TERRITORIAL LIMITATIONS ON PROVINCIAL POWERS

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I. THE PROBLEM

A. *Introduction*

Of the sixteen paragraphs of section 92 of The British North America Act, 1867 which confer legislative power on the provinces, eight are limited by the phrase "in the province" or some variation thereof. Absent from the Quebec Resolutions of October, 1864 and the London Resolutions of December, 1866, the phrase makes its first appearance in the initial draft of the Act and then its use fluctuates in subsequent versions until finally fixed in its present form by the seventh and final draft of February, 1867.[1] Just what the drafters of the B.N.A. Act intended by the incorporation of that phrase is a matter for speculation. Possibly their objective was to eliminate, or at least reduce, the likelihood of overlapping provincial statutes. Early drafts of the Act and even the London and Quebec Resolutions contained a provision creating a paramountcy principle for concurrent powers whereby federal legislation would prevail in the event of a conflict between federal and provincial statutes and provincial legislation would be void. Presumably since the provinces were each to have concurrent powers the express inclusion of the territorial principle was considered the solution to any potential overlap problems between and among provinces. No one apparently foresaw the overlap between the division of federal and provincial powers which subsequent generations have experienced. Therefore, no general paramountcy principle was included[2] and the courts had to create one to fill the void.

The object of this article is to analyze the approaches which have been taken in the cases, to clarify some areas of confusion and to outline the questions which should be asked when the issue of the territorial limitation on provincial legislative power arises. It will be assumed, whatever form of limitation the drafters of the British North America Act intended by the inclusion of the phrase "in the province" in the various

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[1] DOCUMENTS ON THE CONFEDERATION OF BRITISH NORTH AMERICA *passim* (G. Browne ed. 1969).

[2] Peter Hogg commented that "[t]he B.N.A. Act is curiously silent on the point." P. HOGG, CONSTITUTIONAL LAW OF CANADA 102 n. 6 (1977), but the anomaly disappears if one remembers that it was thought that the division of subject matters would be quite clear.

heads of section 92, that the phrase has conclusively been interpreted as imposing a limitation on provincial legislative competence; it cannot be argued that it is merely a rule of statutory construction which can be avoided by sufficiently express language as is the case in England and federally in Canada. Nevertheless, it is also assumed that the international consensus concerning the scope of the territorial limitation on sovereign states is still relevant as that was probably the limitation which the drafters of the British North America Act intended to incorporate in some form; judicial references to extraterritoriality implicitly seem to refer to some universal standard and not just a doctrine of Canadian constitutional law. The analogy between the principles delimiting the legislative jurisdiction of independent sovereign states and the principles employed in a federation may be weak. A federation possibly needs a narrower doctrine. It is certain, however, that the international doctrine should mark the outer limits. At the very least a consistent approach is surely desirable and if some of the particular areas of confusion are clarified, then it is more likely that the results will be more reconcilable than they are at present. Furthermore, a better understanding of the doctrine of extraterritoriality might be of aid to the legislative draftsman. One of the characteristics of this doctrine is its susceptibility to circumvention by legislative draftsmen, a weakness which was particularly persuasive to Salmond, who was concerned with the doctrine, not as it affected Canadian provinces, but as it affected the colonies:

> Surely the circumstance that [the principle of extraterritorial incompetence] can be evaded and brought to naught by a mere trick of draftsmanship — that its only practical effect is to drive colonial legislatures into indirect paths to the end which they are forbidden to seek directly — is sufficient to cast the gravest doubts on the claim of this rule to any place [at] all in the fabric of the Imperial constitution.[3]

It is too late in Canada to argue, like Salmond, that the doctrine is a mere rule of statutory construction, but a better understanding of its scope may prevent some litigation by permitting draftsmen to avoid some obvious traps and may aid both courts and litigants when the issue of extraterritoriality is raised.

B. *Development of the Territorial Approach*

The explanation for the use of the territorial principle to resolve potential overlaps between and among the provinces can probably be attributed to an admixture of constitutional law and international law as perceived by English eyes at the time of Confederation. In English constitutional law parliamentary sovereignty was the dominant principle: nothing was beyond the power of Parliament and the concept of judicial

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[3] Salmond, *The Limitations of Colonial Legislative Power*, 33 L.Q.R. 117, at 127 (1917).

review of legislative action was non-existent. The common law principles of statutory interpretation, however, deferred to the territorialist theory of sovereignty with its international limitations on jurisdiction advanced by Huber, Story and Savigny, a theory which had its beginnings in the seventeenth century and reached its final form in the nineteenth century.[4] This public international law doctrine can be summarized in two maxims:

> (1) As every nation possesses an exclusive sovereignty and jurisdiction within its own territory, the laws of every State affect and bind directly all property, whether real or personal, within its territory; and all persons who are resident within it, whether natural born subjects or aliens; and also all contracts made and acts done within it.
> (2) No State can, by its laws, directly affect or bind property out of its own territory or bind persons not resident therein, except that every nation has a right to bind its own subjects by its own laws in every other place.[5]

Judicial opinion in England was that Parliament had the power to legislate in violation of these maxims but, in the absence of express words indicating an intention to do just that, all British statutes would be construed so as to conform to the territorial limitation on jurisdiction.[6] Whether or not the drafters of the British North America Act intended to do any more than crystallize in statutory form these common law rules of construction, a coincidental colonial development seems to have put the effect of the phrase "within the province" beyond all doubt and to have transformed it, if such transformation were needed, into a limitation on provincial legislative power.

To the interaction between English constitutional law and international law was added the development of independent responsible

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[4] *See* Mann, *The Doctrine of Jurisdiction in International Law*, in F. MANN, STUDIES IN INTERNATIONAL LAW 1, at 18-23 (1973).

[5] *Id.* at 20.

[6] The House of Lords has recently confirmed that this was only a canon of construction: Air-India v. Wiggins, [1980] 2 All E.R. 593, [1980] 1 W.L.R. 815. Lord Scarman stated:

> There are, as my noble and learned friend, Lord Diplock has said, *two canons of construction* to be observed when interpreting a statute alleged to have extraterritorial effect. The first is a presumption that an offence-creating section was not intended by Parliament to cover conduct outside the territorial jurisdiction of the Crown: Cox v. Army Council, [1963] A.C. 48, [1961] 3 All E.R. 1194 (H.L. 1961). The second is a presumption that a statute will not be construed as applying to foreigners in respect of acts done by them abroad: Regina v. Jameson, [1896] 2 Q.B. 425, 75 L.T. 77 (1896). *Each presumption, is, however, rebuttable, and the strength of each will largely depend upon the subject matter of the statute under consideration*

Id. at 597, [1980] 1 W.L.R. at 820-21 (emphasis added). Though shocked by the undisputed fact that Air-India had permitted the death of 2,000 parakeets and mynah birds en route from India to England, the majority found that the presumption had not been displaced. The act which established jurisdiction under the provisions invoked was the landing of animals in England and on the facts no animals were landed there: "[O]nly their carcases arrived, a tragic memorial that they had once lived." *Id.* at 599, [1980] 1 W.L.R. at 822. The deaths by mistreatment occurred outside British territory

government in the colonies. The Colonial Office saw fit to elevate the principle of statutory construction to a rule of colonial legislative incompetence when advising on the allowance of colonial bills.[7] The Privy Council, which did engage in the process of judicial review with respect to colonial legislation, apparently followed suit.[8] The main consideration for the creation by the Colonial Office of the doctrine of colonial extraterritorial legislative competence is said to have been not the dictates of pure theory but, rather, concern to protect imperial interests by precluding the possibility of colonial inconsistency with imperial law.[9]

Whether or not the courts by 1931 had already[10] or would have reduced the doctrine of extraterritorial legislative incompetence to a mere rule of construction is irrelevant as that was accomplished for the Dominions, including the Dominion of Canada, by section 3 of the Statute of Westminster,[11] which "declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation". However, as Mr. Justice Pigeon pointed out in *Interprovincial Co-operatives Ltd. v. The Queen*,[12] that section was not made expressly applicable to the provinces. Thus, whatever the intended effect of the phrase "within the province" in the 1867 Act, it was subsequently interpreted as a limitation on provincial legislative

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[7] O'Connell, *The Doctrine of Colonial Extra-Territorial Legislative Incompetence*, 75 L.Q.R. 318, at 319 (1959). O'Connell stated that what "has become much more obvious as the records have become available, is that extra-territoriality as a concept was developed more fully in the Colonial Office and in colonial correspondence than it was in court decisions".

[8] The most notable example of legislation being struck down as an infringement of colonial legislative competence is MacLeod v. Attorney General for New South Wales, [1891] A.C. 455, 12 N.S.W.R. 232 (P.C.). In that case MacLeod married a woman in New South Wales and then, several years later, his first wife still being alive, went through another ceremony of marriage in the United States. On his return to New South Wales he was charged with and convicted of bigamy under a provision which read: "Whosoever being married marries another person during the life of the former husband or wife, *wheresoever such second marriage takes place*, shall be liable to penal servitude for seven years." (emphasis added). The Privy Council read down the phrase "wheresoever such second marriage takes place" to mean wheresoever in New South Wales. Thus the actual result, the acquittal, was reached by way of the ordinary process of statutory interpretation. However, the Privy Council added that if such a reading had been impossible they would have declared the provision to be *ultra vires* the state.

[9] O'Connell. *supra* note 7, at 320; R. LUMB, THE CONSTITUTIONS OF THE AUSTRALIAN STATES (4th ed. 1977); La Forest, *May the Provinces Legislate in Violation of International Law?*, 39 CAN. B. REV. 78 (1961).

[10] The argument that the courts had already so acted is based on the Privy Council decision in Croft v. Dunphy, [1933] A.C. 156, [1933] 1 D.L.R. 225 (1932) (Can.). It has also been argued that there really never was any *legislative* incompetence on the part of the colonies, that the presumption against extraterritorial legislation was always a mere canon of construction: W. CLEMENT, THE LAW OF THE CANADIAN CONSTITUTION (3rd ed. 1916); Salmond, *supra* note 3, *passim*.

[11] 22 & 23 Geo. 5, c. 4 (1931).

[12] [1976] 1 S.C.R. 477, at 512, 53 D.L.R. (3d) 321, at 356 (1975).

authority and the imperial statute of 1931 effected no alteration for the provinces or for the Australian states.

C. *The Constitutional Issue: Frequently Overlooked*

Legislators and courts are still faced with the problem of ascertaining when a statute can be said to have an impermissible extraterritorial operation. The problem arises not only when a statute expressly makes itself applicable in a given situation with extraprovincial elements but also when it simply speaks in general terms. As Beetz J. has pointed out, even the latter situation raises a constitutional issue which the courts should not ignore:

> Many statutes are drafted in terms so general that it is possible to give them a meaning which makes them *ultra vires*. It is then necessary to interpret them in light of the Constitution, because it must be assumed the legislator did not intend to exceed his authority:
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> > There is a *presumptio juris* as to the existence of the *bona fide* intention of a legislative body to confine itself to its own sphere and a presumption of similar nature that general words in a statute are not intended to extend its operation beyond the territorial authority of the Legislature.
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> (Fauteux, J. — as he then was — in *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, at 255, 7 D.L.R. (2d) 257, at 311.)
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> In order to give effect to this principle a Court may, in keeping with the constitution, limit the apparently general scope of an enactment, *even when the constitutionality of the provision has not been disputed and the Attorney-General has not been impleaded*.[13]

When the provision is drafted in general terms the fact that its application involves a constitutional issue often goes unrecognized. Usually the ordinary process of statutory interpretation to determine the intended objective of the legislature is utilized without consideration of any territorial limitations. Invocation of the common law rules of construction of statutes which defer to the territorial principle brings the court closer to recognizing that a constitutional issue is involved. Sometimes a court will even state expressly that no constitutional issue is involved, apparently because no one has argued that a particular statute is *ultra vires*. A very recent example of the latter form of non-recognition can be found in the judgment of Martland J. in *Regina v. Thomas Equipment Ltd.* There the Supreme Court of Canada held that the Alberta Farm Implements Act was applicable to a New Brunswick manufacturer of farm machinery. The manufacturer was liable to a penalty under the Act for failure to comply with a statutory obligation even though the manufacturer had never had any presence in Alberta. Each stage in the reasoning of the majority must have been taken with a view to the territorial limitation on provincial legislative power and yet, apparently

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[13] Canadian Broadcasting Corp. v. Quebec Police Comm'n, [1979] 2 S.C.R. 618, at 641, 101 D.L.R. (3d) 24, at 43-44 (emphasis added).

because there was no allegation that the Alberta statute was *ultra vires*, Martland J. stated: "No constitutional question has been raised in this case and therefore the only question to be decided on the stated case is as to the proper construction of the statute in respect of the facts of the case."[14]

The fact is that the common law rules of construction which are used to determine the applicability of a generally worded statute bring one to the same test as is used to determine the validity of a statute which is made expressly applicable. The practical result is also the same whether the statute is simply given a restricted interpretation or is declared *ultra vires*. It is important that the courts recognize that in each situation a constitutional issue is raised because, as Dickson J. has pointed out, more is at stake whenever a constitutional issue is raised than "merely the private interests of the two parties before the Court . . . [T]he interests of two levels of government are also engaged."[15] The question is whether, once it is acknowledged that both interpretation of general statutes as well as allegations of invalidity of expressly applicable statutes raise constitutional issues, the notice procedure must be invoked. Mr. Justice Dickson also pointed out that to decide constitutional issues without notifying the concerned Attorneys-General meant that "the Court lacks the traditional procedural safeguards that would normally attend such a case and the benefit of interventions by the governments concerned".[16] Though both situations certainly warrant notification, it is probably unrealistic to assume that the theoretically interested Attorneys-General would always demonstrate that interest by intervention; the constitutional issue might still be determined without the traditional procedural safeguards. Nevertheless, recognition that even interpretation of general statutes may involve a constitutional issue could be of benefit to the courts if there were a little more clarity concerning the nature of the territorial limitation on provincial legislative power than presently exists. To have to decide a constitutional issue concerning a doctrine with which the adjective "obscure" is often coupled, perhaps

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[14] [1979] 2 S.C.R. 529, at 545, 96 D.L.R. (3d) 1, at 13. The stages in the reasoning were basically threefold: characterizing the action as a quasi-criminal action rather than one in contract; finding a local presence by locating an omission in Alberta because the statute could have been complied with there; and distinguishing thereby *Interprovincial Co-operatives*, *supra* note 12.

[15] Northern Telecom Ltd. v. Communications Workers of Canada, [1980] 1 S.C.R. 115, at 139-40, 98 D.L.R. (3d) 1, at 19 (1979).

[16] *Id.* at 140, 98 D.L.R. (3d) at 19.

without the benefit of full argument, is not an enviable task and the inconsistency in the cases demonstrates this clearly.[17]

II. THE DOCTRINE

A. *Enforcement Beyond Provincial Borders*

The first point to be clarified is an elementary one: the distinction between the authority to legislate and the authority to enforce. A sovereign state such as England, whose legislative authority is constitutionally unlimited, still has no right recognized in international law to enforce its laws directly outside the geographical confines of the country, though enforcement within the country may have an effect outside its boundaries. As Walter Wheeler Cook said, " 'law' is not a material phenomenon, which spreads out like a light wave until it reaches the territorial boundary and then stops."[18] Legal relations of persons anywhere in the world may be affected indirectly.

Direct enforcement may take two forms, one far less obvious than the other. Everyone recognizes that the acts of officials of one state in another state would amount to direct enforcement of their own law and thus would constitute an infringement of the sovereignty of the state in which they are acting. A situation where direct enforcement is not so obvious is one which arises with far greater frequency: the invocation in the courts of one state of the laws of another state. In conformity with the international principle of territorial sovereignty the courts of one state will never apply foreign laws *ex proprio vigore*. It is only through the medium of the conflicts rules of the forum that the law of another state can be applied. These limitations are common to all states. They are not unique to the provinces of Canada because they are not the product of the British North America Act. Rather, they are imposed by theories of sovereignty shared by all jurisdictions. Nevertheless, though the territorial limitation on direct enforcement of laws is easily stated, its application in the first form suggested is sometimes unclear and it is often forgotten in the second situation by the party invoking the non-forum law.

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[17] Speaking of the Australian cases, O'Connell has said:

> The general conclusion must be that the cases on extra-territoriality raise a dilemma. No attempt at reconciling them has succeeded and indeed the attempts have always taken the form of forcing the facts within an *a priori* definition. One is left to question whether the doctrine has today any practical merit beyond providing yet another happy hunting ground for Australian and colonial constitutional lawyers.

Supra note 7, at 332.

[18] Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, at 484 (1923-24).

Clearly, judgments and judicial orders cannot be directly enforced outside the province in which they were made. *McGuire v. McGuire*[19] affords the best Canadian example of this simple point. There, the Ontario Court of Appeal agreed with the argument of the Attorney General of Canada that the courts of Ontario had no jurisdiction and could constitutionally never be given jurisdiction to issue a writ of *habeas corpus ad testificandum* to someone outside Ontario. Mrs. McGuire was thus not able in litigation in Ontario to obtain the testimony of her co-defendant, Desordi, who was incarcerated in a Quebec penitentiary. A sweeping statement was made in the reasons for judgment: "[N]o provincial Legislature has any power to pass laws having any operation outside its own territory and *no tribunal established by provincial legislation can extend its process beyond its own territory* so as to subject either persons or property to its decisions."[20]

The statement is sufficiently broad to encompass service *ex juris* yet not since the turn of the century has the constitutional validity of rules which permit service of process outside a province been questioned.[21] The legislative authority to make rules respecting service of process falls within section 92(14) of the B.N.A. Act as a procedural matter pertaining to the administration of justice and yet that head of power is also limited

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[19] [1953] O.R. 328, [1953] 2 D.L.R. 394 (C.A.). *See also, e.g., Ex parte* Eli, [1920] 1 W.W.R. 661 (Alta. S.C. Chambers); Vantel Broadcasting Co. v. Canada Lab. Rel. Bd., 40 W.W.R. 95, 35 D.L.R. (2d) 620 (B.C.C.A. 1962). When a provincial court is enforcing *federal* laws, however, its territorial jurisdiction may be extended: *Vantel*, *id.*; Regina v. J.V., 60 C.C.C. (2d) 121 (B.C.S.C. 1981). Nevertheless, as Davey J.A. pointed out in *Vantel*, though a provincial court is thereby empowered to issue orders directed, for example, to a federal board whose head office is located in another province, "there is presently no machinery by which a court of this province can against the board or its members directly enforce obedience or punish disobedience to one of its writs or orders by civil process operating in another province." *Id.* at 107, 35 D.L.R. (2d) at 629. Execution of writs, orders and judgments lies in the hands of "sheriffs and marshals, the gaolers, and others": *id.* at 107, 35 D.L.R. (2d) at 630, and it apparently never crossed the mind of Davey J.A. that such persons from B.C. would be entitled to act in another province to enforce obedience.

The territorial issue was recently raised in British Columbia with respect to the jurisdiction of provincial court judges under s. 20(1) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3. *See J.V.*, *id.* The B.C. Supreme Court held that the provincial courts had extended jurisdiction according to the wording of the federal statute.

[20] *McGuire*, *id.* at 334, [1953] 2 D.L.R. at 397 (emphasis added).

[21] There is, however, an ambiguous comment by Laskin C.J.C., speaking in dissent, in *Interprovincial Co-operatives*, *supra* note 12, which indicates that he thinks the validity of such provincial rules is at least justiciable, if not subject to open doubt:

> We are not concerned in this case with the jurisdiction of the Manitoba Courts over the appellants; that is not disputed because they have a sufficient presence in that Province to provide a basis for jurisdiction *in personam*. Hence, any question of constitutional limitation on the power of the Province to act within the Province against non-residents (to use a general term), by fashioning its own rules to provide a basis for service *ex juris*, does not arise.

Id. at 498, 53 D.L.R. at 337-38.

by the phrase "in the province". In 1901 the Ontario Divisional Court in *Deacon v. Chadwick*[22] refused to recognize a default judgment from Manitoba in a case in which the jurisdiction of the Manitoba court had been founded on service *ex juris*. The primary ground for the non-recognition was that the Manitoba court had not had jurisdiction according to the law of Manitoba, a fact which is usually irrelevant under the common law rules of recognition and enforcement to which the provinces still adhere. However, as a secondary ground the court combined the American constitutional position, in which the extension of jurisdiction is limited by the due process clause, with the territorialist theory advanced by Story, and concluded that Manitoba process served outside Manitoba was of no effect. The same issue was again raised in *Standard Construction Co. v. Wallberg*,[23] the only difference being that the validity of the rules permitting service *ex juris* was being impugned in the issuing forum itself, Ontario. On a motion by the defendant to be allowed to enter a conditional appearance in the Ontario action after having been served with process in Quebec, Falconbridge J. in Chambers said that he was "not prepared to hold that the Master [was] wrong [in dismissing the motion], *nor to hold that the Judges have enacted, and the Legislature sanctioned, a Rule which is ultra vires*".[24] On appeal, the Divisional Court either deliberately or accidentally sidestepped the issue of the constitutional validity of rules permitting service *ex juris* by focussing on the territoriality of the enforcement of the judgment. Middleton J. pointed out that since the defendant had assets in Ontario the Ontario judgment would be enforceable within the province, an aspect of the matter which had never been contested by the defendant. Thus Ontario, where the issue has been twice raised, is in the unenviable position of having conflicting judgments, one of which suffers from the defect of reaching a conclusion by avoiding the issue.

In British Columbia the issue appears not to have been directly raised but there are very strong dicta on point in one British Columbia Court of Appeal decision. In *Vantel Broadcasting Co. v. Canada Labour Relations Board*[25] the issue was the constitutional jurisdiction of a provincial court to control a federal board by means of prerogative writs, not the validity of provincial rules permitting service *ex juris*. Nevertheless, in dicta, none of the members of that court thought that the rules of service of process *ex juris* suffered from any constitutional infirmity even though they clearly recognized the territorial limitation incorporated in the B.N.A. Act. Davey J.A. stated: "It is clear that under the *B.N.A. Act* the legislature of a province cannot in matters otherwise falling within its authority extend the power of provincial courts beyond

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[22] [1901] 1 O.L.R. 346, 21 C.L.T.: Occasional Notes 204 (Div'l Ct.).

[23] [1910] 20 O.L.R. 646 (Div'l Ct.).

[24] *Id.* at 647 (emphasis added). It is of interest to note that counsel for the plaintiff objected to the constitutional issue being decided because notice had not been given.

[25] *Supra* note 19.

the territorial limits of the province, although it may permit some processes to be served *ex juris*."[26] Sheppard J.A. considered that "[s]ec. 92(14) would authorize the provincial legislature to confer upon the court the usual powers of the superior courts of Westminster to assume jurisdiction over non-residents and to order service out of the jurisdiction."[27] Though neither judge advanced any justification for his conclusion, two possible arguments do exist to support provincial power to permit their courts to order service *ex juris*, the first derived from history, the second from international law. Of the two, it is the second which is perhaps the more persuasive.

In 1852, by the Common Law Procedure Act,[28] discretion to permit service of writs outside England was conferred on the English courts. Provincial superior courts have all the powers of the Queen's courts in England and section 129 of the B.N.A. Act continued in force all the laws in the founding provinces, all the courts and all the "legal Commissions, Powers and Authorities". There can be little argument that if the courts in each province had such power at Confederation that power continues until altered. The problem is that section 129 provides that alteration or amendment is to be according to the division of powers in the B.N.A. Act. Since amendment of the rules of court authorizing service *ex juris* is not unknown in the provinces, what is required to validate such amendments is a finding that section 92(14) confers the power to do so in spite of the limiting phrase. The strongest argument on this point seems to be by analogy to that accepted by the Privy Council in *Croft v. Dunphy*[29] and in *Ashbury v. Ellis*:[30] the English Parliament had such power and it must have intended to confer the same power on the subordinate legislature in question. In *Croft* Canada was held to have the jurisdiction to enact legislation directed against hovering outside territorial waters. In *Ashbury* a statute permitting service outside New Zealand which was modelled on, and virtually identical to, the English statute was also upheld on the grounds that it was in relation to the peace, order and good government of New Zealand and that it was "highly reasonable" that the courts should be able to decide whether they would proceed in the absence of the defendant. As New Zealand was at the time subject to the doctrine of colonial extraterritorial incompetence, the decision is particularly significant in supporting provincial power in Canada. Even though the Privy Council did not expressly discuss that doctrine, the decision was reached with a full awareness that there was such a limitation on New Zealand's legislative competence.

The second basis on which the constitutional validity of provincial rules permitting service *ex juris* might be upheld turns on the nature of

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[26] *Id.* at 101, 35 D.L.R. (2d) at 624.
[27] *Id.* at 119, 35 D.L.R. (2d) at 640-41.
[28] 15 & 16 Vict., c. 76, ss. 18, 19.
[29] *Supra* note 10.
[30] [1893] A.C. 339 (P.C.) (N.Z.).

the contents of the document served and is derived from a distinction drawn in international law with respect to the territorial principle. Where the document served contains a mere notification with no threat of penalties in the event of non-compliance then it is said that there is no invasion of the territorial sovereignty of the receiving state and service of that document is permissible. On the other hand, a document containing a command infringes the territorial principle.[31] Prerogative writs, such as that in issue in *McGuire v. McGuire*, would fall into the latter prohibited category and writs and statements of claim into the former permissible category. The Canadian cases are thus reconcilable with each other and with the internationally accepted territorial limitation and, therefore, unless the Canadian version is narrower, with the territorial limitation which the B.N.A. Act imposes on the provinces.

The second aspect of this elementary point, that laws of another jurisdiction will apply in the forum only through the medium of the forum choice of law rules, is one which often seems to be overlooked by counsel who raise the applicability of a statute of another province but fail to invoke the forum conflicts rule which would permit that foreign statute to be applied. A direct application of a foreign rule is, of course, a breach of the territoriality principle and naturally provokes outbursts from courts as to the limits of the legislative jurisdiction of the other province. The distinction between direct application of foreign law and application by way of forum conflicts rules was put with great clarity by Wilson J. of the Ontario High Court in *George C. Anspach Co. v. C.N.R.*, a contract case in which it was argued that the law of the state of Washington should apply:

> What the plaintiff seeks to enforce here is not, strictly speaking, the law of the United States, as it was put in argument, but is in reality Canadian law, and when the plaintiff asks for the enforcement of a foreign law, *what it really means is the enforcement not of a foreign law but of a right acquired under the law of a foreign country applicable according to the rules of the conflict of laws as determined by the law of the Province of Ontario*. Just what is the foreign law, of course, is in Ontario courts a question of fact.[32]

Thus anyone who argues in the courts of one province for the direct application of the law of another province will invariably be met with refusal, on the ground that if such operation was intended by the legislating province then the statute is to that extent *ultra vires*. A good example of this point is *Desharnais v. C.P.R.*[33] The plaintiffs there were residents of Alberta employed by C.P.R. They suffered injuries in an accident which occurred in the province of Saskatchewan and commenced an action for damages in that province. The problem was that, in their absence, the Alberta Workmen's Compensation Board awarded compensation to them. The defendant then, in the Saskatchewan action,

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[31] Mann, *supra* note 4, at 114.

[32] [1950] O.R. 317, at 329, [1950] 3 D.L.R. 26, at 38 (H.C.) (emphasis added)

[33] [1942] 3 W.W.R. 594, [1942] 4 D.L.R. 605 (Sask. C.A.)

asked to have it dismissed by virtue of the provisions in the Alberta Act which barred civil actions for compensation and gave exclusive jurisdiction to the Alberta Workmen's Compensation Board. Naturally the Saskatchewan Court of Appeal rejected the direct application of the Alberta provisions saying that if the legislature in Alberta had purported to bar actions outside the province by the Act, the Act would to that extent be *ultra vires*. Nevertheless, the court did give full consideration as well to the possibility that the conflicts rules of Saskatchewan might render the Alberta statute applicable: if the proper law of the contracts of employment had been Alberta's and if under their contracts the plaintiffs had contracted out of their right of action, then the Alberta statute would at least have been relevant. Mackenzie J.A. pointed out, however, that since the law of Saskatchewan rendered void such agreements, the defendant still might not have succeeded in staying the Saskatchewan action.[34]

With respect, it appears that both Pigeon and Ritchie JJ., in *Interprovincial Co-operatives*,[35] fell into the trap of failing to keep the distinctions discussed above in mind. Ritchie J., in particular, was upset by the nature of the remedy asked for, an injunction.

> This to me is a clear assertion of a right of one province to enter into another and there invoke its own law so as to restrain companies who have a presence in all three provinces from exercising rights which they are assumed to have under licences from the province where the discharge took place.[36]

An injunction operates *in personam* and the defendant was present in Manitoba. Its operations in Saskatchewan and Ontario would have been affected only indirectly as a result of compliance in Manitoba. Clearly the injunction could not have been enforced by Manitoba officers acting outside that province. The injunction might have constituted a *brutum fulmen* but there would be no breach of the territorial limitation on

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[34] *Id.* at 600. [1942] 4 D.L.R. at 609-10. The Saskatchewan court, in applying a Saskatchewan statute to an Alberta contract, would have been engaging in an internationally permissible direct application of its own law. However, as will appear from the discussion *infra*, an argument could be mounted based on Royal Bank of Canada v. The King, [1913] A.C. 283, 9 D.L.R. 337 (P.C.) (Can.), that that would be an unconstitutional application of the Saskatchewan statute because it destroyed contract rights outside Saskatchewan.

The common law conflicts rules concerning the issue of contracting out of tort liability, if unaffected by constitutional considerations, would permit a Saskatchewan court to apply the Saskatchewan statute, however: A. DICEY & J. MORRIS, THE CONFLICT OF LAWS 873 (10th ed. 1980).

[35] *Supra* note 12.

[36] *Id.* at 525, 53 D.L.R. (3d) at 350.

provincial powers in a Manitoba court issuing such an order.[37] Similarly, the licences obtained in Saskatchewan and Ontario probably were never intended by those provinces to be operable beyond the boundaries and certainly could not have been *ex proprio vigore*. As Laskin C.J.C. pointed out, they were "local to each of the provinces" and necessarily so.[38] Indeed, Pigeon J. performed the remarkable feat of both having and eating his cake: first he apparently located the tort outside Manitoba and held that the Manitoba statute could not apply directly to it, and then he ignored the fact that the Saskatchewan and Ontario licences would be applicable only by way of the forum choice of law rules and held that any such licencing would also be *ultra vires* if it were to defeat a Manitoba cause of action in Manitoba. Of course, his solution to allocate legislative jurisdiction to the Dominion because the pollution was interprovincial was also unique.

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[37] An English court is certainly not disturbed by the potential ineffectiveness of the injunction if it considers that an injunction is an appropriate remedy. In Castanho v. Brown & Root, [1980] 3 W.L.R. 991, at 999, [1981] 1 All E.R. 143, at 150 (1980), a case in which the House of Lords was called upon to decide whether to stay English proceedings or enjoin proceedings in Texas, Lord Scarman dealt perfunctorily with the argument that an injunction would be ineffective by quoting Romer L.J. from *In re* Liddell's Settlement Trusts, [1936] Ch. 365, at 374, *cf.* [1936] 1 All E.R. 239, at 248 (C.A.), stating: "It is not the habit of this Court in considering whether or not it will make an order to contemplate the possibility that it will not be obeyed."

[38] *Supra* note 12, at 499, 53 D.L.R. (3d) at 338.

The second major point to be clarified is a corollary of the first. The forum, applying its own law, will, of course, be applying it directly if the legislation can be interpreted in such a way as to encompass the situation and still conform to the constitutional limitations imposed by the B.N.A. Act. What the extent of that limitation is will be discussed below. The immediate point is that even if the forum statute is inapplicable directly, it may still apply by virtue of the forum conflicts rules. This point is as non-controversial as those discussed above whenever counsel or the court remembers that this option exists. The distinction between application of forum law and application of the law of another province (or any foreign law) is that the latter is applicable solely by way of conflicts rules whereas with forum law, conflicts rules constitute a second chance to have the forum law applied. As Kirke Smith J. stated in *Gronlund v. Hansen*:

> [T]here can, I think, . . . be no quarrel with the proposition that a provincial legislature has competence only within the geographical confines of the province concerned. This, however, is not an end of the matter; for if it were, there would be no room, or need, for the principles of private international law.[39]

Gronlund itself is a good example of the use of the conflicts option to avoid the very difficult question of whether the forum statute which is invoked is inapplicable because application would infringe the territorial limitation on provincial powers. The facts in that case were that a seaman, employed on a fishing vessel owned by the defendant, was killed in an accident off the coast of British Columbia. The widow, a British Columbia resident, commenced an action for damages on behalf of herself and her three children pursuant to a British Columbia statute, the Families' Compensation Act.[40] The defendant was a British Columbia company and the vessel was registered in the port of Vancouver. An argument was raised on behalf of the defendant that the Families' Compensation Act was inapplicable to an offshore accident as that extended application would be beyond the power of the legislature.

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[39] 65 W.W.R. 485, at 489-90, 69 D.L.R. (2d) 598, at 602 (B.C.S.C. 1968), *aff'd* 68 W.W.R. 329, 4 D.L.R. (3d) 435 (C.A. 1969). Even commentators sometimes overlook the role of forum conflicts rules vis-à-vis the legislation of other provinces. In a note on Hannah v. Pearlman, [1954] 1 D.L.R. 282 (B.C.S.C.), Ziegel criticizes Wilson J. for being prepared to recognize a reservation of title under a conditional sales contract pursuant to the Manitoba Lien Notes Act because that would have been "to give extraterritorial effect to the Manitoba Act". *Conflict of Laws — Chattel Mortgage in One Province — Chattel Subsequently Sold in Another — Territorial Nature of Bills of Sale Legislation*, 34 CAN. B. REV. 323 (1956). He apparently overlooks the point that the basis for such recognition of the Manitoba Act was the conflicts rule of the forum that the *lex situs* of the goods determines questions of title to them. The Manitoba statute (had its conditions been satisfied) would have had an extraterritorial effect but because the application would have been by way of a conflicts choice of law rule of the forum it would not have been a direct application and so not an infringement of the territorial principle.

[40] R.S.B.C. 1960, c. 138.

Conceding the point without discussion, Mr. Justice Kirke Smith applied a proper law of the tort choice of law rule and discovered to his gratification that the law selected was that of British Columbia. Thus British Columbia law, including the Families' Compensation Act, was applicable. In the Court of Appeal the same procedure was followed: there was no discussion of the constitutional issue but instead there was an immediate leap to the conflicts rule. Unfortunately, from a conflicts point of view, the British Columbia Court of Appeal reverted to the rule in *Phillips v. Eyre*[41] and ignored the proper law of the tort approach. Then, having discovered that the *situs* of the tort was a place where there was no law in force, the presumption that foreign law is the same as forum law in the absence of proof to the contrary was invoked and the Families' Compensation Act of British Columbia was found to be in force not only in the forum but also in the place where the tort occurred. The result is satisfactory. The two stage procedure is clear. What is not so satisfactory is the acceptance without discussion of the argument that direct application of the British Columbia Act would have been an unconstitutional extension of the legislative jurisdiction of the province.

The rules of private international law, then, will provide a second chance for the application of forum law and the only chance for the application of the law of some other jurisdiction. In the area of tort, the common law choice of law rule constituted by the combination of *Phillips* and *Machado v. Fontes*[42] invariably results in application of the law of the forum so in practice, inapplicability of forum law *ex proprio vigore* rarely makes a difference.[43]

B. *Three Approaches to the Problem*

The critical problem in this area is the one which was avoided by judicial concession in *Gronlund*: what are the territorial limitations on the legislative power of a province? Would there, in that case, have been a breach of the territoriality principle if the Families' Compensation Act had been applied *ex proprio vigore* and not through the medium of the rules of private international law? This is the crucial issue and it is sufficiently obscure even when the undergrowth of confusion created by the failure to distinguish between direct and indirect application which frequently occurs has been cleared away. Three distinct approaches to the problem can be isolated.

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[41] [1871] L.R. 6 Q.B. 1, 40 L.J.Q.B. 28 (Ex. Ch. 1870).

[42] [1897] 2 Q.B. 231, 66 L.J.Q.B. 542 (C.A.).

[43] Unless the tort is not justifiable according to the *lex loci delicti* as in, *e.g.*, Walpole v. C.N.R., [1923] A.C. 113, 70 D.L.R. 201 (P.C.) (Can.), McMillan v. C.N.R., [1923] A.C. 120, 70 D.L.R. 229 (P.C. 1922) (Can.).

1. *The Royal Bank Approach*

First, and at the heart of the problem, lies the well known case of *Royal Bank of Canada v. The King*,[44] a 1913 decision of the Privy Council. The decision was criticized at the time and the precise basis for it has defied rationalization over the years though many suggestions have been offered. According to John S. Ewart, writing very shortly after the decision, it was the Privy Council itself which raised the issue of the extraterritoriality of the Alberta legislation:

> [I]t is only fair to say that none of the bank's advisers either in Canada or England had imagined that there could be any validity in the point decided; that it was not referred to in the pleadings; that it was not mentioned in either of the two arguments in Canada; that it was not suggested in the opening speeches of the bank's counsel in London; that it was never hinted at by anybody until leading counsel for the Province had delivered two-thirds of his address; that it was then put forward, not by the bank but by Lord Macnaughten; and that counsel for the province, without a moment for reflection, had to deal with it as best he could.[45]

Ewart's contention was that, because of the manner in which it was raised, many of the points which ought to have been considered by the Privy Council were not discussed.[46]

The essence of the impugned provincial legislation was a statutory command to the Royal Bank to pay over into the general revenue fund of the province of Alberta the proceeds and interest resulting from the sale of bonds for the financing of a railway to be constructed entirely within the province. The bonds were sold in England and the proceeds were transmitted to New York. From there, they went on to the head office of the bank in Montreal. A special account in a branch of the bank in Alberta was credited with the amount. According to Viscount Haldane L.C., the alteration of the conditions of the scheme for construction of the railway was the equivalent of a failure of consideration which would have entitled the English bondholders to the return of their money. This was a right enforceable in Quebec at the head office of the bank, and was thus a civil right outside the province of Alberta and beyond the power of the legislature of Alberta to destroy.

Whether the "civil rights" located outside Alberta consisted of the contract rights of the bondholders, the rights of action, or something else, has been the subject of both judicial and academic speculation.

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[44] [1913] A.C. 283, 3 W.W.R. 994 (P.C.) (Can.).

[45] Ewart, *The King v. Royal Bank*, 33 CAN. L.T. 269, at 270-71 (1913).

[46] *Id.*

Royal Bank is usually regarded as a contracts case,[47] yet the explanation of the case which is most consistent with the language used and with the result is one which rests on a property characterization. W.H.P. Clement, writing just after the Privy Council decision, concluded that the only difference between the decision in the Alberta Supreme Court which upheld the legislation and that (*per saltum*) in the Privy Council was that the Privy Council considered the property to be the money located in Montreal at the head office of the bank, whereas the Alberta Supreme Court had found the property to be the debt in Alberta.[48] This certainly coincides with the emphasis placed by Viscount Haldane L.C. on the fact that no money *in specie* was sent to Alberta and with his distinguishing of *Rex v. Lovitt*,[49] the case which would have located the debt in Alberta at the branch where the special account had been set up. Since it was a transfer of ownership of a tangible movable asset (the actual proceeds from the bonds), the only province with immediate effective control was Quebec, the province where the property was located. If one accepts Clement's analysis, one need not worry about whether the civil rights which Viscount Haldane L.C. found were located outside Alberta consisted of contract rights or rights of action, or what the connecting factor might be for allocating that *situs* to them. Giving a geographical location to intangibles, as one eminent English judge has noted, is really a venture into the realm of unreality:

> The question as to the locality, the situation of a debt, or a chose in action is obviously difficult, because it involves consideration of what must be considered to be legal fictions. A debt, or a chose in action, as a matter of fact, is not a matter of which you can predicate position; nevertheless, for a great many purposes it has to be ascertained where a debt . . . is situated.[50]

If, therefore, the necessity for "predicating position" can be eliminated, an advantage will be obtained. The property characterization of the case does achieve this advantage. Unfortunately, when given a chance to

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[47] *See, e.g.*, Blom, *The Conflict of Laws and the Constitution — Interprovincial Co-operatives Ltd. v. The Queen*, 11 U.B.C.L. REV. 144, at 147 (1977); Hertz, *The Constitution And The Conflict of Laws: Approaches in Canadian and American Law*, 27 U. TORONTO L.J. 1, at 28 (1977); Laskin C.J.C., speaking in dissent, in *Interprovincial Co-operatives*, *supra* note 12, at 502-03, 53 D.L.R. (3d) at 341, and in *Thomas Equipment*, *supra* note 14, at 534, 96 D.L.R. (3d) at 4.

[48] W. CLEMENT, *supra* note 10, at 823. He concluded that if his analysis of the decision were correct "there is nothing in the decision to indicate a territorial limitation in the phrase 'in the province' different from or greater than the essential territorial limitation which exists in the case of any modern state. The words do not connote any dividing line between federal and provincial authority." *Id.* at 827. In other words, if Clement were right, Air-India v. Wiggins, *supra* note 6, would be applicable provincially.

[49] [1912] A.C. 212, 10 E.L.R. 156 (P.C. 1911) (Can.).

[50] Atkin L.J. in New York Life Ins. v. Public Trustee, [1924] 2 Ch. 101, at 119, *cf.* 131 L.T. 438, at 444 (C.A.). Warrington L.J. also observed that the rule created for English purposes was not necessarily the one utilized in other countries: *id.* at 117, *cf* 131 L.T. 438, at 444.

explain the basis for the decision in *Royal Bank* in a subsequent case, *Workmen's Compensation Board v. C.P.R.*,[51] Viscount Haldane L.C. chose simply to distinguish his own earlier decision on the grounds that the rights affected in *Royal Bank* were "wholly outside" the province and the British Columbia legislation in question was for the "securing" of civil rights within the province rather than for "interfering" with rights outside the province. Thus an argument that the provisions of the British Columbia Workmen's Compensation Act which provided for compensation to dependants of employees injured in accidents outside the province was *ultra vires* because it took away the immunity an employer might have enjoyed in the place where the accident occurred was defeated. The legislation was characterized as conferring contract rights within British Columbia rather than as destroying tort rights outside British Columbia, and the possibility that *Royal Bank* turned on a fictional rule for locating intangible rights rather than on the factual locating of tangible property continued.

If *Royal Bank* did turn on assigning a *situs* to all intangible rights, then in addition to the difficulties inherent in that problem it suffers from the further difficulty that it appears to import for constitutional purposes the now anachronistic vested rights doctrine. That theory, at least in its American incarnation,[52] postulated rigid rules for identifying the jurisdiction which could exclusively create rights which other jurisdictions were then obligated to recognize and enforce. For conflicts purposes the vested rights doctrine has been "effectively destroyed"[53] and replaced by the local law theory which reconciles the application of foreign law with the doctrine of territorial sovereignty by stating that a court is not enforcing foreign rights but creating rights by a combination of its own conflicts rules and the fact of the foreign law. For conflicts purposes this may be, as Morris states, a mere play on words,[54] but for constitutional purposes retention of the vested rights doctrine has considerable significance, particularly when courts can state arbitrarily that certain civil rights are located outside the legislating province without ever enunciating the connecting factor employed to put them there.

A pair of cases which followed the result in *Royal Bank* and which bear a remarkable similarity to that case are *Ottawa Valley Power Co. v. Hydro-Electric Power Commission*[55] and *Beauharnois Light, Heat &*

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[51] [1920] A.C. 184, [1919] 3 W.W.R. 167 (P.C. 1919) (Can.).

[52] *As exemplified* in the AMERICAN LAW INSTITUTE RESTATEMENT OF THE CONFLICT OF LAWS (1934).

[53] J. MORRIS, THE CONFLICT OF LAWS 503 (2d ed. 1980). The Privy Council cannot be faulted in either the *Royal Bank* case or *Workmen's Compensation Bd., supra* note 51, for adhering to the vested rights doctrine (if they did) because its destruction occurred about 1924 with the publication in the United States of Cook's article, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924).

[54] J. MORRIS, *id.* at 507.

[55] [1937] O.R. 265, at 297, [1936] 4 D.L.R. 594 (C.A. 1936).

Power Co. v. Hydro-Electric Power Commission.[56] Like the *Royal Bank* case, both purport to sound in contract and yet the property elements are extremely strong. The Hydro-Electric Power Commission, a corporate entity created by Ontario statute, had entered into contracts for the joint development of hydro-electric power on the Ottawa River on the boundary between Ontario and Quebec. The plaintiffs in each case were Quebec corporations. By statute, the legislature in Ontario had declared the contracts "illegal, void and unenforceable", and had prohibited any action being brought against the Commission founded upon such contracts. The critical element was not so much the fact that the plaintiffs in each case were resident outside Ontario and that they carried rights with them, as that the performance of the contracts was tied to real property situate in Quebec. The proper law of the contracts was not expressly chosen and might have been either that of Ontario or of Quebec but the performance of the contract was primarily to take place in Quebec. It is true that in the *Ottawa Valley Power* case, Middleton J.A. made the following statement which, if taken literally, would virtually preclude all provincial contract legislation because contract rights could never be said to be within any province:

> A contract creates civil rights which, speaking generally, know no territorial limitation. When legislation does not merely prohibit resort to Provincial Courts to enforce these rights but purports, as here, to destroy the contract itself, that legislation does not concern "Civil Rights in the Province", but is an attempt to destroy civil rights which have no territorial limitation, and, in my view, it is *ultra vires* of the Province.[57]

As Rose C.J.H.C. pointed out in *Beauharnois*, neither of the other two majority judges picked up on the statement. They dealt instead with the particular contract and not contracts in general.

2. *The Ladore v. Bennett Approach*

Two years later in *Ladore v. Bennett*[58] the Privy Council had an opportunity to review the situation. An entirely different approach was taken by Lord Atkin in the face of an argument based directly on *Royal Bank* and the two Ontario cases, yet *Ladore* is never treated as overruling *Royal Bank*. Rather, it constitutes a rarely invoked alternative approach in deciding whether a province has legislated in violation of the territoriality principle. The explanation for the survival of *Royal Bank* may lie in the fact that in the very short reasons for judgment delivered by Lord Atkin no mention was made anywhere of any of the cases cited. They were neither expressly overruled nor distinguished — just ignored.

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[56] [1937] O.R. 796, at 818, [1937] 3 D.L.R. 458 (C.A.).
[57] *Supra* note 55, at 304, [1936] 4 D.L.R. at 599.
[58] [1939] A.C. 468, [1939] 2 W.W.R. 566 (P.C.) (Can.).

The legislation in *Ladore* consisted of Ontario statutes which amalgamated four municipalities in financial difficulties and exchanged the existing debentures issued by each for new debentures with a scaled down rate of interest. It was argued that this amounted to legislation in relation to interest and bankruptcy and that it interfered with the civil rights of debenture holders outside the province. On the first issue, the subject matter of the legislation, Lord Atkin held that it was in relation to municipal institutions in the province. Agreeing that creditors' rights outside the province would necessarily be affected by the legislation, the Privy Council held that this would not amount to an infringement of the territorial principle because it was merely a collateral effect, a necessary incident in the achievement of a valid provincial object. No distinction was drawn by Lord Atkin between provincial legislation which adversely affected rights which might be said to be located outside the province because the persons in whom those rights were vested were resident there, and legislation which conferred rights on non-residents of the province. *Ladore* was, of course, an example of the former situation: legislation which derogated from rights of non-residents. This is significant in view of the gloss on *Royal Bank* first enunciated by Viscount Haldane L.C. in *Workmen's Compensation Board,*[59] then picked up by Rand J. in *Attorney General for Ontario v. Scott*[60] and used to distinguish the *Royal Bank* case, an effort which really should have been redundant after *Ladore*. In *Scott*, Rand J. said that "a state, including a province, does not require jurisdiction over a person to enable it to give him a right in personam; but ordinarily, and to be recognized generally, such a jurisdiction is necessary to divest such a right."[61] The distinction works for the *Royal Bank* facts and for *Scott* but fails to explain *Ladore*, in which non-residents were divested of existing rights. To ask whether the legislation confers rights or divests non-residents of rights is not determinative in the *Ladore* approach. That approach permits a province to divest non-residents of rights provided that the legislation is directed to a valid provincial object and that the effect on the rights of non-residents is necessary for the achievement of that object. Furthermore, if property is located in the province it is generally conceded that the province has plenary jurisdiction.[62] Yet legislation conferring rights to that property within the province may very well derogate from rights of non-residents to that same property.[63]

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[59] *Supra* note 51.

[60] [1956] S.C.R. 137, 1 D.L.R. (2d) 433 (1955).

[61] *Id.* at 141, 1 D.L.R. (2d) at 436.

[62] The *Royal Bank* facts, of course constitute exactly the converse situation if the property analysis is accepted.

[63] Provincial legislation affecting rights to tangible movables which protects the title of the *bona fide* purchaser for value in one province may well destroy the title reserved in the vendor under a conditional sales contract in another: *e.g.*, Century Credit Corp. v. Richard, [1962] O.R. 815, 34 D.L.R. (2d) 291 (C.A.). *See generally* cases cited in J. CASTEL, II CANADIAN CONFLICT OF LAWS 378 (1977).

Whether courts in other provinces would recognize and apply the legislation is an independent question which has no bearing on the validity of the legislation though it may have a bearing on its effectiveness. Application outside the legislating province will, as explained above, depend entirely on the conflicts rules of the other provinces.

It is unusual, however, to find courts taking a *Ladore* approach when faced with a challenge to provincial legislation based on extraterritoriality,[64] although it can often be said that the result is the same as it would have been under *Ladore*. The more usual technique is to distinguish *Royal Bank* in one of three ways: by utilizing the distinction between conferring and divesting rights;[65] by finding that the legislation deals with property in the province;[66] or by holding that the legislation regulates persons, or regulates or prohibits conduct within the pro-

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[64] Day v. City of Victoria, [1938] 3 W.W.R. 161, [1938] 4 D.L.R. 345 (B.C.C.A.) is a notably strong exception. It followed almost immediately upon the Privy Council decision, however.

[65] *E.g.*, The Queen v. Labour Rel. Bd.; *Ex parte* Eastern Bakeries Ltd., 44 M.P.R. 213, 23 D.L.R. (2d) 635 (N.B.C.A. 1960). In this context it is of interest to note the dissent of Miller J.A. in Pinay v. Dawson, 34 W.W.R. 673, 28 D.L.R. (2d) 109 (Man. C.A. 1961). He objected to the decision of the majority to allow filiation proceedings based on the presence in Manitoba of only the putative father because that decision had the potential to confer rights on mothers all over the world, whenever the putative fathers should happen to pass through Manitoba.

[66] Attorney General of B.C. v. Canada Trust Co., [1980] 5 W.W.R. 591, [1980] C.T.C. 338 (S.C.C.). When the property consists of an intangible (or a chose in action) then provincial courts may have differing views as to its location and as to the constitutional validity of any provincial legislation changing the common law conflicts rules for determining its *situs* for any purpose. The garnishment cases illustrate this problem. *See* Edinger, *Interprovincial Garnishment: Hansen et al v. Dunstar Mines Ltd. et al.*, 10 R. DE D. 243 (1979). The location of property affected *outside* the province, on the other hand, can be a compelling argument against the application of forum legislation even when all concerned parties are within the province and before the court. *See, e.g.*, Horsman & Son v. Sigurdson, [1980] 5 W.W.R. 667, 13 B.C.L.R. 20 (S.C. 1979); Middleton v. Middleton, [1980] 5 W.W.R. 143, 110 D.L.R. (3d) 497 (Sask. C.A.) (leave to appeal to Supreme Court of Canada refused). *But see, contra*, McKinney v. McKinney, 17 R.F.L. (2d) 308 (B.C.S.C. 1980); McCalla v. McCalla, 5 Sask. R. 224 (Q.B. 1980).

vince.[67] Yet, while an affirmative finding on the latter two points may result in a divesting of rights of persons outside the province, this fact is usually disregarded, a result which is quite consistent with *Ladore*.

The territoriality principle as developed in the international law context clearly concedes to a state the authority to control conduct within its borders when both the actor and the act are present there. When the actor is absent and/or some elements of the conduct proscribed occur outside the borders of the state, then the legislative authority of that state becomes questionable both constitutionally in Canada and also in international law.[68]

Nevertheless, the cases show that if the applicability of a provincial legislative provision turns on the existence of some conduct or activity within the province, it is highly unlikely that it will be declared invalid because of the territoriality principle even though the actor has never set foot in the province. *Regina v. W. McKenzie Securities Ltd.*[69] is a good example. In that case, an Ontario company was charged under the Manitoba Securities Act with unlawfully trading in securities in Manitoba without being properly registered. The defendant company had sent letters to a Manitoba resident and had telephoned him from Toronto in order to sell certain shares of stock. The Court of Appeal found that the definition of "regulated conduct", *i.e.* trading, as stated in the Manitoba statute, included solicitation and that the act of soliciting had occurred in Manitoba because:

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[67] Attorney General for Ontario v. Reciprocal Insurers, [1924] A.C. 328, [1924] 2 W.W.R. 397, [1924] 1 D.L.R. 789 (P.C.) (Can.); *Re* Leduc, 33 W.W.R. 223, 25 D.L.R. (2d) 680 (Sask. C.A. 1961); Attorney General for Manitoba v. Forbes, [1937] 1 W.W.R. 167, [1937] 1 D.L.R. 289 (P.C. 1936) (Can.); Cowen v. Attorney General for British Columbia, [1941] S.C.R. 321, [1941] 2 D.L.R. 687; Gregory & Co. v. Quebec Securities Comm'n, [1961] S.C.R. 584, 28 D.L.R. (2d) 721; Regina v. W. McKenzie Securities Ltd., 55 W.W.R. 157, 56 D.L.R. (2d) 56 (Man. C.A. 1966); *Thomas Equipment*, *supra* note 14.

It is of interest to contrast the decision as to the location of the omission in *Thomas Equipment* with the statement regarding the matrimonial offence of non-support in Smith v. Smith, [1953] 61 Man. R. 105, 7 W.W.R. (N.S.) 163, [1953] 3 D.L.R. 682 (Q.B. 1952), *appeal dismissed* [1953] 61 Man. R. 105, at 115, 9 W.W.R. (N.S.) 144, [1953] 3 D.L.R. 682, at 690 (C.A.). In this case the wife was in Manitoba and the husband resided in B.C. The court considered that the offence of omission "ought not to be said [to occur] in any and every place where the wife happens to be residing". *Smith*, *id.* at 110, 7 W.W.R. (N.S.) at 167, [1953] 3 D.L.R. at 686.

[68] A prime example of the international reaction which overextension of jurisdiction can engender is that caused by the application of United States anti-trust legislation in American courts. The United Kingdom passed specific legislation designed to counter the damaging effects on English interests in American anti-trust suits: Protection of Trading Interests Act 1980, U.K. 1980, c. 11. This Act provides protection for persons in the United Kingdom from certain measures taken under the law of overseas countries when those measures apply to things done outside such countries and their effect would be to damage the trading interests of the United Kingdom.

[69] *Supra* note 67.

> The invitation put forward by the accused in their letters was a continuing one. It started when written in Toronto; it continued when deposited in the post box there; it did not cease to exist during the period when it was being transported through the postal service . . . and it retained its vitality and spoke with special effectiveness to McCaffrey at the time when he opened and read the letter in Shilo in Manitoba.[70]

One might feel that the explanation of how the act occurred in the province is a little strained but the justification is obvious: the Manitoba Securities Act was designed to protect the Manitoba public and the protection would be incomplete if solicitations originating outside the province were not included. Probably, on the strength of *Gregory & Co. v. Quebec Securitites Commission*,[71] it could also have been said that the same acts by the Ontario company constituted trading in securities in Ontario.

A more recent and even weightier example of the constitutional effectiveness of the technique of focussing on regulation of conduct is *Thomas Equipment Ltd.*[72] There the Alberta Farm Implement Act imposed on vendors (defined as manufacturers or suppliers) the obligation to repurchase unused farm implements on demand from a dealer after the termination or expiration of an agreement. An Alberta dealer entered into a contract with a New Brunswick vendor in which, *inter alia*, they made an express choice of the law of New Brunswick. The New Brunswick company refused to comply with a demand from the Alberta dealer to repurchase machinery. A majority of the Supreme Court of Canada held that the Alberta statute was valid and applicable; its object was to regulate the sale of farm implements in Alberta and the failure to comply with the demand for repurchase was a failure which occurred in Alberta because compliance "could have been effected in Alberta".[73] While one might quibble with the arbitrary way in which the omission was given a geographical location in Alberta, the result is consistent with the *Ladore v. Bennett* approach. The main object of the statute, control of the local farm implement business, is a valid provincial purpose. Thus, it is not an invalidating fact that civil rights of non-residents might be affected. Although the majority, speaking through Martland J., held that what was being enforced was a statutory obligation entirely independent of contract, it is hard to escape the conclusion that the contract of the New Brunswick company was adversely affected by the insertion of a new term. In *Royal Bank* terms, there was derogation from civil rights outside Alberta.

Laskin C.J.C., dissenting, refused to deal with the statute as one regulating conduct in Alberta. He dealt with it as a statute related to contracts. Saying cryptically that he had some doubts about the actual results of *Royal Bank*, he nevertheless applied *Ottawa Valley Power* and

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[70] *Id.* at 165, 56 D.L.R. (2d) at 64.
[71] *Supra* note 67.
[72] *Supra* note 14.
[73] *Id.* at 544, 96 D.L.R. (3d) at 12.

Beauharnois and held that for Alberta law to apply to a New Brunswick contract it would amount to an extraterritorial application of the law of Alberta. It remains to be seen whether Laskin C.J.C.'s judgment will have implications for the ordinary conflicts rule which permits the forum to apply its own mandatory laws even when the proper law of the contract is the law of some other jurisdiction.[74] The inference is that when the forum is a Canadian province, then such application may be constitutionally impermissible. However, that inference can be made only if one can ascertain first whether or not the Chief Justice had the conflicts choice of law rule in mind, and secondly, whether or not he was considering the relationship between constitutional law and the common law conflicts choice of law rules for contracts.

Thomas Equipment Ltd. should stand as a lesson to legislators if they still need it. The lesson is that legislation prohibiting and regulating conduct taking place within the province is more likely to be upheld than legislation drafted in private law terms such as tort or contract. Courts have a far easier time assigning a *situs* to acts and persons than to intangibles such as contract rights or causes of action. A *situs* for the latter is pure fiction, whereas the former at least is objectively observable even if it moves or takes place in more than one province.

Other statutes which have been held not to breach the territoriality principle are those which demand consideration of conduct wherever it occurs, but only for very specific purposes: to determine fitness to hold a licence or be accorded some other status within the province.[75] No sanctions can be imposed directly as a result of conduct occurring outside the province, but it is constitutionally permissible for a court to consider conduct even if it took place outside the boundaries of the province. The main object of such statutes is the protection of the provincial public interest by controlling the fitness of persons practising any given occupation.[76] There is, of course, only a fine theoretical distinction between the imposition of a direct sanction for conduct taking place outside the province and the indirect punishment constituted by the refusal or removal of a licence. However, this distinction is constitutionally acceptable.

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[74] The source of this permissive rule is Vita Food Products, Inc. v. Unus Shipping Co., [1939] A.C. 277, [1939] 2 D.L.R. 1 (P.C.) (Can.). Admittedly, their Lordships did not consider constitutional issues on this point.

[75] Note that such statutes are similar to provincial regulatory legislation.

[76] *Re* Legault & Law Soc'y of Upper Canada, 8 O.R. (2d) 585, 58 D.L.R. (3d) 641 (C.A. 1975); Underwood McLellan & Assocs. v. Association of Professional Eng'rs of Sask., [1978] 4 W.W.R. 525, 103 D.L.R. (3d) 268 (Sask. C.A. 1979).

3. *Transformation of Common Law Rules of Conflicts into Rules of Constitutional Law*

A third possible approach to determining the scope of provincial legislative jurisdiction consists of the use of the common law conflicts choice of law rules as a constitutional doctrine.[77] A recent authority illustrating this approach may be *Interprovincial Co-operatives Ltd.*[78] In his judgment, Laskin C.J.C. made use of a conflicts rule to locate the tort in the province in order to uphold the application of Manitoba law, commenting that Manitoba had not purported to bring tort "within its borders" by any other means.[79] Ritchie J. applied the common law conflicts rule in *Phillips*[80] instead of the Manitoba legislation, which had been intended to abrogate the second branch of the common law rule for the particular tort of pollution. He stated, without elaboration, that there was an unbroken line of authority in the Supreme Court of Canada adhering to *Phillips* and that he was not about to depart from it. Whether or not either judge thought a provincial departure from common law conflicts choice of law rules to be constitutionally impermissible is a matter of speculation only.[81]

This third approach is similar to but quite distinct from the situation outlined earlier,[82] in which conflicts rules are used to give forum law a wider application in a situation where a direct application would be constitutionally impermissible or simply not within the expressed scope of the legislation. The present alternative is used to determine legislative scope for the purpose of direct application. The choice of law rules of conflicts become a part of the constitutional law of Canada, and individual rules are no longer subject to legislative alteration by any individual province. A major premise of this approach seems to be that in any given situation there is a single appropriate legislative body. Therefore, if legislatures were to consult conflicts choice of law rules before acting, the extent of their jurisdiction would be known and there would be no overlapping legislation.

Prima facie this looks like an ideal solution. It could even be said that if the property characterization of the issue in the *Royal Bank* case were accepted, then that case would be an early application of the principle. Certainly the traditional jurisdiction-selecting choice of law rules were intended to conform to the territorial principle and they look as if they would provide a test which, while it might be arbitrary, would

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[77] Romero, *The Consumer Products Warranties Act (Part II)*, 44 SASK. L. REV. 261 (1979-1980).

[78] *Supra* note 12.

[79] *Id.* at 500, 53 D.L.R. (3d) at 339.

[80] *Supra* note 41.

[81] Note that older and clearer authority is to be found in tax cases. *See, e.g.*, The King v. National Trust Co., [1933] S.C.R. 670, [1933] 2 D.L.R. 474.

[82] *See* notes 39-43 and accompanying text *supra*.

be sure. There is, however, a significant number of problems with this approach.

First, the appearance of certainty is very often a mere facade. The two cases just mentioned are excellent examples of this point. In *Royal Bank* the Alberta Supreme Court held that the property in question consisted of the debt. Applying a conflicts rule for locating the intangible property constituted by a debt, the court held that the debt was situated in Alberta. The Privy Council, while not denying that the debt was located in Alberta, held that the property in issue consisted of the money *in specie* which, as a tangible movable, could be factually located in Quebec. In *Interprovincial Co-operatives* the members of the Supreme Court of Canada were divided, not on the appropriate choice of law rule for torts (though potential disagreement was evident) but on the preliminary question of where the tort could be said to have occurred. For Laskin C.J.C., the *situs* was Manitoba; for Ritchie J., the *situs* must have been Saskatchewan and Ontario or there would have been no necessity to apply the rule in *Phillips*.

Second, there is the consideration that the common law rules of private international law were formulated to achieve justice and convenience for individuals and not for the purpose of determining the absolute limits of legislative jurisdiction of any state. To adopt the common law rules, even subject to development by the courts, is perhaps to adopt an unsuitable test. Even if they could be said to have been intended to define the limits of legislative jurisdiction, the English common law conflicts rules are the product of a "free and self interested forum" and therefore may not be the panacea desired for allocating jurisdiction in a federation. Speaking of the American scene Mr. Justice Jackson said:

> In considering claims of foreign law for faith and credit [clauses] courts of course find conflict of laws a relevant and enlightening body of experience and authority to provide analogies. But while the . . . law of conflicts is a somewhat parallel and contemporaneous development with the law of faith and credit, they also are quite independent evolutions, are based on contrary basic assumptions, and at times support conflicting results. We must beware of transposing conflicts doctrines into the law of the Constitution. . . . Private international law and the law of conflicts extend recognition to foreign statutes or judgments by rules developed by a free forum as a matter of enlightened self-interest. The constitutional provision extends recognition on the basis of the interests of the federal union which supersedes freedom of individual state action by a compulsory policy of reciprocal rights to demand and obligations to render faith and credit.[83]

In Canada the courts are not expressly enjoined by the constitution to give full faith and credit to the laws or judgments of any other province. Nevertheless, the incorporation of the rules of conflicts as a constitutional doctrine for allocating jurisdiction among or between provinces

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[83] Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, at 30 (1945).

has that principle as an implicit object. Thus, the fundamental point made by Mr. Justice Jackson about the basic assumptions underlying the conflict of laws is valid for any federation.

A third consideration is that, although the objective appears to be to designate a single province with exclusive jurisdiction, utilizing common law choice of law rules will not necessarily result in only one province having legislative jurisdiction, as rules of alternative reference are not unknown to the common law.[84]

Fourth, while one might be prepared to trade off a little arbitrariness for the sake of certainty, it must be recognized that although the common law conflicts rules are certainly based on the internationally recognized territorial principle, they are not the only conflicts rules created in conformity with that principle. Civil law systems also base their conflicts rules on the territorial principle though perhaps to a lesser extent. Very often the civil law rules differ from those employed by the common law.[85] For example, the connecting factor may not correspond to the common law equivalent for the same juridical category. In other words, the territorial principle as embodied in conflicts rules may "correctly" accord legislative jurisdiction to entirely different states or law districts depending, *inter alia*, on whether one looks at the common law or the civil law. The common law rules would, of course, have the advantage of familiarity in common law courts but they do not necessarily possess any intrinsic advantage in terms of their content. They do not represent in any way a universal consensus as to the solution to the problem of legislative jurisdiction. They do not logically and necessarily flow from the territorial principle even though they bear a close relation to it.

The final and perhaps the most significant point to consider with respect to the merits of this approach is that constitutionalizing the conflicts choice of law rules in this way virtually sounds the death knell for any provincial initiatives in modifying or replacing those choice of law rules. The law of conflicts is, of course, a part of the domestic law of each province and it is now within the exclusive discretion of each province whether to alter or replace the common law rules in relation to matters falling within section 92 of the B.N.A. Act. Logically, however, the conflicts rules of a province are subject to the same constitutional limits as are all other legislative endeavours. If the territorial scope of legislative power is defined by the common law choice of law rules, then that is also the measure by which the validity of provincial statutory conflicts rules will be determined. It is not only logic which leads to this

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[84] *E.g.*, capacity to contract may be determined by the proper law of contract or by the *lex domicilii* of the contracting party: A. DICEY & J. MORRIS, *supra* note 34, at 778. The formalities of a contract may be governed either by the *lex loci contractus* or by the proper law of the contract: *id.* at 784. The common law also provided alternatives in the area of formal validity of wills but those rules have now been put in statutory form, both in England and in Canada.

[85] J. CASTEL, I CANADIAN CONFLICTS OF LAWS 198 (1975)

conclusion; there is also, as shall now be discussed, some judicial authority to support it.

Provincial statutes containing conflicts rules come in a variety of forms. A province may enact a general statute creating a conflicts rule for an entire juridical category[86] or more commonly, it may enact particular conflicts rules dealing with the application of a single statute. For example, an "overriding" statute will contain a provision mandating its own application in circumstances which would not necessarily call for its application under the ordinary conflicts rules. "Self-denying" statutes are those which contain provisions limiting their application to fewer situations than the ordinary conflicts rules would produce.[87]

An example of an overriding statute was the Insurance Act of Ontario[88] discussed in *Gray v. Kerslake*.[89] Section 134(1) provided that a contract was deemed to be made in Ontario if the place of residence of the insured was stated to be in that province, and Part V of the Act applied to contracts of life insurance made in Ontario. The effect of this section was to create a new connecting factor for a statute dealing with particular contracts, displacing the ordinary connecting factor of the proper law in which the *lex loci contractus* is simply one element to be considered.

Another example, also in the area of contracts, was the Master and Servant Act of British Columbia[90] discussed in *Ashmore v. Bank of British North America*.[91] One provision of that statute rendered void contracts, wherever made, for the performance of labour or service in the province by non-residents (*i.e* at the time of making the contract). Again, the connecting factor is not the ordinary one for contracts. Instead of being just one factor in determining the proper law, performance in the province is selected as the connecting factor permitting application of the provincial statute. In the *Ashmore* case, there is no indication that the British Columbia Court of Appeal even considered the possibility that the provision might have overreached the territorial limitation on the authority of the province. On the other hand, in *Gray* both Locke and Cartwright JJ., with Taschereau J. and Kerwin C.J.C. concurring respectively, thought there were constitutional problems with the

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[86] Such statutes are not common in Canada, but the provincial Wills Acts are good examples.

A burst of legislation in the United Kingdom in the 1970s produced a number of such general statutes dealing, for example, with marriage and divorce, and supplementing and/or replacing the common law rules. *See* Recognition of Divorces and Legal Separations Act 1971, U.K. 1971, c. 53; Matrimonial Causes Act 1973, U.K. 1973, c. 18; Domicile and Matrimonial Proceedings Act 1973, U.K. 1973, c. 45.

[87] The names designating these statutes are taken from A. DICEY & J. MORRIS, *supra* note 34, at 19-23. The text notes that while there is growing literature on the subject, there is as yet no agreement on either terminology or categories.

[88] R.S.O. 1980, c. 218, ss. 99, 100, 150.

[89] [1958] S.C.R. 3, 11 D.L.R. (2d) 225 (1957).

[90] R.S.B.C. 1911, c. 153, s. 19 (*replaced by* Employment Standards Act, S.B.C. 1980, c. 10).

[91] 4 W.W.R. 1014, 18 B.C.R. 257 (C.A. 1913).

conflicts provision in the Ontario Act. Whether or not one agrees with their analyses and conclusions, the fact is that they applied what they considered to be the territorial limitation to a particular conflicts rule embodied in a particular statute. Since most of the conflicts rules in Canada which are statutory are of the particular rather than the general type, this is a significant case. If the test consists of the common law choice of law rules and that test is applied to determine the constitutional reach not only of statutes drafted in general terms, but also to particular conflicts rules purporting to determine the applicability of particular statutes, it is difficult to see how the latter can survive a constitutional attack. Any exception or variation from the general common law conflicts rules which would have the effect of expanding the legislative jurisdiction of the province will have to be struck down. Presumably self-denying or limiting provisions would survive, as it is not constitutionally incumbent on a province (or on the Dominion) to exercise its legislative jurisdiction to the fullest extent, or indeed at all.

Constitutionalizing the conflicts rules will not only immunize them from legislative change at the provincial level, but will also engender repercussions on the existing law of conflicts at the private level. It seems a logical conclusion that what is now the option of a litigant to plead the application of foreign law by way of the law of conflicts would disappear. A Canadian court would be obliged to consider whether forum law was constitutionally applicable by deciding, in every case with foreign elements, whether the constitutionalized rules of conflicts would permit it. If forum law were not applicable, then the law of some other province or country would be. Provisions such as those in the British Columbia Evidence Act[92] requiring that judicial notice be taken of the laws of other provinces, *inter alia*, would presumably be fully utilized. It would be a logical necessity to take judicial notice of the laws of other provinces whenever, according to the application of common law choice of law rules, forum law was not the *lex causae* and so was constitutionally inapplicable. The common law presumption that forum law and foreign law are the same in the absence of satisfactory proof of the foreign law would undercut the whole constitutional arrangement and therefore it also would have to be abandoned. Another conflicts distinction which might perish because of its potential for undermining the constitutional allocation of legislative jurisdiction is the dichotomy between substantive and procedural laws. The rule is that the forum applies its own laws of procedure but the substantive law of the *lex causae*. Obviously, continued use of that distinction would permit the forum to avoid the constitutional issue by characterizing as procedural a

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[92] R.S.B.C. 1979, c. 116, s. 26.

greater number of forum laws than is usually desirable in a conflicts case.[93]

4. *Summary*

The fact is that it is impossible to distinguish in the cases a uniform approach to determination of the question whether provincial legislation has breached the territorial principle. The cases in which the territorial principle is directly in issue are not that numerous; conflicts cases usually simply ignore the constitutional issues, and constitutional cases are usually concerned with the contest between particular heads in sections 91 and 92 of the B.N.A. Act.[94] Often the result of the constitutional cases is that provincial legislation which clearly has the potential for interfering with the rights of non-residents is upheld. Unless anyone raises the doctrine of extraterritoriality, this extraprovincial effect is simply dismissed as a mere incidental effect, and thus as permissible. In other words, the *Ladore v. Bennett* approach is frequently employed *except* when the issue of extraterritoriality is raised directly. Of the cases in which extraterritoriality was argued, one commences with the trilogy of cases (*Royal Bank, Ottawa Valley Power, Beauharnois*) in which the provincial legislation in question (which is always taken as dealing with the contract rights of non-residents) was struck down. The explanation proferred here, that the weakness of the legislation was that it dealt with property outside the province, is not one which has been used for purposes of distinguishing those cases. Instead, Viscount Haldane[95] L.C. introduced the conferral/derogation distinction,[96] which was adopted by Rand J. in *Scott*[97] and is still employed today. The Privy Council decision in *Ladore*, which ignored Viscount Haldane's conferral/derogation

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[93] Many texts advise caution in the use of substance/procedure dichotomy, warning that just because a rule is characterized as procedural for domestic purposes, it should not necessarily be so classified for conflicts purposes. *See, e.g.*, J. MORRIS, *supra* note 53, at 445-46.

[94] A recent exception to this general statement is Burns Foods Ltd. v. Attorney General for Manitoba, [1975] 1 S.C.R. 494, 40 D.L.R. (3d) 731 (1973). Pigeon J. struck down the Natural Products Marketing Act, R.S.M. 1970, c. N-20, both because it was legislation in relation to s. 91(2) of the B.N.A. Act and because it was in breach of the territorial principle since it interfered with contracts entered into outside Manitoba (applying the *Royal Bank* case). As in *Interprovincial Co-operatives*, Pigeon J. may have been influenced on this last point by the fact that the remedy sought was an injunction.

An older exception is Reference as to the Validity of the Debt Adjustment Act, Alberta, [1942] S.C.R. 31, [1942] 1 D.L.R. 1. Chief Justice Duff, having struck down the Alberta Act on the basis that it was not within s. 92 of the B.N.A. Act, commented in passing on the legislative jurisdiction of a province to deal with debts "entirely under the regulatory authority of the province": *id.* at 37, [1942] 1 D.L.R. at 6. Crocket J. would have upheld the Alberta legislation *in toto* on the authority of *Ladore*, *supra* note 58, and Attorney General for Ontario v. Attorney General for Canada, [1894] A.C. 189.

[95] *Workmen's Compensation Bd.*, *supra* note 51.

[96] *See* text accompanying footnote 59 *supra*.

[97] *Supra* note 60.

distinction and made no attempt to allocate a *situs* to intangible rights, seems to be almost forgotten except to academics.[98] A number of provincial acts have been upheld in which the connection with the province might be characterized as tenuous but which dealt with conduct or persons in a regulatory or quasi-criminal way. Finally, some support can be found in the cases for employing common law choice of law rules to identify the one province with legislative jurisdiction.

III. Solutions in Other Federal States

Since the problem of allocating legislative jurisdiction is perceived to be a distinctively federal problem calling for an approach more moderate than unadulterated self-interest on the part of each unit, a comparison with other federal systems may be instructive.

A. *Australia*

Under the Australian constitution, the states suffer from a similar territorial limitation on their legislative authority.[99] Comparison with the federal system in the United States is also helpful;[100] but since the constitutional histories of Canada and Australia have far greater similarity than do those of Canada and the United States, a comparison with Australia is probably more significant and more persuasive. Of course the Australian constitution was drafted with an eye to the American constitution just as was the British North America Act.[101] However, where the Canadian Fathers of Confederation avoided what were thought to be American pitfalls, the Australians deliberately copied what were considered to be meritorious provisions. One such provision is the full faith and credit clause[102] which, while it has played a far less significant role in Australia than in the United States, adds a complicating factor to the problem of territoriality which Canada does not face. Section 118 of the Australian Constitution[103] provides that 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.

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[98] *See, e.g.*, P. Hogg, *supra* note 2, at 210.

[99] R. Lumb, The Constitutions of the Australian States (4th ed. 1977); Castles, *Limitations on the Autonomy of the Australian States*, [1962] Pub L. 175

[100] *See, e.g.*, Hertz, *supra* note 47.

[101] Latham, *Interpretation of the Constitution*, in Essays on the Australian Constitution 1, at 2 (2d ed. J. Else-Mitchell 1961).

[102] Commonwealth of Australia Constitution Act, 63 & 64 Vict., c. 12, s. 118 (1900) (U.K.).

[103] The statute was passed 9 Jul. 1900 and came into effect as the constitution of Australia on 1 Jan. 1901.

Legislative power to implement section 118 is vested in the Commonwealth by section 51(xxiv) and (xxv).

Unlike the Canadian provinces, the Australian states are not limited as to the range of subject matters on which they may legislate. Each has general power to legislate for the peace, order and good government of the state, but each is subject to the same territorial limitations that exist in Canada for the provinces. However, the Australian courts have had the benefit of strong and consistent judgments delivered by the High Court of Australia. These decisions were delivered fairly early in the constitutional history of that country and were rendered almost exclusively in the context of tax law, but they contain principles considered to be of general application. In 1933 in *Trustees, Executors & Agency Co. v. Federal Commissioner of Taxation*,[104] a Commonwealth statute was upheld which levied tax on movable property outside Australia which had belonged to an individual domiciled in Australia at the time of his death. Evatt J. found it "curious" that questions should still arise in relation to extraterritorial matters as to the competence of the legislatures of the Commonwealth and of the states; because arguments based on that question were "becoming frequent", he entered into a full examination of the problem.[105] His ultimate conclusion was that:

> The correct general principle is . . . that applied, not obscurely, in *Ashbury v. Ellis*, namely, whether the law in question can be truly described as being for the peace, order and good government of the Dominion concerned. . . .
>
> In this view, the fact of the Legislature's dealing with circumstances, persons or things without the Dominion is always a relevant, but never a conclusive, element in the determination by its own Courts of questions of legislative power.[106]

Evatt J. went on to lay down six general principles:

> (1) The mere exhibition of non-territorial elements in any challenged legislation does not invalidate the law.
> (2) The presence of such non-territorial elements may, however, call attention to the necessity for enquiring whether the challenged law is truly a law with respect to the "peace, order and good government" of the Dominion. . . .
> (3) It is the duty of the Courts of the Dominion to make this enquiry in a proper case.
> (4) The test is not quite . . . whether the law is a "bona fide exercise of the subordinate legislative power" . . . because the bona fides of the exercise of legislative power cannot be impugned in the Dominion's own Courts.
> (5) The test is whether the law in question does not, in some aspects and relations, bear upon the peace, order and good government of the Dominion, either generally or in respect to specific subjects.

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[104] 49 C.L.R. 220 (Aust. H.C. 1933).
[105] *Id.* at 230-34.
[106] *Id.* at 234-35.

> (6) If it does not bear any relation whatever to the Dominion, the Courts must say so and declare the law void.[107]

Three years later, the High Court of Australia applied Evatt J.'s principles to state legislation, a New South Wales statute, and Dixon J. elaborated on the scope of state legislative authority:

> The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose by reference to some act, matter or thing occurring outside the State a liability upon a person unconnected with the State. . . . But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicil, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers. As in other matters of jurisdiction or authority courts must be exact in distinguishing between ascertaining that the circumstances over which the power extends exist and examining the mode in which the power has been exercised. No doubt there must be some relevance to the circumstances in the exercise of the power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection or that it includes many cases that cannot have been foreseen.[108]

Commentators agree that the courts in Australia have utilized this approach not only consistently but liberally, even though it is conceded that it is still impossible to determine precisely what degree of connection with the state is necessary.[109] All that is required is some nexus.

The result of the liberal Australian approach is a greater opportunity for overlapping legislation. The constitutional position in Australia in this respect is complicated, as noted above, by the full faith and credit clause in the constitution. This clause raises difficult problems with respect to recognition of judgments from other states, but the further question of whether a *statute* should be given full faith and credit in a non-legislating state poses what to date remains an extraordinarily difficult and unresolved situation. The clause is taken to postulate the existence of a single applicable law to which all states should defer,[110] and therefore the existence of several applicable statutes raises a constitutional problem of choice of law. One suggested solution to the problem of overlapping legislation is to employ common law choice of

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[107] *Id.* at 240.

[108] Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.), 56 C.L.R. 337, at 375 (Aust. H.C. 1937).

[109] R. LUMB, *supra* note 99; Castles, *supra* note 99; Trindade, *The Australian States and the Doctrine of Extra-territorial Legislative Incompetence*, 45 AUST. L.J. 233 (1971).

[110] Cowen, *Full Faith and Credit — The Australian Experience*, in ESSAYS ON THE AUSTRALIAN CONSTITUTION, *supra* note 101, at 293.

law rules unaffected by statute. As this is apparently not a problem to which much judicial or academic attention has yet been paid, it is still unclear whether that suggestion will be accepted.

Use of the rules of conflicts at this stage, that is, to determine which statute should be accorded full faith and credit, is quite distinct in theory from the use discussed earlier to determine the territorial limitations on the legislative jurisdiction of a province. Nevertheless, in many cases, the end result would be the same. If conflicts rules are used to determine legislative jurisdiction, then only one province may legislate validly for a given situation. All other provincial laws which purport to deal with the same subject matter in the same circumstances will be *ultra vires* as an infringement of the territorial principle or, if they are drafted in general terms, they will be interpreted so as to be inapplicable. Use of conflicts rules at the secondary stage, however, is, for Australia, the equivalent of the paramountcy principle familiar to Canadian constitutional law; the overlapping statutes are both valid but the conflicts rules determine selection of the statute applicable in a given situation. The distinction between the two uses is quite clear when there is not yet any overlapping legislation. In Australia, if one state were to expand its jurisdiction to encompass a wider spectrum of circumstances, an Australian court would ask only whether the legislation was for the peace, order and good government of the state and whether there was a nexus with the state. The law would be valid regardless of whether the common law choice of law rules would apply the law of that state. Not until another state purported to regulate the same circumstances and a court had to decide which statute should be given full faith and credit would a choice have to be made. At that stage, the court might use common law conflicts rules.

This latter approach is less rigid, and thus a more acceptable use of conflicts rules as constitutional law. Even so, it effectively seems to preclude individual or even uniform state initiative with respect to change or modification in the rules of conflicts. Sykes, the main advocate of this use of conflicts, described the theory as follows:

> It seems to be a justifiable conclusion that the law to determine the limits of "legislative jurisdiction" must be the common law of conflicts as it exists in the six States, unaffected by any statute-made conflictual principle created by any of them which departs from any of it. *The reference is not to a State law of conflicts as such but to the common law part of all the State systems. If the question is as to the recognition to be accorded a State Act which deliberately proclaims extraterritorial effect, then the question whether it, in the Courts of another State, should be held to govern a particular transaction must be settled by the question whether according to common law conflictual concepts that statute is part of the law governing such transaction.* The body of law to which reference would be made would not be static but one which would be extended from time to time by the ordinary judicial technique of State judicial decision; State statutory law alone is to be excluded. The ultimate arbiter of the legislative value of Acts would be the High Court which of course would

> have adequate power to resolve any apparent inconsistencies between State Court decisions bearing on the body of common law conflictual principles.[111]

Two points arise from this passage. First, it seems that even if all the states were to agree on a modification of the common law conflicts rules (for example, to fix on a new connecting factor allocating jurisdiction to a different state in a given situation) and to enact uniform legislation in each state, that legislation would be completely ineffective. Resort must be had exclusively to the common law principles. Of course, in Australia the option does exist under the constitution for legislative action by the Commonwealth in such circumstances. Section 51(xxv) endows the Commonwealth with legislative authority to make provision for the recognition throughout the Commonwealth of the laws, the public acts and records and the judicial proceedings of the states. In other words, section 51(xxv) authorizes legislation to implement the full faith and credit clause of the Constitution so that the Commonwealth could act even if the states could not. Second, Sykes seems to envision that in the legislating state (which has expressly extended the application of its substantive domestic law by modifying the common law conflicts rule unilaterally) the courts would apply and enforce that modification of the conflicts rule. Only courts in other states, and of course the High Court, would apply the common law rules to determine which law should be given full faith and credit. *Prima facie* it is anomalous that, in a federal system, the courts of a component part should be exempted from considering the constitutionality of the application of the law. On the other hand, if that loophole is real and not just apparent, it does offer some room for state initiative in the field of conflicts. The obvious result of such a loophole, however, is an inducement to forum shopping and/or to appeals to the High Court in order to obtain a review of the constitutionality of applying the state law invoked.

B. *United States*

The American attempt to solve the special problem of allocating legislative power in a federal state is the subject of voluminous literature.[112] However, because the techniques employed are express constitutional provisions which are non-existent in Canada, the Ameri-

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[111] Sykes, *Full Faith and Credit — Further Reflections*, 6 RES JUDICATAE 352, at 364-65 (1954) (emphasis added). Cowen, however, would draw the line at the application of *Phillips*, *supra* note 41, as a constitutional choice of law rule, even while accepting Sykes' suggestion as a general approach to full faith and credit: *id* at 324-25

[112] *See, e.g.*, Reese, *Limitations on the Extraterritorial Application of Law*, 4 DALHOUSIE L.J. 589 (1978); Cook, *supra* note 18; B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); Reese, *Legislative Jurisdiction*, 78 COLUM. L REV. 1587 (1978); Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); Martin, *Constitutional Limitations on Choice of Law*, 16 CORNELL L. REV 185 (1976); Jackson, *supra* note 83; Hertz, *supra* note 47.

can method is not immediately transferrable, although the end result may be instructive. Though the American colonies certainly suffered originally from the confining strictures of the doctrine of colonial extraterritorial legislative incompetence, that doctrine has been replaced as a limitation on state legislative power by the due process and full faith and credit clauses of the constitution. The American Constitution,[113] the model in this respect for the Australian Constitution, places no limit in terms of subject matter on the legislative powers of the states. Article I contains an enumerated list of Congressional powers and Article X of the amendments added in 1791 expressly confers the residual power on the states. The content of state legislation can be controlled by the courts through other articles of the constitution. In the area under discussion, the two articles mentioned have played a prominent role in curbing legislative overreaching.

> The command of due process is essentially negative; it forbids a state from applying its own law, or even the law of another state, in situations where no reasonable basis exists for doing so. On the other hand, the command of full faith and credit is affirmative; it compels a state in certain circumstances to entertain suit on a sister state claim and in other circumstances to apply the law of a given state even though the law of two or more other states could permissibly be applied under due process.[114]

To say that full faith and credit commands the application of a single state law is probably to state the ideal theory rather than the actual practice. After decades of discussion, no one has yet suggested a uniformly acceptable solution to the problem caused by overlapping legislation of states with equally balanced interests. More accurate is Hertz's analysis, suggesting that these clauses provide a mininum standard by prohibiting the existence and/or the application of state legislation where the state has no nexus at all with this factual situation.[115] The end result, then, in the United States is that not only is overlapping state legislation permissible, it is a frequent occurrence; the only control with respect to territoriality is that there be some nexus with the state sufficient to satisfy the requirements of due process. Faced with the problem of choice, the control invoked by the courts to curb conflicts rules with a tenuous connecting factor is the full faith and credit clause. In theory, this clause posits the existence of a single state to which all others must defer but in fact, the problem of determining the single state having proved insoluble so far, it simply requires some nexus between the state and the case.

C. *Switzerland*

One final federal system deserves to be noted for its complete solution of the problem. The Swiss federation recognized decades ago

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[113] U.S. CONST. art. I, X.

[114] Reese, *Legislative Jurisdiction*, *supra* note 112, at 1590.

[115] Hertz, *supra* note 47, at 14-22.

that it had a problem of intercantonal conflicts. As early as 1891, the conflicts rules were unified in an effort to ensure uniformity at least in choice of law questions. That manoeuver left some problems hanging so the federation moved to the ultimate solution for a federation: it unified the substantive law.[116] The Swiss experience, then, may be said to represent one option for a federal system, but certainly not a realistic one for Canada.

IV. CONCLUSION

A. *Evaluation of Suggested Approaches*

The only obvious conclusion is that there is no self-evident solution to the very difficult problem of allocation of legislative jurisdiction among the provinces *inter se*. The premise that more is desired in a federation than a collection of self-interested balkanized states seems sound; yet it must also be accepted that one of the objects of a federal union is the freedom of each unit to experiment.[117] Thus, the same arguments which are advanced against a highly centralized Canadian union may also be available against an interpretation of the territorial principle which unduly restricts the scope of the legislative power of each province.

Of the three possible approaches to the interpretation of the territorial limitation on provincial legislative power, the most restrictive must be the transformation of common law rules of conflicts into rules of constitutional law. That approach postulates a single province with legislative jurisdiction in any given situation and stultifies development of conflicts as an area of private law because it leaves absolutely no room for legislative variation of the common law conflicts rules. At a time when conflicts rules are rapidly evolving in all countries to meet modern social and economic conditions, there is not much to be said for imposing a freeze on provincial development. Even if certainty could be achieved, which is doubtful, that could not compensate for the rigidity which would result. Nor would it compensate for the arbitrariness of the choice which results from transferring rules developed in a private law setting by a self-interested sovereign state, to a public law federal purpose.

The *Royal Bank* approach, on the other hand, offers considerably more flexibility because of its inherent ambiguity. It requires characterization of intangible rights and invocation or development of rules for giving such rights a physical *situs*, and seems to be premised on the vested rights doctrine. Since it is extremely difficult to predict how the

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[116] Schoch, *Conflict of Laws in a Federal State: The Experience of Switzerland*, 55 HARV. L. REV. 738 (1942).

[117] *See, e.g.*, Lysyk, *Reshaping Canadian Federalism*, 13 U.B.C. L. REV. 1, at 7 (1979).

right will be characterized, what rule will be applied, or what technique will be invoked to distinguish the case, the *Royal Bank* approach might be said to offer the maximum in uncertainty. It can vary from extreme flexibility to the rigidity of the conflicts approach, especially when the two overlap and common law rules are used to determine the physical location of the intangible rights.

Ladore v. Bennett, the third possible approach, offers the maximum in both certainty and flexibility. The certainty resides in the fact that the test can be easily and clearly stated. A province may legislate without infringing the territorial limitation provided only two conditions are met: first, that the legislation is in relation to some provincial object; and second, that the expanded application is necessary for the attainment of the object and that there is some nexus with the province. The flexibility lies in the application. It permits the provinces to avoid gaps in their legislation and gives them the opportunity to reassess the wisdom, convenience and justice of the common law conflicts rules both generally and in relation to specific questions. The test is such that the substantiality of the nexus with the province can be stiffened in the event of provincial overreaching.

Furthermore, in addition to the needed flexibility for provincial legislative activity, the *Ladore v. Bennett* approach has a very significant advantage: it is consistent with the ordinary interpretative doctrine which upholds provincial legislation whose pith and substance relates to a head of power in section 92 of the British North America Act, even if a federal matter within section 91 is thereby affected.[118] If federal jurisdiction may be so affected, why not the legislative jurisdiction of another province? This is an approach familiar to the courts and so admits of convenience in application.

Another factor in favour of the *Ladore v. Bennett* approach is that it accords with the present solution in the other federations comparable in age and composition with Canada, namely, Australia and the United States.

Finally, it is noteworthy that an eminent international lawyer, F.A. Mann, has suggested that the complex conditions of modern times call for a reconsideration of Story's maxims defining jurisdiction for purposes of public international law; the doctrine embodied therein requires mechanical tests and is unable to cope with the borderline situations which today are the rule rather than the exception. The replacement he has suggested is one drawn from American constitutional jurisprudence as discussed briefly above: legislative jurisdiction should be accorded to the state whose contact with the facts is such as to make such jurisdiction just and reasonable.[119] In other words, there must be an adequate nexus with the state. Thus one comes full circle from the

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[118] A clear application can be found in Carnation Co. v. Quebec Agriculture Marketing Bd., [1968] S.C.R. 238.

[119] Mann, *supra* note 4, at 15-41.

Canadian statutory limitation, which probably was intended to incorporate the international doctrine, to American constitutional law, which uses different techniques but whose result coincides almost completely with the Privy Council decision in *Ladore v. Bennett* interpreting the Canadian constitutional limitation on provincial legislative power.

The only difficulty with this approach to the territorial limitation on provincial legislative power is that the likelihood of overlapping legislation is increased. Situations with interprovincial elements will fall within the terms of the legislation in more than one province, and action may be taken in each province to enforce its own law. Australian commentators appear to make two assumptions with respect to a situation where more than one state's law is applicable: first, that the courts will normally apply their own law if by its terms it is applicable; and second, that the common forum, the High Court of Australia, must have some constitutional rule for choosing between overlapping statutes. Neither assumption seems to be unquestionable in Canada. If there is a constitutional rule for the Supreme Court's choosing between state laws, then it would seem equally applicable in the provincial courts. On the other hand, if provincial courts are free to apply their own laws where so directed by their legislature, then it is not constitutionally imperative for the Supreme Court to act other than as a court of last resort unless this is precluded by a full faith and credit clause of the constitution. The Supreme Court of Canada, without a full faith and credit clause to contend with, would seem to have a clear option on this point. Should it decide that there must be a set of constitutional rules[120] for allocating legislative authority when the provinces have created overlapping legislation, then it will judicially have created a full faith and credit clause for Canada.

Even now such overlapping statutory laws are not an unknown phenomenon, though it is still exceptional that cases involving an overlap reach the Supreme Court of Canada. *Bank of Montreal v. Metropolitan Investigation & Security (Canada) Ltd.*,[121] which did reach the Supreme Court of Canada, is inconclusive in determining how that Court will

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[120] This set of rules would be distinct from the ordinary application of conflicts rules in a private law context.

[121] [1975] 2 S.C.R. 546, 3 N.R. 123, 50 D.L.R. (3d) 76 (1974), discussed in Hertz, *supra* note 47, at 25, 45-51. The case was referred to with approval by Pigeon J in *Interprovincial Co-operatives*, *supra* note 12, at 514-15, 53 D.L.R. (3d) at 358. He noted that, in a private conflicts case, inconsistent decisions from different jurisdictions are an accepted hazard and then said: "Fortunately in Canada, no such situation exists. There is a common forum having unifying authority over all superior Courts. Concurrent jurisdiction will not therefore authorize the Courts of one province to disregard the authority of those of another." Whether he was simply affirming that recognition of sister province judgments should be more liberal than the common law rules permit or whether he was trying to say that all provincial courts should apply the same choice of law rules and achieve uniform results is unclear, especially in light of the fact that in the immediately preceding paragraph he reached the conclusion that legislative power over interprovincial pollution resided in the Dominion by analogy with s. 91(2).

proceed. The overlapping legislation was that of Manitoba and Quebec. The area of overlap consisted of four million dollars in Montreal branches of two banks, the Bank of Montreal and the Royal Bank, both of which also had branches in Manitoba. Courts in both Quebec and Manitoba issued attaching orders for that debt, with the Quebec order issuing first in time. Both orders were valid by the terms of the statutes which authorized them. The Supreme Court of Canada, at the very least, simply decided that the Quebec order should take priority, being first in time and *prima facie* suffering from no invalidating condition. Laskin C.J.C. created some ambiguity, however, by employing what sounds like full faith and credit terminology when he spoke of the later Manitoba judgment calling upon the banks to be "faithless to the competent order of a sister judicial district";[122] but he did not expand on that phrase and ultimately determined priority simply by order of time.

Similarly, the Alberta Supreme Court appears to have reached a decision in an overlap situation without the aid of constitutional law or conflicts rules by relying primarily on the time element. In *Rhodes v. McKee Harvester (Alberta) Ltd.*,[123] the plaintiff, an employee of the defendant manufacturer of farm machinery with head offices in Ontario, was injured on the job in Alberta. The Ontario Workmen's Compensation Board awarded him compensation immediately. Under the Ontario Act, the Board was subrogated to any rights of action which the injured worker might have had. With the consent and authorization of the Ontario Board, a tort action was commenced in Alberta. Meanwhile, the Alberta Workmen's Compensation Board had decided that the employer was carrying on business in the province and, therefore, that compensation should be awarded under Alberta legislation. Under the Alberta Act, the award of compensation replaced all rights of action. The defendants in the tort action relied on this provision, but to no avail. Not only did the trial judge disagree with the conclusion of the Alberta Board that the plaintiff's employer was carrying on business in the province (though with little or no discussion of the facts), but he also pointed out that by the time the Alberta Board had made up its mind to act there was "no claim in existence". It seems likely that even if the Alberta Act had been found to be applicable, the first in time rule would have prevailed.

B. *Raising the Territoriality Issue in Court*

The following questions should be asked by a provincial court when the territoriality issue arises and it wishes to employ the *Ladore v. Bennett* approach:

(1) Is the statute which is invoked a law of the forum or a law of some other province?

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[122] *Id.* at 557, 3 N.R. at 131, 50 D.L.R. (3d) at 83.

[123] 9 Alta. L.R. (2d) 179, 24 A.R. 520, 99 D.L.R. (3d) 704 (S.C. 1979).

(2) If it is the statute of another province, do the conflicts rules of the forum permit or require its application?
(3) If it is a forum statute:
  (a) is it directly applicable by its express terms or, if drafted in very general terms, by the process of statutory interpretation; or
  (b) is it applicable by way of
    (i) the general rules of conflicts, or
    (ii) a particular conflicts rule in the statute itself?

The only constitutional restrictions on questions (3)(a) or (b) under the *Ladore v. Bennett* approach are that the statute must be in relation to a provincial head of power and that there must be some nexus between the province and the situation regulated, prohibited, or otherwise affected by the statute. This approach allows a province to legislate not only with respect to the substance of any head of power but also with respect to conflicts rules. Thus the applicable conflicts rules in questions (2) and (3)(b) may differ from province to province unless the provinces engage with more enthusiasm than they exhibit at present in the process of uniform legislation.

Following this approach there are two possible choices for the Supreme Court of Canada in the event of overlapping provincial legislation:

(1) Employ the common law choice of law rules to select the province whose law should apply; or
(2) Simply act as a final court of appeal from the originating province, accepting whatever legislative changes have been made in the conflicts rules, provided only that there is some nexus with the province which renders the change *intra vires*, and giving priority to the statute first applied.

If the first alternative is the one selected by the Supreme Court of Canada, two consequences follow: first, Canada acquires a judicially created full faith and credit clause; and second, the Supreme Court of Canada must be prepared to engage in further judicial creativity because the common law choice of law rules suffer from various deficiencies and at the very least may require adapting from a private law system to a public law use. It is significant to note that neither the United States nor Australia has ever exercised the legislative power vested in the central government to enforce the full faith and credit clauses with respect to substantive law.

The second alternative, on the other hand, is relatively simple and straightforward and poses no greater threat to unity of the federation than does the present variation in substantive law among the provinces. The only obvious disadvantage is that it might be an inducement to provincial overreaching and to forum shopping at the private level. Since the jurisdictional rules in each province are relatively liberal, forum shopping is a real possibility. Other than tightening the jurisdictional

rules, the only way of controlling forum shopping is development of the doctrine of *forum non conveniens*.[124]

If, instead of the *Ladore v. Bennett* approach, the common law rules of conflicts are employed to allocate legislative authority, questions (2) and (3)(b)[125] are modified if the conflicts rules of the province have undergone legislative reform. Only common law rules will be applicable regardless of whether the legislative amendment to the conflicts rules favours application of forum law or foreign law and regardless of whether the legislation is unique to one province or consists of uniform acts in every province. Questions (2) and (3)(b) become: do the common law conflicts rules common to every province call for application of the statute? The direct application of a forum statute (question (3)(a)) will also be affected, as no statute by its express terms or by the process of statutory interpretation can validly apply if the common law conflicts rules would not call for its application. On appeal to the Supreme Court of Canada, of course, the only option for that judicial body will be to apply the common law rules of conflicts to select the applicable provincial law.

If the *Royal Bank* approach is taken with the conferral/derogation gloss on it created by Viscount Haldane L.C. in *Workmen's Compensation Board*[126] and espoused in *Attorney General for Ontario v. Scott*,[127] then the Court must identify the civil right that is being affected as, for example, a contract right, a right of action, or a property right, and then must either find a conflicts rule which assigns a physical location to that intangible right or must create such a rule. The Supreme Court of Canada has said it is permissible to create rights in the province for the benefit of non-residents; but focussing on the creation process should not blind the Court to the fact that the creation of a right for one person may impinge on the rights of others if it is truly concerned about restricting provincial legislation to rights in the province. The clearest example of this concerns property rights. Property physically in the province gives the province jurisdiction, but creating or transferring rights in that property may derogate from the rights of non-residents. No court has yet suggested, however, that "Property and Civil Rights in the Province" in section 92(13) must be read conjunctively so that all persons affected must be in the province too, although that is the logical conclusion of the *Royal Bank* approach. If the *Royal Bank* approach is taken, questions (1) and (2)[128] are applicable in an unmodified form, as is question (3)(b). Only question (3)(a) is amended to conform to the constitutional limits on a province's legislative authority; a statute will be *ultra vires* insofar as

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[124] Discussed in Edinger, *Discretion in the Assumption and Exercise of Jurisdiction in British Columbia*, 16 U.B.C.L. REV. 1 (1982).

[125] Which should be asked by a provincial court.

[126] *Supra* note 51.

[127] *Supra* note 60.

[128] Which should also be asked by a provincial court.

by its express terms it applies to and derogates from rights located outside the forum, and a statute drafted in general terms will be interpreted restrictively so as to conform to the above rule. Presumably, any provincial attempts to change the conflict rules would also fall afoul of *Royal Bank* because they may affect rights outside the province.

Precedent dictates nothing. There is some authority for each of the approaches discussed. A federation must preserve some internal harmony and thus must avoid the extreme of unrestrained legislative authority produced by parochial self-interest on the part of each unit which would be permissible if the territorial limitation on provincial legislative power were suddenly to vanish. At the same time, a federation must avoid narrow mechanical rules which are unsuited to modern conditions in which transactions and events with increasing frequency have contacts with more than one jurisdiction.[129] *Ladore v. Bennett* seems to be the quintessential compromise. It may permit some legislative overreaching, but the possible friction between the provinces which that might engender is hardly more likely to tear Canada apart than the friction produced by legislative overreach as to subject matter between the federal and provincial levels which Canada has survived for more than a century.

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[129] Speaking of the need to find some compromise internationally in respect to economic regulation, Donald J. Baker stated:

> There are varied views on jurisdiction. At one extreme is the "pure territoriality" theory. Practically speaking, someone operating in one territory (or perhaps on high seas) can do whatever he wants, regardless of how harmful it is to those in another territory, as long as it is not illegal where he physically does it. With all due respect, this view is more suitable to the simpler world of Queen Victoria than to our highly technological and interdependent world; and, in the economic realm, it tends to support private "beggar your neighbor" undertakings.

Baker, *Extraterritorial Application of United States Anti-Trust Law Problems for Canada — Recommendations for the United States and Canada*, 2 CAN.-U.S. L.J. 152, at 155 (1979).