RENVOI IN CANADA — FORM AND AVAILABILITY

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Unless one advocates abolition of the traditional conflicts choice of law rules, questions of the form and availability of renvoi[1] in Canada remain matters of continuing concern. For practitioners, who do not enjoy the luxury of refusing to deal with existing rules, answers to those questions, however infrequently required, assume added significance.[2] The century of cases and of learned discussion unfortunately shed little light on the Canadian answers although they may provide answers for other countries not only on one or both questions but also on what a particular individual thinks the answers ought to be.

The questions posed obviously assume the existence of renvoi in Canada in some form and yet so eminent an authority as Castel states that "the theory of renvoi is not . . . part of the conflict of laws of the common law provinces of Canada."[3] Thus, that fundamental preliminary issue must be briefly addressed.

The Case for Renvoi in Canada

The case for renvoi in Canada rests on the double foundation of decided cases and received common law.

A strong argument can be made that renvoi would have been part of the conflicts law of the common law provinces as received common law even if no Canadian court had ever actually used the theory. As every Canadian law student learns, Canada received common law and was bound by decisions of the House of Lords and the Privy Council until 1949 when the Privy Council graciously consented to give effect to Parliament's wish to make the Supreme Court of Canada the final appellate court of and for the country.[4] Nevertheless, post-1949 English decisions as well as decisions from other common law jurisdictions retain persuasive force because courts in Canada operate on the unstated assumption that the common law remains a geographically undifferentiated body of law.[5]

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1. Questions of form and availability may remain but there is universal agreement about the circumstances in which renvoi — and thus the questions — will arise.

   > The problem of renvoi arises whenever a rule of the conflict of laws refers to the 'law' of a foreign country, but the conflict rule of the foreign country would have referred the question to the 'law' of the first country or to the 'law' of some third country. The classic illustration is that of the British subject who dies intestate domiciled in Italy, leaving movables in England. The English conflicts rule refers to the law of the domicile (Italian law), but the Italian conflict rule refers to the national law, which may for the moment be assumed to be English law. [1 Dicey and Morris, *The Conflict of Laws*, (10th ed. 1980) 65]

   Of course, if the conflict rule is specific about the applicable foreign law, the problem of renvoi does not arise.

2. This paper was conceived in response to the hypothetical question of what answer I would give if I were called upon to testify in foreign proceedings as to the B.C. law concerning renvoi. By coincidence, after work was begun, I was consulted on a case raising precisely that point and the possibility of actually testifying in foreign proceedings gave added impetus to the work in hand.

3. 1 J.G. Castel, *Canadian Conflict of Laws* (1975) 53.

4. *A.G. for Ontario* v. *A.G. for Canada*, [1947] A.C. 127 (P.C.).

5. J.E. Cote, "The Reception of English Law" (1977), 15 Alta. L.R. 29 at 55-57. For discussion of this assumption as it relates to constitutional law see Right Honourable Sir Owen Dixon, "The Common Law As An Ultimate Constitutional Foundation" (1957), 31 Aust. L.J. 240.

   The notable exceptions to treating the common law as geographically undifferentiated occur when a court is considering the jurisdiction of the Federal Court of Canada and is trying to determine whether the cause of action is based on Federal common law and when a court is seized with a conflicts case and the *lex causae* is the law of another common law jurisdiction. In any domestic case, the court would freely consider relevant cases from any common law jurisdiction, but in a conflicts case the court will so proceed only with the aid of expert evidence.

Neither the House of Lords nor the Court of Appeal used renvoi before 1949[6] but the well known Privy Council case of *Vita Food Products, Inc.* v. *Unus Shipping Co.*[7] was an appeal from Canada. That case gave its blessing to renvoi in the field of contract and, though corrected later on the renvoi point,[8] *Vita Foods* would have been binding in Canada. The correction, notably limited to excluding renvoi from contract and not from the entire body of conflicts choice of law rules, came too late to be accepted in Canada without question under the doctrine of precedent. That we have accepted the exclusion simply demonstrates that all common law decisions continue to be received though not in the pre-1949 binding form and suggests that even the decisions of the lower English courts using renvoi are of some force in Canada.[9]

More convincing, perhaps, is the fact that there is a small number of Canadian cases in which renvoi has either actually been used or has been discussed. These cases are very difficult to dismiss except by asserting that they were erroneously decided, but their paucity does make determination of the form and availability of renvoi very difficult, if those questions are to be answered solely by reference to decided Canadian cases.[10]

Further evidence that renvoi is part of the law in Canada is to be found in statutes, both actual[11] and proposed,[12] which expressly exclude renvoi by directing the court to apply only internal law of the *lex causae.* Although we know that a misapprehension of the law will not necessarily convert that mistake into law,[13] the fact that the legislators assumed that, in the absence of such direction, renvoi would offer the court a choice is additional weight favouring the existence of renvoi.

Statutes which expressly direct the courts to consider the conflict rules of a foreign jurisdiction are less numerous[14] but considerably more ambiguous with respect to the inferences which can be drawn as to the existence of renvoi. Such a direction clearly indicates awareness of the doctrine but it is unclear whether the provision has been inserted for greater certainty or whether its presence implies that the legislature considers that no renvoi exists unless it is expressly included.

The true problem, therefore, is one of attempting to determine from this mixture of Canadian statutes, cases and received common law the questions initially raised: the form of renvoi and the availability of renvoi.

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6. Nor has either since. Some Canadian courts did treat even Court of Appeal decisions as binding: M.R. McGuigan, "Precedent and Policy in the Supreme Court" (1965), 45 C.B.R. 627.

7. [1939] A.C. 277 (P.C.).

8. *In re United Railways of Havana and Regla Warehouses Ltd.*, [1960] Ch. 52 at 96-97, 115 (C.A.). See also n. 21 *infra* for recent decisions on this point.

9. An even more striking example of continued reception is the application in Canada of *Indyka* v. *Indyka*, [1969] 1 A.C. 33 (H.L.) after what looked like a statutory freeze on the common law rules of recognition of foreign divorces by s. 6(2) of the *Divorce Act*, R.S.C. 1970 c. D-8.

   Australia and New Zealand, of course, are faced with the same problem. P.E. Nygh, *Conflict of Laws in Australia* (3d. ed. 1976) 169 states: "If, therefore, the foreign court theory is part of the law of Australia and New Zealand, it is not by virtue of any binding or compelling authority, but simply by reason of a common judicial assumption since 1917." and warns that Australian courts should be made aware of that fact in order to prevent an unthinking extension of the doctrine.

10. The cases are discussed *infra*.

11. For example, *Succession Law Reform Act*, S.O. 1977 c. 40.

12. Manitoba Law Reform Commission, *Report on the Law of Domicile* (Winnipeg: The Commission, 1982).

13. *Radwan* v. *Radwan (No. 2)*, [1973] Fam. 35, [1972] 3 All E.R. 1026 (Fam. Div.).

14. See for example, *Personal Property Security Act*, R.S.O. 1980, c. 375, ss. 5(2), 6(1); *Personal Property Security Act*, S.M. 1973, c. 5, ss. 5(1), 6(1).

The Question of Form

The first question, the form of the renvoi, refers of course to the familiar main contending theories — partial renvoi and total renvoi or the foreign court theory.

Partial renvoi is the theory generally subscribed to by those civil law systems of which renvoi forms a part[15] and probably by some American states.[16] It is the theory which is the most simple to articulate and to apply. The forum, having been given evidence about the equivalent appropriate conflicts rule of the *lex causae*, engages in a single reference and applies the domestic law 'selected' by that foreign conflicts rule. A reference to the *lex fori* is a remission. A reference to another law district is a transmission.

The term 'selected' is not used in a descriptive sense, however. The forum never actually asks whether a court of the *lex causae* would apply the domestic law. Application of domestic law is simply assumed by the forum rule. Any similarity between the disposition of the case by the forum and the disposition that would have occurred under the foreign legal system will thus be purely coincidental.

A theory which bears a close resemblance to partial renvoi, but which cannot be classed as true renvoi, is desistement.[17] Though there is neither remission nor transmission by way of a foreign conflicts rule, the theory is identical with renvoi in the preliminary stages in that the whole of the foreign law is applied to the particular facts. The theory is of interest because echoes of desistement reasoning can be detected in some total renvoi cases and even in some allegedly non-renvoi cases.

Desistement requires the forum to ascertain the conflicts rule of the *lex causae* solely in order to determine whether the foreign system would apply its own internal law to the facts. If the foreign conflicts rule would direct the foreign court to another legal system, the forum applies forum law. The basis for the application of the *lex fori* is not that it is the law selected by the foreign conflicts rule but, rather, that it is applied *qua lex fori* to fill the void left by the disinterest of both the foreign system and the forum in the facts. Indeed, the chief merit of desistement is said to lie in the fact that the forum is able to apply forum law more frequently.

This approach is also strikingly similar to the governmental interest approach which attempts to eliminate false conflicts by determining the extent of interest of each potentially interested legal system. Desistement is based on the premise that the conflicts rules of each system represent the considered judgment of that system on the limits for the application of its own law. The weakness of desistement lies, of course, in the validity of that

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15. 1 E. Rabel, *The Conflict of Laws: A Comparative Study* (1958) 75-90.

16. American Law Institute, *Restatement of the Law of Conflict of Laws* (2d) (Washington, D.C.: The Institute, 1971), s. 8(2).

17. Advocated by Westlake, *Private International Law* (5th ed. 1912) 32-34. Discussed in J.D. Falconbridge, *Conflict of Laws* (2d ed. 1954) 21-24; E.O. Schreiber, "The Doctrine of the Renvoi in Anglo-American Law" (1917-18), 31 H.L.R. 523 at 530-33; and E.G. Lorenzen, "The Renvoi Doctrine in the Conflict of Laws — Meaning of 'The Law of a Country,'" (1918), 27 Yale L.J. 509 at 513-14.

premise; the main function of conflicts rules is selective, not definitive.[18] They are designed to determine which one of the competing internal legal systems applies, not to determine the extent of the applicability of the domestic law.

Though desistement has never become part of the common law, desistement reasoning is not unknown to English courts. For example, Maugham J. was persuaded in *In Re Askew*[19] that the foreign domestic law was not applicable because the foreign conflicts rule pointed elsewhere. Instead of applying English law *qua lex fori*, however, Maugham J. went on to ask a further question: what would the foreign system do? He discovered that the foreign system could look to the English conflict rule, would accept the remission and would thus apply its own domestic law. Rights were thereby created which the first stage of reasoning had determined could not have been acquired under the foreign law.

The foreign court theory of renvoi, though equally easy to state, is far more difficult to apply than partial renvoi and the range of possibly applicable laws is greater. It is to this theory that English courts are said to adhere[20] though, as will be suggested below, there is reason to believe that the foreign court theory is not the only form of renvoi actually used by English courts.[21]

The foreign court theory is really self-descriptive: the forum is obliged to ask how the foreign court would solve the problem raised by the particular facts.[22] Ultimately a system of domestic law will be applied but there are four logically possible routes which the forum employing the foreign court theory may take.

First, of course, is the possible direct application of the foreign domestic law. Just as forum law may be drafted in terms wide enough to encompass cases with foreign contacts, so may be the foreign law.[23]

A second route is by way of the foreign conflict rule and results in the application of whatever domestic law is selected by that rule. The domestic

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18. Schreiber, *ibid.*, at 531. In Canada, however, it is possible that conflicts rules perform a definitive limiting function with respect to provincial legislative jurisdiction: E.R. Edinger, "Territorial Limitations on Provincial Powers" (1982), 14 Ott. L.R. 57.

    Governmental interest, of course, suffers from the inherent difficulty that lies in any attempt to interpret a statute and from the additional problems that arise when the statute is, for example, received English law or when the law is simply common law.

19. [1930] 2 Ch. 259. The case is said by Falconbridge, *supra* n. 17, at 195 to represent the acquired rights mode of stating the theory of total renvoi.

20. J.H.C. Morris, *The Conflict of Laws* (2d ed. 1980) 466; *Chesire and North's Private International Law* (10th ed. 1979) 62.

21. See text accompanying n. 37-39 *infra*. The latest pronouncement on renvoi also seems to be couched in partial renvoi terms. Lord Diplock, correcting the error he fell into in *The Hollandia*, [1983] 1 A.C. 565 at 573 (H.L.) of suggesting that the proper law of a contract includes a reference to the private international law of that legal system, seems to have only partial renvoi in contemplation in describing what is excluded from the proper law of a contract: *Amin Rasheed Shipping Corporation* v. *Kuwait Insurance Co.*, [1983] 3 W.L.R. 241 at 246 (H.L.). It has been suggested that the decision may not have eliminated renvoi from the field of contract: see Erwin Spiro, "The Proper Law of the Contract and Renvoi: Further Comments on the Amin Rasheed Shipping Case" (1984), 33 I.C.L.Q. 199.

22. Sometimes facts have to be altered in order to make the foreign court theory work, however, thereby rendering renvoi as much an exercise in unreality as the general approach is said to do by domesticating all the facts. See S. Dobrin, "The English Doctrine of the Renvoi and the Soviet Law of Succession" (1934), 15 B.Y.I.L. 36; J.D. Falconbridge, *supra* n. 17.

23. See 1 Dicey and Morris, *The Conflict of Laws* (10th ed. 1980) 14-23 for a discussion and suggested classification of statutes as they relate to the conflict of laws.

system selected could be that of the foreign court or there might be a remission to the *lex fori* or a transmission to the law of a third state.

If partial renvoi is part of the foreign law, the domestic law applied will be the system selected by the conflicts rule of whatever jurisdiction is pointed to by the conflicts rule of the *lex causae*. To ask whether the *lex causae* accepts or rejects the renvoi is really to ask whether the second or the third route is the appropriate one. If partial renvoi is a part of the foreign law, then of course any remission will be accepted. If renvoi is not a part of the foreign law, then there will be no remission to accept or reject. The question, moreover, should not be whether renvoi is part of the foreign law generally, but whether the foreign court would employ renvoi in this particular case.

The fourth and final possible route arises when the forum discovers that the foreign court also adheres to the foreign court theory. This discovery engenders the dreaded *circulis inextricabilis*. The ultimate solution remains unknown since no English court has yet made the fatal discovery but it can hardly be doubted that the common law will discover a common sense solution, however much the existence of some secondary rule here may detract from the supposed logic of the foreign court theory.[24]

Although these theories differ significantly in the question asked of the foreign expert witness and although a court using total renvoi may follow a notionally circuitous route, both partial renvoi and the foreign court theory may apply the same system of domestic law in a given case. Thus the two forms become very difficult to distinguish and identify. Similarly, the result in a total renvoi case may also on occasion be identical with that which would occur in the complete absence of renvoi.[25] But when partial renvoi is used, the result will never coincide with the result which would have occurred in the absence of renvoi. Assuming that the foreign conflicts rule differs from the forum rule, partial renvoi will always result in the application of a system of domestic law different from the law which would be selected by the ordinary forum choice of law rule.

The Question of Availability

Availability is a distinct issue but it may have a bearing on the form of renvoi employed.[26] Theoretically, renvoi could be universally available as a general conflicts principle. Every reference to foreign law could result in the application of whatever form of renvoi the forum employs. This possibility has been mooted but cannot seriously be considered today in view of the overwhelming percentage of cases that are apparently decided without the benefit of renvoi.[27] The general approach must be as stated in Dicey and Morris:

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24. For a discussion of the point see T.A. Cowan, "Renvoi Does Not Involve a Logical Fallacy" (1938-39), 87 U. of Penn. L.R. 34; and E. Griswold, "In Reply to Mr. Cowan's Views On Renvoi" (1938-39), 87 U. of Penn. L.R. 257.

25. See for example, *Re Annesley*, [1926] Ch. 692, 95 L.J. Ch. 404, 135 L.T. 508, 42 T.L.R. 584.

26. See text accompanying n. 36-39 *infra*.

27. One could attempt to explain the absence of renvoi by blaming counsel for failing to introduce the right evidence; or for failing to ask the right question of the foreign expert; or by working out the cases where the application of renvoi would have produced the same result; but the explanation would be forced and artificial.

> Rule 1 In the Rules and Exceptions in this book the law of a country . . .
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> (2) means, when applied to any foreign country, usually the domestic law of that country . . . .[28]

Under this general rule the facts are notionally domesticated and the foreign domestic law is applied on that basis. Failure to domesticate the facts paves the way for a renvoi approach and it is an omission which often occurs. That renvoi does not more often result is surprising and perhaps fortuitous.

Sometimes renvoi is avoided because of lack of knowledge about the foreign legal system. In *Beaudoin* v. *Trudel*,[29] for example, the Ontario court might have found itself employing renvoi had the expert witness in the law of Quebec been prepared to answer the renvoi question put to him.

Sometimes renvoi is avoided by the process of characterization. In *Sayers* v. *International Drilling Co. N.V.*,[30] somewhat sketchily reported expert evidence concerning the law of the Netherlands indicated that exemption clauses would be invalid in a domestic contract but valid in an international contract. In other words, the law of the Netherlands provided that its domestic law was not applicable to a particular class of contracts and that class appeared to be all those with foreign contacts. This type of rule can be classified as a self-limiting provision or statute. Dicey and Morris assert that such rules constitute domestic law, not conflicts rules, and therefore that they should be given effect to by an English court.[31] But, it is difficult to accept this characterization where the exclusionary factors consist of the foreign contacts. The result is a non-application, of course, of some aspect of the foreign law rather than a reference to some other system of law. However, the approach is more like renvoi or desistement than that dictated by the general rule because the facts are not domesticated.

For the same reason, any reading down by the forum of a foreign statute expressed in general terms, so as to exclude its application to a conflicts fact pattern, is renvoi: the forum is sitting as a foreign court and purporting to apply the foreign law to the actual facts. An example of this is reading down on the basis of the territorial principle, such as was undertaken by the Ontario Court of Appeal in *Re Spencer and the Queen*.[32]

Nevertheless, although a renvoi approach may be more pervasive than many suspect because courts naturally apply the law to the actual facts, renvoi is not a general principle. However, continued failure to domesticate the facts will certainly soon turn it into one.

The second possibility is that which the texts grudgingly admit is required by English case law:[33] identification of certain juridical categories or subcategories as renvoi rules. Logically the only limit to the rules classified as

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28. 1 Dicey and Morris, *supra* n. 23, at 64.
29. [1937] 1 D.L.R. 216, [1937] O.R. 1 (C.A.). See also *Charron* v. *Montreal Trust* (1958), 15 D.L.R. (2d) 240 (Ont. C.A.).
30. [1971] 1 W.L.R. 1176, 115 Sol. J. 466, [1971] 3 All E.R. 163 (C.A.).
31. *Supra* n. 23, at 14-24. But see J.D. Falconbridge, *supra* n. 17, at 194.
32. (1983), 145 D.L.R. (3d) 344 (Ont. C.A.). On appeal to the Supreme Court of Canada.
33. For example, Chesire and North, *supra* n. 20, at 58-76; J.H.C. Morris, *supra* n. 20, at 461-73.

renvoi rules should depend on the purpose which renvoi is intended to achieve but in fact the reverse process has occurred. The purpose of the renvoi has been defined by reference to the cases in which renvoi has been judicially employed and it has been defined so as to fit those cases and nothing else, if possible.

Finally, the third form of availability of renvoi is as an alternative choice of law rule. Some of the decided English cases which are difficult to fit into the category of renvoi rules are rationally explicable as alternative choice of law rules. Just as capacity to contract may be determined either by the proper law of the contract or by the *lex domicilii*,[34] and as contract formalities may be governed by the *lex loci contractus* or by the proper law,[35] so may any other issue be governed either by the domestic law selected by the forum choice of law rule or by whatever law the conflicts rule of the *lex causae* selects. The only difference between the contract examples and the renvoi alternative is that in the former both possible connecting factors are known, whereas in the latter the second connecting factor may have a variable content depending on the *lex causae* selected.

Recent legislation, which expressly eliminates renvoi but which provides the court with a number of possible legal systems from which to select, constitutes clear evidence that validation is a renvoi objective.[36]

A renvoi rule as described above aims at uniformity so the form of renvoi used there will obviously be the foreign court theory or total renvoi. Renvoi as an alternative validating rule, however, has as its object the selection of another domestic system of law. Thus, the safest form of renvoi to use is partial renvoi because it will always point directly to the domestic law of some other legal system. Ironically, *Collier* v. *Rivaz*[37] is the seminal case for the foreign court theory and yet is explicable only as a use of renvoi as an alternative validating rule. On what other basis could the English court have applied both English and Belgian law so as to hold every codicil valid? *Taczanowska* v. *Taczanowski*[38] also constitutes an excellent example of renvoi used as an alternative choice of law rule. This use is reflected in the phrasing of the English rule for determining the formal validity of a marriage which now appears in Dicey and Morris.[39] In both cases, whatever the court thought or said it was doing, the reference was conveniently a single one and that is consistent with partial renvoi even though it is also consistent with the foreign court theory.

Whether a court has turned a choice of law rule into a renvoi rule or has simply used renvoi as an alternative choice of law is very difficult to ascertain. Sequential reasoning is an indicator of renvoi used as an alternative rule, but it is not conclusive. Logically, the first question which the

34. Dicey and Morris, *supra* n. 23, at 778.

35. *Ibid.*, at 784.

36. For example, *Wills Act, 1963*, c. 44 (U.K.); *Recognition of Divorces and Legal Separations Act, 1971*, c. 53 (U.K.); *Succession Law Reform Act*, S.O. 1977, c. 40.

37. (1841), 2 Curt. 855, 163 E.R. Full Rep. 608.

38. [1957] P. 301, [1957] 3 W.L.R. 141, 101 Sol. J. 534, [1957] 2 All E.R. 563 (C.A.).

39. *Supra* n. 23, at 261.

forum should ask in applying the foreign court theory is whether the foreign domestic law is directly applicable to the facts. If not, the next question is how the foreign court would decide the case under its conflicts rules. The difference between renvoi as an alternative rule and as a renvoi rule is that the progression from the foreign domestic law to the foreign conflicts rules is triggered by the wrong result for the former and by inapplicability for the latter. Another factor which renders the cases ambiguous is that apparently sequential reasoning, in the sense of progression from the foreign domestic law to the foreign conflicts rules, may just be an exploration by the court of possible forum rules rather than true progression.

Renvoi Cases in Canada

Ross v. *Ross*[40] is the first Canadian case in point of time, but perhaps not in point of authority. Though a decision of the Supreme Court of Canada, its authority as a common law precedent is weakened by the fact that the case arose in Quebec under the Quebec Civil Code. In issue was the formal validity of a holograph will made in New York by a testator domiciled at all times in Quebec. New York law did not recognize holograph wills as valid domestically but, by the conflicts rule of that state, would recognize as valid a will which conformed to the law of the last domicile of the testator.

The majority held that the Quebec rule was permissive and authorized an alternate reference either to the *lex loci actus* or to the *lex domicilii*. It also held that even if the Quebec rule had been mandatory, the forum could look at the conflicts rule of New York as part of the *lex loci*.

Were this the only basis for renvoi at common law in Canada, the existence of the doctrine might well be in doubt. Nevertheless, it is significant that the majority was English and the dissenters were Quebec judges and that common law texts and cases were cited in argument as well as those in civil law. Furthermore, there may be significance for the common law and there certainly is irony in the fact that Taschereau J., who dissented vehemently, attributed to a New York court exactly the approach he was denying should exist for Quebec civil law — the renvoi approach:

> Upon evidence that by the Quebec law a holograph will made in New York by a citizen of Quebec is not valid in Quebec to transmit property real or personal situated or to be found in Quebec if, by the New York law, holograph wills by citizens of New York are not valid in New York, this will in question here would not be admitted to probate in New York.[41]

Naturally, the term renvoi appears in none of the judgments in *Ross* v. *Ross*. The result is a single reference but that is as consistent with the foreign court theory as with partial renvoi. What does appear relatively clear, though not absolutely free from doubt, is that the Supreme Court of Canada was using renvoi as an alternative validating choice of law rule.

In 1906, *Armitage* v. *Attorney General*[42] extended the use of renvoi to recognition and enforcement of foreign divorce decrees. Instead of restrict-

40. (1893), 25 S.C.R. 307.

41. *Ibid.*, at 354-55.

42. [1906] P. 135, 75 L.J.P. 42, 94 L.T. 614, 22 T.L.R. 306 (Prob., Divorce, & Adm. Div.).

ing recognition to decrees granted by courts of the common domicile, England thereafter also recognized any decree which was considered valid under the recognition rules of the domicile. Because *Armitage* itself involved recognition of an American divorce which was considered valid in the domicile by the operation of American constitutional law, the case does not look like renvoi. But, because the rule enunciated there is wide enough to include a reference to the conflicts recognition rules in any domicile, it has come to be regarded as another renvoi case.[43]

A substantial number of Canadian cases indicate adoption of *Armitage* in this country.[44] Though it can be argued that *Armitage* has converted the rule in *LeMesurier* v. *LeMesurier*[45] into a renvoi rule, its purpose was for validation. The tests for recognition are usually implemented sequentially so that *Armitage* can also be considered an example of renvoi as an alternative rule of validation.

In *Schwebel* v. *Ungar*,[46] the Supreme Court of Canada upheld the validity of a marriage between a man domiciled in Ontario and a woman domiciled in Israel even though the woman had been divorced by a gett in a refugee camp in Italy at a time when her (then) husband was domiciled in Hungary. The divorce was not recognized in Hungary but it was considered valid in Israel, the country to which both parties travelled within weeks of the divorce and in which both acquired a domicile.

Schwebel v. *Ungar* is usually discussed either as a classic example of the *lex causae* method of solving the incidental question or as a potentially uncontrollable extension of the recognition rules for foreign divorces. But, the case can equally well be explained as an example or renvoi because, either way, there was a reference to Israeli conflicts rules. However, if the case was decided as one involving an incidental question, then capacity to marry may have become a renvoi rule. If the case was decided under the forum rules for recognition, we simply have an extended version of *Armitage*, which is probably renvoi used as an alternative validating rule.

Rosencrantz v. *Union Contractors Ltd. and Thornton*[47] involved an action on a promissory note whose proper law was held to be the law of the state of Washington. The case is of interest for two reasons. First, there is an express consideration by Wilson J. of the renvoi problem and a clear rejection of renvoi in a contract case based on common law authorities and texts generally. A better example could not be found of continued reception of English law for the purposes of determination of a particular rule. Secondly, the case strongly suggests that were renvoi appropriate, Wilson J. would have used the foreign court theory, as he asks not just what the Washington conflicts rule is but what the courts of Washington would do on these facts.

The relationship between federal and provincial laws in Canada is particularly conducive to the use of renvoi. *Yuen Tse* v. *Minister of Employment*

43. Although it is still rejected by Morris, *supra* n. 20, at 467.

44. See 1 Castel, *supra* n. 3, at 120 for a list of the cases.

45. [1895] A.C. 517, 64 L.J.P.C. 97, 72 L.T. 873, 11 T.L.R. 481 (J.C.P.C.).

46. (1964), 48 D.L.R. (2d) 644 (S.C.C.); aff'g (1963), 42 D.L.R. (2d) 622 (Ont. C.A.).

47. (1960), 31 W.W.R. 597, 23 D.L.R. (2d) 473 (B.C.S.C.).

and Immigration[48] is a classic example. The problem in *Yuen Tse* was the legitimacy of three children of the applicant. While domiciled in Hong Kong, Yuen Tse had acquired a t'sai or principal wife by whom he had nine children and also a t'sip or secondary wife. This union produced the three children in question. It was agreed that by the law of Hong Kong, the marriages were valid polygamous unions and all children had the status of legitimacy. Yuen Tse came to Canada, acquired a domicile in Ontario, and applied to have the three children join him.

The Immigration Act, 1976,[49] like many other federal statutes, directs the court to the law of a particular province for the purpose of determining a particular issue by way of a choice of law rule. The Immigration Regulations define 'son' in section 2(a) as:

> . . . [A] male who is (a) the issue of a marriage of that person [the sponsor] and who would possess the status of legitimacy if his father had been domiciled in a province of Canada at the time of his birth.

The connecting factor is domicile of the parent in a province but, as the Federal Court of Appeal noted, the section creates both a time element problem and a renvoi problem: it is ambiguous about whether the applicable provincial law is the law as it exists at the time of the application or the law as it stood at the time of the birth; and, there is no qualification on the applicable provincial law. The result of these ambiguities was that the court was able to reach a unanimous conclusion by different routes.

According to McQuaid and Lalande D.JJ., the applicable provincial law was the internal law of the province at the time of the application. Since Ontario in 1978 had eliminated the concept of illegitimacy for all purposes of the law of that province by the *Children's Law Reform Act, 1977*[50] the children of the second wife were considered legitimate for purposes of immigration too. McQuaid D.J. notes, however, that application of the common law conflicts rules would have produced the same result.

Urie J. agreed substantially with his brethren but he preferred a different approach, possibly on the grounds that not all applicants might be fortunate enough to be domiciled in a province which had eliminated the concept of illegitimacy. Urie J., then, held that domicile in the Regulations could be interpreted as domicile in *any* province and that: "The laws of that province must include, of course, its conflict of law rules."[51] Consideration of case law revealed that B.C. would certainly regard the children as legitimate under its conflicts rules and "quite possibly Ontario as well."[52]

The result is a single reference to the law of Hong Kong. The reasons for judgment indicate that renvoi was probably being used as an alternative

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48. (1983), 45 N.R. 252, 144 D.L.R. (3d) 155 (F.C.A.).
49. S.C. 1976-77, c. 52.
50. S.O. 1977, c. 41, s. 1.
51. *Supra* n. 48, at 262 (N.R.), 159 (D.L.R.).
52. Why he thought there might be doubt about the Ontario conflicts rules is mystifying as the decision discussed as ultimate authority for the B.C. conflicts rule was *R. v. Leong Bo Chai*, [1954] 1 D.L.R. 401, [1954] S.C.R. 10, 107 C.C.C. 337 and the Supreme Court of Canada is supposed to unify the common law rules of the provinces.

validating choice of law rule in order to fulfil the immigration policy of Canada as set out in the Act — to administer the law so as "to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad."[53]

The most recent and most bizarre use of renvoi occured in *Re Hudson and County of Santa Clara, State of California.*[54] An application was brought in Saskatchewan to enforce a provisional maintenance order obtained in California. Section 7(2) of the Saskatchewan *Reciprocal Enforcement of Maintenance Orders Act*[55] typically provides that at the confirmation hearing the person against whom the order was raised "may raise any defence that he might have raised in the original proceedings if he had been a party thereto, but no other defence". The normal interpretation of this provision is that it is a choice of law rule which permits the raising of defences available under the domestic law of the place where the provisional order was made.[56] The very order itself, which the Saskatchewan court had before it, listed the defences available as absence of fatherhood and inability to support, but the Court of Appeal appears to overlook this and instead asks itself:

> If the defendant had been a party to those proceedings, would California law have permitted him to raise as a defence the law of Saskatchewan in relation to his obligation to support Heather?[57]

The answer is found by the Court in section 1670 of the California *Code of Civil Procedure*, which provides:

> 1670. Duties of support applicable under this title are those imposed under the laws of any state where the obligor was present for the period during which support is sought.[57a]

Obviously this provision is geared to the American system of reciprocity which the Court of Appeal had taken the trouble to explain at some length and it is the exact equivalent of the Saskatchewan provision. The Court accepts the reference back and applies Saskatchewan domestic law.

The form of renvoi used would appear to be partial renvoi as the Saskatchewan court makes no apparent effort to ascertain what a California court would really do. The case falls generally in the field of family law, but renvoi here cannot be justified because the whole purpose of s. 7(2) of the Saskatchewan Act is to permit the invocation of foreign defences.

Renvoi, then, has actually been used in Canada to resolve questions concerning the formal validity of a will, capacity to marry, recognition of foreign divorce decrees, legitimacy and confirmation of a foreign maintenance order. It has been rejected in contract. In no case has there been more than a single reference. But, that is insufficient to establish partial

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53. *Supra* n. 48, at 256 (N.R.), 161 (D.L.R.).
54. (1983), 146 D.L.R. (3d) 155, (sub nom. *Hudson* v. *Santa Clara County, California*) [1983] 4 W.W.R. 1, 32 R.F.L. (2d) 367 (Sask. C.A.).
55. S.S. 1968, c. 59. Now R.S.S. 1978, c. R-4.
56. See for example, *Re Miller and Graves* (1983), 146 D.L.R. (3d) 182 (Alta. Q.B.).
57. *Supra* n. 54, at 164 (D.L.R.).
57a. *Ibid.*, at 165.

renvoi as the only Canadian form: that result is also consistent with the foreign court theory. *Rosencrantz* suggested a willingness to employ the foreign court theory, and the English cases are at the very least still highly relevant in Canada. On the other hand, all the cases are explicable as involving the use of renvoi as an alternative validating rule, even if that is not the only explanation they will support. That use of renvoi is best served by partial renvoi.

In these circumstances the most that can be done is to suggest answers for the future on the questions of form and availability based on a consideration of renvoi in relation to other aspects of conflicts law and in relation to the purposes which renvoi is intended to achieve.

Renvoi Considered

The study of renvoi might aptly be described as a study in contradiction and inconsistency.

The logical extension of the vested rights theory, renvoi was adamantly opposed by some of the strongest proponents of vested rights; presumably because renvoi demonstrated the fallibility of that theory. Clearly, every cause of action did not belong to a single jurisdiction and there were thus no rights which ought to be recognized.

Renvoi might thus today be regarded simply as an anachronism and discarded. Yet, like judicial review of legislation in Canada, renvoi persists. The original logic may be obsolete, but the doctrine lives on supported by independent justifications.[58] The local law theory has effectively destroyed the concept of pre-existing rights, but as Griswold pointed out,[59] many judges still perceive themselves to be merely recognizing and enforcing foreign acquired rights and that perception is probably one of the reasons for the continued vitality of renvoi. The decision of Maugham J. in *In re Askew* is a good example:

> . . . [I]t should not be forgotten that the English Court is not applying Utopian law *as such*, and the phrase is really a short way of referring to rights acquired under the lex domicilii. The inquiry which the Court makes is, of course, as to Utopian law as fact, and one to be proved in evidence like any other. The inquiry might accurately be expanded thus: What rights have been acquired in Utopia by the parties to the English suit by reason of the de facto domicil of John Doe in Utopia? For the English Court will enforce those rights, though, I repeat, it does not, properly speaking, enforce Utopia laws.[60]

Von Mehren has suggested that renvoi is the Trojan horse of governmental interest.[61] Advocates of the traditional choice of law rules should by definition therefore be opponents of renvoi. The inconsistency of a tradi-

58. See for example, W.R. Lederman, "The Independence of the Judiciary" (1956), 34 Can. B.R. 769, 1139; W.R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981) 107; W.R. Lederman, "Review of B.L. Strayer, Judicial Review of Legislation in Canada" (1970-71), 16 McGill L.J. 723; B.L. Strayer, *Judicial Review of Legislation in Canada* (1968).

59. E.N. Griswold, "Renvoi Revisited" (1938), 51 H.L.R. 1165 at 1186.

60. *Supra* n. 19, at 267. The idea of pre-existing vested rights is also still current in non-conflicts cases such as those in which the court must decide whether legislation is retrospective, for example, *Petrofina Canada Ltd.* v. *Lynn* (1978), 84 D.L.R. (3d) 129 (Ont.H.C.); or those concerned with limitation periods, for example, *Surdel Carpets and Rugs* v. *Ciprut*, B.C. Co.Ct. unreported, Oct. 13, 1983.

61. A.T. Von Mehren, "The Renvoi And Its Relation to Various Approaches to The Choice of Law Problem", in *XXth Century Comparative and Conflicts Law* (1961) 380 at 385.

tionalist favouring the continued existence of renvoi is not so glaring today as Von Mehren suggests, however. Even traditionalists tend to favour the more particularized functional conflicts rules which Von Mehren was advocating, though they may not be prepared to go to the same lengths as he. Von Mehren is on solid ground, however, in pointing out that by asking how a foreign court would solve the problem total renvoi gives the foreign system the maximum opportunity for realization of its interests.

Most difficult to explain is the inconsistency of the theory in a body of rules that insists on characterization of both the juridical category and the connecting factor and usually even the foreign law by the *lex fori*, and which settled on a connecting factor (domicile) known to differ from that commonly used in civil law systems. The capitulation in the mid-nineteenth century to the *lex causa* in renvoi cases may just have been a convenient accident induced by adherence to the logic of vested rights theory. The question, however, is whether the modern justifications for this abberation are valid and thus whether they render worthwhile the difficulty and expense of renvoi.

In fact, there is really nothing new in the current justifications advanced for the continued use of renvoi. Uniformity is the object but uniformity has always been an object of the conflict of laws and of renvoi. The only difference is that now we recognize that not all legal systems solve conflicts problems the same way. The argument for renvoi is simply that the necessity for uniformity is particularly strong in certain areas. Assuming that uniformity is achievable, the question that must be addressed is whether renvoi is really necessary in those areas.

Uniformity is said to be mandatory where immovables are concerned out of deference to the power theory. Since only the courts of the *situs* have effective control of title to and disposition of the foreign immovable, the forum is compelled to do exactly what the foreign court would do on the actual facts.

The use of renvoi in this area, in fact, is probably an unnecessary complication. A far more rational approach is to ask whether the foreign jurisdiction would recognize and enforce the forum judgment relating to the property. If no recognition will be extended anyway, then the judgment is a *brutum fulmen* so far as the immovable is concerned[62] and it is irrelevant what law is applied. Similarly, if the forum judgment will be recognized, the chances are good that recognition and enforcement are not dependent on application of the correct law or correct application of the law. So, again, it is irrelevant what law is applied by the forum.[63] Any attempt to ascertain the *lex situs* within the meaning of the foreign court theory simply adds confusion without achieving anything substantial.

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62. Canadian courts adhere inflexibly to the rules conferring exclusive jurisdiction on the *situs* insofar as immovables are concerned. They not only refuse to assume jurisdiction over foreign immovables, they also refuse recognition of any foreign judgment which concerns immovables situate in the forum, whatever law has been applied by the foreign court: *Duke* v. *Andler*, [1932] S.C.R. 734; *Chochinov* v. *Davis* (1981), 113 D.L.R. (3d) 715 (Man. C.A.); *Re Palmer and Palmer* (1980), 107 D.L.R. (3d) 401 (Sask. C.A.). *Palmer* goes so far as to suggest that not even an *in personam* judgment would be recognized insofar as it affects title or ownership of real property.

63. See *Godard* v. *Gray* (1870), 6 L.R.Q.B. 139, 24 L.T. 89, 19 W.R. 348.

The problem with renvoi in the area of succession to movables (as distinct from questions concerning the formal validity of a will where renvoi has also been used but, it is submitted, as an alternate rule of validation), is that the objective of uniformity which might be achieved by renvoi is seriously undercut by lack of effective control. This criticism operates against the primary choice of law rule too, of course. Any movables situated outside the effective control of both the forum and the domicile will be distributed according to the law in force at their *situs*. Renvoi, again, may thus be wasted effort if the estate is widely distributed; and simply unnecessary if the courts of the domicile would recognize any forum decision concerning distribution in the same way that common law courts will recognize and enforce any decision of the courts of the domicile.[64]

The arguments for uniformity of status and capacity are very strong in the realm of family law and, if achievable through the use of renvoi, would justify that theory. Three comments can be made. First, uniformity as between the forum and the *lex causae* can probably be achieved by the forum subordinating its opinion as to the legal system with the most substantial connection and, on proper evidence, accepting the foreign opinion — if the *lex causae* recognizes the forum judgment. But, renvoi will guarantee universal uniformity of status only if the decision is also recognized by every other court. However, since the actual decision will depend on which state the action is commenced in, the status may be a relative concept rather than an absolute one. Second, there may really be no necessity for uniformity if the purpose for which the matter must be resolved is one to be effected in the forum. In other words, if the parties are going to enjoy or suffer the consequences of the decision in the forum or in some way involving the forum, then possible uniformity becomes less desirable and internal considerations assume more importance. Only if the parties want a forum judgment for a foreign purpose, as in *R.* v. *Brentwood Superintendent Registrar of Marriages*,[65] is any attempt to do exactly what the foreign court would do really necessary. Even then, the litigants must realize that no judgment in any area of the law is necessarily universally portable. Finally, an examination of the cases indicates that though in some uniformity appears to have been the main object, in others an attempt to find a method of validation appears to have been the paramount consideration.

It is significant, for example, that the decision in *Brentwood Superintendent of Marriages* was reversed by legislation. The significance lies in the fact that English courts are now directed to apply the law which validates instead of treating capacity as a renvoi rule if those circumstances arise again. This supports the suggestion that renvoi is really being used in this area as an alternate rule of validation, whether or not the courts have structured the judgments in those terms.

Whether uniformity is achievable is, of course, a separate issue. Dobrin[66] and Falconbridge[67] pointed out that where property is concerned, the forum

64. See for example, *Senkiw* v. *Muzyka* (1969), 4 D.L.R. (3d) 708, 68 W.W.R. 515 (Sask. C.A.); Dicey and Morris, *supra* n. 23, at 609.

65. [1968] 2 Q.B. 956, [1968] 3 W.L.R. 531, 112 Sol J. 672, [1968] 3 All E.R. 279.

66. *Supra* n. 22.

67. *Supra* n. 17, at 191-94.

sometimes has to 'adjust' the *situs* in order to render the foreign law applicable. This effectively destroys the logic of the foreign court theory. There is the further familiar proviso that the combination of forum procedural rules and foreign substantive law produces a unique result. The selection of expert witnesses and the nature of the questions asked will, of course, have a bearing on the achievement of uniformity. Furthermore, the actual result may depend on where the action is commenced. Arguments on this point are fully canvassed in the literature. The comments above assumed the achievability of uniformity and argued that the effort was unnecessary. The fact that uniformity may be unachievable simply constitutes an additional consideration which needs to be repeated, but has not convinced renvoi believers in the past.

A peculiarly Canadian consideration militating against the foreign court theory, in so far as the *lex causae* is the law of another province, is that it permits the introduction of constitutional issues into a conflicts case. This is a particularly undesirable complexity in light of the uncertainty about the applicable test for the constitutional issue raised.[68]

The problem is that the direct application of any provincial law to facts, not entirely provincial, raises the issue of the validity of that law in light of the territorial limitation on provincial legislative jurisdiction. The general conflicts approach eliminates the problem by domesticating the facts and permitting the indirect application of a provincial law through the medium of a conflicts rule. No question can thus arise concerning the territorial validity of the law applied. The foreign court theory directs the forum to consider how the foreign court would resolve the problem and thus allows for possible direct application of foreign law.[69] If the foreign provincial law is drafted so as to apply to the conflicts fact pattern, the question arises as to whether that application is constitutionally permissible.

The likelihood of renvoi between the provinces is not high, but it is possible. For example, the capacity of a married woman to acquire an independent domicile may vary from province to province.[70] Furthermore, the constitutional issue is not insoluble, but it is one of the more difficult issues in Canadian constitutional law. Application of the foreign court theory will simply be rendered additionally complex and that merits consideration.

Nevertheless, there is no reason to reject renvoi altogether. Partial renvoi lacks the apparent initial logic of the foreign court theory, but it is available for use as an alternative choice of law rule and as such it embodies a logic of its own. Once one accepts that uniformity is either unachievable or unnecessary, the policy of the forum in the particular matter regains its normal paramountcy. If the local policy is one of validation, such as is said

68. See E.R. Edinger, *supra* n. 18.

69. As far as the forum is concerned, of course, the application of the foreign law is still indirect because it applies only through the medium of the forum conflicts rule.

70. Ontario and Prince Edward Island have abolished the domicile of dependency for married women for all provincial purposes and Manitoba is considering a similar provision. See *Family Law Reform Act*, R.S.O. 1980, c. 152; *Family Law Reform Act*, S.P.E.I. 1978, c. 6; Manitoba Law Reform Commission, *supra* n. 12.

to exist in matters of succession, family law and contract, and if flexibility in the choice of law rule is needed in order to effect that policy, partial renvoi is the obvious technique. This is so at least until such time as the primary choice of law rule can be refined in order to obtain the same result.

This use of partial renvoi has the advantage of reinstating the general rule as the universal first stage — namely application of the foreign domestic law — and it raises no constitutional issues.

The availability of partial renvoi as an alternative choice of law rule should be limited only by the appropriateness of the juridical category or subcategory. Probably, in practice, it will be found to be appropriate in few more than the areas in which renvoi is already said to be established.

Conclusion

English cases appear to use renvoi both as a rule and as an alternative rule. The foreign court theory is said to prevail, but there very often is only a convenient single reference. Partial renvoi may thus also be part of English law where it is used as an alternative rule.

Renvoi is clearly also a part of the law of the common law provinces of Canada. In no Canadian case has there been more than a single reference and it is impossible to determine whether renvoi is being used as a rule or an alternate rule. The combination of case law and inherited common law renders unanswerable the question of what form of renvoi is available in Canada.

The justifications for renvoi rules are shaky, but if uniformity is an objective, then only the foreign court theory of renvoi should be used. For conflicts among Canadian provinces, that form of renvoi acquires additional complexity by permitting the introduction of constitutional issues.

As an alternative choice of law rule, renvoi has considerable merit. If that is the intended use, then partial renvoi is the most appropriate form, since it virtually guarantees a different system of domestic law.