# Canadian Cases in Private International Law in 2015 / Jurisprudence canadienne en matière de droit international privé en 2015

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## JURISDICTION / COMPÉTENCE DES TRIBUNAUX

### *Common Law and Federal*

### Jurisdiction *in personam*

#### *Jurisdiction* simpliciter — *presence or residence in the jurisdiction — individuals*

*Broad v Pavlis*, 2015 BCCA 20, 381 DLR (4th) 193

The parties were married in 1999 and divorced in 2006 by a court in Alberta, where the matrimonial home had been. By the time of the divorce, the wife had moved with two of the three children to British Columbia. The husband stayed in Alberta. The court ordered the husband to pay child support but, as part of a settlement entered into before the divorce, the wife had waived spousal support as part of her acceptance of $1 million as her equal share in a division of matrimonial property. The main item of property was the husband's interest in an Alberta energy company he owned with his brother. In 2007, the husband and his brother sold the company for $25.5 million. Six years later, the wife brought the present proceeding claiming that the husband had fraudulently failed to disclose the true value of the Alberta company and seeking spousal support and increased child support. The husband took the position that the BC court lacked territorial competence (jurisdiction *simpliciter*) under the *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*)[1] or should decline jurisdiction on the basis that Alberta was clearly a more appropriate forum.[2]

The chambers judge held the court had territorial competence because the husband was ordinarily resident in British Columbia as well as in Alberta,

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[1] *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 [*CJPTA* (BC)].

[2] Declining jurisdiction on the ground of *forum non conveniens* is governed by *ibid*, s 11.



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since he spent about 30 percent of each year at a home he had in West Kelowna, British Columbia.[3] The Court of Appeal upheld this finding. The husband's argument that the West Kelowna house was just a vacation place was beside the point. Multiple ordinary residences were appropriately found if a person maintained residences in more than one place where he stayed as part of the settled routine of his life. The Court of Appeal also refused to interfere with the judge's exercise of his discretion not to stay the wife's proceeding. A factor the judge had rightly treated as important was that the wife's claims for a variation of child support and for the ordering of spousal support were claims for corollary relief under the *Divorce Act*, which the wife had a right to make in British Columbia,[4] and so would result in multiple proceedings if she were required to bring her claims relating to the valuation of the company in a court in Alberta.

*Note.* As far as claims against individuals are concerned, the "ordinary residence" criterion in the *CJPTA*, which is law in three provinces,[5] is a stricter criterion than at common law, which regards simple presence as sufficient to give jurisdiction.[6]

*Jurisdiction* simpliciter — *presence or residence in the jurisdiction — corporations*

*Note.* A man who had been employed by any or all of a BC company and two Chinese subsidiaries brought a wrongful dismissal action in British Columbia against the parent company. The court held it had territorial competence based on the ordinary residence of the company[7] and refused to decline jurisdiction because the employment relationship was governed at least in part by BC law: *Livingston v IMW Industries Ltd.*[8]

[3] Ordinary residence is one of the grounds of territorial competence. *Ibid*, s 3(d).

[4] The *Divorce Act*, RSC 1985, c 3 (2nd Supp), ss 4–5 give jurisdiction to grant or vary corollary relief if either former spouse is ordinarily resident in the province, with no discretion to decline the jurisdiction (unless an application for custody is involved). *CJPTA* (BC), *supra* note 1, s 12 gives priority to any other applicable statute, such as the *Divorce Act*, that expressly confers or denies territorial competence in a way that conflicts or is inconsistent with the *CJPTA*.

[5] *CJPTA* (BC), *supra* note 1; *Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 [*CJPTA* (SK)]; *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2d Sess), c 2 [*CJPTA* (NS)]. The acts differ slightly.

[6] See note on *Chevron Corp v Yaiguaje*, below, under *Jurisdiction* simpliciter — *proceeding to enforce a foreign judgment.*

[7] As defined in the *CJPTA* (BC), *supra* note 1, s 7.

[8] *Livingston v IMW Industries Ltd.*, 2015 BCSC 1627.

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

*York (Regional Municipality) v LeBlanc*, 2015 ONCA 431, 37 MPLR (5th) 207

The Court of Appeal affirmed the motion judge's decision that the Superior Court of Justice had jurisdiction in an action by the regional municipality against three related corporate defendants and one individual defendant, all apparently resident in the United States, in an action arising out of a contract to haul waste to Massachusetts and process it there into compost. The municipality alleged the waste had simply been taken to a landfill, and it claimed damages on the basis of breach of contract, negligent misstatement, fraud, and conspiracy to defraud. The Court of Appeal held there was jurisdiction *simpliciter* because of several alleged torts having been committed in Ontario and a contract connected with the dispute having been made in Ontario, all of which were presumptive connecting factors.[9] The motion judge made no error in relying on the plaintiff's pleadings as far as the viability of the claims was concerned; the only question at this stage was whether the plaintiff had a good arguable case. There was also no reason to interfere with the judge's conclusion, on the issue of *forum non conveniens*, that under the circumstances the defendants could reasonably expect to be called upon to defend the action in Ontario.

*Eco-Tec Inc v Lu*, 2015 ONCA 818[10]

Eco-Tec, an Ontario company, brought an action against Dr Lu, who was a Canadian citizen, as well as three Chinese companies owned by him or his parents and a British Virgin Island (BVI) company owned by him. The defendants had been the plaintiff's consultant, agent, or distributor in China under a series of agreements entered into between 2000 and 2008. Eco-Tec alleged that the defendants had misappropriated its proprietary and confidential technology and, using the technology, manufactured products in China and elsewhere to compete with the plaintiff's products. The Court of Appeal upheld the motion judge's decision that jurisdiction was established on the basis of the presumptive connecting factor that the contracts in question had all been made in Ontario.

In finding that the contracts were made in the province, the judge correctly applied the rule that a contract concluded by instantaneous transmission is made where the acceptance is received. In response to the

[9] Presumptive connecting factors are the basis for jurisdiction *simpliciter* at common law, as laid down by *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 [*Van Breda*].

[10] Leave to appeal to SCC refused, 36825 (5 May 2016).

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defendants' argument that a 2014 decision of the court[11] required a more holistic assessment of whether the contract was truly an "Ontario contract," the Court of Appeal held that the earlier case did not add such a requirement and, in any event, the connection with Ontario was supported by contextual factors. The contracts sought to protect Ontario-based trade secrets and authorized the defendants to distribute products incorporating that Ontario-based proprietary information.

On *forum non conveniens*, the motion judge was right to hold that the defendants bore the onus of showing that a forum in China would be clearly more appropriate. It was true that the latest distributorship agreement included a clause whereby the plaintiff and the BVI company attorned to the jurisdiction of the Chinese courts, but this case involved multiple agreements. Some of the other contracts selected an Ontario forum and one selected a BVI forum. In these circumstances, the judge was right to apply the general rule that the defendant has the burden on the issue of *forum non conveniens*. Her conclusion that the defendants had not met the burden was entitled to deference.

*Note.* Other contract actions in which the Ontario courts found jurisdiction *simpliciter* based on the contract's having been made in the province were *Tyoga Investments Ltd v Service Alimentaire Desco Inc*[12] (chicken import contract) and *Neophytou v Fraser*[13] (loan). *Tyogo* also relied on the defendant's carrying on business in Ontario, as did *Orthoarm Inc v American Orthodontics Corp* (royalties on licence of US patent rights).[14]

*Geophysical Service Inc v Arcis Seismic Solutions Corp.*, 2015 ABQB 88, 20 Alta LR (6th) 112

Geophysical, an Alberta corporation, had developed seismic data relating to the Beaufort Sea and the area offshore Newfoundland and Labrador (NL). It was required by federal law to provide some of the data to a federal agency based in Ottawa, the National Energy Board (NEB), and to a joint federal-provincial agency based in NL, the Canada-Newfoundland and Labrador Offshore Petroleum Board (OPB). Geophysical claimed that the NEB and the OPB had sent copies of its seismic data to a number of petroleum exploration companies, many of which were based in Alberta.

[11] *Trillium Motor World Ltd v General Motors of Canada Ltd*, 2014 ONCA 497, 120 OR (3d) 598, noted in (2014) 52 Can YB Int'l L 583.

[12] *Tyoga Investments Ltd v Service Alimentaire Desco Inc*, 2015 ONSC 3810.

[13] *Neophytou v Fraser*, 2015 ONCA 45, 63 CPC (7th) 13.

[14] *Orthoarm Inc v American Orthodontics Corp*, 2015 ONSC 1880, 125 OR (3d) 312.

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They were permitted to do so under the relevant legislation, but Geophysical claimed that they were obliged to do so in a manner that protected its property interest in the data and had failed to do this. The OPB (though not the NEB) contended that the court had no jurisdiction *simpliciter* over the claims against it and, alternatively, that the court should decline jurisdiction.

The Court of Queen's Bench, reversing the Master's decision, held there was jurisdiction *simpliciter*. According to the Alberta *Rules of Court*, a commencement document may be served outside Alberta if a real and substantial connection exists between Alberta and the facts on which a claim in the action is based.[15] The rules also provide that such a connection is presumed to exist if, among other cases, the defendant, though outside Alberta, is a necessary or proper part to the action brought against another person who was served in Alberta.[16] This rule applied here because the claims against the OPB were inextricably connected to those against the Alberta corporations that requested and received data from the OPB.

It was true that the Supreme Court of Canada had treated the "necessary or proper party" basis as insufficient to be a common law presumptive connecting factor.[17] That was said, however, in the context of a claim against a defendant outside Canada. The rule in question here dealt with service outside Alberta but within Canada.[18] In that context, the "necessary or proper party" category was a valid presumptive connecting factor where, as here, the subject matter of the action was connected to Alberta and the other principal players in the dispute were Alberta corporations.

In any event, there were other presumptive connecting factors. The tort of conversion was committed in Alberta for jurisdictional purposes because the Alberta defendants received the seismic materials there. Alberta was also the site of any alleged copyright infringement, since the OPB sent the materials directly to the requesting corporation in Alberta. Jurisdiction *simpliciter* therefore existed. As for *forum non conveniens*, there was no basis for regarding NL as a more appropriate forum than Alberta.

*Note.* Jurisdiction *simpliciter* was based on the presumptive connecting factor of a tort committed in Ontario in *QBD Cooling Systems Inc v Sollatek (UK) Ltd* (claim by Ontario manufacturer of cooled display cases against UK supplier for defects in thermostats)[19] and *Candoo Excavating Services Ltd v Ipex Inc*

[15] *Alberta Rules of Court*, Alta Reg 124/2010, r 11.25(1)(a).

[16] *Ibid*, r 11.25(3)(i).

[17] *Van Breda*, *supra* note 9 at para 55.

[18] The presumptions in r 11.25(3) are not *per se* so limited, but r 11.25(2) of the *Rules of Court*, *supra* note 15, does distinguish between service elsewhere in Canada and service abroad by requiring leave in the latter case.

[19] *QBD Cooling Systems Inc v Sollatek (UK) Ltd*, 2015 ONSC 947.

(third party claim by Ontario manufacturer of water pipe, installed in Alberta, against Alberta engineers for the project).[20] Arguments of *forum non conveniens* were rejected in both cases.

See also *Poseidon Concepts Corp*, 2015 ABASC 933, in which the Alberta Securities Commission held it had jurisdiction in relation to breaches of Alberta securities legislation by an out-of-province resident who was an officer of a company that was a reporting issuer under the legislation. The commission used the presumptive connecting factor technique in coming to this conclusion.

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

*Glasford v Canadian Imperial Bank of Commerce*, 2015 ONSC 197, aff'd 2015 ONCA 523[21]

A doctor who resided in Barbados or St Kitts and her son, who resided in Ontario, planned to build a house in St Kitts on property that the mother owned. They met in St Kitts with representatives of First Caribbean, a bank incorporated in Barbados of which a Canadian bank was the majority shareholder, to arrange mortgage financing. At this meeting, First Caribbean was said to have made misrepresentations as to how the funds would be handled. The actual loan agreement was later executed by the mother in Barbados and posted there, and it was subsequently executed and posted by the son in Ontario. The building project ran into problems. The plaintiffs brought an action in Ontario against First Caribbean claiming fraud, breach of collateral warranty, and breach of fiduciary duty. The defendant argued the Ontario Superior Court of Justice lacked jurisdiction *simpliciter* or should decline jurisdiction.

The motion judge and Court of Appeal held there was no jurisdiction *simpliciter*. The place of contracting, which was in Ontario according to the postal acceptance rule, was a presumptive connecting factor,[22] but it was rebutted on the facts of this case. First Caribbean had no connection with Ontario and committed no wrong there. As for the place of the tort, another presumptive connecting factor, it was in St Kitts. The plaintiffs had received the alleged misrepresentation at a meeting there. The fact that it might have been repeated in a letter sent to Ontario did not alter the place of the tort.

The parties had also begun an action in St Kitts against the same defendants, based largely on the same claims. The court in St Kitts was clearly

[20] *Candoo Excavating Services Ltd v Ipex Inc*, 2015 ONSC 809, 42 CLR (4th) 153.

[21] Leave to appeal to SCC refused, 36670 (7 April 2016).

[22] As required by *Van Breda*, *supra* note 9.

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a more appropriate forum. For this reason, the Ontario court would have declined jurisdiction even if jurisdiction *simpliciter* had been found.

*Note.* Jurisdiction *simpliciter* was also found not to exist, for want of a presumptive connecting factor, in a claim by a resident of Nova Scotia against the Prince Edward Island law firm that had represented her in litigation in that province;[23] a claim by an Ontario resident against the government of Nunavut for wrongful dismissal from his position in that territory;[24] and a claim by a BC resident against his ex-son in law, resident in Texas, for payment of the proceeds of Mexican property that the plaintiff had caused to be transferred to the defendant by a BVI company.[25]

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

*Gulevich v Miller*, 2015 ABCA 411, 393 DLR (4th) 304

In November 2007, the plaintiff had had a CT scan in Ontario when she suffered from headaches and vision changes. The defendant, a diagnostic radiologist practising there, reviewed the scan results and reported them as normal. The plaintiff's family physician so informed her. Her symptoms by that time had decreased. In February 2008, the plaintiff moved to Alberta. Over the next few years, her symptoms worsened, until eventually new scans led to the detection of a malignant brain tumour, which was treated with ongoing, intensive cancer treatment in Alberta. The plaintiff brought an action in Alberta against the defendant on the basis that the 2007 CT scan already showed the tumour and the defendant was negligent in reporting the scan was normal. Service *ex juris* on the defendant in Ontario was based on the presumption in the *Rules of Court* that a claim based on a tort committed in Alberta has a real and substantial connection with Alberta.[26]

The Court of Appeal, reversing the chambers judge, held that the tort being sued upon was committed in Alberta. In the *Van Breda* case, the Supreme Court of Canada had indicated that the mere fact that damage was suffered in the province from a tort committed elsewhere was not a presumptive connecting factor.[27] However, the connections with Alberta included other elements that justified treating the tort as having been

[23] *Li v MacNutt & Dumont*, 2015 NSSC 53, 356 NSR (2d) 176.

[24] *Arsenault v Nunavut*, 2015 ONSC 4302.

[25] *Vines v Blaugrund*, 2015 BCSC 1525. Compare *Neophytou v Fraser*, *supra* note 13, another intra-family lawsuit.

[26] *Alberta Rules of Court*, *supra* note 15, r 11.25(3)(d).

[27] *Van Breda*, *supra* note 9 at para 89.

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committed there. Earlier Supreme Court of Canada authority, which was still relevant, had defined the location of a tort as being in the place most substantially affected by the defendant's activities or its consequences.[28] The province most substantially affected by the defendant's activities and its consequences was Alberta. The CT scan report accompanied the plaintiff to Alberta, and the consequences of it were that the Alberta physicians who attended upon the plaintiff initially relied on the report. As a result, she continued to receive treatment inappropriate to her condition, and her symptoms worsened. When the correct diagnosis was made, she underwent surgery and treatment in Alberta. The consequences of the defendant's report were significant not only to the plaintiff's health in Alberta but also to the province, which paid the health costs. The defendant had not rebutted the presumption of jurisdiction based on the tort having been committed in Alberta.

The chambers judge had held that, if he had found the court had jurisdiction *simpliciter*, he would have held that Alberta was the *forum conveniens*. After the Court of Appeal gave its reasons, it gave a second decision clarifying its formal judgment. Since the appeal had dealt with jurisdiction *simpliciter* only, and the chambers judge's comments on *forum non conveniens* had been *obiter*, it was open to the Court of Queen's Bench to consider the *forum non conveniens* issue afresh.[29]

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

*Note.* A frequent example of jurisdictional contests is where Canadian tourists injured abroad try to sue the foreign operators of the tour or resort in their home province. *Van Breda* involved two such cases, arising out of accidents at Cuban resorts, and found the Ontario courts had jurisdiction *simpliciter* in each.[30] However, jurisdiction was based on the happenstances that one of the main defendants in one case carried on business in Ontario and that the trip in the other case had been booked through an Ontario agency as a *quid pro quo* for providing sports training services at the resort. In general, the requirement that *Van Breda* laid down, that the plaintiff must show a presumptive connecting factor with the province, has made it more difficult to establish jurisdiction in such cases. Examples in the past year were *Brown v Mar Taino SA*,[31] involving a collapsed chair at a hotel

[28] *Moran v Pyle National (Canada) Ltd*, [1975] 1 SCR 393 at 407–09.

[29] *Gulevich v Miller*, 2016 ABCA 17, [2016] 5 WWR 249.

[30] *Van Breda*, *supra* note 9.

[31] *Brown v Mar Taino SA*, 2015 NSSC 348, 367 NSR (2d) 253.

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in the Dominican Republic, and *Cook v 1293037 Alberta Ltd*,[32] in which the accident happened in a hotel in Alberta. *Brown* was decided under the *CJPTA*.[33] The plaintiff could not show that the claim against the foreign defendants had a real and substantial connection with Nova Scotia. In *Cook*, there was no presumptive connecting factor to link the claim with Ontario.

*Forsythe v Westfall*, 2015 ONCA 810, 125 OR (3d) 135[34]

Forsythe, an Ontario resident, was injured in an accident in Alberta when she was riding as a passenger on a motorcycle owned and operated by Westfall, an Alberta resident. Westfall claimed the accident was caused solely by an unidentified driver. Forsythe brought an action in Ontario against Westfall, his insurer, her own insurer, and John Doe, representing the unidentified driver. Forsythe's claim against her own insurer was to invoke the uninsured or underinsured motorist coverage. Her policy, issued to her in Ontario, required that she sue in Ontario to determine whether she had coverage or not. Westfall moved to have the action against him stayed on the basis that the court lacked jurisdiction *simpliciter*.

The Court of Appeal affirmed the motion judge's decision that no presumptive connecting factor with Ontario had been shown. An earlier decision of the court, dealing with a similar case, had reached the same conclusion[35] and was indistinguishable. The claim on Forsythe's uninsured motorist coverage arose out of her private contract with her insurer. Westfall was not a party to that contract, he was not a named insured, and the contract had nothing to do with him. The uninsured motorist claim was, moreover, speculative and contingent. Forsythe relied on the fact that the earlier case had not considered the argument, which she made now, that both the terms of her policy and general legislation dictating those terms[36] required a claim on her uninsured motorist coverage to be brought in Ontario. This argument was beside the point. Whether the contractual term was prescribed by statute or not, it remained a term of the contract between Forsythe and her insurer and it had nothing to do with Westfall, the party over whom she sought to establish jurisdiction.

*Note*. Despite the lack of a presumptive connecting factor, an Ontario action arising out of a Michigan motor vehicle accident was allowed to proceed in

[32] *Cook v 1293037 Alberta Ltd*, 2015 ONSC 7989.

[33] *CJPTA* (NS), *supra* note 5.

[34] Leave to appeal to SCC refused, 36716 (3 March 2016).

[35] *Tamminga v Tamminga*, 2014 ONCA 478, 375 DLR (4th) 190, noted (2014) 52 Can YB Int'l L 579.

[36] *Uninsured Automobile Coverage*, RRO 1990, Reg 676, s 4(1)(c).

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*Ibrahim v Robinson*.[37] The change in the common law of jurisdiction in *Van Breda*[38] had taken place after the limitation period in Michigan had expired and the defendant had also waited years to challenge jurisdiction.

*Best v Palacios*, 2015 NBQB 165

The plaintiff sued defendants resident in Massachusetts for injuries she suffered in an accident at Logan Airport in Boston. The basis for the jurisdiction of the New Brunswick court was that the injuries suffered in Massachusetts were indivisible from those suffered in a subsequent motor vehicle accident in New Brunswick. The court dismissed the claim against the Boston defendants for lack of jurisdiction *simpliciter*. Neither the plaintiff's residence in New Brunswick nor her having suffered damage there as a consequence of the Boston accident was a presumptive connecting factor. There was no causal relationship between the Boston accident and the later accident in the province.

*Note*. The same conclusion was reached in two other cases. In one, a New York road accident had occurred some months after an Ontario accident.[39] In the other, an accident in Washington state had occurred two years after an accident in British Columbia.[40] The fact that the injuries suffered in the domestic and the foreign accidents overlapped did not support jurisdiction *simpliciter* in the claims arising out of the foreign accident.

*Jurisdiction* simpliciter — *non-resident defendant — claim for defamation — jurisdiction found to exist*

*Note*. An example of the rule that jurisdiction *simpliciter* in a defamation action can be based on publication in the province, since this meant the tort was committed there, is *Goldhar v Haaretz.com*.[41] An Ontario resident was allegedly defamed by an article on the website of an Israeli newspaper.

*Jurisdiction* simpliciter — *proceeding to enforce a foreign judgment*

*Chevron Corp v Yaiguaje*, 2015 SCC 42, [2015] 3 SCR 69

The plaintiffs brought an action on behalf of some 30,000 Ecuadorian villagers, claiming damages for environmental damage done to the villagers'

[37] *Ibrahim v Robinson*, 2015 ONCA 21, 380 DLR (4th) 306.

[38] *Van Breda*, *supra* note 9.

[39] *Mannarino v Brown Estate*, 2015 ONSC 3167, 50 CCLI (5th) 122.

[40] *Sekela v Cordos*, 2015 BCSC 732, 77 BCLR (5th) 184.

[41] *Goldhar v Haaretz.com*, 2015 ONSC 1128, 125 OR (3d) 619, aff'd 2016 ONCA 515.

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lands by the oil exploration and extraction activities of Texaco, an American oil company that was later acquired by Chevron Corporation (Chevron US). The claims were first brought in 1993 in federal court in New York, but they were eventually dismissed in 2002 on the ground that the action should be heard in Ecuador. Chevron undertook to submit to the jurisdiction of the Ecuadorian court. An action was accordingly brought against Chevron in Ecuador in 2003. A judgment was given in the plaintiffs' favour in 2011 and affirmed on final appeal in 2013, although with a reduction of the damages by half to US $9.51 billion. By this time, Chevron had initiated lawsuits in the United States against the plaintiffs' American lawyer and two of his Ecuadorian clients, claiming that the lawyer and his team had corrupted the Ecuadorian proceedings. They also obtained a judgment from federal court in New York in 2014 that the Ecuadorian judgment had been obtained by fraud on the Ecuadorian courts.

Since Chevron had no assets in Ecuador, the plaintiffs had, in 2012, brought an action in Ontario on the Ecuadorian judgment. The defendants were Chevron US, a Delaware corporation with no presence in Canada, and Chevron Canada, a federally incorporated Canadian company that was a seventh-level subsidiary of Chevron, with ownership at each level being 100 percent. Chevron US was served *ex juris* at its head office in California pursuant to an Ontario Civil Procedure Rule that authorizes service *ex juris* if the proceeding is a claim "on a judgment of a court outside Ontario."[42] Chevron Canada was served at its office in Ontario.

In the present proceeding, both defendants applied for dismissal or a stay of the Ontario enforcement action on the basis that the court lacked jurisdiction *simpliciter* over the action. As far as Chevron US was concerned, the basis for the argument was that it had no presence in Canada and no assets in Canada and that, consequently, the enforcement action lacked a real and substantial connection with Ontario as the constitution requires.[43] Chevron Canada argued that, although it was resident in Ontario by carrying on business there, the present claim was unrelated to that business and so, again, the action against it had no real and substantial connection with Ontario.

The motion judge held that the court had jurisdiction *simpliciter* over the enforcement action against Chevron US and accordingly refused to set aside service *ex juris* on that defendant. As for Chevron Canada, he held there was undoubted jurisdiction over it by reason of its presence in

[42] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 17.02(m).

[43] The requirement that the jurisdiction of the court of a province must be based on a real and substantial connection that the defendant or the facts of the case have with the province was established in *Morguard Investments Ltd. v De Savoye*, [1990] 3 SCR 1077; *Hunt v T & N Plc*, [1993] 4 SCR 289.

Ontario, but he nevertheless ordered a stay of the proceeding against it on the basis that it was not a defendant in the Ecuadorian action and neither its shares nor its property were assets of Chevron US, so there was no possible claim against it. The Ontario Court of Appeal reversed the motion judge on the stay as against Chevron Canada because Chevron Canada — wanting to ensure that it did nothing that could be seen as touching on the merits and so an attornment to the court's jurisdiction — had not applied for the stay, and it was wrong to stymie the plaintiffs' enforcement action on grounds that had not been fully argued.

The Supreme Court of Canada dismissed the defendants' appeal and held that the Ontario court had jurisdiction over the enforcement action as against both Chevron US and Chevron Canada. It said nothing on the correctness of the motion judge's stay because the defendants had not appealed from the Court of Appeal's reversal of it, consistently with their abstention in the lower courts from making any submission that might be considered as going to the merits of the enforcement action.

The arguments made by each defendant revolved around the real and substantial connection test as a prerequisite for jurisdiction. For different reasons, the court held that in the context of the claims against each of them the test was irrelevant. For the claim against Chevron US, the critical distinction was between jurisdiction over an original action and jurisdiction over an action to enforce a foreign judgment. An original action against a non-resident defendant must have a real and substantial connection with the province where it is brought, although, as the court had recently held, jurisdiction depends not on the real and substantial connection itself, which is a constitutional parameter but, rather, on conflict-of-laws rules — in the form of "presumptive connecting factors" — within that parameter.[44] However, jurisdiction in an action to enforce a foreign judgment against a non-resident defendant requires no other basis than the act of service on the defendant.

The court based this proposition on precedent and on principle. As far as precedent was concerned, no case had suggested that the enforcing court's jurisdiction depended on any criterion other than proper service. The only jurisdictional inquiry was into the foreign court's connection with the action in which judgment was given. As for principle, there were two points. One was that an action to recognize and enforce a foreign judgment was different in a crucial respect from an action at first instance, in that it was not to establish a new obligation but only to allow a pre-existing obligation to be fulfilled. The court just offers a legal mechanism to facilitate the collection of a debt, or the enforcement of a non-monetary order, within the jurisdiction. The enforcing court's order has no coercive force outside its jurisdiction.

[44] *Van Breda*, *supra* note 9.

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The other point was the notion of comity, which had consistently underlain actions for recognition and enforcement. Comity is grounded in notions of order and fairness to participants in litigation. One of its core components was the need to acknowledge and show respect for the legal acts of other states. In recognition and enforcement proceedings, comity and fairness are provided by ensuring that a real and substantial connection existed between the foreign court that gave the judgment and the underlying dispute. The judgment debtor has the opportunity to raise the lack of such a connection not only before the enforcing court but also, in most cases, before the foreign court. In the present case, Chevron admittedly attorned to the jurisdiction of the Ecuadorian court.

To insist, as Chevron argued, that there must also be a real and substantial connection with the enforcing court would only undermine order and fairness. The defendant itself would often not be present in that court's jurisdiction, and looking to the location of its assets would mean that the connection could appear or disappear as assets were moved into and out of the jurisdiction. An unambiguous statement by the Supreme Court of Canada that a real and substantial connection is not necessary will provide a fixed, clear, and predictable rule that is consistent with the dictates of order and fairness and will allow parties to predict with reasonable confidence whether a court will assume jurisdiction in the case. A clear rule would also help to avert dilatory tactics by defendants in the form of jurisdictional challenges that merely thwart the proceedings from their eventual resumption.

The court stressed that in deciding that jurisdiction to enforce the Ecuadorian judgment existed, it was not deciding whether that jurisdiction would or should be exercised. Either by way of preliminary motion or at trial, Chevron US could still argue, for example, that the proper use of Ontario judicial resources justified a stay, that Ontario should decline jurisdiction on the ground of *forum non conveniens*, or that Chevron US had a defence to enforcement such as fraud or natural justice.

On jurisdiction in the action against Chevron Canada, the court framed its analysis by distinguishing between three bases for jurisdiction in an action: the defendant's presence in the territory, the defendant's consent (before or after the proceedings began), and assumed jurisdiction, meaning jurisdiction over a defendant not present in the province based on the cases having a defined connection with the province. The real and substantial connection requirement did not apply to presence-based jurisdiction because presence in and of itself was a traditional ground of jurisdiction that was not displaced by the real and substantial connection that cases from *Morguard*[45] onwards have held to be necessary for the exercise of assumed jurisdiction. So far as Chevron Canada was concerned, the

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

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court had jurisdiction based on its presence in Ontario, as established by its doing business there. The maintenance of physical business premises was a compelling jurisdictional factor in that regard. Whether Chevron Canada's shares or assets were in law available to satisfy Chevron US's judgment debt was a matter left for argument at a subsequent stage of the enforcement action.

*Note.* After a quarter-century of saying that, for the courts of a province, judicial jurisdiction depends on the proceeding having a real and substantial connection with the province, it comes as something of a surprise to have the Supreme Court of Canada revert, even if only for the purposes of actions on foreign judgments, precisely to the pre-*Morguard* state of affairs, namely that jurisdiction *simpliciter* is conclusively established by satisfying the rules of service of process.[46] Those rules, in the case of actions on foreign judgments, make no mention (as the court noted with evident approval) of any connection with the province at all. Given that part of the constitutional context is the incapacity of a province to act extraterritorially, how can one justify an absolutely unqualified jurisdiction to enforce a foreign judgment against a non-resident defendant? The court's answer, essentially, is that enforcement is by definition wholly intra-territorial because it creates no new rights or obligations that have any effect outside the province. It has consequences only in the form of legal measures that may be taken in the province.

One argument to the contrary is that once a foreign judgment acquires the status of a local (for example, Ontario) judgment, that status does have consequences outside Ontario because the judgment creditor now has an Ontario judgment that it can register in other provinces. The court adverted to this argument[47] by acknowledging that such a right of registration existed, but added that it was the product of legislation[48] and did

[46] The court referred at para 70 to the principle that rules of court "do not in and of themselves confer jurisdiction," but this is little more than lip-service because the court immediately went on to say (*ibid*) that the rules of court express the considered view of the Ontario legislature as to what the requirements for jurisdiction ought to be. That view is exactly what cases like *Morguard*, *ibid*, and *Van Breda*, *supra* note 9, discounted on the basis that the rules, or at least some of them, evidently paid no heed to the need for a real and substantial connection with the province.

[47] *Chevron Corp v Yaiguaje*, 2015 SCC 42 at para 49, [2015] 3 SCR 69 [*Yaiguaje*].

[48] Eg, the *Enforcement of Canadian Judgments and Decrees Act*, SBC 2003, c 29, based on a Uniform Law Conference of Canada model act, which was held in *Solehdin v Stern Estate*, 2014 BCCA 482 (noted in (2014), 52 Can YB Int'l L 603), to authorize the registration of an Ontario judgment in an action on a judgment from Louisiana. The court there distinguished its earlier decision in *Owen v Rocketinfo Inc*, 2008 BCCA 502, which held that under a different statute the California registration of a Nevada judgment could not be registered as if it were a California judgment.

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not qualify "the basic fact that absent some obligation to enforce another forum's judgments, the judicial system of each province controls access to its jurisdiction's enforcement mechanisms."[49] This suggests that the court takes the common law position to be that no action can be brought in one province on another province's judgment that merely holds enforceable a judgment from elsewhere.

Even after all this is said, it is strange to adopt over the last twenty-five years a real and substantial connection with the province as the *sine qua non* of judicial jurisdiction and now carve out an exception in which that criterion is simply jettisoned. Even acknowledging the problems in applying the real and substantial connection test to actions to enforce a foreign judgment — clearly the defendant's presence cannot be required, and the presence of assets, as the court noted, cannot always be essential either — it would not have been difficult to base the decision on an extension rather than on an elimination of the real and substantial connection test. One could, for instance, say that in the context of enforcement actions a real and substantial connection test with the province exists whenever the judgment creditor has legitimate reasons for invoking the local enforcement mechanisms. Some such statement would have avoided bifurcating the law as to jurisdiction, while, as a practical matter, giving judgment debtors little opportunity for bringing dilatory jurisdictional challenges, since a judgment creditor would usually have no trouble coming up with convincing reasons for bringing the enforcement proceeding in the province.

This aspect of *Yaiguaje* may have consequences beyond the category of enforcement actions. One can read the case as supporting the proposition that the real and substantial connection requirement for jurisdiction *simpliciter* can be superseded in other types of litigation where order and fairness — one might say the demands of a fair and effective interjurisdictional legal system — justify sidelining it in favour of an alternative approach. The most prominent such category is the "forum of necessity," which would let the court of a province take jurisdiction over a case that otherwise has little or no connection with the province if there is no other forum elsewhere to which the plaintiff can realistically turn. The *CJPTA*[50] and the *Civil Code of Quebec*[51] both include forum of necessity provisions. The Supreme Court of Canada recently had a chance to say something about whether a forum of necessity can exist at common law but expressly declined to do so.[52]

[49] *Yaiguaje*, *supra* note 47 at para 49.

[50] Eg, *CJPTA* (BC), *supra* note 1, s 6.

[51] *Code civil du Québec*, LQ 1991, ch 64, art 3136 [*CcQ*].

[52] *Van Breda*, *supra* note 9.

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The court in *Yaiguaje* noted that the *CJPTA* treats an enforcement action as having a presumed real and substantial connection with the province,[53] but at least in theory lets the judgment debtor try to rebut the presumption by showing that the enforcement action lacks a real and substantial connection with the province.[54] This was a choice the legislature was entitled to make, but it was one that Ontario had not seen fit to make in any of the legislation and rules of court dealing with the enforcement of judgments.[55] The court's treatment of jurisdiction over the claim against Chevron Canada is also of note. What the court said about that issue is of general application, not limited to actions to enforce a foreign judgment. In effect, the court confirms three things: that presence-based jurisdiction and assumed jurisdiction are governed by different principles; that the dichotomy applies to corporate as well as individual defendants; and that the dichotomy applies not just as a matter of traditional common law but also as a matter of constitutional law.

Jurisdiction over a resident, meaning present, defendant extends to any and all claims against that person, regardless of whether the claims as such have any connection with the province. From a constitutional point of view, the defendant's presence in and of itself supplies the necessary connection with the province. If the defendant is non-resident, however, it is the claim that must be sufficiently connected with the province.[56] Hence, claims against a non-resident corporation must meet the real and substantial connection test, via a presumptive connecting factor, whereas claims against a resident corporation need not.[57] For a time, it was unclear whether, in the latter situation, the corporation's presence had to meet a superadded "real and substantial" standard, but the court has now made it clear that the answer is no.[58]

### *Jurisdiction* simpliciter — *orders against non-resident third party*

*Equustek Solutions Inc. v Jack*, 2015 BCCA 265, 396 DLR (4th) 224[59]

This case turned on the question whether the BC Supreme Court could, and should, have issued an interlocutory injunction against Google,

[53] *Yaiguaje*, *supra* note 47 at para 73.

[54] Eg, *CJPTA* (BC), *supra* note 1, s 10(k).

[55] *Yaiguaje*, *supra* note 47 at paras 70–72.

[56] In the United States, the distinction is expressed in terms of "general" versus "specific" jurisdiction.

[57] Quebec law takes a different view. Article 3148(2) *CcQ*, *supra* note 51, says that if the defendant is a legal person that is not domiciled in Quebec but has an establishment in Quebec, jurisdiction exists if "the dispute relates to its activities in Quebec."

[58] *Yaiguaje*, *supra* note 47 at para 89.

[59] Leave to appeal to SCC granted, 36602 (11 June 2015).

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a Delaware corporation headquartered in California, ordering it to prevent certain websites from being accessed by its search engines. Google was not a party to the proceeding out of which the order arose. The main action was for misuse of confidential information and trade secrets by the defendants, formerly based in British Columbia but now operating from somewhere outside Canada. The defendants sold over the Internet a piece of industrial network hardware that was allegedly produced using technology wrongfully obtained and used by the defendants, who were formerly the distributors of the plaintiffs' products.

The order was made against Google because the chambers judge found that this was the only way in which the defendants could be prevented, pending a trial on the merits, from continuing to offer the allegedly infringing product in competition with the plaintiff's product. When the plaintiffs first applied for an injunction, Google voluntarily removed from its search indexes 345 web pages on the defendants' sites. The plaintiff was dissatisfied with the result for two reasons. One was that the de-indexing, pursuant to Google's policy, was only of individual pages, not whole websites. This allowed the defendants simply to move their sales material to other pages in their websites. The other was that Google was willing only to de-index the offending material from the Canadian Google website (google.ca), whereas most of the plaintiff's customers were in countries outside Canada and so would be directed to other Google search websites from which the material had not been de-indexed. The plaintiff therefore sought and obtained an order that Google de-index specified whole websites from its search engines on all of its websites of which there were dozens or perhaps hundreds.

Before the Court of Appeal,[60] Google argued, first, that the BC court lacked territorial competence under the *CJPTA* to make the order;[61] second, that the court lacked jurisdiction *simpliciter* on the constitutional ground that there was no real and substantial connection with British Columbia to support the court's imposing obligations on Google; and, third, that the court had wrongly exercised its discretion to make the order it did. On the first point, the court held that the injunction application against Google was not an independent "proceeding" under the definition in the *CJPTA*,[62] which meant that the court's territorial competence was to be determined with respect to the proceeding to which the application pertained, not the application as such. There was no question that the BC court had territorial

[60] Which had granted leave to appeal: *Equustek Solutions Ltd. v Jack*, 2014 BCCA 295.

[61] *CJPTA* (BC), *supra* note 1.

[62] *Ibid*, s 1, which says that "proceeding" means "an action, suit, cause, matter, petition proceeding or requisition proceeding and includes a procedure and a preliminary motion."

competence over the action against the defendants, and, consequently, it had territorial competence over the injunction application.

On the second point, the court agreed with Google's argument that the power to make an order against Google, a non-party, required that there be a real and substantial connection so as to support personal jurisdiction with respect to Google. The court held, however, that such a connection existed. The subject matter of the underlying litigation clearly had a real and substantial connection with British Columbia. Equally, Google's services, which provided a link between the defendants' products and potential customers, were substantially connected to the substance of the lawsuit. There remained a question whether Google itself was substantially connected with the province in a manner sufficient to allow a BC court to assume *in personam* jurisdiction over it.

The court agreed with the chambers judge's analysis on this aspect of the case. She had found that Google did business in British Columbia. Its websites were not passive information sites. They offered users a menu of suggested potential search queries as soon as the user started entering a query. Those offerings were based on that particular user's previous searches as well as the phrases or keywords most commonly used by all users. Google collected a wide range of information as a user searched, including the user's IP address, location, search terms, and whether the user acted on the search results offered by "clicking through" to the websites on the list. In addition to its search services, Google sold advertising to BC clients. Google had in fact made an advertising contract with the defendants and advertised their products up to the date of the hearing before the chambers judge, although it acknowledged this was the result of an inadvertent failure to suspend the defendants' Google account before the hearing.

Although it was Google Canada, a subsidiary, that marketed the advertising business in Canada, it was Google itself that made the contracts with BC advertisers. The Court of Appeal held that the judge's findings of fact were entitled to deference and agreed with her conclusion in law. The chambers judge had relied mainly on the advertising aspects of Google's business but the Court of Appeal based the conclusion as well on Google's gathering information in British Columbia using its proprietary web crawler software. This active process of obtaining data that resided in the province or was the property of individuals in British Columbia was a key part of Google's business.

On the third point, Google argued that an injunction should not be granted that went beyond its specific business activities in the province. The court disagreed, on the basis that the business carried on in British Columbia was an integral part of Google's overall operation, which collected data from websites throughout the world and provided search results, accompanied by targeted advertising, to users throughout the world, including British Columbia. The business conducted in British Columbia was

the same business as was targeted by the injunction. Google's assertion that if the injunction was upheld, it could be subjected to restrictive orders from courts in all parts of the world, might be true but, if it was, that flowed from the worldwide nature of Google's business and not from any defect in the law. The court also thought Google was overstating the danger, in light of the fact that courts typically exercise restraint in making orders with extraterritorial effects.

There was no doubt that courts could make orders against non-parties to the litigation and that such orders could relate to what the person subject to the order did outside the jurisdiction. A prime example of both was worldwide freezing orders that were made directly against third parties such as banks in order to prevent a dissipation of assets by a defendant. Once it was accepted that a court has *in personam* jurisdiction over a person, the fact that its order may affect activities in other jurisdictions is not a bar to its making the order. Issues of comity and enforceability are concerns that must be taken into account, but they do not result in a simple rule that the activities of non-residents in foreign jurisdictions cannot be affected by orders of Canadian courts.

A further argument considered by the court was whether the order in this case violated comity. The case was sufficiently connected with British Columbia to be properly within the jurisdiction of the province's courts. From a comity perspective, the question must be whether in taking jurisdiction the BC courts failed to pay due respect to the right of other courts or nations. The only comity concern that had been articulated in this case was potential interference with freedom of expression in other countries. Here, there was no realistic assertion that the order would offend against the sensibilities of any other nation. It was an order prohibiting the defendants from advertising wares that violated the intellectual property rights of the plaintiff. Moreover, the order was an interlocutory one and therefore could be varied by the court in the unlikely event that any jurisdiction found the order to be offensive to its core values.

Lastly, the court held that the injunction was properly ordered under the three-part test for interlocutory injunctions, namely that there was a serious issue to be tried, that the plaintiff would suffer irreparable harm if the order was not granted, and that the balance of convenience favoured the granting of the injunction. Of the three factors, the balance of convenience was the real issue. Not only Google's interests but also important public interests had to be taken into account. The chambers judge had found that the injunction would not inconvenience Google in any material way and that Google would not incur expense in complying with it. She had also found that the granting of the order against Google was the only practical way for the defendants' websites to be made inaccessible and so prevent the defendants from flouting the court's orders against it. The plaintiff had also shown that an order limited to

the google.ca website would not be effective, which justified giving the injunction worldwide effect.

*Note 1*. The controversial aspect of the *Equustek* case is not that an injunction was issued with respect to conduct outside the province, which is something that courts routinely do in cases like anti-suit injunctions and orders freezing the assets of a defendant (an example that the Court of Appeal noted). It is that the injunction was issued against a completely innocent third party and related not to physical assets but, rather, to that party's freedom to conduct its business internationally as it saw fit. Google was subject to this treatment because, through its overwhelming dominance in most countries of the business of providing Internet search services, it functions almost as an international private utility that provides essential infrastructure for the conduct of business on the Internet.

As this case illustrates, it is often hardly possible to stop someone from carrying on a wrongful Internet business by taking legal steps directly against them because the business is so easily moved, both physically and in terms of websites, while it continues to enjoy practically unimpaired access to the Internet market. So taking away the infrastructure is the most effective means available. But since the infrastructure has international reach, and the business to be stopped may be international, effectiveness means international measures. Since no international authority exists to take such measures, national courts are the only recourse. They are put in the position of having to use what powers they have to deny the wrongdoer access to the international infrastructure.

In this case, Google's services to, and data derived from, users in British Columbia were the slender basis for the court to exercise such power by directing Google to de-index the defendants' websites from all Google's search websites. The court noted, but did not conclusively answer, the question of what consequences Google would face if it did not comply.[63] The court played down a suggestion by the chambers judge that Google might be denied access to the BC courts.[64] It contented itself with saying that the BC courts were entitled to expect that Google, which did business in British Columbia, would abide by their orders and that if Google did not comply it was likely that there "will be consequences that can be visited on the company."[65]

*Note 2*. In *Lockwood v China Blue Chemical Ltd*, the court refused to make a *Norwich Pharmacal* order (an order for the discovery of documents against

[63] *Equustek Solutions Inc. v Jack*, 2015 BCCA 265 at paras 97-99, 396 DLR (4th) 224, leave to appeal to SCC granted, 36602 (11 June 2015) [*Equustek*].

[64] *Ibid* at para 98, referring to *Equustek Solutions Inc. v Jack*, 2014 BCSC 1063 at paras 96–97.

[65] *Equustek*, *supra* note 63 at para 98.

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an innocent third party) against a company in Hong Kong.[66] The court held it had no territorial competence under the *CJPTA*[67] to make the order. The court treated the application for the order as a separate "proceeding" under the act, which the Court of Appeal in *Equustek* subsequently said was not a correct interpretation of the statutory rules. However, the company against whom the order was sought, unlike Google in *Equustek*, had no business or presence in British Columbia, which meant that even under the Court of Appeal's analysis, the third party had no real and substantial connection with British Columbia that would support personal jurisdiction to make the order. The judge in *Lockwood* also held that she would not make the order even if there were jurisdiction. The order would force an innocent third party that did no business in the province to do something in Hong Kong at the behest of a BC court, which would violate international comity.

### Declining jurisdiction *in personam*

#### *Forum selection clause — interpretation*

*Note.* In *CP Ships Ltd v Icecorp Logistics*, a contract of guarantee given by a German company in respect of the obligations of its Canadian subsidiary included a clause that the agreement was governed by German law and "Competent court … shall be … Hannover."[68] This was construed in the context of the agreement as an exclusive choice of forum, although the word "exclusive" was not used. In *Babey v Greer*, a clause in a technology licensing agreement that the parties each "irrevocably attorns to the jurisdiction of the courts" of South Dakota was construed as non-exclusive and not a ground for staying proceedings in Saskatchewan.[69]

#### *Forum selection clause — effect of legislation of the forum*

*Douez v Facebook Inc*, 2015 BCCA 279, 387 DLR (4th) 360[70]

Douez sought to commence a class action holding Facebook liable for using members' pictures in automatically generated advertisements. If the members had clicked "like" for World Wide Web content relating to a business, political party, charity, or other entity that had purchased from

[66] *Lockwood v China Blue Chemical Ltd*, 2015 BCSC 839.

[67] *CJPTA* (BC), *supra* note 1.

[68] *CP Ships Ltd v Icecorp Logistics*, 2015 ONSC 6243.

[69] *Babey v Greer*, 2015 SKQB 219, 77 CPC (7th) 183.

[70] Leave to appeal to SCC granted, 36616 (10 March 2016).

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Facebook its "Sponsored Stories" option, that member's picture could appear in advertising for that business or entity, which was communicated to the member's Facebook friends. Douez claimed that this use of a person's picture without her consent in order to sell products or services contravened a provision of the BC *Privacy Act*.[71] Facebook sought a stay of the certification proceeding on the basis that the terms of use that comprised Douez's contract with Facebook, like any other member's, included an agreement that "[y]ou will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County [California]."

The chambers judge refused to stay the action. Section 4 of the *Privacy Act* says, "[d]espite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court [of British Columbia]." The judge held that this amounted to giving the BC court exclusive jurisdiction to hear claims under the *Privacy Act*, which meant that a California court could not hear them. Consequently, section 4 either implicitly required the forum selection clause to be disregarded or gave "strong cause" for refusing to enforce the clause, as contemplated by *ZI Pompey Industrie v ECU Line NV*.[72]

The first issue addressed on appeal was whether a stay application based on an exclusive forum selection clause had to be dealt with under the *forum non conveniens* provisions of the *CJPTA* (BC)[73] or was a separate inquiry. The conclusion on this point, based on its own earlier decisions, which the court held were binding on it,[74] was that a forum selection clause argument was distinct from a *forum non conveniens* argument. The proper course was to address the former and then, if a stay was not granted on account of the clause, go on to consider whether it should nevertheless be granted on the ground of the *forum non conveniens* discretion in the *CJPTA*.

In this case, the chambers judge should have granted a stay based on the forum selection clause. The judge's error was to assume that section 4 of the *Privacy Act*, by granting exclusive subject matter jurisdiction to the BC Supreme Court, operated to deny jurisdiction to a California court. That proposition was contrary to the territorial principle that BC law can only bind BC courts. It was also not the proper interpretation of section 4, which was that it only laid down which court in British Columbia had jurisdiction.

[71] *Privacy Act*, RSBC 1996, c 373, s 3(2).

[72] *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27, [2003] 1 SCR 450 [*Pompey*].

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

[74] *Douez v Facebook Inc*, 2015 BCCA 279 at para 31, 387 DLR (4th) 360, leave to appeal to SCC granted, 36616 (10 March 2016) [*Douez*], citing *Viroforce Systems Inc. v R&D Capital Inc*, 2011 BCCA 260 and *Preymann v Ayus Technology Corp*, 2012 BCCA 30.

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The result was that section 4 did not "override" the forum selection clause of its own force. Nor, with section 4 out of the way, was there any basis for finding "strong cause" not to enforce the clause under the *Pompey* test. It was open to Douez to adduce evidence that a court in California would consider itself to lack jurisdiction to hear her claim, and if that were shown, it could be "strong cause" for not enforcing the clause. No such evidence, however, had been adduced.

*Note.* One consequence the Court of Appeal attached to the distinction between the forum selection clause and *forum non conveniens* grounds for seeking a stay related to the burden of adducing evidence. In both of them, the overall burden of persuasion is on the defendant. However, in seeking a stay based on an exclusive choice of forum, the defendant does not have an onus to provide evidence that the foreign court, under its own rules, has territorial competence over the action. It is for the plaintiff to raise that issue as part of a "strong cause" argument and to adduce evidence to support it. However, if *forum non conveniens* is the basis of the application, the defendant must persuade the court that the alternative forum is clearly more appropriate, which usually will involve adducing expert evidence that that forum would have territorial competence under its own law.[75]

The court's reasoning on section 4 of the *Privacy Act* included two propositions. One was that BC legislation cannot of its own force bar a California court from hearing a claim. This is clearly correct but is, with respect, only half the picture. The legislature cannot tell Californian courts what to do, but it can tell BC courts what to do, and that means it can, if it wishes, guarantee access to a BC court by invalidating any contractual attempt to give exclusive jurisdiction to a foreign court. Even if the issue is put in these terms, however, one still comes up against the court's second proposition. This was that section 4 of the *Privacy Act* did not — as the court read it — amount to a nullification of the forum selection clause. The court (correctly, it is submitted) distinguished a case in which a consumer protection statute made void any attempt to have a consumer waive his or her rights under the act.[76] Clearer words were needed to give section 4 a similar effect.

Even if the statute does not guarantee access to the BC court, the plaintiff can argue that such access is a matter of public policy and so amounts to "strong cause" for denying a stay based on a forum selection clause.

[75] *Douez, supra* note 74 at para 41.

[76] *Seidel v Telus Communications Inc*, 2011 SCC 15, [2011] 1 SCR 531, applying s 3 of the *Business Practices and Consumer Protection Act*, SBC 2004, to hold ineffective a clause requiring the consumer to go to arbitration in a claim against a supplier when that claim was based on the act.

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The difficulty in a case like *Douez* is that such a public policy argument is strongest if it is clear that the claim cannot be brought in the foreign court. Section 4 on its own did not make it clear that the claim could not be brought in California, and for the rest it was a question of California law on which the plaintiff had not provided, and perhaps could not easily obtain, evidence. An added difficulty with arguing public policy is that the plaintiff's claim, though based on a section of the *Privacy Act*, was essentially a tort claim for appropriation of personality, something that is not intrinsically a matter of public policy in the strictly circumscribed private international law sense.

Forum non conveniens — *claim for financial loss*

*Coady v Quadrangle Holdings Ltd*, 2015 NSCA 13, 355 NSR (2d) 324[77]

In 2003, Quadrangle subscribed for a number of common shares in Shannon International Resources. The subscription agreement was governed by Alberta law, although its wording referred exclusively to American securities law. It also included an attornment clause giving exclusive jurisdiction to the courts of Calgary, Alberta. When, in 2004, the warrants Shannon had issued to Quadrangle for the shares were about to expire, and Quadrangle lacked the funds to exercise the warrants, it was able, by agreement with Shannon, to exercise the warrants in return for a promissory note to Shannon secured by a number of shares in Rally Energy. This agreement, too, was expressly governed by Alberta law and contained an attornment clause like the earlier one.

Coady, a director and officer of both Shannon and Rally, caused the pledged Rally shares to be delivered to Lynch, a Halifax investment dealer, which disposed of most of them and credited the proceeds to a Shannon account. Quadrangle learned of Shannon's actions in October 2005. It reached a settlement with Shannon but had not been paid when the latter became judgment proof in early 2008. It then brought an action in conversion against Coady. The Nova Scotia Supreme Court stayed the action on the ground that Alberta was the more appropriate forum, all of the original transactions relating to the issuing of the Shannon shares and the pledge of the Rally shares having taken place in Alberta. Quadrangle then sued Coady and several other defendants in Alberta, but the Alberta court found that the action was statute barred under the two-year limitation period in the Alberta *Limitations Act*.[78] It made no difference whether

[77] Leave to appeal to SCC refused, 36378 (15 October 2015).

[78] *Limitations Act*, RSA 2000, c L-12, s 3(1)(a). The Alberta court found that Quadrangle knew about the misappropriation of the Rally shares as of October 2005, so the period expired in October 2007.

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Alberta or Nova Scotia law applied to the claim, because the act requires the Alberta court to apply the Alberta limitation period even if the law governing the cause of action provides for a longer period.[79] Faced with being unable to sue in Alberta, Quadrangle applied for, and obtained, a lifting of the stay of the 2008 Nova Scotia proceeding.

On appeal from this order, Coady argued two points. One was that the claim against him was *res judicata* because it had been decided in his favour by the Alberta court on the ground that the claim was governed by Alberta law. The Nova Scotia Court of Appeal rejected this argument because the Alberta court had not decided what law applied to the claim. It did not have to, since the Alberta limitation period applied regardless of which law governed the action. The Alberta judgment did not render the claim *res judicata* because it was not on the merits of Quadrangle's claim. It gained no additional force from having been registered in Nova Scotia under the *Enforcement of Canadian Judgments and Decrees Act*.[80] All the Alberta judgment decided was that Quadrangle could not bring its claim in Alberta.

The second argument was that the claim was in fact governed by Alberta law, which meant that the Nova Scotia court would have to apply the Alberta limitation period anyway. The Court of Appeal saw no error in the motion judge's decision that the claim was properly pleaded as a conversion claim and that, even taking the connections with Alberta into account, the claim was governed by the law of Nova Scotia, where the alleged tort was committed.

*Note.* In *Machado v Catalyst Capital Group Inc*,[81] a stay was refused in an Ontario wrongful dismissal action against an Ontario employer, notwithstanding that the place of employment had been in New York. A stay was granted in *Legge v Young*,[82] an Ontario action against a Florida buyer for the price of a horse sold at auction in Pennsylvania. Jurisdiction *simpliciter* existed because the defendant did business in Ontario, but the dispute was mainly about the soundness of the horse, and Pennsylvania was a more appropriate forum.

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

*Bouzari v Bahremani*, 2015 ONCA 275, 385 DLR (4th) 332

In 2000, Bouzari brought an action against the Islamic Republic of Iran, claiming he had been tortured in Iran by agents of the state. This action

[79] *Ibid*, s 12. The applicable limitation period in Nova Scotia was six years from the time the wrong was discoverable by the plaintiff.

[80] *Enforcement of Canadian Judgments and Decrees Act*, SNS 2001, c 30.

[81] *Machado v Catalyst Capital Group Inc*, 2015 ONSC 6313 (Master).

[82] *Legge v Young*, 2015 ONSC 775, 125 OR (3d) 67.

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was dismissed on the basis of state immunity. Bouzari, his wife, and children then brought the present action against Hashemi and other defendants, who he alleged were the individuals who carried out the torture. The action was undefended, and default judgment was given against Hashemi. Jurisdiction was based on the forum of necessity because there was no reasonable basis upon which the plaintiffs could be required to bring the action in Iran. The default judgment was set aside by consent, on terms permitting Hashemi to move to challenge the forum. The parties agreed it was impossible to litigate in Iran, but Hashemi argued the Ontario court should decline jurisdiction because England, where he was now living and studying, was a more appropriate forum. By the time the jurisdictional motion was argued, however, Hashemi had voluntarily returned to Iran to face prosecution and could not leave. The plaintiffs were Canadian citizens and residents. Bouzari and his wife had business interests and owned property in England and traveled there from time to time. Hashemi had no connection with Canada. He did not attend the appeal and was not represented at the hearing.

The Court of Appeal, reversing the motion judge, held that the Ontario action should be stayed. The motion judge had erred in concluding, based on evidence of the immigration laws of Canada and England, that Hashemi could come to Canada as well as England to defend. The evidence showed, to the contrary, that previous applications to obtain permission for him to enter Canada on a temporary visa had failed, and there was no indication that this position would change. The motion judge had also erred in her treatment of the question of juridical advantage. She had held that the plaintiffs had referred to Canadian law that supported their claim, whereas Hashemi had not shown that an English court would apply law that was equally favourable. There was no onus on Hashemi to do so, given that the plaintiffs had not put in any evidence as to the law that an English court would or might apply and also given that the loss of a juridical advantage, based on a difference between legal systems, is an argument that should be applied with some caution.[83] The objectives of assuring fairness to the parties and providing an efficient process for resolving their dispute would be better met through litigation in England.

### *Garcia v Tahoe Resources Inc.*, 2015 BCSC 2045, [2016] 3 WWR 169

The court stayed, on the ground of *forum non conveniens*, an action brought by Guatemalan workers for injuries they suffered at the hands of

[83] The court cited *Prince v ACE Aviation Holdings Inc*, 2014 ONCA 285 at para 64, leave to appeal to SCC refused, 35935 (23 October 2014), itself citing *Van Breda*, *supra* note 9 at para 112.

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their employer in the course of a protest at the mine in Guatemala. The employer was a Guatemalan subsidiary of the defendant BC corporation, the central management of which was in Nevada. The court, based on the evidence presented, did not accept that the defendant company could not be sued in Guatemala or that justice could not be obtained there even if it were to be sued. Under Guatemalan law, it would be vicariously liable if its personnel directed or supervised the alleged battery. The plaintiffs could seek to have the defendant added to an existing criminal proceeding in Guatemala against its subsidiary. The plaintiffs were seeking compensation in that proceeding and could also bring a civil proceeding. The convenience of the parties and their witnesses made Guatemala a clearly more appropriate forum. If the action were in British Columbia there could be significant difficulties in compelling non-party witnesses from Guatemala or other jurisdictions to give evidence. The public interest required that Canadian courts proceed extremely cautiously in finding that a foreign court is incapable of providing justice to its own citizens. To hold otherwise was to ignore the principle of comity and risk that other jurisdictions would treat the Canadian judicial system with similar disregard.

*Huang v Silvercorp Metals Inc.*, 2015 BCSC 549, 75 BCLR (5th) 195, aff'd 2016 BCCA 100, 81 CPC (7th) 1

Huang was a Canadian citizen working in China for an investment fund when, in 2011, the fund manager, who was based in British Columbia, published under a pseudonym a report questioning the value of the Chinese assets of Silvercorp, a British Columbia-based public company with mining interests principally located in China. Silvercorp controlled Henan, a Chinese mining company, the Chinese government holding a minority stake. The report caused a sharp fall in Silvercorp's share price. The report had been based in part on Huang's research and local investigations. At the end of 2011, when he was about to leave China, Huang was arrested at the Beijing airport and transported to Luoyang, about 800 kilometres distant. Luoyang was the major city closest to Silvercorp's mine. He was held there, convicted of harming the business reputations of Silvercorp and Henan, sentenced to two years in prison, and fined. He was released in 2014.

Huang brought this action against Silvercorp in defamation and false imprisonment, alleging that Silvercorp had instigated his arrest and prosecution in China. Silvercorp conceded the BC court had jurisdiction *simpliciter* over both claims but argued the court should stay the false imprisonment proceeding on *forum non conveniens* grounds. The chambers judge, applying the *forum non conveniens* provision of the *CJPTA*,[84] refused the stay.

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

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Both parties were resident in British Columbia. A major factor was that the plaintiff would have significant juridical advantages in a BC proceeding. There was no tort of false imprisonment in China, no discovery, no document discovery, and no evidence that BC witnesses would be compellable in China. The only type of proceeding in China that could be open to the plaintiff was a trial supervision proceeding to show he had been wrongly convicted. Such a proceeding would not implead Silvercorp at all. The question as to whether Huang's claim was governed by Chinese or by BC law did not need to be resolved at this stage. It was important that to require Huang to pursue a remedy for false imprisonment in China, while pursuing a defamation claim in British Columbia, would lead to multiplicity of proceedings.

The Court of Appeal upheld the decision. The fact that Huang's claim, or a reasonably similar one, could not be pursued in China at all was determinative of the appeal. An argument that Silvercorp advanced for the first time on appeal was that the chambers judge should have declined jurisdiction on the ground that Huang's action was a collateral attack on his conviction in a Chinese court and so contrary to international comity and an abuse of process. This misstated the nature of Huang's claim. He was arguing that his conviction and imprisonment were obtained corruptly at the behest of Silvercorp. To say that he should not be permitted to challenge the conviction was in substance an attack on the merits of his action against Silvercorp. That was a matter for trial.

Forum non conveniens — *parallel proceedings elsewhere — jurisdiction declined*

*Note.* In *JICO Holdings Ltd v Plante*,[85] the plaintiffs were already engaged in complex litigation in Alberta concerning employment agreements and non-competition covenants. They now had commenced a proceeding in Saskatchewan against the same defendants. The court held that, to the extent that the claims duplicated those being litigated in Alberta, they were an abuse of process, and to the extent that they were new claims, they were better litigated as part of the Alberta proceeding. The court therefore stayed the action.

Forum non conveniens — *parallel proceedings elsewhere — jurisdiction not declined*

*James Bay Resources Ltd v Mak Mera Nigeria Ltd*, 2015 ONCA 781, 128 OR (3d) 198

James Bay entered into an agreement in Ontario with Wake Sola, who was an Ontario resident, and a Nigerian company run by Wake's uncle, for the

[85] *JICO Holdings Ltd v Plante*, 2015 SKQB 262.

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acquisition of oil and gas assets in Nigeria. The agreement was expressly governed by Ontario law. James Bay began an action in Ontario for breach of this agreement. The defendants subsequently commenced their own action against James Bay in Nigeria. James Bay filed a defence in the Nigerian action and had brought an unsuccessful motion to strike the action for want of jurisdiction. The dismissal of that motion was under appeal. The present decision was on whether to stay the Ontario proceeding in favour of the Nigerian one.

The Court of Appeal upheld the motion judge's refusal of the stay. The fact that both agreements were negotiated and signed in Ontario and that Wake Sola was an Ontario resident were strong presumptive factors in favour of Ontario being the more appropriate forum. The motion judge's decision to exercise jurisdiction showed no lack of comity towards the Nigerian court. The judge was fully aware of the state of the Nigerian proceedings. Nor had the motion judge been wrong in giving little weight to the fact that James Bay had filed a defence in the Nigerian action, which the defendants said indicated acceptance of the Nigerian court's jurisdiction. The defendants had offered no evidence as to whether this constituted attornment to the jurisdiction according to Nigerian law, and the plaintiff had offered affidavit evidence that the responsible officer had not understood that filing a defence would have that effect.

*Note.* In *Billing v Precisioneering DKG Corp*,[86] the British Columbia court, applying the *forum non conveniens* provisions in the *CJPTA*,[87] refused to stay the action in favour of parallel litigation in Ontario. The latter was commenced six months after the BC action and the dispute had more connection with British Columbia than with Ontario.

## Class actions

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

*Airia Brands v Air Canada*, 2015 ONSC 5332, 126 OR (3d) 756

This was a class action against a number of airlines claiming that they had overcharged airfreight customers. The defendants had agreed to settle the action, but there was still a dispute about the proper definition of the plaintiff class. The plaintiffs sought a global class that would include customers from more than thirty different countries that had booked shipments to or from Canada other than shipments from or to the United States. The defendants sought to exclude "absent foreign claimants," meaning non-residents

[86] *Billing v Precisioneering DKG Corp*, 2015 BCSC 270.

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

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of Canada who had purchased services outside Canada and suffered any alleged losses outside Canada and who had not opted into the present action. All of the defendants except Air Canada were resident and domiciled abroad and entered into the shipping contracts in the foreign countries from which goods were shipped into Canada.

The court accepted expert evidence that the Canadian test for jurisdiction *simpliciter*, based on the defendant or the facts having a real and substantial connection with Canada, is not recognized by other countries and that, consequently, an Ontario judgment that purported to bind the absent foreign claimants would not be recognized outside Canada. Even if an aggregate damage award were made, a Canadian court could not resolve or prevent the potential for double recovery. The court went on to hold that applying the constitutional limits on jurisdiction in a class action meant respecting the requirements of order and fairness. This holding militated against including plaintiffs who would not expect that their rights would be determined in a Canadian proceeding. From this, the court concluded that a global as distinct from a national plaintiff class should not be based on the claims' having a real and substantial connection with Canada. Rather, jurisdiction over class members in the present case could only be established if they were present in Ontario or had consented in some way to the court's jurisdiction. Accordingly, the "absent foreign claimants" should be excluded from the plaintiff class.

*Note.* In *Shah v LG Chem Ltd*,[88] an Ontario court dismissed a class action against NEC, which was one of twenty-six corporations, all non-resident, that were sued for having engaged in a conspiracy to fix prices for lithium-ion batteries and so injured Ontario consumers. The conspiracy might have taken place in Ontario, but the plaintiffs did not show a good arguable case that NEC was part of it. They proffered insufficient evidence that NEC's acts or omissions had caused damage in Ontario from price fixing or that NEC had been active in the Ontario marketplace.

*Coordination of class actions in multiple jurisdictions*

*BCE Inc v Gillis*, 2015 NSCA 32, 384 DLR (4th) 111

Virtually identical class claims were filed by the same law firm in nine provinces, including Saskatchewan and Nova Scotia, against companies that provided cellular telephone services. For ten years, the Saskatchewan proceeding had moved forward, while the Nova Scotia proceeding was left dormant. Recently, however, the Saskatchewan court had held that non-residents should be included in the class only on an opt-in rather

[88] *Shah v LG Chem Ltd*, 2015 ONSC 2628, 125 OR (3d) 773.

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than an opt-out basis. The plaintiffs now wished to revive the Nova Scotia proceeding, in which both residents and non-residents would be included on an opt-out basis. The court held that the Nova Scotia action should be permanently and unconditionally stayed as an abuse of process. The plaintiffs had made it clear years before that Saskatchewan was their forum of choice and had no right to keep actions alive in other provinces just so that the plaintiffs' law firm could maintain carriage of the claim. That Nova Scotia residents now had to opt into the Saskatchewan proceeding did not alter the matter; there was a venue open to them in Saskatchewan if they wished to take advantage of it. The action filed in Nova Scotia was one that was never intended to be pursued. It was time for the plaintiffs to be forced to pick cherries from a single tree, the one groomed for so many years, while the one in Nova Scotia was neglected.

*Note.* The courts of two provinces have reached opposite conclusions on whether a judge has jurisdiction to take part in person in a hearing outside the province in which settlements of related class actions in multiple provinces are considered. The BC Court of Appeal has said no,[89] the Ontario Court of Appeal has said yes.[90] Both decisions are under appeal to the Supreme Court of Canada.[91]

## Matrimonial causes

*Divorce and corollary relief — jurisdiction* simpliciter

*Nafie v Badawy*, 2015 ABCA 36, 381 DLR (4th) 208[92]

The husband and wife were both resident in Alberta, though still Egyptian citizens, when they married in Egypt in 2000. They continued to live in Canada until November 2011, when they moved to Saudi Arabia. They rented out their Calgary house for two years and kept their Canadian credit and bank accounts, cellular telephones, and health insurance. They rented a house in Saudi Arabia, furnished it, hired domestic help, leased two cars, opened a bank account, and enrolled the children in American schools. In June 2012, the family returned to Alberta for what the husband said was a two-week vacation. The wife maintained she planned to, and did, stay in Alberta with the children to escape from Saudi Arabia and her husband. In July 2012, she commenced proceedings in Alberta for a divorce.

[89] *Endean v Canadian Red Cross Society*, 2014 BCCA 61, 59 BCLR (5th) 113.

[90] *Parsons v Ontario*, 2015 ONCA 158, 318 DLR (4th) 667.

[91] Leave to appeal granted, 35483 (*Endean*) and 36456 (*Parsons)* (both 5 November 2015).

[92] Leave to appeal to SCC refused, 36371 (5 November 2015).

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The Court of Appeal, by a majority, reversed the trial judge's decision that the wife, as the *Divorce Act* requires, had been ordinarily resident in Alberta for the twelve months immediately preceding the commencement of the divorce proceedings.[93] The judge had given too much weight to the wife's after-the-fact rationalization of what had happened and not enough weight to affidavit evidence that conflicted on material points. The facts showed that in moving to Saudi Arabia, even if not permanently, the parties had changed their ordinary mode of living, with all of its accessories, from Alberta to Saudi Arabia. The court therefore lacked jurisdiction in the wife's divorce proceeding. A number of interlocutory orders made by the court of first instance relating to interim custody, possession of the matrimonial home, and child support were kept in place, notwithstanding that they could not be made under the *Divorce Act*. They were within the court's *parens patriae* jurisdiction, as being in the best interests of the children, and were validated *nunc pro tunc* by the Court of Appeal.

*Divorce and corollary relief — application to set aside divorce*

*Nowacki v Nowacki*, 2015 ONSC 973

The mother had wrongfully taken her and the father's child to Poland. The father obtained an order in Ontario for the return of the child under the *Hague Convention on the Civil Aspects of Child Abduction* (*Hague Convention*),[94] but the mother successfully resisted enforcement of the order in the Polish courts. The father obtained a divorce in Ontario. The mother now applied to have the divorce set aside on the ground that the father had obtained it in a procedurally irregular manner and that she wished to seek a divorce and custody in Poland. The court refused to set the divorce aside. The mother had abducted the child, and the Polish court had refused to enforce the order for the child's return on grounds that were inconsistent with the convention. Although the court had acknowledged that the father was a good father and posed no risk of harm to the child, it nevertheless took it upon itself to exercise a discretion, not provided in the convention, based on the child's best interests being served by remaining in Poland. Such a discretion was reserved under the convention to the courts of Ontario, which, as the Polish court recognized, was the child's habitual residence. To review the divorce order would be to reward the mother for her contempt of the Ontario order and her disregard of the child's best interests, including having a relationship with both parents.

[93] *Divorce Act*, *supra* note 4, s 3(1).

[94] *Hague Convention on the Civil Aspects of Child Abduction*, 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) [*Hague Convention*], implemented by the *Children's Law Reform Act*, RSO 1990, c C.12, s 46.

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The mother was free to return the child to Ontario and to seek custody and support in Ontario.

*Support claims* — forum non conveniens

*Syer v Syer*, 2015 ONSC 4514

A mother sought orders from the Ontario Superior Court of Justice to vary the 2002 order of an Alberta court, as varied by the same court in 2013, fixing child support arrears owing to the father, who then lived with the child in Alberta. The child was now eighteen. The Ontario judge held that Alberta was the appropriate jurisdiction to deal with the issues. The Alberta court, as part of the original order, had stipulated that it retained jurisdiction. The Ontario judge noted that this specific, and unusual, retention of jurisdiction reflected particular considerations, including the fact that the mother was already out of Alberta at the time. When the Alberta court varied the order in 2013 the mother was settled in Ontario, and the 2013 decision did not terminate the jurisdictional provisions in the 2002 order. For the mother to proceed in Ontario, she would first have to commence a proceeding in Alberta to rescind the jurisdictional provision in the 2002 order. Even leaving that provision to one side, the case was most appropriately dealt with in Alberta. The mother was seeking a substantial reduction in arrears and a retroactive termination of entitlement to child support, issues that were very fact driven and the evidence as to which was for the most part available in Alberta.

*Matrimonial property* — forum non conveniens

*Note.* See *Broad v Pavlis*, noted above under Jurisdiction *in personam; Jurisdiction* simpliciter — *presence or residence in the jurisdiction — individuals.*

Infants and children

*Custody — jurisdiction* simpliciter

*HE v MM*, 2015 ONCA 813, 393 DLR (4th) 267[95]

The mother of two children, resident with them in Ontario, applied for custody. The respondent father lived in Saudi Arabia. The mother and father had been married in Egypt in 2003. She had joined the father in Canada, and they lived in Ontario from late 2005. Both daughters were born there. In August 2007, when the family were in Egypt for a wedding, the father and the mother separated. She remained with the daughters in

[95] Leave to appeal to SCC refused, 36839 (9 June 2016).

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Egypt, and he returned to Canada. They reconciled for a time when his employer transferred him to Saudi Arabia in 2008. The family were together in Saudi Arabia from July 2008 until they separated again in September 2009, and the mother and children moved to Egypt. The parents were divorced in Egypt later in 2009. In February 2010, the mother obtained an order from the Egyptian court giving her physical custody of the children. The father, who by Egyptian law continued to be their guardian, saw them on his occasional visits to Cairo. In June 2012, the mother, without notice to the father, moved back to Canada with the children. In January 2013, she began the present proceedings. The father contended that the court lacked jurisdiction under the *Children's Law Reform Act* because the children had been habitually resident in Egypt when the mother, without his consent, had removed them to Ontario.[96]

The trial judge held that the Egyptian divorce was valid, the children were habitually resident in Egypt before the mother's removal of them, the mother had attorned to the jurisdiction in custody of the Egyptian court, and the mother had not shown that the two girls would suffer serious psychological harm if returned to Egypt. He therefore ordered that the children be returned to Egypt.[97] The Court of Appeal reversed his decision. It rejected fresh evidence tendered by the mother on the father's behaviour towards the daughters since that evidence could have been raised at trial. However, it admitted fresh evidence as to the children's anxiety about being returned to Egypt and placed in the father's care. The latter was highly relevant to the determination of jurisdiction.

The judge had been wrong to give crucial weight to the fact that the mother had attorned to the custody jurisdiction of the Egyptian court. Such attornment was not relevant in the face of the statutory grounds of jurisdiction in the *Children's Law Reform Act*. The act takes a child-centred approach, and a child has no control over where its parents litigate. In the present case, jurisdiction existed under both of two provisions of the act dealing with children who are present, though not habitually resident, in Ontario. One gives jurisdiction if the child would suffer serious psychological harm if returned to the country of habitual residence.[98] The evidence here, including the fresh evidence, showed that there probably was a serious risk of such harm. The other provision gives jurisdiction if five conditions are fulfilled, one of which is that evidence as to the child's

[96] *Children's Law Reform Act, supra* note 94.

[97] The Court of Appeal noted at paras 34–35 that although Egypt is not a party to the *Hague Convention, supra* note 94, Canada and Egypt have a bilateral agreement, dated 23 July 1997, on the consular elements of family matters. It applies to children of Canadian or Egyptian Citizens and entered into force on 10 November 1997.

[98] *Children's Law Reform Act, supra* note 94, s 23.

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best interests is available in Ontario and another of which is that the child has a real and substantial connection with Ontario.[99] These two, along with the others, were fulfilled. The children, now ten and eight years old, had lived in Ontario for a total of about four and three years, respectively, at the time of the trial. It was more than two years since they had returned from Egypt. They went to school in Ontario, had friends there, and were connected with the community. The court granted the mother interim custody pending further order of the Superior Court.

*Note.* In *MJG v PRB*,[100] a Saskatchewan court held it had no jurisdiction in an application for custody of a child. The mother had taken the child from Ontario to Saskatchewan without the father's consent, and under the relevant legislation,[101] the child's habitual residence was Ontario because he had last lived there with both parents.

*Custody* — forum non conveniens

*Colburn v Cummins-Colburn*, 2015 ABCA 397

The Court of Appeal upheld a chambers judge's decision that custody proceedings begun as corollary relief in Alberta divorce proceedings should be transferred to the state of Colorado. The father had brought the divorce proceedings in Alberta, where the mother now lived, but he lived in Colorado. The children had been born in Colorado, where the father had brought them legally, and they had now lived there for the better part of two years. There was no error in the judge's conclusion that Colorado remained the preferred jurisdiction to have issues of custody, access, and parenting determined going forward. Because the mother, who at this point had joint custody with the father, should have the opportunity to attend and fully participate in the proceedings in Colorado, the court ordered that the father pay a sum as interim litigation costs to the mother.

*Note.* The court declined to make any custody award in a divorce proceeding between two recent immigrants to Canada who had left their son in India, because the child had no connection with Alberta: *Kaur v Nagra*.[102] However, corollary relief would not be severed from the proceeding until the court was satisfied that reasonable arrangements had been made for the son's support.

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

[100] *MJG v PRB*, 2015 SKQB 365, 70 RFL (7th) 460.

[101] *Children's Law Act, 1997*, SS 1997, c C-8.2, s 15.

[102] *Kaur v Nagra*, 2015 ABQB 29.

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*Custody — variation of order*

*Note.* See *TK v RJHA*, in which a BC court refused to vary the conditions of a custody order so as to permit the mother to move with the children to Ontario.[103]

*Child abduction* — Hague Convention

*Sampley v Sampley*, 2015 BCCA 112, 383 DLR (4th) 106

The court affirmed the trial judge's decision to order the return of a child to Montana under the *Hague Convention*.[104] The parents had married in Alberta in 2010, lived in Alaska when the child was born, and later moved to Washington and then to Montana. The wife had brought the child to British Columbia, which was her original home, on a temporary basis while the husband was getting their house habitable in Montana, but the wife decided not to return to Montana and wrongfully retained the child in British Columbia. The judge was right to have found that the child's habitual residence at the time of the retention was Montana, not British Columbia, given the parties' intentions when she took the child to British Columbia. It was no impediment to the order that the Montana court had declined jurisdiction to decide the parenting dispute between the parties. That decision was based solely on a domestic rule that the parties must have resided in Montana for a certain time. The decision was under appeal and, in any case, there could be other bases for jurisdiction. Even if the Montana court could not take jurisdiction, a court in Washington admittedly could.

The court set aside, however, a number of additional orders the judge had made as conditions of the order for the child's return. These were actual orders, not undertakings offered or extracted in connection with the child's return. Orders for child and spousal support were for relief that had not been applied for, and there was no basis on which the judge could make them. An order that the child live with the mother in Montana until a court there ordered otherwise was beyond the jurisdiction of a BC court to make, since it purported to take effect in Montana. Whether the living circumstances of the child pending adjudication of custody in the foreign court may, in appropriate circumstances, properly be the subject of undertakings was not commented on. Orders the judge made requiring payment of money for transportation and rental accommodation as a condition of the child's return served a valid purpose but issuing orders

[103] *TK v RJHA*, 2015 BCCA 8, 380 DLR (4th) 346.

[104] *Hague Convention*, *supra* note 94, implemented by the *Family Law Act*, SBC 2011, c 25, Part 4, Division 8.

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was an inappropriate way of achieving the purpose. An order that the father provide a letter without an end date, stipulating that the mother could return to Canada with the child, was also set aside because it interfered improperly with the substantive merits of the custody and access issues to be decided by a US court.

*Note.* In *JHF v SHFN*,[105] an order for the return of children from British Columbia to Florida was refused because to do so would expose them to a grave risk of harm, given evidence that their grandmother, who had custody, physically and psychologically abused them. In *Alibhoy v Tabalujan*,[106] a child was ordered returned from British Columbia to the United Kingdom; the mother's intention to return to British Columbia after the separation from the father could not alter the child's habitual residence. See also *Nowacki v Nowacki*,[107] noted above under Matrimonial causes; *Divorce and corollary relief — application to set aside divorce.*

## Succession and administration

### *Jurisdiction* simpliciter

*Re Grillo Estate*, 2015 ONSC 1352, 125 OR (3d) 707

The court held that it had jurisdiction to decide on the validity of the alleged will of Domenico Grillo, who died leaving movable property, mainly bank accounts, in both Ontario and Italy. He was in Italy when he died, but the court held he was resident and domiciled in Ontario. Presumptive connecting factors[108] that established jurisdiction *simpliciter* were found in two of the Ontario service *ex juris* rules, namely that the proceeding concerned the administration of an estate in respect of personal property in Ontario and that the deceased was a resident of Ontario at the time of death[109] and that the proceeding was to interpret, rectify, enforce, or set aside a will in respect of personal property of a deceased person who was resident in Ontario at the time of death.[110] The court proceeded to hold that the contested will was not written or made by Grillo himself and so was not a valid will.

[105] *JHF v SHFN*, 2015 BCSC 349.

[106] *Alibhoy v Tabalujan*, 2015 BCSC 37.

[107] *Nowacki v Nowacki*, 2015 ONSC 973.

[108] As required by *Van Breda*, *supra* note 9.

[109] *Rules of Civil Procedure*, *supra* note 42, r 17.02(b).

[110] *Ibid*, r 17.02(c).

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*Declining jurisdiction* — lis alibi pendens

*Note.* See *Park v Myong*,[111] a case involving the will of a California resident in which there was a contest between an Ontario resident who was appointed executor under the will and the testator's son, whom the California court had appointed administrator of the estate. The Ontario resident's action, which was to determine entitlement to the Ontario assets under a declaration of trust made by the deceased, was stayed pending the outcome of the son's California proceeding to determine the rights under the will.

Bankruptcy and insolvency

*Stay of creditors' proceedings — lift of stay to permit action in another jurisdiction*

*Re Yukon Zinc Corp.*, 2015 BCSC 1961

Two trucking companies had commenced proceedings in Yukon to enforce miners' liens against the defendant mining company, which subsequently went into bankruptcy protection. The trucking companies applied to the BC Supreme Court to lift the general stay of proceedings in order to allow their miners' lien claims to continue. The court held that a BC court had jurisdiction *simpliciter* over the claims against the mining company, based on the latter's submission as well as a real and substantial connection with the province. The court lifted the stay, but only for the limited purpose of having the Yukon court determine the validity and relative priority of the lien claims and the assets in Yukon to which the liens attached. The court made an order seeking the assistance of the Yukon court on these matters. It did not seek the latter's assistance on the underlying contractual claims or on the position with respect to assets outside Yukon.

*Québec*

Règles générales de compétence juridictionnelle

Forum non conveniens — *article 3135* Code civil du Québec (CcQ)[112]

*Note.* Veuillez voir *Swissair Swiss Air Transport Co Ltd c Société anonyme Sabena en faillite.*[113]

[111] *Park v Myong*, 2015 ONSC 2287, 11 ETR (4th) 12.

[112] *CcQ, supra* note 51.

[113] *Swissair Swiss Air Transport Co Ltd v Société anonyme Sabena en faillite*, 2015 QCCS 3879.

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*Litispendance — article 3137* CcQ

*Axon Intégration & Développement inc c The Pace Gallery LLC*, 2015 QCCS 1935

Axon œuvre dans le domaine du développement, de l'intégration et de la modernisation de logiciels. Elle a son siège social à Montréal. Désirant améliorer le logiciel de gestion d'inventaire qu'elle utilisait, Pace, une société américaine, a retenu les services d'Axon afin d'en concevoir une version plus récente. En juillet 2014, elle s'est résiliée du contrat liant les parties.

Axon intente cette action contre Pace en août 2014 en recouvrement de 447 526 $. Pace présente une requête en exception déclinatoire, soutenant que la Cour supérieure du Québec n'a pas compétence pour statuer sur la requête introductive d'instance, ou qu'elle devrait le décliner. Les parties sont aussi engagées dans un litige devant la United States District Court en New-York. Pace y a en effet introduit un recours de plus de 2 500 000 $ contre Axon en juillet 2014. Pace plaide d'abord qu'aucun des cas attributifs de compétence internationale aux tribunaux du Québec n'est présent en l'espèce. Subsidiairement, si la Cour conclut qu'elle a compétence, Pace propose qu'elle devrait exercer sa discrétion judiciaire et surseoir à statuer. Pace invoque en effet la situation de litispendance internationale. Subsidiairement encore, Pace invoque la doctrine de *forum non conveniens*.

La Cour supérieure accueille la requête en exception déclinatoire. Selon l'article 3148 alinéa 3 *CcQ*, les autorités québécoises sont compétentes si l'une des obligations découlant d'un contrat devait y être exécutée ou un préjudice y a été subi. Axon a rendu des services au Québec en développant le projet pour Pace. Axon a aussi subi un préjudice financier ou patrimonial au Québec du fait du non-paiement du solde contractuel. Le tribunal conclut à une situation de litispendance internationale au sens de l'article 3137 *CcQ*. Il n'est pas nécessaire que deux demandes concluent à des condamnations identiques pour qu'il y ait identité d'objet; il suffit que l'objet d'une des actions soit implicitement compris dans l'objet de l'autre. Le tribunal conclut aussi qu'il est opportun d'exercer la discrétion que lui reconnaît la jurisprudence et de surseoir à statuer sur la requête d'Axon. Pace a intenté son action en New-York avant qu'Axon introduise sa requête en recouvrement devant la Cour supérieure. Le litige engagé devant le tribunal américain permet une approche plus globale au litige. Le dossier est rendu à un stade beaucoup plus avancé dans cette juridiction. Le fait que les partis aient convenu dans leur contrat que la loi applicable à leur litige est la loi du Québec n'est pas suffisant en soi pour justifier le tribunal de ne pas surseoir à statuer. Dans un contexte de mondialisation des activités commerciales, il n'est pas inhabituel qu'un tribunal d'une juridiction ait à appliquer les lois en vigueur dans une autre.

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*Litispendance — article 3137* CcQ *— recours collectif*

*Note.* Veuillez voir *Parker c Apotex inc.*[114]

Actions personnelles à caractère extrapatrimonial et familial

*Pension alimentaire — clause d'élection de for*

*Droit de la famille — 152222*, 2015 QCCA 1412

Les parties se marient en Ohio en 2000 et y demeurent durant toute la durée du mariage. Le mari est américain alors que la femme est originaire du Québec. En 2004 un enfant est né de leur union. En 2010 ils signent deux ententes relatives à leur séparation. Une des ententes a trait aux modalités de garde et de pension alimentaire au bénéfice de l'enfant du couple. Quelque jours plus tard, et avec le consentement du mari, la femme revient pour vivre au Québec avec l'enfant. Le divorce des parties est entériné par un juge de l'Ohio en 2011.

En 2015, la femme signifie une requête en modification de la pension alimentaire pour enfant et aux droits d'accès et pour l'obtention d'une pension alimentaire pour elle-même. Le mari présente une requête en exception déclinatoire. Il soutient que la Cour supérieure doit décliner compétence en raison d'une clause d'élection de for comprise dans l'entente portant sur les modalités de garde et de pension alimentaire relatives à l'enfant. La clause établit que les tribunaux de l'Ohio conservent pour l'avenir une compétence exclusive quant à la garde de l'enfant et aux mesures le concernant, à l'exclusion de tout autre tribunal domestique ou étranger.

La Cour d'appel affirme le jugement de la Cour supérieure, qui rejette la requête en exception déclinatoire. Les règles relatives à un litige extrapatrimonial et familial prévoient spécifiquement que les tribunaux québécois sont compétents si l'une des personnes concernées est domiciliée au Québec (articles 3141 à 3147 *CcQ*). Le législateur québécois ne prévoit pas que les parties puissent convenir de soumettre les litiges à caractère extrapatrimonial à une autorité étrangère. Tout au contraire, lorsqu'il s'agit de litiges familiaux, aucune ouverture n'est faite à la volonté des parties de choisir par convention l'endroit où un litige peut être entendu. Si le législateur avait voulu que les parties à un litige familial puissent convenir d'exclure la compétence des autorités québécoises, il l'aurait dit tout aussi clairement que pour les litiges à caractère patrimonial (article 3148 *CcQ*). Son omission s'explique par deux raisons : la particularité du droit familial et le fait que les questions alimentaires et de garde d'enfants intéressent l'ordre public. Le législateur a aussi proscrit qu'un différend portant sur les matières familiales ou intéressant l'ordre public puisse être soumis à l'arbitrage (article 2639 *CcQ*).

[114] *Parker c Apotex inc*, 2015 QCCS 1210.

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À partir du moment où il est établi que l'enfant et la mère ont leur domicile au Québec, la Cour est compétente pour entendre les demandes de pension alimentaire et de garde les concernant.

Le juge n'a pas commis d'erreur quand il refuse de décliner compétence (article 3135 *CcQ*). Le fardeau ne consiste pas seulement à affirmer que l'autorité d'un autre État est mieux placée pour trancher le litige. La démonstration doit tenir compte d'une seconde condition, soit celle de démontrer les circonstances de l'affaire. L'analyse des critères doit s'effectuer de façon globale. Il faut aussi souligner que, en matière familiale, les tribunaux ont adapté ces critères faisant notamment place aux meilleurs intérêts de l'enfant, au lieu où il a sa principale attache et au lieu de résidence du parent gardien. Le juge de première instance s'est attardé à ces critères, reprenant d'ailleurs plusieurs décisions qui accordent une grande importance au fait que l'intérêt de l'enfant est mieux servi s'il est analysé à la lumière du lieu de son domicile, tout en accordant une importance déterminante au domicile de l'enfant et de la mère. Ce faisant, le juge n'a pas commis d'erreur.

*Divorce — mesures accessoires — décliner compétence*

*Droit de la famille — 152718*, 2015 QCCS 5041

Les parties se divorcent par jugement de la Cour supérieure de l'Ontario en 2006. La mère se voit confier la garde de leurs deux enfants. Elle saisit à plusieurs reprises la Cour supérieure du Québec quant à la pension alimentaire des enfants et des frais particuliers. Le père affiche des arrières de pension alimentaire importants. En septembre 2014, le fils aîné, âgé de 17 ans, déménage chez son père à Ottawa. En mai 2015, le père présente une requête à la Cour supérieure de l'Ontario. Il demande la garde et une ordonnance modificatrice de pension alimentaire tel qu'ordonné par la Cour supérieure du Québec en 2010. Suite à la réception de cette requête, la mère dépose en juin 2015 à la Cour supérieure du Québec une requête intitulée "Motion for special expenses, provision for costs and declaration of jurisdiction." Le père demande à la Cour de décliner compétence en vertu de l'article 5(2) de la *Loi sur le divorce*.[115]

La Cour accueille la requête. L'article 5(2) de la *Loi sur le divorce* est applicable à toute procédure à l'intérieur du Canada et ce n'est que lorsque qu'il est de juridiction étrangère que le tribunal peut exercer son pouvoir discrétionnaire en vertu de l'article 3131 *CcQ*. De plus, le fils aîné habite en Ontario depuis 2014. Les fins de la justice et la recherche de la

[115] *Loi sur le divorce*, *supra* note 4. L'article 5(2) dit que lorsque des actions en modification entre les même ex-époux concernant le même point sont en cours devant deux tribunaux qui auraient par ailleurs compétence en vertu de l'article 5(1), le tribunal saisi en premier a compétence exclusive pour instruire l'affaire et en décider.

saine administration commande en l'espèce qu'un seul tribunal se voit saisi des questions qui concerne l'enfant. Il est aussi important que des jugements portant sur la pension alimentaire ou des questions alimentaires tels les frais particuliers ou extraordinaires ne soient pas rendus par les deux instances.

*Enfants — garde — domicile de l'enfant*

*Droit de la famille — 15984*, 2015 QCCA 781, 63 RFL (7th) 53

The Court of Appeal reversed the decision of the first instance judge and granted the father's motion for a declinatory exception in respect of the mother's application for custody and access of the parties' son, who was born in 2011. The mother had lived with the son in Quebec from October 2011 to June 2013, while the father lived in Ontario but visited the mother and son frequently. In 2013, the mother moved with the son, and a daughter from her previous relationship, to Ontario and began a successful daycare business there. The couple separated in February 2014. In September of that year, without informing the father, the mother moved back to Quebec with their son and her daughter.

The Court of Appeal held that the principal establishment of the parents and the son was in Ontario from the time the mother and father decided to settle there indefinitely in July 2013. It was where the family consciously decided to live. Article 3142 of the *Civil Code of Quebec* (*CCQ*) provides that Quebec has jurisdiction in custody matters if and only if the child is domiciled in Quebec. That was not the case in September 2014, when both parents, and the son, were domiciled in Ontario. The judge had erred by inquiring into the parties' intentions at the time of the separation rather than at the time they settled together in Ontario. In its order, the Court of Appeal acknowledged a judgment of the Superior Court of Justice for Ontario that, in October 2014, ordered the return of the son to Ontario. The mother had confirmed at the hearing that she would return the son to Ontario in the event the appeal was allowed, in conformity with the pending Ontario order.

*Droit de la famille — 1535*, 2015 QCCS 106[116]

La mère, née au Liban en 1982 mais citoyenne canadienne depuis 2003 et résidente du Québec, s'est mariée en 2010 avec le père, qui réside et travaille dans les Émirats Arabes Unis (EAU). Le mariage est célébré au Liban. Les époux font vie commune à Abu Dhabi, aux EAU. Elle revient au Québec en 2011 pour que son accouchement ait lieu au Canada. La fille du

[116] Autorisation d'appeler refusée, 2015 QCCA 382.

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couple naît en 2011. La mère et sa fille retournent aux EAU quelques mois après sa naissance. En avril 2013, la mère demande de quitter Abu Dhabi pour le Québec afin de revoir sa famille et se reposer. Le père accepte que la mère quitte les EAU avec la fille et signe les autorisations. La mère retourne au Québec. Sa famille constate des sévices physiques infligés à la mère. La mère décide d'y rester définitivement prenant conscience des risques pour elle et son enfant si elle retourne à Abu Dhabi. En octobre 2013, la mère entreprend une demande en séparation de corps et garde de l'enfant. Le père présente une requête d'exception déclinatoire, alléguant que le tribunal n'a pas compétence.

La Cour rejette l'exception déclinatoire. Selon l'article 3146 *CcQ*, les autorités québécoises sont compétentes pour statuer sur la séparation de corps lorsqu'un des époux a son domicile ou sa résidence au Québec à la date de l'introduction de l'action. L'article 3142 *CcQ* édicte que les autorités québécoises sont compétentes pour statuer sur la garde d'un enfant pourvu que l'enfant soit domicilié au Québec. En cas de conflit de juridiction, en présence d'une demande de séparation de corps et de garde d'enfant, c'est l'article 3146 *CcQ* (séparation de corps) qui détermine la compétence à la fois pour la demande en séparation de corps et la garde d'enfant. Or, puisque la mère réside et a son domicile au Québec, les autorités québécoises ont compétence pour statuer sur la demande en séparation de corps et de garde de la fille.

La Cour conclut aussi que les tribunaux des EAU ne sont pas mieux à même de trancher le débat (article 3135 *CcQ*). Il est impossible ou intolérable d'exiger que la mère s'adresse aux tribunaux d'Abu Dhabi, lesquels favorisent une loi qui véhicule les valeurs de la Charia stricte. Ces valeurs sont incompatibles avec le fait de devoir placer l'intérêt supérieur de l'enfant au centre des considérations. Il y a lieu d'écarter la demande du retour de l'enfant même s'il s'agit d'un déplacement illicite. Le tribunal a compétence et exerce sa discrétion afin de ne pas décliner compétence en faveur des autorités judiciaires d'Abu Dhabi, considérant le péril pour la mère et l'enfant et la situation intolérable qui résulterait de l'application de la loi des EAU.

## Actions personnelles à caractère patrimonial

*Compétence — article 3148* CcQ *— requête pour jugement déclaratoire — convention de fiducie — droit de nommer un fiduciaire — régime de retraite enregistré en Ontario*

*Note.* Veuillez voir *Syndicat canadien de la fonction publique c Syndicat canadien des communications, de l'énergie et du papier, section locale 2013*.[117]

[117] *Syndicat canadien de la fonction publique c Syndicat canadien des communications, de l'énergie et du papier, section locale 2013*, 2015 QCCA 1392.

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*Compétence — personne légale non domiciliée au Québec — établissement au Québec*

*Belley c TD Auto Finance Services Inc / Service de financement auto TD inc*, 2015 QCCS 168[118]

The petitioner filed a motion to authorize the bringing of a class action on behalf of persons whose personal information was stored or saved on a data tape that was lost by Daimler Chrysler in 2008, claiming that those whose data were on the tape suffered various forms of damage. One of the issues was whether it was appropriate to authorize a national class. Daimler Chrysler argued that such a class would exceed the boundaries of the jurisdiction defined by Article 3148 of the *CCQ*. In particular, it argued that although it had a business establishment in Quebec, the dispute, so far as it concerned non-residents of Quebec, did not relate to its activities in Quebec, as the terms of paragraph (2) require.

The Superior Court held that a national class could be authorized. The dispute related to Daimler Chrysler's activities in Quebec, where it did have an establishment. It might be that there remain questions about the type of connection between the Quebec establishment and the dispute. However, the Quebec Court of Appeal advocates a liberal interpretation of article 3148, which is more compatible with the reality of modern era business decision making.[119] The liberal interpretation suggested by the Court of Appeal was all the more appropriate where, as here, personal information was used for Canada-wide business purposes and where the membership in the proposed group was spread around the country.

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

*Marciano c Guess? inc*, 2015 QCCS 3481

Marciano se plaint du fait que Guess fabrique, distribue et vend des marchandises sous le nom de "Guess by George Marciano," alors que Marciano allègue que Guess n'a aucun droit d'utiliser le nom "George Marciano." Guess réplique par exception déclinatoire. Elle allègue que les achats allégués par Marciano ont été effectués au Koweit auprès de deux entreprises qui résident au Koweit et que, de toute façon, le seul élément pouvant être significatif dans le processus décrit par Marciano est que les produits en question ont été livrés par la poste à une adresse située à Montréal. Pour Guess, cette livraison ne constitue pas un critère de rattachement suffisant donnant juridiction à la Cour supérieure du Québec au sens de l'article 3148 *CcQ*.

[118] La Cour d'appel a rejeté la requête de la défenderesse en autorisation de pourvoi : *TD Auto Finance Services Inc / Service de financement auto TD inc c Belley*, 2015 QCCA 1225.

[119] The court cited *Interinvest (Bermuda) Ltd v Herzog*, 2009 QCCA 1428 at paras 38–40.

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La Cour a rejeté l'exception déclinatoire. La documentation produite en l'instance démontre qu'une entreprise au Koweit vend par internet des produits qui contreviendraient aux droits de Marciano et que ces produits sont disponibles au Québec via les services de Postes Canada. Marciano réside au Québec et il a cédé les droits d'utilisation de son nom à la codemanderesse, une société québécoise. Il y a commercialisation de produits contrefaits au Québec. Même si cette commercialisation se fait à l'extérieur, elle affecte le patrimoine des demandeurs au Québec, leur causant un préjudice ici (article 3148, alinéa 3 *CcQ*). Le préjudice dont se plaignent les demandeurs n'est pas uniquement comptabilisé au Québec. Il affecte directement leur capacité de gain au Québec.

Compétence *ratione materiae*

*Corporate recourse*

*Takefman c Golden Hope Mines Ltd*, 2015 QCCS 4947

Takefman was a shareholder of Golden Hope, a company incorporated in Ontario, with its head office in Ontario but also with operations in Quebec. He brought the present action in Quebec, claiming that his rights as a shareholder had been violated and that he was entitled to an oppression remedy. The dispute centred on the company's refusal to put to a vote of the shareholders the proposal that Takefman and other shareholders attempted to present regarding the future strategic direction of the company. This was said to be contrary to the provisions of the Ontario corporations legislation. Before the current corporate recourse was filed, the Quebec Superior Court had ruled that Takefman's claim for injunctive relief under the Ontario statute pertained to the internal management of the company and lay within the jurisdiction of the Ontario courts, as per the law of incorporation. The claim was reframed as a damages claim, but the present court held that the new tagging did not change the pith and substance of the corporate recourse.

The scope of the superintending and reforming power of the Quebec Superior Court does not extend to companies incorporated under the law of another province, having their head office in another province. Such companies are not captured in the wording of Article 33 of the *Code of Civil Procedure* (*CPC*),[120] which indicates that the superintending and reforming power of the Superior Court applies to "legal persons established … for a private interest within Quebec." Matters of internal corporate governance fall within the jurisdiction of the state of incorporation of the company. Principles of comity and public policy command that courts should not

[120] *Code of Civil Procedure*, CQLR, c C-25.01.

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issue orders purporting to regulate the internal governance of a corporation incorporated in another jurisdiction. It is true that Article 3148(2) of the *CCQ* gives the court jurisdiction if the defendant is a corporation that has an establishment in Quebec, but it requires that the dispute relate to the activities of the company in Quebec. This dispute did not relate to the activities of Golden Hope but to the internal management, capacity, and status of the company.

PROCEDURE / PROCÉDURE

*Common Law and Federal*

Commencement of proceedings

*Note.* See *Xela Enterprises Ltd v Castillo*[121] (validity of service of process in Guatemala, which is not a party to the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*[122]) and *Bulmer v Nissan Motor Co*[123] (validity of service in Japan, which is a party to that convention).[124]

Interlocutory orders

*Injunction — extraterritorial effect*

*Note.* See *Equustek Solutions Inc v Jack*, noted above under Jurisdiction; Common law and federal; Jurisdiction *in personam*; *Jurisdiction* simpliciter — *orders against non-resident third party*. Compare that case with *Niemela v Malamas*,[125] in which an injunction against Google to restrain distribution of defamatory material was confined to the Canadian website.

*Interlocutory injunction granted by foreign court — enforcement —* Mareva *injunction*

*Oesterlund v Pursglove*, 2014 ONSC 2727[126]

The husband, a Finnish citizen, had met the wife, a UK citizen, when she was working as a photographer on a cruise ship. They married and had

[121] *Xela Enterprises Ltd v Castillo*, 2015 ONSC 866, 70 CPC (7th) 224, aff'd 2016 ONCA 437.

[122] *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (1965), referred to in *Rules of Civil Procedure*, *supra* note 42, r 17.05.

[123] *Bulmer v Nissan Motor Co*, 2015 SKCA 16.

[124] The convention is referred to in *Queen's Bench Rules*, Sask Gaz, 21 June 2013, 1370, r 12-12.

[125] *Niemela v Malamas*, 2015 BCSC 1024.

[126] This case was inadvertently omitted from last year's survey.

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two children who were born in the United States, where the family then lived. They also lived in the Bahamas, Finland, and Canada, where they moved in 2012. In early 2014, the parties separated. The wife moved with the children back to Florida, where the family had previously lived and a house was bought in the wife's name in 2005. The husband commenced divorce proceedings in Ontario. The wife had not submitted to the court's jurisdiction in those proceedings but commenced divorce proceedings in Florida. She obtained from the Florida court an asset injunction and order in the form of a *Mareva* injunction, which restrained the husband from disposing of, or transferring or moving, assets anywhere in the world, either personally or corporately. The order specifically extended to the husband's personal and corporate assets in Canada.

The wife brought an emergency motion, which she asked the Ontario court to hear without having her attorn to the jurisdiction of the court in Ontario. She sought a protective order to prevent the depletion of Canadian assets by the husband or his transferring them to entities outside the jurisdiction. The wife's affidavit evidence of the couple's assets showed a total gross asset value of some $400 million. The court granted the order. The making of the order was just, given the sixteen-year length of the parties' marriage, the assets in Ontario, and the fact that the Florida court had seen fit to grant similar injunctive relief over all of the husband's assets. Foreign interlocutory injunctions, including those made *ex parte*, as this one was, could be enforced in relation to Ontario assets. The Supreme Court of Canada had decided that non-monetary orders of foreign courts could be enforced by Canadian courts exercising their equitable jurisdiction.[127]

This case cried out for the flexibility that infuses equity. There was an Ontario connection, in the form of assets and the fact that the family had last lived together in Ontario and had been building a home there when the husband and wife separated. It would be unconscionable to allow the husband, who had attorned to the jurisdiction of the Ontario court, to systematically strip out of the jurisdiction all of the assets he controlled here and move them to some offshore jurisdiction that would not obey a court order issued in any country. Equity favoured freezing the husband's assets here to protect them until justice had been done. The wife's claims involved both child and spousal support as well as whatever equalization or other equitable distribution of assets was made by the court in the jurisdiction where the litigation finally took place. To dismiss the wife's motion because she had not attorned to the jurisdiction would be putting form over justice.

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

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Requests to foreign court

*Request to enforce domestic judgment*

*First Majestic Silver Corp v Davila Santos*, 2015 BCCA 452, 391 DLR (4th) 553

The judgment debtor under a BC judgment for $96 million appealed from the BC Supreme Court's order transmitting a formal request to a Mexican court to enforce the judgment. The court made the order on the basis of evidence that it was a necessary step, according to Mexican law, for having a foreign judgment enforced. The judgment debtor argued the court had no jurisdiction to make such a request. The Court of Appeal held that making such an order was within the Supreme Court's inherent jurisdiction over its own procedure.

FOREIGN JUDGMENTS / JUGEMENTS ÉTRANGERS

*Common Law and Federal*

Conditions for recognition or enforcement

*Nature of judgment — judgment on the merits*

*Note.* See *Coady v Quadrangle Holdings Inc*, noted above under Jurisdiction; Common Law and Federal; Declining jurisdiction *in personam*; Forum non conveniens — *claim for financial loss.*

*Finality of judgment*

*Note.* Although a US judgment was final, execution on it was stayed pending an appeal, in *Continental Casualty Co v Symons Estate.*[128]

*Jurisdiction of the enforcing court*

*Note.* See *Chevron Corp v Yaiguaje*, noted above under Jurisdiction; Common Law and Federal; Jurisdiction *in personam*; *Jurisdiction* simpliciter — *proceeding to enforce a foreign judgment.*

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

*Ward v Nackawic Mechanical Ltd*, 2015 NBCA 1, 429 NBR (2d) 228

The actual decision in this case was that the application judge had been wrong to hold that an Ohio judgment could be enforced by simple registration.[129] The relevant legislation, which codifies the law on the enforcement

[128] *Continental Casualty Co v Symons Estate*, 2015 ONSC 6394, 127 OR (3d) 758.

[129] The decision at first instance was noted (2013) 51 Can YB Int'l L 612.

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of foreign judgments in New Brunswick, requires enforcement by action.[130] The matter was therefore remitted to the Court of Queen's Bench. The Court of Appeal did, however, comment *obiter* on a substantive issue relating to enforcement, which was whether the judgment debtor had attorned to the jurisdiction of the Ohio court, as the application judge had held. The debtor had filed an "Answer" with the Ohio court, but argued this act was a nullity because Ohio law requires such a document to be filed by a lawyer entitled to practise in the state, which the person who filed it was not. The judgment creditors had, in fact, obtained judgment in default of appearance on the basis that the answer was a nullity.

The Court of Appeal noted that the cases on attornment (or submission) to the foreign court's jurisdiction formed a factually based scale. At one end were cases where a defendant had done no more than protest against jurisdiction, which was not submission. At the other end were those where a defendant filed a defence inviting the foreign court to make a decision on the merits, which was submission. A number of cases had found a defendant to have voluntarily appeared based on acts such as filing an answer to a complaint and participating in pre-trial conferences,[131] and combining technical pleadings, such as a requesting that a claim by struck for lack of particularity, with a motion disputing the foreign court's jurisdiction.[132] On the other hand, there was no submission in a case in which the debtor's New Brunswick counsel had forwarded an Appearance to the Ontario court clerk for filing, but the filing was refused because it was not accompanied by the required filing fee.[133]

In the present case, the debtor was said to have submitted by filing the answer, by taking part in pre-trial telephone conferences, and by failing to abide by orders of the Ohio court. The last of these was clearly unfounded in law, but the first two required determining exactly what was said and done on the debtor's behalf by its principal. The relevant facts were disputed and therefore had to be determined as part of the action on the judgment.

## Defences to recognition or enforcement

### *Fraud on the foreign court*

*Note.* See *Sutcliffe v Sotvedt*,[134] in which the defence of fraud under the *Convention between Canada and the United Kingdom of Great Britain and Northern*

[130] *Foreign Judgments Act*, RSNB 2011, c 162.

[131] *Morguard v Guimond Boats Ltd*, 2006 FCA 401.

[132] *Mid-Ohio Imported Car Co v Tri-K Investments Ltd* (1995), 129 DLR (4th) 181 (BCCA).

[133] *GA Racicot Enterprises Ltd v Moore* (1979), 26 NBR (2d) 151 (QB).

[134] *Sutcliffe v Sotvedt*, 2015 NSSC 194, 362 NSR (2d) 218.

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*Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters* (*Canada-United Kingdom Convention*) was held to be the same as that in the common law on the enforcement of foreign judgments.[135]

Effect of recognition (*res judicata*)

*Foreign civil and criminal judgments — evidence to establish facts of wrongdoing*

*Note.* In *Bank of China v Fan*, a case of knowing assistance and knowing receipt of embezzled funds, a number of foreign judgments were accepted as evidence of the facts underlying the claims.[136]

Bankruptcy of the judgment debtor

*Whether judgment debt survives bankruptcy — judgment based on violation of fiduciary duty owed to creditor*

*Note.* See *Korea Data Systems (USA) Inc v Aamazing Technologies Inc*,[137] in which a judgment of a California court against an individual was held enforceable but not based on "fraud, embezzlement, misappropriation or defalcation" so as to survive his bankruptcy intact.[138]

Statutory enforcement

*Uniform* Reciprocal Enforcement of Judgments Act — *application to set registration aside*

*Note.* Although there were probably grounds for setting aside the registration of a judgment from the state of Washington,[139] the court held it had no power to relieve against the forfeiture of the judgment debtor's right if the application to set the registration aside was made out of time: *LLS America LLC (Trustee of) v Wilson*.[140]

[135] Art IV(d) of the *Convention between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters* (1984), implemented by the *Canada and United Kingdom Reciprocal Recognition and Enforcement of Judgments Act*, RSNS 1989, c 52.

[136] *Bank of China v Fan*, 2015 BCSC 590.

[137] *Korea Data Systems (USA) Inc v Aamazing Technologies Inc*, 2015 ONCA 465, 386 DLR (4th) 746.

[138] Under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 178(1)(d).

[139] Under the *Court Order Enforcement Act*, RSBC 1996, c 78, Part 2.

[140] *LLS America LLC (Trustee of) v Wilson*, 2015 BCSC 441, aff'd 2016 BCCA 122.

Canada-United Kingdom Convention — *defences*

*Note.* See *Sutcliffe v Sotvedt*, applying the defence of fraud to registration under the convention.[141]

Arbitral awards

*Enforcement* — UNCITRAL Model Law

*Note.* In *Depo Traffic v Vikeda International*,[142] an award made in an arbitration in China was enforced in Ontario under the *UNCITRAL Model Law on International Commercial Arbitration*.[143] Defences based on natural justice and public policy were rejected.

*Québec*

Conditions nécessaires à la reconnaissance d'une décision étrangère

*Déclaration de parentage — enfant né à l'étranger d'une mère porteuse*

*Droit de la famille — 151172*, 2015 QCCS 2308

Les requérants, mariés depuis 2005, sont domiciliés au Québec. Monsieur JF est citoyen américain et résident permanent du Canada. Monsieur SH est citoyen canadien. Les requérants ont recours à une mère porteuse, la mise en cause, américaine, domiciliée aux États-Unis, pour devenir parents. La convention de mère porteuse est soumise aux lois de la Californie. Le père biologique est SH et JF n'a pas de lien biologique avec l'enfant. En janvier 2013 JF et SH obtiennent un jugement de la Court of Common Pleas en Pennsylvanie (le Jugement) selon lequel "JF and SH are the legal parents of a child expected to be born … at Hanover Hospital, Hanover, Pennsylvania, through CD acting as embryo carrier for the said JF and SH as the intended parents." L'enfant X est né en 2013, tel qu'il appert du certificat de naissance qui désigne les requérants comme parents.

Les requérants demandent l'homologation du Jugement. Ils demandent aussi d'être déclarés parents de X et que le Directeur de l'état civil du Québec émette un certificat de naissance pour X ou, subsidiairement, insère l'acte de naissance américain au registre de l'état civil du Québec comme s'il y avait été créé, avec les requérants comme pères. La Procureure générale

[141] *Sutcliffe v Sotvedt*, 2015 NSSC 194, 362 NSR (2d) 218.

[142] *Depo Traffic v Vikeda International*, 2015 ONSC 999.

[143] *International Commercial Arbitration Act*, RSO 1990, c I.9, s 2(1) provides that the *Model Law* is in force in Ontario.

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du Québec (la PG) et le Directeur contestent. Ils allèguent que les dispositions du *CcQ* relatives à la reconnaissance d'un jugement étranger ne sont pas satisfaites et que les conclusions demandées quant à l'acte de naissance équivalent à cautionner un mode de filiation qui n'est pas reconnu par le *CcQ*.

La Cour accueille la requête en homologation du Jugement, déclare les requérants parents de X, et ordonne au Directeur d'insérer au registre le certificat de naissance du Commonwealth de Pennsylvanie. Le tribunal n'est pas saisi d'une demande visant à établir la filiation d'un enfant puisque cette dernière l'a déjà été par un tribunal compétent de la Pennsylvanie. Le tribunal n'a donc pas à appliquer les lois d'un État américain, mais plutôt à confirmer qu'un officier public de cet État était légalement autorisé, suite à un jugement rendu dans ce même État, à émettre un acte de l'état civil. Pour se faire, le tribunal doit appliquer les règles en matière de reconnaissance de jugement étranger, tant quant à la vérification de la juridiction étrangère que de la conformité de son jugement et de ses effets avec l'ordre public, tel qu'il est entendu dans le contexte international.

L'article 3166 *CcQ* édicte que la compétence des autorités étrangères est reconnue en matière de filiation lorsque l'enfant ou l'un de ses parents est domicilié dans cet État ou a la nationalité qui y est rattachée. Cet article confirme la compétence de l'officier public de Pennsylvanie, puisque l'un des parents, soit la mère porteuse, y était domiciliée et a la nationalité américaine. L'enfant a acquis la nationalité américaine dès sa naissance. Il est faux de prétendre, comme le suggère la PG, qu'il n'y a aucun lien de rattachement entre les requérants et les États-Unis, puisque JF est un citoyen américain. Les requérants, dont l'un est américain, ont en toute légalité bénéficié du régime juridique américain en y concluant légalement une convention de mère porteuse. Ils ont par la suite obtenu légalement, par voie judiciaire, une déclaration de parentalité avant la naissance. Or, de telles déclarations sont émises par de nombreuses provinces canadiennes et par d'autres pays.

La PG plaide que, lorsqu'il y a naissance d'un enfant *via* une convention de mère porteuse au Québec malgré la nullité juridique, le parent d'intention qui n'est pas le père biologique doit obtenir un consentement spécial à l'adoption en s'adressant à la Cour du Québec. Elle reproche ensuite aux requérants de ne pas avoir respecté les règles québécoises en matière de filiation et d'adoption. Le tribunal ne saurait reprocher aux requérants de ne pas avoir respecté les règles applicables en matière d'adoption puisqu'ils n'ont jamais cherché à adopter un enfant. Il est vrai que les cours québécoises ont reconnu la validité de cette approche dans un contexte où le parent d'intention est la conjointe ou le conjoint du père biologique. Il est cependant difficile de conclure qu'il s'agit là de la seule voie légale pour faire reconnaître la filiation de l'enfant né d'une

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convention de mère porteuse, alors que de nombreux ressorts avoisinants du Québec prévoient l'émission de déclaration de parentalité, soit avant la naissance ou tout de suite après.

La PG prétend que la filiation est matière d'ordre public et exclue du domaine contractuel. Le résultat du Jugement et de l'acte de naissance qui en découle est de reconnaître la filiation de deux hommes à l'égard de leur enfant. Non seulement ce résultat n'est pas contraire à l'ordre public, tel qu'il est entendu dans les relations internationales, mais il ne l'est pas non plus en vertu de l'ordre public interne du Québec, puisque l'article 115 *CcQ* prévoit spécifiquement la possibilité pour un enfant d'avoir deux parents du même sexe.

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

*Common Law and Federal*

### Contract

*Proper law — no agreed choice — equipment sale and installation contract*

*Lilydale Cooperative Ltd v Meyn Canada Inc*, 2015 ONCA 281, 126 OR (3d) 378

Meyn, an Ontario company, contracted to design, build, and install a fryer and oven system for Lilydale's poultry processing plant in Alberta. The plant caught fire ten years after the system was installed. Lilydale sued Meyn in Ontario for breach of contract and negligence. A preliminary question of law that had to be decided was the proper law of the contract since, if Alberta law applied to it, the contract claims were statute barred.

The Court of Appeal affirmed the motion judge's decision that the proper law of the contract was Ontario law. The nature and subject matter of the contract, being the design and building of the fryer and oven system, was more closely connected with Ontario than Alberta. The place of performance was also more Ontario, where design and construction took place, than Alberta, where the system was delivered. The supplier's domicile and residence in Ontario was also a weightier factor than the customer's being based in Alberta. The court rejected Meyn's argument that to apply Ontario law offended against the principles of order, fairness, and comity. There was nothing unfair in requiring Meyn to adhere to the substantive law of Ontario, the law of its home jurisdiction in Canada. (Meyn was a subsidiary of a German firm.) It was a multinational enterprise that could have inserted a choice of law clause in its contract with Lilydale and, had it done so, it would undoubtedly have chosen Ontario, the only province in Canada where it operated. The court said it was more than a little

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ironic that, despite its own close connection to Ontario, Meyn would seek to take advantage of Alberta law.

*Statutory regulation of contract — employment contract*

*Note.* In *Karmali v Donorworx Inc*, an Alberta court applied the employment standards legislation of Ontario to determine the rights of an employee who worked in Ontario.[144]

*Statutory regulation of contract — franchise contract*

*Note.* The dealership agreements of all General Motors dealers across Canada included an express choice of Ontario law to govern the contract. In a class action by the dealers against General Motors, *Trillium Motor World Ltd v General Motors of Canada Ltd*,[145] the court held that effect of the choice of law was that General Motors and the dealers outside Ontario had opted by contract into the Ontario franchise legislation.[146]

*Third party's rights — group accident insurance policy — law governing individual's claim*

*Zurich Life Insurance Co Ltd v Branco*, 2015 SKCA 71, [2015] 10 WWR 246[147]

Branco, a Canadian citizen resident at all material times in Portugal, injured his foot in a workplace accident in 2000 in Kyrgyzstan, where he worked since 1997 as a welder at a mine owned by Kumtor. The employees of Kumtor were insured against workplace injury under two group policies, one issued by Zurich Life and the other by AIG. Branco claimed disability benefits under these two policies. He received some benefits but claimed he was entitled to more. Zurich eventually conceded it owed him the additional benefits he claimed, but AIG, supported by Kumtor, denied any further liability. The trial judge held both insurers liable for failing to administer Branco's claims properly and awarded Branco a total of $4.5 million in punitive damages and $450,000 in damages for mental distress.

One of the issues on appeal was whether Branco's rights under the Zurich policy were governed by Swiss law or, as the trial judge had held, Saskatchewan law. Swiss law did not permit punitive damage awards in a case like this. The policy included a clause that, should any differences

[144] *Karmali v Donorworx Inc*, 2015 ABQB 105 (Master).

[145] *Trillium Motor World Ltd v General Motors of Canada Ltd*, 2015 ONSC 3824.

[146] *Arthur Wishart Act (Franchise Disclosure), 2000*, SO 2000, c 3.

[147] Leave to appeal to SCC refused, 36696 (21 April 2016).

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arise between the contracting parties, the courts at the domicile of the insurer, which was Zurich, should be considered competent and Swiss law would be applicable. The argument for Saskatchewan law was that the dispute was not between Kumtor and the insurer but between Branco and the insurer. Branco was not a party to the policy; he was merely a beneficiary under it. The clause did not say that all claims would be subject to Swiss law, only that differences between Kumtor and Zurich would be. Therefore, the law governing Branco's claim should be governed by the system of law that had the closest and most substantial connection with his claim, which he argued was Saskatchewan law.

The Court of Appeal accepted each step in this argument except the last. In holding that the choice-of-law clause was not decisive, the court attached importance to the wording. If the insurer wished to dictate the law that would govern claims by beneficiaries under the policy, it should do so expressly. However, the trial judge was wrong to apply Saskatchewan law. Among various errors in his reasoning on that issue, he had applied a "real and substantial connection" test rather than the correct one, the "closest and most substantial connection" test. There was some Saskatchewan connection — the AIG policy expressly required the insurer to pay benefits comparable to Saskatchewan workers' compensation benefits — but the closest connection Branco's claim had was with Swiss law. He was resident in Portugal and Zurich's head office was in Switzerland. The claim arose in Kyrgyzstan. The claim was administered and paid out of Switzerland. The contract was described as part of Zurich's "Swiss Foreign Portfolio" and did include express reference to Swiss law, even if that was not directly applicable. Premiums under the policies were payable in Canadian dollars in Switzerland.

However, having decided that Swiss law governed the policy, the Court of Appeal held that the exclusion of punitive damages was contrary to the public policy of Saskatchewan. The concept of punitive damages was deeply rooted in the Canadian legal system. They serve both to affirm broad social values and to remedy specific wrongs. They serve a vital function in sanctioning conduct that cries out for punishment where no other punitive remedy is available. They are particularly important in the context of relationships involving significant power imbalances. The court observed[148] that it was only deciding that public policy applied in this particular context, of an insured versus an insurer. It was not suggesting that every foreign law that prohibits or limits punitive damages must be displaced on this basis; different circumstances might generate different results.

Turning to the quantum of the punitive damages, the Court of Appeal reduced the trial judge's award against Zurich from $3 million to $500,000.

[148] *Zurich Life Insurance Co Ltd v Branco*, 2015 SKCA 71 at para 179, [2015] 10 WWR 246.

*Note.* The invocation of public policy is unusual for two reasons. One is that the Supreme Court of Canada has made it clear that public policy is an instrument directed at the repugnancy of a foreign law, not the repugnancy of facts.[149] The Saskatchewan Court of Appeal said that excluding punitive damages against insurers who have behaved badly is a matter of public policy although excluding them in other types of cases may not be. That comes close to focusing on whether the facts — taking this to mean the results in the individual case — offend against our fundamental notions of justice, rather than focusing on whether the relevant foreign law is intrinsically unjust. The other reason is that the court's description of punitive damages as deeply rooted in the Canadian system is true as far as punitive damages in some kinds of civil cases are concerned, but not in this type of case. Awarding punitive damages against insurers is a recent innovation in Canada. It was long uncertain whether punitive damages were available at all in breach of contract cases. Moreover, an insurer's failure to handle a claim in good faith was an obligation that courts only started imposing in recent decades. The case that settled both the general question of punitive damages in contract and the particular question of an insurer's obligation to act in good faith, is just fifteen years old.[150] To assert that a legal rule so recently established is now part of the "fundamental morality of the Canadian legal system," which is what public policy is supposed to reflect,[151] stretches the doctrine to an extraordinary degree.

## Corporations and shareholders

*Corporations — dissolved corporation — status to be sued*

*Cirque du Soleil Inc v Volvo Group Canada Inc*, 2015 ONSC 2698, 126 OR (3d) 234

One of the defendants in this action was a California corporation that applied for an order dismissing the action against it on the ground that it had voluntarily filed a certificate of dissolution in January 2013 and, accordingly, was dissolved under California law. This defendant had supplied electric generators to the plaintiff's theatrical productions. The plaintiff was suing it for negligent design and manufacture. Ontario law has no general rule permitting actions against a dissolved corporation, but does have a statutory exception for Ontario business corporations that allows, *inter alia*, a civil action to be brought against the corporation as if it had not been dissolved.[152] Evidence was submitted, however, that under California

[149] *Beals v Saldanha*, 2003 SCC 72 at paras 71–72, 219, [2003] 3 SCR 416 [*Beals*].

[150] *Whiten v Pilot Insurance Co*, 2002 SCC 18, [2002] 1 SCR 595.

[151] *Beals*, *supra* note 149 at para 72.

[152] *Business Corporations Act*, RSO 1990, c B.16, s 242(1).

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law, a corporation that is dissolved nevertheless continues to exist for the purpose of winding up its affairs and prosecuting and defending actions by or against it.

The court held that the California rule was not a rule of procedure but part of the substantive law of corporations of that state. It therefore must be applied in determining the status of a California corporation to be sued in an Ontario court. By California law, the defendant corporation, which filed for voluntary dissolution three months after the fire that gave rise to the plaintiff's claim, was not "dissolved" but continued to exist for the purposes of this lawsuit.

## Matrimonial causes

### *Divorce — foreign divorce*

*Nomaan v Nomaan*, 2015 ABQB 69

The husband and wife married in Pakistan, where both were domiciled and resident, in February 2004. They became permanent residents of Canada in December 2005. A son was born in April 2006. The marriage broke up in September 2006. The wife then returned to Pakistan with the son. The husband also returned in December 2006 in an attempt to reconcile. When that failed, he applied for a divorce in Pakistan in January 2007. A divorce certificate was granted in April 2007. The wife resumed living in Canada from at least September 2007. The husband and wife had both remarried, the marriages taking place in Pakistan in 2012 and 2014, respectively. The husband now applied for an order that the 2007 Pakistan divorce was valid under the foreign divorce recognition provisions of the *Divorce Act*.[153]

The court granted the order. It held that the husband and, it appeared, the wife were both ordinarily resident in Pakistan for at least one year immediately preceding the husband's application for divorce in January 2007. Either party's ordinary residence for that period satisfied one of the recognition rules in the act.[154] In addition, the court apparently relied on the common law recognition rule, preserved by the act,[155] that a foreign divorce is valid if either party had a real and substantial connection with the foreign jurisdiction. The court said, in relation to both grounds, that both parties were resident and domiciled in Pakistan from their 2004 marriage until their 2007 divorce, thus holding in effect that their immigration to Canada had not interrupted their ordinary residence or domicile in Pakistan.

[153] *Divorce Act*, *supra* note 4, s 22(1)–(3).

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

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

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*Québec*

Mariage

*Mariage à l'étranger — conditions de fond — consentement*

*Droit de la famille — 151706*, 2015 QCCS 3210

La femme, qui est québécoise, demande au tribunal d'annuler son mariage avec le mari, qui est marocain. Elle invoque que son consentement à leur mariage, célébré en 2011 à Casablanca, au Maroc, n'était ni libre ni éclairé. L'article 5 *CcQ* stipule que "Le mariage requiert le consentement libre et éclairé de deux personnes à se prendre mutuellement pour époux." La Cour décide que la femme est domiciliée au Québec à tout moment pertinent aux faits et questions soulevés par sa demande en nullité de mariage. La Cour supérieure du Québec est donc compétente pour décider de sa demande en nullité de mariage (article 3144 *CcQ*).

Le tribunal conclut que le mari n'avait, ni au moment du mariage ni par la suite, aucune réelle intention conjugale avec la femme ni de fonder une famille avec elle. De surcroît, le mari a sciemment, par le mariage, contourné les règles d'ordre public d'Immigration Canada. Pire encore, il a incité d'autres personnes désireuses d'immigrer au Canada d'utiliser le même stratagème qu'il a utilisé. La demande en nullité de mariage de la femme est bien fondée. Au moment de la célébration du mariage, le consentement de la femme n'était pas éclairé et le mariage est contraire à l'ordre public.