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TERRITORIAL RESTRICTIONS ON  
PROVINCIAL JURISDICTION UNDER  
SUBSECTIONS 92(13) AND 92(14)  
OF THE CONSTITUTION ACT

A thesis submitted to the  
School of Graduate Studies  
in partial fulfillment of  
the requirements for the  
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Ruth Sullivan, OTTAWA, Canada, 1984.



UNIVERSITÉ D'OTTAWA  
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## Résumé

This thesis explores the territorial limitations imposed by the Canadian constitution on provincial powers under subsections 92(13) and 92(14) of the Constitution Act. There are, it is argued, two sources of territorial limitation: the words "in the Province" appearing in the text of the subsections and the common law rule of Imperial constitutional law which states that colonies are incompetent to enact laws having extra-territorial operation.

In chapter one of the thesis the origin of these two limitations is investigated. The international law doctrine of territorial sovereignty is briefly examined and its reception into common law is explained. The reasons for introducing territorial limitations into the constitution are then explored in some detail.

In chapter two the relationship between territorial limitations and the rules of private international law is examined. The chapter begins with a brief account of the common law system of private international law as it developed in the nineteenth century. Attention is then focussed on recent efforts to reform this area of law in Canada and the United States and on the constitutional problems posed by these reforms.

Chapter three examines the interpretation of territorial restrictions in Canada and the United States. Section one looks at the case law interpreting the common law rule of colonial extra-territorial incompetence and

notes the tendency of the Privy Council to move from a strict to a more liberal construction. Section two traces the parallel history of the American case law dealing with territorial restrictions on the jurisdiction of the states. In sections three and four the Canadian cases interpreting the words "in the Province" are examined with special attention to two recent decisions of the Supreme Court of Canada. The weaknesses and inconsistencies of the Canadian approach to territorial restrictions are documented and the Canadian tendency to rely on the rules of private international law to resolve constitutional problems is criticized. In section five a different approach, based on developments in American case law, is suggested.

Chapter four deals with the territorial restrictions on judicial jurisdiction and the recognition of foreign judgments. The case law on provincial service ex juris rules is examined and a test of validity is proposed. The chapter ends with a brief consideration of the virtues and dangers of introducing a full faith and credit requirement into Canadian law.

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## Introduction

It is well established in Canadian constitutional law that the legislature of a province does not have jurisdiction to enact laws respecting property or civil rights outside the province. There is a leading case in confirmation of this point, Royal Bank of Canada v. The King,<sup>1</sup> and one finds in the case law numerous dicta referring to this basic limitation on provincial legislative competence. It is also clear that the jurisdiction of the courts in each province is similarly subject to territorial restrictions, for some purposes at least and to some degree. Although the case law on this topic is thin and inconsistent, the existence of the restrictions has never been doubted.

Until quite recently, Canadian courts have shown little inclination to tackle the difficulties inherent in the interpretation and application of territorial restrictions of this sort. Most constitutional challenges to provincial legislation can be resolved on some safer ground than territoriality, for a provincial statute with extra-territorial reach is apt to intrude on some heading of section 92 of the Constitution Act or to offend section 121.<sup>2</sup> Challenges to the jurisdiction of the courts typically rely on common law principles of interpretation and the constitutional issue is never reached. In both areas the problem of determining the territorial reach of provincial jurisdiction in particular circumstances has traditionally been solved by reference to the rules of

private international law.

During the 1970's a number of cases came before the Supreme Court of Canada which exposed serious inadequacies in the traditional approach. The best known of these, and the only one in which the constitutional issue was fully argued, was Interprovincial Co-operative Ltd. and Dryden Chemicals Ltd. v. The Queen.<sup>3</sup> Prior to Dryden the Court gave judgment in Moran v. Pyle National (Canada) Ltd.<sup>4</sup> and Bank of Montreal v. Metropolitan Investigations and Security (Canada) Ltd.;<sup>5</sup> Dryden was followed by R. v. Thomas Equipment.<sup>6</sup>

All four of these cases were concerned with problems in private international law. Moran v. Pyle dealt with the jurisdiction of a provincial court to hear an action for damages founded on facts that had occurred in part outside the borders of the province. The Metropolitan Investigation case dealt with the recognition to be given an order by the court of a sister province. These were cases under subsection 92(14), "The Administration of Justice in the Province". Dryden and Thomas Equipment both considered whether a particular statute applied to a dispute whose facts were situate in more than one province. They raised the issue of provincial competence under subsection 92(13), "Property and Civil Rights in the Province".

Each of these cases poses difficult and complex questions concerning the proper relation between the constitutional restrictions on provincial jurisdiction on

the one hand and the operation of private international law on the other. One purpose of this paper is to investigate this relationship and in particular to explore the extent to which the territorial restraints imposed by the constitution inhibit legislative attempts to reform private international law. A second purpose of this paper is to suggest a set of values and a basic approach to be used by the courts in interpreting and applying the territorial limitations on provincial powers.

In an effort to capture the constitutional values embodied in these limitations, chapter one of this paper investigates their origins in pre-Confederation law. Chapter two looks at the historical development of private international law and the directions modern reform of that law has taken, especially in the United States. Chapter three then examines the interpretation of territorial restrictions offered by various courts and their response to legislative attempts to reform the choice of law rules of private international law. The response of the Supreme Court of Canada in the Dryden case is critically assessed and a somewhat different response, based on developments in American case law, is suggested. Chapter four, finally, considers the territorial limitations on judicial jurisdiction and the recognition of foreign judgments.

## Chapter 1. Origins

Constitutional restraints on the territorial reach of provincial jurisdiction originate in two sources. The first is the common law rule respecting British colonies: under Imperial constitutional law, colonial courts and legislatures are incapable of exercising extra-territorial jurisdiction. The second is the words "in the Province" appearing in section 92 of the Constitution Act. In this chapter the origin of the common law rule and the impetus behind the introduction of the words "in the Province" will be examined. My purpose in undertaking this examination is to explore the assumptions underlying the introduction of these restrictions into constitutional law -- to discover what values they were thought to serve and what practical objects they were intended to achieve. Clearly the interpretation of constitutional restrictions by contemporary courts cannot be governed by the conceptions of the nineteenth century. The courts must respond to fundamental changes in political outlook and in the economic life of the country. If this response is to be coherent and consistent, however, the basic rationale of the restrictions must be clearly understood. For this purpose a study of origins can be useful.

### 1. Nineteenth Century Assumptions: the Doctrine of Territorial Sovereignty

The idea that jurisdiction is territorially limited must ultimately be traced to the international law doctrine of territorial sovereignty. This doctrine has a

long and rich history, beginning with the work of the French scholar Bodin in the sixteenth century. In Six livres de la république,<sup>7</sup> published in 1576, Bodin sought to justify the secularization and centralization of political power in France. The theory of sovereignty he formulated for this purpose proved an extremely powerful idea. As elaborated by subsequent scholars, it supplied a theoretical basis for the development of the modern state and the premise on which modern international law was founded. It also furnished some key assumptions underlying the theory of legal positivism. In short, it exercised a profound influence on British and American conceptions of jurisdiction during the nineteenth century.<sup>8</sup> A proper appreciation of the territorial restrictions on the provinces must begin with an understanding of this doctrine.

The basic premise of Bodin's theory is shortly stated:<sup>9</sup> every sovereign has absolute, exclusive and perpetual jurisdiction over the territory comprising the state. As Story explains, "it is an essential attribute of every sovereignty that it has no admitted superior, and that it gives the supreme law within its own dominions."<sup>10</sup> The state exercises jurisdiction in the broadest sense over all that is found within its borders. This includes persons who are present there, whether permanently or temporarily, whether subject or alien, and it includes all real and personal property situate there. This is the internal aspect of sovereignty, involving the

relation between the state and its territory. The external aspect of sovereignty is concerned with the relations among states. Since sovereignty is absolute, all sovereign states must be equal and what is legal or illegal for one must be equally so for the others. Then, since sovereignty is exclusive, the jurisdiction of each must be strictly confined to its own borders. Any attempt by a state to assert jurisdiction over persons or things situate in the territory of another would offend the principles of equality and exclusivity and violate the sovereignty of the other.

As the principles of territorial sovereignty were elaborated in the seventeenth and eighteenth centuries, a number of refinements were introduced which permitted states to exercise certain kinds of extra-territorial jurisdiction.<sup>11</sup> Under the law of the sea, for example, coastal states could exercise a limited jurisdiction over a portion of the high seas adjacent to their shores. The law of conquest permitted the annexation of new territory that did not already form part of the dominions of another state. States were also permitted to control their diplomats in foreign countries and their ships on the high seas. Under the doctrine of personal allegiance, a sovereign could impose duties on his subjects wherever they might be, although such duties were not enforceable unless the subject was present on domestic soil. Finally, under the theory of comity a sovereign was obliged in certain circumstances to apply the law of another state

to persons or things within his own dominions. In what circumstances this obligation arose was determined by the rules of private international law.

These international law rules were introduced into the municipal law of Britain and the United States through the doctrine of adoption. The first authoritative exposition of this doctrine appears in Blackstone's Commentaries, in a passage widely quoted by British and American courts:

[T]he law of nations ... is here adopted in its (sic) full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule. (12)

To the authority of Blackstone may be added that of Lord Talbot,<sup>13</sup> Lord Hardwicke,<sup>14</sup> and especially Lord Mansfield, who declared on many occasions that "the law of nations [is] in full force in these Kingdoms."<sup>15</sup> Although some judgments of Lord Mansfield suggest that Parliament itself was bound by international law, given its role under the British constitution this view was impossible to sustain. In the end the courts were content to assert a simple rule of construction: Parliament is presumed to legislate in accordance with international law, but this presumption is rebuttable by clear words to the contrary.

In principle, then, the Imperial Parliament was not subject to territorial restrictions of any sort, save those which it permitted or imposed on itself. In practice, the rule of construction rehearsed above furnished an effective check on all but the most explicit of extra-

territorial ambitions. The result is succinctly summarized by Lord Russell of Killowen in R. v. Jameson, decided in 1896:

If there be nothing which points to a contrary intention, the statute will be taken to apply only to the United Kingdom....It will be taken to apply to all the persons in the United Kingdom...including foreigners who during their residence there owe temporary allegiance to Her Majesty. And, according to its context, it may be taken to apply to the Queen's subjects everywhere, whether within the Queen's dominions or without. One other general canon of construction is this -- that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect of acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and rights of all other sovereign powers outside its own territory. (16)

In the United States, the principles of territorial sovereignty were similarly received into domestic law by adoption. This doctrine was applied by state and federal courts alike<sup>17</sup> and throughout the nineteenth century it was universally understood that the jurisdiction of the states was territorially limited.<sup>18</sup> In the words of one state court, any effort by a state to assert jurisdiction beyond its borders would be "wanting in respect to the sovereignty of other States, and violative of that comity happily now ... subsisting between the civilized nations of the earth."<sup>19</sup>

## 2. The Constitutionalization of the Doctrine of Territorial Sovereignty

The principle that jurisdiction is territorially limited was well established in English law by the nineteenth century. The origin of the principle was clearly understood and so was its purpose: as a member of the community of nations, Britain was obliged to respect the sovereignty of its peers. What is not immediately clear is how and why this common law principle became a constitutional limitation on the powers of colonies and provinces. If the Imperial Parliament could disregard territorial limitations in suitable circumstances, why was a similar power not afforded to the colonies? For what reason were the words "in the Province" added to the provisions of the Constitution Act setting out provincial powers? Is there anything in the situation of colonies of provinces that justifies this difference in constitutional capacity? These are difficult questions and any attempt to answer them now must be speculative to a degree. However, the available historical materials do point to certain answers and these answers offer insight into the purpose and scope of the rules.

### 2.1 The Common Law Rule of Colonial Extra-territorial Incompetence

Much of what is known concerning the origin of the territorial restriction on colonies<sup>20</sup> is due to the scholarship of D.P. O'Connell.<sup>21</sup> Professor O'Connell has shown that the rule of colonial extra-territorial incompetence was first formulated by the law officers attached

to the Colonial Office during the early years of the nineteenth century. In advising the Imperial government on its day to day administration of the Empire, the law officers wrote formal opinions for Cabinet, carried on official correspondence with colonial governors and gave informal advice on all matters concerning the proper exercise of executive and legislative power by colonial agencies.<sup>22</sup> In this way they exerted considerable influence on the development of Imperial constitutional law. Their views on territoriality were accepted by Parliament and were later confirmed by the courts toward the end of the century.

Professor O'Connell suggests that the rule of colonial extra-territorial incompetence first crystallized in 1838 when Lord Durham, Governor of Lower Canada, issued an ordinance authorizing the transport of eight rebels to the Island of Bermuda for an indefinite period of exile.<sup>23</sup> This ordinance was disallowed on the advice of the Colonial Office because it authorized the exercise of executive power beyond the borders of the colony. When the issue was discussed in Parliament, the Attorney General explained that the legislative act of Lord Durham "could not have power or operation beyond the Province of Lower Canada."<sup>24</sup> After this early incident, the Colonial Office regularly acted on the assumption that "a colonial legislature is in the nature of its grant of power territorially limited."<sup>25</sup>

That this assumption was shared by Parliament is evident from the series of statutes it enacted to overcome

the colonial disability. In 1849, for example, it passed the Admiralty Offences (Colonial) Act enabling colonial courts to try persons under local admiralty law for acts committed outside the territorial waters of the colony.<sup>26</sup> The Colonial Prisoners Removal Act, 1869 permitted colonies, "with the sanction of an order of Her Majesty in Council," to enter bilateral agreements for the transport of convicted persons from one colony to the other for the purpose of "undergoing ... the whole or any part of their punishment."<sup>27</sup> There are numerous examples of this type of legislation relating to both public and private law matters.<sup>28</sup> Some presuppose extremely narrow limits on colonial powers. In 1860, for example, it was thought necessary to have a special provision so that a colonial court could apply its local law respecting murder to persons who inflicted fatal injuries within the colony but whose victims were beyond colonial borders when they actually died.<sup>29</sup>

Although Parliament was quick to accept the views of the Colonial Office, judicial acceptance was slow in coming. Beginning in the 1870's it is possible to find judicial references to the special limitation on colonial powers.<sup>30</sup> However, these early pronouncements are inconsistent and inconclusive.<sup>31</sup> The exact nature of the limitation on colonies remained unclear until 1891 when the Privy Council rendered its judgment in MacLeod v. Attorney General of New South Wales.<sup>32</sup> The issue in MacLeod was whether the defendant could be convicted of bigamy under a New South Wales statute enacted in the

following terms: "whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place" is guilty of bigamy. The defendant first married in New South Wales. Later, although the wife of his first marriage was still living, he married a second time in the United States. This action brought him squarely within the language of the statute, or so it would appear. His conviction was set aside, however, on the grounds that the statute could not be construed to apply to acts performed outside the territory of New South Wales: "if that construction were given to the statute, it would follow as a necessary result that the statute was ultra vires of the Colonial Legislature to pass."<sup>33</sup> Such a construction "would be inconsistent with the powers committed to a colony.... Their jurisdiction is confined within their own territories."<sup>34</sup>

There can be no doubt that Lord Halsbury intended to assert and did assert a rule of constitutional law in the passages quoted above.<sup>35</sup> In a series of cases following MacLeod the Privy Council applied the rule narrowly, so as to take from it much of its sting. However, no Board has ever doubted the existence of the rule<sup>36</sup> and it continues to bind the remaining colonies of the British Empire.<sup>37</sup>

Professor O'Connell argues that the rule asserted by Lord Halsbury was the final product of two unfortunate errors committed by the law officers of the Colonial

Office. The first was their failure to distinguish the limitations imposed by international law from those imposed by imperial constitutional law. The second was their tendency to enlarge the limitation beyond what was required under international law so that in the end colonies were unable to impose obligations on their own residents abroad even though such legislation was for the peace, order and good government of the colony. In Professor O'Connell's view, this result "is devoid of any theoretical or practical justification."<sup>38</sup>

Certainly there is much careless language in the early opinions of both the law officers and the courts, and it may be that the rule asserted by Lord Halsbury owes its existence to fortuitous confusion. There is another explanation, however, that makes sense of the rule and is supported by the case law after MacLeod. On this alternative approach, the rule is understood as an incident of the general incapacity of colonies to participate in international relations.<sup>39</sup> Although colonies might be granted extensive, even sovereign control over their internal affairs, the power to conduct external affairs was uniformly withheld.<sup>40</sup> This point is forcefully illustrated by the position of the self-governing Dominions just prior to World War I. By this time nearly all the powers of executive government had been granted to the Governors of Dominions and were exercised by them on the advice of local ministers. The one exception to this arrangement was the power to conduct external affairs. This power consists largely of a number of Crown

prerogatives, including the power to declare war, dispatch embassies to foreign countries, negotiate political treaties, annex new territory and the like. These powers were not granted to Dominion Governors (still less to the Governors of colonies) because, as A.B. Keith explains,

these prerogatives cannot belong to any but a completely sovereign power, and ... their concession would convert the Dominions into independent entities. The essence of a unified Empire in any form is that for foreign affairs there can be only one voice, and these prerogatives therefore cannot be sought if the unity of the Empire is to be maintained.<sup>41</sup>

The practice of retaining the external affairs power in Imperial hands, even in the case of Dominions, is reflected in section 132 of Canada's Constitution Act, which provides:

The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

This section contemplates that any treaty affecting Canada would be concluded by the Imperial government.

It is submitted that the incapacity of colonies to engage in international relations necessarily entailed their incapacity to assert extra-territorial jurisdiction. Of necessity, acts that affect persons or property outside the territory of the state operate in the international arena. Before taking such acts a state must gauge the likely response of the international community. In a given case it may be necessary to weigh the advantages to

be had from violating the limits imposed by international law against the possible disadvantages:-- loss of prestige, perhaps, or the deterioration of relations with a particular state. This is essentially a matter of foreign policy and, as Keith suggests, no colony could be permitted to dictate the foreign policy of the Empire or interfere with it in any way. From the point of view of logic, then, the extra-territorial incompetence of colonies was clearly justified.

There is a practical consideration here as well, flowing from the status of colonies at international law. Because colonies were subordinate entities, they were not recognized as distinct persons by the international community but were treated as part and parcel of the mother country.<sup>42</sup> This meant that any extra-territorial jurisdiction exercised by a British colony would be imputed to the United Kingdom; and if this exercise offended international law, its government alone would be responsible. It is not surprising that a government answerable for violations of the law should reserve to itself the possibility of committing them. From a practical point of view, the rule was clearly necessary.<sup>43</sup>

The account of colonial extra-territorial incompetence offered here is supported by the reasoning of Strong, C.J. in Re Criminal Code Sections Relating to Bigamy,<sup>44</sup> the first case on extra-territoriality to come before the Supreme Court of Canada. The question referred to the Court in this Reference was the validity of a provision making it an offence to leave Canada for the purpose of

contracting a bigamous marriage.<sup>45</sup> In considering whether the Dominion had been granted the power to legislate with extra-territorial effect, Strong, C.J. reasoned as follows:

As the Imperial Parliament is a sovereign legislature I do not for a moment dispute the proposition that it may confer upon a colonial legislature powers in this respect co-equal with its own....The question to be dealt with here is...whether such authority has actually been conferred.

...

I am clearly of the opinion that no such power was conferred.

...

[R]easons of good policy, national safety and convenience all concur in favour of retaining all matters of legislation which may in any way tend to conflict with the rights or claims of foreign nations in the hands of the Imperial Government. (46)

Strong, C.J. was the only judge of the Court to conclude that the impugned provision was ultra vires. The majority upheld it notwithstanding any extra-territorial effect it might have. However, the reasons offered by the majority are instructive. They did not deny that colonial legislatures are incompetent to enact laws having extra-territorial operation, but they refused to apply this principle to the Canadian Parliament on the grounds that Canada already enjoyed the status of a sovereign state or at least a semi-sovereign state.

Gwynne, J. expressed the following view:

I cannot fail to see the manifest intention of the framers of our constitution to have been to give to Her Majesty's subjects constituting the people of Canada, a political status infinitely superior to that of a colony. (47)

He had always "regarded this new creation of the Dominion

of Canada as a mode of introduction, as it were, into the family of nations."<sup>48</sup> Girouard, J. added that "the semi-sovereign position of the British self-governing colonies has been recognized even by authorities on international law."<sup>49</sup>

Their Lordships, writing in 1897, appear to be jumping the gun: Canada did not attain the status of a sovereign state until some years later, after the close of the First World War.<sup>50</sup> The assumption underlying their reasoning is nonetheless correct: only sovereign states have the power to assert extra-territorial jurisdiction. Colonies lack this power because they lack external sovereignty and the conduct of their external affairs rests entirely in the hands of the Imperial government.

This explanation of the rule is also supported by the reasoning of the Privy Council in Croft v. Dunphy,<sup>51</sup> decided in 1931. In that case the Board upheld an enactment which authorized Canadian customs officers to arrest ships in international waters. Lord Macmillan explained:

Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate...their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State. (52)

The sovereignty of Canada was officially confirmed by the Statute of Westminster, 1931. Section 3 of this Act "declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation." Because the provinces of Canada have

never obtained the status of sovereign states, they continue to be bound by the constitutional rule.<sup>53</sup> When endowed by the Imperial Parliament, the legislatures of all provinces were "colonial" in the sense employed here. They were given the powers of internal sovereignty -- jurisdiction over the persons and things within their territory -- but the powers of external sovereignty were withheld. Nothing in the series of British North America Acts or any other enactment of the Imperial Parliament has enlarged provincial powers in this respect. Section 3 of the Statute of Westminster applies to Dominions alone.<sup>54</sup> Nor have the provinces acquired external sovereignty through a process of evolution.<sup>55</sup> The progress toward independence which provinces once shared with other colonies of the Empire was permanently arrested when they became part of the federation of Canada.<sup>56</sup>

The continuing application of the common law rule to Canadian provinces is potentially of considerable significance. It could be relied on by the courts to check provincial claims to jurisdiction whenever the matter in question affects Canada's relations with other nations. On at least one occasion the Supreme Court of Canada has taken this approach. In Reference re Offshore Mineral Rights of British Columbia, the Court rejected British Columbia's claim to jurisdiction over the natural resources of the continental shelf on the following grounds:

There are two reasons why British Columbia lacks the right to explore and exploit and lacks legislative jurisdiction:

(1) The continental shelf is outside the boundaries of British Columbia, and

(2) Canada is the sovereign state which will be recognized by international law as having the rights stated in the Convention of 1958, and it is Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention.

There is no historical, legal or constitutional basis upon which the Province of British Columbia could claim the right to explore and exploit or claim legislative jurisdiction over the resources of the continental shelf.<sup>57</sup>

The reasoning of the Court in this passage has been criticized by a number of commentators, who suggest that the Court failed to appreciate the distinction between international and municipal law and in so doing ignored the principle established in the Labour Conventions case.<sup>58</sup> In my view this criticism is not justified. When international law confers rights on the sovereign state of Canada, it clearly does not determine the distribution of those rights within Canada; this is a matter of Canadian constitutional law. No one could seriously challenge this proposition, and the failure of the Court to rehearse it is hardly evidence that it failed to take the point. In the passage quoted above the Court addresses the precise question put to it: under the Canadian constitution do the rights in the continental shelf belong to Canada or to British Columbia? The Court's answer is based on a number of considerations and although these are not spelled out as

clearly as one might wish, they are nonetheless considerations that pertain to Canadian, not international law.

The first is the fact that when Canada became a sovereign state, the Crown prerogatives constituting the external relations power were vested in the Governor General of Canada, to be exercised on the advice of federal ministers. The constitutional anchor for this allocation is the residual power clause of section 91. In the two propositions quoted above the Court implicitly finds that the rights conferred on coastal states over the continental shelf are no different in kind from other forms of extra-territorial jurisdiction conferred on sovereign states by international law -- the conquest of new territory, the dispatch of troops to foreign soil, the establishment of consulates abroad and so on. In each case, the state is permitted to act outside its territorial boundaries in stipulated circumstances for a certain purpose and subject to certain obligations. This extra-territorial jurisdiction belongs to the federal government rather than the provinces because it alone has extra-territorial competence and it alone has the power to conduct Canada's external affairs.

The second consideration mentioned by the Court is the absence of any provision or principle in the Canadian constitution that justifies the provincial claim. It has been suggested that because the right to explore and exploit natural resources is a property right, it should belong to the provinces under section 109 (or the counterpart of this section in other Constitution Acts). As

construed by the Court, however, this section refers to territory over which a province exercised internal sovereignty upon its entry into Confederation. Thus, in order for British Columbia to succeed it had to show that the continental shelf formed part of its territory in 1871. The underlying idea here is explained by Barwick, C.J. in the Australian case of Bonser v. La Macchia:

I think it is essential to bear in mind that when colonies were formed all that relevantly occurred was that a specified land mass was placed at the outset under governorship, and later, under the control of a legislature. The instruments setting up the colonies did not in terms include as territory and subject to colonial governorship any part of the bed of the sea or the superincumbent waters. The progression was from the condition of governorship with near absolute powers to a state of self-government with plenary powers to make laws for the peace, order and good government of that land mass. This was the utmost to which the colonies ever attained. (59)

The purpose of section 109 was to ensure that the prerogatives exercised by the provinces over their land mass remained vested in the Crown in right of the province and were not transferred to Canada save as expressly provided in the Act. These powers were all incidents of internal sovereignty. Because the right to explore and exploit the resources of the continental shelf is an incident of external sovereignty, it is outside the scope of the section.

There is no inconsistency between the reasoning of the Court in the 1967 Reference and the principle asserted in the Labour Conventions case.<sup>60</sup> That case decided that where the exercise of the external affairs,

power impinges on the internal affairs of Canada, as it does when the government seeks to enact a domestic labour code, the jurisdiction to carry out the scheme is determined in the usual way under the relevant provisions of the Constitution Act. At no point do their Lordships doubt the competence of the federal government to bind the sovereign state of Canada by entering international agreements nor is it suggested that the obligations conferred on Canada in this way might become a provincial responsibility. It is assumed throughout that the external affairs power is exclusively federal and the sole issue is the distribution of the powers of internal sovereignty. Since the right to explore and exploit natural resources outside the territorial boundaries of Canada is an incident of external sovereignty and its exercise does not impinge on the internal affairs of Canada, the principle asserted in the Labour Conventions case does not apply.

The reasoning of the Court in the 1967 Reference has a number of applications. It might be relied on, for example, to strike provincial legislation which obliged parent companies situate in the province to order their foreign subsidiaries to act in a certain way or which directed provincial courts to refuse recognition to judgments rendered by a particular foreign state. It might be relied on to justify treating international problems differently from interprovincial ones. For example, a rule allowing service ex juris in particular circumstances might be constitutionally permissible against

persons resident elsewhere in Canada but not against persons in a foreign country. These possibilities will be considered in more detail in chapters three and four.

## 2.2. "In the Province"

The other source of territorial limitations on provincial powers is the language of the Constitution Act. While this Act is an "ordinary" enactment of the British Parliament, the basic scheme of federation was largely conceived in Canada and the Act itself was based on materials prepared by representatives of the federating provinces at a series of conferences held at Charlottetown, Quebec and London. At the first of these, the broad principles of the proposed federation were discussed and it was agreed that the powers of the central government would be "general" while those of the provinces would be restricted to local matters.<sup>61</sup> In keeping with this plan, both the Quebec Resolutions of 1864 and the London Resolutions of 1866 divided legislative jurisdiction between the "General Parliament", with jurisdiction "respecting all matters of a general character", and "the Local Legislatures" to whom "all matters of a private or local nature" were reserved.<sup>62</sup> Nowhere in either set of Resolutions did the expression "in the Province" appear.

It is clear that throughout the period in which these Resolutions were formulated and debated the focus of concern was on the allocation of power between the central and provincial governments. The possibility of

conflicts within areas reserved to the provinces was not much considered.<sup>63</sup> This oversight can be explained in two ways. First, it was assumed that matters transcending purely local interest would be dealt with by the central legislature, which would enact a uniform law. If the same law applies everywhere, the possibility of conflicts does not arise. This aspect of the proposed constitution was emphasized by Sir John A. MacDonald in his speech to the Parliament of Canada in 1865:

The criminal law too... is left to the General Government.... It is one of the defects in the United States system, that each separate state has or may have a criminal code of its own.... But under our Constitution we shall have one body of criminal law, based on the criminal law of England, and operating equally throughout British America. (64)

It was also assumed that in the areas of property and civil rights the common law provinces would quickly agree to the unification of their laws. A provision for unification was included in both the Quebec and London Resolutions in terms substantially identical to section 94 of the Act. Although this section has proved a dead letter, the prospect of unification was regarded with optimism in 1865. Thus, Sir John A. MacDonald observed:

The 33rd provision is of very great importance to the future well-being of these colonies. It commits to the General Parliament the 'rendering uniform all or any of the laws relative to property and civil rights in [common law Canada]'.... The great principles which govern the laws of all the provinces, with the single exception of Lower Canada, are the same, although there may be a divergence in details; and it is gratifying

to find, on the part of the Lower Provinces, (sic) a general desire to join together with Upper Canada in this matter, and to procure, as soon as possible, an assimilation of the statutory laws and the procedure in the courts, of all these provinces. (65)

Even Quebec, it was supposed, would join in.

The London Resolutions were presented to the Imperial government in December of 1866. At this point Lord Carnarvon, Secretary of State for the Colonies, took over the leadership of the Conference. His task was to prepare a bill for submission to Parliament based on the Canadian proposals but also acceptable to the Imperial government.<sup>66</sup> During a six week period some seven drafts were produced but the most important for our purposes was the first.<sup>67</sup> It introduced a variety of expressions restricting the scope of the subjects assigned to the provinces by the London Resolutions. The power of "Direct taxation", for example, became in the first draft "Direct Taxation within the Province...for Provincial purposes"; "Borrowing money on the Credit of the Province" became "The borrowing of money on the sole Credit of the Province for Provincial Purposes"; and the words "in the Province" were added to several headings of provincial power including "The Administration of Justice" and "Property and Civil Rights". In the drafts which followed most of these restrictive expressions were retained, although in the case of "Property and Civil Rights" the words "in the Province" were dropped and did not reappear until the final draft.

The meagre records of the Conference give no indication of what significance the participants attached to these modifications in the language of the Resolutions. It is likely, however, that the addition of the words "in the Province" was regarded as nothing more than a formal statement of the obvious -- a stylistic clarification rather than a substantial change in the position of the provinces. When the Canadian federation was put together, the experience of Lord Durham was already thirty years in the past. By this time the territorial limitations on the power of colonies was well established in the minds of both colonial administrators and the Imperial government. More to the point, perhaps, it is difficult to imagine a federation in which the constituent members, each with identical subject matter jurisdiction, are not subject to territorial restraints of some sort. The point is well illustrated by the American precedent, with which the authors of Canada's constitution were naturally familiar. By the middle of the nineteenth century the territorial limitation on the jurisdiction of American states was a well established part of the American constitution; and this limitation existed despite the absence of express words to that effect in the constitutional documents of the several states and the United States.

For many years the leading case on territorial restrictions in the United States was Pennoyer v. Neff,<sup>68</sup> decided by the Supreme Court of the United States in 1878. The issue in the case was the validity of an ex

parte judgment rendered by an Oregon court. The defendant was not a resident of Oregon and he had been notified of the action against him by constructive service outside the state. Although this form of service was authorized under Oregon's Code, the Court held that it was unconstitutional and that the judgment was absolutely null. The opinion of the majority was written by Mr. Justice Field who explained this holding on the basis of "two well established principles of public law" respecting the jurisdiction of independent States:

The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.... The other...is that no State can exercise direct jurisdiction and authority over persons or property without its territory.... The several States are of equal dignity and authority; and the independence of one implies the exclusion of power from all others. 69

The states of the American federation resemble the independent states of the international community in two important respects: each is of "equal dignity" and each has exclusive jurisdiction over its own territory in respect of matters not assigned to the federal level of government. As Field, J. points out, if these principles of equality and exclusivity are to be respected, no state can be permitted to exercise jurisdiction over persons or property beyond its borders.

The independent states of the international community observe territorial restrictions because generally speaking it is in their interest to do so. However, independent states do not lack the capacity to assert extra-territorial jurisdiction. In given circumstances, where the interest of a state in violating international law outweighs its interest in observing it, there is nothing to stop a state from asserting jurisdiction over persons or property situate on foreign soil. Implicit in Pennoyer v. Neff is the recognition that in a federation respect for the sovereignty of one's fellows cannot depend on self-interest alone. The principles of equality and exclusivity are essential features of the basic constitutional arrangement and so therefore is the corollary of these principles, the territorial limitation on jurisdiction.

It is submitted that this reasoning applies equally to the Canadian federation of provinces and accounts for the inclusion of the words "in the Province" in section 92 of the Constitution Act. The provinces of Canada, no less than the states of America, are of equal dignity and each is vested with identical exclusive jurisdiction over the subjects listed in section 92. This jurisdiction is necessarily confined to matters "in the Province" because any other arrangement would permit one province to violate the internal sovereignty of others.

This submission has a number of implications which will be explored at length in chapters three and four. At this point its relevance to contemporary problems in constitutional law may be illustrated by a short example.

Suppose that an accident occurred in the international waters adjacent to British Columbia and a court was asked to decide whether the victims could claim damages as provided by a British Columbia statute.<sup>70</sup> Under the principles of territorial sovereignty, the fact that the accident occurred outside the borders of British Columbia is not the controlling consideration. There is no magic in geographical boundaries: the point of the restriction is to ensure that the sovereignty of other states is respected. Thus a court could properly apply British Columbia's law in these circumstances if its application did not interfere with the jurisdictional rights of another province.

#### Conclusion

This study of the origins of territorial restrictions on provincial jurisdiction was undertaken in the belief that understanding the origins of a rule can aid in its interpretation. It must be acknowledged, however, that in the years since Confederation Canadian courts have not relied on these materials in their application of the rule. In order to appreciate what the courts have in fact done it is necessary to know something about private international law and its relation to the doctrine of territorial sovereignty. This is the subject of chapter two.

## Chapter 2. Private International Law

The number of Canadian cases that address the issue of territorial restrictions on provincial jurisdiction is surprisingly small. In an ordinary week Canadian courts hear dozens of cases in which some legally significant fact occurred in or is connected to a jurisdiction other than the forum. If the forum's law is applied to resolve such disputes, some degree of extra-territorial operation is necessarily entailed. Consider, for example, the following commonplace facts. O, a domiciliary of Ontario, has borrowed money from Q, a domiciliary of Quebec, while temporarily living in the latter province. O has failed to repay the money on the appointed day and he later returns to Ontario. To recover his money, Q must sue him there. Suppose that under Quebec's law this contract is enforceable but the Ontario court dismisses the suit because, under Ontario law, O lacked the capacity to borrow. The question that must surely occur to Q in these circumstances is why does Ontario law apply. After all, the contract was made in Quebec and both parties were living there at the relevant time. Is this not an instance in which the law of a province has been allowed to operate extra-territorially, contrary to the constitutional rule?

Although this question is an obvious one, it is almost never asked. The reason is that cases of this sort are typically resolved by the common law rules of private international law. Under these rules the capacity of a person to bind himself by contract is governed by the law of

his domicile.<sup>71</sup> Ontario's law applies in the example above because O was domiciled in Ontario at the relevant time. This, of course, is not a complete answer to Q's question, for there is no self-evident reason why the rules of private international law must determine the constitutional result. The explanation of why they generally do so, in Canada at least, lies in the historical development of these rules.

#### 1. The Nineteenth Century System of Private International Law

We saw in chapter one that the constitutional rule limiting provincial jurisdiction was derived from the doctrine of territorial sovereignty. This doctrine presupposes a tidy, checkerboard world in which persons and property are subject to the jurisdiction of one sovereign only for a given purpose at a given time. The basic restriction of the doctrine, captured in the constitutional rule, is addressed to the sovereigns of this world: they are forbidden to exercise jurisdiction outside the borders of their own dominions. However, the mass of men who marry, commit torts or otherwise involve themselves in legally significant relations do so with small regard to territorial boundaries. Clearly some way must be found to fit these untidy legal relations into the ideal checkerboard world. This was the function of private international law. Its rules determined which sovereign had jurisdiction, whose law was to apply and whether the resulting judgment could be enforced in the other squares.

The private international law of both Britain and the United States during the nineteenth century was derived to a very large extent from the work of the Dutch scholar Huberus.<sup>72</sup> In a text first published in 1689, entitled De Conflictu Legum,<sup>73</sup> Huber set out in a few short pages a remarkably comprehensive system of rules for resolving conflict of laws disputes. Included were rules on contracts, torts, marriage, succession, the ownership of property and the recognition of foreign judgments. The chief importance of Huber's work, however, lay in his theory of comity, set out in the opening pages of the text. This theory was formulated to reconcile the system of conflict rules with the principles of territorial sovereignty.

In the introductory pages of De Conflictu Legum Huber explains that his system is founded on three maxims.

(1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond.

(2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.

(3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects. (74)

Huber's first two maxims restate the basic principles of territorial sovereignty. Given the content of these principles, it would appear that conflict among states is avoidable only if the jurisdiction of each is strictly confined to its territory. However, as Huber points out, this method of avoiding conflict produces serious diffi-

cultures for persons who move from one state to another or engage in interstate transactions:

Although the laws of one nation can have no force directly within another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law. And that is the reason for the third maxim. (75)

Under the third maxim, introducing the theory of comity, this problem is resolved. Comity obliges State A to apply the local law of State B to transactions coming before its courts when instructed to do so by the rules. This obligation is subject to a single proviso: State A need not apply the law of State B where to do so would jeopardize some important interest of its own.

Under comity, the law of State B is given an extra-territorial operation. This does not violate the sovereignty of State A, however, because the law of B is applied solely at the instance of A and by virtue of its consent. B has no more power to extend its laws to A, ex proprio motu, than it has to send soldiers to be billeted there or fishermen to exploit its waters. A may consent to such intrusions, tacitly under the customary rules of international law or expressly by treaty, but in the absence of A's consent, B can do nothing.

It is important to recognize that Huber's solution to the problem of private law conflicts was an international law solution. De Conflictu Legum begins with the following words:

It often happens that a transaction which is contracted in one place, is to have effect in places of another realm, or that it will be adjudicated elsewhere. It is known, however, that the law and statutes of the several peoples differ in many respects....The question [of how such a transaction is to be dealt with] belongs to the jus gentium rather than the jus civile, because what different people must observe between each other obviously belongs to the field of the jus gentium. (76)

Whereas each state decrees its own local laws, having application within its borders but not beyond, international law is the same for all peoples and so has universal application. Under international law, each state is subject to identical rules and none can claim an advantage not equally available to the others.

Huber's theory of comity and many of the rules of private international law were received into the common law through adoption. This process is well illustrated by the case of Scrimshire v. Scrimshire<sup>77</sup> in which the question of the validity of a foreign marriage between two British subjects came before English courts for the first time. Under English law the marriage between the parties was valid. Under the law of France, where the marriage took place, it was null. To determine the applicable law, the court consulted some half dozen authorities on international law. It then stated its conclusions in the following terms:

From the doctrine laid down in our books --the practice of nations--and the mischief and confusions that would arise to the subjects of every country, from a contrary doctrine, I may infer that it is the consent of all nations that it is the jus gentium, that the solemnities of the different nations

with respect to marriages should be observed, and that contracts of this kind are to be determined by the laws of the country where they are made....The jus gentium is the law of every country, and is obligatory on the subjects of every country. Every country takes notice of it: and this Court observing that law, in determining upon this case, cannot be said to determine English rights by the laws of France, but by the law of England, of which the jus gentium is part. (78)

After Scrimshire, the rule that the formal validity of a marriage is determined by the law of the place where it is celebrated formed part of the common law.

In this way by the middle of the nineteenth century the common law had evolved a fairly efficient method for allocating jurisdiction among competing states. This method involves the application of two kinds of rules -- reference rules and situs rules -- and it proceeds in three stages. The first stage is characterization: the court must identify the legal issues arising in each case in terms of the categories of private international law. Thus, in an action by the Quebec plaintiff Q to recover money loaned to the Ontario defendant O, the issue might be the capacity of Q or the formal validity of the contract. At the second stage, selection, the court must identify the state whose law will govern these issues. For this purpose, it consults the appropriate reference rules. It should be noted that reference rules do not tell which state has jurisdiction, but merely indicate what test to use in making this determination. If the issue is capacity, the test is the domicile of the contracting party. If the issue is formal validity, the test is the place where the contract was made.<sup>79</sup> The court then looks to

the situs rules to discover in which state the party was domiciled and the place where the contract was made. In the final stage, application, the court applies the law of the selected state to each issue to determine the legal result. Thus, in our example, Ontario law is applied to determine Q's capacity while the law of Quebec is applied to determine the validity of the contract.

Neither O nor Q is likely to raise a constitutional objection to this result. Either every case with an inter-provincial or international dimension must be decided under federal law, an impossible solution, or the laws of the provinces must sometimes be given a measure of extra-territorial application. The results produced by reference and situs rules are inoffensive from a constitutional point of view because they are so obviously uncontrived. In the first place, the common law rules are blind and even-handed. They are as likely to favour one province as another and it is impossible to manipulate the outcome in advance, for it depends on facts over which the courts have no control -- where particular parties are domiciled, where a given contract is made. Furthermore, under the common law system the province whose law is selected has not sought to assert jurisdiction in disregard of the sovereignty of its fellows. This jurisdiction has been thrust upon it, in effect, by virtue of the rules.

This system looks good on paper but in practice there are flaws at every stage. The characterization of issues in terms of the categories of private international law is often difficult and artificial. More seriously, it can be

manipulated by the parties in their pleadings so as to influence the choice of the appropriate reference rule. Courts too have been known to adopt strained characterizations with an eye to the ultimate disposition of the case in terms of its merits.

There are difficulties at the selection stage as well. Some reference rules are too general and do not allow the courts to respond with sufficient flexibility. In a tort case, for example, there might be good reason to apply the law of jurisdiction A to the issue of causation and the law of jurisdiction B to the issue of damages. Under the traditional reference rule, this solution is impossible.

The body of common law situs rules is inadequate in several respects. Some are highly complex and technical; others are woefully underdeveloped. It is often difficult to discern any underlying rationale. Under the rules for determining domicile, for example, a person may be domiciled in a place where he has never set foot and with which he has not the slightest real connection. Under the rules for determining where a contract is made, the result may vary depending on whether the parties completed their bargain by telephone, telex or the ordinary mails. Such rules make a mockery of the supposed link between the facts of a dispute and the jurisdiction whose law applies.

Finally, the common law system does not always succeed in assigning particular problems to one sovereign alone. Although a person can have only one domicile, he can have several residences. A tort of negligence may occur in the state where the negligent act took place, the

state where the injury occurred or the state where the resulting damage was suffered. This means that the law of more than one state may apply to the same set of facts, a situation designed to produce conflict rather than resolve it.

These criticisms reveal flaws in the common law system but they do not challenge the value or validity of its basic approach. A more fundamental criticism is offered by American scholars of the conflict of laws. They point out that under the common law system, jurisdiction is allocated among states in a blind and mechanical way. The judge is not free to consider whether the state picked out by the rules has any interest in having its law apply in the circumstances of the case. Nor is he free to consider whether the law of that state will resolve the dispute in a way that does justice to the parties. Once the issues are classified, he has only to apply the rules. This makes the system even-handed, but it leaves no room for creative analysis and it often produces absurd or unjust results.

This criticism, it should be noted, attacks the very features of the common law system which make it acceptable from a constitutional point of view. Because the rules are blind and mechanical, they yield solutions without reference to the actual interests of states or the merits of particular cases. Of necessity the judge remains impartial and if the law of his state applies, it is only because it has been selected by the rules. In this way the

extra-territorial application of law is permitted without doing violence to the principles of territorial sovereignty. What the American criticism shows is that a system which works from a constitutional point of view may be unsatisfactory for the purpose of resolving private law disputes in a sound and efficient way.

## 2. Reform of the Nineteenth Century System

Dissatisfaction with the common law method devised in the nineteenth century has led to two important developments in this century: the adoption of new common law approaches and the enactment of statutory choice of law rules to displace the common law in certain specific areas. These developments clearly are necessary, for conflicts law no less than any other branch of law must be permitted to respond to changing conditions. The point to be illustrated here is that changes in the common law system create new problems in constitutional law which the courts must be prepared to solve.

### 2.1 Common Law Reforms

The new common law approaches to conflict of law disputes originate in the United States and until quite recently their influence was not much felt in Canada. The following discussion will therefore focus on American materials. These are voluminous and extraordinarily diverse. Apart from a shared dislike for the ways of the past, it appears that no two scholars or judges think quite alike on this subject. Some favour the complete elimination of conflict rules; some would replace rules with choice of law norms or policies; others urge the formulation of new rules based on principles other than those generated by the doctrine of territorial sovereignty.

Among the scholars who favour the total elimination of rules, Professor Currie has probably had the greatest influence on American theory and practice.<sup>80</sup> On his

approach, a court seized with a conflict dispute does not consult choice of law rules, but looks directly to the relevant domestic law of the forum. Using ordinary principles of construction, it first determines the governmental policy expressed in that law. It then inquires whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy.<sup>81</sup> If such an interest is discovered, the forum law applies even though some other jurisdiction has a greater interest in the case. If the forum has no interest, the court must then inquire into the governmental policies of the foreign jurisdictions with which the case is connected and determine whether one of them has an interest to assert. If so, its law applies.<sup>82</sup>

The key to Professor Currie's method is that it ties choice of law to the interests of jurisdictions in cases rather than to the factual connections between jurisdictions and cases. This approach enables the courts to eliminate what Professor Currie calls "false" conflicts. Although a case has factual connections with several jurisdictions, analysis of the relevant governmental policies may reveal that only one has an interest in the application of its law. When this happens, there is really no conflict to resolve.

When analysis reveals the existence of a "true" conflict, Professor Currie's solution is to apply the law of the forum. He argues that any attempt to weigh competing interests is doomed to failure, because a forum court

cannot be expected to prefer the policies of a foreign jurisdiction or to sacrifice its interest to that of some other jurisdiction. Moreover, weighing competing interests is not, in Professor Currie's view, the proper function of a court: "assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, ...is a political function...that should not be committed to courts in a democracy."<sup>83</sup>

Other American scholars are more willing to trust to the courts. Professors von Mehren and Trautman, for example, adopt the interest analysis method of Professor Currie but suggest that the courts resolve true conflicts by applying the "law of the jurisdiction predominantly concerned" or the one that has "ultimate, effective control".<sup>84</sup> If no jurisdiction meets this test, the court should apply the law that best facilitates multi-state activity.

Professor Ehrenzweig is another scholar who eschews rules and he shares Professor Currie's preference for the forum.<sup>85</sup> He would have courts resolve conflicts by always applying the law of the forum -- save in certain cases, where the reasonable expectations of the parties should govern. The rampant forum shopping this solution would encourage should be controlled, he suggests, by the jurisdictional test of forum non conveniens: courts should simply refuse to hear cases where the plaintiff has no basis for invoking forum law.

Other American scholars prefer an approach that requires the courts to consult a number of "criteria" or

"policies" or "considerations" in resolving conflict cases. Professors Cheatham and Reese list nine "policies".<sup>86</sup> Several of these reflect the interest analysis method referred to above: "A Court should Seek to Effectuate the Purpose of its Relevant Local Law Rule" and "Application of the Law of the State of Dominant Interest". Others emphasize justice to the parties: "Protection of Justified Expectations", for example. Still others emphasize the political considerations which Professor Currie thought were not properly the business of the courts: for example, "The Fundamental Policy Underlying the Broad Local Law Field Involved". A combination of diverse considerations is the hallmark of this approach. Professor Leflar lists five "choice-influencing considerations":

- (a) Predictability of results
- (b) Maintenance of interstate and international order
- (c) Simplification of the judicial task
- (d) Advancement of the forum's governmental interests
- (e) Application of the better rule of law. (87)

Professor Weintraub adopts a similar approach, but his "criteria" differ depending on the area of law involved. To resolve a conflict in torts, for example, four criteria are suggested: "Identify and Eliminate Spurious Conflicts", "A Presumption in Favor of Recovery", "Unfair Surprise" and "Avoid Anachronism and Aberration".<sup>88</sup>

Yet another approach to the problem instructs the courts to apply the law that has the "most significant relation" to the particular issue to be resolved. This simple instruction allows ample room for creative analysis

for it is left to the courts to determine which of the facts connecting the issue to competing jurisdictions are significant and why. This approach, also known as the "centre of gravity" or "grouping of contacts" approach, was adopted by Professor Reese in preparing the Restatement (Second) of Conflict of Laws.<sup>89</sup>

A relatively small number of American scholars believe that rules are necessary in this area. Apart from the larger issues (such as the proper role of the courts in a democracy) practical considerations like the need for certainty and predictability and the limited resources of the courts favour the adoption of rules. Some scholars have suggested that rules are not just desirable but inevitable in this area. Thus Professor Rosenberg observes that "trying to throw away choice of law rules is like trying to throw away a boomerang."<sup>90</sup> As we shall see, this observation is borne out by the experience of the New York Court of Appeals.

The impact of these scholarly theories on the practice of American courts has been considerable, but uneven. The diversity of the academic literature offers the courts rather a lot to choose from and to date the judicial response has been eclectic. Some state courts have responded by developing their own conflict theory; others are content to follow in the footsteps of the scholars. The displacement of the traditional system is a gradual process and in most jurisdictions the old rules are still applied to certain problems while some version of the new methodology is applied to others.

The eclecticism of recent American case law can best be illustrated by considering a commonplace issue as dealt with by two of the more innovative states. The states are New York and Wisconsin. The issue is whether the driver of a car is liable for injuries suffered by gratuitous passengers in an accident caused by his negligence. Some jurisdictions permit passengers to recover in these circumstances while others do not. A conflict of laws problem arises when the driver and passenger are resident in one jurisdiction and the accident occurs in another.

The traditional solution to this problem is illustrated by Buckeye v. Buckeye,<sup>91</sup> an early Wisconsin case. The parties in this case were both domiciled in Wisconsin but the accident had occurred in Illinois. Under the law of Wisconsin the plaintiff could recover damages for injuries suffered in the accident, but under Illinois law she could not. To determine the applicable law the Court first characterized this as a tort case and then applied the reference rule governing liability in tort. The American rule refers this issue to the law of the state where the tortious act occurred. Since the negligent act of the driver had occurred in Illinois, its law applied and the passenger did not recover.

Prior to 1950 every court in the United States would have arrived at the same conclusion in the same way. One of the first states to break away from the traditional methodology was New York. In a series of cases decided in the 1950's its courts applied the "most significant relation" test to determine the law applicable to contracts.

Then, in 1963, the approach was extended to torts in the celebrated case of Babcock v. Jackson.<sup>92</sup> In this case the plaintiff was suing for damages caused by the negligence of the defendant while driving in Ontario. Both parties were resident in New York and the defendant's car was insured by a New York company. The law of New York permitted recovery, but Ontario law did not. After reviewing the defects in the traditional way of resolving this conflict, the Court went on to apply the most significant relation test. Fuld, C.J. explained:

Justice, fairness and 'the best practical result'...may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation. (93)

Ontario was related to the occurrence, but New York was related to the parties. To assess the significance of these competing relationships, the Court examined the underlying governmental interests much in the manner recommended by Professor Currie:

The object of Ontario's guest statute, it has been said, is "to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies" (Survey of Canadian Legislation, 1 U. Toronto L.J. 358, 366) and, quite obviously, the fraudulent claims intended to be prevented by the statute are those asserted against Ontario defendants and their insurance carriers, not New York defendants and their insurance carriers. Whether New York defendants are imposed upon or their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario simply because the accident occurred there, any more

so than if the accident had happened in some other jurisdiction. (94)

The object of New York's negligence law, on the other hand, was to ensure that tortfeasors compensated their New York victims, including those who were guests of a negligent driver. New York's interest in such victims did not disappear simply because the accident occurred elsewhere. For these reasons the Court concluded that New York had the more significant relation to the issue of host liability.

It is hard to fault either the reasoning or the result in Babcock. When it first appeared it was much commented on by scholars and it was followed by courts in other states. However, the next several host-passenger cases to reach the New York Court of Appeals revealed some weaknesses in the approach. In Kell v. Henderson,<sup>95</sup> for example, the facts were the exact obverse of those in Babcock; the parties were Ontario residents, insured in Ontario, on a weekend visit to New York. Yet here too the Court applied New York law. In Dym v. Gordon<sup>96</sup> the accident occurred in Colorado, but the driver and passenger were both domiciled in New York and the insurer was a New York company. This time the Court held that Colorado law applied, on two grounds. First, the parties had been spending the summer in Colorado and their host-guest relationship had been formed there. Secondly, another car was involved in this accident and the policy behind Colorado's guest statute was not only to protect insurance companies, but also to preserve the driver's

assets for victims who had not accepted the risk of riding in his car. Dym v. Gordon can be reconciled with Babcock on the basis of these differences in the facts. In Tooker v. Lopez,<sup>97</sup> however, the facts were indistinguishable from those in Gordon, yet this time the law of New York was applied.

The weaknesses in the New York approach were analyzed by Fuld, C.J. in Neumeier v. Kuehner:

In consequence of the change effected [by Babcock v. Jackson]...our decisions in multi-state highway accident cases, particularly in those involving guest-host controversies, have, it must be acknowledged, lacked consistency. This stemmed, in part, from the circumstance that it is frequently difficult to discover the purposes or policies underlying the relevant local law rules of the respective jurisdictions involved. It is even more difficult, assuming that these purposes or policies are found to conflict, to determine on some principled basis which should be given effect at the expense of the others. (98)

To put an end to these difficulties Fuld, C.J. proposed the formulation of a new set of reference rules to govern liability in tort. These would be "more narrow" and "less categorical" than traditional reference rules. Indeed, to govern the single issue of host liability the Court adopted a three part rule of some two hundred words which more nearly resembles a rule of thumb than a rule. It nonetheless introduced a measure of certainty and objectivity into what had become a very unpredictable and subjective process.

Wisconsin's experiment with the "most significant relation" test proved more successful than New York's,

largely because it relied to a greater extent on the theory of Professor Currie. The Wisconsin approach is explained by Heffernan, J. in Wilcox v. Wilcox, the first case in that state to break with the traditional method.

For the problem of choice of law to arise there must be contact with one or more states....We conclude that the mere counting of contacts should not be determinative of the law to be applied. It is rather the relevancy of the contact in the terms of policy considerations important to the forum, vis-à-vis, other contact states. We start with the premise that if the forum state is concerned it will not favor the application of a rule of law repugnant to its own policies, and that the law of the forum should presumptively apply unless it becomes clear that nonforum contacts are of the greater significance. (100)

In Wilcox the significant contacts were all with Wisconsin: the parties were domiciled there, their guest-host relation was formed there, the trip was to begin and end there and the car was insured there. Although the negligent act had occurred in Nebraska, this contact was insignificant because the place of the accident was purely fortuitous. Nebraska had no interest in applying its law and this, therefore, was a "false conflict" case.

The Wisconsin approach to "true conflicts" is illustrated by several host-passenger cases, the most recent of which is Conklin v. Horner.<sup>101</sup> In Conklin, the accident had occurred in Wisconsin, but all other contacts (domicile, insurance, etc.) were with the state of Illinois. On the basis of the reasoning in Wilcox, one might have thought that Wisconsin had no interest in this case. However, Wilcox was distinguished on the following grounds:

While in Wilcox, Nebraska was merely the site of the tort and not the forum, in the instant case, Wisconsin is...the forum as well. Thus, this court is specially charged as an instrument of the Wisconsin government to further the interests of Wisconsin, if to do so furthers the underlying policies of our law.<sup>102</sup>

The policies underlying Wisconsin's ordinary negligence law were threefold: to compensate victims, to admonish the wrongdoer and to deter similar conduct in others. These policies would be defeated if Illinois law were applied. On the other hand, Illinois' policy of protecting the host and his insurer would be equally defeated by the application of Wisconsin law. To resolve this true conflict, the Court turned to the five choice-influencing considerations of Professor Leflar.<sup>103</sup>

Given the facts in Conklin, one would expect the first two criteria of Professor Leflar -- predictability of results and maintenance of interstate order -- to point to Illinois. Apart from its status as the forum, Wisconsin's only connection with the case was an admittedly fortuitous one: the accident happened there. The Court, however, reasoned that drivers do not plan to drive negligently and therefore do not rely on local host immunity statutes when inviting passengers into their cars. In a case of this sort, therefore, the first consideration should be given little weight.<sup>104</sup> As for the maintenance of interstate order, this criterion "requires that a state that is minimally concerned defer to the interests of a state that is substantially concerned. Wisconsin is more than minimally concerned, for the negligent conduct occurred on its highways."<sup>105</sup> The Court found that the

third consideration -- simplification of the judicial task -- had no application at all in a host-guest situation, but the fourth -- advancement of the forum's governmental interests -- was especially important. "This court would seriously breach its duty to its forum obligations by applying a foreign guest-host rule when the Wisconsin rule of ordinary negligence could reasonably be applied."<sup>106</sup> Finally, the Wisconsin rule was the better rule of law. Guest statutes are "anachronistic...and do not reflect present day socio-economic conditions."<sup>107</sup> On the whole, Professor Leflar's criteria favoured the application of Wisconsin law.

This brief survey of the new common law approaches to conflict of law disputes hardly does justice to the range and depth of the American materials. It should be sufficient, however, to indicate what happens when conflicts law is detached from its historical context in international law and treated as an ordinary part of the municipal law of states. Freed of the restraints imposed by the doctrine of territorial sovereignty, conflicts law moves in two directions. First, there is a striking tendency to favour the law of the forum. In case after case American courts discover that forum law applies -- because the forum alone has an interest in the case or its interest takes priority or its contacts are more significant or its law conforms to the reasonable expectations of the parties....The reasons are various, but the results are remarkably uniform. Secondly, far more attention is paid

to the private character of the conflict problem. This problem does not arise save in the context of a private law dispute. Under the new approaches, the just resolution of the dispute is perceived as a major concern of conflicts law. The courts are encouraged to look at the content of the competing laws and to apply the one that will produce a just result. In practice, this aspect tends to favour the claims of the plaintiff, for it is he who chooses the forum and the forum is unlikely to find its own law inferior to the law of another jurisdiction. Thus a plaintiff is able to shop for the most favourable jurisdiction among those having some minimal connection with his case.

## 2.2. Statutory Choice of Law Rules

The other way of reforming unsatisfactory common law rules is to enact legislation. Le Code Civil du Québec has always contained a number of conflict rules and L'Office de Révision du Code Civil has recently proposed a comprehensive codification of private international law which introduces major reforms.<sup>108</sup> In the common law jurisdictions of Canada one does not find general legislation in this area, but there are numerous examples of conflict provisions which are enacted as part of a particular legislative scheme. These take a variety of forms and from a constitutional point of view may range from the wholly innocuous to the decidedly suspect.

Some statutory provisions are in the form of conventional reference rules. For example, section 36 of

Ontario's Succession Law Reform Act<sup>109</sup> provides:

36(1) The manner and formalities of making a will and its essential validity and effect, so far as it relates to an interest in land, are governed by the internal law of the place where the land is situated.

(2) Subject to other provisions of this Part, the manner and formalities of making a will, and its essential validity and effect, so far as it relates to an interest in movables, are governed by the internal law of the place where the testator was domiciled at the time of his death.

Statutory reference rules are innocuous for the same reason that common law reference rules are: they do not assert jurisdiction, but allocate it on the basis of a test that is no more likely to favour the forum than any other state. Such rules are "bilateral" in effect.

Other statutory provisions take the form of application rules. They indicate in what circumstances the regulatory scheme set out in the Act will apply to cases with an extra-provincial dimension. Section 57 of the Family Law Reform Act<sup>110</sup> is an example:

57. The manner and formalities of making a domestic contract and its essential validity and effect are governed by the proper law of the contract, except that,

- (a) a contract for which the proper law is that of a jurisdiction other than Ontario, is also valid and enforceable in Ontario if entered into in accordance with the internal law of Ontario;
- (b) subsection 18(4) and section 55 apply in Ontario to contracts for which the proper law is that of a jurisdiction other than Ontario; and
- (c) a provision in a marriage contract or cohabitation agreement respecting the right to custody of or access to children is not valid or enforceable in Ontario.

Application rules of this sort are generally labelled

"unilateral rules" since they make forum law applicable to persons or things at the instance of the legislature regardless of the result that would be obtained under the common law rules.

Finally, some statutory provisions take the form of "substantive" rules of law. They provide specific solutions to legal issues arising in cases where a foreign element is involved. The Personal Property Security Act<sup>111</sup> contains elaborate conflict of laws provisions some of which are substantive:

5(3) If a jurisdiction does not provide, by registration or recording in such jurisdiction, for perfection of a security interest of the kind referred to in subsections (1) and (2), the security interest may be perfected by registration in Ontario.

6(2) Where goods brought into Ontario are subject to the sellers' right to revendicate or to resume possession of the goods, unless the seller registers a financing statement in the prescribed form within twenty days after the day on which the goods were brought into Ontario, such right is unenforceable in Ontario thereafter.

Substantive rules are a sensible response to the fact that cases involving a foreign element may require special treatment for any number of reasons -- to ensure that the legislative scheme operates effectively and is not readily evaded, to extend the benefits of the scheme to a particular class of non-residents, to coordinate the scheme with comparable legislation in other jurisdictions. Such rules may also be enacted for the less legitimate purpose of conferring benefits on provincial residents at the expense of non-residents. At the least they make the law of the province applicable in every interprovincial

and international case, including those which would have been allocated to some other jurisdiction under the common law rules.

### Conclusion

It seems fair to conclude that the new types of statutory rules, no less than the new common law approaches, tend to undermine the working relation that existed in the nineteenth century between private international law on the one hand and the principles of territorial sovereignty on the other. The harmony of this relationship depended on two things: first the passivity of the state whose law was to be given extra-territorial application and secondly the blind even-handedness of the rules. Under both sorts of modern reform states are no longer passive and the rules, at least some of them, are neither blind nor even-handed; jurisdiction is asserted at the will of the legislature or the courts whenever this appears desirable. It does not follow that these reforms are unconstitutional. They may well be reconcilable with the territorial limitations imposed by constitutional law. Whether such a reconciliation is possible and on what terms it might be effected depends entirely on how the limitations are interpreted. This is the subject of chapter three.

### Chapter 3. Constitutional Restrictions on Legislative Jurisdiction

To assert that a jurisdiction is subject to territorial limitations is not a very telling remark. The practical importance of such limitations may be great or negligible depending on how they are interpreted. This involves responding to a number of specific questions. For example, do the limitations operate on the subject matter with which a legislature may deal or do they rather restrict the scope of application of its laws? To determine the validity of specific enactments, should the court look chiefly to the object or purpose of an enactment or should it also consider its possible, probable or actual effects? If the enactment is aimed at persons or things within the jurisdiction, should extra-territorial effects be tolerated if they are incidental to a valid legislative purpose? Or must the enactment be held ultra vires or inoperative if some, or many, extra-territorial effects occur? There is also the question of how literally one is to take the notion of a territorial limitation. Does "territory" refer to the physical space within the borders of a jurisdiction or is the reference rather to a more conceptual notion of territory as a sphere of interest? In this chapter the response of the courts to these questions will be examined with respect to the jurisdiction of the legislature in the area of property and civil rights.

1. Privy Council Decisions Interpreting the Common Law Rule,

For many years the Privy Council had the final word in interpreting both the rule of colonial extra-territorial incompetence and the words "in the Province" in section 92 of the Constitution Act. The response of the Board to the common law rule will be examined first. Initially this response was quite restrictive of colonial powers. In the MacLeod case,<sup>112</sup> Lord Halsbury thought of the territorial limitations on New South Wales in terms of the geographical boundaries of the colony. The fact that the impugned legislation was designed to protect a colonial institution was not a relevant consideration. It is clear both from his remarks and from the holding in the case that no enactment, however central to the well being of the colony, could be applied to extra-territorial facts. This repressive response was soon abandoned, however, and in the series of cases which followed, the Board tried out a number of different approaches in an effort to accommodate colonial needs and goals.

The first case to come before the Privy Council after MacLeod was Peninsular and Oriental Steam Navigation Co. v. Kingston.<sup>113</sup> This case was concerned with section 192 of Australia's Customs Act, 1901, which provided:

No...seal placed by an officer upon any goods...shall be...broken...except by authority, and if any ship enters any port with any such...seal...broken.... contrary to this section, the master shall be guilty of an offence against this Act.

The issue was whether the defendant could be convicted of

an offence under this section given that the seals on his ship were broken outside the territorial waters of Australia. The Board upheld the legislation on the grounds that the section did not impose a penalty for breaking the seals: the offence was rather the act of re-entering an Australian port with broken seals and such re-entry took place within the territory of Australia.

Relying on this decision, a number of commentators have suggested that the constitutional limitation can be readily evaded by the simple expedient of attaching the penalty to an act that occurs within the territory while treating the extra-territorial behaviour aimed at as a mere condition of the offence.<sup>114</sup> This suggestion must surely be rejected. It is against first principles to allow the legislature to evade a constitutional limitation by a mere trick of draftsmanship. If section 192 is to be upheld, the reason must be that under the constitutional rule colonies are permitted some degree of extra-territorial reach.

This is substantially the position adopted by the Privy Council in the next two cases to come before it: Attorney General for Canada v. Cain,<sup>115</sup> decided in 1906, and Croft v. Dunphy,<sup>116</sup> decided in 1931. Both concerned legislation enacted by the Parliament of Canada prior to the Statute of Westminster which authorized Canadian officials to perform acts beyond the territorial limits of the Dominion. In Cain, the Attorney General was authorized to expel illegal immigrants and to order their transport back to the place from which they came. In

Croft v. Dunphy, Canadian customs officers were given the power to arrest ships in international waters. In both, the court looked chiefly to the subject matter of the legislation and its extra-territorial operation was allowed to the extent that this was a necessary or normal incident of legislation in respect of that subject. In the Cain case, the idea of logical necessity was emphasized. Once a jurisdiction is granted the power to expel aliens, the Board reasoned, it must equally have "the power to do those things which must be done in the very act of expulsion, if the right to expel is to be exercised effectively at all."<sup>117</sup> In Croft v. Dunphy, the power to operate extra-territorially was expanded to include not only what is logically necessary in exercising jurisdiction with respect to a particular subject, but also the normal or conventional incidents of that jurisdiction:

When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice....

[W]hen the Imperial Parliament in 1867 conferred on the Parliament of Canada full power to legislate regarding customs, it had long been the practice to include in Imperial statutes relating to this branch of law executive provisions to take effect outside ordinary territorial limits.... In these circumstances it is difficult to conceive that the Imperial Parliament... should have withheld...the power to enact provisions similar in scope to those which had long been an integral part of Imperial customs legislation. (118)

In both Attorney General for Canada v. Cain and Croft v. Dunphy, territorial limitations are thought of

primarily in terms of geographical boundaries. However, in Wallace Brothers & Co. Ltd. v. Commissioner of Income Tax, Bombay,<sup>119</sup> the Privy Council adopted a new approach. It held that the rule of colonial extra-territorial incompetence does not preclude a colony from dealing with persons or things beyond colonial borders, but merely requires it to "mind its own business" -- to stay, in other words, within the ambit of its own sphere of interest. The key passage in the judgment, written by Lord Uthwatt, is as follows:

There is no rule of law that the territorial limits of a subordinate legislature define the possible scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by a subordinate legislature depends on the proper construction of the statute conferring those powers. No doubt the enabling statute has to be read against the background that only a defined territory has been committed to the charge of the legislature. Concern by a subordinate legislature with affairs or persons outside its own territory may therefore suggest a query whether the legislature is in truth minding its own business. It does not compel the conclusion that it is not. (120)

At first impression, this passage may appear to deny the very existence of the common law rule. However, to assert that a colonial legislature must mind its own business is to impose a limitation that does not exist in the case of the Parliament of the United Kingdom. As we all know, that Parliament can make it an offence to smoke in the streets of Paris, whereas under the test set out in Wallace Brothers, a colonial legislature could not.

What counts as minding one's own business is a matter over which reasonable men may disagree. In Wallace

Brothers, the impugned legislation was a revenue provision of the Central India Legislature which taxed companies carrying on business in India in respect of their world-wide income. To determine whether this income was properly the business of Central India, the court asked itself whether there was a "sufficient territorial connexion" between the persons or things affected by the provision and the enacting jurisdiction:

[T]he validity of the legislation in question depends on the sufficiently (sic) for the purpose for which it is used of the territorial connexion set forth in the impugned portion of the statutory text....[T]he derivation from British India of the major part of its income for a year gives to a company as respects that year a territorial connexion sufficient to justify the company being treated as at home in British India for all purposes relating to taxation on its income for that year. (121)

In other words, a colonial legislature may assert jurisdiction over a matter if there is a sufficient territorial connection between the matter and the colony, even though the matter is not confined to the colony; and what is sufficient for this purpose depends on the particular matter involved. With respect to the taxation of income, it is enough that the taxpayer derives the major portion of his income from the colony, though for some other purpose this connection might not be sufficient.

Wallace Brothers is the last case in which the Privy Council interpreted the common law rule. The test of validity adopted by the Board in this case tends to enhance rather than restrict colonial powers: Mr. MacLeod, for example, would almost certainly have gone to jail

under it. However, it leaves a great deal to the discretion of the courts and the impressions of individual judges, who must determine in each case whether the connection between the case and the jurisdiction is "sufficient" given the legislative matter involved.

The approach of the Privy Council in the Wallace case has been adopted and refined by the High Court of Australia in testing the validity of legislation enacted by Australian states. The locus classicus is a passage from the judgment of Dixon, J., in Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.):

[I]t is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist of presence within the territory, residence, domicile, carrying on business there or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers....No doubt there must be some relevance to the circumstances in the exercise of the power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection or that it includes many cases that cannot have been foreseen. (122)

On this approach, although a territorial connection with the enacting jurisdiction is necessary, the requirement of sufficiency mentioned by Lord Uthwatt is greatly attenuated. The connection chosen by the legislature must have "some relevance" to the purpose of the legislation, but once this minimal test is met the court will not interfere.

Broken Hill, like Wallace itself, is a tax case but the test suggested by Dixon, J., applies generally to all enactments by Australian states.<sup>123</sup>

## 2. The American Interpretation of Territorial Restrictions

The Privy Council's interpretation of the common law rule is paralleled to a remarkable extent by the interpretation of territorial limitations offered by the Supreme Court of the United States. Some fifteen years before MacLeod was decided, the Supreme Court had announced in Pennoyer v. Neff that any attempt by a state "to give extra-territorial operation to its laws, or to enforce an exterritorial (sic) jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the State in which the [affected] persons are domiciled or the [affected] property is situated, and be resisted as a usurpation."<sup>124</sup> This meant that a person could not be served with process issuing from a state court unless he was present within the state; and even if the court could assert jurisdiction over the person, it could not apply state law to resolve the dispute unless the subject of the dispute had occurred in or was situated in the state.

This view of territorial limitations was clear, but it had certain drawbacks. In the first place, under this approach the courts were required to determine the true situs of each dispute for constitutional law purposes. While situating a dispute over the ownership of real estate was easy enough, the situs of disputes involving

interstate contracts or family relationships was far from self-evident. In such cases, the courts quite naturally turned to private international law for a ready made system of rules. This solved the immediate problem, but it introduced into constitutional law many of the defects of the common law system.<sup>125</sup>

More seriously perhaps, the strict approach to territoriality made it too easy for individuals and companies to frustrate the legitimate purpose of state laws. A tortfeasor could avoid being sued in the forum of his victim simply by leaving the state. A company could do business in a state and yet avoid the burden of its laws by establishing its head office in another state and taking care to situate its legal relationships there. As interstate travel and commerce increased, this effect of the strict approach became more and more unacceptable.

The courts first sought to mitigate the injustice and inconvenience of this approach through the use of legal fictions. Thus, persons who derived a benefit from a state, by driving on its roads for example, were deemed to have consented to state jurisdiction in disputes arising out of that activity. Corporations were deemed to be present in a state for all purposes if they carried on commercial activity there.<sup>126</sup> These fictions helped, but by the 1930's the need for a basic new approach had become apparent. The Supreme Court of the United States responded to this need and in a series of cases decided between 1930 and 1955 it evolved a new theory of territorial limitations for both judicial and legislative

jurisdiction.

The first task of the Court was to locate a suitable constitutional basis for territorial restrictions on the states. It will be recalled that the holding in Pennoyer v. Neff was not grounded in a particular clause of the written constitution, but was based on the nature of the relationship among states in a federation. In a brief paragraph near the end of his judgment, however, Mr. Justice Field suggested that extra-territorial encroachments by a state would likely violate the due process clause of the fourteenth amendment.<sup>127</sup> This clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." It thus ensures that the governmental power of states is not exercised in an unreasonable or arbitrary way. Mr. Justice Field thought that a state which issued process or applied its laws to a person living elsewhere and having no connection with that state would be acting arbitrarily and so contravene the clause. This suggestion was seized on by subsequent courts and after Pennoyer v. Neff the due process clause served as the chief source of territorial restraint on state jurisdiction.

Another possible source of restraint was the full faith and credit clause. It appears in Article IV of the Constitution and provides as follows:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

At first blush this clause appears to be a natural repository for the principles of exclusivity and equality asserted in Pennoyer v. Neff: states are obliged to acknowledge the laws and judgments of their fellows regardless of whether it is in their interest to do so. This clause was not mentioned by Mr. Justice Field, doubtless because during the nineteenth century the courts took the view that it was merely an enabling provision whose force and effect would depend on the terms of whatever legislation Congress chose to enact. Since the only enactment ever passed by Congress dealt merely with procedural matters and imposed no obligations on states, the clause could not be relied on to limit state powers.<sup>128</sup> This view was eventually abandoned and by the 1930's it would have been possible for the Supreme Court to ground its restriction on legislative jurisdiction in this clause, either in lieu of or as a supplement to the traditional reliance on due process.

In fact the Court explored this possibility in a number of judgments handed down in the 1930's. In Bradford Electric Light Co. v. Clapper,<sup>129</sup> decided in 1932, a Vermont worker sought damages against his Vermont employer for injuries suffered in an industrial accident. The accident had occurred in New Hampshire and the worker brought his suit there in reliance on New Hampshire's ordinary law of tort. The Court held that New Hampshire was obliged by the full faith and credit clause to apply Vermont's workmen's compensation statute in preference to its own law.

This uncompromising approach to full faith and credit was considerably modified first in Alaska Packers Association v. Industrial Accident Commission,<sup>130</sup> decided in 1935, and then in Pacific Employers Insurance Co. v. Industrial Accident Commission,<sup>131</sup> decided in 1939. In the former Mr. Justice Stone pointed out that "a rigid and literal enforcement of the full faith and credit clause ... would lead to the absurd result that ... the statute of each state must be enforced in the courts of the other, but cannot be in its own."<sup>132</sup> He therefore concluded that conflicts of state laws should be resolved "not by giving automatic effect to the full faith and credit clause ... but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."<sup>133</sup> The Court took substantially the same approach in the Pacific Employees case, save the notion of "weighing" interests was abandoned. The forum was constitutionally entitled to apply its own law to a matter if it had an "appropriate concern" in the matter. It was not required by full faith and credit to sacrifice its interests to those of another state.<sup>134</sup>

The interest analysis method formulated in these cases was quickly adopted by the Court in its application of the due process clause, so that by 1955 the Court was able to conclude that the full faith and credit requirement with respect to state acts imposed no restriction on the jurisdiction of states apart from those already imposed by due process.<sup>135</sup> As it more recently observed,

This Court has taken a similar approach in deciding choice-of-law cases under both the Due Process Clause and the Full Faith and Credit Clause. In each instance, the Court has examined the relevant contacts and resulting interests of the State whose law was applied. (136)

Although the implications and possibilities of the full faith and credit clause, in so far as it applies to state acts, are still debated by American scholars and may yet be explored by the courts,<sup>137</sup> for the moment at least the role of the clause in this area is insignificant and may safely be dismissed.

The clearest formulation of the new theory of territorial limitations developed during the period appears in International Shoe Co. v. State of Washington.<sup>138</sup> This case was decided in 1945 and immediately displaced Pennoyer as the leading authority on point. Although International Shoe is ordinarily thought of as a case on judicial jurisdiction, in fact there were two questions asked: whether Washington could issue process against a company that had no formal presence in the state and whether Washington could tax this company under its unemployment compensation law. The case thus dealt with both judicial and legislative jurisdiction and is one of many in which it is actually impossible to separate the two because the jurisdiction asserted by the state court is granted by special statute and will not be valid unless the statute applies to the parties.

International Shoe was not a difficult case, for on any reasonable view of the facts the company was doing

business in Washington. Its importance lies in Mr. Justice Stone's analysis of the limitations imposed on state jurisdiction by the due process clause.

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

...

To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agents within the state which courts will deem to be sufficient to satisfy the demands of due process....Those demands may be met by such contacts of the corporation with the state of the forum as to make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. (139)

Under the "minimum contacts" test suggested by Mr. Justice Stone, a state may serve process on a defendant and subject him to its local laws only if the connection between the state and the defendant is substantial enough so that asserting jurisdiction over him meets two distinct standards: it accords with traditional notions of fairness and it is reasonable in the context of the American federal system. To meet these standards a state must be able to point to one or more significant contacts with the defendant, but it need not show that its own claim to jurisdiction is superior to the claim some other state might have.

In the years following International Shoe the minimum contacts test was elaborated and refined in dozens of cases heard by the federal courts. In those involving judicial jurisdiction the language of Mr. Justice Stone was the starting point. In those where the only issue was whether a state could apply its own law, International Shoe was not invoked and the test of validity applied by the courts was not always clear. The chief source of confusion was the courts' uncertainty about where to draw the line between state overreaching and the legitimate application of state law. The solution ultimately adopted was a minimum contacts test in substance identical to the one set out in International Shoe. This test may be summarized in the following way. To determine whether it accords with fairness to apply the law of a state to a particular dispute, the court must look at the dispute from the point of view of the defendant. If he could reasonably have anticipated that the law of that state would be invoked to regulate the activity or transaction in question, then it is no violation of due process to force him to submit to that law. To determine whether it is reasonable in the context of the federal system to apply a state's law, the court must look at the dispute from the point of view of the state. If the application of its law to the activity or transaction in question furthers some legitimate state interest, then the due process requirement is met.

The use of the minimum contacts test to determine the validity of legislative jurisdiction is illustrated

by the Supreme Court's decision in Watson v. Employers Liability Assurance Corp.,<sup>140</sup> decided in 1954. This case concerned an insurance policy issued by the defendant to Gillette and covering its subsidiary Toni. The plaintiff was a resident of Louisiana who had been injured by a Toni product. In her suit to recover damages she relied on a Louisiana statute which permitted her to sue the insurer without first establishing the liability of the insured. The question was whether this was permissible under the due process clause.

Dealing first with the issue of unfair surprise, the Court noted that the policy was not issued in respect of purely local activity: "it was to protect Gillette and its Illinois subsidiary against damages on account of personal injuries that might be suffered ... anywhere in the United States, its territories, or in Canada."<sup>141</sup> Under such circumstances it could come as no surprise to the insurer that injury might occur in a jurisdiction other than the state where the policy was issued and that a direct action provision might be invoked against the company. Dealing next with the issue of what is reasonable in a federal system, the court observed:

Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them .... Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages.... [W]hat has been said is enough to show Louisiana's legitimate interest in safeguarding the rights of persons injured

there. In view of that interest, the direct action provisions here challenged do not violate due process. (142)

The minimum contacts test of International Shoe is strongly reminiscent of the sufficient territorial connection test formulated by the Privy Council in Wallace Brothers<sup>143</sup> and further refined by the High Court of Australia in Broken Hill.<sup>144</sup> These cases do not abandon territorial limitations altogether, but they do allow courts and legislatures considerable extra-territorial reach. The key to their approach is the conception of territory in terms of interest rather than physical extension in space: an exercise of jurisdiction by a state is valid if the state has a legitimate interest in the person or thing affected. On this approach, it is not necessary to fix an exclusive situs for each subject of dispute and so it is not necessary to rely on the rules of private international law. This detachment of the constitutional test from the rules of private international law is the chief virtue of the American and Australian approaches. A major drawback is that they require the courts to assess the significance of the contacts in each case to determine whether the constitutional standard has been met. This produces a great deal of expensive litigation, but it also makes possible a continuous and responsive development of the law.

### 3. The Case Law on the Words "in the Province"

The history of judicial interpretation of the words "in the Province" is very different from what one finds

in the comparable case law of the United States. The Canadian cases contain no single test of validity applicable generally to provincial enactments under subsection 92(13). Nor is there a discernable trend toward the liberalization of provincial powers. One finds instead a jumble of cases or independent lines of cases, each focussing narrowly on some particular problem: workmen's compensation claims, maintenance, custody and adoption, the retroactive cancellation of contracts, the situs of interprovincial torts and so on.<sup>145</sup> Only a handful of cases actually address the constitutional issue and those that do betray a bewildering variety of approaches. Little effort has been made, either by the courts or by academics, to test the consistency of these cases or to formulate policies and principles that might explain the differences in approach. Such differences may be justified but they need to be put on a sound footing. At present, they appear chiefly the result of accident and confusion.

Royal Bank of Canada v. The King,<sup>146</sup> decided by the Privy Council in 1913, is generally taken to be the leading case on the interpretation of territorial limitations under subsection 92(13). One of the main causes of confusion in this area is the weakness of Viscount Haldane's judgment in this case. The dispute in Royal Bank arose out of the abortive attempt of an Alberta government to construct a railway in the province. Legislation was passed incorporating a company to carry out the work and authorizing it to raise capital through the issue of bonds.

Over six million dollars' worth were sold to residents of the United Kingdom. This money was deposited at a New York branch of the Royal Bank and on the instruction of the bank's head office in Montreal it was credited to an account in Edmonton under the name of Alberta's Treasurer. The money was to be used to secure past advances to the bank and to finance future work on the railroad. At this point, however, a new government came into power in Alberta and legislation was passed ending the construction project and obliging the bank to transfer the money in the account to the general revenue fund of the province. When the bank refused, the government sought an order from the court on the basis of its legislation. This order was granted by the trial judge and upheld by the Alberta Court of Appeal, but the Privy Council reversed. It held that the Alberta statute was ultra vires because it prejudiced civil rights belonging to the bondholders that were situate outside the province.

The court began by reciting "a well-established principle of English common law", namely where money is loaned to a borrower on the understanding that it will be used to carry out a particular scheme, the lender has a right to claim the return of the money from the borrower as being held to his use if the scheme is aborted.<sup>147</sup> In this case, when the Alberta legislature altered the purpose for which the bond proceeds would be used, "the lenders in London were entitled to claim from the bank at its head office in Montreal the money which they had advanced....

Their right was a civil right outside the province, and the Legislature of the province could not legislate validly in derogation of that right....

In the opinion of their Lordships the effect of the statute of 1910, if validly enacted, would have been to preclude the bank from fulfilling its legal obligation to return their money to the bondholders, whose right to this return was a civil right which had arisen, and remained enforceable outside the province. The statute was on this ground beyond the powers of the Legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it. (148)

In this passage the Privy Council adopts the most conservative of all possible interpretations regarding territorial limitations. The permissible reach of the provinces is defined in terms of physical borders rather than spheres of interest and the Board looks to the effects of the legislation rather than its subject matter or purpose. Moreover, its finding that one such effect is felt outside the province is considered sufficient ground on which to declare the legislation invalid. The result of this interpretation is to seal the provinces closed at their borders, at least so far as provincial legislation is concerned.

There is nothing inherently impossible or incorrect in this limited view of provincial competence. It resembles the interpretation of the Supreme Court of United States in Pennoyer v. Neff. What is objectionable about the Royal Bank case is its failure to explain how the Alberta legislature put the rights of the bondholders in jeopardy and why these rights were situate without rather

than within the province. One wants to know, for example, why English law was applied to determine the remedy of the bondholders instead of Alberta law. Was the contract between the bondholders and the company made in the United Kingdom? There is nothing in the facts recited by their Lordships to suggest that it was or it wasn't. If the contract had been made in Alberta, would Alberta's legislature not be competent to change its terms or regulate the remedies of the parties? Their Lordships do not consider this possibility, but they can hardly afford to overlook it, for it is of considerable importance. If a provincial legislature is powerless to modify or destroy a contract made within the province because one of the parties to the contract is resident elsewhere, provincial powers are more limited than one might have supposed, even on a sealed territory approach.

Granting that the applicable law was English law, one next wants to know why the right of the bondholders to recover their money was exercisable against the bank. The bondholders had no contract with the bank. Their contract was with the company and if the failure of consideration created a right to recover, this right should have been exercisable against the company, not the bank. Certainly the Alberta legislature anticipated that any action by the bondholders would be brought against the company and it provided for this possibility in its legislation: one section of the impugned enactment stipulates that the province rather than the company is to be "primarily liable on the bonds" and that it will "indemnify

the company against claims under them."<sup>149</sup>

Let us assume, however, that the bondholders had a right exercisable against the bank. Under the common law rules, the situs of such a right is the residence of the debtor<sup>150</sup> and the debtor in this case was clearly resident in Alberta. It was also resident in Quebec and New York and any other place where it carried on business. It may be that the Board thought it necessary for constitutional law purposes to fix an exclusive situs for this right. If so, it needed to find or formulate a rule of some sort. It might have looked to the place where the money in specie was situate or the place where the bank had its head office or the place from which the money was effectively controlled. Any of these tests would be reasonable and would situate the right in one jurisdiction only, in this case Quebec. This may have been what the Board intended, but if so, its explanation is seriously deficient.

Finally, granting the bondholders had a right of action situate in Quebec, the next question that arises is how the legislation enacted by Alberta could possibly affect this right. Clearly it could not prevent the English bondholders from engaging counsel in Montreal and going ahead with their action. If the bank were sued in Montreal, the fact that it had already paid in Alberta would afford it no defence, for under Quebec's law respecting the recognition of foreign judgments, a judgment cannot be recognized and enforced against a person unless he was duly served with process in the original action.<sup>151</sup>

In this case, the bondholders were not parties to the action against the bank. Thus an Alberta judgment against the bank could have no effect on a bondholders' action taken in Montreal. If the bondholders succeeded in Montreal, the bank would be forced to pay twice, which is unfair; but unfairness is not grounds for striking provincial legislation. There is only one way in which Alberta's legislation could prejudice a bondholders' action brought in Montreal: if under the private international law of Quebec the applicable law was Alberta's, then the action of the bondholders could fail -- but this is a possibility to which their Lordships do not even allude.

The point of these questions is not to suggest that Royal Bank was wrongly decided, but rather to illustrate the complicated interaction of constitutional law and conflicts law that arises when a narrow interpretation of provincial powers is adopted and to suggest the sort of analysis that must be undertaken before a court can fairly conclude that a provincial enactment is ultra vires on account of its extra-territorial effects. There is a tendency in Royal Bank and some of the cases which follow it to simply assert or assume what most needs to be demonstrated. This tendency is especially striking in Ottawa Valley Power Co. v. Attorney General for Ontario<sup>152</sup> and Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission.<sup>153</sup>

The dispute in these cases, like the dispute in Royal Bank, arose because of a change in provincial

government. The Hydro Electric Power Commission of Ontario was initially instructed to enter contracts with a number of Quebec companies under which the companies promised to build power stations along the Ottawa River and the Commission promised to purchase the electricity that would ultimately be produced. The contracts included complex provisions concerning the location of property to be constructed on both sides of the Quebec-Ontario border and the rights of the parties in respect of this property. These contracts were partly executed when a new government took power in Ontario and enacted legislation which declared them "to be and always to have been illegal, void and unforceable as against the Hydro-Electric Power Commission." Two of the Quebec companies brought actions in Ontario to enforce the contracts and the preliminary question for the courts was whether they were precluded from doing so by the Ontario statute.

The first case to be heard was Ottawa Valley. Although the judgments of the Ontario Court of Appeal in this case are lengthy and in other respects quite thorough, very little consideration is given to the problem of characterizing affected rights and determining how they are to be situated in one province as opposed to another.

The judgments of Masten, J.A., and Fisher, J.A., make no reference to the rules of private international law nor do they offer their own analysis of where the plaintiff's rights are situate. They simply cite Royal Bank and assert that the plaintiff had acquired rights in Quebec which Ontario was powerless to destroy.

Middleton, J.A., does deal briefly with this question, but his answer does not appear to be well thought out. He says:

A contract creates civil rights which, speaking generally, know no territorial limitation. When legislation...purports ...to destroy the contract itself, that legislation does not concern 'Civil Rights in the Province', but is an attempt to destroy civil rights which have no territorial limitation, and, in my view, it is ultra vires of the Province. (154)

This analysis, it is submitted, cannot be correct. It is well established that a province may legislate with respect to contractual rights where both parties to the contract are in the province,<sup>155</sup> so it can't be the case that rights created by a contract are always outside provincial jurisdiction. Apart from judicial authority, the analysis of Middleton, J.A., is unacceptable because it implies that the provinces are incompetent to deal with intangibles of any sort. The defining feature of an intangible is that it has no physical extension and therefore knows no territorial limitation: it can be located in one place as opposed to another only by virtue of a rule of some sort. To exclude intangibles from the ambit of subsection 92(13), would leave little for the words of the subsection to operate on and so cannot be an acceptable interpretation.

In the Beauharnois case, the court addresses the problem of characterizing and situating contractual rights as follows:

The contract was executed in this case within Ontario and the place of payment

in, the present case is in the City of Toronto, whereas in the Ottawa Valley case the contract was executed in the Province of Quebec...and the place of payment named in the contract was the City of Montreal....Neither of these facts affords any ground of distinction. They do not affect the basis of the Ottawa Valley decision. In this respect I agree entirely with the learned trial Judge, and in addition I desire to point out that there are rights not enumerated by him, rights which belong to the plaintiff companies, which exist outside of the Province of Ontario...which the Legislature of the Province of Ontario has attempted to destroy. (156)

Under the relevant private international law, a contract is governed by the law of the place where it is made and a debt is situate in the place where payment can be exacted. In Beauharnois, the contract was made in Ontario and the debt was exigible there. In the view of the court, however, these facts are irrelevant. The plaintiff, we are assured, has rights existing outside Ontario which its legislature may not destroy. Yet these rights are never identified and we are never told why they are situate without rather than within Ontario.

There is no reason why the rules of private international law must govern the situs of rights for constitutional law purposes. However, if the provinces are to be sealed at their borders, some means must be found to determine whether a right is or is not "in the Province". This necessity has been recognized by the courts in dealing with cases under subsection 92(2), "Direct Taxation within the Province." The interpretation of the words "within the Province" adopted by the courts is summarized in the judgment of Duff, J. in The King v. National Trust:

First, property...can, for the purposes of determining situs as among the different provinces of Canada...have only one local situation....

Then, it seems to be a corollary of this proposition that situs, in respect of intangible property (which has no physical existence) must be determined by reference to some principle or coherent system of principles: and again, the courts appear to have acted upon the assumption that the British Legislature, in defining, in part, at all events, by reference to the local situation of such property, the authority of the province in relation to taxation, must be supposed to have had in view the principles of, or deducible from, those of the common law....

We think it follows that a provincial legislature is not competent to prescribe the conditions fixing the situs of intangible property for the purpose of defining the subjects in respect of which its powers of taxation under 92(2) may be put into effect. (157)

In this passage Duff, J. asserts three principles of interpretation. First, for constitutional law purposes property is within the taxing jurisdiction of one province only, to the exclusion of all others. Secondly, to determine this exclusive situs the court looks to the common law rules of private international law. These rules are treated as a gloss on the meaning of the words "within the Province" and so it follows, thirdly; that they are not subject to amendment by provincial legislatures. The corollary of these principles is not mentioned by Mr. Justice Duff, but it is clearly understood: once property is situated in a province under the rules, the legislature of that province is free to deal with it in whatever way, it chooses. <sup>158</sup>

In Gray v. Kerslake, <sup>159</sup> decided in 1957, the Supreme

Court of Canada adopted this approach in dealing with legislation enacted under subsection 92(13). The issue in this case was whether Ontario's Insurance Act applied to a contract purchased by a resident of Ontario from a New York association. Section 132 provided that the Act was to apply to all life insurance contracts made in Ontario notwithstanding any agreement of the parties to the contrary. Section 134 provided that "a contract is deemed to be made in the Province if the place of residence of the insured is ... in the Province." Under the common law rules the contract on which the plaintiff was suing had been made in New York and it stipulated that New York law should govern its validity and effect.

The lower courts in Ontario applied the statutory rules: since the insured was a resident of Ontario, the contract was made in the province (s. 134), and the Act therefore applied to the contract notwithstanding the agreement of the parties (s. 132). The Supreme Court, however, reversed. It held that Ontario's Act did not apply because

the contract itself was made in the State of New York and, by its terms, the obligations of the Association were to be... such as were imposed on it under the laws of that State....The situs of the cause of action which would arise on the death of the policy-holder...was clearly in the State of New York....

I agree with the contention of the appellant and the Attorney General that...s. 134 and s. 132...do not apply. To hold otherwise would be to say that the Legislature of the Province might affect civil rights the situs of which was outside the Province. This is the argument which failed in Royal Bank of Canada et al. v. The King et al. (160)

The Court does not say that section 132 of the Ontario Act is ultra vires. It is merely inapplicable to a contract that is not situate in Ontario under the common law rules. Had those rules situated the contract in Ontario, presumably the section would have applied notwithstanding the term in the contract stipulating the application of New York law. Neither does the Court say that section 134 is ultra vires. This, however, is the implication of its holding, for the whole purpose of this section is to bring into Ontario contracts that would not be situate there under the common law rules. Just as the provincial legislature cannot change the situs of property for taxation purposes under subsection 92(2), on the approach adopted in Kerslake it cannot change the situs of a contract for the purpose of making its law applicable under subsection 92(13).<sup>161</sup>

Although Royal Bank is considered the leading case on the reach of provincial jurisdiction under subsection 92(13), there are many cases which implicitly reject its narrow interpretation of provincial powers. In Workmen's Compensation Board v. Canadian Pacific Railway Co.,<sup>162</sup> for example, decided just six years after Royal Bank, the Privy Council considered and upheld two substantive rules in British Columbia's Workmen's Compensation Act. The dispute in this case concerned a claim for compensation made by dependents of workmen who were employed by the defendant in British Columbia, but were killed while working outside the province. The claimants themselves were not residents of the province, but the Act expressly

provided that non-resident claimants were to be treated in the same way as residents. It also provided that claims could be brought in respect of accidents occurring outside the province whenever the injured workman was a resident of the province and ordinarily performed part of his work there. Although challenged by C.P.R., in the view of the Board these provisions were valid; they did not entail an unconstitutional extension of British Columbia law:

[The workman] is given a right which enures for the benefit of himself and the members of his family dependent on him, not the less that the latter may happen to be non-resident aliens. This right arises...out of the workman's statutory contract, and their Lordships think that it is a legitimate provincial object to secure that every workman resident within the Province who so contracts should possess it....The scheme of the Act is not one for interfering with rights outside the Province. It is in substance a scheme for securing a civil right within the Province. (163)

Viscount Haldane here offers a very different interpretation of territorial limitations from the one he offered in Royal Bank. His focus in this passage is on the purpose of the impugned legislation rather than its effects, and territorial limitations are thought of in terms of provincial interests rather than geographical borders.

Had this approach been taken in the Royal Bank case, the result would probably have been different. Alberta's scheme, no less than British Columbia's, was one for securing rights in the province. The purpose of its legislation could not have been interference with the rights of the bondholders, for these were acknowledged

and secured by special provision of the Act. Like British Columbia's workmen, Alberta's Treasurer was given a statutory right enforceable against a corporation doing business in the province. The only feature distinguishing the cases is the nature of the extra-territorial effects produced by the acts; British Columbia's granted rights to non-residents while Alberta's took them away.<sup>164</sup> On the reasoning implicit in the passage quoted above, the nature of the extra-provincial effects should not be material. It appears, however, that the Board was unwilling to press the logic of its approach quite so far. Rather than overruling Royal Bank, it distinguished it on the following somewhat dubious grounds:

[This case] is wholly different from...  
Royal Bank of Canada v. The King...The  
rights affected were in that case rights  
wholly outside the Province; here the  
rights in question are the rights of  
workmen within British Columbia. (165)

In 1939, the Privy Council rendered judgment in Ladore v. Bennett,<sup>166</sup> a case that no amount of ingenuity can reconcile with Royal Bank. At issue in Ladore was the validity of a provincial scheme to refinance the debt of certain power companies and municipalities in the province. Legislation was enacted amalgamating the municipalities and authorizing a board to cancel outstanding debentures, most of which were held by non-residents, and to issue new ones at a reduced rate of interest. Notwithstanding the prejudicial effect of this legislation on the rights of non-residents, the Privy Council upheld it because it was legislation in relation

to "municipal institutions in the province". Any interference with rights situate outside the province was a necessary incident of carrying out a valid provincial scheme and therefore supplied no grounds on which to declare the legislation ultra vires.<sup>167</sup>

This reasoning is clear, but more concise than one could wish. Although the Royal Bank case was argued by counsel, their Lordships do not even mention the case in their judgment. They do not acknowledge the conflicting approaches in the previous case law nor do they explain or elaborate their own approach. It is nonetheless clear that Ladore carries the reasoning in the C.P.R. case to its logical conclusion. The Board here appears to recognize that if the validity of legislation turns on its subject matter and purpose rather than its effects, it is unnecessary to consider the nature or situs of affected rights: so long as the province is "minding its own business" as defined in section 92, rights may be destroyed or created regardless of their situation if such is the inadvertent effect of the legislation.

The approach of the Privy Council in Ladore v. Bennett was adopted by the Alberta Court of Appeal in Re Ogal<sup>168</sup> where the issue was whether a provision of Alberta's Intestate Succession Act could be relied on even though its effect in the circumstances was the loss of contractual rights by persons outside the province. The court said:

[A]ny interference with any civil right which may be said to exist abroad, is

merely incidental to something which in my view is clearly within the ambit of the legislative jurisdiction of the Province, namely, its right to deal with...the ownership of the property within the Province, under its jurisdiction over property and civil rights within the Province. (169)

Provincial provisions regulating advertising,<sup>170</sup> the conduct of members of professional corporations,<sup>171</sup> the sale of securities,<sup>172</sup> supply agreements<sup>173</sup> and title to land<sup>174</sup> have all been upheld despite some degree of interference with the rights of non-residents, because the subject matter of the legislation was property situate in the province or the behaviour to be regulated would take place in the province or the purpose of the legislation was to confer a right exercisable within the province. Although the courts do not expressly say so, they appear in these cases to apply a test of validity akin to the sufficient territorial connection test asserted by the Privy Council in Wallace Brothers.<sup>175</sup> The failure of the courts to spell out the governing principle is a serious flaw in these cases and more than anything else accounts for the continuing viability of Royal Bank.

The only conclusion to be drawn from the Canadian case law is that it supports two distinct and wholly incompatible interpretations of the territorial limitations on provincial jurisdiction. The one is grounded in the Royal Bank case, which is treated as the leading case but is ill understood. The other is exemplified by Ladore v. Bennett, but is not tied to any leading case. Ladore itself is rarely cited, save by academics, probably because

it is so terse and the Board relies on subsection 92(8) rather than 92(13). Other examples of the second approach fail to address the constitutional issue or, like Ladore, deal with it too briefly or indirectly to establish an adequate alternative to Royal Bank. C

#### 4. Recent Decisions of the Supreme Court of Canada

Recently the Supreme Court of Canada was given an opportunity to expose the contradictions and inadequacies in the case law and to furnish a coherent interpretation of the words "in the Province" in subsection 92(13). This opportunity arose in Interprovincial Co-operatives Ltd. and Dryden Chemicals Ltd. v. The Queen.<sup>176</sup>

At issue in Dryden was the validity of the following provisions in Manitoba's Fishermen's Assistance and Polluters' Liability Act:

4(1) In any suit in which the government is a plaintiff wherein the pollution of water is in issue, if it is established ...that the defendant has...discharged or permitted the discharge of any contaminant from premises occupied by him, into waters in the province or into any waters whereby the contaminant is carried to waters in the province, and that thereafter fish in those waters have suffered death, disease or injury, ...the defendant is liable for all financial loss occasioned thereby to any person whose loss is a subject matter of the suit, notwithstanding any one or more of the following circumstances:

- (a) At no time did that person have any proprietary interest in the fishery containing the affected fish.
- (b) A regulatory authority has forbidden ...the taking of fish...by reason of the pollution of the waters...
- (c) Those waters have been, or are being polluted from any other cause or by

any other person.

(d) It cannot be established that the contaminant affecting the fish derived from the actual volume of contaminant which the defendant discharged...provided the deleterious effect on the fish is of a nature consistent with a contaminant of that kind being the total or partial, immediate or mediate cause.

(2) For the purposes of subsection (1), it is not a lawful excuse for the defendant to show that the discharge of the contaminant was permitted by the appropriate regulatory authority having jurisdiction at the place where the discharge occurred, if that regulatory authority did not also have jurisdiction at the place where the contaminant caused damage to the fishery. (177)

Both parts of this section contain a substantive rule of private international law. Subsection 4(1) tells the court what solution to apply where a contaminant is discharged into waters which carry it into the province: the act of discharge contemplated here takes place outside of Manitoba. Subsection 4(2) stipulates a solution for cases in which the discharge of contaminants was licensed by an authority that did not have jurisdiction at the place where the contaminant caused damage to the fishery: the authority contemplated here is an extra-provincial one.

To appreciate the significance of these provisions, one must refer to the common law conflicts rule respecting liability in tort. This rule was established in Phillips v. Eyre<sup>178</sup> and has two legs: the alleged "wrong must be of such character that it would have been actionable if committed" in the forum and "the act must not have been justified by the law of the place where it was done."<sup>179</sup> In other words, the applicable law is the law of the forum,

but the defendant is also permitted to rely on defences available to him under the law of the place where his act was performed. Section 4 of Manitoba's Assistance Act largely abrogates the second leg of this rule. Subsection 4(2) does this in an obvious way by precluding a defendant from pleading that his act was licensed by the jurisdiction where it occurred. Subsection 4(1) does so more subtly by removing ordinary common law defences that would otherwise be available to the defendant in any Canadian jurisdiction and probably any American jurisdiction as well.

Manitoba's Assistance Act was enacted in response to a serious pollution problem. Because of the high levels of mercury discharged into its waters, the government was forced to close a number of fisheries and this caused economic damage to some 1,500 residents of the province. The Act authorized the government to compensate these residents and to recover the amounts so paid from those responsible for the pollution. Approximately two million dollars were paid in compensation. The Attorney General then sought to recover this amount from two companies, Dryden and Ipco, both of which operated plants outside the province that discharged mercury into rivers flowing into Manitoba. These emissions of mercury were in both cases authorized by licence under the authority of the provinces where the plants were situated. The Attorney General claimed damages at common law for nuisance and negligence and he also claimed damages under the Act. Since the common law claims were almost certain to fail,

the crucial issue for the parties was the validity of the provisions in section 4. In the result, a majority of the Supreme Court held that those provisions were ultra vires.

Mr. Justice Ritchie and Mr. Justice Pigeon both wrote opinions for the majority and both accepted the interpretation of territorial limitations established by Royal Bank. They differed, however, in their view of the implications of that case. The reasoning of Mr. Justice Ritchie is contained in the following passages:

It is perhaps trite to observe that under the British North America Act, 1867 each Province of Canada enjoys sovereign authority within the spheres enumerated in s. 92 of that Act and that this authority is limited by the territorial boundaries of the Provinces respectively. It follows in my view that in considering the law applicable in any particular case, the common law principles established in the general field of conflict of laws must govern. (180)

In this passage Ritchie J. appears to deny to provincial legislatures the power to alter or displace common law conflict rules: "in any particular case, the common law principles...must govern." Whereas the authority of a provincial legislature is limited by the territorial boundaries of the province, conflict rules by definition apply to matters extending in some fashion beyond those boundaries and so cannot be changed, at least not by provincial legislatures.

As Ritchie J. points out, the common law rule in torts is the one established in Phillips v. Eyre:

If that rule is to be adhered to it follows that if there were licences making the appellants' 'mercury discharging activities' in Saskatchewan and Ontario justified, this not only gave rise to the civil right under the law of those Provinces, but to a concomitant civil right to have those licences recognized in the Courts of Manitoba....As to the authority of the Legislature of that Province to nullify these civil rights and convert an act lawfully done in another Province...into an unlawful one while at the same time disregarding rights established under private international law, ...the case of Royal Bank of Canada et al. v. The King...has direct application to the circumstances. (181)

Ritchie J. here suggests that common law conflicts rules create rights in defendants to have their disputes litigated under the law chosen by the conflicts rule and that it is beyond the competence of a provincial legislature to tamper with those rights.

It follows from the reasoning of Mr. Justice Ritchie that either the common law rules are entrenched in subsection 92(13) of the Constitution Act or the power to modify them lies with the federal Parliament. Ritchie J. appears to reject the latter possibility.<sup>182</sup> Does he therefore mean to assert that the common law rules are entrenched? It should be noted that this solution differs from the one adopted by the courts in Gray v. Kerlake and the taxation cases.<sup>183</sup> In those cases situs rules originating in private international law are treated as glosses on the meaning of the words "in" or "within the Province" in subsections 92(13) and 92(2). These rules situate rights or property in a single province for constitutional law purposes. Once rights or

property are so situated in a province, it has exclusive jurisdiction and may deal with the rights or property in whatever way it likes. Thus, if the torts of the defendants in the Dryden case were situate in Manitoba, the special provisions in section 4 of Manitoba's legislation would apply. On Mr. Justice Ritchie's approach, however, the whole "general field of conflict of laws" is immune from legislative interference. This includes not only situs rules, but reference rules as well. In the instant case, it means that even if the defendants' torts were situate in Manitoba, section 4 could not apply because it changes the choice of law rule established in Phillips v. Eyre.

The solution of Mr. Justice Ritchie entails certain difficulties. From a practical point of view, it puts the entire burden of reforming conflicts law on the courts, which thus far have shown little inclination to accept the challenge. As Ritchie J. remarks, there is an unbroken line of cases in the Supreme Court of Canada accepting the rule in Phillips v. Eyre despite its glaring inadequacies. There are conceptual difficulties with this solution as well. The "general field of conflict of laws" in so far as it relates to provincial matters cannot be a gloss on the words "in the Province." It cannot have been the intention of the Imperial Parliament to entrench the entire body of choice of law rules in subsection 92(13). Yet if this is not what Mr. Justice Ritchie means, how is it that the provinces are not competent to change these rules? Ritchie, J. seems to assume

that conflicts law, without being federal law and without being constitutional law, is nonetheless pan-Canadian law. However, there is no way to fit such a concept into the Canadian legal system. It is very likely that faced with a more reasonable attempt to amend the rule in Phillips v. Eyre, Mr. Justice Ritchie would adopt a different solution.

The reasoning of Pigeon, J. in the Dryden case is difficult to follow, but of the three opinions written his alone does full justice to the complexities of the issue. He begins by rehearsing the principles of interpretation established in the taxation cases and summarized by Duff, C.J. in The King v. National Trust.<sup>184</sup> These, he suggests, should apply equally to the construction of subsection 92(13). This means that the Court must apply the rules of the common law to determine the situs of the parties' rights and Manitoba will not be permitted to change those rules or to deem its law applicable to a matter whose true situs is elsewhere under those rules. Pigeon, J. then reviews the case law and finds that under the rules "a cause of action arises where damage is caused by acts performed in another State or Province."<sup>185</sup> In the instant case, since damage was caused in Manitoba, the cause of action was situate there and could not be prejudiced by legislation enacted in another province. For this reason the licences granted by Ontario and Saskatchewan did not afford the companies a defence:

I fail to see how a provincial authority could, by licensing the polluting operations, destroy this cause of action....

Such a cause of action is, I think, a right enforceable outside... [the licensing] Province which its Legislature cannot take away under the principle stated in Royal Bank of Canada v. The King. (186)

Up to this point the reasoning of Pigeon J. parallels that of the courts in Gray v. Kerlake and the taxation cases. However, he refuses to draw the logical conclusion: being situate in Manitoba, the cause of action is within the jurisdiction of Manitoba and can be dealt with as its legislature sees fit. While conceding that Manitoba's common law of tort will govern the cause of action, he holds that the special solutions of subsection 4(1) are ultra vires because they purport to regulate a "pollution problem that is not really local in scope but truly inter-provincial."<sup>187</sup> If provisions like those in subsection 4(1) are wanted, they must be enacted by the federal Parliament under its residual power.

It is difficult to fault the logic of this solution. If a matter cannot be contained within the borders of a province, then clearly it is not "in the Province" as those words are construed in Royal Bank. Then, if a matter does not come under provincial jurisdiction as defined by section 92, save in certain exceptional cases it belongs to the federal Parliament under the introductory words of section 91. Despite its logic, the solution of Pigeon J. has not been well received.<sup>188</sup> Those who dislike this solution, however, tend to overlook the considerations that led to it. These are set out at some length in the opinion:

As between sovereign countries, such problems can be settled only by

international agreement....However, as between different Canadian Provinces, the situation is not in all respects the same as if they were independent States. There is a constitutional limitation on their legislative authority and there is a common forum to enforce it.... (189)

In deciding what is 'within a Province', the Courts must obviously look for guidance at decisions rendered in matters of private international law. However, there is a very important difference between those cases and those that arise under our constitution. When a Court is called upon to choose as between the laws of two countries the proper laws to be applied for the solution of some private dispute, it must in the end be guided by the laws of the State that created it. But the superior Courts of the Canadian Provinces are not State Courts. (190)

...  
Coming back to the facts of the present case, it appears to me equally impossible to hold that Saskatchewan and Ontario can license the contaminant discharge operations so as to preclude a legal remedy by those who suffered injury in Manitoba, or to hold that Manitoba can, by prohibiting the discharge of any contaminant into waters flowing into its territory, require the shutting down of plants erected and operated in another Province. (191)

The first point here is that private international law is based on the assumption that the competing jurisdictions are sovereign states. After weighing the international consequences, a sovereign state may find that its best interest lies in extending its law to the territory of another state. Should it do so, its courts are obliged to give effect to the extra-territorial legislation to the fullest extent possible. Canadian provinces, on the other hand, are not sovereign states and under the unitary judicial system in Canada, the

courts of the provinces are bound to ensure that they do not exceed the limitations on their powers imposed by the Canadian constitution. Because of these differences in underlying assumptions, the rules and methods of private international law cannot be indiscriminately adopted to resolve constitutional law problems.

The second point here is that in interpreting the words "in the Province" in subsection 92(13), the courts are concerned with public rather than private law. Their task is to allocate jurisdiction among competing provinces in a fair and rational way. The system of conflicts law developed in the nineteenth century reflected this concern, but in a very imperfect way. The first leg of the rule in Phillips v. Eyre, for example, was designed to attract rather than allocate jurisdiction while the second leg was designed to protect the private interests of defendants. The tendency to favour the forum and to focus on the private interests of the litigants is greatly exacerbated under the modern American approaches. In the light of these considerations, Mr. Justice Pigeon is surely correct in insisting on a clear distinction between conflicts law and constitutional law and in refusing to automatically accept the private international law solution to the constitutional problem.

The dangers of blurring this distinction are illustrated by the dissenting opinion in the Dryden case, written by Laskin C.J. The reasoning of the dissent is set out in the following excerpt:

In my opinion, choice of law principles relative to the place of commission of the tort in the present case make it appropriate for Manitoba to apply its own law, whether common law or statute law, to the liability of Ipco and Dryden. ...I do not regard this as a case where Manitoba has purported to bring within its borders a tort which could not justifiably be litigated there under Manitoba law by common law choice of law principles....

Manitoba's predominant interest in applying its own law, being the law of the forum in this case, to the question of liability for injury in Manitoba to property interests therein is undeniable. Neither Saskatchewan nor Ontario can put forward as strong a claim....

If, as I would hold, Manitoba law is applicable to redress the injury suffered in that Province, how can there be constitutional infirmity in its imposition of liability merely because the cause of the damage arose outside Manitoba?...Of course, the Manitoba Act has an effect upon [the rights and interests of Ipco and Dryden] but its purpose is to strike at the damage and loss produced in Manitoba to Manitoba property. (193)

The language of Laskin C.J. in this passage is highly allusive and it is difficult to know how much one can fairly read into his remarks. The final words of the passage echo the reasoning of the Privy Council in Ladore v. Bennett.<sup>193</sup> Does the Chief Justice here embrace the liberal interpretation of territorial limitations offered in that case? Also, reference is made to the "predominant interest" of Manitoba in applying its own law. Is this intended to introduce the American method of interest analysis for the purpose of testing constitutional validity? Or is it merely an application of a conflicts approach like the one described by Professors von Mehren and Trautman?<sup>194</sup> Given the emphasis in the passage on

choice of law principles, the latter alternative is probably correct. Finally, although Laskin C.J. refers to "choice of law" principles, he writes as if he were applying a situs rule: "choice of law principles relative to the place of commission of the tort...make it appropriate for Manitoba to apply its own law." The method employed here is basically the one used in Gray v. Kerslake and the taxation cases, save that the Chief Justice relies on "principles" rather than rules to determine the situs of the tort.

The problem with this approach is that it does not permit the courts to consider the content of the applicable provincial law. Once a legal problem is situated in a province by virtue of the rule or the principle, there is no restriction on the way in which the provincial legislature may deal with it.<sup>195</sup> In the instant case, subsection 4(2) of Manitoba's Assistance Act is unobjectionable, but subsection 4(1) is not. Under 4(1) a defendant can be made liable for the entire financial loss resulting from damage to Manitoba's fisheries even though he could prove that 99% of the damage was in fact caused by manufacturers within Manitoba.<sup>196</sup> Furthermore, he can be made liable for this loss even though his own act of pollution was negligible and could not have contaminated a single Manitoba fish.<sup>197</sup> In short, the provisions of subsection 4(1) permit the government of Manitoba to impose the entire cost of Manitoba's pollution on an extra-provincial defendant without having to show that there was any significant connection between

Manitoba's loss and the defendant's act.

This result is unfair to the defendant, but more importantly from a constitutional point of view, it is unfair to the provinces in which actual and potential defendants are situate. Suppose, for example, that the Manitoba court found Ipco liable and dismissed the action against Dryden. Under the Act, Ipco's liability would total more than two million dollars, a result that would probably put it out of business. The resulting loss of jobs, production and revenues must be born by Saskatchewan. The extent of interference with Saskatchewan policy is potentially very significant. Ipco may have been granted its licence, for example, in order to lure new industry into an economically depressed area of the province; the plant may have been the site of an experiment in new technology or a new form of industrial management which Saskatchewan was anxious to promote. The general deterrent effect of the Assistance Act must also be considered. In order to ensure immunity from liability in Manitoba, all manufacturers discharging contaminants into waters that flow into Manitoba would have to install virtually fail-safe pollution devices. This would be costly and would probably reduce the taxable profits of the company and the capital available for expansion. When the concrete effects of the Assistance Act are considered, the solution produced by the conflict of law rules or principles begins to look unacceptable from a constitutional point of view.

The problem here is clear enough. Like all regulatory

legislation, the Assistance Act is the result of a policy decision based on a weighing of competing private interests. The best interest of the fishing industry lies in putting a complete stop to pollution while the best interest of manufacturers lies in having no pollution controls at all. So long as both are situated in the same province, no one can constitutionally object if the provincial legislature sacrifices the interest of manufacturers to fishermen. Where these interests are situated in different provinces, however, two problems arise. First, under section 92 of the Constitution Act the legislatures of the concerned provinces have an equal claim to make the necessary policy decisions and, secondly, the best solution for each will be to sacrifice the interest situated in the other. If one of the competing interests were situated in a foreign state, a different problem would arise -- that of Canada's relations with the other state.

Given these hard facts, the solution of Mr. Justice Pigeon appears less eccentric. Under a federal system one member cannot be permitted to transfer the costs of hard policy decisions to another member. This means that Saskatchewan cannot license its resident manufacturers to pollute Manitoba waters and Manitoba cannot make Saskatchewan manufacturers pay for pollution that it may not have caused. If any legislature is competent to balance the competing private interests involved in this case, it must be the federal Parliament for the pollution of interprovincial rivers, like the regulation of interprovincial pipelines, is a "truly interprovincial" problem. Pigeon,

J., one should notice, does not assert that every problem with extra-territorial dimensions must be dealt with at the federal level. There may well be matters with which no legislature is competent to deal. Nor does he assert that provincial legislatures lack the power generally to enact legislation respecting the conflict of laws. The real weakness of his judgment is that it suggests no criteria for distinguishing permissible provincial initiatives from impermissible ones.

As conflicts problems go, Dryden is an easy case. Even on the approach in Ladore v. Bennett<sup>198</sup> or the minimum contacts test of International Shoe,<sup>199</sup> subsection 4(1) of the Assistance Act should be inapplicable to extra-provincial defendants, for it dispenses with the sine qua non of validity -- a connection of some sort between the legislating jurisdiction and the activity of the defendant. A hard case is one in which the competing private interests are not so clearly concentrated in different provinces or where the transferred costs are minimal and the advantage to the enacting province is great. Suppose, for example, that the Assistance Act had instructed the courts to impose liability in strict proportion to the amount of damage actually caused by the defendant. Should this revised version of the subsection be allowed? What if nearly all polluters were situated in Manitoba but to make its policy of pollution control effective Manitoba had to reach a single extra-provincial manufacturer located just on the Ontario side of the border? Should this relatively modest interference be

allowed? It is difficult to predict what the response of Pigeon J. would be to a less over-reaching provincial enactment.

Although the result in the Dryden case is surely correct, the case is unsatisfactory because it does little to reduce the confusion in this area. In lieu of a single, generally applicable test of validity, the case offers three distinct approaches none of which attracts a majority of the Court. Nor is the conflict between the different interpretations of the words "in the Province" resolved: Royal Bank remains the leading case and its import remains obscure. Pigeon J. relies on it to exclude the defence of extra-provincial licences while Ritchie J. relies on it in holding that this defence cannot be taken away. Chief Justice Laskin seems to prefer the interpretation in Ladore v. Bennett, but distinguishes rather than overrules Royal Bank on the grounds that it dealt with "promissory undertakings" whereas Dryden is a case in tort.<sup>200</sup>

Matters were not greatly improved by the next case to come before the Court involving this problem. The case was R. v. Thomas Equipment Ltd.,<sup>201</sup> a penal action brought in Alberta for violation of Alberta's Farm Implement Act. The defendant in Thomas Equipment was a manufacturer of farm machinery whose offices and plant were situate in New Brunswick. It had a contract with an Alberta retailer, Suburban, under which it supplied machinery to Suburban for resale in a certain area while Suburban promised to advertise in that area and to service

the machinery it sold. The final clause of the contract stipulated that it would be governed by New Brunswick law. The Farm Implement Act provided that where a contract to supply farm machinery was terminated, the dealer could serve notice on the vendor to repurchase any stock originally acquired from the vendor and not disposed of. A vendor who received such notice was obliged by the Act to repurchase and failure to do so was an offence punishable by fine. Subsection 22(12) provided that the obligation to repurchase existed "notwithstanding anything in an agreement...between the vendor and the dealer." The issue for the Court was whether Thomas could be convicted of an offence under this Act, having regard to the fact that its only connection with Alberta was its contract with Suburban and this was by agreement of the parties to be governed by New Brunswick law.

The constitutional issue that arises on these facts is similar to the one in Gray v. Kerslake. However, because the issue was not pleaded, the majority of the Court took the position that no constitutional question had been raised. In the words of Martland J., "the only question ... is as to the proper construction of the statute in respect of the facts of the case."<sup>202</sup> Though not raised on the pleadings, the constitutional issue had nonetheless to be dealt with. The presumption that statutes are not intended to apply to persons or things outside the territory of the enacting jurisdiction could not be relied on in this case. Since most suppliers of

farm machinery are in fact situate outside Alberta, the Act would have little point if it were not intended to capture the interprovincial case. Whether it could validly do so is a constitutional question.

The majority in the Alberta Court of Appeal<sup>203</sup> characterized the Act as penal legislation and assumed that it could apply to Thomas only if the offence had been committed within the province. This is a well established rule, but its application in a case where the actus reus of the offence is an omission gives some difficulty: omissions, like rights, are intangibles.<sup>204</sup> The Court did not remark on this point, but responded to it by shifting attention from the place where the "act" occurred to the place where the "actor" was situate. It thus implicitly assumed that omissions occur in the place where the person guilty of the omission is situate. Then, to determine where Thomas was situate it applied the common law rule: a company is situate in a jurisdiction if it carries on business there. In the view of the majority, Thomas did not carry on business in Alberta:

In my opinion, this contract does no more than provide that Thomas will sell goods at determinable prices to Suburban, and will not sell to others in Northern Alberta, and...it cannot be said that Thomas is carrying on business in the Province of Alberta....

The question as I see it is whether the province of Alberta can effectively legislate so as to make it an offence for a resident of New Brunswick to fail to comply with a demand to re-purchase machinery sold to an Albertan. The offence would surely be committed in New Brunswick when Thomas refused to make payment. (205)

To say that the offence was committed in New Brunswick is an unfortunate way of putting it perhaps, but the point is clear enough: since Thomas was not present in Alberta, it could commit no act or omission there and so was immune from Alberta's penal legislation.

In the Supreme Court of Canada Martland, J. reached a different conclusion. He thought that the contract between Thomas and Suburban could not be regarded as a simple sale of goods. The ratio of his judgment, however, does not depend on the application of situs rules. He focusses on the purpose and policy of Alberta's legislation and the crucial question for him was whether the defendant company came within the legitimate scope of the Act. In holding that it did, he relied on the following passage from the judgment of Sinclair J.A. dissenting in the Court below:

As I see it, the Act provides a code for the very important business of buying and selling farm machinery in Alberta. If a manufacturer wants to have his farm implements sold here he must comply with the rules of the game, as it were, established by the legislature of Alberta. (206)

The dissenting judgment in the Supreme Court was written by Laskin C.J. who responds to this argument in the following way:

It is said...that Thomas in having his goods sold in Alberta must accept 'the rules of the game' established by the Alberta Legislature. This is a one-sided view because it is an equally if not a more tenable proposition that if Suburban wishes to buy from Thomas it must accept New Brunswick law. (207)

This touches the heart of the problem: from a constitu-

tional point of view, Alberta can have no better claim to regulate the relation between Suburban and Thomas than New Brunswick has. To break the apparent deadlock Laskin C.J. again goes to the situs rules of private international law:

So far as the record shows, the contract between Thomas and Suburban was a New Brunswick contract, and its locus there is emphasized by the provision therein that the contract and the rights and obligations of the parties were to be determined according to the laws of New Brunswick....

How then does the termination in New Brunswick of a contract made in New Brunswick which, by its terms is governed by New Brunswick law, give Suburban any claim to apply unilaterally against Thomas a statutory advantage to Suburban based on Alberta law? (208)

Some of the difficulties with this approach have already been suggested. Thomas Equipment exposes still others. Whereas the majority in the Court below thought that the impugned provisions were penal in character and so applied a rule to determine the situs of the offence, Laskin C.J. sees this as a problem in contracts and applies a different rule. Such conflicts in characterization are common in private international law cases and often affect the final result. More seriously, some situs rules allow the parties themselves to determine the final result. Laskin C.J. suggests that New Brunswick's claim to govern the relation between Thomas and Suburban is "more tenable" because the contract was made in New Brunswick. Given existing situs rules, it was possible for Thomas to ensure this result through the conduct of

its negotiations; it may have done so for the specific purpose of avoiding Alberta's law. At best the result was fortuitous. Surely the resolution of the constitutional issues here should not be left to chance or the private preference of the parties.

This is just one of many problems associated with reliance on the common law rules. As a method of resolving conflict of law disputes, the common law system has proved inadequate. Adopted into constitutional law, it scarcely does better. Situs rules may assign issues to jurisdictions in a blind and even-handed way, but the result is apt to be both too generous and too hard. It is too generous because once an issue is assigned to a province, that province is free to impose whatever solution it likes regardless of the effects on others. It is too hard because once assigned, the issue is removed from the reach of all other provinces regardless of the legitimacy and importance of their interests in that issue.

##### 5. A Recommended Approach

What, then, are the courts to do? Should they adopt a test of validity like the one set out in International Shoe?<sup>209</sup> With its judgment in the Thomas Equipment case, the Supreme Court of Canada appears to be leaning in that direction. It comments on the economic benefits which the defendant derived from Alberta by capturing a share of its market and it notes the importance to Alberta of the business of selling farm machinery. The possible

importance of this business to New Brunswick is not a material consideration. This reasoning contains the seeds of a minimum contacts test which could be developed more fully in subsequent decisions of the Court. This would bring Canada into the twentieth century and would free the case law from the confusions and inadequacies of Royal Bank.

At first glance, this appears to be an attractive solution. The liberal approach to territorial restrictions has been adopted in both Australia and the United States and the experience of other federations ought to be persuasive. More importantly, the strict interpretation of Royal Bank has proved unduly repressive and difficult to apply. It requires the courts to formulate or adopt a complete set of situs rules capable of assigning property and civil rights in one province only at a given time. The existing set of rules is far from satisfactory, but even if this problem were overcome the strict interpretation would remain unacceptable because it is too blunt a tool for controlling provincial initiatives. It is unable to discriminate between legislation that officiously meddles in extra-provincial affairs and legislation that deals with provincial matters but has some minor or inadvertent extra-provincial effect.

While the inadequacy of the approach in Royal Bank may be conceded, it does not follow that a minimum contacts test must or should be adopted in its stead. When one remembers the purpose for which words of territorial limitation were introduced into section 92 of the

Constitution Act, this test appears to miss the mark. The point of the limitation, we have seen, is to ensure that no one province can assert jurisdiction over persons or things outside that province on the grounds merely that it has an interest in doing so. Yet nothing further is required under a minimum contacts test.

It is true that this test has worked reasonably well in the United States, but American constitutional law differs from Canadian law in several important respects. In the first place, the American test is grounded in the due process clause of the American Constitution. This clause is concerned with the relations between governments and individuals rather than the relations of governments inter se and it naturally lends itself to a test which focusses on the conflict between the forum state and the defendant rather than on competition among states for jurisdiction. Under the minimum contacts test judicial assessment of the forum's claim to jurisdiction occurs in a vacuum, apart from any consideration of the interests of other states. Furthermore, as the law has developed, the nature of the interest necessary to justify the application of forum law has become ever more minimal.<sup>210</sup> In the result, the principles of territorial sovereignty have all but disappeared. This result is tolerable in the United States because the other part of the due process test, concerning fairness to individuals, provides an additional source of control. Although the forum may have a minimal interest in the subject of the dispute, it will be denied jurisdiction if in the

circumstances a reasonable person would not have expected to be subject to its laws.

Canada now has a Charter of Rights and a due process clause of its own, but it is not clear that section 7 of Canada's Charter is capable of playing a similar role.

It provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Canadian courts may find that applying the law of a province to a person who has no significant connection with that province violates the principles of fundamental justice. Indeed, any other result would be very surprising. However, unlike the due process clause of the American constitution, section 7 of the Charter does not refer to property. The guaranteed rights are "the right to life, liberty and security of the person." If a person is threatened with imprisonment for failure to comply with a law, section 7 clearly applies. Where the threat takes the form of some purely economic disadvantage, its application is more doubtful. The imposition of a fine or liability in tort might be thought to deprive a person of the "liberty" to act. Economic loss that threatens the livelihood of a person might come within the ambit of "life" or "security of the person". Given the deliberate omission of property rights from the section, however, the courts may well prefer a more restrictive construction. 211

Apart from the due process clause there are other constitutional checks on state overreaching in the United

States that are not available in Canada. As interpreted by the Supreme Court of the United States, the American commerce clause puts much greater limits on the power of the states to interfere in interstate business and trade than does subsection 91(2) of the Constitution Act.<sup>212</sup>

American courts may also rely on the privileges and immunities clause to strike legislation that deals unfairly with non-residents.<sup>213</sup> Under the supremacy clause, treaties concluded by the federal authorities are deemed to form part of the "Law of the Land" and have the same status and effect as duly enacted federal laws.<sup>214</sup> This means that treaties override any inconsistent state law to the extent of the inconsistency. As the number of treaties respecting private law matters increases, this power will significantly curtail the freedom of states to offer their own solutions to choice of law problems. Finally, state conflicts law is liable to be displaced by federal common law in a variety of circumstances: where the subject of the dispute is a federal transaction, where federal rights are involved or where the area in question is subject to federal control.<sup>215</sup> Federal common law will apply in these circumstances whenever the need for uniformity of results across the country outweighs the need for uniformity within the state.

In the absence of comparable controls in Canada, a minimum contacts test could prove unduly generous to the provinces. It must be remembered that a generous reading of provincial powers in this area is not necessarily an advantage to the provinces, for in this area the provinces

exercise their powers not at the expense of the federal Parliament but at the expense of one another.

Notwithstanding the range of constitutional controls available in the United States, there are signs that American courts are beginning to find the minimum contacts test as traditionally applied an unsatisfactory method of resolving interstate conflicts. The seeds of this dissatisfaction are found in several cases dealing with judicial jurisdiction and the service of process on defendants not present in the forum state. In Jonnet v. Dollar Savings Bank,<sup>216</sup> decided in 1976, Mr. Justice Gibbons wrote an opinion in which he returned to nineteenth century case law in order to recapture the values which the analysis of state interests was originally intended to serve. Gibbons, J. discovered that "the concern prior to the adoption of the fourteenth amendment was not fairness, but sovereignty."<sup>217</sup> If a plaintiff could be authorized to serve process on a defendant in a jurisdiction other than the forum, "the sovereignty of that other jurisdiction would be offended."<sup>218</sup> In an effort to reassert this original concern with the relationship of states inter se, Mr. Justice Green formulates the test for valid jurisdiction in the following way: "Ultimately, the exercise of raw judicial power must stand on twin legs...1) respect for federal system values and 2) fairness to the parties."<sup>219</sup> The wording does not differ greatly from what is found in International Shoe,<sup>220</sup> but the emphasis has changed.

The importance of respect for "federal system values"

is emphasized by the Supreme Court of the United States in another recent case on judicial jurisdiction, World-Wide Volkswagen Corp. v. Woodson,<sup>221</sup> decided in 1980.

The plaintiff in this case had purchased a car from the defendant dealer in New York. Later, while driving through Oklahoma, he was struck from behind and injured when his car caught fire. Alleging the fire was caused by a defect in the car's construction, the plaintiff brought a products liability action in Oklahoma. Both the District and Supreme Courts of Oklahoma applied the minimum contacts test and found that the defendant's relation to that state was sufficient to sustain the jurisdiction of its courts. The Supreme Court of the United States reversed. Speaking for the majority, Mr. Justice White reviewed the case law since International Shoe and significantly reinterpreted it.

[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of the States was foreseen and desired by the Framers. In the Commerce Clause, they provided that the Nation was to be a common market...in which the States are debarred from acting as separable economic entities....But the Framers also intended that the States retain many essential attributes of sovereignty.... The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States -- a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

Hence, even while abandoning the shibboleth that '[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established,' Pennoyer v. Neff, ...we emphasized that the reasonableness of asserting jurisdiction over

the defendant must be assessed 'in the context of our federal system of government,' International Shoe Co. v. Washington.

...  
Thus, ...even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. (222)

The minimum contacts test thus performs "two related, but distinguishable functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States... do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."<sup>223</sup> This approach effectively revitalizes the values implicit in the nineteenth century doctrine of territorial sovereignty. When these values were brought to bear on the facts in the case, the Court found the defendant's relation to Oklahoma too tenuous to sustain jurisdiction. This was so even though Oklahoma was the most convenient forum and the defendant was a large dealer who could reasonably expect that its cars would be dispersed throughout the United States.

The implications of the new focus are especially interesting in the area of choice of law. In a subsequent Supreme Court decision,<sup>224</sup> this time involving legislative jurisdiction, Mr. Justice Stevens wrote a concurring opinion in which he detached the values of territorial sovereignty from the due process clause, attached them to the full faith and credit clause and

then relied on the latter to introduce a new approach for testing the valid reach of state law. Stevens J. begins by asserting that in his view, two separate questions must be answered.

First, does the Full Faith and Credit Clause require Minnesota, the forum State, to apply Wisconsin law? Second, does the Due Process Clause of the Fourteenth Amendment prevent Minnesota from applying its own law? The first inquiry implicates the federal interest in ensuring that Minnesota respect the sovereignty of the State of Wisconsin; the second implicates the litigants' interests in a fair adjudication of their rights. (225)

In considering what is required of the forum state under the full faith and credit clause, Mr. Justice Stevens first notes the purpose of that clause:

The Full Faith and Credit Clause is one of several provisions in the Federal Constitution designed to transform the several States from independent sovereignties into a single, unified Nation....The Full Faith and Credit Clause implements this design by directing that a State, when acting as the forum for litigation having multi-state aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty. (226)

He then addresses the fundamental difficulty, that of resolving the conflict when both the forum and another state have a legitimate interest in a dispute. His solution is the following: "in my opinion, the Clause should not invalidate a state court's choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State."<sup>227</sup>

This test is not very precise and it raises a new

dilemma. How are the courts to determine when the choice of forum law "unjustifiably infringes" the interest of another state? Mr. Justice Stevens' answer to this question is disappointing. He suggests that full faith and credit does not require the application of foreign law whenever the other state has a legitimate interest in the dispute, that "the forum state is also a sovereign in its own right" and therefore may "in appropriate cases ...attach paramount importance to its own legitimate interests."<sup>228</sup> For example, a state needn't apply the law of another state in violation of its own public policy.<sup>229</sup> In reasoning thus, Stevens J. comes close to reintroducing the traditional minimum state interest test through the back door. His approach is nonetheless innovative and goes far toward putting the resolution of interstate conflicts on a sound footing. First of all, it focusses on the relation of states to one another rather than the relation of individuals to states. Secondly, it reflects the purpose of having territorial limitations in the first place -- to ensure that states respect the "sovereignty" of other states. This consideration suggests that the attention of the courts in a case of conflict should properly focus not on the interests of the forum or enacting state, but on those of the states interfered with. Finally, it directs the courts to consult constitutional, not private international law values in resolving the constitutional dispute. In the instant case, for example, Stevens J. found that "the Minnesota courts' decision to apply Minnesota law was plainly unsound as a matter of

normal conflicts law,<sup>230</sup> but this did not determine the constitutional issue, which Stevens J. ultimately resolved in favour of Minnesota.

It is submitted that the insights of Mr. Justice Stevens could be applied to good purpose in Canada. Once the appropriate constitutional values are recognized and the constitutional issue is detached from the context of conflicts law, it should be possible for the courts to redefine the notion of a "state interest" in a more manageable way. Not every interest identified by conflicts scholars is necessarily relevant from a constitutional point of view. In a loose sense states are legitimately "interested" in whatever happens to their residents or domiciliaries at home or abroad and in every event occurring anywhere whose effects are felt within the state. This sense of interest is too broad to be used in resolving conflicts. It is because the legitimate interests of states are so wide ranging that conflicts arise in the first place. This sense of "interest" is also highly abstract. Quebec is theoretically interested if its resident Q fails to receive money owed him by O because Ontario law is applied in an action to enforce a contract. The actual interest of Quebec may be tested by the response of the government if Q wrote a letter of complaint to his legislative representative.

For the purpose of testing the competence of a province to enact legislation, including choice of law rules, the broad and abstract sense of interest is appropriate: a province may validly legislate with

respect to a matter if it has a "legitimate interest," that is, if the matter has a significant relation to the province because it involves residents of the province or events whose impact is felt within the province. For the purpose of determining whether that legislation unjustifiably interferes with the sovereignty of another province, however, a narrower and more concrete sense of interest is wanted.

In defining an interest in the latter sense, the courts must distinguish the private interests of individuals from the public interest of the province in which they reside. As analysis of the Dryden case shows, a province may have a public interest in the welfare of particular individuals in the province, but this occurs only if these individuals happen to figure in a concrete, expressly formulated policy of the government or because prejudice to these individuals creates governmental costs which the province would not otherwise have to bear. Where the public interest of the province is not engaged, because the costs of the impugned legislation are entirely absorbed by the private litigants for example, the sovereignty of the province is not interfered with. In such a case, the dispute is between the legislating province and the private individuals and whatever limits exist on the application of otherwise valid legislation should flow from the Charter of Rights, not the words "in the Province."

The controlling consideration in international cases should be somewhat different. It was suggested in

chapter one that the principles of territorial sovereignty were embodied in the Constitution Act in order to allocate jurisdiction among the several provinces in the areas assigned to them by section 92. The question of the relations between the provinces and a foreign country, however, is governed by the common law rule of colonial extra-territorial incompetence. The purpose of this rule, we have seen, was to prevent colonies from interfering in the international relations of the Imperial government. This suggests that otherwise valid provincial legislation should not be found ultra vires or inoperative under the common law rule unless it interferes with Canada's relations with a particular foreign power or Canada's position in the international community.

In the light of these considerations, the following two part test of validity is suggested:

- (1) A provincial enactment under subsection 92(13) is ultra vires, or inoperative with respect to a class of cases, if there is no significant territorial connection between the enacting province and the matter dealt with. This initially treats the words "in the Province" as a limit on the subject matter of legislation rather than its effects and it invites an analysis similar to that undertaken by American courts in applying the minimum contacts test of International Shoe: the province must have a "legitimate interest" in the matter in the broad sense explained above.
- (2) A provincial enactment that is valid under the first test is nonetheless ultra vires, or inoperative with respect to a class of cases, if it interferes in a significant way with the public interest of another province or with the international policies of Canada. The public interest of a province is interfered with if the impugned legislation effects a significant transfer of costs

to that province or significantly affects a concrete governmental policy of that province. The international policies of Canada are interfered with if the impugned legislation jeopardizes Canada's relations with a foreign nation or the community of nations. The burden of proof is on the defendant to demonstrate these impermissible effects as a matter of fact rather than mere abstract possibility.

This test puts a heavy burden on the courts, but not an insurmountable one. The court is not required to weigh the competing interests of the provinces and pick out the one with the best claim to jurisdiction. Under the first part of the test, the court looks to the legitimate interests of the legislating province alone. Under the second part, it looks to the public interests of the affected province alone. At this point, it must make two determinations: (1) whether the affected province can make out a public interest in the matter and (2) whether the enactment interferes with this interest in a "significant" way. Since the issue here is constitutional validity, the practical burden of proving the facts should fall on the Attorney General of the affected province, who is in the best position to substantiate the existence of a public interest and the degree of interference entailed by the impugned legislation.<sup>231</sup> The task reserved to the courts is the difficult one of judging degrees of significance. To aid in this judgment, the following rules of thumb are suggested.

(a) a de minimus rule:

Where one of the competing private interests regulated by the impugned legislation is concentrated in the enacting province and the other is widely dispersed so that the effects of the enactment are spread throughout a

number of jurisdictions, the interference is justified.

(b) a fraude à loi rule:

Where a private litigant carries on activity in a province from which he derives material benefits and the litigant has attempted to remain outside the province in order to avoid legislation otherwise applicable to that activity, interference is justified.

(c) an acceptance of risk rule:

Where it was possible for a private litigant to have avoided the pre-judicial effects of the impugned legislation, but by failing to do so he created costs for the affected province, the interference is justified.

What does not justify interference, it should be noted, is the fact that interference is necessary if the enacting province is to achieve an important policy of its own. In a case like Dryden, where the impugned legislation significantly interfered with the public interests of neighbouring provinces, no degree of interest on Manitoba's part could justify this effect.

Finally, a word must be said on the role of the federal Parliament in truly interprovincial disputes. Not every dispute between provinces necessarily or properly belongs to the federal Parliament under its residual powers in section 91. As Pigeon J. suggests, disputes involving matters that are "like" interprovincial marketing or interprovincial works may well require a federal solution. The special feature of these matters is that they are not local in any ordinary sense of the term; that is, they are not confined to a single province or group of provinces but are of concern to the

nation as a whole. The dispute in Dryden comes within this category. The dispute in the Ottawa Valley and Beauharnois cases, on the other hand, does not. No national interest is engaged by contracts made between Ontario's Hydro-Electric Commission and a handful of Quebec companies. The matter is of concern to Ontario and Quebec alone. Such matters, it is submitted, must be left to the interested provinces to resolve through negotiation. If negotiation fails, there is already a mechanism in place under which the dispute may be submitted to the Federal Court for resolution.<sup>232</sup>

Under the approach recommended here both Royal Bank<sup>233</sup> and Gray v. Kerslake<sup>234</sup> were wrongly decided and would have been wrongly decided even if the extra-provincial effects had occurred in another province rather than a foreign state. Gray v. Kerslake is a particularly easy case. The impugned sections of Ontario's Insurance Act dealt with contracts made by Ontario residents. There was thus a significant territorial connection between the matter in question and the province. As for the second part of the test, the Attorney General of Canada would have great difficulty convincing a court that the application of Ontario's law to the contract in question jeopardized Canada's relations with the United States. Had the insurance company been situated in Quebec rather than New York, the result would not be different. Ontario's law transferred no costs and Quebec's government could hardly claim to have a policy respecting the manner in which Ontario residents disposed of the benefits under

their insurance policies. Even if one of the potential beneficiaries had been a resident of Quebec, so that the loss of insurance benefits put a burden on Quebec's welfare facilities, for example, the de minimus rule would apply. To the extent potential beneficiaries of Ontario residents are not themselves residents of Ontario, they would be dispersed in random fashion throughout many jurisdictions.

A similar analysis applies to the Royal Bank case. Alberta's interest in the financing and construction of a railroad in the province is obvious and the extra-provincial effects of its legislation were not likely to have either international or interprovincial repercussions. The legislation entailed no transfer of costs nor did it interfere with the public policy of another jurisdiction. Its concrete effects, if any, would likely be absorbed by the private individuals involved.

The Ottawa Valley and Beauharnois cases,<sup>235</sup> on the other hand, would be upheld on the approach recommended here. Quebec clearly had a public interest in the development of the hydro resources in question and Ontario's legislation interfered with this interest in a significant way. As for the Thomas Equipment<sup>236</sup> case, it is difficult to say whether Alberta's legislation was valid without knowing more of the facts, in particular the state of Alberta's market at the relevant times and the importance of Thomas' operations in New Brunswick. Suppose, for example, that at all relevant times the market for farm machinery in Alberta was stable. Suppose

further that the suppliers of farm machinery in Alberta were not concentrated in New Brunswick but were dispersed throughout a number of Canadian and foreign jurisdictions and that Thomas was not the object of special consideration by the New Brunswick government. On these facts, the legislation should be both valid and applicable to Thomas. Although the effect of the legislation is to transfer certain risks from Alberta dealers to extra-provincial suppliers, the costs being transferred are relatively low and could be recovered by a revised pricing policy which would shift the cost back to Alberta or distribute it throughout a number of markets. Since Alberta's legislation applies to all extra-provincial manufacturers doing business in Alberta, Thomas would not suffer a competitive disadvantage. In the absence of significant prejudice to Thomas, no public interest of New Brunswick is engaged. Suppose, on the other hand, that Alberta enacted its legislation in response to a sudden collapse in its market and that Thomas had contracts with some dozen dealers in Alberta. On these facts the costs transferred to Thomas are significant and could threaten its economic position in a serious way. This in turn could threaten the interest of New Brunswick in jobs, tax revenues and the like. On these facts, Alberta's legislation would likely be ultra vires or at least inapplicable to Thomas. Suppose finally that when Alberta enacted its legislation the market was stable but the action against Thomas was taken after a sudden collapse. This is a harder case, but since it was

possible for Thomas to have avoided the prejudice by correctly predicting the market and reducing its stock in Alberta, its failure to do so should not be grounds for holding the Alberta legislation inoperative: the acceptance of risk rule should apply here.

#### Conclusion

These examples should suffice to illustrate the basic approach contemplated here. The court is to focus on fairness to the competing provinces rather than fairness to the individual litigants in the dispute. Where a given provincial initiative does not unjustifiably interfere with the public interest of another province, it should be upheld if there is a significant territorial connection between the enacting province and the matter of the dispute. Individual litigants must look to the Charter for protection from unfair applications of otherwise valid provincial law.

Chapter 4. Constitutional Restrictions on Judicial  
Jurisdiction and the Recognition of  
Foreign Judgments

The power to enact legislation respecting the jurisdiction of the superior courts of Canada and the recognition of foreign judgments appears to be an auxiliary one: insofar as the subject matter in question comes within the ambit of some other heading of section 92, the provinces may deal with it under subsection 92(14); in matters such as bankruptcy or divorce, however, the federal Parliament is competent.<sup>237</sup> Within the areas assigned to the provinces, jurisdiction is further limited by the rule of colonial extra-territorial incompetence and the words "in the Province" appearing in 92(14). In this chapter, the interpretation of these territorial limitations by the courts will be examined and assessed. The chief question for consideration is the extent to which provincial legislatures may change the common law rules derived from the doctrine of territorial sovereignty.

The basic common law rules respecting jurisdiction are laid out in a frequently cited passage from the judgment of the Privy Council in Singh v. The Rajah of Faridkote:

[T]he general rule [is] that the plaintiff must sue in the Court to which the defendant is subject at the time of suit....All jurisdiction is properly territorial....Territorial jurisdiction attaches...upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it....It exists always as to land within the territory, and it may be exercised over moveables within the territory; and in questions of status or succession governed by domicil,

(sic) it may exist as to persons who were domiciled, or who when living were domiciled, within the territory. (238)

Concerning the recognition of foreign judgments, the Privy Council explains:

In a personal action...a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation. (239)

As the Board notes, "These are doctrines laid down by all the leading authorities on international law."<sup>240</sup> It is clear from this account that the same territorial principle underlies both the jurisdiction of the courts and the recognition of foreign judgments: at common law a judgment founded on in personam proceedings is not valid unless the defendant was served with originating process within the territory of the forum or voluntarily submitted to the jurisdiction of the court.<sup>241</sup>

1. Provincial Legislation Respecting the Jurisdiction of the Courts.

In the years since Confederation the provinces have enacted a number of statutes providing for the reciprocal recognition of foreign judgments in certain areas.<sup>242</sup> These enactments uniformly respect the territorial principle. They offer judgment creditors a streamlined procedure, but they do not relax the basic requirement for recognition rehearsed above. Provincial legislation establishing the conditions for asserting in personam jurisdiction, on the other hand, has been far less

restrained. In every province the common law requirement has been relaxed to a degree and in some it has virtually disappeared. Under Nova Scotia's rules, for example, originating process may be served on any person in Canada or the United States and with leave of the court on any person anywhere.<sup>243</sup>

Nova Scotia's rule is the culmination of a trend that began with a British statute enacted in 1852.<sup>244</sup> This statute permitted service ex juris on persons residing out of the jurisdiction provided the cause of action arose within the jurisdiction or concerned the breach of a contract made there. Although British courts have never doubted the competence of Parliament to enact such legislation, they have frequently noted its incompatibility with the doctrine of territorial sovereignty. The following comment of Scott L.J. in George Munro v. American Cyanamid Ltd. is typical: "Service out of the jurisdiction at the instance of our court is necessarily prima facie an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected."<sup>245</sup> This consideration has been relied on by British courts to justify a strict construction of service ex juris rules.

In the United States, under the rule in Penneyer v. Neff,<sup>246</sup> service ex juris in any circumstances was considered unconstitutional. Although this restriction was greatly relaxed under the minimum contacts test of International Shoe,<sup>247</sup> the recent judgment of the Supreme Court in World-Wide Volkswagen<sup>248</sup> suggests that American courts will be more exacting in the future. Under the new version

of the minimum contacts test, which emphasizes the role of the due process clause as an "instrument of interstate federalism," a state may not assert jurisdiction over a defendant unless "the defendant's conduct and connections with the forum State are such that he should reasonably anticipate being hauled into court there."<sup>249</sup> Once again, this wording does not differ significantly from previous formulations of the test. The importance of the Volkswagen case lies in the announcement of a new judicial attitude based on the rediscovery of old values.

In Canada the case law respecting judicial jurisdiction betrays many of the weaknesses noted in connection with the cases under subsection 92(13). The number of relevant judgments is small and few address the constitutional issue. Although there are certain areas within which the courts of the provinces regularly refuse jurisdiction on territorial grounds, these cases are decided on the basis of common law rather than constitutional law rules.<sup>250</sup> Even where a provincial statute purports to expand jurisdiction beyond the common law limits, the courts rely on principles of construction rather than constitutional law to avoid the extra-territorial effect.<sup>251</sup>

There are also inconsistencies in the case law under 92(14). On the one hand, the courts have held as a matter of constitutional law that judicial orders may not be issued to persons who are not present within the issuing province. Thus it was ultra vires for an Ontario court to direct a writ of habeas corpus ad testificandum to a person situate in Quebec<sup>252</sup> and it was ultra vires for a

Quebec court to issue a warrant of arrest under a provincial statute to a person situated in British Columbia.<sup>253</sup> The courts have also ruled that where the judgment of a provincial court is founded on service ex juris, it cannot be recognized by the courts of other Canadian provinces.<sup>254</sup> Yet despite these acknowledgements of the constitutional limitations on provincially authorized jurisdiction, challenges to the validity of provincial service ex juris rules have been rare and unsuccessful.

Two distinct justifications have been offered for the provincial rules, one by Ontario's Court of Appeal in Standard Construction Co. v. Wallberg,<sup>255</sup> the other by Nova Scotia's appeal court in Stairs v. Allan.<sup>256</sup> In the Wallberg case, the action was taken in Ontario and the defendant was served with a writ of summons in Montreal. This was done on the basis of an Ontario rule which permitted service ex juris with leave where the plaintiff's action was in contract and the defendant had assets in Ontario valued at \$200 or more. The defendant challenged the validity of this rule. The Court responded as follows:

Whether the service can be made out of Ontario is a question which, for Ontario Courts, must be determined by the statutes and statutory Rules in force here....A foreign Court will, no doubt, regard a judgment obtained against a non-resident as entitled to no extra-territorial recognition....

But the validity of the judgment in the country of the forum by which it is pronounced is expressly recognized....

It was argued that the English cases could not be applied in Ontario, because, while the Imperial Parliament has plenary jurisdiction, the Legislature of Ontario cannot make laws having any extra-territorial effect.

The answer is obvious: the provision has no extra-territorial effect. The Courts of Ontario can only authorise the taking in execution of the defendant's assets within the Province, and the enforcing of civil rights is undoubtedly within the ambit of provincial jurisdiction. (257)

In contrast to American law, which requires that full faith and credit be given to the judgments of sister states, the recognition rule prevailing in Canada ensures that any judgment of a provincial court founded on service ex juris is not recognized outside the rendering province. Does it follow that such a judgment has no extra-territorial effect?

The Court is able to conclude as it does in Wallberg only by ignoring the full legal effect of rendering an in personam judgment. Such a judgment creates a civil right in the judgment creditor and it equally imposes an obligation on the judgment debtor. If provincial legislatures may not destroy the rights of persons outside the province, it is hard to see how provincial courts may impose obligations on such persons: the one is simply the obverse of the other. The key question, of course, is when is a person outside the province for this purpose. Traditionally provincial rules authorizing service ex juris required a connection of some sort between the province, the dispute and the defendant. Service was allowed where the defendant had committed a tort in the province, for example, or breached a contract there or had a property interest in provincial land. It is possible to interpret the territorial limitations on provincial jurisdiction in a way that will uphold such rules. This was

the strategy adopted in International Shoe.<sup>258</sup> However, the Wallberg court does not adopt this approach. It suggests that the effects of Ontario's judgment will be confined to the province because the assets to be taken in execution of that judgment are situated there. This reasoning ignores the obvious difference between rendering a judgment and executing one. Under the territorial principle, jurisdiction to render a judgment in personam is founded on the power of the court over the person, whereas the right to execute this judgment depends on power over the assets to be taken. These are distinct matters and the fact that a province may validly execute a judgment can hardly cure a defect in the original jurisdiction of the court.

More seriously, the reasoning in the Wallberg case ignores the practical connections that exist between taking jurisdiction over a defendant and determining the outcome of his case under the appropriate provincial law. These are theoretically distinct matters, but in practice the result of an action often varies depending on the forum in which it is brought. Suppose, for example, that the contract alleged in the Wallberg case had no connection with Ontario. Suppose further that under the relative substantive law of Ontario the plaintiff would succeed whereas under Quebec's law he would fail. If the defendant fails to appear and defend this action, a default judgment will be rendered against him on the basis of Ontario law. This result is inevitable because the court of the forum always assumes that foreign law is

identical to domestic law unless the contrary is alleged and proved. If the defendant does not appear, he obviously cannot plead and prove the relevant Quebec law. By failing to appear, he will thus forfeit his Ontario assets and the court will apply Ontario law to a transaction with which it has no connection. Of course, to save his Ontario assets the defendant will want to appear. By doing so, however, he will put all his assets at risk: since his appearance is a voluntary submission to the court's jurisdiction, the resulting judgment will be enforceable throughout Canada and elsewhere as well. The risk to the defendant is considerable, for although by appearing he will be able to plead the favourable Quebec law, whether this law will in fact be relied on to resolve the dispute depends on the conflicts rules of Ontario and their application by Ontario judges. For any number of reasons the result may favour the plaintiff: the relevant choice of law rule might be a unilateral one, for example, obliging the application of Ontario law; or the court might characterize the issue in the case so as to bring it within a bilateral rule that points to Ontario; or the court might discover a public policy of Ontario that makes its own law immediately applicable notwithstanding the choice of law rules. Finally, even if Quebec law is chosen to govern the substantive issues between the parties, Ontario's law will govern all matters which, according to the conflicts law of Ontario, are purely procedural in character. Thus, notwithstanding Ontario's lack of interest in this case, the plaintiff may

benefit from Ontario's more lenient limitation period or a shift in the burden of proof or any other provision that the Ontario court deems to be procedural. In circumstances such as these, it is naive to say that Ontario's service ex juris rule has no extra-territorial effect. Its actual effect is to permit the application of at least some aspects of Ontario law to matters which may or may not have a significant connection with Ontario.

The other justification offered for provincial service ex juris rules is more convincing. It relies on the reasoning of the Privy Council in Ashbury v. Ellis,<sup>259</sup> decided in 1893. At issue in this case was a New Zealand statute which authorized the courts of New Zealand to allow service ex juris in any action founded on a "contract made or entered into or wholly or in part to be performed within the colony." The English defendant argued that this was a violation of the rule in MacLeod,<sup>260</sup> but the Privy Council upheld the rule because, in the words of Lord Hobhouse,

their Lordships are clear that it is for the peace, order, and good government of New Zealand that the Courts of New Zealand should...have the power of judging whether they will or will not proceed in the absence of the Defendant. The power is a highly reasonable one....[I]n proper cases the English Courts have it conferred on them by the Imperial Parliament. The New Zealand Legislature, it is true, has only a limited authority; but in passing the rules under discussion, it has been careful to keep within its limits. (261)

This reasoning was adopted by Nova Scotia's appeal court in Stairs v. Allan to reject a constitutional challenge

to a similar rule enacted by the Nova Scotia legislature.<sup>262</sup>

It is possible to make out in Ashbury v. Ellis the rudiments of a constitutional test for the validity of service ex juris rules. The Board suggests that the legislature of New Zealand did not violate the territorial limitations on the colony because its rule was "a highly reasonable one;" presumably an unreasonable rule would be ultra vires. This hint is not developed in the judgment of the Board, however, nor is it pursued in Stairs v. Allan or in any subsequent Canadian case. The most recent judgment of the Supreme Court of Canada respecting service ex juris, Moran v. Pyle National (Canada) Ltd.,<sup>263</sup> contains an interesting analysis of what is reasonable in this kind of rule but, typically, the constitutional issue is neither pleaded by counsel nor directly dealt with in the judgment of the Court.

The question in the Moran case was whether a Saskatchewan plaintiff could serve process on an Ontario defendant under a Saskatchewan rule permitting service ex juris where "the action...is founded on a tort committed within the jurisdiction." The injury complained of had occurred in Saskatchewan and the plaintiff alleged that it was caused by a defective lightbulb negligently manufactured by the defendant in Ontario. The only issue dealt with by the courts at all levels was whether on these facts a tort had been committed in Saskatchewan within the meaning of the rule. In the Supreme Court, Dickson J. looked first to the common law rule respecting the situs of a tort. He found the law in this area in a

sorry state and he therefore suggested a new approach, based on the most recent edition of Dicey and a number of English cases. The new approach is aptly labelled a "real and substantial connection test."

[I]t would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade...and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a state has in injuries suffered by persons with its territory....By tendering his products in the market place, ...a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum...is one that he reasonably ought to have had in his contemplation when he so tendered his goods. (264)

This passage might have been taken from any number of American judgments rendered since International Shoe.<sup>265</sup>

The language is particularly reminiscent of that used by the Supreme Court of the United States in World-Wide Volkswagen.<sup>266</sup>

It appears likely that when a constitutional challenge to provincial service ex juris rules is finally brought before the Supreme Court of Canada, it will readily adopt for constitutional law purposes the real and substantial connection test set out in Moran. This will not exhaust

the constitutional issue, however, for at some point the Court must deal with the nexus between judicial and legislative jurisdiction noted in the discussion of the Wallberg case. As that discussion showed, once the jurisdiction of the forum court is established, the forum is permitted to apply its own rules of private international law and some of these favour the forum in ways that may not be acceptable from the point of view of constitutional law. If the courts are to take a liberal attitude toward service ex juris, and it is submitted that they should, then some formal mechanisms should be introduced to ensure that choice of jurisdiction does not inadvertently and unreasonably determine choice of law.

One concern here is the rule by which the substantive law of the forum is deemed to be identical to foreign law unless the contrary is pleaded and proved. This rule, it is submitted, should be limited to international cases. It makes little sense in the context of the Canadian system, where the superior courts of the provinces are part of a unitary system and where lawyers and judges have ready access to "foreign" provincial legislation. In interprovincial cases, the plaintiff should be required to plead the applicable law in his statement of claim.

A second concern is the conflicts principle that permits the forum court to refuse to apply foreign law on the grounds that it contravenes the public policy of the forum. In interprovincial cases, it is doubtful that this principle has any valid application. Suppose, for example, that the Ontario court in the Wallberg case had

concluded that the proper law of the contract was the law of Quebec. It would be a serious affront to the sovereignty of Quebec if the court were nonetheless to apply Ontario law because the content of the applicable Quebec statute violated a public policy of Ontario. Such a decision would violate the basic principle embodied in section 92. In international cases, on the other hand, this principle should continue to operate, subject to any restraints flowing from the international relations of Canada.

Finally, the rule that makes forum law applicable under the rubric of procedure should be subject to careful scrutiny. Some rules of procedure are so intimately connected to the operation of the courts that it would be absurd to ask a court to displace them in favour of foreign law. This category includes rules governing interlocutory proceedings or costs, the conditions for bringing an appeal, when trial by jury may be demanded, the format of factums and the like. If the court may validly assert jurisdiction, it may validly apply these rules for they are the rules on which its operation depends. Other matters, however, are not genuinely procedural in this sense: statutes of limitation are an obvious example. The classification of rules as procedural or substantive must be subject to review and where a rule is properly classified as substantive, its application must meet the constitutional test for choice of law.

Subject to these qualifications, it is submitted that

the real and substantial connection test adopted by the Court in Moran is an appropriate test for the validity of judicial jurisdiction in Canada. It closely resembles the test in International Shoe,<sup>267</sup> which was found wanting in the previous chapter dealing with legislative jurisdiction. The different conclusion here is based on the fact that Canada has a unitary system of courts. The courts of the several provinces are not "competitors" in the way the legislatures of the provinces are, for each is part of a single pan-Canadian system. It would be peculiar to say in these circumstances that the jurisdiction of one is asserted at the expense of the other or interferes with the sovereignty of the other.

On this approach, apart from any requirements flowing from Canada's Charter of Rights, the words "in the Province" in subsection 92(14) impose a fairly modest limitation on the territorial jurisdiction of provincial courts. A rule like Nova Scotia's, which allows service of extra-provincial defendants at the whim of the plaintiff, would be ultra vires or at least inoperative in cases where the plaintiff cannot show any kind of relation between Nova Scotia, the defendant and the dispute. Where such a relation exists, however, service ex juris would be upheld in interprovincial cases. In international ones, the standard may be higher or lower. Current international opinion on the issue of judicial jurisdiction favours a nationalistic approach and there is little surprise or outrage when the courts of one nation assert

jurisdiction over persons resident in another nation on the basis of fairly tenuous connections. In this climate of opinion the aggressive service ex juris rules of the provinces are unlikely to interfere with Canada's international relations and so should be upheld. A change in this climate of opinion, however, would mandate a different constitutional result.

A final word should be said on the concept of forum non conveniens and the discretion of the courts to disallow service ex juris under some provincial rules. On the approach recommended here, the courts remain free to exercise any common law or statutory discretion permitted them by the provincial legislature. Although a particular case might meet the constitutional standard, the court may yet refuse jurisdiction on the grounds of convenience or fairness to the defendant. This discretionary jurisdiction is particularly important in Canada, where the Charter of Rights appears to offer only a limited due process protection.<sup>268</sup>

## 2. Provincial Legislation Respecting the Recognition of Foreign Judgments

The Supreme Court of Canada has recently demonstrated interest in the implications of the unitary character of Canada's judicial system. In the Dryden case Mr. Justice Pigeon relied on this feature to support his view that the content of provincial choice of law rules is subject to constitutional review.<sup>269</sup> In Bank of Montreal v. Metropolitan Investigation and Security (Canada) Ltd.,<sup>270</sup> it was again relied on to prevent a Manitoba court from

making an order in respect of a trust fund, as it was entitled to do under Manitoba law. Speaking for the Court, Laskin C.J. ruled that because the fund had been attached by order of a Quebec court, the Manitoba court was no longer free to deal with it:

The garnishment in Quebec took the moneys out of the control of the two banks, pending the determination of the proceedings instituted therein, and I do not see how the later in personam jurisdiction asserted by the Manitoba Courts can be given effect in respect of those moneys when, apart from any question of comity, the issue comes before this Court with its unifying jurisdiction over the Manitoba Courts as well as over those of Quebec....

Since the two banks were already subject to the Quebec garnishment when the Manitoba proceedings began, the Manitoba judgment calls upon them to be faithless to the competent order of a sister judicial district. This Court, with a reviewing and controlling authority over both the Courts of Manitoba and of Quebec, cannot be expected to support such a call. Unless this Court is in a position (and it is not in these appeals) to rule on the validity of the Quebec garnishment, it cannot with any propriety approve an order of one provincial Court that purports to deal with assets already captured by the competent order of another provincial Court, and particularly an order of the Court of the Province where those assets are situated. 271

Laskin C.J. uses the language of full faith and credit in this passage, but whether he means to introduce a general full faith and credit requirement into the Canadian constitution is not at all clear. That Manitoba may not interfere with Quebec's seizure before judgment is one thing; that it must recognize and enforce the final Quebec judgment is quite another thing.

Were the Supreme Court to introduce a full faith and credit requirement comparable to the one in American law,

the importance of the connections among the several areas of private international law would become even greater. Under existing law, liberal service ex juris, along with considerable bias in favour of the forum, is tolerable because the common law recognition rule more or less confines the effects of the resulting judgment to the forum alone. The defects in this arrangement have already been noted in connection with the Wallberg case: a defendant who is served outside the forum and who fails to appear will lose his forum assets, in many cases under an inappropriate application of forum law. Nonetheless, the judgment against him will not be recognized elsewhere in Canada. If the provinces were obliged in every case to recognize the final judgments of sister provinces, this important protection would disappear. This is something the Supreme Court should consider before changing the current rule.

It also has implications for the Court's review of provincial legislation in this area. To what extent may provincial legislatures change the common law rule respecting recognition? Suppose, for example, that the Manitoba legislature instructed the courts of Manitoba to recognize every order of judgment rendered by any court in Canada. Or suppose that it instructed the courts, in proceedings to enforce a judgment rendered by a court of Quebec, to permit the judgment debtor to raise any defence on the merits available under Manitoba law. Prima facie, given the constitutional values recommended in this paper, the first hypothetical should be valid, while the second

should be bad. However, a proper analysis of recognition rules must take into account the content of existing constitutional restrictions on judicial jurisdiction and choice of law. If a province is constitutionally free to authorize arbitrary service or the application of a law that has no significant connections with the case, then an obligatory recognition rule should be unconstitutional, for in such circumstances non-recognition is the only constitutional check on provincial over-reaching. Similarly, a provincial enactment enlarging the defences to recognition should not be objectionable on constitutional grounds because the law of the receiving province is as likely to have a significant connection with the case as the law of the rendering jurisdiction.

In an ideal world, constitutional objections to service or the forum's choice of law would be raised by the defendants before the rendering court and conclusively disposed of at that time. This court would hear argument on whether its jurisdiction met the constitutional test suggested above and whether the law pleaded by the plaintiff could validly apply under the test suggested in chapter three. Any error in its decision on these points would be grounds for appeal to a higher court. In these circumstances a defendant would have no good constitutional reason for failing to appear and if judgment were rendered against him upon default, there would be no good constitutional reason for refusing to recognize it in every province of Canada. In these circumstances the argument in favour of introducing a full faith and credit requirement

into Canada would be unanswerable.

Existing Canadian law is far from ideal, however. The constitutional limits on the reach of judicial jurisdiction have yet to be clearly established and the trend is to introduce increasingly permissive rules of service ex juris. Once a court acquires jurisdiction, it applies its own rules of private international law. These tend to favour the forum in certain respects and under the current methods of reform, examined in chapter two, this tendency is greatly exacerbated. In these less than ideal circumstances, extra-provincial defendants must be allowed to stay at home, secure in the knowledge that any judgment rendered against them will not be enforceable outside the rendering province. As suggested above, in these circumstances a provincial enactment requiring recognition of sister province judgements should be bad, while one permitting the defendant to raise defences under the substantive law of the receiving province should be valid, at least where the receiving province has a substantial connection with the case.

In this area, too, the distinction between international and interprovincial cases is important. There should be no constitutional objection if a receiving court refuses recognition because it distrusts the judicial system of a foreign country or objects to the policy expressed in its law, providing that its distrust and distaste are not eccentric in the context of Canada as a whole. On this approach, a provincial enactment that instructed provincial courts to refuse recognition

to any judgment rendered by a court of Japan would clearly be ultra vires. Such an enactment is eccentric and could impair Canada's relations with Japan. On the other hand, a provincial enactment that permitted judgment debtors to raise the defence that natural justice had been violated by the rendering court would be unimpeachable. In inter-provincial cases, however, defences based on natural justice should not be allowed. The unifying authority of the Supreme Court, now supplemented by the Charter of Rights in some areas, should ensure sufficient uniformity across Canada to make this defence inappropriate in the interprovincial context. A court in Manitoba cannot be permitted to review a Quebec court's interpretation of what natural justice requires. If the Quebec court has erred, correction must come from the Supreme Court of Canada and not the court of a sister province. Similarly, distaste for the policy of a sister province should not be grounds on which a receiving court may refuse recognition, assuming the choice of law made by the rendering court was a valid one. As suggested above, for a provincial court to prefer its own policy to that of another province is an interference with the sovereignty of the other province and so violates the basic principle embodied in the words "in the Province" in subsection 92(14).

#### Conclusion

It is not supposed that the specific solutions recommended in this paper are the only "correct" solutions to

the problems created by a constitutional restriction on the territorial jurisdiction of the provinces. The purpose of this paper has been less to stipulate specific solutions than to suggest the overall approach the courts should adopt in responding to these problems. The inability of private international law to provide appropriate solutions has been demonstrated, it is hoped, and an alternative source of guidance has been suggested in the doctrine of territorial sovereignty. As embodied in the rule of colonial extra-territorial incompetence, this doctrine suggests that a province may not interfere with the international relations of Canada. As embodied in the language of section 92 of the Constitution Act, it suggests that a province may not interfere with the sovereignty of another province in areas of concurrent jurisdiction. This inhibition is somewhat qualified in the area of judicial jurisdiction owing to the unitary character of Canada's system of courts.

These guiding principles, it is thought, are not unduly restrictive of provincial powers, for only those initiatives that demonstrably interfere with matters of substantial importance to a sister province or with the international relations of Canada need be prohibited. Nor do they unduly favour the federal Parliament, for only those matters of "general" concern to the nation as a whole fall within the ambit of Parliament's residual powers. Matters that are merely of "local" interest, involving two or several provinces, must be dealt with

by negotiation or, failing that, by reference to the Federal Court.

One aspect of the subject that has been dealt with only in passing in this paper is the weight of the burden the courts must carry in interpreting and applying territorial limitations. It appears that any test of validity which pays sufficient attention to the relevant constitutional values is going to require a good deal of the courts. One may perhaps take comfort from the fact that over the next several years all areas of Canadian constitutional law and in particular the Charter of Rights are likely to challenge and so sharpen the skills of the courts. In any case there is no way of avoiding this burden in a federal system. The allocation of jurisdiction among the constituent members of the federation, no less than the division of powers between those members and the central government, is fixed by the constitution and the interpretation and enforcement of the constitution is ultimately the responsibility of the courts.

## Footnotes

1. [1913] A.C. 283, 3 W.W.R. 994, 9 D.L.R. 337.
2. Subsection 91(2), for example, has been held to give exclusive jurisdiction to the federal Parliament over marketing schemes that transcend the borders of a single province and over the regulation of trucking that crosses provincial borders. Federal jurisdiction over interprovincial transportation is also established under subsection 92(10). See Attorney General for Manitoba v. Manitoba Egg and Poultry Association, [1971] S.C.R. 689 and Burns Foods v. Attorney General for Manitoba, [1975] 1 S.C.R. 494 with respect to marketing. See Attorney General for Ontario v. Winner, [1954] A.C. 541 and Coughlin v. Ontario Highway Transport Board, [1968] S.C.R. 569 with respect to transportation. Although the issue of extra-territoriality arises in these cases, they are decided on the ground that the matter in question falls within a heading reserved to the federal Parliament under sections 91 and 92. In the Manitoba Egg and Poultry case, the Court also relied on section 121.
3. [1976] 1 S.C.R. 477, [1975] 5 W.W.R. 382, 53 D.L.R. (3d) 321, 4 N.R. 231.
4. [1975] 1 S.C.R. 393, [1974] 2 W.W.R. 586.
5. [1975] 2 S.C.R. 546, 50 D.L.R. (3d) 76.
6. [1979] 2 S.C.R. 529, 96 D.L.R. (3d) 1, 26 N.R. 499.
7. For an account of Bodin's Six livres de la republique, see J.L. Briery, The Law of Nations (6th ed., 1963), pp. 7-12.
8. See A. Nussbaum, A Concise History of the Law of Nations (rev. ed., 1962), pp. 102-114 and Briery, op. cit., footnote 7, pp. 1-40. See also H.E. Yntema, The Historic Bases of Private International Law (1953), 2 Am. J. Comp. L. 297 and D.J.L. Davies, The Influence of Huber's De Conflictu Legum on English Private International Law (1937), 18 Br. Y.B. Int. L. 49. For illustrations of nineteenth century reliance on the doctrine of Bodin as developed by Grotius and Huber, see H. Wheaton, Elements of International Law (3rd ed., 1866), pp. 4-14 and 113-4; J. Story, Commentaries on the Conflict of Laws (5th ed., 1857), pp. 26-46; Sir Travers Twiss, The Law of Nations (2nd ed., 1884), pp. 257-83.
9. The account of the doctrine given in the text is drawn chiefly from Wheaton and Story, op. cit., footnote 8. However, virtually identical accounts can be found in any international law text of the nineteenth century and in innumerable cases as well. In The Schooner

Exchange v. McFaddon (1812), 7 Cranch. (U.S.S.C.) 116, for example, Chief Justice Marshall observes:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. Any restriction upon it, deriving validity from an external source, would imply a diminution of its own sovereignty to the extent of the restriction.

Similarly in The Parlement Belge case, decided in 1880, Brett, L.J. points out that the common law rules respecting the immunity of a foreign sovereign are "the consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence and dignity of other states": see (1880), 5 L.R.P.D. 197 at 214.

10. Story, op. cit., footnote 8, p. 11.
11. For a fuller account of these refinements, see Wheaton or Twiss, op. cit., footnote 8.
12. W. Blackstone, Commentaries on the Laws of England, vol. 14 (1765), p. 67.
13. See Buvert v. Barbuit (1737), Cas. T. Talb. 281, 25 E.R. 777.
14. See Roach v. Jurvan (1748), 1 Ves. Sen. 157, 27 E.R. 954.
15. Triquet v. Bath (1764), 3 Burr. 1478, 97 E.R. 936 at 1481. See also Lockwood v. Coysgarne (1765), 3 Burr. 1676, 97 E.R. 1041 and Heathfield v. Chilton (1764), 4 Burr. 2015, 98 E.R. 50.
16. [1896] 2 Q.B. 425 at 430.
17. See, for example, Respublica v. De Longchamps (1784), 1 Dall. 111 (Pa), where Chief Justice McKean of the Supreme Court of Pennsylvania upheld the conviction of the appellant for "an infraction of the law of nations. This law, in its full effect, is part of the law of this State, and is to be collected from the practice of different nations, and the authority of writers", quoted in C. Hyde, The Supreme Court of the United States as an Expositor of International Law (1937), 18 Br. Y.B. Int. L. 1 at p. 2, footnote 1. For assertions of this principle by federal courts, see Rose v. Himely (1808), 4 Cranch. (U.S.) 241 at 276-7 and The Neveide (1815), 9 Cranch. (U.S.) 388.
18. For discussion of the relevant authorities, see R. Whitten, The Constitutional Limitation on State Court Jurisdiction: a Historical-Interpretive Re-examination of the Full Faith and Credit and Due

Process Clauses, [1980-81] Creighton L. Rev. 499, 735 at pp. 575 et seq. Whitten points out that in the early years of the nineteenth century some state courts adopted the English position and held that state legislatures could derogate from the international law rules. This view was rejected later on in the century; see infra, at footnote 68. In any case, it is clear that international law was at least considered part of the common law of states throughout the nineteenth century.

19. Dearing v. Bank of Charleston (1848), 5 Ga. 497, quoted by Whitten, op. cit., footnote 18, p. 580. See also Ogden v. Saunders (1827), 25 U.S. 135, 12 Wheat. 213, where a federal court expresses a similar sentiment.
20. In discussing the common law rule of colonial extra-territorial incompetence, the term "colony" is used throughout to refer to any possession of the British Empire including Dominions, self-governing colonies and provinces and Crown colonies. The shared feature of the class is the lack of full sovereignty of the members, as manifested in a number of constitutional incapacities. Extra-territorial incompetence is one such incapacity; for a summary of the others, see Hals., 4th ed., vol. 6, pp. 508 et seq. See also A.C. Castles, Limitations on the Autonomy of the Australian States, [1962] Public Law 175.
21. See D.P. O'Connell, The Doctrine of Colonial Extra-Territorial Legislative Incompetence (1959), 75 L.Q.R. 318.
22. For an account of the activities of the law officers and in particular of the political dimension of their work, see D.M. Young, The Colonial Office in the Early Nineteenth Century (1961). The importance of the law officers in developing the rule of colonial extra-territorial incompetence is illustrated in an early judgment of the Supreme Court of Canada: Shields v. Peak (1883), 8 S.C.R. 579. In this case, Strong, C.J. relied on an opinion of the law officers rendered in 1867 which asserted that an Indian legislature did not have power to pass laws binding on native subjects outside India. The Chief Justice thought the opinion relevant "since it strengthens the presumption that all laws passed by the Parliament of Canada are...intended to be restricted in their operation to the limits of the Dominion" (see p. 597). This is one of numerous examples in Canadian law where the constitutional issue of territorial limitations is avoided by applying a rule of construction.
23. "An Ordinance to provide for the security of Lower

- Canada", June 28, 1838. The Ordinance provided that "it shall be lawful for Her Majesty to transport to Her Majesty's Islands of Bermuda, during Her pleasure, the said Wolfred Nelson [and others]...and to subject them...to such restraints in the said Islands, as may be needful to prevent their return to this Province." An account of this incident appears in R. Christie, *A History of the Late Province of Lower Canada*, vol. 5 (1854) at pp. 145-177. The Ordinance is reproduced at p. 161. For an account of the Imperial response to the Ordinance, see O'Connell, *op. cit.*, footnote 21, pp. 319-20.
24. Hansard, Parl. Debates, 3rd ser., vol. 44, col. 1267.
  25. O'Connell, *op. cit.*, footnote 21, p. 320.
  26. 12 & 13 Vict., c. 96.
  27. 32 & 33 Vict., c. 10, s. 4.
  28. See O'Connell, *op. cit.*, footnote 21, pp. 323-4. The legislation listed there deals with marriage, bankruptcy, merchant shipping, the enforcement of penal law and the regulation of colonial navies and militia beyond colonial borders.
  29. 23 & 24 Vict., c. 88.
  30. See, for example, *R. v. Makin* (1875), 1 V.L.R.(L.) 274 (Vict. S.C.) at 280-2 and *Shields v. Peak*, *supra*, footnote 22.
  31. The early confusion of the courts over the nature of the territorial limitations on colonies is well illustrated in the several judgments of the Victoria Supreme Court in *In re Victoria Steam Navigation Board, Ex parte Allan* (1881), 7 V.L.R.(L.) 248; see especially 256 and 263-5.
  32. [1891] A.C. 455.
  33. *Ibid.*, at p. 459.
  34. *Ibid.*, at pp. 457, 458.
  35. In an article published in 1917 Sir John Salmond argued that MacLeod could be adequately explained as an application of a rule of construction and did not establish a rule of constitutional law: see *The Limitations of Colonial Legislative Power* (1917), 33 L.Q.R. 117. This view was favoured by other early commentators as well: see, for example, H.A. Smith, *The Legislative Competence of the Dominions* (1927), 43 L.Q.R. 380. The passages from MacLeod quoted in the text make this view untenable.

36. The Privy Council affirmed the existence of the rule as recently as 1970 in Rediffusion (Hong Kong) Ltd. v. Attorney General for Hong Kong, [1970] A.C. 1136 at 1154.
37. Professor O'Connell conducted a survey of Crown colonies in the 1950's and discovered that "each and every one regards itself as legislatively incompetent outside territorial waters, even in matters so closely connected with colonial affairs as fishery conservation": O'Connell, op. cit., footnote 21, p. 318.
38. Ibid., p. 319.
39. This suggestion is made by Professor La Forest (as he then was) in May the Provinces Legislate in Violation of International Law (1961), 39 Can. Bar Rev. 78. Professor O'Connell himself acknowledges that in formulating the rule the law officers were motivated in part at least by a desire to ensure that colonies would not interfere with Imperial relations.
40. See A.B. Keith, The Sovereignty of the British Dominions (1929), pp. 1-2 and 277 et seq. and K. Wheare, The Constitutional Structure of the Commonwealth (1960), pp. 54-7.
41. A.B. Keith, Imperial Unity and the Dominions (1916), p. 53.
42. Thus Oppenheim writes:  
Formerly the position of self-governing Dominions, such as Canada, ...did not in International Law present any difficulties. Then they had no international position whatever, because they were, from the point of view of International Law, mere colonial portions of the mother country. It did not matter that some of them...flew as their own flag the modified flag of the mother country, or that they had their own coinage, their own postage stamps, and the like. Nor did they become subjects of International Law (although the position was somewhat anomalous) when they were admitted, side by side with the mother country, as parties to administrative unions, such as the Universal Postal Union. Even when they were empowered by the mother country to enter into certain treaty arrangements of minor importance with foreign States, they still did not thereby become subjects of International Law, but simply exercised for the matters in question the treaty-making power of the mother country which had been to that extent delegated to them.

See L. Oppenheim, *International Law*, vol. 1 (3rd ed. by R.F. Roxburgh, 1920), pp. 169-70.

43. This reasoning explains why what is merely a rule of construction in English law becomes a constitutional limitation in colonial law. It does not fully answer Professor O'Connell, however, who argues that by denying colonies the power to deal with extra-territorial acts performed by their residents, the law officers and courts went beyond the requirements of international law. Under international law, a state could impose obligations on its subjects wherever they went, so long as the obligations were not enforced until the subject returned to the state. By analogy, in O'Connell's view, a colony should have a similar power over its residents. This argument leaves out of account what being a subject means. Under international law in the nineteenth century allegiance was regarded as a personal relationship between the subject and the sovereign involving obligations on both sides. Because this relationship was personal in character, it did not end simply because the subject was elsewhere. The same cannot be said of residence, however: a resident of a state was obliged to obey its laws only so long as he remained physically present there. The answer to Professor O'Connell, then, is that no person ever owed allegiance to a colony and so the basis for this form of extra-territorial jurisdiction is missing. "Citizens" of colonies were subjects of Her Majesty and owed their allegiance to Her alone.
44. (1897), 27 S.C.R. 461, 1 C.C.C. 172.
45. The section was drafted in this peculiar way in an effort to capture bigamists like Mr. MacLeod without appearing to do so: by making the actus reus of the offence departure from Canada rather than remarriage outside Canada, the problem of extra-territoriality might be avoided altogether. For discussion of this trick of draftsmanship, see infra, at footnote 113.
46. Supra, footnote 44, at pp. 472-5 of (1897), 27 S.C.R. 461.
47. Ibid., at p. 480.
48. Ibid., at pp. 480-1.
49. Ibid., at p. 492.
50. The Supreme Court of Canada, in Reference re Offshore Mineral Rights of British Columbia, [1967] S.C.R. 792, 62 W.W.R. 21, 65 D.L.R. (2d) 353, found at p. 816 of [1967] S.C.R. 792:

There can be no doubt that Canada has become a sovereign state. Its sovereignty was acquired in the period between its separate signature of the Treaty of Versailles in 1919 and the Statute of Westminster, 1931.

In Reference re Constitution of Canada (1982), 125 D.L.R. (3d) 1 at 44 the Court was more precise:

[T]he Government of Canada had, by 1923, obtained recognition internationally of its independent power to enter into external obligations when it negotiated the Halibut Treaty with the United States. Great Britain understood this by that time as did the United States.

51. [1933] A.C. 156.

52. Ibid., at p. 163.

53. The states of Australia are in the same position, as Barwick, C.J. points out in Bonser v. La Macchia (1968-69), 122 C.L.R. 177 at 185: "The colonies were never at any stage international personae nor sovereign and the States still are not." Because the constitution of Australia contains no express words of territorial restraint, the sole limitation on the territorial reach of the states derives from the common law rule. There is considerable Australian case law and academic commentary on the meaning and practical implications of the rule: see R.D. Lumb, The Constitutions of the Australian States (4th ed., 1976), pp. 82-91; W.A. Wynes, Legislative, Judicial and Executive Powers in Australia (4th ed., 1970), pp. 64-88; F.A. Trindade, The Australian States and the Doctrine of Extra-territorial Legislative Incompetence (1971), 45 A.L.J. 233; Castles op. cit., footnote 20, pp. 196 et seq.; O'Connell, op. cit., footnote 21, pp. 327-32. For a comparison of the Australian and Canadian positions, see E.R. Edinger, Territorial Limitations on Provincial Powers (1982), 14 Ottawa L. Rev. 57 at pp. 87-91.

54. The significance of this point was noted by Pigeon, J. in the Dryden case, supra, footnote 3, at p. 356 of [1976] 1 S.C.R. 477:

What was said in British Coal Corp. et al v. The King...about the doctrine forbidding extra-territorial legislation being 'a doctrine of somewhat obscure extent' was in relation to the powers of the federal Parliament, not of the provincial Legislatures. In this respect, it must be noted that s. 7(2) of the Statute of Westminster, 1931 has made applicable to the provincial Legislatures only the provisions of s. 2

dealing with conflict with Imperial statutes, not those of s. 3 which declare that the federal Parliament 'has full power to make laws having extra-territorial operation'.

55. One possible exception is Newfoundland. Newfoundland participated in the Imperial Conference of 1926, which issued the Balfour Declaration, and it was a "Dominion" within the meaning of the Statute of Westminster. However, its legislature never adopted ss. 2-6 of the Statute, it never exercised the functions of a sovereign state and in 1933 it suspended responsible government until its entry into Confederation in 1949. The question of Newfoundland's status is presently before the Supreme Court of Canada.
56. In recent years the provinces have asserted the "right" to participate in international relations where provincial interests are at stake and they have backed this claim with various actions: establishing foreign trade missions, participating in international conferences, consultations with foreign governments and the like. Provincial claims in this area are contentious; there is considerable academic debate on both their legal validity and their political and constitutional implications. See, for example, the essays on this subject in Canadian Perspectives on International Law and Organization (1974), ed. by R.St.J. MacDonald et al. It may be that the provinces are in the process of evolving a new status within Canada and within the international community. If so, this process is only just beginning and does not yet affect the accuracy of the account of the provincial position given in the text.
57. Supra, footnote 50, at p. 821 of [1967] S.C.R. 792.
58. G. Ecuyer writes of this passage that "il...illustre comment, dans cette affaire, le Cour Suprême a pu confondre 'Canada' et 'gouvernement fédéral'": see Le Cour suprême du Canada et le Partage des Compétences, 1949-1978 (1978), p. 298. Professor McWhinney writes that in this passage "the Supreme Court was making the fatal equation between jurisdiction in international law in relation to foreign countries and internal law jurisdiction between the federal and provincial governments. That there is no logical or necessary connection between the two is the core of the Privy Council's ruling in the 1937 Labour Conventions case": see E. McWhinney, Quebec and the Constitution, 1960-1978 (1979), p. 42. A similar argument is made by I. Head in The Canadian Offshore Minerals Reference (1968), 18 U. Toronto L.J. at pp. 154-6.

59. Supra, footnote 53, at p. 185. Emphasis is mine.
60. Attorney General for Canada v. Attorney General for Ontario (Labour Conventions), [1937] A.C. 326.
61. See W.R. O'Connor, Report to the Senate (1939), annex 4, p. 32. O'Connor gives a detailed description of the three Conferences and the mandates of the provincial representatives. The account of the Conferences given in the text is based largely on O'Connor's material. See also J. Pope, Confederation, Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act (1895), pp. 111-22.
62. See sections 29 and 43 of the Quebec Resolutions, 1864 and sections 28 and 41 of the London Resolutions, 1866.
63. For a detailed examination of the relevant historical material, see A. Tremblay, Les Compétences législatives au Canada et les Pouvoirs provinciaux en Matière de Propriété et de Droits civils (1967), pp. 15-67.
64. Parliamentary Debates on the Confederation of the British North American Provinces, 3rd Sess., 8th Provincial Parliament of Canada, 1965, p. 40.
65. Ibid., pp. 40-1.
66. Little is known of the discussions and negotiations that took place once the London Resolutions had been passed on to the Imperial Government. The participants agreed that their meetings would be confidential and apparently few records were kept: see O'Connor, op. cit., footnote 61.
67. The "first" draft refers to the draft of 23 Jan. 1867. In fact, there were at least two drafts prior to this date, but they are fragmentary and have not been published. Pope, op. cit., footnote 61, labels the Jan. 23rd draft the "first" and counts from there up to the "fifth", the one actually submitted to Parliament. This labelling has become conventional.
68. (1878), 95 U.S. 714, 24 L.Ed. 565.
69. Ibid., at pp. 722-3 of 95 U.S. 714. Although Pennoyer v. Neff was not decided until 1878, the principles in the passage quoted in the text had been asserted and acted on for many years. For example, one finds the following passage in a standard text on constitutional law published in 1868:

[T]he legislative authority of every state must spend its force within the territorial limits of the State. The legislature of one State cannot make laws by which people outside the State must govern their actions, except as they may have occasion to resort to the remedies which the State provides, or to deal with property situated within the State.

See Judge Cooley, *Constitutional Limitations* (1st ed., 1868), p. 248, quoted in M. Rheinstein, *The Constitutional Bases of Jurisdiction* (1955), 22 U. Chicago L. Rev. 775 at p. 810. Mr. Justice Field himself points out in *Pennoyer* (at p. 723) that the views quoted in the text "are not new. They have been frequently expressed...in the opinions of eminent judges, and have been carried into adjudications in numerous cases." The relevant cases and authorities are reviewed at pp. 723-734 of the judgment.

70. This example is drawn from *Workmen's Compensation Board v. C.P.R.*, [1920] A.C. 184, [1919] 3 W.W.R. 167, 48 D.L.R. 218, discussed *infra*, at footnote 162.
71. This was the nineteenth century rule respecting capacity to contract. In this century the courts have preferred to formulate more particular rules to govern different kinds of contracts: thus capacity to marry is determined by the law of the parties' domicile, the capacity to sell land is determined by the law of the place where the land is situate. For discussion, see J.-G. Castel, *Canadian Conflict of Laws*, vol. 2 (1977), pp. 547 *et seq.*
72. See A.E. Anton, *The Introduction into English Practice of Continental Theories on the Conflict of Laws* (1956), 5 Int. & Comp. L.Q. 534, and D.J.L. Davies, *The Influence of Huber's De Conflictu Legum on English Private International Law*, *op. cit.*, footnote 8.
73. U. Huberus, *De conflictu legum diversarum in diversis imperiis*, in *Praelectiones Juris Romani et hodierni*, vol. 2 (1689). The Latin text with an English translation appears in E.G. Lorenzen, *Huber's De Conflictu Legum* (1919), 13 Ill. L. Rev. 375 at pp. 401 *et seq.* and in Davies, *op. cit.*, footnote 8, at pp. 64 *et seq.*
74. Translated by Lorenzen, *ibid.*, at p. 403.
75. *Ibid.*
76. Translated by Davies, *op. cit.*, footnote 8, p. 64.

77. (1752), 2 Hag. Cons. 395, 161 E.R. 782. See also Robinson v. Bland (1760), 1 Bl. 234, 96 E.R. 129, where Lord Mansfield observed (at p. 141): "the general rule, established ex comitae and jure gentium, is that the place where a contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract." The international law origins of private international law are discussed in detail by Rheinstejn, op. cit., footnote 69. For an account of international law origins of admiralty and mercantile law, see A. Sack, Conflicts of Laws in the History of the English Law in Law: A Century of Progress, 1835-1935, vol. 3 (1935).
78. Ibid., at p. 790.
79. This general rule is subject to qualification: it is open to the parties to choose the law that will govern disputes arising under their contract and it is only in the absence of such choice that the rule stated in the text applies. For discussion see Castel, op. cit., footnote 71, at p. 546.
80. Professor Currie summarizes his theory in Notes on Methods and Objectives in the Conflict of Laws, in B. Currie, Selected Essays on the Conflict of Laws (1963), pp. 176 et seq.
81. Ibid., at p. 183.
82. Professor Currie was never able to suggest a satisfactory solution in cases where the forum is disinterested and more than one foreign jurisdiction has an interest in the case.
83. Currie, op. cit., footnote 80, at p. 182.
84. A. von Mehren and D. Trautman, The Law of Multistate Problems (1965), pp. 76-7.
85. See A. Ehrenzweig, Conflict of Laws (1962), pp. 311 et seq. See also the Lex Fori -- Basic Rule in the Conflict of Laws (1960), 58 Mich. L. Rev. 637.
86. See E. Cheatham and W. Reese, Choice of the Applicable Law (1952), 2 Col. L. Rev. 959.
87. R. Leflar, American Conflicts Law (3rd ed., 1977), p. 195.
88. R. Weintraub, Commentary on the Conflict of Laws (2nd ed., 1980), pp. 267-75.
89. American Law Institute, Restatement (Second) of Conflict of Laws (1971).

90. M. Rosenberg, Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals (1967), 67 Colum. L. Rev. 459 at p. 464.
91. (1931), 203 Wis. 248, 234 N.W. 342.
92. (1963) 12 N.Y. 2d 473, 191 N.E. 2d 279.
93. Ibid., at p. 283 of 191 N.E. 2d 279.
94. Ibid., at p. 284.
95. (1966), 26 App. Div. 2d 595, 270 N.Y.S. 2d 552.
96. (1965), 16 N.Y. 2d 120, 209 N.E. 2d 792.
97. (1969), 24 N.Y. 2d 569, 249 N.E. 2d 394.
98. (1972), 31 N.Y. 2d 121, 286 N.E. 2d 454 at 457.
99. (1965), 26 Wis. 2d 617, 133 N.W. 2d 408.
100. Ibid., at p. 416 of 133 N.W. 2d 408.
101. (1968), 38 Wis. 2d 468, 157 N.W. 2d 579.
102. Ibid., at p. 582 of 157 N.W. 2d 579.
103. See supra, at footnote 87.
104. Supra, footnote 101, at p. 583 of 157 N.W. 2d 579.
105. Ibid., at p. 584.
106. Ibid., at p. 588.
107. Ibid., at pp. 586-7.
108. See articles 6-7 and 79 et seq. of the present Code. See Projet de Code Civil, vol. 1, Livre 9, in Rapport sur Le Code Civil du Québec (1977).
109. R.S.O. 1980, c. 488.
110. R.S.O. 1980, c. 152.
111. R.S.O. 1980, c. 375.
112. Supra, footnote 32.
113. [1903] A.C. 471.
114. See Salmon op. cit., footnote 35, at pp. 126-7 and Edinger, op. cit., footnote 53, at pp. 58-9.
115. [1906] A.C. 542.

116. [1933] A.C. 156.
117. Supra, footnote 115, at p. 546.
118. Supra, footnote 116, at pp. 165-6.
119. (1947-48), L.R. 75 Ind. App. 86.
120. Ibid., at p. 98.
121. Ibid., at p. 100.
122. (1936-37), 56 C.L.R. 337 at 375.
123. The powers of Australian states, unlike those of the provinces, are not limited to a series of subjects listed in the constitutional document: each state may enact legislation for the peace, order and good government of that state. For further discussion of the Australian treatment of territorial limitations, see authorities cited in footnote 53, especially Edinger, at pp. 87 et seq.
124. Supra, footnote 68, at p. 723 of 95 U.S. 714.
125. The methodology used by the Court in its early decisions under the due process clause is illustrated by New York Life Insurance Co. v. Dodge (1918), 246 U.S. 357. The plaintiff in Dodge was suing on an insurance policy. She was a resident of Missouri and under the law of that state was entitled to a substantial payment from the insurer. The defendant company was domiciled in New York and under its law the policy in question was exhausted. The Missouri court found for the plaintiff but the company appealed to the Supreme Court of the United States on the ground that it was contrary to due process to apply the law of Missouri to a contract situate in New York.
- As suggested in the text, the chief problem for the Court was to determine the situs of the contract. Since it had been negotiated and perfected through an exchange of letters between one person in Missouri and another in New York, prima facie both states could put forward an equally compelling claim. To resolve the dilemma the Court relied on a situs rule of private international law: where a contract is perfected by mail, it is situate in the place where the letter of acceptance is received. This rule put the contract in New York. The Court thus agreed that the company's right to due process had been violated by the application of Missouri law.
126. For an account of these early attempts to make territorial restrictions more palatable to the

states, see the judgment of Gibbons, J. in Jonnet v. Dollar Savings Bank (1976), 530 F. 2d 1123 (U.S.C.A., 3rd cir.).

127. Supra, footnote 166, at pp. 733-4 of 94 U.S. 714.
128. See Act of May 26, 1790, ch. 11, 1 Stat. 122. The early history of the full faith and credit clause is described by K. Nadelmann, Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal (1957), 56 Mich. L. Rev. 33, especially pp. 60 et. seq. See also Whitten, op. cit., footnote 18.
129. (1932), 286 U.S. 145, 52 S.Ct. 571.
130. (1935), 294 U.S. 532, 55 S.Ct. 518.
131. (1939), 306 U.S. 493, 59 S.Ct. 629.
132. Supra, footnote 130, at p. 547 of 294 U.S. 532.
133. Ibid.
134. Supra, footnote 131, at p. 503 of 306 U.S. 493.
135. This conclusion was reached in Carroll v. Lanza (1955), 349 U.S. 408, 75 S.Ct. 804.
136. Allstate Insurance Co. v. Hague (1981), 449 U.S. 302, 101 S.Ct. 633 at 637, n. 10, per Brennan J. for the majority.
137. See, for example, the concurring opinion of Stevens, J. in the Allstate case, ibid., discussed infra, at footnote 220.
138. (1945), 326 U.S. 310, 66 S.Ct. 154.
139. Ibid., at p. 158 of 66 S.Ct. 154.
140. (1954), 348 U.S. 66, 75 S.Ct. 166.
141. Ibid., at pp. 71-2 of 348 U.S. 66.
142. Ibid., at pp. 72-3 of 348 U.S. 66.
143. Supra, footnote 119.
144. Supra, footnote 122.
145. See Workmen's Compensation Board v. C.P.R., supra, footnote 70, Desharnais v. C.P.R., [1942] 4 D.L.R. 605 (Sask. C.A.) (workmen's compensation), Re Kenny, [1951] 2 D.L.R. 98 (Ont.), Smith v. Smith, [1953] 3 D.L.R. 682 (Man. C.A.), Meyers v. Meyers,

- [1953] 2 D.L.R. 255 (Ont.) (maintenance); Dickson v. Dickson, [1944] 2 D.L.R. 396 (Sask. C.A.), Cleaver v. Cleaver, [1949] 4 D.L.R. 367 (Ont.) (custody); Re Leduc (1960), 25 D.L.R. (2d) 680 (Sask. C.A.) (adoption); Royal Bank of Canada v. The King, supra, footnote 1, Ottawa Valley Power Co. v. Attorney General for Ontario, [1937] O.R. 265, [1936] 4 D.L.R. 594 (Ont. C.A.), Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission, [1937] O.R. 796, [1937] 3 D.L.R. 458 (C.A.) (cancellation of contracts); Anderson v. Nobels Explosive Co. (1960), 12 O.L.R. 644, Beck v. Willard Chocolate Co. Ltd., [1924] 2 D.L.R. 140 (N.S.), Jenner v. Sun Oil Co. Ltd., [1952] 2 D.L.R. 526 (Ont.), Original Blouse Co. Ltd. v. Bruck Mills Ltd. (1964) 42 D.L.R. (2d) 174 (B.C.) (situs of tort).
146. Supra, footnote 1.
147. Ibid., at p. 296 of [1913] A.C. 283.
148. Ibid., at p. 298.
149. Ibid., at p. 290.
150. See Castel, op. cit., footnote 71, pp. 334-5.
151. See articles 179 and 180 of Le Code de Procédure Civile.
152. [1937] O.R. 265, [1936] 4 D.L.R. 594 (C.A.).
153. [1937] O.R. 796, [1937] 3 D.L.R. 458 (C.A.).
154. Supra, footnote 152, at p. 304 of [1937] O.R. 265.
155. See, for example, Citizens Insurance Co. v. Parsons (1881), 7 App. Cas. 96, 1 Cart. 265.
156. Supra, footnote 153, at p. 821 of [1937] O.R. 796.
157. [1933] S.C.R. 67 at 673, [1933] 4 D.L.R. 465.
158. This point is affirmed in Bank of Toronto v. Lambe (1887), 12 App. Cas. 575.
159. [1958] S.C.R. 3, 11 D.L.R. (2d) 225.
160. Ibid., at pp. 17-8 of [1958] S.C.R.: 3.
161. For other cases in which Canadian courts have relied on the situs rules of private international law to situate property or rights for constitutional law purposes, see Credit Foncier Franco-Canadien v. Ross, [1937] 3 D.L.R. 365 (Alta. C.A.) and Grondlund

v. Hansen, [1968] 4 W.W.R. 485 (B.C.).

162. Supra, footnote 70.
163. Ibid., at p. 191 of [1920] A.C. 194.
164. This distinction was emphasized by Rand, J. in Attorney General for Ontario v. Scott, [1956] S.C.R. 137, 114 C.C.C. 224, 1 D.L.R. (2d) 433 at p. 141 of [1956] S.C.R. 137:  
 A distinction may properly be made between vesting a right and extinguishing it. The former is, in fact, a declaration that within the jurisdiction making it the attributes of ownership of property or of a claim against a person within the jurisdiction, are available to the non-resident. Generally, the right so declared would be recognized and enforced under the principle of comity by other jurisdictions. But a like declaration purporting to extinguish a right based on jurisdiction over the debtor only could not bind the non-resident creditor -- in the case of a province, even in its own courts, Royal Bank of Canada v. The King, -- outside of that jurisdiction unless otherwise supported by recognized elements furnishing jurisdiction over him or the right. In short, a state, including a province, does not require jurisdiction over a person to enable it to give him a right in personam; but ordinarily, and to be recognized generally, such a jurisdiction is necessary to divest such a right. The Scott case establishes the proposition that a province may confer personal rights on non-residents of the province which are enforceable in the province against residents of the province. Apart from this, the remarks in the passage quoted above are obiter and the suggestion that rights are situate in the place where the right-holder is resident has not been adopted by subsequent courts.
165. Supra, footnote 162, at p. 191 of [1920] A.C. 184.
166. [1939] A.C. 468, 21 C.B.R. 1, [1939] 2 W.W.R. 566, [1939] 3 D.L.R. 1.
167. Ibid., at p. 481 of [1939] A.C. 468.
168. [1940] 2 D.L.R. 345 (Alta. C.A.).
169. Ibid., at p. 348. In justifying this reasoning the Court referred to the judgment of Lord Haldane in the C.P.R. case, discussed supra, at footnote 162.
170. See Cowen v. Attorney General for British Columbia, [1941] S.C.R. 321, [1941] 2 D.L.R. 687 and Attorney

General for Quebec v. Kellogg's Co., [1978] 2 S.C.R. 211.

171. See Re Legault and Law Society of Upper Canada (1975), 58 D.L.R. (3d) 641 (Ont. C.A.) and Underwood, McLellan and Ass. Ltd. v. Ass. of Professional Engineers of Sask., [1978] 4 W.W.R. 525 (Sask.).
172. See R. v. McKensie Securities Ltd. (1966), 56 D.L.R. (2d) 56 (Man. C.A.).
173. See R. v. Thomas Equipment Ltd., *supra*, footnote 6.
174. See Morgan v. Attorney General for P.E.I., [1976] 2 S.C.R. 349.
175. Supra, footnote 119.
176. Supra, footnote 3.
177. These provisions are reproduced at p. 487 of [1976] 1 S.C.R. 477.
178. (1870), L.R. 6 Q.B. 1.
179. Ibid., at pp. 28-9.
180. Supra, footnote 3, at p. 521 of [1976] 1 S.C.R. 477.
181. Ibid., at pp. 523-4.
182. See his reasoning at pp. 525-6 of [1976] 1 S.C.R. 477:  
 I take the view that while the control of pollution of such [interprovincial] rivers is a federal matter, the legislation here impugned has to do with its effect in damaging property within the Province of Manitoba.
183. See supra, at footnote 157.
184. Supra, footnote 157.
185. Supra, footnote 3 at p. 511 of [1976] 1 S.C.R. 477.
186. Ibid.
187. Ibid., at p. 514.
188. See Edinger, op. cit., footnote 53, at p. 69 and M. Hertz, 'Interprovincial', the Constitution and the Conflict of Laws (1976), 26 U. Toronto L.J. 84 at pp. 97-8.
189. Supra, footnote 3, at p. 512 of [1976] 1 S.C.R. 477.

190. Ibid., at p. 513.
191. Ibid., at p. 515.
192. Ibid., at pp. 500-1.
193. Supra, footnote 166.
194. See supra, at footnote 84.
195. For a similar criticism of the judgment of Laskin, C.J. in the Dryden case, see Hertz, op. cit., footnote 188, at pp. 101-2.
196. Clause 4(1)(c) provides that "the defendant is liable for all financial loss" even though "those waters have been, or are being polluted...by any other person." Emphasis is mine.
197. Clause 4(1)(d) provides that the Attorney General need not establish "that the contaminant affecting the fish derived from the actual volume of contaminant which the defendant discharged." All he need prove is (1) the defendant discharged a contaminant into waters flowing into Manitoba; (2) "thereafter fish in those waters suffered death, disease or injury", and (3) that it is possible that the injury to the fish was caused by that kind of contaminant. (Emphasis is mine.) The Attorney General thus avoids having to show a causal relation between the defendant's act and the damage.
198. Supra, footnote 166.
199. Supra, footnote 138.
200. Supra, footnote 3, at p. 503 of [1976] 1 S.C.R. 477. This basis of distinction is not altogether convincing. The relevant feature of the rights in Royal Bank was their situs, not their legal origin. For further analysis of this aspect of Chief Justice Laskin's judgment, see M. Hertz, The Constitution and the Conflict of Laws: Approaches in Canadian and American Law (1977), 27 U. Toronto L.J. 1 at pp. 28-9.
201. Supra, footnote 6.
202. Ibid., at p. 545 of [1979] 2 S.C.R. 529.
203. See (1978), 5 A.R. 258.
204. For discussion of this point see H.P. Glenn, Conflict of Laws -- Eviction of Proper Law of Contract By Legislation Creating Provincial Offence -- Extra-Territorial Effect of Provincial Legislation --

- Where Is An Omission? (1981), 59 Can. Bar Rev. 840.
205. Supra, footnote 203, at pp. 259-60.
206. Ibid., at p. 270.
207. Supra, footnote 3, at p. 534 of [1979] 2 S.C.R. 529.
208. Ibid., at p. 533.
209. Supra, footnote 138.
210. See, for example, Allstate Insurance Co. v. Hague, supra, footnote 136. The issue was whether Minnesota had violated due process by applying its insurance law in a suit against Allstate. Minnesota law provided that if an insured held more than one policy of car insurance which included indemnity for personal injury, he could claim for the full amount of the injury under each. Wisconsin law permitted recovery under one policy only. The insured in this case was a resident of Wisconsin and he had purchased his insurance there. The accident in which he was injured occurred in Wisconsin during the course of a local outing. The insured's only connection with Minnesota was the fact that he was employed there. (Also, after the accident his widow moved there and the defendant company had always done business there.) In the view of the majority of the Court, this was sufficient to give Minnesota an interest in the application of its law:
- Minnesota's workforce is surely affected by the level of protection the State extends to it, either directly or indirectly. Vindication of the rights of the estate of a Minnesota employee, therefore, is an important state concern.
- See p. 641 of 101 S.Ct. 633. To characterize a "stacking" provision in an insurance law as a measure to protect the workforce of the state is surely stretching the notion of interest too far; on this account the bulk of Minnesota's statute law is worker protection law.
211. Although I predict that the Courts will not construe section 7 broadly to include the protection of property rights, the only case to date which addresses the issue goes the other way. In The Queen v. Fisherman's Wharf (1982), 135 D.L.R. (3d) 307 (N.B.Q.B.), Dickson, J. relied on s. 7 to narrow the scope of a provision in a sales tax act which created a lien on property. He reasoned as follows: The Canadian Charter of Rights and Freedoms ...purports to be fairly all-embracing in

respect of those rights and freedoms to which all Canadians have been accustomed, whether under that portion of our Constitution which has heretofore been written or under that portion which has heretofore been unwritten. The Charter is silent in specific reference to property rights. In that circumstance it can only be assumed, in my view, that the expression 'right to... security of the person' as used in s: 7 must be construed as comprising the right to enjoyment of the ownership of property which extends to 'security of the person'.

See p. 315.

212. Article I, Section 8 provides that "the Congress shall have Power...to regulate Commerce with foreign Nations, and among the several States." This clause has been broadly construed by the Supreme Court of the United States from the beginning: see Gibbons v. Ogden (1824), 9 Wheat. 1. For a comparison of the American and Canadian positions, see Tremblay, op. cit., footnote 63, at pp. 140 et seq.
213. Article IV, Section 2 provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This clause has occasionally been relied on to control state choice of law: see B. Currie, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, in Selected Essays on the Conflict of Laws, op. cit., footnote 80, at pp. 445 et seq.
214. Article VI provides that "all Treaties made...under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."
215. See Leflar, op. cit., footnote 87, at pp. 125-42.
216. Supra, footnote 126.
217. Ibid., at p. 1134.
218. Ibid.
219. Ibid., at p. 1132.
220. Supra, footnote 138.
221. (1980), 444 U.S. 286, 100 S.Ct. 559.
222. Ibid., at pp. 565-6 of 100 S.Ct. 559.

223. Ibid., at p. 564.
224. Allstate Insurance Co. v. Hague, supra, footnote 136. For the facts and holding of the majority in this case, see footnote 210. Mr. Justice Stevens spoke for himself alone.
225. Ibid., at p. 644 of 101 S.Ct. 633.
226. Ibid., at p. 645.
227. Ibid., at p. 646.
228. Ibid., at p. 645.
229. Ibid.
230. Ibid., at p. 646.
231. This suggestion would require amendment of provincial legislation providing for notice to Attorneys General when a constitutional question is raised. Existing legislation typically requires that notice be given to the Attorney General of Canada and the Attorney General of the forum province only. If the approach suggested in the text were adopted, notice would have to be given to the Attorney General of the affected province(s) as well.
232. The Federal Court Act, R.S.C. 1970 (2d Supp.), c. 10, s. 19 provides:  
Where the legislature of a province has passed an Act agreeing that the Court... has jurisdiction in cases of controversies ...between such province and any other province or provinces that have passed a like Act, the Court has jurisdiction to determine such controversies.
233. See supra, at footnote 146.
234. See supra, at footnote 159.
235. See supra, at footnotes 152 and 153.
236. See supra, at footnote 201.
237. Valin v. Langlois (1879), 3 S.C.R. 1 is generally cited as authority for this proposition. For further discussion, see M. Hertz, op. cit., footnote 200, at pp. 29 et seq.
238. [1894] A.C. 670 at 683-4.
239. Ibid., at p. 684.

240. Ibid.
241. The rule is the same for Quebec: see Code de Procédure Civile, art. 110 et seq. and 179-80. This chapter will deal exclusively with in personam proceedings since the courts of Canadian provinces do not hear proceedings in rem: both judgments in personam and judgments in rem are founded on in personam proceedings. Professor Hertz, op. cit., footnote 200, suggests that provincial statutes allowing for the garnishment of debts confer on Canadian courts a jurisdiction comparable to the quasi-in-rem jurisdiction exercised by American courts: see pp. 38-41. Garnishment, in my view, is more properly analyzed as a problem in recognition. This means that the governing territorial principle is the presence within the jurisdiction of the assets to be executed on. Since debts are intangibles, a rule may be wanted to situate them exclusively in one province for this purpose -- as in the taxation cases.
242. These statutes, along with provincial legislation respecting service in in personam proceedings, are collected by R.J. Sharpe in Interprovincial Product Liability Litigation: Jurisdiction, Enforcement and Choice of Law (1981) at pp. 182 et seq. Sharpe discusses provincial reciprocal recognition legislation at pp. 68-70.
243. Nova Scotia Rule 10.07, reproduced ibid., at p. 207.
244. An Act to amend the Process, Practice, and Mode of Pleading in the Superior Courts of Common Law, 15 & 16 Vict., c. 76.
245. [1944] K.B. 432 at 435.
246. Supra, footnote 68.
247. Supra, footnote 138.
248. Supra, footnote 221.
249. Ibid., at p. 567 of 100 S.Ct. 559.
250. Canadian cases respecting jurisdiction to make a custody order offer a good example. Jurisdiction is refused unless the applicant establishes a significant connection between the child and the forum province. Ordinarily the child must be a resident of the province but in special circumstances domicile or physical presence will suffice. The rules establishing the limitation are common law rules and British case law is heavily relied on. The special territorial limitations on the

- provinces under s. 92(14) are uniformly ignored. See Hannon v. Eisler, [1955] 1 D.L.R. 183 (Man. C.A.); Elash v. Elash (1964), 43 D.L.R. (2d) 599 (Sask. Q.B.); Neilson v. Neilson (1971), 16 D.L.R. (3d) 33 (Ont. H.C.).
251. See, for example, Smith v. Smith, [1953] 3 D.L.R. 682 at 688-9 (Man. C.A.); see also Meyers v. Meyers, [1953] 2 D.L.R. 255.
  252. See McGuire v. McGuire and Desordi, [1953] O.R. 328 (C.A.).
  253. See Ex parte Eli, [1920] 1 W.W.R. 661 (Alta.).
  254. See Deacon v. Chadwick (1901), 1 O.L.R. 346 (Div. Ct.).
  255. (1910), 20 O.L.R. 646.
  257. Supra, footnote 255, at p. 649.
  258. Supra, footnote 138.
  259. [1893] A.C. 339.
  260. See supra, at footnote 32.
  261. Supra, footnote 259, at p. 344.
  262. Supra, footnote 256, at pp. 418-9.
  263. Supra, footnote 4.
  264. Ibid., at pp. 408-9 of [1975] 1 S.C.R. 393.
  265. Supra, footnote 138.
  266. Supra, footnote 221.
  267. Supra, footnote 138.
  268. See discussion supra, at footnote 211.
  269. Supra, footnote 190.
  270. Supra, footnote 5. See also Attorney General of Canada v. Law Society of British Columbia (1982), 137 D.L.R. (3d) 1 at 16, where the Court commented on the "prime importance" of provincial superior courts in the constitutional pattern of Canada.
  271. Supra, footnote 5, at pp. 556-7 of [1975] 2 S.C.R. 546.