Canadian interprovincial jurisdiction-taking and judgment-enforcing post-*Morguard*... a comparative perspective

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Abstract

In 1990, the Supreme Court of Canada considered the way in which the courts of Canadian common-law provinces enforced judgments issued by other Canadian courts.[1] The Court concluded that the traditional Canadian approach was an "unthinking" adoption of English rules that were inappropriate in a federation such as Canada. The Court held that where the courts of a province have a "real and substantial connection" with a matter, any resulting judgment should receive "full faith and credit" in other provinces.

Unfortunately, although not surprisingly, the Court's decision raises almost as many questions as it answers. This paper considers some of these questions and proposes a Canadian approach to the twin issues of jurisdiction-taking and judgment-enforcing.

Part I reviews the development of the Canadian common-law approach prior to the Court's decision in *Morguard*. This is contrasted with the *droit civil* approach, both under the current *Civil Code of Lower Canada* and under the proposed *Civil Code of Québec*. It then reviews the Court's decision in *Morguard* and indicates some of the questions that the Court's decision did not resolve.

As the Court took notice how three other "federal" systems—the United States, the European Community and Australia—deal with these issues, these systems are reviewed in Part II to see how they have addressed jurisdiction-taking and judgment-enforcing.

The United States has adopted Constitutional provisions in the form of the Due Process and Full Faith and Credit Clauses. Under this system, judgments issued by state courts which respect the Due Process Clause are entitled to full faith and credit throughout the United States. Over the years, the United States Supreme Court has modified its understanding of the meaning of the Due Process

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[1] *Morguard Investments Ltd* v. *De Savoye*, [1990] 3 SCR 1077.

Clause. An early interpretation aligned it with the traditional common-law approach to jurisdiction-taking, based on presence of defendants or their assets within the court's jurisdiction. This has given way over the years to a "minimum contacts" test under which there must be minimum contacts between a defendant and a state in order for its courts to take jurisdiction over the defendant. Once the minimum-contacts test of the Due Process Clause is met, notwithstanding the fact that the required contacts are very minimal, a court's judgment is entitled to enforcement throughout the United States under the Full Faith and Credit Clause.

In the European Community, the *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* lays down detailed rules regarding the taking of jurisdiction over persons domiciled in the European Community. The notion of domicile is not the common law one and it is more akin to habitual residence. The basic rule of the *Convention* is that persons may only be sued in the courts of their domicile (regardless of nationality and other traditional considerations). Courts of the European Community member states are not permitted to apply many of their traditional jurisdiction-taking techniques to these persons. There are also specific rules granting courts jurisdiction over such matters as insurance and consumer contracts and there are provisions for the recognition of choice of forum clauses in freely negotiated contracts; these operate in conjunction with the basic jurisdiction of the defendant's domicile. On the assumption that the *Convention's* jurisdiction-taking rules have been followed, the resulting judgment is enforceable throughout the European Community in an efficient and effective manner and is virtually unassailable. By means of a *Protocol* to the *Convention*, the European Court of Justice is empowered to interpret the provisions of the *Convention* and its decisions are binding on the courts of the member states.

The Australian Constitution, like its American counterpart, contains a Full Faith and Credit Clause. It does not, however, include a Due Process Clause. As the result of Commonwealth legislation shortly after Australia came into existence, process issued out of any of the state courts could be served throughout Australia in most civil matters. Resulting judgments were then enforceable throughout the Commonwealth. As a result of their rather complex jurisdictional situation, the Australian Commonwealth and State governments adopted a new system in 1987: the cross-vesting scheme.

Under the cross-vesting scheme, a plaintiff may commence an action against a defendant in <u>any</u> court in Australia. Upon application by the defendant, or on the court's own motion, the matter may be transferred to any other court in Australia when it is more appropriate that the other court deal with the matter. The decision to transfer or not is not appealable. In addition, where it is not appropriate to transfer a matter, the courts of one state can exercise the jurisdiction of any other state or of any of the Commonwealth courts. Resulting judgments are enforceable throughout Australia.

A discussion of these "federal" systems demonstrates that it is more important to clarify jurisdiction-taking rules than it is to clarify judgment-enforcing rules because it is only those judgments which meet the terms of the jurisdiction-taking criteria, whatever those criteria may be, that are entitled to enforcement or full faith and credit. Unfortunately, the jurisdiction-taking criteria of *Morguard* are not particularly detailed. American experience in this regard would indicate that a considerable amount of litigation will be required to fill in the details and establish the parameters of the "real and substantial connection" test. This will involve a substantial investment of time and money for plaintiffs and defendants.

In the spirit of *Morguard*, the Uniform Law Conference has proposed the adoption of a Uniform Enforcement of Canadian Judgments Act. Unfortunately the proposed legislation focuses on judgment-enforcing, rather than on jurisdiction-taking, and is open to criticism on other grounds.

Under these circumstances, this paper recommends that Canada adopt a system broadly based on the Australian cross-vesting scheme.

For various reasons, a Canadian scheme should be limited to making provision for the transfer of matters from the courts of one province to the courts of another. This could be achieved in several ways. There is an argument that the federal government could legislate such a scheme without the involvement of the provinces; in the current political climate such legislation is unlikely. The next best alternative is joint legislation by all provinces and the federal government, although it would be possible to implement such a scheme without the involvement of Québec, if that were necessary. Finally, it would probably be possible, although not particularly desirable, to implement such a scheme through amendments to provincial rules of court.

Introduction

In December 1990 the Supreme Court of Canada rewrote the rules that govern the way Canadian courts in one province enforce judgments emanating from the courts of other provinces. At the same time it also rewrote the rules regarding the way courts take jurisdiction over litigation where elements of the case are inter-provincial in nature.[1] *Morguard* is an important decision, not only because it effects a sea change in the way Canadian common law courts will engage in jurisdiction-taking and judgment-enforcing, but also because it is framed in constitutional terms.[2] This paper will look at some of the issues raised by this decision and will suggest how the new doctrine enunciated by the Supreme Court of Canada might develop.

Although not likely foremost in litigants' minds, jurisdiction-taking and judgment-enforcement are important to both plaintiffs and defendants. Once one moves past a spontaneous response to a perceived injustice, the decision to begin legal proceedings is, or should be, the result of a careful weighing of a number of factors: a dispassionate evaluation of the merits of the case in light of the applicable law; an evaluation of the cost of proceeding and the amount and type of compensation that might be obtained if successful; and, ultimately, a determination that the chance of winning outweighs the risk of losing. Where a plaintiff and a defendant are both located in the same place, this will usually be a relatively straightforward calculation. Matters become considerably more complex when it becomes necessary to factor in the effects of jurisdictional boundaries, and the need to decide which courts—of at least two—might be the best before which to bring an action.

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1 *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 SCR 1077, 52 BCLR (2d) 160, 76 DLR (4th) 256, 122 NR 81, [1991] 2 WWR 217, 46 CPC (2d) 1, 51 RPR (2d) 1; hereafter referred to as *Morguard* and cited to SCR.

2 See *infra* note 80.

Where plaintiffs and defendants are located in different jurisdictions, plaintiffs have to know which court or courts will entertain their suit, what law is likely to be applied and, perhaps most importantly, whether the resulting judgment will be enforceable against the intended defendant. Defendants, on the other hand, need to know what risks they run if they ignore proceedings in another jurisdiction and, equally importantly, what risks they run if they appear to defend their interests in that jurisdiction.

The English and, by extension, Canadian systems of common law courts and, indeed, the common law itself, find their origins in the system of justice established by William the Conqueror shortly after his successful invasion of England in 1066 CE. The civil law system used in Québec can easily claim to be older as it can trace its roots to the Justinian Code of Rome.[3] Given the realities of life in those days, it is not surprising that laws and courts were initially designed to deal with relatively local issues. In earlier times when people travelled less and traded locally, most disputes involved individuals who rarely strayed from their place of residence or business.

In today's world, it is not unusual for individuals and companies to find themselves in situations that involve elements with connections to different places, whether countries or subordinate law districts with different legal systems. Over the past several hundred years, the world's legal systems have had to come to terms with this reality and develop ways and means of dealing with the fact that persons who appear before their courts can bring problems that have elements that arise outside the courts' territorial boundaries.

There are many challenges for legal systems and their courts in such situations. One is clearly the decision which of two or more competing sets of legal rules should apply. However, there are two

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[3] See J.H. Merryman, *The Civil Law Tradition*, 2d ed. (Stanford: University of Stanford Press, 1985) at 3-4.

questions which bracket the choice of law: when should courts become involved in the resolution of a dispute involving extra-territorial elements, and when should courts respect and enforce the decisions other courts have handed down?

These questions apply at the international level but they also apply within countries, such as Canada, that are divided into different law districts. While significant at the international level, if anything these questions are even more important within a country, particularly if that country makes any claim to having a national identity (for example, it would be difficult to imagine a country in which a person could be considered to be married in one province or state, but not in another). Similarly, a country that claims to have a national marketplace in goods and services will compromise national economic efficiency, if participants are not able to resolve internal disputes in a relatively predictable fashion.[4]

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[4] The challenge—and potential scandal—inherent in jurisdictional questions within a federation is well set out by David Vernon in a "Lawyering Note" introducing his discussion of jurisdiction in the American context:

> ...choice of forum often means the difference between winning or losing, or between a large or a small judgment. A forum with the most favorable choice-of-law rule from plaintiff's perspective may be questionable in terms of jurisdiction. Plaintiff's counsel then must balance the potentially favorable substantive result with the danger of being out of court on jurisdictional grounds. If the forum is the only one in which a favorable substantive result is likely, the jurisdictional issue must be faced and litigated. If another forum is available in which a favorable substantive result is somewhat less likely, but probable, and in which jurisdiction is clear, a hard decision must be made. How should the lawyer proceed? Should the conservative lawyer file in both states? Is it an abuse of process to file in both states and to test the water in the courts of the state having the more favorable substantive rule while leaving the suit in the other state quiescent if possible?...
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> The substantive law as such, of course, is not the only consideration in selecting a forum. From plaintiff's perspective, State *X* with a history of large plaintiff's verdicts would be preferable to State *Y* with a contrary history. A sound and sophisticated understanding of jurisdictional requirements often permits the lawyer greater flexibility than would otherwise be possible. Competence requires that kind of understanding.

D.H. Vernon, *Conflict of Laws: Theory and Practice*, 2d ed. (New York: Matthew Bender, 1982) at 7-1, para. 7.02.

The determination of which system of law should apply to a given dispute is crucial to the resolution of a legal question, and the fact that a particular court would probably apply a particular law, thereby making a favourable verdict likely, will be a key factor in a plaintiff's choice of forum. But not only must a plaintiff first find a court that will agree to hear the matter, there is little satisfaction, other than perhaps from a moral point of view, in obtaining a favourable judgment that cannot be enforced. Hence, if the defendant does not have sufficient assets under the jurisdiction of the court before which it is contemplated that an action be brought, the question whether that court's judgment will be enforced elsewhere is an important consideration.

While these questions have been important to parties since litigation began, their importance has increased in recent years and will continue to do so. As the world becomes a "global village", the splendid isolation that characterized communities in the past becomes untenable and unrealistic. Today's mobility of goods and people means that it is increasingly likely that individuals and companies will suffer or cause injuries outside their "home" jurisdictions. The development of mail-order and telemarketing businesses means that it is not even necessary to leave home to be in such a situation. Inter-jurisdictional issues can only grow in number and importance.

Canada has, traditionally, been somewhat backward in the way its law districts (*i.e.* the provinces and territories) have dealt with matters involving contacts with each other. The decision in *Morguard*, though, has brought Canada up to date and set it on a new course. The Supreme Court has indicated that the old rules are no longer, if they ever were, appropriate within Canada, and that new ones will be required in the future. Unfortunately, while it has provided signposts indicating the general direction to be taken, the Court has not provided anything approximating a detailed road map.

In its decision, the Supreme Court looked to the United States, the European Community and Australia, not, as it frequently does, to consider how the common law is developing elsewhere, but to see how the issues of jurisdiction-taking and judgment-enforcing are handled in other "federations". This comparative law approach will be continued in this paper as a method for exploring the various ways in which the issues associated with jurisdiction-taking and judgment-enforcing raised by *Morguard* might be addressed.

Part I of the paper will review the development of Canadian law—both common law and *droit civil*—prior to *Morguard*, as well as the Court's decision in that case. Part II will review how the three "federal" systems mentioned by the Court deal with jurisdiction-taking and judgment-enforcing. Part III will consider what guidance these systems offer Canada and recommend a response to the Court's initiative.

I. The development of Canadian rules on jurisdiction and recognition of foreign judgments.

A. Common Law Jurisdictions

Just as Canadian common law is based on English common law, the Canadian court system is based on the English court system. Over the years various modifications have been made, such that a number of provinces no longer distinguish between superior and inferior courts. As each province has tinkered with its court structure, they have adopted legislation such as the Ontario *Courts of Justice Act*.[5] These laws generally provide an overall grant of jurisdiction to the courts established under them. This, however, does not provide a plaintiff with a sufficiently clear indication whether a case will be heard by a particular court.[6]

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[5] RSO 1990, c. C.43. Although there are differences among the Canadian common-law provinces, particularly in the actual phrasing and numbering of the applicable provisions, the Ontario scheme is broadly representative of the common-law provinces and territories, and reference to its *Act* and rules of court will be used throughout. For a compendium of the *Act*, the Ontario *Rules of Civil Procedure*, RRO 1990, Reg. 194, and other useful material, see J. McCarthy, W.A.D. Millar and J.G. Cowan, *The Ontario Annual Practice, 1992-93, Special Interim Edition* (Aurora, Ontario: Canada Law Book, 1992).

[6] For example:

> 10.—(1) The Ontario Court of Justice is continued under the name Ontario Court of Justice in English and Cour de justice de l'Ontario in French.
> (2) The Ontario Court shall consist of two divisions, the General Division and the Provincial Division.
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> 11.—(1) The Ontario Court (General Division) is continued as a superior court of record named the Ontario Court (General Division) in English and Cour de l'Ontario (Division générale) in French.
> (2) The General Division has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario.
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> ...
> 22.—(1) The Small Claims Court is continued as a branch of the General Division under the name Small Claims Court in English and Cour des petites créances in French.
> (2) ...
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> 23.—(1) The Small Claims Court,
> (a) has jurisdiction in any action for the payment of money where the amount claimed does not exceed the prescribed amount exclusive of interest and costs; and

Canadian common-law courts derive their basic jurisdiction as part of the inherent powers they exercise by virtue of their status as common-law courts.[7] In other words, they have the same basic *in personam* and *in rem* jurisdiction as their English counterparts; however this is not defined in the *Act* and reference must be had to the applicable rules of court. In Ontario, the *Courts of Justice Act* authorizes the Civil Rules Committee to make rules "even though they alter or conform to the substantive law" relating to *inter alia*:

> (c) commencement of proceedings, representation of parties by solicitors and <u>service of process in or outside</u> Ontario; [emphasis added][8]

Given the historical relationships between the two systems, in order to understand the anglo-Canadian rules of jurisdiction-taking and judgment-enforcing, it is necessary to understand the development of English traditions in these fields. Consequently, in this discussion, the Ontario approach will be considered in the context of English antecedents.

> (b) has jurisdiction in any action for the recovery of possession of personal property where the value of the property does not exceed the prescribed amount.

[7] See, for example, Ontario *Courts of Justice Act*, RSO 1990, c. C.43, s. 11.

[8] S. 66(2). See, for example, Ontario *Rules of Civil Procedure*: Rule 16 governs service of process out of the General Division within Ontario and Rule 17 makes provision for service outside Ontario. For a complete text of Rules 16 and 17, see Appendix 3, below at 118.

1. Jurisdiction-Taking[9]

Not surprisingly, the traditional English approach to questions of jurisdiction is based on territorial considerations: a person or thing within the territory over which the English court has jurisdiction will properly be the subject of an action before that court. This is congruent with the power the courts and/or the sovereign could actually exercise over their land and persons in it. The jurisdiction over things is known as jurisdiction *in rem* whereas the jurisdiction over individuals is known as the court's *in personam* jurisdiction.

Although *in personam* jurisdiction primarily applied to those persons the English system claimed as its own, *i.e.* persons domiciled[10] in England, as Morris notes, an English court would also take jurisdiction over a case involving a defendant who was only temporarily within its territory:

> Any individual who is present in England is liable to be served with a writ in an action *in personam*, however short may be the period for which he is present in England, and irrespective of his nationality, or domicile, or usual place of residence, provided it is outside the EEC, or of the nature of the cause of action. Thus in *Maharanee of Baroda v. Wildenstein*,[11] an Indian princess residing in France brought an action against an American art dealer also residing in France for rescission of a contract to sell her a picture. The contract was made in France and governed by French law. The writ was served on the defendant at Ascot races during a temporary visit to England. It was held that the court had jurisdiction.[12]

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[9] The following discussion is, of necessity, a brief summary of the English and Canadian rules relating to jurisdiction-taking. For a more detailed discussion, reference can be had to any standard conflicts textbook. For a discussion of the English context, see G.C. Cheshire and P.M. North, *Private International Law*, 11th ed. (London: Butterworths, 1987) at 183-220; A.V. Dicey and J.H.C. Morris, *The Conflicts of Law*, 10th ed. (London: Stevens & Sons, 1980) at 149-246; J.H.C. Morris, *The Conflict of Laws*, 3d ed. (London: Stevens & Sons, 1984) at 64-101. For a discussion of the Canadian context, see J.-G. Castel, *Canadian Conflict of Laws*, 2d ed. (Toronto: Butterworths, 1986) at 187-206; J.G. McLeod, *The Conflict of Laws*, (Calgary: Carswell, 1983) at 79-118.

[10] For a discussion of the different meanings of this term, see *infra* note 121.

[11] [1972] 2 QB 283, [1972] 2 All ER 689 (CA).

[12] Morris, *supra* 9 at 65. As Morris notes, "The actual decision would now be different because of the defendant's residence in France." *Ibid.* note 4. See the discussion of the European *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, below at 49. See also, E.L. Hayes, "*Forum non conveniens* in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation" (1992) 26 UBC L Rev. 41 at 44.

Notwithstanding the somewhat fortuitous—although quite traditionally defensible—grounds on which such a jurisdiction would be exercised, it does not provide plaintiffs with a great deal of hope. Waiting until an intended defendant happens to set foot within the territorial jurisdiction of the plaintiff's court is hardly a satisfactory way of instituting proceedings. Not only can the clever defendant avoid being served in this way, totally unaware defendants may also avoid service, through absolutely no effort on their part.

In an era when persons moved around very little, an approach based on presence in the jurisdiction, even transitory presence, was logical and would have covered almost all situations which might have presented themselves to the courts. As people became more mobile, trade between England and other jurisdictions developed and the possibility for commercial or tort actions which involved non-English, or "foreign", elements increased. In recognition of this, the number of situations in which the English courts would entertain actions was expanded.

Since the late nineteenth century, the English courts have been able to take jurisdiction over matters which involve defendants who are not present in England, under specifically defined circumstances.[13] Generally these required that the plaintiff demonstrate that there was at least some, albeit quite limited, connection between the matter and the English courts. As the basis of this jurisdiction involves serving the defendant with originating process while outside the territory of the court, this procedure is referred to as "service *ex juris*"; in the American context, this is also known as "long-arm" jurisdiction.

Originally, service *ex juris* was only available if the plaintiff first applied to the court for permission. In most Canadian provinces and many other common-law jurisdictions, the requirement for prior

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[13] See, *Common Law Procedure Act, 1852* (UK), 15 & 16 Vict., c. 76, ss 18, 19.

permission from the court has been abolished in favour of automatic service *ex juris* in situations meeting conditions laid down by the rules of court. In some cases, the connections with the court are tenuous, at best.[14] The possibility of making an application to the court in situations not covered by the rules of the court is maintained. This provides plaintiffs with virtually unlimited access to common-law courts. Once service *ex juris* is effected, either as of right or with permission of the court, courts feel they have jurisdiction to hear the case and grant judgment, even in the absence of the defendant. As will be seen, this very wide jurisdiction-taking is not mirrored in the judgment-enforcing practices of the common-law courts: as a general rule the common-law courts do not accept that other courts should exercise the wide jurisdiction they claim for themselves.

Given the traditional way in which common-law courts enforce default judgments,[15] a defendant who receives service *ex juris* is faced with a difficult choice whether to appear to defend the action. Failure to appear almost certainly results in a default judgment from the original court. This would not be a problem for a defendant who does not have, and does not intend to have, any assets in that court's jurisdiction, as this type of judgment has not traditionally been enforceable elsewhere. On the other hand, a default judgment does present a problem for the defendant who has property within the original court's jurisdiction, as the property becomes subject to seizure to satisfy the judgment.

Appearing before an original court in order to protect property within that court's jurisdiction, though, could endanger the defendant's property elsewhere. One of the key grounds on which a

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14 See Rule 17.02, Appendix 3, below at 118. While it is easy to see why it is appropriate that an Ontario court should have jurisdiction to hear many of the matters on the list in Rule 17.02, the connection between some of them and Ontario is potentially quite tenuous. For example, damage suffered within the province can cover a wide range of situations. The Ontario courts have a residual authority under Rule 17.03 to permit service *ex juris* in cases not provided for by Rule 17.02.

15 See the discussion of judgment-enforcing, below at 13.

common-law court would enforce the judgment of another court was that the foreign court had valid *in personam* jurisdiction over the defendant. A defendant who had appeared before the original foreign court to defend an action was held to have "attorned" to that court's jurisdiction, thereby granting it valid *in personam* jurisdiction, even if that jurisdiction did not otherwise exist. As a consequence, any appearances before foreign courts were fraught with danger.[16]

Common-law courts have long held that they have an inherent power to stay matters before them in appropriate cases[17] and in recent times they have adopted—to varying degrees[18]—the traditional Scots plea of *forum non conveniens* by which a court is invited not to hear a matter on the grounds that, depending on the formulation, it is not a convenient forum, or there is another more convenient forum. However, in the absence of statutory provisions to the contrary, the courts often held that an appearance to make a *forum non conveniens* plea was an 'invitation' to the court not to exercise its jurisdiction, and was an attornment to the jurisdiction even if the plea was unsuccessful.

Today, defendants who are of the view that Ontario is not the most suitable location for a case to be heard can apply to have the Ontario court refuse to exercise its jurisdiction by invoking the doctrine of *forum non conveniens* without facing the traditional dilemma. Rule 17.06 now provides that a

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16 See *Henry v. Geoprosco International Ltd*, [1976] 1 QB 726, [1975] 2 All ER 726 (CA). Although, as J. Blom notes, this case "has not been well received in Canada", "Conflict of Laws—Enforcement of Extraprovincial Default Judgment—Real and Substantial Connection: *Morguard Investments Ltd.* v. *De Savoye*" (1991), 70 Can. Bar Rev. 733 at 744, note 64.

17 See Castel, *supra* note 9 at 219ff and McLeod, *supra* note 9 at 119ff, for a discussion of the Canadian approach; and Cheshire and North, *supra* note 9 at 221ff, Dicey and Morris, *supra* note 9 at 247ff, and Morris, *supra* note 9 at 93ff, for a discussion of the English approach.

18 See, for example, Castel, *supra* note 9 at 219-225; Hayes, *supra* note 12; A.G. Slater, "*Forum non conveniens*: A View from the Shop Floor" (1988) 104 LQ Rev. 554; D.W. Robertson, "*Forum non conveniens* in America and England: 'A Rather Fantastic Fiction'" (1987) 103 LQ Rev. 398. See also, *Amchem Products Incorporated* v. *British Columbia (Workers' Compensation Board)* (25 March 1993), 22256 (SCC), where Sopinka J, writing for the Court, considers the doctrine of *forum non conveniens* as it has been adopted in England, Australia, the United States and Canada.

defendant served outside Ontario may challenge the service on the grounds that service was not authorized by the rules, that an order permitting service should be set aside or that Ontario is not "a convenient forum"[19] and the court may make the order which "is just".[20] Subrule 17.06(4) makes it clear that a person who challenges the Ontario court's jurisdiction is not held to have attorned to its jurisdiction.

Hence, it can be seen that since the mid-nineteenth century, common-law courts have been provided with the tools to permit plaintiffs to use them, regardless where the defendant is located. Even though the doctrine of *forum non conveniens* has been accepted in theory, its practical application remains very much open to discussion to this day. Given the declarations of common-law courts about the rights of plaintiffs not to have their choice of forum lightly interfered with, only a defendant with a lot to lose by doing nothing would take the risk of invoking the doctrine. While legislated initiatives such as Ontario's Rule 17.06 do mitigate the effects of service *ex juris*, they do not materially alter the fact that the common-law courts reflect a plaintiff-centred viewpoint when it comes to taking jurisdiction: it does not take much effort on the part of a plaintiff to bring an action within the service *ex juris* provisions.[21]

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19 Subrule 17.06(2)(c) (emphasis added).

20 *Ibid.*

21 In Ontario, the rules applicable to actions brought in the Ontario Court (General Division) do not apply to matters in Small Claims Court. As might be expected for a court that is supposed to be more expeditious and less formal than the regular courts, the Small Claims Court rules are somewhat less detailed than are the rules governing actions in the General Division. For example, there are no provisions dealing with *forum non conveniens* pleas or other challenges to the court's jurisdiction. See Appendix 4, below at 121, for the relevant rules.

2. Judgment-Enforcing[22]

As has been seen, it is fairly easy to get a common-law court to hear a case, even one involving an absent defendant. However, as has been pointed out, a judgment which cannot be enforced is not particularly valuable, and the common-law courts do not have a particularly good record enforcing judgments from other courts.

The original English view was a relatively straightforward one: its courts recognized in other courts basically the same jurisdiction over people and things as they exercised themselves:

> Although the English courts would not automatically enforce foreign judgments in England, they would entertain an action based on the foreign judgment against an English defendant if the foreign court had obtained jurisdiction over the defendant according to English rules. Although this sensibly recognised the foreign court's jurisdiction over property located and persons domiciled within its territory, unless the foreign court had been able to effect service of process on a defendant domiciled in England while he was within its territory, the English courts were of the view that any subsequent proceedings could not be enforced in England.[23]

For better or worse, this willingness to recognise in others the same jurisdiction as the English courts claimed themselves did not extend to service *ex juris*. While the English courts were more than willing to have their process run throughout the world, and issue default judgments against defendants who did not appear before them, they were not so willing to allow other courts to do the same thing:

> In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has

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22 For a more detailed discussion of this aspect see Castel, *supra* note 9 at 237-274, McLeod, *supra* note 9 at 579-654, Cheshire and North, *supra* note 9 at 337-401, Dicey and Morris, *supra* note 9 at 1033-1121, and Morris, *supra* note 9105-130.

23 P. Finkle and S. Coakeley, "Morguard Investments Limited: Reforming Federalism from the Top" (1991) 14 Dalhousie LJ 340 at 343.

> voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained.[24]

As La Forest J noted in *Morguard*, with the exception of the first criterion, this "accurately represents the common law in England to this day."[25]

Before *Morguard*, Canadian courts had adopted this approach, not only in their dealings with foreign judgments, but also in their dealings with judgments emanating from sister provinces:

> Essentially, then, recognition by the courts of one province of a personal judgment against a defendant given in another province is dependant on the defendant's presence at the time of the action in the province where the judgment was given, unless the defendant in some way submits to the jurisdiction of the court giving the judgment.[26]

According to La Forest J, "The English approach...was unthinkingly adopted by the courts of this country, even in relation to the judgments given in sister-provinces."[27]

Enforcement of judgments which met the necessary jurisdictional test could still be denied on a number of grounds, most of which are not particularly relevant for the purposes of this paper. These grounds include fraud; the fact that the foreign judgment is not a final judgment, (*i.e.* it is still subject to appeal); that the judgment is not for a determined, or at very least determinable, amount of money; that the judgment is for the payment of taxes to a foreign authority; that the foreign judgment has actually been satisfied; that the judgment violates the enforcing court's notions of

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24 *Emanuel v. Symon*, [1908] 1 KB 302, 77 LJ (NS) 180 (CA), *per* Buckley LJ at 309.

25 *Supra* note 1 at 1088. It should also be noted that the English courts would appear to have accepted reciprocity as a basis for the recognition of foreign *in rem* judgments; see *Travers v. Holley*, [1953] P 246, [1953] 2 All ER 794, [1953] 3 WLR 507 (CA), which considered the effect in England of a foreign divorce judgment.

26 *Ibid.* at 1092.

27 *Ibid.* at 1095.

public policy; and that the foreign proceedings did not meet the enforcing court's notions of natural justice.[28]

Over the years there have been legislative initiatives to facilitate the enforcement of foreign judgments in English and Canadian courts. These schemes have tended to provide an easier method of enforcing foreign judgments based on registration, rather than requiring re-litigation of the original suit or an action on the foreign judgment, where the foreign judgment meets the requirements of a codification of the common-law rules regarding which judgments may be enforced. Many of these legislative initiatives have been based on reciprocal arrangements between jurisdictions,[29] although some pieces of legislation do purport to govern foreign judgments wherever arising.[30]

The net result of the traditional English practices, as adopted by Canadian jurisdictions, has been to allow plaintiffs—regardless of their residence or domicile—virtually unlimited access to the courts, thereby presenting defendants with the possibility of facing a default judgment if they do not appear, while severely limiting the possibility of their appearance to mount challenges to the court's

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[28] See, for example, *Foreign Judgments Act*, RSNB 1973, c. F-19, and *Foreign Judgments Act*, RSS 1978, c. F-18, s. 5, which merely codify the common law. These *Acts* are based on the 1978 Model Law proposed by the Uniform Law Conference of Canada: *Uniform Foreign Judgments Act*, Uniform Law Conference of Canada, *Consolidation of Uniform Acts*, No. 18.

[29] See, for example, the *Reciprocal Enforcement of Judgments Act*, RSA 1980, c. R-6; *Court Order Enforcement Act*, RSBC 1979, c. 75; *Reciprocal Enforcement of Judgments Act*, RSM 1987, c. J20; *Reciprocal Enforcement of Judgments Act*, RSNB 1973, c. R-3; *Reciprocal Enforcement of Judgments Act*, RSNfld 1990, c. R-4; *Reciprocal Enforcement of Judgments Act*, RSNS 1989, c. 388; *Reciprocal Enforcement of Judgments Act*, RSO 1990, c. R.5; *Reciprocal Enforcement of Judgments (United Kingdom) Act*, RSO 1990, c. R.6; *Reciprocal Enforcement of Judgments Act*, RSPEI 1988, c. R-6; *Reciprocal Enforcement of Judgments Act*, RSS 1978, c. R-3; *Reciprocal Enforcement of Judgments Act*, RSNWT 1988, c. R-1; *Reciprocal Enforcement of Judgments Act*, RSYT 1986, c. 146.

[30] See K.W. Patchett, *Recognition of Commercial Judgments and Awards in the Commonwealth*, (London: Butterworths, 1984), and the reciprocal enforcement legislation, *supra* note 29, and the foreign judgments legislation, *supra* note 28.

jurisdiction. At the same time, the courts have been particularly solicitous of the interests of their domiciliaries, requiring that foreign courts follow even stricter rules than the English and Canadian courts in order for their judgments to be enforceable. What is surprising is that this chauvinism was not only applied by common-law courts to non common-law courts, it was also applied to each other and, within Canada, it was applied to other Canadian common-law courts.

B. Québec

For a number of years, Québec has been in the process of replacing the *Civil Code of Lower Canada*.[31] This process has reached the stage where the *Civil Code of Québec*[32] has been adopted, although it has yet to come into force.[33] When it does, it will make significant changes to the way Québec courts deal with conflict of laws questions, both from the point of view of substance and procedure. An entire book of the new *Code* (Book Ten, articles 3076-3168) has been devoted to Private International Law; Title Three of the Book (articles 3134-3154) deals with the International Jurisdiction of Québec Authorities[34] while Title Four (articles 3155-3168) deals with Recognition and Enforcement of Foreign Decisions and Jurisdiction of Foreign Authorities.

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31 *An Act respecting the Civil Code of Lower Canada*, LC 1865, c. 41; hereafter referred to as *CCLC* or "the old *Code*".

32 LQ 1991, c. 64; hereafter referred to as *CCQ* or "the new *Code*". For the text of the new *Code*, see *Code Civil du Québec/Civil Code of Québec*, (Cowansville, Québec: Yvon Blais, 1992). This new *Code* is based on the work of the Office de révision du Code civil (hereafter referred to as the ORCC). See, Québec, Office de révision du Code civil, *Rapport sur le Code civil du Québec, Projet de Code civil*, vol. I; *Rapport sur le Code civil du Québec, Commentaires*, vol. II, (Québec: Éditeur officiel du Québec, 1977).

33 At the time of writing, it was expected to come into force on 1 January 1994.

34 The term "Québec authority" is used throughout Title Three of the new *Code* where one would expect to see the term "Québec court"; there is no definition for the former term. According to Groffier, the Minister of Justice feels that Québec courts should decide how far to extend the concept: Groffier, *La réforme du droit international privé québécois, supplément au Précis de droit international privé québécois*, (Cowansville: Yvon Blais., 1993) at 127; hereafter referred to as Groffier, *Supplément*.

1. Jurisdiction-Taking

a. *Civil Code of Lower Canada*—The old *Code*[35]

The Québec courts have traditionally taken a similar, albeit more limited, approach to jurisdiction as their common-law counterparts. Like the common-law courts, they claim jurisdiction over land and other immoveables within their territorial jurisdiction: in other words, the province of Québec.[36] They also claim jurisdiction over all persons domiciled in Québec. It should be noted that the civil-law notion of domicile is somewhat different from the common-law notion.[37] The Québec courts do not accept simple, transitory presence within their territory as being sufficient to ground jurisdiction; Groffier considers this to be "un lien trop ténu et arbitraire entre la partie et la juridiction."[38] Additional grounds for exercising jurisdiction are location of the cause of action and agreement of the parties.

The old *Code* provides for the application of Québec law to persons and things located within Québec. It does not, however, generally determine the jurisdiction of the Québec courts. For this, reference must be had to the *Code of Civil Procedure*.[39] According to Groffier,

> Les seules dispositions du droit québécois concernant la compétence juridictionnelle des tribunaux à connaître des litiges présentant un élément d'extranéité se trouvent dans les articles 27 et 28 du Code civil qui ne sont pas très explicites. L'article 27 déclare que:

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[35] See generally, J.-G. Castel, *Droit international privé québécois*, (Toronto: Butterworths, 1980) at 659ff.

[36] This is broadly similar to the common-law *in rem* jurisdiction, subject to the difference between the civil-law notion of immoveables and the common-law notion of real property.

[37] This jurisdiction is analogous, although, as will be seen, not identical, to the common-law *in personam* jurisdiction. See articles 79ff *CCLC* for the Québec rules relating to domicile. The new rules are found in articles 75ff *CCQ*.

[38] E. Groffier, *Précis de droit international privé québécois*, 4th ed. (Cowansville, Québec: Yvon Blais, 1990) at 243, para. 244; hereafter referred to as Groffier, *Précis*.

[39] *Code of Civil Procedure*, SQ 1965, c. 80.

L'étranger quoique non résidant dans le Bas-Canada, peut y être poursuivi pour l'exécution des obligations qu'il a contractées même en pays étranger.

[Aliens, although not resident in *Lower Canada*, may be sued in its courts for the fulfilment of obligations contracted by them in foreign countries.]

Ces articles n'ont fait l'objet d'aucun commentaire particulier de la part des codificateurs québécois qui indiquent pourtant comme sources les articles 14 et 15 du Code civil français.

La plupart des auteurs et la jurisprudence y voient le simple principe que l'étranger ne peut décliner la juridiction pour la seule raison qu'il est étranger. Par contre, l'article 27 ne donne aucunement compétence à un tribunal québécois qui n'aurait pas juridiction conformément aux articles 68 et s. du Code de procédure civile.

Quant à l'article 28, il s'agit d'une règle quelque peu superfétatoire réaffirmant la compétence des tribunaux du domicile du défendeur et protégeant l'étranger lorsque les faits imputés au défendeur québécois ont été commis à l'étranger.[40] [Emphasis added.]

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[40] Groffier, *Précis*, *supra* note 38 at 249, footnotes omitted. Groffier cites the French text of art. 27 *CCLC*; the English version is the official translation. Article 28 *CCLC* provides:

> Any inhabitant of *Lower Canada* may be sued in its courts for the fulfilment of obligations contracted by him in foreign countries, even in favour of a foreigner.

The applicable articles of the *Code of Civil Procedure* provide:

> **68.** Subject to the provisions of articles 70, 71, 74 and 75, and notwithstanding any agreement to the contrary, a purely personal action may be instituted:
>
> (1) Before the court of the defendant's real domicile or, in the cases contemplated by article 85 of the Civil Code [of Lower Canada which governs election of domicile], before that of his elected domicile.
>
> If the defendant has no domicile in Québec but resides or possesses property therein, he may be sued before the court of his ordinary residence, before the court of the place where such property is situated, or before the court of the place where the action is personally served upon him;
>
> (2) Before the court of the place where the whole cause of action* has arisen; or, in an action for libel published in a newspaper, before the court of the district where the plaintiff resides if the newspaper has circulated therein;
>
> (3) Before the court of the place where the contract which gives rise to the action was made.
>
> A contract giving rise to an obligation to deliver, negotiated through a third party who was not the representative of the creditor of such obligation, is deemed to have been made at the place where the latter gave his consent. [Emphasis added.]

As can be seen, these provisions are much more restrictive than those in effect in the common-law provinces. In line with this more restrictive approach, the general rule is to sue defendants where they are located, unlike the common-law approach which is to allow plaintiffs to choose a forum to their liking. Given this approach, it is perhaps not too surprising that the doctrine of *forum non conveniens* has not been well-received in Québec. There is, in fact, a strong judicial tendency to hold that the Québec courts cannot decline to exercise jurisdiction if a matter is properly before them.[41]

b. *Civil Code of Québec*—The new *Code*

Under the provisions of the new *Code*, Québec authorities still have jurisdiction over immoveables located in Québec (article 3152) and over persons domiciled in Québec (article 3134). In addition to the basic jurisdiction based on domicile in Québec, Québec authorities will have jurisdiction over companies with a presence in Québec when the matter relates to their activities there (article 3148(2)); over "faults" committed in Québec, damage suffered in Québec, injurious acts occurring in

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> **69.** Notwithstanding any agreement to the contrary, an action based upon a contract of insurance and taken against the insurer may in all cases be instituted before the court of the domicile of the insured; in the case of insurance of property, it may also be instituted before the court of the place where the loss occurred
>
> **73.** A real action or a mixed action may be taken either before the court of the domicile of the defendant or before the court of the district where the property in dispute is situated in whole or in part.

* This term has caused a good deal of discussion within Québec legal circles. See Groffier, *Précis*, *ibid.* at 254ff for a discussion of how the courts and authors have dealt with this apparently restrictive provision. Articles 70, 70.1 and 70.2 deal with family law matters; article 71 deals with incidental actions in warranty; article 72 deals with multiple actions instituted by the same plaintiff against the same defendant; article 74 deals with successions; article 75 deals with multiple defendants. For a list of cases interpreting and articles considering these provisions of the *Code of Civil Procedure*, see H. Reid, *Code de procédure civile du Québec—Complément jurisprudence et doctrine*, 8th ed. (Montréal: Wilson & Lafleur, 1992) at 104ff.

[41] See Groffier, *Précis*, *ibid.* at 244-5 for a discussion of this question, as well as a list of the cases in which the matter has been discussed. It is somewhat ironic, though, that *forum non conveniens* is not well received in Québec circles as it has been imported into common law from Scots civil law, which shares similar antecedents with Québec civil law.

Québec and "obligations arising from a contract [that] was to be performed in Québec" (article 3148(3)); over matters the parties have agreed to submit to Québec authorities (article 3148(4)); and when the defendant submits to the Québec authority's jurisdiction (article 3148(5)). Québec authorities will have no jurisdiction when the parties have previously agreed to confer jurisdiction on other courts, unless the defendant submits to the Québec authority's jurisdiction (article 3148, last paragraph).

Québec authorities will have jurisdiction over consumer and employment contracts where the consumer or employee is domiciled or resident in Québec, and the employee or consumer's waiver cannot be held against him/her (article 3149). In the case of insurance contracts, Québec authorities will have jurisdiction where "the holder, the insured or the beneficiary of the contract is domiciled or resident in Québec, the contract is related to an insurable interest situated in Québec or the loss took place in Québec" (article 3150). Québec authorities will also have jurisdiction over the succession matters listed in article 3153. By the interplay of articles 3151 and 3129, Québec authorities will have exclusive jurisdiction over, and Québec rules will apply to, liability "as a result of exposure to or the use of raw materials, whether processed or not, originating in Québec" (article 3129; this would appear to be an attempt to keep disputes relating to alleged injuries from the world-wide use of asbestos before Québec authorities). In addition to the general rules, special provision is made for Personal Actions of an Extrapatrimonial and Family Nature (articles 3141-3147, *i.e.* custody of children, alimony, etc.). What is particulary interesting in terms of the development of Québec law is that, even if the Québec authorities do not otherwise have jurisdiction, they may assume jurisdiction:

> if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.[42]

[42] Article 3136. See Groffier, *Supplément*, *supra* note 34 at 131-2, for a discussion of this provision.

In addition to being much more explicit and expansive than its predecessor, the new *Code*[43] also makes provision for a Québec authority not to exercise its jurisdiction: "it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide."[44]

2. Judgment-Enforcing

a. *Civil Code of Lower Canada*—The old *Code*[45]

In theory, the Québec approach to enforcing foreign judgments is very similar to the common-law approach:

> Pour qu'un jugement étranger puisse être reconnu au Québec, il faut tout d'abord que le tribunal étranger ait rempli les conditions de compétence juridictionnelle prévues par le droit international privé québécois. Il s'agit de ce qu'on appelle la «compétence indirecte». Il faut également que le jugement respecte un certain nombre d'autres conditions: qu'il ne soit pas contraire à l'ordre public du Québec, qu'il soit final et définitif et, de façon moins générale, que le jugement ait été rendu selon la loi prescrite par la règle de conflit québécoise.[46]

Of course, given that Québec jurisdiction-taking rules are different from common-law ones, it is only to be expected that the situations in which Québec courts will enforce foreign judgments will be different from the common-law situations. For the type of situation under consideration in this discussion, Groffier indicates that any one of the following can ground a foreign court's jurisdiction:

> a) le défendeur a son domicile dans la juridiction territoriale du tribunal qui a prononcé le jugement;
> b) la cause d'action y a pris naissance et le défendeur y a reçu personnellement signification de la demande;
> c) le défendeur y a des biens;

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[43] According to Groffier, the *Code of Civil Procedure* will be amended to limit the effect of article 68 to internal Québec matters, hence the new *Code* will be the sole source of jurisdiction in international matters: Groffier, *Supplément*, *ibid.* at 139.

[44] Article 3135. This is effectively a codification of the doctrine of *forum non conveniens*. See Groffier, *Supplément*, *ibid.* at 129-31.

[45] See generally, Castel, *supra* note 35 at 837-848.

[46] Groffier, *Précis*, *supra* note 38 at 285.

d) les parties se sont soumises à la juridiction du tribunal.[47]

Although the common lawyer might not fully understand, or agree with, these bases, it is obvious that they are linked to the jurisdiction-taking rules in a similar way to the common-law approach, with the notable difference that Québec recognizes in other courts virtually the same jurisdiction that it claims for itself.[48] In addition to the basic criteria there are requirements similar to the common law that the foreign judgment be final, not obtained by fraud and that it not violate any significant public policy rule. One of the interesting features of Québec's current approach to enforcement of foreign judgments is the *révision au fond* provided for by article 178 and its counterparts, articles 179 and 180 of the *Code of Civil Procedure*:

> **178.** Any defence which was or might have been set up to the original action may be pleaded to an action brought upon a judgment rendered out of Canada.
>
> **179.** Any defence which might have been set up to the original action may be pleaded to an action brought upon a judgment rendered in any other province of Canada, provided that the defendant was not personally served with the action in such other province or did not appear in such action.
>
> **180.** Any such defence cannot be pleaded if the defendant was personally served in such province, or appeared in the original action, except in any case involving the decision of a right affecting immoveables in this province [*i.e.* Québec], or the jurisdiction of a foreign court concerning such right.
>
> [Emphasis added.]

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47 Groffier, *Précis*, *ibid.* at page 285-6, footnotes omitted. In the following pages she discusses the application of each of these criteria. Particularly interesting is her comment "Il nous semble que si la comparution se borne à contester la juridiction, elle ne devrait en aucun cas être assimilée à une soumission", *ibid.* at 287.

48 Although as Groffier notes, in Groffier, *Précis*, *ibid.* at 287-8, article 180.1 of the *Code of Civil Procedure* denies recognition of foreign judgments in those cases where Québec law grants exclusive jurisdiction to Québec courts, *i.e.* particularly in matters relating to asbestos—a particularly sensitive point in Québec political and economic circles.

As Groffier notes, these provisions essentially give the Québec judge the right to sit on appeal of all foreign judgments,[49] but only of Canadian judgments rendered in circumstances in which the common law would hold that the original court did not have valid *in personam* jurisdiction. Somewhat ironically, unlike the common-law provinces, Québec has traditionally given more credence to the judicial proceedings of other Canadian provinces than it does to the proceedings of other countries.

b. *Civil Code of Québec*—The new *Code*

Chapter I of Title Four deals with the Recognition and Enforcement of Foreign Decisions.[50]

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[49] Groffier, *Supplément*, *supra* note 34 at 149. Although generally unknown in common-law jurisdictions, see *Re Aero Trades Western Ltd and Ben Hocum & Son Ltd* (1974), 51 DLR (3d) 617 (Man. Co. Ct), which suggests that the Manitoba courts may engage in a similar exercise in some situations.

[50] Articles of interest are:

> **3155.** A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:
> (1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title;
> (2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;
> (3) the decision was rendered in contravention of the fundamental principles of procedure;
> (4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec;
> (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
> (6) the decision enforces obligations arising from the taxation laws of a foreign country.

According to the ORCC, *supra* note 32 at 1008 (vol. II), these provisions and the following ones are largely based on the *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (1 February 1971).

> **3156.** A decision rendered by default may not be recognized or declared enforceable unless the plaintiff proves that the act of procedure initiating the proceedings was duly served on the defaulting party in accordance with the law of

According to Groffier, "La réforme est fondée sur le principe que les décisions étrangères sont reconnues."[51] She notes that:

> Cette partie du droit international privé était peut-être celle qui avait le plus besoin de réforme car la difficulté d'exécuter un jugement étranger au Québec en fait le havre des mauvais débiteurs.
>
> • • • • •
>
> En matière de reconnaissance et d'exécution des décisions étrangères, deux immenses améliorations sont à signaler: (1) la suppression de la révision au fond (art. 3158), ce qui aligne le droit québécois sur la règle en vigueur dans les autres provinces du Canada et dans un grand nombre d'autres pays dont la France et l'Angleterre et (2) la suppression de l'exigence d'application par le juge étranger de la loi désignée par la règle de conflit du droit québécois (art. 3157).[52]

Although these provisions will likely make a major difference to the number and type of judgments enforced in Québec, structurally they are not particularly innovative. They make the enforcement of foreign judgments subject to jurisdictional rules established in Québec.[53] In other words, the

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> the place where the decision was rendered.
>
> However, the authority may refuse recognition or enforcement if the defaulting party proves that, owing to the circumstances, he was unable to learn of the act of procedure initiating the proceedings or was not given sufficient time to offer his defence.
>
> **3158.** A Québec authority confines itself to verifying whether the decision in respect of which recognition or enforcement is sought meets the requirements prescribed in this Title, without entering into any examination of the merits of the decision.

For a discussion of the likely effect of these provisions, see Groffier, *Supplément*, *ibid.* at 149ff.

51 Groffier, *Supplément*, *ibid.* at 149.

52 E. Groffier, "La réforme du droit international privé québécois" (1992) 52 R du B 607 at 642; hereafter referred to as Groffier, *Réforme*. See also Groffier, *Supplément*, *ibid.* at 147ff.

53 Chapter II deals with the Jurisdiction of Foreign Authorities, its principal provisions include the following:

> **3164.** The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the country whose authority is seised of the case. [Emphasis added.]

simple fact that a foreign court felt itself competent to issue a judgment will not entitle it to enforcement in Québec; the decision will still have to be final and it will still have to meet Québec's

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This article first appeared in Bill 125, *Code civil du Québec*, 1st sess., 34th Leg., Québec, 1990, two days before the Supreme Court's decision in *Morguard*, *infra* note 1. Referring to *Morguard*, Groffier comments:

> Cette décision, bien qu'émanant d'une province de common law, influencera probablement l'interprétation de l'article 3164. En tout cas, elle a changé l'image du droit international privé anglo-canadien.

Groffier, *Réforme*, *ibid.* at 647. See also, Groffier, *Supplément*, *ibid.* at 162ff.

> **3165.** The jurisdiction of a foreign authority is <u>not</u> recognized by Québec authorities in the following cases:
>
> (1) where, by reason of the subject matter or an agreement between the parties, Québec law grants exclusive jurisdiction to its authorities to hear the action which gave rise to the foreign decision;
> (2) where, by reason of the subject matter or an agreement between the parties, Québec law recognizes the exclusive jurisdiction of another foreign authority;
> (3) where Québec law recognizes an agreement by which exclusive jurisdiction has been conferred upon an arbitrator. [Emphasis added.]
>
> **3168.** In personal actions of a patrimonial nature, the jurisdiction of a foreign authority is recognized <u>only</u> in the following cases:
>
> (1) the defendant was domiciled in the country where the decision was rendered;
> (2) the defendant possessed an establishment in the country where the decision was rendered and the dispute relates to its activities in that country;
> (3) a prejudice was suffered in the country where the decision was rendered and it resulted from a fault which was committed in that country or from an injurious act which took place in that country;
> (4) the obligations arising from a contract were to be performed in that country;
> (5) the parties have submitted to the foreign authority disputes which have arisen or which may arise between them in respect of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;
> (6) the defendant has recognized the jurisdiction of the foreign authority. [Emphasis added.]

The grounds in article 3168 are analogous to the grounds on which the Québec authorities have jurisdiction; see article 3148.

notions of procedural fairness and public policy.[54] New legislated criteria include the notion of *lis pendens* and the prohibition on enforcing foreign taxation judgments.[55] The *révision au fond* no longer exists so the preference previously accorded to other Canadian judgments no longer exists.

As these provisions have yet to be proclaimed in force, it is still too early to determine how they will actually affect Québec courts' attitudes to the taking of jurisdiction and recognizing and enforcing foreign judgments.[56] As noted above, the *révision au fond* and its associated preference for Canadian judgments will no longer exist and there is no discussion in these texts of any difference in treatment of situations which involve other Canadian provinces rather than foreign countries. While it is unfortunate that the traditional preference afforded to other Canadian judgments has been

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[54] In presenting its draft Civil Code in 1977, the ORCC commented on the notion of public order (public policy in common-law terms):

> L'ordre public est l'enfant terrible, «l'élément perturbateur» du droit international privé. Il n'y a pas de matière où cette notion ne fasse son apparition. En donner une définition qui pourrait servir de critère clair et net dans l'appréciation des différents cas n'est pas possible....
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> • • • • •
>
> Dans certains cas, le juge reconnaîtra une situation valablement créée à l'étranger, même si elle n'eût pu l'être au Québec. L'ordre public, en principe, ne doit pas faire échec aux droits acquis. Ainsi, la réaction à l'encontre d'une disposition contraire à l'ordre public n'est pas la même selon qu'elle met obstacle à l'acquisition d'un droit au Québec ou qu'il s'agit de laisser se produire au Québec les effets d'un droit acquis sans fraude à l'étranger. Pour mettre obstacle à l'effet d'un droit acquis sans fraude à l'étranger, l'ordre public doit remplir une fonction plus draconienne que pour écarter une loi étrangère susceptible d'intervenir dans l'acquisition d'un droit au Québec. C'est pour cela que le texte utilise l'expression «manifestement incompatible». On a voulu mettre en relief que les tribunaux ne devraient faire appel à l'ordre public que dans des cas graves, à savoir dans les cas où l'application de la loi étrangère ou la reconnaissance ou l'exécution d'une décision étrangère porterait atteinte aux principes fondamentaux du droit ou de la morale au Québec.

Supra note 32 at 987 (vol. II).

[55] Although article 3162 provides for enforcement of such judgments where the foreign jurisdiction enforces similar Québec judgments.

[56] For a general discussion of some of the likely implications of these articles, see Groffier, *Supplément*, *supra* note 34 at 161-9.

removed, given the traditional approach of the other Canadian provinces, there is no reason why Québec should have maintained a more open-minded approach than the common-law provinces.

C. *Morguard Investments Ltd. v. De Savoye*[57]

At the end of 1990, with very little fanfare or warning,[58] the Supreme Court of Canada made a substantial change to the way Canadian courts will take jurisdiction over matters with an extra-provincial element, and the way in which they enforce judgments emanating from sister-provinces. In *Morguard*, the Court decided that henceforth, the judgments of the courts of one province shall be enforced by the courts of the others, almost automatically, providing that the issuing court met certain jurisdiction-taking criteria. Somewhat surprisingly, the court drew no distinction between the common-law provinces and Québec and, as two civil law judges sat on the panel which heard the case,[59] one can only assume that there are no reasons not to apply the new rules in relation to judgments emanating from or being enforced in Québec.

The facts of the case are relatively simple: De Savoye, while resident in Alberta became a guarantor and then mortgagor of four condominium units; there were no jurisdiction clauses in the mortgages. The mortgages were assigned to Morguard Investments and Credit Foncier Trust. De Savoye moved to British Columbia and subsequently defaulted on the mortgages. The mortgagees

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[57] *Supra* note 1. The discussion in this part is based in large part on the author's previous work with Peter Finkle and Louise Barrington: Finkle and Coakeley, *supra* note 23; S. Coakeley, P. Finkle and L. Barrington, "*Morguard Investments Ltd*: Emerging International Implications" (1992) 15 Dalhousie LJ 629.

[58] While it is not, of course, suggested that the Court should have given advance warning of its intention to decide the case in a particular way, in view of the language it used and the nature of its analysis there are Constitutional implications to its decision. As was noted in Finkle and Coakeley, *ibid.* at 346, note 22, it is unfortunate that the Court did not have the benefit of intervenors such as the Attorneys General.

[59] Dickson CJ (at the time of hearing) and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ. La Forest J wrote the unanimous decision.

commenced proceedings in Alberta and De Savoye was served, in British Columbia, in accordance with Alberta rules of court. De Savoye did not make any effort to defend the Alberta actions, nor did he in any way attorn to the Alberta court's jurisdiction, and default "Rice Orders" were obtained; under these Orders, after a redemption period had expired, the properties were sold and De Savoye became liable for the deficiencies. The mortgagees applied to the British Columbia courts to have the Alberta judgments enforced.

As has been noted above, under the rules that had obtained in Canada up to this point, it is quite easy to see why De Savoye made no effort to defend the action before the Alberta courts. Although, as La Forest J notes, "No one denies the Alberta court's jurisdiction to entertain the actions and enforce them there if it can",[60] for the courts of another common-law jurisdiction to have recognized and enforced the Alberta judgment under the traditional approach would have required De Savoye's presence in Alberta at the time the action began, a clause in the mortgage stipulating, or at very least implying, that the Alberta courts would have jurisdiction to hear the action, or a voluntary appearance before the Alberta court.[61] Assuming that De Savoye had no assets in Alberta other than the subject properties, and did not contemplate acquiring assets there or establishing a residence there in the future, he should have been immune from the judgment.

Somewhat surprisingly, the British Columbia Supreme Court granted the mortgagees' application.[62] De Savoye appealed to the British Columbia Court of Appeal and lost.[63] De Savoye then appealed to the Supreme Court of Canada.

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60 *Morguard*, *supra* note 1 at 1086.

61 See *Emanuel v. Symon*, *supra* note 24.

62 *Morguard Investments Ltd* v. *De Savoye* (1987), 18 BCLR (2d) 262, [1988] 1 WWR 87 (SC).

63 *Morguard Investments Ltd* v. *De Savoye* (1988), 27 BCLR (2d) 155, [1988] 5 WWR 650, 29 CPC (2d) 52 (CA).

In determining that the traditional situation should no longer be the norm in Canada, La Forest J reviewed the historical roots of the English rules and their adoption by Canadian courts vis-à-vis the decisions of the courts of other provinces. He concluded that the adoption of the English approach was a "serious error".[64] In his view, courts must look to the underlying principles of private international law, the rules of which "are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner."[65] This flow of wealth, skills and people is obviously of great importance to the Court as the notion is repeated in the judgment and accommodating it is said to have "become imperative".[66] The traditional rules "fly in the face of the obvious intention of the Constitution to create a single country",[67] one of the "central features [of which] was the creation of a common market."[68]

Noting that there are constitutional and sub-constitutional arrangements in Canada that ensure all Canadian lawyers and judges are effectively subject to national standards, La Forest J felt that there was no need for a Canadian equivalent to the American and Australian Full Faith and Credit Clauses, or a Canadian equivalent of the European *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*,[69] concluding as he did that "the courts in one

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[64] *Morguard*, *supra* note 1 at 1098.

[65] *Ibid.* at 1096.

[66] *Ibid.* at 1098.

[67] *Ibid.* at 1099.

[68] *Ibid.*

[69] Given that both the United States and Australian Constitutions have a Full Faith and Credit Clause, and given that the European Community has seen the need to adopt a similar approach in its *Convention* (see discussion below at 48ff), it is somewhat odd that the Fathers of Confederation could have thought it possible to create a single Canadian marketplace without a Full Faith and Credit Clause. On the other hand, given that the Americans, Australians and Europeans felt the need for an explicit provision, it is also somewhat odd that La Forest J is of the view that such a provision is not necessary in the Canadian Constitution.

province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action."[70] Fairness to the defendant "requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction."[71] Fair process is not the same, though, as due process under the United States Constitution and it is expressly declared by La Forest J not to be an issue in the Canadian context.[72]

La Forest J rejected the British Columbia Court of Appeal's reasoning which held that the Alberta court's decision should be enforced in British Columbia on the basis of reciprocity of jurisdiction-taking rules (*i.e.* as the British Columbia courts would have taken jurisdiction under similar circumstances, they should recognize the validity of the Alberta court's actions): "...I do not see the 'reciprocity approach' as providing an answer to the difficulty regarding *in personam* judgments, whatever utility it may have on the international plane."[73] He was more attracted by the "real and substantial connection" approach taken by Dickson J, as he then was, in *Moran* v. *Pyle National (Canada) Ltd.*[74] Dickson J felt that the existence of a real and substantial connection was the test to determine whether the courts of a province were competent to hear a case in tort. La Forest J realized that it would be counter-intuitive for the Supreme Court to hold that a province's courts would have jurisdiction to hear a case if it did not also hold that the resulting judgment could be

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70 *Morguard*, *supra* note 1 at 1102, (emphasis added).

71 *Ibid.* at 1103.

72 *Ibid.*

73 *Ibid.* at 1104.

74 [1975] 1 SCR 393, 43 DLR (3d) 239, 1 NR 122, [1974] 2 WWR 586.

enforced throughout the country. Presumably if this logic obtains in the case of tort, it also obtains in contract and in other matters as well.

Given the common-law tradition, it is not surprising that La Forest J seemed to be primarily concerned with the interests of the plaintiff, but he was not totally oblivious to the interests of the defendant, concluding:

> It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. ...
>
> The private international law rule requiring substantial connection with the jurisdiction where the action took place is supported by the constitutional restriction of legislative power "in the province". As Guerin J. observed in *Dupont v. Taronga Holdings* (1986), 49 D.L.R. (4th) 335 (Que. Sup. Ct.) at p. 339, (translation) "In the case of service outside of the issuing province, service *ex juris* must measure up to constitutional rules." The restriction to the province would certainly require at least minimal contact with the province, and there is authority for the view that the contact required by the Constitution for the purposes of territoriality is the same as required by the rule of private international law between sister-provinces.[75]

La Forest J intimated, although he did not decide, that the applicable test might be similar to the minimum contacts test expounded by the Supreme Court of the United States,[76] however he did not adopt the American terminology. In addition, he clearly expects courts to continue to apply the doctrine of *forum non conveniens* where appropriate, and he did not exclude the possibility of courts refusing to enforce decisions from the courts of sister-provinces on the traditional grounds of "fraud or conflict with the law or public policy of the recognizing jurisdiction."[77]

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75 *Morguard*, *supra* note 1 at 1108-9.

76 See discussion below at 34ff.

77 *Morguard*, *supra* note 1 at 1110.

In La Forest J's view, the various *Reciprocal Enforcement of Judgments Acts*[78] in no way limit the effects of his judgment as they "simply provided for the registration of judgments as a more convenient procedure than was formerly available, i.e. by bringing an action to enforce a judgment given in another province... There is nothing, then, to prevent a plaintiff from bringing such an action and thereby taking advantage of the rules of private international law as they may evolve over time."[79]

Now that the dust has settled, it is clear that the judges of the Supreme Court have re-written aspects of Canadian conflicts law and standardized it across the country—at least as far as common-law provinces are concerned.[80] It is perhaps less clear exactly how much they have changed it and even less clear how they expect the lower courts to go about implementing the decision. Among the questions that have been asked as a result of the Court's decision are the following:[81]

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[78] See text accompanying note 29, above at 15.

[79] *Morguard*, *supra* note 1 at 1111.

[80] There is disagreement regarding the extent to which the court has laid down rules applicable to Québec as well as the common-law provinces. As Groffier notes, the present author along with P. Finkle, as well as P. Hogg, are of the view that the Court has probably laid down a constitutional principle which is also applicable to Québec; J. Blom is uncertain, as is V. Black (although they tend to agree), E. Edinger and H.P. Glenn (both of whom tend to disagree). Groffier does not express an opinion, although she comments:

> Certes, il n'est pas certain que ces arrêts aient créé des règles constitutionnelles susceptibles de faire déclarer *ultra vires* une disposition législative qui les enfreindrait....Mais il est incontestable qu'une évolution a commencé et elle risque d'aboutir à imposer l'existence d'un lien avec la province pour pouvoir procéder à une signification *ex juris* en se fondant sur les paragraphes 92(13) et (14) de la *Loi constitutionnelle de 1867* ou encore sur l'article 7 de la *Charte canadienne des droits et libertés.*

Groffier, *Supplément*, *supra* note 34 at 12 and associated notes.

[81] See, for example, Finkle and Coakeley, *supra* note 23; Blom, *supra* note 16; J.-G. Castel, "Recognition and Enforcement of a Sister-Province Default Money Judgment: Jurisdiction Based on Real and Substantial Connection" (1991) 7 BFLR 111.

What does "real and substantial connection" mean and is it sufficient that there be a real and substantial connection between the province and the litigation or must the province have the most real and substantial connection?

Can a plaintiff invoke a real and substantial connection to give a court a jurisdiction it would not otherwise possess through its own rules regarding extra-territorial jurisdiction, or is it simply available to a defendant to contest a court's jurisdiction if a real and substantial connection does not exist? Is the defendant required to challenge a court's jurisdiction during the initial litigation, or is it possible to invoke the absence of a real and substantial connection when the plaintiff attempts to enforce the judgment?

What is "fair process" and is it really not relevant in the Canadian context?

What grounds can a defendant invoke to prevent enforcement of a judgment? Is the defendant's only recourse to challenge a judgment before the issuing court or are there pleas that can properly (and maybe only) be made before the enforcing court?

What are the mechanics of enforcement—must a plaintiff bring a new action before the enforcing court or is it possible to proceed simply by registration?

What level(s) of courts are covered by this new scheme: superior courts and inferior courts, to the extent that they still exist, are presumably covered, but what about small claims courts, and does the judgment apply to other tribunals?

In order to answer these and other questions, the courts will have to start interpreting *Morguard* in light of the various factual situations litigants are able to present. The next sections of this paper will consider whether the other "federal" jurisdictions that attracted the Supreme Court's attention, and which have had more experience in dealing with the thorny issues of jurisdiction-taking and judgment-enforcing in a coordinated and symmetrical way in a federal environment, namely the United States, the European Community and Australia, offer any guidance how these questions might be answered.

II. Other "Federal" Systems

A. United States of America

The oldest of the four "federal" systems considered in this paper is the United States of America. The fundamental legislated provisions governing an American court's jurisdiction-taking and judgment-enforcing can be found in the Constitution of the United States—they are generally referred to as the Due Process and the Full Faith and Credit Clauses. The Full Faith and Credit Clause is part of the Constitution itself and dates to its adoption, while the Due Process Clause, at least insofar as it applies to federal courts, is part of the Bill of Rights adopted in 1791.

1. Jurisdiction-Taking

Through two centuries of experience, the United States Supreme Court has formulated a test to judge when a state may claim jurisdiction over a particular matter. This has been called the minimum contacts test:

> Under civilized systems of law a state must have certain minimum contacts with the parties or their property in order to possess legal power to exercise authority through its courts. A judgment rendered in the absence of such contacts will not be recognized or enforced in other states.
>
> In the United States the sufficiency of such contacts is a question of constitutional law on which the Supreme Court of the United States has the final voice. The rendition of a judgment by a federal court when the United States has no judicial jurisdiction is a violation of the due process clause of the Fifth Amendment to the Constitution; similar action on the part of a State court violates the due process clause of the Fourteenth Amendment.[82]

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[82] *Restatement of the Law, Second, Conflict of Laws*, (St Paul, Minn.: American Law Institute Publishers, 1971) at 100; hereafter referred to as *Restatement Second, Conflicts*. The Constitutional paradigm which has formed the basis of the United States Supreme Court's decisions restricting states from exercising so-called long-arm jurisdiction is the notion of due process. This notion was first embodied in the Fifth Amendment, part of the Bill of Rights adopted in 1791, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of

Although decided just before the Fourteenth Amendment extended the due process notion to the States, for almost a hundred years the leading American case on inter-state jurisdiction-taking was *Pennoyer* v. *Neff*.[83] In *Pennoyer*, the Supreme Court held:

> ...where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.[84]

The facts in *Pennoyer* are not particularly relevant to this discussion; what is interesting to note, though, is the effect that the judgment had on the development of American conflicts doctrine. According to Vernon, the effect of *Pennoyer* was to create

> ...a presence-power doctrine of state judicial jurisdiction. In essence, *Pennoyer* stood for the proposition that physical presence of a defendant in a state gave that state's courts the power to adjudicate a claim against the defendant even though the asserted claim was unrelated to the state. *Pennoyer* also came to mean that presence of property in the state gave that state's courts the power to adjudicate claims against the property's absent owner even though the asserted claim was

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> law; nor shall private property be taken for public use without just compensation. [Emphasis added.]

The Fifth Amendment was only applicable to actions before federal courts; Section 1 of the Fourteenth Amendment, adopted in 1868, extended the notion of due process and provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [Emphasis added.]

83 95 U.S. 714, 24 L.Ed. 565 (1878); hereafter referred to as *Pennoyer*.

84 At 727 U.S., 565 L.Ed.

unrelated to the state or to the property itself. In suits based on the presence of property, courts limited recovery to the value of the property.[85] [Emphasis added.]

In this way, the various state courts were on the same footing as their common-law cousins in England and Canada: they exercised *in personam* and *in rem* jurisdiction, except that their *in personam* jurisdiction, at least as far as citizens of the other states were concerned, was limited. As the Supreme Court itself has noted,

> The *Pennoyer* rules generally favored nonresident defendants by making them harder to sue. This advantage was reduced, however, by the ability of a resident plaintiff to satisfy a claim against a nonresident defendant by bringing into court any property of the defendant located in the plaintiff's State.[86]

This is, of course, remarkably similar to the traditional attitude of Canadian and English courts.[87]

Crampton *et al.* note:

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[85] Vernon, *supra* note 4 at 7-3. In order to justify taking jurisdiction over defendants who were not physically present in their territory, American courts came up with some intriguing notions regarding the location of property. See, for example, *Harris* v. *Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905):

> "...Epstein, a resident of Maryland, had a claim against Balk, a resident of North Carolina. Harris, another North Carolina resident, owed money to Balk. When Harris happened to visit Maryland, Epstein garnished his debt to Balk. Harris did not contest the debt to Balk and paid it to Epstein's North Carolina attorney. When Balk later sued Harris in North Carolina, this Court [the Supreme Court] held that the Full Faith and Credit Clause, U.S. Const., Art. IV, § 1, required that Harris' payment to Epstein be treated as a discharge of his debt to Balk. This Court reasoned that the debt Harris owed Balk was an intangible form of property belonging to Balk, and that the location of that property travelled with the debtor. By obtaining personal jurisdiction over Harris, Epstein had "arrested" his debt to Balk, 198 U.S., at 233, 25 S.Ct., at 627, and brought it into the Maryland court. Under the structure established by *Pennoyer*, Epstein was then entitled to proceed against that debt to vindicate his claim against Balk, even though Balk himself was not subject to the jurisdiction of a Maryland tribunal."

Shaffer v. *Heitner*, *infra* note 96 at 200 U.S., 2577-8 S.Ct., 695 L.Ed.2d, *per* Justice Marshall.

[86] *Shaffer* v. *Heitner*, *infra*, note 96 at 200 U.S., 2577 S.Ct, 695 L.Ed.2d.

[87] Note that the fact that English courts assert jurisdiction over a defendant who has property in England required a specific reference in the European *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*. See discussion of Article 3 of the *Convention*, below at 51.

> ...The *Pennoyer* opinion made no effort to relate the limitation to the idea that due process guarantees a fair trial; rather it reflects the territorialist notion then in vogue that Oregon simply had no power over persons outside its borders. In an international context the absence of the defendant might make the judgment unenforceable, and that might be reason enough for the court to refuse to entertain the action; but why does it follow that the court lacks power to do so? [Emphasis added.][88]

Inasmuch as the English and Canadian courts laboured under no similar impediment, it is clear that the answer to their question must lie somewhere within that which is unique to the United States (*i.e.* in the Full Faith and Credit Clause). It is one thing for a court to exercise exorbitant jurisdiction when there is little or no likelihood that its decision will ever be enforced elsewhere, it is quite another thing—requiring careful scrutiny—when other courts are obliged to give effect to such a decision. It is only reasonable that the Supreme Court of the United States should have stepped in to limit what it perceived to be unjustified and unjustifiable jurisdiction-taking by states and their courts.

Unlike the situation in Canada and England, the presence-power doctrine prevented state courts from entertaining suits which did not meet the *Pennoyer* criteria. States and their courts found this limitation too restrictive and, while ostensibly following it, developed laws and theories to circumvent its application.[89] As Crampton *et al.* note:

> It was not too long before the *Pennoyer* rule against extra-territorial service began to crumble. *Hess v. Pawloski*, 274 U.S. 352 (1927), invoking a fictitious consent (see *Olberding v. Illinois Central R.R.*, 346 U.S. 338, 340 (1953)), held that a nonresident motorist, absent at the time of service, could be required to defend an action in the state where he had been involved in an accident. *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935), held that service could be made on the local agent of a nonresident securities dealer respecting obligations arising from transactions in the forum state. *Milliken v. Meyer*, 311 U.S. 457 (1940), held that an absent defendant could be sued in the courts of the state in which he was domiciled. Finally, in the seminal opinion of Chief Justice Stone in *International Shoe Co. v.*

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88 R.C. Crampton, *et al.*, *Conflict of Laws, Cases—Comments—Questions*, 3d ed. (St Paul, Minn.: West Publishing Company, 1981) at 526.

89 See the discussion of *Harris* v. *Balk*, text accompanying note 85 *supra*.

> *Washington*, 326 U.S. 310 (1945), the Supreme Court discarded entirely the *Pennoyer* rule that the defendant must be present in the forum state of [sic] the time of service, redefining the due-process limitation as an element of fair trial.[90]

Notwithstanding the absence of any fundamental change in the constitutional provisions applicable to inter-state conflicts in the United States, as Crampton *et al.* note, American practice has undergone a significant change in the past century as a result of the way the Supreme Court has interpreted the effect of these provisions. The presence-power doctrine of *Pennoyer* has given way to the notion that a state court will exercise constitutionally valid jurisdiction, provided that there are "minimum contacts" between the state and the matter before its courts. This notion found its expression in *International Shoe Co.* v. *Washington*.[91]

As in *Pennoyer*, the facts of this case are not particularly pertinent to the discussion, although a brief understanding of them will make the Court's views somewhat easier to follow. The State of Washington attempted to impose a tax on commissions paid by International Shoe Co. to its salespersons in Washington. The company had no actual presence in the state nor any assets which would have met any of the *Pennoyer* grounds for jurisdiction. Hence, under *Pennoyer* the Washington courts did not have jurisdiction to entertain the suit against International Shoe. As the case dealt with a tax imposed by Washington, and given most courts' reticence to enforce the taxation statutes of other jurisdictions, it was probably pointless for Washington to attempt to initiate the suit in the courts of another state with more direct contacts with International Shoe.[92]

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[90] Crampton *et al.*, *supra* note 88 at 527, where the authors also note a series of cases which attenuated the *Pennoyer* rule.

[91] *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S.Ct. 254, 90 L.Ed. 95 (1945); hereafter referred to as *International Shoe*.

[92] Although it would appear that this position is not actually a tenable one in the United States, at least as far as the taxation practices of the other states are concerned; see Crampton *et al.*, *supra* note 88 at 137-141, for a discussion which indicates that there has been a degree of confusion over this point.

The Supreme Court rejected its earlier holding limiting state courts' jurisdiction:

> But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due 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."[93] [Emphasis added.]
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> Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.[94]

This represented a relaxation of the earlier restrictive notion of presence-power. Although an apparently relatively straight-forward test, it is not really surprising that more than 45 years later, there is still a considerable degree of uncertainty regarding what does and does not constitute a "minimum contact" with a given state in the context of a given law suit.[95] Much of this is irrelevant for non-American purposes, rooted as it is in the specific division of powers between the federal and state governments in the United States.

As International Shoe Co. had no *Pennoyer*-type connections with the State of Washington, this case only affected *Pennoyer* to the extent that it overruled the requirement for a defendant to be physically present in the jurisdiction. The Court left the *in rem* and *quasi in rem* aspects of *Pennoyer* intact as well as the innovative notions of presence that had been developed in order to

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93 *International Shoe*, *supra* note 91 at 316 U.S., 158 S.Ct., 102 L.Ed.

94 *Ibid*. at 319 U.S., 160 S.Ct., 104 L.Ed.

95 See, for example, the discussion and cases noted in Crampton *et al.*, *supra* note 88 at 520-656.

extend the *Pennoyer* limitations to defendants whose property could be, at least notionally, found within a court's jurisdiction. These aspects were addressed in *Shaffer* v. *Heitner*.[96]

Shaffer involved a shareholder action against Greyhound Corp. and a number of its officers. Greyhound was incorporated in Delaware and, under Delaware law, shares in Delaware corporations were notionally held to be located in Delaware, thereby giving the Delaware courts *in rem* jurisdiction over them in line with the *Pennoyer* presence-power doctrine. By a further quirk of Delaware law, putative defendants were not able to make special or conditional appearances to challenge the Delaware courts' jurisdiction. In other words, in order to challenge the Delaware courts' jurisdiction, a defendant would have to attorn to its jurisdiction, with all the attendant negative implications.

The Supreme Court held

> The case for applying to jurisdiction *in rem* the same test of "fair play and substantial justice" as governs assertions of jurisdiction *in personam* is simple and straightforward. It is premised on recognition that "[t]he phrase 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." Restatement (Second) of Conflict of Laws § 56, Introductory Note (1971) [at 192] (hereafter Restatement). This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing." The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*.[97]
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> We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.[98]

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96 *Shaffer* v. *Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); hereafter referred to as *Shaffer*.

97 *Ibid.* at 207 U.S., 2581 S.Ct., 699 L.Ed.2d; footnotes omitted.

98 *Ibid.* at 212 U.S., 2584 S.Ct., 703 L.Ed.2d; footnotes omitted.

Although *International Shoe* had had the effect of extending the *Pennoyer* limits on jurisdiction, in the result in *Shaffer*, the lower court's decision that it had jurisdiction was overturned on the grounds that "Delaware's assertion of jurisdiction over appellants in this case is inconsistent with [the Due Process Clause]."[99]

The latest word in the development of the minimum contacts test under the Due Process Clause is *World-Wide Volkswagen* v. *Woodson.*[100] It is not particularly relevant for the purposes of this discussion as all it essentially determines is whether a particular fact situation meets the applicable constitutional test:

> The issue before us is whether, consistently with the Due Process Clause of the Fourteenth Amendment, an Oklahoma court may exercise *in personam* jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma.[101]

Given the somewhat tenuous and rather unpredictable nature of the contact with Oklahoma, it is surprising that only a bare majority of the Court was of the view that the Oklahoma court might not exercise such jurisdiction.

Two years earlier, a slightly more united Court[102] addressed the following:

> The issue before us is whether, in this action for child support, the California state courts may exercise *in personam* jurisdiction over a nonresident, nondomiciliary parent of minor children domiciled within the State. For reasons set forth below, we

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[99] *Ibid.* at 216 U.S., 2586 S.Ct., 705 L.Ed.2d.

[100] 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); hereafter referred to as *World-Wide Volkswagen.*

[101] *Ibid.* at 287 U.S., 562 S.Ct., 495 L.Ed.2d.

[102] Six justices concurred and three dissented.

> hold that the exercise of such jurisdiction would violate the Due Process Clause of the Fourteenth Amendment.[103]

Contemporaneously with *World-Wide Volkswagen*, the court addressed the question:

> ...whether a State may constitutionally exercise *quasi in rem* jurisdiction over a defendant who has no forum contacts by attaching the contractual obligation of an insurer licensed to do business in the State to defend and indemnify him in connection with the suit.[104]

The Court decided that, in line with *International Shoe*, the answer was "no".[105] Finally, as recently as 1990 the Supreme Court confirmed that state courts could claim jurisdiction over a person who was only temporarily within their territory.[106]

Hence in the United States, courts have seen their long-arm authority quite severely limited by *Pennoyer* to situations which practically required the presence of the defendant, or at very least the defendant's property, in the state. This was followed by a relaxation of the limitations in *International Shoe* so that a court may now exercise long-arm jurisdiction when there are "minimum contacts" between the state and the defendant before it. This has been reinforced by subsequent judgments which clarify the minimum contacts test: *Shaffer*, *Rush* and *Kulko*. Transitory presence is still an acceptable basis for jurisdiction: *Burnham*.

It is interesting to note that originally the United States Supreme Court severely limited state courts' jurisdiction, only subsequently did it relax this and hold that only minimum contacts were necessary. It is also interesting to note that this is a constitutionally imposed limit on jurisdiction, it is not a

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103 *Kulko* v. *Superior Court*, 436 U.S. 84 at 86, 98 S.Ct. 1690 at 1694, 56 L.Ed.2d 132 at 137 (1978); hereafter referred to as *Kulko*.

104 *Rush* v. *Savchuk*, 444 U.S. 320 at 323, 100 S.Ct. 571 at 574, 62 L.Ed.2d 516 at 521 (1980); hereafter referred to as *Rush*.

105 In this case, the majority was slightly stronger than in *Kulko*: only two justices dissented.

106 *Burnham* v. *Superior Court*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990). Although all nine justices agreed with the result, there were four written decisions, none of which was supported by a clear majority of the judges.

constitutionally imposed <u>definition</u> of a court's jurisdiction: states are not required to claim the full jurisdiction that the Constitution grants them. As Vernon comments:

> Knowledge of the constitutional limitations on state-court jurisdiction...is essential. Keep in mind, however, that it is only a starting point. In many states, jurisdiction is governed by statutes or rules that do not extend jurisdiction to the full extent permitted by the Constitution. In such states a two-level analysis—one constitutional and the other statutory—is required. Further, some expansive pre-1977 state authorities that asserted jurisdiction despite very minimal contacts appear to have gone beyond what will now be permitted under the Supreme Court decisions in *Kulko* v. *Superior Court*, *Rush* v. *Savchuk*, *Shaffer* v. *Heitner* and *World-Wide Volkswagen* v. *Woodson*...[107]

2. Judgment-Enforcing

According to the *Restatement Second, Conflicts*,

> A judgment rendered in this country without judicial jurisdiction is void and subject to collateral attack in the State where rendered and elsewhere. For the meaning of "collateral attack" see § 11 of the Restatement of Judgments (1942). On the other hand, a judgment rendered in this country with judicial jurisdiction is entitled under full faith and credit to recognition and enforcement in sister States, except as stated in § 103, provided that the rendering court was competent and there has been compliance with the requirements of notice and of opportunity to be heard.[108]

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[107] Vernon, *supra* note 4 at 7-1. See also, P. Hay, "Refining Personal Jurisdiction in the United States" (1986) 35 ICLQ 32 at note 5, where he comments:

> At least one state [Illinois] has retreated from this expansive view [that it is co-extensive with the limits of the Constitution] of its jurisdiction.

He also notes that the California courts' jurisdiction is defined in terms of the Constitutional limits:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

Cal. Code Proc. (1973), § 410.10.

[108] *Restatement Second, Conflicts*, *supra* note 82 at 100-1. Article IV, Section 1 of the Constitution provides:

> 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.

In addition, 28 USC § 1738 (1988), originally adopted in 1790, provides:

In discussing the effects of the Full Faith and Credit Clause and 28 USC § 1738, the authors of *Corpus Juris Secundum* comment:

> The requirement of full faith and credit is imposed by the Constitution; the congressional act [28 USC § 1738] merely prescribes a rule of evidence as to the method of proving the judgment of a sister state. The full faith and credit clause altered the status of the several states as independent sovereignties, each free to ignore rights and obligations created by the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation in which rights judicially established in any part are given nationwide application. The clear purpose of the full faith and credit clause was to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered. Speaking generally, the effect of the full faith and credit clause is to make the local doctrine of res judicata a part of the national jurisprudence, to extend the res judicata effect of a judgment from the state of its rendition to all others states.[109]

The Full Faith and Credit Clause and 28 USC § 1738, have been interpreted in such a fashion as to limit severely any attempt on the part of individual states to restrict recognition of sister-state judgments. In *Fauntleroy* v. *Lum*[110] the Supreme Court required the Mississippi courts to recognize and enforce a judgment of a Missouri court resulting from a suit based on debts arising

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> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
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> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Note that the "Restatement of Judgments" referred to in the text has been superseded by *Restatement of the Law, Second. Judgments*, (St Paul, Minn.: American Law Institute Publishers, 1982).

[109] 50 CJS Judgments, § 888 at 469, footnotes omitted.

[110] 210 U.S. 230, 28 S Ct. 541, 52 L.Ed. 1039 (1908); hereafter referred to as *Fauntleroy*.

from gambling futures in Mississippi, which was clearly contrary to Mississippi civil and criminal law. The Missouri court would appear to have misinterpreted the Mississippi law which it had held to be applicable to the case before it. Speaking for the majority of the Supreme Court, Mr Justice Holmes commented:

> We feel no apprehensions that painful or humiliating consequences will follow upon our decision. No court would give judgment for a plaintiff unless it believed that the facts were a cause of action by the law determining their effect. Mistakes will be rare. In this case the Missouri court no doubt supposed that the award was binding by the law of Mississippi. If it was mistaken, it made a natural mistake. The validity of its judgment, even in Mississippi, is, as we believe, the result of the Constitution as it always has been understood, and is not a matter to arouse the susceptibilities of the states, all of which are equally concerned in the question and equally on both sides.[111]

The Full Faith and Credit provisions of American law have given rise not only to discussion about whether states can refuse to enforce sister-state judgments—in almost all cases the answer would appear to be in the negative—but also to whether states can entertain additional suits when a matter has been brought before the courts or other tribunals of a sister state.[112] However, it has been settled for the last hundred years that some judgments are subject to attack: those that were rendered without jurisdiction, in violation of the Due Process Clause.

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[111] *Ibid.* at 237 U.S., 643 S.Ct., 1042 L.Ed.

[112] For an interesting discussion in which the Supreme Court managed to split three ways and leave a confused mess, see *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980):

> This is clearly a case where the whole is less than the sum of its parts. In choosing between two admittedly inconsistent precedents, *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149 (1943), and *Industrial Comm'n of Wisconsin* v. *McCartin*, 330 U.S. 622, 67 S.Ct. 886, 91 L.Ed 1140 (1947), six of us agree that the latter decision, *McCartin*, is analytically indefensible... The remaining three Members of the Court concede that it "rests[s] on questionable foundations."... Nevertheless, when the smoke clears, it is *Magnolia* rather than *McCartin* that the plurality suggests should be overruled... Because I believe that *Magnolia* was correctly decided, and because I fear that the rule proposed by the plurality is both ill-considered and ill-defined, I dissent.

Per Justice Rehnquist, Justice Marshall concurring, at 290 U.S., 2665 S.Ct., 778 L.Ed.2d.

In *Thompson* v. *Whitman*[113] the Court commented:

> On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the 4th article of the Constitution and the law of 1790 [28 USC § 1738], and notwithstanding the averments contained in the record of the judgment itself.[114]

This rather self-evident proposition has been significantly limited in *Durfee* v. *Duke*,[115] which dealt with the ownership of land in the Missouri river on the border between Nebraska and Missouri. The Nebraska courts held that the land was in Nebraska, therefore giving them jurisdiction, and proceeded to determine the issue before them. In subsequent litigation before the Federal Court in Missouri, the losing party in the Nebraska action claimed that the Nebraska court did not have jurisdiction to determine the matter because the land was not situated in Nebraska. Under *Thompson*, if the land was determined to be in Missouri, the Nebraska court would have lacked jurisdiction and its decision would have been open to collateral attack, and not entitled to full faith and credit. The Supreme Court held, though, that there was a,

> ...general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.[116]

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113 85 U.S. (18 Wall.) 457, 21 L.Ed. 897 (1873); hereafter referred to as *Thompson*.

114 *Ibid.* at 469 U.S., 902 L.Ed., quoted by Justice Stewart in *Durfee* v. *Duke*, *infra* note 115 at 110 U.S., 244 S.Ct., 190 L.Ed.2d.

115 *Durfee* v. *Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963).

116 *Ibid.* at 111 U.S., 245 S.Ct, 191 L.Ed.2d. In other words, just as the English courts held in *Henry v. Geoprosco*, *supra* note 16, appearing before a court to argue the question of jurisdiction can be fatal to a subsequent argument before other courts that the original one lacked jurisdiction to entertain the substantive matter before it.

Against this tendency must be noted the decision of the Oregon Supreme Court in *Lilienthal* v. *Kaufman*.[117] The defendant had been declared a spendthrift in Oregon, under that state's legislation. He signed a contract with the plaintiff in California; the Oregon Supreme Court held that under normal circumstances California law would apply to the contract and that the defendant would be liable to the plaintiff for an action on the contract. However, the Court held that Oregon spendthrift legislation was part of the public policy of Oregon and, consequently, Oregon's interest in seeing its spendthrift legislation applied overrode California's interest in seeing its citizens' contracts enforced. This case did not involve a question of enforcing a California judgment. If the plaintiff had brought suit in California—one would assume that as the Oregon Court held that California law applied to the contract, it would have been possible to demonstrate "minimum contacts" with California—the Oregon Court would, arguably, have had more difficulty in preferring Oregon law to California law. According to *Corpus Juris Secundum*, there is authority for the proposition that while the Full Faith and Credit Clause applies to both the laws of other states and to their courts' judgments, it is more assiduously applied to judgments than to statutes.[118]

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117 395 P 2d 543, 239 Or 1 (1964).

118 50 CJS Judgments, § 888(b), *supra* note 109 at 469, referring to *People ex rel. Jones* v. *Chicago Lloyds*, 63 N.E.2d 479, 391 Ill 492 (1945).

B. Europe—The *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*

Although not a federation in the traditional sense of the word, the members of the European Community have been moving towards a more integrated union since the adoption of the Treaty of Rome by the original six members of the European Economic Community in 1957.[119] In 1968, the members of the European Community concluded the *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*.[120] This agreement established the rules under which citizens of the member states could initiate proceedings against other citizens of the member states. As the Community grew, new members joined the *Convention* in accordance with the provision of Article 63. The most significant expansion, for the purposes of this discussion,

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[119] *Treaty Establishing the European Economic Community* (25 March 1957); hereafter referred to as the *EEC Treaty*. For an unofficial text of the *EEC Treaty*, see Commission of the European Communities, *Treaties Establishing the European Communities*, abridged ed. (Luxembourg: Office for Official Publications of the European Communities, 1987) at 119ff.

[120] (27 September 1968); hereafter referred to as the *Judgments Convention* or the *Convention*. The *Convention* was originally signed in Brussels in 1968 by the original six members of the European Common Market. It has since been modified to accommodate the subsequent expansions of the European Community and has also been extended to the members of the European Free Trade Association. The latest version of the *Convention*, although not a legally binding text, can be found at OJ 1990, C189. The *Convention* was adopted in accordance with Article 220 of the EEC Treaty, which read:

> Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:
>
> ...
>
> —the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

For an unofficial text of the *Convention* and the legislation implementing it in the United Kingdom (see Appendix 2, below at 114), as well as a discussion of the effects of each, see, F.R. Simmonds, gen'l ed., *Encyclopedia of European Community Law* (London: Sweet & Maxwell, 1973) at B11233ff and A2437ff, respectively. The text of the *Convention* can also be found in A. Prujiner, *Treaties and International Documents Used in International Trade Laws* (Montréal: Wilson & Lafleur, 1992) at 683ff.

For a general discussion of the effects of the *Convention*, see Cheshire and North, *supra* note 9 at 184 and 282-336 for jurisdiction-taking, and 403-434 for judgment-enforcing; Dicey and Morris, *supra* note 9 at 1121ff; Morris, *supra* note 9 at 77-89 for jurisdiction-taking, and 130-133 for judgment-enforcing.

occurred when the United Kingdom, Eire and Denmark joined the Community in 1973 and became signatories to the *Convention* in 1978.

The original members of the Community—France, Italy, West Germany, Belgium, the Netherlands and Luxembourg—all have a civil law tradition. As they were the original signatories to the *Convention*, it is not surprising that some elements of the *Convention* are based on notions more akin to the civil law than to the common law. Eire and the United Kingdom, with the exception of Scotland, are common-law countries with basically identical traditional rules relating to jurisdiction-taking and judgment-enforcing. The pre-existing *Convention* rules are fundamentally incompatible with the Anglo-Irish approach. It was probably a foregone conclusion that the latter would have to adapt to the former rather than *vice versa*.

By its names and terms, this *Convention* applies to civil and commercial matters; it does not apply to revenue or similar matters (*e.g.* taxation), nor does it apply to administrative proceedings, status or legal capacity, rights in property arising from marriage, wills or estates, bankruptcy or similar proceedings, social security or arbitration (Article 1). The basic rule under the *Convention* is that persons domiciled in one of the member states are to be sued in that state (Article 2). Two points should be noted in this regard: first, the notion of domicile used in the *Convention* is <u>not</u> the common-law notion; and second, nationality, which is used by some European countries as a basis for jurisdiction, is not applicable under the *Convention*.[121]

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[121] Domicile is a word which means different things to different systems of private international law. To the common law, a person may have only one domicile at a time: at birth one acquires a domicile of origin which may be supplanted by a domicile of choice, but which is always ready to fill the void should one give up one's domicile of choice before acquiring a new domicile of choice. The domicile of origin is, for all intents and purposes, one's place of birth. The domicile of choice is evidenced by a combination of actual presence in a place combined with an intention to subject oneself to the laws of the jurisdiction in question. In this regard, it should be noted that domicile refers to a jurisdiction in relation to a system of laws; hence one can be domiciled in Canada, for the purposes of divorce law, while being domiciled in one of the provinces for the purposes of succession law. For the civil law, the notion of domicile is a much simpler one, being, essentially, a question of habitual residence or presence within a jurisdiction. See Cheshire and North, *supra* note

In the context of the *Convention*, the notion of domicile is much closer to the civil law concept than to the common-law one and adjustments have been made to the British notion of domicile to cope with the requirements of the *Convention*.[122] The *Convention* sets out a comprehensive code of procedure governing where persons domiciled in the Contracting States may be sued and how judgments from the courts of one of the Contracting States may be enforced before the courts of the other Contracting States.

1. Jurisdiction-Taking

There are six groups of jurisdiction-taking rules in Title II of the *Convention*: the general rule based on the domicile of the defendant (Articles 2-4); special jurisdiction based on the nature of the matter being litigated (Articles 5-6A); jurisdiction in insurance matters (Articles 7-12A); jurisdiction over consumer contracts (Articles 13-15); exclusive jurisdiction in matters which are intimately related to the laws of a particular Contracting State (Article 16); and special situations which do not fall into any of the other categories (Article 17).

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9 at 142. See also, for example, article 79, *CCLC*:

> The domicile of a person, for all civil purposes, is at the place where he has his principal establishment.

The civil law also uses a presence plus intention test for change of domicile, article 80, *CCLC*:

> Change of domicile is effected by actual residence in another place, coupled with the intention of the person to make it the seat of his principal establishment

and assumes that a person will only have one domicile at any given time, but it also allows persons to "elect" domicile for the purposes of service of documents. See, for example, article 85, *CCLC*.

It is interesting to note that domicile is <u>not</u> the test suggested by Article 220 of the *EEC Treaty*.

[122] See below at 116. The court before which a matter is pending uses its own internal law to determine if a person is domiciled in its jurisdiction; it uses the law of the other Contracting State to determine if a person is domiciled there. Where a person's domicile depends on the domicile of another person or on the "seat of authority", the person's national law is used (Article 52). A court uses its own private international law rules to determine whether a trust is domiciled in a Contracting State and where the "seat of a company or other legal person or association of natural or legal persons" is, which is the legal person's domicile (Article 53).

The basic rule under the *Convention* is that persons domiciled in one of the member states "shall, whatever their nationality, be sued in the courts of that State [emphasis added]." Persons who are not nationals of the state in which they are domiciled are treated as if they were nationals of that state for jurisdictional purposes (Article 2). In other words, a British national domiciled (for the purposes of the *Convention*) in France is subject to the same rules as a French national, and may be sued in France. In addition, according to Article 3:

> Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 [Articles 5-18] of this Title.
>
> In particular the following provisions shall not be applicable as against them:... [Emphasis added]

The text then proceeds to enumerate a number of provisions, basically one from each Contracting State, which are fundamentally incompatible with the scheme of the *Convention*. These provisions include the British and Irish ones based on the defendant's temporary presence in the jurisdiction and British ones dealing with presence or seizure of property in the United Kingdom.

The *Convention* does not apply to defendants present but not domiciled in one of the Contracting States (Article 4),[123] and the normal rules of private international law, including the ones listed in Article 3, may be invoked against them. In addition, plaintiffs domiciled in (but not nationals of) a Contracting State are entitled to be treated as nationals of the state and avail themselves of the courts to sue defendants not domiciled in a Contracting State, in accordance with the provisions applicable to nationals. For example, a Canadian domiciled in France may use the French courts' jurisdiction over French nationals anywhere to sue a French national resident in the United States, but would have to sue a French national domiciled in Britain in the British courts.

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[123] Except in those cases covered by Article 16 (exclusive jurisdiction).

The drafters of the *Convention* have focused on the defendant in regulating the cases in which the courts of the Contracting States may take jurisdiction; this is a considerable departure from the traditional common-law approach. In doing so, they have divided the world into two basic types of defendants: those domiciled in the European Community and those domiciled elsewhere. The Canadian domiciled in France is covered by the *Convention*, while the Briton domiciled in Australia is not. These general, defendant-centred rules are subject to other provisions dealing with specific situations, some of which depend on the nature of the litigation, some on the character of the plaintiff and some on the character of the defendant.

The special jurisdiction provided in Article 5 is concurrent with the jurisdiction of the domicile of the defendant; in other words the defendant may be sued in the courts of two or, conceivably, more Contracting States in these circumstances. Noteworthy for the purposes of this paper are the following: where the suit is based on breach of contract, the courts of the place of performance may be used; where the suit is based on tort, or similar doctrines, the courts of the place "where the harmful event occurred" (Article 5(3)) may be used; in matters of branch operations or agency, the courts of the place where the branch or agency is located may be used. In addition, where there are multiple defendants, the domicile of any one of them may be used; where a person is a third party, or where there is a counterclaim, the court before which the principal action is being argued may be used (Article 6).

These provisions are much more familiar to the common law than the general provisions. They would appear to represent a recognition on the part of the drafters that while fairness to the defendant might argue in favour of suing in the defendant's domicile, legal relationships between individuals do give other states an interest in the outcome of disputes between them. In some cases, one could argue, the courts of these states have a greater interest than the courts of the defendant's domicile and, at least as far as availability of witnesses and evidence might be concerned, are more appropriate *fora*.

In insurance matters, the provisions of Article 8 essentially extend the number of places where an insurer can be sued to include the domicile of the policy holder and the courts before which a leading co-insurer is sued; in the event that the insurer is not domiciled in one of the Contracting States, agency rules apply. Liability insurers may be sued in places where "the harmful event occurred" (Article 9) and, if local rules of court permit, before the court where the insured has been sued (Article 10).[124]

On the other hand, an insurer may only sue in the defendant's domicile, with the exception of counterclaims, which may be brought in the jurisdiction in which the original suit is pending (Article 11). Article 12 provides for an agreement between the insured and the insurer to depart from the other provisions under certain cases. The net effect of these Articles is to extend the number of courts before which an insurer can be sued, while effectively maintaining the basic limitation based on domicile for suits against policy holders. This clearly represents a policy choice in favour of the individual policy holder or beneficiary to the 'detriment' of the insurer.

Similarly, the provisions relating to consumer contracts have the effect of increasing the number of courts in which the consumer may sue. Article 13 provides a definition of "consumer" and examples of contracts covered by Articles 13-15. Article 14 permits the consumer to sue in the courts of the Contracting States in which the consumer or the contractor is domiciled, while limiting the contractor to suing in the consumer's domicile. Article 15 allows for the parties to avoid these provisions under

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[124] Articles 7, 8 & 9 would appear to apply only where direct actions against the insurer are allowed, in which case, if local rules permit, the plaintiff may join the insured to a direct action against the insurer, notwithstanding the insured's domicile.

certain circumstances. Again, these provisions represent a clear policy choice in favour of the consumer to the 'detriment' of the other party.

Article 16 grants exclusive jurisdiction, "regardless of domicile", to the courts of particular Contracting States in the case of matters *in rem* or otherwise dealing with immoveables; in the case of disputes about the constitution of companies or other legal persons; in cases of disputes about the contents of public registers; in patent or similar matters; in proceedings regarding the enforcement of judgments.[125] The provisions are neutral as between plaintiffs and defendants and, given the nature of the subject matter, it is quite logical, and not surprising, that the drafters of the *Convention* should have chosen to limit the courts which had jurisdiction over them.[126]

Parties to a dispute may agree to give the courts of a particular Contracting State jurisdiction over the matter. According to Article 17, such a situation grants the specified court "exclusive jurisdiction", if at least one of the parties is domiciled in a Contracting State; if none of the parties are domiciled in a Contracting State, courts of the other states may not exercise jurisdiction unless the designated court refuses to do so. The agreement must be evidenced in writing or "...in international trade or commerce, [be] in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware". Specific provisions govern trust agreements, which are not allowed to violate the provisions of Articles 12 (insurance), 15 (consumer contracts) or 16 (exclusive jurisdiction). Where the agreement relating to jurisdiction was concluded for the benefit of one party only, that party may, despite the agreement, avail itself of other jurisdictions made available under the *Convention*.

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125 See below at 56.

126 It is interesting to note, however, recent Australian developments, which would appear to include each Australian state granting jurisdiction over at least some of these matters to the courts of the other Australian states. See below at 66.

Finally, Article 18 provides that where a defendant actually appears to defend an action, notwithstanding the other provisions of the *Convention*, the courts before which the defendant appears will have jurisdiction unless this violates Article 16 (exclusive jurisdiction) or the defendant appears to contest the court's jurisdiction (*i.e.* makes a conditional appearance).

These provisions would appear to be designed to maintain the protection for individuals or weaker parties that is evident throughout the *Convention*, while allowing more sophisticated or experienced parties to organise their affairs in a manner that suits them. There is nothing particularly unusual about permitting parties to choose a forum in advance, what is somewhat unusual is requiring that they live with their choice. Equally, requiring defendants to accept the jurisdiction of a court before which they have voluntarily appeared is hardly innovative, nor is allowing for the possibility of conditional appearances for the purposes of contesting jurisdiction, although it is a procedure that can be fraught with danger in other jurisdictions.[127]

Articles 19-20 require a court before which an action is pending to ensure that it has jurisdiction in accordance with the *Convention* and to declare *proprio motu* that it does not have jurisdiction in appropriate cases. In addition, the court "shall stay proceedings so long as it is not shown" that the defendant has had sufficient time to receive the originating process and to arrange for a defence. Section 8 (Articles 21-23) provides for *lis pendens* and requires a court to decline jurisdiction *proprio motu* where an action is pending before another competent court. Provision is also made for suspending actions where other "related actions" are pending. Finally, article 24 permits applications "to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this *Convention*, the courts of another Contracting State have jurisdiction as to the substance of the matter."

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[127] See the discussion of *Henry v. Geoprosco International Ltd*, *supra* note 16.

2. Judgment-Enforcing

Judgment-enforcing is covered in Title III of the *Convention*. According to Article 26, the basic rule is "[a] judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required," and "[u]nder no circumstances may a foreign judgment be reviewed as to its substance." (Article 29) This is not to say that all judgments are automatically enforced without question; rather the circumstances in which enforcement will be denied are limited.

Article 27 provides several situations in which a judgment shall not be recognised: when it would be contrary to the recognising state's public policy; in the case of a default judgment, when the defendant was not served with the originating process, or did not have enough time to prepare a defence; if the judgment is irreconcilable with one from the recognising state between the same parties, or with one from a non-Contracting State which the recognising state's normal rules would recognise; if the issuing state made a preliminary determination which conflicts with the recognising state's private international law rules and a different result would have been obtained by using the recognising state's rules.

Article 28 provides that judgments which were obtained in violation of Articles 7-12A (insurance rules), 13-15 (consumer contracts) or 16 (exclusive jurisdiction), and judgments which are covered by an agreement under Article 59[128] shall not be recognised. A recognising court may stay the application if an appeal of the original decision has been launched (Article 30).

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128 Under Article 59 a Contracting State may sign an agreement with a non-Contracting State which limits the effect of the *Convention* on persons domiciled or habitually resident in the non-Contracting State. This is the basis on which Canada and the United Kingdom have agreed to enforce each other's judgments. See *Canada-United Kingdom Civil and Commercial Judgments Convention Act*, RSC 1985, c. C-30; *Reciprocal Enforcement of Judgments (United Kingdom) Act*, RSO 1990, c. R-6. As with other reciprocal arrangements, this scheme merely provides for easy registration of judgments that would be recognised and enforced at common law.

Where the courts of a Contracting State have issued an enforceable judgment, it is enforceable upon application to the courts (as listed in Article 32) of another Contracting State (Article 31). The application is governed by the law of the court before which the application for enforcement is made (Article 33); it is to be given without delay, without the party against whom enforcement is sought being able to make any submissions (Article 34), and it may only be refused on the grounds specified in Articles 27 and 28—it may not be reviewed on the merits. Where enforcement is granted, an appeal is possible (to the court specified in Article 37) within one or two months depending on the domicile of the defendant (Article 36). The court hearing the appeal may stay the proceedings if an appeal against the original judgment has been launched and may make enforcement conditional on the provision of security (Article 38). Other Articles cover appeals from a denial of enforcement (Articles 40-41), judgments which are only partially enforceable (Article 42), judgments for periodic payments (Article 43), provision of legal aid on enforcement applications (Article 44) and dispense with the requirement for non-residents to post security on an application for enforcement (Article 45).

Articles 46-49 specify the type of documents that must be attached to an application for recognition or enforcement, while Article 50 covers authentication of documents. Article 51 provides that a settlement enforceable in the original jurisdiction is enforceable throughout the Community as if it were a judgment.

The provisions regarding the recognition and enforcement of judgments are much more straightforward that the jurisdiction rules. This is only to be expected. Once a court has issued a judgment it should be a relatively simple task to determine whether it will be recognised and enforced. According to the *Convention*, where the judgment was granted in accordance with the *Convention*'s jurisdictional rules it will be enforced, and where it was not, it will not be enforced.[129]

[129] As with many international agreements, the *Convention* is silent regarding its interpretation and enforcement. However, the European Community has an established structure for harmonizing the interpretation of Community-wide policies and laws: the European Court. According to a Protocol adopted in 1971 and subsequently amended to take into account the accession of the new members of the Community:

> The Court of Justice of the European Communities [the European Court] shall have jurisdiction to give rulings on the interpretation of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and of the Protocol annexed to that Convention, signed at Brussels on 27 September 1968, and also on the interpretation of the present Protocol.
>
> The Court of Justice of the European Communities shall also have jurisdiction to give rulings on the interpretation of the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention of 27 September 1968 and to this Protocol.

Protocol to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (3 June 1971), Article 1.

Article 2 of the Protocol enumerates which national courts may ask the European Court to render an interpretation of the *Convention*. Article 3 provides for situations in which specified courts shall ask for an interpretation from the European Court.

C. Australia

Australia came into existence in much the same way as Canada: it is a federation of earlier British colonies which were combined, largely at their own request, into a federal state under a Constitution,[130] enacted by the Imperial Parliament, which provides for a British-style parliamentary democracy. Coming as it did after the creation of both the United States and Canada, it is not surprising that the drafters of Australia's Constitution were able to pick and choose those elements of a federal system that suited them best. That they preferred the American model to the Canadian model is quite evident from the wording of the Australian Constitution.[131]

Unlike its predecessor, the *British North America Act*,[132] the Australian Constitution did not attempt to list the powers of both the commonwealth and the states nor does it deal with the establishment of the government structures of the several states, rather its provisions deal with the establishment of the commonwealth government and only deal with the states to the extent that their powers are modified or circumscribed by the establishment of the commonwealth.

Section 51, in Chapter I, Part V, enumerates the powers of the Parliament of the Commonwealth.[133] Chapter III deals with the establishment of commonwealth courts; as this

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130 Constitution of the Commonwealth of Australia, enacted by *Commonwealth of Australia Constitution Act* (Imp.), 63 & 64 Vict., c. 12; hereafter cited as Australian Constitution. In accordance with Australian terminology, the expression "commonwealth" is used to denote the federal level of government.

131 Sir A. Mason, "The Australian Constitution 1901-1988" (1989) 62 Aust. LJ 752.

132 (Imp.), 30 & 31 Vict., c. 3, renamed *Constitution Act 1867* by *Canada Act 1982* (UK), 1982, c. 11

133 Of interest for the purposes of this discussion are the following:

> **51.** The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—
>
> ...

structure would appear to have played more than a peripheral role in the development of the Australian approach to intra-national conflicts of law, it is discussed in greater detail in Appendix 1.[134]

For the purposes of this discussion, the key feature of the Australian model is the full faith and credit section (s. 118) of the Australian Constitution, which is almost identical to its American precursor:

> Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

For whatever reason, though, the drafters of the Australian Constitution did not see the need to copy the other half of the American equation: the due process clause.

Pursuant to the authority granted by section 51, shortly after Australia came into being, the Commonwealth Parliament enacted the *Judiciary Act 1903*,[135] the *Service and Execution of Process Act 1901*,[136] and the *State Laws and Records Recognition Act 1901*,[137] which are discussed below. After more than 75 years of experience with these pieces of legislation, sufficient difficulties had been encountered that the Commonwealth and State Parliaments each enacted legislation which effectively allows any superior court in Australia to exercise the jurisdiction of any of the other superior courts and to transfer any matter before it to one of the other superior courts.

> (xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:
>
> (xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:
>
> ...

[134] See below at 107.

[135] No. 6 of 1903 (Cth). For a discussion of this legislation, see below at 107.

[136] No. 11 of 1901 (Cth).

[137] No. 5 of 1901 (Cth).

This legislative scheme is known as the cross-vesting legislation and is discussed in greater detail below.[138]

1. Jurisdiction-Taking

As Sykes and Pryles have commented:

> The first question which arises in litigation involving a foreign element is whether the court can and will hear the case. For reasons of convenience alone it is obvious that a court will not hear all conceivable cases and that some limits must be drawn. If the action is entirely foreign so that the parties are not connected with the forum and the cause of action wholly arose elsewhere it can scarcely be contended that the courts of the forum ought to adjudicate.[139]

Nygh, for his part, is of a similar view:

> The first question which must arise in any case involving foreign elements is whether the court has jurisdiction to hear and determine the matter. The jurisdiction of Australian courts obviously is limited. The Supreme Court of New South Wales, for instance, would not assume jurisdiction to hear a dispute between citizens of Mongolia who had never been within the state and whose dispute had no connection with the state.[140]

Like their English and Canadian cousins, the Australian courts have traditionally assumed a jurisdiction based on the defendant's presence within their territory. This has been supplemented, as in both England and Canada, with statutory extensions in the form of rules of court. As Sykes and Pryles suggest, "The Anglo-Australian [and Anglo-Canadian] rules have developed on an ad hoc basis, dependent on the exigencies of procedure, and the common law has failed to create a consistent theory of jurisdiction."[141]

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138 See below at 66ff.

139 E.I. Sykes and M.C. Pryles, *Australian Private International Law*, 2d ed. (Sydney: Law Book Company, 1987) at 21.

140 P.E. Nygh, *Conflict of Laws in Australia*, 5th ed. (Sydney: Butterworths, 1991) at 35. One could be forgiven for suggesting that English and Canadian courts have not always shown the same degree of admirable restraint as the courts of New South Wales.

141 Sykes and Pryles, *supra* note 139 at 21. See also, M. Pryles, "The Basis of Adjudicatory Competence in Private International Law" (1972) 21 ICLQ 61.

Each of the Australian jurisdictions has adopted rules of court which provide for service of their process *ex juris* along lines that are very familiar.[142] As in Canada, most jurisdictions originally required permission of the court before service *ex juris* would be effective; this is no longer the case in New South Wales, Victoria, Queensland, Tasmania and the Northern Territory or in the Federal Court. With the exception of Queensland, these provisions only apply to the state superior courts; hence these rules do not operate to permit service *ex juris* of process originating out of the inferior courts. In addition, in pursuance of its powers under the Australian Constitution, the Commonwealth Parliament adopted legislation governing the service of process by the courts of one Australian state in the territory of the others.

The *Service and Execution of Process Act* was adopted by the Commonwealth in 1901, shortly after the creation of the Australian federation. As currently worded, it provides:

> 4.(1) A writ of summons issued out of or requiring the defendant to appear at any Court of Record of a State or part of the Commonwealth may be served on the defendant in any other State or part of the Commonwealth.
>
> (2) Subject to any rules of court that may be made under this Act, the service under this section of a writ of summons may be effected—
> (a) in the same manner as if the writ were served on the defendant in the State or part of the Commonwealth in which the writ was issued;...

subject to the rules provided in the remainder of the *Act*.[143] In filing an appearance, the defendant must provide a valid address for service of additional documents "within five miles of the office of the Court out of which the writ was issued" (s. 9(1)) failing which "the appearance may be set aside as

142 For a review of the grounds and a discussion how they differ among the states, and how they have been interpreted in Australia, see Nygh, *supra* note 140 at 42-54, and Sykes and Pryles, *ibid.* at 35-53.

143 Which provide for "indorsements" on the writ indicating that it is to be served outside the originating state (s. 5(1)); that the defendant is to provide a local address for additional service (s. 5(2)); and briefly describing the content of the writ (s. 5(3)). Failure to provide such information renders the writ "ineffective for service under this Act" (s. 6). It should be noted that the *Act* applies to "Courts of Record", and does not distinguish between superior and other courts. Reference to a particular court's enabling statute is necessary to determine to what extent the *Act* applies to it.

irregular" (s. 9(2)). If the defendant fails to file an appearance, the issuing court may proceed to hear the matter before it.[144]

Pryles has noted that

> The *Service and Execution of Process Act* permits service of process ex juris without leave and no nexus requirement is imposed at the point of service. It is only if a defendant does not appear (or challenges the court's jurisdiction) that the nexus provisions become relevant. [Emphasis added.][145]

Suits dealing with land within the issuing court's territory and shares of a company having its principal place of business within the territory of the issuing court (s. 11(1)(a)); contracts made or entered into within the territory of the issuing court (s. 11(1)(b)); breaches of contract occurring within the territory of the issuing court (s. 11(1)(c)); injunctions or claims for damages relating to things done or to be done within the territory of the issuing court (s. 11(1)(d)); damage claims against defendants present within the territory of the issuing court when the liability arose (s. 11(1)(e)); and certain matrimonial causes are all ones which have the requisite nexus. In these cases, the court may permit the plaintiff to continue in the absence of the defendant, with or without conditions (s. 11(1)), and may rescind or modify its order on the application of the defendant (s. 11(2)). However, it should be noted that the *Act* does not purport to confer any jurisdiction on a court that it does not otherwise possess (s. 13).

At first blush, one might be inclined to wonder whether there is an ongoing need for rules of court, given the explicit provisions of the *Service and Execution of Process Act*, which would appear to render the service *ex juris* provisions superfluous, particularly when the *Act* by its wide definition of a

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144 Providing the subject matter of the suit is described by s. 11(1)(a)-(f) and the defendant was served personally with the writ (s. 11(1)(g))—proven by an affidavit or by any other means that would be acceptable if it had been served within the issuing state (s. 17)—or if the defendant had knowledge of it (s. 11(1)(h)).

145 M. Pryles, "Conflict of Laws" in R. Baxt and G. Kewley, eds, *An Annual Survey of Australian Law 1986* (Sydney: Law Book Company, 1987) 95 at 95.

court[146] includes service originating out of inferior courts. One reason is that the *Act* is limited to giving effect <u>within</u> Australia to service issuing out of Australian courts. It would appear, though, that there is no serious inconsistency between the two schemes:

> The state rules exist side by side with the federal *Service and Execution of Process Act* and are not inconsistent with it so as to be inoperative under s. 109 of the Constitution. Thus within Australia the state provisions for service ex juris exist as an alternative to Commonwealth law. However if both provisions are used inconsistencies may result which can affect the regularity of service. Service on defendants outside Australia can only be effected under state or territorial law (or in the case of litigation in the High Court, under the *High Court Rules*) because the federal *Service and Execution of Process Act* is confined to service within Australia.[147]

2. Judgment-Enforcing

Part IV of the *Service and Execution of Process Act* deals with the enforcement of civil judgments. Section 20 provides that a person in whose favour a judgment has been issued by a Court of Record is entitled to a certificate from the court setting out specific pieces of information.[148] This certificate may be registered in any similar court in Australia and has the same effect as a judgment of the court in which it is registered (s. 21), although there are certain procedural rules that must be followed in order to enforce the judgment (s. 23-26).

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146 According to s. 3,

> In this Act, unless the contrary intention appears—
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> "Court" includes any judge or justice of the peace acting judicially;
> "Court of Record" includes any court that is required to keep a record of its proceedings;
> ...

147 Sykes and Pryles, *supra* note 139 at 32; footnotes omitted. See also, Nygh, *supra* note 140 at 39, where he comments: "The state and territorial provisions are not affected or displaced by the Service and Execution of Process Act 1901 (Cth): *Flaherty v Girgis* (1987) 162 CLR 574."

148 The certificate is contained in the Third Schedule to the *Act*.

The *State Laws and Recognition Act* was adopted in 1901.[149] Like its counterpart—the *Service and Execution of Process Act*—it was clearly felt to be necessary to the smooth functioning of the new federation. As it currently stands, the *Act* primarily provides for the recognition throughout Australia of certain public documents and the manner in which they may be proven. Of particular interest for the purpose of this discussion are the following provisions:

> **18.** All public acts records and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every court and public office as they have by law or usage in the courts and public offices of the State or Territory from whence they are taken.
>
> **19.** The provisions of this Act shall be in addition to and not in derogation of any powers existing at common law, or given by any law at any time in force in any State or Territory.

Whether section 18 extends or merely repeats in different words section 118 of the Australian Constitution is not particularly relevant for the purposes of this discussion. What is important to note is that, unlike Canada, where there has traditionally been a rigid separation of the provinces, the Australian states have a tradition of more than 75 years of constitutionally-mandated and supported dealings which have mitigated the effect of states treating each other as if they were totally different international law areas.[150]

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[149] No. 5 of 1901.

[150] See, for example, Nygh, *supra* note 140 at 6-8, regarding the High Court's decision in *Laurie v Carroll* (1958), 98 CLR 310 at 331. For a discussion whether there is a difference between the rules applicable to foreign judgments and those applicable to inter-state judgments, see J.D. Fine, "Defences Against Recognition or Enforcement of Interstate or Foreign Judgments" (1987) 61 Aust. LJ 350.

3. *Jurisdiction of Courts (Cross-vesting) Acts*

In 1987, the commonwealth and the various states all adopted a coordinated legislative scheme under the title *Jurisdiction of Courts (Cross-vesting) Act.*[151] The *Acts* begin with a preamble which is particularly instructive:

> WHEREAS inconvenience and expense have occasionally been caused to litigants by jurisdictional limitations in federal, State and Territory courts, and whereas it is desirable—
> (a) to establish a system of cross-vesting of jurisdiction between those courts, without detracting from the existing jurisdiction of any court;
> (b) to structure the system in such a way as to ensure as far as practicable that proceedings concerning matters which...would be entirely or substantially within the jurisdiction (other than any accrued jurisdiction) of the Federal Court or the Family Court or the jurisdiction of a Supreme Court of a State or Territory are instituted and determined in that court, whilst providing for the determination by one court of federal and State matters in appropriate cases; and
> (c) if a proceeding is instituted in a court that is not the appropriate court, to provide a system under which the proceeding will be transferred to the appropriate court.

According to J.L.R. Davis, "the reasons for this legislative scheme [the Cross-vesting *Acts*] stem largely from jurisdictional difficulties arising in relation to trade practices and family law matters."[152] However, while the former is primarily an internal Australian division of powers question, and the latter is outside the context of this paper, the legislative scheme adopted by the Commonwealth and State Parliaments in 1987 does affect the way in which general civil litigation involving parties with connections to different Australian States and Territories will be conducted in the future.

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[151] See *Jurisdiction of Courts (Cross-vesting) Act 1987*, No. 24 of 1987, (Cth) and cognate legislation in each state, for example, *Jurisdiction of Courts (Cross-vesting) Act 1987*, No. 29 of 1987 (Vic); and *Jurisdiction of Courts (Cross-vesting) Act 1987*, No. 125 of 1987 (NSW). All references are to the commonwealth version of the legislation, unless otherwise indicated.

[152] J.L.R. Davis, "Conflict of Laws" in R. Baxt and G. Kewley, eds., *An Annual Survey of Australian Law 1987* (Sydney: Law Book Company, 1988) 53 at 53.

Under this scheme, the commonwealth has granted the jurisdiction over "civil matters" exercised by the Federal Court and the Family Court (a commonwealth court) to the State and Territorial courts; in exchange, the states have granted jurisdiction over civil matters to the Federal Court, the Family Court, and the Supreme Courts of the other states and territories. As a result, the Federal Court, the Family Court and the State and Territorial Supreme Courts now all have jurisdiction over civil matters arising anywhere in Australia.[153]

In addition, though, section 5 of the *Acts* also provides for the transfer of matters from one court to another in three situations: where the matter relates to proceedings already pending in another court and it is appropriate that the matter be dealt with by that court; where, in the absence of the cross-vesting scheme, the first court would not have been able to hear the matter and it is "more appropriate" that another court deal with the matter; and where "it is otherwise in the interests of justice" that the matter be dealt with by another court.[154]

Section 6 makes provision for "special federal matters" which are only defined in the commonwealth version of the legislation.[155] Generally speaking state courts are expected to transfer "special federal matters" to the Federal Courts; if they choose not to do so, prior to proceeding, they are

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153 Section 4; although the commonwealth and state wordings are different, they are to the same effect.

154 Section 5. Perhaps in order to protect the scheme of the *Acts* against the results of possible constitutional challenges (see note 162), the drafters of the legislation wrote this section in such a way that its parts could be severed if necessary. Consequently s. 5(1) deals with transferring matters to the Federal Court and the Family Court; s. 5(2) deals with transferring matters from one state or territorial Supreme Court to another; s. 5(3) deals with transferring matters between a state supreme court and a state family court (in the case of the commonwealth legislation) and from the courts of the other states into the Supreme Court of Victoria (in the case of the Victoria legislation); s. 5(4) deals with transferring matters from the Federal and Family Courts to the state supreme courts; s. 5(5) deals with transferring matters between the Federal and Family Courts; s. 5(6) provides for transferring additional matters relating to the first one transferred.

155 Sub-section 3(1).

required to give the Commonwealth Attorney General notice and sufficient opportunity to request a transfer to the Federal Court.[156]

Section 7 deals with appeals. Given the rather complex nature of the Australian court structure and this scheme, these provisions are similarly complex.[157] According to Davis, section 8 provides for a limited transfer of matters from inferior courts:

> Under s. 8, if a matter has been commenced in an inferior court of one State or Territory, and related proceeding are pending in another superior court, the Supreme Court of the first State or Territory may remove the proceedings from the inferior court into the Supreme Court, and thereafter those proceedings may be transferred to the other superior court. The reverse process, of the transfer of proceedings from a federal court or the Supreme Court of another State or Territory [to a state's inferior courts], is provided for by s. 10. Such a transfer is available only in relation to proceedings which include a matter arising under...the *Trade Practices Act*...[158]

Section 9 appears to be a counterpart to section 4, inasmuch as it permits courts to exercise the jurisdiction that is conferred on them by the legislative scheme or by other enactments which cross-vest jurisdiction.

Section 11 makes provision for the substantive and procedural laws which apply to transferred matters: generally the substantive law is that of the territory in which the court sits, including its

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156 See *Attorney General (NSW) v. Ray (No 1)* (1989), 99 FLR 261 (NSWSC) and *Attorney General (NSW) v. Ray (No 2)* (1989), 99 FLR 263 (NSWSC) for a brief discussion when a state court might exercise jurisdiction over a "special federal matter". Although s. 6(4) says that the Commonwealth Attorney General may "request" a transfer to the Federal Court, where such a "request" is issued, the Supreme Court before which the matter is pending "shall transfer the proceeding to the Federal Court."

157 For a discussion of the effect of s. 7 where a request to transfer a special federal matter under s. 6 has been made, see *NEC Information Systems Australia Pty Ltd v. Lockhart* (1991), 101 ALR 95 (NSWCA).

158 Davis, *supra* note 152 at 57; *Trade Practices Act 1974*, No. 51 of 1974 (Cth).

choice of law rules.[159] If the matter is to be determined according to legislation, both the "written and unwritten law" of the jurisdiction which enacted the legislation are to be applied.[160] The courts are given wide latitude in procedural matters:

> (c) the rules of evidence and procedure to be applied in dealing with that matter shall be such as the court considers appropriate in the circumstances, being rules that are applied in a superior court in Australia or in an external Territory.

Section 12 deals with orders relating to costs. Section 13 provides that there are no appeals of the decision whether to transfer a matter to another court, or of the choice of rules of evidence and procedure.[161] Section 14 deals with the enforcement of judgments issued pursuant to the cross-vesting scheme. It provides that judgments issued under the scheme are enforceable in the same manner as other judgments from the same courts. Sections 15 and 16 deal with matters not relevant to this discussion, including the coming into force of the legislation and provision for the results of possible constitutional challenges.

The principal provisions of the legislation are section 4 (which allows one court to act as if it were another) and section 5 (which provides for matters to be transferred to other jurisdictions). Before considering these sections in greater detail, it is important to note a number of preliminary issues which have been identified by Australian courts and commentators. These include the constitutional

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159 Paragraph 11(1)(a). For a discussion about whether a plaintiff may claim punitive damages in a cross-vested defamation claim, see *Waterhouse v. Australian Broadcasting Corp.* (1992), 27 NSWLR 1 (SC).

160 Paragraph 11(1)(b). For a discussion of the effect of s. 11 in the case of a multi-state defamation suit, see *Australian Broadcasting Corp. v. Waterhouse* (1991), 25 NSWLR 519 (CA).

161 That this section means exactly what it says was confirmed by Kirby P in *Tangaloona Island Resort Pty Ltd v. Miles* (1989), 96 FLR 47 (NSWCA). See, A.E. Wallace, "Conflict of Laws" in R. Baxt and G. Kewley, eds, *An Annual Survey of Australian Law 1989* (Sydney: Law Book Company, 1990) 190 at 193-4.

validity of the legislation[162] and what rules apply to the commencement of cases which have an extra-state element,[163] although in Pincus' words, "The cross-vesting scheme...say[s], to put it broadly, that you can start any civil case in any superior court, State or federal [emphasis added]."[164]

It should also be noted that one of the traditional limitations on the *in rem* jurisdictions of common-law courts has been eliminated: "Furthermore, the limitation on jurisdiction in matters relating to interstate real property will be abolished by this legislation [emphasis added.]."[165] Davis bases this statement on the notion that common-law courts exercise *in personam* jurisdiction over all who are found within their territorial jurisdiction and he is of the view that the cross-vesting scheme grants each state or territorial Supreme Court with territorial jurisdiction throughout Australia.[166]

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162 See, for example, K. Mason and J. Crawford, "The Cross-vesting Scheme" (1988) 62 Aust. LJ 328 at 333; C.W. Pincus, "Cross Vesting of Jurisdiction" [1989] Queensland L Soc. J 259 at 263; G. Griffith, D. Rose and S. Gageler, "Further Aspects of the Cross-vesting Scheme" (1988) Aust. LJ 1016 at 1023. See also M. Moshinsky, "State Extraterritorial Legislation and the Australia Acts 1986" (1987) 61 Aust. LJ 779. In *West Australian Psychiatric Nurses' Association v. Australian Nursing Federation* (1991), 30 FCR 120 (FC), Lee J suggested that it might not be constitutionally possible for the states to vest state jurisdiction in commonwealth courts. For a discussion of this judgment, see J. Goldsworthy and P. Hanks, "Constitutional Law" in R. Baxt and A.P. Moore, eds, *An Annual Survey of Australian Law 1991* (Adelaide: Adelaide Law Review Association, 1992) 109 at 124-126.

163 As has been noted above, prior to the adoption of the cross-vesting scheme, an Australian plaintiff who wished to commence a suit against an out-of-state defendant had the choice between proceeding under the *Service and Execution of Process Act* or under the service *ex juris* provisions of the rules of the state court out of which service was being issued. According to Davis, under the new scheme, "...a plaintiff before [a state or territorial Supreme Court] whose action is against a defendant who is able to be served in another part of Australia will no longer need to rely on Part II of the *Service and Execution of Process Act* 1901, or the Rules of Court permitting service out of the jurisdiction," *supra* note 152 at 58. For a suggestion that matters would not prove to be quite so straightforward, see Mason and Crawford, *ibid.* at 336, and Pincus, *ibid.* at 261. It would appear that any question in this area has been resolved by amendments to the state rules of court to provide for service in cross-vesting situations; see Griffith, Rose and Gageler, *ibid.* at 1022.

164 Pincus, *ibid.* at 260.

165 Davis, *supra* note 152 at 58.

166 *Ibid.* at 59. Similarly, he is of the view that the scheme has the effect of making all of the Australian courts courts of the situs of all land in Australia, thereby avoiding the effect of *British South Africa Co. v. Companhia de Mozambique*, [1893] AC 602 (HL) which had been held to be in

In *Rains v. Project Technology Pty Ltd*,[167] the Supreme Court of New South Wales decided to act under section 4 as if it were the Supreme Court of the Australian Capital Territory (ACT) and wind up a company incorporated there, rather than transfer the matter to the ACT for adjudication. However, the vast majority of the reported cases under the cross-vesting legislation, at least in the case of ordinary civil judgments, involve courts transferring matters under section 5.

Writing before the legislation came into effect, Davis noted:

> Although the substantive provisions of [section 5] are set out in the form of four subsections, <u>the essence of the legislative scheme</u> is that if a matter is pending in one court, but it is more appropriate that the proceedings be heard by another court, the first of those courts shall transfer the matter to the other court. In determining whether such a transfer is appropriate, a court may have regard to any of three criteria: (a) whether proceedings between the same parties on the same or related issues are already pending in the transferee court; (b) what would have been the jurisdictional power and law to be applied had the cross-vesting legislation not been passed; and (c) "the interests of justice". [Emphasis added.][168]

Mason and Crawford quote from the explanatory memorandum to the Commonwealth Bill:

> ...Courts will need to be ruthless in the exercise of their transfer powers to ensure that litigants do not engage in 'forum shopping' by commencing proceedings in inappropriate courts.

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force in Australia. Davis cites *Commonwealth v. Woodhill* (1917), 23 CLR 482 (HC) and *Inglis v. Commonwealth Trading Bank of Australia* (1972), 20 FLR 30 (ACTSC) as authority for this proposition.

[167] (1989), 97 FLR 355 (NSWSC).

[168] Davis, *supra* note 152 at 57. In addition to the cases noted in the body of the text, s. 5 has been considered relatively frequently since its adoption, see for example, *Mattock v. Mattock* (1989), 97 FLR 112 (NSWSC); *Raynard v. Pittard* (1989), 99 FLR 111 (NSWSC); *Yee v. Alex Taylor Investments Pty Ltd* (1989), 97 FLR 116 (NSWSC); *Chase Corp. (Australia) Ltd v. City of Melbourne* (1989), 97 FLR 258 (NSWSC); *Sunbanc Australia Ltd v. Multivest Corp. Ltd* (1989), 97 FLR 269 (NSWSC); *Jackson v. John Fairfax & Sons Ltd* (1988), 96 FLR 145 (ACTSC); *Seymour-Smith v. The Electricity Trust of S.A.* (1989), 97 FLR 160 (NSWSC) (hereafter referred to as *Seymour-Smith*), where the New South Wales Supreme Court decided that it could permit service *ex juris* by exercising cross-vested jurisdiction from the Supreme Court of South Australia, and then transferred the proceedings back to the Supreme Court of South Australia for resolution; *Mansell v. Cummings* (1989), 86 ALR 637 (FC); *Waterhouse v. Australian Broadcasting Corp.* (1989), 86 ACTR 1, 97 FLR 1 (SC).

and comment:

> This suggests that the fear is judicial restraint in the exercise of the power to order transfer....The United States experience is that the forum non conveniens principle has been used extensively and explicitly as a means of controlling overcrowding or 'docket congestion'.[169]

The first court to address the issue of transferring a matter to another court was the Supreme Court of New South Wales in *Bankinvest AG v Seabrook and others*.[170] Rogers A-JA wrote the principal decision with Kirby P and Street CJ writing concurring decisions. Street CJ's judgment is particularly interesting as it summarises the effects of the cross-vesting scheme:

> The cross-vesting legislation in effect brings together the eight State and Territory Supreme Courts, the Federal Court and the Family Court into an organisational relationship. Very broadly speaking, the legislation now operative throughout Australia achieves two objectives: first it enables any one of these courts to exercise the jurisdiction of, and to apply the law that would be applied by, any one of the other nine; secondly it enables any one of those courts in which proceedings are commenced to transfer them to any one of the other nine.
>
> The introduction of this scheme is a significant move towards providing throughout our nation the services of an integrated court system transcending the boundaries, both geographic and jurisdictional, that have in the past obstructed the courts in meeting the requirement of the Australian public.
>
> The cross-vesting legislation passed by the Commonwealth, the States and the Territories both conferred on each of the ten courts Australia-wide jurisdiction and set up the mechanism regulating the transferring of proceedings from one of these ten courts to another. In relation to transfer, the common policy reflected in each of the individual enactments is that there must be a judicial determination by the court in which proceedings are commenced either to transfer or not to transfer the proceedings to one of the other nine based, broadly speaking, upon consideration of the interests of justice. To describe it as judicial determination, should not be permitted to obscure the real purport of the decision. The determination must, of course, be made with full regard to principles governing an adjudication. But, in its effect, an order granting or refusing a transfer is an administrative decision.
>
> It is important to observe that a court may transfer a proceeding to another court of its own motion, that is to say without an initiating application by any of the parties: eg *Jurisdiction of Courts (Cross-vesting) Act* 1987, s 5(7). Moreover, an appeal

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169 Mason and Crawford, *supra* note 162 at 332. They also refer to Robertson, *supra* note 18 at 405-408.

170 (1988), 14 NSWLR 711, 92 FLR 153 (CA); hereafter referred to as *Bankinvest*. For a discussion of the effects of this case, see Griffith, Rose and Gageler, *supra* note 162 at 1018ff.

> does not lie from the decision to transfer proceedings to another court (ibid, s 13(a)).
>
> As a very broad generality it can be said that the ordinary day to day administration of the cross-vesting scheme in its operation on a given proceeding is placed in the hands of whatever court it may be in which they are commenced. Ordinarily it could be expected that a single judge of that court would decide whether it is in the interests of justice to transfer the proceedings to one of the other nine courts. If such an order be made then in practical terms it effects what might be likened to an administrative redirection of the proceedings to the other court selected. In the hands of that other court the proceedings will continue to attract the Austrliawide jurisdiction and law which would have been exercisable and applicable by the court from which they were transferred.
>
> Viewed from this standpoint it can be seen to be highly desirable that the judicial administration of the day to day working of the cross-vesting scheme is not encumbered by an encrustation of judge-made pronouncement of principles to be applied when considering making a transfer order. It calls for what I might describe as a "nuts and bolts" management decision as to which court, in the pursuit of the interest of justice, is the more appropriate court to hear and determine the substantive dispute.[171]

Rogers A-JA wrote the majority decision and addressed the issue under what circumstances a court should decide to transfer proceedings to another court in Australia. He noted that all state supreme courts had been given the jurisdiction of the other state supreme courts and commented:

> As well as its beneficial effects, this investment of jurisdiction entailed the danger of forum shopping. If the Supreme Court of State X had the jurisdiction of the Supreme Court of State Y, why not institute proceedings there in pursuit of some real or imaginary advantage, notwithstanding that the dispute as such bore no relation to State X? It was in order to prevent this happening as well as to enable a transfer to another Supreme Court in cases where the requirements of the legislation were satisfied that s 5(2) was enacted...
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> • • • • •
>
> In order to enable the courts to act in the spirit of the legislation, the power, indeed in appropriate cases, the duty to transfer may be exercised by the court of its own motion (s 5(7)). This provision enables the court to resist forum shopping where all parties are engaged in the exercise and no party wishes to move for a transfer to the more appropriate tribunal...
>
> It is important that full effect be given by the courts to the imaginative and detailed code for ensuring that throughout Australia disputes are dealt with by the one court and that be the court <u>most appropriate</u> for the particular dispute. Consistently with

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171 *Bankinvest, ibid.* at 713-4 NSWLR, 153-4 FLR, *per* Street CJ.

> the preservation of dual State and Federal court systems and with State courts dispensing justice within the State boundaries, there has been a legislative recognition of the need to transcend State boundaries in appropriate cases. No longer is it appropriate to regard the court of another State as a "foreign" court.
>
> One consequence is that the principles of forum non conveniens, applied in circumstances where the competition is between an Australian and a non-Australian court, have no role to play in the resolution of applications made under the legislation or in its interpretation. [Emphasis added.][172]

Even though he rejects the *forum non conveniens* test, Rogers A-JA does find guidance in the House of Lords' decision in *Spiliada Maritime Corporation v. Cansulex Ltd*[173] where Lord Goff provides an indication of what Roger A-JA calls the "natural forum":

> ...being 'that with which the action had the most real and substantial connection'. [Emphasis added.][174]

According to Street CJ, "The reasons prepared by Rogers A-JA will henceforth be definitive of the law and practice on this topic in this State."[175]

In discussing the effect of this judgment and an early application of it in *Amor v. MacPak Pty Ltd*,[176] Wallace notes:

> Thus, the most appropriate forum is the forum with which the action has the most real and substantial connection. [Emphasis added.][177]

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172 *Ibid.* at 725-6 NSWLR, 165-6 FLR, *per* Rogers A-JA.

173 [1987] AC 460, [1986] 2 All ER 843 (HL); hereafter referred to as *Spiliada*. It is worth noting, though, that in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988), 165 CLR 197, 79 ALR 9, 62 ALJR 389 (HC) (hereafter referred to as *Oceanic Sun Line*), the majority of the High Court did not accept this as being determinative of the law in Australia. For a brief discussion of these cases see *Amchem, supra* note 18, *per* Sopinka J.

174 *Spiliada, ibid.* at 478 *per* Lord Goff, quoted by Rogers A-JA in *Bankinvest, supra* note 170 at 728 NSWLR, 168 FLR.

175 *Bankinvest, ibid.* at 715 NSWLR, 155 FLR, *per* Street CJ.

176 (1989), 95 FLR 10 (NSWSC).

177 A.E. Wallace, "Conflict of Laws" in R. Baxt and G. Kewley, eds, *An Annual Survey of Australian Law 1989* (Sydney: Law Book Company, 1990) 190 at 190.

This view has not been universally adopted in Australia, notably Ipp J disagreed with it in *Mullins Investments Pty Ltd v Elliott Exploration*.[178] At the time of writing, the High Court of Australia has not had an opportunity to express its views on the subject, although in view of the provisions of section 13 of the *Act*, and the interpretation already placed on it,[179] it is possible that the High Court's views will only be known if, as and when it is faced with a matter within its original jurisdiction.

Another aspect of the transfer procedure that was addressed in *Bankinvest* is the question what burden of persuasion the party moving for a transfer bears. Put another way, do plaintiffs have a right to have a matter heard in the court of their choice? Rogers A-JA firmly rejected such a notion:

> Mr Nicholas [the plaintiff's lawyer] submitted that consideration of the question, whether an order for transfer should be made, should follow two steps. First, there is a prima facie presumption that the court, the jurisdiction of which was properly invoked, should exercise it. The litigant invoking the jurisdiction had an entitlement and the court had a corresponding obligation to exercise jurisdiction. Secondly, there is an onus resting on the person moving to transfer to show some positive basis on which it could be contended that the entitlement of the other party to the exercise of jurisdiction should be displaced.

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[178] (11 January 1990), (WASC) [unreported]; hereafter referred to as *Mullins*. *Mullins* was followed in *Baffsky v. John Fairfax & Sons Ltd* (1990), 97 ACTR 1 (SC). See also A.E. Wallace, "Conflict of Laws" in R. Baxt and G. Kewley, eds, *An Annual Survey of Australian Law 1990* (Sydney: Law Book Company, 1991) 323 at 325-6. The basis of the disagreement seems to be confusion regarding the use of the notion of *forum non conveniens* in Australia, particularly given the interpretation the High Court gave in *Oceanic Sun Lines*, *supra* note 173, to the House of Lord's decision in *Spiliada*, *supra* note 173.

For a discussion of the High Court's judgment in *Oceanic Sun*, see M. Pryles, "Judicial Darkness on the Oceanic Sun" (1988) 62 Aust. LJ 774. The High Court has "clarified" its views in *Oceanic Sun*; see *Voth v. Manildra Flour Mills Pty Ltd* (1990), 171 CLR 538, where a majority (four judges) of the Court held that the "clearly inappropriate forum" test articulated by Deane J in *Oceanic Sun*, and not the "clearly more appropriate" test in *Spiliada*, was applicable in Australia. Unfortunately, one judge agreed that this was the test to apply but differed in the results of its application and another agreed in the result but differed in the appropriate test. For a discussion of this judgment see, A.E. Wallace, "Conflict of Laws" in R. Baxt and A.P. Moore, eds, *An Annual Survey of Australian Law 1991* (Adelaide: Adelaide Law Review Association, 1992) 65. See also, *Amchem*, *supra* note 18 at 19, *per* Sopinka J.

[179] See *supra* note 161.

In my view, this approach should be firmly rejected. If accepted, it would entrench the concept of one Australian jurisdiction being "foreign" to another. No allowance would be made for the fact that the Australian States are a federation. Most relevantly, the purpose of the legislation would be lost. The cross-vesting legislation does not call for this approach. Indeed, it positively rejects it. The only lodestar that a judge may steer by is, what do the interests of justice dictate should be done? It is inapt to speak in terms of onus. Bearing in mind that the Court may make an order of its own motion the language of onus being discharged is inapplicable. [Emphasis added.][180]

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180 *BankInvest*, *supra* note 170 at 726-7 NSWLR, 168 FLR. See also *Seymour-Smith*, *supra* note 168 at 174, where Rogers CJ comments:

> With respect, I do not accept there is any weight to be ascribed to the fact that the court may be overriding the plaintiffs' choice of venue. The court is, in my view, required to carry out a balancing exercise to determine the appropriate court.

III. *Morguard*: A Suggested Response

Part I of this discussion reviewed the origins of Canadian jurisdiction-taking and judgment-enforcing rules, and considered how *Morguard* has brought about a change in the way the common law courts, and arguably Québec courts, will be dealing with these issues in Canada. It ended with a number of questions that the Supreme Court's decision left unanswered and suggested that guidance in formulating appropriate responses to these questions might be found in the experience of three "federal" systems: the United States, the European Community and Australia. Part II looked at how these three federal systems have dealt with the issues of jurisdiction-taking and judgment-enforcing. This third Part will compare and contrast each of these other "federal" systems in an attempt to ascertain whether their experiences actually contain any useful lessons for Canada as it embarks upon the task of applying the *Morguard* principles, and if so what they may be.

A. The United States

The United States has over two hundred years of experience as a single nation. From the earliest days, its courts have been required to recognize and enforce each others' decisions. Over the years, the United States Supreme Court has concluded that it is only those which meet the constitutional requirements of due process that are actually entitled to full faith and credit. These requirements have been identified as being "minimum contacts" between the forum state and the defendant.

As both requirements—due process and full faith and credit—are part of the constitutional law of the United States, they apply to all levels of courts, both state and federal. The Due Process Clause imposes a minimum requirement: there must at least be minimum contacts with the forum state, but there is no requirement that a state avail itself of jurisdiction based on this level of contact. Indeed, there is no requirement that a state claim any long-arm jurisdiction. Consequently, while a defendant can successfully resist jurisdiction on the grounds that there are no minimum contacts, a plaintiff cannot require a court to hear a matter on the grounds that there are minimum contacts, unless the state claims such a jurisdiction. Even when a state does claim some degree of long-arm jurisdiction, a defendant may still make a *forum non conveniens* argument, the result of which could be that the state court declines to exercise the jurisdiction it possesses.

The key feature of the American system is that it is coordinated and symmetrical: a plaintiff's judgment is only entitled to full faith and credit when the defendant received due process, and the Due Process Clause has been interpreted the way it has been, because the Full Faith and Credit Clause is part of the Constitution. In addition, as these are constitutional issues, the United States Supreme Court has jurisdiction to exercise judicial review over the decisions of the various state courts to ensure that they and the various state legislatures respect the limits imposed by the Constitution. In the absence of this constitutional element, the Supreme Court would have limited involvement in what would be essentially a matter internal to the individual states.

After flirting with a return to almost traditional common law notions of limitations on court jurisdiction in *Pennoyer*,[181] which were relatively favourable to defendants, the Supreme Court's test of minimum contacts now clearly favours plaintiffs. The test is framed in terms of the contacts a defendant has with the forum state (rather than in terms of the contacts the plaintiff has) so that defendants are protected from being dragged before a totally unrelated court. Because the contacts required between a state and a defendant are minimum ones, though, it does not take much contact on the part of defendants to make themselves subject to the jurisdiction of a state, and plaintiffs are able to engage in a good deal of forum shopping.[182] However, a defendant who has no contacts

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181 *Supra* note 83.

182 See *Amchem*, *supra* note 18. One hundred and ninety-four Canadian plaintiffs commenced an action against a number of companies involved in the manufacture and marketing of asbestos products in Texas. Although all of the defendants had some contact with Texas, none were

with the forum state can safely ignore its process and resist enforcement of any resulting judgment that failed to meet the requirements of the due process test.

B. Europe

Although the European Community is not a federation in the traditional sense of the word, it is a group of different law districts which have come together to form, to the extent possible, a single marketplace. It is particularly noteworthy that with the goal of forming the marketplace in mind, the drafters of the *EEC Treaty*[183] recognized that a necessary part of a single marketplace was a simplified system of recognizing and enforcing judgments originating in each of the members of the marketplace.

Although perhaps going beyond initial expectations, the *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*[184] meets the task set out in Article 220 of the *EEC Treaty*: when a judgment has been issued in accordance with the jurisdiction-taking provisions of the *Convention*, it is entitled to recognition throughout the community. Without using the term, the *Convention* provides that such judgments are entitled to full faith and credit.

The drafters of the *Convention*, probably in large part because of their civil-law backgrounds, opted for a defendant-centred agreement: the basic jurisdictional test is based on the relationship between a defendant and a Member State (*i.e.* a separate law district). In those cases where it is possible to sue defendants elsewhere than in the country of their domicile, the additional jurisdictions tend to favour individuals over corporations. Given the interplay amongst the basic, special, exclusive and

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incorporated there.

[183] *Supra* note 119.

[184] *Supra* note 120.

other jurisdictions granted by the *Convention*, there is still the possibility of a certain amount of forum shopping, but the number of courts before which a defendant can be sued, at least from a common-law point of view, is limited and, in every case, there is a rational policy reason why a matter can be heard by a particular court.

The *Convention's* provisions contrast with the traditional common-law approach, which was to the advantage of plaintiffs who could either remain in their jurisdictions until unwitting defendants happened to pass through, or could invoke the *ex juris* provisions of the rules of court and attempt to force unwilling defendants to appear before their courts. Whether, from a policy viewpoint, the interests of defendants or plaintiffs should be preferred, or whether the interests of individual consumers and insured persons should be preferred over corporations, is somewhat beside the point: if one wants to develop a rational approach to the matter of jurisdiction, a choice has to be made; in Europe, for better or worse, the choice has been made.

In many ways, the situation under the *Convention* is very similar to the situation in the United States. The *Convention* acts as a limit on exorbitant jurisdiction otherwise claimed by the courts of the Member States, in much the same way that the Due Process Clause limits the long-arm claims of the American states. Judgments that meet the terms of the *Convention*, like those that meet the terms of the Due Process Clause, are entitled to recognition and enforcement—or full faith and credit—throughout the territory covered by the *Convention*, just as American judgments are entitled to enforcement throughout the United States. In addition, the European Court of Justice functions in much the same way as the United States Supreme Court: it is not a court of general appeal, but it does have jurisdiction to ensure that the *Convention* is correctly interpreted and applied by the Member States, in much the same way as the United States Supreme Court ensures that individual states respect the provisions of the United States Constitution.

Perhaps the most significant difference, other than the fact that the *Convention* is defendant-centred while the American system is plaintiff-centred, is that the *Convention* operates to confer jurisdiction on courts which otherwise would not necessarily exercise such jurisdiction.[185] In other words, it is arguable that a plaintiff could invoke the provisions of the *Convention* to insist that the courts of a Member State exercise jurisdiction over a defendant domiciled there, even if the courts would not normally take jurisdiction over such a defendant.

C. Australia

From its beginnings at the turn of the century, Australia took a different view from Canada of the relationships among the different parts of the federations. Even though the individual states were held to be separate and "foreign" law districts, the commonwealth government mitigated the effect of this by providing for service of process, recognition of judgments and judicial notice of legislation throughout the country.

It is quite clear from even the limited review of the Australian system in Part II that the *Service and Execution of Process Act*[186] and related legislation is plaintiff-centred, as is traditionally the case in common law jurisdictions. Plaintiffs could choose the court before which to commence an action, while defendants who appeared to defend the action were required to provide an address for additional service that was within five miles of the court.[187] Assuming the defendant was served somewhere in Australia, the plaintiff could proceed in the defendant's absence and any resulting

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[185] For example, as noted in Appendix 2, below at 114, the *Convention* has been incorporated into the law of the United Kingdom by means of the *Civil Jurisdiction and Judgments Act 1982* (UK), 1982, c. 27.

[186] *Service and Execution of Process Act 1901*, No. 11 of 1901 (Cth).

[187] While such a provision may have made sense in 1901, it is hard to justify in 1993, and one might be forgiven for cynically suggesting that it has done more to protect commercial property values within a five-mile radius of the court house than it has to ensure justice to defendants.

judgment (which presumably would have been favourable to the plaintiff) could then be registered and enforced in the defendant's home state—or any other state where the defendant might have been or might have owned assets.

Although the Australian system did not have any institutional protection for the interests of defendants along the lines of the American Due Process Clause, from a very early stage in its development, there was a concern in Australia that matters should be heard before the most appropriate court and that, as far as possible, there should not be a multiplicity of proceedings in any matter.[188] Unfortunately, this may well have had the unfortunate and unintended effect that some matters bounced backwards and forwards between state and federal courts somewhat unnecessarily until they landed before the most appropriate court.

As noted in Appendix 1,[189] the Australian High Court has original diversity jurisdiction and it sits as the final court of appeal for Australia, on all matters. Consequently, like the situation in Canada but unlike the situation in the United States, a single court has always been available to consider the merits of all aspects of an Australian case, not just whether procedure had met constitutional norms.[190] In circumstances such as these, it is perhaps less necessary to have constitutionally-enshrined principles protecting defendants from being brought from one end of the country to the other as, ultimately, the same court will supervise the result.

Hence, prior to 1987, plaintiffs in Australia were in a considerably more advantageous situation than their Canadian and English counterparts: not only were they able to engage in as much forum

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188 See discussion of the *Judiciary Act 1903*, No. 6 of 1903, in Appendix 1, below at 107.

189 Below at 107.

190 Prior to 1986, the Privy Council exercised this authority on appeal from the High Court. See below at 108.

shopping—because the *Service and Execution of Process Act* jurisdiction-taking rules were very similar to Canadian and English rules of court governing service *ex juris*—but they had the added advantage that a decision issued under this scheme would be enforceable anywhere in Australia, even if the judgment was a default judgment because the defendant did not appear. This is very close, if not identical, to the situation which now exists in Canada under the *Morguard* full-faith-and-credit regime.

Regardless of its merits, that the situation in Australia was felt not to be ideal can be seen from the adoption of the cross-vesting scheme. This is a radical departure from traditional notions of jurisdiction and, as plaintiffs may now institute proceedings in <u>any</u> superior court in Australia, on its face the scheme encourages forum shopping. Although this broadens the options for plaintiffs, defendants enjoy a two-fold protection if the plaintiff chooses an inappropriate court: either the original court will exercise the jurisdiction and apply the law of the appropriate court (*i.e.* it will exercise cross-vested jurisdiction under s. 4), or it will transfer the proceedings to the appropriate court (under s. 5), thereby nullifying any benefit the plaintiff may have hoped to achieve by engaging in forum shopping.[191] In the case of a transfer, which may be ordered on the original court's own initiative, there is no appeal and the matter will proceed in the transferee court as if it had been commenced there in the first place.

In the result, this represents not only a radical departure with regard to the mechanics of jurisdiction, it also represents a quite radical notion for common law courts: matters should only be decided by the <u>most</u> appropriate court. As noted, there is some disagreement within Australia as to when courts should order matters transferred to other courts, although the weight of judicial opinion would appear to be to the effect that proceedings will be transferred to the court having the "most real and

[191] While defendants might prefer that a law suit simply go away, they cannot really complain if it either proceeds before the <u>most</u> appropriate court, or before a court that acts <u>as if it were</u> the most appropriate court.

substantial connection" with the matter, and that this is a decision that will be taken with little or no regard to the preference of the parties.[192]

In many ways, while the American and European approaches respect the needs and realities of a federation, inasmuch as they both make provision for a free circulation of litigation and judgments within a single set of defined rules operating throughout the federation, the Australian approach perhaps best captures the notion of a federation. Like its American and European counterparts, the Australian system provides for a single, effective system of jurisdiction-taking and judgment-enforcing throughout the federation. In addition, though, the Australian system <u>requires</u> its courts to consider whether there is another court somewhere in Australia that is better placed to decide a matter having extra-territorial contacts. In the event that the answer to this consideration is positive, the court has two options: refer the matter to the other court or, in appropriate circumstances, act in exactly the same way as the other court would by exercising cross-vested jurisdiction.

Unfortunately, the cross-vesting scheme does not apply as broadly as the *Service and Execution of Process Act* scheme. While the latter covered process issued out of all courts of record, the former applies principally to the superior courts. Although provision is made for removing matters from an inferior court to a superior court, and then dealing with them under the cross-vesting and transfer provisions, only the superior courts are able to make transfer decisions or exercise cross-vested jurisdiction. As a result, proceedings before courts and tribunals other than the superior courts (for example, small claims courts) are not really subject to the cross-vesting scheme. Since the scheme was not primarily designed to address civil litigation in tort or contract, its drafters would appear not to have turned their minds to the type of matters that usually find their way into small claims courts: breaches of consumer contracts and collection of small debts, for example.

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192 See *Bankinvest*, *supra* note 170.

It is still too early to know how the cross-vesting scheme will affect the conduct of litigation in Australia. If early indications are anything to go by, though, the outlook would appear to be promising: with some exceptions, the courts seem to be seeking to ensure that matters are conducted in the appropriate jurisdiction and are resolutely ensuring that plaintiffs do not engage in forum shopping.

D. Lessons for Canada

Do the American, European and Australian experiences offer answers to the questions posed in Part I and what lessons can Canada learn from them? The answer is complex: Canada cannot look to any of these "federations" to answer the specific questions raised by *Morguard*. They do, though, offer a number of lessons for Canada as it grapples with the twin issues of jurisdiction-taking and judgment-enforcing. These lessons arise primarily out of the similarities that the other "federations" share in their approaches to these issues.

The first lesson is that an efficient marketplace requires a coordinated and symmetrical system of jurisdiction-taking and judgment-enforcing. Each of the other three "federations" has such a system: judgments meeting the jurisdiction-taking test are enforced; judgments not meeting the test are not enforced. This lesson has already been endorsed by the Supreme Court. Although it has not specifically adopted this wording, its decision in *Morguard* could be expressed as follows:

> A judgment issued by a Canadian court which had a real and substantial connection with the action is entitled to full faith and credit throughout Canada.

This creates a coordinated, symmetrical system: judgments which are issued by courts having the requisite real and substantial connection will be enforced, judgments issued by courts which do not have that connection will not be enforced.

A second lesson is that there are no magic formulae for jurisdiction-taking. They can be plaintiff-centred as in America and Australia under its traditional rules, or defendant-centred as in Europe, and they can be general, as in America and Australia, or very specific as in Europe. However, the terms of the system must be made explicit. As there is no constitutional or legislated text to which reference can be made in Canada, the only source for the appropriate test is a judgment of the Supreme Court. Unfortunately, the Court was not as explicit as it might have been in *Morguard*. While all of the elements are in its judgment, they are not laid out quite as completely as they might be. To the extent that the formulation above is an accurate reflection of the Court's views, the lesson from the United States is that defining the test is relatively easy, applying it is less so: concepts such as due process (and, presumably, real and substantial connection) require continuing litigation to ascertain their changing meaning over time.

A third lesson is that there should be a single body within the "federation" with the power to ensure adherence to the enunciated criteria. In this regard, it would appear to be sufficient that this body have authority to supervise such adherence, as in the case of the United States and Europe, although it is also quite possible that the body have general appellate jurisdiction, as in the case of Australia. In Canada, the Supreme Court has general appellate jurisdiction and it has signalled its willingness to exercise its supervisory jurisdiction over provincial courts' jurisdiction-taking and judgment-enforcing activities.

Perhaps the most important lesson that these three systems offer, is the emphasis that each places on the balance between the twin aspects of jurisdiction-taking and judgment-enforcing. There are basically no differences in their approach to judgment-enforcing: for all intents and purposes it is automatic in each system. All three place most of the emphasis on the jurisdiction-taking aspect of their schemes, although there are significant differences in the way in which the three define their criteria.

The United States represents the traditional common law approach of determining, on a case-by-case basis, how the law should develop, thereby arriving at general principles, the application of which in most cases is reasonably predictable, but which require relatively frequent review by the Supreme Court to rein in some of the excesses of lower courts and state legislators. The European approach represents a clear policy choice by governments, which have tried to define as exhaustively as possible which court will have jurisdiction under a particular set of circumstances. This is not surprising, given the civil law tradition out of which it grew. The Australian approach, on the other hand, is a new one that aims at a more efficient allocation of work amongst courts by removing sometimes arbitrary and artificial rules, and replacing them with a requirement that the courts do what makes most sense under the circumstances, with no right of appeal on purely procedural matters.

This lesson has not been lost on the Supreme Court of Canada. It has decided that there must be a "real and substantial connection" between a province and litigation and where there is such a connection, the resulting decision will be enforceable in other provinces. Unfortunately it has given little guidance how this test is to be interpreted. Since the Court was well aware of the American jurisprudence when it rendered its decision in *Morguard*, one can assume that if it had wanted to adopt a test along the lines of the American one, it would have used similar terminology to that employed by the Supreme Court of the United States; that it did not choose to use the "minimum contacts" terminology is an indication that it wanted to adopt a different test. The "real and substantial connection" test is not only different, but by a simple comparison of its terminology, it would appear to be a more stringent test than the one applied in the United States. In addition, while the American test clearly looks at the contacts between the defendant and the forum state, the Supreme Court of Canada did not make it clear that the real and substantial connection had to exist between the forum state and the defendant.[193] Once again, one can only assume that this was a deliberate choice on the part of the Court.

Consequently, even though American decisions regarding jurisdiction-taking initially offer the closest parallel to the Canadian situation, they will be of limited use, if any, in the Canadian context. This is, perhaps, just as well, for American traditions have been far from consistent regarding what actually constitutes minimum contacts between a state and a defendant. Just as in the current Canadian context, the American test leaves almost as many questions unanswered as it answers[194] even though the United States has had several decades to gain a head start on Canada.

This indicates what is perhaps the greatest drawback to *Morguard*: a substantial amount of litigation will be required to ascertain the meaning of the Supreme Court's test of "real and substantial connection". Guidance can, of course, be obtained from the many cases which review the notion of real and substantial connection in different contexts.[195] However, as the Court did not indicate that any of these cases provided a correct definition of the test, one can assume that it did not want to commit itself too early on to a definitive formulation, if such a formulation can actually be defined for a concept as subtle as "real and substantial connection".

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193 Indeed, as has been noted by Blom, *supra* note 16 at 741, and Coakeley, Finkle and Barrington, *supra* note 57 at 239, the Court has not indicated whether the connections are to be between a province and the plaintiff, the defendant, the subject matter of the litigation, or some other factor.

194 See Hay, *supra* note 107 at 32; Blom, *supra* note 16 at 751; V. Black, "Uniform Enforcement of Judgments Act: Uniform Law Conference of Canada (1991); *Enforcement of Canadian Judgments Act*, S.B.C. 1992, c. 37" (1992) 71 Can. Bar Rev. 721 at 725.

195 See, for example, *Indyka v. Indyka*, [1969] 1 AC 33, [1967] 2 All ER 689 (HL); *The Abidin Daver*, [1984] 1 AC 398, [1984] 1 All ER 470, [1984] 2 WLR 196 (HL), and the many cases in Canada and elsewhere (particularly England and Australia) that discuss them. A QuickLaw search indicates just over 150 cases in which the term "real and substantial connection" has been used in Canadian judgments.

The net result of this is that the courts are going to be occupied for some time with plaintiffs and defendants jockeying for position around the concept of "real and substantial connection". Indeed, as had been predicted,[196] the jockeying has begun. Of the cases decided since December 1990, judgment debtors have attempted, largely without success, to argue that *Morguard* does not cover the situations in which they find themselves.[197] However, the New Brunswick Court of Queen's Bench has decided that *Morguard* does not apply in New Brunswick.[198]

One of the clear results of *Morguard* is that provinces are going to have to review their rules of court to ensure that their service *ex juris* rules meet the Supreme Court's test of "real and substantial

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[196] See, Finkle and Coakeley, *supra* note 23 at 353-4; Blom, *supra* note 16 at 750.

[197] See, for example, *Niemetz* v. *Niemetz*, [1992] BCJ No. 2065 (SC) (QL); *Mady Leaseholds Ltd.* v. *Sooter Photo Inc.*, [1992] MJ No. 137 (QB) (QL); *TDI Hospitality Management Consultants Inc.* v. *Browne*, [1992] MJ No. 623 (QB) (QL); *87313 Canada Inc.* v. *Neeshat Oriental Carpet Ltd*, [1992] OJ No. 1907 (Gen. Div) (QL); *Acme Video Inc.* v. *Hedges* (1992), 10 OR (3d) 503 (Gen. Div.); *Aitchison* v. *Fiducie Desjardins Inc.*, [1992] OJ No. 2448 (Gen. Div.) (QL); *Amopharm Inc.* v. *Harris Computer Corp.* (1992), 10 OR (3d) 27, 93 DLR (4th) 524 (Gen. Div.); *Servotech Ltée* v. *Hayward Burry Ltd*, [1992] NJ No. 60 (SC) (QL).

The courts have also considered whether *Morguard* affects their jurisdiction-taking procedures. See *Northland Properties Ltd* v. *Equitable Trust Co.*, [1991] BCJ No. 3273 (CA) (QL), and *Standard Trust Co.* v. *Ginnell*, [1992] SJ No. 498 (QB) (QL), which held that it does; *Ell* v. *Con Pro Industries Ltd*, [1992] BCJ No. 513 (CA) (QL), which held that it does not.

[198] *844903 Ontario Ltd* v. *Pluijm*, [1992] NBJ No. 614 (QB) (QL), and *Caisse d'épargne et de crédit Mutuellistes* v. *Fortin*, [1992] NBJ No. 613 (QB) (QL). Deschênes J, the judge in both cases, held that the New Brunswick *Foreign Judgments Act*, RSNB 1973, c. F-19, had codified and fixed the common law relating to judgment-enforcing. On the other hand, the Saskatchewan Court of Queen's Bench considered the Saskatchewan *Foreign Judgments Act*, RSS 1978, c. F-18, which is to the same effect as the New Brunswick legislation, and is also based on the Uniform Law Conference's model *Uniform Foreign Judgments Act*, Uniform Law Conference of Canada, *Consolidation of Uniform Acts*, No. 18, and came to the opposite conclusion in *Cardinal Couriers Ltd* v. *Noyes*, [1992] SJ No. 395 (QB) (QL), *per* Dieschneider J. Deschênes J did not address the question whether *Morguard* created a constitutional requirement, as the appropriate notices to the various Attorneys General required by the court's rules had not been sent. Deschênes J's views are not necessarily shared by all his fellow judges in New Brunswick, see *Beaver Diversified Corp.* v. *Walker*, [1992] NBJ No. 527 (QB) (QL).

connection".[199] They are also going to have to review their judgment-enforcing legislation[200] to ensure that it meets the terms of *Morguard's* requirement for full faith and credit, whatever that may ultimately prove to be.

This process has already started to a certain extent: In 1991, in response to *Morguard*, the Uniform Law Conference of Canada adopted the Uniform Enforcement of Canadian Judgments Act.[201] The UECJA only addresses the judgment-enforcing aspect of *Morguard*. It provides for relatively straightforward and automatic enforcement in the enacting provinces of judgments issued by the courts of the other provinces. In other words it provides for full faith and credit for judgments of Canadian courts.

In order to facilitate this full faith and credit, the UECJA specifically prevents judgment-debtors (*e.g.* the defendant before the issuing court) from arguing a rule of private international law as a defence to an application for enforcement.[202] For example, defendants cannot resist enforcement of a

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199 While *Morguard* only applies to Canadian judgments, to the extent that it is based on constitutional principles—especially the notion of the limitation of a province's legislative power under the *Constitution Act 1867*—it is arguable that the courts of a Canadian province not only do not have jurisdiction over the residents of other Canadian provinces unless the "real and substantial connection" test is met, they do not have jurisdiction over anyone unless the test is met. On the other side of the coin, if *Morguard* establishes a constitutional limit on a court's jurisdiction, it is arguable that a judgment issued by a Canadian court without a real and substantial connection would not be entitled to enforcement anywhere in the world as it would have been rendered *ex hypothesi* by a court which had no valid jurisdiction.

200 See, *supra* notes 28 and 29.

201 Uniform Law Conference of Canada, *Proceedings of the Seventy-third Annual Meeting* (1991), Appendix J, at 425-430. Hereafter referred to as UECJA. To date, the only province to have adopted the Uniform Act is British Columbia: *Enforcement of Canadian Judgments Act*, SBC 1992, c. 37 (not yet in force).

202 See s. 6(2) which reads:

> **6.** (2) The [superior court of unlimited trial jurisdiction in the enacting province or territory] shall not make an order staying or limiting the enforcement of a registered Canadian judgment on the grounds that

default judgment on the grounds that the issuing court had no valid *in personam* jurisdiction, as it had relied on service *ex juris*. This would appear to represent a policy choice that arguments against jurisdiction are better made before the court that is about to claim jurisdiction than before the court that is requested to enforce the resulting judgment.

As Black notes,[203] to the extent that *Morguard's* requirement of real and substantial connection establishes a principle of private international law, the UECJA would have the effect of requiring defendants to appear before Canadian courts which have no jurisdiction over them (under the *Morguard* criteria) in order to ensure that a default judgment is not issued. For if one is, its enforcement throughout Canada would be unstoppable.

If *Morguard* has established a constitutional requirement, Black's concerns can be answered in two ways. First, the rule in *Morguard* will not be a principle of private international law, and so subsection 6(2) will not apply to it. Second, and more convincingly, a judgment issued by a court that did not have the requisite constitutional jurisdiction will be a nullity that could not be enforced in any event. Unfortunately, just as with the Court's jurisdiction-taking test of real and substantial

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> (a) the judge, court or tribunal that made the judgment lacked jurisdiction over the subject matter of the proceeding that led to the judgment or over the judgment debtor under
>
> > (i) principles of private international law, or
> >
> > (ii) the domestic law of the province or territory where the judgment was made,
>
> (b) the [superior court of unlimited trial jurisdiction in the enacting province or territory] would have come to a different decision on a finding of fact or law or on an exercise of discretion from the decision of the judge, court or tribunal that made the judgment, or
>
> (c) a defect existed in the process or proceeding leading to the judgment.

[203] Black, *supra* note 194 at 724ff.

connection, considerable litigation will probably be required before the definitive answer to this question is provided by the Supreme Court.

Now that the Supreme Court has taken a giant step forward, it is unfortunate that its initiative should be attended by such a degree of uncertainty. That subsequent litigation to establish the limits of the real and substantial connection test would be required was an inconvenient, but foregone conclusion. The UECJA does not really help matters. Even if all the common law provinces adopt it, as Black thinks is likely,[204] experience elsewhere teaches that while providing for easy judgment-enforcing is important, it is not the real issue. The most crucial aspect of a coordinated and symmetrical system is deciding which courts have jurisdiction over defendants and actions so that they may issue the judgments that will be enforced. It is particularly inauspicious that British Columbia, the province that started the trend culminating with the decision in *Morguard*, should be the first to take a giant step backwards, under the guise of an improvement in the law in the spirit of *Morguard*. The UECJA is not an improvement because it will increase the need for complex litigation to ascertain the particular application of subsection 6(2) and its relation to *Morguard*.

The vast majority of individual plaintiffs and defendants will be unwilling or unable to bear the cost of litigating these issues and it is open to question whether, no matter how deep their pockets, they should have to pay the substantial sums that will be required to arrive at even preliminary resolutions to these issues. It is also questionable whether the courts should devote valuable time and energy to questions that could be better resolved through legislative action. Provinces are going to experience a degree of difficulty deciding which of their current jurisdiction-taking provisions require amendment. Given this, and given the highly uncertain state of the law for the foreseeable future, their efforts would be better spent if they took this opportunity to effect a wholesale revision of

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204 *Ibid.* at 723.

Canadian rules for jurisdiction-taking, rather than tinker with the current rules and adopt a Uniform Act that does not address the most important questions of jurisdiction-taking.

In this regard, the Australian approach is particularly instructive, and potentially applicable.[205] The obvious interest of Australia for Canada is their shared common law background and federal nature. While the constitutional situation of the commonwealth and the states is not identical to that of the Canadian federal government and the provinces, there are important similarities and both nations now have regimes that require enforcement of valid state/provincial judgments throughout the country.

In many respects, Canada is now in a very similar situation to that faced by Australia from the early 1900s: provinces are required to give full faith and credit to judgments from the other provinces and process issued out of Canadian courts now, effectively, runs throughout the country. Consequently, Canada, like Australia, faces a challenge defining what counts as appropriate jurisdiction-taking criteria and procedure. After some eighty years of a regime like Canada's current one,[206] Australia resolved these issues by crafting a new system—the cross-vesting scheme—to improve the jurisdiction-taking aspects of their system.

The scheme combines jurisdiction-taking and judgment-enforcing rules and provides for the transfer of matters from one court to another, and the exercise by one court of another court's jurisdiction. Five basic principles can be discerned from the scheme:

1 an action can be commenced before any court;

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205 See Blom, *supra* note 16 at 753.

206 The big difference between Canada's current regime and Australia's previous one is that Canada's jurisdiction-taking rules are arguably somewhat more restrained that Australia's were.

2 the first court will consider whether it is the most appropriate court to hear the matter and, if so, it will proceed to render a judgment;

3 if the first court determines it is not the most appropriate court, it will either transfer the matter to the most appropriate court, or exercise that court's jurisdiction and render a judgment;

4 the most appropriate court will accept a matter transferred to it and render a judgment;

5 regardless which court renders a judgment, it is enforceable throughout Australia.

Could a similar scheme work in Canada? The simple answer is, "Yes". While there are certainly important issues which would have to be considered before such a scheme could be adopted in Canada, there are clear advantages that make its implementation worthy of serious consideration.

Although, on the face of it, such a scheme would offer increased opportunities to plaintiffs to engage in forum shopping, the net result is that such efforts would be for nought, as matters will be resolved by the most appropriate court (*i.e.* the one with the most real and substantial connection with the matter and the parties, regardless of the plaintiff's original choice) and resulting judgments will be automatically enforceable. This achieves the Supreme Court's goals of jurisdiction-taking based on real and substantial connection and judgment-enforcing based on full faith and credit.

Plaintiffs benefit because they are assured that they can commence a suit against defendants within the country, and they do not run the risk of obtaining an unenforceable judgment. Defendants benefit because while they may have to appear before a court on the other side of the country, they are able to have the matter transferred to the more appropriate court, if there is one.[207] The

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[207] By requiring courts to transfer matters to the most appropriate court, the concerns raised by the UECJA would be minimised: it is not unreasonable to require a defendant—on pain of an enforceable default judgment—to appear before the most appropriate court. It is unreasonable to require a defendant to appear before an inappropriate court, as the UECJA would appear to do.

courts benefit because they are better able to administer the matters before them and they are not called upon to issue judgments that will be unenforceable. While the resulting system does not actually make the definition of "real and substantial connection" any clearer, it may obviate the need to arrive at an all-encompassing definition, and thereby reduce the possibility of complex litigation. The resulting system makes the outcome of litigation more predictable for all, thereby enabling parties to make much more informed decisions whether to commence and defend litigation. Indeed, plaintiffs and defendants will always be certain that the most appropriate court will hear a case, and defendants will know that failure to appear before such a court will result in an enforceable default judgment. Consequently, such a system can only reduce overall costs and enhance market integrity.

What problems would such a scheme present in Canada? This would depend on whether a Canadian system adopted the twin aspects of cross-vesting and transfer of jurisdiction. There are practical issues relating to both and there is the possibility that a cross-vesting of jurisdiction might raise constitutional issues.

A basic concern with a transfer scheme would relate to the issue of a court declining to exercise its jurisdiction. This is easily answered: common law courts already have the power not to exercise their jurisdiction in appropriate cases under the doctrine of *forum non conveniens* and other techniques; Québec courts will soon have analogous powers. Experience to date in Australia indicates that while not identical, the factors used to determine whether to transfer a matter to another state are very similar to the factors used to decide a *forum non conveniens* plea.[208] Hence the juridical basis for transferring matters by refusing to exercise jurisdiction already exists in Canada, although there is no corresponding requirement on other courts to accept transferred matters.

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[208] See *Bankinvest*, *supra* note 170.

Concerns could be expressed about courts deciding whether to transfer matters on inappropriate or unreasonable grounds. In Australia, there is a specific provision in the cross-vesting legislation preventing appeals of transfer provisions.[209] Whether this is totally appropriate is open to debate. While it is understandable that the designers of the system would have wanted to avoid it bogging down in endless, and potentially pointless, appeals, there should be an effective way of reviewing a court's decision when it has acted in flagrant disregard of appropriate considerations. As transfer decisions are essentially administrative ones rather than determinations of the rights of individuals, the scheme's efficiency would be undermined by allowing parties unlimited appeal rights. Frivolous appeals, though, could easily be controlled by appellate courts rarely granting appeals, or by means of the adoption of a standard of review more akin to that used in judicial review of governmental administrative decisions (*e.g.* a 'patently unreasonable' test). Ideally this standard would be incorporated in the legislation establishing the scheme, however if it were not, the courts could develop such a standard on their own initiative.

There could be concerns about difficulties the receiving court might experience with documents originally filed elsewhere. These can be answered in a number of ways. First, if the original transfer decision is made at a very early stage of litigation, as it almost always would be, the documents already filed would be limited. Just as *forum non conveniens* arguments are usually heard on an interlocutory basis before trial, so applications to transfer a matter could be dealt with in a similar way: defendants could be required to make an application for transfer prior to filing a statement of defence. Second, to the extent that the documents do not completely meet the standards of the receiving court, they could be accepted as filed, subject to the parties seeking directions from the court or the court advising the parties that they had to be refiled within a specified period of time.

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209 See s. 13 of the cross-vesting legislation.

Plaintiffs could be concerned that a matter transferred to another province would not receive the same quality of judging as it would receive in the province selected by the plaintiff. This was not a concern in the Australian context, even though the judges of the various state courts are appointed by the individual states. This issue has already been addressed in *Morguard* and the Supreme Court has stated that there can be no concerns about the quality of judging in other provinces.[210]

Plaintiffs might be concerned that matters started in the superior courts of one province might be transferred to a province which requires such matters to be heard by a small claims, or other court of limited jurisdiction. This would likely centre on two aspects: different limits on monetary jurisdictions and limitations on the right to counsel. To the extent that a determination has been made that the courts of a particular province are the most appropriate ones to hear a matter, it is reasonable that that province's choice of court structure would then be appropriate to deal with the matter.

The general rule should be that matters transferred would proceed as if they had been commenced in the province to which they are transferred, in accordance with its rules. This would be in keeping with the overall spirit of such a scheme: if it is appropriate that a matter be heard in Saskatchewan, for example, it is entirely appropriate that Saskatchewan rules apply to it. Therefore, a transferred matter would be heard by the court (small claims, county, district, divisional, supreme, superior,

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[210] See *Morguard*, *supra* note 1 at 1099-1100. The judges who would be deciding these matters are appointed in exactly the same way in each province—*i.e.* by the federal government—and a person who has been appointed to the Ontario Court (General Division) could have been appointed to the Court of Queen's Bench in Alberta, and *vice versa*.

If the scheme were to involve all courts in Canada, *i.e.* including small claims courts, as it would have to, to be most effective, this argument would not fully answer the concerns, as small claims court judges are appointed by provincial governments. However, in Ontario, for example, members of other provincial bars can be appointed provincial judges (see Ontario *Courts of Justice Act*, RSO, 1990, c. C.43, s. 42(2)) and in any event the superior courts and the Supreme Court of Canada exercise superintending authority over all the lower courts and tribunals in Canada, *Morguard*, *ibid.* at 1100.

Queen's Bench, etc.) having jurisdiction over the subject matter and monetary value in the province to which the matter was transferred, and any limits on representation and other procedural aspects ought to apply. Most significantly, the existence of such limits ought not influence the decision to transfer a matter in the first place.

None of these concerns are particularly persuasive. More significant ones would be raised in the Canadian context if the system made provision for the courts of one province to exercise the authority of the courts of another province.

Concerns about the notion that one province's courts would interpret the law of another province can be answered by pointing out that it already happens. When the courts of a foreign jurisdiction (anywhere in the world) determine that British Columbia law applies to a contract, they do not generally refer the matter to British Columbia for judgment. They hear evidence about the law of British Columbia and apply it, to the best of their ability.[211] A cross-vesting scheme, to the extent that it adopts the Australian notion that a court of one province can, in appropriate circumstances, sit as if it were the court of another province would merely formalize what already occurs, and it would only apply to a small minority of situations.[212]

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211 That currently the law of one province has to be proven in proceedings in the other provinces, is arguably the result of "unthinking"—to use La Forest J's word—application of English principles in a federation. It is somewhat bizarre, especially when dealing with common law principles, that an expert witness should be required to tell the British Columbia courts about the law of Ontario, when the British Columbia judges are just as capable as anyone of reading the Ontario Reports, Ontario statutes and regulations, and figuring it out for themselves. It is even more bizarre when one considers that the British Columbia courts may refer to the Ontario Reports to clarify their understanding of British Columbia law. The situation is somewhat different at the Supreme Court of Canada [see P. Hogg, *Constitutional Law of Canada*, 3d ed. Vol 1, (Toronto: Carswell, 1992) at 13-13, note 58], so there is no reason why, to the extent that this is a judge-made rule, the Supreme Court could not overturn it; alternatively it could be legislated away through amendments to provincial *Interpretation Acts*: see, for example, *Interpretation Act*, RSO 1990, c. I.11.

212 So far in Australia, by far the majority of the reported cases involve courts transferring matters to other states, rather than exercising the other state's jurisdiction.

Québec is obviously in a different situation than the common-law provinces. Its civil-law is quite different, in approach if not in result, from the common law of the rest of the country, and in the context of a cross-vesting scheme, there would be concerns expressed about the ability of common-law judges to interpret and correctly apply *droit civil*. There should be no concern, though, about the ability of Québec judges to interpret and correctly apply common law, as Québec judges are called upon to interpret federal law—which is essentially common law—on a regular basis, and they do not seem to be less successful at it than their common-law counterparts. Although it would complicate a national cross-vesting scheme, it should not be too difficult to include a provision in the scheme under which a common-law court could not purport to exercise the jurisdiction of a Québec court and a Québec court could not purport to exercise the jurisdiction of a common-law court.

There would, though, be no need to prevent a common-law court from transferring a matter to the Québec courts in appropriate circumstances or *vice versa*. Although traditionally, there was reason to believe that a Québec court could not refuse to exercise jurisdiction conferred on it by the *Civil Code of Lower Canada* and the *Code of Civil Procedure*,[213] the provisions of the new *Civil Code of Québec* specifically provide for *forum non conveniens*-type arguments and also permit the Québec courts to take jurisdiction over a matter where there is no other appropriate court, notwithstanding that they do not specifically have such jurisdiction.[214]

Where would the Federal Court fit in? Unlike the Australian situation, it is quite possible that the Federal Court would not have to be part of the scheme.[215] To the extent that the jurisdiction of

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213 See above at 19.

214 See articles 3135 and 3136, discussed above at 20.

215 In Australia it was vitally necessary that the commonwealth courts be included in the scheme as they—particularly the Federal Court and the Family Court—were significant elements of the difficulties being addressed. Because of this and because of the way in which legislative authority is divided between the states and the commonwealth in Australia, the participation of the commonwealth government was vital to the success of the cross-vesting scheme.

the Federal Court of Canada remains relatively limited,[216] and authority to apply and interpret federal legislation remains with the provincial court systems,[217] there would be no compelling reason to include the Federal Court in a Canadian cross-vesting scheme. As matters currently stand, the Federal Court's process runs throughout the country, its judgments can be enforced anywhere in Canada, and there is relatively little jurisdictional overlap between it and the provincial courts. Consequently, any gains from its inclusion in such a scheme would be incremental, at best.

Are there any constitutional issues? Because legislative and judicial authority is split between the federal and provincial governments in Canada, there are constitutional issues that would have to be addressed in any such scheme, and the Australian one demonstrates that constitutional divisions of power between the federal and provincial levels and among the provinces would have to be carefully considered. To the extent that they are real—and not just imagined—most of the issues should be fairly easy to resolve. The answer to this question also depends on whether a Canadian scheme would include cross-vesting provisions or would be limited to transferring matters.

The Supreme Court has suggested that it might violate the constitutional limits on a province's jurisdiction if its courts were to attempt to exercise jurisdiction over Canadian defendants outside the province, unless there is a real and substantial connection between the court and the matter before it. It is hard to see how a scheme that required the transfer of matters to the courts that have the <u>most</u> real and substantial connections with them would seriously run afoul of this limitation on a province's jurisdiction. If anything, it would ensure that a province's courts do not violate it. Hence, at least at first blush, there would appear to be little difficulty with a formalized transfer scheme.

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216 See *Federal Court Act*, RSC 1985, c. F-7.

217 Because the federal government appoints provincial superior court judges, there is probably no real reason why it should want to remove this power from the provincial courts, even if it were theoretically possible for it to do so.

A cross-vesting scheme that would have an Alberta court, for example, sit and act as if it were an Ontario court, thereby rendering any decision that an Ontario court could render in similar circumstances, would be of greater concern. There would be obvious questions about a province's authority to delegate the exercise of its courts' jurisdiction to the courts of another province. These questions would be serious ones, but they could be addressed by pointing out that Ontario would not be delegating its legislative authority to the province of Alberta, it would merely be permitting the judges of the Alberta Court of Queen's Bench to interpret and apply Ontario law in certain circumstances (which they already do). The difference would be that Alberta courts do not currently issues orders that purport to have the character of Ontario court orders. However, as noted,[218] the Australian experience to date would suggest that this is a relatively rare occurrence. Indeed, it is arguable that it is such a rare occurrence that a Canadian scheme would not need to include cross-vesting provisions.

If there is no real need in Canada for the cross-vesting of jurisdiction that is a feature of the Australian scheme, it may be felt that the challenge of accommodating the common law and *droit civil* would make such a regime impractical at this time. A politically feasible Canadian scheme should, consequently, permit plaintiffs to commence an action anywhere; require original courts to transfer matters to the most appropriate court; and require transferee courts to receive the matters with all resulting judgments being enforceable throughout the country. If such a scheme is desirable, the question becomes how such a scheme might be implemented in Canada.

It has been argued that the federal government has constitutional authority to legislate for civil matters which have an interprovincial character;[219] if this is so Parliament could legislate a transfer

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218 Above at 98.

219 Black, *supra* note 194 at 721. Black bases this argument on the notion that the *Constitution Act, 1867* gives legislative authority over property and civil rights in a province to the provincial government but nowhere talks about property and civil rights between provinces.

scheme on its own. In the current political climate, though, it is unlikely and perhaps undesirable to suggest that the federal government should legislate a Canadian jurisdiction-taking and judgment-enforcing scheme independently of the provinces, even if it does actually have the appropriate constitutional authority to do so.

If the federal government does not wish to proceed unilaterally, the next best alternative would be for the federal government, the provinces and the territories to follow the lead of Australia and design and enact a coordinated scheme that would apply across the country.[220] Should either Québec or the federal government not wish to proceed with such a scheme, though, it is possible that a workable system among the common law provinces could be achieved. It is also possible that the same ends could be achieved through a more *ad hoc* approach if it were not possible to proceed with legislation.

Canadian common law courts already have, and Québec courts soon will have, the authority to refuse to exercise jurisdiction they otherwise technically enjoy when they are *forum non conveniens*. If Canadian courts wanted to, they could, even of their own initiative, start to decide whether they are the <u>most</u> appropriate forum, and where they are not they could order matters stayed. Hence, Canadian courts are already approximately half-way to a transfer scheme. All that is needed to complete a transfer scheme is a provision that would require the courts of the second province to

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Notwithstanding Black's views, it should be noted that the *Constitution Act, 1867* grants legislative authority over the administration of justice in a province to that province (s. 92(14)). To the extent that any federal scheme was held to affect the administration of justice by *e.g* requiring a court to hear a matter that was transferred to it, or by limiting appeal rights, this could be construed as being an intrusion on provincial jurisdiction. The resolution of such a question is beyond the scope of this paper.

[220] This could take the form of a set of almost identically worded statutes, adopted by all the jurisdictions, or it could be a set of coordinated amendments to existing legislation such as the Ontario *Courts of Justice Act*, RSO 1990, c. C.43.

accept a matter transferred from the first province, and then proceed with it as if it had been commenced there.

To the extent that a system which simply makes provision for transferring proceedings from the courts of one province to those of another does not raise constitutional issues, it is arguable that such a system could be achieved without legislation: as common law courts' jurisdiction-taking rules are usually found in their rules of court,[221] all that would be required would be amendments to the rules of court to provide:

1 that a court will transfer a matter to the courts of another province when, all things considered, it is more appropriate that the courts of that province adjudicate the matter;
2 that the decision to transfer a matter may be made on application of a party, or on the court's own motion, before a consideration of the merits and that the decision to transfer or not will only be overturned if it is 'patently unreasonable';
3 that a court will take jurisdiction over a matter that is transferred to it by the courts of another province; and
4 where a matter is transferred, the receiving court will accept the documents already filed as if they met the requirements of the receiving court; subsequent documents will be in the form specified by the receiving court's rules.

In addition, in order to ensure that the system works in an effective and expeditious fashion, there would need to be some control on appeals from decisions to transfer or not to transfer matters. There would also need to be a procedure for determining which court (in terms of money, subject-matter and local territorial jurisdiction) of the receiving province would hear the case. A benefit of this *ad hoc* approach to a cross-vesting scheme is that it could be adopted on a reciprocal basis:

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221 See discussion in Part I, above at 9. These rules, while regulatory in nature, do not necessarily require legislation to be effective. See, for example, Ontario *Courts of Justice Act*, RSO 1990, c. C.43, s. 66.

the rules could be drafted in such a way that a court would only be authorized to transfer a proceeding to the courts of a province which had adopted adequate provisions to permit it to receive such matters.[222]

This *ad hoc* approach would not copy the Australian scheme and would not include all of its elements.[223] It would, though, provide a Canadian solution to jurisdiction-taking and judgment-enforcing in line with the Supreme Court's guidance in *Morguard*.

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[222] Alternatively, and perhaps even more appropriately in 1993, such an *ad hoc* scheme could provide for transfer of jurisdiction to, and receipt of proceedings from, <u>any</u> jurisdiction which had adopted compatible procedures. Given that the common law courts already have the inherent power not to exercise their jurisdiction, even in favour of the courts of other countries, there is no real reason why they should not be able to hold that the courts of one of the American states, or of England or Australia, or of some other country, are the 'most appropriate' in all of the circumstances to decide a matter and "offer" to transfer proceedings to those jurisdictions, if they will accept them.

At the same time, there would appear to be no particular reason why the British Columbia courts, for example, should not agree to receive a matter which had originally been commenced in California, if the California courts had come to the conclusion that British Columbia was the most appropriate forum. In fact, the existence of such an explicit willingness to receive transferred matters in a fair and expeditious manner might support Canadian defendants making *forum non conveniens* pleas before foreign courts.

As has already been noted, Canadian courts have applied *Morguard* reasoning to situations dealing with judgments rendered in American states: *Clarke* v. *Lo Bianco* (1991), 59 BCLR (2d) 334, 84 DLR (4th) 244 (SC); *Minkler & Kirschbaum* v. *Sheppard* (1991), 60 BCLR (2d) 360 (SC); *Federal Deposit Insurance Corp.* v. *Vanstone* (1992), 63 BCLR (2d) 190, 88 DLR (4th) 448 (SC); see Coakeley, Finkle and Barrington, *supra* note 57. The Supreme Court of Canada in *Amchem*, *supra* note 18, has also reviewed the notion of comity and encouraged Canadian courts not to arrogate unto themselves jurisdiction to interfere with litigation that is being conducted in clearly appropriate foreign jurisdictions. Given this current climate, Canada could perhaps play a leading role in establishing a new international environment that would see courts decline to act where other courts were better placed to do so.

[223] The Australian scheme also makes provisions for the original lawyers from the first state to appear before the courts of the second state in transferred proceedings. In Canada there are already procedures which permit the members of one provincial law society to appear before the courts of another province; that the circumstances may have to be expanded, and even made automatic in the case of a transferred proceeding, while liable to cause great consternation within the governing bodies of the provincial law societies, should not operate as a bar to proceeding, and might actually be a salutary experience for the public, and possibly even for the law societies.

IV. Conclusion

The Supreme Court of Canada's decision in *Morguard* has made considerable changes to the way in which Canadian courts will take jurisdiction over matters involving an extra-provincial element and in the way in which they will enforce judgments arising from other provinces. If the experience of other "federations" is any guide, much work will have to be done clarifying jurisdiction-taking rules in order to achieve the relatively automatic judgment-enforcing outcome that the Supreme Court has encouraged. If left to the courts, this will be an ongoing process that will take considerable time and money on the part of plaintiffs and defendants. To expect parties to incur such expenses is not appropriate.

Current legislative initiatives, while welcome, do not adequately address all, or even the most important, issues raised by *Morguard*. In some respects they represent a step backwards, rather than a step forward. Given the need to review current and proposed jurisdiction-taking and judgment-enforcing rules, effort would be best spent devising a new, flexible system, broadly modelled on the Australian cross-vesting scheme.

This Canadian scheme should make provision for the transfer of proceedings from an original Canadian court to whichever Canadian court is the <u>most</u> appropriate one to dispose of the matter, in all of the circumstances. The decision to transfer, which could be made on a court's own initiative, should, in the normal course of events, be an administrative one that is not appealable, although it should remain subject to judicial review in appropriate circumstances, for example where the decision to or not to transfer is patently unreasonable.

Every effort should be made to ensure that the criteria on which such transfers are based are efficient and expedient, and that transferred matters should proceed as expeditiously as possible, and decisions arising under this scheme should be enforceable throughout the country in line with the Supreme Court's approach of full faith and credit being accorded to judgments issued by courts having a real and substantial connection with the litigation.

Although there is an argument that the federal government might have constitutional authority to enact such a scheme, in view of the fact that such authority is not clear under the *Constitution Act 1867*, and given current political realities, the scheme should be implemented by joint federal, provincial (including Québec) and territorial legislation. However, if it is not possible to proceed with Québec or the federal government's participation, similar goals could be achieved through joint legislation among the common law provinces. If this were not possible or desirable, amendments to the provinces' rules of court could be employed to implement the system.

Appendices

1. Australian Court Structure[224]

Like Canada, Australia has inherited its court structure from its long association with England. Equally like Canada, the drafters of the Australian Constitution were faced with a situation where the pre-existing colonies had established court structures while the new federation had none. Obviously, in addition to providing for the creation of new structures, the Australian Constitution had to make appropriate provision for determining the relationship between the existing courts and any new ones which were to be created. Unlike the limited provisions in the *Constitution Act 1867*,[225] the Australian Constitution devotes a Chapter—10 sections—to "The Judicature", although it is not certain that they are any less ambiguous than their Canadian cousins. Section 71 provides, in part:

> **71.** The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.

Although the Australian Constitution makes provision for the creation of the High Court, perhaps somewhat reminiscent of the Canadian experience, the court was not actually created until the adoption—"after heated debate"[226]—of the *Judiciary Act* 1903.[227] Although this piece of legislation contains much which is irrelevant to this discussion, a number of its provisions deal with the relationship between the High Court and the state supreme courts.

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224 The following is, of necessity, a brief discussion of the Australian court structure. It should be readily apparent to the reader that while there are similarities between the Australian and the Canadian systems, there are also similarities between the Australian and American systems. As a consequence, the Australian system is more complicated than either of them. For a more detailed discussion of the Australian system, its evolution from English common law and the American influences sought by the drafters of the Australian Constitution, see J. Crawford, *Australian Courts of Law* (Melbourne: Oxford University Press, 1988).

225 (Imp.), 30 & 31 Vict., c. 3.

226 Crawford, *supra* note 224 at 156.

227 No. 6 of 1903 (Cth).

Like the Supreme Court of Canada, the Australian High Court is designed to be a general court of appeal for all of Australia. This is provided for by section 73 of the Australian Constitution.[228] With the abolition of appeals to the Privy Council in 1986,[229] the High Court finally acquired equivalent appellate authority to that enjoyed by the Supreme Court of Canada since 1949 and the Supreme Court of the United States since its creation.[230] Unlike these two courts, though, the Australian

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[228] **73.** The High Court shall have jurisdiction, with such exceptions and subject to such regulations as Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences—

> (i) Of any Justice or Justices exercising the original jurisdiction of the High Court:
> (ii) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:
> (iii) Of the Inter-State Commission, but as to questions of law only:

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

[229] *Australia Act 1986*, No. 142 of 1985 (Cth), s. 11; *Australia Act 1986* (UK), 1986, c. 2, s. 11.

[230] Crawford suggests that there are different types of appeal courts and that they have different roles. The first type exists to correct errors made by a court of first instance. He suggests that this can be accomplished by only one level of appeal; where there is a second level of appeal, the role of the final court of appeal is different:

> It follows that the functions of a final appeal court are rather different. In the case of the High Court there seem to be four: the embodiment of the unity of the common law of Australia, the development of that law, the determination of the case at hand in accordance with the proper principles of appellate review, and the general supervision of the machinery of justice. The first function—the embodiment of the unity of the common law—needs little comment. It is well established that decisions of the High Court on appeal from any jurisdiction bind all courts in Australia. Probably the existence of a general court of appeal is a precondition to the continuing unity of the common law: in the United States there are as many systems of 'common law' as there are separate jurisdictions.

High Court enjoys original jurisdiction in a number of areas, described as inherent[231] or invested.[232] In addition, some of these areas of jurisdiction are held concurrently with the state courts. While the High Court has a diversity jurisdiction under paragraph 75(iv) that is analogous to the American federal diversity jurisdiction, the Court is, apparently, loath to exercise this original jurisdiction, and it has powers under the *Judiciary Act 1903*[233] to remove and remit cases to lower courts for disposition.[234]

Section 17 of the *Judiciary Act* invests state supreme courts with chambers jurisdiction in matters pending before the High Court which are not within the latter's exclusive jurisdiction. Section 30 adds to the High Court's original jurisdiction under the Constitution. Section 32 provides:

> **32.** The High Court in the exercise of its original jurisdiction in any cause or matter pending before it, whether originated in the high Court or removed into it from another Court, shall have the power to grant, and shall grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter; so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters may be avoided. [Emphasis added.]

Crawford, *supra* note 224 at 173.

231 Those areas listed in s. 75 of the Australian Constitution, including matters arising under a treaty (s. 75(i)); matters affecting representatives of other countries (s. 75(ii)); matters in which the Commonwealth is a party (s. 75(iii)); matters between states, between a state and a resident of another state, and between residents of different states (s. 75(iv)); matters in which *mandamus* or prohibition against an officer of the Commonwealth is sought (s. 75(v)).

232 Those areas granted by the Commonwealth Parliament pursuant to s. 76 of the Australian Constitution including matters relating to the Australian Constitution (s. 76(i)); matters arising under federal laws (s. 76(ii)); matters relating to admiralty and maritime law (s. 76(iii)) although this is a concurrent jurisdiction with state courts and will soon be lost to them entirely (see Crawford, *supra* note 224 at 160 and associated note 34).

233 No. 6 of 1903.

234 See discussion of s. 44, below at 110.

Part VI—Exclusive and Invested Jurisdiction of the *Act*, basically repeating section 75 of the Australian Constitution, sets out those areas in which the High Court has exclusive jurisdiction; the appeal provisions in areas in which, although the High Court has original jurisdiction, state courts have been invested with federal jurisdiction; and establishes the rules for other federal matters, jurisdiction over which has been invested in state courts by other pieces of legislation.[235]

Part VII—Removal of Causes governs the transfer of matters between the High Court and the state supreme courts. As noted above, the High Court has an original jurisdiction that is broadly analogous to the diversity jurisdiction of the American federal courts, but the High Court has a broad power to decline to deal with a matter before it, by means of remitting it to another court:

> **44.**(1) Any matter other than a matter to which sub-section (2) applies that is at any time pending in the High Court, whether originally commenced in the High Court or not, or any part of such a matter, may, upon the application of a party or of the High Court's own motion, be remitted by the High Court to any federal court, court of a State or court of a Territory that has jurisdiction with respect to the subject-matter and the parties, and, subject to any directions of the High Court, further proceedings in the matter or in that part of the matter, as the case may be, shall be as directed by the court to which it is remitted.[236] [Emphasis added.]

235 For a discussion of the context of these provisions, see Crawford, *supra* note 224 at 22-42.

236 This section replaces the original s. 45, which read:

> **45.** (1) Any matter which is at any time pending in the High Court, whether originally commenced in the High Court or not, may be remitted for trial to any Court of a State which has federal jurisdiction with regard to the subject-matter and the parties.
>
> (2) The order remitting the matter may be made by the High Court, or a Justice sitting in Chambers, on the application of any party to the matter.

The new section was enacted by the *Judiciary Amendment Act 1976*, No. 164 of 1976 (Cth), s. 9, and amended by the *Statute Law (Miscellaneous Provisions) Act (No. 2) 1983*, No. 91 of 1983 (Cth.), sch. 1, and the *Judiciary Amendment Act (No. 2) 1984*, No. 12 of 1984 (Cth), s. 6.

According to Nygh:

> The High Court has held in *Johnstone v Commonwealth* (1979) 143 CLR 398, that under s 44(1) it has a wide power to remit to state and territorial courts actions instituted in its original jurisdiction. In *Weber v Aldone* (1981) 36 ALR 345, the High Court held that it could under s 44(1) remit a diversity action in tort, between a resident of South Australia and a resident of Victoria, to the Victorian Supreme Court even though that court would not have had jurisdiction had the action been instituted there.[237]

Crawford notes:

> Section 44 applies to territory as well as to state courts, and to cases of appellate as well as original jurisdiction (although there is less likelihood that there will be an appropriate lower appellate court). It allows the High Court to act on its own motion, without the consent of any party. To a High Court determined to reduce the burden of its original jurisdiction, s44 has been a potent weapon. Referring to motor accident cases in its diversity jurisdiction, Sir Garfield Barwick stated:
>
>> The Court has begun the practice of remitting all such cases, at least so soon as they are set down for hearing, but also...at earlier stages of the litigation, to a state court for disposal. In addition, there are other causes of action between residents of different states which are sought to be litigated in the original jurisdiction of the High Court. These can also now be remitted to state courts.[238]
>
> The practice of the Court is to remit all cases in its original jurisdiction which involve disputes as to matters of fact to a lower court for the facts to be found, even if the matter will then be returned to the High Court for it to deal with the legal issues.[239]

Section 46 permits defendants in matters transferred to the High Court to set up defences available in the High Court even if they were not available in the original state court. In Part IX—Suits by and against the Commonwealth and the States, section 56 provides that suits in contract or tort against the Commonwealth may be brought before the High Court or in state courts; the remaining sections

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237 Nygh, *supra* note 140 at 61-2.

238 Sir G. Barwick, "The State of the Australian Judicature" (1977) 51 Aust. LJ 480 at 489. See Crawford, *supra* note 224 at 178, n. 60, for some statistics regarding remitted actions.

239 Crawford, *Ibid.* at 163-4. Regarding the latter points, he refers to *Mabo v. Queensland & Commonwealth* (1986), 166 CLR 186, 64 ALR 1 (HC).

in this Part clarify matters not relevant to this discussion. Similarly the remainder of the *Act* is not relevant to this discussion.

The Constitution also provides for the establishment of other federal courts and the exercise of federal judicial authority by State courts.[240] The current Australian Federal Court was created out of the Australian Industrial Court by the *Federal Court of Australia Act 1976*.[241] The Federal Court's jurisdiction is not found in its constitutive *Act*, rather it is to be found in other pieces of legislation adopted by the Commonwealth Parliament in areas such as bankruptcy, trade practices and federal administrative law. In addition, the Federal Court has appellate jurisdiction over federal matters decided by state courts.

The state courts, like their Canadian counterparts, exercise jurisdiction in state matters and, again like their Canadian counterparts, in federal matters which have not been reserved to the High Court or to the Federal Court by the Commonwealth Parliament. Unlike their Canadian counterparts, they are truly creatures of their states in that the judicial appointments are all made by the State governments and they exercise much less Commonwealth jurisdiction than their Canadian counterparts.

> Until 1974, the judicial power of the Commonwealth was, by and large, vested in the State courts. It was practically unknown for a problem to arise as to whether or not a State court had jurisdiction to deal with a claim on the basis that it was the judicial

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240 **77.** With respect to any of the matters mentioned in the last two sections the Parliament may make laws—
(i) Defining the jurisdiction of any federal court other than the High Court:
(ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:
(iii) Investing any court of State with federal jurisdiction.

241 No. 156 of 1976 (Cth).

power of the Commonwealth that was invoked. When the Federal Court of Australia was established, the Commonwealth Parliament vested exclusive jurisdiction in the Federal Court in respect of a number of matters. At about the same time, the Family Court of Australia was also established and exclusive jurisdiction in matrimonial causes was conferred on it. Thereafter, difficulties arose, from time to time, in that neither the Federal Court or the Family Court nor the State courts had full and complete jurisdiction and there were disputes which had to be determined, in part, in the Federal Court and, in part, in the State courts. As well, it was not clear in some instances where jurisdiction resided. This situation occasioned a certain amount of disquiet.

At the same time, as Australia became more and more one market, and there was more extensive movement of people and goods around the nation, the restrictions imposed by State boundaries became more burdensome. It was thought by some irksome and, indeed, contrary to the concept of Federalism, that, for the purposes of principles of private international law, all other States in Australia should be regarded as "foreign" countries by the courts of a State... Yet the High Court held that a State was "a distinct and separate country or 'law area'": *Laurie v Carroll* (1958) 98 CLR 310 at 331 and *Pedersen v Young* (1964) 110 CLR 162 at 170.[242]

What is particularly interesting in the traditional Australian approach is the twin tendencies exhibited by sections 44 and 32 of the *Judiciary Act*: on the one hand there is an obvious desire to have matters decided before the most appropriate court; on the other is the desire to dispose of all aspects of a dispute without resorting to multiple proceedings. Neither of these tendencies being strictly necessary in the Canadian context, as there is virtually no possibility of forum shopping as between the federal and provincial courts, there are no equivalent provisions in Canadian legislation or jurisprudence. However, their importance in the Australian scheme is evident and it is interesting to see how these tendencies are expressed in the cross-vesting scheme.

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242 *BankInvest, supra* note 170 at 723 NSWLR, 163 FLR.

2. Incorporation of the European *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* into the laws of the United Kingdom

The European *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*[243] came into force in the United Kingdom with passage of the *Civil Jurisdiction and Judgments Act 1982*.[244] According to the *Act*:

> 2.—(1) The Conventions shall have the force of law in the United Kingdom, and judicial notice shall be take of them.
>
> ...
>
> 3.—(1) Any question as to the meaning or effect of any provision of the conventions shall, if not referred to the European Court in accordance with the 1971 Protocol, be determined in accordance with the principles laid down by and any relevant decision of the European Court.
>
> (2) Judicial notice shall be taken of any decision of, or expression of opinion by, the European Court on any such question.
>
> (3) Without prejudice to the generality of subsection (1), the following reports (which are reproduced in the Official Journal of the Communities), namely—
>
> (*a*) the reports by Mr. P. Jenard on the 1968 Convention and the 1971 Protocol; and
>
> (*b*) the report by Professor Peter Schlosser on the Accession Convention,
>
> may be considered in ascertaining the meaning or effect of any provision of the Conventions and shall be given such weight as is appropriate in the circumstances.

The effect of these sections is not only to implement the *Convention* in the United Kingdom but also to ensure that its interpretation in the United Kingdom is consistent with the interpretation in other Community states. It should, of course, be obvious that references to the European Court and to the reports of Mr Jenard[245] and Prof. Schlosser[246] would have been anathema to British common law just a few years ago. Sections 4-15 specify which United Kingdom courts fulfil functions under the *Convention* and make similar provisions as the *Convention* regarding the authentication of documents, payment of judgment interest, etc. In addition, section 47 provides for

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243 (27 September 1968); *supra* note 120. Hereafter referred to as the *Convention*.

244 (UK), 1982, c. 27, as am.

245 OJ 1979, C59/1.

246 OJ 1979, C59/71.

the use of Orders in Council to effect modification to "the law of any part of the United Kingdom" to ensure concordance with any decision of the European Court regarding the *Convention*.

Part II of the *Act* brings about one of the most significant changes in the jurisdictional rules of the British courts since the adoption of the *Common Law Procedure Act* of 1852.[247] According to section 16:

> **16.**—(1) The provisions set out in Schedule 4 (*which contains a modified version of Title II of the 1968 Convention*) shall have effect for determining, for each part of the United Kingdom, whether the courts of law of that part, or any particular court of law in that part, have or has jurisdiction in proceedings where—
> (*a*) the subject-matter of the proceedings is within the scope of the 1968 Convention as determined by Article 1 (whether or not the Convention has effect in relation to the proceedings); and
> (*b*) the defendant or defender is domiciled in the United Kingdom or the proceedings are of a kind mentioned in Article 16 (exclusive jurisdiction regardless of domicile).

The effect of this and subsequent provisions of the *Act* are to make the rules applicable to Inter-European matters applicable to Intra-United Kingdom matters as well.

The *Act* also makes specific provision for miscellaneous aspects of private international law including section 32 which provides that where an agreement exists between the parties to an action that the courts of a particular place have jurisdiction, judgments of other courts will not be recognised or enforced unless the defendant consented or otherwise attorned to the jurisdiction of the court making the order. Section 33 provides *inter alia* that appearing before the court to contest its jurisdiction or making a *forum non conveniens* application do not constitute attorning to the court's jurisdiction, thereby effectively overturning *Henry v. Geoprosco*.[248]

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247 15 & 16 Vict., c. 76.

248 *Supra* note 16.

As noted above,[249] the *Convention* adopts a notion of domicile that is more akin to the civil law notion than the common law one. The *Act* makes specific provisions (sections 41-46) which define, for the purposes of the *Act* and the *Convention*, the notion of domicile:

> **41.**—(1) Subject to Article 52 (which contains provisions for determining whether a party is domiciled in a Contracting State), the following provisions of this section determine, for the purposes of the 1968 Convention and this Act, whether an individual is domiciled in the United Kingdom or in a particular part of, or place in, the United Kingdom or in a state other than a Contracting State.
>
> (2) An individual is domiciled in the United Kingdom if and only if—
> (*a*) he is resident in the United Kingdom; and
> (*b*) the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom.
>
> (3) Subject to subsection (5), an individual is domiciled in a particular part of the United Kingdom if and only if—
> (*a*) he is resident in that part; and
> (*b*) the nature and circumstances of his residence indicate that he has a substantial connection with that part.
>
> (4) An individual is domiciled in a particular place in the United Kingdom if and only if he—
> (*a*) is domiciled in the part of the United Kingdom in which that place is situated; and
> (*b*) is resident in that place.
>
> (5) An individual who is domiciled in the United Kingdom but in whose case the requirements of subsection (3)(*b*) are not satisfied in relation to any particular part of the United Kingdom shall be treated as domiciled in the part of the United Kingdom in which he is resident.
>
> (6) In the case of an individual—
> (*a*) is resident in the United Kingdom, or in a particular part of the United Kingdom; and
> (*b*) has been so resident for the last three months or more,
>
> the requirements of subsection (2)(*b*) or, as the case may be, subsection (3)(*b*) shall be presumed to be fulfilled unless the contrary is proved.
>
> (7) An individual is domiciled in a state other than a Contracting State if and only if—
> (*a*) he is a resident of that state; and

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[249] At 49.

(*b*) the nature and circumstances of his residence indicate that he has a substantial connection with that state.

[Emphasis added.]

The other sections deal with the domicile of a corporation or an association, domicile for the purpose of insurance and consumer contract matters under the *Convention*, the domicile of trusts and the domicile of the Crown.

3. Ontario *Rules of Civil Procedure*[250]

RULE 16 SERVICE OF DOCUMENTS

16.01 (1) An originating process shall be served personally as provided in rule 16.02 or, except in the case of a divorce petition, by an alternative to personal service as provided in rule 16.03

(2) An originating process need not be served on a party who has delivered a defence, notice of intention to defend or notice of appearance without being served.

(3) No other document need be served personally, or by an alternative to personal service, unless these rules or an order require personal service or an alternative to personal service.

...

16.02 (1) Where a document is to be served personally, the service shall be made,

(a) on an individual, other than a person under disability, by leaving a copy of the document with the individual;

...

(c) on any other corporation, by leaving a copy of the document with an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be in control or management of the place of business;

...

(e) on a person outside Ontario who carries on business in Ontario, by leaving a copy of the document with anyone carrying on business in Ontario for the person;

...

(m) on a partnership, by leaving a copy of the document with any one or more of the partners or with a person at the principal place of business of the partnership who appears to be in control or management of the place of business; and

(n) on a sole proprietorship, by leaving a copy of the document with the sole proprietor or with a person at the principal place of business of the sole proprietorship who appears to be in control or management of the place of business.

RULE 17 SERVICE OUTSIDE ONTARIO

17.01 In rules 17.02 to 17.06, "originating process" includes a counterclaim against only parties to the main action, and a crossclaim.

17.02 A party to a proceeding may, <u>without a court order</u>, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

(a) in respect of real or personal property in Ontario;

(b) in respect of the administration of the estate of a deceased person,

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250 Ontario *Rules of Civil Procedure*, RRO 1990, Reg. 194.

(i) in respect of real property in Ontario or
(ii) in respect of personal property, where the deceased person, at the time of death, was resident in Ontario;

(c) for the interpretation, rectification, enforcement or setting aside of a deed, will, contract or other instrument in respect of,
(i) real or personal property in Ontario, or
(ii) the personal property of a deceased person who, at the time of death, was resident in Ontario;

(d) against a trustee in respect of the execution of a trust contained in a written instrument where the assets of the trust include real or personal property in Ontario;

(e) for foreclosure, sale, payment possession or redemption in respect of a mortgage, charge, lien on real or personal property in Ontario;

(f) in respect of a contract where,
(i) the contract was made in Ontario,
(ii) the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario,
(iii) the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract, or
(iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario;

(g) in respect of a tort committed in Ontario;

(h) in respect of damages sustained in Ontario arising from a tort or breach of contract, wherever committed;

(i) for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario;

(j) for support;

(k) for custody of or access to a minor;

(l) to declare the invalidity of a marriage;

(m) on a judgment of a court outside Ontario;

(n) authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario;

(o) against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario;

(p) against a person ordinarily resident or carrying on business in Ontario;

(q) properly the subject of a counterclaim, crossclaim or third or subsequent party claim under these rules; or

(r) made by or on behalf of the Crown or a municipal corporation to recover money owing for taxes or other debts due to the Crown or the municipality.

[Emphasis added.]

17.03 (1) In any case to which rule 17.02 does not apply, the court may grant leave to serve an originating process or notice of a reference outside Ontario.

(2) A motion for leave to serve a party outside Ontario may be made without notice, and shall be supported by an affidavit or other evidence showing in which place or country the person is or probably may be found, and the grounds on which the motion is made.

17.04 (1) An originating process served outside Ontario without leave shall disclose the facts and specifically refer to the provision of rule 17.02 relied on in support of such service.

(2) Where an originating process is served outside Ontario with leave of the court, the originating process shall be served together with the order granting leave and any affidavit or other evidence used to obtain the order.

17.05 (1) In this rule,

"contracting state" means a contracting state under the Convention; ("*État contractant*")

"Convention" means the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters signed at The Hague on November 14, 1965.("*Convention*")

(2) An originating process or other document to be served outside Ontario in a jurisdiction that is not a contracting state may be served in the manner provided by these rules for service in Ontario, or in the manner provided by the law of the jurisdiction where service is made, if service made in that manner could reasonably be expected to come to the notice of the person to be served.

(3) An originating process or other document to be served outside Ontario in a contracting state shall be served,

(a) through the central authority in the contracting state; or
(b) in a manner that is permitted by Article 10 of the convention and that would be permitted by these rules if the document were being served in Ontario.

(4) Service may be proved,

(a) in the manner provided by these rules for proof of service in Ontario;
(b) in the manner provided by the law of the jurisdiction where service is made; or
(c) in accordance with the Convention, if service is made in a contracting state.

17.06 (1) A party who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance,

(a) for an order setting aside the service and any order that authorized the service; or
(b) for an order staying the proceeding.

(2) The court may make an order under subrule (1) or such other order as is just where it is satisfied that,

(a) service outside Ontario is not authorized by these rules;
(b) an order granting leave to serve outside Ontario should be set aside; or
(c) Ontario is not a convenient forum for the hearing of the proceeding.

(3) Where on a motion under subrule (1) the court concludes that service outside Ontario is not authorized by these rules, but the case is one in which it would have been appropriate to grant leave to serve outside Ontario under rule 17.03, the court may make an order validating the service.

(4) The making of a motion under subrule (1) is not in itself a submission to the jurisdiction of the court over the moving party.

4. Ontario *Rules of the Small Claims Court*[251]

RULE 6 FORUM AND JURISDICTION

6.01 (1) An action shall be entered and tried,

(a) in the territorial division,

(i) in which the cause of action arose, or

(ii) in which the defendant or, if there are several defendants, in which any one of them resides or carries on business, or

(b) at the court's place of sitting that is nearest to the place where the defendant or, if there are several defendants, where any one of them resides or carries on business.

(2) If the court is satisfied that the balance of convenience substantially favours holding the trial of an action at another place than those described in subrule (1), the court may order that the action be tried at that other place.

RULE 8 SERVICE

8.01 (1) A claim shall be served personally...

...

8.03 Where a document is to be served personally, the service shall be made,

...

(e) on a person outside Ontario who carries on business in Ontario, by leaving a copy of the document with anyone carrying on business in Ontario for the person;

8.06 (1) Where the defendant is out of Ontario,

(a) and the plaintiff is represented by a solicitor, service of the claim may be made by the solicitor or someone acting on the solicitor's behalf; and

(b) in all other cases, the clerk may arrange for service of the claim on the defendant.

(2) The court may allow, as costs in an action, the costs reasonably incurred in effecting service of the claim outside Ontario.

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251 *Rules of the Small Claims Court*, RRO 1990, Reg. 201.

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