Canadian Cases in Private International Law in 2020

Jurisprudence canadienne en matière de droit international privé en 2020

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JURISDICTION / COMPÉTENCE DES TRIBUNAUX

Common Law and Federal

Jurisdiction *in personam*

Jurisdiction simpliciter — *non-resident defendant — claim for financial loss — jurisdiction found to exist and not declined*

Ewert v Höegh Autoliners AS, 2020 BCCA 181, 450 DLR (4th) 301, leave to appeal to SCC refused, 39403 (29 April 2021)

The plaintiffs brought a class action in British Columbia against a number of defendants based in the United States and Norway, alleging that they were parties to a global price-fixing conspiracy to lessen competition and inflate prices for the roll-on, roll-off marine shipment of vehicles. This was alleged to have resulted in higher prices paid for vehicles sold in British Columbia. The defendants applied to have the proceedings against them stayed or dismissed on the basis that the BC court lacked territorial competence under the *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*).[1] The Court of Appeal affirmed the chambers judge's decision that the court had territorial competence because there was a real and substantial connection between the province and the facts giving rise to the proceeding.[2] The defendants did not contest that they were parties to the alleged conspiracy,

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[1] SBC 2003, c 28 [*CJPTA* (BC)].

[2] *Ibid*, s 3(e).

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and it was alleged that the conspiracy caused harm in the province, so the pleaded facts supported the argument that the defendants had committed the tort of conspiracy in British Columbia. Under the Act, this argument raises a presumption that there is a real and substantial connection with the province.[3] The presumed connection created by the alleged tort was not rebutted merely by showing that the defendants did not do business in British Columbia.

Hydro Aluminium Rolled Products GmbH v MFC Bancorp Ltd, 2020 BCCA 295

In 2016, the plaintiff HARP, a German company, agreed to deliver aluminum products to another German company on condition that the purchaser arrange for a merchant banking enterprise to guarantee the payment. The purchaser caused MFC, a BC company whose registered office was in Vancouver, to give the guarantee to HARP in June 2017, in the amount of 4.2 million euro. The guarantee was governed by German law. Any dispute arising out of it was to be referred to the courts in Frankfurt, Germany, or, at HARP's option, any other place at which MFC "holds an office." HARP was to make any demand for payment to MFC's Vancouver office.

Shortly afterwards, MFC underwent a corporate reorganization, approved by the BC court in July 2017, under which it was continued as a numbered company in the Marshall Islands that was wholly owned by a Cayman Islands company, with the MFC Bancorp name being assumed by another Cayman Islands company. HARP was unaware of these manoeuvres until it presented a demand for payment under the guarantee at MFC's former Vancouver office and discovered it was no longer MFC's registered office. HARP commenced an action in British Columbia against the Cayman Island companies and two individuals that were alleged to have masterminded MFC's move out of British Columbia. The defendants applied to strike HARP's claim on the basis that British Columbia lacked territorial competence over the dispute under the *CJPTA*.[4] The chambers judge held that the court lacked territorial competence and that, even if it had territorial competence, it should decline to exercise it on the basis that Germany was clearly a more appropriate forum.[5]

The Court of Appeal reversed the judge on both grounds.[6] On territorial competence, the pleaded facts raised an arguable case that MFC had agreed

[3] *Ibid*, s 10(g).

[4] *Ibid*.

[5] *Ibid*, s 11(1).

[6] Jurisdiction as against the two individual defendants was the subject of subsequent reasons. *Hydro Aluminium Rolled Products GmbH v MFC Bancorp Ltd*, 2021 BCCA 182. The court held that territorial competence existed with respect to the claims against them too and should not be declined.

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that the BC court had jurisdiction.[7] On this view, HARP contracted for the right to choose to litigate either in Germany or in any other place at which MFC "holds an office." HARP's response to the defendants' notice of application made it clear that it was relying on the restructured corporations constituting a single entity that continued to have a business presence and an office in Vancouver. The facts alleged by HARP arguably supported its choice of Vancouver under the forum selection clause.

The court's territorial competence could also be based on the presumption that the proceeding had a real and substantial connection with British Columbia because it concerned contractual obligations that, to a substantial extent, were to be performed in British Columbia.[8] The express terms of the contract supported the argument that the parties had a reasonable expectation at the time the guarantee was entered into that it would be substantially performed in Vancouver.

It was unnecessary to consider whether HARP's tort claims of fraudulent misrepresentation alleged a tort that was committed in the province and so fell within another statutory presumption of a real and substantial connection.[9] Territorial competence on either of the two grounds already considered would support jurisdiction over additional claims arising from the same factual and legal situation.[10]

On the *forum non conveniens* issue, the Court of Appeal noted that the defendants proposed that the forum should be Germany, a jurisdiction with which they had no ties, asserting that it was more appropriate because HARP had ties there. HARP had chosen to accept the additional expense and inconvenience associated with having its case heard in British Columbia rather than Germany. That being so, the factor of comparative convenience and expense[11] had to be assessed from the defendants' point of view. Nothing in the judge's analysis suggested that Germany was more convenient or less expensive for the defendants. The court also noted, with reference to the "interest of the parties to a proceeding and the ends of justice,"[12] that HARP claimed that MFC had committed fraud in part by using the BC Supreme Court to obtain approval of a corporate reorganization without disclosing its prejudicial impact on the guarantee holders. None of those allegations had

[7] *CJPTA* (BC), *supra* note 1, s 3(c).

[8] *Ibid*, ss 3(e), 10(e)(i).

[9] *Ibid*, s 10(g).

[10] For this point, the court cited *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 at paras 21, 99 [*Van Breda*].

[11] The comparative convenience and expense of litigating in the respective forums is one of the factors to be taken into account in deciding whether to decline to exercise territorial competence. *CJPTA* (BC), *supra* note 1, s 11(2)(a).

[12] *Ibid*, s 11(1).

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been proved, but, at this stage of the proceedings, this circumstance also arguably supported British Columbia as an appropriate forum.

The court concluded with the observation that neither the claims nor the facts relied upon by HARP to establish jurisdiction had been proved on a balance of probabilities, and jurisdiction might therefore continue to be a live issue in the proceeding.

Note. In relation to the last point, the BC *Supreme Court Civil Rules* expressly contemplate that a defendant who has unsuccessfully challenged the court's jurisdiction in an interlocutory proceeding may resume the challenge in the light of facts established at trial.[13] The "second kick at the can" is justified by the difference between the approach taken to jurisdiction-related factual issues at the interlocutory proceeding, where the test is whether the plaintiff has made out an arguable case on the pleadings, and at the trial, where the test is whether the plaintiff has proved the facts on a balance of probabilities. The plaintiff seeking to sustain jurisdiction can prevail on the assumed facts at the interlocutory stage but lose on the proved facts at the trial stage. I am unaware of any case, in British Columbia or elsewhere, in which a court has actually found at the interlocutory stage that it had jurisdiction, only to dismiss the proceeding subsequently on the ground that the facts as proved showed that it lacked jurisdiction.

Bell v James, 2020 BCSC 443 and 2020 BCSC 1506

Natasha Bell claimed that her father, Colin Bell, had signed a form to alter the beneficiary of his group life insurance from his estranged wife, Patricia, to Natasha as to 50 percent and Colin's then partner, Anna James, as the other 50 percent. Natasha alleged that Anna had prevailed on Colin to change the form to increase Anna's share to 70 percent and to reduce Natasha's to 30 percent. The change was handwritten on the form but not initialled. Natasha and Patricia sued Anna and the life insurer, claiming that Anna had unduly influenced Colin, breached a duty to seek help for Colin when he appeared dissociated from reality and thus contributed to his death by suicide, and had been unjustly enriched at the plaintiffs' expense by being named a beneficiary of insurance that the plaintiffs said was paid for by property of the marriage between Patricia and Colin. Both Patricia and Colin, the plaintiffs alleged, expected that Natasha was to be the sole beneficiary of the policy. The plaintiffs also alleged that the change in beneficiary was void.

Anna, who lived in Manitoba, where Colin had also lived, sought to have the court dismiss the proceeding for lack of territorial competence. Patricia and Natasha lived in British Columbia. The court held that it had territorial competence. The proceeding had a presumed real and substantial

[13] *Supreme Court Civil Rules*, BC Reg 168/2009, r 21-8(1).

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connection with British Columbia because its purpose was to rectify a document relating to movable property in the province — namely, the right by a person resident in British Columbia to call for payment to them of proceeds of the policy.[14] Two other presumed real and substantial connections were not made out. These were that the proceeding was brought to determine rights in property in the province[15] and that it concerned a tort committed in the province.[16]

However, the court[17] granted Anna's subsequent application that it decline to exercise territorial competence on the ground of *forum non conveniens*. The plaintiffs had amended their notice of civil claim to include a claim for damages for wrongful death. This was a serious allegation, the events relating to which took place mainly in Manitoba. The claim would be governed by the law of Manitoba, where the alleged tort was committed. Of the factors listed in the *CJPTA* as relevant to the court's discretion,[18] the most important in this case was the fair and efficient working of the Canadian legal system.[19] The allegations against Anna were more connected to Manitoba than to British Columbia, and a trial in British Columbia would be unacceptably unfair to Anna and her ability to defend herself. There would be no significant prejudice to the plaintiffs if their BC action was stayed. There was no reason why the work product that had been prepared by their BC lawyers could not be shared with new counsel in Manitoba.

Wilson c Fernand Campeau & Fils Inc, 2020 ONCA 384

Les appelants exploitent une ferme en Ontario près de la frontière du Québec. Ils ont acheté de la machinerie agricole de l'intimée Campeau, qui est concessionnaire de machinerie agricole. Son commerce est situé au Québec, près de la frontière de l'Ontario. Les appelants ont intenté une poursuite contre l'intimée suite à des problèmes qu'ils ont encourus avec la machinerie. Ils ont signifié la déclaration en dehors de l'Ontario. L'intimée a présenté une motion pour demander une ordonnance d'annulation de la signification et une ordonnance de sursis de l'instance. Le juge de motion a conclu que les appelants n'ont pas démontré la présence d'un facteur de rattachement créant une présomption de compétence.

[14] *CJPTA* (BC), *supra* note 1, s 10(c)(i) ("is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to (i) property in British Columbia that is immovable or movable property").

[15] *Ibid*, s 10(a).

[16] *Ibid*, s 10(g).

[17] The *forum non conveniens* application was heard by a different judge. It was the plaintiffs' choice to separate the two proceedings.

[18] *CJPTA* (BC), *supra* note 1, s 11(2).

[19] *Ibid*, s 11(2)(f).

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La Cour d'appel accueille l'appel. La conclusion du juge de motion selon laquelle l'intimée n'exploite pas une entreprise en Ontario était une erreur manifeste et dominante dans le contexte du dossier. Dans l'audition, l'avocat des appelants a demandé au représentant de l'intimée s'il est juste de dire que Campeau fait affaire en Ontario et celui-ci a répondu que oui. Bien qu'il ne s'agisse pas d'un aveu formel ni d'un élément de preuve déterminant, l'affirmation du représentant est une preuve pertinente que le juge de motion aurait dû prendre en compte.

En outre, l'intimée opère un service de réparation mobile et effectue aussi des réparations de machinerie en Ontario. Des employés de Campeau se rendent en Ontario pour vendre de la machinerie agricole et l'intimée fait des ventes en Ontario grâce à ses représentants de ventes qui visitent la province. Le fait que l'intimée maintient un système de géopositionnement par satellite (GPS) en Ontario qui soutient la machinerie qu'elle vend en Ontario appuie la conclusion qu'elle y exploite une entreprise. Le système de GPS est intimement lié à la vente de machinerie agricole et fait partie intégrante des opérations de l'intimée. L'intimée a une présence très visible dans l'est de l'Ontario et tire à peu près 40 pour cent de ses revenus de ventes de l'Ontario.

Les appelants ayant établi un facteur de rattachement entre le litige et la province, les tribunaux de l'Ontario sont présumés compétents pour connaître du litige, et rien au dossier ne réfute la présomption.

GIAO Consultants Ltd v 7779534 Canada Inc, 2020 ONCA 778

The plaintiff brought an action in Ontario in which it made claims in breach of contract and in tort against a number of defendants in relation to a share purchase agreement. The contract was expressly governed by Quebec law and included a non-exclusive forum selection agreement in favour of Quebec. Four defendants were Quebec residents who did not submit to the court's jurisdiction. The others were either Ontario residents or had submitted to the jurisdiction. The four Quebec defendants argued that the court lacked jurisdiction *simpliciter* with respect to the claims against them or should decline jurisdiction on the basis of *forum non conveniens*. On jurisdiction *simpliciter*, the motion judge found that several presumptive connecting factors were present and had not been rebutted. The defendants were conducting business in Ontario, the tort claims concerned a tort committed in Ontario, and a contract connected with the claims was made in Ontario. On *forum non conveniens*, the motion judge held that the defendants had not shown that Quebec was a clearly more appropriate forum.

The motion judge's decision was affirmed on appeal.[20] The defendants had shown no grounds for setting aside the motion judge's findings on jurisdiction *simpliciter*. On *forum non conveniens*, the defendants argued on

[20] Not all defendants participated in the appeal.

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appeal that the motion judge gave insufficient weight to the fact that Quebec law governed the contract, but the Court of Appeal observed that there were both contract and tort claims, and there could be questions about whether they were all governed by Quebec law. There were no grounds for interfering with the judge's exercise of discretion in refusing a stay.

Note. Other cases in which jurisdiction *simpliciter* was found and jurisdiction was not declined were *Access Mortgage Corp (2004) Ltd v Western Acres Capital Inc*,[21] a claim in a BC court by Alberta investors for, among other relief, foreclosure of a mortgage on BC property; and *Daytona Power Corp v Hydro Company Inc*,[22] a claim in an Alberta court against foreign borrowers, the court relying on the presumptive connecting factor that the relevant financing agreements were expressly governed by Alberta law.

Jurisdiction simpliciter — *non-resident defendant — claim for financial loss — jurisdiction found to exist but jurisdiction declined* — forum non conveniens — lis alibi pendens

Note. Touchup RX v Dr Colorchip[23] was a dispute between a Florida manufacturer of automobile paint touch-up products and its former Canadian licensee. In the Ontario action, the licensee claimed tortious interference with its economic relations, breaches of Canadian competition laws by making false representations to the public, and defamation. The court held that, although jurisdiction *simpliciter* was established by the presumptive connecting factor that the alleged tortious conduct took place partly in Ontario, jurisdiction should be declined in favour of two proceedings under way in Florida that addressed the same conduct. By way of contrast, a similar claim against non-resident defendants for interfering with the plaintiff's business was held to be outside the court's jurisdiction in *Glycobiosciences Inc v Fougera Pharmaceuticals Inc*[24] because none of the wrongful conduct was said to have taken place in Ontario.

Jurisdiction simpliciter — *non-resident defendant — claim for financial loss — jurisdiction found to exist but jurisdiction declined* — forum non conveniens — *transfer of proceeding requested*

Schuppener v Pioneer Steel Manufacturers Ltd, 2020 BCCA 19, 443 DLR (4th) 409

The plaintiff was injured when a steel storage building that he purchased from the defendant collapsed on him. The sales contract included an

[21] 2020 BCSC 1892.

[22] 2020 ABQB 723.

[23] 2020 ONSC 3068.

[24] 2020 ONSC 2900.

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exclusive forum selection agreement in favour of Ontario. The plaintiff commenced an action in British Columbia claiming damages for his injuries on the basis of breach of contract and negligence. The defendant sought a stay and a request to transfer the proceeding to Ontario, relying on the forum selection agreement. The chambers judge held that the plaintiff had shown strong cause not to enforce the agreement. The Court of Appeal allowed the defendant's appeal and ordered that the BC Supreme Court request that the Ontario Superior Court accept a transfer of the proceeding.[25] Strong cause for departing from the forum selection agreement had not been shown. The court did not have discretion to refuse to enforce valid contracts unless there was some paramount consideration of public policy sufficient to override the public interest in freedom of contract. The judge had emphasized that the contract was a consumer contract, that it was a claim for personal injury and not just for a commercial loss, and that the public had an interest in seeing the issues litigated in British Columbia, where the problem with the building arose and the damage was suffered. The judge had erred in principle by characterizing ordinary considerations as matters of public policy.

Jurisdiction simpliciter — *non-resident defendant — claim for financial loss — jurisdiction found not to exist*

Note. In *Ahman v Rawjee*,[26] A UK citizen working in Bahrain sued in Ontario to recover money that he had lent to the defendant, a Canadian citizen with family in Canada. There was no jurisdiction *simpliciter* because no presumptive connecting factor was present. The defendant was neither resident nor domiciled in Ontario. He did do some business there, but the claim had nothing to do with that business. Nor was there a presumptive connection with Ontario in *Beijing Hehe Fongye Investment Co Ltd v Fasken Martineau Dumoulin LLP*,[27] a claim by a Chinese company and its joint venturer, a resident of Ontario, against two other Chinese companies for having knowingly assisted the joint venture's Canadian law firm in breaches of the lawyers' fiduciary duty by acting both for the joint venture and another client competing with the joint venture for acquisition of a stake in a company listed on the Toronto Stock Exchange.

[25] The mechanism for requesting and accepting a transfer of a proceeding is contained in Part 3 of the *CJPTA* (BC), *supra* note 1. The mechanism can be set in motion even if the proposed receiving court is in a jurisdiction that does not have a statute similar to the *CJPTA* (BC). The receiving court is assumed to have inherent authority to accept the transfer, although it can decline to do so for any reason, as the *CJPTA* (BC) provisions contemplate. See *Bishop v Wagar*, noted below under *Declining jurisdiction* in personam, *transfer of proceedings under* CJPTA — *transferring court lacking territorial competence.*

[26] 2020 ONSC 6279.

[27] 2020 ONSC 934, 149 OR (3d) 466.

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Jurisdiction simpliciter — *non-resident defendant — claim for financial loss — jurisdiction found not to exist — forum of necessity argued*

Bowles v Al Mulla Group, 2020 ONCA 761, 455 DLR (4th) 342

The plaintiff brought an action in Ontario in 2018 against several defendants resident in Kuwait, where the plaintiff had formerly worked as a used car appraiser. The plaintiff claimed that the defendants had conspired to take revenge on him for refusing to participate in his employer's fraudulent scheme. He said he was arrested, beaten, and tortured. In his action, he sought compensatory damages of $150 million and punitive damages of $100,000. He had left Kuwait in 2017 and was granted refugee status in Canada. He claimed his life would be in danger if he ever returned to Kuwait. Although the case had no connection with Ontario, the plaintiff argued that the court should take jurisdiction on the basis of forum of necessity.

The motion judge held that the plaintiff had not met the requirements for a forum of necessity. There was no corroborating evidence in support of the plaintiff's claims of what had been done to him. No credible evidence showed that threats made against him on social media emanated from the defendants. The Court of Appeal affirmed the motion judge's decision, which was an exercise of discretion that was entitled to deference on appeal. The court rejected the argument that the motion judge should have given greater weight to the plaintiff's refugee status. The plaintiff presented no evidence to the motion judge that revealed the basis for his refugee status. Moreover, the plaintiff had left Kuwait for Canada only after the conclusion of various legal proceedings in Kuwait in which he was seeking compensation from the same parties and was represented by counsel.

Jurisdiction simpliciter — *non-resident defendant — claim for injury to person or damage to property or reputation — jurisdiction found to exist and not declined*

SSAB Alabama Inc v Canadian National Railway Co, 2020 SKCA 74, [2021] 4 WWR 22, leave to appeal to SCC refused, 39362 (11 February 2021)

CN's train derailed in Saskatchewan, allegedly because a flatcar bearing steel for delivery in Alberta had been improperly loaded by the defendant steel company, SSAB, in Alabama. CN brought an action for damages against SSAB in Saskatchewan. SSAB applied to have the action dismissed for lack of territorial competence (jurisdiction *simpliciter*) or stayed on the ground of *forum non conveniens*, both under the Saskatchewan *CJPTA*.[28]

The Court of Appeal held that the chambers judge had properly dismissed both motions. Subject to affidavit evidence submitted, the facts in the

[28] *Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 [*CJPTA* (SK)].

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pleadings can determine territorial competence. The proceeding was presumed to have a real and substantial connection with Saskatchewan because the alleged tort was committed there.[29] The *situs* of the tort for jurisdictional purposes, according to authority, could be in any state that was substantially affected by the defendant's activities or its consequences and the law of which was likely to have been in the reasonable contemplation of the parties.[30] Here, there was no tort of negligence unless and until the steel fell or slipped from the flatcar and caused the derailment. That this precipitating event, and all of the ensuing damage, occurred in Saskatchewan was enough to sustain the notion that the alleged tort was committed in the province and that there was a real and substantial connection between the facts on which CN's action was based and the province.

SSAB argued that the presumed connection was rebutted by showing that only a minor part of the tort was committed in Saskatchewan. The court rejected this proposition because, given that no jurisdiction was more affected by the alleged tort than Saskatchewan, to discount the place where the accident and the damage occurred would be to revive a "place of acting" test that the law had rejected.[31] There was no need to decide whether other possible presumptive real and substantial connections with Saskatchewan were made out. Possible categories were that the proceeding concerned contractual obligations that were to be performed to a substantial extent in Saskatchewan[32] and that it concerned a business carried on in Saskatchewan.[33] If a real and substantial connection exists between the forum and the subject matter of the litigation in respect of one factual and legal situation, a court must take jurisdiction over all aspects of the case.[34] The fact that the Court of Queen's Bench had territorial competence in relation to the tort cause of action meant that it had jurisdiction to try the whole of CN's claim against SSAB.

On the *forum non conveniens* motion, the burden was on SSAB to demonstrate that a forum in Alabama was clearly more appropriate than the forum in Saskatchewan. In considering that issue, the court should have regard to the trial of all the causes of action advanced in the statement of claim, both in tort and in contract, not just the cause of action that might have grounded territorial competence. An approach that did not consider the whole of the action might fail to take account of factors that could significantly impact the

[29] *Ibid*, ss 4(e), 9(g).

[30] *Moran v Pyle National (Canada) Ltd*, [1975] 1 SCR 393 at 408–09, 43 DLR (3d) 239 at 250–51 [*Moran*], cited in *SSAB Alabama Inc v Canadian National Railway Co*, 2020 SKCA 74 at para 51 [*SSAB*].

[31] In *Moran*, *supra* note 30.

[32] *CJPTA* (SK), *supra* note 28, s 9(e)(i).

[33] *Ibid*, s 9(h).

[34] *SSAB*, *supra* note 30 at para 69, citing *Van Breda*, *supra* note 10 at para 99.

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assessment of the fairness and efficiency of proceeding on one jurisdiction versus another.

On the comparative convenience and expense of trial in Saskatchewan and in Alabama for the parties and their witnesses,[35] it was obvious that issues surrounding the loading and inspection of the flatcar in Alabama would be very significant. However, it was also very likely that other important issues would include matters such as the condition of the tracks in Saskatchewan, how the train containing the flatcar was being operated at the time of the derailment, and the causes of the derailment more generally. Facts surrounding the damages claim could also be expected to be important. There was no error in the judge's conclusion that the availability of witnesses did not tip the *forum non conveniens* analysis meaningfully one way or the other. Nor was there error in his consideration of the other relevant factors, including the law to be applied to the proceeding, the location of relevant records, the procedural rights in Saskatchewan and Alabama, and judgment enforcement issues. There was no basis for taking issue with his ultimate conclusion that SSAB had failed to establish that Alabama was a more appropriate forum in which to try CN's claims.

At several points in its argument, SSAB had maintained that it was not reasonable to expect it to answer to proceedings in Saskatchewan. The court took the opposite view. It seemed entirely reasonable that a company loading steel on a rail car for shipment out of the jurisdiction should expect to answer for damage caused by negligent loading of the steel and to answer for the damage in the jurisdiction where it was incurred.

Note. The court in *SSAB* made an interesting *obiter dictum* casting doubt on the generally held view that, when jurisdiction is challenged in an interlocutory proceeding, the plaintiff need only establish a "good arguable case" that the grounds for jurisdiction exist. "[T]here is at least some room to ask," said the court, "whether this is the appropriate approach or whether jurisdiction should be established on a balance of probabilities."[36] It was unnecessary to address that issue because both parties accepted that the "good arguable case" standard was the proper one.

If by "establishing jurisdiction on a balance of probabilities" the court means that any facts on which jurisdiction is based, if disputed, must be proved by evidence, it will pose a case management problem. The facts on which jurisdiction turns may also be facts on which the merits turn. In cases where that is so, the facts in question would presumably be most efficiently determined in the trial proper rather than in a separate proceeding. The BC Court of Appeal has indicated that jurisdiction can be tested twice in succession: first at the interlocutory stage on a "good

[35] *CJPTA* (SK), *supra* note 28, s 10(2)(a).

[36] *SSAB*, *supra* note 30 at para 14.

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arguable case" basis and then at the trial stage when jurisdictional facts can be proved on a balance of probabilities. See the note to *Hydro Aluminium Rolled Products GmbH v MFC Bancorp Ltd*, above under *Jurisdiction* simpliciter — *non-resident defendant — claim for financial loss — jurisdiction found to exist and not declined.*

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

Sikhs for Justice v Republic of India, 2020 ONSC 2628

Sikhs for Justice (SFJ), a non-profit Ontario organization advocating for an independent state of Khalistan to be created in the Punjab, brought an action in Ontario against the nation of India and various Indian media companies for having allegedly defamed SFJ by posting to various websites. There was no evidence that more than two people, both associated with SFJ, had accessed the websites from Canada. Even if publication in Ontario was a presumptive connecting factor for the tort of defamation, the presumption was rebutted because there was no evidence that SFJ's reputation suffered any harm in Ontario.

Note. In *Hammuri v Hammuri*,[37] an action was brought in Ontario against the plaintiff's brother, resident in Alberta, for injuries suffered in a motor vehicle accident in Alberta. No presumptive connecting factor was found with Ontario.

Declining jurisdiction *in personam*

Forum non conveniens — *dispute concerning sale of Canadian asset by American-owned Canadian company to American company — parallel proceedings in the United States*

Jamer Materials v US Concrete Inc, 2020 NBQB 90

The plaintiff, a New Brunswick company that owned an aggregate quarry in that province, entered into an agreement to sell its business to the defendant US Concrete, a Delaware company with its principal place of business in Texas. The plaintiff was owned by a Virginia company, and the agreement was negotiated between Virginia, where the plaintiff's US counsel was located, and Texas. It was signed by the plaintiff's parent company in Virginia and by US Concrete in Texas.

The sale of the business did not proceed, but a dispute arose concerning provisions of the agreement relating to the production of inventory at the plaintiff's New Brunswick quarry for US Concrete's New Jersey subsidiary, Eastern Concrete. US Concrete alleged that the plaintiff had

[37] 2020 ONSC 6448.

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misappropriated inventory belonging to Eastern. It commenced proceedings against the plaintiff in state court in New Jersey. The plaintiff had responded to the claims challenging jurisdiction and pleading on the merits. One of its arguments was that the *United Nations International Sales Convention* applied.[38] The plaintiff subsequently commenced an action in New Brunswick against US Concrete and Eastern Concrete dealing with essentially the same issues. The defendants challenged jurisdiction *simpliciter* and argued alternatively for a stay on the ground of *forum non conveniens*.

On jurisdiction *simpliciter*, the court found that two presumptive connecting factors were present. First, US Concrete carried on business in New Brunswick by agreeing to take over a New Brunswick company, taking steps to do due diligence in that regard and owning inventory in New Brunswick. Second, the alleged torts and breaches of contract related to property and to conduct in New Brunswick. However, the proceeding was stayed. The New Jersey proceeding was under way on the same issues, and that court was a clearly more appropriate forum. The dispute was about a contract negotiated between the plaintiff's US lawyer and other US lawyers and was executed in New Jersey. A key component of the contract was the shipment and supply of aggregate to the New York market. The inventory would have been delivered to Eastern in New Jersey. The jurisdiction most connected with performance of the relevant matters under the contract was New Jersey. There was no loss of juridical advantage to the plaintiff in litigating there; its argument that the *United Nations International Sales Convention* applied could be made in either court since the convention was law in both jurisdictions. Neither defendant had assets in New Brunswick, so enforcement of a judgment in the United States would be necessary. It was fairer and more efficient to stay the New Brunswick action.

Forum selection agreement designating foreign court as non-exclusive forum — whether domestic court is forum non conveniens

Note. See *Hydro Aluminium Rolled Products GmbH v MFC MFC Ltd,* 2020 BCCA 295, noted above under *Jurisdiction* simpliciter — *non-resident defendant — claim for financial loss — jurisdiction found to exist and not declined.*

Forum selection agreement designating domestic court as exclusive forum — discretion not to enforce

Nexen Energy ULC v ITP SA, 2020 ONSC 1616 (Div Ct)

The plaintiff Nexen had brought an action in Alberta against ITP, a French company, and other companies involved in the construction of three

[38] *United Nations Convention on Contracts for the International Sale of Goods*, 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).

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pipelines in Alberta. Out of caution, Nexen also brought an action in Ontario only against ITP because the contract between them contained an exclusive forum selection agreement in favour of Ontario, although the law governing the contract was that of Alberta. The parties agreed to stay the Ontario action in favour of Alberta, but ITP brought a motion to have two provisions in the contract between them interpreted by the Ontario court before the proceeding was stayed. These provisions concerned limitation of liability.

The court held that ITP's participation in the Alberta proceeding[39] amounted in practical terms to an agreed rescission of the clause or to a strong cause not to enforce the clause. The fact that ITP had agreed to Alberta law governing the contract was a factor that favoured declining jurisdiction.

Transfer of proceedings under the CJPTA — *transferring court lacking territorial competence*

Bishop v Wagar, 2020 NSSC 154

The plaintiff brought an action in Nova Scotia for damages arising out of a motor vehicle accident in Ontario. The accident occurred when he was driving in the course of his employment delivering freight. His tractor trailer collided with a vehicle owned by an Ontario resident and driven by another Ontario resident. The defendants were the owner of the vehicle and the estate of the driver, who was killed in the accident. The court held that it lacked territorial competence under the *CJPTA*.[40] None of the presumed real and substantial connections in the Act applied.[41] Nor was a real and substantial connection shown on the facts. For this purpose, the plaintiff had put forward certain presumptive connecting factors such as those that the courts had approved in non-*CJPTA* provinces, including the plaintiff's motor vehicle insurance being a Nova Scotia contract and the plaintiff's employment contract being made in Nova Scotia, but these connections were held to have nothing to do with the claims in the action.

The court granted the plaintiff's application to issue a request under the *CJPTA* to the Ontario Superior Court of Justice to accept a transfer of the proceeding. The Act contemplates that a court in a non-*CJPTA* jurisdiction can be requested to accept a transfer. If the transferring court itself has territorial competence, it must be satisfied that the receiving court is a more

[39] One case arising out of that proceeding was *Nexen Energy ULC v ITP SA*, 2020 ABQB 83, decided about a month before the Ontario case. It upheld the Alberta court's jurisdiction as against one of the defendants, a Swiss company that provided a leak detection system for the pipelines.

[40] *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003, c 2, s 4.

[41] *Ibid*, s 11.

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appropriate forum for the proceeding,[42] but if the transferring court lacks territorial competence, as here, it need only be satisfied that the receiving court has territorial competence in the proceeding.[43] Those criteria were met in this case. It was possible that, by this time, the plaintiff's action was statute barred in Ontario, but because it lacked territorial competence, the Nova Scotia court had nothing to say as to the conduct of the proceeding. To save the cost of commencing a new proceeding in Ontario, the judge would request that the Superior Court of Justice accept a transfer of the proceeding. That court would, applying Ontario law including limitation periods, determine if this was an appropriate case to accept the request for the transfer.

Arbitration agreement

Uber Technologies Inc v Heller, 2020 SCC 16, 447 DLR (4th) 179

The plaintiff, an Uber food delivery driver, commenced a class action in Ontario in 2017 on behalf of Uber drivers, claiming various remedies for breaches by Uber of the *Employment Standards Act* of Ontario.[44] The services agreement, entered into by each driver, was with Uber subsidiaries incorporated in the Netherlands. The agreement provided that it would be governed by Netherlands law, and any dispute between the driver and Uber was first to be mandatorily submitted to mediation proceedings under the International Chamber of Commerce (ICC) rules. Failing settlement within sixty days of the request for mediation, the dispute could be referred to arbitration in Amsterdam under the ICC *Arbitration Rules*.[45] Relying on this term of the services agreement entered into by the representative plaintiff, the defendants moved for a stay of the class proceeding in favour of arbitration in the Netherlands. The motion judge granted the stay, but the Court of Appeal reversed on the ground that the arbitration agreement was unconscionable.

The Supreme Court of Canada dismissed Uber's appeal. The court rejected an argument that the application for a stay fell under the *International Commercial Arbitration Act* (*ICAA*).[46] Disputes subject to that Act had to be both "international" and "commercial." This dispute was "international" but not "commercial" because it concerned labour and employment matters. Employment disputes are expressly excluded from the scope of the Act,

[42] *Ibid*, s 15(1)(b).

[43] *Ibid*, s 15(2). In either case the court must also be satisfied that the receiving court also has subject matter competence in the proceeding. *Ibid*, s 15(1)(a), (2).

[44] *Employment Standards Act*, SO 2000, c 41.

[45] For the current version, see International Chamber of Commerce, *2021 Arbitration Rules and 2014 Mediation Rules* (English version), online: <iccwbo.org/publication/arbitration-rules-and-mediation-rules/>.

[46] *International Commercial Arbitration Act*, SO 2017, c 2, Sch 5.

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and a dispute about whether someone is an employee, as here, was similarly excluded.

Since the *ICAA* did not apply to the motion for a stay on the ground of the arbitration agreement, the *Arbitration Act* did apply.[47] It permits a court to refuse a stay if the arbitration agreement is invalid.[48] A preliminary question was whether the court should decide on the issue of invalidity or leave it to the arbitrators to decide on their own jurisdiction. The normal rule was that the validity of the agreement should be decided by the arbitrators, except where validity could be decided as a question of law with only a superficial consideration of the documentary evidence in the record. However, a *bona fide* challenge to an arbitrator's jurisdiction should not be referred to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved. That was so in this case because a driver could only initiate arbitration in the Netherlands by paying some $4,500 in up-front administrative fees. That posed a brick wall between the representative plaintiff and resolution of any of the claims he made against Uber. The court should therefore decide the issue whether the agreement was invalid.

The issue of validity should be decided by Ontario law rather than by the law of the Netherlands because neither party had led evidence as to Dutch law. Both elements of unconscionability were present. First, there was inequality of bargaining power between each driver and Uber. Second, this inequality resulted in an improvident bargain. The arbitration agreement, considered to be separate from the rest of the services agreement, was improvident because the obligation to pay very substantial fees in order to commence the proceeding meant that arbitration in the Netherlands was not a realistic option for the driver. The agreement was therefore unconscionable and voidable.

The reasons just summarized were agreed with by seven judges. One other judge agreed in the result but would have held that the arbitration agreement was against public policy rather than unconscionable. The ninth judge dissented and would have granted a stay, conditional on Uber advancing the funds needed to initiate the arbitral proceedings.

Note. A case that went the other way, because it did not have the employment law aspects of the *Heller* case, was *Clayworth v Octaform Systems Inc.*[49] The BC Court of Appeal held that it was an error for the chambers judge to have decided that the arbitration clause, on its proper construction, did not apply to the plaintiff's claim. If there was an arguable case that the plaintiff was bound by the clause, it was for the arbitrator to decide whether that interpretation was made out.

[47] *Arbitration Act*, SO 1991, c 17.

[48] *Ibid*, s 7(2).

[49] 2020 BCCA 117.

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Matrimonial causes

Support obligations

Note. In *Zeineldin v Elshikh*,[50] jurisdiction to order child support for children who might not be habitually resident in Ontario was based on their presence in Ontario coupled with the other grounds required by statute for making a parenting order in such a case, including that there was substantial evidence in Ontario as to the children's best interests.[51] Spousal support was also awarded, notwithstanding the parties' having been divorced in Egypt, because the divorce met none of the grounds for recognition in Canada.[52]

Matrimonial property — subject matter jurisdiction

Rees v Shannon, 2020 ONSC 3633

In the context of an Ontario divorce proceeding commenced by the husband, the wife made claims relating to the parties' property. The parties' property rights were governed by a domestic agreement. One asset was a Florida condominium that the parties acquired as tenants by the entirety. The wife had essentially put up the husband's half of the purchase price by using her savings, in the expectation that the husband would repay her with an inheritance that he expected. The husband sought summary judgment on the wife's property claims so far as they related to the Florida condominium because the immovable property was in Florida, or, alternatively, Ontario was *forum non conveniens*.

The judge held that the court had jurisdiction *in personam* as against the husband, which was sufficient because the wife's claim against him was a personal claim for the debt as a "protected asset" under the agreement. It was not a claim for title to the Florida property. The Ontario court could make a monetary award to effect the result. Ontario was overwhelmingly the *forum conveniens* because it was not certain that a Florida court could split the tenancy other than fifty-fifty without also itself granting the divorce.

Li v Li, 2020 ONSC 5552

The parties were married in China in 2012, the husband being a Canadian citizen and the wife a citizen of China. They were resident in China when they separated. In 2018, they jointly applied to a Chinese court for divorce, which was granted. The wife owned property in Ontario. The husband and members of his family lent a large sum in Chinese currency to the wife in

[50] 2020 ONSC 1160.

[51] *Children's Law Reform Act*, RSO 1990, c C.12, s 22(1)(b) [*CLRA*].

[52] Under the *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 22.

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2019. The husband brought this action in Ontario in February 2020 for a declaration that the Chinese divorce was not recognized in Ontario, that a property agreement between the parties should be set aside, and that the Ontario court had jurisdiction to decide equalization, spousal support, and the husband's trust claims to a house that the wife owned. The wife had not attorned to the court's jurisdiction and, in the present proceeding, argued that the court had no jurisdiction *simpliciter* over the husband's claims or should decline jurisdiction on the basis of *forum non conveniens*.

The court held that, in the absence of evidence to the contrary, the divorce must be presumed to be valid. If it was valid, the court had no jurisdiction to grant spousal support because the parties were former spouses. The claims for equalization and property division were, according to the statutory choice-of-law rule, governed by the last common habitual residence of the parties or, if the parties had no common habitual residence, by the law of Ontario.[53] As for jurisdiction *simpliciter* in relation to the property claims, there was no statutory rule. There had to be a real and substantial connection between the parties, the issues, and Ontario. Here, there was such a connection. The husband was a Canadian citizen and made frequent trips to Canada. The parties' adult children continued to reside there. The wife had been a permanent resident of Canada. The court had jurisdiction to adjudicate on property rights as between spouses divorced abroad, if the foreign judgment did not deal with property issues, which the Chinese judgment in this case did not. The wife had not shown that Ontario was *forum non conveniens*. The natural forum for property adjudication was where the property was located.

Infants and children

Custody — habitual residence of children

Note. In *Johansson v Janssen*,[54] although the children were born in Canada and still habitually resident in British Columbia, they were also habitually resident in Germany, where the mother had her permanent residence. The father lived in Sweden. The court held that custody was more appropriately decided in Germany and stayed the BC proceeding. In *Andersen v Ali*,[55] jurisdiction in custody was exercised despite the children's being habitually resident in Pakistan when the proceeding in Ontario was commenced. They had lived in Canada from 2004 to 2013, and the statutory requirements for taking jurisdiction based on the children's presence in Ontario were met.[56]

[53] *Family Law Act*, RSO 1990, c F.3, s 15.

[54] 2020 BCSC 1738, aff'd 2021 BCCA 190.

[55] 2020 ONSC 501.

[56] *CLRA*, *supra* note 51, s 22(1)(b).

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Custody — extra-provincial order

KNW v CEJB, 2020 ABCA 149, 446 DLR (4th) 567

The father obtained an order in Ontario that the mother return their three children to Ontario, where he lived. He applied in Alberta for enforcement of the order under the *Extra-Provincial Enforcement of Custody Orders Act*.[57] The Alberta Court of Appeal held, reversing the chambers judge, that the order should be refused enforcement because the children no longer had a real and substantial connection with Ontario when the order was made. The Ontario Children's Aid Society had relocated the mother and children to Alberta seven months earlier because the father was charged with violence against the mother over a period of three days in the presence of the children. The real and substantial connection requirement for enforcement was a mandatory one and, contrary to the chambers judge's view, applied even though the mother had consented to the Ontario court's making the order. The children's connection with Ontario must be considered as having ended, considering the significant delay on the father's part in initiating and proceeding with his application in Ontario, and the atypical action on the part of the Ontario Children's Aid Society to relocate the mother and the children to Alberta upon receiving a report of domestic assault involving the father. A parenting application filed by the mother was pending in Alberta and should be proceeded with as the Court of Queen's Bench might direct.

Leavens v Fry, 2020 ONSC 5077

The father and mother originally met in Ontario but moved to Australia, where both their children were born. From 2015 to 2018, the family lived in Connecticut. A court in that state granted them a divorce and made an order that each parent would bear their own support costs. In 2019, the Connecticut court ordered that the father could relocate, with the children, to Ontario. The father now applied for recognition of the Connecticut divorce and the relocation order; for revised access terms for the mother, who continued to live in Connecticut; and for the mother to pay child support according to Ontario guidelines.

The court held that the children were now habitually resident in Ontario, which gave the court jurisdiction to make a new custody order.[58] There was an extraterritorial custody order in effect that the court must recognize,[59] but the court had jurisdiction to supersede the order if it was satisfied that there had been a material change in circumstances that affected, or was

[57] RSA 2000, c E-14.

[58] *CLRA*, *supra* note 51, s 22(1)(a).

[59] *Ibid*, s 41.

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likely to affect, the best interests of the child and that the child was habitually resident in Ontario at the time of the application.[60] There had been a material change in circumstances owing to the relocation of the children to Toronto pursuant to the terms of the Connecticut relocation order. The court therefore had jurisdiction to hear the father's application for custody and access orders.

Since the Ontario court would be making a new custody order superseding the Connecticut order, it followed that the issue of support for those children could also be considered anew. Since there was a real and substantial connection between Ontario and the matters being litigated, there was also jurisdiction *simpliciter* to order child support. Connecticut was not shown to be a clearly more appropriate forum for determining child support than Ontario, so the court should not decline to exercise its jurisdiction.

Onuoha v Onuoha, 2020 ONSC 6849

The father and mother were divorced in 2018 in Nigeria, where they had both always lived. A consent order for custody of their two children was included in the Divorce Order. The children would live with the mother during the school year and with the father during the holidays. In the same year, the mother applied to emigrate to Canada, her application was accepted, and she moved with the children to Canada in 2019. Five days after the removal of the children, the father applied to the court in Nigeria for an order that the mother return the children. The mother was represented in the proceeding. The court held that the mother had violated the Divorce Order and ordered her to return the children. The father now moved in the Ontario court for an order recognizing the Nigerian Divorce Order and the order to return the children to Nigeria.

The motion judge held that the custody provisions in the Divorce Order must be recognized under the *Children's Law Reform Act*.[61] The children remained habitually resident in Nigeria since the father had not consented to their removal, and they were abducted. The children's presence in Ontario did not give the court jurisdiction to adjudicate custody because they had been brought to Ontario in violation of a foreign court order that was recognized in Ontario.[62] The Court of Appeal dismissed the mother's appeal. It did not doubt that the mother believed she was seeking a better life for her and for her daughters, but this was not a decision she was entitled to make alone. Her remedy, if she wished to emigrate to Canada with the children, was a motion before the Nigerian court to vary the Divorce Order.

[60] *Ibid*, s 42.

[61] *Ibid*, s 41(1).

[62] *Ibid*, s 22(1)(b).

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Child abduction — Hague Child Abduction Convention

JM v LL, 2020 NBCA 14, 444 DLR (4th) 626, leave to appeal to SCC refused, 39167 (9 July 2020)

On a one-year visit to the United States from her home in New Brunswick, the mother obtained (illegally) a job in Texas, met the father, and had a child there in September 2017. The couple had no plans to move to Canada and were going to try to get a US work visa for the mother. The mother took the child to see family in New Brunswick in February 2018. They were there for a month; the father joined them there for a week. In August 2018, the mother returned to New Brunswick for a year to work. The plan was that the parents would travel back and forth to each other's home as often as they could. In September 2018, the father revoked his consent for the child to remain in Canada and obtained a court order in Texas against removal of the child from that state. He left a copy of the documents with the mother on a visit to New Brunswick.

In February 2019, the parents' relationship ended. The mother applied in New Brunswick for custody of the child and cancelled a planned trip to Texas that month. In April 2019, the New Brunswick court granted interim custody to the mother, declaring the child's habitual residence to be New Brunswick. Also in April 2019, the father applied in Texas for an order under the *Hague Child Abduction Convention*[63] that the child be returned to Texas. The documents were received by the Central Authority in New Brunswick in May 2019. In the following month, the father filed an application in New Brunswick for an order for return of the child to Texas under Article 12 of the convention. The Court of Queen's Bench dismissed the application, holding that the child was habitually resident in New Brunswick before February 2019, and the mother's retention of the child in New Brunswick was therefore not wrongful. The Court of Appeal affirmed the judge's decision. The judge had properly applied the hybrid test for habitual residence[64] and had not left out of account the parties' intention that the mother and child would return to Texas in June 2019.

Farsi v Da Rocha, 2020 ONCA 92, 444 DLR (4th) 197, leave to appeal to SCC refused, 39120 (11 June 2020)

The child in this case was born in April 2018 to a Portuguese permanent resident of Canada, the father, and a French woman who was in Canada on

[63] *Hague Convention on the Civil Aspects of Child Abduction*, 25 October 1980, Can TS 1983 No 35 (entered into force 1 December 1983).

[64] Adopted in *Office of the Children's Lawyer v Balev*, 2018 SCC 16, noted in Joost Blom, "Canadian Cases in Private International Law in 2018" (2018) 56 CYIL 517 at 584–87. "Hybrid" refers to the test being based both on a child's factual connections with the jurisdiction and on the parents' intentions as to the child's residence.

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a student visa. The family lived together until October 2018, when the mother took the child to France. The father consented only to a two-week visit. When he learned that she intended to remain there, he went to France in February 2019 and returned with the child to Canada. The mother said that she had agreed only to the child's staying with the father for a month, but the father maintained that she had agreed to a permanent return of the child to Canada since he had previously commenced legal proceedings in Ontario for the child's return. The application judge held that the child's habitual residence in February 2019 was in Canada and that the mother was wrongfully retaining her in France. The father's removal of the child to Canada, and the retention of her there, had not been wrongful.

The Ontario Court of Appeal affirmed the decision. The judge had correctly applied the hybrid approach to determining habitual residence.[65] The key in this case was the lack of evidence about the child's circumstances after the mother returned with her to France and before the father returned her to Canada. There was no error in concluding that her habitual residence had not been changed to France in that period.

Note. In *Rainey v Summers*,[66] an order was made for return of the child to Missouri, where he was habitually resident. He had been wrongfully retained in Ontario.

Adult guardianship and powers of attorney

Enforcement of foreign guardianship order

Note. A New York adult guardianship order was enforced in Ontario in *Bank of Nova Scotia Trust Co v Pernica*.[67] The Ontario court's order was limited to things to be done in Ontario, including the guardian's obtaining access to funds in Ontario bank accounts.

Subject matter jurisdiction

Justiciability of issues implicating foreign relations — acts of foreign states — claims of violation of plaintiffs' human rights abroad

Nevsun Resources Ltd v Araya, 2020 SCC 5, 443 DLR (4th) 383

The plaintiffs were Eritreans who were employed at the Bisha gold, copper, and zinc mine in Eritrea. The mine was majority owned by Nevsun, a BC corporation. The minority stake was owned by an Eritrean state entity. The

[65] See note 64 above.

[66] 2020 ONSC 6165.

[67] 2020 ONSC 67.

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plaintiffs alleged that they were military conscripts who had been forced to work at the mine for years in inhuman conditions as employees of contractors connected to Eritrean politicians or military leaders. They commenced an action in British Columbia against Nevsun. They pleaded a variety of causes of action, including common law torts and breaches of customary international law that constituted violations of their human rights.

Because Nevsun was a BC company, jurisdiction *simpliciter* was clear. Nevsun argued, however, that the court should decline jurisdiction under the *CJPTA* on the ground of *forum non conveniens*.[68] It also argued that the plaintiffs' pleadings should be struck out as non-justiciable under the act of state doctrine since the claims would require the BC court to pass judgment on the conduct of the Eritrean state. It argued in addition that civil claims could not be based, as pleaded, on violations of customary international law. All three of these arguments failed in the BC Supreme Court and the BC Court of Appeal.[69] Nevsun did not appeal the dismissal of its argument of *forum non conveniens* but appealed the decision on the other two issues to the Supreme Court of Canada.

The Supreme Court affirmed the Court of Appeal on both of the issues under appeal. The act of state doctrine was held to be no part of Canadian common law. The twin principles underlying the doctrine — conflict of laws and judicial restraint — were subsumed in Canada within the jurisprudence on private international law. The principles of private international law generally call for deference to the validity of foreign laws, but allow for discretion to decline to enforce foreign laws where they are contrary to public policy, including respect for public international law.

As for the claims for violations of customary international law, Nevsun had not demonstrated that these should be struck at this preliminary stage. It was not "plain and obvious" that the domestic common law could not recognize a direct remedy for the breach of norms of public international law. The court was not required to determine definitively whether the Eritrean workers should be awarded damages for the alleged breaches of customary international law. It was enough to conclude that the breaches of customary international law, or *jus cogens*, relied on by the Eritrean workers might well apply to Nevsun.

The reasons summarized above were those of five of the nine judges. Two judges dissented because they would have struck the claims so far as they were based on violations of customary international law. Two other judges dissented on both issues under appeal. They would have struck the plaintiffs' claims on the ground of the act of state doctrine and also struck the claims so far as they were based on violations of customary international law.

[68] *CJPTA* (BC), *supra* note 1, s 11(1).

[69] *Araya v Nevsun Resources Ltd*, 2017 BCCA 401, noted in Joost Blom, "Canadian Cases in Private International Law in 2017" (2017) 55 CYIL 598 at 609–11.

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Québec

Actions personnelles à caractère extrapatrimonial et familial

Enfants — garde — domicile de l'enfant — déplacement illégal de l'enfant

Droit de la famille — 201682, 2020 QCCA 1477, autorisation de pourvoi à la CSC refusée, 39523 (3 juin 2021)

Les parties sont les parents d'un garçon âgé de près de trois ans. La mère quitte la Tunisie où elle réside avec son fils pour s'installer au Québec en attendant l'issue de sa demande de statut de réfugiée. Alléguant que l'appelante a illégalement quitté le pays avec son fils, le père réclame le retour de l'enfant en Tunisie. En première instance, le juge, après avoir souligné que le dossier n'était pas régi par la *Loi sur les aspects civils de l'enlèvement international et interprovincial d'enfants*,[70] conclut, en s'appuyant sur les principes du *Code civil du Québec* (*CcQ*), que l'enfant était domicilié en Tunisie au moment de son déplacement et que la Cour supérieure n'avait pas compétence pour statuer sur sa garde.

La Cour d'appel accueille l'appel du jugement. Les parties conviennent que la *Convention sur les aspects civils de l'enlèvement d'enfants*[71] et la Loi ne s'appliquent pas au dossier. Les parties se rencontrent vers la fin de l'année 2016 et se marient environ trois semaines plus tard, le 10 décembre 2016, en Tunisie. À l'époque, le mari travaille aux États-Unis. L'enfant naît aux États-Unis en 2017. À la suite du décès du père du mari en septembre 2018, la famille retourne en Tunisie et s'installe chez la mère du mari. La femme y demeure avec son fils alors que le mari retourne aux États-Unis pour son travail en novembre 2018. En avril 2019, le mari décide de demander le divorce. La femme retourne vivre chez ses parents, en Tunisie, avec l'enfant.

Les parties n'étant pas parvenues à s'entendre sur les modalités de leur divorce, le mari introduit une demande en divorce en Tunisie. En juillet 2019, le tribunal tunisien rend "une mesure d'urgence" par laquelle il attribue la garde de l'enfant à la femme et accorde des droits de visite au mari. Aucune ordonnance n'interdit cependant à la femme de quitter le pays pendant l'instance. En août 2019, la femme quitte la Tunisie pour se rendre au Canada.

En l'absence de preuve quant à l'existence d'un litige entre les parties en Tunisie relativement à la garde de l'enfant, le juge de première instance devait conclure que le déplacement n'était pas illicite puisque la femme détenait alors la garde de son fils et pouvait choisir d'établir son lieu de résidence au Québec. En vertu de l'article 80 *CcQ*, la Cour supérieure avait donc compétence pour se prononcer sur les questions relatives à la garde de

[70] RLRQ, c A-23.0.1.

[71] Voir *supra*, note 63.

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l'enfant. Tenant compte de la preuve au dossier et contrairement à ce que le juge de première instance a conclu, le meilleur intérêt de l'enfant commande qu'il demeure au Canada avec sa mère.

Actions personnelles à caractère patrimonial

Compétence — une des obligations découlant d'un contrat devait être exécutée au Québec — article 3148(3) CcQ

Partner Reinsurance Company Ltd c Optimum Réassurance inc, 2020 QCCA 490

L'appelante, Partner Re, est domiciliée aux Bermudes et n'a aucun établissement au Canada, bien qu'elle y exerce des activités par le biais de son agent principal, Reeve, à Toronto. L'intimée, Optimum, a son siège social à Montréal. Depuis 2000, les parties sont liées par des traités de rétrocession par lesquels Partner accepte de partager une partie du risque réassuré par Optimum, en contrepartie d'une portion des primes versées par ses assurés, en lien avec deux de ses portefeuilles. En 2014, les parties concluent une nouvelle entente intitulée *General Agreement*, qui comporte une clause de non-concurrence à l'égard du marché canadien de la réassurance. La clause se lit, "Partner Re agrees to not compete directly or indirectly with Optimum by assuming reinsurance or retrocession of business from clients where Optimum owns the contact to the client and Partner Re is taking a share as the retrocessionaire." En outre, elle se lit, "at the beginning of each calendar year … Partner Re must inform Optimum if it has the intention to start entering the Canadian market as a reinsurer within the next 12 months."

En septembre 2016, Partner informe verbalement Optimum de son intention d'entrer sur le marché canadien de la réassurance. En octobre 2016, elle annonce l'acquisition d'un réassureur actif sur le marché canadien qui fait concurrence à Optimum. En avril 2017, les parties négocient et conviennent d'un *Amendment to the General Agreement*, lequel comporte une clause de renonciation à l'obligation de non-concurrence assortie de conditions. Parmi ces conditions, Partner "pays to Optimum a retrocession reorganization fee of CA$1.5 million," et "provides Optimum with recapture rights." Tant le *General Agreement* que l'amendement stipulent expressément que les parties sont régies par les loi du Québec. Ils ne contiennent toutefois aucune clause d'élection de for.

En mars 2019, Optimum transmet à Partner des avis d'exercice de ses droits de reprise (recapture rights) comme prévus dans l'amendement. Partner avise Optimum qu'elle considère que celle-ci a renoncé à exercer ses droit de reprise. Optimum intente une action en jugement déclaratoire par laquelle elle demande à la Cour supérieure de déclarer qu'elle a validement exercé ses droit de reprise. Partner réplique par une demande en rejet fondée sur l'absence de compétence des tribunaux québécois. La Cour supérieure rejette la demande de Partner. Partner obtient la

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permission d'appeler du jugement et la suspension des procédures en première instance.

La Cour d'appel rejette l'appel. Le juge de première instance n'a pas erré en concluant que les autorités québécoises sont compétentes en vertu de l'article 3148(3) *CcQ* au motif que des obligations contractuelles devaient être exécutées au Québec. La partie demanderesse doit démontrer que l'une des obligations découlant du contrat *devait* y être exécutée, sans pour autant exiger qu'elle démontre que la cause d'action est elle-même fondée sur la violation d'une obligation devant être exécutée au Québec, puisque ceci ferait double emploi avec le critère distinct de la faute prévue à l'article 3148(3) *CcQ*. Partner ne remet pas en question la conclusion du juge voulant que l'obligation de non-concurrence ait été exécutée en partie au Québec. Elle soutient que cette obligation n'existe plus parce qu'elle s'est éteinte lors de la conclusion de l'amendement.

Dans le cadre de l'amendement, les parties ont convenu qu'en contrepartie du versement d'une indemnité et de l'octroi de droits de reprise, Optimum renonçait à invoquer la clause de non-concurrence contenue dans le *General Agreement*, mais cette renonciation était conditionnelle à ce que Partner fasse preuve de bonne foi et de diligence, et qu'elle mette les efforts requis pour permettre l'exercice des droits de reprise. L'obligation de non-concurrence est simplement suspendue jusqu'à ce que soient remplies les conditions convenues par les parties.

De toute manière, le fait de prétendre qu'une obligation serait éteinte lors de l'institution d'un recours n'empêche pas les tribunaux québécois de s'en saisir. La compétence des tribunaux québécois peut s'appuyer sur des obligations déjà exécutées.

L'obligation de non-concurrence devait être exécutée au Québec. La clause de non-concurrence prévoit expressément que Partner doit informer Optimum si elle entre sur le marché canadien. Cette obligation de ne pas faire concurrence au Canada couvre la province du Québec et il en découle que l'obligation de non-concurrence devait y être exécutée.

En outre, les tribunaux québécois ont la compétence voulue pour se saisir du litige en vertu de l'article 3148(3) *CcQ* en fonction du lieu du préjudice subi. Optimum allègue expressément qu'une variété de préjudices ont été subis au Québec à la suite du refus injustifié de Partner de reconnaître l'exercice de ses droits de reprise et donc de la difficulté réelle soulevée à l'égard de l'interprétation de l'amendement. La démonstration de la difficulté réelle et, par extension, du préjudice subi, fait partie du fardeau de preuve d'Optimum et le fait qu'aucune conclusion de nature pécuniaire ne soit recherchée, du moins pour le moment, ne la prive pas de soutenir l'existence d'un lien de rattachement avec le Québec. La situation n'est d'ailleurs pas ici très différente de celle d'une demande d'injonction qui, bien que ne comportant aucune conclusion en dommages-intérêts, peut comporter un facteur de rattachement lié à un préjudice subi au Québec.

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Optimum allègue une difficulté réelle qui lui cause préjudice au Québec, où elle a son siège social et d'où elle gère ses affaires québécoises, en raison d'une divergence dans l'interprétation des modalités d'exercice des droits de reprise stipulées dans le contrat.

Note. Veuillez voir aussi *Manisy inc c Geotility Systems Corp.*[72]

Compétence — préjudice subi au Québec — article 3148(3) CcQ

Groupe SNC-Lavalin inc c Siegrist, 2020 QCCA 1004

Groupe SNC-Lavalin a entrepris un recours devant la Cour supérieure du Québec cherchant des condamnations pécuniaires à l'égard de deux anciens cadres supérieurs, Ben Aïssa et Bebawi, fondées sur des détournements de fonds totalisant 127 245 937 $ effectués par l'entremise des sociétés Duvel et Dinova. SNC-Lavalin réclame aussi de ces défendeurs 12 500 000 $ pour dommages à sa réputation résultant du stratagème mis en place. Ces montants sont également réclamés de Kaufmann, un avocat suisse agissant comme le fondé de pouvoir de Duvel et Dinova, de même que du cabinet d'avocats Froriep auquel il était associé. Le banquier suisse Siegrist et son employeur, la banque suisse EFG, sont également poursuivis pour ces montants. SNC-Lavalin soutient que Kaufmann et Siegrist participaient consciemment au détournement des fonds en aidant activement Ben Aïssa et ses sociétés, Duvel et Dinova, à mettre en œuvre le stratagème frauduleux.

Ben Aïssa demande à la Cour supérieure de rejeter cette procédure en invoquant la chose jugée. Selon lui, un jugement du tribunal pénal fédéral suisse en 2014 le condamnant à verser 12 817 573 CHF à SNC-Lavalin fait obstacle au recours. Subsidiairement, Ben Aïssa demande à la Cour supérieure de décliner compétence au profit des tribunaux suisses selon la doctrine du *forum non conveniens*.

Les défendeurs suisses (Kaufmann, Froriep, Siegrist et EFG) demandent aussi le rejet du recours de SNC-Lavalin à leur égard, au motif que la Cour supérieure n'aurait pas compétence sur eux. Ils soutiennent que leur responsabilité ne pourrait être engagée que sur une base extracontractuelle selon des fautes survenues exclusivement en Suisse.

La Cour supérieure rejette les demandes de Ben Aïssa mais accueille le moyen d'irrecevabilité fondé sur l'absence de compétence soulevé par les défendeurs suisses. La Cour d'appel rejette tant l'appel de SNC-Lavalin que celui de Ben Aïssa. Sur la question de la chose jugée, bien que les parties civiles du jugement suisse puissent être reconnues au Québec, celles-ci ne constituent pas chose jugée à l'égard des réclamations entreprises au Québec par SNC-Lavalin. Il n'y a pas d'identité d'objet et de cause, au sens de l'article

[72] 2020 QCCS 3392, autorisation d'appeler refusée, 2020 QCCA 1708.

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2848 *CcQ*, entre la partie civile du jugement suisse et le recours de SNC-Lavalin entrepris au Québec. Quant à la partie pénale, les effets au Québec d'un jugement pénal sur la chose jugée, qu'il s'agisse d'un jugement issue du Canada ou de l'étranger, sont régis par le droit québécois. Ainsi, dans la mesure où le droit québécois ne reconnaît pas dans une procédure civile l'effet de la chose jugée découlant d'un jugement pénal canadien, il s'ensuit que la même règle s'applique au jugement pénal étranger. Or, le droit québécois n'accorde dans une procédure civile aucun effet de chose jugée à un jugement d'acquittement pénal.

La Cour refuse d'intervenir dans la décision de la juge refusant de décliner compétence selon la doctrine de *forum non conveniens*. Les principaux artisans de l'escroquerie reprochée, soit Ben Aïssa et Bebawi, étaient tous les deux domiciliés au Québec. Le fait que des témoins étrangers puissent être appelés à témoigner au Québec n'avait pas un poids prépondérant dans ce dossier, vu que les témoignages par visioconférence sont fréquents et peuvent pallier aux frais de déplacement. Quant à la loi applicable au litige, dans les cas de Ben Aïssa et Bebawi, il s'agit principalement du droit québécois. C'est notamment en raison de graves manquements aux devoirs découlant de leur lien d'emploi que SNC-Lavalin poursuit Ben Aïssa et Bebawi.

La juge de première instance n'a pas erré en concluant que le préjudice économique ne pouvait fonder la compétence de la Cour supérieure à l'égard des défendeurs suisses. Ce ne sont pas les versements faits au profit de Saadi Kadhafi à même les montants payés à Duvel et Dinova qui constituent le préjudice subi, mais plutôt le détournement de la majeure partie de ces montants aux fins personnelles de Ben Aïssa et de Bebawi. Ces détournements de fonds reposent sur des faits et gestes qui ont été largement accomplis hors du Québec. D'ailleurs, dans le cas précis des défendeurs suisses, tous les faits et gestes qu'ils ont posés dans le cadre de l'escroquerie reprochée ont été commis en Suisse. Le préjudice économique de SNC-Lavalin ne s'est pas matérialisé au Québec lors de la conclusion des contrats avec Duvel et Dinova, ni même lors des paiements en vertu de ces contrats déposés dans les comptes bancaires suisses de ces sociétés.

Les allégations de la demande introductive d'instance amendée de SNC-Lavalin portant sur l'atteinte à la réputation sont vagues quant au lieu où le préjudice fut subi. SNC-Lavalin n'a soumis aucune preuve permettant de situer le préjudice résultant de l'atteinte à la réputation. Dans ces circonstances, il n'y a pas lieu d'intervenir afin d'asseoir la compétence de la Cour supérieure sur les seul préjudice à sa réputation qu'elle allègue dans ses procédures.

Conille c Directora de Cadena de Notificias (CDN), 2020 QCCS 737

Le demandeur, Conille, est un homme d'affaires qui agissait entre autres, jusqu'en février 2018, à titre de représentant en République dominicaine pour une société domiciliée au Québec. En janvier 2018, une jeune femme

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trouve la mort en se jetant en bas d'un balcon d'une unité de condominium dans lequel se trouvait le Eros Barberia & Spa. Conille reproche aux défenderesses d'avoir, à plusieurs reprises, fait des commentaires diffamatoires à l'effet, entre autres, qu'il s'agissait d'un Gentleman's Club, que des activités criminelles liées notamment à la prostitution s'y déroulaient et qu'il était propriétaire de cet établissement avec Mme Echeverri, qu'elles prétendent erronément être son épouse. Conille introduit une demande auprès de la Cour supérieure réclamant des défenderesses la somme de 850 000 $ en dommages. Les défenderesses, qui sont domiciliées en République dominicaine, plaident que la Cour supérieure n'a pas compétence pour entendre le litige, car aucun des cas de rattachement de l'article 3148 *CcQ* ne trouve application. De façon subsidiaire, elles demandent que le tribunal décline compétence selon l'article 3135 *CcQ*.

La Cour supérieure retient qu'un préjudice est subi au Québec par le fait de la terminaison du contrat d'emploi, et le fait que le demandeur ne reçoit plus les paiements de salaire dans son compte d'épargne montréalais. C'est en République dominicaine, lieu du domicile du demandeur, qu'une atteinte au patrimoine du demandeur serait ressentie, mais c'est à Montréal que l'on trouve le *situs* du préjudice. Le tribunal souligne qu'il n'aurait pas conclu que le préjudice non pécuniaire découlant de la prétendue atteinte à sa réputation était subie à Montréal, car le demandeur n'y a manifestement pas son domicile.

Le tribunal est convaincu qu'il s'agit d'un des cas où, exceptionnellement, il est approprié que le tribunal décline compétence. Le lieu de résidence des parties est en République dominicaine. Il sera nécessaire d'appeler plusieurs témoins, domiciliés en majorité en République dominicaine, pour établir entre autres quelles activités se déroulent au Eros Barberia & Spa, et quelles rôles Mme Echeverri et Conille jouent dans ce commerce, et pour quelles raisons son employeur québécois a mis fin à l'emploi. Deux dossiers se déroulent présentement en République dominicaine qui pourraient avoir pertinence: une enquête dont Conille fait l'objet menée par les autorités en République dominicaine relativement aux activités de prostitution, de traite de personnes et de blanchiment d'argent qui auraient pu se dérouler au Eros Barberia & Spa; et des procédures en diffamation instituées par Mme Echeverri contre les défenderesses en République dominicaine. Les défenderesses ne détiennent aucun bien au Canada. C'est la loi de la République dominicaine qui s'applique. Le demandeur ne bénéficie d'aucun avantage à débattre de la question au Québec, puisqu'il n'a plus de lien particulier avec la juridiction. Il faut ajouter que, présentement, le demandeur ne semble pas pouvoir quitter la République dominicaine.

Note. Veuillez voir aussi *Chandler c Volkswagen Aktiengesellschaft.*[73]

[73] 2020 QCCS 1202.

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Compétence — article 3149 CcQ *— action fondée sur un contrat de travail*

Note. Veuillez voir *Bright c Site 2020 inc*[74] (l'employé est un résident du Québec; la défenderesse est domiciliée en Nouvelle-Écosse).

Action concernant des droits des peuples autochtones du Canada

Premières Nations — revendication du droit d'utiliser et d'occuper de façon exclusive un territoire traditionnel chevauchant la frontière qui sépare les provinces du Québec et de Terre-Neuve-et-Labrador — compétence du tribunal québécois — articles 3134, 3148 CcQ

Terre-Neuve-et-Labrador (Procureur général) c Uashaunnuat, 2020 CSC 4, 443 DLR (4^{e}) 1

En 2013, deux Premières Nations innues ainsi que plusieurs chefs et conseillers (les Innus) intentent une poursuite en Cour supérieure du Québec contre deux compagnies minières responsables d'un mégaprojet comprenant de nombreuses mines à ciel ouvert exploitées près de Schefferville, au Québec, et de Labrador City, à Terre-Neuve-et-Labrador, de même qu'un port, un chemin de fer et des installations industrielles à Sept-Îles, au Québec, et des chemins de fer sillonnant les deux provinces. Dans leur demande introductive d'instance, les Innus revendiquent le droit d'utiliser et d'occuper de façon exclusive les terres visées par le mégaprojet. Ils affirment occuper depuis des temps immémoriaux un territoire traditionnel chevauchant la frontière qui sépare les provinces du Québec et de Terre-Neuve-et-Labrador. Ils soutiennent que le mégaprojet a été entrepris sans leur consentement, et allèguent une longue liste d'atteintes à l'environnement qui nuisent à leurs activités, les empêchant de jouir de leur territoire. À titre de réparations pour ces préjudices allégués, les Innus sollicitent notamment une injonction permanente contre les compagnies minières leur ordonnant de cesser tous les travaux liés au mégaprojet, des dommages-intérêts de 900 millions de dollars et un jugement déclaratoire portant que le mégaprojet constitue une violation de leur titre ancestral et d'autres droits ancestraux reconnus et confirmés par l'article 35 de la *Loi constitutionnelle de 1982*.[75]

Les compagnies minières et le procureur général de Terre-Neuve-et-Labrador déposent chacun une requête en radiation de certaines portions de la demande des Innus qui, selon eux, concernent des droit réels sur des terres situées à Terre-Neuve-et-Labrador et qui, en conséquence, relèvent de la compétence des tribunaux de cette province. La Cour supérieure du Québec rejette les requêtes en radiation. Comme elle refuse de qualifier

[74] 2020 QCCS 2532.

[75] *Loi constitutionnelle de 1982*, art 35, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11.

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l'action de réelle, elle conclut que les tribunaux du Québec ont compétence pour instruire l'affaire. La Cour d'appel du Québec rejette l'appel de Terre-Neuve-et-Labrador.

La Cour suprême du Canada rejette (cinq contre quatre) le pourvoi. La Cour supérieure du Québec a compétence pour connaître de l'ensemble de la demande.

Le *CcQ* est muet quant à l'analyse appropriée à effectuer pour qualifier une action aux fins du chapitre deuxième, qui prévoit des règles de compétence particulières en fonction de la nature de l'action. À défaut d'indication du législateur, il faut prendre en considération la nature des droits en cause et des conclusions recherchées lorsque vient le temps de qualifier l'action. Il faut interpréter les règles énoncées au livre dixième à la lumière des impératifs de notre ordre constitutionnel et conformément à la Constitution. Lorsque les droits garantis par l'article 35 sont en jeu, le livre dixième doit être interprété de manière à respecter les droits ancestraux et les droits issus de traités reconnus et confirmés par la Constitution, mais aussi en tenant compte des considérations relatives à l'accès à la justice.

L'action est qualifiée correctement comme une action mixte non classique qui suppose la reconnaissance de droits *sui generis* et l'exécution d'obligations. Comme les compagnies minières ont toutes les deux leur siège à Montréal, les tribunaux québécois ont compétence sur les aspects tant personnel que *sui generis* de la demande. Les actions pour délit et pour troubles de voisinage sont généralement qualifiées d'actions personnelles et l'article 3148 *CcQ* confère aux autorités québécoises la compétence d'entendre les actions personnelles à caractère patrimonial lorsque le défendeur a son domicile au Québec. Le *CcQ* est toutefois muet quant à la compétence des autorités québécoises en ce qui concerne les aspects de la demande qui ont trait à la reconnaissance d'un droit *sui generis*, comme un droit garanti par l'article 35. En conséquence, l'article 3134 — qui dispose que, "[e]n l'absence de disposition particulière, les autorités du Québec sont compétentes lorsque le défendeur a son domicile au Québec" — s'applique. Comme les compagnies minières ont toutes les deux leur siège à Montréal, les autorités québécoises ont compétence à l'égard des deux aspects de cette action mixte non classique en vertu des articles 3134 et 3148 *CcQ*, qui suffisent pour établir cette compétence.

Selon les juges dissidents, il y aurait lieu d'accueillir l'appel et d'ordonner que les conclusions de la requête introductive d'instance des Innus qui sont de nature déclaratoire ou injonctive et qui visent leur territoire ancestral ou le mégaprojet soient modifiées afin qu'elle se limitent à des faits, activités ou droits situés à l'intérieur des limites territoriales du Québec. Les règles du droit international privé sont d'une nature législative et sont autorisatrices. Elle peuvent à elles seules autoriser l'exercice extraterritorial d'un pouvoir qui, autrement, est limité à un seul territoire. Les demandes de remèdes

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déclaratoires visent manifestement à faire reconnaître un titre ancestral et d'autres droits ancestraux ou issus de traités, lesquels sont des droits réels aux fins du droit international privé. Les demandes des Innus visant l'émission d'une injonction permanente afin de faire cesser les opérations, installations et activités des compagnies minières sont aussi de nature réelle, puisqu'elles visent manifestement à protéger un titre ancestral et d'autres droits ancestraux ou issus de traités, lesquels sont des droits réels aux fins du droit international privé.

PROCEDURE / PROCÉDURE

Common Law and Federal

Obtaining evidence locally for a foreign proceeding

Letters rogatory — denial on ground of public policy

Perlmutter v Smith, 2020 ONCA 570, 152 OR (3d) 185

The Court of Appeal found no error in the motion judge's order, which enforced a letter of request but somewhat narrowed the scope of the evidence to be sought. The request was in aid of a Florida action between the Perlmutters, an American couple, and Perenboom, a Canadian, about the affairs of the gated community in Florida in which they both had condominiums. Perenboom alleged that the Perlmutters were conducting a hate campaign against him and he said that Smith, an Ontario resident who did not want to testify in Florida, had participated in the campaign. He and the Perlmutters applied for the letter of request in order to obtain Smith's evidence.

The court reviewed and upheld the judge's decision on each of the requirements for enforcement. The evidence sought was not otherwise obtainable, the letter did not impose an undue burden on Smith, the letter identified the documents with reasonable specificity, and Smith had not shown that deficiencies in the process that led the Florida court to issue the letter infringed any recognized Canadian legal or moral principle.

Glegg v Glass, 2020 ONCA 833, 155 OR (3d) 41

Glegg sought letters rogatory against two lawyers who had acted for his ex-wife and three that had acted for his adult daughter. The letters were sought in a Florida lawsuit in which Glegg alleged that the ex-wife and daughter and their lawyers had conspired to perpetrate a fraud on the Ontario courts by interfering with Glegg's right of custody of the daughter, who was sixteen at the time. The mother had retained the daughter after the daughter visited her and her second husband in Florida, to which they had moved from Ontario. Glegg obtained the daughter's return to Ontario by police action. With her mother's help, she got away from Glegg by enrolling in a Florida

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university. An Ontario judge held that she had withdrawn from his parental control.

The Superior Court of Justice refused to enforce the letters rogatory, holding that public policy was offended because what Glegg sought in Florida was to pursue a cause of action that was forbidden in Ontario — namely, suing a spouse or third parties for interfering with the relations between parent and child. The Court of Appeal upheld the judge's decision, not on that ground but, rather, because the evidence sought was to be used to attack orders made by Ontario courts. This amounted to a potential infringement of Canadian sovereignty. In addition, the judge had been entitled to decline to enforce the letters on the ground of public policy because they would improperly interfere with solicitor-client privilege and confidentiality.

FOREIGN JUDGMENTS / JUGEMENTS ÉTRANGERS

Common Law and Federal

Statutory enforcement of monetary judgments

Reciprocal enforcement of judgments legislation — defences

HMB Holdings Ltd v Antigua and Barbuda (Attorney General of), 2020 ONCA 12, 442 DLR (4th) 241, leave to appeal to SCC granted, 39130 (12 November 2020)[76]

HMB owned property on the island of Antigua that was expropriated by the government of Antigua and Barbuda (hereafter Antigua). HMB obtained a judgment for compensation from the Judicial Committee of the Privy Council, given in default of appearance by Antigua. HMB brought a common law action to enforce the judgment in British Columbia and obtained a judgment of the BC court. It then sought to register that judgment in Ontario under the *Reciprocal Enforcement of Judgments Act*.[77]

The motion judge held that the judgment could not be registered because Antigua had a defence under the Act — namely, that the defendant state did not carry on business in British Columbia. There was someone in British Columbia who promoted business opportunities on Antigua's behalf, but that did not constitute carrying on business. The Court of Appeal affirmed the decision. It did not find it necessary to decide whether the "judgment" of a reciprocating jurisdiction under the Act (in this case British Columbia) included a "ricochet judgment," meaning one that merely grants enforcement of an original judgment granted in a non-reciprocating jurisdiction (in this case, Antigua).

[76] The court heard the appeal on 20 April 2021 and reserved judgment.

[77] RSO 1990, c R.5.

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Statutory recognition of support judgments

Cao v Chen, 2020 BCSC 735

Ms. Cao and Mr. Chen married in China in 1994. She was twenty-four and he was forty and had a son from a previous marriage. They had three children together. Cao became a permanent resident of Canada in 2007, although she spent substantial time in China between 2010 and 2013 to deal with legal proceedings there. In January 2010, Cao commenced the present proceeding in British Columbia against Chen and his son (on the basis that the son held property on trust for Cao) for a division of family property located in that province. In March 2010, Chen commenced a proceeding in China for divorce and related relief. Cao participated in the Chinese proceeding, and Chen participated in the BC proceeding. In January 2013, the Chinese court granted a divorce, awarded Cao custody of the youngest of the couple's three children, and awarded Chen custody of the middle child. (The eldest was beyond the age for custody.) The court made each party responsible for supporting the child in her or his custody. It also divided the family assets in China and denied Cao spousal support.

The current phase of the present proceeding was to determine the effect of the Chinese judgment on Cao's property claims. The court held that Cao was not estopped from asserting the BC court's jurisdiction by the fact that she had participated in the Chinese proceeding. She had begun her BC proceeding first and had not selected the Chinese forum. In any event, Chen conceded that the BC court was the appropriate forum in which to decide certain issues, particularly those concerning the children.

The court had territorial competence in respect of Cao's property claims under the *CJPTA* on the basis that Chen had attorned to the jurisdiction and that the proceeding had a real and substantial connection with British Columbia.[78] Territorial competence in respect of the claims concerning parenting arrangements existed under the *Family Law Act*[79] either because the children were habitually resident in British Columbia when the application was filed[80] or, even if they were habitually resident in China, the children were present in British Columbia, they had a real and substantial connection with it, and, on the balance of convenience, it was appropriate for jurisdiction to be exercised by the BC court.[81]

[78] *CJPTA* (BC), *supra* note 1, s 3(b) (submission during the course of the proceeding), s 10(a) (presumption of real and substantial connection if the proceeding concerns rights in property in British Columbia), s 10(k) (presumption of real and substantial connection if the proceeding is for enforcement of a judgment of a court made in our outside British Columbia).

[79] SBC 2011, c 25 [*FLA*].

[80] *Ibid*, s 74(1)(a).

[81] *Ibid*, s 74(1)(b) (only the statutory criteria that are material here are noted).

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The court should not decline to exercise jurisdiction on the basis of *forum non conveniens*. Only a BC court could deal with the BC properties since the Chinese court had refused to do so. All the major parties were Canadian or at least North American residents (it was not clear where Chen now lived, but it was no longer in China). The Chinese divorce was recognized under the *Divorce Act* on the basis that Chen had, at the time of the commencement of his proceeding, been ordinarily resident in China for at least a year.[82] As for custody of the two children, even if the Chinese order were to be recognized, there had been a material change in circumstances in that all three children had lived exclusively with Cao since the order was made. This allowed the BC court to make an order superseding the Chinese order with respect to custody.[83] The child support provisions in the Chinese order should not be recognized because they were not final. The spousal support order (that Cao was not entitled to support) was final and should be recognized. The basis on which the order was made — namely, that spousal support was awarded only if the claimant demonstrated need — did not contravene Canadian public policy.

Orders in bankruptcy

Recognition of foreign orders placing debtor in bankruptcy and freezing assets debtor had transferred to his spouse

Re Pelletier, 2020 ABQB 450, aff'd 2021 ABCA 264

Mr. Pelletier, then resident in Alberta, received $60 million in 2014 when he sold the interest that he and his holding company, RPHI, owned in an oilfield construction company called Pacer. The buyer of the Pacer shares was MasTec, based in Miami. Pacer subsequently claimed that it had been defrauded and claimed repayment. After an arbitration lasting three years, the tribunal gave an award of $33 million against RPHI and Pelletier personally, which was converted into three judgments of the Alberta Queen's Bench. By this time, neither Pelletier nor RPHI had any assets. Pelletier had caused the $60 million purchase price to be transferred to Cayman Islands corporations and trusts for the benefit of his wife and children, and he and they had moved to the Cayman Islands.

The issue in the present proceeding was whether to enforce, in Alberta, an order absolute in bankruptcy made by the bankruptcy court in the Cayman

[81] *Ibid*, s 74(1)(b) (only the statutory criteria that are material here are noted).

[82] *Divorce Act*, *supra* note 52, s 22(1). At the time of the decision, the criterion was "ordinarily resident." It has since been amended to "habitually resident." *An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, SC 2019, c 16, s 18 (in force 1 July 2020).

[83] *FLA*, *supra* note 79, s 76(1)(b).

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Islands as well as a freezing order made by that court in respect of up to $20 million in assets belonging to Pelletier's wife. The chambers judge held that both should be enforced. The recognition of the bankruptcy order followed from the earlier recognition, by the Alberta court, that the Cayman bankruptcy proceeding was the "foreign main proceeding" under Part XIII of the *Bankruptcy and Insolvency Act* (*BIA*)[84] and that the trustees appointed by the Cayman Islands bankruptcy court were "foreign representatives" in respect of the main proceeding. The recognition of the freezing order was supported by provisions of the *BIA*,[85] by the ability of the courts to enforce non-monetary foreign judgments according to equitable principles[86] and by satisfaction of the test for granting interlocutory injunctive relief.[87]

The Court of Appeal affirmed the chambers judge's decision. Among its reasons, it rejected an argument that enforcement of the freezing order in respect of the wife's assets was an improper enforcement of a foreign judgment that was not final. The freezing order was enforceable not because it was a final judgment but, rather, because it was part of the Cayman bankruptcy proceedings, aimed at enforcing rights, not at establishing them. In making the order, the Cayman Islands court had not decided on the merits of the trustees' claim that Pelletier's transfers to his wife were a fraudulent preference to defeat creditors. An eventual judgment on the merits would need to meet the usual rules in order to be recognized and enforced in Alberta.

CHOICE OF LAW (INCLUDING STATUS OF PERSONS) / CONFLITS DE LOIS (Y COMPRIS STATUT PERSONNEL)

Common Law and Federal

Contract

Formation of contract — notarization requirement

Farm Credit Canada v Pacific Rockyview Enterprises Inc, 2020 ABQB 357, aff'd 2021 ABCA 168

The issue was whether two guarantees, which were sued upon by a British Columbia creditor in an Alberta proceeding, were subject to a notarization requirement under the Alberta *Guarantees Acknowledgement Act*.[88] The

[84] RSC 1985, c B-3.

[85] *Ibid*, s 272(1) ([i]f an order recognizing a foreign proceeding is made, the [Canadian] court may . . . , if the court is satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors, make any order that it considers appropriate").

[86] Established by *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52.

[87] As set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385.

[88] RSA 2000, c G-11, s 3.

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principal debt was owed by an Alberta corporation controlled by the same individuals that executed the guarantees. The funds had been borrowed to finance a land development in Alberta. The court held that the Alberta statute did not apply to these guarantees. The guarantees stated that they were governed by the law of British Columbia. The loan to the borrower was adjudicated and the funds were advanced in British Columbia, all the documentation was generated by the lender in British Columbia, and the respondents had signed the guarantees in Ontario. The lender had the right under the terms of the guarantee to bring an action anywhere and, logically, brought this action in Alberta so that it could be concurrent with the foreclosure action, which had to be brought in Alberta given the location of the lands. The Act did not apply substantively, procedurally, or otherwise to the guarantees.

Proper law of contract — no agreed choice of law

Note. A construction contract between a Manitoba contractor and an Ontario First Nation, for a project on the latter's land in Ontario, had its closest and most real connection with Ontario: *Gray-McKay v Whiteway*.[89] The Manitoba court therefore held that a claim against the contractor was statute barred under Ontario law.

Tort

Accident victim claiming workers' compensation benefits in one province and bringing tort proceeding in another

Thomson v Watson, 2020 ONSC 4409

Thomson was injured when the asphalt truck he was driving in British Columbia overturned. The truck was owned by his employer, IC Asphalt, which was based in Alberta, did business there and in British Columbia, and was owned and directed by Watson, a resident of Ontario. IC Asphalt paid premiums to the Workers' Compensation Board of Alberta (WCBA).[90] Thomson had travelled from his home in Ontario to work for IC Asphalt for ten weeks. It was during that period that the accident occurred. He claimed benefits from the WCBA, which were approved in September 2012. In April 2014, Thomson commenced this action in Ontario, where he and Watson lived, claiming $2 million in damages for Watson's negligence. Watson argued that the claim was barred by the Alberta legislation because Thomson had claimed benefits under it.

The Superior Court of Justice held that the negligence claim was barred by Thomson's having claimed benefits under the Alberta Act.[91] This followed

[89] 2020 MBQB 62.

[90] Under the *Workers' Compensation Act*, RSA 2000, c W-15.

[91] *Ibid.*

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from principles of comity and the existence of the *Interjurisdictional Agreement on Workers' Compensation*,[92] which, although not law, had evidentiary significance in the overall tapestry of provincial workers' compensation schemes. These schemes were organized on the basis that every work-related injury should be covered by a provincial plan, and the applicable plan depended on the place of employment, not the employee's place of residence. Common to all the schemes was the "historical compromise" that insurance coverage took the place of the workers' tort rights against employers and fellow employees. The "historical compromise" existed in Ontario legislation. On that basis, Thomson's claim was barred. In addition, Thomson's tort action was an abuse of process. It represented an attempt at re-litigation of a matter covered by insurance to which the employer had contributed, a circumvention of the historical compromise in the national workers' compensation system, and an opportunity for double recovery.

Note. This case was not decided on the basis that Alberta law applied to the tort because the place of the tort was in British Columbia and that, at least for accidents in Canada, determines conclusively the substantive law that governs the tort.[93] Hence, the judgment is couched in terms of the extraterritorial effect of workers' compensation. For the reasons given by the court, the claiming of benefits under the Alberta scheme had the effect of barring the plaintiff's rights arising out of a tort that was otherwise governed by BC law.

Matrimonial causes

Divorce — foreign decree — recognition — party precluded from impeaching validity

Antonyuk v Antonyuk, 2020 ONSC 644

The husband and wife were born in Ukraine, married there in 1983, had their only child there in 1986, and emigrated to Canada in June 1998. By this time, the marriage was in difficulties. The parties had discussed divorce before moving to Canada. The husband returned to Ukraine in July 1998 for his employment. In August 1998, the husband commenced divorce proceedings in Ukraine, using as his address the Kyiv address of the woman who later became his second wife. A certificate of divorce was issued after a hearing in September 1998. The wife, who had remained in Canada, was given the certificate in January 1999. She raised no objection to the divorce until 2016, when she wished to remarry, and the husband gave her a duplicate of the Ukrainian certificate. She said it was invalid in Canada.

[92] (2017), online: *Association of Workers' Compensation Boards of Canada* <awcbc.org/wp-content/uploads/2018/03/IJ-Consolidated-Agreement-2017.pdf>.

[93] *Tolofson v Jensen*, [1994] 3 SCR 1022, 120 DLR (4th) 289.

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The husband sought an order from the Ontario Superior Court of Justice that the 1998 Ukrainian divorce was valid in Canada.

The divorce did not meet the recognition rule in the *Divorce Act* based upon either party's being ordinarily resident in Ukraine for the twelve months immediately preceding the commencement of proceedings for divorce.[94] However, the Act preserved "any other rule of law respecting the recognition of divorces,"[95] and the Ukrainian divorce could be recognized on the common law ground that either party had a real and substantial connection with Ukraine. At the time the proceedings were commenced, both parties were citizens of Ukraine. On the evidence submitted, citizenship was a basis for jurisdiction in divorce under Ukrainian law. The parties resided in Ukraine during their fifteen-year marriage. They owned, and continued to own, property there. Each party had a real and substantial connection to Ukraine.

The wife argued that the certificate of divorce was improperly obtained because she had not been given due notice of the proceeding. The Ukrainian court was satisfied that the proper steps to give her notice had been taken, and the Ontario court could not inquire into whether the foreign court erred in applying its own law. The wife did not allege that jurisdiction was obtained by fraud.

The Ontario court also held that it would be unjust and unfair for the court not to recognize the divorce, given that the wife had waited at least fifteen years before attacking the divorce and the husband had, in the meantime, remarried and had a child with his second wife.

Support obligations — applicable law

Note. In *Tang v Cheng*,[96] the BC court applied BC law to determine a right to interim spousal support, although the respondent husband had not lived in Canada since 2012 and he and the applicant wife had been divorced in China in 2019. The wife had established a *prima facie* case that BC law had the closest connection to the parties and the issues. She habitually resided both in China and in British Columbia and she and the husband jointly owned a house in British Columbia.

Administration and succession

Validity of testamentary gift — pour-over clause

Re Waslenchuk Estate, 2020 BCSC 1929

Although the testator was living in Connecticut at the time her will was executed in 2013, she died domiciled in British Columbia in 2016. Her

[94] *Divorce Act, supra* note 52, s 22(1). See further note 87 above.

[95] *Divorce Act, supra* note 52, s 22(3).

[96] 2020 BCSC 1341 (Master).

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estate consisted of movable and immovable property in British Columbia and movables in Connecticut, worth about $4 million in total. The will left the residue of her estate to an *inter vivos* trust that was created, on the advice of her Connecticut lawyer, at the same time as the will was executed. The terms of the trust were that, upon her death, the trust property would be distributed one-third to Ms Letourneau (the testator's only surviving sibling and the executor under the will), one-third to the son of the testator's late brother, and one-third to two named charities. The testator had the right to alter the terms of that trust at any time but had not done so.

On an application for directions, the BC court held that the gift of the residue was invalid. A gift to an amendable trust constituted a pour-over clause, which was invalid according to BC law because it defeated the formalities of a testamentary disposition. BC law, as the law of her domicile at the time of her death, determined the substantive validity of the terms of the will and, because the gift was invalid, caused the whole of the residue to pass on intestacy to Ms. Letourneau.

Intestate succession — preferential share of estate — adult independent partner

Desnoyers Estate v Desnoyers, 2020 ABQB 120

The deceased died domiciled in Alberta. He had been in a relationship for the last four years with a woman in Mexico. He spent the winter months with her in Mexico; she never came to Alberta. He died intestate. An issue in the administration of his estate was whether she qualified for a preferential share of his estate as an "adult independent partner" under the Alberta *Wills and Succession Act*.[97] The court held that she did. The definition of "adult independent partner" extended to relationships entirely formed and carried on outside Alberta.

Québec

Statut personnel des personnes physiques

Mariage — effets — régime matrimonial

Droit de la famille — 201114, 2020 QCCA 1054

Les parties se rencontrent en 2002. Toutes deux évoluent dans l'industrie musicale: l'appelant est un bassiste professionnel et propriétaire d'un studio d'enregistrement situé dans la Ville B, alors que l'intimée est une artiste. Progressivement, l'appelant s'implique dans la carrière de l'intimée, participant ainsi à la production de son premier album, tout en continuant de

[97] SA 2010, c W-12.2, ss 1(1)(a), 61(1)(b)(i). The deceased also had a son from an earlier relationship.

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faire du travail pour d'autres artistes. Les parties se marient en 2007. Elles sont alors domiciliées dans la ville B, mais leur mariage est célébré au Québec, à Ville A, où la famille de l'intimée possède une propriété. Elles s'unissent sans passer de conventions matrimoniales. À la suite du décès de sa mère en 2010, l'intimée manifeste la volonté de déménager à Ville C. L'appelant n'est pas enthousiaste à cette idée. Les parties déménagent néanmoins à Ville C en 2013, mais conservent leur résidence située à Ville B. L'appelant continue son travail de musicien avec l'intimée et auprès de sa famille, tout en retournant à l'occasion à Ville B pour ses affaires.

Les parties cessent de faire vie commune en août 2016. L'intimée introduit une demande en divorce en décembre 2016. Le juge de première instance[98] applique les règles du patrimoine familial du *CcQ* puisque les effets du mariage sont soumis à la loi du domicile commun des époux (articles 416 et s. et 3089 *CcQ*). Toutefois, puisqu'elles étaient domiciliées dans l'État de New York au moment du mariage et n'avaient pas passé de conventions matrimoniales, le juge applique l'article 3125 *CcQ* et conclut que les droits des époux sont régis par la *Equitable Distribution Law* (Loi new yorkaise).[99] Selon lui, l'article 5 de cette loi est équivalent au système de régime matrimonial suivant le droit québécois, de sorte qu'il applique aux fins du partage des biens des époux non régis par le patrimoine familial.

La Cour d'appel rejette l'appel de cette décision. Le juge de première instance ne commet aucune erreur en qualifiant la Loi new yorkaise, à son article 5, de régime matrimonial au sens de l'article 3123 *CcQ*. Le régime matrimonial est fondé sur le concept de liberté de choix du régime par les époux. En l'occurrence, au moment de leur mariage, ou même durant leur mariage, les parties ont librement choisi de ne pas conclure d'entente écrite portant sur "the ownership, division or distribution of separate and marital property," conformément à l'article 3 de la Loi new yorkaise. Ce faisant, elles ont librement choisi que le partage de leurs biens, au moment du divorce, serait régi par les règles de la loi, qui dans leur cas est l'article 5 de la Loi new yorkaise. Elles ont convenu de s'en remettre à ces règles substantives, bien que celles-ci reposent sur un exercice discrétionnaire du tribunal, pour une distribution équitable des biens qui se qualifient à titre de "marital property." La Cour ne peut se convaincre que la Loi new yorkaise, à son article 5, constituerait un effet du mariage au motif qu'elle ne contient aucune référence à un "régime matrimonial," qu'elle permet l'intervention du tribunal quant à la répartition des biens ou encore qu'elle puisse être assimilée au concept de la prestation compensatoire (article 427 *CcQ*), comme le plaide l'intimée. Les parties ont adopté le concept de distribution

[98] *Droit de la famille — 19882*, 2019 QCCS 2008, noté dans Joost Blom, "Jurisprudence canadienne en matière de droit international privé en 2019" (2019) 57 ACDI 593 à la p 635.

[99] *Domestic Relations Law*, Cons L NY, § 236(B)(5).

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équitable lors de leur mariage, en ne passant pas de conventions matrimoniales, et ne peuvent pas maintenant prétendre être propriétaires de leurs biens respectifs autrement exclus du patrimoine familial du seul fait qu'elles se sont installées au Québec depuis leur mariage.

Successions

Droit de survie en common law — qualification juridique

Succession de Gold, 2020 QCCA 23

Abraham Gold (Abe) and Harriet Ressler (Harriet) were married in December 1982 in the Bahamas. Harriet died on 14 March 2006. No children were born of the marriage, but each had issue from previous marriages. The appellant and his deceased sister were Harriet's children. From the marriage until 1991, Abe and Harriet resided in the Bahamas. They then moved to Florida, where they purchased a condominium apartment. In 1992, they transferred the ownership of that property to a Bahamian corporation of which they held the shares jointly. Following Harriet's death, Abe had the joint share certificates cancelled and new ones issued in his name alone.

In 2001, Abe and Harriet moved to Montreal. In 2002, they created the R & G Trust, of which they were the sole beneficiaries until the last of them died, at which time the trust property was to be distributed to Abe's two children. The trust purchased a condominium apartment in Westmount, Quebec, where the couple resided. They kept the Florida condominium, which they used in the winter months.

Shortly after Harriet's death, a Montreal attorney contacted the appellant to inform him that his firm was in possession of a will executed by Harriet. The appellant was told he was the sole surviving person named in the will as a liquidator. Under the will, the appellant and the children of his deceased sister would be Harriet's heirs. The appellant told Abe of the existence of the will but the two of them told no one else. Harriet's estate was wound up under the *ab intestate* rules of the *Civil Code of Quebec* so that each of Abe, the appellant, and the children of his late sister received one-third of the assets, consisting of cash in a bank account.

Abe died in August 2013. The universal legatees under his will consisted of his children and grandchildren. Contrary to an understanding that the appellant thought he and Abe had had, the appellant was not a beneficiary under Abe's will. The sole trustee of the R & G Trust moved for declaratory relief before the Quebec Superior Court as to the ownership of the proceeds of the Westmount and the Florida condominiums, which were held by the trust. The Superior Court judge held that any right the appellant had to claim on behalf of Harriet's estate was prescribed. The judge also held that Harriet's estate had no claim to one-half of the proceeds from the sale of the

Florida condominium because the half-interest in the holding company that owned the condominium had passed to Abe by right of survivorship and did not form part of Harriet's estate.

The Court of Appeal affirmed the judge's decision in both respects. Only the decision on the Florida condominium issue is summarized here. The Court of Appeal disagreed with the judge's conclusion that Harriet's half-interest in the corporation that owned the Florida condominium passed to Abe by the right of survivorship. The question was whether the right of survivorship is to be characterized as something other than pertaining to the law of successions. If it does pertain to the law of successions, the applicable law to determine the inheritance of Harriet's half interest in the shares would be that of Quebec as the law of Harriet's domicile when she died.

Characterization is performed upon application of the principles of Quebec law. Though sparse in Quebec doctrine, consideration of the right of survivorship by contemporary authors publishing in private international law favours the qualification of the right as pertaining to the law of successions. The few reported cases also adopt this solution. The triggering event of the transfer of ownership is death. Quebec civil law views transmission of property on death as a function of either testamentary or *ab intestate* rules, both of which pertain to successions and not to the law of property. Quebec law therefore applied and the right of survivorship in Bahamian law did not.

The interest in the shares fell into Harriet's estate upon her death in 2006, which is when Abe appropriated them by having the existing, joint share certificates cancelled and replaced with new ones in his name alone (done in good faith as reflecting his understanding that the right of survivorship applied). The appellant raised his right to the shares in 2014. The general period of extinctive prescription of three years under Article 2925 of the *CcQ* applied, so the appellant's claim to the proceeds of the Florida condominium through Harriet's estate failed for that reason rather than the one relied upon by the judge at first instance.

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