Canadian Cases in Private International Law in 2019

Jurisprudence canadienne en matière de droit international privé en 2019

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JURISDICTION / COMPÉTENCE DES TRIBUNAUX

Common Law and Federal

Jurisdiction *in personam*

Jurisdiction — resident defendant — claim for financial loss — jurisdiction not declined

Nordmark v Frykman, 2019 BCCA 433, 32 BCLR (6th) 224

The plaintiff sued her son for misappropriating some $6 million of her property. She was originally from British Columbia but moved to Sweden in 1953, when she first married. The defendant was the son of her second marriage. He moved from Sweden to British Columbia in 2009, and, in 2011, the plaintiff did so too in order to be closer to him and his family. She returned to Sweden in 2015. In 2017, a Swedish court had appointed a daughter from her first marriage, who lived in New York State, as the mother's legal guardian. The daughter had a litigation guardian appointed in British Columbia to bring the plaintiff's action against the defendant. He was resident in British Columbia when the action was commenced in June 2017, but, subsequently, he and his family moved back to Sweden, although they still spent part of each year in British Columbia, where he continued to teach at a university.

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The plaintiff's action concerned three transactions, two of which involved transfers of funds located in Switzerland and Sweden that were made by her to the defendant in 2011, when both were resident in British Columbia. The third transaction was the transfer, executed by the plaintiff in Sweden in 2015, of her country residence to the defendant's four children. The defendant's position was that the transactions were made in good faith and the mother was competent when she made them. The defendant sought a stay of the proceeding on the ground of *forum non conveniens*, contending that Sweden was the more appropriate forum. The chambers judge held that the defendant had attorned to the jurisdiction of the BC court and so was precluded from arguing *forum non conveniens*. In any event, the defendant had not made out a case for a stay.

The Court of Appeal upheld the decision to deny a stay. Contrary to some BC lower court decisions, the Court of Appeal held that attornment to the jurisdiction does not preclude the defendant from raising *forum non conveniens*. In this case, there was not even attornment. The defendant was ordinarily resident in British Columbia when the action was commenced, and so the court had territorial competence under the BC *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*).[1] Attornment was a stand-alone basis for the assumption of jurisdiction,[2] which arises when a defendant is deemed to have submitted to the jurisdiction of a court that otherwise would not have jurisdiction over them, by actions inconsistent with a denial of that jurisdiction. The concept does not apply when jurisdiction already exists.

Even if there had been attornment, the defendant would not be barred from raising *forum non conveniens*. The relevant procedural rules provided no support for such a principle. There is no reason why the ability to raise *forum non conveniens* of a person who has attorned should be different from that of a person who is subject to the court's jurisdiction on another basis.

A decision to deny a stay on *forum non conveniens* grounds is an exercise of discretion that will be reviewed on appeal only if the judge erred in principle, misapprehended or failed to take into account material evidence, or reached an unreasonable decision. Here, the judge had attached weight to his finding that all three of the impugned transactions took place in British Columbia, when the evidence was that the third took place in Sweden. That permitted the Court of Appeal to review the judge's reasons for his decision, but the court, having reassessed the relevant statutory factors,[3] upheld the judge's conclusion that the defendant had not shown that Sweden was clearly a more appropriate forum. In particular, the court rejected the argument that only a Swedish court could deal with title to the

[1] *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 3(a).

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

[3] *Ibid*, s 11.

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country residence. Title to that property would not be affected, should the action succeed. The claim was a personal one against the defendant for damages for having improperly influenced the plaintiff to transfer the property to his children.

Note. See also *Semex Alliance v Hi Tech Dairy Equipments*,[4] in which an Alberta company was sued in Alberta for breach of its contract to distribute an Ontario company's bovine semen in Iran. The contract was in English and governed by Ontario law, and, partly for this reason, the court refused to decline jurisdiction on the basis that Alberta was *forum non conveniens* compared with Iran.

Jurisdiction — matrimonial property action — resident defendant — jurisdiction not declined.

Boychuk v Hampton, 2019 SKCA 65, [2020] 2 WWR 62

The petitioner and the respondent cohabited in a common law relationship from 2002 to 2015. After they separated, the petitioner commenced an action for a division of the family home and an unequal division of the family property. The respondent was served in Saskatchewan. Some months later, the respondent commenced an action in Alberta to deal with the couple's property. He then applied to the Saskatchewan court to have the Saskatchewan action transferred to Alberta.[5] During their relationship, the parties had lived both in Alberta and in Saskatchewan. The only significant asset of the parties was a cottage in Saskatchewan. The chambers judge declined to transfer the matter to Alberta, and that decision was affirmed on appeal. The Court of Appeal held that the judge had misapplied some of the factors listed in Saskatchewan's *CJPTA*[6] that are to be taken into account in exercising the discretion to decline jurisdiction. In particular, the judge was wrong to give weight, when considering the law to be applied to the proceeding[7] and the fair and efficient working of the Canadian legal system as a whole,[8] to his view that Saskatchewan law was fairer than that of Alberta because the latter did not give matrimonial property rights to unmarried couples. Focusing on the substantive fairness of the law in a given jurisdiction ran counter to the principle of comity. This error permitted the appeal court to review the

[4] 2019 ABQB 70, 42 CPC (8th) 398 (Master).

[5] Under the transfer provisions of the *Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C 41.1 [*CJPTA* (SK)].

[6] *Ibid*, s 10.

[7] *Ibid*, s 10(2)(b).

[8] *Ibid*, s 10(2)(f).

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exercise of the judge's discretion. The Court of Appeal nevertheless concluded that, even if the factors pointed less overwhelmingly to Saskatchewan than the chambers judge thought they did, the respondent had still failed to meet his onus to show that Saskatchewan was *forum non conveniens*.

Jurisdiction simpliciter — *non-resident defendant* — *attornment during the proceedings*

IBC Advanced Technologies v Ucore Rare Metals, 2019 NSCA 80[9]

IBC, a company based in Utah, announced publicly that an option for Ucore, a company that carried on business in Nova Scotia, to acquire IBC had been terminated by mutual agreement. Ucore disputed this and, on 11 December 2018, filed an application in the Nova Scotia Supreme Court claiming that IBC had defamed it, committed injurious falsehood, and unlawfully interfered with Ucore's economic relations. On 4 January 2019, IBC filed its own lawsuit against Ucore in Utah for a number of causes of action, including misappropriation of trade secrets, unfair competition, and tortious interference with economic relations. Numerous procedural steps were taken in the Nova Scotia proceedings, including Ucore's amending its claims. In April 2019, the court decided on IBC's motion challenging the court's jurisdiction over the claims as amended (attornment with respect to the claims that Ucore originally made in December 2018 was conceded). The motions judge held that the court had territorial competence under Nova Scotia's *CJPTA*[10] over the amended claims, either because they were included in IBC's attornment or because a real and substantial connection existed between the facts of the case and Nova Scotia. The judge also held that IBC was barred by its attornment from arguing *forum non conveniens*. In any event, the judge held that IBC had not shown that Utah would have been a more appropriate forum than Nova Scotia.

The Court of Appeal dismissed the appeal but differed from some of the motions judge's reasoning. The judge made no error in finding that IBC had submitted to the court's jurisdiction in respect of the amended claims as well as the original claims. The judge found that the factual foundation for the two sets of claims were essentially the same. If IBC took no issue with the court's jurisdiction over the original application, there was no principled reason why the court would not have jurisdiction over the amended claims. In any event, IBC had addressed both sets of claims in the steps it took that went to the merits of the case before it raised any jurisdictional issue.

[9] Leave to appeal to SCC refused, 38834 (16 April 2020).

[10] *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003, c 2 [*CJPTA* (NS)].

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The judge's finding that Ucore's claims had a real and substantial connection with Nova Scotia was likewise upheld. The judge had found that three of the statutory presumed connections were present. The alleged facts in Ucore's action included that Ucore's contractual obligations had occurred and would occur substantially in the province,[11] that the tort of defamation occurred in the province,[12] and that the claims concerned a business that Ucore carried on in the province.[13] The Court of Appeal rejected IBC's argument that the last of these statutory presumptions should be read as referring to the defendant's (that is, IBC's) business, not the plaintiff's. There was nothing in the statutory language that would admit of this restriction.

The Court of Appeal disagreed with the judge's conclusion that IBC's attornment to the jurisdiction, before raising any jurisdictional challenge, barred it from arguing *forum non conveniens*. The statute's provision on declining jurisdiction did not preclude consideration of *forum non conveniens*, based on how territorial competence was found.[14] Nothing in the act would prevent the consideration of *forum non conveniens* on the basis that a party had submitted to a court's jurisdiction.

The Court of Appeal upheld the judge's finding that the court should not decline jurisdiction but found that the judge had made an error in law in failing to address two of the factors that the statute required to be considered in a *forum non conveniens* application. There was the law to be applied to issues in the proceeding[15] and the enforcement of an eventual judgment.[16] The Court of Appeal analyzed these but found that neither would have favoured Utah as the more appropriate forum. The judge's conclusion that Utah had not been shown to be more appropriate therefore stood.

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

Fort Hills Energy LP v Jotun A/S, 2019 ABQB 237

An Alberta company bought steel from Korea to which a fire-protection coating had been applied. It was to be used in an oil sands plant in Alberta. An action for deficiencies in the fire-protection coating was brought in Alberta against a Norwegian company that developed the coating, a Korean and a United Kingdom (UK) company that each manufactured some of the

[11] *Ibid*, s 11(e).

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

[13] *Ibid*, s 11(h).

[14] *Ibid*, s 12.

[15] *Ibid*, s 12(2)(b).

[16] *Ibid*, s 12(2)(e).

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coating, and a Korean company that applied the coating to the steel. The claims were for negligent misrepresentation, negligent manufacture and supply, negligent recommendation and supervision of the application process, and breach of a duty to warn. The court found jurisdiction *simpliciter* as against each of the defendants on the basis of the presumptive connecting factor that there was a good arguable case that each of the alleged torts was committed in Alberta. The court refused to decline jurisdiction on the basis that Korea was clearly a more appropriate forum, partly because the tort of negligent misrepresentation was unavailable there.

Note. In *Pourshian v Walt Disney Co*,[17] an Ontario resident sued several US companies for infringing his Canadian copyright in a screenplay he had written, by distributing in Canada films that reproduced parts of the screenplay and distributing merchandise tied to those films. As against some of the defendants, based on the pleaded facts, the court held it had jurisdiction *simpliciter* based on the presumptive connecting factors of the defendant's carrying on business in Canada and of committing the tort of copyright infringement in Canada.[18] *Forum non conveniens* was not raised, presumably because infringement of Canadian copyright can basically be litigated only in Canada. *Forum non conveniens* was raised, but rejected, in *Blonde Ambition Investments Inc v RJM Ventures LLC*,[19] in which a Saskatchewan resident sued a company and an individual resident in New York to recover investment funds that had been fraudulently misappropriated.

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

Canadian Pacific Railway Co v Hatch Corp, 2019 ABQB 392, 34 CPC (8th) 355

The railway sued six defendants in Alberta to recover the cost of having to reconstruct a new spur line located in Saskatchewan that proved structurally inadequate. Five of the defendants had been involved with the design and construction of the line; the sixth was the insurer that had issued a performance bond. One of the design and construction defendants was served in Alberta, as was the insurer. Two defendants were served in Ontario, but, in their contracts with the railway, they had agreed to the non-exclusive jurisdiction of the Alberta courts. The remaining two defendants were served in British Columbia and Saskatchewan. All four of the defendants

[17] 2019 ONSC 5916.

[18] On presumptive connecting factors, see note 20 below.

[19] 2019 SKQB 275. Jurisdiction *simpliciter* (territorial competence under the *CJPTA* (SK), *supra* note 5) was not discussed, apparently because the alleged fraud was a tort committed in Saskatchewan, where the target of the fraud lived.

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that were served out of the province applied for dismissal for want of jurisdiction or a stay on *forum non conveniens* grounds.

The court held that jurisdiction *simpliciter* was established for all four. Two had agreed by contract to the Alberta court's jurisdiction. The claims against the other two had a real and substantial connection with Alberta. The court referred to several presumptive connecting factors[20] establishing the real and substantial connection between Alberta and the claims against particular defendants. These were that the claim concerned a tort committed in Alberta, or that the claim was connected to a contract made in Alberta, or that the claim was against a non-resident defendant that was a necessary or proper party to a proceeding brought against a defendant resident in Alberta. The presumed real and substantial connections had not been rebutted.

The court found, however, that Saskatchewan was clearly a more appropriate forum for the litigation with respect to all six defendants. A difficulty was that three of the six defendants had given undertakings not to raise limitation defences in a Saskatchewan proceeding, but the other three had not. It would be manifestly unfair to the railway and to the three defendants that had given the undertakings to stay the Alberta proceeding if it meant that the other three, by raising limitation defences in the Saskatchewan proceeding, could for practical purposes bring the railway's claims against them to an end. It could not be said that the railway had acted unreasonably in assuming that Alberta was *forum conveniens* for the litigation and not bringing actions in Saskatchewan.

To avoid the limitation obstacle, the court chose to request that the Saskatchewan court accept a transfer of the Alberta action under the transfer provisions of Saskatchewan's *CJPTA*.[21] The reason for doing so was that the act includes a provision that the Saskatchewan court shall not hold a claim barred because of a limitation period if the claim would not be barred pursuant to the limitation rule that would be applied by the transferring court.[22] The Saskatchewan act did not require that the transfer be from a province that had reciprocal transfer legislation; rather, the Saskatchewan court was enabled to accept a transfer "from a court outside Saskatchewan."[23] The Alberta court had the inherent jurisdiction, in controlling its process so as to avoid unnecessary and duplicitous proceedings, to make the request of another superior court to accept a transfer. In the event that the Saskatchewan court determined that it could not accept the transfer, the action would continue in Alberta.

[20] The common law factors that presumptively establish a real and substantial connection with the province. The methodology of presumptive connecting factors was introduced by *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572.

[21] *CJPTA* (SK), *supra* note 5.

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

[23] *Ibid*, s 12(1)(b).

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

Battiste v Finnegan, 2019 NSSC 393

The plaintiff, a Nova Scotia resident, was in a motor vehicle accident in Massachusetts. She brought an action in Nova Scotia against the driver of the other car, who was a Massachusetts resident, and that person's employer, who was the owner of the car. The employer was a Delaware company headquartered in California. The court held that it lacked territorial competence under Nova Scotia's *CJPTA*.[24] None of the statutory presumed real and substantial connections applied. Nor was the plaintiff able to show that a real and substantial connection nevertheless existed on the facts, given that no common law presumptive connecting factor applied either. Nor was the forum of necessity provision in the statute applicable.[25] Neither the fact that the plaintiff was pregnant and therefore reluctant to travel, nor that she was from the Mi'kmaq Indigenous community in Nova Scotia, was an exceptional circumstance that would lead the court to conclude that a proceeding outside Nova Scotia could not reasonably be required.

Note. Another case in which jurisdiction *simpliciter* was absent was *Rosenblatt v Peled*.[26] The plaintiff, an Ontario resident, sought to sue nephews and nieces, all resident in other provinces, in connection with a testamentary trust created by the plaintiff's mother's will. No presumptive connecting factor existed to support jurisdiction, nor were the (common law) forum of necessity requirements met. In *Lavern v Norman Estate*,[27] a Prince Edward Island resident sued Oklahoma-resident defendants for various intentional economic torts that were allegedly committed when they brought an unsuccessful lawsuit against him in Oklahoma for infringing their intellectual property rights. No presumptive connecting factor with Prince Edward Island could be shown.

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

Vahle v Global Work & Travel Co, 2019 ONSC 3624, aff'd 2020 ONCA 224

The sister and the parents of a woman who was killed in a road accident in Thailand brought this action against a British Columbia company that had

[24] *CJPTA* (NS), *supra* note 10.

[25] *Ibid*, s 7.

[26] 2019 ONSC 5197.

[27] 2019 PEISC 47.

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organized a teaching engagement for the deceased and her sister as a "working holiday" in Thailand. The defendant was alleged to have been in breach of contract and negligent in providing the two women with motor scooters to get around and in dealing with the consequences of the accident, which took place when the women were riding one of the scooters. The defendant had clients across Canada, and the alleged wrongs included misrepresentations made in their Internet advertising. The court found that jurisdiction *simpliciter* was shown on the basis of the two presumptive connecting factors of a tort committed in Ontario and the defendant's carrying on business in Ontario. A *forum non conveniens* argument was rejected. Both the plaintiffs and the defendant were Canadian, and the claims related to things done or not done in Canada.

Jurisdiction simpliciter — *non-resident defendant — claim for injury to person or damage to property or reputation — jurisdiction found to exist but jurisdiction declined*

Note. See *Brown v Bliss*,[28] in which the Alberta court declined jurisdiction in a civil claim for sexual assault, given that the defendant was already suing the plaintiff in Ontario for defamation for accusing him of the assault. The truth of what took place should be ascertained once and for all in the Ontario proceeding rather than put the victim through two proceedings in which the details of the assault would be in issue.[29]

Jurisdiction simpliciter — *non-resident defendant — estate matter — jurisdiction established and not declined*

Raczkowski-Filliter v Raczkowski, 2019 NSSC 165

This litigation was between two siblings who disagreed as to their respective rights to their mother's estate. The son lived in Ontario and had begun an action there to have the mother's 2014 will, which was made on a visit to him in Ontario, declared valid. His sister had previously commenced the present proceeding in Nova Scotia to challenge the validity of that will so as to make an earlier will operative. The son applied to have the Nova Scotia proceeding stayed so that the Ontario court could address all of the matters in dispute. The Nova Scotia court admittedly had jurisdiction *simpliciter* because the litigation concerned the administration of the estate of a

[28] 2019 ABQB 530, 42 CPC (8th) 374 (Master).

[29] Jurisdiction *simpliciter* was found on the basis of the presumptive connecting factor that the defendant was a necessary or proper party to the plaintiff's action against two other parties, who were served in Alberta. These parties were the plaintiff's former employers, whom the plaintiff sued for wrongfully making public her identity as the victim of the assault by the defendant, who was a fellow employee at the time.

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person who died ordinarily resident in the province.[30] The court held that the son had not shown Ontario to be a more appropriate forum, largely because most of the evidence as to the mother's testamentary capacity was likely to be found in Nova Scotia.

Jurisdiction simpliciter — *non-resident defendant — forum of necessity*

Mohammad v Tarraf, 2019 ONSC 1701, 145 OR (3d) 370

The plaintiff brought an action against the defendant, with whom he had a joint venture to develop a poultry plant in the United Arab Emirates (UAE). Two corporate entities in the UAE were also sued. Both individuals were resident there when their joint venture was formed. The plaintiff claimed that the defendants had unlawfully deprived him of his share. The allegations included intimidation and threats to the plaintiff's safety that were approved of, and acquiesced in, by members of the royal family of Dubai. The plaintiff and his family had fled Dubai fearing for their lives and were accepted as refugees in Canada in 2000. The defendants were personally served in the UAE but did not appear. The plaintiff was granted a default summary judgment for $16.5 million. The court considered the question of jurisdiction *simpliciter* and held that, although the claims had no real and substantial connection with Ontario, the common law forum of necessity principle applied. The plaintiff could not reasonably be expected to sue the defendants in the UAE, where he had reason to fear that his life would be in danger or at least that he would be imprisoned.

Note. The forum of necessity argument was unsuccessfully made in *Rosenblatt v Peled*,[31] in which the Ontario court held it lacked jurisdiction *simpliciter*. It was possible for the plaintiff's action, which related to a family trust, to be brought in Quebec, where most of the trustees lived. See also *Droit de la famille — 192582*.[32]

Declining jurisdiction *in personam*

Forum selection clause — stay of related proceeding — standstill agreement

Trustees of the Labourers' Pension Fund of Central and Eastern Canada v Sino Forest Corp, 2019 ONSC 3790

A litigation trust, formed as part of insolvency proceedings in Ontario, sued a related group of corporate defendants in Ontario, Singapore, and Australia to

[30] *CJPTA* (NS), *supra* note 10, s 11(b).

[31] 2019 ONSC 5197.

[32] 2019 QCCS 3599.

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recover losses by a group of pension funds and other investors. These investors had acquired shares in Sino Forest, a Canadian corporation with its principal office in Hong Kong, which made fraudulent misrepresentations about its business in China. The defendants were the Pöyry group of companies (collectively known as Pöyry), based in China, which had provided valuations to Sino Forest of the latter's assets. The trust brought these actions as the assignee of Sino Forest's claims as purchaser of Pöyry's valuation services. The litigation trust and Pöyry entered into a standstill agreement on 28 June 2016, by which they agreed to litigate the Singapore action before all other actions. In the Singapore action, the litigation trust alleged that Pöyry (Singapore) was liable for breach of contract and negligence and sought US $593 million in damages. The action was commenced in March 2014 and, at the time of the present proceeding, was well advanced and on the eve of trial.

Pöyry had previously been a defendant in the litigation trust's class action against Sino Forest, Pöyry, and a number of others, based on their direct liability to the investors under Ontario securities law and other causes of action. Pöyry had reached a settlement with the litigation trust in that proceeding, while the class action continued against the other defendants. In the present proceeding, commenced on 28 March 2014, Pöyry sought an order from the Ontario Superior Court of Justice that the litigation trust was precluded from suing it in Singapore as the assignee of Sino Forest's claims against Pöyry because of the terms of the settlement agreement made earlier in relation to the class action. The litigation trust argued in response that the court should not make such an order on four grounds, two of which were in essence *forum non conveniens* grounds that Singapore was the appropriate forum.

Justice Paul Perell dismissed Pöyry's motion on those two grounds. The case was a paradigm for the application of the Ontario rule that a court can stay or dismiss an action if, *inter alia*, the court had no jurisdiction over the subject matter of the action or another proceeding is pending in another jurisdiction between the same parties in respect of the same subject matter.[33] Here, the court had jurisdiction over the subject matter, but there was another proceeding not only pending but also imminent in Singapore between the same parties in respect of the same subject matter. Moreover, the parties' standstill agreement was akin to, but not quite, an exclusive jurisdiction clause. Where the parties have by contract specified a particular jurisdiction as having exclusive jurisdiction, this is a very weighty, although not conclusive, factor that favours the specified court as being the natural forum.

Note. In *Busch v Yelp Inc*,[34] a law firm sought to bring an action in British Columbia against a California-based website operator that hosted reviews of

[33] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 21.03(3)(a) and (c), respectively.

[34] 2019 BCSC 1746.

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businesses. The claim was that the defendant had published a defamatory review of the firm. The court gave effect to an exclusive forum selection clause in favour of the courts of California. An action against an online business was also stayed in *WCL Capital Group Inc v Google LLC*.[35] The dispute was about the contract under which the defendant provided online advertising for the plaintiff's Ontario financial business. An exclusive choice of forum clause in favour of the California courts was applied. A forum selection clause agreeing on the jurisdiction of the English courts was not given effect in *Forbes Energy Group Inc v Parsian Energy Rad Gas*[36] because it was not exclusive; the issue was an ordinary *forum non conveniens* question, and the defendant had not shown that England was clearly a more appropriate forum.

Matrimonial causes

Nullity of marriage

Boateng v Darko, 2019 ABQB 38, 87 Alta LR (6th) 426

The Alberta court granted a nullity decree in respect of a marriage that was entered into in Ghana in 2006 between a wife domiciled in Canada and a husband domiciled in Ghana. The husband later joined the wife in Canada. The couple had three children. They separated in 2014, and the husband commenced proceedings for a divorce. The wife sought a nullity decree on the basis that, in 2006, the husband was already married to another woman with whom he also had a child. The husband's argument in response was that polygamy was legal in Ghana, so the second marriage was valid. The court followed an earlier lower court decision in Alberta[37] and held that, even if the second marriage was a valid polygamous marriage when it was entered into, it should be recognized for the limited purpose of granting an annulment. It was appropriate on policy grounds to exercise such jurisdiction in order to recognize the realities of immigration and pluralism in Canadian society and to provide a meaningful remedy to the wife, who found herself in Canada ensnared in an unwanted marriage.[38]

[35] 2019 ONSC 947, 144 OR (3d) 254.

[36] 2019 ONCA 372, 93 BLR (5th) 169.

[37] *Azam v Jan*, 2013 ABQB 301, 362 DLR (4th) 111.

[38] There is at present no authority that would permit a Canadian court to grant a divorce, even to a person domiciled in Canada, in respect of a marriage that was entered into as a polygamous marriage and is still actually polygamous. Matrimonial relief is barred by the principle in *Hyde v Hyde* (1866), LR 1 P & D 130, a position strongly criticized by Bielby JA in her concurring judgment in *Azam v Jan*, 2012 ABCA 197 at paras 20–23.

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Matrimonial property — forum non conveniens — *two common habitual residences*

Fisher v Oates, 2019 BCSC 2162

The parties were two women who married in British Columbia in 2011. One was from that province, and the other was from the United States. The parties divided their time throughout their marriage about equally between a jointly owned residence in British Columbia and the respondent's home in the United States, which was first in New York State and then, after 2013, in Delaware. The petitioner brought a divorce proceeding in the BC Supreme Court. The respondent brought a divorce proceeding in Delaware and sought to have the BC proceeding stayed. The BC Supreme Court refused a stay. The petitioner's claim for support as corollary relief under the *Divorce Act*[39] could only be brought in British Columbia, and the court could not decline that jurisdiction in favour of another court. The matrimonial property claims were subject to the *Family Law Act*,[40] which has a provision about declining jurisdiction.[41] None of the factors specified in that provision pointed in the direction of Delaware. Among the factors was the law that governed the petitioner's property claims. This was BC law because British Columbia was the parties' first common habitual residence,[42] even if they simultaneously had a second habitual residence in Delaware.

Note. English v McCurdy[43] was a case in which the BC court lacked jurisdiction in divorce since neither party was ordinarily resident in the province for one year immediately preceding the commencement of the proceeding.[44] The court held that it could take jurisdiction in respect of one of the spouses' actions for a division of matrimonial property because there was a real and substantial connection between the province and the facts on which the proceeding was based,[45] but it declined jurisdiction in favour of Arizona where both parties were ordinarily resident.

[39] RSC 1985, c 3 (2nd Supp).

[40] SBC 2011, c 25.

[41] *Ibid*, s 106.

[42] This is the statutory choice-of-law rule, *ibid*, s 108(5), if the first common habitual residence is in a community of property jurisdiction, which for this purpose British Columbia was held to be.

[43] 2019 BCSC 96.

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

[45] *Family Law Act*, SBC 2011, c 25, s 106(2)(d).

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Matrimonial property — subject matter jurisdiction

Note. In *Ward v Allison*,[46] a Saskatchewan court held that it could not directly divide movable property situated in Alberta—in this case, brokered accounts at an Alberta branch of a national bank. It could, however, take the value of the property into account in making the overall division of the couple's assets.

Infants and children

Child abduction — Hague Convention on the Civil Aspects of Child Abduction *(*Hague Child Abduction Convention*)*

RVW v CLW, 2019 ABCA 273, 435 DLR (4th) 740

The mother and father lived together in Alberta from 2015 to 2017 when the father returned to his former home in Texas after being denied the right to immigrate to Canada. The mother followed him there, and their child was born in September 2017. The parties separated soon afterwards. Both commenced proceedings in Texas. In January 2018, the mother, with the four-month-old child, returned to Alberta. The father applied for the return of the child to Texas under the *Hague Child Abduction Convention*.[47] The chambers judge, applying the hybrid, non-technical approach to determining habitual residence,[48] found that the child was habitually resident in Texas before the mother wrongfully removed him to Alberta in breach of the father's rights under Texas law. The judge's decision to order the child's return to Texas was appealed on two grounds: that the child was habitually resident in Alberta, not Texas, when the mother returned with the child to Alberta and that the trial judge ought to have denied the return of the child on the ground that there was "a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[49]

The Court of Appeal rejected both grounds. On the habitual residence question, the convention did not contemplate a child with no habitual residence. The child was born in Texas and had never lived anywhere else.

[46] 2019 SKQB 95, [2019] 10 WWR 463.

[47] *Hague Convention on the Civil Aspects of Child Abduction*, 25 October 1980, Can TS 1983 No 35 (entered into force 1 December 1983), implemented in Alberta by the *International Child Abduction Act*, RSA 2000, c I-4.

[48] The hybrid approach treats both factual connections and the parents' intentions as relevant, neither to the exclusion of the other, and was 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 571 at 584–87 [Blom, "Canadian Cases 2018"].

[49] *Ibid*, art 13(b).

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Prior to his abduction, he had never been to Canada. An infant of his age could not be expected to have any greater involvement in Texan society than to live there with his parents. The father could only lawfully reside in Texas, and the mother's decision to follow the father there displayed a sufficient intent to make Texas the family residence for the indefinite future. The judge was entitled to find that any indefinite long-term parental plans to relocate to Canada were not sufficient to displace the child's present habitual residence in Texas. The mother's argument, that the child was too young to have formed any connection with Texas, would make the convention effectively inapplicable to very young children. That cannot have been the intention.

On the second ground, the judge's conclusion that the child would not be exposed to "grave risk" if returned to Texas was available on the record and did not disclose reviewable error. Both parents had invoked the jurisdiction of the District Court in Harris County, Texas. If the mother wished to return to Canada, she should have awaited the ruling of that court on the issue.

Note. An order for return of a four-year-old child to the United States was refused in *Souza v Krahn*.[50] The child's habitual residence, determined using the hybrid approach, was in Manitoba at the time of the alleged wrongful retention. The child had spent two-thirds of her short life there, with the remainder on intermittent stays, with her mother, at the father's home in the United States, a country in which the mother had no right of permanent residence. In *Knight v Gottesman*,[51] a father's application for return of two children from Ontario to Massachusetts was granted. The court found that the children's habitual residence became Massachusetts when the family moved there in December 2018, notwithstanding that the mother took them back to Ontario only a few months later for a visit that became a wrongful retention. In *RG v KG*,[52] the father obtained an order under the convention for return of two children from New Brunswick to Israel, from which the mother had wrongfully removed them.

Child abduction — interlocutory injunction against removal from Ontario

Note. In *Geliedan v Rawdah*,[53] the mother's removal of a six-year-old child from Dubai to Ontario was in breach of a 2015 order of a UK court. The Ontario court made no finding as to whether the child's habitual residence before the removal was the UAE or England, but it was one or the other. The father was granted a temporary order against the mother's removing the child from Ontario.

[50] 2019 MBQB 174.

[51] 2019 ONSC 4341, 147 OR (3d) 121.

[52] 2019 NBQB 46.

[53] 2019 ONSC 4517, 27 RFL (8th) 96.

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Child abduction — interprovincial

Note. In *Aslanimehr v Hashemi*,[54] a BC court held that it lacked jurisdiction to order, as the father requested, that a one-year-old child be brought from Ontario to British Columbia so that parenting rights could be decided. Under the relevant legislation,[55] jurisdiction depended on the child's being habitually resident in British Columbia, which he was not, although he had lived there for some months with his grandmother. The exercise of *parens patriae* jurisdiction was also unjustified, as Ontario appeared to be an available forum.

Adult guardianship and powers of attorney

Action against holder of power of attorney

Hutter v Hutter, 2019 ONSC 2173, 46 ETR (4th) 85

The mother lived in Ontario until 2013, when she moved, first to Yukon and then to British Columbia, to live with her son Fred and his wife. In British Columbia, the three of them lived in a house that the mother purchased. In 2018, she moved into a care home nearby. The son's two siblings, Victor and Marilyn, brought an action in Ontario, where they still lived and the mother still had assets, claiming a variety of relief against Fred with respect to his handling of the mother's affairs, which he did under a 2013 power of attorney, starting in January 2018. Victor and Marilyn sought to have the court declare Fred's power of attorney invalid and declare valid the powers of attorney that the mother had granted in 2012 to each of the two of them. Fred took part in the Ontario proceedings. The parties disagreed as to when the mother became incapable of managing her affairs, but Fred agreed that she had become incapable by May 2018.

The present proceeding was a motion by Victor and Marilyn, seeking a variety of orders against Fred to account for his handling of the mother's affairs, to pay certain debts that the mother held, and suspending his ability to take any further actions pending the passing of accounts. The orders were sought under Ontario legislation on substitute decision-makers.[56] Fred argued that the Ontario court lacked jurisdiction, given that the mother was resident in British Columbia. The court held that both it and the BC court had jurisdiction. No proceedings had been commenced in British Columbia. The events giving rise to the dispute took place in Ontario, where the powers of attorney were executed; the proceeding in Ontario was defended; the court

[54] 2019 BCSC 804, 24 RFL (8th) 310.

[55] *Family Law Act*, SBC 2011, c 25, s 74(2).

[56] *Substitute Decisions Act, 1992*, SO 1992, c 30, s 42.

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had previously held that certain funds, the proceeds of the mother's Ontario house, be held in trust pending further order of the court; the property in question was situated in Ontario, though readily transferable; the focus of the proceedings was on the mother's assets, some of which remained in Ontario; and the applicants were resident in Ontario. Jurisdiction rested in Ontario.

Anti-suit injunctions

Restraining litigation in another province for workplace injury — workers' compensation schemes

Pe Ben Oilfield Services (2006) Ltd v Arlint, 2019 ABCA 400, 96 Alta LR (6th) 98

Melissa Arlint and Douglas Bishop had a motor vehicle accident near Dawson Creek, British Columbia. Each was driving their own car in the course of employment with an Alberta employer. Arlint claimed benefits from WorkSafe BC (the workers' compensation board in British Columbia) and was denied. She applied to the Alberta Workers Compensation Board (WCB) and received benefits, but these did not cover all of her losses. She and the Alberta WCB brought an action for damages in British Columbia against Bishop and his employer, Pe Ben, which owned the truck Bishop was driving. Pe Ben applied to the Alberta Court of Queen's Bench for an anti-suit injunction to restrain Arlint and the WCB from continuing the BC action. The basis was that the action circumvented the bar in the Alberta *Workers' Compensation Act*[57] against an injured worker, who has received benefits pursuant to the act, from commencing a personal injury action against an employer, or a worker of an employer, that is also insured under the Act.

The anti-suit injunction application was dismissed, and the dismissal was upheld on appeal. On a conflict-of-laws analysis, BC law applied to the tort because the situs of the tort was in that province. It was therefore appropriate that the BC courts, as the action began in that province, address the issues between the parties. A comity analysis led to the same conclusion. The issues that a BC court might be called upon to decide included whether the *Interjurisdictional Agreement on Workers' Compensation*[58] applies and whether recovery in British Columbia should be precluded on the ground that it is contrary to public policy because it breaches the historic compromise. Those were determinations to be made by the BC courts.

[57] RSA 2000, c W-15, s 23.

[58] *Interjurisdictional Agreement on Workers' Compensation* (2006, amended in 2017), online: *Association of Workers' Compensation Boards of Canada* <https://awcbc.org/wp-content/uploads/2018/03/IJ-Consolidated-Agreement-2017.pdf>.

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Restraining concurrent proceedings to recognize a foreign judgment

RDX Technologies Corp v Appel, 2019 ABQB 477[59]

RDX brought an action in Alberta against CWT, which agreed in 2013 to sell certain partnership units to RDX. The action alleged fraud, misrepresentation, and breach of contract. The allegations revolved around CWT's biodiesel plant in Missouri. The action was commenced on 26 August 2014. The Unit Purchase Agreement (UPA) contained a provision that Alberta was the exclusive jurisdiction for resolving any action arising from, or related to, the UPA. CWT applied to stay the action on the basis that New York was the more appropriate forum and commenced a proceeding against RDX in that state. CWT's application for a stay was first adjourned by consent and eventually struck for failure to file a brief in support. The New York action concluded in a judgment in favour of CWT, and, on 6 September 2018, CWT filed an application in the Alberta proceeding alleging that the New York judgment was *res judicata*. In a case management application, RDX sought an injunction against CWT's announced intention to file an application in Ontario to recognize and enforce the New York judgment. In a case management application made at the same time, CWT, for its part, sought to revive its challenge to the Alberta court's jurisdiction.

The Alberta court held that the *res judicata* application of 6 September 2018 constituted attornment to the court's jurisdiction by CWT and made the jurisdictional argument moot. Reinstatement of CWT's jurisdictional application was refused. RDX was granted the injunction against CWT's enforcing the New York judgment in Ontario. The Ontario application was duplicative of the *res judicata* application in Alberta and inappropriate. CWT's attornment by making the *res judicata* application gave the Alberta court jurisdiction to issue an anti-suit injunction against CWT in respect of the Ontario application. CWT was enjoined from seeking any order in the Ontario court for recognition and enforcement of the New York judgment, pending further order of the Alberta court.

Restraining foreign arbitration

Li v Rao, 2019 BCCA 264, 26 BCLR (6th) 219

Mr. Rao, a resident of China, and Ms. Li, a resident of British Columbia, met when Rao was on a trip to Vancouver. They commenced a romantic relationship and went through a ceremony of marriage in Las Vegas, Nevada, in April 2016. Rao was already married at the time. The parties'

[59] RDX made an unsuccessful application for security for the costs of an appeal being brought from this decision. *RDX Technologies Corp v Appel*, 2019 ABCA 338.

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relationship came to an end in the fall of the same year. Between January and May 2016, Rao had transferred $17.65 million to Li's real estate company, LPP, of which Rao then became a 50 percent shareholder. The agreement under which Rao became a shareholder was to be governed by Canadian law, but any disputes under it were to be submitted to the Chinese International Economic and Trade Arbitration Commission (CIETAC) branch in Shenzhen, China.

Complicated legal manoeuvres followed, revolving around the $17.65 million. They included Rao's civil action for a return of the funds, Li's family action for support and division of property, and an arbitration that Rao commenced with CIETAC. In September 2017, the parties agreed to a standstill agreement, by which Rao would not take steps in the CIETAC arbitration until the BC court had ruled on Li's application for summary judgment in the civil action. When Rao indicated that he was going ahead with the arbitration anyway, Li sought an anti-suit injunction.

The Court of Appeal, upholding the chambers judge, held that the injunction should be granted. An anti-suit injunction would usually be granted where the proceeding to be enjoined was in breach of an agreement not to pursue the proceeding. There had to be strong reasons to depart from the parties' agreement. Comity concerns were less significant where the ground for imposing the injunction was contractual rather than an assertion that the jurisdiction of the domestic forum should take precedence over that of the other forum because the domestic forum is more appropriate. No strong cause existed to support the conclusion that it would be unreasonable or unjust to require Rao to adhere to the terms of the standstill agreement and not proceed with the arbitration until the BC Supreme Court had ruled on the extant applications.

Québec

Classification juridique

Présomption qu'un absent est vivant durant les sept années qui suivent sa disparition, à moins que son décès ne soit prouvé avant l'expiration de ce délai — article 85 CcQ *— effet*

Note. Veuillez voir *Threlfall c Carleton University*,[60] qui rejette le pourvoi contre la décision de la Cour d'appel du Québec.[61]

[60] 2019 CSC 50.

[61] *Threlfall c Carleton University*, 2017 QCCA 1632, noté dans Joost Blom, "Jurisprudence canadienne en matière de droit international privé en 2017" (2017) 55 ACDI 598 aux pp 642–43 [Blom, "Jurisprudence canadienne 2017"].

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Actions personnelles à caractère extrapatrimonial et familial

Compétence — effets du mariage — article 3145 CcQ *— partage du patrimoine familial — divorce à l'étranger*

Droit de la famille — 191053, 2019 QCCS 2250

La Cour supérieure a reconnu un jugement de divorce prononcé en 2015 dans l'État A comme ayant autorité de la chose jugée, du moins en ce qui a trait à la dissolution de l'union des parties, et l'a déclaré irrévocable. Bien que la demanderesse, Madame, avait résidé au Québec depuis cinq mois, les deux parties avaient la nationalité de l'État A et la compétence des autorités de cet État devait être reconnue selon l'article 3167 du *Code civil du Québec* (*CcQ*). Le critère additionnel de la nationalité dans cet article se conjugue harmonieusement avec les critères associés au paragraphe 22(3) de la *Loi sur le divorce*.[62]

Néanmoins, la Cour supérieure a décidé qu'elle avait compétence pour se prononcer sur le partage du patrimoine familial. La Cour supérieure a maintes fois ordonné le partage du patrimoine familial des parties dans un jugement de divorce prononcé par une autorité étrangère. En l'espèce, le tribunal du pays A ne s'est pas prononcé sur la dissolution du régime matrimonial ni sur le partage du patrimoine familial. Selon l'article 3145 *CcQ*, pour ce qui est des effets du mariage, notamment ceux qui s'imposent à tous les conjoints quel que soit leur régime matrimonial, les autorités québécoises sont compétentes lorsque l'un des conjoints a son domicile ou sa résidence au Québec. La reconnaissance du jugement de divorce du pays A n'affecte pas le droit des parties de demander un partage du patrimoine familial. L'ensemble des biens visés était situé au Québec et les deux époux avaient leur résidence au Québec au moment de l'introduction de l'action. Dès lors, en appliquant l'article 3154, la Cour supérieure du Québec avait également compétence pour la dissolution du régime matrimonial. Quant à la loi applicable, le régime est régi par la loi du domicile des parties au moment de leur union, selon l'article 3123 *CcQ*.

Divorce — requête demandant de surseoir à statuer sur la demande de l'épouse pour cause de litispendance internationale — article 3137 CcQ

RS c PR, 2019 CSC 49, 438 DLR (4e) 579

R. et S. se marient en Belgique en 2004. Ils déménagent au Québec avec leurs enfants en 2013. Au cours de l'année 2014, la relation entre les époux se dégrade, et S. annonce à R. sa décision de mettre fin à leur union. Deux

[62] LRC 1985, 2e suppl, c 3.

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demandes en divorce sont alors intentées, l'une par R. en Belgique le 12 août, l'autre par S. au Québec le 15 août. Prenant appui sur le droit belge, R. révoque ensuite par lettre toutes les donations qu'il a consenties à S. au cours de leur mariage, qui se chiffrent à plus de 33 millions de dollars.

Invoquant l'article 3137 *CcQ*, R. demande à la Cour supérieure de surseoir à statuer sur les procédures de S. au Québec pour cause de litispendance internationale. D'avis qu'une décision d'un tribunal belge appliquant la disposition du code civil belge qui permet la révocation par R. des donations ne pourrait être reconnue au Québec en raison de son caractère discriminatoire, la Cour supérieure conclut qu'il n'y a pas lieu de suspendre les procédures en divorce de S. au Québec. La Cour d'appel infirme ce jugement.[63] À ses yeux, il serait prématuré de conclure qu'une décision belge se prononçant sur la révocation des donations ne pourrait être reconnue au Québec. Selon la Cour d'appel, la juge de première instance a en outre commis une erreur qui a rendu déraisonnable son analyse portant sur l'opportunité d'exercer son pouvoir discrétionnaire pour surseoir à statuer. En conséquence, la Cour d'appel ordonne la suspension des procédures en divorce de S. au Québec.

La Cour suprême du Canada, par une majorité de six à un, accueille le pourvoi et la conclusion de la Cour supérieure sur le refus de surseoir est rétablie. L'article 3137 *CcQ* permet à un tribunal de surseoir à statuer sur une action introduite au Québec lorsque le différend fait déjà l'objet de procédures devant les tribunaux d'un for étranger. L'exception de litispendance internationale a pour objectif de permettre au tribunal interne de surseoir à statuer en attendant de donner effet au Québec à la décision étrangère, afin d'éviter que des procédures intentées parallèlement n'aboutissent à des décisions incompatibles qui pourront toutes deux avoir des effets au Québec. Trois conditions sont requises pour qu'un tribunal québécois puisse surseoir à statuer. Premièrement, le for étranger doit avoir été saisi de l'action en premier. Deuxièmement, il doit y avoir identité de parties, de faits et d'objet entre les deux actions intentées — soit la condition de triple identité. Troisièmement, l'action étrangère doit pouvoir donner lieu à une décision susceptible de reconnaissance au Québec. Si l'une de ces conditions n'est pas remplie, la requête en sursis à statuer ne peut être accueillie puisqu'il n'y a pas alors de litispendance au sens de l'article 3137 *CcQ*. Conformément aux principes applicables en matière de preuve civile et comme pour toute autre demande, il appartient à la partie qui invoque la situation de litispendance internationale et sollicite le sursis à statuer de démontrer, selon la prépondérance de la preuve, que les conditions qui y sont prévues, y compris la troisième condition, sont remplies.

[63] *Droit de la famille — 172244*, 2017 QCCA 1470, noté dans Blom, "Jurisprudence canadienne 2017," *supra* note 61 aux pp 619–21.

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Selon S., l'analyse de la troisième condition met en cause ici l'incompatibilité de l'article 1096 du code civil belge avec l'ordre public tel qu'entendu dans les relations internationales, l'une des exceptions à la reconnaissance des jugements étrangers prévues à l'article 3155 *CcQ*. Mais le libellé de cette exception édicte que c'est le résultat de la décision étrangère qui doit faire l'objet de l'analyse, et non les lois de l'État étranger. Il ne s'agit pas de faire la leçon aux autorités étrangères sur leur propre droit. Le rôle du tribunal québécois consiste simplement à s'assurer que ne soit pas exécutée une décision étrangère dont le résultat serait tellement incompatible avec certaines des valeurs qui sous-tendent le système juridique québécois qu'il ne pourrait être incorporé à celui-ci. L'ordre public tel qu'entendu dans les relations internationales est donc généralement plus restreint que son pendant en droit interne. Une décision étrangère ne sera pas reconnue si son résultat heurte de front les conceptions morales, sociales, économiques ou même politiques qui sous-tendent l'ordre juridique québécois.

Une certaine doctrine qualifie le fardeau de preuve requis pour l'application de l'article 3137 *CcQ* de "pronostic" ou de "plausibilité" de reconnaissance. La partie requérante s'acquitte de son fardeau si elle démontre qu'il est possible que la décision étrangère soit éventuellement reconnue au Québec. Ce seuil peu onéreux s'explique notamment par les objectifs qui sous-tendent l'article 3137 *CcQ*, à savoir favoriser la courtoisie internationale et éviter le risque de jugements potentiellement contradictoires. R. était uniquement tenu d'établir l'existence d'une possibilité que l'éventuelle décision belge ne serait pas manifestement incompatible avec l'ordre public tel qu'entendu dans les relations internationales. Le résultat de l'éventuelle décision belge demeure, à ce jour, incertain. Plusieurs éléments étayent la possibilité que ce résultat soit autre que la révocation des donations et, partant, qu'il ne soit pas manifestement incompatible avec cet ordre public international. Cela suffit pour satisfaire à la troisième condition que pose l'article 3137 *CcQ*.

Le fondement du pouvoir discrétionnaire à l'article 3137 *CcQ* réside dans l'idée selon laquelle, même si le tribunal étranger a été saisi en premier, et même si aucune des exceptions à la reconnaissance des jugements étrangers énoncées à l'article 3155 *CcQ* ne s'applique, il demeure néanmoins possible que ce tribunal ne soit pas celui présentant les liens les plus étroits avec le litige. En cela, l'analyse requise s'apparente à celle applicable à l'égard du pouvoir discrétionnaire dont traite l'article 3135 *CcQ*, disposition qui codifie la doctrine du *forum non conveniens* en droit international privé québécois. En raison de cette proche parenté, les critères développés par les tribunaux en matière de *forum non conveniens* s'appliquent aussi en matière de litispendance internationale.

La norme d'intervention qu'il convient d'appliquer à l'exercice du pouvoir discrétionnaire en matière de litispendance internationale est exigeante. Une cour d'appel ne devrait intervenir que si le ou la juge saisie de la demande a

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commis une erreur de principe, a mal interprété ou n'a pas pris en considération des éléments de preuve importants, ou a rendu une décision déraisonnable. Au bout de compte, la reconnaissance éventuelle du jugement québécois à l'étranger est le seul critère sur lequel s'appuie la Cour d'appel en l'espèce pour substituer sa propre analyse à celle de la première juge. La Cour d'appel n'adresse aucun reproche à la juge de première instance en ce qui concerne les autre critères que cette dernière a analysés. Ce seul critère ne pouvait justifier son intervention dans l'exercice par la juge de première instance de son pouvoir discrétionnaire. La reconnaissance du jugement québécois à l'étranger ne pouvait constituer une considération déterminante que si le jugement québécois n'avait aucune utilité à part celle d'être exécuté à l'étranger. Ici, l'utilité du jugement québécois ne fait aucun doute étant donné que plusieurs biens de grande valeur visés par le litige sont situés au Québec.

Action pour séparation de corps – art 3146 CcQ

Note. Veuillez voir *Droit de la famille — 192111*[64] (la demanderesse était domiciliée au Québec, compétence est établie) et *Droit de la famille — 1931*[65] (ni la demanderesse ni l'intimé étaient domiciliés au Québec, compétence n'est pas établie).

Enfants — garde — domicile de l'enfant — enfant domicilié à l'étranger — forum de nécessité — article 3136 CcQ

Note. Veuillez voir *Droit de la famille — 192582*.[66] Au moment où le père introduit sa demande, il est déjà partie à une procédure dans le pays où l'enfant est domicilié. Ceci suffit à exclure qu'il puisse invoquer la compétence de nécessité de l'article 3136 *CcQ*.

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

Droit de la famille — 192603, 2019 QCCS 5487

Monsieur demande la garde de l'enfant des parties. Madame plaide que la Cour supérieure du Québec n'a pas compétence pour entendre la demande puisque l'enfant n'habite pas au Québec. Madame a quitté le pays avec l'enfant sans l'autorisation de Monsieur. L'enfant est né au Québec en 2013 dans un contexte où les parties avaient une relation parsemée de ruptures ponctuelles, mais fréquentes, en raison d'un conflit parental persistant. Durant la vie commune, les parties étaient domiciliées au Québec. Depuis

[64] 2019 QCCS 4451.
[65] 2019 QCCS 75.
[66] 2019 QCCS 3599.

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la séparation définitive des parties vers le mois d'août 2014, Madame exerce la garde *de facto* de l'enfant. Madame n'a jamais voulu accorder de véritables droits d'accès à Monsieur, sauf à son propre condo au moment qui lui convenait à elle. Elle quitte le Canada avec l'enfant en 2016 pour ne plus y revenir. Elle s'installe au Chili. Dans le but de faire réagir Madame, Monsieur cesse de lui verser la pension alimentaire destinée à l'enfant à compter du mois de septembre 2016. Étant d'avis que Monsieur aurait abandonné l'enfant parce qu'il n'a intenté aucune demande judiciaire et qu'il néglige de subvenir à ses besoins, Madame présente une demande en déchéance de l'autorité parentale au Québec. C'est dans ce contexte que Madame présente son moyen déclinatoire à l'encontre de la demande de garde de Monsieur.

La Cour supérieure a rejeté le moyen déclinatoire. En quittant le Canada avec l'enfant sans l'autorisation de Monsieur, Madame a déplacé l'enfant illégalement. Son argument selon lequel le père, en raison de son inaction depuis janvier 2016, aurait tacitement consenti à ce qu'elle exerce la garde et acquiescé au déplacement de l'enfant, n'est pas retenu. Le fait que Monsieur n'ait pas été proactif est peut-être pertinent à l'analyse d'une éventuelle demande de retour de l'enfant en vertu de la *Loi sur les aspects civils de l'enlèvement international et interprovincial d'enfants*[67] ou des critères relatifs à la demande de garde. Mais à ce stade-ci des procédures, il ne s'agit pas d'un élément déterminant afin d'évaluer si la Cour est compétente pour se saisir de la demande de Monsieur.

Il y a absence de preuve indiquant que Monsieur aurait consenti de façon libre, éclairée et non équivoque à ce que l'enfant aille vivre à l'étranger et acquiescé à son non-retour au Canada. Un tel déplacement ne peut servir d'assise légale à un changement de domicile pour l'enfant. En conséquence, en raison du caractère illicite du déplacement, l'enfant est présumé être encore domicilié à l'endroit où il vivait avant son départ du Canada. La Cour supérieure du Québec a donc juridiction pour entendre la demande de Monsieur puisque l'enfant était domicilié au Québec, comme l'exige l'article 3142 *CcQ*.

En outre, la Cour supérieure du Québec a juridiction aussi sur la base de l'article 3139 *CcQ*: L'autorité québécoise, compétente pour la demande principale, est aussi compétente pour la demande incidente ou reconventionnelle. La demande de garde de Monsieur n'est pas une demande incidente au sens de l'article 3139 *CcQ* puisque cette notion réfère plutôt à l'intervention forcée ou volontaire d'un tiers lorsque sa présence est nécessaire à la résolution du litige principal. Il s'agit plutôt d'une réplique à la demande de Madame, en l'occurrence une forme de demande reconventionnelle. La demande de Madame en déchéance de l'autorité parentale

[67] RLRQ, c A-23.01.

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exigera que la Cour se prononce sur l'abandon potentiel de l'enfant et sur les raisons qui ont fait que Monsieur ne l'a pas vu depuis janvier 2016. La demande de garde qu'il présente est ainsi étroitement liée aux faits qui seront analysés par le juge du fond et la demande de Madame sera de toute évidence rejetée si celle de Monsieur est accueillie. En ce sens, la première ne peut être décidée sans que la deuxième soit analysée.

Madame n'a pas fait la démonstration que le tribunal devrait décliner sa compétence en vertu de la doctrine du *forum non conveniens*. Il n'y a pas lieu de décliner compétence en vertu de l'article 3135 *CcQ*.

Actions personnelles à caractère patrimonial

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

Note. Veuillez voir *Prométal inc c Maxim Construction inc*[68] et *Optimum Réassurance inc c Partner Reinsurance Co Ltd.*[69]

Compétence — article 3148(4) CcQ *— parties ont soumis les litiges aux autorités québécoises*

Bombardier c Honeywell International, 2019 QCCS 481[70]

The plaintiffs, Bombardier, based in Quebec, and its Northern Irish subsidiary Short Brothers, which did no business in Quebec, brought an action against Honeywell, whose head office was in New Jersey, for bad faith failure to negotiate a new long-term supply agreement for thermal anti-ice valves. Honeywell supplied the valves to Short Brothers, which incorporated them in aircraft engine nacelles that were in turn sold to Rolls-Royce in England. Rolls-Royce incorporated the nacelles into engines supplied to Airbus, which mounted them in aircraft that were manufactured in several European countries. Until 2017, the purchases of these valves were governed by a long-term agreement (LTA) originally made in 1991 between a predecessor of Honeywell and Short Brothers. In March 2017, Honeywell demanded that a new long-term agreement be negotiated, with a short-term agreement to be put in place in the meantime under which purchases would be made at Honeywell's current price. The additional amounts paid under this agreement would be reimbursed when the new long-term agreement

[68] 2019 QCCS 1207, requête pour permission d'appeler rejetée, 19 juin 2019, 2019 QCCA 1077.

[69] 2019 QCCS 3184, affirmée 2020 QCCA 490.

[70] Requête pour permission d'appeler rejetée, 2 avril 2019, 2019 QCCA 582.

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was signed. Honeywell sent a draft letter of agreement (LOA) for the interim agreement to Bombardier and Short Brothers, but this document was never executed. Honeywell began invoicing prices higher than the LTA prices in April 2017.

The plaintiffs commenced their action in October 2017. Their claim was based on the argument that the LTA had continued in effect, that the higher prices paid since April 2017 were meant to be clawed back once a long-term contract was entered into, and that, but for Honeywell's failure to negotiate in good faith, such a long-term agreement would have been entered into. The claim was for $13.5 million in damages for the extra paid for the valves since April 2017 and the amount to be paid until March 2019 (corresponding to the two-year notice period for termination of the 1991 contract). The plaintiffs also alleged that Honeywell's bad faith negotiation and abuse of its *de facto* monopoly put at risk Short Brothers's supply chain and caused significant damages to the plaintiffs and sought $100,000 damages for trouble and inconvenience and harm to their reputation.

Honeywell filed a declinatory exception disputing the court's jurisdiction. The plaintiffs raised an exclusive choice-of-forum clause that was contained in a 2009 General Terms Agreement (GTA) between Bombardier and Honeywell. This laid down a set of terms that were to be incorporated by reference into all contracts made between Bombardier, its affiliates, including Short Brothers, and Honeywell.

The Quebec Superior Court rejected the declinatory exception. Although the claims in the present action did not arise directly out of that agreement, the choice-of-forum clause in the GTA applied. The LTA predated the GTA and did not refer to it, so the only relevant contract was the GTA. The present action could be said to "arise out of," or be "connected with," the GTA in the terms of the clause. Nothing in the clause limited it to contractual disputes. The issue was whether the dispute was "connected with" a contract. A broad interpretation of that expression was appropriate here. The purpose of the GTA was to provide a framework for the relationship between the parties. The parties wanted all litigation to be in Quebec. The present action was for a failure to negotiate a new long-term agreement between the parties that would be subject to the GTA.

The court further held that a similar choice-of-forum clause in the LOA also applied because the dispute arose out of, or was concerned with, the temporary short-term contract, and, on the pleadings, the terms of the LOA were tacitly accepted by both sides as constituting the short-term contract between them, although the LOA was not formally executed. The parties were acting in accordance with the LOA from April 2017 onwards.

In addition, at least two grounds in Article 3148(3) of the *Civil Code of Québec* (*CCQ*) were satisfied. There were no contractual obligations to be performed in Quebec that were at issue, but the facts pleaded showed a fault committed in Quebec — namely, failure to negotiate in good faith,

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which took place at least partly in Quebec when Honeywell communicated with Bombardier's executive in Montreal. There was also damage in Quebec — namely, harm to Bombardier's reputation and to Bombardier's relationship with Rolls-Royce. Honeywell had not shown that any other forum was clearly more appropriate than Quebec, and, in any event, the presence of the choice-of-forum clauses in favour of Quebec made it inappropriate to decline jurisdiction.

Note. Veuillez voir aussi *Québecor inc c SMI Defensive*[71] (une clause d'élection de for s'appliquait; la requête en exception déclinatoire est rejetée).

Compétence — article 3148, alinéa 2 CcQ *— choix de soumettre les litiges à une autorité étrangère*

Note. Veuillez voir *Alfred c Constandinou*[72] (la requête en exception déclinatoire est accueillie), et *AXC Construction inc c Bioénergie AE Côte-Nord Canada inc*[73] (les requêtes en exception déclinatoire sont accueillies en partie).

Compétence — article 3150 CcQ *— action fondée sur un contrat d'assurance*

Bombardier produits récréatifs inc c PICC Property and Casualty Insurance Co Ltd, 2019 QCCS 1503

La défenderesse PICC demande le rejet du recours au motif d'absence de compétence de la Cour supérieure du Québec ou subsidiairement le renvoi devant les tribunaux chinois. BRP et son assureur Allianz réclament des défenderesses les sommes d'argent qu'elles ont conjointement versées aux héritiers d'une victime d'un accident mortel survenu en 2015 au Texas. La victime était alors passagère dans un véhicule côte à côte, conçu, testé et commercialisé par la demanderesse BRP dans ses installations au Québec et distribué en territoire américain par sa filiale BRP US. C'est à la suite d'une entente hors cour, intervenue dans le cadre de la poursuite américaine, que les demanderesses ont déboursé 2,4 millions de dollars américains aux héritiers de la victime. Selon les prétentions des demanderesses, l'accident résulte du bris d'une pièce mécanique fabriquée en Chine par SPS, une entreprise chinoise. Les demanderesses allèguent qu'en raison des agissements de la défenderesse PICC, assureurs chinois de leur sous-traitant SPS, et de TMCA, compagnie d'expertise en sinistres mandatée par PICC dans le dossier, elles ont cru à la participation de celles-ci au règlement du sinistre

[71] 2019 QCCS 4510.
[72] 2019 QCCS 3790.
[73] 2019 QCCS 3890.

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survenu aux États-Unis. Toutefois, ces entités refuseraient maintenant de respecter leurs engagements. C'est pourquoi, se fondant sur le contrat de fourniture de services avec sa sous-traitante SPS et le contrat d'assurance émis par les assureurs de SPS qui lui apporteraient une couverture d'assurance en tant qu'assurée, la demanderesse BRP et son assureur Allianz poursuivent les deux défenderesses.

La Cour supérieure du Québec a rejeté le moyen déclinatoire. PICC n'est pas en mesure de démontrer l'application claire d'une clause d'élection de for suffisamment impérative et exclusive ni de démontrer qu'il était de l'intention réelle des parties qu'en toutes circonstances tout litige relatif à l'application de la police d'assurance doit être soumis à l'autorité des tribunaux chinois. La police d'assurance émise par PICC et le certificat d'assurance établissent clairement que BRP est un assuré additionnel. En tant qu'assurée nommée et additionnelle à la police d'assurance émise par la défenderesse PICC, la demanderesse BRP est justifiée d'invoquer que les tribunaux québécois ont compétence pour entendre un litige qui découle de l'application de cette police d'assurance. L'article 3150 *CcQ* déclare que les autorités québécoises ont compétence pour décider de l'action fondée sur un contrat d'assurance lorsque, entre autres, l'assuré a son domicile ou sa résidence au Québec. Bien qu'il est loin d'être certain, en raison des dispositions de l'article 3148 *CcQ*, que la Cour supérieure pourrait exercer sa compétence principalement en raison du lieu de domicile des défenderesses, de l'endroit où la faute a pu être commise ou du lieu réel où le préjudice est subi, il n'en demeure pas moins qu'en raison des dispositions impératives de l'article 3150 *CcQ* et de celles de l'article 43 du *Code de procédure civile* (*Cpc*), la Cour supérieure a certainement juridiction dans cette affaire.

Si BRP peut poursuivre PICC au Québec, son assureur Allianz, qui l'a indemnisé en partie, peut également intenter le même genre de recours devant le même tribunal. Quant au recours intenté par les deux demanderesses contre TMCA, il est intimement lié à celui intenté contre l'autre défenderesse PICC. Il est logique que les recours contre les deux défenderesses soient entendus en même temps, et qu'ils fassent l'objet d'une preuve commune, ce qui évitera le risque de jugements contradictoires.

Compétence — article 3139 CcQ *— demande incidente ou reconventionnelle*

Succession de Belcourt, 2019 QCCS 3921[74]

Les intimés, Michel Belcourt et Louise Belcourt, sont les enfants de feu David Belcourt, décédé le 13 avril 2010. Aux termes du dernier testament

[74] Requête pour permission d'appeler rejetée, 29 novembre 2019, 2019 QCCA 2091.

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du défunt, Campeau et Boyle ont été nommés liquidateurs de la succession. À la suite du retrait de ce dernier, Campeau a nommé Connolly pour prendre la suite. Le ou vers le 30 novembre 2011, les intimés ont intenté un recours judiciaire visant la destitution des liquidateurs testamentaires. Plusieurs années se sont écoulées sans que le dossier ne puisse procéder au fond. Puis, les intimés ont pris connaissance du transfert, par Campeau, pour une somme symbolique, d'un immeuble lui appartenant situé au Connecticut au bénéfice de sa fille Campeau-Fenzel et de son gendre, Fenzel. De crainte que ce transfert ne rende insolvable Campeau, les intimés ont modifié leur demande introductive d'instance afin d'ajouter Campeau-Fenzel et Fenzel à titre de codéfendeurs et de demander au tribunal de déclarer inopposable à l'encontre des intimés le transfert en leur faveur de l'immeuble situé au Connecticut. Campeau-Fenzel et Fenzel ont alors présenté un moyen déclinatoire au motif que le tribunal québécois n'avait pas compétence à l'égard d'un contrat conclu aux États-Unis et portant sur un bien qui y était situé et à l'égard de parties qui y étaient domiciliées.

Le juge, après avoir constaté que le tribunal québécois ne peut fonder sa compétence ni sur l'article 3153 *CcQ*, les conclusions en litige ne concernant pas une matière successorale, ni sur l'article 3148 alinéa 1(3) *CcQ*, aucun facteur de rattachement n'ayant eu lieu au Québec, a tout de même rejeté le moyen déclinatoire en fondant la compétence du tribunal québécois sur l'article 3139 *CcQ*. L'action en inopposabilité est une matière connexe à une action principale lorsqu'il est allégué qu'un défendeur s'est départi de ses actifs sans considération en faveur d'un tiers. Dans de telles circonstances, la personne qui aurait organisé les actes reprochés et qui en aurait bénéficié peut être jointe à l'action. La demande en inopposabilité et la demande de condamnation des Fenzel sont des demandes incidentes au sens de l'article 3139 *CcQ*.

Compétence — lieu du bien en litige — saisie-arrêt avant jugement

Instrubel NV c Republic of Iraq, 2019 QCCA 78, conf par *International Air Transport Association c Instrubel NV*, 2019 CSC 61

The appellant, a Dutch company, concluded contracts more than thirty years ago with Iraq. In 2003, the Chamber of Commerce of the International Court of Arbitration in Paris issued a final award condemning Iraq to pay the appellant nearly $32 million plus interest. Iraq had failed to do so. In 2013, the appellant filed an application in the Quebec Superior Court for the homologation of the arbitration award and for a solidary condemnation of the respondents — Iraq and a number of its state agencies — to pay their due. It alleged that Iraq had significant assets in Quebec. Believing that the recovery of its debt was at risk, the appellant requested the issuance of a writ

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of seizure before judgment in the hands of the International Air Transport Association (IATA). The IATA managed the billing and collection of aerodrome and air navigation fees from airlines flying over Iraq and using its aerodromes. The seizure would apply to all such charges billed or collected or held by the IATA on behalf of Iraq at the IATA's head office in Montreal or at any of its worldwide branches.

The Superior Court authorized the seizure before judgment. The property seized included $90 million that the IATA held in a bank account in Switzerland, which the IATA said was held on trust for the Iraqi Civil Aviation Authority (ICAA). The respondents sought to quash the seizure before judgment on the ground that the Superior Court lacked jurisdiction to authorize it because the property concerned was outside Quebec. The Superior Court upheld the motion to set aside the seizure.

The Quebec Court of Appeal allowed the appeal. The Supreme Court of Canada affirmed the Court of Appeal's decision[75] and adopted that court's reasons. The Court of Appeal held that the judge was in error in holding that the funds in the IATA's bank account in Switzerland were not the IATA's property but belonged to the ICAA. It was not a possible outcome to characterize the right of a party such as the ICAA, having no contract with a bank nor title or authority to a bank account, as a holder of a real right in the funds or part of the funds in such account, absent a trust or a patrimony by appropriation. Even though the Swiss bank account was referred to by the IATA as a "trust account," it was nowhere suggested that the IATA was a trustee or that the account was a trust or patrimony by appropriation within the meaning of Article 1260 of the *CCQ*. As the *in personam* debtor of the ICAA, it mattered not whether the IATA deposited the money it collected, giving rise to such indebtedness in a bank account in Geneva, New York, or Montreal. The IATA was a debtor of a personal right owed to the ICAA, which could be the subject of a garnishment issued by the courts of Quebec, where the IATA is domiciled.

Compétence — forum non conveniens — *article 3135* CcQ

Note. Veuillez voir *SNC Lavalin Group inc c Ben Aïssa.*[76]

Compétence — litispendance — article 3137 CcQ

Note. Dans *SPS Technologies c Lisi Aerospace Canada Corp.*,[77] les critères de l'article 3137 *CcQ* n'étaient pas satisfaits, et la cour a aussi refusé

[75] Côté J dissented. Her reasons were issued on 1 May 2020.

[76] 2019 QCCS 465.

[77] 2019 QCCS 4730.

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d'exercer sa discrétion prévue à l'article 491 *Cpc*. Veuillez voir aussi *Droit de la famille — 19920*,[78] dans laquelle la Cour supérieure a rejeté la demande de surseoir à statuer sur une demande en divorce. Le tribunal a exprimé de sérieux doutes à ce qu'un jugement rendu par le tribunal au Cameroun soit reconnu au Québec. L'affaire en cours doit continuer à cheminer au Québec jusqu'au jugement final de divorce, et ce, dans l'intérêt de la justice.

Compétence — litispendance — recours collectif — article 3137 CcQ

FCA Canada inc c Garage Poirier & Poirier inc, 2019 QCCA 2213

Les requérantes sollicitent la permission d'appeler du jugement rendu en cours d'instance qui refuse de surseoir à statuer sur une demande d'autorisation d'exercer une action collective intentée au Québec jusqu'au jugement final statuant sur le fond de l'action collective intentée contre elles en Ontario sur la base des mêmes faits et allégations. Les requérantes sont défenderesses à des demandes d'autorisation d'exercer des actions collectives intentées en Ontario, au Québec et en Colombie-Britannique concernant des véhicules EcoDiesel Dodge Ram 1500 et EcoDiesel Jeep Grand Cherokee 2014 à 2016. Les parties reconnaissent que les procédures déposées dans les trois juridictions se fondent sur le mêmes faits et allégations sous réserve que celles entreprises en Ontario et en Colombie-Britannique visent une classe nationale alors que le groupe décrit dans la demande d'autorisation au Québec est limité à cette province. Les demandes d'autorisation ont été déposées le même jour en Ontario et au Québec, soit le 13 janvier 2017. Le recours en Colombie-Britannique a été déposé six jours plus tard. Les dossiers sont au stade de l'autorisation tant au Québec que dans les autres juridictions.

Les requérantes souhaitent que la Cour supérieure sursoie à statuer dans le présent dossier en attendant l'issue finale du recours Ontario. Elles allèguent qu'un tel sursis est dans l'intérêt des membres, respecte le principe de la proportionnalité et favorise une saine administration de la justice. Les intimés s'opposent à cette demande au motif que la Cour supérieure ne peut surseoir à statuer dans le recours intenté au Québec puisque les requérantes n'ont pas fait la preuve que le recours en Ontario est antérieur au recours au Québec. La juge de première instance a refusé la demande de sursis à statuer puisque les critères de l'article 3137 *CcQ* en matière de litispendance internationale n'étaient pas satisfaits.

[78] 2019 QCCS 2359, requête en autorisation de pourvoi rejetée, 30 septembre 2019, 2019 QCCA 1700.

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L'appel est rejeté. En première instance, les requérantes n'ont pas tenté de faire la preuve des heures de dépôt des procédures même s'il s'agissait d'un élément pertinent selon l'article 3137 *CcQ*. On ne peut conclure que les requérantes ont fait preuve de diligence raisonnable dans ces circonstances. Si la preuve de l'antériorité du recours étranger est impossible, la demande de surseoir, en vertu de l'article 3137 *CcQ*, devra être rejetée.

En outre, l'ajout d'une telle preuve n'aurait pu influer sur le résultat du litige. La juge de première instance a conclu de toute manière que la poursuite des procédures au Québec présente un avantage pour les membres putatifs qui y résident de sorte que, même si la condition d'antériorité avait été satisfaite, elle n'aurait pas exercé son pouvoir discrétionnaire pour accorder le sursis recherché. Si l'intérêt des membres putatifs et l'administration de la justice militent pour la suspension de l'instance, le juge désigné doit pouvoir utiliser sa compétence inhérente pour ordonner une telle suspension (temporaire par sa nature) lorsque l'existence d'une procédure étrangère est susceptible d'avoir un impact sur le déroulement de l'instance québécoise. Ceci, même si les conditions de l'article 3137 *CcQ* ne sont pas satisfaites. En l'occurrence, la juge de première instance, en *obiter*, a conclu que l'intérêt des membres putatifs milite pour le rejet de la demande de suspension. Le raisonnement de la juge de première instance sur cette question, qui est aussi pertinent aux fins de l'exercice de son pouvoir inhérent, repose sur des conclusions de fait qui commandent la déférence.

PROCEDURE / PROCÉDURE

Common Law and Federal

Commencement of proceedings

Manner of service — Hague Service Convention

Note. The requirements of the *Hague Service Convention*[79] were not met, and service therefore was held invalid, in *Acciona Infrastructure Canada v Posco Daewoo Corp*[80] and *Dong v Jiang*.[81] In the latter, the plaintiff applied to continue the proceeding because no response had been received after transmission of the documents to the Central Authority in China. The application was dismissed because the documents had not been transmitted

[79] *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 15 November 1965, 658 UNTS 163 (entered into force 10 February 1969).

[80] 2019 ABCA 241, 91 Alta LR (6th) 59.

[81] 2019 BCSC 2117.

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in Chinese, as required, and the plaintiff had not shown that every reasonable effort had been made to obtain a certificate of service.

Interlocutory orders (including *Mareva* injunctions)

Mareva *injunction — showing risk of dissipation of assets*

Note. In *Voysus Connection Experts Inc v Shaikh*,[82] the injunction was denied because the plaintiff had provided insufficient evidence of fraud to raise an inference that there was a substantial risk of dissipation of assets.

Obtaining evidence locally for a foreign proceeding

Letters rogatory — denial on ground of public policy

Glegg v Glass, 2019 ONSC 6623, 34 RFL (8th) 394

Letters rogatory issued by a Florida court for the examination of a number of Ontario lawyers were denied enforcement on the ground of public policy. The Florida litigation was aimed at holding the applicant's ex-wife and his teenage daughter liable for conspiring to perpetrate a fraud on the Ontario courts in order to interfere with the applicant's rights of custody of the daughter. What the applicant was seeking to do in Florida was a forbidden cause of action in Canada — namely, obtaining damages for interference with parental rights. To grant the request would give extraterritorial authority to foreign laws that would infringe on recognized Canadian legal principles that privilege the best interests of children over the parental rights of their parents.

Québec

Introduction de l'action

Signification des procédures à l'étranger — Convention de la Haye sur la signification

Droit de la famille — 192513, 2019 QCCA 2139

La Cour d'appel du Québec a infirmé les conclusions du jugement du premier juge autorisant chaque partie dans un litige matrimonial à signifier

[82] 2019 ONSC 6683, 58 CCEL (4th) 192.

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toutes procédures à l'autre par courriel. La Cour a remplacé ces conclusions par une déclaration que les parties devront se signifier ou notifier mutuellement tout "acte judiciaire" tel que défini à la *Convention de la Haye sur la signification*[83] en conformité avec l'article 494 *Cpc* et cette *Convention*. Monsieur était domicilié au pays A, qui a fait une déclaration indiquant qu'elle s'oppose à l'usage, sur son territoire, des voies de transmission prévues aux articles 8 et 10 de la *Convention*, dont la signification par "voie postale." L'article 494 *Cpc* incorpore la *Convention* dans la législation québécoise. Le premier juge aurait dû reconnaître le caractère impératif de l'article 494 et de la *Convention*. Les parties résident dans deux pays signataires de la *Convention* et les conditions d'application de celle-ci sont remplies: les procédures en l'espèce sont (1) des actes judiciaires (2) qui doivent être transmis à l'étranger pour y être notifiés; (3) en matière civile et (4) l'adresse du destinataire est connue. Une fois ces conditions satisfaites, les méthodes prévues par la *Convention* s'appliquent impérativement.

Note. Veuillez voir aussi *Omega Laboratories Ltd c Claris Lifesciences Ltd.*[84]

FOREIGN JUDGMENTS / JUGEMENTS ÉTRANGERS

Common Law and Federal

Conditions for recognition or enforcement

Jurisdiction of the originating court — attornment

Note. In *NewAgco Inc v Syngenta Crop Protection LLC*,[85] a Saskatchewan company, NewAgco, was held not liable on a judgment of the District Court for the District of Columbia because, on the facts, the party that had attorned to the court's jurisdiction was found to have been a Barbados company, NewAgco (Barbados). It was owned by members of the same family, but it was a separate entity whose acts did not bind NewAgco.

Jurisdiction of the originating court — real and substantial connection

Dead End Survival LLC v Marhasin, 2019 ONSC 3569

A United States District Court judgment from the State of Georgia was enforced on the basis of a real and substantial connection with Georgia.

[83] *Convention de la Haye relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale*, 15 novembre 1965, 658 RTNU 163 (entrée en vigueur: 10 février 1969).

[84] 2019 QCCS 4636.

[85] 2019 SKQB 56.

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The defendant, an Ontario online vendor of Chinese-made counterfeit goods, had been held liable for statutory damages under US trademark law, and a permanent injunction had been obtained against him. Both the damages and the injunction were included in the Ontario court's enforcement judgment. The real and substantial connection was that the defendant sold its product in the United States, including Georgia. Public policy was not violated by the fact that the statutory damages were higher than Canadian law would provide in similar circumstances.

Jurisdiction of the originating court — real and substantial connection — forum selection clause in favour of another forum

Select Comfort Corp v Maher Sign Products, 2019 ONSC 2478, aff'd 2020 ONCA 95[86]

The plaintiff, a Minnesota company, purchased signs from an Ontario supplier, the defendant. The plaintiff brought an action in Minnesota for breach of contract, alleging the signs were not as promised. The defendant received notice of the action but did not defend, informing the Minnesota court that the contract gave exclusive jurisdiction to the courts of Ontario. The plaintiff brought an action in Ontario to enforce the Minnesota judgment and was granted summary judgment. Both the motion judge and the Court of Appeal held that, even if the forum selection clause was an exclusive one, which was doubtful, it did not deprive the foreign court of jurisdiction based on a real and substantial connection between the subject matter of the litigation and the foreign jurisdiction. To enforce the judgment under such circumstances did not offend against public policy.

Assignment of the judgment debt

Capital One, National Association v Solehdin, 2019 BCSC 1593, aff'd 2020 BCCA 182

Capital One, National Association (CONA) obtained judgments in Louisiana in 2007–08 against the Solehdins for some US $791,000 plus interest and costs. In 2010, CONA obtained an Ontario judgment that held the Louisiana judgments enforceable in that province. In 2013, SMS, which had bought CONA's assets, registered the Ontario judgment as a judgment of the BC Supreme Court.[87] The Solehdins disputed whether SMS was in

[86] *Sub nom Sleep Number Corp v Maher Sign Products.*

[87] Under the *Enforcement of Canadian Judgments and Decrees Act*, SBC 2003, c 29, s 2.

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law the assignee of CONA's rights under the Ontario judgment. The BC judge held that, on construction of the asset purchase contract between CONA and SMS, the latter was the assignee of the right to claim on the judgment. Another issue was the failure by SMS to obtain a continuation order from the Ontario court, which Ontario law requires the assignee of a party to a lawsuit to do before the proceeding can continue. BC law has no similar requirement. The Ontario rule was only a procedural step, and the failure to take it before registering the Ontario judgment in British Columbia (it had been remedied since) did not undermine SMS's status as an assignee and had not prejudiced the Solehdins. The BC registration was upheld.

Defences to recognition or enforcement

Violation of rules of natural justice

Note. A Russian divorce decree was denied recognition in *Novkova v Lyzo*[88] because the respondent wife had not received proper notice of the proceeding. She had been aware of the fact that her husband commenced the proceeding because attempts had been made to serve her by registered mail at her parents' address in Russia, but they had refused to accept the documents.

Limitation period for enforcement

Grayson Consulting Inc v Lloyd, 2019 ONCA 79, 144 OR (3d) 507

This was an action to enforce a default judgment for US $451 million from the US District Court for the District of South Carolina. The defendants were alleged in the US proceedings to have defrauded the plaintiffs by means of a pyramid investment scheme. The motion judge had decided that the action on the judgment was statute barred under the *Limitations Act, 2002*.[89] The Court of Appeal upheld that decision. The two-year limitation period for enforcing a foreign judgment began to run when the thirty-day appeal period under US law expired. The main contention on appeal was that the motion judge had come to the wrong conclusion, based on the expert evidence of the foreign law, as to when that expiry date was. The Court of Appeal held that he had made no error.

[88] 2019 ONCA 821, 31 RFL (8th) 140.

[89] SO 2002, c 24.

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Statutory enforcement

Interjurisdictional support orders legislation

Wysocki v Wysocki, 2019 BCSC 1274

The BC court refused to confirm a provisional order, made by an Ontario court, to reduce the husband's liability under a 2002 separation agreement that was filed as a support order in both British Columbia, where the wife lived, and in Ontario. British Columbia does not require a provisional order where the applicant is a resident of Ontario. The husband should have followed the correct procedure, which was to submit a variation application through the designated authorities in Ontario and British Columbia for a single hearing before the BC court.[90]

Recognition of extra-provincial custody orders

Note. In *Altidore v Messaoud*,[91] an English court awarded the father, a professional soccer player, custody of a child born of a brief relationship with the mother in England. The father, who now played for a soccer club in Ontario, was granted summary judgment on an application to register the English order as an order of the Ontario court.[92] The mother had not shown that any of the exceptions to registration applied.

Class actions

Parallel proceedings in other jurisdictions — coordination of outcomes

Note. The Alberta Court of Queen's Bench, in *Macaronies Hair Club and Laser Center v BofA Canada Bank*,[93] confirmed the approval of a settlement of a class proceeding. The same settlement had been approved in class actions on the same facts against the same defendants in British Columbia, Saskatchewan, Ontario, and Quebec. Comity among the provinces' legal systems militated in favour of reaching similar results in all five jurisdictions.

[90] The relevant legislation was the *Interjurisdictional Support Orders Act*, SO 2002, c 13, and the *Interjurisdictional Support Orders Act*, SBC 2002, c 29.

[91] 2019 ONSC 5314.

[92] Under the *Children's Law Reform Act*, RSO 1990, c C.12, s 41.

[93] 2019 ABQB 181, 89 Alta LR (6th) 264.

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Québec

Conditions nécessaires à la reconnaissance d'une décision étrangère

Décision doit être définitive ou exécutoire — article 3155 CcQ *— décision ontarienne autorisant l'action collective*

Asselin c Nishikawa Rubber Co, 2019 QCCS 1615

Les demandeurs dans l'action ontarienne désirent représenter un groupe national de consommateurs qui, entre le 7 septembre 2003 et le 1er octobre 2011, ont acheté ou loué un véhicule automobile contenant des joints d'étanchéité produits par les défenderesses. Les défenderesses auraient illégalement fixé à la hausse le prix de vente de ces joints. Le 21 janvier 2019, les avocats représentant les membres de ce groupe national et les défenderesses signent une entente de règlement au nom de tous les membres du groupe, y compris ceux du Québec. Le 2 avril 2019, la Cour supérieure de justice de l'Ontario autorise les demanderesses à déposer l'action collective et approuve le contenu des avis à être diffusés. Le demandeur en la présente instance, demeurant au Québec et membre du groupe canadien, et les défenderesses demandent conjointement à la Cour supérieure du Québec de reconnaître et de déclarer exécutoire au Québec le jugement rendu le 2 avril 2019 en Ontario. Ils demandent de plus d'autoriser la distribution, dans la province de Québec, des avis aux membres et le dépôt ultérieur d'une demande de reconnaissance et d'exécution de la seconde décision à intervenir de la Cour supérieure de justice de l'Ontario, la décision qui approuverait l'entente de règlement.

La Cour supérieure du Québec a décidé qu'il ne peut donner suite à la procédure du demandeur. Le *Cpc* ne prévoit pas qu'un tribunal québécois puisse interférer entre le moment où un tribunal externe autorise une action collective et le moment où il rend son jugement définitif. Le jugement d'autorisation d'une action collective rendu par la Cour supérieure de justice de l'Ontario est définitif, mais n'est pas exécutoire, et donc ne peut être reconnu et rendu exécutoire par la Cour supérieure du Québec. De plus, si la Cour supérieure du Québec se penchait sur les avis autorisés par un tribunal ontarien, elle interférerait dans la juridiction de ce dernier. toutefois, puisque la Cour, saisie de nombreux dossiers du même genre, est soucieuse d'offrir aux consommateurs québécois le pouvoir d'intervenir lors de l'audience à Toronto sur l'entente intervenue entre les parties, le tribunal autorise l'utilisation d'une salle du palais de justice de Québec pour leur permettre de faire valoir plus facilement leur points de vue, et ce, au moyen d'une visioconférence.

Compétence des autorités étrangères — preuve — article 3168 CcQ

Barer c Knight Brothers LLC, 2019 CSC 13, [2019] 1 RCS 573

Barer, un résidant du Québec, a été poursuivi à titre personnel dans l'État du Utah, conjointement avec deux sociétés dont il aurait eu le contrôle, CBC et BEC. Knight, une société dont le siège était situé en Utah, avait intenté la poursuite et affirmait que BEC avait un solde dû aux termes d'un contrat intervenu entre elles. Knight soutenait que Barer avait faussement déclaré que les défendeurs allaient payer une certaine somme, qu'il fallait lever le voile de la personnalité morale des deux sociétés et que les défendeurs s'étaient injustement enrichis. Barer a présenté une requête sollicitant le rejet de la demande présentée contre lui au stade préliminaire, faisant valoir que (1) la demande de Knight fondée sur de fausses déclarations était irrecevable en droit; (2) le tribunal de l'Utah n'avait pas compétence à son égard à titre personnel; et (3) Knight n'avait pas démontré qu'il y avait lieu de lever le voile de la personnalité morale. Le tribunal de l'Utah a rejeté la requête de Barer et a subséquemment rendu un jugement par défaut contre les trois défendeurs. Knight a alors demandé la reconnaissance de cette décision au Québec et une déclaration selon laquelle elle serait opposable à Barer. La Cour supérieure a jugé que la compétence du tribunal de l'Utah pouvait être reconnue. La Cour d'appel a débouté Barer de son appel.

La Cour suprême du Canada, par une majorité de huit à un, a rejeté le pourvoi. La compétence du tribunal de l'Utah ne pouvait pas être établie au titre des paragraphes 3168(3) (le préjudice et la faute dont il résulte sont survenus dans l'État où la décision a été rendue) ou 3168(4) *CcQ* (décision concerne les obligations découlant d'un contrat qui devaient être exécutées dans cet État). Knight n'a présenté aucun élément de preuve se rapportant aux paragraphes 3168(3) ou (4) en ce qui a trait à Barer à titre personnel. Toutefois, le motif de reconnaissance prévu au paragraphe 3168(6) *CcQ*, à savoir la reconnaissance de l'autorité étrangère, était respecté en l'espèce.

Barer a reconnu la compétence du tribunal de l'Utah comme le prévoit le paragraphe 3168(6) *CcQ* en présentant des arguments de fond dans sa requête en irrecevabilité, qui, s'ils avaient été retenus, auraient résolu le litige en tout ou en partie. L'argument selon lequel l'allégation de Knight relative aux fausses déclarations était irrecevable aurait pu conduire le tribunal de l'Utah à rejeter définitivement cette allégation. Une telle conclusion aurait acquis force de chose jugée et empêché Knight de faire valoir cette allégation devant un autre tribunal. L'argument de Barer s'apparentait donc à un moyen de défense sur le fond aux fins de la reconnaissance de la compétence du tribunal de l'Utah. Barer n'a en outre pas démontré qu'en raison de l'application des règles de procédure de l'Utah il n'avait d'autre choix que de procéder comme il l'a fait et il était tenu de présenter ensemble tous ses moyens préliminaires.

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Il n'était pas nécessaire de résoudre la question de savoir si l'établissement d'un des critères de la reconnaissance de la compétence du tribunal étranger énoncés à l'article 3168 *CcQ* satisfait dans tous les cas à la condition de l'article 3164 *CcQ* exigeant l'existence d'un rattachement important entre le litige et le for saisi. Le fait que Barer a participé à l'instance dans l'Utah au point où il a reconnu la compétence du tribunal de cet État suffit amplement et ne soulève aucune question quant au rattachement important du litige avec cet État et avec ce tribunal.

Sentence arbitrale — reconnaissance — prescription

Société Générale de Banque au Liban SAL c Itani, 2019 QCCS 5266

La demanderesse demande au tribunal de reconnaître et déclarer exécutoire une sentence arbitrale rendue au Liban le 10 août 2006, condamnant le défendeur à lui rembourser 1,319,733.27 € avec intérêts au taux de 4% à compter du 29 janvier 2005. La demande a été introduite le 14 avril 2016. L'article 2924 *CcQ* prévoit que le droit qui résulte d'un jugement se prescrit par 10 ans, et l'article 2925 *CcQ* stipule que l'action qui tend à faire valoir un droit personnel ou un droit réel mobilier et dont le délai de prescription n'est autrement fixé se prescrit par trois ans. La Cour supérieure a décidé que c'est l'article 2924 *CcQ* qui s'applique. Le tribunal retient que l'article 2924 *CcQ* doit être lu en considérant que le processus d'arbitrage, bien qu'il ne fasse pas partie intégrante d'une structure judiciaire étatique, est considéré comme une demande en justice en matière de prescription et est assujetti aux mêmes règles. Le tribunal conclut que l'article 2924 *CcQ* trouve application à la demande de reconnaissance de la sentence arbitrale et que le délai de prescription applicable est de 10 ans.

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

Common Law and Federal

Procedure and substance

Limitations statute — characterization as substantive — effect of expiry of limitation period on obligations of guarantor

Note. In *HOOPP Realty Inc v Guarantee Co of North America*,[94] the Alberta Court of Appeal upheld a trial judge's decision[95] that the expiry of the limitation

[94] 2019 ABCA 443, 440 DLR (4th) 383.

[95] *HOOPP Realty Inc v Guarantee Co of North America*, 2018 ABQB 634, noted in Blom, "Canadian Cases 2018," *supra* note 48 at 602–03.

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period for a claim against a construction contractor did not mean that a surety's liability on a performance bond was also statute barred. It was true that limitations rules are substantive for conflict-of-laws purposes, even if they are worded in terms of the remedy.[96] However, there was no reason to ignore the wording of the statute when it came to deciding whether it extinguished the contractor's liability or only barred the remedy as against the contractor while leaving the guarantor still liable. The latter was the correct interpretation of the Alberta statute.

Contract

Statutory regulation of contract — insurance contract — accidents in other jurisdictions — law applicable to interpretation of the contract

Benson v Belair Insurance Co Inc, 2019 ONCA 840, 439 DLR (4th) 142[97]

This was a consolidated appeal in two cases, each of which involved an Ontario resident being injured in an accident while riding an off-road recreational vehicle. Both accident victims were holders of Ontario insurance policies on their automobiles. Each claimed statutory no-fault benefits (SABs) under Ontario law in respect of the recreational vehicle accidents. In one case, the victim was a passenger on an all-terrain vehicle in British Columbia, and, in the other, the victim was the driver of a dirt bike in the state of Georgia. The issue was whether the right to Ontario SABs extended to out-of-province accidents on vehicles that were not automobiles. Ontario law required such vehicles to be insured as if they were automobiles, but that requirement only applied to vehicles being used in Ontario. The insurers argued that under the laws of the places where the accidents happened, the vehicles were not automobiles.

The Court of Appeal held that the issue of the status of the recreational vehicles, on which the Ontario statutory benefits turned, was a matter for Ontario law. The insurance was under an Ontario contract that was subject to Ontario legislation. The *lex loci delicti* was inapplicable to interpret the contract. The SABs applied to incidents in the insured automobile "or another automobile," meaning another automobile as Ontario law defined the phrase. Earlier decisions made clear that the definition included a vehicle that fell within an enlarged definition of automobile in a relevant statute. Ontario law treated these recreational vehicles as "automobile-like" for compulsory insurance purposes. The geographical scope of the insurance requirement was immaterial to this issue. The Act, the SAB regulations,

[96] *Tolofson v Jensen*, [1994] 3 SCR 1022.

[97] Leave to appeal to SCC refused, 38974 (9 April 2020).

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and the contract language all stated that the SABs would be provided whether the incident occurred anywhere in Canada, the United States, or other designated jurisdictions.

Matrimonial causes

Nullity of marriage — polygamous marriage

Note. See *Boateng v Darko*,[98] noted above under Jurisdiction: Common law and federal — Matrimonial causes — *Nullity of marriage.*

Divorce — foreign divorce decree — bars to recognition

Al Sabki v Al Jajeh, 2019 ONSC 6394, 148 OR (3d) 741

The husband and the wife were originally from Syria and married there. They moved to Kuwait in 1989 with their oldest child, and a second child was born in that country. In 1995, they immigrated to Canada, but, in 1999, they moved to the UAE so the husband could practise medicine again. In 2006, the husband moved to Singapore, and the wife and children returned to Canada. In about 2008, the husband obtained a divorce in Syria with minimal provision for support for the wife and children. He remarried shortly afterwards. He supported the wife until 2017, when he said it was their sons' turn to do so. The wife applied to the Ontario court for an order for spousal support. The husband earned the equivalent of $600,000 a year. The husband relied on the Syrian divorce as having put an end to the marriage.

The Ontario Superior Court of Justice held that the Syrian divorce should not be recognized in Canada. None of the grounds of recognition in the *Divorce Act*,[99] nor any of the common law grounds of recognition, which were preserved by that Act,[100] applied. In particular, as far as common law grounds were concerned, the parties had no real and substantial connection with Syria since they had not resided in that country or had any active involvement with it for almost twenty years. A further reason for not recognizing the divorce was that the proceeding violated natural justice because Syrian law gave the wife absolutely no ability to defend herself with regard to the alteration of her own marital status and the consequent loss of significant legal rights in her country of residence. The wife's application for spousal support could therefore proceed.

[98] 2019 ABQB 38, 87 Alta LR (6th) 426.

[99] RSC 1985, c 3 (2nd Supp), s 22(1)–(2).

[100] *Ibid*, s 23(3).

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Québec

Statut personnel des personnes physiques

Mariage — effets — régime matrimonial

Droit de la famille — 19882, 2019 QCCS 2008

The parties were married in Quebec in 2007 but were domiciled at that time in the state of New York. They later acquired domicile in Quebec. As part of divorce proceedings, the Quebec Superior Court had to decide on, *inter alia*, the partition of the family patrimony. The effects of marriage, according to Article 3089 of the *CCQ*, are subject to the law of the domicile of the spouses if they have a common domicile. Because both parties were domiciled in Quebec, the partition was ordered according to the provisions of Articles 416 and following of the *CCQ*.

The court also had to decide on the partition of the matrimonial regime between the parties. The parties' matrimonial regime was that of the law of New York, pursuant to Article 3123 of the *CCQ* because the parties were domiciled in the state of New York when they married. New York had an equitable distribution law, which gave the judge discretion to divide the property fairly, regardless of which spouse held title.[101] That type of partnership should be characterized as an integral part of a matrimonial regime in the eyes of Quebec private international law. The court proceeded to determine what property was subject to the equitable distribution law, and decided that it should be divided equally.

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

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