Recognition of Provincial Divorces in Canada

At present, the federal Parliament has exclusive jurisdiction over divorce under section 91:26 of the *British North America Act, 1867*.[1] However, the desirability of integrating divorce law with the aspects of family and property law already within provincial jurisdiction[2] has prompted the suggestion in recent years that the divorce jurisdiction be transferred to the provincial legislatures. The implementation of this suggestion would require modification of sections 91 and 92 of the *British North America Act, 1867* and repeal of the 1968 *Divorce Act*.[3] Each province would then be free to adopt divorce legislation which would reflect the social and ethical values of its residents and express its particular social philosophy. However, such a transfer of jurisdiction would require balancing uniform recognition throughout Canada of provincial divorce decrees[4] and each province's right to exercise control over foreign decrees affecting its residents. Several approaches are possible, none of which is free from criticism.

I. Provincial approaches

A. *Application of common law rules of recognition*

In the absence of a constitutional provision stipulating mandatory recognition throughout Canada of all provincially-rendered divorce decrees, each province could develop its own rules of recognition. The common law rules may serve as a starting point: a foreign decree of divorce will be recognized if it was rendered by a court of competent jurisdiction; if it is not tainted with fraud or lack of due process; and if it does not violate the public policy of the jurisdiction in which recognition is sought.[5]

The ascertainment of the competency of the decree-rendering courts, however, may present some problems. The common law predicates jurisdictional competence upon the existence of a substantial connection (for example, domicile or residence) between

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[1] 30-31 Vict., c.3 (U.K.).

[2] This is by virtue of ss.92:13 and 92:16 of the *British North America Act, 1867, ibid.*

[3] R.S.C. 1970, c.D-8.

[4] Uniformity is a necessity if "limping marriages" are to be avoided.

[5] Castel, *Canadian Conflict of Laws* (1977), vol.2, 117 *et seq.*

the court rendering the decree and at least one of the parties.[6] Quebec, however, has not yet subscribed to the substantial connection test. Moreover, even the common law provinces may differ in their respective concepts of substantial connection. Finally, a Canada-wide judicial consensus, even if achieved, would always be liable to upset, as each provincial legislature would be capable of modifying by statute the judge-made rules at its discretion.

B. *Adoption of a uniform act*

A uniform act might be drafted, based on the Convention on the Recognition of Divorces and Legal Separations prepared by the Hague Conference on Private International Law,[7] which each provincial legislature could then enact. The difficulty with this approach is that not all provinces may be willing to adopt such an act. Consequently, uniformity of recognition could not be achieved.

II. Constitutional approaches

A. *Inclusion of a recognition clause*

A new constitution could include a clause (similar to section 14 of the *Divorce Act*[8]) to read as follows: "A final decree of divorce granted in any of the provinces or territories of Canada has legal effect throughout Canada." The Supreme Court, in interpreting this provision, may be called upon to determine whether each province would be precluded from attacking the basis upon which courts of the others exercise jurisdiction. This issue does not arise under the present *Divorce Act* which sets out a jurisdictional standard applicable throughout Canada.

It is not certain that the provinces would accept an absolute obligation to recognize one another's divorces, as the American

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[6] *Indyka* v. *Indyka* [1969] 1 A.C. 33 (H.L.). For a recent Canadian case see *Kereztessy* v. *Kereztessy* (1976) 14 O.R. (2d) 255 (H.C.).

[7] *Recueil des Conventions de la Haye* (1951-1968), no. XVIII, 128 (June 1, 1970). This convention has been ratified and implemented by the U.K. in its *Recognition of Divorces and Legal Separations Act 1971*, c.53 as am. (U.K.).

[8] R.S.C. 1970, c.D-8, s.14: "A decree of divorce granted under this Act or an order made under section 10 or 11 has legal effect throughout Canada." See also s.15: "An order made under section 10 or 11 by any court may be registered in any other superior court in Canada and may be enforced in like manner as an order of that superior court or in such other manner as is provided for by any rules of court or regulations made under section 19." Ss.10 and 11 deal with corollary relief (*e.g.*, alimony, maintenance, and custody).

experience tends to show.[9] However, this approach might be rendered acceptable to the provinces if the constitution required that the substantial connection test be satisfied. This would effectively impose the same jurisdictional standard on each province, eliminating refusals to recognize divorce decrees rendered elsewhere in Canada. Although difficulties might arise, should the original court and the recognizing court take different views as to what constitutes the substantial connection required by the constitution, this could be solved by the Supreme Court of Canada. Moreover, in cases where a divorce is obtained without this substantial connection, any province's refusal to recognize such a divorce should itself be recognized by all the provinces, including the one which originally granted the decree.

This approach need not involve recognition of rights to property, alimony, and custody of children which could continue to be governed by ordinary rules of recognition. Furthermore, a provincial decree would still be subject to the requirement of due process under the *Canadian Bill of Rights*[10] whenever a spouse has not been notified of the proceedings.

B. *Inclusion of a "Full Faith and Credit" clause*

An alternative approach might be to follow the American example by implementing a provision similar to the Full Faith and Credit clause contained in article IV of the United States constitution.[11] This clause makes the enforcement in one state of judgments of another state a federal question. Thus the states are deprived of their ordinary freedom to refuse recognition to foreign judgments. The clause provides that: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[12] The framers of the constitution intended that the clause should compel recognition and coordination yet still leave room for state originality.

Congressional legislation under the Full Faith and Credit clause includes an Act of May 26th, 1790[13] which deals with the authentication of records, judicial proceedings and acts of the state legis-

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[9] See *infra*, p. 650.
[10] S.C. 1960, c.44; R.S.C. 1970, App.III.
[11] U.S. Const. art.IV, §1.
[12] *Ibid.*
[13] Ch.11, 1 Stat. 122.

latures and provides that these documents should have such faith and credit given them in every state as they have by law or usage in the courts of the state from which they issue. On March 27th, 1804, Congress passed an Act extending the provisions of the 1790 statute to the territories of the United States and to countries subject to its jurisdiction.[14] Finally, in 1948, the present statute was enacted which provides: "Such Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."[15]

Judgments of federal courts must be given the same recognition by state courts as judgments of another state would receive. Similarly judgments of state courts must be given full faith and credit in the federal courts. It should be noted further that the clause applies to the public acts of other states. However, the decisions compelling recognition of such statutes have been limited to relatively few fields.

One question which has come before the courts is under what circumstances recognition may be denied under the Full Faith and Credit clause. The Supreme Court of the United States has held that the clause and the legislation thereunder do not preclude an inquiry into the jurisdiction of the first court to render the judgment sought to be enforced in the second state.[16] If the court had no jurisdiction, the judgment is not entitled to full faith and credit. The sister state judgment may also be attacked for fraud in its procurement, provided it could be so attacked in the state where it was rendered. In other words, *the measure of credit is that which the judgment would receive in the state where it was rendered.*

It should also be emphasized that under the Full Faith and Credit clause, a sister state judgment cannot be denied local recognition on the ground that it conflicts with the notions of public policy or good morals of the forum in which recognition is sought. This approach is quite desirable from the point of view of the needs of a federal system.

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[14] Ch.56, §2, 2 Stat. 298.

[15] 28 U.S.C. §1738 (1976).

[16] See *Hanson* v. *Denckla* 357 U.S. 235 (1958); *May* v. *Anderson* 345 U.S. 528 (1953); *Mullane* v. *Central Hanover Bank & Trust Co.* 339 U.S. 306 (1950); *Griffin* v. *Griffin* 327 U.S. 220 (1946); *Williams* v. *North Carolina, infra,* note 19.

With respect to the recognition of sister state divorce decrees, the courts have had to determine the jurisdictional tests required by the constitution. The test they have applied is a very narrow one: the *bona fide* domicile of either spouse. This is not a progressive approach, especially in view of the fact that in recent years, in Canada and other British jurisdictions, a substantial connection test has been adopted which includes, *inter alia*, domicile, residence and nationality.[17] Nevertheless, until the United States Supreme Court extends recognition to other jurisdictional bases, domicile remains the only test.

It is well established that a divorce rendered in a state where *neither* spouse was domiciled is not entitled to recognition in another state under the Full Faith and Credit clause. At the other extreme, a divorce decree rendered in a state where *both* spouses were domiciled is certainly entitled to recognition under that clause.

In *Williams* v. *North Carolina* [I],[18] the United States Supreme Court held that the petitioner's domicile alone is a sufficient constitutional basis for divorce jurisdiction even though the other spouse does not appear in the action. However, in order to accord with due process, the absent spouse must be given reasonable notice of the proceedings and an opportunity to be heard.

The Supreme Court also held that in the case of an *ex parte* divorce neither the non-participating spouse nor the court of the marital domicile is bound by the jurisdictional finding of domicile. This spouse may therefore collaterally attack the validity of the divorce in another state by showing that in fact the purported domicile did not exist.[19] The court stated that "the [*ex parte*] decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil [*sic*] is a jurisdictional fact."[20] However, in the event that a collateral attack is made upon the divorcing court's jurisdictional finding of domicile, the Full Faith and Credit clause requires that such a finding be treated with respect. The recitation of a *bona fide* domicile in the sister state decree is *prima facie* evidence sufficient to warrant a finding of domicile in that state. The recognizing court is not compelled to infer domicile from this, but must give appropriate weight to the finding.

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[17] *Supra*, note 6.

[18] 317 U.S. 287 (1942).

[19] *Williams* v. *North Carolina* [II] 325 U.S. 226 (1945); *Esenwein* v. *Pennsylvania* 325 U.S. 279 (1945).

[20] *Williams* v. *North Carolina* [II], *ibid.*, 232.

If the collateral attack has been successful, it is not clear whether the original state must give full faith and credit to the decision of the second state denying full faith and credit.[21] If there is a single constitutional definition of domicile, the decision of the second state should be given full faith and credit in the original state. However, one could argue that the divorce decree is still valid where rendered although not entitled to full faith and credit elsewhere. There is also the possibility that a state might, without having recourse to the Full Faith and Credit clause, recognize a divorce decree based on a different jurisdictional ground. In such a case, a collateral attack might still be possible under the clause.

If both spouses appear in the divorce proceedings, neither spouse can thereafter, in another state, make a collateral attack on the divorce court's jurisdictional finding of domicile, unless the state in which the divorce was granted would itself permit this kind of collateral attack.[22] Anyone whom the divorce forum would bar from collaterally attacking in its courts the jurisdictional finding of fact is barred by the Full Faith and Credit clause from collateral attack in a sister state.[23] However, the clause will not allow a state to give a divorce decree of a sister state a greater effect than it had in the state where it was rendered.

At the present time, no cases involving statutes which require residence only (as opposed to domicile) have reached the United States Supreme Court. However, this is no reason for domicile to be considered the only *constitutional* basis for divorce jurisdiction. Thus, if a Full Faith and Credit clause were to be inserted in the Canadian constitution, there would be no compelling reason for the Supreme Court of Canada to adopt as a test of jurisdiction one similar to that now prevailing in the United States.

The American case law, while it has illustrated that divorce can be effectively adjudicated by "the separate sovereignties", has not demonstrated that this can be done with optimal efficiency. *Williams II*[24] clearly indicates the consequential possibilities of bigamous marriages and illegitimate children. It has been pointed out:

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[21] See *Colby* v. *Colby* 78 Nev. 150, 369 P. 2d 1019 (1962), *cert. denied* 371 U.S. 888 (1962).

[22] *Sherrer* v. *Sherrer* 334 U.S. 343 (1948).

[23] *Cook* v. *Cook* 342 U.S. 126 (1951). See also *Johnson* v. *Muelberger* 340 U.S. 581 (1951); *Davis* v. *Davis* 305 U.S. 32 (1938).

[24] *Supra,* note 19.

> The field of divorce is a fertile ground for conflict between the various states; indeed, a mobile population, widely conflicting views of many questions of domestic relations, and the frequency of litigation have combined to make interstate divorce the most persistent and perplexing of the full faith and credit problems.[25]

For these reasons a number of American authors, in spite of the constitutional prohibitions, have suggested federal legislation in the area of divorce as a possible method of achieving uniformity.[26]

In the absence of compelling reasons for transferring competence over divorce from the federal Parliament to the provincial legislatures, it might be preferable to leave things as they stand. Provincial competence could give rise to the very real perils of added litigation, inconsistent judgments regarding marital status, and general confusion.

If it does become imperative to transfer legislative jurisdiction over divorce to the provinces in conjunction with a Full Faith and Credit clause, the following measures are suggested:

(1) Care should be taken to ensure that the clause adopted precludes a collateral attack on an adjudicated matter that could not be entertained in the courts of the rendering province.
(2) Domicile as the sole basis for jurisdiction should be rejected in favour of connecting factors that could not be impeached on collateral grounds.
(3) A decision to nullify a decree granted in one province should void the decree in every province — including the one which rendered it — to avoid the situation of "limping marriages".
(4) A central registry system could also be used to record marital proceedings.

If divorce is to be subject to provincial control, Canada should learn from the American experience.

III. Conclusion

In light of the difficulties encountered in the United States under the Full Faith and Credit clause, a better solution would seem to be the adoption of a constitutional text providing for the recognition of provincial divorces throughout Canada where at least one of the spouses has a substantial connection with the

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[25] Rodgers & Rodgers, *The Disparity Between Due Process and Full Faith and Credit: The Problem of the Somewhere Wife* (1967) 67 Colum. L. Rev. 1363, 1378.

[26] *Ibid.*, 1400-1, n.219.

province of the rendering court. Control by the recognizing court would be limited to challenging the validity of the divorce decree in accordance with the law of the rendering province and the constitutional requirement of a substantial connection.[27]

It should further be mentioned that a problem of *lis pendens* may arise in a situation in which both spouses bring petitions of divorce in two different provinces. At the present time this is covered by section 5(2) of the *Divorce Act*[28] which contains special rules dealing with concurrent proceedings. If divorce were a provincial matter this problem might be difficult to solve, especially in circumstances where a decree is granted by one court and refused by another. In such a situation a province might be compelled to recognize a divorce granted in a second province which conflicts with a local decree or with one granted in a third province.

It must therefore be admitted that, apart from sociological and cultural considerations, leaving exclusive jurisdiction in matters of divorce to the federal Parliament is by far the simplest and most effective way to deal with the question of recognition of divorces throughout Canada.

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[27] This solution is proposed in Committee on the Constitution of the Canadian Bar Association, *Towards a new Canada* (1978), 135, Recommendation 2.

[28] R.S.C. 1970, c.D-8.

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