Canadian Cases in Private International Law in 2014 / Jurisprudence canadienne en matière de droit international privé en 2014

compiled by / préparé par
JOOST BLOM

JURISDICTION / COMPÉTENCE DES TRIBUNAUX

Common Law and Federal

Jurisdiction *in personam*

Jurisdiction simpliciter — *attornment to the jurisdiction*

Fraser v 4358376 Canada Inc., 2014 ONCA 563, 376 DLR (4th) 295

The Court of Appeal held, reversing the motion judge's decision, that neither applying for a temporary stay of proceedings, nor applying to strike a statement of claim, amounted to attornment to the jurisdiction. Attornment requires that a party go beyond challenging the jurisdiction of the court based on jurisdiction *simpliciter* and *forum non conveniens*. This party had not gone beyond that because both steps were taken solely to provide a proper procedural foundation for the hearing of that party's motion challenging the court's jurisdiction over the claim against it.

Note. See also *Bansal v Ferrara Pan Candy Co.*, noted below under *Non-resident defendant — claim essentially financial — jurisdiction* simpliciter *found to exist but jurisdiction declined.*

Joost Blom is in the Faculty of Law at the University of British Columbia.

Vol. 52 [2014], doi:10.1017/cyl.2015.17
© The Canadian Yearbook of International Law / Annuaire canadien de droit international 2015
https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

Jurisdiction simpliciter — *general principles — presumptive connecting factors*

Christmas v Fort McKay First Nation, 2014 ONSC 373, 119 OR (3d) 21

The plaintiff, a Toronto lawyer, agreed to become in-house counsel for an Alberta First Nation organization composed of Cree and Dene people. The contract was negotiated by email and executed by both parties. It provided that the contract was governed by Ontario law. The plaintiff moved to Alberta, but the employment was terminated after only a few months, and he returned to Ontario. He brought a wrongful dismissal action in Ontario. The defendant argued the court lacked jurisdiction *simpliciter* because no presumptive connecting factor linked the case to Ontario. The plaintiff argued there were two factors present: the contract was made in Ontario, and it contained an express choice of Ontario law. The first was rejected on the facts because the plaintiff's acceptance of the defendant's offer was received in Alberta. The second was rejected as a matter of law. An express choice of law should not automatically be treated as if it were a choice of forum. Moreover, choice of law was properly a matter for a *forum non conveniens* evaluation and not for jurisdiction *simpliciter*.

Khan v Layden, 2014 ONSC 6868

The plaintiff was injured as a passenger in a two-car collision in Pennsylvania. The driver, who was also the owner, of the car in which the plaintiff was riding was an Ontario resident. The car was registered and insured in Ontario. The driver as well as the owner of the other car were residents of Pennsylvania, and the car was registered and insured there. The plaintiff brought an action for compensation for her injuries against her own driver, the driver's insurer, and the plaintiff's father's insurer, the last on the basis of the underinsured motorist coverage in the father's policy. In the same action, the plaintiff also sued the driver and the owner of the Pennsylvania car. The Pennsylvania defendants brought a motion to have the action dismissed against them for want of jurisdiction *simpliciter* or stayed on the basis of *forum non conveniens*.

The court held that, although none of the four presumptive connecting factors in *Club Resorts Ltd v Van Breda*[1] applied to the claims against the out-of-province defendants taken separately, it

[1] *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 [*Van Breda*].

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

was sufficient that the court had jurisdiction over the action taken as a whole on the basis of the presumptive connecting factors of the domicile and residence in Ontario of three of the five defendants (the driver of the plaintiff's car, that driver's insurer, and the plaintiff's father's insurer). To force the plaintiff to divide her action for one set of damages between two jurisdictions would not do justice between the parties.

Note. The methodology of presumptive connecting factors was introduced in 2012 by *Club Resorts Ltd v Van Breda*,[2] which among other things recast the common law on jurisdiction *simpliciter* so as to resemble more closely the approach taken in the uniform *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*), which codifies the law of jurisdiction in three provinces.[3] The court's insertion, into the common law, of the notion of presumptive connecting factors echoed the statute's use of a list of presumed real and substantial connections. It is worth noting, in relation to the *Christmas* case, that the *CJPTA* does include, as having a presumed real and substantial connection with the province, a case that concerns contractual obligations if the contract by its express terms is governed by the law of the province.[4]

The *Khan* case raises an issue left murky by the *Van Breda* case, namely to what extent separate claims against two parties (or, by extension, third party claims) must each stand on its own feet as far as jurisdiction *simpliciter* is concerned. The rules of court of most provinces allow service *ex juris* against a non-resident defendant that is a necessary or property party to an action against a defendant resident in the province.[5] In *Van Breda*, the Supreme Court of Canada, in an *obiter dictum*, seemed to say that the particular defendant's being a necessary or proper party to an action against a resident defendant should not be considered a presumptive connecting factor because it is not a reliable indicator of jurisdiction.[6] On the other hand, in another part of the judgment, the

[2] *Ibid*.

[3] *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 [*CJPTA (BC)*]; *Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 [*CJPTA (SK)*]; *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2d Sess), c 2 [*CJPTA (NS)*]. The acts differ slightly.

[4] Eg, *CJPTA (BC)*, *supra* note 3, s 10(e)(ii).

[5] Eg, Ontario, *Rules of Civil Procedure*, RRO 1990, Reg 194, r 17.02(o).

[6] *Van Breda*, *supra* note 1 at para 55.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

court indicated that if one claim is within the court's jurisdiction, being supported by a presumptive connecting factor, any related claim against the same defendant should be considered also to be within the court's jurisdiction: "[T]he court must assume jurisdiction over all aspects of the case."[7] The latter seems to offer a handhold for arguing that if a court has jurisdiction over a claim against Defendant A, it should also be taken to have jurisdiction over a claim against Defendant B that is sufficiently related to the claim against Defendant A. That seems to have been the court's line of thinking in *Khan*.[8] An Alberta court reached a similar conclusion in *Toews v First Choice Canada Inc.*,[9] an action involving negligence claims against both Canadian and Mexican defendants arising out of an accident at a resort in Mexico.

See also *Trillium Motor World Ltd v General Motors of Canada Ltd*, noted below under Class actions; *Jurisdiction* simpliciter *found to exist*, and *Tamminga v Tamminga*, noted below under *Non-resident defendant — claim for injury to person or damage to property — jurisdiction* simpliciter *found not to exist.*

Non-resident defendant — claim essentially financial — copyright infringement — jurisdiction simpliciter *found to exist — jurisdiction not declined*

Davydiuk v Internet Archive Canada, 2014 FC 944

The plaintiff had sought to remove from the Internet all copies of pornographic films and performances in which he appeared. These had been produced by Intercan, a Quebec company between 2002 and 2003 and were distributed solely on Intercan's websites, which were housed on servers in Canada. He had paid Intercan to remove all of them from its websites in 2009. However, copies of the works had been obtained from Intercan's websites by Internet Archive, a non-profit public benefit corporation in California, for inclusion in the "Wayback Machine," an online archive of some 240 billion web pages, where they could be searched for, and accessed by, Internet users anywhere. Internet Archive accumulated the archive using automatic web crawlers. In this action, the plaintiff sought a Federal Court of Canada order against Internet

[7] *Ibid* at para 99.

[8] Relying on *Cesario v Gondek*, 2012 ONSC 4563, 113 OR (3d) 466.

[9] *Toews v First Choice Canada Inc*, 2014 ABQB 784 (Master).

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

Archive and its Canadian subsidiary to have the copies of the relevant works removed from the online archive, none of which was housed on servers located in Canada. The action was based on copyright infringement, the plaintiff, as part of his settlement with Intercan, having purchased the copyright in the works in question. The defendants contended that the court lacked jurisdiction *simpliciter* to make such an order against Internet Archive or, alternatively, should decline jurisdiction.

The court affirmed the prothonotary's decision that there was jurisdiction. Internet Archive reached into Canada when, through their crawler, they requested web pages from Intercan's website, which was located on servers in Canada. The Canadian public could access the web page on the Wayback Machine and have it transmitted back to Canada. The combination of collecting information in Canada and making it available in Canada amounted to a real and substantial connection with Canada. On *forum non conveniens*, the defendants had not shown that a court in California would be clearly more appropriate for hearing the plaintiff's copyright infringement action.

Note 1. The court in *Davydiuk* did not identify in so many words a presumptive connecting factor, as required by the *Van Breda* decision on jurisdiction *simpliciter*.[10] It relied on Supreme Court of Canada precedent that Canadian copyright law could be applied to any Internet transmission that had a real and substantial connection with Canada and that such a connection could be based, depending on all of the circumstances, either on the place of transmission or the place of reception.[11]

Note 2. A wrongful dismissal action was held within the jurisdiction of a court in Alberta based on the employer's having a place of business there, although the plaintiff had been recruited in Ontario and had worked in China and Indonesia: *Pedwell v SNC-Lavalin Inc*.[12] No other forum was shown to be more appropriate. In another employment contract action, this time brought by the employer against a former employee and third parties, the Alberta

[10] *Van Breda, supra* note 1.

[11] *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427.

[12] *Pedwell v SNC-Lavalin Inc*, 2014 ABQB 309 (Master).

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

court had jurisdiction *simpliciter* over the claims against the third parties, who were resident in Saskatchewan: *1400467 Alberta Ltd v Adderley*.[13] A *forum non conveniens* argument was rejected; it was true that the third parties were not bound by an express attornment clause in the contract, but it was appropriate to hear the claims against them in the same proceeding as the claims against the employee.

In *Harrowand SL v DeWind Turbines Ltd*,[14] a fraudulent conveyance action was brought against a UK corporation and two US corporations, alleging they had sold a wind turbine business to a Korean corporation (also a defendant) to defeat an eventual judgment in an Ontario action in which the plaintiff Ontario corporation sued the first three defendants for breach of contract. The fraudulent conveyance action was held within the Ontario court's jurisdiction. The presumptive connecting factor was that the contract at issue in the breach action was made in Ontario. That contract was essentially the source of the fraudulent conveyance claim because the latter had to do with the defendant's alleged response to the contract litigation.

A breach of contract and related tort claims brought against a BC supplier of a prefabricated log home were held within the Saskatchewan court's jurisdiction in *O'Brien v Lake Country Log Homes 2009 Ltd*.[15] The home had been built in Saskatchewan, and the harm occurred there.

Non-resident defendant — claim essentially financial — jurisdiction simpliciter *found to exist but jurisdiction declined*

Bansal v Ferrara Pan Candy Co., 2014 ABQB 384

The plaintiffs claimed that the defendants had conspired to deprive them of their exclusive right to distribute Ferrara candy products throughout Canada and sought damages of $65 million. The Ferrara company and its principal (the Ferrara defendants) were resident in Illinois. The other defendants, who allegedly sought to supplant the plaintiffs as distributors, were resident in Ontario. The corporate plaintiff, which carried on the distributorship business,

13 *1400467 Alberta Ltd v Adderley*, 2014 ABQB 84 (jurisdiction *simpliciter*), 2014 ABQB 339 (*forum non conveniens*).

14 *Harrowand SL v DeWind Turbines Ltd*, 2014 ONSC 2014 (Master).

15 *O'Brien v Lake Country Log Homes 2009 Ltd*, 2014 SKQB 24.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

was located in Ontario and was not registered as an extra-provincial corporation in Alberta. The individual plaintiff, its principal, was resident in Alberta. All of the defendants argued that the Alberta court lacked jurisdiction *simpliciter* or should decline jurisdiction.

The court held that it had jurisdiction but should decline it. Jurisdiction *simpliciter* could not be based on the fact that the Ferrara defendants had applied to have the plaintiffs' counsel removed from the action because of a conflict. This was not attornment to the jurisdiction because it did not go to the merits of the lawsuit but only to an issue of professional conduct. Jurisdiction, however, was established by the fact that the claim concerned a contract made in Alberta, which was a presumptive connecting factor reflected in the Alberta rules of court.[16] However, the action should be stayed on *forum non conveniens* grounds. Ontario or Illinois would clearly be a more appropriate forum. The contractual relationship commenced outside Alberta and had several times been varied outside Alberta. Only one of the plaintiffs resided in Alberta. A large part of the plaintiffs' claim was civil conspiracy, the alleged acts in relation to which were committed in Ontario or Illinois.

Note. A resident of Ontario, and an Ontario company he controlled, were sued in British Columbia by another Ontario company he had founded for breach of fiduciary and other duties by engaging in a joint venture with a Chinese company. Although the court found a real and substantial connection with British Columbia[17] in business done by the defendants there and some tortiously caused harm arising there, Ontario was clearly a more appropriate forum because the acts relating to the impugned joint venture took place in that province: *Alpha Resource Management Inc. v Brown.*[18] In *Sky Harvest Energy Corp. v Ireland*,[19] BC litigation about an asset purchase agreement was stayed[20] because it would be better to consolidate

[16] *Alberta Rules of Court*, Alta Reg 124/2010, s 11.25(1) and (3)(b). The former says that service *ex juris* requires that a real and substantial connection exist between the province and the facts on which the claim is based. The latter provides that a real and substantial connection is presumed to exist if "the claim relates to a contract or alleged contract made, performed or breached in Alberta."

[17] For the purpose of the *CJPTA (BC)*, *supra* note 3, s 3(e).

[18] *Alpha Resource Management Inc v Brown*, 2014 BCSC 1339.

[19] *Sky Harvest Energy Corp v Ireland*, 2014 BCSC 472.

[20] Under the *CJPTA (BC)*, *supra* note 3, s 11.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

that dispute with a wrongful dismissal suit in Manitoba, to which it was closely related. Similarly, a Manitoba share ownership lawsuit between spouses was stayed in favour of the court in the Northwest Territories where the parties' divorce proceedings were taking place: *Nielsen v Nielsen*.[21] And an Ontario action concerning stock options was stayed in favour of letting the defendant sue in British Columbia or Nevada, where other litigation involving the parties was underway: *Solloway v Klondex Mines Ltd*.[22]

Non-resident defendant — claim essentially financial — jurisdiction simpliciter *found not to exist*

West Van Inc v Daisley, 2014 ONCA 232, 119 OR (3d) 481[23]

In an action in North Carolina, West Van was held liable for wrongfully discharging a lien registered against an aircraft and was ordered to pay damages of more than $500,000. West Van, whose only offices were in Ontario, now sued its North Carolina lawyers for negligent conduct of the defence and missing the deadline for filing an appeal. The lawyers obtained an order at first instance staying the action on the ground of lack of jurisdiction *simpliciter*. On appeal, West Van conceded that its claim had no real and substantial connection with Ontario but argued that the first instance court should have taken jurisdiction based on forum of necessity because West Van could not obtain counsel in North Carolina.

The Court of Appeal noted that in the only case in which it had favoured, *obiter*, the doctrine of forum of necessity, it had said that there must be no other forum where the plaintiff can reasonably be expected to seek relief.[24] The requirements of the doctrine must be stringently applied. A case of this kind — a private commercial dispute where the plaintiff was unable to obtain counsel — was unlikely ever to be exceptional enough to trigger the doctrine. In any event, West Van had not shown that it had in fact exhausted all reasonable options for obtaining counsel for a North Carolina action.

[21] *Nielsen v Nielsen*, 2014 MBQB 110.

[22] *Solloway v Klondex Mines Ltd*, 2014 ONSC 391, aff'd 2014 ONCA 672.

[23] Leave to appeal to SCC refused, 35906 (4 September 2014).

[24] *Van Breda v Village Resorts Ltd*, 2010 ONCA 84, 98 OR (3d) 721, aff'd *Van Breda*, *supra* note 1.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

Note. Jurisdiction *simpliciter* was also absent in *Microcoal Inc. v Livneh*,[25] in which a dispute about the defendants' dealings with a Delaware company that did business in Colorado was held to have no real and substantial connection with British Columbia, where the plaintiff, the parent of the Delaware company, was based. The decision was based partly on the tenuous nature of the plaintiff's claims and partly on the failure to plead jurisdictional facts. In *Manson v Canetic Resources Ltd*,[26] there was no presumptive connecting factor to connect with Ontario an action by an Ontario-resident lessor against the Alberta-resident lessee under a petroleum and natural gas lease on land in Alberta. See also *Christmas v Fort McKay First Nation*, noted above under *Jurisdiction* simpliciter — *general principles — presumptive connecting factors.*

Non-resident defendant — claim for injury to person or damage to property — jurisdiction simpliciter *found not to exist*

Tamminga v Tamminga, 2014 ONCA 478, 375 DLR (4th) 190

The plaintiff, a resident of Ontario, was injured in a motor vehicle accident in Alberta; she was a passenger in a truck driven by her relative. She sued him, the co-owner of the truck, as well as her own Ontario insurer under the under-insured motorist coverage in her policy. The Court of Appeal upheld the motion judge's decision that the case had no presumptive connecting factor with Ontario. The primary defendants were not resident there, the tort was not committed there, and no relevant contract was made there. The only Ontario element in the plaintiff's case was her own insurance contract, but it was unconnected to the claims against the Alberta defendants; it became relevant only in the aftermath of the tort.[27]

Gulevich v Miller, 2014 ABQB 377, 57 CPC (7th) 116

A medical malpractice claim was brought in Alberta when the medical services were provided in Ontario. The patient lived in Ontario at the time but shortly afterwards moved to Alberta.

[25] *Microcoal Inc v Livneh*, 2014 BCSC 787.

[26] *Manson v Canetic Resources Ltd*, 2014 ONSC 261.

[27] The court distinguished *Cesario v Gondek, supra* note 8, on the basis that the real and substantial connection found in that case was the joint liability, for the same damage, of an out-of-province defendant with the in-province defendant.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

The defendant physician argued that the court lacked jurisdiction and that service *ex juris* of the statement of claim should be set aside. The court reluctantly held that the court lacked jurisdiction *simpliciter*, since there was no connection with Alberta other than the fact that the plaintiff suffered damage in the province after she became resident there. It was clear from the *Van Breda* case[28] that this was not a presumptive connecting factor, and earlier cases in which such actions had been found to be within a court's jurisdiction[29] had been implicitly overruled. The Alberta court regretted the result in this case because Alberta was, in the judge's view, *forum conveniens*. The burden on the physician to defend the action in Alberta was much lighter than the burden on the plaintiff of having to sue in Ontario. However, without jurisdiction *simpliciter*, the issue of *forum conveniens* did not arise.

Non-resident defendant — claim for injury to person or damage to property — jurisdiction simpliciter *found to exist — jurisdiction not declined*

Central Sun Mining Inc. v Vector Engineering Inc., 2014 ONSC 1849

The Toronto-based owner of a mine in Costa Rica sued several out-of-province defendants in negligence, negligent misrepresentation, and breach of contract in connection with engineering, design, and construction errors that were said to have led to a landslide at the mine. In an earlier proceeding, the Court of Appeal held the courts of Ontario had jurisdiction *simpliciter*[30] but remitted the issue of *forum non conveniens* to the Superior Court. This court held that neither of the two suggested alternative forums, Costa Rica or Colorado, was clearly more appropriate than Ontario. The court held that it was not enough just to point to the connections that the facts and the parties had to those forums. The defendants had to adduce evidence of the characteristics of the courts there so as to enable the Ontario court to conclude that those courts would be in a better position to dispose fairly and efficiently of the litigation.

[28] *Van Breda*, *supra* note 1.

[29] E.g. *Oakley v Barry* (1998), 158 DLR (4th) 679 (NSCA).

[30] *Central Sun Mining Inc v Vector Engineering Inc*, 2013 ONCA 601, 117 OR (3d) 313, leave to appeal to SCC refused, 35640 (13 March 2014).

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

Declining jurisdiction *in personam*

Forum selection clause

Yara Belle Plaine Inc. v Ingersoll-Rand Co., 2014 SKQB 254

The court applied the "strong cause" exception that enables a court to take jurisdiction, notwithstanding an exclusive forum selection clause, if there are compelling reasons for hearing the case.[31] The clause, properly construed, did not apply to the plaintiff's principal claim, and only one of four defendants was a party to the clause. The claims that were not subject to the clause were so interrelated with the claims that were subject to it that it would not be sensible to make the plaintiff divide its claims between Saskatchewan and Alberta, the jurisdiction designated by the clause.

Arbitration clause — whether discretion to take jurisdiction

Note. In *Comtois International Export Inc. v Livestock Express BV*,[32] a prothonotary's decision that a cargo owner's action against a carrier could proceed notwithstanding an arbitration agreement was reversed on the ground that the federal *Commercial Arbitration Act*[33] leaves a court no such discretion.

Resident defendant — forum non conveniens *application — attornment to the court's jurisdiction*

Wang v Sun, 2014 BCSC 87

The plaintiff, a resident of China, sued the defendant, resident in British Columbia, for failing to pay a commission to the plaintiff on the defendant's sale of certain land in China. The court had jurisdiction *simpliciter* because the defendant was ordinarily resident in the province,[34] but the defendant applied to have the court decline jurisdiction on the basis that a court in China was clearly a more appropriate forum. The plaintiff contended that the defendant could not make such an application after having attorned to the British Columbia court's jurisdiction. The defendant had

[31] The "strong cause" test was last reaffirmed in *ZI Pompey Industrie v ECU-Line NV*, 2013 SCC 27, [2003] 1 SCR 450.

[32] *Comtois International Export Inc v Livestock Express BV*, 2014 FC 475.

[33] *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp), sched 1, art 8.

[34] *CJPTA (BC)*, *supra* note 3, s 3(d).

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

applied to set aside a garnishing order obtained by the plaintiff against certain assets in the province.

The court held that there was no attornment because it was not the defendant but, rather, the plaintiff that had invoked the court's jurisdiction in the garnishing order matter, and the defendant's application was strictly limited to seeking to have the order, which seized significant assets belonging to the defendant, set aside. The defendant had not asked the court to decide anything to do with the merits of the plaintiff's claim. Although the *forum non conveniens* application was therefore proper, it was dismissed because the defendant had not shown that China would be a clearly more appropriate forum.

Lis alibi pendens — *jurisdiction declined*

Colonial Countertops Ltd v Maple Terrazzo Marble & Tile Inc., 2014 BCSC 752

Colonial, the plaintiff, made and installed stone countertops for BC residents who bought this service from a home renovation and building supply company, Home Depot. Colonial's contract was not with Home Depot but, rather, with Maple, an Ontario company that had the exclusive right to supply and install countertops for Home Depot in Ontario and western Canada. Maple's relationship with Home Depot was terminated, and Maple gave notice of the termination of its contract with Colonial. On 1 August 2012, Maple sued Colonial in Ontario, claiming money owing for granite products that Colonial had bought from Maple. Five weeks later, Colonial brought a breach of contract action against Maple in British Columbia. Maple now applied to have the latter action dismissed for lack of jurisdiction *simpliciter* or stayed on grounds of *forum non conveniens.*

The court held it had territorial competence because the claim concerned contractual obligations that were substantially to be performed in the province.[35] However, it declined jurisdiction in favour of the Ontario action, which was much further advanced. Colonial's participating in that proceeding without making any challenge to the court's jurisdiction indicated that the Ontario court was an appropriate forum. An additional factor was that part

[35] A presumed real and substantial connection under *CJPTA (BC)*, *supra* note 3, s 10(e)(i).

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

of Colonial's claim in British Columbia was an injunction to have Marble remove supplies of granite from Colonial's premises, an order that could not be registered in Ontario.[36]

Note. In *Moneris Solutions Corp. v Groupe Germain Inc.*,[37] an Ontario court refused to stay an Ontario proceeding altogether in favour of a Quebec proceeding between the same parties because the Quebec litigation, as currently framed, would decide liability but not assess contractual penalties and damages as claimed in the Ontario action. However, a temporary stay was ordered because the Ontario court should wait to see exactly what scope the Quebec proceeding would take and, if appropriate, should let the Quebec proceeding decide the liability issues before the Ontario court addressed the penalties and damages.

Class actions

Jurisdiction simpliciter *found to exist in respect of the class action claim*

Trillium Motor World Ltd v General Motors of Canada Ltd, 2014 ONCA 497, 374 DLR (4th) 411[38]

This class action was brought against General Motors (GM) on behalf of a large number of its dealers, who, as part of GM's restructuring in the post-2008 financial crisis, had entered into wind-down agreements with GM relating to the termination of their dealerships. The dealers were located in various provinces, but all of the agreements were substantially identical, were expressly governed by Ontario law, and included an attornment to the jurisdiction of the Ontario courts in case of any dispute. The plaintiffs' claims against GM were based on contraventions of Ontario franchise legislation, the protection of which had purportedly been waived in each agreement. The action was also brought against the Ontario law firm that had represented GM. In turn, it brought third party claims against 150 law firms across the country, eighty-three of which were outside Ontario. These law firms had been consulted

[36] Under the *Reciprocal Enforcement of Judgments Act*, RSO 1990, c R.5, which is confined to money judgments. The enforceability of an eventual judgment is a factor in *forum non conveniens* analysis under *CJPTA (BC), supra* note 3, s 11(2)(e).

[37] *Moneris Solutions Corp v Groupe Germain Inc*, 2014 ONSC 6102.

[38] Leave to appeal to SCC granted, 36087 (16 April 2015).

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

by individual dealers, which were required to certify that they had obtained independent legal advice. A number of Quebec law firms argued that the Ontario court lacked jurisdiction *simpliciter* over the claims against them because their legal advice had been given in Quebec to Quebec clients.

The Court of Appeal upheld the motion judge's conclusion that the Ontario court had jurisdiction *simpliciter* over the Ontario law firm's third party claims against the Quebec law firms. The court relied on a modified version of the "fourth PCF [presumptive connecting factor]" approved by the Supreme Court of Canada for use in relation to tort claims,[39] namely that a contract connected with the dispute was made in the province. It was right to have regard to the wind-down agreements as a prominent part of the origin of the third party claims, even if the immediate basis of the claims was the relationship between the third parties and their clients rather than the wind-down agreement between their clients and GM. The wind-down agreements were technically all concluded in Ontario, thus satisfying the letter of the fourth PCF, but the court preferred to say that they were "Ontario contracts" because they included choice-of-law and attornment clauses in favour of Ontario. This was seen as a more substantial connection with the province than the rather arbitrarily determined place of contracting.

The court also upheld the decision that Ontario was the *forum conveniens* for the action. The third party claims would be triggered if GM's law firm was held liable to the dealers on grounds that implicated the advice the dealers had received from the local lawyers. There was no reasonable basis for requiring the third party claims to be decided in proceedings separate from the main claim.

Kaynes v BP plc, 2014 ONCA 580, 375 DLR (4th) 415

The plaintiff sought to bring a class action in Ontario on behalf of the purchasers of certain of British Petroleum's (BP) securities on the secondary market, claiming BP was liable under the Ontario *Securities Act* for misrepresentations concerning its business. The relevant provision attaches civil liability to a "reporting issuer" or "any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded."[40] The proposed plaintiff

[39] *Van Breda*, *supra* note 1.

[40] *Securities Act*, RSO 1990, c S.5, s 138.1.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

class included all Canadian residents who had purchased the relevant BP securities, irrespective of the exchange on which they had been acquired. BP argued it did not carry on business in Ontario, and the only possible presumptive connecting factor to support jurisdiction *simpliciter* over the claims was if a tort had been committed in Ontario. Even if a claim under the securities legislation was considered a tort, BP argued, the tort would be committed in Ontario only if the shares were purchased on the Toronto Stock Exchange. BP conceded the court had jurisdiction in respect of those purchasers, but it sought to have excluded from the class all purchasers who had acquired the shares on exchanges in New York or London.

The Court of Appeal agreed with the motion judge[41] that the court had jurisdiction *simpliciter* over the claims of Ontario residents who had purchased on an exchange in New York or London. The plaintiffs' case was that the defendant, by issuing false statements to investors, committed in Ontario a statutory wrong. That wrong was analogous to a tort. It was immaterial that the statements were issued outside Ontario because they were contained in documents that the company was legally obliged to provide to Ontario shareholders, and so the company's act was one that had a direct and immediate connection with Ontario.

However, notwithstanding that there was jurisdiction *simpliciter*, the court held that the motion judge should have excluded from the class those who had bought their shares on exchanges in New York or London. Both the United States and the United Kingdom asserted jurisdiction over secondary market misrepresentation claims based on the exchange where the securities were traded. These countries' laws reflected an international norm or practice relating to jurisdiction, and it would be against comity for an Ontario court to assert jurisdiction if the shares were bought on exchanges located there. It was imperative to maintain an orderly and predictable regime for the allocation of claims among the countries whose securities laws were being invoked.

Turner v Bell Mobility Inc., 2014 ABQB 36

This was a class action brought on behalf of Alberta residents who had been charged access fees by mobile telephone companies. All of the defendant providers had business operations in Alberta

[41] Whose decision is noted (2013) 51 Can YB Intl L 590.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

except SaskTel, which operated only in Saskatchewan, but it did have a small proportion of its customers with billing addresses in Alberta. Its application to have the claims against it dismissed for lack of jurisdiction *simpliciter* failed. To the extent that the claims by its Alberta customers were contractual, the court had jurisdiction based on the presumptive connecting factor that the claim related to contracts performed or breached in Alberta. This presumptive connecting factor was contained in the service *ex juris* rules of the rules of court.[42] To the extent that the claims were extra-contractual ones based on unjust enrichment, the presumptive connecting factor was that the SaskTel customers' claims were essentially similar to those of the customers of the other providers and were governed by Alberta law, even if the contracts with SaskTel were governed by Saskatchewan law.[43]

Jurisdiction simpliciter *found not to exist in respect of the class action claim*

Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP, 2014 ONSC 4118, 31 BLR (5th) 46

Although the defendant was an accounting firm resident in Ontario, the court refused to certify a global class in an action against the firm for negligently valuing an American company that was to carry out a business venture in China. All but one of the fifty-seven investors in the plaintiff class were US residents. All of the investors' claims were based on a private placement memorandum provided by the US promoters to the accredited investors, which included an audit report prepared by the defendant. These transactions were entirely connected with the United States and were governed by US securities law. The defendant's residence in Ontario was not a real and substantial connection for the purpose of supporting a global class action. The court also noted that, perhaps with a few exceptions, the class members did not need a class action

[42] *Alberta Rules of Court*, Alta Reg 124/2010, s 11.25(1) and (3)(b). See note 16 in this digest.

[43] In a subsequent proceeding, *Turner v Bell Mobility Inc*, 2015 ABQB 169, the Alberta court granted an interim stay to give individual plaintiffs an opportunity to opt into a parallel Saskatchewan class action and thus not be part of the class in the Alberta action. Jurisdiction issues in the Saskatchewan action were decided in *Microcell Communications Inc v Frey*, 2011 SKCA 136, 377 Sask R 156, noted (2011) 49 Can YB Intl L 569.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

to obtain access to justice. As accredited investors, they were not without resources to bring individual actions, which they could do in Ontario, subject to a possible *forum non conveniens* argument by the defendant.

Matrimonial causes

Divorce and related support, custody, and property claims — lis alibi pendens — *coordination of jurisdictional decisions of both courts*

L. (S.R.) v T. (K.J.), 2014 BCSC 597

The husband and wife were members of different First Nations in the United States. They lived in Minnesota for the first twelve years of their marriage. In 2009, they moved to Vancouver, where the wife had obtained a position as a university professor. Their two children were adopted from China. In 2013, the wife commenced a proceeding for divorce and ancillary and related relief in British Columbia. The husband, a month later, filed a divorce proceeding in a Tribal Court in Minnesota. The wife sought an injunction in United States District Court in Minnesota to prevent the Tribal Court from dealing with the divorce. The District Court denied the application and declined to make further rulings until the jurisdictional issue between the BC court and the Tribal Court was resolved. The Tribal Court judge had already held, in response to a jurisdictional challenge by the wife, that his court had jurisdiction over the parties under the Tribal Domestic Relations Code.

The husband now sought a stay of the BC proceedings on the basis of lack of jurisdiction and *forum non conveniens*. The court held that jurisdiction *simpliciter* existed. It was assessed separately for the divorce proceeding,[44] applications for child and spousal support,[45]

[44] Based on the wife's ordinary residence in British Columbia for a year preceding commencement of the proceeding (for divorce) and at the commencement of the proceeding (for corollary relief in respect of support and custody): *Divorce Act*, RSC 1985, c 3 (2nd Supp), ss 3 (divorce) and 4(1) (support and custody).

[45] So far as these claims were not corollary to the divorce but made independently, they rested on the *Family Law Act*, SBC 2011, c 25, Part 7. It has no specific jurisdictional test for support claims, which means that territorial competence is determined under the *CJPTA (BC)*, *supra* note 3. That act, if the defendant is a non-resident and does not attorn to the jurisdiction, requires a real and substantial connection between British Columbia and the facts on which the proceeding is based (s 3(e)).

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

guardianship of the children,[46] division of family property, and allocation of family debt.[47]

On *forum conveniens*, it was not evident that one jurisdiction was clearly the better forum to hear all matters. The judge of the Tribal Court had expressed the initial view that his court would be reluctant to engage in any process relating to the custody of the children and that it might well be that many, or even all, other issues between the parties should not be decided by the Tribal Court. The BC judge agreed with the Tribal Court judge that this was a case in which it would be appropriate for the two forums to engage in efforts to seek an orderly way forward. The parties should set a joint hearing, at which the judges of both the Tribal Court and the British Columbia Supreme Court would preside through a video link to address which of the two forums was better suited to resolve some or all of the parties' issues.

Support claims

Note. See *Lamothe v Lamothe*,[48] in which a Nova Scotia court was held to lack jurisdiction *simpliciter* over support and property claims by a Nova Scotia resident wife against an Ontario resident husband. The matrimonial home had been in Ontario for many years, and the wife's claims were held to lack a real and substantial connection with Nova Scotia.[49]

Matrimonial property

Knowles v Lindstrom, 2014 ONCA 116, 371 DLR (4th) 324[50]

The parties, who were not married, lived together in Florida from 2002 until they separated in 2012. For the last five years of that time, they divided their time between Florida and Ontario.

[46] The *Family Law Act*, *supra* note 45, gives jurisdiction to make an order respecting guardianship or parenting arrangements if the child is habitually resident in the province when the application is filed (s 74(2)(a)).

[47] Under the *Family Law Act*, *supra* note 45, jurisdiction over property division depends on either spouse being habitually resident in the province when the action commences (s 106(2)(c)).

[48] *Lamothe v Lamothe*, 2014 NSSC 137.

[49] For the purpose of the *CJPTA (NS)*, *supra* note 3. The wife could, if she wished, seek a provisional support order under the *Interjurisdictional Support Orders Act*, SNS 2002, c 9, but the claims as presented had to be brought in Ontario.

[50] Leave to appeal to SCC refused, 35828 (14 April 2014).

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

After the separation, the woman moved her principal residence to Ontario. In this action, she sought support and an interest in two properties the man owned in Ontario, claiming they were subject to a constructive trust in her favour because of her contribution to the properties. The man argued the court lacked jurisdiction *simpliciter* or should decline it on *forum non conveniens* grounds. He also claimed that if the Ontario court exercised jurisdiction it should apply Florida law to the wife's claims. Under Florida law, she had no claim to support, but, under Ontario law, she did.

The Court of Appeal affirmed the motion judge's decision that the court had jurisdiction *simpliciter*, that it should not decline jurisdiction in favour of a court in Florida, and that Ontario law applied to the woman's claims. On jurisdiction *simpliciter*, the necessary presumptive connecting factor was supplied by the fact that the woman's property claim related to property in Ontario. It was immaterial for this purpose that the man had sold the two properties and the only remedy was therefore a monetary one. The man had not rebutted the presumption of jurisdiction.

On the *forum non conveniens* issue, the court held the judge made no error in finding that the man had not shown that Florida was clearly a more appropriate forum. One factor relevant to this question was that the woman would have suffered a loss of juridical advantage if Ontario declined jurisdiction. Nor had the man shown that Ontario law should not be applied to the woman's claims. The property-related claim was clearly more closely connected to Ontario than to any other jurisdiction. There was also no compelling reason to apply another law to her support claim, given that the parties, as the judge had found, were ordinarily resident in Ontario as well as in Florida for the last five years of their relationship. The connection between the support and property claims reinforced the case for applying the same law to both.

Note. An Ontario court, in *Cork v Cork*,[51] stayed a proceeding for division of matrimonial property pending the decision of a Quebec court on ownership of a cottage in that province that formed part of the matrimonial assets. Conversely, in *Mendez v Demos*,[52] a BC court took jurisdiction to decide on division of real property in the province but stayed the rest of the wife's matrimonial property

[51] *Cork v Cork*, 2014 ONSC 3488.

[52] *Mendez v Demos*, 2014 BCSC 2047.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

proceeding until the courts in Mexico, where the parties' home had been, dealt with the property and support claims between the parties.

Infants and children

Custody — parallel custody application in foreign divorce proceeding

Murray v Ceruti, 2014 ONCA 679, 50 RFL (7th) 298[53]

The child in this case was born in Ontario after the mother had, in a four-month period, moved to Indiana, married the father, separated from him, and moved back to Ontario. After the separation, the father had applied in Indiana for divorce and other relief and subsequently applied for custody. In the meantime, the mother had obtained an order for temporary custody in Ontario and commenced a proceeding for permanent custody. The father now applied to stay the Ontario proceeding.

The Court of Appeal held that the motion judge had not erred in refusing a stay. The judge had held that the child, now ten months old, was not habitually resident in Ontario for the purposes of jurisdiction in custody,[54] but the court nevertheless had jurisdiction based on the child's presence in Ontario, her residence in and substantial connection with Ontario, and the fact that substantial evidence concerning her best interests was available in Ontario.[55] The mother was not forum shopping. The parallel proceeding in Indiana was unfortunate but did not require the Ontario court to decline jurisdiction in favour of the foreign court. It was true that the Indiana court had made an order granting the father co-equal parenting rights, but since that order was made before the child was born the Ontario court was not obliged to enforce it.[56]

[53] Leave to appeal to SCC refused, 36193 (12 March 2015).

[54] *Children's Law Reform Act*, RSO 1990, c C-12, s 22(2) says that a child is habitually resident in the place where he or she resided with both parents; or, if the parents are separated, with one parent under a separation agreement or with the other parent's consent; or with a person other than a parent on a permanent basis, whichever last occurred. None of these conditions was met in this case.

[55] These are the principal conditions under *ibid*, s 22(1)(b).

[56] The conditions for recognizing an extra-provincial custody order are in *ibid*, s 41(1).

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

Child support — non-resident respondent — jurisdiction — whether applicant obliged to apply under interjurisdictional support orders legislation

Note. It was held in *Navarro v Parrish*[57] that the Ontario courts had jurisdiction to award child custody against a non-resident respondent based on the presumptive connecting factor of the child's ordinary residence in the province. The *Interjurisdictional Support Orders Act*[58] only provides an alternative procedure, and does not bar an applicant from seeking support under the *Family Law Act*,[59] if the court has jurisdiction to hear the claim.

Child support — effect of refusal to return child to jurisdiction — conflicting custody decisions in two jurisdictions

Hughes v Hughes, 2014 BCCA 196, 376 DLR (4th) 197[60]

The father and mother were divorced in British Columbia. The court made a corollary order awarding the father custody of the child. The mother, who lived with the child in Italy, participated by telephone. The mother refused to return the child to British Columbia and successfully defended the father's application in the Italian courts for return of the child under the Hague Convention.[61] The Italian court held that the mother had wrongfully removed the child from British Columbia but that the return of the child should nevertheless not be ordered because the child's return would expose her to a grave risk of physical or psychological harm or otherwise place her in an intolerable situation. Two years later, the mother obtained an order from the Italian court for custody of the child.

The question in the present proceeding was whether the father was entitled to rescission of the BC court's order, made in the divorce proceedings, that he pay the mother child support. The chambers judge held that he was and cancelled arrears of support under that order as well. The Court of Appeal, by a majority, affirmed this decision. The mother's refusal to return the child

57 *Navarro v Parrish*, 2014 ONCA 856, 52 RFL (7th) 76.

58 *Interjurisdictional Support Orders Act*, SO 2002, c 13.

59 *Family Law Act*, RSO 1990, c F.3, Part III.

60 Leave to appeal to SCC refused, 36020 (11 December 2014).

61 *Hague Convention on the Civil Aspects of Child Abduction*, 25 October 1980 (entered into force 1 December 1983) [Hague Convention].

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

was a material change of circumstances since the order was made. The order for support was a transitional one pending the return of the child to the father. The mother's conduct had thwarted the father's ability to support the child in the manner contemplated by the BC court when it made the original order. The mother, having chosen to pursue her claim for custody in Italy after wrongfully removing the child from British Columbia, must now look to the Italian courts for any attendant order for child support. The dissenting judge held that the mother's conduct was not a material change in circumstances. The Italian proceedings under the Hague Convention were in progress at the time the judge made the original child support order, and the judge made the order knowing that there was no assurance at the time that the mother would ultimately return the child.

Note. Another case in which a father and mother obtained conflicting orders from the courts of their respective countries was *Nowacki v Nowacki*.[62] The mother had persuaded the Polish court not to enforce an Ontario court's Hague Convention order for return of the child from Poland. The question in the present proceeding, which was not finally resolved, was whether the mother was entitled, if she purged her contempt of the Ontario order, to have a Canadian divorce order set aside in order to enable her to seek a divorce and a final order for custody in Poland.[63]

Québec

Règles générales de compétence juridictionnelle

Forum non conveniens — *article 3135* CcQ[64]

Stanford International Bank Ltd (Liquidation de), 2014 QCCS 204

Les demandeurs sont les liquidateurs conjoints de Stanford International Bank (SIB) nommés par la Cour d'Antigua et recherchant des dommages au nom de la SIB et de ses créanciers. La SIB est une banque étrangère opérant à Antigua qui a eu une relation d'affaires avec la Banque TD (TD) pendant plus de 20 ans pour

[62] *Nowacki v Nowacki*, 2014 ONSC 2052.

[63] The Canadian divorce was ultimately not set aside: *Nowacki v Nowacki*, 2015 ONSC 973.

[64] *Code civil du Québec*, LQ 1991, ch 64 [*CcQ*].

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

services de correspondance bancaire, services de financement commerciaux, et services de gestion de portefeuilles et d'investissements. Les demandeurs reprochent à TD d'avoir su — ou qu'elle aurait dû savoir — que Robert Allen Stanford et certains autres conspirateurs orchestraient une fraude importante aux dépens de la SIB. Cette connaissance — réelle ou présumée — de TD découlerait spécifiquement des services fournis à la SIB, d'où la réclamation de 20 millions $. La défenderesse TD reconnaît que la Cour supérieure du Québec a compétence, mais elle invoque la théorie du "*forum non conveniens*" pour demander la suspension du dossier ou son rejet.

La Cour décide d'accueillir la requête de la défenderesse, de décliner la juridiction et de transférer le dossier en Ontario. Plus de 70% des créanciers canadiens de la SIB résident hors du Québec. Les témoins proviennent ailleurs que du Québec. S'il s'agit d'une faute contractuelle, le for le plus approprié serait celui de l'Ontario puisque les contrats entre TD et SIB ont été signés en Ontario, à Houston ou Antigua, y précisant que la loi applicable serait celle de l'Ontario. S'il s'agit d'une faute extracontractuelle, le juge du fond aura à déterminer à quels endroits les fautes ont été commises, à quels endroits le dommage a été subi, et la loi applicable. Ce facteur milite en faveur d'un transfert en Ontario. Diverses autres procédures entamées — tant en Alberta qu'en Ontario à la suite de l'effondrement de la SIB en 2009 — tendent à démontrer que l'Ontario est un for nettement plus approprié que le Québec pour entendre la demande des liquidateurs. La défenderesse a démontré la grande similitude entre le recours ontarien et le recours québécois entrepris par les liquidateurs. Le dossier en Ontario a le plus progressé. Les liquidateurs reconnaissent que s'ils n'ont pas gain de cause sur le fond de la requête introductive d'instance dans le présent dossier, ils continueront le recours émis la même journée en Ontario, ce qui indique que, pour la bonne administration de la justice, l'Ontario soit le for le plus approprié puisque les recours pourraient être réunis, à la discrétion du tribunal ontarien.

Le Tribunal conclut que la présente affaire évoque l'idée de rareté, de cas inhabituel, de circonstances spéciales, de situation hors de l'ordinaire, comme le requiert l'article 3135 *CcQ*.[65]

[65] Art 3135 *CcQ:* "[U]ne autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette compétence."

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

Actions personnelles à caractère extrapatrimonial et familial

Enfants — garde — domicile de l'enfant

Droit de la famille — 143017, 2014 QCCA 2188

La mère quitte le Québec en 2007 pour aller travailler en Colombie-Britannique et s'y établit de façon permanente. En 2010 elle commence à vivre avec le père. Leur enfant est né en 2011. À l'automne 2012, en raison de violence conjugale dont elle se dit victime, elle quitte le domicile familial avec l'enfant et retourne vivre au Québec. Elle y engage une procédure en vue d'obtenir la garde de l'enfant. Le père présente une exception déclinatoire et demande à la Cour supérieure de décliner compétence en faveur des tribunaux de la Colombie-Britannique. Il plaide que le déplacement de l'enfant, qui a été fait à son insu et sans son consentement, ne peut servir d'assise légale à un changement de domicile. La Cour supérieure rejette ce moyen d'exception déclinatoire.

La Cour d'appel accueille l'appel ainsi que l'exception déclinatoire du père. Selon l'article 3142 *CcQ*, les autorités québécoises sont compétentes pour statuer sur la garde d'un enfant pourvu que l'enfant soit domicilié au Québec. Selon l'article 80 *CcQ*, lorsque les père et mère exercent la tutelle mais n'ont pas de domicile commun, le mineur est présumé domicilié chez celui de ses parents avec lequel il réside habituellement. Il est bien établi que la "résidence habituelle" de l'enfant ne peut être modifiée au gré d'un parent, sans l'autorisation de l'autre parent gardien. Dans un contexte de séparation récente qui implique un déplacement, le lieu de résidence habituelle de l'enfant demeure celui qui était le sien avant son déplacement. Accepter que le domicile d'un enfant puisse être modifié au gré d'un parent à l'insu de l'autre, équivaudrait à reconnaître que le parent qui agit de façon unilatérale peut se prévaloir de sa propre faute au préjudice de l'enfant qui se voit ainsi privé de la présence de l'un de ses parents. Une telle proposition est irrecevable.

L'enfant est né en Colombie-Britannique et y résidait de façon habituelle au moment de la séparation. Le père y a d'ailleurs engagé une procédure en vue de faire statuer sur la garde de l'enfant avant son déplacement vers le Québec. Le fait que la mère se soit déplacée au Québec parce qu'elle craignait pour sa sécurité et celle de l'enfant n'a pas modifié le domicile de ce dernier.

Le juge de première instance ne pouvait pas s'appuyer sur l'article 3140 *CcQ* pour accorder au Québec un statut de for de convenance. L'article 3140, qui permet aux autorités québécoises de "prendre les

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

mesures qu'elles estiment nécessaires à la protection d'une personne qui se trouve au Québec," revêt un caractère exceptionnel et ne peut trouver application que dans les situations d'urgence ou celles présentant des inconvénients sérieux qui compromettent la santé physique ou psychologique d'une personne se trouvant au Québec.

L'article 3136 *CcQ* ne s'applique pas non plus. Cet article dispose qu'une autorité québécoise qui n'est pas compétente pour connaître d'un litige peut, si une action à l'étranger se révèle impossible ou, si on ne peut exiger qu'une telle action y soit introduite, entendre le litige. Il est acquis qu'une audition en Colombie-Britannique respectera les règles de justice fondamentale. Par ailleurs, s'il est vrai que la mère devra encourir des inconvénients et frais importants pour faire valoir ses droits devant le tribunal compétent de Colombie-Britannique, il s'agit là d'une conséquence du déplacement qui s'avère illicite.

Enfants — garde — domicile de l'enfant — pension alimentaire

Droit de la famille — 14994, 2014 QCCS 1893

La demanderesse, la mère, est de nationalité française. Elle est venue au Québec en 2001 afin d'entreprendre des études universitaires. Elle est devenue enceinte et a abandonné ses études en mai 2005 en raison de sa grossesse. Elle est retournée en France et l'enfant, X, est née à Rouen en 2005. La demanderesse est revenue au Québec en 2011 afin de "faire reconnaître sa fille." Elle a le statut de résidente temporaire au Canada, ce qui lui interdit d'y exercer un emploi et de fréquenter un établissement d'enseignement ou de suivre un cours théorique ou personnel. Le défendeur a été déclaré père de l'enfant par jugement de la Cour supérieure en août 2012. Dans la présente procédure la mère demande que lui soit confiée la garde de son enfant et réclame une pension alimentaire au bénéfice de l'enfant.

La Cour soulève d'office la question de la compétence de la Cour supérieure du Québec pour connaître du litige, parce qu'il s'agit d'une question de compétence *ratione materiae*. La Cour décide qu'elle n'a pas compétence. L'article 3142 *CcQ* délimite la compétence des autorités québécoises en matière de garde. L'enfant doit être domicilié au Québec. Selon l'article 80 *CcQ*, lorsque les père et mère exercent la tutelle, mais n'ont pas de domicile commun, le mineur est présumé domicilié chez celui des ses parents avec lequel il réside habituellement. X réside avec sa mère depuis sa naissance, et a son domicile là où sa mère a le sien.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

L'article 76 *CcQ* exige deux conditions pour qu'il y ait changement de domicile: l'établissement de sa résidence dans un autre lieu, et l'intention d'en faire son principal établissement. La preuve démontre que la mère a le désir de maintenir pour l'instant le lieu de son principal établissement en France, même si elle n'y a actuellement pas de résidence. La Cour supérieure du Québec n'a en conséquence pas compétence pour statuer sur la garde de X. Que le père ne conteste pas la demande de garde de la mère ne change rien. La compétence *ratione materiae* d'un tribunal est une question d'ordre public et toute décision d'un tribunal dans un litige à l'égard duquel il n'a pas compétence est nulle.

La procureure de la mère soulève l'article 3136 *CcQ*,[66] mais selon cet article il doit être démontré que l'introduction d'un recours devant l'autorité compétente se révèle impossible ou qu'il ne peut être raisonnablement exigé qu'il soit introduit devant cette dernière. Cette démonstration n'a pas été faite dans le présent cas.

La compétence internationale des autorités québécoises en matière d'aliments est délimitée à l'article 3143 *CcQ*: "Les autorités québécoises sont compétentes pour statuer sur une action en matière d'aliments ou sur la demande de révision d'un jugement étranger rendu en matière d'aliments qui peut être reconnu au Québec lorsque l'une des parties a son domicile ou sa résidence au Québec." Considérant que le père est domicilié au Québec et que la mère et X y ont actuellement leur résidence habituelle, la compétence de la Cour supérieure du Québec pour statuer sur la demande d'aliments de la mère au bénéfice de X ne soulève aucun doute. La Cour fixe donc la pension alimentaire et ordonne le paiement de celle-ci.

Actions personnelles à caractère patrimonial

Compétence — faute commise au Québec — article 3148, alinéa 3 CcQ

SNC-Lavalin inc c Ben Aïssa, 2014 QCCS 374

SNC-Lavalin poursuit Vanier et Ben Aïssa afin de récupérer les sommes détournées par les défendeurs dans le but de faire sortir de Libye Saadi Kadhafi, le fils de Mouammar Kadhafi et de lui fournir un asile en Amérique du Nord. Il est allégué que les faits

[66] Art 3136 *CcQ*: "Bien qu'une autorité québécoise ne soit pas compétente pour connaître d'un litige, elle peut, néanmoins, si une action à l'étranger se révèle impossible ou si on ne peut exiger qu'elle y soit introduite, entendre le litige si celui-ci présente un lien suffisant avec le Québec."

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

et gestes des défendeurs auraient été posés dans un contexte de "retour d'ascenseur" à l'endroit de Saadi Kadhafi, qui aurait facilité l'octroi en Libye de contrats d'ingénierie fort importants et lucratifs en faveur de SNC. Vanier, qui n'a ni domicile ni résidence au Québec, demande le rejet, quant à elle, de la requête introductive d'instance sur la base de l'absence de compétence des tribunaux québécois.

La Cour est d'avis que l'alinéa 3 de l'article 3148 *CcQ* doit ici recevoir application. Les premières discussions relatives au complot se font entre personnes qui sont à Montréal. Au surplus, la décision de monter le projet d'évasion de Kadhafi de Libye vers le Mexique est décidé, non pas par Vanier, mais par Ben Aïssa et Roy (vice-président et contrôleur de SNC respectivement) à Montréal. Le contrat qui servira de couverture à Vanier est accepté à Montréal et les fonds permettant de réaliser l'opération proviennent du compte SNC à Montréal et y sont retirés par Roy. Le juge considère que plusieurs fautes ont été commises au Québec permettant d'établir un critère de rattachement entre Vanier et la demanderesse SNC. Il y a donc suffisamment de faits donnant compétence juridictionnelle aux tribunaux québécois.

Compétence — préjudice subi au Québec — article 3148, alinéa 3 CcQ

3790908 Canada inc. c Green Films inc., 2014 QCCS 4542

La demanderesse, Canada inc, qui a son siège social au Québec, réclame aux défendeurs 150 000 $ pour les dommages qu'elle dit avoir subis à la suite de l'annulation injustifiée d'une entente de distribution. Le siège social et place d'affaires des défendeurs est situé à l'extérieur du Québec. Les défendeurs présentent une requête en exception déclinatoire au motif que les tribunaux du Québec ne sont pas compétents pour décider le litige. Deux des défendeurs, Green Films inc et Everything's Gone Green inc (Green), sont les productrices d'un film, "Everything's Gone Green." Ils signent une entente de distribution en 2007 par laquelle Canada inc se voit attribuer la licence exclusive de distribuer le film au Canada. L'entente de distribution contient une clause d'élection de for qui stipule que "The Courts of the District of Montreal, Quebec shall be the appropriate forum to hear any matter arising out of this agreement."

En 2011, Green propose à Canada inc de mettre un terme à l'entente de distribution. Après plusieurs échanges, Canada inc

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

fait parvenir à Green un projet de quittance visant à mettre fin à l'entente de distribution. La quittance prévoit "This release shall be governed and interpreted in accordance with the laws of the Province of Quebec" mais ne contient aucune clause spécifique d'élection de for. Les représentants de Green et de Canada inc signent la quittance à leurs places d'affaires. Par sa requête introductive d'instance, Canada inc recherche l'annulation de la quittance à laquelle elle dit avoir consentie sur le coup de fausses représentations de la part du représentant de Green. Elle invoque le vice de consentement et réclame 150 000 $ en dommages.

La Cour supérieure rejette l'exception déclinatoire de Canada inc. La clause d'élection de for contenue à l'entente de distribution ne peut servir d'assise pour revendiquer la compétence des tribunaux québécois. La quittance a pour effet de mettre un terme à la relation contractuelle entre Green et Canada inc. La quittance est un contrat distinct de l'entente de distribution qui ne contient pas de clause d'élection de for.

Canada inc plaide que son préjudice a été subi au Québec et que les autorités québécoises sont compétentes pour entendre le litige en vertu de l'article 3148, alinéa 3 *CcQ*. La Cour décide que la perte financière alléguée par Canada inc découle de la quittance conclue au Québec. Ainsi, le préjudice causé par cette quittance a été subi au Québec. Le préjudice économique que Canada inc allègue avoir subi ne constitue pas un préjudice économique "uniquement comptabilisé" au Québec. Il s'agit d'un préjudice réel subi au Québec, et les tribunaux québécois sont donc compétents pour entendre ce litige.

Note. Veuillez voir aussi *MNC Multinational Consultants inc c Natraceutical Group*,[67] et *Ferme Jolicap inc c Select Genetics of Indiana llc*.[68]

Compétence — préjudice subi au Québec — article 3148, alinéa 3 CcQ *— recours collectif*

Cunning v Fitflop Ltd, 2014 QCCS 586

La requérante, Cunning, demande la permission d'intenter, au nom des membres qu'elle représente, un recours collectif afin d'obtenir des dommages et une injonction suite à son achat d'une

[67] *MNC Multinational Consultants inc c Natraceutical Group*, 2014 QCCS 5400.

[68] *Ferme Jolicap inc c Select Genetics of Indiana llc*, 2014 QCCS 5552.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

paire de souliers Fitflop. En effet, Cunning soutient que l'intimée, Fitflop Ltd, dont le siège social est en Angleterre, n'a pas rempli sa promesse lors de la fabrication desdits souliers, soit: "Get a workout while you walk." Dans la présente procédure Cunning introduit une requête pour permission d'amender la requête en autorisation pour, entre autres, exercer un recours collectif au nom de "All residents in Canada who have purchased Fitflop footwear, or any other group to be determined by the Court."

La Cour décide qu'il n'y a pas de motifs en l'espèce pour autoriser un recours collectif nationale, soit une action personnelle à caractère patrimonial en vertu de l'article 3148 *CcQ*. Fitflop n'a pas de siège social ni même une place d'affaires au Québec. Or, les alinéas 1 (domicile du défendeur au Québec) et 2 (personne morale ayant un établissement au Québec et contestation relative à son activité au Québec) ne s'appliquent pas, de même que l'alinéa 4 (convention soumettant les litiges au tribunal québécois). Cunning ne peut alléguer une faute commise au Québec en ce qui concerne les membres des autres provinces. La fausse publicité et les fausses représentations dont les non-résidents auraient été victimes auraient eu lieu ailleurs qu'au Québec. Il n'y a donc aucune faute commise au Québec envers des non-résidents. Les membres du groupe national proposé n'entrent pas dans le cadre de l'article 3148 *CcQ*. En conséquence, le recours autorisé visera les résidents du Québec seulement.

PROCEDURE / PROCÉDURE

Common Law and Federal

Remedies

Canadian judgment enforcing foreign judgment — interest — currency conversion

SHN Grundstücksverwaltungsgesellschaft mbH & Co v Hanne, 2014 ABCA 168, 11 Alta LR (6th) 359[69]

The debtor under the judgment of a German court had admittedly attorned to the court's jurisdiction but raised the defences of fraud, violation of natural justice, and public policy to the creditors' action for enforcement of the judgment in Alberta.

[69] Leave to appeal to SCC refused, 36011 (4 December 2014).

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

All were found to be without merit. On natural justice, the Alberta Court of Appeal found that various differences between civil and common law procedure, including having appeals heard by a single judge, did not fall short of the minimum standards of fairness.

The only issue on which the court varied the judgment of the lower court was that of interest on the judgment, holding that interest on the German judgment ran at the rate prescribed by the German court up to the date of the judgment in the Alberta Queen's Bench. From then on, it ran at the rate prescribed in the relevant Alberta legislation.[70] The date for conversion of the award from Euros into Canadian currency was also the date of the Queen's Bench judgment.

Note. In *PT ATPK Resources TBK (Indonesia) v Diversified Energy and Resource Corp.*,[71] the court applied a rule in Ontario legislation[72] that if an Ontario court makes an order based on an order given outside Ontario, or an order of a court outside Ontario is filed with a court in Ontario for the purpose of enforcement, interest runs at the rate applicable to the order in the law of the place where it was given, both up to and after the date when the judgment was made enforceable in Ontario.

FOREIGN JUDGMENTS / JUGEMENTS ÉTRANGERS

Common Law and Federal

Conditions for recognition or enforcement

Nature of judgment — order of marketing board

Note. In *Fédération des producteurs acéricoles du Québec v SK Export Inc*,[73] the order of a Quebec marketing board against a maple syrup producer in New Brunswick was held unenforceable at first instance, both because the order could not extend Quebec

[70] *Judgment Interest Act*, RSA 2000, c J-1.

[71] *PT ATPK Resources TBK (Indonesia) v Diversified Energy and Resource Corp*, 2014 ONCA 466.

[72] *Courts of Justice Act*, RSO 1990, c C.43, s 129(3).

[73] *Fédération des producteurs acéricoles du Québec v SK Export Inc*, 2014 NBQB 243, aff'd 2015 NBCA 30.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

law into New Brunswick and because the order was only an interim one. The Court of Appeal affirmed the decision on the latter point.

Nature of judgment — non-monetary order

Note. A Singapore court's declaration that a defendant held certain shares on trust for the plaintiff was held enforceable in Ontario; the fact that it was followed by a monetary judgment for benefits obtained from the shares did not detract from the finality of the first judgment: *PT ATPK Resources TBK (Indonesia) v Diversified Energy and Resource Corp.*[74] A Quebec child apprehension order was held unenforceable in Ontario at common law because it was not a final order and there was no statutory basis for enforcement under Ontario child protection legislation: *Chatham-Kent Children's Services v H. (A.).*[75]

Jurisdiction of the originating court — real and substantial connection

Norfolk Southern Ry Co. v Crowshaw, 2014 ABQB 273

In 2008, Norfolk Southern obtained a Pennsylvania judgment against PSS, a company controlled by Crowshaw, which traded in railway rolling stock. The judgment was for PSS's failure to pay for rolling stock it had bought and then resold. PSS having gone into bankruptcy and the judgment against it remaining unpaid, Norfolk Southern sued Crowshaw personally in Pennsylvania in 2011 on the basis of the *alter ego* principle. He resided in Alberta and did not attorn to the Pennsylvania court's jurisdiction. Judgment was given against him in default for US $937,997. The present action was to enforce the 2011 judgment.

The court held that the judgment was not enforceable. On the facts, Crowshaw's correspondence with Norfolk Southern did not amount to participation in the merits of the action. Norfolk Southern had therefore not shown that he had attorned to the foreign court's jurisdiction. Nor had a presumptive connecting factor been established between him, or the claims against him, and Pennsylvania. There was insufficient evidence that he and his companies carried on business there. There was a contract

[74] *PT ATPK Resources, supra* note 71.

[75] *Chatham-Kent Children's Services v H (A)*, 2014 ONSC 2352, 46 RFL (7th) 111.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

between PSS and Norfolk Southern in Pennsylvania, but the subject matter of the judgment was Crowshaw's conduct under the *alter ego* principle. Regardless of whether fraud, or wrongdoing less than fraud, sufficed to lift the corporate veil, it was Crowshaw's actions in Alberta that were the subject of the claim. Norfolk Southern had therefore not shown a real and substantial connection between the litigation against Crowshaw personally and Pennsylvania.

Note. Another case in which a foreign judgment was refused enforcement for want of a real and substantial connection with the foreign jurisdiction was *Norwood Sales Inc. v Empire Welding and Machining Ltd*.[76] The North Dakota judgment against a Saskatchewan farm implement manufacturer was for breach of the plaintiff's rights as distributor for the defendant's products in North Dakota. The defendant's obligations under the distributorship contract were not performed in North Dakota, and no other real and substantial connection with North Dakota was shown.[77]

Defences to recognition or enforcement

Fraud on the foreign court

Note. The defence of fraud was rejected in a summary judgment in *Kavoussi v Moos*.[78] The judgment debtor had failed to make out an arguable case that the evidence, which he now wished to put forward to show the fraud, could not have been discovered by the exercise of reasonable diligence before the proceedings in California.

[76] *Norwood Sales Inc v Empire Welding & Machining Ltd*, 2014 SKQB 255.

[77] The decision was made under the *Enforcement of Foreign Judgments Act*, SS 2005, c E-9.121. Section 10 provides that a foreign judgment shall not be enforced if "(a) there was not a real and substantial connection between the state of origin and the facts on which the civil proceeding was based; and (b) it was clearly inappropriate for the court in the state of origin to take jurisdiction." The court refused to read those requirements as making a judgment enforceable, even in the absence of a real and substantial connection, unless the debtor shows it was clearly inappropriate to the foreign court to take jurisdiction. In the case of a default judgment, which this was, the court thought it made no sense of the originating court "taking jurisdiction," since entering the judgment is no more than a function performed by court staff.

[78] *Kavoussi v Moos*, 2014 ONSC 2612, aff'd 2015 ONCA 195.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

Statutory enforcement

Uniform Enforcement of Canadian Judgments and Decrees Act — *whether a Canadian judgment enforcing a non-Canadian judgment is enforceable under the act*

Solehdin v Stern Estate, 2014 BCCA 482, 66 CPC (7th) 62

BC creditors obtained a judgment against the debtors in United States Bankruptcy Court in Louisiana for US $62,500. They subsequently brought an action in Ontario against the debtors on that judgment. The Ontario court held that the Louisiana court had jurisdiction based on a real and substantial connection between the litigation and that state. The Ontario court gave three judgments declaring that the Louisiana judgment should be enforced against the defendants and awarding costs. The Ontario judgments were subsequently registered in British Columbia, where the debtors resided, under the *Enforcement of Canadian Judgments and Decrees Act* (*ECJDA*).[79] The debtors now applied for a stay of execution of the Ontario judgments and an order removing the judgments from the title to their property, on the basis that the Ontario judgments were invalidly registered. The argument was that they were not original judgments but merely judgments to enforce a foreign judgment, and to register them would be to do indirectly what could not be done directly, namely register a Louisiana judgment.

The mainstay of the debtors' argument was the Court of Appeal's earlier judgment in *Owen v Rocketinfo Inc*.[80] That case held that under the reciprocal enforcement of judgments scheme in the *Court Order Enforcement Act* (*COEA*),[81] the California registration of a Nevada judgment, which gave the latter the status of a California judgment, did not qualify for registration in British Columbia. Although California was a reciprocating state under the act, Nevada was not, and allowing the California filing to be treated as a California judgment would circumvent the scheme.

In the present case, the Court of Appeal held that *Owen* was distinguishable and that the Ontario judgments qualified as

[79] *Enforcement of Canadian Judgments and Decrees Act*, SBC 2003, c 29.

[80] *Owen v Rocketinfo Inc*, 2008 BCCA 502.

[81] *Court Order Enforcement Act*, RSBC 1996, c 78, Part 2. This is based on a Uniform Reciprocal Enforcement of Judgments Act that has been in force in many provinces for many years. In some provinces, including British Columbia, the act allows jurisdictions outside Canada to be designated as reciprocating states.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

"Canadian judgments" that were registrable under the *ECJDA*. In *Owen*, the California judgment was not one pronounced by a court but was obtained merely through the filing of a sworn statement containing information about the sister-state judgment. Moreover, the *COEA* was an entirely different scheme from the *ECJDA*, and the language in each was different. The Ontario judgments in the present case were qualitatively different from the California judgment in *Owen* and fell squarely within the definition of "Canadian judgment" under the *ECJDA*.

The court expanded on the policy behind the *ECJDA*. It noted that it reflected the principle articulated in *Morguard Investments Ltd v De Savoye*[82] that it is implicit in the Canadian federal system that the provinces owe a "full faith and credit" obligation to recognize and enforce each other's judgments. The act creates a more expeditious procedure for doing so than the common law provides, including eliminating an inquiry into the jurisdiction of the originating court and excluding several common law defences to enforcement, including defects in the process or proceeding leading to the judgment. It would be contrary to the purpose of the act and the principles in *Morguard* to require the BC creditors to re-litigate in British Columbia the issue of enforceability of the Louisiana judgment. This would create the risk of inconsistent verdicts and impediments to economic development that the act was intended to address. The Ontario judgments were the result of substantive legal proceedings that occurred in Ontario. The fact that they addressed the recognition of a foreign judgment did not render them "foreign."

Note. Another case on the working of the *ECJDA* was *Skye Properties Ltd v Wu*.[83] It concerned a 2008 Ontario judgment declaring that the debtor must repay amounts paid to it by those on a list of investors, without specifying the dollar amounts repayable to each. The creditors wanted the Nova Scotia court to determine the amounts under a provision in *ECJDA* that permits a court in an enforcing province to modify the judgment in order to make it enforceable in conformity with local practice.[84] The court refused, holding that it was for the Ontario court to make those determinations.

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

[83] *Skye Properties Ltd v Wu*, 2014 NSSC 382.

[84] *Enforcement of Canadian Judgments and Decrees Act*, SNS 2001, c 30, s 8(2)(a).

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

The role of an enforcing court under the act is administrative only and does not extend to curing deficiencies in the original judgment.[85]

Justice for the Victims of Terrorism Act — *United States judgments against Iran*

Tracy (Litigation guardian of) v Iranian Ministry of Information and Security, 2014 ONSC 1696

The plaintiffs, residents of the United States, obtained judgments in 2003 and 2005 in the United States District Court for the District of Columbia against several state agencies of the Islamic Republic of Iran. They brought an action on these judgments in Nova Scotia, where the court made an order that the judgments were to be an order of the Nova Scotia court pursuant to the federal *Justice for the Victims of Terrorism Act*.[86] Then they secured registration of the Nova Scotia court's order as an order of the Ontario Superior Court pursuant to the *Reciprocal Enforcement of Judgments Act*.[87] The state of Iran was duly served with notice of the Ontario order but did not file a response, with the result that the order became enforceable in the same manner as any other Ontario court order.

The present proceeding was concerned with determining the status of various assets said to be non-diplomatic assets belonging to Iran and so available for execution of the Ontario order.[88] On the evidence, the court held that two bank accounts fell into this

[85] The court cited *Apollo Real Estate Ltd v Streambank Funding Inc*, 2012 BCSC 1088.

[86] *Justice for the Victims of Terrorism Act*, SC 2012, c 1, s 4(5). That section requires that a judgment in favour of a person that has suffered loss or damage from terrorism, as defined, from a foreign court must be recognized in Canada if it meets the criteria under Canadian law for being recognized and, if the judgment is against a foreign state, if the state is on the list referred to in the *State Immunity Act*, RSC 1985, c S-18, s 6.1(2). The latter provision allows the federal government to designate states in respect of which it is "satisfied that there are reasonable grounds to believe that the foreign state supported or supports terrorism." Iran has been so designated.

[87] *Reciprocal Enforcement of Judgments Act*, RSO 1990, c R.5.

[88] The *State Immunity Act, supra* note 86, s 12(1)(b) excludes from the general immunity from attachment and execution, any property of a foreign state that is used or intended to be used in a commercial activity or, if the foreign state is on the list referred to in s 6.1(2), is used or intended to be used by it to support terrorism or engage in terrorist activity.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

category, as did two real estate properties in Toronto. With respect to the latter, there was an additional issue whether they had "cultural or historical value" so as to exclude them from execution,[89] which, on the evidence, the court held they did not.

Arbitral awards

Mareva *injunction freezing assets pending an action to enforce a foreign arbitral award — jurisdiction to grant*

Sociedade-de-fomento industrial Private Ltd v Pakistan Steel Mills Corp., 2014 BCCA 205, [2014] 7 WWR 1

The plaintiff (SFI), an Indian corporation, had obtained an International Chamber of Commerce arbitration award against the defendant (PSM), a Pakistani corporation. It remained unpaid after ten months. SFI obtained in British Columbia a *Mareva* injunction freezing an asset belonging to PSM, namely a shipment of coal onboard a vessel in British Columbia. The injunction prohibited the vessel from leaving the jurisdiction. PSM obtained an order at first instance discharging the injunction. The chambers judge held that the injunction should not have been granted when neither the parties nor the dispute had a substantial connection with the province and the plaintiff had not produced evidence that the award could not be enforced in Pakistan.

The Court of Appeal reversed the judge's decision. An action to enforce an arbitral award in the province has a presumed real and substantial connection with the province under the *CJPTA*.[90] A foreign arbitral award is enforceable in the province pursuant to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.[91] The effect of these legislative provisions is to make an enforcement action akin to a domestic action for jurisdictional purposes. The judge was therefore wrong to impose on SFI an onus to show the award could not be enforced in Pakistan. The prospects of such enforcement were relevant but only as a factor

89 *State Immunity Act*, *supra* note 86, s 12(1)(d), which applies specifically to property belonging to a state that is on the list referred to in s 6.1(2).

90 *CJPTA (BC)*, *supra* note 3, s 10(k).

91 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, online: <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf>, implemented by the *Foreign Arbitral Awards Act*, RSBC 1996, c 154.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

in the exercise of the court's discretion to grant the injunction. On the facts before the chambers judge, as amplified before the Court of Appeal, enforcement of the award in Pakistan would be "challenging," and, overall, the balance of convenience favoured granting the *Mareva* injunction.

Québec

Conditions nécessaires à la reconnaissance d'une décision étrangère

Compétence de l'autorité étrangère — ordre public — respect des principes essentiels de la procédure

Jules Jordan Video inc. c 144942 Canada inc., 2014 QCCS 3343

Jules Jordan Video et Gaspar (les requérants) demandent au Tribunal de reconnaître et de déclarer exécutoire au Québec le jugement rendu en 2011 par la United States District Court of the Central District of California à l'égard de 144942 Canada inc, Leisure Time Video Canada inc et Elmaleh (les intimés). Depuis 2005, les parties étaient opposées dans un litige étant relié à une violation alléguée des droits d'auteur des requérants selon le droit américain. En 2006, la District Court a conclu qu'Elmaleh était l'*alter ego* de 144942 et Leisure Time. En 2011, la District Court a condamné 144942 et Leisure Time à payer 390 000 $ aux requérants et Elmaleh à leur payer 1 820 000 $. Les intimés soumettent que l'état de la Californie n'était pas compétente pour décider du litige d'origine, que le jugement de 2011 a été rendu en violation des principes essentiels de la procédure et que le résultat est manifestement incompatible avec l'ordre public.

Le Tribunal accueille la requête. Les DVDs faisant l'objet du litige ont été vendus dans l'état de la Californie, et ce fait dommageable y a causé un préjudice. Les intimés ne pouvaient pas ne savoir que les DVDs se retrouveraient éventuellement dans l'état de la Californie, même si la vente directe à cet endroit n'était pas effectuée par eux. Elmaleh a été en mesure d'expliquer de long en large à la District Court ses prétentions quant à l'absence de juridiction de cette cour, mais elles ne furent pas retenues. Le Tribunal n'est pas en appel du jugement sur la juridiction, et n'a pas à refaire le procès. Le Tribunal est interpellé par le nombre de procédures que les intimés ont déposé dans le cadre du litige d'origine, sur une période de plus de sept ans, et ce, jusqu'à la Cour suprême des

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

États-Unis. Ceci illustre bien qu'ils ont reconnu, d'une certaine façon, la compétence de l'état de la Californie et qu'ils ont tout fait pour faire valoir leurs droits dans l'état de la Californie.

Qu'aujourd'hui les intimés puissent prétendre à une absence de compétence de la District Court dépasse l'entendement, en plus du fait que cela reviendrait à inciter le Tribunal à manquer totalement de courtoisie à l'égard des tribunaux américains. Les intimés ont eu toutes les occasions désirées, et tout le temps voulu, pour faire valoir leurs arguments devant les tribunaux américains, et ils l'ont fait à plusieurs reprises.

Le Tribunal refuse une demande des requérants de prononcer l'exécution provisoire du jugement de reconnaissance, et ce, nonobstant appel. Peu importe le nombre de procédures déposées par les intimés dans l'état de la Californie, rien ne justifie au Québec de rendre exécutoire immédiatement le jugement de reconnaissance. Ordonner l'exécution provisoire aurait pour résultat de restreindre un des droits importants des intimés, soit celui de porter en appel, dans le délai imparti, le jugement de reconnaissance.

Choice of Law (Including Status of Persons) / Conflits de lois (y compris statut personnel)

Common Law and Federal

Exclusion of foreign law

Penal laws — whether foreign court order was in nature of a contempt order

Dingwall v Dornan, 2014 ABCA 89, 93 Alta LR (5th) 80

A Nevada state court judgment held the defendant liable in default of appearance for US $4.2 million. The defendant participated in a proceeding in which his pleadings were struck and default judgment entered against him. The grounds for doing so were that he had acted in bad faith throughout the discovery process and repeatedly failed to obey court orders relating to the process. The damages awarded were assessed at a "prove-up" hearing at which the defendant was represented. The two plaintiffs brought an action on the judgment in Alberta. The defendant argued, *inter alia*, that the Nevada judgment was in essence a penal sanction for his misconduct, similar to the American contempt order that had been held unenforceable in Canada in the *Pro Swing* case.[92]

[92] *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52, [2006] 2 SCR 612.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

The Court of Appeal agreed with the motion judge that the judgment was enforceable. The award was compensatory in nature. The damages had been assessed by the Nevada court at a prove-up hearing. They included no punitive damages. This was not a case in which a court sanctioned misconduct. It was a case in which a party sued in a foreign court does not attorn and default judgment is entered. A judgment resulting from a failure to cooperate with the discovery process was similar to a judgment resulting from a default of appearance. To hold otherwise would open up a tactical route by which a defendant could turn a default judgment into a penal judgment and so defeat enforcement.

Revenue laws — claim for return of improperly levied foreign taxes

Prince v ACE Aviation Holdings Inc., 2014 ONCA 285, 373 DLR (4th) 109[93]

This class action was brought on behalf of the purchasers of tickets from Air Canada, claiming that the airline had illegally included US transportation taxes in the ticket price. The plaintiffs included customers who had purchased tickets in Canada and customers who had purchased them in the United States. The claim was based on the premise that Air Canada's collection of the taxes gave US tax law impermissible extraterritorial effect. In the case of tickets purchased in Canada, the claim was also based on an argument that US tax law had been misapplied. Air Canada brought a motion for dismissal or stay of the action on the basis that the Ontario court was *forum non conveniens*. The motion judge had stayed the action by the sub-class of plaintiffs who had purchased tickets in the United States but held that Ontario was *forum conveniens* for the claims of those who had bought their tickets in Canada.

The Court of Appeal reversed the motion judge's decision and held that the plaintiffs' claims should be stayed in their entirety until the plaintiffs had brought their claims before the US Internal Revenue Service (IRS). The relevant legislation provided a mechanism for both purchasers of tickets in the United States and purchasers of tickets outside the country to apply for a refund of taxes. It would be against comity for a Canadian court to hear claims for the refund of foreign taxes without requiring the claimants first to exhaust their remedies in the country that levied the taxes.

[93] Leave to appeal to SCC refused, 35935 (23 October 2014).

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

Also relevant to the *forum non conveniens* assessment was that Air Canada had the juridical advantage, under US law, that it was immune from suit for a refund of taxes that it collected on behalf of the IRS.

The court also considered, as a threshold question, whether the plaintiffs' claims were barred by the "revenue rule" that a court will not enforce, directly or indirectly, the payment of foreign taxes. The court thought that, just as an Ontario court would not assist the enforcement of foreign revenue laws in Canada, so it had jurisdiction to restrain the application of a foreign tax law in its territory by a foreign state or its agent. The court was therefore prepared to assume that an Ontario court did have jurisdiction to determine whether a foreign law was being enforced extraterritorially and to grant appropriate relief.[94]

Characterization

Substance and procedure

Ngo v Luong, 2014 BCSC 516

The plaintiff was injured in a single-car motor vehicle accident in Saskatchewan. She sued her husband, the driver of the car, in British Columbia. The defence was that, under Saskatchewan law, the plaintiff was confined to a claim for no-fault benefits from the insurer. A 2002 amendment to the legislation, the *Automobile Accident Insurance Act*, did permit a Saskatchewan resident to make, by written notice to the insurer, a "tort election" to waive the no-fault benefits and retain the right to bring an action for personal injury arising out of an accident.[95] The election only operates prospectively and only so long as the person continues to be a resident of the province.

The plaintiff argued that the effect of introducing the tort election for Saskatchewan residents was to change the complete bar to any civil action, which existed until then, from a rule of substantive law (which the complete bar was conceded to be) into a rule of procedure. The rationale was that the rule no longer dictated the rights of civilians but now allowed individuals to choose between two procedures for pursuing their rights. The court saw

[94] *Prince v ACE Aviation Holdings Inc*, 2014 ONCA 285, 373 DLR (4th) 109 at para 54.

[95] *Automobile Accident Insurance Act*, RSS 1978, c A-35, s 40.2(1).

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

this argument as incorrect. The accident victim had no choice of procedure. His or her rights were defined by the statute as of the moment the accident occurred. Unless he or she had previously made the tort election, a civil action was barred. It was immaterial to the characterization of the rule that the tort election was open only to residents of Saskatchewan. To treat the rule as procedural would set up a difference in result, depending on whether the action was brought in British Columbia or Saskatchewan, and would thus encourage forum shopping.

Henry v Henry Estate, 2014 MBCA 84, 376 DLR (4th) 634

Melvina Henry, a UK resident, brought a paternity proceeding in Manitoba to establish that she was the daughter of a UK citizen, Rupert Henry, who died intestate in England in 1999. Melvina's mother was also resident in the United Kingdom. One respondent was the estate of Rupert's mother Adelaide Henry, who died in 2006 domiciled in Jamaica and whose estate was being administered in Jamaica. Three of Adelaide's six surviving children were also respondents. Two of them lived in, respectively, Quebec and the United States and were the executors of Adelaide's estate. The third, Joseph, lived in Manitoba and had caused the funds that comprised Rupert's sole asset to be transferred to that province,[96] which was why Melvina's paternity proceeding was being brought there. It was agreed that Adelaide's estate inherited Rupert's property unless Melvina was indeed Rupert's daughter. Adelaide's estate had agreed that the assets of the estate would be held in trust pending either settlement or a determination of the issues in the paternity action in Manitoba. The estate had also filed a statement of defence. The issue of paternity was agreed to be governed by English law.

The issues in the current proceeding related to the Manitoba court's jurisdiction to grant a declaration of paternity and to the effect of certain provisions in the *Family Maintenance Act*.[97] On the jurisdiction issue, the motion judge held that Adelaide's estate, which she found to be the only true defendant, had attorned to the Manitoba court's jurisdiction. Attornment alone might not be

[96] An earlier phase of the siblings' dispute about Rupert's property was *Henry Estate v Henry*, 2012 MBCA 4, noted (2012) 50 Can YB Intl L 588.

[97] *Family Maintenance Act*, CCSM, c F20.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

sufficient if the case had no substantial connection with Manitoba, but in fact it did. Aside from the location of the estate assets, the three non-party children of Adelaide's lived, like Joseph, in Manitoba, and the probate of Adelaide's will was resealed in Manitoba. The court therefore had jurisdiction. This part of the judge's decision was not appealed.

The statutory provisions in question state, in effect, that where an alleged father is deceased, a living applicant can obtain a declaration of parentage only if she establishes that circumstances exist that give rise to a presumption of paternity under the act.[98] Those circumstances include the father's having been married to the mother at, before (up to 300 days), or after (with an acknowledgment of paternity) the child's birth and the father's cohabiting with the mother in a relationship of some permanence at or before (up to 300 days) the time of the birth. Adelaide's estate argued that Melvina had to establish such circumstances because the provisions were procedural.

On this point, the motion judge and the Court of Appeal held the provisions were substantive. The policy of requiring an applicant to come within one of the presumptions was to limit the circumstances in which a claim for support or inheritance on intestacy can be brought where the alleged father is dead and cannot defend the proceeding. It was also intended to provide some protection to executors and administrators of estates. These provisions were therefore backed by real and important policy considerations relating to the rights at stake. They were not just procedural rules that would make the machinery of the court run smoothly. Since, by common consent, English law governed the substantive issues, these provisions did not apply.

Connecting factor

Domicile

Vanston v Scott, 2014 SKQB 64, 439 Sask R 236.

The law governing the essential validity of a will was held to be that of Alberta, the testator's domicile of origin. He had abandoned his domicile of choice in Saskatchewan but had not yet established a new domicile of choice. Before Saskatchewan, he had lived in British Columbia and was living there again for some time before his death.

[98] *Ibid*, ss 20(6)-(7), 23.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

However, this last stay was found to be a temporary pause before resuming his search for work elsewhere. He was a radiologist and knew that he could not practice his profession in that province because of his disciplinary history with the BC College of Physicians and Surgeons.

Property

Movables — transfer inter vivos *— maritime lien*

Norwegian Bunkers AS v Samatan (The), 2014 FC 1200

Norwegian Bunkers (Norwegian) supplied bunker fuel in Brazil to the *Samatan* but was not paid for it. The ship was owned by Boone Star, a Marshall Islands company, and time-chartered to Kristiania, a British Virgin Islands company, which purchased the fuel. Norwegian brought this action in Canada against the ship, Boone Star, and Kristiania. The claim against the ship was based on a maritime lien that Norwegian argued arose in its favour when its Brazilian agent supplied the fuel.

The court held that the issue whether a lien was created was to be decided according to Brazilian law. It was not a matter for the proper law of the supply contract between Norwegian and Kristiania because in a non-contractual claim the perspective to consider is that of the parties involved in the claim rather than that of the contracting parties. The proper law of the supply contract was a factor, but only one, in determining with which system of law the issue of the maritime lien had its closest connection. In this case, in which six systems of law were potentially involved, the law of Brazil was decided to have the closest connection, which did indeed give Norwegian a maritime lien against the *Samatan*. Boone Star, however, was not personally liable for the fuel because Kristiania, under the terms of the charter party, had no actual authority to bind the ship, and merely authorizing its ship to accept bunkers was not the sort of behaviour that would lead to liability on the part of the ship owner under Canadian law.

Succession — will — what law governs issue of revocation

Morton v Christian, 2014 BCSC 1303

The testator, who died in British Columbia in December 2011, had made a notarial will in Quebec in 1991. Pursuant to the law of that province, the will was registered, and a copy was retained

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

by the notary. The sole beneficiary was Morton, the woman with whom he had been living in a common law relationship for some time. He and Morton separated in 2009. Some time before October 2010, the testator tore up a true copy of the will, and, after he died, no copy of the notarial will could be found in his possession nor could a new will be found. He left immovable and movable property in British Columbia and was survived by his mother and his sister. Morton sought a declaration that the notarial will was valid and related relief. The mother and a cousin sought a declaration that he revoked the will before his death and that his estate passed as on intestacy. Morton, however, produced the notarial will as retained by the notary in Quebec.

The court held that the issue of revocation was governed by BC law because the testator was domiciled in British Columbia throughout the period when destruction of the will could have taken place. Under the law of British Columbia,[99] revocation depended on showing both the physical act of destruction and proof that the testator acted with the intention of revoking the will.[100] The judge found that it had not been proven that the testator had, in fact, destroyed the three copies of the will that the notary had given him. Even if that had been proven, tearing up a copy of a notarial will, knowing that the original is safely lodged with a notary, seemed to the judge not to satisfy the requirement of destruction. The notarial will was therefore admitted to probate.

Note. See also *Vanston v Scott*, noted above under Connecting factor; *Domicile*. The dispute was about the validity of the testator's disinheriting of his two biological children in favour of a new wife and her children. The case only decided the domicile point.

Matrimonial causes

Divorce — foreign divorce

Asghar v Doyle, 2014 NBQB 254, 427 NBR (2d) 338

Asghar and his first wife were married in Pakistan in 2004. They lived there until 2006, when first the wife, and then he, moved to

[99] The *Wills Act*, RSBC 1996, c 489, in force when the testator died. That act was replaced by the *Wills, Estates and Succession Act*, SBC 2009, c 13 as of 31 March 2014. The date of death is the critical date by virtue of s 185 of the new act.

[100] *Wills Act*, *supra* note 99, s 14(1)(d).

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

New Brunswick. They separated in 2007. They signed a deed of divorce in New Brunswick in accordance with the requirements of the law of Pakistan and forwarded it to authorities in Pakistan. Both he and the first wife subsequently remarried. Asghar's second wife, whom he also married in Pakistan, was denied permission to immigrate to Canada to join Asghar in his home in Nova Scotia. Citizenship and Immigration Canada took the position that the 2009 divorce was invalid and that Asghar's second marriage was therefore also invalid. Asghar now applied for a declaration that the 2009 divorce was valid. The court granted the declaration.

Neither of the statutory grounds of recognition in the *Divorce Act*,[101] namely ordinary residence by either party in Pakistan for a year immediately preceding the commencement of the divorce proceeding or the wife's independent domicile in Pakistan, applied. However, the act preserved the common law grounds for recognizing foreign divorces.[102] These included a real and substantial connection between either party and the country granting the divorce.

Asghar had such a connection with Pakistan. He owned property there, maintained relationships with, and continued to visit, his family there, the marriage had been performed there in accordance with Muslim tradition, he and the first wife continued to live there for a time, and the process of divorce was undertaken with the intent that the marriage be dissolved in accordance with the Muslim religion and traditions. The judge laid stress on the last factor, expressing the view that the *bona fide* desire of a party to seek the dissolution of a marriage in accordance with the same religious traditions with which it was solemnized should be given the same degree of recognition as other more commonly understood hallmarks of a real and substantial connection, such as past and continuing physical connections to the jurisdiction.

Note. The real and substantial connection ground for recognizing a foreign divorce was also applied in *Essa v Mekawi*,[103] where the parties were held to have retained substantial connections with Egypt, where the divorce was granted, despite living in Canada, where the husband had employment for the time being. In *Zeng v Fu*,[104]

[101] *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 22(1)-(2).

[102] *Ibid*, s 22(3).

[103] *Essa v Mekawi*, 2014 ONSC 7409.

[104] *Zeng v Fu*, 2014 ONSC 3268.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

the court recognized a 2010 divorce obtained by the wife in China, again on the basis of the parties' real and substantial connection there, despite their having immigrated to Canada in 2002. The main factors referred to were both parties' domicile of origin in China and the indication, from her returning to China to get the divorce, that the wife had not adopted a domicile of choice in Canada. Recognition extended to a corollary order giving the wife custody of the parties' daughter.

Matrimonial property and support claims — property in Ontario — parties ordinarily resident in Ontario and in Florida

Note. See *Knowles v Lindstrom*, noted above under Jurisdiction / Compétence des tribunaux; Common law and federal; Matrimonial causes; *Matrimonial property*.

Québec

Obligations

Contrat — application de la Loi sur l'optométrie *aux ventes hors du Québec*

Ordre des optométristes du Québec c Coastal Contacts Inc., 2014 QCCS 5886

L'Ordre cherche à faire déclarer que Coastal Contacts Inc contrevient à la *Loi sur l'optométrie*[105] (LSO) et au *Code des professions*[106] puisqu'elle exerce l'optométrie en vendant des lentilles ophtalmiques au Québec par l'entremise de ses sites Internet sans être inscrite à l'Ordre. Coastal a son siège social et un établissement en Colombie-Britannique et n'a pas de places d'affaires au Québec. La Cour décide que la LSO ne s'applique pas aux activités de Coastal. L'Ordre propose d'appliquer le droit québécois à un contrat mixte de vente et de services professionnels. Or, les services professionnels sont rendus sur le territoire de la Colombie-Britannique et le droit québécois considère que la vente y a été conclue. Le seul lien entretenu avec le Québec est que le client y a reçu le produit fini. Par conséquent, la situation ne présente pas le lien réel et substantiel avec le Québec qui permettrait de donner raison à l'Ordre.

[105] *Loi sur l'optométrie*, RLRQ, c O-7.

[106] *Code des professions*, RLRQ, c C-26.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

Même si c'était le cas, plusieurs arguments fondés sur des principes constitutionnels s'opposent à ce que le droit du Québec s'applique en l'instance. Rien dans la LSO n'indique une intention législative claire de donner à la LSO la portée que l'Ordre souhaite lui donner. La seule interprétation possible de la LSO en est une qui présume qu'elle a été édictée en conformité avec les limites territoriales des pouvoirs législatifs de l'Assemblée nationale.

Mariage

Mariage à l'étranger — conditions de fond — consentement

Droit de la famille — 1486, 2014 QCCS 183

En 2001, la demanderesse, qui avait son domicile au Québec, s'est mariée avec le défendeur à Cuba. Le défendeur avait son domicile à Cuba. Par la suite, la demanderesse fait une demande de parrainage afin de permettre à son conjoint d'immigrer au Québec. Il obtient son statut de résident permanent et arrive au Québec en juin 2013. Dès son arrivée au Québec, le défendeur cesse à toutes fins utiles toute forme de communication avec la demanderesse. Dans les circonstances, la demanderesse se voit contrainte de mettre fin à sa relation avec le défendeur ainsi qu'à leur vie commune, et ce, en septembre 2013. D'autres faits ont été révélés par la suite et confirment que le défendeur a obtenu le consentement de la demanderesse à se marier sous de fausses représentations. La demanderesse sollicite donc l'annulation de son mariage avec le défendeur.

Une des questions soulevées dans l'affaire est quelle loi doit s'appliquer à la demande d'annulation du mariage. La Cour applique le droit québécois. Les conditions de fond du mariage sont régies par la loi du domicile de chacun des futurs époux: article 3088, alinéa 1 *CcQ*. Ces conditions concernent notamment l'âge, le consentement des futurs époux, l'absence de lien de parenté entre eux à un degré prohibé, etc. La loi qui régit la validité du mariage est la même qui en détermine et en organise les sanctions. Ainsi, lorsque l'un des futurs époux, domicilié au Québec, demande l'annulation de son mariage conclu à l'étranger aux motifs que son consentement a été vicié à la suite des manœuvres exercées par l'autre partie, le Tribunal doit appliquer le droit québécois pour apprécier cet élément. Le domicile de la demanderesse au moment du mariage était au Québec. C'est donc le droit québécois

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press

qui doit être appliqué pour trancher sa demande d'annulation de mariage. Le Tribunal a compétence pour trancher cette demande puisque la demanderesse a son domicile au Québec: article 3144 *CcQ*. La Cour conclut que le mariage doit être annulé.

https://doi.org/10.1017/cyl.2015.17 Published online by Cambridge University Press