Canadian Cases in Private International Law in 2018

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Jurisprudence canadienne en matière de droit international privé en 2018

compiled by / préparé par
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JURISDICTION / COMPÉTENCE DES TRIBUNAUX

Common Law and Federal

Jurisdiction *in personam*

Jurisdiction simpliciter — *non-resident defendant — attornment*

Zheng v Zhuo, 2018 ONSC 2073

The court held that it had no jurisdiction in a breach of contract claim brought by a non-resident of Canada against two residents of China, concerning loans made in China. The defendants had not attorned to the jurisdiction of the Ontario court by delivering a notice of intent to defend. Serving such a notice does not necessarily mean that the defendant is precluded from challenging the jurisdiction of the court or the convenience of the forum. Here, the notice was served in error, and it was always the defendant's intent to challenge Ontario's jurisdiction. The notice was set aside.

With attornment excluded, jurisdiction *simpliciter* required that the facts fall within a presumptive connecting factor so as to have a real and substantial connection with Ontario. No existing presumptive connecting factor applied to this case. All of the material elements of the dispute pointed to China and not to Ontario. No new connecting factor could be framed so as to support the finding of a real and substantial connection to Ontario. It was true that the two defendants' children, who were also defendants, lived and were served in Canada, but the facts disclosed no basis for a claim

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against them. They were not parties to the loans, and there was no allegation that they had committed any torts in Ontario.

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

Flying Frog Trading Co v Amer Sports Canada Inc, 2018 BCCA 384, 427 DLR (4th) 483[1]

The plaintiff, a Chinese company, brought an action against Arc'teryx, a British Columbia company, for breach of an agreement under which the plaintiff distributed Arc'teryx's products in China. The agreement gave BC courts jurisdiction over disputes arising under the agreement and provided that BC law applied to the contract. Arc'teryx's sole owner was a Finnish company, Amer, which was also sued for having induced Arc'teryx to breach the distribution contract. A Chinese affiliate of Amer was also a defendant but had not yet been served. Amer sought an order that the BC court had no jurisdiction *simpliciter*. The chambers judge refused the order.

The Court of Appeal held, affirming the chambers judge, that the court had jurisdiction under the *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*)[2] because the facts giving rise to the claim against Amer had a real and substantial connection with the province.[3] The main issue on appeal was whether the tort claim against Amer for inducing Arc'teryx's breach of contract could fit the statutory presumption of a real and substantial connection with the province that applies where the proceeding "concerns contractual obligations" and the obligations, "to a substantial extent, were to be performed in British Columbia."[4] The four elements of the tort (knowledge of the existence of the contract, an intention to cause its breach, causing such a breach, and damage) each to some extent "concerned" the contractual obligations of Arc'teryx, satisfying the presumption. The fact that there was also a presumed real and substantial connection if a proceeding concerned a tort committed in the province[5] did not militate against this reading of "concerns contractual obligations." The categories of presumption were not mutually exclusive and more than one could apply to the same set of facts. In any event, the *situs* of the tort of inducing the breach of a BC contract could be considered to be British

[1] *Sub nom Flying Frog Trading Co Ltd v Amer Sports OYJ.*

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

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

[4] *Ibid*, s 10(e)(i).

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

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Columbia,[6] and the "tort committed in" the province presumption could also have been applied by the chambers judge.

The Court of Appeal also held that, aside from the presumptions, the chambers judge was entitled to find that a real and substantial connection was affirmatively shown, based on the common law presumptive connecting factor that the tort was connected to a contract that was concluded in the province.[7]

Note. In *Cain v Pfizer Canada Inc*,[8] the court refused to decline jurisdiction in a wrongful dismissal action brought by a resident of Ontario. The plaintiff's employment had been solely in Ontario, and a forum selection clause (referring to New York) included in some of the contractual documents applied to disputes about benefits but not to a wrongful dismissal claim. In *Deadman v Jager Estate*,[9] an Alberta court refused to stay an action brought by a brother and sister acting on behalf of, respectively, their father's estate and their mother, against another brother and his wife, who resided in Mexico. The claim was for contractual, tortious, and fiduciary wrongs relating to family financial transactions agreed to in Alberta by which the parents had financed a property acquisition in Mexico.

In *Murray Market Development Inc v Casa Cubana*,[10] a BC court had jurisdiction *simpliciter* in a BC company's breach of contract action against a federally incorporated company based in Quebec because the obligations under the contract, which was for the provision of marketing services to the Quebec-based firm, were, to a substantial degree, to be performed in British Columbia.[11] Quebec had not been shown to be a more appropriate forum. A case on similar facts, with the same results, was *New World Merchant Bank Inc v Radient360 Solutions Inc.*[12] In *DORA Construction Ltd v Hospitality*

[6] The court, 2018 BCCA 384 at para 24, cited *AG Armeno Mines & Minerals Inc v PT Pukuafu Indah*, 2000 BCCA 405.

[7] A presumptive connecting factor that was first applied in *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572. Under the *CJPTA* (BC), *supra* note 2, s 3(e), one of the grounds of territorial competence is that there is a real and substantial connection between the facts giving rise to the claim and the jurisdiction in which the court sits. The statutory presumptions in s 10 do not exhaustively define when such a connection exists, so cases falling outside any of those presumptions can still meet the s 3(e) requirement. The *Van Breda* case introduced the idea of presumptive connecting factors as the common law analogue of the statutory presumptions in the *CJPTA*, a model act that has been enacted by three provinces. The common law presumptive connecting factors approved in *Van Breda* include some, such as the one in question, that are not among the *CJPTA*'s presumptions.

[8] 2018 ONSC 297.

[9] 2018 ABQB 985.

[10] 2018 BCSC 565.

[11] *CJPTA* (BC), *supra* note 2, s 10(e)(i).

[12] 2018 NSSC 227.

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Homes Ltd,[13] a dispute between a Nova Scotia general contractor and a New Brunswick subcontractor, about breaches of a subcontract to supply modular homes to a site in Labrador, was held within the territorial competence of the Nova Scotia court based on a real and substantial connection with Nova Scotia — namely, the plaintiff's doing business there and the subcontract having been negotiated and executed there.[14] New Brunswick was not a more appropriate forum.

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

3289444 Nova Scotia Ltd v RW Armstrong & Associates Inc, 2018 NSCA 26

The motions judge in this case had held[15] that a claim for unpaid fees owing to a Nova Scotia sub-consultant, now in receivership, by a consultant based in Abu Dhabi should not be heard in Nova Scotia. The consultant and sub-consultant's work related to an energy project in the United Arab Emirates (UAE). The motions judge held that the UAE was clearly a more appropriate forum. The consultancy agreement was with an Abu Dhabi entity owned by the state and was expressly governed by UAE law. The sub-consultancy contract was also expressly governed by UAE law and contained a forum selection clause. The clause was drafted to require good faith attempts to settle in the first instance, and, if these were unsuccessful, the parties were bound to engage in mediation. If that failed to resolve the dispute, the parties were free to agree to a dispute resolution of their choice, or either party could seek to have the dispute resolved by a court in the UAE. The motions judge construed this as a non-exclusive forum selection clause, but gave the clause considerable weight in the *forum non conveniens* analysis that led him to decline jurisdiction in favour of the UAE courts. The plaintiff sought leave to appeal from this decision.

The Nova Scotia Court of Appeal gave leave, but dismissed the appeal. The court agreed with the motions judge's approach to the forum selection clause. It thought that the judge was, if anything, generous to the Nova Scotia company in finding that the clause was non-exclusive, but the court was prepared to assume that the interpretation was correct. Non-exclusive

[13] 2018 NSSC 50.

[14] The court relied mainly on the presumed real and substantial connection based on a business carried on in the province. *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2d Sess), c 2, s 11(h) [*CJPTA* (NS)].

[15] *3289444 Nova Scotia Ltd v RW Armstrong & Associates Inc*, 2016 NSSC 330, 43 CBR (6th) 59, noted in Joost Blom, "Canadian Cases in Private International Law in 2016" (2016) 54 CYIL 585 at 591.

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clauses reflect a spectrum of degrees of preference, and the weight merited by such a clause in the *forum non conveniens* analysis varies with the force of the wording. Given this clause's wording, the judge was right to ascribe weight to the parties' contractual preference as to the forum. There was no reason to interfere with the judge's staying of the action under section 12 of the *CJPTA*.[16]

Note. See also *Corrosion Service Co Ltd v Hydrosphere Construction Inc*,[17] in which the Ontario court was found to have jurisdiction *simpliciter*, based on a forum selection clause in favour of Ontario, but the action was stayed because Quebec was a more appropriate forum. In *Tarp-Rite Inc v Atlantic Hy-Span Ltd*,[18] jurisdiction *simpliciter* in a contract action was based on the contract's having been made in New Brunswick, but jurisdiction was declined because the evidence as to breach was mostly in Prince Edward Island, where the contract was performed. In *Prism Resources Inc v Detour Gold Gorp*,[19] the BC court had jurisdiction *simpliciter* based on the presence in the province of an agent for service, but the claim concerned an interest in mining claims and leases in Ontario, which was better heard in Ontario.

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

Note. In *Wilson v Campeau & Fils*,[20] an Ontario court held that it lacked jurisdiction *simpliciter* in an action by Ontario purchasers against a Quebec seller from whom they had bought a tractor. Neither the presumptive connecting factor of carrying on business in Ontario, nor that of the contract having been made in Ontario, applied on the facts.

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

Canadian National Railway Co v SSAB Alabama Inc, 2018 SKQB 272

A flatcar loaded with steel being delivered to Alberta, part of a train originating in Manitoba, derailed in Saskatchewan, causing the plaintiff railway losses of more than $12 million. The plaintiff brought an action in Saskatchewan against the shipper of the steel, alleging that the defendant

[16] *CJPTA* (NS), *supra* note 14.

[17] 2018 ONSC 4434 (Master).

[18] 2018 NBQB 83.

[19] 2018 BCSC 1416.

[20] 2018 ONSC 7761.

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had improperly loaded and secured the steel on the flatcar at its manufacturing plant in Alabama. The defendant sought a dismissal or stay of the action on the ground that the Saskatchewan court lacked territorial competence (jurisdiction *simpliciter*) or should decline jurisdiction on the basis of *forum non conveniens*. Both issues were subject to the *CJPTA*.[21]

On territorial competence, the court found that the case was one in which a real and substantial connection with Saskatchewan was presumed to exist because the proceeding "concerns contractual obligations," and those obligations "were to be performed, to a substantial extent, in Saskatchewan."[22] There was nothing in the wording of the relevant statutory provision to suggest that the obligations referred to were the obligations allegedly breached. The question was whether the contract as a whole was sufficiently connected with the province. Here, the plaintiff railway's obligations to the shipper were clearly to be performed to a substantial extent in the province, and it was in the course of fulfilling these obligations that the derailment took place. The defendant's obligations also created a relationship with the province because how the defendant carried out its loading obligations in Alabama carried consequences in Saskatchewan, to the railway, and to others. The presumption of a real and substantial connection was not rebutted. The connection was substantial, not tenuous.

The court found, in the alternative, that the proceeding was also "brought for a tort committed in Saskatchewan."[23] No jurisdiction was more obviously affected by the defendant's alleged negligence than Saskatchewan, and the defendant knew that the railway could be injured and it was reasonably foreseeable that the place of the injury could be Saskatchewan. On the question of *forum non conveniens*,[24] the court considered mainly the location of witnesses and evidence, so far as known at this early stage of the litigation. It concluded that there was no way to prefer Alabama over Saskatchewan when it came to the proof of factual matters in issue. Other factors relied upon by the defendant also did not tip the scales in favour of Alabama. The action should not be stayed.

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

Haaretz.com v Goldhar, 2018 SCC 28, [2018] 2 SCR 3, 423 DLR (4th) 419

[21] SS 1997, c C-41.1 [*CJPTA* (SK)].

[22] *Ibid*, s 9(e)(i).

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

[24] Governed by *CJPTA* (SK), *supra* note 21, s 10.

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The plaintiff, an Ontario businessman who owned a professional soccer club in Israel, brought a libel action in Ontario based on publication on an Israeli newspaper's website of an article critical of the way that the plaintiff managed the soccer team. Evidence was submitted that about 200 or 300 Canadian readers had seen the article, which linked the plaintiff's style of managing the football team to the way he conducted his Canadian business activities. The defendant sought to stay the action for lack of jurisdiction *simpliciter* or because jurisdiction should be declined on *forum non conveniens* grounds. The motion judge held that the court had jurisdiction and should not decline it. The Ontario Court of Appeal affirmed the judgment. The Supreme Court of Canada, by six judges to three, reversed the decision because jurisdiction should be declined.

The judges were unanimous that the Ontario court had jurisdiction *simpliciter* based on the presumptive connecting factor of a tort committed in Ontario. Libel was committed wherever the defamatory material was published. It was published in Ontario, where it was read on the defendant's website. Whether the publication was substantial was a matter to be considered in deciding whether the presumptive connecting factor was rebutted. The key issue was whether the defendant could reasonably be expected to have to answer a legal proceeding based on the connection present. Here the answer was yes, because the plaintiff was an Ontario businessman.

On the *forum non conveniens* question, three of the six majority judges gave a joint judgment, and each of the other three gave a separate judgment differing from some part of the joint judgment while concurring in the result. This summary of the decision refers to the joint judgment unless otherwise indicated. The purpose of the *forum non conveniens* discretion is to temper any potential rigidity in the rules governing the assumption of jurisdiction and to assure fairness to the parties and an efficient resolution of the dispute. Given the ease with which jurisdiction *simpliciter* is established in a defamation case, a motion judge must conduct a robust and carefully scrutinized review of the issue of *forum non conveniens*. A motion judge's decision on a stay motion is entitled to deference, but appeal courts can intervene if the motion judge errs in principle, misapprehends or fails to take into account material evidence, or reaches an unreasonable decision.

The motion judge was right in finding that the inconvenience and expense for the plaintiff to litigate in Israel, compared with the inconvenience and expense for the defendant to litigate in Ontario, favoured a trial in Israel. However, he was wholly unreasonable in finding that the comparative inconvenience and expense for the witnesses only slightly favoured Israel. He wrongly assumed that letters rogatory could be used to compel the defendant's witnesses in Israel to come to Ontario to testify. He also unreasonably discounted the defendant's proposed witnesses and the relevance of their evidence. This factor, on a proper assessment, heavily favoured Israel.

Another factor relied upon by the motion judge was that the plaintiff enjoyed the juridical advantage of a right to a jury trial in Ontario but not in Israel. There was no error in giving some weight to this factor, although, as the court had said in an earlier case, it should not be given too much weight.[25] The judge was not obliged to assess how far the plaintiff might have juridical advantages in an Israeli forum. The question was whether the plaintiff would lose a particular advantage by being denied access to his forum of choice, not whether he would suffer a net loss overall.

The factor of fairness had been seen by the judge to favour Ontario. He thought that there was no surprise or injustice to the defendant if the plaintiff sought to vindicate his reputation in Ontario, where he lived and worked. But this was affected by two errors. One was to ignore the importance of the plaintiff's reputation in Israel. It would not be significantly unfair for the plaintiff to have to bring his claim in Israel for comments that were written and researched there and pertained primarily to his reputation and business there. The other error was failing to weigh the fairness of an Ontario forum from the plaintiff's point of view against the unfairness of it from the defendant's point of view. The prospect that the defendant could not compel its witnesses to testify in Ontario meant that it would not have a fair opportunity to defend itself. When both parties were considered, fairness favoured a trial in Israel.

The factor of whether an Ontario judgment would be enforceable against the defendant in Israel had not been considered by the motion judge or the Court of Appeal. This was an error. The plaintiff claimed substantial damages, reflecting in part his financial losses. Even if the plaintiff sought an order that the defendant remove the offending content from its website, the order would have to be enforced in Israel. The enforceability of the orders that an Ontario court might make should have been included in the *forum non conveniens* analysis.

The factor of the law applicable to the litigation caused the most judicial discussion. The general choice-of-law rule for tort claims is the *lex loci delicti*, which in the context of defamation means the law of the country where the defamatory material is published. In the age of the Internet, material can be simultaneously published in every country, so there are as many potentially applicable laws as there are countries where the material might be seen. The joint judgment of the three majority judges took the line that the traditional rule applied. It noted that, based on expert testimony, a court in Israel would apply Israeli law to the dispute. With each court applying its own law, this factor did not assist the defendant in showing that Israel was a

[25] *Breeden v Black*, 2012 SCC 19 at para 27, [2012] 1 SCR 667. The reasoning behind this comment was that the defendant would presumably likewise suffer a disadvantage if unable to make its defence before the foreign court as it wished to do.

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more appropriate forum.[26] In any case, the applicable law should receive little weight in the overall balancing, given that jurisdiction was based on the place of the tort being Ontario, and the same factor should not drive both jurisdiction *simpliciter* and *forum non conveniens*.

Two of the judges who gave separate opinions did so because they favoured replacing the *lex loci delicti* rule, in Internet defamation cases, with a rule, which the court had raised *obiter* in an earlier case,[27] that the law of the place of most substantial harm should apply.[28] This indicated that the law of Israel should apply to the dispute even if litigated in Ontario. The rest of the majority did not want to broach this issue in the present case because it was unnecessary to do so in order to decide the *forum non conveniens* question. They did note that a place of most substantial harm test did not clearly point to either Ontario or Israel.[29] The dissenting judges expressly said that they thought the choice-of-law rule should not be changed.[30]

The majority's overall conclusion was that the defendant had shown that Israel was clearly the more appropriate forum, primarily because the factors relating to the convenience and expense for the parties and, especially, for the witnesses pointed in that direction, as did the fairness factor. The only factors that favoured Ontario were loss of the plaintiff's juridical advantage, which should not weigh heavily, and the applicable law being that of Ontario, which should be given little weight.

The three dissenting judges, in a joint judgment, essentially agreed with the lower courts that the plaintiff was entitled to vindicate his reputation in Ontario, where he lived and maintained his business and where the sting of the article's comments was felt. They disagreed with the majority's view on the scope of his claim; they thought that he had effectively limited it to the damage suffered in Ontario. They also disagreed with the majority's finding of errors in the *forum non conveniens* analysis. They considered the "errors" simply points on which the majority would have weighed the evidence differently from the motion judge. They expressed concern that, by making it too easy for appellate courts to re-examine a *forum non conveniens* analysis, the majority's approach undermined stability and increased costs

[26] *Haaretz.com v Goldhar*, 2018 SCC 28 at para 100, [2018] 2 SCR 3 (Karakatsanis J) [*Haaretz.com*], disagreed (as did the dissenting judges) with bringing into the equation the law that the alternative forum would apply.

[27] *Éditions Écosociété Inc v Banro Corp*, 2012 SCC 18, [2012] 1 SCR 636.

[28] *Haaretz.com*, *supra* note 26 at paras 109–19 (Abella J), 144–46 (Wagner J). Abella J favoured extending that test to jurisdiction *simpliciter* by allowing the presumptive connecting factor of the place of the tort (that is, the place of publication) to be rebutted if the place of most substantial harm was elsewhere (paras 120–30), but Wagner J seemed not to want to go that far (para 147).

[29] *Ibid* at para 94.

[30] *Ibid* at paras 198–204.

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and uncertainty for parties. They also disagreed with the majority's discounting of the importance of the applicable law. The test for *forum non conveniens* is whether the alternative forum is clearly more appropriate. Regarding the finding that the Israeli court would apply its own law as offsetting the finding that the Ontario court would apply its own law was inconsistent with this test. It distorted the analysis in favour of the foreign jurisdiction.

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

Note. Brooks v Leithoff[31] held that a BC resident's claim for injuries suffered in a motor vehicle accident in Alberta had no real and substantial connection with British Columbia for the purposes of territorial competence under the *CJPTA* (BC),[32] merely because that accident compounded injuries suffered in two earlier accidents in British Columbia.

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

Goodings v Lubin, 2018 ONSC 176

An action was brought against a hospital in British Columbia by a woman who was born there twenty years before but moved with her mother to Ontario in her infancy. Her mother was also a plaintiff. It was argued that the negligence of the hospital staff had caused the daughter to be born severely disabled. It was admitted that the Ontario court lacked jurisdiction *simpliciter*, but it was contended that the court was a forum of necessity because the daughter could not travel to, or participate in, a trial in British Columbia. The argument was rejected. The courts had, to date, rightfully recognized that an inability of a party to participate in the trial in another jurisdiction was not a basis for assuming jurisdiction. To hold otherwise would invite a frenzy of forum-of-necessity arguments based on a myriad of circumstances that might prevent a party from readily travelling to the proper forum. Nor had the plaintiffs made out a case that the daughter would be exposed to a real risk of serious physical harm if her mother were obliged to participate in litigation in British Columbia.

Even at its highest, the plaintiffs' evidence fell far short of establishing the type of exceptional circumstances that are required to apply the doctrine. There must be particular reasons making the other forum unfit. A focus on the characteristics of the plaintiff, as opposed to the characteristics of the forum, would create much uncertainty in the application of the doctrine.

[31] 2018 BCSC 1906.

[32] *CJPTA* (BC), *supra* note 2.

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This was not one of those exceptional cases in which Ontario must assume jurisdiction in order to ensure the plaintiff's access to justice. Nor was the court's *parens patriae* jurisdiction a ground for taking jurisdiction here. The daughter was not threatened with any harm or otherwise in need of protection.

Declining jurisdiction *in personam*

Declining jurisdiction in favour of Indigenous processes

Note. The respondent in an application for custody, spousal, and child support argued that he had a right to have the family law dispute decided through the governance processes and laws of the Indigenous people to which he belonged. The Ontario Court of Appeal, in *Beaver v Hill*,[33] decided that Indigenous law was not "foreign" and that jurisdictional issues did not depend on conflict-of-laws principles. The issues raised by the application were constitutional.

Forum selection clause — whether part of contract — whether there was strong cause not to apply

Note. In *Nowak v Biocomposites Inc*,[34] a forum selection clause in favour of the courts of North Carolina, contained in an employer's service agreement, was held to be not binding on the employee because his contract was complete at the time he accepted an offer letter, and no new consideration was provided for agreeing to the subsequently notified service agreement. There was also strong cause to exercise the court's discretion not to enforce the clause because it would deprive a BC resident of the protection of BC employment law.

Forum selection clause — stay of related proceeding

Note. A Nova Scotia action by a developer against a design professional was stayed in *Charlotte County Hospitality Partnership v Coles Associates Ltd.*[35] The dispute was about construction delays and deficiencies in a project in New Brunswick, and the developer and the contractor were in litigation there because they were bound by a forum selection clause. The proceedings should be litigated in the same court.

Arbitration clause — some defendants not being party to the clause

[33] 2018 ONCA 816, 428 DLR (4th) 288.

[34] 2018 BCSC 785.

[35] 2018 NSSC 254.

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Note. MacDonald v Burke[36] was a case about the wrongful termination of a partnership agreement, brought against the other partners and against third parties who had allegedly tortiously interfered with the partnership agreement. The partnership agreement contained an arbitration clause. The court held that the action should be stayed as against the other partners on the ground of the arbitration clause and as against the third party defendants pending the outcome of the arbitration.

Class actions

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

Leon v Volkswagen AG, 2018 ONSC 4265

A class proceeding was sought to be commenced in Ontario on behalf of Ontario residents who had invested in securities issued by a German automobile manufacturer. The securities were acquired on exchanges in the United States or Europe. The plaintiffs claimed to have suffered losses owing to the company's fraud in relation to emissions testing of diesel vehicles. The proposed action was based solely on the common law tort of fraudulent misrepresentation, not on the misrepresentation provisions of Ontario securities legislation.

The court held that it had no jurisdiction *simpliciter* in such an action. The two possible presumptive connecting factors were that the defendant carried on business in Ontario and that it committed the alleged fraud in Ontario. Neither applied. The defendant's Canadian subsidiary carried on business in Ontario by selling thousands of vehicles there, but the defendant itself did not. The subsidiary was not acting as the defendant's agent. Nor was the alleged tort committed in Ontario. The only Ontario connection was the representative plaintiff's residence. If the plaintiff's residence alone was sufficient to give the court jurisdiction, it would be tantamount to universal jurisdiction against any defendant located anywhere.

Even if jurisdiction *simpliciter* had existed, Ontario was *forum non conveniens*. The jurisdiction where the securities were bought was clearly the more appropriate forum for such investor claims, in the light of international comity and other factors. Arguments that the plaintiffs would not have access to as favourable a class proceedings regime — or, in the case of Germany, any class proceedings regime — were not persuasive. Nor was an argument that Ontario offered more favourable limitation periods for the claims.

[36] 2018 ABQB 534, aff'g *MacDonald v Burke*, 2017 ABQB 444 (Master), noted in Joost Blom, "Canadian Cases in Private International Law in 2017" (2017) 55 CYIL 598 at 599 [Blom (2017)].

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Matrimonial causes

Nullity of marriage

De Guzman v Pamulaklakin, 2018 ABQB 169

A wife sought to bring nullity proceedings in Alberta with respect to her marriage in the Philippines to a husband who now lived in the United States and could not be contacted. She said that she was already married when she married him and that he ceased to take up contact with her about two years after the marriage. The court held that jurisdiction depended upon either party being domiciled in Alberta. The applicant was in Canada on a temporary work visa, which the court held was insufficient for her to acquire a domicile in Canada. It was a limited-term immigration status with a work permit that expired at the end of two years. She had not shown an intention to remain permanently in Canada, one of the elements necessary for a domicile of choice to be acquired. She could commence a nullity action if and when she secured permanent resident status in Canada.

Matrimonial property — jurisdiction simpliciter *and* forum non conveniens

Note. A woman resident in British Columbia sought a division of matrimonial property and spousal support from a man who lived in Ontario. The BC court held that it had jurisdiction in respect of the property matter based on the respondent's attornment or the claimant's habitual residence in British Columbia,[37] and in respect of the support claim based on a real and substantial connection between British Columbia and the facts on which the claim was based.[38] *Forum non conveniens* arguments were rejected.

Support obligations — forum non conveniens

Note. In *Geissler v Geissler*,[39] the Saskatchewan court held that Nova Scotia was the more appropriate forum for a husband's application to vary a support order made in contested proceedings in Nova Scotia some two years earlier. The court ordered the transfer of the proceeding.[40]

[37] *Family Law Act*, SBC 2011, c 25, ss 106(2)(b) (submission to the jurisdiction), 106(2)(c) (habitual residence of either spouse at the time the proceeding is started).

[38] *CJPTA* (BC), *supra* note 2, s 3(e). The court did not rely on any of the presumptions of real and substantial connection in s 10.

[39] 2018 SKQB 14.

[40] Under the transfer provisions of the *CJPTA* (SK), *supra* note 21.

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Infants and children

Custody and access — statutory jurisdiction rules — child not habitually resident in the province

Kunuthur v Govindareddigari, 2018 ONCA 730[41]

A husband, wife, and their US-born son became Canadian permanent residents in 2011. Two years later, the mother took the son back to India without the father's consent and started proceedings for custody in India. The father began custody proceedings in Ontario in 2014 but was found to have also attorned to the Indian court's jurisdiction by seeking custody for himself in those proceedings. On that basis, the Ontario Court of Appeal held that the motion judge should have declined jurisdiction in custody.

Note. In *CLZ v CGZ*,[42] a child was held habitually resident in British Columbia at the time of the commencement of divorce and related proceedings. The BC court was therefore held to have jurisdiction to determine parenting and guardianship issues during the pendency of divorce proceedings.[43] Saskatchewan was not, at this stage, shown to be a more appropriate forum, and an application to transfer the proceeding to that province was dismissed.

Custody and access — parties consented to order that BC court would continue to be exclusive court of jurisdiction

Note. See *Quigg v Quigg*,[44] in which a father was ordered to discontinue a California proceeding seeking joint custody, which a BC court had already ordered in a consent order that was part of divorce proceedings. The parties, both of whom lived in California, had agreed that the BC court would continue to have jurisdiction. The father was obliged to bring any application for a variation in British Columbia.

Child abduction — Hague Child Abduction Convention

Office of the Children's Lawyer v Balev, 2018 SCC 16, [2018] 1 SCR 398

[41] Leave to appeal to SCC refused, 38401 (17 January 2019).

[42] 2018 BCSC 2172.

[43] The jurisdictional provision based on the child's habitual residence is *Family Law Act*, SBC 2011, c 25, s 74(2)(a).

[44] 2018 BCSC 853.

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The parents were married in Ontario and moved in 2001 to Germany, where their two children were born in 2002 and 2005. Because the children were having trouble in school in Germany, the father agreed that for the 2013–14 school year, the children and the mother would live with the mother's parents in Ontario and go to school there. The father, suspecting that the mother would not return the children to Germany at the end of the school year, purported to revoke his consent and began proceedings in Ontario under the *Hague Child Abduction Convention*,[45] seeking an order that the children be returned to Germany. He also began custody proceedings in Germany that were unsuccessful. The Ontario Superior Court eventually ordered the return of the children on the basis that they had been habitually resident in Germany when the mother wrongfully retained them in Canada. The Divisional Court reversed, but the Ontario Court of Appeal restored the order. The children were returned to Germany in October 2016. Subsequently, the Supreme Court of Canada gave leave to appeal. The German courts awarded the mother sole custody, thus rendering the appeal moot.

Despite the fact that the appeal was now moot, the Supreme Court proceeded to give judgment on two questions raised: first, the proper approach to determining the habitual residence of a child and, second, when a court should apply Article 13(2), giving effect to a child's objections to return. On the habitual residence question, the court, by a majority of six to three, changed the law. By and large, the Canadian jurisprudence followed the parental intention approach, under which the child's habitual residence could change only if both parents intended it to. Thus a time-limited visit with one parent, consented to by the other, could not alter habitual residence, because the intention of the consenting parent was that the child should not remain indefinitely in the other country. The two alternatives to this approach were a child-centred approach, which looked at habitual residence from the point of view of the child's connections to a country, and a hybrid approach that took both the parents' intentions and the child's connections into account. The court held that the hybrid approach should be adopted, both because it was the clear trend of the *Hague Child Abduction Convention* jurisprudence elsewhere and because it was better adapted to meet the purposes of the convention.

The court emphasized that the harmonizing purpose of the convention should not be frustrated by domestic courts interpreting its provisions differently from courts in other countries that were party to the convention. The best assurance of certainty lay in following the developing international

[45] *Hague Convention on the Civil Aspects of Child Abduction*, 25 October 1980, Can TS 1983 No 35, 19 ILM 1501 [*Hague Child Abduction Convention*], implemented in Ontario by *Children's Law Reform Act*, RSO 1990, c C.12, s 46(2).

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jurisprudence that supports a multi-factored hybrid approach. The hybrid approach best fulfils the *Hague Child Abduction Convention*'s goals of (1) deterring parents from abducting the child in an attempt to establish links with a country that might award them custody; (2) encouraging the speedy adjudication of custody or access disputes in the forum of the child's habitual residence; and (3) protecting the child from the harmful effects of wrongful removal or retention.

The requirement that the child's habitual residence must be in the state of the parent seeking return serves to ensure that the state to which the child is returned is the proper state to determine custody. Under the hybrid approach, a child's habitual residence can change while he or she is staying with one parent under the time-limited consent of the other. The application judge must consider the entirety of the child's situation at the time of the wrongful removal or retention. This includes the intention of the parents that the move would be temporary and the reasons for that agreement, but the judge must also consider all of the other evidence relevant to the child's habitual residence. The court must do so mindful of the risk of overlaying the factual concept of habitual residence with legal constructs like the idea that one parent cannot unilaterally change a child's habitual residence or that a parent's consent to a time-limited stay cannot shift the child's habitual residence. The court must also avoid treating a time-limited consent agreement as a contract to be enforced by the court.

Since the appeal was moot, the Supreme Court did not need to decide whether the application judge erred in ordering the children returned to Germany. On the Article 13(2) issue, the court held that this exception to the general rule — that a child who has been wrongfully removed or retained should be returned to the country of habitual residence — should not be read so broadly that it erodes the general rule. The party opposing return must establish that (1) the child has reached an appropriate age and degree of maturity at which his or her views can be taken into account and (2) the child objects to return. In most cases, the object of Article 13(2) can be achieved by a single process in which the judge decides whether the child possesses sufficient age and maturity to make his or her evidence useful, decides whether the child objects to return, and, if so, exercises his or her judicial discretion as to whether to return the child. Determining sufficient age and maturity is generally just a matter of inference from the child's demeanour, testimony, and circumstances. Expert evidence may be appropriate in some cases if the proceedings are not delayed by it. The child's objection should also be assessed in a straightforward fashion, without formal conditions or requirements not set out in the convention.

The dissenting judges would have confirmed the parental intention approach to determining habitual residence. By incorporating other factors that could supplant parental intent, the hybrid approach blurred the distinction between custody adjudications and *Hague Child Abduction*

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Convention applications and undermined the convention's goals. Where there is unambiguous evidence of what the parents intended, the parental intent model offers a clear and predictable answer to the question of habitual residence.

Note 1. The hybrid approach to determining habitual residence was applied in *Beairsto v Cook*.[46] The Nova Scotia Court of Appeal reversed the first instance judge's conclusion, based on the shared intention approach, that the child's habitual residence was the state of Washington. The Court of Appeal held that, applying the hybrid approach, her habitual residence was Nova Scotia and her retention there by the mother was not wrongful.

Note 2. In *Mbuyi v Ngalula*,[47] two children, whom their mother had wrongfully retained in Manitoba, were ordered returned to the State of Iowa, where the couple had lived and the father still did. The court rejected arguments by the mother that the father had acquiesced, after the wrongful retention, to the children's remaining in Canada and that the return of the children to their father's care in Iowa would expose them to physical or psychological harm or otherwise place them in an intolerable situation.[48]

Child abduction — other country not party to the Hague Child Abduction Convention

Note. In *Kong v Song*,[49] a two-and-a-half year old child was ordered returned to China, where his mother lived, because the child, though born in British Columbia, was habitually resident in China and the respondent father had wrongfully removed him from there to British Columbia.[50]

Corporations and shareholders

Statutory claim for misrepresentation under securities legislation — securities acquired on a foreign exchange — subject matter jurisdiction

Yip v HSBC Holdings plc, 2018 ONCA 626, 425 DLR (4th) 594[51]

[46] 2018 NSCA 90.

[47] 2018 MBQB 176.

[48] *Hague Child Abduction Convention*, *supra* note 45, art 13(1)(a) and (b), respectively.

[49] 2018 BCSC 1691.

[50] The power to order the return of a child to a country from which it has been wrongfully removed is in the *Family Law Act*, SBC 2011, c 25, s 77. The provisions are couched in the terminology of the *Hague Child Abduction Convention*, *supra* note 45.

[51] Leave to appeal to SCC refused, 38331 (28 March 2019).

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Investors in shares of HSBC, a UK company, sought to bring a class proceeding against HSBC in Ontario under the *Securities Act*,[52] based on alleged misrepresentations made by HSBC in relation to its business, thus causing loss to those who acquired its shares. The representative plaintiff was a resident of Ontario who had acquired his shares on the Hong Kong Stock Exchange. HSBC shares were also traded on the London Stock Exchange, and there were secondary listings on exchanges in Paris and Bermuda. The statutory tort applies to misrepresentations in documents or oral statements by a "responsible issuer,"[53] which is defined to include a "reporting issuer,"[54] which HSBC was not, or "any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded."[55] HSBC brought a motion to dismiss the *Securities Act* claim based on lack of jurisdiction *simpliciter* or, alternatively, *forum non conveniens*.

The jurisdiction question turned in part on the interpretation of "real and substantial connection" in the definition of a responsible issuer. The plaintiff's argument that there was such a connection rested on the facts that HSBC, both directly and through its Canadian subsidiary, had released documents containing the alleged misrepresentations and made them available over the Internet to potential investors in Ontario. The court, affirming the motion judge, rejected this argument. The legislature did not intend that Ontario would become the default jurisdiction for issuers around the world whose securities were purchased by residents of Ontario. The legislature had deliberately chosen "real and substantial" to echo the language of the common law test for jurisdiction *simpliciter*. It was specifically aimed at preventing jurisdictional overreach. An issuer that knows or ought to know that its investor information is being made available to Canadian investors does not, by that level of engagement alone, have a securities regulatory *nexus* sufficient to establish a real and substantial connection to Ontario.

That meant that the statutory phrase had to be applied using the common law tests for jurisdiction *simpliciter*. One potential presumptive connecting factor was that HSBC carried on business in Ontario, but the motion judge had correctly found that it did not. HSBC was a holding entity that owned, directly or indirectly, a group of commonly bannered banks in various countries, including Canada. By its holding activities in relation to its Canadian subsidiary, it did not carry on business in Ontario.

[52] RSO 1990, c S.5.

[53] *Ibid*, s 138.3.

[54] A reporting issue is, basically, an Ontario corporation whose securities are publicly traded, or a non-Ontario corporation whose securities are traded on an exchange in Ontario (*ibid*, s 1(1) "reporting issuer").

[55] *Ibid*, s 138.1 "responsible issuer," para (b).

There was an argument that it did fit the presumptive connecting factor of a tort committed in Ontario, given that misrepresentations were received and acted upon there, but the motion judge had correctly held that if such a presumptive connecting factor applied, it had been rebutted. Downloading material from the Internet was a very weak connection, and HSBC carried out too few activities in Ontario for it reasonably to expect that it was subject to Ontario securities regulation. Therefore, there was no real and substantial connection with Ontario for the purpose of the statutory definition of "responsible issuer."

The Court of Appeal also affirmed the motion judge's conclusion that Ontario was *forum non conveniens*. The primary factor the court invoked was comity. Internationally, the general pattern was that the country where securities were traded was the appropriate forum for secondary market misrepresentation claims. That was so in the present case.

Québec

Actions personnelles à caractère extrapatrimonial et familial

Enfants —garde — domicile de l'enfant — action pour séparation de corps – art 3146 CcQ

Note. Veuillez voir *Droit de la famille — 182044*.[56]

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

Droit de la famille — 18126, 2018 QCCA 116[57]

In 2012, the Quebec Superior Court varied a prior custody order so as to grant sole custody to the mother, with the view of authorizing her to move to Brampton, Ontario, with a child aged nine. The order gave the father defined telephone and personal access rights to the child. The father continued to reside in Quebec. Because the mother allegedly obstructed his access rights, the father notified her in 2013 that he would suspend the exercise of those rights. In 2017, the father applied to the Quebec Superior Court to restore the 2012 order with some variations as to the location of pick-ups and drop-offs for personal access. The mother sought dismissal of the father's application on the ground that the court lacked jurisdiction since the child was now domiciled in Ontario. The Superior Court held that it had jurisdiction, though not exclusive jurisdiction, to modify the conditions of access in an earlier order of the court when the

[56] 2018 QCCS 4115.

[57] Autorisation de pourvoi à la CSC refusée, 38040 (30 août 2018).

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non-custodial parent continues to reside in Quebec. The mother was seen as continuing to submit to the jurisdiction of the Superior Court by living in Ontario in accordance with its earlier order.

The Quebec Court of Appeal reversed the decision. The Superior Court's jurisdiction to decide on matters of custody is ordinarily circumscribed by the domicile of the child, according to Articles 3093 and 3142 of the *Civil Code of Quebec* (*CcQ*).[58] A minor's domicile is presumed to be that of the parent with whom the minor usually resides unless the court has fixed the domicile of the child elsewhere.[59]

Private international custody law has the dual objectives that the court ruling on custody and access must be obliged to consider the child's interests and must be adequately equipped to evaluate them, and that the rules of territorial jurisdiction must discourage child abduction and forum shopping. Quebec private international law, like that in other Canadian provinces, has adopted a jurisdictional model based on the residence of the child. This is similar to that of the *Hague Child Abduction Convention*,[60] which employs habitual residence as the basic criterion. Since Quebec has adopted a jurisdictional model based on the domicile of the child, which resembles the *Hague Child Abduction Convention*, it is incumbent on the court to enforce that model.

Consequently, if the custodial parent has moved to another jurisdiction to establish a new domicile there, and that move was authorized by a final order of a court in Quebec, the non-custodial parent must then rely on principles of private international law to ensure that the Quebec judgment on access is recognized and enforced in the new jurisdiction. The non-custodial parent cannot simply return to the Superior Court to seek either enforcement or variation of the access order. The Court of Appeal added, *obiter*, that where separation or divorce proceedings are pending, and the child's domicile changes in the course of proceedings, different considerations come into play and the court in which the separation or divorce proceedings are brought may retain jurisdiction in some circumstances to make orders with respect to custody and access rights.

Enfants — garde — enlèvement international et interprovincial d'enfants

Droit de la famille — 1815, 2018 QCCS 31

Le père demande le retour immédiat des enfants des parties, X, 9 ans, et Y, 3 ans, en République d'Afrique du Sud, le lieu de leur résidence habituelle.

[58] Art 3093 contains the choice of law rule (custody is governed by the law of the child's domicile) and art 3142 the jurisdiction rule (Quebec authorities have jurisdiction to decide on custody provided the child is domiciled in Quebec).

[59] Art 80 *CcQ*.

[60] *Hague Child Abduction Convention*, *supra* note 45.

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La mère plaide que le retour des enfants en Afrique du Sud ne peut être ordonné. D'une part, elle fait valoir qu'un tel retour exposerait les enfants à un danger psychique les plaçant dans une situation intolérable et cela parce qu'elle ne pourrait elle-même y retourner pour en prendre soin comme elle le fait depuis leur naissance. D'autre part, elle soutient que l'enfant X s'oppose à ce retour et désire demeurer au Canada. Les parties sont toutes deux de citoyenneté congolaise.

La Cour accueille la demande. La preuve prépondérante démontre que la mère est effectivement la figure parentale dominante. Depuis la naissance des enfants, c'est elle qui prend soin d'eux sur une base quotidienne. Si le père peut être justifié de reprocher à la mère d'avoir déplacé les enfants de façon illicite, cette faute n'éradique pas pour autant tout ce qu'elle a fait pour eux depuis leur naissance. Par contre, la preuve ne permet pas de conclure qu'il est impossible pour la mère de retourner en Afrique du Sud. Elle détient toujours un permis de résidence temporaire valide. Même en considérant justifiée la crainte de la mère que si elle quitte le Canada, sa demande de citoyenneté canadienne risque d'être refusée, elle ne saurait à elle seule faire échec à la demande de retour. Cette difficulté ne concerne pas les enfants et constitue un motif peu pertinent au débat portant sur la demande de retour. Malgré la préférence exprimée par X, le Tribunal ne peut conclure à une opposition ferme et motivée quant à un retour éventuel, au sens où on l'entend en vertu de la jurisprudence.

Note. Veuillez voir aussi *Droit de la famille — 18372*.[61]

Actions personnelles à caractère patrimonial

Compétence — défendeur a son domicile ou sa résidence au Québec — article 3148, alinéas 1 et 2 CcQ

Bombardier inc v General Directorate for Defense, Armaments and Investments of the Hellenic Ministry of National Defence, 2018 QCCS 2127

In 1998, the defendant HMOD, an agency of the Greek government, ordered ten amphibious fire-fighting aircraft from the plaintiff Bombardier, a manufacturer based in Quebec. In addition to the procurement contract, the parties entered into an "offsets contract" that would provide offsetting benefits to HMOD, the Greek defence industry, and the Greek economy in general. The offsets contract provided that, if any obligations remained unfulfilled by Bombardier at the expiry of the offsets contract, Bombardier would pay HMOD liquidated damages up to a maximum of US $27,736,710. The obligation to pay liquidated damages was secured

[61] 2018 QCCS 736.

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by a letter of guarantee in favour of HMOD issued by a predecessor of Eurobank, a Greek bank. The letter of guarantee itself was secured by a letter of counter-guarantee in favour of Eurobank issued by NBC, a bank based in Quebec. The letter of guarantee was subject to Greek law, while the letter of counter-guarantee was governed by Quebec law.

A dispute developed between Bombardier and HMOD as to whether Bombardier had defaulted on its obligations under the offsets contract. Bombardier's position was that the state of the Greek aviation industry made it impossible to have the contemplated work done in Greece. Years of litigation followed. Under an arbitration clause in the offsets contract, an International Chamber of Commerce (ICC) arbitral tribunal gave a final award in 2013 entirely in Bombardier's favour, holding that the offsets contract and its provisions on liquidated damages, as well as the letter of guarantee, were void *ab initio*. That award was later confirmed by the Cour d'appel de Paris. A week before the ICC tribunal made its final award, HMOD took steps in Greece that obliged Eurobank to pay the funds available (by now, US $13,868,354) under the Letter of Guarantee to HMOD. Shortly afterwards, Bombardier obtained an order from the Quebec Superior Court enjoining NBC from paying out any monies under the letter of counter-guarantee.

In the present proceeding, the Superior Court had to decide whether to homologate the ICC award; whether it should order HMOD to comply with the award; whether it should declare NBC's counter-guarantee void; whether it should declare that any amount paid by Eurobank to HMOD was not due and could not form the basis of a claim under the counter-guarantee; and whether it should enjoin NBC from paying out under the counter-guarantee. Eurobank and HMOD challenged the court's jurisdiction to make any of these orders.

The court held that it had jurisdiction over the dispute about NBC's obligations under the counter-guarantee. NBC was domiciled in Quebec and that gave the Quebec courts jurisdiction over claims against it, based on Article 3148(1) and (2) of the *CcQ*. An argument that NBC was not a "defendant" for the purpose of those articles was rejected. The objective of the action was to obtain an order to enjoin it from paying Eurobank. Banks domiciled in Quebec had previously been enjoined by Quebec courts from paying parties domiciled abroad in execution of letters of credit or of guarantee. In addition, a number of the obligations that stemmed from the counter-guarantee must be performed in Quebec. That was more than enough to give jurisdiction to the Quebec courts under Article 3148(3) of the *CcQ*.

On the question of jurisdiction to homologate the ICC award, HMOD argued that a claim for homologating an award against a Greek entity fell outside Article 3148 and should be heard in the Greek courts. The court held that it had jurisdiction to homologate the award as an "incidental demand"

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to the "principal demand" of the relief against NBC under Article 3139 of the *CcQ*.[62] The award declared both the offsets contract and the letter of guarantee null and void, and so was at the very least an incidental issue. It would be unfair to deny Bombardier, after successfully going through the lengthy arbitration process, the right to have the ICC's award homologated in the context of its proceedings before the court.

Compétence — faute commise au Québec — obligations découlant d'un contrat devaient être exécutées au Québec — article 3148, alinéa 3 CcQ

Poppy Industries Canada inc v Diva Delights Ltd, 2018 QCCA 163

The plaintiff Poppy, a Quebec company, distributed in Quebec, Ontario, and the United States, products made by the defendant Diva, a Manitoba manufacturer. When Diva sought to terminate the distribution agreement, Poppy objected and the parties executed a settlement agreement that extended the termination notice period to the end of 2015. There were then disputes about the settlement agreement. Diva sued Poppy in Manitoba, and Poppy sued Diva in Quebec. The Quebec action was commenced between the time when Poppy filed its Manitoba claim and the time when Poppy served Diva with notice of the claim. Diva argued that the Quebec court lacked jurisdiction.

The Court of Appeal affirmed the Superior Court's decision that it had jurisdiction. Some of the contractual obligations were to be performed in Quebec, thus satisfying one ground of jurisdiction under Article 3148(3) of the *CcQ*. It was not necessary that the cause of action be a violation of the obligation to be performed in Quebec, only that there be at least one obligation to be performed there. In addition, there was a claim for reputational harm to Poppy; injury suffered in Quebec was also a ground under Article 3148(3) of the *CcQ*. This code provision did not require that each potential cause of action bear a connecting factor to Quebec; one cause of action is enough to grant jurisdiction over the whole proceeding. The grounds for *litispendance* under Article 3137 had not been shown because the facts and objects of the two actions were different.

Compétence — article 3148 CcQ *— préjudice subi au Québec — action en recours collectif*

Delisle c R, 2018 QCCS 3855[63]

[62] Art 3139 *CcQ*: "Where a Quebec authority has jurisdiction on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross-demand."

[63] Autorisation de pourvoi à la CA Qc refusée, 2018 QCCA 1993.

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Les demandeurs demandent l'autorisation judiciaire de leur action collective au nom de membres ou d'employés de la Gendarmerie Royale du Canada (GRC) qui auraient subi un préjudice en raison d'harcèlement physique, d'harcèlement psychologique, de représailles, de discrimination et d'abus de pouvoir. Le groupe principal comprendrait deux sous-groupes: le sous-groupe linguistique, dont les membres auraient subi une faute en raison de leur affiliation linguistique francophone, et le sous-groupe de la liberté d'association, regroupant ceux et celles qui auraient subi une faute en raison de leur exercice de la liberté d'association et du droit de former un syndicat.

La Cour accueille la demande en partie. Les règles du droit international privé codifiées au *Code civil du Québec* n'habilitent pas la Cour supérieure du Québec à se saisir du cas de tous les membres et membres civils résidant au Canada, tel que réclamé dans la demande. Selon l'article 3148(3),[64] les tribunaux québécois détiennent compétence pour se saisir des cas des membres et membres civils de la GRC se trouvant dans l'une ou l'autre de quatre situations: (1) ils ont subi préjudice au Québec en raison d'un abus de pouvoir commis par un membre de l'État-major de la GRC; (2) le membre de l'État-major fautif était situé au Québec au moment où il a commis l'abus de pouvoir, à leur préjudice; (3) ils étaient requis par la GRC d'exercer au Québec leurs fonctions de membre ou membre civil, au moment de l'abus de pouvoir; (4) ils étaient domiciliés au Québec, ou y résidaient, au moment où ils ont subi préjudice en raison de l'abus de pouvoir.

Il y a lieu de modifier le groupe en conséquence. Il y a lieu d'éviter qu'il y ait à l'avenir d'autres procès individuels regroupant les mêmes questions que celles décrites dans la demande. La documentation au dossier démontre *prima facie* l'existence d'une vaste problématique d'abus de pouvoir au sein de la GRC et ce, même en restreignant cette problématique au Québec. Les faits allégués paraissent justifier les conclusions recherchées.

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

Hart Stores inc c Riocan Holdings inc, 2018 QCCS 1079

Par le biais de moyens déclinatoires, Riocan et 374324 NB inc (NB), dont les sièges sociaux sont respectivement situés en Ontario et au Nouveau-Brunswick, demandent le rejet de l'action au motif d'absence de compétence

[64] Selon l'article 3148(3) les tribunaux québécois peuvent se saisir d'une action personnelle à caractère patrimonial quand l'une ou l'autre des quatre conditions suivantes est remplie : (a) la faute reprochée au défendeur a été commise au Québec; (b) le demandeur a subi un préjudice au Québec; (c) un fait générateur de préjudice s'est produit au Québec; ou (d) l'une des obligations découlant d'un contrat devait y être exécutée.

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de la Cour supérieure du Québec. Hart leur réclame la somme de 190 524 $ en remboursement du loyer payé en trop pour l'année 2014, le tout conformément à une clause d'ajustement prévue au bail. Hart opère une entreprise de commerce de détail. Son siège social est situé à Laval, Québec. Dans le cadre de ses opérations, Hart loue successivement de Riocan et de NB un local situé dans le centre commercial Madawaska, au Nouveau-Brunswick. Hart soutient que les autorités québécoises sont compétentes pour entendre le litige puisque l'une des obligations découlant du contrat devait être exécutée au Québec et qu'elle a subi un préjudice au Québec.

Les arguments de Riocan relatifs au lieu de formation du contrat ou au lieu où est situé l'établissement pour lequel le remboursement de loyer est réclamé ne peuvent être retenus, tels que formulés. À l'évidence, Riocan confond la compétence internationale des tribunaux québécois avec la compétence territoriale des tribunaux québécois. À l'instar de Hart, la Cour est d'avis qu'au moins une des obligations découlant de la convention devait être exécutée au Québec. Ici, puisque le bail ne désigne pas expressément ou implicitement le lieu de paiement du loyer, le droit supplétif énoncé à l'article 1566 *CcQ* prévoit qu'il se fait alors au domicile du débiteur, soit, ici, Hart, au Québec. Il s'ensuit que la Cour supérieure du Québec a compétence. Au surplus, puisque Hart demande subsidiairement l'autorisation d'opérer compensation entre les montants dus par Riocan et NB et les loyers qui seront dus éventuellement à NB en vertu du bail, le paiement devra donc s'effectuer au Québec, là où le débiteur Hart se trouve. La Cour est d'avis que Hart a aussi subi un préjudice au Québec.

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

TCA Global Credit Master Fund v 8894132 Canada inc, 2018 QCCA 1132

The plaintiff appealed from a decision of the Superior Court that granted the defendants' motion for declinatory exception and dismissed the plaintiff's judicial demand for reimbursement of amounts owed under certain guaranty agreements signed in relation to a credit agreement. The plaintiff, apparently based in Florida, had sued the defendants in Quebec, where they were domiciled. The basis of the decision to accept the declinatory exception was that the credit and guaranty agreements all contained a forum selection clause giving exclusive jurisdiction to the courts in the state of Florida. Article 3148, paragraph 2, of the *CcQ* applied.

One of the arguments on appeal was that the forum selection clause had been vitiated by fraud and false representations. The alleged fraud related to failure of the agreement to reproduce certain conditions agreed to by

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the parties. The Superior Court had been right to reject this argument. It would defeat the purpose of the forum selection clause if it were set aside at an early stage, without the benefit of a hearing on the merits, particularly where the validity of the agreement containing the clause is being challenged only in part, for reasons that have nothing to do with the signature or existence of the agreement.

Note. Veuillez voir *KOM International inc c Swiednicki*,[65] *Holiday Hospitality Franchising c Hôtels Côte de Liesse inc*,[66] et *Groupe Anderson inc c CGAO*[67] au sujet de l'interprétation d'une clause d'élection de for. Veuillez voir aussi *Domin Development c Abzac Canada inc*,[68] dans laquelle la Cour supérieure n'avait pas compétence matérielle pour entendre un litige fondé sur un contrat qui contenait une clause d'élection de for en faveur des tribunaux français.

Compétence — forum non conveniens — *Article 3135* CcQ

Note. Veuillez voir *Peartree Financial Services Ltd c Explor Resources inc*[69] (moyen déclinatoire rejeté).

Compétence — litispendance — recours collectif — Article 3137 CcQ

Li c Equifax inc, 2018 QCCS 1892[70]

L'intimé a déposé une demande d'autorisation d'exercer une action collective contre les demanderesses, Equifax inc et Equifax Canada co ("Equifax"), suite à l'accès non autorisé de tiers aux renseignements personnels en matière de crédit des membres du groupe proposé, qui sont recueillis par Equifax et entreposés de façon électronique.

Préalablement à l'audition de la demande d'autorisation, Equifax demande à la Cour supérieure du Québec, en vertu de l'article 3137 *CcQ* et des articles 18 et 577 du *Code de procédure civile*,[71] de suspendre le dossier jusqu'à ce qu'il y ait un jugement final dans l'une des autres actions collectives intentées ailleurs au Canada, notamment en Ontario, qui inclura

[65] 2018 QCCS 546.

[66] 2018 QCCA 1998.

[67] 2018 QCCS 3458.

[68] 2018 QCCS 2701.

[69] 2018 QCCS 3733.

[70] Autorisation de pourvoi à la CA Qc refusée, 2018 QCCA 1560; autorisation de pourvoi à la CSC refusée, 38411 (21 mars 2019).

[71] CQLR, c C-25.01.

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les résidents du Québec. Selon Equifax, celles-ci se fondent sur les mêmes faits et allégations.

Le juge refuse la demande d'Equifax pour le principal motif que la demande d'autorisation de l'intimé au Québec a été déposé avant la demande ontarienne. Par conséquent, l'une des conditions de l'article 3137 *CcQ* ne serait pas remplie. Le juge souligne également, en raison des circonstances, que la protection des droits et des intérêts des résidents du Québec milite fortement pour la poursuite des procédures au Québec.

Note. Veuillez voir aussi *Garage Poirier & Poirier inc c FCA Canada inc.*[72] Une demande en suspension a été rejetée puisque les procédures en autorisation d'exercer une action collective ont été déposées simultanément au Québec et en Ontario.

PROCEDURE / PROCÉDURE

Common Law and Federal

Commencement of proceedings

Hague Service Convention

Tiwari v Tiwari, 2018 ONSC 6697

The applicant wished to commence divorce proceedings in Ontario against the respondent, a resident of India. Under the Ontario *Rules of Civil Procedure*,[73] service of an originating process outside Ontario in a state that is a party to the *Hague Service Convention*[74] must be through the central authority in that state. The alternative of serving in a manner that is permitted by the convention that would be permitted by the rules if the document were being served in Ontario[75] is available only if the other state has not objected to Article 10 of the convention, which makes that alternative possible. India is a party to the convention and has objected to Article 10, which means that service had to be through the Indian Central Authority. The applicant's Ontario lawyer had delivered by mail her application for divorce and a request for service, in the form required by the convention, to the Central Authority for India. The Central Authority replied by mail acknowledging receipt and including a letter from the Central Authority

[72] 2018 QCCS 107.

[73] RRO 1990, Reg 194, r 17.05(3).

[74] *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) [*Hague Service Convention*].

[75] *Ibid*, art 10.

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to a district judge, asking the judge to serve the document on the respondent at the address provided by the applicant. No further response had been received. It was more than six months since the materials were forwarded to the Central Authority.

The Ontario court made an order for substituted service by email and regular mail to the respondent in India. Under Article 15 of the convention, a contracting state may declare that a judge may give judgment, even if no certificate of service or delivery has been received, if the document has been transmitted by one of the methods provided for in the convention, at least six months has elapsed since the date of transmission, and no certificate of any kind has been received even though every reasonable effort has been made to obtain it through the competent authorities of the state addressed. The wife's lawyer sending the documents to the Central Authority in India complied with the convention.[76] The other requirements of Article 15 were also met. An order for substituted service therefore could be made in order to establish her entitlement to judgment in her application for divorce, notwithstanding her inability to effect service on the respondent.

Note. Another case in which substituted service was ordered because the plaintiff had complied as fully as possible with the *Hague Service Convention* was *Xue v Zheng*.[77] See also *Coskun v Ozeke*,[78] in which service was effected through the Central Authority in Turkey but there was doubt as to whether a necessary document had been omitted. The court held that the applicant must either re-serve or establish that she did not need to serve the document.

FOREIGN JUDGMENTS / JUGEMENTS ÉTRANGERS

Common Law and Federal

Conditions for recognition or enforcement

Jurisdiction of the originating court — real and substantial connection

Dish v Shava, 2018 ONSC 2867, 157 CPR (4th) 40, aff'd 2019 ONCA 411

The plaintiffs obtained default judgment in a US District Court in Virginia, holding the defendants liable for copyright and trademark infringement

[76] Art 3 requires that the request must be made by the "authority," which in Ontario is the Ministry of the Attorney General, or by a "judicial officer competent under the law of the State in which the documents originate." The court held that the applicant's lawyer was such a judicial officer.

[77] 2018 ONSC 1979.

[78] 2018 ONSC 3350.

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and unfair competition. The defendants had captured and transmitted broadcasts of the plaintiffs' television channels through an interactive, commercial website. The Ontario court granted summary judgment enforcing both the monetary award and the injunction granted by the US court. The foreign court's jurisdiction was clear, as the defendants' actions had created a real and substantial connection with Virginia. These included leasing servers in Virginia to retransmit the material and selling content in Virginia. The injunction was in clear and specific terms. There was no risk that the defendants would not be able to identify which activities were prohibited. While its scope was broad, it was fair, reasonable, and necessary in circumstances of ongoing infringement of intellectual property rights through a variety of technological means. Its enforcement placed no undue burden on the Canadian justice system.

Note. A judgment for US $86,638, given by a court in India in favour of an Indian seller of industrial products against an Ontario buyer, was enforced in *Corona Steel Industry Private Ltd v Integrity Worldwide Ltd.*[79] The subject matter of the action had a real and substantial connection with India because the seller had received the buyer's purchase orders in India, partly performed its contract in India, and suffered loss through the non-payment of its invoices, which were to be paid in India.

Defences to recognition or enforcement

Limitation period for enforcement

Note. In *Corona Steel Industry Private Ltd v Integrity Worldwide Ltd.*,[80] the limitation period for bringing an action on an Indian judgment was held to run from the time when the time to appeal the judgment in India had expired; it was only then that the creditor knew that it was legally appropriate to commence a legal proceeding on the judgment.[81]

Foreign currency

Common law action on judgment — foreign currency — rate of interest

Wei v Mei, 2018 BCSC 1057, aff'd 2019 BCCA 114

The parties to an action for debt in China had agreed to a consent judgment that bore 73 percent interest on the outstanding principal on the

[79] 2018 ONSC 3901.

[80] *Ibid.*

[81] *Limitations Act, 2002*, SO 2002, c 24, s 5(1)(a)(iv) (defining when a claim is discovered).

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two loans in question. The outstanding principal was RMB 25,017,461. In this proceeding, part of a series of proceedings to enforce the judgment, two issues were what the interest rate should be and in what currency judgment should be given. The court held that the interest rate must be reduced to the 60 percent maximum permitted by Canadian criminal law.[82] The interest rate was part of the judgment and so was not subject to review on its merits, but compliance with Canadian criminal law was a matter of public policy. Reduction below the maximum was not called for because the doctrine of notional severance of the illegal portion of the interest should be applied. The agreement of the parties on the interest rate was legal in China and was not made for an illegal purpose or with evil intention.

As for the currency, the court decided to award judgment in Canadian dollars, converted as of the date of the BC judgment. The *Foreign Money Claims Act*[83] allows a court to order a foreign currency obligation to be paid in Canadian dollars using a conversion rate at the date of payment, if the creditor "will be most truly and exactly compensated" by such an order. The judge held that in this case the creditor would not be most truly and exactly compensated because, given the history of the dispute, there was every reason to expect that, if such an order were made, the debtors would try to delay payment to take advantage of the most favourable exchange rate. In addition, the creditor would be put to further legal costs in having the conversion rate determined in order for him to receive each payment.

Statutory enforcement

Enforcement under uniform reciprocal enforcement of judgments statute — defences

Kriegman v Dill, 2018 BCCA 86

LLS was a Washington State company that operated a Ponzi scheme in which many people, including residents of Canada, were fraudulently induced to invest. LLS went into bankruptcy, and the trustee commenced proceedings in US District Court in Washington (sitting as a Bankruptcy Court) against the investors, claiming repayment of amounts they had received from LLS so that the pool of funds "clawed back" could then be distributed to investors on an equitable basis. The trustee obtained judgment and registered the judgment in British Columbia *ex parte* against the defendants, who were BC residents, under the *Court Order Enforcement Act*.[84] Washington State is a reciprocating jurisdiction for the purpose of that act.

[82] *Criminal Code*, RSC 1985, c C-46, s 347.

[83] RSBC 1996, c 155, s 1(1).

[84] RSBC 1996, c 78, Part 2.

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The defendants had had the *ex parte* registration order set aside on the ground that the plaintiff had not made full disclosure of the relevant facts. On appeal, the Court of Appeal held that the chambers judge had been right to set the registration order aside but wrong to refuse to make a new order *de novo*. The court reviewed a number of the statutory defences to registration and rejected all of them. One defence was that the US court had acted "without jurisdiction under the conflict of laws rules of the court to which application is made."[85] The judge had erred in placing the onus on the trustee to provide further support for the District Court's authority by means of opinion evidence.

A second defence was that the defendant neither carried on business nor was ordinarily resident in Washington and "did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of" the US court.[86] The relatively few cases to discuss the question appeared to have assumed that the law of the domestic court governs the issue of what constitutes voluntary submission. The chambers judge had found that, under BC law, the defendant would normally be found to have attorned to the District Court. The judge's view that, due to exceptional circumstances, the attornment was negated was erroneous. Nor was the submission made under duress imposed by the US court. The filing of a proof of claim in the bankruptcy was, itself, a submission to the Bankruptcy Court's jurisdiction.

Defences that the judgment had been obtained by fraud,[87] or was contrary to public policy,[88] were also not made out. On the latter, the court commented that it would not shock the conscience of most Canadians to discover that an investor in a Ponzi scheme who has reaped hundreds of thousands of dollars in interest or commissions would be required to disgorge his earnings, and (if he failed to show good faith) even the principal amount of his "investment," and to share in a pool with later "investors" who have lost their entire investments.

Finally, the chambers judge had erred in accepting the defence that "the judgment debtor would have a good defence if an action were brought on the judgment."[89] There had been no breach of natural justice. The defendant had been fully informed of the case against him, had the opportunity to participate with other defendants in meeting that case, and was tried by independent judges in accordance with procedures that could be assumed to be fair and reasonable. The judge had found that the District Court's order was defective in failing to refer to certain BC companies that should

[85] *Ibid*, s 29(6)(a)(i).

[86] *Ibid*, s 29(6)(b).

[87] *Ibid*, s 29(6)(d).

[88] *Ibid*, s 29(6)(f).

[89] *Ibid*, s 29(6)(g).

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have been included. This, however, was at most a minor procedural error with no real consequences. To give it weight was contrary to the deferential and "non-invasive" approach that Canadian law takes to the recognition and enforcement of foreign judgments.

Québec

Conditions nécessaires à la reconnaissance d'une décision étrangère

Décision rendue par défaut — partie défaillante n'a pu prendre connaissance de l'acte introductif d'instance — art 3156, alinéa 2 CcQ

Note. Dans *Platania c Di Campo*,[90] la Cour d'appel affirme un jugement de la Cour supérieure du Québec[91] qui rejette une demande de reconnaissance et d'exécution d'un jugement rendu par défaut contre les intimés en Italie, au motif que les appelants n'ont pas démontré que la procédure introductive d'instance étrangère avait été régulièrement signifiée en vertu du droit italien suivant l'article 3156 *CcQ*.

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

HOOPP Realty Inc v Guarantor Co of North America, 2018 ABQB 634

The plaintiff rejected as unsuitable the floor in a warehouse being built for the plaintiff by general contractors. The contractors agreed to remove and replace the floor. The plaintiff had incurred expenses in investigating the floor and claimed these from the defendant, which had issued a performance bond and bond agreement covering the construction work. Litigation resulted in a finding that the plaintiff's complaints were arbitrable under the construction contract and the plaintiff had missed the limitation period to arbitrate. The defendant argued that this meant its obligation under the performance bond, in relation to the work in question, was also at an end.

[90] 2018 QCCA 1532.

[91] 2017 QCCS 430, noté dans Joost Blom, "Jurisprudence canadienne en matière de droit international privé en 2017" (2017) 55 ACDI 598 aux pp 635–36.

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The defendant relied on the Supreme Court of Canada's decision in *Tolofson v Jensen*[92] that limitation periods were to be characterized for conflicts purposes as substantive. While this eliminated the distinction in the conflict of laws between limitation rules that extinguished the right (substantive) and those that barred the remedy (formerly procedural), it did not render that distinction invalid for other purposes. The Alberta limitations statute says that the defendant is "entitled to immunity" if a claimant does not seek a remedial order within the applicable period.[93] Under that wording, it is clear that the act does not extinguish the claim. No "immunity" would be necessary if the claim were extinguished. *Tolofson* did not decide, and could not have decided, that a provincial statutory limitation provision barring a remedy must be treated as claim extinguishing. It instead classified such a provision as substantive despite its having no extinguishing effect.

Therefore, the expiry of the plaintiff's limitation period to pursue the contractor, while giving the contractor immunity to the plaintiff's claim, did not extinguish the contractor's liability. The liability of the bonding company, which is a separate and distinct liability, was subject to its own limitation period, which had not expired.

Tort

Parent company's failure to take care for safety of those put at risk by operations of a supplier — place of the tort

Das v George Weston Ltd, 2018 ONCA 1053

The plaintiffs sought certification of a class proceeding on behalf of all those who had been injured in the collapse of the Rana Plaza, a multistorey factory building in Bangladesh. One defendant was a Canadian company, Loblaws, that purchased garments from a Bangladesh supplier, Pearl Global, for sale in Loblaws's Canadian stores. The supplier engaged another Bangladesh company, New Wave, to produce some of the garments. New Wave's factory was in the Rana Plaza building. Loblaws had adopted corporate social responsibility (CSR) standards designed to oversee the operations of its suppliers, which were located in many foreign countries. The plaintiffs' case was that Loblaws had been negligent in failing to take reasonable measures to ensure that the premises in which New Wave's employees worked were safe. The plaintiffs alleged that Loblaws should have been aware of manifest deficiencies in the structural safety of the Rana Plaza building.

The class proceeding was brought not only against Loblaws but also against a French company, Bureau Veritas, which carried on business

[92] [1994] 3 SCR 1022.

[93] *Limitations Act*, RSA 2000, c L-12, s 2(2).

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in Ontario and in Bangladesh as well as in many other countries. Loblaws had engaged Bureau Veritas's Bangladesh subsidiary to conduct "social audits" of Loblaws's suppliers there. A social audit was an assessment of the supplier's compliance with Loblaws's CSR standards as well as industry standards and local laws. Bureau Veritas was said to have been negligent in relation to the victims of the building collapse in failing to include building safety in its audit of New Wave.

The motion judge refused to certify the class proceeding because the plaintiffs' claims against the two defendants were bound to fail.[94] If Ontario law applied to the claims, they would fail because neither defendant was under a duty of care towards the occupants of the building. If Bangladesh law applied, the claims, based on expert evidence of Bangladesh law, were statute barred. The judge also held that Bangladesh law applied because the *locus* of the torts alleged was in Bangladesh, not Ontario. The plaintiffs appealed.

The Ontario Court of Appeal dismissed the appeal. The judge did not err in finding that Bangladesh was where the alleged torts were committed. Generally, the place of the wrong is where the wrongful activity occurred. Here, this activity was implementing decisions in Bangladesh that were said to have caused death and injury from the collapse of the building. It was the injury in Bangladesh that crystallized the alleged wrong. Nor was the judge wrong in refusing to make an exception to the *lex loci delicti* rule on the basis that applying Bangladesh law would cause an injustice that would offend Canadian values. The unavailability of punitive damages under that law was not the type of issue that offends Canadian fundamental values.

The Court of Appeal also upheld the judge's assessment of the evidence relating to Bangladesh limitations law. It likewise upheld his finding that, even if the claims were not statute-barred, Bangladesh law would not recognize a novel duty of care such as that being alleged in this case. The Indian and UK cases that, the plaintiffs argued, a Bangladesh court would follow were distinguishable from the circumstances in the present case. The judge therefore made no error in concluding that it was plain and obvious that under Bangladesh law, the negligence claim had no reasonable prospect of success.

Restitutionary obligations

Contribution among insurers

Budget Rent A Car System Inc v Philadelphia Indemnity Insurance Co, 2018 BCSC 1584

Six people were injured in an accident in British Columbia and brought civil claims against the driver of a van that had been rented in California

[94] *Das v George Weston Ltd*, 2017 ONSC 4129, noted in Blom (2017), *supra* note 36 at 638.

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from Budget by the First Presbyterian Church and was driven by Mr Wilson. The church had authorized Wilson to drive the van. As provided in the rental agreement, which was entered into in California, the six claims were defended and ultimately settled by Budget itself and by ACE American Insurance, which had issued supplementary liability coverage that the church had purchased under the terms of its rental agreement with Budget. In the present proceeding, Budget and ACE claimed against two other insurers to contribute to the defence and indemnity costs. One, Philadelphia, had issued a policy to the church covering, among other risks, its liability for anyone authorized by the church to drive a vehicle that the church rented. The other, State Farm, had issued personal auto insurance and general insurance policies to Wilson. The sole issue in the present proceeding was to determine whether the insurers' obligations to each other were to be decided according to California or BC law.

The court held that the claim by Budget and ACE was to be characterized as restitutionary. The fact that the subsequent determination of the merits of the claim entailed interpretation of the contracts did not make the claim contractual in nature. The choice-of-law rule for restitutionary claims adopted in an earlier BC decision[95] consists of three principles. If the obligation arises in connection with a contract, the proper law of the obligation is the law applicable to the contract. If it arises in connection with a transaction concerning an immovable, its proper law is the law of the *situs* of the immovable. If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs. The applicable principle here was the third one. The court interpreted it as, essentially, referring to the place that has the closest connection to the obligation claimed.

The obligation that was the basis of the plaintiff insurers' claim rested both on the applicable insurance policies and on the actions by the accident victims, which triggered the liability under those policies. All of the factors connecting the policies and the actions to the two legal systems in question must be examined. The insurance contracts were all entered into in California but contained no express choices of law. The place where each policy was underwritten was unclear but there was no suggestion that it was California or British Columbia. The policies all insured vehicles that could incur liability in different jurisdictions, as the terms of the policies recognized. The actions, on the other hand, were commenced in British Columbia because the accident occurred there.

The judge concluded that the jurisdiction with the closest and most real connection to the obligation in issue was British Columbia. That was where the actions were brought. Consideration of the policies themselves did not

[95] *Minera Aquiline Argentina SA v IMA Exploration Inc*, 2006 BCSC 1102 at para 185, aff'd 2007 BCCA 319, leave to appeal to SCC refused, 32211 (20 December 2007).

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establish a strong connection to California. The insurers had entered into power of attorney and undertaking agreements with regulatory authorities, relating to the defence of actions in the jurisdictions listed in the policies, one of which was British Columbia. The law of British Columbia therefore applied to Budget's and ACE's claims.

Matrimonial causes

Nullity of marriage — recognition of foreign decree

Mills v Mills, 2018 ABCA 195[96]

The parties married in Cameroon in 2011. The husband was Canadian, and the parties came to Canada after the marriage. They separated in 2015. They had had two children. The husband obtained a nullity declaration in Cameroon on the basis that the wife was still married to her first husband at the time of the marriage in question because her divorce in Belgium, though pronounced before the marriage, did not take effect until a month after the marriage. The husband then applied in Alberta to have the declaration of annulment recognized and enforced. The Alberta court held that the Cameroon court had jurisdiction to grant the nullity decree because Cameroon was the place of celebration of the marriage. The evidence as to the effective date of the Belgian divorce was incontrovertible. The decree was therefore recognized as having rendered the marriage void.

Québec

Statut personnel des personnes physiques

Obligation alimentaire — divorce à l'étranger — art 3096 CcQ

Droit de la famille — 18752, 2018 QCCS 1475

La mère demande une pension alimentaire pour les deux enfants des parties. Le père allègue des difficultés excessives rattachées aux frais de transport pour son accès aux enfants. La mère et les enfants résident à Marseille, en France, alors que le père réside au Canada. Suite au mariage, la mère est venue s'établir au Canada, parrainée par le père, et ils ont eu deux enfants avant que la mère ne quitte en juillet 2012 avec les deux enfants pour Marseille, où réside sa famille. Les parties ont été divorcées en Algérie et la Cour a ordonné au père de payer une pension alimentaire de 68 $ par mois. La mère présente maintenant, au Québec, une demande pour faire modifier la pension alimentaire payable pour les enfants, maintenant

[96] Leave to appeal to SCC refused, 38235 (14 February 2019).

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âgés de 11 ans et 9 ans. Les deux parties reconnaissent la compétence de la Cour supérieure à l'égard de la question de la pension alimentaire pour les enfants, le débat portant plutôt sur la question de savoir si c'est la loi française qui doit être appliquée (ce que propose le père), ou la loi québécoise (comme le prétend la mère).

La Cour accueille la demande en partie. L'obligation alimentaire est régie par la loi du domicile du créancier. Par conséquent, c'est le droit français que doit appliquer la Cour pour fixer la pension alimentaire appropriée. La Cour considère qu'une pension alimentaire de 1 000 $ par mois, limitée ou réduite à ce montant pour tenir compte des frais substantiels de voyage qui devront être dépensés par le père pour exercer ses accès, est appropriée. Sur la question de la rétroactivité de la pension alimentaire, vu que la loi du créancier permet d'obtenir des aliments, c'est cette loi qu'il faut appliquer. Il n'y a pas lieu, en vertu du droit français, de faire débuter la pension alimentaire à une autre date que celle du dépôt de la demande en justice.

Statut des obligations

Acte juridique — contrat

Beterbiev v Groupe Yvon Michel inc, 2018 QCCS 2536

The plaintiff was a light heavyweight boxer from Russia who came to Quebec to begin his professional career. He entered into a promotion contract with the defendant, which was expressly governed by the law of the State of Nevada. The contract was entered into in 2015 for a period of at least six years. The choice of Nevada law was to avoid a rule limiting boxing promotion contracts to two years, as part of Quebec regulations about contact sports. The court held that it was a legitimate choice of law because the agreement was an international contract in terms of where it was to be performed. It therefore was not subject to the proviso in Article 3111 of the *CcQ*, which preserves the applicability of mandatory provisions of a state's law if the agreement contains no "foreign element" in relation to that state.

Plant v Estate of Sorger, 2018 QCCS 152

The plaintiff had lent money, or given money in trust, to his late partner. The two never lived together and maintained separate residences for themselves and their respective children. The plaintiff sued to recover the amounts lent or given in trust from the partner's estate, which was administered in Quebec, where she was living when she died. One issue was whether the estate's obligations were governed by the law of Ontario, where the plaintiff had lived throughout, or that of Quebec.

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In relation to one set of loans, which were made when the partner was living in Quebec, the court applied the presumption in Article 3113 of the *CcQ* that a juridical act is "most closely connected with the law of the State where the party who is to perform the prestation which is characteristic of the act has his residence." The prestation that is characteristic of a contract of loan is the obligation by the creditor to advance the funds. The plaintiff advanced the funds in Ontario and so Ontario was the "state" to which the loans were most closely connected.

As for the other amounts claimed, both parties were residing in Ontario when those funds were made available. Since there were no foreign elements, the law of Ontario applied under the proviso in Article 3111 of the *CcQ*.[97]

[97] The second paragraph of article 3111 reads, "Where a juridical act contains no foreign element, it remains nevertheless subject to the mandatory provisions of the law of the State which would apply in the absence of a designation." It is a proviso to the first paragraph, according to which a juridical act, whether or not it contains any foreign element, is governed by the law expressly or impliedly designated in the act.

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