislation[15] which has frequently been applied to alleged foreign cartels, including those of Canadian origin.[16] Even though the consequences of this aggressive unilateralism continue to concern policy makers,[17] one cannot but suspect that the purpose of the *Act* has shifted to the protection of Quebec manufacturers from product liability claims. This supposition stems from the fact that federal measures now address the original extraterritoriality problem more effectively than do provincial blocking statutes.[18] The federal legislation is not mentioned in the Supreme Court's judgment, but it may nonetheless have influenced the final result.

B. Jurisdiction and Constitutional Challenges

Before considering the constitutionality of the Quebec statute, the Supreme Court had to dispose of the argument that British Columbia courts did not have jurisdiction to make such a determination and, consequently, that this latter issue was not open for consideration on appeal. Both British Columbia courts had ruled that they did not have jurisdiction.[19] This ruling was partly due to practical concerns relating to the manner in which the Attorney General of Quebec could be notified and to his ability to present evidence.[20] However, it was also based upon more principled reasons such as the interpretation of the doctrine of comity. The British Columbia Supreme Court held that comity prevented it from ordering the circumvention of Quebec law, and the Court of Appeal found that *Morguard* supported this determination.[21] Although the Court of Appeal declared that comity did not extend to enactments designed to intrude into the legislative field of other provinces, it held that the Quebec *Act* was *intra vires* the province's power. Applying *Churchill Falls*, the court ruled that the *Act*'s

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[13] *Hunt, supra* note 3 at 298.

[14] *Ibid.* at 296.

[15] *Ibid.* at 304.

[16] See *e.g. In Re Uranium Antitrust Litigation*, 473 F. Supp. 382 (N.D. Ill. 1979) and 480 F. Supp. 1138 (N.D. Ill. 1980).

[17] See Investment Canada, *Extraterritoriality in the 1990s* (Working Paper No. 15) by G. Tereposky (Ottawa: Investment Research and Poliey Division of Investment Canada, June 1993).

[18] *Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-29.

[19] *Hunt, supra* note 3 at 299-302.

[20] *Ibid.*

[21] *Ibid.*

extraterritorial effect was merely incidental.[22]

Justice La Forest presented two responses to these concerns. First, he noted that under common law conflict rules, the determination of the content of foreign law is a question of fact. There was thus no reason to exclude the issue of constitutional validity from such fact finding.[23] Given that the *Act* had never been challenged in Quebec, the British Columbia courts were free to conclude that the legislation was *ultra vires* the National Assembly.

This first response to the defendants' jurisdictional challenge is somewhat problematic. At the very least, the doctrine of comity would seem to require a presumption of validity of foreign law that could only be rebutted by substantial evidence to the contrary. Furthermore, if an incorrect finding of constitutional invalidity were made as a finding of fact by the British Columbia Supreme Court, it would presumably not be a ground for appeal. This could give rise to a scenario where, following a declaration of the *Act*'s validity by Quebec courts, the Quebec defendant would be obliged to violate either the law of Quebec or that of British Columbia, and the Supreme Court would be unable to harmonize the law by overturning the British Columbia court's verdict.

Justice La Forest's second response is more persuasive and indicates that such an unpleasant scenario need not arise. He observed that, in determining the validity of the *Act*, the British Columbia courts would be addressing an issue of Canadian constitutional law, which could hardly be considered local foreign law. He remarked that "[a]ll judges within the Canadian judicial structure must be taken to be competent to interpret their own Constitution."[24] Given that constitutional challenges frequently arise in the course of "normal" litigation, *Morguard*'s principles of order and fairness obviate the requirement that plaintiffs pursue their action in the defendant's province.[25]

Despite the potentially far-reaching impact of constitutional rulings, La Forest J. concluded that the test for assuming jurisdiction in constitutional challenges was the same as in any other case with geographically complex facts. Given that the British Columbia courts had correctly dismissed an earlier challenge to their jurisdiction, they should not have reversed that decision simply because a constitutional issue had arisen.[26] La Forest J. dismissed without much discussion the question whether the British Columbia courts, having validly established their jurisdiction, should have exercised their discretion under the doctrine of *forum non conveniens* and declined jurisdiction.[27] This conclusion is not surprising in light of the Supreme Court's holding in *Amchem* that "the existence of a more appropriate forum must be clearly established

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[22] *Ibid.*
[23] *Ibid.* at 309.
[24] *Ibid.* at 314.
[25] *Ibid.* at 313.
[26] *Ibid.* at 316.
[27] *Ibid.*

to displace the forum selected by the plaintiff."[28]

La Forest J. made one final point regarding the defendants' jurisdictional challenge. In *obiter dictum*, he noted that even if the British Columbia courts did not have jurisdiction to address the constitutional issue, the Supreme Court of Canada did have such jurisdiction. This power stemmed from precedents which held that the Court may take judicial notice of any provincial law, and that it can exercise a "unifying jurisdiction" over the provincial courts.[29]

C. *A New Approach to Provincial Extraterritoriality*

Hunt would still be a noteworthy decision even if it had only established that provincial courts have jurisdiction to consider constitutional challenges to the legislation of sister provinces. However, the most innovative aspect of *Hunt* concerns the substantive constitutional issue itself rather than the jurisdictional one. The standard of review for provincial extraterritoriality in *Hunt* is completely different from that adopted in earlier cases.

The significance of *Hunt* can only be understood in light of the pre-*Morguard* approach to provincial extraterritoriality. As La Forest J. explained,

> issues about the extent to which a province may give extraterritorial effect to legislation ... have traditionally been considered in the context of the limitation in every head of provincial power to legislation "in the province".[30]

For example, in the present case, the Attorney General of Quebec sought to justify the *Business Concerns Records Act* under the provincial property and civil rights power in section 92(13) of the *Constitution Act, 1867*. However, the words "in the Province" limit the scope of this section. In assessing the impact of this limitation, the traditional approach entails determining the legislation's "pith and substance". This test was discussed by McIntyre J. in *Churchill Falls*:

> Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*. Where, however, the pith and substance of the provincial enactment is the derogation from or elimination of extra-provincial rights then, even if it is cloaked in the proper constitutional form, it will be *ultra vires*. A colourable attempt to preserve the appearance of constitutionality in order to conceal an unconstitutional objective will not save the legislation.[31]

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[28] *Amchem, supra* note 10 at 921.
[29] *Hunt, supra* note 3 at 317-19.
[30] *Ibid.* at 319.
[31] *Churchill Falls, supra* note 8 at 332.

This quotation demonstrates that the traditional approach was concerned primarily with the scope and content of the legislation in question, and not with the principle of comity.[32]

It is important to emphasize, however, that *Hunt* does not overrule the traditional test for the constitutionality of extraterritorial provincial legislation. La Forest J. did not need to consider the "pith and substance" test since he found the impugned *Act* constitutionally inapplicable on the grounds that it offended the principles enunciated in *Morguard*.[33] The relevance of the traditional test is therefore limited to cases in which these principles do not apply.

The remainder of La Forest J.'s judgment was devoted to fleshing out the scope of the principles of *Morguard* and to applying them to the facts in *Hunt*. *Morguard* involved an action for the recovery of the deficiency between the value of the land and the amount owing on a mortgage that fell into default. The mortgage charged Alberta land and was constituted between two Alberta residents. The debtor had moved to British Columbia before the commencement of the action and had not attorned to Alberta's jurisdiction. This led to a default judgment against him.[34] In holding that the judgment should be recognized and enforced in British Columbia, the Supreme Court of Canada explicitly rejected the restrictive traditional British common law rules[35] and replaced them with a requirement that

> the courts in one province should give full faith and credit, to use the language of the U.S. Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in that action.[36]

The Court then went on to define the test for proper exercise of jurisdiction in terms of a "real and substantial connection" as interpreted by Dickson J. in *Moran* v. *Pyle National (Canada) Ltd.*[37]

Justice La Forest's critique of the traditional rules proceeded along two lines. First, he pointed to changes in the world economy that made it increasingly necessary "to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner."[38] Second, adopting a theme from *Aetna Financial Services Ltd.* v. *Feigelman*,[39] he argued that conflict rules needed to be adapted to the context of Canadian federalism.[40]

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[32] Application of the "pith and substance" test will be discussed more fully in Part **III**, below.

[33] *Hunt*, *supra* note 3 at 331.

[34] *Morguard*, *supra* note 2 at 1083.

[35] See *Emanuel* v. *Symon*, [1908] 1 K.B. 302, 77 L.J. K.B. 180 (C.A.).

[36] *Morguard*, *supra* note 2 at 1102.

[37] (1974), [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239 [hereinafter *Moran* cited to S.C.R.].

[38] *Morguard*, *supra* note 2 at 1096.

[39] [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161.

[40] *Morguard*, *supra* note 2 at 1099.

Morguard, however, was not argued on constitutional grounds and La Forest J. considered it sufficient to base the requirement of "full, faith and credit" on principles of comity.[41] Some commentators viewed this as an indication that the case merely reinterpreted the common law and therefore did not bind the provinces. For example, Woods argued that since Quebec's conflict rules were not consistent with the holding in *Morguard*, it was unlikely that the Court could have intended *Morguard* to bind the province.[42] He based this view on the absence of any reference to sections 92(13) and 92(14) of the *Constitution Act, 1867* in the decision.[43]

It is now clear that this interpretation of *Morguard*'s constitutional dimensions is mistaken: "[T]he constitutional considerations raised [in *Morguard*] are just that. They are constitutional imperatives, and as such apply to provincial legislatures as well as to the courts."[44] Woods' misperception, however, is understandable. After all, the words "full faith and credit" appear in the United States' Constitution, not in Canada's. Furthermore, *Morguard* dealt more explicitly with private international law than with constitutional law. Yet, the Supreme Court was not content to give the *Constitution Acts* a narrow, literal interpretation. Instead, it read the Constitution as a whole and found that a "full faith and credit" clause followed inevitably from the following four considerations: (1) a common citizenship; (2) the interprovincial mobility rights in section 6 of the *Canadian Charter of Rights and Freedoms*;[45] (3) the various provisions of the *Constitution Act, 1867* creating a common market, namely section 121 (removing barriers to interprovincial trade), section 91(2) (federal power over trade and commerce), the national concern branch of the Peace, Order and Good Government clause,[46] and the combined effect of sections 91(29) and 92(10) (interprovincial works and undertakings); and (4) the essentially unitary structure of the judicial system.[47]

These constitutional considerations give the federal government the power to legislate with respect to recognition and enforcement of judgments without removing all such power from the provinces.[48] Rather, these considerations require that the exercise of provincial power be consistent with "the minimum standards of order and fairness addressed in *Morguard*."[49] Thus, provincial rules permitting service *ex juris* are

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[41] *Ibid.* at 1100-101.

[42] J.A. Woods, "Recognition and Enforcement of Judgments between Provinces: The Constitutional Dimensions of *Morguard Investments Ltd.*" in "Symposium", *supra* note 4, 104 at 116.

[43] *Ibid.* at 120.

[44] *Hunt*, *supra* note 3 at 324.

[45] Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Inter-provincial mobility rights were considered in *Black* v. *Law Society of Alberta*, [1989] 1 S.C.R. 591, 58 D.L.R. (4th) 317.

[46] *R.* v. *Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, [1988] 3 W.W.R. 385 [hereinafter *Crown Zellerbach*].

[47] *Hunt*, *supra* note 3 at 322; *Morguard*, *supra* note 2 at 1099.

[48] *Hunt*, *ibid.* at 324.

[49] *Ibid.*

presumably still valid, provided that they are only applied in cases which have a "real and substantial connection" to the forum.

While these clarifications of the constitutional dimensions of *Morguard* are helpful, their relationship to the basic issue in *Hunt*, the validity of the impugned Quebec *Act*, is not obvious. On its face, the *Act* says nothing about recognition and enforcement of judgments, nor does it deal with the jurisdiction of Quebec courts. However, the *Act* does have the effect of impeding litigation in sister provinces. This is its only connection to the issue of recognition and enforcement, but, according to Justice La Forest, it is a connection sufficient to render the *Act* constitutionally inapplicable to procecdings outside of the province of Quebec. He characterizes the *Act* as denying effect to orders in other provinces by means of a "preemptive strike" which makes compliance impossible.[50] The disruption of litigation in other provinces is both the *Act*'s "essential effect" and its "barely shielded intent".[51] Consequently, the *Act* is a violation of comity that offends the basic structure of the Canadian federation.[52]

This interpretation of *Morguard* is strikingly broad. It begins with a requirement of comity that is merely implicit in the Constitution, and extends the requirement from the issue of recognition and enforcement of judgments to apply to any provincial legislative measure with an extraterritorial impact on litigation. *Hunt* does not seem to restrict the application of *Morguard*'s principles to statutes that impede discovery or other rules of procedure. Nor does the judgment require that a statute completely obstruct foreign litigation for it to be declared invalid. As the trial judge had noted, discovery, while significant, is "considerably less vital to civil actions than the ability to compel evidence at trial."[53]

The Supreme Court has therefore created a leading role for *Morguard*'s principles in cases of provincial legislation with extraterritorial effects. The broader "in the province" limitation as interpreted in *Churchill Falls*, will still be relevant in many cases. When the impugned statute can be characterized as impeding extraprovincial litigation, however, this test will be unnecessary since a violation of comity requirements will be more readily discovered. Whether or not this expanded role for *Morguard* is appropriate remains to be determined.

II. Order, Fairness and the Economic Union

The central task of both constitutional and private international law is, as Justice La Forest observed, to find "a workable balance between diversity and uniformity."[54] In seeking to strike this balance, the Supreme Court relied on the doctrine of comity. Unfortunately, as will be discussed below, this reliance has become excessive. Comity

[50] *Ibid.* at 327.
[51] *Ibid.* at 330.
[52] *Ibid.* at 327.
[53] *Ibid.* at 300.
[54] *Ibid.* at 296.

is too vague and indeterminate a concept to evaluate the validity of provincial legislation which impacts upon litigation in other provinces. The idea of comity must be related to the fundamental values of the Canadian economic union. It will also be argued that the Court's vision of the economic union is excessively centralizing. Finally, an alternative method of balancing uniformity with diversity will be examined.

A. The Tragedy of Comity

In *Hunt*, La Forest J., adopting a theme from *Morguard*, castigated traditional common law conflict rules as

> rooted in an outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness. Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe.[55]

This vision of the transformation of the world economy is consistent with fashionable media claims of globalization, but is at odds with historical reality. International trade accounted for a greater share of the United Kingdom's gross national product in 1908 (the year *Emanuel* v. *Symon* was decided) than it did in 1980.[56] In quantitative terms, the indisputable changes in communications and transportation technology have been less instrumental in increasing flows of goods, capital and labour than were the invention of the steamship and the telegraph, as well as the settlement of the Canadian prairies.

The fact that the transformation of the global economy since the nineteenth century has not been as dramatic as the Supreme Court suggests means only that greater comity is not a necessity. It does not mean that greater comity is not desirable. Comity would still be desirable if it could provide guidance to courts grappling with the problems of when to choose foreign law, to recognize and enforce foreign judgments or to invalidate laws with extraterritorial effects.

In *Morguard*, La Forest J. adopted the following formulation of the idea of comity, articulated by the United States Supreme Court in *Hilton* v. *Guyot*:

> 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[57]

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[55] *Ibid.* at 321-22.

[56] P. Krugman, *Exchange Rate Instability* (Cambridge, Mass.: Massachusetts Institute of Technology, 1989) at 7. Krugman, *ibid.* at 10, also cites statistics on relative price movements, international labour flows and international capital flows which indicate that, in some respects, "it is unambiguous that today's markets are less well integrated than those of Edwardian times."

[57] 159 U.S. 113 at 163-64, 40 L. Ed. 95 (1895), as quoted in *Morguard*, *supra* note 2 at 1096.

Before adopting this formulation, however, it may have been wise for La Forest J. to have considered the following dictum of Justice Cardozo: "The misleading word 'comity' has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles."[58] As this passage indicates, the meaning of comity is highly contested in American jurisprudence, and will probably be equally problematic in Canada.

One of the problems that the reliance on comity may have created in the United States is an excessively pro-defendant position. According to Weinberg, "[t]o the extent that an interested forum strives for comity and reciproeity in choice of law, it abnegates responsibility for providing justice."[59] As the decisions of the lower courts in both *Amchem* and *Hunt* indicate, this danger is not confined to problems of choice of law.

In *Amchem*, the trial judge found that, while comity would ordinarily have required him to defer to the Texas court's decision to assume jurisdiction, that court's failure to apply the doctrine of *forum non conveniens* itself constituted a breach of comity and thus deprived the Texas court of any entitlement to deference. The trial judge therefore issued an anti-suit injunction preventing the plaintiffs from suing in Texas.[60] The Supreme Court held that this interpretation of comity was too narrow and that deference was due to foreign courts except in cases of serious injustice.[61] Having been reversed in *Amchem*, the same trial judge in *Hunt* followed the Court's advice and gave comity a broad interpretation, holding that comity required deference to the law of another province.[62] This time his decision was reversed for the reasons discussed above in Part I.

The decisions of the Supreme Court in *Amchem* and *Hunt* should reduce the risk of the pro-defendant biases to which Weinberg alludes. However, the judicial histories of these cases indicate that the lengthy discussion of comity in *Morguard* has not provided lower courts with any guidance as to the appropriate degree of deference to foreign law. La Forest J. himself seems to have recognized this in *Hunt*, where he wrote that "the ideas of 'comity' are not ends in themselves, but are grounded in notions of order and fairness to partieipants in litigation with connections to multiple jurisdictions."[63] These notions of order and fairness relate in turn to the Supreme Court's vision of the Canadian economic union.

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[58] *Loucks* v. *Standard Oil Co.*, 120 N.E. 198 at 201-202 (N.Y. Ct. App. 1918) as quoted in L. Weinberg, "Against Comity" (1991) 80 Georgetown L.J. 53.

[59] Weinberg, *ibid.* at 75.

[60] *Amchem*, *supra* note 10 at 910.

[61] *Ibid.* at 914-15.

[62] *Hunt*, *supra* note 3 at 300.

[63] *Ibid.* at 325.

B. The Economic Union Re-examined

The Supreme Court's judgment in *Morguard* recognized that the task of ensuring a fair and orderly flow of wealth and people across the country was a constitutional imperative. In order to understand the nature of this imperative, we must consider its economic and political rationales. These rationales, it is argued, provide a more solid basis for constitutional review of the territorial limits on provincial powers than does the vague idea of comity.

The economic benefits of a common market have been extensively scrutinized in Canada and need only be briefly discussed here.[64] The free movement of goods across the country allows each unit of the federation to specialize in the production of those goods for which it possesses a comparative advantage. Free mobility of labour and capital permits each of these factors to be put to its most productive use. A less frequently mentioned benefit of economic union is its insurance function. The negative impact of a change in external circumstances on one region tends to be offset by a related expansion in another. For example, the hardship to Ontario workers created by a rise in the price of oil is alleviated by the possibility of moving to a new job in Alberta.

The economic union can also be justified in political terms by appealing to notions of equal citizenship and equality of opportunity.[65] These concerns include gains in economic efficiency which increase individual opportunity, but they also call for a stronger federal role in promoting equity and social justice.[66] A political theory of economic union recognizes the need to complement "negative integration", which involves the elimination of barriers to the mobility of goods and factors of production, with "positive integration", which entails the adoption of uniform social and regulatory policies.[67]

The relationship between these values of economic union and the conflict of laws was summarized by La Forest J. in the following passage from *Hunt*:

> It is inconceivable that in devising a scheme of union comprising a common market stretching from sea to sea, the Fathers of Confederation would have contemplated a situation where citizens would be effectively deprived of access to the ordinary courts in their jurisdiction in respect of transactions flowing from the existence of that common market. The resultant higher transactional costs for interprovincial transactions constitute an infringement on the unity

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[64] The literature is surveyed in R. Howse, *Economic Union, Social Justice and Constitutional Reform: Towards a High But Level Playing Field* (North York, Ont.: York University Centre for Public Law and Policy, 1992).

[65] *Ibid.* at 15.

[66] *Ibid.* The importance of a federal role in the promotion of equity is also emphasized by R. Boadway, "Constitutional Design in a Federation: An Economist's Perspective" in R.L. Watts & D.M. Brown, eds., *Options for a New Canada* (Toronto: University of Toronto Press, 1991) 237.

[67] Howse, *ibid.* at 25-29.

> and efficiency of the Canadian marketplace ... , as well as unfairness to the citizen.[68]

La Forest J. was therefore calling for both negative and positive economic integration. In terms of negative integration, he drew on the argument of Finkle and Labrecque that barriers to the transferability of rights within a unified market can be considered transaction costs.[69] In terms of positive integration, the recognition that causes of action arise from the existence of the common market can be traced back to *Moran*. In that judgment, Dickson J. justified the forum's right to exercise jurisdiction over the defendant on the grounds that a manufacturer who places defective goods in the interprovincial flow of commerce ought to assume the burden of defending his or her products wherever they cause harm.[70]

These economic and political values of economic integration are beyond dispute. If taken to their logical conclusion, however, they suggest that Canada should be a unitary state. La Forest J.'s analysis appears to ignore the possibility that other economic and political values could justify a federal state. This led him to an overly broad view of the Constitution's implicit "full faith and credit" clause.

An interpretation of the Constitution consistent with the virtues of federalism would have recognized the economic and political benefits of decentralization. In economic terms, decentralization permits governments to match the provision of local public goods with local preferences.[71] Competition between provinces could also lead to the introduction of innovative social and regulatory policies which would then be adopted nationwide.[72] In political terms, decentralization provides local minorities with greater opportunities to preserve their distinctive cultural or linguistic identities.

The literature on conflict of laws is generally oblivious to these potential benefits of diversity.[73] Whereas the field of corporate law has witnessed an extensive debate about the merits of state competition for corporate charters,[74] law review articles and law reports dealing with conflict cases continue to be full of disparaging comments about "forum shopping".[75] These objections bring to mind Lord Denning's reply: "You may call this 'forum shopping' if you please, but the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service."[76] This

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[68] *Hunt, supra* note 3 at 330.

[69] P. Finkle & C. Labrecque, "Low-Cost Legal Remedies and Market Efficiency: Looking Beyond Morguard" (1993) 22 Can. Bus. L.J. 58 at 60.

[70] *Moran, supra* note 37 at 409.

[71] Boadway, *supra* note 66 at 245-46.

[72] See generally A. Breton & A. Scott, *The Economic Constitution of Federal States* (Toronto: University of Toronto Press, 1978).

[73] An exception is B. Hay, "Conflicts of Law and State Competition in the Product Liability System" (1992) 80 Georgetown L.J. 617.

[74] See R. Daniels, "Should Provinces Compete? The Case for a Competitive Corporate Law Market" (1991) 36 McGill L.J. 130.

[75] See *e.g. Prefontaine* v. *Frizzle* (1990), 71 O.R. (2d) 385 at 395, 65 D.L.R. (4th) 275 (C.A.).

[76] *Owners of the Motor Vessel "Atlantic Star"* v. *Owner of the Motor Vessel "Bona Spes"*, [1973]

comment, despite its blatant national chauvinism, indicates that jurisdictional competition may eventually lead to a better quality of justice.

Indeed, the recent evolution of the doctrine of *forum non conveniens* suggests that courts are beginning to distinguish between good and bad "forum shopping". For example, Lord Goff, in *Spiliada Maritime Corp* v. *Cansulex Ltd.*,[77] recognized that while some aspects of litigation (such as longer limitation periods) benefit one party at the expense of the other, other aspects (such as the location of witnesses and solicitors) do not share this purely distributive character.[78] According to Black, *Spiliada* implies that *forum non conveniens* "could become a doctrine which requires an explicit minimization of litigation costs."[79] By refusing to condemn plaintiffs who seek out an advantageous forum which has a real and substantial connection to the case,[80] Sopinka J.'s judgment in *Amchem* appears to confirm Black's hypothesis.

Rather than appealing exclusively to the values of economic union, the Supreme Court in *Hunt* should also have considered the virtues of decentralization. Had it done so, it might have found a way to maximize simultaneously the benefits of uniformity and of diversity. One solution to this problem will be considered below.

C. Reconciling Uniformity with Diversity: The Minimal Impairment Test

Once we recognize that there are benefits to decentralization as well as to economic union, there is a danger that courts will try to balance these benefits on a case by case basis. Such "interest balancing" is well outside the courts' institutional competence, as was recognized by McKinlay J.A. in *Quebec* v. *Ontario Securities Commission*.[81] The case involved an appeal of an order issued against a Quebec crown corporation, La Société Nationale de l'Amiante (S.N.A.), by the Ontario Securities Commission for violation of the Ontario *Securities Act*.[82] The Court rejected the appellant's argument that it should balance the interest of the Ontario government in regulating its capital markets with Quebec's interest in using the S.N.A. to implement its asbestos industry policies. McKinlay J.A. could see "no objective way of choosing which governmental interest is more compelling."[83] Although the case involved a conflict between two provincial regulatory policies, the same problem exists when provincial policy conflicts with the national interest in securing a common market.

A more principled approach to the extraterritorial effects of provincial legislation is clearly required. Such an approach can be found by reconsidering the theory of

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Q.B. 364 at 381-82, [1972] 3 All E.R. 705 (C.A.), rev'd (1973), [1974] A.C. 436, [1973] 2 All E.R. 175 (H.L.).

[77] (1986), [1987] A.C. 460, [1986] 3 W.L.R. 972 (H.L.) [hereinafter *Spiliada* cited to W.L.R.].

[78] *Ibid.* at 991.

[79] Black, *supra* note 6 at 25.

[80] *Amchem*, *supra* note 10 at 920.

[81] (1992), 10 O.R. (3d) 579, 58 O.A.C. 277 (C.A.) [hereinafter *Quebec* v. *O.S.C.* cited to O.R.].

[82] R.S.O. 1990, c. S.5.

[83] *Quebec* v. *O.S.C.*, *supra* note 81 at 590.

comparative advantage that is one of the main justifications of the economic union. For quite some time now, international trade theorists have been modelling the effects of trade barriers in the presence of market failures.[84] A market failure in the domestic economy provides an efficiency rationale for activist state measures. However, economic models invariably lead to the conclusion that, while trade barriers may improve public welfare over free trade, the more appropriate policy intervention is to directly target the source of the market failure.[85] For example, if a country is suffering from high unemployment, labour market policy is a better tool for dealing with the problem than is trade policy.

The international trade literature therefore provides a policy rationale for a "minimal impairment" test for barriers to economic mobility, similar to the *Oakes* test in *Charter* litigation.[86] Under such a test, a court would first determine whether a provincial policy was aimed at a valid objective. If so, the court would go on to consider whether the policy was the least drastic means of pursuing that objective given its impact on the economic union. In terms of the above example, if provincial trade barriers were found to be a genuine response to unemployment, the court would examine why the province did not adopt an alternative policy, such as an employment subsidy, that would have less of an effect on interprovincial trade.

A minimal impairment test would also be consistent with the political values of federalism. It would give provincial governments the latitude to pursue valid objectives, while at the same time respecting the interests of the rest of the country. If one values provincial autonomy, the analogy to the *Oakes* test, with its process of reconciling individual autonomy and government purposes for *Charter* rights violations, is particularly appropriate.

The idea of minimal impairment is more attractive than is the concept of comity that La Forest J. relied on so extensively in *Hunt*. Perhaps because the objective of the Quebec blocking statute was colourable (*i.e.* a deliberate attempt, couched in neutral language, to protect domestic manufacturers from liability), the Court never indicated whether a statute that impedes litigation in other provinces might be justifiable in other circumstances. If a case should one day arise in which an impugned statute with similar effects had the valid objective of protecting individual privacy, would such a statute also be considered a violation of comity? Or would a court uphold the legislation and merely order the defendants to attempt in good faith to make information available, permitting an adverse inference to be drawn if they fail to do so?[87] This uncertainty following *Hunt* is particularly unfortunate because, as will be shown below, the legal

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[84] Classic articles include W. M. Corden, "Tariffs, Subsidies and the Terms of Trade" (1957) 24 Economica 235; J. Bhagwati & V.K. Ramaswami, "Domestic Distortions, Tariffs and the Theory of Optimum Subsidy" (1963) 71 J. Pol. Econ. 44.

[85] For a survey, see J. Bhagwati, "The Generalized Theory of Distortions and Welfare" in J. Bhagwati *et al.*, eds., *Trade, Balance of Payments and Growth* (Amsterdam: North Holland, 1971).

[86] *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes*].

[87] This has been the solution adopted by American courts when foreign bank secrecy laws impede discovery (see *e.g.* the cases cited in Weinberg, *supra* note 58 at note 43, p. 62).

basis for a minimal impairment test of the extraterritorial impact of provincial legislation had already been established.

III. The Legal Basis for Minimal Impairment

A. The Traditional Interpretation of Territorial Limits

Prior to the Supreme Court's decision in *Churchill Falls*, the case law interpreting the words "in the Province" in section 92 of the *Constitution Act, 1867* was a morass of contradictions.[88] Two predominant approaches, however, had emerged. The first was based on a line of cases dating back to the Privy Council's decision in *Royal Bank of Canada* v. *R.*[89] The second approach was based on another Privy Council decision, *Ladore* v. *Bennett.*[90]

At issue in *Royal Bank* was the validity of an Alberta statute that required the Bank to transfer funds held in Montreal to the Alberta Treasury. These funds had been raised from bondholders outside of the province for the construction of a railway, a project for which the province was the guarantor. The railway company having defaulted on its interest payments, the rights to these funds had revested in the bondholders. The Privy Council held that since these rights were held outside the province, the statute was *ultra vires.*[91] As Sullivan notes, "[t]he result of this approach is to seal the provinces closed at their borders, at least so far as provincial legislation is concerned."[92]

The *Royal Bank* approach was followed as recently as 1976 in *Interprovincial Cooperatives Ltd.* v. *Manitoba*,[93] a case which vividly illustrates the approach's inadequacies. This case arose as a result of damage caused to Manitoba fishermen by pollution originating in Saskatchewan and Ontario. Manitoba passed a law compensating the fishermen and taking assignment of any cause of action. The law also provided that legislation in force in other provinces which permitted discharge of pollutants would not constitute a defence to such an action. When Manitoba sued, the defendants moved to strike out any references to the legislation.

The Supreme Court found the statute *ultra vires* the province. Pigeon J., writing for the majority, claimed that "[w]hile it can be said that the legislation is aimed at damage caused in Manitoba, it is not directed against acts done in the Province."[94] This view is clearly inconsistent with the basic thrust of *Moran*,[95] which had been decided just a

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[88] R.E. Sullivan, "Interpreting the Territorial Limitations on the Provinces" (1985) 7 Sup. Ct. L. Rev. 511 at 537.

[89] [1913] A.C. 283, 9 D.L.R. 337 (P.C.) [hereinafter *Royal Bank*].

[90] [1939] 3 D.L.R. 1, [1939] 2 W.W.R. 566 (P.C.) [hereinafter *Ladore*].

[91] *Churchill Falls*, *supra* note 8 at 328-29.

[92] Sullivan, *supra* note 88 at 538.

[93] (1975), [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321 [hereinafter *Ipco* cited to S.C.R.].

[94] *Ibid.* at 507.

[95] This point is made in the dissenting judgment of Laskin C.J.C., *ibid.* at 500-501.

year earlier. In that case, the Supreme Court held that the commission of a tortious act outside provincial territory did not deprive a court of jurisdiction when the damage occurred in the province. However, the fact that the Manitoba court in *Ipco* had jurisdiction did not, in Pigeon J.'s view, give the Manitoba court unlimited authority.[96]

Had the Court adopted a minimal impairment test in this case, it would have reached the opposite conclusion. The ultimate objective of the statute, as even Pigeon J. recognized, was the protection of property in Manitoba.[97] Although the statute was directed at actions outside of the province, its impact met the minimal impairment requirement. The legislation only sought to remove impediments to a basic common law tort action that may have been created by other provinces. It did not in any other manner affect the civil rights of the defendants.

The restrictive approach to provincial territorial limitations, as exemplified by *Royal Bank* and *Ipco*, was ultimately rejected by the Supreme Court in *Churchill Falls*. In that case, the Court chose instead to follow the authority of *Ladore*,[98] which involved a challenge to provincial legislation which amalgamated two municipalities and reduced the rates of interest paid to non-resident bondholders. Although the facts were very similar to those of *Royal Bank*, the Privy Council upheld this legislation on the grounds that the effect on non-residents was "a necessary incident" to the exercise of a valid provincial power.[99]

The Supreme Court extracted the "pith and substance" analysis of *Churchill Falls*, mentioned above in Part I,[100] from *Ladore*. This time, however, the analysis was applied in such a way as to render provincial legislation invalid. The Court found that Newfoundland's expropriation of the assets of a corporation situated within its borders was a colourable attempt to interfere with a power contract that gave Hydro-Quebec a favourable price on Labrador electricity.[101]

The *Ladore* approach to territorial limits has been criticized on the grounds that characterization of the "pith and substance" of provincial legislation "in the best of circumstances is a highly subjective art; often it is merely arbitrary."[102] However, this criticism can be levied against almost all decisions interpreting provincial powers in section 92 of the *Constitution Act, 1867*. The standard method of interpreting the division of powers presumes that legislation, the pith and substance of which relates to a head of power in section 92, is valid even if it has ancillary effects on a federal matter within section 91.[103]

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[96] *Ibid.* at 516.
[97] *Ibid.* at 507.
[98] *Churchill Falls, supra* note 8 at 332.
[99] *Ibid.* at 331.
[100] See text accompanying note 32, above.
[101] *Churchill Falls, supra* note 8 at 333.
[102] Sullivan, *supra* note 88 at 540.
[103] See *Starr* v. *Houlden*, [1990] 1 S.C.R. 1366, 68 D.L.R. (4th) 641.

Moreover, unlike *Royal Bank*, *Ladore* involved more than just a determination of the object of the impugned statute. As Edinger explains,

> [a] province may legislate without infringing the territorial limitation provided only two conditions are met: first, that the legislation is in relation to some provincial object; and second, that the expanded application is necessary for the attainment of the object and that there is some nexus with the province.[104]

In effect, this test is equivalent to the minimal impairment test suggested above. *Churchill Falls* therefore has already provided the legal basis for the most suitable test on policy grounds.

B. Minimal Impairment, Federalism and International Law

Churchill Falls and other cases interpreting the words "in the Province" address the problem of the appropriate method for dividing powers amongst provinces. It may be helpful to compare these cases with recent decisions addressing the related problem of the appropriate division of powers between the provinces and the federal government. These cases reveal that the minimal impairment test of *Ladore* is consistent with the approach adopted for other aspects of federalism.

The case of *General Motors of Canada Ltd.* v. *City National Leasing Ltd.*[105] is a revealing example of how the minimal impairment test has been applied to the interpretation of federal powers. In *General Motors*, the Supreme Court upheld the validity of a provision of the *Combines Investigations Act*[106] creating a civil cause of action for violations of the *Act*. This clear encroachment on provincial powers over civil rights was justified on the grounds that the provision was of limited scope and was functionally related to the rest of the *Act*. As Howse has observed, this requirement of "a close fit between the intrusion and the national purposes reflected in the regulatory scheme as a whole" is very similar to an *Oakes*-style minimal impairment test.[107]

Crown Zellerbach is not as easily reconcilable with this approach to constitutional interpretation. At issue in that case was the validity of federal legislation regulating pollution in provincial waters. The majority of the Court upheld the statute under the national concern branch of peace, order and good government, even though the intrusion into provincial jurisdiction could not be interpreted as necessarily incidental to the exercise of federal jurisdiction over pollution in extraprovincial waters. Le Dain J., however, characterized water pollution as a single, indivisible subject matter: if one province failed to regulate pollution, the others would be negatively affected.[108] This suggests that the encroachment on provincial jurisdiction created by the federal

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[104] E. Edinger, "Territorial Limitations on Provincial Powers" (1982) 14 Ottawa L. Rev. 57 at 94.

[105] [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255 [hereinafter *General Motors*].

[106] R.S.C. 1985, c. C-23.

[107] Howse, *supra* note 64 at 57.

[108] *Crown Zellerbach*, *supra* note 46 at 432.

legislation was less intrusive than that which would have resulted from another province's failure to regulate. Consequently, even though it was not necessarily incidental, the impairment was, in a sense, minimal.

General Motors and *Crown Zellerbach* both indicate that the Supreme Court has abandoned the "watertight compartments" approach to the division of powers between the federal government and the provinces. Problems such as economic regulation or environmental policy are too complex to be confined to a single head of power, and will usually encompass powers in both sections 91 and 92 of the *Constitution Act, 1867*. Similarly, there is no reason why the "watertight compartments" approach should be maintained with respect to the territorial division of powers between the provinces. The *Ladore* interpretation of these territorial limits, as even its proponents acknowledge, is likely to lead to some instances of overlapping legislation.[109] Yet, the approach's benefits in terms of both certainty and flexibility make this a price worth paying. The visibility of the costs of overlapping legislation, in terms of bureaucracy and duplication, should not obscure the equally real costs of unaddressed social and economic problems.

Finally, it is worth noting that the minimal impairment test has found favour in areas of international trade law that raise problems similar to those raised by federalism. Under Article XX of the *General Agreement on Tariffs and Trade* (GATT),[110] a country is permitted to deviate from its basic GATT obligations in order to achieve certain public policy goals. GATT panels assess these deviations by determining whether the policies in question meet the following three criteria: "i) fit the scope of the Article; ii) be 'necessary' to (or related to) the stated objectives; and iii) be non-discriminatory and non-protectionist."[111] These criteria ensure that countries will pursue their legitimate policy objectives, such as the protection of the environment, in a manner that distorts trade flows as little as possible.

C. *An Application to* Hunt *v.* T&N plc

Had the Supreme Court refrained from applying *Morguard*'s principles of comity in *Hunt*, the result would probably have been the same. The impugned statute in *Hunt* would still have failed to meet the demands of proportionality as required by *Churchill Falls*. While this failure would have led to a declaration that the *Act* was wholly unconstitutional, instead of merely constitutionally inapplicable outside the province, this distinction would have been of no practical importance. Justice La Forest indicated that the power to legislate with extraterritorial effects belongs to the federal Parliament.[112] Thus, should the *Act* be used to impede international litigation, a successful challenge to its constitutionality would be likely.

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[109] Edinger, *supra* note 104 at 95.

[110] 30 October 1947, 55 U.N.T.S. 188.

[111] P. Sorsa, "GATT and the Environment" (1992) 15 The World Economy 1 at 10.

[112] *Hunt*, *supra* note 3 at 328.

Although the British Columbia Court of Appeal found the "pith and substance" of the *Act* to be within the province,[113] La Forest J.'s judgment indicated that it was clearly a colourable attempt to protect Quebec manufacturers from liability:

> Everybody realizes that the whole point of blocking statutes is not to keep documents in the province, but rather to prevent compliance, and so the success of litigation outside the province that that province finds objectionable.[114]

Thus, a critical scrutiny of the *Act*'s objective would have led to a finding that it failed to meet the first branch of the minimal impairment test. The British Columbia Court of Appeal may have been unwilling to subject the *Act* to such scrutiny because of the political consequences of a British Columbia court declaring a Quebec statute unconstitutional.

Furthermore, even if the purpose of defending against the extraterritorial impact of American antitrust law would have been accepted as valid, the statute was "a blunt response" to the problem.[115] It contained no qualifications and gave no discretion. Moreover, federal legislation, the *Foreign Extraterritorial Measures Act*, was in place to deal with the purported objective. Thus, it is likely that the *Act* would have failed the minimal impairment requirement implicit in *Ladore* v. *Bennett*.

Conclusion

In a sense, *Hunt* was too easy a case and as a result, did not give rise to good law. The Quebec statute had such an extreme impact on extraprovincial litigation that *almost* any approach to federalism would have found it objectionable. Given that the outcome of the case is reasonable, the problems inherent in the use of the comity principle to assess the extraterritorial impact of provincial legislation are not immediately apparent. Unfortunately, cases will eventually arise, such as *Ipco*, where provincial legislation serves a valid purpose. When they do, the problems with *Hunt*'s interpretation of the scope of the Constitution's implicit "full faith and credit" clause will become apparent. Will such forms of provincial legislation be characterized as impediments to litigation outside the province? If so, will they also lead to a violation of comity?

A more traditional approach to the territorial limitations on provincial powers would have made these questions unnecessary. On the contrary, *Hunt* presented an opportunity for the Court to build on the principles established in *Churchill Falls* and *Ladore*. The Court could have clarified the test of minimal impairment largely implicit in the earlier cases. The constitutional status of *Morguard*'s principles could still have been recognized, but their scope would have been limited to the conditions for

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[113] *Ibid.* at 301-302.
[114] *Ibid.* at 327.
[115] *Ibid.* at 328.

exercising jurisdiction and recognizing and enforcing judgments of sister provinces. By extending these principles so as to encompass any provincial legislation that impacts upon litigation in other provinces, the Court has upset the balance between uniformity and diversity provided by the minimal impairment test