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THE CANADIAN CONSTITUTION, FEDERALISM AND THE CONFLICT OF LAWS

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The author argues that there is a constitutional dimension to each of the three principal issues—judicial jurisdiction, recognition and enforcement of foreign judgments, and choice of law—that arise in the Conflict of Laws. Provincial claims to assert a jurisdiction over defendants who are not in the province must be limited by the same tests as limit the extra-territorial reach of provincial law under the constitution. There is no justification for giving greater extra-territorial scope to provincial law merely because that scope is set by traditional choice of law rules. If this constitutional standard is met in relation to jurisdiction and choice of law, the problems of the enforcement of the judgments of one province in another are largely avoided, for there can no longer be any possibility of such enforcement, when judged by the standards of the enforcing court, being unfairly prejudicial to the defendant. The consequence of these arguments is that the Supreme Court of Canada has a special role to play in the development of the law. This role permits the complete replacement of conflicts rules, first, by constitutional tests to set limits to the reach of provincial law, and second, by the application of substantive rules of provincial law within their proper scope.

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Selon l'auteur, les trois principales questions posées par le conflit des lois, soit la compétence judiciaire, la reconnaissance et l'application des décisions judiciaires étrangères et le choix de la loi applicable, ont toutes un aspect constitutionnel. La compétence que revendiquent les provinces dans le cas d'un défendeur qui se trouve hors de la province, doit suivre les mêmes critères que ceux qui, dans la constitution, limitent le champ du droit de la province hors de son territoire. Il n'y a aucune raison de donner au droit provincial un champ plus vaste simplement parce qu'on tient à avoir le choix traditionnel de la loi applicable. Si l'on suivait la norme constitutionnelle dans le cas de choix de la loi applicable comme dans le cas de compétence judiciaire, on éviterait la plupart des difficultés d'application des décisions rendues hors de la province, puisque l'application de ces décisions, jugée par les normes du tribunal qui les fait appliquer ne serait plus préjudiciable au défendeur. La Cour suprême du Canada a donc un rôle spécial à jouer dans le développement du droit. Ce rôle lui permet de remplacer totalement les règles des conflits en établissant des normes constitutionnelles afin de délimiter le champ du droit provincial, dans un premier temps, et, dans un deuxième temps, en conservant leur champ propre aux principes de droit provincial quand on en vient à les appliquer.

Introduction

The argument of this article is that issues of the Conflict of Laws raise important questions of constitutional law and federalism that have largely been ignored in every discussion of federalism, constitutional law or conflicts in Canada. Once these issues are explicitly raised and examined a number of seemingly intractable problems are resolved and a basis for a radical reassessment of the Conflict of Laws is revealed. The approach that I take is based to a significant degree on the analysis of conflicts problems worked out in other federal states in the common law tradition. I shall focus particularly on the law of the United States. On occasion I will also refer to the Australian experience, though, as we shall see, that, at first glance, obvious comparison does not turn out to be as helpful as one might expect.

Among federal states, Canada is unusual in that there are no express provisions in any of its constitutional documents dealing with issues of federalism raised in Conflict of Laws cases. There are three such issues: judicial jurisdiction, recognition and enforcement of extra-provincial judgments and choice of law. Of course, these issues arise not only in inter-provincial but also in international cases, but for the moment their disposition in the former setting will be the focus of inquiry. Both the American and the Australian constitutions deal with these issues (or some of them) in express constitutional provisions. It is natural in those jurisdictions to regard them as "constitutional", and I adopt, if only as a matter of definition for this article, that term in discussing their status in Canada. By claiming that they are constitutional issues, I wish to emphasize that they pertain to the proper functioning of a federal system. It is this claim which is the focus of this article.

I. *Judicial Jurisdiction and Recognition and Enforcement of Foreign Judgments*

These two topics are closely related, though the connection is neither as explicitly made as it should be, nor is it in Canada pushed as far into the issues of constitutional law and federalism as I propose to extend it. The basic common law rule for the enforcement of a foreign judgment (and the rules do not distinguish between inter-provincial and international judgments) is that the court that gave the judgment (the rendering court) must have had personal jurisdiction over the defendant.¹ Personal jurisdiction requires that the defendant either has been personally served in the jurisdiction of the rendering court or has submitted to its jurisdiction by entering a voluntary appearance.² Leaving the issue of submission aside for the moment, the former basis for enforcement is extremely narrow, even if the enforcing court regards the judgment of the rendering court as conclusive on the merits of the dispute between the parties. The narrowness of the rule is seldom justified; it is simply accepted as the common law rule. Such statutory provisions dealing with foreign judgments as there are,³ do not change the rule (these provisions either narrow the basis for enforcement even more; they do not widen it). They offer only a speedy method of enforcement of those judgments that are enforceable.

A possible reason for the narrowness of the rule could be the belief that, if the rule were wider, a court might be required to enforce a judgment of a court that asserted a claim to judicial jurisdiction that the enforcing court would regard as somehow improper. (It will be important to be precise about the meaning of the word "improper"; for the moment we could replace it by saying that the jurisdiction claimed is too wide on some ground or unfair to the defendant). Some support for this position is supplied by history. The common law rule is generally regarded as having

¹ *Schibsy v. Westenholz* (1870), L.R. 6 Q.B. 155. A full list of the cases is found in J.G. McLeod, *The Conflict of Laws* (1983), Part IV, Chap. 1.2. A good review is found in R.J. Sharpe, *Interprovincial Product Liability Litigation* (1982). This paper will not attempt to cover the law of either judicial jurisdiction or enforcement in any detail. It is sufficient for my purposes to focus on the principal features of those areas.

² *Emanuel v. Symon*, [1908] 1 K.B. 302 (C.A.).

³ These are the acts of the common law provinces and the ordinances of the territories based on the recommendations of the Uniform Law Conference of Canada over many years. The acts are often called Reciprocal Enforcement of Judgments Act (*e.g.*, R.S.O. 1980, c.432), but there is no standard nomenclature (the equivalent legislation in British Columbia is now the Court Order Enforcement Act, R.S.B.C. 1979, c.75, Part 2) and the provisions of all the acts are not entirely uniform. The lack of uniformity does not bear on the problems discussed in this article. It is sufficient to notice that under all provincial acts or territorial ordinances, it is a defence to the summary procedure provided for in the acts that the defendant to the proceedings for enforcement of the foreign judgment would have a good defence to the action on the judgment at common law; see, *e.g.*, R.S.O. 1980, c.432, ss.3(g). The model Act of The Uniform Law Conference is set out in Sharpe, *op.*

been laid down in 1808.⁴ At that date the English courts had no power to serve a defendant beyond the boundaries of England. It finds some support in some much later American decisions that equated international (interstate) judicial jurisdiction with physical power; only a state that had physical power (conferred by service in the jurisdiction) could properly take judicial jurisdiction in any dispute.⁵ If the enforcing court only takes jurisdiction when it has physical power over the defendant it could plausibly deny any wider power to any other court.

This reason, however, became hard to accept after the English courts acquired in 1852 the power to serve *ex juris*.⁶ As that power has been continually expanded while the enforcement rules remain unchanged, the discrepancy between the power a province asserts for itself and that which it allows to others has become even more marked and harder to defend. This discrepancy, if we confine ourselves solely to inter-provincial cases, suggests a need for some kind of common approach to the justification of the claim made for provincial power and the power conceded to other provinces, provinces that assert an identical power to that of the enforcing court. The absence of the discrepancy in American law and the qualified Australian position illustrate that different solutions are possible. We will begin our examination of the common law and alternative positions by exploring first the rules of the common law provinces of Canada on judicial jurisdiction, and then consider the American and Australian positions.

A. Judicial Jurisdiction

(1) The Canadian Law

At common law it was conceded (and followed logically) that a judgment of a court that had physical power over a defendant would be enforced in another province.⁷ The problem of inter-provincial enforcement only arose when the defendant was served *ex juris*, that is beyond the jurisdiction of the court whose judgment had come for enforcement.

cit., footnote 1, p. 139. S. 2(6)(g) of that Act is reproduced in all the acts of the common law provinces. The special position of Quebec will be considered later.

⁴ *Buchanan v. Rucker* (1808), 9 East. 192, 103 E.R. 546 (K.B.).

⁵ E.g., *Pennyroyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1877). The English position is expressed in *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A.C. 670 (P.C.).

⁶ Common Law Procedure Act (1852), 15, & 16 Vict. c.76, s.18. The development of this power is found in Sharpe, *op. cit.*, footnote 1, pp. 2 *et seq.*

⁷ See authorities cited *supra*, footnotes 1 and 2. Again, the special problems of corporations are ignored for the purposes of this paper.

The rules regarding service of a writ of summons (or notice thereof) out of the jurisdiction are based on the rules of court of the various provinces.⁸ These rules are, in turn, based on provincial legislation.⁹ When the English courts were first given this power, or perhaps more accurately, when plaintiffs were first given this power, it was treated very cautiously.¹⁰ The power was seen as a potential threat to the sovereignty of the state where the individual was when served with the English notice of the writ. This fear was, presumably, part of the justification for the requirement that the plaintiff seek leave before serving the defendant outside the territorial boundaries of the court. The courts' early treatment of the plaintiff's power was based on ideas of international law and of the rights of sovereign states. The English attitude was carried into the Canadian courts' approach to the same problem, even though some pause might have been made before international attitudes to sovereignty were applied to the constituent parts of a federation. I do not propose to debate here the issue of provincial sovereignty. I only want to point out that it need not have been accepted as simply too obvious for argument that another province is no different from a foreign state. As will be seen shortly, the Americans had to grapple with the similar problem of state sovereignty. Echoes of the English nineteenth century position on the care required before the plaintiff's right to serve *ex juris* should be permitted can be found in Canadian courts as late as 1979.¹¹ Views that express a very different attitude to the exercise of the power in inter-provincial matters have also been expressed,¹² but these views have not been fully carried into either the texts or the cases.

The rules of the Canadian common law jurisdictions fall into four categories: rules that permit the plaintiff to serve *ex juris*, without leave, in any case where the defendant can be served in North America (note that this power is not confined to service within Canada),¹³ rules that require the plaintiff's claim to be fitted into one of the set of categories or "pigeon-holes" in which service *ex juris* is permitted and which require

⁸ See Sharpe, *op. cit.*, footnote 1, Appendix, where the Rules of Court of the Canadian Provinces are set out.

⁹ *E.g.*, The Judicature Act, R.S.O. 1980, c.223, s. 116. All other provinces have similar legislation.

¹⁰ See Sharpe, *op. cit.*, footnote 1, for a survey of this treatment.

¹¹ See, *e.g.*, *Singh v. Howden Petroleum Ltd.* (1979), 100 D.L.R. (3d) 121, 22 O.R. (2d) 588 (Ont. C.A.).

¹² *Jannock Corp. Ltd. v. R.T. Tamblin & Partners Ltd.* (1975), 58 D.L.R. (3d) 678, 8 O.R. (2d) 622 (Ont. C.A.).

¹³ The Provinces in this group are Nova Scotia and Prince Edward Island. Sharpe, *op. cit.*, footnote 1 mentions that Newfoundland may join it. (The references to all the provincial rules may be found in Sharpe).

leave,¹⁴ rules that are similar but where no leave is required,¹⁵ and rules that offer the same pigeon-hole approach but permit service *ex juris* with leave in any case that does not fit into either one of the prescribed categories.¹⁶

Some courts assert an inherent power to control the exercise of the right to serve *ex juris*,¹⁷ others deny that they possess this power.¹⁸ All courts would, however, assert an inherent power to prevent an abuse of their processes.¹⁹ The power to prevent an abuse of the court's process is sometimes referred to as the power to prevent an action being brought in an inconvenient forum.²⁰ Since the right to serve a defendant *ex juris* is one that generally can now be claimed by a plaintiff without the need to obtain leave, the onus is on the defendant to convince the court that the service should be set aside, either because the rules do not permit it in the particular case, or because to allow the action to proceed would be an abuse of the court's process.²¹ No very clear criterion has been establis-

¹⁴ Alberta, New Brunswick and Newfoundland.

¹⁵ Ontario. The new rules that came into force in 1985 put Ontario into the next category, *viz.* pigeon-hole and catch-all provision exercisable with leave.

¹⁶ British Columbia, Manitoba and Saskatchewan.

¹⁷ See, *e.g.*, *Singh v. Howden Petroleum*, *supra*, footnote 11; *Petersen v. Ab Bahco Ventilation* (1979), 107 D.L.R. (3d) 49, 17 B.C.L.R. 335 (B.C.S.C.).

¹⁸ See, *e.g.* *Selan v. Neumeyer* (1959), 29 W.W.R. 542, *aff'd sub. nom. Belan v. Neumeyer* (1960), 33 W.W.R. 48 (Man. C.A.); *Benedict v. Autuofermo* (1975), 60 D.L.R. (3d) 469 (N.S.S.C.).

¹⁹ G.D. Watson, M. McGowan, Ontario Supreme and District Court Practice (1984), referring to Rule 21.01(3)(d); *Earl Putnam Organization Ltd. v. Macdonald* (1978), 91 D.L.R. (3d) 714, 21 O.R. 815 (Ont. C.A.). E. Edinger, *Discretion in the Assumption and Exercise of Jurisdiction in British Columbia* (1982), 16 U.B.C. Law Rev. 1, draws a distinction between the power to control service *ex juris* and the power to control an action in which the defendant has been served in the jurisdiction of the court, the former power being far broader than the latter. She observes at p. 14:

[E]ven though courts in British Columbia and Ontario, at least, are free to apply the leave to serve/*forum conveniens* standard of discretion after service *ex juris* as of right it does not follow that the inherent power to control their own process is irrelevant in such situations. That power to prevent abuse of process may prove useful as an adjunct to the *forum conveniens* test to control the dread spectre of forum shopping.

²⁰ See *Moreno v. Norwich Union Fire Insurance Society Ltd.* (1970), 16 D.L.R. (3d) 247, [1971] 1 O.R. 625 (Ont. C.A.) and other cases cited in Watson & McGowan, *op. cit.*, footnote 19, p. 234. The English courts dislike the phrase "forum conveniens" but use instead the phrase "natural forum": *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795, [1978] 1 All E.R. 625 (H.L.). The terms would appear to be substantially interchangeable in effect.

²¹ See cases referred to in footnote 20, *supra*. There is an issue of onus. Must the defendant show that the action is frivolous and vexatious or merely brought in an inconve-

hed for what would be considered an abuse of process, though a list of factors that would normally be considered relevant can be produced.²²

(2) *The American Law*

The American position regarding the exercise of a state's "long-arm" jurisdiction is that such power is restricted by the "due process" clause of the Fourteenth Amendment.²³ For many years the leading case in the area was the decision of the Supreme Court of the United States in *International Shoe Co. v. State of Washington*.²⁴ *International Shoe* involved a Delaware corporation and its liability to pay state unemployment compensation levies in Washington state. The corporation did business (through salesmen, though it had no place of business) in Washington. The corporation had not been made liable by a judgment of a court. Notice of assessment under the Washington Act had been served on an agent of the corporation in Washington and had been mailed to the corporation's head office in Missouri. The two questions that the Supreme Court addressed were: (1) whether the corporation had, by its activities in Washington, rendered itself amenable to proceedings in the courts of that state to recover the levy, and (2) whether the state could exact the levy. The first question is the important one both for the court and for us. It was assumed that the question that the court had to answer was the constitutionality (under the Fourteenth Amendment) of Washington's assertion of *in personam* jurisdiction over the corporation.

The Supreme Court decided that *International Shoe* was subject to the Washington tax. In so doing it destroyed the idea usually associated with the decision in *Pennoyer v. Neff*²⁵ that the only proper basis for judicial jurisdiction was physical power. Once the notion of physical power as the only basis for jurisdiction was rejected, the court (and American courts ever since) faced two separate, and at times competing standards to determine appropriateness of a state's assertion of judicial jurisdiction. The first is based on the idea of fairness to the defendant, or possibly the need for balancing fairness to the defendant with the need for

nient forum? The test now is tending towards the latter one: Watson, McGowan, *op. cit.*, footnote 19, p. 234. The issue of onus is discussed in Edinger, *loc. cit.*, footnote 19.

²² Edinger, *ibid.*, at p. 33.

²³ The Amendment reads in part:

. . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

²⁴ 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). The judgment was delivered by Stone C.J. The development that led to this case and the subsequent history of it up to 1977 are usefully outlined in M.T. Hertz, *The Constitution and the Conflict of Laws: Approaches in Canadian and American Law* (1977), 27 U.T.L.J. 1.

²⁵ *Supra*, footnote 5.

fairness to the plaintiff.²⁶ The second standard can be termed one of federalism. Both of these standards are expressed in the judgment of Stone C.J. in *International Shoe*.

The case may be said to be decided on the basis that a state may take jurisdiction against an absent defendant when, broadly speaking, it would be fair and rational to do so. The phrase associated with *International Shoe* is that to be justified in asserting its "long-arm" jurisdiction, the state or state court must have some "minimum contacts" with the defendant. The court said:²⁷

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

The court went on to consider the special considerations that apply to a business that is subject to "long-arm" jurisdiction. It said:²⁸

[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances hardly be said to be undue.

The result of *International Shoe* was that a fairly broad basis for a state "long-arm" jurisdiction was accepted. It supported both *in personam* jurisdiction and what is referred to as "quasi *in rem*" jurisdiction, jurisdiction asserted against a defendant's property in the state (the amount recoverable being limited to the amount of the property in the state), even though the defendant was not subject to *in personam* jurisdiction.

If, however, the decision may be said to be based on considerations of fairness to the defendant, Stone C.J. also raised the issue of federalism. On this he said:²⁹

Those demands [of due process] may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend a particular suit which is brought here.

Until relatively recently the development of the *International Shoe* test was characterized by a general emphasis on the first of these standards.³⁰ Four recent cases of the Supreme Court are regarded by some as a

²⁶ This balancing is implicit in any test that could be applied.

²⁷ *Supra*, footnote 24, at pp. 316 (U.S.), 158 (S.Ct.).

²⁸ *Ibid.*, at pp. 319 (U.S.), 160 (S.Ct.).

²⁹ *Ibid.*, at pp. 317 (U.S.), 158 (S.Ct.).

³⁰ A.R. Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory* (1980), 15 *Georgia L. Rev.* 19, at pp. 19-21; G.B. Manishin, *Federalism, Due*

shift to the second standard;³¹ they at least appear to apply the first standard in a narrow way. *Kulko v. Superior Court*,³² a case involving California's right to take jurisdiction in a custody case, and *World-Wide Volkswagen v. Woodson*,³³ a case of a products liability claim, narrowed the test of *International Shoe* by holding that the state concerned had inadequate contacts in the circumstances of each case. (*World-Wide Volkswagen* is of particular relevance for this paper and will be explored later). *Shaffer v. Heitner*³⁴ restricted the *quasi in rem* jurisdiction by holding that the mere presence of the defendant's property in the state was not sufficient for "long-arm" jurisdiction; the "minimum contacts" required by the *International Shoe* test were necessary. *Rush v. Savchuk*³⁵ held that a direct right of action against an insurer doing business in the state could not be invoked when there would be insufficient contacts with the automobile driver (who was the nominal defendant) to support an action against him, had this claim been pursued.

If overall the exact import of these cases is not clear the decision of the court in *World-Wide Volkswagen Corp.* seemed fairly explicit. The case regarded the concept of minimum contacts as performing two functions:³⁶

It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

Here we have an express statement of the two standards as part of the explication of the effect of the Fourteenth Amendment and the requirement of due process. What is seen as evidence of the shift I have mentioned is the addition of the concerns of state sovereignty as a part of the test of state jurisdiction. This development is regarded as a consequence of the view that too wide an assertion of jurisdiction by one state threatens the sovereignty of other states, and so the sovereignty of each must be controlled in the interests of all.³⁷

To some extent this emphasis on state sovereignty is a return to the narrower jurisdictional basis of the decision in *Pennoyer v. Neff*,³⁸ as

Process, and Minimum Contacts: *World-Wide Volkswagen Corp v. Woodson* (1980), 80 Col. L. Rev. 1341; B. Posnak, A Uniform Approach to Judicial Jurisdiction After *World-Wide* and the Abolition of the "Gotcha Theory" (1981), 30 Emory L. Journal 729.

³¹ Kamp, *ibid.* Not all commentators agree that such a shift would be a good thing; see views expressed in the articles cited in footnote 30.

³² 436 U.S. 84, 98 S.Ct. 1690, 56 L. Ed. 2d 132 (1978).

³³ 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

³⁴ 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).

³⁵ 444 U.S. 320, 100 S. Ct. 571, 62 L. Ed. 2d 516 (1980).

³⁶ *Supra*, footnote 33, at pp. 292 (U.S.), 564 (S.Ct.), 498 (L.Ed.).

³⁷ Kamp, *loc. cit.*, footnote 30, at p. 37.

³⁸ *Supra*, footnote 5. Marshall J. in *Shaffer v. Heitner*, *supra*, footnote 34, provides

opposed to the more liberal test of *International Shoe*. It may, however, be doubted that, as has been said, the decision in *World-Wide Volkswagen* has created "a plaintiff's hell and a defendant's paradise"³⁹ for the law seldom goes so far in either direction, and there is little support for such an extreme view in the 1982 decision of the court in *Insurance Corporation of Ireland Ltd. v. Compagnie des Buaxites de Guinée (CBG)*.⁴⁰ That case suggests American courts may in fact be moving slightly away from the dual test of *World-Wide Volkswagen*. *CBG* arose out of an exercise by a federal court of its power to compel disclosure of documents. The defendants had been ordered to produce evidence that would disclose whether the court had *in personam* jurisdiction or not. They failed to produce the documents, and the judge had then determined that the court had jurisdiction on the ground that the failure to comply with the order for production justified the court in taking the facts alleged by the plaintiff as established. The majority of the Supreme Court, in a judgment by White J., held that the judge had not violated the restrictions on state long-arm jurisdiction by so doing. It is not clear from the judgment whether the defendants could be taken, on the particular facts of the case, to have submitted to the federal court's decision on the jurisdictional issue, and to have waived, therefore, their right to invoke their "due process" protection, or whether the federal rules permitted the court to draw an adverse inference from the defendants' failure to comply with the order for production, and that this effect of the rules was permissible under the Fourteenth Amendment. Powell J., in a concurring judgment, noted with respect to the majority judgment:⁴¹

By finding that the establishment of minimum contacts is not a prerequisite to the exercise of jurisdiction to impose sanctions under . . . [the Federal Rules of Civil Procedure], the Court may be understood as finding that "minimum contacts" no longer is a constitutional requirement for the exercise by a state court of personal jurisdiction over an unconsenting defendant. Whenever the Court's notions of fairness are not offended, jurisdiction apparently may be upheld.

White J. (who wrote the judgment in *World-Wide Volkswagen*) in a footnote to the majority judgment denies that the judgment had the effect alleged by Powell J., and refers specifically to the quotation from *World-Wide Volkswagen* set out earlier. White J. however, says this:⁴²

a useful summary of the basis for the decision in *Pennoyer v. Neff*, *supra*, footnote 5 and the consequences of it.

³⁹ *Kamp*, *loc. cit.*, footnote 30, at p. 53. The narrower test may have been foreshadowed by such cases as *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

⁴⁰ 456 U.S. 694, 102 S. Ct. 2099, 72 L. Ed. 492 (1982). The case concerned the jurisdiction of the Federal Court, but nothing turns on that fact. It is admitted that the *in personam* jurisdiction (as opposed to the subject-matter jurisdiction) of the Federal Court is determined by State law and subject, therefore, to the Fourteenth Amendment.

⁴¹ *Ibid.*, at pp. 713-714 (U.S.), 2110 (S.Ct.), 508 (L.Ed.).

⁴² *Ibid.*, at pp. 702 (U.S.), 2104-2105, n.10 (S.Ct.), 501 (L.Ed.).

The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That clause is the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

After *CBG* it is not clear whether the sovereignty issue, referred to by Stone C.J. in *International Shoe* and upheld by the court as recently as 1980 in *World-Wide Volkswagen*, remains an independent criterion in the American law of judicial jurisdiction. It seems inevitable that there will be aspects of both fairness and federalism in any question of judicial jurisdiction, and that this statement will remain true regardless of the apparent exclusive focus on issues of fairness or on the question, "Which is the best forum to adjudicate the entire lawsuit"?⁴³ that is alleged to be the true (or desirable) legacy of *International Shoe*. The courts have always been concerned about a second question: "What is the relationship between this particular defendant and the forum?" It is unlikely that the tension between the two standards will ever be finally resolved. Many cases will be fairly clearly decided on the fairness ground, others will be much more difficult. In these latter cases, the courts will have to balance the focus on fairness, with its implicit comparison between fairness (or unfairness) to both plaintiff and defendant, against the focus on federalism, or on the need to require one jurisdiction to behave responsibly in the context of a federal system.⁴⁴

(3) *The Australian Law*

The common law rules in Australia are much the same as in Canada. These rules are the rules of procedure of the several states. They are principally relevant for service beyond Australia. The Commonwealth Parliament, under power conferred by section 51(xxiv) of the Constitution,⁴⁵ enacted in 1901 the Service and Execution of Process Act, 1901.⁴⁶

⁴³ Kamp, *loc. cit.*, footnote 30, at p. 41.

⁴⁴ Two recent Supreme Court decisions, *Keeton v. Hustler Magazine*, 104 S.Ct. 1473 (1984), and *Calder v. Jones*, 104 S.Ct. 1482 (1984) may represent a return to a more generous "long-arm" power. It is however the method of approach, not the precise state of the current law in the United States, which is relevant for this paper.

⁴⁵ Commonwealth of Australia Constitution Act, 1900, s.51:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (xxiv.) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States.

⁴⁶ Now Service and Execution of Process Act, 1901-1973.

This Act is restricted to the service within Australia of the process of the courts of one state on a person resident in another state. Unlike the State rules, leave to serve *ex juris* is not required under the Act. Section 11 of the Act has five major provisions that permit service beyond the borders of a state. The Act applies when (1) the subject matter of the suit is land in the state, (2) a contract was made or breached in the state, (3) an act (*e.g.*, a tort) was done in the state, (4) "at the time when the liability sought to be enforced against the defendant arose, he was within that state", or (5) a matrimonial cause has been begun when the defendant's domicile is in the state, or the proceedings are brought under the federal Matrimonial Causes Act.⁴⁷ The provisions of section 11 parallel some of the pigeon-holes found in the Canadian rules. The Act has been held to preserve the power of a court to control a plaintiff's right in cases of inconvenience to defendants.⁴⁸ In some respects the power given by the Act is narrower than that asserted by Canadian courts. Thus it has been held that merely suffering damage in the jurisdiction does not, by itself, justify the taking of jurisdiction under the Act.⁴⁹

The existence of federal legislation precludes any challenge within Australia to the exercise of long-arm jurisdiction by the states, at least when that jurisdiction is asserted under the Act. The Act is not so wide that it is likely that there could be extensive inconsistencies with the *International Shoe* test. As regards the third head, the tort provisions, the limitation imposed, *viz.* that the mere suffering of harm in the jurisdiction is insufficient, will be likely to rule out one of the more objectionable features of the Canadian rules.⁵⁰ The contracts head, especially as regards contracts "made" in the state, could permit the exercise of a very technical and potentially objectionable power.⁵¹ There does not appear to be any

⁴⁷ Matrimonial Causes Act, 1959-1973.

⁴⁸ P.E. Nygh, *Conflict of Laws in Australia* (3rd ed., 1976), p. 30, referring to *Earthworks and Quarries Ltd. v. F.T. Eastment and Sons Pty. Ltd.*, [1966] V.R. 24 (S.C.).

⁴⁹ Nygh, *ibid.*, at p. 35; *Wilson Electric Transformer Co. Pty. Ltd. v. Electricity Commission of New South Wales*, [1968] V.R. 330 (S.C.).

⁵⁰ *Lummus Co. Canada Ltd. v. International Alloys Inc.* (1977), 80 D.L.R. (3d) 278, 17 O.R. (2d) 322 (Ont. H.C.); *Skyrotors Ltd. v. Carrière Technical Industries Ltd.* (1979), 102 D.L.R. (3d) 323, 26 O.R. (2d) 207 (Ont. H.C.); *Vile v. Von Wendt* (1979), 103 D.L.R. (3d) 356, 26 O.R. (2d) 513 (Ont. C.A.).

⁵¹ The power is technical in the sense that the courts make the decision on the place where a contract is "made" by the application of the traditional rules of offer and acceptance without regard to what the parties might have expected, or to any consideration of fairness; see, *e.g.*, *Entores Ltd. v. Miles Far East Corp.*, [1955] 2 Q.B. 327, [1955] 2 All E.R. 493 (C.A.); *Brinkibon Ltd. v. Stahag Stahl und Stahlwarenhandels-gesellschaft m.b.H.*, [1983] 2 A.C. 34, [1982] 1 All E.R. 293 (H.L.).

case exploring the scope of the fourth head: it has been suggested that it applies to the enforcement of foreign judgments.⁵²

A further feature of the Australian law is the existence of an original jurisdiction in the High Court in all matters "between residents of different states".⁵³ This power is not the same as that exercised by the Federal Court in Canada in that the jurisdiction is national as opposed to local.⁵⁴ As we have seen from the decision in *CBG*, the federal courts in the United States are limited by state long-arm jurisdiction. The jurisdiction of the High Court under this head remains largely undeveloped.⁵⁵

From a North American, or even a Canadian perspective, the Australian situation regarding judicial jurisdiction is curious. On the one hand, there is both a federal statute with the potential to remove all the problems encountered in the American and Canadian contexts, and original jurisdiction in a national court, while, on the other, there are comparatively few cases and very little analysis of the issues in the terms used in this article.⁵⁶ As we shall see, the Australian situation in regard to the enforcement of foreign (interstate) judgments is equally curious and undeveloped. It will be more useful to compare the American and Canadian positions since neither has (at least so far as we are concerned) federal legislation dealing with the issue of service *ex juris*.

B. Enforcement of Foreign Judgments

(1) The Canadian Law

We can better understand the problem of the taking of jurisdiction by examining the opposite problem: the issue of the enforcement of foreign judgments. The common law rules regarding the necessity of personal

⁵² Nygh, *op. cit.*, footnote 48, p. 52; E.I. Sykes, M.C. Pryles, *Australian Private International Law* (1979), p. 40, note 67.

⁵³ Commonwealth of Australia Constitution Act, 1900, s.75(iv).

⁵⁴ Federal Court Act, R.S.C. 1970 (2nd Supp.), c.10.

⁵⁵ The existence of s.75(iv) is strongly criticized by Zelman Cowen, *Bilateral Studies in Private International Law*, No. 8, *American-Australian Private International Law* (New York, Parker School of Foreign and Comparative Law, Columbia University, 1957) pp. 15-16. See also, *Australian Temperance and General Mutual Life Assurance Society Ltd. v. Howe* (1922), 31 C.L.R. 290 (H.C. Aust.) and *Cox v. Journeaux* (1934), 52 C.L.R. 282 (H.C. Aust.). Cowen quotes Higgins J. in the former case, where at p. 330, he states: "we might think that the jurisdiction given in matters 'between residents of different states' is a piece of pedantic imitation of the Constitution of the United States, and absurd in the circumstances of Australia, with its State Courts of high character and impartiality".

⁵⁶ Cowen, *ibid.*, at p. 17 refers to the predominant influence of English law. England is a unitary state and the House of Lords has never referred to any kind of fairness or "constitutional" limit on English courts (in spite of the presence in the United Kingdom of Scotland) in the terms used in the United States.

service in the jurisdiction of the rendering court as a basis for enforcement outside the jurisdiction are so well established that there are few recent cases dealing with that issue.⁵⁷ As a practical matter, the more difficult problem centres on the issue of submission. Most of the recent cases have dealt with the question whether the defendant submitted or not.⁵⁸ The simple proposition that a defendant who submits is bound by the resulting judgment appears to be easily justifiable. There are, however, difficult issues to be resolved. These difficulties appear if we examine the common law rules more carefully. The traditional view of the common law in the Anglo-Canadian tradition is summed up in the following statement:

[T]he narrow recognition and enforcement rules. . . . mean that there is less reason for restraint in assuming jurisdiction over extraprovincial defendants. Because the issues of assumed jurisdiction and enforcement are determined independently, and because a judgment against a foreign defendant will not be enforced elsewhere in Canada unless he voluntarily submits to the jurisdiction, the policy of fairness to defendants can largely be satisfied without undue concern for jurisdictional restraint. It may safely be assumed that a defendant will only appear voluntarily to defend his conduct in a foreign jurisdiction if he has assets in that jurisdiction. By the same token, the existence of assets in the jurisdiction may act as a rough indication that the defendant's contact and interest in the jurisdiction are sufficiently strong to justify the assertion of jurisdiction over him. There is, then, every incentive to extend the scope of assumed jurisdiction: the policy of providing plaintiffs with ready access to domestic courts is thereby satisfied and the policy of acting fairly to defendants is answered by the restrictive enforcement rules themselves —after all, a defendant will only appear and defend on the merits if he has interests worthy of protection within the rendering jurisdiction.⁵⁹

This view of judicial jurisdiction suggests that we can be indifferent to the breadth of the claims made for it because the very restricted recognition rules will ensure that only those defendants who fall in a very narrow class will be effectively subject to a province's process and juris-

⁵⁷ See, e.g., *McLeod, op. cit.*, footnote 1, p. 584, Rule 174, for a statement of the common law. *Hertz, loc. cit.*, footnote 4, at p. 33 refers to *Attorney General of Ontario v. Scott*, [1956] S.C.R. 137, [1956] 1 D.L.R. (2d) 433, a case where Rand J. stated the traditional common law rule, as raising issues of extra-territoriality (i.e. Constitution Act, 1867, s.92(13) issues). This point has not been generally accepted. See also, B. Laskin (1956), 34 Can. Bar Rev. 215. The scope of s.92(13) will be considered *infra*. Part II, Choice of Law.

⁵⁸ *Henry v. Geoprosco International Ltd.*, [1976] 1 Q.B. 726, [1975] 2 All E.R. 702 (C.A.); *Re McCain Foods Ltd.* (1979), 103 D.L.R. (3d) 724, 26 O.R. (2d) 758 (Ont. C.A.); *Re Attorney General of B.C. and Becker* (1978), 87 D.L.R. (3d) 536 (B.C.S.C.); *Re Overseas Food Importers & Distributors Ltd. and Brandt* (1981), 126 D.L.R. (3d) 422, 27 B.C.L.R. 31 (B.C.C.A.); *Alberta Livestock Transplants Ltd. v. Pine Tree Rancho Ltd.* (1978), 92 D.L.R. (3d) 478 (Sask. Q.B.); *Dovenmuehle Inc. v. Rocca Group Ltd.* (1981), 34 N.B.R. (2d) 444 (N.B.C.A.), *aff'd* [1982] 2 S.C.R. 534, (1982), 43 N.B.R. (2d) 359.

⁵⁹ *Sharpe, op. cit.*, footnote 1, pp. 8-9. Professor Sharpe is not to be regarded as supporting this view: his statement of the traditional view is simply a convenient version of it.

diction. This view creates two problems. First, in accepting that submission justifies enforcement, it ignores whatever lesson may lie in the *Shaffer v. Heitner*⁶⁰ analysis. Second, it ignores the fact that there may be very good and defensible reasons for the assertion of a "long-arm" *in personam* jurisdiction, even when the defendant has not submitted.

The traditional view permits a court (subject always to the *forum non conveniens* discretion) to take jurisdiction (by serving *ex juris*) and to seize the defendant's property even though that taking may involve a violation of the due process concerns articulated in *Shaffer v. Heitner*. Marshall J., delivering the judgment of the court in that case, said:⁶¹

The case for applying to jurisdiction in rem the same test of 'fair play and substantial justice' as governs assertion of jurisdiction in personam is simple and straightforward. It is premised in recognizing that '[T]he phrase, 'judicial jurisdiction over a thing', is a customary elliptical way referring to jurisdiction over the interests of persons in a thing . . . This recognition leads to the conclusion that in order to justify an exercise of jurisdiction in rem, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing'. The standard for determining whether an exercise of jurisdiction over the interest of persons is consistent under the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*.

The Common Law approach justified in the quotation previously set out may be unfair to a defendant for, as has been suggested, the statutory grounds for service *ex juris* in all Canadian provinces are extremely wide, and such indications as we have of the content of the criteria for determining when a forum is inconvenient,⁶² do not suggest that they always coincide with the "due process" concerns expressed, for example, in the "minimum contacts" test of *International Shoe*. The unfairness lies in forcing a defendant to defend in a jurisdiction in which the defendant may have property, but which has no other contact with the dispute than that it is the plaintiff's chosen forum. This power in the plaintiff offers an effective tactical weapon.⁶³

⁶⁰ *Supra*, footnote 34. See, e.g., *BP Canada Holdings Ltd. v. Westmin Resources Ltd.* (1983), 32 C.P.C. 300 (Ont. H.C.) and *Pace v. Synthetics Inc.* (1983), 145 D.L.R. (3d) 749, (1983) 41 O.R. (2d) 267 (Ont. H.C.), explicitly rejecting this kind of concern reflected in *Shaffer v. Heitner*; the plaintiff should not be deprived of a "legitimate judicial advantage"; Watson, McGowan, *op. cit.*, footnote 19, p. 233.

⁶¹ *Ibid.*, at p. 207 (U.S.), 2581 (S.Ct.), 699-700 (L.Ed.).

⁶² See, e.g., cases mentioned, *supra*, footnote 50, and in Watson, McGowan, *op. cit.*, footnote 19, p. 233; see especially *Cutting Ltd. v. Lancaster Business Forms Ltd.* (1977), 18 O.R. (2d) 526 (Ont. H.C.).

⁶³ This power has been extensively used by plaintiffs bringing actions against ships (see, e.g., *Kuhr v. The Ship "Friedrich Busse"* (1982), 134 D.L.R. (3d) 261, [1982] 2 F.C. 709 (F.C.T.D.)), and often offers the occasion for the court to deal with the *forum non conveniens* argument: *The Atlantic Star*, [1974] A.C. 436, [1973] 2 All E.R. 175 (H.L.).

The second problem is equally, if not more serious. The basic common law rule for the enforcement of judgments suggests that only judgments rendered after personal service in the jurisdiction of the rendering court or after submission to it, are enforced in another province. It takes little imagination to see how such a rule could, for example, significantly restrict the effectiveness of any statutory scheme for imposing liability on manufacturers of defective products.⁶⁴

An interesting example of a statutory change in the common law rule is provided by the problem of motor vehicle liability arising out of an accident in one province caused by a resident of another. In such cases it is obviously important that there be an effective remedy available against the out-of-province tort-feasor. This result is achieved by uniform provisions in each of the Insurance Acts of the common law provinces giving a direct right of action against the insurer whenever a judgment has been obtained against the driver (or owner) in another Canadian jurisdiction.⁶⁵ This right would usually meet the *International Shoe* test even after *Shaffer v. Heitner*⁶⁶ and *Rush v. Savchuk*,⁶⁷ for there could clearly be sufficient contact with the out-of-province driver to justify the taking of *in personam* jurisdiction in any action brought by the injured resident in the place where the accident occurred.

It is not inevitable however that the *International Shoe* test will be met. It might be assumed that, if for example, an Ontario motorist negligently injures a British Columbia resident, any action against the motorist would be brought in British Columbia. Such an action would be supportable under both *International Shoe* and *World-Wide Volkswagen*. But what if the injured person was either a resident of another jurisdiction or moved after the accident to another province and were to sue there? The rules of several provinces are wide enough to permit service *ex juris* on the Ontario motorist in these circumstances.⁶⁸ It is not clear that the

⁶⁴ The significance of this problem is shown by the fact that several provinces have specific provisions expanding the power of the courts to serve manufacturers of allegedly defective products *ex juris*; see, e.g., British Columbia, Supreme Court Rules, Rule 13(1)(o): "the claim arises out of goods or merchandise sold or delivered in British Columbia"; The Consumer Product Warranties Act, R.S.S. 1978, c.C-30, s.33(1); the Consumer Product Warranty and Liability Act, S.N.B. 1978, c.C-18.1. There is no general acceptance of the view of Hertz, *loc. cit.*, footnote 24, that there are limits on provincial long-arm jurisdiction set by the limit on provincial power found in the Constitution Act, 1867, s.92(13). See also *supra*, footnote 57.

⁶⁵ See, e.g., Insurance Act, R.S.B.C. 1979, c.200, s.252; Insurance Act, R.S.N.S. 1967, c.148, cap.I-17, ss. 93,93A,98; Insurance Act R.S.O. 1980, c.218, s.226. The Canadian scheme is duplicated in essence by the European "Green Card" system.

⁶⁶ *Supra*, footnote 34.

⁶⁷ *Supra*, footnote 35.

⁶⁸ See, e.g., Nova Scotia and Prince Edward Island, *supra*, footnote 13.

control based on the argument that the new province is an inconvenient forum would be effective to protect the defendant (and the insurer) from the risk of the plaintiff's obtaining a significant tactical advantage.⁶⁹ In such cases the provisions of the Insurance Acts by which the insurer is constituted the attorney for the insured to defend any action⁷⁰ and the requirement that any insurer be subject to an action in the province where it does business,⁷¹ may have the result that the insured, and not just the insurer, becomes personally liable on a judgment obtained anywhere in Canada.⁷² *Rush v. Savchuk* does not quite deal with this problem because in that case there was no judgment against the insured before the direct action was brought against the insurer. But implicit in *Rush v. Savchuk* is the concern for the possible unfairness to the driver and insurer if an action were brought in a jurisdiction that does not satisfy the *International Shoe* or *World-Wide Volkswagen* test. These issues have not been adequately addressed by the Insurance Acts, even though the most serious potential problem (that of the ineffective judgment against a non-resident tort-feasor) has been.

(2) *The American and Australian Law*

The American position, shortly stated, is that under the Constitution⁷³ recognition must be given to the judgment of courts of other states provided that the rendering court had jurisdiction and the defendant had notice of the proceedings.⁷⁴ As we have seen, the test for jurisdiction is the general test of *International Shoe*. It follows therefore that a judgment that meets that test must be enforced in another state and a judgment that does not meet that test must not be enforced. There are no constitutional provisions governing the recognition of foreign, i.e. international judgments, but the rules would appear to be much the same as for interstate judgments.⁷⁵ Once again, the details of American law are not my princi-

⁶⁹ Such an advantage was alleged to have been taken in *Robinson v. Warren* (1982), 55 N.S.R. (2d) 147, 114 A.P.R. 147 (N.S.C.A.). The tactical advantage of forum selection is, of course, made even more attractive by the choice of law rule of *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1.

⁷⁰ E.g., Insurance Act, R.S.B.C. 1979, c.200, s.246; Insurance (Motor Vehicles) Act, R.S.B.C. 1979, c.201, s.17; Insurance Act, R.S.N.S. 1967, c.148, cap. I-17, s.93; Insurance Act, R.S.O. 1980, c.218, s.220.

⁷¹ *Ibid.*

⁷² This result would follow from the usual rules regarding contractual (or a "deemed" contractual) submission.

⁷³ Article IV s.1, provides:

Full Faith and Credit shall be given in each state to the public Acts, Records and judicial Proceedings of every other State . . .

⁷⁴ Hertz, *loc. cit.*, footnote 4, at p. 10.

⁷⁵ *Ibid.*

pal concern, and, in any event, I want to focus on the interstate situation where the approach is clear.

The Australian constitutional provisions are very similar to the American, but in spite of this, the Australian position is closer to the common law than to the American. The Australian Constitution⁷⁶ and federal legislation⁷⁷ provide for "full faith and credit" to be given by each state to the "laws, the public Acts and Records, and the judicial proceedings of every State".⁷⁸ The legislative provisions, as opposed to the constitutional provisions, have been held to alter the common law rules of recognition of foreign judgments,⁷⁹ but there are very few cases and the area appears quite undeveloped.⁸⁰ The Australian position is, therefore, not particularly useful as a comparison to the common law or Canadian one.

C. *The Relation Between Jurisdiction and Enforcement*

The danger in the acceptance of the traditional approach to both jurisdiction and enforcement is that it makes it likely that every possible mistake will be made. Jurisdiction is taken when it should not be, if we were to consider carefully the issue of fairness to the defendant. In any case the

⁷⁶ Commonwealth of Australia Constitution Act, 1900, s.118 and s.51(xxv) which confers on the Commonwealth Parliament the power to enact legislation to provide for the "recognition throughout the Commonwealth of the laws, the public Acts and Records, and the judicial proceedings of the states".

⁷⁷ State and Territorial Laws and Records Recognition Act, 1901-1973, s.18:

All public acts, records and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken.

⁷⁸ Commonwealth of Australia Constitution Act, *supra*, footnote 76, s.118. This section adds the word "laws" to the words of Article IV, section 1 of the American Constitution, *supra*, footnote 73. Most of the Australian cases have been concerned with the choice of law implications of this section. This issue will be examined, *infra*, at footnote 135.

⁷⁹ *Harris v. Harris*, [1947] V.L.R. 44 (S.C.). Fullagar J. in that case gave effect to a New South Wales decree of divorce (when matrimonial causes were governed by state laws) that would not have been recognized at common law. He went so far as to regard s.18 of the State and Territorial Laws and Records Recognition Act, *supra*, footnote 77, as precluding any investigation of the foreign judgment; the judge was permitted to ask only one question: what was the effect of the New South Wales decree in that state? (Cowen, *Bilateral Studies*, *op. cit.*, footnote 66, p. 23). This view of the legislation has been severely criticized (Cowen, *op. cit.*) and more recently it has been said of the Australian provisions that "their effect in other fields [than matrimonial causes] has been minimal and the time is long past when one would think . . . that they were going to have a profound effect on Australian conflictual development"; Sykes, Pryles, *op. cit.*, footnote 52, p. 172.

⁸⁰ Cowen, *op. cit.*, footnote 66; Sykes & Pryles, *op. cit.*, footnote 52; Nygh, *op. cit.*, footnote 48.

unfairness is not excused by the need to consider the fairness to the plaintiff. While many assertions of jurisdiction do not lead to enforcement, other cases in which jurisdiction is taken may force the defendant to submit when its property is threatened by a default judgment with resultant extra-provincial enforcement. So also, when effective enforcement is provided under the Insurance Acts, there is significant potential for abuse. Conversely, enforcement is denied in a large class of cases where concern for fairness to the plaintiff would support it and where there may be no necessary unfairness to the defendant.

Once we see the relation between jurisdiction and enforcement as merely aspects of the same problem; as in the American approach,⁸¹ many if not all of these mistakes can be avoided. The arguments in favour of the restrictive common law rules regarding the enforcement of foreign judgments are convincingly refuted if those judgments that come for enforcement have only been given after the rendering court has taken jurisdiction when, to put it broadly, the defendant cannot claim to be unfairly surprised by the assertion of jurisdiction against it.

The same concern has been expressed in the area of products liability in a judgment of the Supreme Court of Canada that has the potential to re-cast the whole law of judicial jurisdiction in this country in the American constitutional form. In *Moran v. Pyle National (Canada) Ltd.*⁸² the plaintiff brought, in Saskatchewan, an action for the wrongful death of her husband. The defendant was an Ontario corporation and the claim was for negligence in the manufacture of a light bulb. The plaintiff sought leave to serve the writ out of Saskatchewan, as was then required by Saskatchewan rules.⁸³ The "pigeon-hole" which the plaintiff relied on was that the tort had been committed in Saskatchewan. The Saskatchewan courts had refused leave, holding that no tort (the tort consisting in the alleged negligent manufacture in Ontario) had been committed in the province. The Supreme Court, in a judgment by Dickson J., reversed the decision of the Saskatchewan Court of Appeal. The narrow ground for the court's decision was its acceptance of the plaintiff's argument that the tort had been committed in Saskatchewan. Dickson J., however, went further and said:⁸⁴

Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the *Distillers' case* [*Distillers Co. (Bio-Chemicals) Ltd. v. Thompson*, [1971] A.C. 458, [1971] 1 All E.R. 694 (P.C.)] and again in the *Cordova case* [*Cordova Land Co. Ltd. v. Victor Bros. Inc.*, [1966] 1 W.L.R. 793

⁸¹ See, *supra*, footnote 73.

⁸² [1975] 1 S.C.R. 393, (1973), 43 D.L.R. (3d) 239.

⁸³ The Queen's Bench Act, R.S.S. 1965, c.73, s.54.

⁸⁴ *Supra*, footnote 82, at pp. 408-409 (S.C.R.), 250-252 (D.L.R.).

(C.A.)] a real and substantial connection test was hinted at. Cheshire, [Private International Law] 8th ed. (1970), p. 281, has suggested a test very similar to this: the author says that it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless manufacture, the following rules can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a state has in injuries suffered by person within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.

There is a significant shift between the opening sentences of this paragraph and the remainder of it. The shift occurs when the focus moves from the simple factual test referred to as the "real and substantial test" and Cheshire's curiously convoluted interpretation of the phrase "place of the tort", to the focus on what can only be referred to as the "due process" consideration. The parallel between what Dickson J. says in this part of his judgment and what Stone C.J. said in *International Shoe* is both close and obvious. Both judgments focus on the "notions of fair play and substantial justice". It is this dimension that is lacking in (though, of course, it is not necessarily inconsistent with) the English approach. It is this latter part of Dickson J.'s judgment that I want to focus on.

The result of this justification for the assertion of jurisdiction by the Saskatchewan court is to provide a basis for the incorporation into Canada of the *International Shoe* test for "long-arm" jurisdiction. The close parallel between the language of Dickson J. and Stone C.J. has been noted. In *World-Wide Volkswagen v. Woodson*, the plaintiff's claim (brought in Oklahoma) was against the distributor, World-Wide Volkswagen, and dealer, Seaway, of a car sold in New York which had been involved in an accident. The plaintiffs were the purchasers of the car. They had been injured when the gas tank exploded after the car had been in an accident while travelling in Oklahoma. The plaintiffs were on their way from New York to a new home in Arizona. In denying the right of Oklahoma to assert "long-arm" jurisdiction against the defendants, White J., speaking for the majority, said:⁸⁵

⁸⁵ *Supra*, footnote 33, at pp. 295-298 (U.S.), 566-567 (S. Ct.), 500-502 (L.Ed.).

Applying these principles to the case at hand, we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma . . . In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.

It is argued, however, that because an automobile is mobile by its very design and purpose it was "foreseeable" that the Robinsons' Audi would cause injury in Oklahoma. Yet "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause . . .

This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there . . . The Due Process Clause, by ensuring the "orderly administration of the laws," . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v. Denckla*, 357 U.S. at 253, 78 S.Ct. at 1240, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State . . .

But there is no such or similar basis for Oklahoma jurisdiction over World-Wide or Seaway in this case. Seaway's sales are made in Massena, N.Y. World-Wide's market, although substantially larger, is limited to dealers in New York, New Jersey, and Connecticut. There is no evidence of record that any automobiles distributed by World-Wide are sold to retail customers outside this Tristate area. It is foreseeable that the purchasers of automobiles sold by World-Wide and Seaway may take them to Oklahoma. But the mere "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."

It should follow from what Dickson J. said in *Moran v. Pyle National* that, even if we assume that the defendant did not submit after being served *ex juris*, an Ontario court should respect the judgment of the Saskatchewan court if the plaintiff took that judgment to Ontario for enforcement. However, traditional common law rules regarding the enforcement of foreign judgments would support the refusal of the Ontario courts to enforce the Saskatchewan judgment. But now consider what has happened. The Ontario courts are refusing to enforce a judgment rendered after the Supreme Court of Canada has specifically held that the Saskat-

chewan courts would be fully justified in asserting jurisdiction over the defendant; and this even though the decision of the Supreme Court would suggest that the Ontario courts could take jurisdiction in precisely the same situation as the Saskatchewan courts. It is one thing for the Ontario courts to apply the common law rules to deny enforcement of a foreign judgment when there may be a suspicion that the foreign court has behaved unfairly. It is, however, quite another thing for the Ontario court to deny enforcement of a judgment given when the Supreme Court of Canada has not only specifically upheld the jurisdiction of the Saskatchewan court, but has also explicitly addressed the issue of the fairness (from the defendant's point of view) in so doing. In other words, the imposition of a due process standard must inevitably bring in the requirement that full faith and credit⁸⁶ be given to the resulting judgment.

This argument is not one that the basis for the recognition of foreign judgments is "reciprocity"; that is, that a court should recognize a judgment of a foreign court given in circumstances in which it would itself have taken jurisdiction.⁸⁷ This view is supported by an unconsidered comment of Denning L.J.⁸⁸ and by the unjustified assumption that the approach worked out in matrimonial causes to determine what foreign judgments of divorce should be recognized is generally applicable to judgments *in personam*.⁸⁹ Reciprocity is probably preferable to the present common law position, but only in so far as the problems of recognizing a judgment that is obviously unfair to a defendant may force a re-consideration of the enforcing court's own rules of jurisdiction. Reciprocity does not ensure that all defendants are treated fairly. It may be justified on the ground that it provides "honesty, simplicity and flexibility

⁸⁶ Hertz, *loc. cit.*, footnote 24, at pp. 45-50, suggests that *Bank of Montreal v. Metropolitan Investigation & Security (Canada) Ltd.*, [1975] 2 S.C.R. 546, (1974), 50 D.L.R. (3d) 76 is a Canadian example of the concept. The case has not, however, been regarded as changing Canadian law.

⁸⁷ The arguments in favour of reciprocity and some other choices are fully discussed in Sharpe, *op. cit.*, footnote 1, pp. 68-75. Reciprocity is endorsed by J.G. Castel, *Canadian Conflict of Laws*, Vol. 1 (1975), p. 446 (hereafter cited Castel, Vol. 1).

⁸⁸ *In re Dulles' Settlement (No. 2)*, [1951] Ch. 842, at p. 851, [1951] 2 All E.R. 69, at p. 73 (C.A.).

⁸⁹ *Travers v. Holley*, [1953] P. 246, [1953] 2 All E.R. 794 (C.A.); *Robinson & Scott v. Robinson & Scott*, [1958] P. 71, [1957] 3 All E.R. 473 (P.D.A.); *Indyka v. Indyka*, [1969] 1 A.C. 33, [1967] 2 All E.R. 689 (H.L.). The reason that the matrimonial causes cases provide no basis for the enforcement of judgments *in personam* is that the issues and principles are fundamentally different. We have to recognize foreign decrees of divorce in general, if we are not wantonly to deny validity to subsequent remarriages of the parties, and the petitioner in a matrimonial cause can present a claim for relief quite independently of the impact of such a claim on the expectations of the respondent. See, J. Swan, *Annual Survey of Canadian Laws, Conflict of Laws: Part I* (1981), 13 *Ottawa L. Rev.* 123, at pp. 152-163.

ty",⁹⁰ but, as I shall argue, it has no unique claim to meet these goals. What is more important, however, is that, in an important sense, it is unprincipled. It is unprincipled because it does not meet directly the issues of fairness and federalism implicit not only in *International Shoe* and *World-Wide Volkswagen*, but also in *Moran v. Pyle National*. Reciprocal jurisdiction and recognition rules are an inevitable by-product of the acceptance of what I believe *Moran v. Pyle National* stands for (at least in the enforcement of inter-provincial judgments), but the governing principle is one of fairness to the defendant, not one that ignores such a concern.

The full impact of the decision in *Moran v. Pyle National* can now be seen. The Supreme Court's focus on the "due process" aspects of the assertion of jurisdiction by Saskatchewan not only justifies the taking of jurisdiction, but also implicitly sets limits on the assertion of jurisdiction when the due process concerns are not met. If, on the facts of the case, *Pyle National* could not complain if it is being subjected to the jurisdiction of the Saskatchewan courts, it must follow that in different circumstances (when it had not put its goods into inter-provincial trade, or when it had deliberately sought to keep its goods out of Saskatchewan because of the fear of liability there) it would be inappropriate and unfair to subject it to the same risk. Just as the "minimum contacts" and "traditional notions of fair play and substantial justice" justified the state of Washington in taking jurisdiction in *International Shoe*, so the same concerns prevented Oklahoma from taking jurisdiction in *World-Wide Volkswagen v. Woodson*.

The replacement of the traditional common law test for taking jurisdiction—the notion of *forum inconueniens* and the power to prevent an abuse of the court's process—by one explicitly based on notions of due process, simultaneously deals with the problem of the proper criterion for the right to serve *ex juris* and the problem of enforcement. Just as the compliance of a court with the due process concerns of the Fourteenth Amendment provides a basis for the invocation of the Full Faith and Credit requirement of Article IV so too, we can now claim, the same relation should exist in Canada. It is this claim that transforms the issue into one that can be called "constitutional".

The last point to notice is that the decision is a decision of the Supreme Court. As such, it is a decision of a court that has a national perspective as opposed to a provincial one. This perspective may inform its decisions based on the fairness aspect of provincial long-arm jurisdiction, but will provide a unique basis for the explication of the concerns of federalism. The claims that issues of judicial jurisdiction are constitutional and raise issues of federalism sounds odd in Canada; we have no custom of using these words in this context. Yet, as has been shown from

⁹⁰ Sharpe, *op. cit.*, footnote 1, p. 70.

the American experience, issues of judicial jurisdiction do raise issues of federalism and of constitutional law, and there is nothing in the Canadian federation that would make such issues irrelevant or non-existent here.

In order to support the claim for the special role of the Supreme Court, its jurisdiction must be explicitly established. The Supreme Court has two bases upon which it can review the decision of a provincial Court of Appeal in a case like *Moran v. Pyle National*. The first is the power of the Supreme Court to act as a final Court of Appeal for Canada. As such, it can review the power of the Saskatchewan courts to control their own processes. The power is part of the inherent jurisdiction of the common law courts, and may be exercised by the Supreme Court in the same way as it exercises any common law power. There is nothing special about this power in the hands of the Supreme Court, except in so far as the court itself chooses to bring a national perspective to bear on the problem before it. The judgment of the court, as quoted earlier, is certainly consistent with a national perspective, though it could not be claimed that no provincial courts would have taken the same view. For recognition purposes, however, for the aspect of full faith and credit, it is, as I have said, important that the power granted by the decision to the Saskatchewan courts would equally be granted to every other provincial court. That power is arguably based more on the absence of unfairness to the defendant than on the exact wording of the provincial rules of court.⁹¹ One may plausibly argue that the fairness criterion is a Canadian standard.

The second source of the Supreme Court's power would be to base it explicitly on the need to keep the provinces within the powers conferred on them under section 92(14) of the Constitution Act, 1867 to deal with "the Administration of Justice in the Province". The limitation on provincial power arises from the need to give effect to the phrase, "in the Province". The need for a similar limitation on the power of the provinces under section 92(13), "Property and Civil Rights in the Province", is acknowledged, and it too is based on the need to give some meaning to the phrase "in the Province". (This clause will be more fully considered in the next section of the paper). It is possible to maintain that a power to control provincial "long-arm" jurisdiction can be found in section 92(14). The argument could be based on the fact that the power to serve *ex juris* is a statutory power based on the provincial equivalents of the original Common Law Procedure Act and the later Judicature Act.⁹² As such, the power would be supported on the normal grounds for supporting provin-

⁹¹ The last part of the quotation set out at footnote 84, *supra*, does not follow from the first, and I am unable to see any connection between the two parts. I have to take the last part as essentially standing on its own; it has nothing to do with the inquiry into the determination of the place "where the tort was committed".

⁹² This power is now found in the Rules of Court of the several common law provinces and is clearly based on provincial legislative power. There is no common law power to serve *ex juris*. The position of Quebec would presumably be the same.

cial power. As has been observed, section 92(14) contains exactly the same limiting phrase as does section 92(13), and would then be similarly limited.⁹³

There may be a difference between the assertion by the Supreme Court of a power to control provincial jurisdiction on the basis of the court's inherent power and on the basis of section 92(14). This difference may correspond to the issues raised earlier in the discussion of the American position. Dickson J., in referring explicitly to the issue of fairness and by making no reference to section 92(14), may be basing the power to control the taking of jurisdiction (as an implicit consequence of the justification for the assertion of jurisdiction) on the inherent power of the court. This power corresponds to the fairness aspect of *International Shoe*. If the power to control were instead to be based on section 92(14), it would be easily seen as an aspect of federalism in the sense used by Stone C.J. and emphasized by *World-Wide Volkswagen*. This basis for control raises issues of provincial sovereignty.

It may be important to keep these two bases for control separate, since they could reflect different concerns. The scope of provincial power conferred by section 92(14) cannot be unrestricted; there must be some limitation arising from the phrase "in the Province". That limitation may be regarded as setting the maximum scope for provincial power. Within that scope the considerations of fairness operate. This distinction may not be easy to maintain, for, as may now be true in the American context, the scope for provincial or state sovereignty may reflect or be restricted solely by considerations of fairness.⁹⁴ Even so, the distinction may have more validity in Canada, since, unlike the American situation, we do not have an explicit "due process" clause applicable to protect property, and so the section 92(14) basis for control can be more easily regarded as raising solely issues of federalism.

Regardless of the basis for the Supreme Court's power to control the power to serve *ex juris*, the important fact for the constitutional argument is that it is the Supreme Court that is asserting the power. This fact means that the Supreme Court can, when Mrs. Moran brings the Saskatchewan judgment for enforcement to Ontario, force the Ontario courts to respect (or to give full faith and credit) to the Saskatchewan judgment. Any other result would be impossible to defend. It cannot be argued, because Dickson J. has expressly denied it, that the defendant is caught by unfair

⁹³ The limitations on provincial power under s.92(13) will be considered later, see, *infra*, Part II, Choice of Law.

⁹⁴ This position is strengthened by the decision in *CBG*, *supra*, footnote 40. In spite of the language of White J. in that decision, it is, I believe, inevitable that some of the federalism issues will remain separate from the fairness issues. It has been suggested that support for federalism concerns in cases like *World Wide Volkswagen* can be found in the Tenth Amendment rather than the Fourteenth; Kamp, *loc. cit.*, footnote 30, at p. 38.

surprise, or has in any other way been unfairly treated. Arguments that the defendant has been denied any right to a fair hearing, or is being denied any right to natural justice are similarly untenable. It would be hard to maintain in an Ontario court that a Saskatchewan court, a court composed of judges appointed by the same person who appointed the Ontario judges, and which operated an almost identical trial process, behaved unfairly in allowing the plaintiff to obtain judgment by default. It will be similarly hard to argue that in allowing judgment to go by default, the Saskatchewan court applied the wrong criteria. This argument is independent of the claim that Dickson J. is not only maintaining the justification for the assertion of jurisdiction by the Saskatchewan court, but is also expressing the view that the court would be justified in applying Saskatchewan law to determine the issue of liability.⁹⁵ (This last point is important because Saskatchewan now has legislation dealing expressly with the liability of manufacturers of defective products, so that the choice of law issue assumes more importance than it had at the date of *Moran v. Pyle National*).⁹⁶ The transformation worked by the explicit recognition of a due process element in the taking of jurisdiction and the effect of this in enforcement in another province offers a far preferable basis for a discussion of the rules than that offered by the traditional common law justification set out earlier.

The combination of the two bases for the control of provincial long-arm jurisdiction provides both a principled approach to the interrelated problems of judicial jurisdiction and enforcement. These standards, if accepted, will ensure not only fairness to defendants (at no unjustifiable cost to plaintiffs) but also responsible behaviour on the part of each province in the context of the Canadian federation. These tests are honest, simple and flexible.

II. Choice of Law

One way of expressing the argument on the constitutional dimension of jurisdiction, is to say that the courts of all provinces should be compelled to behave responsibly in asserting judicial jurisdiction over a defendant who is outside the boundaries of the province. The same argument can now be made as regards the choice of law issue. This argument makes the claim that there is a constitutional dimension to choice of law, and that the recognition of the limits that must now be set on a province's choice

⁹⁵ See, Laskin C.J.C. in *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477, at p. 501, (1975), 53 D.L.R. (3d) 321, at p. 340. The choice of law issue in torts, is, of course, highly forum-centred. This feature of the choice of law rules has an indirect impact on some of the recognition problems. See, *infra*, at footnote 149.

⁹⁶ The Consumer Products Warranties Act, R.S.S. 1978, c.C-30. (First enacted, S.S. 1976-77, c.15).

of law can, once again, be seen as requiring the courts of each province to behave responsibly. There are large problems in determining what is responsible behaviour in choice of law; and only a very brief outline of what criteria might be applicable will be given here.

It will be easiest to confine our examination of the problem to a particular case, and to develop for the facts of that case an analysis of what responsible behaviour might look like. The case is the decision of Henry J. in the Ontario High Court, *Going v. Reid Brothers Motor Sales Ltd.*⁹⁷ The facts were that the corporate defendant, Reid Brothers, resident and carrying on business in Ontario, had lent a car to Fraser while the latter's car was being repaired. Fraser lived in Quebec. While Fraser was driving in Quebec, he hit the plaintiff's car head-on. The plaintiff lived in Ontario and was making a visit to Quebec when the accident happened. The action arose out of this accident and was brought in Ontario against both Reid Brothers and Fraser. The courts held both defendants liable. I want to ignore the position of the corporate defendant and to concentrate solely on the question of the liability of Fraser.

The defence raised was that in Quebec, under the Quebec Automobile Insurance Act,⁹⁸ there was in force a "no fault" system of tort liability under which people injured in traffic accidents could claim against the Régie de l'assurance automobile du Québec. This defence was disposed of by the application of traditional choice of law rules. These rules are contained in the famous statement of Willes J. in *Phillips v. Eyre*,⁹⁹ where he said:

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

As to the first rule, the wrong was clearly actionable in Ontario; automobile negligence is a tort in Ontario. The second rule caused more problems. It can fairly easily be shown that, while the words used by Willes J. and particularly the word "justifiable", were at least understandable and probably appropriate on the particular facts of that case, they have caused serious problems in other cases.¹⁰⁰ This is not the place

⁹⁷ (1982), 136 D.L.R. (3d) 254, 35 O.R. (2d) 201 (Ont.H.C.).

⁹⁸ R.S.Q. 1977, c.A-25.

⁹⁹ *Supra*, footnote 69, at pp. 28-29.

¹⁰⁰ The literature is vast. The exegesis of one paragraph—and that not even the ratio of the case—is worthy of a more important subject, something like s.7 of the Charter of Rights and Freedoms. A partial listing of the relevant material is far beyond the scope of this paper. See, for a fairly comprehensive list, Sharpe, *op. cit.*, footnote 1, pp. 80 *et seq.*, and McLeod, *op. cit.*, footnote 1, pp. 528 *et seq.*

to pursue this argument. It is sufficient to note that Henry J. was able to conclude that Fraser's acts in driving in Quebec were not "justifiable" under the second rule. This conclusion was reached even though in Quebec Fraser would not be exposed to civil liability of any kind for the physical injuries caused by his negligence. Sections 3 and 4 of the Quebec legislation were quoted by Henry J.:¹⁰¹

3. The victim of bodily injury caused by an automobile shall be compensated by the Régie in accordance with this title, regardless of who is at fault.

4. The indemnities provided for in this title are in the place and stead of all rights, recourses and rights of action of any one by reason of bodily injury caused by an automobile and no action in that respect shall be admitted before any court of justice.

Henry J. continued:¹⁰²

"Victim" in this context is defined by s.1(28)(a) as: (a). . . every person sustaining bodily injury in an accident, including the owner or driver of and every passenger in each automobile involved in the accident.

The effect of the Quebec law was summarized:¹⁰³

The Act thus extinguishes the victim's previously existing cause of action against the person responsible for the accident, and replaces it by a right to claim compensation from the Régie. The plaintiffs before me would therefore be barred from bringing an action in Quebec against the defendant and would be left to assert a claim against the Régie for compensation.

Since, however, Fraser had been found to have been driving on the wrong side of the road at the time of the accident, and since there was liability in Quebec for property damage (as opposed to physical injuries) Henry J. was able to hold that Fraser's act was not "justifiable".

The result of this conclusion was that Fraser was held liable to the plaintiff for her injuries in accordance with Ontario law. It was conceded by the court that the amount of compensation that the plaintiff could have received from the Régie would have been less than that awarded under the common law principles applicable in Ontario.¹⁰⁴ It is also important to note that, while on the facts of the case, Fraser probably had access to the corporate defendant's insurance,¹⁰⁵ the result would have been the same had Fraser had no access to insurance other than through the Régie. What is even more startling is that the result would have been the same even if Fraser had lived all his life in Quebec and had never left it, and had no contact with Ontario other than one rather violent encounter with an Ontario resident who happened to be in Quebec.

¹⁰¹ *Supra*, footnote 97, at pp. 266 (D.L.R.), 209 (O.R.).

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, at pp. 270 (D.L.R.), 213 (O.R.).

¹⁰⁵ Fraser would have come within the definition of "insured" under s.209 of the Insurance Act, R.S.O. 1980, c.218.

It is possible to criticize the result by applying different choice rules than the rule derived from *Phillips v. Eyre*.¹⁰⁶ This is to me rather like shooting fish in a barrel; the traditional rule is so absurd and so capable of producing such unjust results as to have no possible claim to continued acceptance. The argument that I want to make is more fundamental; it is my claim that the application of Ontario law on the facts of *Going* is a violation of the constitutional limits set upon the application of provincial law.

The claim is based simply on the scope of provincial law permitted by the constitution. The issue raised is the issue of provincial extra-territoriality. The issue of provincial extra-territoriality as applied to provincial legislative measures is, of course, based on section 92(13) of the Constitution Act, 1867, and in many cases can be found to support an argument that the territorial scope of provincial legislation is limited by the Constitution. I argue that provincial common law rules raise similar issues of extra-territoriality. It is true that the opening words of section 92, "[i]n each Province the Legislature may exclusively make laws . . .", suggest that the specific heads of section 92 refer only to provincial legislation. On principle, however, it is hard to see how the issues raised by *Going* over the extra-territorial scope of provincial law depend in any way on whether the Ontario rules are based on statute, the common law or Civil Code. In other words, and in spite of the opening words of section 92, the limitation imposed on provincial power by the phrase "in the province" applies equally to any Ontario rules, whatever their source.¹⁰⁷

It is, of course, convenient for my purposes that, since the facts of *Going* straddle the Quebec/Ontario border, no argument can be made that the common law rules are uniform. This assumption of uniform common law rules has conveniently and usually masked the issues of the extra-territorial application of the common law rules. I am, however, prepared to argue that nothing in the end turns on whether the case concerns Quebec and Ontario, Ontario and Manitoba or British Columbia and Alberta.¹⁰⁸

¹⁰⁶ See, e.g., N. Rafferty, Case Comment: *Going v. Reid Bros. Motor Sales Ltd.* (1982), 19 C.C.L.T. 247; B. Schwartz, Choice of Law in Torts: One More for the Road (1983), 12 Man. L. Rev. 175.

¹⁰⁷ The implicit consequence that this argument recognizes the fact (or even *desideratum*) of provincial common law diversity will be dealt with later. For the moment, the assumption of either the fact of uniformity and, *a fortiori*, the desirability of uniformity will not be made.

¹⁰⁸ An argument can be made that by the combined effect of the Constitutional Act 1791, 31 Geo. III, c.31, R.S.C. 1970 Appendix II, No. 3, and the Stats. Upper Canada 1792, 32 Geo. III, c.1, s.1, the common law of Upper Canada is based on a statute with an implicit territorial limitation (the common law only applied "in" Upper Canada, the civil law (by virtue of the Quebec Act 1774, 14 Geo. III, c.83, R.S.C. 1970 Appendix II, No. 2) applied only "in" Lower Canada). This basis for the common law in Upper

The principal problem to overcome in the development of the idea of provincial extra-territoriality is the simple fact that in Canada, apart from those cases expressly raising the scope of section 92(13), we have chosen to ignore the issue. In large part this result has been due to the general acceptance of the choice of law rules applied in so classical a way by Henry J. in *Going*. These rules completely obscure the constitutional issue I want to raise, and I shall later argue that, and not only for this reason, these rules are completely and fundamentally inappropriate to resolve any kind of legal issue. For the moment, I want only to claim that there is a plausible basis for arguing that the tests usually applied to determine the scope of provincial power under section 92(13) are applicable in *Going*.

To outline the principal arguments it is sufficient for my purposes to accept as setting out the general nature of the problem the analysis of Elizabeth Edinger in a recent article.¹⁰⁹ She concentrates on the problem of the extra-territorial application of provincial legislation. Edinger suggests that there are three possible approaches to the problem of the extra-territorial application of provincial law. First, traditional common law conflicts rules may be utilized in any given case to determine which province might be uniquely entitled to legislate with regard to the issues.¹¹⁰ Second, the phrase "within the province" refers to those things that are physically located in the province and such things as contract or tort rights would have to be assigned a *situs* in the province. As regards those things that are "in the province", a province may have legislative power.¹¹¹ Third, a "province may legislate without infringing the territorial limitation provided only two conditions are met: first, 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".¹¹²

Before we consider the first of the tests referred to by Edinger we have to explore briefly what a choice of law rule is. Traditional conflicts

Canada survived the Union Act, 1840, 3&4 Vict. c.35, R.S.C. 1970 Appendix II, no. 4, and the Constitution Act, 1867 by virtue of s. 129. This argument is too technical for my purposes and I would prefer to make the general claim that I have made. This argument also only applies to Ontario.

¹⁰⁹ E. Edinger, *Territorial Limitations on Provincial Powers* (1982), 14 *Ottawa L. Rev.* 57. Edinger's analysis is preferable to that of Hertz, *loc. cit.*, footnote 24, who does not separate issues of extraterritoriality from judicial jurisdiction as rigorously as the common law (English) tradition does.

¹¹⁰ Edinger, *ibid.*, at pp. 67-81, referring to *Interprovincial Co-operatives Ltd. v. The Queen*, *supra*, footnote 95.

¹¹¹ *Ibid.*, at pp. 72-75, referring to *R. v. Thomas Equipment Ltd.*, [1979] 2 S.C.R. 529, (1979), 96 D.L.R. (3d) 1.

¹¹² *Ibid.*, at p. 94, referring to *Ladore v. Bennett*, [1939] A.C. 468, [1939] 2 W.W.R. 566 (P.C.).

theory assumes that the function of such rules is to identify that jurisdiction, the law of which will be applicable to govern the dispute. Thus, we speak of the "proper law of a contract" and identify the governing jurisdiction by deciding the jurisdiction "with which the contract has its closest and most real connection". Similarly, we have the rule that succession to the movable property of an intestate is governed by the law of the deceased's domicile at death. Both of these rules purport to identify a single governing jurisdiction, and, under the first of Edinger's propositions, would provide a justification for the extra-territorial application of provincial law, so that, for example, if we conclude that Alberta is the proper law of the contract, Alberta legislation could constitutionally be applied extra-territorially. As a test for constitutional limits on provincial law, such a test is plainly inadequate for it simply states that any extra-territorial application is justified more-or-less because it is justified.

The inadequacy of the test becomes obvious when applied to torts. The choice of law rule in torts, as found in *Phillips v. Eyre*, unlike the rules in contracts or succession, does not purport to identify a single governing law. It is admitted that it justifies the application of forum law in almost every case where it is applied. The feature of *Phillips v. Eyre* that makes the rule so forum-centred is the requirement of the first rule that the tort be "actionable" in the forum.¹¹³ It has been held that this is a necessary condition, thereby justifying the dismissal of any action not maintainable strictly in accordance with forum law,¹¹⁴ and even a sufficient condition, thereby justifying the maintenance of an action not maintainable in another (or any other) jurisdiction.¹¹⁵ As a test for the constitutionality of provincial law it is unworkable for it would justify in almost all cases the extra-territorial application of forum law, just because it is forum law. It is this feature of the rule which justifies the result in *Going* and thereby creates the problems we have to resolve.

The issue of the extra-territorial effect of provincial law in a tort situation was raised in *Inter-Provincial Co-operatives v. The Queen (IpcO)*.¹¹⁶ The issue there was the constitutionality of Manitoba legislation which gave the government the right to sue for damages for pollution of rivers flowing through Manitoba and which removed any defences based on the laws of other provinces. The Act was challenged by two defendants. Both defendants had been authorized to pollute in Saskatchewan

¹¹³ See, *supra*, footnote 99.

¹¹⁴ *Anderson v. Eric Anderson (Radio and T.V.) Pty. Ltd.* (1965), 114 C.L.R. 20 (H.C.Aust.).

¹¹⁵ *Chaplin v. Boys*, [1971] A.C. 356, [1969] 2 All E.R. 1085 (H.L.). There are however a number of cases where the courts did not accept the "logic" of *Phillips v. Eyre* and reached results inconsistent with decisions like *Chaplin v. Boys*; see, *Walpole v. Canadian Northern Railway*, [1923] A.C. 113 (P.C.); *McMillan v. Canadian Northern Railway*, [1923] A.C. 120 (P.C.).

¹¹⁶ *Supra*, footnote 95.

and Ontario respectively, the provinces where they did so. The question before the court was whether these authorizations could, in effect, be nullified by Manitoba. Any pollution occurring outside Manitoba would inevitably be carried by the rivers into Manitoba. The court held the Act to be beyond the powers of a province under section 92. There was no majority judgment and the court does not address the specific problem which we are examining and which in fact was raised by the case. There is a suggestion in the judgment of Pigeon J. that it might be constitutionally proper for Manitoba to apply its common law tort rules (as opposed to the statutory claim advanced by Manitoba) extra-territorially.¹¹⁷ It must be admitted, however, that the judgment is not clear on this issue. Ritchie J., who supplied the majority by agreeing with the result reached by (though not with the reasoning of) Pigeon J., suggests that *Phillips v. Eyre* is part of our constitution.¹¹⁸ This conclusion is hard to understand, given that he suggests that the immunity conferred by Saskatchewan and Ontario must be respected by Manitoba, i.e., given extra-territorial effect, while the Manitoba effort to defeat the immunity cannot be given the same effect.¹¹⁹

IpcO does not, therefore, provide a basis for maintaining that Ontario is constitutionally justified in applying its own law on the facts of *Going*. If Manitoba is constitutionally incapable of legislating on the facts of *IpcO* when the damage to Manitoba is not only foreseeable but certain (water usually flows downhill) to follow from the acts of the defendants in neighbouring provinces, there seems an even stronger case to deny Ontario legislative competence to make Fraser liable for what he did in Quebec. The judgment of Laskin C.J.C. in dissent in *IpcO* is of more relevance for my analysis. By addressing more explicitly the issues I want to raise, it does not weaken but strengthens the argument that has just been made on the constitutional limits of provincial law. Laskin C.J.C. justified the right of Manitoba to apply its law to govern the liability of the defendant. He said:¹²⁰

Manitoba's predominant interest in applying its own law, being the law of the forum in this case, to the question of liability for injury in Manitoba to property interests therein is undeniable. Neither Saskatchewan nor Ontario can put forward as strong a claim to have their provincial law apply in the Manitoba action; in other words, the wrong in this case was committed, or the cause of action arose in Manitoba and not in

¹¹⁷ *Ibid.*, at pp. 511 (S.C.R.), 356 (D.L.R.).

¹¹⁸ *Ibid.*, at pp. 521-522 (S.C.R.), 347 (D.L.R.).

¹¹⁹ Ritchie J. in effect regards the issue solely from the view of the provinces where the polluters acted and would therefore have applied the first rule of *Phillips v. Eyre* in any action brought there. He refuses to change his reference point (as the first rule would require) when the action is brought in Manitoba. This treatment of *Phillips v. Eyre* (providing for the choice of one governing law, in effect) is highly idiosyncratic. It is, of course, completely unprincipled and unpredictable.

¹²⁰ *IpcO*, *supra*, footnote 95, at pp. 500-501 (S.C.R.), 339-340 (D.L.R.).

Saskatchewan or in Ontario. There is hence no need to consider either *Phillips v. Eyre*, or other cases in which it has been considered or reconsidered such as *Chaplin v. Boys*, since these cases involve the situation where the tort or wrong or the cause of action had arisen outside the forum or the jurisdiction in which suit was brought. The question whether the rules in *Phillips v. Eyre* are jurisdictional (and this is unlikely), or are indeed choice of law rules, does not arise in the present case upon the conclusion being reached that there is here no tort that has arisen outside of Manitoba and is being sued upon in Manitoba. To the extent that the recent judgment of this Court in *Moran v. Pyle National (Canada) Ltd.*, . . . may be said to relate to choice of law principles as well as to jurisdiction, it supports the view I take here as to the place where the cause of action arose.

If, as I would hold, Manitoba law is applicable to redress the injury suffered in that province, how can there be constitutional infirmity in its imposition of liability merely because the cause of the damage arose outside Manitoba, or because as a result of the damage fishing in Manitoba has been halted by the governing regulatory authority or because Manitoba refuses to recognize within Manitoba the lawfulness of the discharge of the pollutant outside Manitoba? I do not regard any of these circumstances . . . as involving legislation in relation to any civil rights or interests of the appellant outside Manitoba. Of course, the Manitoba Act has an effect upon them, but its purpose is to strike at the damage and loss produced in Manitoba to Manitoba property.

Just as the justification for the assertion of jurisdiction by Saskatchewan in *Moran v. Pyle National* implicitly sets limits to the jurisdiction of provincial courts in cases that do not present the same facts, so too what Laskin C.J.C. is saying in *IpcO* can be taken to set implicit limits on provincial power. The difference between *Going* and *IpcO* centres on the strength of the relative claims of Manitoba in *IpcO* and Ontario in *Going* to the application of their own law. As I have argued, I cannot see that anything turns on the fact that one rule is statutory while the other is a common law rule. It may be that in *Going*, the Ontario "interest", to use Laskin C.J.C.'s word, is not entirely absent—the plaintiff was an Ontario resident—but it is clearly not so strong as to justify the complete displacement of the Quebec interest in the integrity of its scheme for motor vehicle accident compensation. As Laskin C.J.C. explicitly states, *Phillips v. Eyre* has nothing to do with the issue raised by *IpcO*. In other words, the scope of Manitoba legislative power under section 92(13) is not to be determined by the application of a test based on common law conflicts rules, at least when the conflicts rule is that of *Phillips v. Eyre*.

The second of the tests suggested by Edinger is again largely unhelpful. The phrase "within the Province" when applied to physical objects and to justify extra-territorial legislation regarding such objects may make some sense. Thus one might justify the provisions of an act like the Personal Property Security Act,¹²¹ which cuts out the rights of an inter-provincial creditor who, having a security interest in goods that have come into the province from another jurisdiction, fails to comply with the registration provisions of the Act. This result, however, only occurs after

¹²¹ See, e.g., R.S.O. 1980, c.375, ss.5-8.

the goods have come into the province, so that when the foreign creditor loses its rights the goods are physically subject to the jurisdiction of the province.

When the claim is not made in respect of a physical thing, but upon a debt, or upon a contract or tort cause of action, the problems of attaching a physical location to the thing, the choses in action, are considerable.¹²² This basis for determining the constitutionality of legislation is, therefore, unsatisfactory. It does not support, and may even deny constitutional validity to an assertion of legislative competence on the facts of *Going*. The debt created by that judgment (or, for purposes of testing the constitutionality of the application of Ontario law, by the mere assertion of the plaintiff's claim) is located, if anywhere, where the debtor is, and that place is Quebec.

Edinger's third test states that a "province may legislate . . . provided only two conditions are met, first, 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".¹²³ This suggests more fruitful inquiries, but still needs to be more fully developed. The issue raised by the claim that a province may legislate extra-territorially is not one that can be looked at solely from the point of view of the province making the claim. The issue is one of federalism, of the limits on provincial sovereignty that must be imposed on each for the good of all. The issue is, therefore, the need to balance the claim of one province to legislate extra-territorially against a claim of another (or others) that its (or their) sovereignty is being infringed. What we need to examine is how this balancing should be done. Considerable help in understanding the issue is, once again, provided by examination of the American handling of the same problem.

The American criteria for dealing with the problem of extra-territoriality are based on the "due process" clause of the Fourteenth Amendment and the "Full Faith and Credit" requirement of Article IV. The issues raised by choice of law are very much the same as those raised by jurisdiction. The same issues of fairness and federalism arise. Thus the Fourteenth Amendment may be regarded as addressing the issue of extra-territorial reach of state law by focussing on the issue of fairness to the parties, while "Full Faith and Credit" reflects the issue of sovereignty and federalism.¹²⁴

¹²² A.V. Dicey, J.H.C. Morris, *The Conflict of Laws* (10th ed., 1980) state in Rule 78(1), "choses in action generally are situate in the country where they are properly recoverable or can be enforced". McLeod, *op. cit.*, footnote 1, p. 193, states that a "right of action in tort is situated in the country where the action may be brought". As tests for the constitutionality of anything, these provisions are useless: they are mere tautologies.

¹²³ See, *supra*, footnote 112.

¹²⁴ E.R. Scoles, P. Hay, *Conflict of Laws* (1982), p. 80.

It has been suggested that the latter criterion was used by the Supreme Court to impose on the states an affirmative duty to apply the law of another state.¹²⁵ This approach would then introduce into the choice of law process, as a constitutional requirement, the duty of courts to balance the claims of competing state laws to application and to make the choice of the applicable law in accordance with constitutional standards. Thus the court would have to decide which state had the greater interest in the application of its law. By asserting that this decision was constitutionally required, the Supreme Court would have the power to review the substantive results of the state's choice of law rule. This approach has been abandoned in more recent cases and the "Full Faith and Credit" clause is equated with the limitations of due process.¹²⁶ Thus the issue has become less an issue of federalism and state sovereignty and more an issue of fairness. "Full Faith and Credit" remains relevant in some circumstances that bear directly on some of the issues raised by *Going* and which will be briefly discussed later.

The basis for the American control of extra-territoriality is the case of *Home Insurance Co. v. Dick*.¹²⁷ The case involved an action on insurance contracts. The plaintiff, while resident in Mexico, had taken out an insurance policy with a Mexican insurer. The risk had been reinsured by two New York insurers. A loss occurred. The policy required that any action on the policy be brought within one year of the loss. This provision was valid in Mexico, but invalid in Texas where the plaintiff sued. A Texas court's rejection of the defence based on the one-year limitation was held by the Supreme Court to be a denial of due process. The court held that Texas was without power to affect "the rights of parties beyond its border having no relation to anything done or to be done within them".¹²⁸ The effect of *Home Insurance v. Dick* is that "the constitution commands that when a state has no significant contact with parties or the occurrence it *may not* apply its law to alter the rights or duties of the parties".¹²⁹

The most recent decision on the due process limitations on choice of law is the case of *Allstate Insurance Co. v. Hague*.¹³⁰ The case arose out of a fatal traffic accident. The plaintiff was the widow of a man who had been killed in an accident that had occurred in Wisconsin. The deceased was a resident of Wisconsin, but was employed in Minnesota. The de-

¹²⁵ *Ibid.*, p. 81.

¹²⁶ *Ibid.*, pp. 81, 89.

¹²⁷ 281 U.S. 397, 50 S. Ct. 338, 74 L. Ed. 926 (1930).

¹²⁸ *Ibid.*, at pp. 408 (U.S.), 341 (S. Ct.); and see Scoles, Hay, *op. cit.*, footnote 124, p. 82.

¹²⁹ Scoles, Hay, *ibid.*, p. 82.

¹³⁰ 449 U.S. 302, 101 S. Ct. 633 (1981).

ceased was killed by an uninsured motorist. The deceased had three automobile insurance policies with the defendant insurer. Each provided for \$15,000 death benefits in the event that death was caused by an uninsured motorist. Wisconsin law provided that in such circumstances the claim would be limited to one for \$15,000. Minnesota law provided that the claims could be "stacked", so that under Minnesota law the plaintiff could claim \$45,000 (\$15,000 on each policy). After her husband's death, but before beginning the action, the plaintiff moved to Minnesota (where she remarried). The Minnesota courts had applied Minnesota law to permit the plaintiff to stack her claims. This choice of law decision was challenged by the defendant as unconstitutional: a denial of due process.

The Supreme Court dismissed the appeal. Four members of the court, speaking through Brennan J., held that Minnesota had sufficient contacts with the case to support the constitutionality of its choice of law rule, its decision to apply its own law. The contacts identified were, (1) the deceased had been employed in Minnesota, (2) the defendant did business in Minnesota, and (3) the plaintiff moved to Minnesota after the accident and had there been appointed personal representative of her husband's estate. A fifth member of the court, Stevens J., upheld the Minnesota decision on the grounds that the defendant could not complain of unfair treatment because the deceased had paid three premiums and that stacking rules were more common than anti-stacking rules.¹³¹ The dissent denied the adequacy of the contacts relied on by the plurality.¹³²

The decision has been severely criticized,¹³³ and, indeed, appears hard to defend, for the contacts relied on are irrelevant to the issue raised (i.e., whether the stacking or anti-stacking rules could be applied). The second and third contacts are, in addition, contrived or artificial. But even if the application of the due process test in *Hague* is unsatisfactory, the general nature of the test is clear. The focus is on "contacts" and in this sense the test applied in *Hague* has a close parallel with the *International Shoe* test applied to determine the constitutionality of a taking of jurisdiction. Behind the notion of "contacts" is the notion of fairness. The basis for decisions like *International Shoe* and *World-Wide Volkswagen* is the consideration of the fairness of subjecting a particular defendant to the jurisdiction of a particular court. The same concern must underlie the choice of law problem, but the test need not be the same. Thus, a defendant may be liable to be sued in a particular state, but be protected from the application of forum law when that application would be unfair to it.

¹³¹ *Ibid.*, at pp. 330 (U.S.), 649 (S. Ct.).

¹³² *Ibid.*, at pp. 337 (U.S.), 633 (S. Ct.) per Powell J., with whom Berger C.J. and Rehnquist J. agreed.

¹³³ See, e.g., Scoles, Hay, *op. cit.*, footnote 124, p. 95; G.R. Shreve, In Search of a Choice-of-Law Reviewing Standard—Reflections on *Allstate Insurance Co. v. Hague*

The Australian position is, once again, curiously undeveloped. The leading cases are often referred to for their support for traditional conflicts rules.¹³⁴ It has, for example, been said that, "[j]udicial opinion, so far, has steadfastly denied the existence of intra-Australian conflicts".¹³⁵ The provisions of the Australian Constitution clearly raise the possibility, dealt with by the American courts as I have outlined, that there are constitutional requirements of choice of law.¹³⁶ But not only has there been no development of mandatory choice of law rules, there has been no development of a "due process" limitation on the power of a court to apply its own state law.¹³⁷ The Australian position is, therefore, much like the Canadian in that no (or very little) special account has been taken of the existence of inter-state conflicts. As a source of ideas to resolve the problems that this article addresses the Australian law is nearly barren.

The American cases are not very clear or very satisfactory on the issue of the test to determine the constitutionality of a choice of law rule. The criteria suggested by commentators are more satisfactory and offer a basis for dealing with the problem of *Going*.¹³⁸ We have assumed that the defendant Fraser, as a resident of Quebec, had been made liable to an Ontario plaintiff when, on the facts of the case, the only contact with Ontario is the plaintiff's residence there. Leaving aside the issue of any insurance and, in particular, the provisions of the Ontario Insurance Act, it is, I think, reasonable to assume that, under the *International Shoe* test or under the test in *Moran v. Pyle National*, Ontario could not constitutionally assert jurisdiction over the defendant; there would be insufficient contacts to support Ontario's long-arm jurisdiction.¹³⁹ By driving in Quebec, even near the Ontario border, one does not thereby accept the risk of

(1982), 66 Minnesota L. Rev. 327. The decision is defended by A.F. Lowenfeld (who was counsel for Mrs. Hague in the Supreme Court), *Renvoi Among the Law Professors: An American's View of the European View of American Conflict of Laws* (1982), 30 Am. J. of Comp. Law 99.

¹³⁴ E.g., *Anderson v. Eric Anderson (Radio and T.V.) Pty. Ltd.*, *supra*, footnote 114.

¹³⁵ Nygh, *op. cit.*, footnote 48, p. 6. Nygh refers to Windeyer J. who in *Pedersen v. Young* (1964), 110 C.L.R. 162, at p. 170 (H.C. Aust.) said:

The States are separate countries in private international law, and are to be so regarded in relation to one another.

¹³⁶ See the provisions set out, *supra*, footnotes 76, 77.

¹³⁷ A good example of this is *Anderson v. Eric Anderson (Radio and T.V.) Pty. Ltd.*, *supra*, footnote 114, where the High Court applied the first rule of *Phillips v. Eyre* to deny the plaintiff a cause of action in New South Wales where contributory negligence was a complete defence to an action in tort. The accident had occurred in the Capital Territory where there was apportionment legislation. The jury, instructed to apportion the fault, had found the plaintiff 10% to blame. The case demands the same kind of criticism I am directing at the equally forum-centred application of Ontario law in *Going*.

¹³⁸ See Scoles, Hay, *op. cit.*, footnote 124, pp. 79-104.

¹³⁹ The most recent statements of the United States Supreme Court, *Keeton v. Hus-*

being haled before an Ontario court. If this argument is accepted, then the argument against the constitutionality of Ontario law is even stronger. It is true that the plaintiff resided in Ontario, but in a balancing of the fairness of the application of Ontario law to both parties, it should be remembered that the plaintiff was the one who left her home to go to Quebec. On fairness or due process grounds, the argument is strong that not only is Ontario unable to assert judicial jurisdiction over the defendant, it is similarly unable to apply its own law.¹⁴⁰

It may be objected that a focus on fairness and due process is irrelevant under the usual tests applied under section 92(13). This proposition may be generally accepted now, but the arguments that are being made here have not often been made before in Canada.¹⁴¹ When they are, it may

iler Magazine, *supra*, footnote 44, and *Calder v. Jones*, *ibid.*, suggest that even after *CBG*, *supra*, footnote 40, there is a requirement that there be "minimum contacts" with the forum. The judgment in *World-Wide Volkswagen*, *supra*, footnote 33, is, I believe, clear that there would be insufficient contacts; see particularly, the quotation of White J., *supra*, footnote 96. See also Scoles, Hay, *op. cit.*, footnote 124, p. 94 (written after *World-Wide Volkswagen*, but before *CBG*).

¹⁴⁰ Again, without getting deeply involved in the American law, support for this argument is supplied by *Hague*, *supra*, footnote 130, and the general acceptance of the view that the Supreme Court went about as far as it is likely to go. The language of Powell J., dissenting in *Hague*, is probably an accurate reflection of American law (pp. 333 (U.S.), 650-651 (S. Ct.)):

[T]he contacts between the forum states at the litigation should not be so 'slight and casual' that it would be fundamentally unfair to a litigant for the forum to apply its own State's law.

¹⁴¹ P. Hogg, *Constitutional Law of Canada* (1977), does not mention this aspect of the issue of extraterritoriality. He accepts the *Ladore v. Bennett*, *supra*, footnote 112, approach endorsed by Edinger, *loc. cit.*, footnote 109. Hertz, *loc. cit.*, footnote 24, discusses the issue of provincial extraterritoriality both from the point of jurisdiction and choice of law. While he makes extensive comparisons between the American and Canadian positions, he accepts the Canadian cases like *Ipcó*, *supra*, footnote 95, and *Royal Bank of Canada v. King*, [1913] A.C. 283 (1913), 9 D.L.R. 337 (P.C.) as setting out the Canadian law. I would prefer to begin my analysis on a *tabula rasa* and to develop a principled (and plausible) approach, in the context of which the earlier cases can be reconsidered. Hertz, *loc. cit.*, footnote 24, at p. 67, quotes Castel, Vol. 1, *op. cit.*, footnote 98, at p. 200, who says:

In a federal state competing provincial interests in conflict of laws cases must be evaluated in the light of the national objective of interprovincial harmony.

I agree, of course, with this statement. I differ from Professor Castel on the ground that it is only by abandoning completely the traditional choice of law rules and developing alternative criteria explicitly based on fairness and federalism concerns that the goal will be achieved. See also J.G. Castel, *Conflict of Laws. Cases, Notes and Materials* (5th ed., 1984), (hereafter cited Castel, *Cases, Notes and Materials*) pp. 1-16-1-17, where he says:

Since Canadian provinces lack power to legislate extraterritorially, territoriality can be used as an instrument of constitutional control over provincial conflict of law rules.

This point of view is not pursued into the analysis of the substantive rules.

be that the explicit fairness argument in *Moran v. Pyle National* as applied to jurisdiction would seem to be equally applicable to choice of law. This statement does not require that what Dickson J. said in *Moran* be regarded as having an explicit choice of law component. In so far as that claim can be made however, it offers support for the argument that there is such a component to the choice of law process.¹⁴²

The other component that is present in the American cases is the federalism or sovereignty issue tied to the "Full Faith and Credit" clause. Stevens J. in the Supreme Court in *Hague* explicitly deplores the decision of the Minnesota court to apply its own law even as he upholds the constitutionality of that decision.¹⁴³ This is consistent with the "hands off" position taken by the Supreme Court regarding the substance for choice of law rules, following the equation of the "Full Faith and Credit" clause with the due process requirement.¹⁴⁴ In Canada, the use of section 92(13) may permit (if it does not require) that the federalism issues be expressly addressed. We could then consider the constitutionality of the decision of a provincial court to apply its own law by asking if doing so "would impair a predominant interest of a sister [province] or violate a national interest"?¹⁴⁵ This test may not be implicit in the third test suggested by Edinger, but it is implicit in the cases that have wrestled with the problem of extra-territoriality in the context of section 92(13).¹⁴⁶

This test would also suggest that the application of Ontario law in *Going* is unconstitutional. It may be true that Ontario is concerned that its residents receive adequate compensation for injuries caused by another's negligence. But this value can only be achieved at the expense of the integrity of the Quebec scheme of motor vehicle accident compensation.¹⁴⁷ The decision in *Going* threatens every Quebec resident by making him or her subject to Ontario law if they are so unlucky as to hit an Ontario

¹⁴² The similarity in terms of the jurisdictional test of *International Shoe*, *supra*, footnote 24, and *Home Insurance v. Dick*, *supra*, footnote 127, or *Allstate v. Hague*, *supra*, footnote 130 is obvious. The "contacts" need not, however be evaluated in the same way, but what Dickson J. says about the justification for the jurisdiction of the Saskatchewan court could be said about the justification for the application of Saskatchewan law (by any court before which the action is brought).

¹⁴³ *Supra*, footnote 130, at pp. 332 (U.S.), 650 (S.Ct.).

¹⁴⁴ Scoles, Hays, *op. cit.*, footnote 124, pp. 92-93.

¹⁴⁵ *Ibid.*, p. 103.

¹⁴⁶ See, *e.g.*, the cases discussed by Hogg, *op. cit.*, footnote 141, and the quotations from Castel, *ibid.*

¹⁴⁷ Fraser, the defendant we are particularly interested in, was a Quebec resident. One of the purposes of any scheme of motor vehicle accident insurance of any kind is the protection of careless drivers from the risk of surprise. The ability of the Quebec scheme to provide such protection is threatened by a case like *Going*. It is in this sense that the integrity of the Quebec scheme is violated by the decision.

resident.¹⁴⁸ (It is worth noting that the rule of *Phillips v. Eyre* as applied in *Going* is so forum-centred that the rule would not differentiate between a claim made by an Ontario resident and one made by a Quebec (or for that matter a New York) resident. Any plaintiff could recover full common law damages in Ontario. It is a poor excuse for these results to say that in many cases the Ontario judgment would not be enforceable outside Ontario; the clear potential for unfair and unjustified treatment of Quebec residents exists.

There is another aspect to the federalism or sovereignty issue. Foreign judgments in Quebec are not conclusive on the merits of the dispute even if the defendant has been personally served or submitted.¹⁴⁹ The defendant can raise the merits of the dispute in any action on the foreign judgment.¹⁵⁰ This view, while generally indefensible,¹⁵¹ becomes much more understandable if there are no constitutional limits on the application of Ontario law on facts like *Going*. This argument emphasizes what is implicit in all the arguments that have been made. Claims to take judicial jurisdiction and to apply forum law when made by one province (or country for that matter) that are generally regarded by others (notwithstanding any element of hypocrisy) as being extravagant or unfair and indefensible, will inevitably result in a breakdown of the kind of cooperation that should exist in a federal state or more widely in the international community.¹⁵² The difference between the federal state and the world is that in the former there exists both a mechanism (the Supreme Court) and standards for comparing responsible behaviour (the Constitution) on the part of all the component parts.

¹⁴⁸ See also *Guerin v. Proulx* (1982), 37 O.R. (2d) 558 (Ont. Co. Ct.); *Perron v. Parisé* (1983), 116 A.P.R. 409, 44 N.B.R. (2d) 409 (N.B.Q.B.).

¹⁴⁹ Civil Code, Art. 178. Cf. *Zodiak International Productions Inc. v. Polish People's Republic*, [1983] 1 S.C.R. 529, 47 N.R. 321, where a foreign arbitral award was given preclusive effect. It is odd that an arbitral award would be given more effect than the judgment of a court that *ex hypothesi* had jurisdiction over the defendant in the sense required by Quebec law.

¹⁵⁰ See, e.g., K.H. Nadelman, *Enforcement of Foreign Judgments in Canada* (1960), 38 Can. Bar Rev. 68; *N.M. Paterson & Sons Ltd. v. St. Lawrence Corp. Ltd.*, [1974] S.C.R. 31, (1973), 34 D.L.R. (3d) 751.

¹⁵¹ The arguments generally given for giving preclusive effect to, at least, some foreign judgments are that it is both unfair and inefficient (in terms of social costs) that a party should be forced to relitigate all over again; see Sharpe, *op. cit.*, footnote 1, p. 66. Similar reasoning underlies all the cases where the courts enforce the foreign judgment.

¹⁵² See, e.g., the extraordinary ramifications of the Uranium Cartel, and international reaction to the American claims for anti-trust jurisdiction. In Canada see Atomic Energy Control Act, R.S.C. 1970, c.A-19, the regulations relating to secrecy about the existence and functioning of the cartel: Uranium Information Security Regulations, P.C. 1977-2923, SOR/77-836, the Foreign Extraterritorial Measures Act, S.C. 1984-1985, c.49, and *Gulf Oil Corp. v. Gulf Canada Ltd.*, [1980] 2 S.C.R. 39, (1980), 111 D.L.R. (3d) 74. In the United Kingdom see such legislation as Protection of Trading Interests Act, 1980 (U.K.)

These arguments suggest that there is both a necessary constitutional component in every choice of law decision, and a strong argument that the application of Ontario law in *Going* was constitutionally indefensible. It is not just that the choice of law rule was based on *Phillips v. Eyre* (though that rule is so absurdly forum-centred that it is very likely to create a problem) that raised the constitutional issue; any conflicts choice of law may raise the same issue when the resulting application of provincial law threatens either due process concerns or the values of federalism.

III. *The Consequences For Conflicts Analysis*

The arguments that have just been made, if accepted, would have a major impact on the usual approach to conflicts cases. As they have been put, they would not necessarily force us to abandon the structure of traditional conflicts doctrine. I believe, however, that they have the potential to destroy the whole traditional structure of conflicts and to force conflicts cases to be seen either as contracts or torts, etc., problems (with some aspects of geographical complexity) or as constitutional ones. I shall briefly develop this argument here. I admit that I am venturing into largely uncharted waters, but I believe that the adventure is worth undertaking.

I have up to now argued that it was constitutionally improper for the Ontario court to apply Ontario law on the facts of *Going*. I have referred to arguments that suggest that a different choice of law rule would have been preferable since such a rule would have chosen Quebec law (or the

(the "Claw-back" Act). Relevant literature includes J.E. Neuhaus, *Power to Reverse Foreign Judgments: The British Claw-back Statute under International Law* (1981), 81 Col. L. Rev. 1097; A. Aucoin, *Extraterritoriality and the Uranium Cartel: A Legal Analysis*, (1982, LL.M. thesis, University of Toronto); R.J. Pikna, *The Uranium Cartel Saga—Yellowcake and Act of State: What Will be Their Eventual Fate?* (1980), 12 Case Western Res. J. Int'l L. 591.

A further installment in the long-running battle between American anti-trust policies, represented by the American courts, and the British government is found in *British Airways Board v. Laker Airways Ltd.*, [1984] 3 All E.R. 39, [1984] 3 W.L.R. 413 (H.L.). The case is part of the fall-out of the bankruptcy of Laker Airways. Laker, through its liquidator, brought an action against British Airways and a number of other trans-Atlantic carriers in the Federal Court in the District of Columbia for damages under the Sherman Act. British Airways sought an injunction in the English courts to prevent Laker from proceeding with the American action. The British Government had intervened by issuing orders under the Protection of Trading Interests Act 1980, ordering British Airways not to comply with orders of the American court for the production of documents. The House of Lords, reversing the decision of the Court of Appeal, denied the injunction on the ground that it was not unconscionable that British Airways should be subject to the American anti-trust proceedings. The House of Lords further held that orders of the British Government did not prevent Laker from pursuing its claim in the American courts.

Quebec rule of no liability) as the governing law or preferred rule.¹⁵³ There are a bewildering variety of choice of law rules of various types competing for application in all areas of conflicts, and the field of torts has been the most prolific progenitor of such rules. I do not propose to review the entire field here. There are however two main types of suggested rules and the proposals have a number of significant common features that I want to investigate.

The first type of rules are, in conflicts terminology, referred to as "jurisdiction selecting".¹⁵⁴ They attempt to identify for any dispute the jurisdiction whose law will "govern". I have already referred to the rules of the type found in contracts and succession to movables.¹⁵⁵ In torts we find, as current alternatives to *Phillips v. Eyre*, a proposal that torts liability be based on the identification of the "proper law of the tort",¹⁵⁶ or on the law of the place of the wrong.¹⁵⁷ The application of the second of these rules, and probably the first as well, would result in the issues in *Going* being governed by Quebec and not Ontario law. I have no quarrel with this result on the facts of *Going*. It is not hard, however, to show that these rules are fundamentally flawed. They are flawed because they are incapable either of differentiating hard cases from easy cases, or of ensuring that whatever tort values are present in any case are considered.

¹⁵³ *Supra*, footnote 106.

¹⁵⁴ One early application of this term comes from D.F. Cavers, *A Critique of the Choice of Law Problem* (1933), 47 *Harv. L. Rev.* 173.

¹⁵⁵ *Supra*, text following footnote 112.

¹⁵⁶ J.H.C. Morris, *The Proper Law of a Tort* (1951), 64 *Harv. L. Rev.* 881, repeated in Dicey and Morris, *op. cit.*, footnote 122, pp. 933-935. It is not correct to say, as does McLeod, *op. cit.*, footnote 1, p. 530, that Dr. Morris was anticipating "the American Revolution". It is not possible to overstate the difference between the jurisdiction-selecting rules of both the traditional type and the (Morris) "proper law" type, on the one hand, and the more modern approaches of B. Currie, *Selected Essays on the Conflict of Laws* (1963), *passim*, (and especially, *Notes on Methods and Objectives in the Conflict of Laws*, [1959] *Duke L.J.* 171, reprinted in Currie, *op. cit.*, p. 177) and D.F. Cavers, *The Choice of Law Process* (1965). Analysis of the dispute, comments on it, on the cases and surveys of the state of the law are so numerous as to be impossible to list here. A good source of both the competing views, and of comments on them and on the problems solved or unsolved is found in American casebooks; see A.T. Von Mehren, D.T. Trautman, *The Law of Multistate Problems* (1965); R.C. Cramton, D.P. Currie, H. Kay, *Conflict of Laws* (3rd ed., 1981); H.L. Korn, *The Choice-of-Law Revolution: A Critique* (1983), 83 *Col. L. Rev.* 772.

¹⁵⁷ This position is sometimes adopted by those who give up in despair the effort to develop satisfactory alternatives; see e.g., A.D. Twerski, *Neumeier v. Kuehner: Where are the Emperor's Clothes* (1973), 1 *Hofstra L. Rev.* 104. It is discussed by J.G. Castel, *Canadian Conflict of Laws*, Vol. II (1977), pp. 597-600 (hereafter cited Castel, Vol. II) and by McLeod, *op. cit.*, footnote 1, pp. 529-530, neither of whom recommend it. Art. 6 of the Civil Code of Quebec has been interpreted in this way (see Castel, *Cases, Notes and Materials*, *op. cit.*, footnote 141, p. 13-5), but the recent recommendation of the Quebec

These criticisms led to the development in the United States of rules of another type.¹⁵⁸ These rules do not seek to identify a jurisdiction whose law will govern; they focus instead on the rules in conflict—the Quebec rule protecting the defendant from a civil action for negligence and the Ontario rule providing the plaintiff with a claim in damages. One result of this shift in focus is that it now becomes possible to see that in many cases there is, in fact, no need to choose between the competing rules. Thus, it may be apparent that a rule of the forum should not be applied to a case of geographical complexity,¹⁵⁹ or it may be that the purpose behind the foreign rule would not be forwarded by its application to the facts of the case.¹⁶⁰ If, for example, we had a case where two Ontario residents (entitled to the protection of the standard Ontario automobile insurance policy) were injured in an accident in Quebec caused by the Ontario driver's negligence, an Ontario court might be justified in concluding that the purpose behind the Quebec rule denying any tort claim would not be served by the application of Quebec law and that the measure of damages appropriate under Ontario law could be awarded.¹⁶¹ It is the inability of the traditional jurisdiction selecting rules to make these kinds of discriminations that is the principal reason for their unsatisfactory nature. An easy case like the one I have just mentioned is said to raise a "false conflict".¹⁶²

Civil Code Revision Office is for the application of the domicile (habitual residence) of the plaintiff, subject to the defendant's right to raise a defence based on the place where the tort occurred, provided that he was domiciled there; Castel, Vol. II, *supra*, p. 647; McLeod, *op. cit.*, footnote 1, p. 564. On the facts of *Going*, Fraser would not be liable had the Quebec rule been applied. As well as the Quebec proposal there has been a suggestion of the Uniform Law Conference of Canada, (Proceedings, 1966) pp. 58-62, (based largely on the Restatement 2d, Conflict of Laws 2d (1971)), and several International conventions. These are referred to in both Castel, Vol. II, *supra*, and McLeod, *op. cit.*, footnote 1. None of these suggestions touch on the argument of this article.

¹⁵⁸ Restatement 2d, *ibid.*, ss. 6, 145; Cavers, *op. cit.*, footnote 156, Principles of Preference; P.R.A. Leflar, American Conflicts Law (1969), especially pp. 233-259; R.A. Leflar, Conflicts Law: More Choice Influencing Considerations (1966), 54 Calif. L. Rev. 1584 (Excerpted in Cramton, Curie, Kay, *op. cit.*, footnote 156, pp. 328-331).

¹⁵⁹ See, e.g., *Neumeier v. Kuehner*, 286 N.E. 2d 454 (N.Y.C.A., 1972); *Block Bros. Realty Ltd. v. Mollard* (1981), 122 D.L.R. (3d) 323, 27 B.C.L.R. 17 (B.C.C.A.); and some curious cases on the Alberta Guarantees Acknowledgement Act, R.S.A. 1970, c.163: *Greenshields Inc. v. Johnston* (1981), 119 D.L.R. (3d) 714, [1981] 3 W.W.R. 313 (Alta. S.C.); *aff'd* (1981), 131 D.L.R. (3d) 234, [1982] 2 W.W.R. 97 (Alta. C.A.); *Bank of Montreal v. Snoxell* (1982), 143 D.L.R. (3d) 349, 44 A.R. 224 (Alta. Q.B.).

¹⁶⁰ See, e.g., *Babcock v. Jackson*, 191 N.E. 2d 279 (N.Y.C.A., 1963); *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277, [1939] 2 D.L.R. 1, [1939] 1 W.W.R. 433 (P.C.).

¹⁶¹ These are the facts of *Babcock v. Jackson*, *ibid.*

¹⁶² The term is usually associated with Currie *op. cit.*, footnote 156. It is used by J.H.C. Morris, *The Conflict of Laws* (3rd ed., 1984), pp. 526 *et seq.* and by Castel, Vol. I, *op. cit.*, footnote 87, pp. 12-13, and Vol. II, footnote 157, p. 548. It is logically impossible to maintain the traditional structure of jurisdiction-selecting rules and to admit

In other words, what might at first sight appear to require the court to make a choice between two competing rules turns out, on examination, not to require such a choice. All of the modern American theories start from the proposition that such cases are easy cases and that this fact must be made clear by the analysis that is adopted.¹⁶³

There are of course more difficult cases. *Going* is not an easy case of the type I have mentioned. If we adopt for the moment the language of "interest analysis",¹⁶⁴ Quebec has an interest in protecting its residents and Ontario has an interest in ensuring that its residents get compensation that is adequate by Ontario standards. If we stop there we would, on the basis of the "governmental interest" I have identified, justify the decision of an Ontario court to apply Ontario law and that of a Quebec court to apply Quebec law.¹⁶⁵ But even here, when we compare the rules and interests of the two provinces, we might justifiably conclude that since the plaintiff chose to go to Quebec it would not be unfair to impose on her the risk that she might be injured by a Quebec driver, while to impose on the Quebec driver the risk that he might hit an Ontario resident might well be unfair. In tort terms, the risk run by the Quebec driver would not be reasonably foreseeable. The answer is perhaps even clearer if we had a case where a Quebec driver is driving in Ontario and there injures an Ontario resident. It would I think be both reasonable and justifiable to impose on him the risk of liability up to the level of compensation required by Ontario law.¹⁶⁶ In this case not only does Quebec law not purport to protect the Quebec resident,¹⁶⁷ but the provisions of the uniform Insurance Act also support the application of Ontario standards of both liability and compensation.¹⁶⁸ We have in the latter situation statutorily imposed choice of law rules that are inconsistent with *Phillips v. Eyre*, and ones which moreover are likely to express the correct balance between the competing rules.

that there can be such a thing as a false conflict. The former method must determine the governing law first, before the content of the rules can be examined. A "false conflict" can only exist once the content of the rules competing for application has been examined, and it has been determined that the purpose of only one would be forwarded by its application in the case; see *Cavers, op. cit.*, footnotes 154 and 156.

¹⁶³ Currie, *op. cit.*, footnote 156; Leflar, *op. cit.*, footnote 158; R.J. Weintraub, *Commentary on the Conflict of Laws* (2nd ed., 1980).

¹⁶⁴ Currie, *ibid.*; Cramton, Currie, Kay, *op. cit.*, footnote 156.

¹⁶⁵ This result is, of course, precisely that of Currie, and his version of "interest analysis": Currie, *ibid.*, pp. 183-184.

¹⁶⁶ Restatement 2d, *op. cit.*, footnote 157; *Cavers, op. cit.*, footnote 156, Principle of Preference No. 1, p. 139.

¹⁶⁷ The Automobile Insurance Act, *supra*, footnote 98, applies only to accidents taking place in Quebec: see ss. 6,7,8.

¹⁶⁸ See, e.g., Insurance Act, R.S.B.C. 1979, c.200, s.246; Insurance Act R.S.N.S. 1967, Cap. I-17, s.93; Insurance Act, R.S.O. 1980, c.218, s.220(1)(b).

There are however even more difficult cases. Suppose that instead of the facts of *Going* we have a case where a Quebec resident travels to Ontario and there picks up an Ontario resident, returning with him to Quebec. While they are in Quebec an accident occurs and the Ontario resident is injured. This is a more difficult case than *Going* because the "contacts" between the Quebec driver and Ontario are now both more extensive and foreseeable. Yet the Ontario resident cannot claim to be caught by unfair surprise if the Quebec rule (forcing him to look to the Régie for compensation that is less than that available under Ontario law) is applied. We can term this kind of case a "true conflict".¹⁶⁹

Such a case raises the central dilemma of the choice of law process. The problem is not resolvable by the methods used to resolve a "false conflict"; there is no easily identifiable correct or easy answer. Two responses are generally made to the problem of a "true conflict". The first is a retreat to rules of the traditional jurisdiction-selecting type.¹⁷⁰ This must be unsatisfactory, for a method that is incapable of dealing with the simple case can hardly be expected to deal rationally with more difficult ones. Such rules are, in any case, so vague and manipulable that it would be as satisfactory—and a good deal cheaper—to flip a coin. The second method is to seek to develop some kind of super-principle, a principle that will provide a basis for choice between the rules in conflict.¹⁷¹

It is implicit in both of these responses that it is regarded as desirable that *both* courts should reach the same conclusion. Methods of resolving true conflicts that either expressly justify the application of forum law,¹⁷² or adopt a principle that is sufficiently vague or so open to chauvinistic

¹⁶⁹ This phrase is also associated with Currie's Interest Analysis, see Cramton, Currie, Kay, *op. cit.*, footnote 156; pp. 252 *et seq.*

¹⁷⁰ See, references, *supra*, footnote 157, and Korn, *loc. cit.*, footnote 156.

¹⁷¹ See, *e.g.*, Cavers, *op. cit.*, footnote 156, Principles of Preference; P. Leflar, *op. cit.*, footnote 158; M. Rosenberg, The Comeback of Choice-of-Law Rules (1981), 81 Col. L. Rev. 946. Rules of this kind are found in the Restatement 2d, *op. cit.*, footnote 158, § 6:

Choice-of-Law Principles

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable law include:
 - (a) the needs of the inter state and international systems;
 - (b) the relevant policies of the forum;
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
 - (d) the protection of justified expectations;
 - (e) the basic policies underlying the particular field of law;
 - (f) certainty, predictability and uniformity of result; and
 - (g) ease in the determination and application of the law to be applied.

¹⁷² *E.g.*, Currie, *op. cit.*, footnote 156.

interpretation as to permit the application of forum law in any case of true conflict,¹⁷³ are severely criticized.¹⁷⁴ The basis for the criticism must be carefully examined, for it is justified by the argument that uniform results in both jurisdictions are required. This argument can be directly challenged.

Suppose that an action in the last imaginary case has been brought in Ontario. If the arguments on the constitutional aspects of the issues have been accepted, then an Ontario court will have had to consider the fairness of subjecting the defendant to the judicial jurisdiction of Ontario. On the facts of the supposed case, there would probably be sufficient contacts under the *International Shoe*, *World-Wide Volkswagen* or *Moran* tests to justify the Ontario court's taking jurisdiction. Similarly, the constitutional propriety of the application of Ontario law may have been considered and held to be justifiable. Satisfaction of both of these requirements is obviously necessary for the case to be a "true conflict". If the Ontario court had no right to take jurisdiction or, if after taking jurisdiction, finds that there is no constitutional basis for the application of its law, no problem arises; the case will not raise any problem of competing rules. Now suppose that the Ontario court applies its own law on the ground that doing so would not be unfair to the defendant and that, in spite of the claim of the defendant to the application of Quebec law (and the claim of the province of Quebec to the protection of its scheme of highway traffic accident compensation), the plaintiff is entitled to compensation to the amount determined by Ontario law. Assume also that another case between different parties is brought in Quebec. Assume that the facts of this case are identical to those of the Ontario case. The defendant being personally served in the jurisdiction of the court, there is no issue of the constitutionality of the Quebec court's taking jurisdiction. The Quebec Court of Appeal, after considering the constitutional aspects of the application of its rule on the facts of the case, holds that it is justified in applying its rule so that the plaintiff is limited to his claim against the Régie. It justifies this conclusion by considering that the plaintiff, by accepting a ride from the Quebec resident and by agreeing to return with her to Quebec, is not unfairly treated (nor is the purpose of Ontario law improperly ignored) by being required to look to the Régie for compensation, which, while less than that available under Ontario law, cannot be regarded as inadequate.

If, let us assume, both of these cases are appealed to the Supreme Court of Canada, what *should* that court do?¹⁷⁵ It *can* do two things; it can

¹⁷³ E.g., Leflar, *op. cit.*, footnote 158, the "better rule of law".

¹⁷⁴ See, e.g., Rosenberg, *loc. cit.*, footnote 171; Korn, *loc. cit.*, footnote 156.

¹⁷⁵ Any case where two provincial courts are justified both in taking jurisdiction and in applying forum law raises the same issue before the Supreme Court. The nature of the issue is completely obscured by the use of choice of law rules, for, as I have argued, such

dismiss both appeals or dismiss one and allow the other. What is implicit in these choices? If the court dismisses one appeal and allows the other, on what basis does it choose? The rules in issue are clearly rules within the class of subjects assigned to the provinces under section 92 of the Constitution Act, 1867; there is no competing federal head of power.¹⁷⁶ In a constitutional case,¹⁷⁷ the Supreme Court may have to decide how the powers of the various provincial legislatures have to be balanced between themselves, or how the powers of the provinces must be balanced against the power of Parliament. But this is not such a case, for we have already determined that each Court of Appeal, in applying the laws of the respective provinces, has behaved with perfect constitutional propriety. The Supreme Court could pick one of the tort values—fault-based liability or no-fault liability—as being a “transcendent national value” but it is hard to see how that result could be defended.¹⁷⁸

The Supreme Court cannot escape the dilemma with which it is faced by saying that both courts should adopt a uniform choice of law rule, for, if that rule is of the traditional jurisdiction-selecting type, we already know that such a rule is an irrational response to conflicts problems, and, in any case, the acceptance of a rule like *Phillips v. Eyre* would simply lead to the application of forum law.¹⁷⁹ Similarity of rules does *not* achieve uniformity unless the *results* are the same in two identical cases. Even if the choice of law rule is one of the modern American ones, those are either capable of justifying the application of forum law in either court, or incapable of suggesting which law should be subordinated

rules have no justifiable role to play in resolving any conflicts dispute in a principled manner and they cannot, of course, provide uniformity.

¹⁷⁶ The presence of a competing head of federal power could raise an issue of paramountcy. This issue was seized on by Pigeon J. in *IpcO*, *supra*, footnote 95, to distinguish the extraterritorial scope of Manitoba common-law rules (because they are uniform across Canada?) from the extraterritorial scope of legislation. As I have argued, I can see no basis for an argument that common law rules should be exempt from the limitation of s.92(13), nor even for the assumption that they should be the same across Canada. In any event, the presence of the civil law system of Quebec must have some bearing on the validity of the assumption across Canada.

¹⁷⁷ *I.e.*, a case now admitted to be such under the usual tests.

¹⁷⁸ If the Supreme Court picks one of the competing regimes, the other, in any case of geographical complexity, is necessarily subordinated to the first. This result either postulates some kind of “federal” tort value or that the province with the “correct” value can have its law applied more widely than the province with the “wrong” tort values. Both of these positions are inconsistent with Canadian federalism.

¹⁷⁹ *Going* itself suggests that in an Ontario court, Ontario law would be applied. Quebec has a statutory choice of law rule in the Civil Code, *supra*, footnote 157, under which Quebec law would be applied. As a matter of fact, under the existing choice of law rules, uniformity would not be achieved. Should we say that one of the provincial choice of law rules is wrong? If we are to say that one is wrong on what basis do we do so, and what is the impact of that decision on the scope of provincial power under s.92?

to the other on the facts of this case.¹⁸⁰ Once again, just because both courts *state* the same rule, say the rule of the Restatement,¹⁸¹ *does not* lead to uniform results if each court applies the rule differently.

In short, it is hard to see how the Supreme Court would decide to choose Quebec law over Ontario law or *vice versa*. What is at stake if the court dismisses both appeals? I suggest that the result is consistent with the principles that underlie a federal system. The essence of a federal system is the power of the component parts (consistently with the power conferred on them by the Constitution) to differ on how they resolve similar problems. Thus Quebec can constitutionally introduce a no-fault scheme of accident compensation, just as Ontario is free to use the common law tort rules for this purpose. As the problem has been put before the Supreme Court, both courts have, *ex hypothesi*, behaved responsibly both in asserting judicial jurisdiction and in applying their own law. Given these factors, the Supreme Court has no choice but to dismiss both appeals. This result should neither be deplored nor avoided; it is, as I have said, simply the inevitable consequence of Canada being a federal state.

Now the full consequences of the analysis can be seen. First, if diversity of results is tolerable within a federal state, such a situation is, *a fortiori*, defensible and foreseeable between states in the international context. The possibility that we can analyze inter-provincial and international cases in ways that are, in principle, the same is a good reason for believing that the analysis I have suggested is correct (or at least defensible).¹⁸² The more important point is what the analysis has done to the assumption

¹⁸⁰ See, e.g., Restatement 2d, *op. cit.*, footnote 156, §§ 6, 145. § 6 is set out *supra*, footnote 171. Ss. 145 reads as follows:

The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred;

(b) the place where the conduct causing the injury occurred;

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

¹⁸¹ In the international context there are neither a court with compulsory jurisdiction to make the member states behave responsibly, nor standards like those found in the Constitution Act, 1867, s.92(13). That similar issues can arise in that context is clear from the references cited, *supra*, footnote 152.

¹⁸² The fact that laws are similar across Canada and even across North America also reduces significantly incidences of "true conflicts".

generally believed to underlie conflicts. There is no basis for believing that the goal of uniformity (i.e., the goal of similar results on similar facts in two jurisdictions) is a proper goal to seek. In fact, one can go further and suggest that the goal of uniformity is prohibited by the existence of a constitutional division of power between the federal Parliament and provincial legislatures and the (albeit qualified) sovereignty of the provinces.

The argument that this result offers an unacceptable opportunity to "forum shop" can be met by one observation and one argument in defence. There is no evidence that there is anything about the traditional rules that would suggest that in the hard case of the type I have been considering, forum shopping is either impossible or likely to be discouraged. The development of constitutional limits on both the taking of judicial jurisdiction and choice of law will go further to ensure that, for the *vast bulk of conflict cases*, there is no incentive to forum shop. Thus, to take only one example, I have argued that the Ontario plaintiff in *Going*, even if she could constitutionally have sued in Ontario, could not constitutionally have maintained the argument to have the amount of compensation determined by Ontario law. It appears to be true as a matter of fact that the vast majority of conflicts cases fall into the "false conflict" category, either because of the constitutional limitations I have mentioned or because, when the court considers which of the two competing rules should be applied, it is clear that one alone is justified. All that I maintain is that, when there is a true conflict, and after a court has behaved responsibly in a constitutional sense, there is no basis for being concerned about the possibility that another court (again a court that has behaved responsibly) may reach a different result.

It follows logically from this analysis that if, for example, the Ontario plaintiff in my hypothetical "true conflict" obtained a judgment for damages in the Ontario court, the Quebec court should enforce the judgment. The concern expressed earlier for the position of Quebec as found in Article 178 of the Civil Code,¹⁸³ denying preclusive effect to any foreign judgment cannot now be supported for, as I have shown, the Ontario court has, in the context of the Canadian federation, behaved responsibly. At first sight it might appear odd that a court, that would (and justifiably could) deny the plaintiff any remedy, may be constitutionally compelled to enforce the judgment of the court of another province giving precisely the remedy that it would not itself have given. Yet on examination, there is nothing illogical or odd about this result. The simple fact is that the issues are not the same. The issues raised when an extra-provincial judgment is brought for enforcement are, as I have shown, quite different from those raised in an action on the original cause of action brought in the province. There is no more incongruity in enforcement in these circumstances than there is in the giving effect to a decision

¹⁸³ *Supra*, footnote 149.

of an arbitrator or administrative tribunal when the court would not, had it had the power to do so, have made the decision that it is now asked to enforce or recognize. This result is based on the well established difference between reviewing the decision of some other tribunal and making a decision on the merits.

Conclusion

The transformation in both conflict and constitutional law that these arguments have achieved is capable of providing a basis for the development of more rational criteria both for the taking of jurisdiction and for the application of choice of law. The development of the former criteria has the direct effect of dealing with the problems of recognition and enforcement of foreign judgments. I do not argue that there will not be difficult cases to be decided, but I do claim that the various factors I have considered provide a better basis both for prediction and for the principled resolution of problems that present geographically complex facts. I also maintain that those solutions that are applicable to disputes arising between two provinces are also in principle applicable between one province and a foreign country. What has changed in such a situation is the absence of a unifying mechanism like the Supreme Court to control both the taking of jurisdiction and choice of law. Yet there are standards in international law by which the territorial scope of law can be restricted. It is true that these standards are far more vague and ill-defined than those applicable in a federal context, but they are there.

It is important to realize what the result of the argument concerning choice of law is. The result is not to support an argument that the application of forum law is always justified; instead the result is that we can acknowledge that a court will apply its own law when, speaking broadly, it is just and reasonable that it do so. It is unrealistic to believe that any kind of choice of law, rules of the traditional type or rules of the modern American type, will be effective to prevent a court doing what it feels is proper to resolve the dispute before it. I have offered a basis for the open discussion of what it is proper for the court to do.

The result of the arguments made in this article is that the Supreme Court of Canada must play a very special role. For if these arguments are accepted, the ambit of what is "constitutional" will be significantly increased. Had the proposal to add property to section 7 of the Charter of Rights and Freedoms been successful, there could be a basis for the argument that the principles of "fundamental justice" parallel the phrase "due process" in the Fourteenth Amendment. Such a provision could be the basis for the arguments that I have made about the constitutional limitation on the right of a plaintiff to serve the defendant *ex juris*. As section 7 stands, it may still be possible to make the same argument. It is unclear now how far that section will be taken. I do not, however,

believe that the requirement that each provincial court behave responsibly depends on anything more than the present rules regarding the inherent jurisdiction of the court and the scope of provincial power conferred by sub-sections 13 and 14 of section 92 of the Constitution Act, 1867.