Canadian Cases in Private International Law in 2017

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Jurisprudence canadienne en matière de droit international privé en 2017

compiled by / préparé par
JOOST BLOM

JURISDICTION / COMPÉTENCE DES TRIBUNAUX

Common Law and Federal

Jurisdiction *in personam*

Jurisdiction simpliciter — *non-resident defendant — attornment*

Note. In *Stewart v Stewart*,[1] the defendant was held to have attorned to the BC court's jurisdiction by filing a substantive pleading. Filing a challenge to jurisdiction before doing so would have provided immunity from attornment under the BC rules of court,[2] but the defendant had not availed himself of this rule. In a Nova Scotia case, *Wamboldt Estate v Wamboldt*,[3] the defendant was held to have attorned by filing a combined challenge to jurisdiction and pleading on the merits.

Jurisdiction simpliciter — non-resident defendant — agreement to submit to jurisdiction

Note. In *TFS RT Inc v Dyck*,[4] the Ontario court found it had jurisdiction *simpliciter*, based on the presumptive connecting factor that the contract

Joost Blom, Professor Emeritus, Peter A. Allard School of Law, University of British Columbia (blom@allard.ubc.ca).

[1] 2017 BCSC 1532, 100 BCLR (5th) 410.

[2] *Supreme Court Civil Rules* , BC Reg 168/2009 as amended, Rule 21–8(1)(c).

[3] 2017 NSSC 288.

[4] 2017 ONSC 2780.

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being sued upon was made in the province. A clause agreeing that the court would have jurisdiction was seemingly overlooked.

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

Note 1. An Ontario court held in *Integrity Worldwide Inc v Knapp*[5] that it had jurisdiction *simpliciter* in a claim against a corporation in the United States that had allegedly received trade secrets from the plaintiff's former employee. The employment contract was made in Ontario, and the foreign company's liability was inextricably linked to the employee's, thus providing the required connection with Ontario. There were also claims that the foreign company was liable in conspiracy and inducing breach of contract, torts that were committed in Ontario. Another case in which a contract's having been made in the province was held to provide a sufficient connection to found jurisdiction *simpliciter* was *MacDonald v Burke*.[6] The claim was in tort for wrongful interference with a partnership consisting of companies from Nova Scotia and New Brunswick, but the means by which the interference was said to have taken place was withdrawal of business under a contract made in Alberta.

Note 2. The rules by which jurisdiction *simpliciter* is determined have been given statutory form in the *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*), which has been adopted by three provinces, including British Columbia.[7] In the other common law provinces and territories, the substantive limits on jurisdiction have been determined, since *Club Resorts Ltd v Van Breda*,[8] using judge-made "presumptive connecting factors." These reflect the overarching constitutional requirement that there be a real and substantial connection between the province and either the defendant or the subject matter of the action. The approaches in the statute and the judge-made law are similar enough that even a court in a *CJPTA* province can occasionally lapse into talking about the judge-made "presumptive connecting factors" rather than the statutory presumptions of a real and substantial connection.[9] See *Flying Frog Trading Co v Amer Sports Canada Inc.*[10]

[5] 2017 ONSC 3423.

[6] 2017 ABQB 444 (Master).

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

[8] 2012 SCC 17, [2012] 1 SCR 572, 343 DLR (4th) 577.

[9] *CJPTA* BC, *supra* note 7, s 10.

[10] 2017 BCSC 1885.

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

Note. Jurisdiction was declined in *Northwestpharmacy.com Inc v Yates*[11] because an arbitration clause applied. The defendants could avail themselves of the arbitration agreement because the plaintiff's claims against them treated them as contracting parties. In two Saskatchewan cases, the court not only declined jurisdiction but also made an order, as the *CJPTA* allows, that the proceeding be transferred to another province, notwithstanding that the other province did not have the *CJPTA*. See *JCP Conservation Systems Ltd v Convenience Group Inc*[12] and *Richards Transport Ltd v 7367555 Manitoba Ltd.*[13]

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

Thain v Pattison Outdoor Advertising LP, 2017 ONSC 3973

The plaintiff, an Ontario resident, booked advertising with Pattison, an outdoor advertising agency, to be placed on buses in Winnipeg, Manitoba, that would pass near the Canadian Museum of Human Rights. Pattison was the contractor that provided advertising for Winnipeg Transit, an agency of the City of Winnipeg. Pattison decided subsequently not to accept the advertising and refunded the plaintiff's money. The advertising was to have promoted negative views about the public funding of religious schools in Ontario and Alberta. The plaintiff brought an action in Ontario against the City of Winnipeg and Pattison, claiming that the City of Winnipeg had violated his constitutional right of freedom of expression. Such a claim could be brought only against the City of Winnipeg as a governmental entity, not against a private entity like Pattison.

The Ontario Superior Court dismissed the action for lack of jurisdiction. The only connection with Ontario was the plaintiff's dealing with Pattison but that could only support jurisdiction over the claims against Winnipeg if Pattison was acting as agent for the city. There was no evidence for such a relationship. All the evidence before the court was that the relationship between Pattison and Winnipeg was simply for the contractual provision of services. The court went on to say that even if the connection through Pattison could be considered a presumptive connecting factor with Ontario, the presumption had been rebutted on the facts. Moreover, even

[11] 2017 BCSC 1572, 1 BCLR (6th) 175.

[12] 2017 SKQB 309.

[13] 2017 SKQB 391.

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if jurisdiction *simpliciter* were established, jurisdiction should be declined on *forum non conveniens* grounds. The connections with Ontario were tenuous, and the issue, whether the limits on the plaintiff's freedom of expression were reasonable, was best determined in Manitoba.

Note. Other cases in which jurisdiction *simpliciter* was held not to have been shown were *Koutros v Persico USA Inc*[14] (US-based former employee could not sue US employer in Ontario); *King v Giardina*[15] (no jurisdiction to sue Italian lawyers in Ontario for having acted against the plaintiff in Italian litigation, and the claim was an abuse of process anyway); and *Yip v HSBC Holdings plc*[16] (class proceeding brought under Ontario securities legislation by purchasers on foreign stock exchanges of shares in a UK company; no presumptive connecting factor with Ontario).

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

Note. In *Hurley v Zutz*,[17] a Nova Scotia court ordered the transfer of a proceeding to Alberta on the basis that the Nova Scotia court lacked territorial competence. Because of the ground for transfer the court made no provision for return of the proceeding to Nova Scotia if the Alberta court were to dismiss the action.

Jurisdiction simpliciter — *interlocutory order against non-resident non-party*

Google Inc v Equustek Solutions Inc, 2017 SCC 34, [2017] 1 SCR 824, 410 DLR (4th) 625

In 2011, Equustek, a British Columbia technology company, commenced an action in British Columbia against one individual and two corporate defendants (collectively Datalink). Equustek claimed that Datalink, then also based in British Columbia, was selling networking hardware that it (Datalink) had developed making illegitimate use of Equustek's confidential information and trade secrets. Equustek demanded that Datalink, which had formerly been Equustek's distributor, cease filling orders for Equustek equipment by providing the equipment that it made itself. It also demanded that Datalink cease referring to Equustek and its products on its websites. Datalink filed statements of defence.

[14] 2017 ONSC 3001.

[15] 2017 ONSC 1588.

[16] 2017 ONSC 5332, aff'd 2018 ONCA 626.

[17] 2017 NSSC 46, 7 CPC (8th) 401.

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The BC Supreme Court granted an injunction against Datalink that, *inter alia*, prohibited it from referring to Equustek or any of Equustek's products on its websites and required it to supply Equustek with a list of customers who had ordered an Equustek product from Datalink. The injunction was not complied with, and Equustek obtained a fresh injunction. At that point, Datalink ceased to take part in the proceedings and left the jurisdiction. Equustek obtained a *Mareva* injunction,[18] freezing Datalink's worldwide assets. The judge who made that order found that Datalink had incorporated a "myriad of shell corporations in different jurisdictions" and expanded its activities so as allegedly to disclose more of Equustek's trade secrets. A further injunction prohibited Datalink from dealing with intellectual property of various kinds, and a contempt order was issued. Despite these various orders, Datalink continued to carry on its business from an unknown location, selling the impugned product on its websites to customers all over the world.

Equustek did not know where Datalink or its suppliers were and had no means of getting the companies hosting Datalink's websites to remove them. Therefore, in September 2012, it approached Google to have the latter de-index Datalink's websites. Google responded by asking Equustek to obtain an order prohibiting Datalink from carrying on business on the Internet, which would provide a basis for Google's removing specific webpages. Equustek appeared in the BC court with Google to obtain such an order, and Google proceeded to de-index 345 specific webpages associated with Datalink. It did not, however, de-index all of the Datalink websites because its internal policy was to de-index only specific pages, not entire websites. Datalink was therefore able simply to shift content to new webpages and carry on as before. Moreover, Google was willing only to de-index Datalink pages from its "google.ca" search website, not from any of the other search websites that it operated. Although each of these, like the ".ca" website, was aimed at a particular country, all of them could be accessed from anywhere in the world by entering the appropriate uniform resource locator. Since most of the customers for Datalink's allegedly infringing product were outside Canada, the de-indexing from google.ca, but no other Google search site, did not have the desired protective effect.

Equustek then obtained from the BC court an injunction ordering Google to "cease indexing or referencing in search results on its internet search engines the [Datalink] websites … including all of the subpages and subdirectories of the listed websites, until the conclusion of the trial of this action or further order of this court." The chambers judge granted the order. She noted that Google controlled 70–75 percent of the global searches on the Internet and that Datalink's ability to sell its impugned

[18] Named after *Mareva Compania Naviera SA v International Bulkcarriers SA*, [1975] 2 Lloyd's Rep 509 (CA).

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product was largely contingent on customers being able to locate its websites through Google's search engine. She held that irreparable harm was being facilitated through Google's search engine and that Equustek had no alternative but to require Google to de-index the websites. She also found that Google would not be inconvenienced by doing so and that, for the order to be effective, the de-indexing had to extend to all of Google's search results, not just on google.ca. The BC Court of Appeal upheld the judge's order.

The Supreme Court of Canada, by a majority of seven to two, affirmed the decision. Most of the Supreme Court's reasons are concerned with the power to grant injunctions against non-parties and the requirements for obtaining such injunctions. The jurisdiction to grant an injunction against a non-party was well established — *Mareva* injunctions being the best-known example — and the jurisdiction to issue them against non-parties outside the jurisdiction was equally well established: "When a court has *in personam* jurisdiction, and where it is necessary to ensure the injunction's effectiveness, it can grant an injunction enjoining that person's conduct anywhere in the world."[19] The only way that the interlocutory injunction attained its objective was to have it apply globally, given that Datalink carried on business on the Internet with global reach. The worldwide effect of the injunction did not mean that the balance of convenience favoured Google. It was not required to take steps around the world, only to take steps where its search engine was controlled, something it acknowledged it could do with relative ease.

The argument that the breadth of the order violated international comity likewise held no water. As the chambers judge had noted, most countries probably recognize intellectual property rights and view the selling of pirated products as a legal wrong. Nor was it a serious concern that the order might violate freedom of expression abroad. If Google had evidence that complying with the order would compel it to violate the laws of another jurisdiction, including freedom of expression, it could apply to vary the interlocutory order accordingly.

The premise that the court granting the injunction must have jurisdiction *in personam* over the non-party, and the question whether it was satisfied here, were examined only briefly in the Supreme Court's reasons. The Court of Appeal, which examined them at more length,[20] held that *in personam* jurisdiction over Google was established by evidence that it did business in British Columbia despite having no physical presence there. Google directed advertising specifically to the local market, and, using

[19] *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 38, [2017] 1 SCR 824, 410 DLR (4th) 625 [*Google*].

[20] *Equustek Solutions Inc v Jack*, 2015 BCCA 265 at paras 51–54, 386 DLR (4th) 224.

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proprietary web crawler software, it gathered data about the BC users of its services. The Supreme Court of Canada simply summarized the Court of Appeal's reasoning and said that Google did not challenge those findings.[21]

The two dissenting judges agreed with the majority that the BC court had jurisdiction to grant the injunction but would have held that under the circumstances it should not have granted it. Essentially, they thought that, first, Equustek had not demonstrated it had no other viable means of obtaining interlocutory relief against Datalink, and, second, the injunction gave Equustek, in effect, a quasi-permanent remedy without having to prove the merits of its case against Datalink.

Note. Soon after the Supreme Court of Canada's decision, Google obtained from the United States District Court for the Northern District of California a permanent injunction against any enforcement of the BC interlocutory injunction in the United States.[22] The District Court's order, which was granted in default of appearance by Equustek, was based on a finding that enforcement would cause Google irreparable harm. It would penalize it for carrying particular content on its websites and so contravene an immunity granted to Internet service providers by US law.[23] Google then applied to the BC Supreme Court to have it set aside or vary its injunction in the light of the District Court's permanent injunction against enforcement. The BC court dismissed the application on the ground that Google had not shown circumstances justifying such relief.[24] A key point was that the District Court had not said that complying with the BC order would violate US law. Its decision showed only that US law protected Google from any liability if it chose not to comply.[25]

Declining jurisdiction *in personam*

Whether application to decline jurisdiction is barred by attornment

Note. A BC court held, in *Andrew Peller Ltd v Mori Vines Inc*,[26] that once a defendant has taken a step that amounts to attornment to the jurisdiction, the defendant is barred from asking the court to decline jurisdiction on *forum non conveniens* grounds. Another BC court held that attornment does

[21] *Google*, *supra* note 19 at para 37.

[22] *Google LLC v Equustek Solutions Inc*, 2017 US Dist LEXIS 206818 (ND Cal, 14 December 2017).

[23] See *Google LLC v Equustek Solutions Inc*, 2017 US Dist LEXIS 182194 (ND Cal, 2 November 2017) (interlocutory injunction proceeding).

[24] *Equustek Solutions Inc v Jack*, 2018 BCSC 610.

[25] *Ibid* at para 20.

[26] 2017 BCSC 203, 97 CPC (7th) 271.

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not bar the defendant from asking the court to decline jurisdiction on account of a forum selection clause — *Wilkie v One Earth Brands Inc.*[27] An Alberta court reached a similar conclusion in *Meta4Hand Inc v Research in Motion Ltd.*[28]

Forum selection clause — validity and interpretation

Note. In *DICE-Design Import Consulting Experts Ltd v Kuehne & Nagel Ltd*,[29] the court refused to decline jurisdiction, given that the forum selection clause at issue said only that the stipulated extra-provincial court would have jurisdiction, not that it would have exclusive jurisdiction. The defendant in *Bidell Equipment LP v Caliber Midstream GP LLC*[30] had pleaded that the contract containing the forum selection clause had not been concluded and, having taken this position, was held unable to rely on the clause.

Forum selection clause — discretion not to enforce

Douez v Facebook Inc, 2017 SCC 33, [2017] 1 SCR 751, 411 DLR (4th) 43

The plaintiff, Douez, sought certification of a class action in British Columbia on behalf of all BC residents that had had their name or picture used by Facebook in its Sponsored Stories advertising program. This used the name and picture of Facebook members to advertise merchants and products to other members who were "friends" of those pictured. The action alleged that Facebook's use of the names and images of members in this way was done without their consent and so was contrary to a provision of the BC *Privacy Act.*[31] The plaintiff class was estimated to comprise about 40 percent of the population of the province. Facebook brought a preliminary motion to stay the action on the basis that each Facebook member, as part of the terms of service, had agreed to a forum selection and choice-of-law clause that required disputes to be resolved in California according to Californian law.

The chambers judge refused the stay.[32] She based her decision mainly on a section of the *Privacy Act* that said that actions under the Act must

[27] 2017 BCSC 1202.

[28] 2017 ABQB 23.

[29] 2017 NSSC 97, 9 CPC (8th) 173.

[30] 2017 ABQB 76 (Master).

[31] RSBC 1986, c 373, s 3(2) [*Privacy Act*]: "It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other … consents to the use for that purpose."

[32] *Douez v Facebook Inc*, 2014 BCSC 953.

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be heard in the BC Supreme Court.[33] She held that this implicitly invalidated a contractual choice of any other forum, domestic or foreign. The Court of Appeal reversed her decision.[34] It held that the section, on its proper construction, only designated the court in which an action in British Columbia must be brought. It was not intended to bar the parties from agreeing to a court elsewhere.[35]

The Supreme Court of Canada agreed six to one that the section of the Act requiring actions to be brought in the BC Supreme Court should not be interpreted as rendering void the forum selection clause in Facebook's terms of service.[36] They also agreed that the omission of any reference to forum selection clauses in the *CJPTA*,[37] which codifies the law on jurisdiction in British Columbia, did not alter the established law that forum selection clauses were normally to be given deference. The only exception is if the plaintiff can show "strong cause" for the court's taking jurisdiction notwithstanding the clause.[38] In this case, however, four judges[39] out of the seven held that, contrary to the Court of Appeal's view,[40] the circumstances triggered the "strong cause" exception and that the clause should not be enforced.

A number of factors were referred to in support of the "strong cause" conclusion. First, this was a consumer contract. In this context, the deference given to forum selection clauses in commercial contracts, and the corresponding narrow view taken of "strong cause," were out of place. The consumer's relinquishing important rights, with no realistic opportunity to bargain for better terms, might be a compelling reason to deny a stay. Private international law should keep in step with the new ubiquity of online

[33] *Privacy Act*, *supra* note 31, s 4.

[34] *Douez v Facebook Inc*, 2015 BCCA 279, 77 BCLR (5th) 116 [*Douez* BCCA], noted in Joost Blom, "Canadian Cases in Private International Law in 2015" (2015) 53 CYIL 560 at 580 [Blom (2015)].

[35] The Court of Appeal added, *ibid* at paras 48–58, that the BC legislature could not, even if it wanted to, lay down jurisdictional rules that operated extraterritorially so as to dictate that a particular type of action could not come before a foreign court. The Supreme Court of Canada did not refer to this "extraterritorial" point in the Court of Appeal's reasoning. It is suggested with respect that the Court of Appeal overstated the effect of what a statutory provision invalidating a forum selection clause does. It does not, even on its face, bar a foreign court from taking jurisdiction. It only guarantees a litigant the right to bring an action in British Columbia.

[36] The only judge to take the opposite view was Abella J. *Douez v Facebook Inc*, 2017 SCC 33 at para 107, [2017] 1 SCR 751, 411 DLR (4th) 434 [*Douez*].

[37] *CJPTA* BC, *supra* note 7.

[38] The leading Canadian authority is *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27, [2003] 1 SCR 450 [*Pompey*].

[39] One of the four, Abella J, also held that the clause was invalid as a matter of contract law.

[40] *Douez* BCCA, *supra* note 34 at paras 74–80.

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consumer contracts. Courts should take account of all the circumstances of the case, including public policy considerations relating to gross inequality of bargaining power between the parties and the nature of the rights at stake. Gross inequality of bargaining power was not *per se* a strong cause for refusing to enforce a forum selection clause, but it was a relevant circumstance.

Turning to the facts, the court noted, first, that this was a case of strong inequality of bargaining power, exacerbated by the fact that, unlike normal retail transactions, there were few comparable alternatives to Facebook, a social networking platform with extensive reach. Second, Canadian courts have a greater interest in adjudicating cases impinging on constitutional and quasi-constitutional rights because these rights play an essential role in society and embody key Canadian values. The right at stake in the proposed class action was a statutory privacy right. Courts had repeatedly recognized that privacy was a right with quasi-constitutional status. Only a local court's interpretation of privacy rights would provide clarity and certainty about the scope of the rights.

The court added two secondary factors also pointing against enforcement of the clause. One was that the interests of justice favoured trial in British Columbia, given that it was unclear whether a California court would apply the *Privacy Act* to Douez's claim at all. Even if it could or would do so, the BC court was better placed to interpret the intent of the legislation and decide whether the choice of California law to govern the parties' contract should be regarded as an opting-out of rights under the Act. The other secondary factor was that the inconvenience and expense for the plaintiffs to have to litigate in California would be much more burdensome than it would be for Facebook to have to defend an action in British Columbia. The three dissenting judges would have held that the forum selection clause was valid and that the plaintiff had not shown strong cause to decline to enforce it.

Note. The majority's reliance on multiple factors to find that the "strong cause" exception was made out, while refraining from saying that any one of them was decisive, makes the impact of this decision very hard to predict. Taken at its broadest, it can be seen as making forum selection clauses presumptively unenforceable in the consumer context. The dissenting judges emphatically denounced this potential effect. On the other hand, it is possible to limit the scope of the decision on the basis that the nature of the particular claim, a "quasi-constitutional" right of privacy, was pivotal.[41]

[41] The accuracy of the "quasi-constitutional" description of the claim in *Douez* is debatable. The relevant provision, even if it is in the *Privacy Act*, *supra* note 31, is arguably concerned, not with a right of privacy, but with an economic right not to have one's name or picture used for someone else's profit. The common law equivalent is the tort of appropriation of personality.

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It would be entirely possible for a later court to hold that even the very clause held unenforceable in *Douez* is enforceable if the consumer sues Facebook for damages or some other standard contractual remedy. The Supreme Court was explicit that the nature of the rights in issue is one of the basic aspects of the "strong cause" evaluation.

One case, *Guest Tek Interactive Entertainment Ltd v PriceWaterhouseCoopers LLP*,[42] has already distinguished *Douez* on the basis that the accounting firm seeking to enforce, against an Alberta client, a forum selection clause in favour of an Ontario court was not a huge multinational like Facebook. The clause was enforced.

Forum non conveniens — *claim for financial loss*

Note. Although the corporate defendant in a wrongful dismissal suit was present in Manitoba in *Fernandes v Wal-Mart Canada Corp*,[43] the Manitoba court ordered a stay in favour of Ontario, where the plaintiff had been employed. The fact that the action was apparently statute barred in Ontario was no ground for refusing a stay because the plaintiff had deliberately let the time run in that province.

Forum non conveniens — *claim for injury to person or damage to property*

Garcia v Tahoe Resources Inc, 2017 BCCA 39, 407 DLR (4th) 651, 92 BCLR (5th) 249[44]

The plaintiffs appealed from a stay, on the ground of *forum non conveniens*, of an action brought in British Columbia by six Guatemalan farmers and a student for injuries they suffered at the hands of security staff of a Guatemalan mining company during a protest at the gates of the mine. The mining company was a subsidiary of Tahoe, a BC corporation, the central management of which was in Nevada.[45] The action was brought against Tahoe on the basis that it was either directly or vicariously liable for the wrongs committed because it had authorized the use of violence by its subsidiary's head of security or been negligent in implementing security measures at the mine. The chambers judge, based on the evidence presented, did not accept that the defendant company could not be sued in Guatemala or that, if it were sued there, justice could not be obtained. Under Guatemalan law, it would be vicariously liable if its personnel directed or

[42] 2017 ABQB 567.

[43] 2017 MBCA 96, 417 DLR (4th) 444.

[44] Leave to appeal to SCC refused, 37492 (8 June 2017).

[45] *Garcia v Tahoe Resources Ltd*, 2015 BCSC 2045, noted in Blom (2015), *supra* note 34 at 585.

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supervised the alleged battery. The plaintiffs could seek to have the defendant added to an existing criminal proceeding in Guatemala against its subsidiary. The convenience of the parties and their witnesses made Guatemala a clearly more appropriate forum.

The Court of Appeal reversed the chambers judge's decision and held that the action should proceed. The court admitted new evidence submitted by the plaintiffs that cast doubt on whether the criminal proceeding in Guatemala would proceed in a timely manner or at all. The new evidence led to the inescapable conclusion that the criminal proceeding currently under way was not a clearly more appropriate forum for the plaintiffs' claims. The judge also erred in concluding that a civil suit in Guatemala was clearly a more appropriate forum. The Court of Appeal held that three factors weighed against such a finding: the limited discovery procedures available to the plaintiffs; the expiration of the limitation period for bringing a civil suit; and a "real risk" that the plaintiffs would not obtain justice in Guatemala.

The onus was not on the plaintiffs to prove that Guatemala was incapable of providing justice. Rather, evidence of corruption and injustice in the proposed alternative forum should be considered as a single factor among all relevant factors to be weighed together in one stage in the *forum non conveniens* analysis, with the overall burden on the defendant to establish that the alternative forum is in a better position to dispose of the litigation fairly and efficiently. The principle of comity requires that Canadian courts be cautious in determining that a foreign court is unlikely to provide justice. The "real risk" standard was framed with this in mind and should be adopted.[46] The quality of evidence regarding the risk of unfairness should dictate the weight that is attached to that factor. Broad assertions of corruption would be given limited weight, whereas detailed and cogent evidence of corruption should attract significant weight. The Court of Appeal placed moderate weight on the "real risk" factor in reaching its overall conclusion that Tahoe had not met the onus of showing that British Columbia was *forum non conveniens*.

Araya v Nevsun Resources Ltd, 2017 BCCA 401, 4 BCLR (6th) 91[47]

The plaintiffs, refugees from Eritrea who did not live in Canada, brought an action against Nevsun, a BC mining company, claiming that the plaintiffs had been subject to forced labour and other human rights abuses while working at the Bisha gold mine developed in Eritrea by Nevsun under

[46] Originally in UK jurisprudence. *AK Investment CJSC v Kyrgyz Mobil Tel Ltd*, [2011] UKPC 7, [2012] 1 WLR 1804 (an appeal from the Isle of Man).

[47] Leave to appeal to SCC granted, 37919 (14 June 2018).

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a commercial venture with the Eritrean state. Some of the claims were based on BC law relating to torts, including conversion, battery, unlawful confinement, negligence, conspiracy, and negligent infliction of mental distress. Other claims were pleaded in terms of breaches of *jus cogens* or peremptory norms of customary international law such as forced labour and torture. These raised the issue whether such claims could form the basis of a civil action. Some claims also raised issues of corporate immunity and whether the act of state doctrine raised a complete defence to the plaintiffs' claims.

Nevsun's liability was pleaded in terms of its active participation in the development of the mine; its condonation of human rights abuses by contractors and by the Eritrean military, who were involved with the contractors; its aiding and abetting the conduct of the contractors; its liability for the conduct of its Eritrean subsidiary;[48] vicarious liability for the conduct of the contractors and the Eritrean military that furthered Nevsun's commercial objectives; participation in a civil conspiracy with the Eritrean parties; and negligence for breach of a duty of care owed to the plaintiffs.

The chambers judge refused a stay of proceedings on the ground of *forum non conveniens*,[49] and the Court of Appeal upheld that decision. A good part of the argument on appeal revolved around the chambers judge's reliance on evidence as to the poor state of the judicial system in Eritrea. In holding that the judge had made no reviewable error in his approach, the court described him as facing a stark choice: the expense, inconvenience, and practical difficulties of mounting a trial in British Columbia concerning conduct in a faraway and inaccessible country against the prospect of no trial at all or a trial in an Eritrean court, possibly presided over by a functionary with no real independence from the state — a state that was implicated in the case. It was also relevant that grave abuses of human rights were alleged. The cost, inconvenience, and expense that would be involved in a trial in British Columbia must be looked at in the light of the gravity of the plaintiffs' allegations.

The court also affirmed the chambers judge's refusal to dismiss the action on the ground of the act of state doctrine. The scope of the act of state doctrine in Canadian law was unclear but, based on any of the possible formulations to be found in the English (mainly) case law, the doctrine did not apply here. The plaintiffs' claims did not purport to challenge the legality or validity of Eritrea's legislation or other laws nor the legal effect of an act of the Eritrean government in relation to events in that country. The claims were for injuries caused by acts on the part of Nevsun

[48] The subsidiary was owned 60 percent by Nevson through intermediate entities and 40 percent by Eritrean state companies.

[49] *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856, noted in Joost Blom, "Canadian Cases in Private International Law in 2016" (2016) 54 CYIL 585 at 599 [Blom (2016)].

in connection with wrongs alleged to have occurred in Eritrea that were not contemplated by any legislation or official policy. Nor was there any suggestion that Eritrea's ownership or possession of property, or, indeed, its legal position in general, would be affected by a judgment in favour of the plaintiffs. Most importantly, even if the act of state doctrine might apply, the court should apply the public policy exception to the doctrine. The nature of the grave wrongs asserted was such that they could not be justified by legislation or official policy, nor had it been argued in this case that they were.

Finally, the court also affirmed the judge's refusal to strike out the pleadings related to violations of customary international law by Tahoe and those for whom it was responsible. It could not be said that a civil claim based on violations of international law was bound to fail. While the plaintiffs faced significant legal obstacles in making good such a claim, it could not be said that recognizing a norm of customary international law as the basis for some type of private law remedy would bring the entire system of international law crashing down. No state was a party to the present proceeding; Eritrea was fully protected by state immunity, and the prohibition against torture, on which the plaintiffs' international law claims rested in part, was universally accepted.

Forum non conveniens — *parallel proceeding in the other forum*

Note. In *Quanta Services Inc v Rokstad Power Corp*,[50] the plaintiff's BC action against four parties, based on an alleged conspiracy, was stayed as against one of those parties on the basis that the plaintiff was also suing that party in Missouri, the plaintiff's home jurisdiction. The plaintiff had attempted to include the other three defendants in the Missouri action, but the Missouri court had held it had no jurisdiction over the claims against them, so there was no basis for staying the BC action as far as the other three were concerned. See also *Lerner v Lerner Estate*,[51] noted below under Succession and administration; *Jurisdiction — action against executors for breach of duty.*

Class actions

Jurisdiction simpliciter *found to exist with respect to class action claim*

Airia Brands v Air Canada, 2017 ONCA 792, 417 DLR (4th) 467

A class action was brought against several airlines, claiming they had overcharged customers who dealt with a particular freight forwarder. The claim

[50] 2017 BCSC 1858, 5 BCLR (6th) 205.

[51] 2017 BCCA 408, 6 BCLR (6th) 43.

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was framed as one in conspiracy to increase the price between 2000 and 2006. It was sought to include plaintiffs that had dealt with the airlines outside Ontario (absent foreign claimants (AFCs)). The Ontario court of Appeal held that AFCs could be included in the class if the claims against them met the real and substantial connection test for jurisdiction. A sufficient connection existed, the court held, between the subject matter of the AFCs' claims and Ontario, and the motion judge had been wrong to decline jurisdiction.

On the real and substantial connection issue, the court referred to all three airlines carrying on business in Ontario, the three representative plaintiffs being present in Ontario and consenting to the jurisdiction, and the plaintiffs' having purchased shipping services through agents in Ontario. Meetings in furtherance of the alleged conspiracy took place in Canada, including one in Ontario, and the tortious conduct related to shipments that were linked to Canada.

In addition to the existence of a real and substantial connection with Ontario, jurisdiction to include the AFCs also required that there be common issues between their claims and those of the representative plaintiff. This was met; the common issues were mainly those with respect to liability in conspiracy and for breaches of competition law. A third requirement for including the AFCs was that procedural safeguards of adequacy of representation, adequacy of notice, and the right to opt out be in place. This requirement was also satisfied. Even with the three requirements met, jurisdiction was only rebuttably presumed, but, in this case, the assumption of jurisdiction had not been rebutted.

As for *forum non conveniens*, the airlines had not shown that another jurisdiction had a real and substantial connection to the claim and also offered a clearly more appropriate forum. To be part of the class, AFCs must have purchased air freight services from one of the airlines for shipments from or to Canada. A majority of these were rendered for shipments from or to Ontario. There was no litigation in any other jurisdiction. The availability of class actions favoured Ontario as the most efficient and cost-effective forum. The claims were not time-barred if the proceeding was brought in Ontario but might be time-barred elsewhere. The judge had been wrong to accord primacy to the question whether an Ontario judgment would be recognized and enforced elsewhere.

Note. See also *Yip v HSBC Holdings plc*,[52] noted above under Jurisdiction *in personam*; *Jurisdiction* simpliciter — *non-resident defendant — claim for financial loss — jurisdiction found not to exist*, and *Das v George Weston Ltd.*,[53]

[52] 2017 ONSC 5332, aff'd 2018 ONCA 626.

[53] 2017 ONSC 4129.

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noted below under Choice of law; Common law and federal; Tort; *Parent company's failure to take care for safety of those put at risk by operations of a supplier — place of the tort.*

Jurisdiction — defining the plaintiff class — jurisdictions where claims subject to different laws

Walter v Western Hockey League, 2017 ABQB 382, 62 Alta LR (6th) 85, aff'd 2018 ABCA 188

A class action was brought on behalf of former major junior hockey players against their leagues, owners, and clubs. The defendants were located in three provinces and the states of Washington and Oregon. The Alberta court decided to exclude the claims against the defendants in the United States. On the evidence, the law was unsettled in the United States on whether athletes like the plaintiffs were employees. It would be inappropriate for a Canadian court to tell two American states how their law should be interpreted and applied. The actions could be brought in those states using the procedures available there.

Matrimonial causes

Support claims — jurisdiction simpliciter

Cheng v Liu, 2017 ONCA 104, 411 DLR (4th) 672

The parties were divorced in China after the Superior Court of Justice stayed the wife's Ontario divorce application on the ground of *forum non conveniens*. The Chinese court refused to make support orders because it had no evidence of the income of the husband, who lived in Canada. The Ontario court now lifted the stay in order that the wife's application for child support could proceed. Because the parties had now been divorced, it was not possible to decide child support as corollary relief under the *Divorce Act*.[54] However, relief could be granted under the Ontario *Family Law Act*.[55] Case law established that if a Canadian court granted a divorce without adjudicating on child support, provincial legislation could be invoked, and the same principle applied where a foreign court granted a divorce without dealing with support. In this case, the Chinese court had expressly ruled that the issue of child support was better dealt with by the Ontario courts.

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

[55] RSO 1990, c F.3.

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Matrimonial property — forum conveniens

Hampton v Boychuk, 2017 SKQB 220, 98 RFL (7th) 165[56]

The parties, who were not married, lived together from 2002 to 2015, with a residence in Alberta and one in Saskatchewan. The petitioner — the woman — sought a division of the Saskatchewan home as the matrimonial home and an unequal division of other family assets. The respondent — the man — applied to the Saskatchewan court for an order transferring the proceeding to Alberta.[57] The respondent had begun an action in Alberta claiming that he owned all of the property and the petitioner had no proprietary interest. Alberta law gave someone in the petitioner's position only such rights as she could show under unjust enrichment and constructive trust.

The court held that it had territorial competence under the *CJPTA*[58] because most, if not all, the property in issue was in Saskatchewan. The respondent had not demonstrated that Alberta would be a more appropriate forum. The judge made it fairly clear that he thought that Saskatchewan's inclusion of unmarried couples in matrimonial property legislation was the more progressive regime, which supported his conclusion that the fair and efficient working of the Canadian legal system,[59] among other factors, favoured Saskatchewan as the forum for the petitioner's claim. The Saskatchewan Court of Appeal gave leave to appeal[60] on two grounds: whether the chambers judge erred by concluding that the laws of Saskatchewan were more fair for the adjudication of the property dispute and whether the judge erred by failing to apply properly the *CJPTA* in failing to transfer the proceeding to Alberta.

Infants and children

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

Note. An Ontario court in *H v A*[61] held that, because the child was habitually resident in Egypt at the time the mother brought the child to Ontario without the father's consent, there was no jurisdiction under the *Children's*

[56] Leave to appeal to Sask CA granted (*sub nom Boychuk v Hampton*), 2017 SKCA 85 [*Hampton*].

[57] Under the *CJPTA* SK, *supra* note 7.

[58] *Ibid.*

[59] One of the non-exhaustive list of *forum non conveniens* factors in the *CJPTA* SK, *supra* note 7, s 10(2)(f).

[60] *Hampton*, *supra* note 56.

[61] 2017 ONSC 703, 92 RFL (7th) 431.

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Law Reform Act[62] to decide permanent custody, and the child must be returned to Egypt.

Custody and access — extraprovincial order — enforcement

Note. In *SC v HS*,[63] the BC court enforced a custody order made in Taiwan. The mother, who resisted enforcement, had participated in the Taiwanese proceedings and was ordered to return the child to Taiwan under provincial legislation.[64]

Child abduction — Hague Convention

Rifkin (Central Authority for) v Peled-Rifkin, 2017 NBCA 3, 89 RFL (7th) 194

The New Brunswick Court of Appeal upheld the trial judge's refusal to order the return of three children to Israel, where the father lived, on the ground that the children were habitually resident in New Brunswick at the time of the alleged wrongful detention. The parents, then still together, had begun the process of emigrating from Israel to Canada in 2011 and pursued it for four years. All of the family members became permanent residents of Canada. The parties followed through on their relocation and immigration plans even in the face of their divorce. For a time, there was an intention to return to Israel in 2016 but that was so the family could run their seasonal business. In those circumstances, the judge was entitled to conclude that the parties had a demonstrated intention to settle in New Brunswick at the time when they and their children moved there in 2015.

Note. See also *Basic v Ivakic*,[65] refusing to order the return of a child on the basis that she had "settled in" to her new environment.

Adult guardianship

Jurisdiction simpliciter — forum conveniens

Pellerin v Dingwall, 2017 BCSC 680, 96 BCLR (5th) 94[66]

[62] RSO 1990, c C.12, s 22.

[63] 2017 BCSC 277.

[64] *Family Law Act*, SBC 2011, s 75(1). This provision was used, rather than the *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, CTS 1983/35, 19 ILM 1501, because Taiwan is not a party to the convention.

[65] 2017 SKCA 23, 409 DLR (4th) 571.

[66] Varied, 2018 BCCA 110, reversing certain orders on the ground that, having declined jurisdiction in the matter, the court lacked jurisdiction to make them.

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Although it held it had territorial competence in the matter, the BC Supreme Court declined jurisdiction in an adult guardianship application made by a daughter in respect of her mother. The daughter had surreptitiously taken her mother, aged eighty, from a care facility in Alberta about two years ago and returned her to the house the two of them had previously shared in British Columbia. For most of her life, before moving in with the daughter, the mother had lived in Alberta. A court in Alberta had already, in 2016, appointed the daughter's brother as guardian and trustee under the relevant Alberta legislation. The daughter had unsuccessfully opposed her brother's application in the Alberta court.

The court held it had territorial competence on the basis that the proceeding was presumed to have a real and substantial connection with the province since it concerned the determination of the personal status or capacity of a person who was ordinarily resident there.[67] The conclusion that the mother was ordinarily resident in British Columbia was not inconsistent with the Alberta court's conclusion that she was ordinarily resident in that province. She had sufficient ongoing connections with each. The daughter's attornment to the jurisdiction of the Alberta court in her brother's proceeding did not, of itself, bar her from invoking the jurisdiction of the BC court.

There was nothing improper or inappropriate with the Alberta court's exercise of jurisdiction, and the need to give "full faith and credit" to its judgment militated strongly in favour of declining to exercise jurisdiction. The daughter's attornment was relevant to the question whether the court should decline jurisdiction. The daughter took the opportunity in the Alberta proceeding to press her position that she and not her brother should be appointed as guardian and trustee there. This made it inappropriate for the BC court to exercise its jurisdiction to hear her petition.

Succession and administration

Jurisdiction — action against executors for breach of duty

Note. In *Lerner v Lerner Estate*,[68] a BC lawsuit brought by one family member against others, concerning their administration of the plaintiff's father's estate, was held to have been properly stayed in favour of concurrent proceedings in Manitoba. The estate had been probated there, most of the assets were there, and the proposed new executors were resident there.

[67] *CJPTA* BC, *supra* note 7, s 10(j).

[68] 2017 BCCA 408.

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Jurisdiction — wills variation application

Note. A BC court ordered that a wills variation proceeding be transferred to Alberta in *Cresswell v Cresswell Estate.*[69] A critical factor was that the testatrix had resumed her ordinary residence in Alberta in her last few months and lacked any real and substantial connection with British Columbia at her death.[70]

Bankruptcy and insolvency

Recognition of orders made in foreign bankruptcy proceeding

Note. In *Re Ultra Petroleum Corp*,[71] the Yukon Supreme Court recognized a claims bar order and confirmation orders made by a US bankruptcy court in respect of a Yukon corporation and its subsidiaries, which held oil and gas interests in the United States. The Yukon court's order was made under the cross-border insolvency provisions of the *Companies' Creditors Arrangement Act.*[72]

Québec

Actions personnelles à caractère extrapatrimonial et familial

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

Droit de la famille — 171632, 2017 QCCS 3115

La femme dépose une demande introductive d'instance en séparation de corps et signifie une demande pour mesures provisoires visant la garde des enfants et la fixation d'une pension alimentaire. Le mari invoque l'absence de compétence de la Cour supérieure du Québec pour statuer sur la garde des enfants, soutenant que les enfants ne sont pas domiciliés au Québec. Les parties se sont mariés en 2008 au Québec et leurs trois enfants y sont nés. Au cours des trois dernières années les parties ont vécu en Colombie-Britannique. La femme retourne au Québec avec les enfants en 2017.

[69] 2017 BCSC 178, 30 ETR (4th) 42, proceeding ordered transferred, 2017 BCSC 1183.

[70] The ordinary residence of the deceased, the succession to whose movable property is in issue, is the criterion for a presumed real and substantial connection with the province for the purpose of determining territorial competence. *CJPTA* BC, *supra* note 7, s 10(b)(ii). The common law jurisdictional criterion for a wills variation proceeding relating to movables would have been domicile.

[71] 2017 YKSC 23.

[72] RSC 1985, c C-36, Part IV.

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Le mari soutient qu'il s'agit d'un déplacement illicite des enfants alors qu'il n'a jamais autorisé ou accordé son consentement à ce que les enfants s'installent au Québec. Ainsi le véritable domicile des enfants est toujours la Colombie-Britannique alors que les articles 3093 et 3142 *CcQ* prévoient que la garde de l'enfant est régie par la loi de son domicile et que les autorités québécoises dans ces circonstances n'ont pas compétence pour entendre cette affaire. La femme soutient que s'agissant d'une demande en séparation de corps à l'origine et conformément à l'article 3146 *CcQ* alors qu'elle est domiciliée au Québec, la Cour a compétence pour entendre tout litige y compris la demande pour mesures provisoires.

La cour rejette le moyen déclinatoire du mari. L'article 3146 *CcQ* énonce que les autorités québécoises sont compétentes pour statuer sur la séparation de corps lorsque l'un des époux a son domicile ou sa résidence au Québec à la date de l'introduction de l'action. La compétence des autorités québécoises sur la séparation de corps implique accessoirement leur compétence sur la garde des enfants. Lorsque des enfants (encore mineurs) sont issus du mariage des parties, l'instance en séparation de corps requiert une décision sur la garde de ces enfants et la pension alimentaire qui peut leur être dûe. Dans le cas où les articles 3142 et 3146 *CcQ* ne désignent pas un même for, la compétence des autorités québécoises sur la garde peut découler de l'article 3146 seulement.

Cette interprétation peut avoir pour effet d'étendre la compétence québécoise à des enfants qui ne seraient pas domiciliés au Québec et n'y résideraient pas; par ailleurs, elle occulte la question du déplacement illicite des enfants. Ces problèmes doivent se résoudre par le recours à la théorie du *forum non conveniens*, que consacre l'article 3135 *CcQ*. La juge conclut que les tribunaux du Québec sont mieux à même de trancher ce litige. Les parties n'habitent la Colombie-Britannique que depuis deux ans alors qu'auparavant elles ont toujours habité le Québec. L'intérêt des enfants, tous trois en bas âge, installés depuis trois mois au Québec, est de terminer leur année scolaire sans un autre déménagement. Le mari n'a pas institué d'action en Colombie-Britannique. Les critères relatifs à la théorie du *forum non conveniens* démontrent que les tribunaux du Québec demeurent mieux placés pour trancher ce litige.

Enfants — garde — enlèvement international et interprovincial d'enfants

Droit de la famille — 172942, 2017 QCCS 5671

Le père fait demande pour le retour immédiat d'un enfant en Italie. En 2012, les parties se marient en Italie. En 2015, l'enfant naît en Italie. En mai 2016, la mère quitte l'Italie avec l'enfant, alors âgé de sept mois, pour se rendre en Belgique, à l'insu du père. Ensuite, la mère et l'enfant quittent la Belgique pour se rendre au Québec. Ils habitent au Québec depuis lors.

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L'enfant est actuellement âgé de 25 mois. En mars 2017, la mère dépose une demande pour garde d'enfant et autorisation de voyager. En septembre 2017, le père notifie à la mère une demande pour le retour immédiat de l'enfant en Italie. La mère s'oppose au retour de l'enfant au motif qu'il est intégré sans son nouveau milieu, que le père a acquiescé à son non-retour en Italie et qu'il existe un risque grave que le retour de l'enfant ne l'expose à un danger physique ou psychologique, ou ne le place dans une situation intolérable. Elle ajoute que, dans l'éventualité où le retour devait être ordonné, elle n'a pas la capacité financière de contribuer aux frais de transport de l'enfant, d'acheter un billet d'avion pour l'accompagner et d'assumer leurs frais de logement et subsistance en Italie. De plus, elle n'a pas renouvelé son statut de résidente permanente en Italie et ignore si elle sera en mesure de demeurer en Italie avec l'enfant, ce qui engendrera une situation intolérable pour l'enfant, puisqu'il ne connaît pas le père.

Il résulte des admissions consignées que la *Convention de La Haye*[73] et la *Loi sur les aspects civils de l'enlèvement international et interprovincial d'enfants*[74] s'appliquent au cas de l'espèce. Il y a eu déplacement illicite de l'enfant. Une période de plus d'un an s'est écoulée à partir du déplacement de l'enfant. Le Tribunal doit ordonner le retour de l'enfant, à moins qu'il ne soit établi que ce dernier s'est intégré dans son nouveau milieu. Mais le Tribunal peut refuser d'ordonner le retour de l'enfant si la mère démontre que le père a acquiescé au déplacement ou au non-retour de l'enfant, comme le prévoit l'article 21(1) de la Loi.

La juge rejette la demande du père. Son silence et son inaction durant huit mois permettent au Tribunal de conclure à un acquiescement libre, éclairé et non équivoque au non-retour de l'enfant, de manière permanente. Il s'agit d'une indication claire, positive et non équivoque du père voulant qu'il accepte que l'enfant demeure au Québec, de manière permanente, sans lui. Par ailleurs, sans diminuer l'importance des événements relatés par la mère, ils ne présentent pas un risque grave que le retour de l'enfant ne l'expose à un danger physique ou psychologique ou ne le place dans une situation intolérable, si son retour était ordonné.

Divorce — litispendance — art 3137 CcQ

Droit de la famille — 172244, 2017 QCCA 1470[75]

Le mari se pourvoit contre un jugement qui rejette sa requête en litispendance, déclare les tribunaux québécois compétents pour prononcer un

[73] *Convention sur les aspects civils de l'enlèvement international d'enfants*, in English, *Hague Convention on the Civil Aspects of International Child Abduction*, *supra* note 64.

[74] RLRQ, c A-23.01.

[75] Autorisation de pourvoi à la CSC accordée, 37861 (26 juillet 2018).

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jugement de divorce et des mesures accessoires entre les parties et refuse de surseoir à l'instance. Le Tribunal devait déterminer quelle autorité judiciaire, de la Belgique ou du Québec, a compétence pour prononcer le divorce des parties, procéder au partage de leurs biens et statuer sur les mesures alimentaires. Jusqu'à présent, les tribunaux de première instance de ces deux juridictions ont répondu posséder la compétence pour en décider et ont refusé de surseoir aux procédures dont ils sont saisis. En appel, le mari demande de suspendre l'instance, à l'exception des procédures relatives à la résidence familiale et aux obligations alimentaires, jusqu'à ce que les tribunaux belges se soient prononcés sur les conclusions dont ils sont présentement saisis dans l'instance mue entre les parties et pendante devant la Cour d'appel de Bruxelles.

Le mari, de nationalité française, et la femme, de nationalité marocaine, se rencontrent en 1990 et s'installent à Paris en 1996. En 2004, les parties ont déménagé à Bruxelles, en Belgique, et s'y sont mariées. En 2012, les parties et leurs deux enfants ont obtenu la nationalité belge. En juillet 2013, les parties ont immigré au Québec. À trois jours d'intervalle, deux demandes en divorce ont été intentées, l'une en Belgique par le mari le 12 août 2014, l'autre au Québec par la femme le 15 août 2014.

La Cour d'appel accueille le pourvoi. Les deux juridictions participent d'une saine administration de la justice en matière matrimoniale, de telle façon que l'on ne puisse, de part et d'autre, choisir le for qui convienne le mieux à l'une ou l'autre des parties en décomposant les demandes accessoires. Le sort des mesures accessoires est souvent inter-relié. Une vision globale de toutes les dimensions des mesures accessoires doit être privilégiée. Le for sera généralement dicté par l'objet principal de la demande. Une fois un tribunal saisi d'une demande en divorce, le traitement des demandes accessoires de l'une et l'autre partie lui revient, sauf absence de compétence ou d'assise juridique, ou impossibilité évidente de reconnaissance de l'éventuel jugement pour des raisons d'ordre public international.

La demande en divorce du mari en Belgique et celle de la femme au Québec ont substantiellement le même objet, le prononcé du divorce et le règlement des mesures qui y sont accessoires (incluant le sort des donations). Ainsi, d'une part, la juridiction belge a été première saisie du litige opposant les parties, et, d'autre part, le critère des trois identités, soit celles des mêmes parties, des mêmes faits à la base des deux actions et du même objet, est satisfait dans les circonstances. Encore faut-il, en vertu de l'article 3137 *CcQ*, que l'action intentée à l'étranger puisse donner lieu à une décision pouvant être reconnue au Québec.

La juge de première instance a notamment pris en considération, pour refuser de surseoir, la forte probabilité que la décision belge ne puisse être reconnue au Québec. Elle fond sa conclusion sur le caractère discriminatoire de la disposition belge prévoyant la révocabilité des donations faites

à la femme par le mari en considération du mariage. Pourtant, il ne peut être tenu pour avéré, à ce stade des procédures, que le tribunal québécois conclura que le résultat de la décision belge, qui pourrait découler de l'interprétation ou de l'application de l'article pertinent du *Code civil* belge, sera manifestement incompatible avec l'ordre public international. En effet, à ce stade, plusieurs décisions du tribunal belge sont envisageables. Il est donc loin d'être acquis que le jugement belge ne pourra être reconnu au Québec.

Le choix du for belge par le mari ne ressort pas d'un *forum shopping* qui équivaille à un abus de droit. Le tribunal belge, compétent en vertu de sa loi pour entendre le divorce des parties, étant donné qu'elles ont la nationalité belge, ne pourra pas surseoir aux procédures de divorce dont il est saisi, à moins que la Cour d'appel belge accueille l'appel de la femme. L'omission par la juge de prendre en considération ce facteur constitue une erreur déterminante. La juge a exercé de manière déraisonnable son pouvoir discrétionnaire. L'article 22 de la *Loi sur le divorce*[76] ne fait pas obstacle à la reconnaissance du jugement de divorce que pourrait rendre la Belgique. Pour ces motifs, il y a lieu de rejeter l'appel incident, qui débat de la constitutionnalité (invalidité ou caractère inopérant) du premier alinéa de l'article 3167 *CcQ* qui traite de la compétence des autorités étrangères en matière de divorce.

Note. Voir également *Droit de la famille — 172911*[77] et *Droit de la famille — 172162*.[78]

Actions personnelles à caractère patrimonial

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

Transax Technologies inc c Red Baron Group Ltd, 2017 QCCA 626

Les appelants se pourvoient contre un jugement qui rejette leur requête en rejet d'action pour défaut de compétence des tribunaux québécois et leur demande subsidiaire réclamant l'application de la doctrine du *forum non conveniens* en faveur du Panama. L'intimée Red Baron est une société dont le siège social est situé en République de Malte. Elle exploite un commerce de traitement de paiements électroniques depuis les Philippines, qui l'amène à faire appel aux services de compagnies spécialisées dans le traitement de transactions de cartes de crédit telles que les sociétés appelantes. Red Baron réclame 1 497 102 $ de ces trois sociétés au motif

[76] LRC 1985, ch 3 (2e suppl).

[77] 2017 QCCS 5618.

[78] 2017 QCCS 4219.

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qu'elles auraient omis de lui remettre des sommes d'argent qui lui étaient dues et elle poursuit aussi personnellement Jacques et Gagnon, respectivement secrétaire et président de l'appelante Solare, leur reprochant d'être à l'origine de la disparition d'une partie de ces sommes. Les appelants plaident que le recours de Red Baron repose entièrement sur le contrat conclu entre elle et Solare. Ils plaident sur une base subsidiaire que même si les tribunaux québécois se déclaraient compétents pour entendre l'affaire, l'absence d'un lien réel et substantiel avec le Québec et des considérations pratiques rendent le forum du Panama plus approprié pour entendre le litige.

La Cour d'appel rejette le pourvoi. Même si les appelants soutiennent que les sommes ont été retenues par Solare en raison de manquements contractuels de Red Baron, il s'agit d'arguments qui relèvent du fond du litige et qui devront être tranchés par le juge du procès, plutôt qu'au stade d'une requête en rejet. Les faits allégués à l'égard de Jacques, de Gagnon et des sociétés Transax et Transax USA, ainsi que les pièces déposées au dossier, paraissent suffisants pour soutenir le recours entrepris contre eux. C'est également le cas pour Solare, dont l'implication est admise par les appelants. Dans la mesure où Transax et Jacques ont leur domicile au Québec, la condition prévue à l'article 3148(1) *CcQ* est satisfaite et la compétence des tribunaux québécois est établie en ce qui les concerne. En ce qui concerne Transax USA, cette société a un établissement au Québec et l'objet du litige paraît lié aux activités de Transax USA au Québec (article 3148(2) *CcQ*). En ce qui concerne Solare, qui n'a pas un établissement au Québec, son implication dans les faits du litige, de même que les liens étroits qui existent entre les trois sociétés poursuivies mènent à conclure que la faute ou le fait dommageable, voire même l'exécution d'au moins une partie des obligations contractuelles alléguées, est susceptible d'avoir eu lieu au Québec. Cela suffit à conférer compétence aux tribunaux québécois en vertu de l'article 3148(3) *CcQ* à l'endroit de Solare, tout comme à l'égard de Gagnon, dont l'implication est démontrée relativement à l'ensemble des trois sociétés poursuivies.

Il n'y a pas ici une situation exceptionnelle et les appelants n'ont pas démontré que le Panama est en meilleure position pour décider du litige que les tribunaux québécois. S'il est vrai que Solare allègue que son siège social est au Panama et que le contrat entre Solare et Red Baron stipule que la loi applicable est celle du Panama, le contrat ne confère pas compétence au Panama par le biais d'une telle clause qui ne peut être qualifiée de clause d'élection de for. En effet, cette clause ne fait que préciser le droit applicable aux fins de l'exécution et de l'interprétation du contrat.

Surin c Puma Canada inc, 2017 QCCS 3821

Le demandeur Surin prétend que les défenderesses commercialisent des produits, sans son consentement, en utilisant sa marque de commerce.

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Il leur réclame, entre autres, des dommages et demande qu'il leur soit ordonné de cesser d'utiliser sa marque. La défenderesse Puma North America (Puma) prétend que les tribunaux québécois ne sont pas compétents pour entendre cette affaire en ce qui la concerne, puisqu'elle n'est pas domiciliée au Québec et n'a pas d'établissement au Québec et que, si faute il y a, elle a été commise hors du Québec. La Cour rejette la *motion for dismissal* de Puma. L'une des pièces soumises permet de croire que les produits à l'origine de cette affaire sont en vente au Canada, via un site internet transactionnel américain. Ainsi, il est permis de croire, *prima facie*, que la faute alléguée, c'est-à-dire l'utilisation sans permission d'une marque de commerce dûment enregistrée et propriété du demandeur, a été commise au Québec par Puma, l'entité américaine. De plus, le demandeur qui réside au Québec subit un préjudice ici et subit ici des dommages résultant de cette commercialisation.

Subsidiairement, Puma demande que le Tribunal décline compétence en faveur du Massachusetts, comme le permet l'article 3135 *CcQ*. Puma soutient que l'article 3126 *CcQ*, qui fait régir la responsabilité extracontractuelle par la loi où le fait générateur du préjudice est survenu, a pour conséquence directe que cette affaire doit être régie par la loi du Massachusetts. Mais l'exception prévue à l'article 3126 *CcQ* s'applique ici. Le préjudice a été subi au Québec, où la marque du demandeur est enregistrée, et Puma ne pouvait ignorer que le préjudice du demandeur se manifeste là où il réside. Par ailleurs, l'intérêt de la justice favorise que le litige soit entendu au Québec. La réclamation financière est limitée et le demandeur fait face à une entité corporative ayant des ressources supérieures à celle d'une personne physique. La Cour refuse donc d'appliquer la doctrine du *forum non conveniens*.

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

Note. Voir *Miracle Department inc c Scene Capital Corporation*[79] et *Produits métalliques AT inc c Nouveau-Brunswick (Province de)*.[80]

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

Air Nostrum Lineas Aereas Del Mediterraneo c DAC Aviation Internationale ltée, 2017 QCCS 5421

Dans le cadre du recours qui l'oppose à Air Nostrum, DAC demande à la Cour supérieure de décliner compétence au profit des tribunaux

[79] 2017 QCCS 2617.

[80] 2017 QCCS 627, autorisation de pourvoi à la CA Qc refusée, 2017 QCCA 453.

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judiciaires de Valence, en Espagne. Nostrum réclame à DAC les sommes qui lui seraient dues en vertu de deux contrats conclus avec une compagnie liée à DAC et d'un contrat de cautionnement conclu avec DAC. En vertu du premier contrat, Nostrum accepte de louer à DAC un jet régional. En vertu du second contrat, Nostrum s'engage à fournir des services d'entretien et de réparation de certains de ses appareils. Le contrat de cautionnement prévoit que DAC garantit notamment le paiement des sommes dûes à Nostrum en vertu des deux premiers contrats. DAC soumet qu'une des deux réclamations de Nostrum est visée par une clause d'élection de for conférant une compétence exclusive aux tribunaux valenciens et que bien que la seconde réclamation ne soit pas visée par la clause d'élection de for, elle serait connexe à la première, de sorte qu'il serait préférable qu'un seul débat, portant sur l'ensemble du litige, ait lieu à Valence. Nostrum rétorque que la Cour supérieure est compétente au plan international, non seulement parce que DAC est domiciliée au Québec, mais également parce qu'elle aurait reconnu la compétence des tribunaux québécois en posant certains gestes dans le cadre de la présente instance. Nostrum ajoute que la clause d'élection de for invoquée par DAC est inapplicable en l'espèce, car elle se trouve dans le contrat d'entretien auquel DAC n'est pas partie.

La Cour accueille le moyen déclinatoire en partie. Le protocole de l'instance conclu en mai 2017 fait mention de l'intention de DAC de présenter un moyen déclinatoire, tout en précisant qu'elle devait le faire avant le 28 juin 2017. Lors d'une conférence de gestion d'instance qui a eu lieu en début juillet, l'échéance applicable au moyen déclinatoire a été reportée à la mi-août. Étant donné que DAC a formellement soulevé l'incompétence des tribunaux québécois le 21 juillet 2017, il faut conclure qu'elle n'a pas agi tardivement. Quant aux gestes que DAC a posés avant la conclusion du protocole de l'instance, il s'avère qu'elle n'a rien fait d'autre que produire au dossier de la Cour une réponse ainsi que des documents faisant état du fait qu'elle avait changé d'avocats. Aucun de ces gestes n'indique une quelconque intention de sa part de reconnaître la compétence des tribunaux québécois. Par ailleurs, la Cour d'appel reconnaît depuis relativement longtemps que la caution peut invoquer, contre la créancière, une clause compromissoire insérée dans le contrat principal. Cette solution ne semble pas remise en question par la doctrine québécoise, et elle doit logiquement s'étendre aux cas où le contrat principal contient non pas une clause compromissoire, mais plutôt une clause d'élection de for. Il n'est pas souhaitable que la Cour s'écarte de ce courant jurisprudentiel. DAC peut donc se prévaloir de l'article 18 du contrat d'entretien. En conséquence, la réclamation de Nostrum pour sommes dues en vertu de ce contrat ne relève pas de la compétence des tribunaux québécois.

Il en va autrement de la réclamation pour la location d'avion. Les fautes que Nostrum reproche à la débitrice principale sont distinctes et aucun

élément du dossier ne laisse croire qu'il serait disproportionné pour les parties d'avoir à débattre des réclamations de Nostrum devant des forums différents. DAC n'a donc pas établi qu'en raison du principe de proportionnalité la Cour devrait surseoir à statuer sur la réclamation de Nostrum fondée sur le contrat de location d'avion.

Compétence — article 3148 CcQ — action en recours collectif — choix de soumettre les litiges à une autorité étrangère

Demers c Yahoo! inc, 2017 QCCS 4154

The applicant sought authorization to bring a class action on behalf of a proposed class of persons residing in Québec, whose personal and financial information was allegedly lost by, or stolen from, the defendants as a result of two data security incidents in 2013 and 2014 as well as of all other persons who purportedly suffered damages as a result of those incidents. The defendants Yahoo! and Yahoo! Canada brought a motion to dismiss for want of jurisdiction. The basis for the motion was that the terms of service of a Yahoo user's account contain a choice-of-forum and choice-of-law clause in favour of Ontario, which excluded the jurisdiction of the Québec courts, according to Article 3148 of the *Civil Code of Québec* (*CcQ*). The plaintiff argued that the clause was inapplicable for either of two reasons: it was contained in a contract of adhesion (Article 41 of the *Code of Civil Procedure* (*Cpc*)),[81] and it was contained in a consumer contract and was invalidated by Article 3149 of the *CcQ* and section 22.1 of the *Consumer Protection Act*.[82] The court rejected the first argument but accepted the second.

The defendant made a subsidiary argument that the proposed action met none of the substantive grounds for jurisdiction under Article 3148 of the *CcQ*. The parties accepted that neither Yahoo!, the American parent company, nor its Canadian subsidiary, had an establishment in Québec. However, the court found that the allegation made by the plaintiff of damages stemming from mental distress was sufficient to fulfill the condition of damages suffered in Québec for the purpose of Article 3148(3) of the *CcQ*.

The court rejected an argument that a class proceeding in Ontario against the same defendants created a situation of litispendance under Article 3137 of the *CcQ*. That proceeding met two of the three conditions — namely, that it was for the same causes of action and that a resulting judgment would be enforceable in Québec. The third condition, however, was not met because the parties in the Québec proceeding were not the same. They included plaintiffs who were not the direct victims of the data breaches

[81] RLRQ, c C-25.01

[82] CQLR, c P-40.

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but were collateral victims in the sense that they had suffered damage as a result of the loss of personal data by others. It might well be that this "collateral victim" sub-group might ultimately prove to be artificial, but, at this stage, the Court had no alternative but to conclude that the class members in the Ontario proceeding and those in the Québec proceeding were not the same parties.

Actions réelles et mixtes

Action mixte — biens hors du Québec — art 3152 CcQ

CGAO c Groupe Anderson inc, 2017 QCCA 923

CGAO se pourvoit contre le jugement interlocutoire rejetant son moyen déclinatoire et déclarant la Cour supérieure compétente pour entendre le recours en injonction déposé par Anderson. Anderson est une entreprise de conception et de fabrication d'équipements agricoles et forestiers. CGAO exploite, principalement en France, une entreprise d'importation et d'exportation d'équipements agricoles. Elle n'exerce aucune activité et ne possède aucun actif au Canada. Elle distribue en France et en Belgique des produits d'Anderson, commercialisés sous la marque BEAUDOIN. En mai 2016, Anderson a notifié à CGAO un avis de non-renouvellement de la dernière entente de distribution convenue entre les parties. Malgré cela, CGAO a continué d'utiliser la marque en France pour vendre les équipements achetés d'Anderson, d'où l'introduction des procédures par Anderson. En fait, la marque BEAUDOIN a été enregistrée par CGAO en France.

La juge de première instance a considéré que le débat concernait l'interprétation et l'exécution du contrat et que la clause d'élection de for du contrat de distribution trouvait application, cette dernière nommant les tribunaux du Québec comme tribunaux compétents. Elle a appliqué l'article 3148(4) *CcQ* et déclaré que la Cour supérieure était compétente pour entendre la demande en injonction provisoire, interlocutoire et permanente d'Anderson.

La Cour d'appel accueille l'appel. Il est vrai que la conclusion demandée par Anderson concernant l'interdiction d'utiliser la marque donne une nature personnelle à l'action. Cependant, Anderson demande également à la Cour d'ordonner à CGAO de faire radier l'enregistrement de la marque en France. Cette dernière conclusion donne une nature clairement réelle à l'action, car l'objet visé est la radiation de l'enregistrement d'une marque qui, en France, est attributif du droit de propriété. De ce fait, Anderson oppose à CGAO son droit exclusif de propriété de la marque. Pour que les tribunaux québécois aient compétence pour entendre les

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actions mixtes, ils doivent nécessairement posséder cette compétence tant pour l'action personnelle que l'action réelle. Ainsi, le volet réel de l'action d'Anderson n'est pas de la compétence des tribunaux québécois, car le bien, la marque détenue par CGAO, ne se trouve pas au Québec mais bien en France. Dans un cas où un lien intime unit les volets réel et personnel d'une action mixte, il importe que le tribunal appelé à instruire le fond de l'affaire soit compétent pour se prononcer à la fois sur les conclusions de nature réelle et personnelle. Ce n'est pas le cas des tribunaux québécois en l'espèce. La clause d'élection de for ne peut trouver application face à une action réelle.

PROCEDURE / PROCÉDURE

Common Law and Federal

Commencement of proceedings

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention)

Bulmer v Nissan Motor Co, 2017 SKCA 19, 412 DLR (4th) 449

The plaintiff served the originating documents in a Saskatchewan class action, by post, on the defendant in Japan. Japan is a party to the *Hague Service Convention*[83] and has not declared that any form of service other than through the Central Authority in Japan will be regarded as valid service. The plaintiff applied for the appointment of a judge to manage the class action, but the chief justice declined to make the appointment because the Japanese defendant had not been properly served. The plaintiff appealed this refusal and argued that postal service was valid service under Article 10(a) of the convention. That provision states: "Provided the State of destination does not object, the present Convention shall not interfere with … the freedom to send judicial documents, by postal channels, directly to persons abroad."

The Court of Appeal affirmed the chief justice's decision. Even if Article 10(a) was intended to create a self-standing right to serve by post, such a right was excluded by the clear terms of the relevant Saskatchewan rule of court.[84] Service in a country that is party to the *Hague Service Convention* can only be in accordance with the method prescribed by the convention.

[83] *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), referred to in the *Queen's Bench Rules*, Sask Gaz, 21 June 2013, 1370, r 12-12.

[84] *Queen's Bench Rules*, *ibid*, r 12-11–12-12.

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Interlocutory orders

Mareva *injunction*

Note. In a matrimonial proceeding in Ontario, an order freezing the husband's assets held outside Ontario was confirmed in *Benarroch v Abitbol*.[85] The husband himself had commenced proceedings for divorce and matrimonial property relief in Ontario and should not now be able to escape the court's jurisdiction simply by moving his assets, which were held in Florida, Venezuela, and other countries, from one country to another.

Injunction against non-party — purpose to enforce court order against party

Note. See *Google Inc v Equustek Solutions Inc*,[86] noted above under Jurisdiction; Common Law and Federal; Jurisdiction *in personam*; *Jurisdiction* simpliciter — *interlocutory order against non-party*.

Evidence obtained abroad for local proceeding

Foreign subpoena — discovery — need for leave of the court

Note. In *Mancinelli v Royal Bank of Canada*,[87] the Ontario court held that a plaintiff that had obtained an *ex parte* subpoena in the United States, for discovery in that country of a non-party to a proposed class proceeding in Ontario, must obtain leave of the Ontario court before taking any step in furtherance of the subpoena. The compelled discovery of non-parties was strictly regulated in Ontario, and the plaintiffs should not be able to circumvent these regulations by using a foreign subpoena.

Québec

Signification — domicile élu — représentant pour signification désigné lors de l'enregistrement d'une marque de commerce au Canada

Note. Veuillez voir *7847866 Canada inc c Gree Electric Appliances Inc of Zhuhai*.[88]

[85] 2017 ONSC 4604.

[86] 2017 SCC 34, 410 DLR (4th) 625.

[87] 2017 ONSC 87, 97 CPC (7th) 121.

[88] 2017 QCCS 1723.

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FOREIGN JUDGMENTS / JUGEMENTS ÉTRANGERS

Common Law and Federal

Conditions for recognition or enforcement

Identity of judgment debtor — subsidiary corporation

Yaiguaje v Chevron Corp, 2017 ONSC 135, aff'd 2018 ONCA 472[89]

A group of villagers resident in Ecuador brought an action in Ontario to enforce a judgment they obtained in Ecuador against Chevon, an American company (Chevron US), for US $9.5 billion. The judgment was for the failure of Texaco, a company subsequently acquired by Chevron, to remediate land on which Texaco conducted petroleum exploration and extraction activities. Chevron US had obtained an order from the federal courts in the United States barring enforcement of the judgment in that country on the ground that it had been obtained by fraud.[90] The Ontario enforcement action was brought against Chevron US and its seventh-level subsidiary, Chevron Canada. The defendant companies sought to have the action dismissed on the ground that the Ontario Superior Court lacked jurisdiction *simpliciter*, but the Supreme Court of Canada ultimately held against this position,[91] and the enforcement action could therefore proceed. The only issue resolved by the Supreme Court of Canada's decision was that of jurisdiction *simpliciter*; the merits of the plaintiff's enforcement action were not addressed.

Chevron US, the judgment debtor, had no presence or directly held assets in Canada. The plaintiff's main argument for summary judgment on its claim against Chevron Canada was that the shares in Chevron Canada were exigible to pay the debt of the seven-levels-up parent company. The Ontario Superior Court held in the present decision that they were not exigible and that summary judgment should therefore be refused. Under Canadian corporate law, the assets of a corporation do not belong to its shareholders. Conversely, the shares in the corporation do not belong to

[89] Before it heard the case, the Court of Appeal initially made an order that the plaintiffs post security for costs (2017 ONCA 741) but subsequently set it aside on the ground that, in the circumstances of the case, such an order was not in the interests of justice (2017 ONCA 827). Although it eventually dismissed the appeal in all other respects, the appeal court lowered the motion judge's actual award of costs against the plaintiffs on the basis that they were excessive, considering the true nature of the litigation. The costs on appeal were agreed.

[90] *Chevron Corp v Donziger*, 974 F Supp 2d 362 (SDNY 2014), aff'd 833 F 3d 74 (2d Cir 2016), cert den 2017 US LEXIS 3962 (US, 19 June 2017).

[91] *Chevron Corp v Yaiguaje*, 2015 SCC 42, [2015] 3 SCR 69, noted in Blom (2015), *supra* note 34 at 569.

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the corporation itself.[92] The Ontario legislation on execution against assets was procedural only and created no new right to execute against the assets or the shares of a subsidiary corporation. Nor did the circumstances provide grounds for piercing the corporate veil so as to treat the subsidiary as one entity with its parent. The plaintiffs therefore had no claim that could be enforced against Chevron Canada.

The Court of Appeal essentially agreed with the motion judge's reasons for refusing to grant relief against Chevron Canada. The separate legal personality of the subsidiary corporation was a bedrock principle of corporate law that should be subject only to narrow and clearly defined exceptions. This case fell outside those exceptions. What was really driving the plaintiffs' appearance in the Ontario courts was their inability to enforce their judgment in the United States. This was not a case where a judgment debtor did not have sufficient assets available to pay the judgment debt. It was only because of the court order in the United States that normally routine enforcement measures were not being pursued there against Chevron US and that the plaintiffs were asking the Ontario courts to create an exception to the principle of corporate separateness that was ill-defined and would be unnecessary for similarly situated judgment creditors.

Jurisdiction of the originating court — debtor's attornment to the jurisdiction

Re Sagewood Holdings Ltd, 2017 BCSC 112

The petitioners were being sued in federal court in New York and applied to the BC Supreme Court for a declaration that, if they defended the New York proceeding on the merits, they would not be precluded from subsequently taking the position in a BC proceeding that they had not attorned to the jurisdiction of the American court. The judge granted the declaration sought. The petitioners were taking steps in the American court analogous to those that, in British Columbia, would enable a party to defend on the merits without prejudice to the outcome of a jurisdictional challenge that it had already initiated.[93] Evidence put before the court as to the American court's rules was to the effect that a defendant that challenged the jurisdiction at the outset of litigation preserved the right to maintain this challenge, notwithstanding that it also defended on the merits.

[92] In a subsequent decision the same judge refused leave to add as a defendant the Nova Scotia holding company that owned Chevron Canada's shares, on the basis that there was no viable claim against that company either. *Yaiguaje v Chevron Corp*, 2017 ONSC 604. The Court of Appeal agreed with the refusal to add the holding company as a defendant. *Yaiguaje v Chevron Corp*, 2018 ONCA 472 at para 84.

[93] The BC provision is in the *Supreme Court Civil Rules*, BC Reg 168/2009 as amended, r 21-8.

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The jurisdictional issue could be appealed only after the conclusion of the whole proceeding, merits and all. The judge also held that the petitioners' defending on the merits was involuntary and therefore did not amount to attornment. They were under duress, in that the court had ordered them to file an answer to the complaint and defend or risk default judgment and, thereby, forfeit the right to appeal against the court's dismissal of the jurisdictional challenge.

Note. A default judgment obtained in Quebec against an individual resident in Ontario was held enforceable on the basis, *inter alia*, that the individual had attorned to the jurisdiction of the Quebec court by applying to have the default judgment set aside — *Olympique CMCT Inc v Industries Pancor Ltée.*[94] Attornment was also the basis for the enforcement of a Washington judgment in *LLS America LLC (Trustee of) v Dill.*[95] The judgment debtors were bound notwithstanding that they had withdrawn from the proceedings part way through.

Defences to recognition or enforcement

Natural justice

Note. An Alberta court in *Cassar v Anderson*[96] held that a default judgment from Quebec was enforceable, notwithstanding that the defendant had been served in Texas by a method that did not comply with the rules in Texas. The Alberta court was satisfied that service would have brought the Quebec proceedings to the defendant's attention.

Limitation period for enforcement

Independence Plaza 1 Associates LLC v Figliolini, 2017 ONCA 44, 410 DLR (4th) 747

The applicant sought to bring an action in Ontario on a judgment it had obtained against the respondent in New Jersey more than two years before. The respondent argued that the action on the judgment was barred by the two-year Ontario limitation period that applies to, *inter alia*, claims for debt.[97] The applicant argued that an action on a foreign judgment, being an "order of a court," fell under the same provision as a proceeding to enforce a domestic judgment, which was not subject

[94] 2017 ONSC 1929, 66 BLR (5th) 173.

[95] 2017 MBCA 12, leave to appeal to SCC refused, 37470 (25 May 2017).

[96] 2017 ABQB 229 (Master).

[97] *Limitations Act, 2002*, SO 2002, c 24, s 4.

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to a limitation period.[98] Alternatively, it argued that if the two-year period applied the time did not commence to run until the time for appeal had expired or an appeal was disposed of. There had been an appeal in New Jersey, which was dismissed within the two-year period.

The Court of Appeal held against the first argument but upheld the application judge's acceptance of the second. On the first, the limitations statute should not be interpreted as treating foreign judgments as if they were domestic judgments. A foreign judgment has no effect in the jurisdiction unless it is enforced by action or by registration under a reciprocal enforcement statute. Jurisprudentially, it is a debt, not a judgment. Hence, the two-year period applied. On the second, the statute uses the time when the plaintiff's right to bring the claim is "discovered."[99] A fair interpretation of this provision in the context of this foreign judgment was that the claim on the New Jersey judgment was discoverable only on the date the appeal was dismissed in New Jersey. Until that date, the respondent would not have reasonably known that a proceeding in Ontario would be an appropriate means to seek to remedy its loss.

Foreign currency

Common law action on judgment — foreign currency — terms of order

Note. Although strict compliance with the *Foreign Money Claims Act*[100] might not be possible for technical reasons (the foreign currency could not be purchased at a chartered bank in the province), a court held in *Gharavi v Khouzani*[101] that it had inherent jurisdiction apart from the statute to order that a judgment obtained in Iran should be enforced in British Columbia by an order for payment in Iranian currency. It also had inherent jurisdiction to order payment of the equivalent of the Iranian amount in Canadian currency, calculated as of the date of the enforcing judgment using evidence acceptable to the court.

Statutory enforcement

Justice for the Victims of Terrorism Act — *enforcement of another province's order for enforcement of US District Court judgment against Iran*

Tracy (Litigation guardian of) v Iranian Ministry of Information and Security, 2017 ONCA 549, 415 DLR (4th) 314[102]

[98] *Ibid*, s 16(1)(b).

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

[100] RSBC 1996, c 155.

[101] 2017 BCSC 48.

[102] Leave to appeal to SCC refused, 37759 (15 March 2018).

The plaintiffs had obtained judgments against the Islamic Republic of Iran, as well as against agencies of that state, in US courts. Their claims were for injuries suffered in terrorist attacks that were found to have been sponsored by Iran. In 2012, Canada enacted the *Justice for the Victims of Terrorism Act* (*JVTA*),[103] which gave victims of terrorism a cause of action against foreign states that support terrorism. The *State Immunity Act* (*SIA*)[104] was amended to remove state immunity in such actions if the foreign state was set out on a list of states reasonably believed to be supporters of terrorism; the Islamic Republic of Iran was on the list. Once these amendments took effect, the plaintiffs brought actions in Nova Scotia to enforce the US judgments against Iran. The *JVTA* states that Canadian courts must recognize an otherwise enforceable foreign judgment granted in favour of a person who has suffered loss or damage within the scope of the right of recovery under the act.[105] The Nova Scotia court gave judgment against Iran and its agencies in favour of the plaintiffs. The plaintiffs then registered the Nova Scotia judgment in Ontario.[106]

Iran, which had not participated in any of the proceedings in the United States or Canada, moved to set aside, vary, or stay the Ontario judgments on various grounds. The motion judge dismissed the motions[107] on the basis that Iran failed to provide a reasonable explanation for its failure to defend the proceedings. The plaintiffs' actions were not statute barred because their right to enforce their US judgments in Canada was not discoverable until the law changed to make it possible. The properties in question, against which enforcement was sought, were not subject to diplomatic immunity because the property was not on the minister of foreign affairs's certificate identifying all of Iran's property in Canada that was recognized as having diplomatic status. The certificate was conclusive.

The Court of Appeal upheld the motion judge's decision except on one issue, the date stipulated in the *SIA* for the lifting of the state's immunity, which was 1 January 1985.[108] The motion judge had held that the plaintiffs could claim for damage suffered after this date even if the acts of terrorism were committed before. The Court of Appeal held that the claims were limited to damage caused by acts of terrorism committed after the date.

[103] SC 2012, c 1 [*JVTA*].

[104] RSC 1985, c S-18, as am by SC 2012, c 1 [*SIA*].

[105] *JVTA*, *supra* note 103, s 4(2).

[106] *Tracy (Litigation guardian of) v Iranian Ministry of Information and Security*, 2014 ONSC 1696, noted in Joost Blom, "Canadian Cases in Private International Law in 2014" (2014) 52 CYIL 571 at 605.

[107] *Tracy (Litigation guardian of) v Iranian Ministry of Information and Security*, 2016 ONSC 3759, 400 DLR (4th) 670, noted in Blom (2016), *supra* note 49 at 626.

[108] *SIA*, *supra* note 104, s 6.1(1).

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Even if the drafting of the statute left the point ambigious, both the presumption of compliance with international law (the general right of state immunity before 1 January 1985, not lifted by the *SIA*) and the presumption against retroactivity favoured the interpretation adopted by the Court of Appeal.

The other grounds of appeal, which essentially related to every point in the motion judge's decision, were each rejected in turn. In particular, the Court of Appeal agreed that it would not be in the interests of justice to set aside the Ontario default judgments against Iran. In addition to the fact that it had failed to show that it had viable defences, Iran was properly served and ultimately chose to take its chances with the court process by not responding to the claims and waiting to have them set aside on a subsequent motion. In the motion judge's words, Iran appeared to have been "gaming the process."

Arbitral awards

Enforcement — UNCITRAL Model Law on International Commercial Arbitration

Consolidated Contractors Group SAL (Offshore) v Ambatovy Minerals SA, 2017 ONCA 939

The applicant, the owner of a mine in Madagascar, sought to enforce an arbitral award made under the rules of the International Chamber of Commerce (ICC). The arbitration agreement was contained in a US $258 million contract for the construction of a pipeline at the mine by the respondent contractor. The agreement provided for three stages of dispute settlement. First, the dispute was to be resolved by the owner's supervising engineer. If that did not resolve it, the dispute would be referred to adjudication by a sole adjudicator. A party that did not accept the adjudication could refer the dispute to arbitration pursuant to the Ontario *International Commercial Arbitration Act* (*ICAA*).[109] The arbitration would be held in Ontario in accordance with Ontario law.

The contractor claimed that the owner had breached the construction contract and claimed an extension of time to complete and compensation for the extra costs. It submitted its claims to the engineer. It disputed the engineer's decision and proposed to submit the dispute to arbitration. The owner suggested that the dispute go directly to arbitration, bypassing adjudication, and this was done. The owner defended the contractor's claims and counterclaimed for liquidated damages for failure to complete on time, plus additional damages for failure to complete the work properly.

[109] RSO 1990, c I.9.

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The contractor was unwilling to have the arbitral tribunal consider the owner's counterclaims except for the liquidated damages claim. It took the position that the other counterclaims should go through the full dispute resolution process. The tribunal nevertheless decided it had jurisdiction to adjudicate all of the counterclaims. Its final award held that the contractor was entitled to only US $7 million of the US $91 million it claimed, whereas it was liable to the owner for nearly US $25 million on the counterclaims.

The Court of Appeal held that the award should be enforced under the *ICAA*, which incorporates the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration.[110] The tribunal had jurisdiction to deal with the counterclaims, notwithstanding that the contractor had not agreed specifically to their inclusion in the arbitration. Under the model law, a court that is asked to enforce an award must consider whether the award deals with a dispute that falls outside the scope of the submission to arbitration.[111] That was not the case with the counterclaims. The terms of reference conferred jurisdiction on the tribunal to decide questions of fact and law necessary to determine the issues and to rule on the parties' requests for relief. It was open to the tribunal to find that the pre-arbitration dispute resolution process did not apply to claims of one party that were closely connected to the claims already submitted to arbitration by the other party. Arguments of procedural unfairness, relevant to judicial enforcement under the Model Law,[112] were also rejected.

Note. A Chinese arbitral award was enforced in British Columbia in *China CITIC Bank Corp v Yan*,[113] under the provisions of the *Foreign Arbitral Awards Act*.[114] Defences as to lack of notice and as to the merits, which had already been rejected by a Chinese court to which the defendant had applied to have the award set aside, could not be re-litigated in this proceeding.

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

Platania c Di Campo, 2017 QCCS 430

[110] *Ibid*, Schedule.

[111] *Ibid*, art 34(2)(a)(iii).

[112] *Ibid*, art 34(2)(a)(ii).

[113] 2017 BCSC 596.

[114] RSBC 1996, c 154.

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Les demandeurs désirent obtenir du Tribunal qu'il reconnaisse et déclare exécutoire un jugement rendu en leur faveur en Italie. Ce jugement a été rendu par défaut contre les défendeurs, ces derniers n'ayant pas comparu devant l'instance italienne. En 2003, un mur s'écroule dans une ruelle d'une municipalité en Sicile, causant la mort d'un passant, M Tutino, alors âgé de 79 ans, qui avait une femme et cinq enfants. La mur était alors la propriété des défendeurs, M Di Campo et ses trois sœurs, qui ont tous émigrés de l'Italie au Canada il y a nombreuses années. Des procédures criminelles sont entreprises devant les tribunaux italiens contre les Di Campo. Ceux-ci retiennent alors les services d'un avocat en Italie pour se défendre des accusations portées contre eux. En 2007, le tribunal de première instance d'Agrigente retient la responsabilité criminelle des défendeurs sous deux chefs. Les Di Campo font appel devant la Cour d'appel de Palerme. En 2008, celle-ci casse le premier jugement quant à l'un des deux chefs, au motif de prescription, mais confirme le jugement pour le reste. Les Di Campo forment alors un appel devant la Cour de cassation, à Rome. Leur appel est rejeté en 2009.

En 2008, la famille de M Tutino commence des procédures civiles contre la municipalité et contre les défendeurs. En 2012, le Tribunal d'Agrigente rend un jugement qui rejette l'action contre la municipalité, mais condamne les Di Campo, qui ont fait défaut de comparaître, à verser à chacun des six demandeurs 230 000 euros, plus un montant total de 15 000 euros pour les honoraires et frais. La condamnation des défendeurs est solidaire, avec la conséquence que chacun peut être tenu à une somme totale de 1 395 000 euros. Ce jugement est déclaré exécutoire en Italie en février 2012. Le demandeurs instituent le présent recours afin de faire reconnaître le jugement italien.

La Cour rejette la demande pour reconnaître et déclarer exécutoire le jugement italien. Les témoignages de trois des Di Campo concordent sur un élément important : avant de recevoir la demande en exemplification, ils n'ont jamais eu connaissance des procédures civiles intentées contre eux en Italie, étant seulement au courant des procédures criminelles. On peut en effet se demander pour quelle raison les défendeurs se seraient rendus jusqu'en Cour de cassation pour se défendre au criminel mais auraient par ailleurs fait défaut de comparaître dans le cadre de poursuites civiles soulevant essentiellement les mêmes questions de fait. Il est certainement permis de penser que s'ils ne l'ont pas fait, c'est précisément en raison qu'ils ignoraient l'existence des procédures civiles intentées contre eux en Italie. Même en supposant que l'acte introductif d'instance ait régulièrement été signifié aux défendeurs par courrier recommandé, ceux-ci n'ont pas été en mesure d'en prendre effectivement connaissance au sens du second alinéa de l'article 3156 *CcQ* et c'est pour cette raison qu'ils n'ont pas comparu devant l'instance civile, alors même qu'ils se défendaient au criminel à l'égard des mêmes événements.

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

Common Law and Federal

Connecting factors

Domicile — establishment of domicile of choice

Sato v Sato, 2017 BCSC 1394, 31 ETR 127, aff'd 2018 BCCA 287

The issue in this case was the revocation of the deceased's 2011 will, which left his estate to his sisters, when he married the plaintiff, a resident of Japan, in 2013. The deceased's domicile of origin was Japan, but the parties agreed that when he immigrated to Canada with his parents at the age of nineteen he acquired a domicile of choice in British Columbia. The parties disagreed on whether he continued to be domiciled there after he began to work for an American-based financial services company in Luxembourg in 2009. He lived continuously in Luxembourg from then until his death in 2015. His last visit to British Columbia was to visit his family in 2011, when he executed the will.

The court held that he continued to be domiciled in British Columbia during his time in Luxembourg and was so domiciled in 2013 at the time of his marriage to the plaintiff. The defendants had not shown that he had had the intention to remain permanently in Luxembourg. A key piece of evidence was the deceased's declaration to the Canadian tax authorities in 1999 that he intended to retire to British Columbia. The affidavit evidence of family and friends tendered by the defendant — the sister who was executrix under the 2011 will — did not show that, subsequent to the 1999 declaration, his retirement intentions had changed to Luxembourg or Japan. Since he was domiciled in British Columbia at the time he married, his will was revoked as provided by the law of that province then in effect.

Procedure and substance

Limitations statute — ultimate limitation period

Thorne v Hudson Estate, 2017 ONCA 208, 136 OR (3d) 797[115]

The court held that a US statute imposing an eighteen-year final limitation period on claims against aircraft manufacturers did not apply to claims in an Ontario action arising out of an airplane crash in New York state. The claims were based on misrepresentations in the manufacturer's service bulletins and overhaul manual and also on failures to warn, both of which

[115] Leave to appeal to SCC refused, 37554 (21 September 2017).

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were tort claims governed by Ontario law; Ontario limitation law therefore applied. Nor did the record support the argument that the US limitation statute would bar the claims in the event that New York law was held to govern the claims. Expert opinion evidence given in motion court as to the American law was to the effect that the statute only regulates the ability of a party to seek compensation in US federal or state court and does not govern the substantive standards involved in tort claims.

Contract

Proper law — no agreed choice

Note. A contract between the Canadian subsidiary of a Netherlands company, and the Belgian manufacturer of a boiler included in the fryer/oven system supplied by the Canadian company to its customer, was held to be governed by Belgian law in *Sofina Foods Inc v Meyn Canada Inc.*[116] The issue was whether the Ontario or Belgian limitation period applied.

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, 2017 ONSC 4129

This was a class proceeding brought on behalf of all those who had been injured in the collapse of the Rana Plaza, a multi-storey factory building in Bangladesh. One defendant was a Canadian company that purchased garments, for sale in its Canadian Loblaws stores, from a Bangladesh supplier, Pearl Global. The supplier engaged another Bangladesh company, New Wave, one of the manufacturers in the building, to produce some of the garments. 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 alleged facts included 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 in Ontario and in Bangladesh, as well as 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

[116] 2017 ONSC 6957.

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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 court refused to certify the class proceeding because the plaintiffs' claims against the two defendants were bound to fail. If the claims were to be decided by Ontario law, they would fail because neither defendant owed the plaintiffs a duty of care in respect of the safety of the building. If the claims were to be decided by Bangladesh law, they would fail because, on the evidence presented as to the law of Bangladesh, the claims were statute barred. Two private international law issues figured in the court's reasons. One was jurisdiction over members of the plaintiff class. Loblaws admitted that there was jurisdiction *simpliciter*, based on its being resident in Ontario, for claims brought by plaintiffs who submitted to such jurisdiction by personal involvement in the class proceeding as named plaintiffs. However, it contended that the claims of the "absent foreign claimants" — that is, victims of the building collapse who had not submitted to the Ontario court's jurisdiction — lacked a real and substantial connection with Ontario and so needed to be excluded from the class proceeding. The court rejected this argument because the absent foreign claimants would be able to opt into the class proceeding by a court-supervised opt-in procedure.

The other private international law issue discussed was whether Loblaws's and Bureau Veritas's torts, if proved, would be governed by Ontario or Bangladesh law. The plaintiffs had tried to plead the claims with emphasis on where Loblaws took its corporate decisions and administered its CSR policy and contended that the alleged torts were committed in Ontario. The court held that, based on the *lex loci delicti* principle, Bangladesh law would apply to the negligence claim against Loblaws. The failure to take steps to monitor the safety of the occupants of a building where garments were made for Loblaws was to be localized in Bangladesh, not in Ontario. That was the country substantially affected by the acts or omissions; the country whose citizens suffered the consequences of the wrongdoing; and the country whose law was in the reasonable contemplation of the parties; which law was referenced in Loblaws's CSR standards. On similar reasoning, the negligence ascribed to Bureau Veritas also had its *locus* in Bangladesh.

Matrimonial causes

Marriage — essential validity

MSC v CFJ, 2017 ONSC 2389, 97 RFL (7th) 343

In a divorce proceeding in Ontario, the question was which, if either, of two marriages between the applicant and the respondent was valid. The parties

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married in Texas in 1995. The applicant, a Canadian citizen, was a transgendered male and the respondent, a US citizen, a woman. Because Texas law at the time regarded such a marriage as being between two people of the same sex and therefore void, the applicant could not get a green card to work in the United States. On legal advice, the parties married again in 2013 in Ontario, where same-sex marriages were legal. Because of recent changes in US federal law, the Ontario marriage would be recognized and entitle the applicant to apply for a green card. The parties, who were resident in California by then, separated in early 2014, and the applicant moved back to Ontario.

The court held that, in the eyes of Canadian law, the Texas marriage was valid. No evidence had been led as to US law so the case had to be decided assuming that the relevant foreign law was the same as the law of the forum, meaning here the law of Canada. In any event, the question was the validity of the marriage, not under US federal or state law but, rather, in the eyes of Ontario law. By 2013, Ontario law regarded the applicant as having been a male person both at the time of the 1995 Texas marriage and at the time of the 2013 Ontario marriage. There was therefore no issue of same-sex marriage. Even if there had been admissible evidence that the marriage was a same-sex marriage and void under Texas law, it was clear from the cases that Ontario law by 2013 refused to give effect to foreign laws that invalidated same-sex marriages. Such laws were seen as being contrary to Canadian public policy since they discriminated between persons on the basis of their sex. Since the Texas marriage was therefore valid in the eyes of Ontario law in 2013, whether it was seen as opposite sex or same sex, the applicant was granted a divorce of the marriage entered into in Texas and a nullity decree in respect of the second marriage in Ontario.

Divorce — foreign divorce

Pontes v Viana, 2017 NBQB 130, 98 RFL (7th) 343

The parties, originally from Portugal, had lived together in Canada, but when they separated, the wife returned to Portugal. Each party then commenced divorce proceedings in the country where the other lived. The husband's action was filed in Portugal in August 2014, about six months after the wife resumed residence there. The wife filed a divorce petition in New Brunswick in November 2014. Each challenged the jurisdiction of the court the other had chosen, but jurisdiction was upheld in both Portugal and New Brunswick. The husband's divorce was granted first, in September 2016. The husband now applied in New Brunswick for an order recognizing the Portuguese divorce and dismissing the wife's divorce proceeding.

The court held that the Portuguese divorce should be recognized, based on the existence of a real and substantial connection between the parties and Portugal.[117] The real difficulty was the wife's claim in the New Brunswick proceedings for spousal support. She had not claimed support in the Portuguese proceedings. The court held that once the Portuguese divorce was granted, her claim for support as corollary relief under the *Divorce Act* could not be maintained since former spouses could not claim under that Act. Nor could she claim spousal support under provincial legislation because it too did not contemplate proceedings brought by former spouses. She could still claim spousal support in Portugal, but she argued that an order of the Portuguese court would not be enforceable against the husband in New Brunswick.

The wife contended that this unfortunate state of affairs was contrary to Canadian public policy, but the court held that public policy required that either the foreign legal process or the foreign law contravene fundamental standards of justice. That was not the case here. The problem stemmed not from Portuguese law but, rather, from the state of enforcement law in Canada, or the absence thereof, and the fact that the wife chose to pursue her claim for spousal support pursuant to the *Divorce Act* and not provincial legislation. By maintaining her divorce petition in Canada even after the Portuguese court allowed the divorce proceeding in its jurisdiction to continue, she courted the risk that she could end up in the present position.

Succession and administration of estates

Effect of foreign probate of will

Alexander v Alexander, 2017 BCSC 914, 26 ETR (4th) 219

The plaintiffs, two siblings and the children of a third sibling who had died, brought an action in British Columbia against the siblings' brother in connection with property that he had received from their mother, who had died resident in Washington State. The mother's will divided her estate into four shares, one for each child. However, before her death, she had transferred a house, a car, and two bank accounts into the joint names of herself and the defendant son. The plaintiffs claimed that these assets had been given to the brother to be held on trust for the mother's estate or on trust for each of the plaintiffs individually. The plaintiffs and the defendant all resided in British Columbia.

[117] This is a common law ground for recognition preserved by the *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 22(3). Neither of the statutory grounds in s 22(1) or (2), one year's residence of either party in the foreign jurisdiction immediately preceding the commencement of proceedings, or the wife's domicile there at that time, applied on the facts.

The main issue in the present proceeding was the effect of the estate's having been probated in Washington. The assets acquired by the brother through the right of survivorship were not included in the assets of the estate. The defendant argued that this made the plaintiffs' claims in respect of those assets either an abuse of process or *res judicata*. The court held that probate in Washington barred any claim that the assets in question formed part of the estate's assets or were held in trust for the benefit of the estate. The estate had been finalized, and, in its final form, those assets did not form part of the estate. In addition, the plaintiffs were well beyond the six-month period within which, under Washington law, a claim in respect of non-probate assets must be brought. *Res judicata* or issue estoppel applied. However, the probate of the estate did not preclude the plaintiffs' personal claims that the defendant had received the assets from his mother subject to a trust obligation to divide them equally with his siblings and his late brother's children. The defendant had not shown that those claims were bound to fail, and so his application to strike out the action was dismissed.

Québec

Classification juridique

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

Threlfall v Carleton University, 2017 QCCA 1632, 417 DLR (4th) 623[118]

The deceased, Mr Rosme, retired from a professorial position at Carleton University in Ontario in 1996. In 2007, he disappeared from his home in Gatineau, Québec. His former life partner, Ms Threlfall, with whom he had continued to be close, continued to receive his pension in her capacity as tutor to the property of Rosme as an absentee within the meaning of Article 84 of the *CcQ*. When the university sought to terminate the payments in 2009, Threlfall's notary pointed out that, under Article 85 of the *CcQ*, an absentee is presumed to be alive for seven years following his disappearance unless proof of his death is made before then. The university continued to make the payments. Rosme's remains were found on the property next to his old home in July 2013, just over five years and ten months after his disappearance. Threlfall's notary advised the university that it was now established that Rosme had died and pension payments were stopped. Subsequently, the Registrar of Civil Status certified the act of death as having occurred on 11 September 2007, the day after Rosme disappeared.

[118] Autorisation de pourvoi à la CSC accordée, 37893 (26 juillet 2018).

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The Québec Court of Appeal, with one minor variation, affirmed the first instance judge's decision[119] that Threlfall was obliged to return the pension payments she had received from Carleton from 11 September 2007 to the date they were stopped in the summer of 2013. Most of the discussion was about the precise juridical basis for the obligation to repay, which is not material to this note. The choice of law involved was not analyzed explicitly. The Court of Appeal characterized Article 85 of the *CcQ*, the presumption that an absentee is alive, as a rule of evidence.[120] It was held to apply to the university's obligation to continue making payments to Threlfall. These payments were due, and the university had no right to terminate them until the presumption in Article 85 was rebutted by proof that Rosme had died. Once the presumption was rebutted, the university's pension obligations, which presumably were governed by Ontario law, were shown to have ended on 11 September 2007. That being so, the payments to Threlfall were, when viewed retrospectively, shown to have been made without cause and had to be returned as a restitutionary obligation under Québec law.

Statut personnel des personnes physiques

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

Droit de la famille – 171282, 2017 QCCS 2449

Les parties se sont mariées en 1985 en Roumanie et se sont établies ensuite au Québec. En 2006, Monsieur quitte le Québec pour travailler au Koweït et Madame demeure au Québec. En 2012, un jugement de divorce est rendu en Roumanie. Ce jugement est prononcé de consentement et ne contient aucune conclusion quant aux biens ou aux mesures accessoires. En 2013, Monsieur entreprend le présent recours, en partage du patrimoine familial, visant essentiellement deux immeubles situés au Québec. Il allègue que c'est le couple, et non pas Madame seule, qui a procédé à l'achat de ces deux propriétés et que c'est lui qui a fourni les fonds nécessaires à cette fin à partir de son salaire considérable, gagné au Koweït. En 2016, Madame réplique par une demande de pension alimentaire pour elle-même et une demande de provision pour frais. Monsieur en réclame le rejet au motif que la loi roumaine, applicable à la demande de Madame, n'admet pas de telles conclusions dans un cas comme celui en l'instance.

La Cour accueille la demande de rejet. L'article 3094 *CcQ* dit que l'obligation alimentaire est régie par la loi du domicile du créancier, mais lorsque le créancier ne peut obtenir d'aliments du débiteur en vertu de cette loi, la

[119] *Carleton University v Threlfall*, 2016 QCCS 406, noted in Blom (2016), *supra* note 49 at 632.

[120] *Carleton University v Threlfall*, 2017 QCCA 1632 at para 68, 417 DLR (4th) 623.

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loi applicable est celle du domicile du débiteur. L'article 3096 *CcQ* précise que l'obligation alimentaire entre époux divorcés est régie par la loi applicable au divorce. L'argument de Madame voulant que, le jugement de divorce roumain n'ayant pas statué sur les mesures accessoires, le droit québécois s'applique à ces dernières, est non seulement en porte-à-faux avec l'article 3096 *CcQ* mais aussi n'est soutenu par quelconque autorité. Cet article fait exception au principe à l'effet que le domicile du débiteur alimentaire — ici le Québec, pour Madame — régit le droit applicable. La preuve est univoque que cette demande de nature alimentaire n'a aucune chance de succès en application de la loi roumaine.

Statut des obligations

Régime matrimonial

Note. Voir *Droit de la famille – 171596.*[121]

Responsabilité civile — écrasement d'un avion en Ontario — vol de l'Alberta au Québec — lien plus étroit des parties avec le système juridique québécois — article 3082 CcQ

Giesbrecht c Nadeau (Succession de), 2017 QCCA 386[122]

Les appelants portent en appel un jugement portant sur une demande conjointe des parties afin de trancher une question de droit et qui déclare que la loi applicable à la solution du litige en cause est la loi québécoise. Un écrasement d'avion mortel est survenu en Ontario. Une action en dommages a été intentée au Québec par les membres de la famille d'une des victimes, Yannick Fournier. La compétence des tribunaux québécois n'est pas remise en question et la responsabilité des intimés n'est pas contestée. Seule la loi applicable pour décider du montant des dommages est en cause : soit celle du lieu où résident les intimés et la majorité des appelants (le Québec), soit celle de la province dans laquelle l'écrasement est survenu (l'Ontario). Le juge de première instance a conclu que l'ensemble des allégations de la requête introductive d'instance permet de conclure que "la loi du centre de gravité réel de la situation" était la loi québécoise.

La Cour rejette l'appel. Contrairement à la *common law* canadienne, l'article 3126 *CcQ* prévoit deux exceptions à la règle de la *lex loci delicti.* La première exception est énoncée au premier alinéa de l'article 3126 *CcQ.* Elle porte sur l'apparence d'un préjudice dans un autre État. Les deux conditions de cette première exception ne sont pas remplies. La deuxième

[121] 2017 QCCS 3054.

[122] Autorisation de pourvoi à la CSC refusée, 37545 (8 novembre 2017).

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exception, au second alinéa de l'article 3126 *CcQ*, prévoit que si l'auteur et la victime ont leur domicile ou leur résidence dans le même État, c'est la loi de cet État qui s'applique plutôt que celle de l'État où le fait générateur du préjudice est survenu. Or, ce n'est manifestement pas le cas en l'espèce puisque quatre des appelants sont domiciliés en Colombie-Britannique.

L'article 3082 *CcQ* dit, "À titre exceptionnel, la loi désignée par le présent livre n'est pas applicable si, compte tenu de l'ensemble des circonstances, il est manifeste que la situation n'a qu'un lien éloigné avec cette loi et qu'elle se trouve en relation beaucoup plus étroite avec la loi d'un autre État." Puisque le deuxième alinéa de l'article 3126 *CcQ* rendrait applicable au litige le droit québécois si ce n'était de la présence des appelants de la Colombie-Britannique, et le recours de ces appelants non-québecois est recevable au Québec, mais non en Ontario,[123] il s'agit ici d'un cas extraordinaire et vraiment exceptionnel qui justifie l'application de l'article 3082 *CcQ* afin d'écarter la loi ontarienne et d'appliquer plutôt la loi du Québec à l'ensemble du litige.

[123] Il s'agit des beaux-parents par alliance de feu Yannick Fournier, mais non-pas de personnes énumérées au paragraphe 61(1) de la *Loi sur le droit de la famille* de l'Ontario, *supra* note 55. Ils ne pourraient donc pas recouvrir des intimés des dommages-intérêts à la suite du décès de Yannick Fournier en vertu du droit ontarien.

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