TAB 10

Francine Bourdon, Lise Chamberland, Gudrun Deumié, Yvon Laprade, Shirley Smith and Michel Tanguay *Appellants*

v.

Stelco Inc. *Respondent*

and

Superintendent of Financial Services *Intervener*

Francine Bourdon, Lise Chamberland, Gudrun Deumié, Yvon Laprade, Shirley Smith et Michel Tanguay *Appelants*

c.

Stelco Inc. *Intimée*

et

Surintendant des services financiers *Intervenant*

INDEXED AS: BOUCHER *v.* STELCO INC.

Neutral citation: 2005 SCC 64.

File No.: 30299.

Hearing and Judgment: June 10, 2005.

Reasons delivered: November 10, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

RÉPERTORIÉ : BOUCHER *c.* STELCO INC.

Référence neutre : 2005 CSC 64.

N° du greffe : 30299.

Audition et jugement : 10 juin 2005.

Motifs déposés : 10 novembre 2005.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Pensions — Pension plans — Partial wind up of pension plan — Wind up report approved by Ontario's Superintendent of Financial Services granting early retirement benefits to plan members employed in Ontario and deferred pensions to members employed in Quebec — Superintendent's decision not contested in Ontario — Quebec members instead bringing action based on employment contract in Quebec to claim early retirement benefits — Whether Quebec Superior Court may rule on conclusions sought in action.

Civil procedure — Exception to dismiss action — Res judicata — Issue estoppel — Partial wind up of pension plan — Wind up report approved by Ontario's Superintendent of Financial Services granting early retirement benefits to plan members employed in Ontario and deferred pensions to members employed in Quebec — Superintendent's decision not contested in Ontario — Quebec members instead bringing action based on employment contract in Quebec to claim early retirement benefits — Whether action inadmissible in light of civil

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Pensions — Régimes de retraite — Liquidation partielle du régime de retraite — Rapport de liquidation approuvé par le surintendant des services financiers de l'Ontario et octroyant une pension anticipée aux participants du régime employés en Ontario et une pension différée aux participants employés au Québec — Décision du surintendant non contestée en Ontario — Participants québécois intentant plutôt une action au Québec basée sur le contrat de travail pour obtenir une pension anticipée — La Cour supérieure du Québec peut-elle se prononcer sur les conclusions de cette action?

Procédure civile — Moyens de non-recevabilité — Chose jugée — Préclusion découlant d'une question déjà tranchée — Liquidation partielle du régime de retraite — Rapport de liquidation approuvé par le surintendant des services financiers de l'Ontario et octroyant une pension anticipée aux participants du régime employés en Ontario et une pension différée aux participants employés au Québec — Décision du surintendant non contestée en Ontario — Participants québécois intentant plutôt une action au Québec basée sur le contrat de travail

law principles relating to res judicata and common law principles relating to estoppel — Civil Code of Québec, S.Q. 1991, c. 64, art. 3137.

Private international law — Jurisdiction of Quebec courts — Doctrine of forum non conveniens — Partial wind up of pension plan — Wind up report approved by Ontario's Superintendent of Financial Services granting early retirement benefits to plan members employed in Ontario and deferred pensions to members employed in Quebec — Superintendent's decision not contested in Ontario — Quebec members instead bringing action based on employment contract in Quebec to claim early retirement benefits — Whether Superior Court had to decline jurisdiction based on doctrine of forum non conveniens — Civil Code of Québec, S.Q. 1991, c. 64, art. 3135.

The respondent, S, set up a single pension plan for all its employees in Canada, regardless of their place of work. The plan was governed by the laws of Ontario. In 1990, as part of a reorganization, S closed three plants in Quebec. Several of the laid-off employees, including the appellants, sought to obtain pension benefits. Ontario's Superintendent of Pensions then ordered a partial wind up of the plan and approved the partial wind up report, which provided for early retirement benefits for plan members employed in Ontario only. For the appellants, all of whom were members employed in Quebec, the report applied Quebec law and the entire amount of the pension was accordingly deferred until the normal age of retirement. The appellants did not institute proceedings in Ontario to contest that decision but instead brought an action in Quebec that was based on contracts of employment. They claimed to be entitled to early retirement benefits on the basis that the plan was subject to Ontario law. The trial judge began by recognizing that the Superior Court had jurisdiction, but dismissed the appellants' action on the merits, holding that early retirement benefits were limited to plan members employed in Ontario. The majority of the Court of Appeal affirmed the trial judge's decision both on the issue of jurisdiction and on the merits.

Held: The appeal should be dismissed.

The appellants' action is inadmissible. Under the interprovincial framework agreement on pension plans, which applied to S's plan, Ontario's Superintendent of Financial Services was expressly entitled to exercise all

pour obtenir une pension anticipée — Vu les règles de la chose jugée en droit civil et celles de la préclusion en common law, l'action est-elle irrecevable? — Code civil du Québec, L.Q. 1991, ch. 64, art. 3137.

Droit international privé — Compétence des tribunaux québécois — Doctrine du forum non conveniens — Liquidation partielle du régime de retraite — Rapport de liquidation approuvé par le surintendant des services financiers de l'Ontario et octroyant une pension anticipée aux participants du régime employés en Ontario et une pension différée aux participants employés au Québec — Décision du surintendant non contestée en Ontario — Participants québécois intentant plutôt une action au Québec basée sur le contrat de travail pour obtenir une pension anticipée — La Cour supérieure devait-elle décliner compétence en vertu de la doctrine du forum non conveniens? — Code civil du Québec, L.Q. 1991, ch. 64, art. 3135.

L'intimée S a établi un régime de retraite unique pour l'ensemble de ses employés au Canada, sans égard à leur lieu de travail. Le régime est régi par la loi de l'Ontario. En 1990, dans le cadre d'une réorganisation, S ferme trois usines au Québec. Plusieurs des salariés mis à pied, dont les appelants, cherchent à obtenir des prestations de retraite. Le surintendant des régimes de retraite de l'Ontario décrète alors la liquidation partielle du régime et approuve le rapport de liquidation partielle, qui ne prévoit l'octroi d'une pension anticipée qu'aux participants employés en Ontario. À l'égard des appelants, tous des participants employés au Québec, le rapport applique la règle québécoise et n'accorde donc qu'une pension dont le versement total est différé à l'âge normal de la retraite. Les appelants n'engagent aucune procédure en Ontario pour contester cette décision, mais intentent plutôt, au Québec, une action basée sur des contrats de travail. Ils allèguent avoir droit aux prestations de retraite anticipée en raison de l'assujettissement du régime au droit de l'Ontario. En première instance, le juge reconnaît d'abord la compétence de la Cour supérieure, mais rejette les prétentions des appelants sur le fond, concluant que les prestations de retraite anticipée étaient réservées aux participants employés en Ontario. La Cour d'appel, à la majorité, confirme cette décision tant sur la question de la compétence que sur le fond.

Arrêt : Le pourvoi est rejeté.

L'action des appelants est irrecevable. En vertu de l'accord-cadre interprovincial sur les régimes de retraite, applicable au régime de S, le surintendant des services financiers de l'Ontario avait expressément le

the powers conferred by the Ontario legislature and to make any necessary decisions for the administration and wind up of the plan, such as verifying and approving the benefits payable to each plan member, including those employed in Quebec. The Superintendent's decision was not contested in Ontario and is final. In light of the civil law principles relating to *res judicata* and the common law principles relating to estoppel, the appellants cannot contest that decision indirectly by means of this action. [20] [26-28] [31]

At this stage of the proceedings, from the perspective of Quebec law, the conditions for applying the principle of *res judicata* have been met. The Superintendent had jurisdiction to make the decision, and the three necessary elements of identical cause, object and parties are present. If it were heard by a Quebec court, the main debate between the parties would concern a question that has already been settled by the Superintendent, and the court could not allow the action without varying or quashing his decision. [32]

Insofar as a decision of an administrative body created by the Ontario legislature is in issue, in a case within that body's jurisdiction under Ontario law, applying the common law rules governing issue estoppel would lead to the same result. In short, the appellants' failure to make use of the usual means of redress, together with the situation in which any other decision would place S, militates against the court's exercise of its residual discretion to decline to apply estoppel. S could find itself in the strange position of having to comply with the Superintendent's decision under Ontario law while at the same time being required to execute a Quebec judgment to the contrary. Such a result could call into question the benefit calculations for all the retirees and the measures taken to ensure the plan's solvency. [33-34]

Finally, even if the Quebec courts had found that it was still legally possible to contest the Superintendent's decision, a proper application of the doctrine of *forum non conveniens* would have justified them in declining jurisdiction in the circumstances. An Ontario court would naturally be in a better position to review the decision of the Ontario body that is responsible for administering the plan, if only to reduce the risk of conflicting decisions and to adhere to the principle of administration set out in the memorandum of reciprocal agreement, especially in that the challenge by the Quebec plan members could affect the plan as a whole and the rights of the other members. [36] [38]

droit d'exercer tous les pouvoirs conférés par la législature ontarienne et prendre toute décision nécessaire à l'administration et à la liquidation du régime, notamment vérifier et approuver les prestations payables à chaque participant, y compris ceux employés au Québec. La décision du surintendant n'a pas été contestée en Ontario et est finale. Vu les règles de la chose jugée en droit civil et les règles de la préclusion en common law, les appelants ne peuvent contester indirectement cette décision par le truchement de la présente action. [20] [26-28] [31]

Dans l'état actuel des procédures, au regard du droit québécois, les conditions d'application du principe de l'autorité de la chose jugée sont remplies. Le surintendant avait compétence pour rendre la décision et les trois identités nécessaires de cause, d'objet et de parties existent. S'il était entendu devant un tribunal québécois, le débat principal entre les parties porterait sur une question déjà tranchée par le surintendant, et le tribunal ne pourrait faire droit à l'action sans réviser ou annuler la décision du surintendant. [32]

Dans la mesure où la décision d'un organisme administratif créé par la législature de l'Ontario est en cause, dans une affaire dont le règlement incombe à cet organisme suivant le droit de l'Ontario, l'application des règles de common law sur la préclusion découlant d'une question déjà tranchée (*issue estoppel*) conduirait au même résultat. Enfin, l'omission des appelants d'utiliser les voies de recours habituelles, de même que la situation dans laquelle toute autre décision placerait S, militent contre l'exercice du pouvoir discrétionnaire résiduel d'un tribunal de ne pas donner effet à la préclusion. S pourrait en effet se trouver dans l'étrange situation de devoir se conformer à la décision du surintendant en vertu de la loi de l'Ontario tout en étant tenue d'exécuter un jugement québécois contraire. Un tel résultat pourrait remettre en cause le calcul des prestations de l'ensemble des retraités et les mesures prises pour assurer la solvabilité du régime de retraite. [33-34]

Enfin, même si les tribunaux québécois avaient conclu qu'il était encore juridiquement possible de remettre en cause la décision du surintendant, une application correcte de la doctrine du *forum non conveniens* les aurait justifiés de décliner compétence dans les circonstances. Un tribunal de l'Ontario serait naturellement mieux placé pour réviser la décision de l'organisme ontarien chargé de l'administration du régime, ne serait-ce que pour réduire le risque de décisions contradictoires et pour respecter le principe d'administration prévu par l'accord de réciprocité, d'autant plus que la contestation des participants québécois pourrait affecter l'ensemble du régime et les droits des autres participants. [36] [38]

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APPEAL from a judgment of the Quebec Court of Appeal (Robert C.J.Q. and Nuss and Morin JJ.A.), [2004] R.J.Q. 807 (*sub nom. Bourdon v. Stelco. Inc.*), 241 D.L.R. (4th) 266, 39 C.C.P.B. 214, [2004] Q.J. No. 1842 (QL), affirming a judgment of Durocher J. (2000), 26 C.C.P.B. 20, [2000] Q.J. No. 6735 (QL), rejecting the appellants' action. Appeal dismissed.

Claude Tardif, Gaétan Lévesque and *Stéphane Forest*, for the appellants.

Chantal Masse, Timothé R. Huot and *Rachel Ravary*, for the respondent.

Deborah McPhail, for the intervener.

English version of the judgment of the Court delivered by

LEBEL J. —

I. Introduction

This appeal concerns an action that was brought against the respondent, Stelco Inc. ("Stelco"), by the appellants, who are laid-off employees, to claim early retirement benefits. The issue in the case at bar, which is more than a question of contract performance, relates to the exercise of jurisdiction by the Quebec Superior Court in respect of a 1997 decision in which Ontario's Superintendent of Pensions approved the partial wind up of Stelco's pension plan. At the hearing, I concurred in dismissing the appellants' action, but for reasons that differ in part from those of the Quebec Court of Appeal. In my view, the Superior Court should have declined to rule on the conclusions sought in this action. Both the inadmissibility of the action — which is contrary to the civil law principle of *res judicata* and to the common law principle of issue estoppel — and the principles of *forum non conveniens* justify dismissing a proceeding that is likely to become an impermissible collateral attack on the Superintendent's decision.

A. *Origin of the Case*

Stelco, a major manufacturing company, operated commercial and industrial establishments in

POURVOI contre un arrêt de la Cour d'appel du Québec (le juge en chef Robert et les juges Nuss et Morin), [2004] R.J.Q. 807 (*sub nom. Bourdon c. Stelco Inc.*), 241 D.L.R. (4th) 266, 39 C.C.P.B. 214, [2004] J.Q. nº 1842 (QL), qui a confirmé la décision du juge Durocher (2000), 26 C.C.P.B. 20, [2000] J.Q. nº 6735 (QL), qui avait rejeté l'action des appelants. Pourvoi rejeté.

Claude Tardif, Gaétan Lévesque et *Stéphane Forest*, pour les appelants.

Chantal Masse, Timothé R. Huot et *Rachel Ravary*, pour l'intimée.

Deborah McPhail, pour l'intervenant.

Le jugement de la Cour a été rendu par

LE JUGE LEBEL —

I. Introduction

Le présent pourvoi fait suite à l'action intentée contre l'intimée, Stelco Inc. (« Stelco »), par les appelants, des employés mis à pied, pour obtenir des prestations de retraite anticipée. Davantage qu'un problème d'exécution de contrat, la présente espèce soulève la question de l'exercice de la compétence de la Cour supérieure du Québec à l'égard d'une décision du surintendant des régimes de retraite de l'Ontario approuvant, en 1997, la liquidation partielle du régime de retraite de Stelco. J'ai été d'accord à l'audience pour confirmer le rejet de l'action des appelants, mais pour des motifs qui diffèrent en partie de ceux de la Cour d'appel du Québec. À mon avis, la Cour supérieure devait refuser de statuer sur les conclusions de cette action. Tant l'irrecevabilité de cette demande, contraire à la règle de la chose jugée en droit civil, et à celle de la préclusion (*issue estoppel*) en common law, que les principes du *forum non conveniens* justifient le rejet d'une procédure susceptible de devenir une contestation indirecte inadmissible de la décision du surintendant.

A. *L'origine du litige*

Stelco, une entreprise manufacturière importante, a exploité des établissements commerciaux

several provinces of Canada, including Quebec. In 1940, it set up a single pension plan for all its employees in Canada, regardless of their place of work. At the time of the events that gave rise to the case at bar, s. 21 of the plan then in effect stipulated that the plan was governed by the laws of Ontario. The same section also provided that the termination or wind up of the plan would be carried out in accordance with Ontario's *Pension Benefits Act*, R.S.O. 1990, c. P.8:

et industriels dans plusieurs provinces canadiennes, dont le Québec. En 1940, elle a établi un régime de retraite unique pour l'ensemble de ses employés au Canada, sans égard à leur lieu de travail. Au moment où surviennent les événements à l'origine du présent litige, l'art. 21 du régime alors en vigueur prévoit que ce dernier est régi par la loi de l'Ontario. Ce même article stipule aussi que la cessation ou la liquidation du régime s'effectueront conformément à la *Loi sur les régimes de retraite* de l'Ontario, L.R.O. 1990, ch. P.8 :

SECTION 21

Applicable Law

(a) This Plan shall be construed and interpreted in accordance with the laws of the Province of Ontario.

(b) In the event of the termination or windup of the Plan such windup will be carried out in accordance with the provisions of the Pension Benefits Act of Ontario.

[TRADUCTION]

ARTICLE 21

Droit applicable

a) Le présent régime est interprété conformément aux lois de la province d'Ontario.

b) En cas de cessation ou de liquidation du régime, la liquidation a lieu conformément aux dispositions de la Loi sur les régimes de retraite de l'Ontario.

3 After the pension plan came into effect, the provincial legislatures gradually enacted legislation on supplemental pension plans. These similarly constructed statutes establish a legal framework for such plans and set up mechanisms for overseeing their management, ensuring their solvency and, if need be, overseeing the wind up of a plan. To avoid subjecting interprovincial plans such as that of Stelco to multiple administrative controls, the provincial governments of Canada agreed on the importance of reciprocity in overseeing them. In substance, their memorandums of reciprocal agreement recognize as a majority "administrator" the regulatory authority of the province in which the majority of the employees participating in a supplemental pension plan work. A memorandum of reciprocal agreement entrusts the oversight of the plan, and decisions on the management and wind up of the plan, to this regulatory authority.

Après l'entrée en vigueur du régime de retraite, les législatures provinciales ont graduellement adopté des législations sur les régimes complémentaires de retraite. Ces lois, conçues de manière assez semblable, établissent le cadre juridique de ces régimes et instituent des mécanismes de surveillance de leur gestion, de leur solvabilité et de leur liquidation, le cas échéant. Pour éviter d'assujettir un régime interprovincial comme celui de Stelco à des contrôles administratifs multiples, les gouvernements provinciaux du Canada se sont entendus sur l'importance de la réciprocité dans la surveillance de ces régimes. En substance, leurs accords multilatéraux de réciprocité ont reconnu un statut d'« administrateur » majoritaire à l'autorité réglementaire de la province où travaillent la majeure partie des employés participant à un régime complémentaire de retraite. L'accord de réciprocité confie la surveillance du régime et la prise de décisions sur sa gestion et sa liquidation à cette autorité réglementaire.

4 The memorandum of reciprocal agreement that is relevant to this appeal was signed in 1968

L'accord multilatéral de réciprocité pertinent pour les besoins du pourvoi est intervenu en 1968

by the Quebec Pension Board ("Régie des rentes du Québec"), the Pension Commission of Ontario, and Alberta's Superintendent of Pensions. Most of the provinces eventually signed it. The memorandum of agreement stipulates that the major authority exercises its own powers and the powers that the minor authorities delegate to it with respect to a plan. In the case of Stelco's plan, the major authority within the meaning of the memorandum of reciprocal agreement was the Pension Commission of Ontario; the major authority is now the Superintendent of Financial Services, who for the last few years has been exercising the duties of the Superintendent of Pensions. This memorandum of agreement was still in effect when the problems that ultimately gave rise to this case began.

In 1990, as part of a reorganization of its operations, Stelco decided to close three plants in Quebec. The closures resulted in the elimination of jobs. Some of the laid-off employees sought to obtain pension benefits. Ontario's Superintendent of Pensions then ordered a partial wind up of the company's pension plan in order to determine and guarantee the pension benefits of the laid-off employees. Stelco contested the partial wind up of the plan and appealed to the Divisional Court of Ontario ((1994), 115 D.L.R. (4th) 437). After losing its case in that court and in the Ontario Court of Appeal ((1995), 126 D.L.R. (4th) 767), the employer was denied leave to appeal to this Court. Consequently, on March 28, 1996, the Superintendent ordered the partial wind up of the plan, on specified dates, with respect to certain classes of employees affected by plant closures. The fact that the appellants were members of the groups of employees affected by that decision is not in issue.

Further to that order, an actuarial firm prepared a wind up report, which the company submitted to the Superintendent of Pensions in January 1997. According to the appellants' record, the employees concerned, including the appellants, each received a personalized statement indicating the pension benefits they would receive. On January 29, 1997, the Superintendent approved the partial wind up

entre la Régie des rentes du Québec, la Commission des rentes de l'Ontario et le surintendant des rentes de l'Alberta. La plupart des provinces y ont adhéré par la suite. Il stipule que l'autorité majoritaire exerce ses propres pouvoirs et ceux que les autorités minoritaires lui délèguent à l'égard d'un régime. Dans le cas du régime de Stelco, l'autorité majoritaire au sens de l'accord multilatéral était la Commission des rentes de l'Ontario; il s'agit désormais du surintendant des services financiers de l'Ontario, qui exerce depuis quelques années les fonctions de surintendant des régimes de retraite. Cet accord s'appliquait toujours lorsque commencèrent les problèmes qui provoquèrent éventuellement le présent litige.

5 En 1990, dans le cadre de la réorganisation de ses activités, Stelco décida de fermer trois usines au Québec. Ces fermetures entraînèrent des suppressions d'emplois. Un certain nombre des salariés mis à pied cherchèrent à obtenir des prestations de retraite. Le surintendant des régimes de retraite de l'Ontario décréta alors la liquidation partielle du régime de retraite pour déterminer et garantir les prestations de retraite des employés mis à pied. Stelco contesta la possibilité d'une liquidation partielle du régime et interjeta appel devant la Cour divisionnaire de l'Ontario ((1994), 115 D.L.R. (4th) 437). Après avoir essuyé des échecs devant ce tribunal et la Cour d'appel de l'Ontario ((1995), 126 D.L.R. (4th) 767), l'employeur se vit refuser l'autorisation d'en appeler devant notre Cour. En conséquence, le 28 mars 1996, le surintendant ordonna la liquidation partielle du régime à des dates précises à l'égard de certaines catégories d'employés touchés par les fermetures d'usines. Nul ne conteste l'appartenance des appelants aux groupes d'employés visés par cette décision.

6 À la suite de cette ordonnance, des actuaires préparèrent un rapport de liquidation que la société transmit en janvier 1997 au surintendant des régimes de retraite. Selon le dossier d'appel, les employés visés, y compris les appelants, reçurent un relevé individuel précisant les prestations de retraite qu'ils recevraient. Le 29 janvier 1997, le surintendant approuva le rapport de liquidation

report, including the description and calculation of the benefits awarded to each employee.

7 That approval is at the heart of the case. To understand the nature of the problem, it will be necessary to briefly review the provisions of the Ontario and Quebec legislation on supplemental pension plans that apply to early retirement. The appellants, who were employed in facilities in Quebec when they were laid off, had not yet reached the normal age of retirement under the laws of either Ontario or Quebec.

8 At that time — and this is still the case today — the legislation of Quebec and Ontario treated employees pensioned off before the normal age of retirement quite differently. Under Quebec's *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1, such employees are entitled to benefits that they will not receive until they reach the normal age of retirement. Ontario's legislation provides for the possibility of receiving early retirement benefits in such cases. Under s. 74 of the *Pension Benefits Act*, a plan member whose age plus total years of membership equals at least 55 has the right to receive early retirement benefits. In other words, when a pension plan to which the Quebec legislation applies is wound up in whole or in part, the employee's benefits will be deferred. Under Ontario's legislation, if a plan member meets the 55-year requirement, he or she will receive benefits immediately.

9 The partial wind up report provided for early retirement benefits for plan members employed in Ontario only. For members employed in Quebec, the report applied Quebec law and the entire amount of the pension was accordingly deferred until the normal age of retirement.

10 Although they were notified that they would only receive deferred pensions, the appellants did not institute proceedings to contest the Superintendent's decision to approve the report. All that can be found in the appellants' record are some copies of a few exchanges of correspondence with Stelco's lawyers, in which these employees

partielle, y compris la description et le calcul des prestations accordées à chaque employé visé.

Cette approbation se situe à l'origine immédiate du litige. Pour comprendre la nature du problème, il faut examiner brièvement les dispositions des lois ontarienne et québécoise sur les régimes complémentaires de retraite applicables à la retraite prise avant l'âge normal. En effet, les appelants, employés dans des établissements situés au Québec au moment de leur mise à pied, n'avaient atteint l'âge normal de la retraite ni en vertu de la loi ontarienne ni selon la loi québécoise.

À cette époque — comme aujourd'hui encore d'ailleurs —, les lois du Québec et de l'Ontario traitaient fort différemment les employés mis à la retraite avant l'âge normal. En vertu de la *Loi sur les régimes complémentaires de retraite* du Québec, L.R.Q., ch. R-15.1, ces employés ont droit à des prestations qu'ils ne toucheront qu'à l'âge normal de la retraite. Pour sa part, la loi ontarienne prévoit plutôt la possibilité de prestations anticipées en pareil cas. En effet, l'art. 74 de la *Loi sur les régimes de retraite* reconnaît au participant dont l'âge et le nombre total d'années de participation atteint 55 le droit à une pension anticipée. En d'autres mots, en cas de liquidation totale ou partielle d'un régime de retraite assujetti à la loi québécoise, le salarié voit ses prestations différées. Suivant la loi ontarienne, s'il satisfait à l'exigence d'un total de 55 années, le participant touche immédiatement des prestations.

Le rapport de liquidation partielle ne prévoyait l'octroi d'une pension anticipée qu'aux participants employés en Ontario. À l'égard des participants employés au Québec, le rapport appliquait la règle québécoise et n'accordait donc qu'une pension dont le versement total était différé à l'âge normal de la retraite.

Bien qu'ils eurent été informés qu'on ne leur accorderait qu'une pension différée, les appelants n'engagèrent aucune procédure pour contester la décision du surintendant d'approuver le rapport. Le dossier d'appel contient tout au plus des copies d'échanges de correspondance avec les avocats de Stelco dans lesquels ces employés exprimaient leur

expressed their disagreement with the assessment of their entitlements to benefits. In their view, since Stelco's plan provided that it was subject to Ontario law and was to be administered in that province, they should have received early retirement benefits. Despite these criticisms, Stelco applied the wind up report as approved by the Superintendent.

In October 1998, the appellants joined forces in an action against Stelco. In these proceedings, which took the form of an action based on contracts of employment, they claimed to be entitled to early retirement benefits on the basis that the plan was subject to Ontario law. Stelco maintained that only plan members employed in Ontario were entitled to early retirement benefits, and asked that the suit be dismissed.

B. *Judicial History*

1. Quebec Superior Court

The appellants first lost in the Superior Court: (2000), 26 C.C.P.B. 20. Durocher J. began by recognizing that the Quebec Superior Court had jurisdiction over the appellants' action. He then decided that he had to rule on the merits, and dismissed their claims. In his view, even though the plan was subject to Ontario law, the appellants were not entitled to receive early retirement benefits. Only plan members employed in Ontario were so entitled. To his mind, Ontario's *Pension Benefits Act* itself limited this benefit to pensioners who had been employed in Ontario. The appellants then appealed to the Quebec Court of Appeal.

2. Quebec Court of Appeal

The Quebec Court of Appeal was divided on the outcome of the appeal: (2004), 241 D.L.R. (4th) 266. Robert C.J.Q. would have allowed the appeal and the action. Morin and Nuss JJ.A. agreed, but for different reasons, that the appeal should be dismissed.

According to Robert C.J.Q., the Superior Court had jurisdiction to hear the appellants' action. Although it was in fact an action based on contracts

désaccord avec l'évaluation de leurs droits à des prestations. À leur avis, puisque le régime de Stelco prévoyait son assujettissement au droit de l'Ontario et son administration dans cette province, ils auraient dû toucher une pension anticipée. Malgré ces critiques, Stelco appliqua tel quel le rapport de liquidation approuvé par le surintendant.

11 En octobre 1998, les appelants se réunirent dans une action contre Stelco. Dans cette procédure, qui prit la forme d'une action basée sur des contrats de travail, ils alléguèrent avoir droit aux prestations de retraite anticipée en raison de l'assujettissement du régime au droit de l'Ontario. Stelco maintint que seuls les participants employés en Ontario avaient droit à la pension anticipée et demanda le rejet de la poursuite.

B. *L'historique judiciaire*

1. La Cour supérieure du Québec

12 Les appelants essuyèrent une première défaite devant la Cour supérieure : (2000), 26 C.C.P.B. 20. Le juge Durocher reconnut d'abord la compétence de la Cour supérieure du Québec sur l'action des appelants. Il décida alors qu'il devait se prononcer sur le fond et il rejeta leurs prétentions. Selon lui, malgré l'assujettissement du régime à la loi ontarienne, ils n'avaient aucun droit aux prestations de retraite anticipée. Seuls les participants employés en Ontario pouvaient toucher une pension anticipée. À son avis, les dispositions mêmes de la *Loi sur les régimes de retraite* de l'Ontario réservaient cet avantage aux retraités qui avaient été employés en Ontario. Les appelants se pourvurent alors devant la Cour d'appel du Québec.

2. La Cour d'appel du Québec

13 La Cour d'appel du Québec se divisa quant au sort du pourvoi : [2004] R.J.Q. 807. Le juge en chef Robert aurait accueilli l'appel et l'action. Pour des motifs différents, les juges Morin et Nuss s'entendirent pour rejeter le pourvoi.

14 Selon le juge en chef du Québec, la Cour supérieure avait compétence sur l'action intentée par les appelants. En effet, il s'agissait d'une action basée

of employment, those contracts had, as is permitted under Quebec private international law, been made subject to Ontario law. Disagreeing with the Superior Court, the Chief Justice concluded that a proper interpretation of the Ontario legislation did not permit the advantage of early retirement benefits to be limited to plan members employed in Ontario. It was also his view that such a conclusion was not an impermissible collateral attack on the decision of Ontario's Superintendent of Pensions. The Superintendent had granted the appellants the minimum benefits provided for under Quebec law; he had not decided that they could not receive fuller benefits under Ontario law. Moreover, Robert C.J.Q. was of the view that the Quebec Court of Appeal had held in a previous decision, *J.J. Newberry Canadian Ltd. v. Régie des rentes du Québec*, [1986] R.J.Q. 1884, that courts of original general jurisdiction have jurisdiction to interpret the provisions of a pension plan and a statute relating to the eligibility of pension plan members for benefits. He would therefore have found in favour of the appellants in their action.

15 Morin J.A. took a completely different approach to the legal issues in the appeal and to the consequences of resolving them. He concluded that the Quebec Superior Court lacked jurisdiction. In his view, the proceedings amounted to an application for judicial review of, or a disguised appeal from, the decision of Ontario's Superintendent of Pensions on the payments owed following the partial wind up of Stelco's pension plan. The action, as brought, could not be allowed without first reversing the Superintendent's decision. The issues raised by the appellants should have been raised by way of administrative appeals to the Pension Commission and actions in the Divisional Court of Ontario. The applicability of Ontario law to the plan barred the Quebec courts from exercising jurisdiction. In the alternative, he recognized, as Durocher J. had, that the Ontario legislation limited early retirement benefits to plan members employed in Ontario. For these reasons, he concluded that the appeal should be dismissed. Although Nuss J.A. concurred with Robert C.J.Q. regarding the jurisdiction of the Superior Court, he nevertheless concluded that the

sur des contrats de travail. Cependant, comme le permet le droit international privé du Québec, ces contrats avaient été assujettis au droit de l'Ontario. En désaccord avec la Cour supérieure, le Juge en chef concluait qu'une interprétation correcte de la loi ontarienne ne permettait pas de réserver l'avantage de la retraite anticipée aux participants employés en Ontario. À son avis également, une telle conclusion ne constituait pas une contestation indirecte inadmissible de la décision du surintendant des régimes de retraite de l'Ontario. Celui-ci avait accordé aux appelants les avantages minimaux prévus par la loi québécoise, mais n'avait pas décidé qu'ils ne pouvaient pas recevoir des prestations supérieures en vertu du droit de l'Ontario. De plus, selon son opinion, un arrêt antérieur de la Cour d'appel du Québec, *J.J. Newberry Canadian Ltd. c. Régie des rentes du Québec*, [1986] R.J.Q. 1884, avait décidé que le tribunal de droit commun demeurait compétent pour interpréter les dispositions d'un régime et d'une loi sur l'admissibilité des participants aux prestations d'un régime de retraite. En conséquence, il aurait fait droit aux conclusions de l'action des appelants.

Le juge Morin analysa de manière complètement différente les questions juridiques en jeu et les conséquences de leur règlement. Il conclut à l'absence de compétence de la Cour supérieure du Québec. Selon lui, la procédure engagée équivalait à une demande de contrôle judiciaire ou à un appel déguisé de la décision du surintendant des régimes de retraite de l'Ontario sur les paiements exigibles à la suite de la liquidation partielle du régime de retraite de Stelco. Telle qu'intentée, l'action ne pouvait être accueillie sans que la décision du surintendant ne soit infirmée au préalable. Les questions soulevées par les appelants auraient dû faire l'objet d'appels administratifs et de recours devant la Commission des régimes de retraite et la Cour divisionnaire de l'Ontario. L'assujettissement du régime à la loi ontarienne écartait la compétence des tribunaux québécois. Subsidiairement, il reconnut, comme le juge Durocher, que la loi ontarienne réservait la retraite anticipée aux participants employés en Ontario. Pour ces motifs, il conclut au rejet de l'appel. En accord avec le juge en chef Robert sur la compétence de la Cour

appeal should be dismissed because he agreed with Morin J.A. that early retirement benefits were limited to plan members employed in Ontario. The case was then brought before this Court.

II. Analysis

A. *Identification of the Issues*

The outcome of this appeal depends on an accurate identification of the decisive legal issues in the case. The hearing before this Court was largely devoted to a debate on the definition and characterization of the issues in dispute. Far more than questions of contract law or private international law, the case raises, first and foremost, issues of procedure, administrative law, and judicial review. It should be noted here that the parties have not raised the question of the application of a collective agreement or the exercise of a concurrent arbitral jurisdiction in relation to the rights in issue and the individuals claiming them.

According to the appellants, the determinative issues in this appeal relate primarily to the law of contracts and to the application of the rules governing the conflict of laws. They submit that their action, which is based on contracts of employment and in which they claim a right to the benefits provided for in those contracts, is within the jurisdiction of the Quebec courts. The pension plan incorporated into the contracts of employment is subject to the laws of Ontario as the result of a choice which is valid under the rules of Quebec private international law. Under Ontario law, the appellants have the exact same benefits as plan members employed in Ontario. The appellants argue that the decision of Ontario's Superintendent of Pensions regarding the benefits payable upon winding up the plan is not binding on the Quebec courts, which may themselves rule on the proper interpretation of Ontario law. On this issue, the appellants cite the reasons of Robert C.J.Q. and the decision in *Newberry*.

Stelco contests, first, the contention that the benefits claimed under the plan and under Ontario law are payable. It contends that there is nothing in the

supérieure, le juge Nuss rejeta néanmoins l'appel, se rangeant à l'avis du juge Morin que les prestations de retraite anticipée étaient réservées aux participants employés en Ontario. L'affaire a été ensuite portée devant notre Cour.

II. Analyse

A. *L'identification des questions en litige*

Le sort du présent pourvoi dépend d'une identification correcte des questions juridiques décisives en l'espèce. L'audience devant notre Cour a d'ailleurs porté en grande partie sur la définition et la qualification des problèmes en cause. Beaucoup plus que des questions relevant du droit des contrats ou du droit international privé, cette affaire soulève en premier lieu des problèmes de procédure, de droit administratif et de contrôle judiciaire. Il importe ici de noter que les parties ne soulèvent pas la question de l'application d'une convention collective ou de l'exercice d'une compétence arbitrale concurrente à l'égard des droits en jeu et des personnes qui les allèguent. 16

Pour les appelants, les questions déterminantes dans le cadre du présent appel se rattachent surtout au droit des contrats et à la mise en œuvre des règles de conflits de lois. Selon leurs prétentions, leur action basée sur des contrats de travail et réclamant des avantages prévus par ceux-ci relève de la compétence des tribunaux québécois. Le régime de retraite intégré dans ces contrats de travail est assujetti au droit de l'Ontario par suite d'un choix valable au regard du droit international privé du Québec. Le droit ontarien reconnaît aux appelants des avantages identiques à ceux des participants employés en Ontario. Selon leur argumentation, la décision du surintendant des régimes de retraite de l'Ontario concernant les prestations payables à la suite de la liquidation du régime ne lie pas les tribunaux québécois, qui peuvent se prononcer sur l'interprétation correcte de la loi ontarienne. Les appelants s'en rapportent sur ce point à l'opinion du juge en chef Robert et à l'arrêt *Newberry*. 17

Stelco conteste d'abord l'exigibilité des avantages réclamés en vertu du régime et de la loi ontarienne. D'après ses prétentions, on ne retrouve 18

plan indicating an intention to grant identical benefits to all members without regard for their place of employment. It also submits that the relevant statutory provisions limit early retirement benefits to Ontario plan members. In addition, after discussing the powers of interpretation of the Régie des rentes du Québec and its counterpart administrative bodies in Ontario, Stelco contends that, at any rate, the Superior Court should have declined jurisdiction. The appellants are challenging final decisions regarding the administration and wind up of the pension plan that were made by the competent administrative authorities even though they have not availed themselves of the administrative appeals or legal proceedings that are available in such cases.

19 Despite all the attempts to sidestep it, the question of the nature and effect of the Superintendent's decision remains the central issue in this appeal. It must be resolved before a ruling can be made on either the admissibility of the appellant's action or the attitude the Quebec courts should adopt toward the exercise of their jurisdiction. A decision on this issue that is contrary to the appellants' submissions would imply that the Quebec courts must decline jurisdiction. Indeed, the appellants' action would become inadmissible. There is thus no need to consider the merits of the parties' arguments concerning the interpretation of the Ontario legislation. I will therefore focus my analysis on this issues of admissibility and jurisdiction.

B. *The Interprovincial Agreement on the Administration of Pension Plans*

20 When analysing the issues raised by the appellants' action, we must bear in mind the importance of the agreement entered into by most of the provinces regarding the administration of supplemental pension plans. The proceeding in the instant case relates to an important aspect of Canadian federalism, namely the intergovernmental agreements designed to ensure that the provinces cooperate with each other in exercising their legislative powers so as to permit people to move and trade to flow freely within the Canadian political space (see J. Poirier, "Les ententes intergouvernementales et

nulle part dans le régime l'intention d'accorder des avantages identiques à tous les participants sans égard à leur lieu de travail. Elle plaide aussi que les dispositions législatives pertinentes réservent la retraite anticipée aux seuls participants ontariens. De plus, après examen des pouvoirs d'interprétation de la Régie des rentes du Québec et des organismes administratifs correspondants de l'Ontario, Stelco soutient que, de toute manière, la Cour supérieure aurait dû décliner compétence. En effet, les appelants remettent en cause des décisions finales prises par les autorités administratives compétentes à l'égard de l'administration et de la liquidation du régime de retraite alors qu'ils n'ont pas utilisé les appels administratifs ou les recours judiciaires disponibles en pareil cas.

En dépit de tous les efforts pour la contourner, la question de la nature et de l'effet de la décision du surintendant demeure centrale pour le sort du présent pourvoi. On ne peut se prononcer ni sur la recevabilité de l'action des appelants ni sur l'attitude que les tribunaux québécois devraient adopter à l'égard de l'exercice de leur compétence sans la résoudre. Trancher la question contrairement aux prétentions des appelants implique que les cours du Québec doivent décliner compétence. L'action des appelants devient d'ailleurs même irrecevable. Il est alors inutile d'examiner au fond les prétentions des parties quant à l'interprétation de la loi ontarienne. J'axerai donc mon analyse sur la question de la recevabilité et celle de la compétence.

B. *L'accord interprovincial sur la gestion des régimes de retraite*

Dans l'analyse des problèmes que pose l'action des appelants, il faut demeurer conscient de l'importance de l'accord intervenu entre la plupart des provinces sur la gestion des régimes complémentaires de retraite. En effet, la procédure entamée dans la présente affaire touche à un aspect important de la vie du fédéralisme canadien, celui des accords intergouvernementaux visant à assurer la coopération entre les provinces dans l'exercice de leurs pouvoirs législatifs afin de permettre la mobilité des personnes et la fluidité des échanges dans l'espace politique canadien (voir J. Poirier, « Les

la gouvernance fédérale: aux confins du droit et du non-droit", in J.-F. Gaudreault-DesBiens and F. Gélinas, eds., *The States and Moods of Federalism* (2005), 441). The framework agreement on pension plans is one such agreement. Recognizing that the same companies maintain a presence in multiple provinces, this agreement organizes the exercise of provincial powers in this area by endorsing reciprocal delegations of administrative functions. The appellants' action thus tends toward reducing the effectiveness of these administrative mechanisms and compromising their application. Under this framework agreement, the competent authorities in Ontario were given responsibility for overseeing the administration of Stelco's pension plan. When confronted with the problem of partially winding up this plan, they made decisions that included a determination and calculation of plan members' benefits. In conducting a legal analysis of the situation, these decisions cannot simply be disregarded. They are a reality. The appellants have never contested them in Ontario. Can they now do so indirectly by means of this action? Bearing in mind the importance of these decisions, I will now analyse the nature and legal framework of Stelco's pension plan.

ententes intergouvernementales et la gouvernance fédérale : aux confins du droit et du non-droit », dans J.-F. Gaudreault-DesBiens et F. Gélinas, dir., *Le fédéralisme dans tous ses états* (2005), 441). L'accord-cadre sur les régimes de retraite représente un exemple de ces ententes. Reconnaissant la réalité de la présence des mêmes entreprises dans plusieurs provinces, cet accord aménage l'exercice des pouvoirs provinciaux dans ce domaine par l'acceptation de délégations mutuelles des fonctions administratives. L'action des appelants tend ainsi à diminuer l'efficacité de ces mécanismes de gestion et à en compromettre la mise en œuvre. En vertu de cet accord-cadre, les organismes compétents en Ontario devenaient l'autorité chargée de la surveillance de l'administration du régime de retraite de Stelco. Confrontés au problème de la liquidation partielle de ce régime, ils ont pris des décisions portant notamment sur la détermination et le calcul des prestations des participants. On ne saurait faire simplement abstraction de ces décisions dans l'analyse juridique de la situation. Elles existent. Les appelants ne les ont jamais contestées en Ontario. Peuvent-ils maintenant le faire indirectement par le véhicule de la présente contestation? Tenant compte de l'importance de ces décisions, j'analyserai maintenant la nature et l'encadrement juridique du régime de retraite de Stelco.

C. *The Nature and Legislative Framework of Stelco's Pension Plan*

Quebec law treats pension plans such as Stelco's as contracts. Section 6 of the *Supplemental Pension Plans Act* states this explicitly:

6. A pension plan is a contract under which retirement benefits are provided to the member, under given conditions and at a given age, the funding of which is ensured by contributions payable either by the employer only, or by both the employer and the member.

Every pension plan, with the exception of insured plans, shall have a pension fund into which, in particular, contributions and the income derived therefrom are paid. The pension fund shall constitute a trust patrimony appropriated mainly to the payment of the refunds and

C. *La nature du régime de retraite de Stelco et son encadrement législatif*

21 Le droit du Québec assimile à des contrats les régimes de retraite comme ceux de Stelco. L'article 6 de la *Loi sur les régimes complémentaires de retraite* prévoit d'ailleurs expressément cette qualification :

6. Un régime de retraite est un contrat en vertu duquel le participant bénéficie d'une prestation de retraite dans des conditions et à compter d'un âge donnés, dont le financement est assuré par des cotisations à la charge soit de l'employeur seul, soit de l'employeur et du participant.

À moins qu'il ne soit garanti, tout régime de retraite doit avoir une caisse de retraite où sont notamment versés les cotisations ainsi que les revenus qui en résultent. Cette caisse constitue un patrimoine fiduciaire affecté principalement au versement des remboursements

pension benefits to which the members and beneficiaries are entitled.

(See also *T.S.C.O. of Canada Ltd. v. Châteauneuf*, [1995] R.J.Q. 637 (C.A.), at pp. 675, 704 and 706; *Pierre Moreault Ltée v. Sauvé*, [1997] R.J.Q. 44 (C.A.), at pp. 46-47.)

22 Stelco's pension plan is part of the contracts of employment between the company and its employees or of their employer-employee relationship. The appellants' action must therefore be regarded as being based on a contract of employment within the meaning of art. 3149 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"). Since this question was not argued, I need not consider the validity of this characterization in the law of the other provinces or the scope of its application with regard to the plan as a whole.

23 As I mentioned above, this plan applied from its inception to employees working in a number of provinces. Like all plans of the same nature, Stelco's plan gradually became subject to restrictive statutory and regulatory frameworks, such as those established by Quebec's *Supplemental Pension Plans Act* and Ontario's *Pension Benefits Act* (see *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54, at paras. 13-14, *per* Deschamps J.; *The Mercer Pension Manual* (loose-leaf), vol. 1, at pp. 1-6 and 1-7).

24 In short, these statutory and regulatory schemes are intended primarily to ensure the continued solvency of the plans so that their members will receive the anticipated benefits when they retire. The schemes also ensure that special care is taken to review any amendments to a plan as well as the terms and conditions of the wind up of a plan. I need not discuss the complex reporting and approval mechanisms set up for this purpose or the scope of the powers of intervention — which can go as far as placing plans under trusteeship — of the public bodies responsible for overseeing supplemental pension plans. Using a variety of means, the administrative authorities responsible for

et prestations auxquels ont droit les participants et bénéficiaires.

(Voir aussi *T.S.C.O. of Canada Ltd. c. Châteauneuf*, [1995] R.J.Q. 637 (C.A.), p. 675, 704 et 706; *Pierre Moreault Ltée c. Sauvé*, [1997] R.J.Q. 44 (C.A.), p. 46-47.)

Ce régime de retraite fait partie des contrats d'emploi liant Stelco et ses employés ou des rapports de salariat établis entre eux. L'action des appelants doit donc être considérée comme fondée sur un contrat de travail au sens de l'art. 3149 du *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* »). Vu l'absence de débat sur cette question, je n'ai pas à examiner la validité de cette qualification dans le droit des autres provinces ni la portée de son application à l'égard de l'ensemble du régime.

Comme je l'ai mentionné précédemment, ce régime s'appliquait dès l'origine à des employés travaillant dans plusieurs provinces. Comme tous ceux de même nature, le régime de Stelco s'est donc trouvé graduellement assujetti à des cadres législatifs et réglementaires contraignants, comme ceux établis par la *Loi sur les régimes complémentaires de retraite* du Québec et la *Loi sur les régimes de retraite* de l'Ontario (voir *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, [2004] 3 R.C.S. 152, 2004 CSC 54, par. 13-14, la juge Deschamps; *The Mercer Pension Manual* (feuilles mobiles), vol. 1, p. 1-6 et p. 1-7).

En bref, ces systèmes législatifs et réglementaires veulent en premier lieu assurer la solvabilité continue des régimes afin que les participants reçoivent à terme les prestations prévues. Ils apportent aussi une attention particulière à l'examen de toute modification d'un régime et à celui des conditions et modalités de sa liquidation. Je n'ai pas à revenir ici sur les mécanismes complexes d'établissement de rapports et d'obtention d'approbations ainsi mis en place ni sur l'étendue des pouvoirs d'intervention — qui peuvent aller jusqu'à la mise en tutelle d'un régime — des organismes publics auxquels est confiée la surveillance des régimes complémentaires de retraite. Selon des modalités

overseeing supplemental pension plans exercise similar functions.

The similarity of these oversight mechanisms, like the need for effective oversight of supplemental pension plans, doubtlessly facilitated the signing by the provinces of Canada of the memorandum of reciprocal agreement in issue. The parties to the memorandum of agreement have agreed to give the "major" authority full powers of oversight over an interprovincial pension plan. Section 2 affirms the contracting parties' intent to delegate extensive oversight and decision-making powers to the major authority:

The major authority for each plan shall exercise both its own statutory functions and powers and the statutory functions and powers of each minor authority for such plan.

D. *The Scope of the Powers of Ontario's Superintendent of Financial Services*

The delegation mentioned above, which applied to Stelco's pension plan, accordingly conferred on Ontario's Superintendent of Financial Services the authority to make any necessary decisions for the administration and wind up of the plan. The memorandum of agreement expressly granted him the right to exercise all the powers conferred by the Ontario legislature. On this point, it should be noted that s. 249 of the *Supplemental Pension Plans Act* authorizes such agreements. Moreover, the validity of the delegations of authority resulting from the Memorandum of Reciprocal Agreement has never been contested. It is therefore necessary to refer to the Ontario legislation to determine the scope of the powers delegated to the Superintendent in the context of the partial wind up of Stelco's plan.

In this regard, Ontario's *Pension Benefits Act* is clear. It gives the Superintendent the authority to verify and approve the benefits payable to each plan member. On the one hand, s. 70(1) of the Act requires the plan administrator to submit to the Superintendent a wind up report that sets out, *inter alia*, the benefits payable to the plan members:

diverses, les autorités administratives chargées de la surveillance des régimes complémentaires de retraite exercent des fonctions analogues.

La similitude de ces mécanismes de surveillance, comme la nécessité d'une surveillance efficace des régimes complémentaires de retraite, a sans doute facilité la conclusion de l'accord multilatéral de réciprocité en cause par les provinces canadiennes. Les parties à l'accord ont accepté de confier à l'organisme « majoritaire » la surveillance complète d'un régime de retraite interprovincial. L'article 2 confirme la volonté des parties contractantes de déléguer des pouvoirs de surveillance et de décision étendus à l'autorité majoritaire : 25

L'autorité majoritaire de chaque régime exerce à la fois ses propres fonctions et pouvoirs statutaires et les fonctions et pouvoirs statutaires de chaque autorité minoritaire de ce régime.

D. *L'étendue des pouvoirs du surintendant des services financiers de l'Ontario*

Applicable au régime de Stelco, la délégation mentionnée précédemment conférait ainsi au surintendant des services financiers de l'Ontario le pouvoir de prendre toute décision nécessaire à l'administration et à la liquidation du régime. L'accord lui reconnaissait expressément le droit d'exercer tous les pouvoirs conférés par la législature ontarienne. Sur ce point, il convient de rappeler que l'art. 249 de la *Loi sur les régimes complémentaires de retraite* autorise la conclusion d'un tel accord. De plus, la validité des délégations de pouvoir découlant de l'Accord multilatéral de réciprocité n'a jamais été contestée. Il faut donc s'en rapporter à la législation de l'Ontario pour déterminer l'étendue des pouvoirs délégués au surintendant dans le cadre de la liquidation partielle du régime de Stelco. 26

À cet égard, la *Loi sur les régimes de retraite* de l'Ontario est claire. Elle confère au surintendant le pouvoir de vérifier et d'approuver les prestations payables à chaque participant. D'une part, le par. 70(1) de la loi oblige l'administrateur du régime à soumettre au surintendant un rapport de liquidation qui indique notamment les prestations payables aux participants : 27

70.—(1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

(a) the assets and liabilities of the pension plan;

(b) the benefits to be provided under the pension plan to members, former members and other persons;

(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and

(d) such other information as is prescribed.

On the other hand, s. 70(2) prohibits any payment being made out of the pension fund before the Superintendent approves the wind up report, except for the continuation of pension benefit payments that commenced before the wind up:

(2) No payment shall be made out of the pension fund in respect of which notice of proposal to wind up has been given until the Superintendent has approved the wind up report.

(3) Subsection (2) does not apply to prevent continuation of payment of a pension or any other benefit the payment of which commenced before the giving of the notice of proposal to wind up the pension plan or to prevent any other payment that is prescribed or that is approved by the Superintendent.

The corollary to this rule can be found in s. 70(4), which prohibits the administrator of a pension plan from making payments that have not been authorized by the Superintendent:

(4) An administrator shall not make payment out of the pension fund except in accordance with the wind up report approved by the Superintendent.

Any plan administrator who makes a payment in violation of these provisions is liable to penal sanctions under ss. 109 and 110 of the Act.

28 The existence of these statutory rules applicable to the administration and wind up of the plan disposes of the arguments the appellants have drawn from the 1986 decision in *Newberry*. In that case, the Court of Appeal held that the Régie des rentes du Québec did not have the authority to intervene

70 (1) L'administrateur d'un régime de retraite, lorsque ce régime doit être totalement ou partiellement liquidé, dépose un rapport de liquidation qui indique ce qui suit :

a) l'actif et le passif du régime de retraite;

b) les prestations qui seront fournies aux participants, aux anciens participants ou aux autres personnes aux termes du régime de retraite;

c) les méthodes d'attribution et de répartition de l'actif du régime de retraite, et la méthode de détermination des priorités pour le paiement des prestations;

d) les autres renseignements prescrits.

D'autre part, le par. 70(2) interdit tout paiement sur la caisse de retraite avant que le surintendant n'ait approuvé le rapport de liquidation, sauf s'il s'agit de poursuivre le versement de prestations de retraite entrepris avant la liquidation :

(2) Aucun paiement n'est effectué sur la caisse de retraite qui a fait l'objet d'un avis d'intention de liquider tant que le surintendant n'a pas approuvé le rapport de liquidation.

(3) Le paragraphe (2) n'a pas pour effet d'empêcher la continuation du paiement d'une pension ou de toute autre prestation si ce paiement a commencé avant la remise de l'avis d'intention de liquider le régime de retraite, ou d'empêcher tout autre paiement qui est prescrit ou qui est approuvé par le surintendant.

Le corollaire de cette règle se retrouve au par. 70(4), qui défend à l'administrateur d'un régime de retraite de faire des paiements non autorisés par le surintendant :

(4) Un administrateur ne fait des paiements sur la caisse de retraite qu'en conformité avec le rapport de liquidation approuvé par le surintendant.

Le paiement effectué en contravention de ces dispositions expose l'administrateur à des sanctions pénales suivant les art. 109 et 110 de la loi.

L'existence de ces règles législatives applicables à la gestion et à la liquidation du régime permet d'écarter les arguments des appelants tirés de l'arrêt *Newberry*, prononcé en 1986. Dans cette affaire, la Cour d'appel a décidé que la Régie des rentes du Québec ne possédait pas le pouvoir de s'immiscer

in the parties' contractual relationship and that legal debate in this respect was a matter for the civil courts (p. 1894). Based on that decision, the appellants submit that the Superintendent could not rule on the application of s. 74 of Ontario's *Pension Benefits Act*. With respect, the statutory provisions cited above expressly confer such authority, the exercise of which is binding on the pension plan administrator. By virtue of a delegation of authority that has never been contested or revoked, these provisions applied to plan members employed in Quebec.

It should also be noted that the decision in *Newberry* was based on a narrow view of the interpretative powers of administrative tribunals and bodies from which this Court has since clearly distanced itself. It will suffice to mention a few recent decisions, all of which recognize the need for an expansive and flexible interpretation of these interpretative and decision-making powers: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11. From this perspective, a consideration of the precedential value of *Newberry* requires some circumspection, if the decision does in fact continue to be relevant. I see no need to analyse this question any further. This appeal does not concern the review of a situation governed by Quebec law. Nor does it concern either the interpretation of the provisions setting out procedures for submitting administrative questions relating to the application of Quebec's *Supplemental Pension Plans Act* (s. 254) to the civil courts or a review of the mechanics and scope of appeals against, or judicial review of, decisions relating to the application of that Act.

The instant case concerns a decision of the Superintendent of Pensions, who, pursuant to powers clearly delegated to him in the memorandum of reciprocal agreement, denied early retirement benefits to plan members employed in Quebec. As the Superintendent of Financial Services pointed out in his argument, it was necessary to consider the situations of all plan members when

dans les relations contractuelles des parties et que les débats juridiques sur ces matières relevaient des tribunaux civils (p. 1894). S'appuyant sur cet arrêt, les appelants plaident que le surintendant ne pouvait se prononcer sur l'application de l'art. 74 de la *Loi sur les régimes de retraite* de l'Ontario. Avec égards, les dispositions législatives précitées confèrent expressément un tel pouvoir, dont l'exercice lie l'administrateur du régime de retraite. En vertu d'une délégation de pouvoirs qui n'a jamais été contestée ni révoquée, ces dispositions s'appliquaient aux participants employés au Québec.

29 Il importe aussi de souligner que ce jugement reposait sur une vision étroite des pouvoirs d'interprétation des tribunaux et organismes administratifs, dont la jurisprudence de notre Cour s'est clairement dissociée depuis. Il suffit de mentionner quelques arrêts récents qui reconnaissent tous la nécessité d'une interprétation large et souple de ces pouvoirs d'interprétation et de décision : *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929; *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, [2003] 2 R.C.S. 504, 2003 CSC 54; *Vaughan c. Canada*, [2005] 1 R.C.S. 146, 2005 CSC 11. Dans cette perspective, la valeur de l'arrêt *Newberry*, comme précédent, serait sujette à caution, si tant est qu'il demeure pertinent. Je ne crois pas utile d'analyser davantage la question. En effet, le présent pourvoi n'a pas pour objet l'examen d'une situation qui serait régie par le droit québécois. Il ne porte pas non plus sur l'interprétation des dispositions prévoyant certaines procédures de renvoi aux tribunaux civils des questions administratives relatives à l'application de la *Loi sur les régimes complémentaires de retraite* du Québec (art. 254) ou sur l'étude des modalités et de l'étendue de l'appel ou du contrôle judiciaire des décisions relatives à l'application de cette loi.

30 Nous nous trouvons ainsi devant une décision du surintendant des régimes de retraite qui a refusé des prestations de retraite anticipée aux participants employés au Québec en vertu de pouvoirs clairement délégués par l'accord multilatéral de réciprocité. Comme l'a d'ailleurs souligné le surintendant des services financiers dans sa plaidoirie, il lui a fallu considérer la situation de tous les

calculating the benefits owed to each one of them, and to assess the impact of paying those benefits on the financial stability of the plan and the protection of the benefits to be paid. The approval of the wind up report left the employer no choice. Under the Act, it could not even pay benefits other than in accordance with the Superintendent's decision. Serious difficulties accordingly arose in relation to the effect of the decision on the legal proceedings instituted by the appellants in Quebec. These difficulties concerned, first, the very admissibility of the action in light of the principles relating to *res judicata* in civil law and issue estoppel at common law, and the principles of public law applicable to the role of the courts. The principles in question discourage collateral attacks on judicial or quasi-judicial decisions in order to preserve the finality of the decisions. In the alternative, a proper application of the principle of *forum non conveniens*, under art. 3135 *C.C.Q.*, would at any rate have led the Quebec Superior Court to decline jurisdiction.

participants pour calculer les prestations dues à chacun et déterminer l'impact du versement de celles-ci sur l'équilibre financier du régime et la protection des prestations payables à terme. L'approbation du rapport de liquidation ne laissait aucun choix à l'employeur. La loi lui interdisait même de verser des prestations autrement qu'en conformité avec la décision du surintendant. De graves difficultés se posaient donc quant à l'effet de cette décision sur l'instance engagée par les appelants au Québec. Ces difficultés touchaient d'abord à la recevabilité même du recours suivant les règles relatives à la chose jugée en droit civil et à la préclusion (*issue estoppel*) en common law, et aux règles de droit public applicables à l'activité des tribunaux. Ces règles visent, en effet, à décourager la contestation incidente ou indirecte de décisions judiciaires ou assimilées afin de préserver leur caractère définitif. Subsidiairement, l'application correcte du principe du *forum non conveniens*, en vertu de l'art. 3135 *C.c.Q.*, aurait de toute manière amené la Cour supérieure du Québec à décliner compétence.

E. *The Finality of the Decision of Ontario's Superintendent of Pensions and the Admissibility of the Appellants' Action*

E. *Le caractère final de la décision du surintendant des régimes de retraite de l'Ontario et la recevabilité de l'action des appelants*

31 As I mentioned above, I do not question the Quebec Superior Court's jurisdiction to hear an action in which benefits are claimed under a contract of employment in the absence of any debate regarding the existence and exercise of an arbitral jurisdiction under the relevant labour legislation. However, the action must be admissible in law. The right to retirement benefits claimed by the appellants exists only if the payment of early retirement benefits is authorized by the Superintendent. The action against Stelco has no legal basis except insofar as the employer is authorized and required to pay the benefits claimed. The employer may not pay them unless such payment is authorized by the Superintendent's decision approving the wind up report. In the absence of such an authorization, the debt claimed from the employer does not exist. The early retirement benefits cannot be claimed if the Superintendent's decision still applies. The problem cannot be circumvented by presuming that it does not exist. I repeat that no appeal or judicial

Je ne mets pas en doute la compétence de la Cour supérieure du Québec sur une action en réclamation de prestations prévues par un contrat de travail en l'absence de tout débat sur l'existence et l'exercice d'une compétence arbitrale en vertu de la législation du travail pertinente, comme je l'ai signalé précédemment. Encore faut-il que l'action soit recevable en droit. Le droit aux prestations de retraite allégué par les appelants n'existe que si le paiement des prestations de retraite anticipée est autorisé par le surintendant. L'action contre Stelco ne possède de base juridique que dans la mesure où l'employeur peut et doit payer les prestations réclamées. L'employeur ne peut verser celles-ci que s'il y est autorisé par la décision du surintendant approuvant le rapport de liquidation. Faute d'une telle autorisation, la créance invoquée contre lui n'existe pas. Les prestations de retraite anticipée ne peuvent être réclamées si la décision du surintendant demeure applicable. Le problème ne peut être contourné en présumant son inexistence. Je le

review proceedings have been instituted in Ontario. In order to consider the merits of the appellants' action, the Quebec courts would now have to treat the decision as if it were already non-existent or invalid, or quash it themselves.

At this stage of the proceedings, from the perspective of Quebec law, the problem is one of *res judicata*. The three necessary elements of identical cause, object and parties are present. The conditions for applying this principle pursuant to art. 2848 *C.C.Q.* and the case law have been met (see *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440). The Superintendent had jurisdiction to make the decision. The Quebec action implicitly requires a review of the question of the right to pension benefits, on which the Superintendent has already ruled. Moreover, the appellants were parties to the process before the Superintendent. The content of the wind up report and the benefit calculations were sent to them, and it was open to them to raise any objections they might have had. Lastly, the principle of *res judicata* applies not only to the decisions of courts, but also to the decisions of administrative tribunals and bodies (see J.-C. Royer, *La preuve civile* (3rd ed. 2003), at pp. 567-68). In the instant case, the main debate between the parties thus concerns a question that was already settled by the Superintendent, since the action cannot succeed unless his decision is varied or quashed. In this context, the principle of *res judicata*, which is in fact codified for the purposes of Quebec private international law in art. 3137 *C.C.Q.*, bars the suit even if Quebec law applies to this aspect of the case.

Insofar as a decision of an administrative body created by the Ontario legislature is in issue, in a case within that body's jurisdiction under Ontario law, the common law rules governing issue estoppel lead to the same result regarding the admissibility of the action. This Court recently considered the conditions for this type of estoppel in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, and *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63. In *City*

rappelle, aucune procédure d'appel ou de contrôle judiciaire n'a été engagée en Ontario. Pour examiner au fond la validité de la demande des appelants, il faudrait maintenant que les tribunaux québécois traitent cette décision comme si elle était déjà inexistante ou invalide ou qu'ils l'annulent eux-mêmes.

32 Dans l'état actuel des procédures, au regard du droit québécois, il s'agit d'un problème de chose jugée. Les trois identités nécessaires de cause, d'objet et de parties existent. Les conditions d'application de ce principe sont remplies conformément à l'art. 2848 *C.c.Q.* et à la jurisprudence (voir *Rocois Construction Inc. c. Québec Ready Mix Inc.*, [1990] 2 R.C.S. 440). Le surintendant avait compétence pour rendre la décision. L'action québécoise exige implicitement un nouvel examen de la question du droit aux prestations de retraite que le surintendant a déjà tranchée. De plus, les appelants étaient parties à la procédure devant le surintendant. Le contenu du rapport de liquidation et le calcul des prestations leur ont été communiqués et ils pouvaient soulever des objections, s'ils en avaient. Enfin, la règle de la chose jugée s'applique non seulement aux décisions des tribunaux judiciaires, mais aussi à celles des tribunaux ou organismes administratifs (voir J.-C. Royer, *La preuve civile* (3e éd. 2003), p. 567-568). En l'espèce, le débat principal entre les parties porterait ainsi sur une question déjà tranchée par le surintendant, puisqu'il ne pourrait être fait droit à l'action sans réviser ou annuler la décision de ce dernier. Dans ce contexte, le principe de la chose jugée, que l'art. 3137 *C.c.Q.* codifie d'ailleurs en droit international privé québécois, fait obstacle à la demande en justice, à supposer que le droit québécois s'applique à cet aspect de l'affaire.

33 Dans la mesure où la décision d'un organisme administratif créé par la législature de l'Ontario est en cause, dans une affaire dont le règlement incombe à cet organisme suivant le droit de l'Ontario, les règles de common law sur la préclusion découlant d'une question déjà tranchée (*issue estoppel*) conduiraient à une même solution quant à la recevabilité de l'action. Notre Cour a examiné récemment les conditions d'existence de cette forme de préclusion dans les arrêts *Danyluk c. Ainsworth*

of Toronto, Arbour J., citing the reasons of Binnie J. in *Danyluk*, set out three preconditions for issue estoppel:

> Issue estoppel is a branch of *res judicata* (the other branch being *cause of action* estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, *per* Binnie J.). [Emphasis in original; para. 23.]

34 These three preconditions are met in the case at bar. The issue, that is, the principal object of the case, is the same as the one decided by the Superintendent. The parties were also involved in the approval procedure for the partial wind up. And the decision that was rendered is final in nature. Also, in my view, the facts of the instant case would not justify the courts in exercising their residual discretion to decline to apply estoppel. Not only the appellants' failure to make use of the usual means of redress — appeal or judicial review — but also the situation in which any other decision would place the respondent, militates against this. Stelco could find itself in the strange position of having to comply with the Superintendent's decision under Ontario law while at the same time being required to execute a Quebec judgment to the contrary, at least with regard to former plan members from Quebec. As the intervener points out, such a result could call into question the benefit calculations for all the retirees and the measures taken to ensure the plan's solvency.

35 The situation in which the respondent could find itself if the principles of *res judicata* or issue

Technologies Inc., [2001] 2 R.C.S. 460, 2001 CSC 44, et *Toronto (Ville) c. S.C.F.P., section locale 79*, [2003] 3 R.C.S. 77, 2003 CSC 63. Dans l'arrêt *Ville de Toronto*, la juge Arbour, s'appuyant d'ailleurs sur les motifs du juge Binnie dans *Danyluk*, énonçait trois conditions préalables d'existence de la préclusion découlant d'une question déjà tranchée :

> La préclusion découlant d'une question déjà tranchée est un volet du principe de l'autorité de la chose jugée (l'autre étant la préclusion fondée sur la *cause d'action*), qui interdit de soumettre à nouveau aux tribunaux des questions déjà tranchées dans une instance antérieure. Pour que le tribunal puisse accueillir la préclusion découlant d'une question déjà tranchée, trois conditions préalables doivent être réunies : (1) la question doit être la même que celle qui a été tranchée dans la décision antérieure; (2) la décision judiciaire antérieure doit avoir été une décision finale; (3) les parties dans les deux instances doivent être les mêmes ou leurs ayants droit (*Danyluk c. Ainsworth Technologies Inc.*, [2001] 2 R.C.S. 460, 2001 CSC 44, par. 25 (le juge Binnie)). [Souligné dans l'original; par. 23.]

Ces trois conditions se trouvent ici réunies. La question, qui est d'ailleurs l'objet principal du litige, est la même que celle tranchée par le surintendant. Elle oppose des parties qui ont également participé à la procédure d'approbation de la liquidation partielle. Enfin, la décision prise a un caractère final. J'estime par ailleurs que les faits de l'espèce ne justifieraient pas l'exercice du pouvoir discrétionnaire résiduel du tribunal de ne pas donner effet à la préclusion. Non seulement l'omission des appelants d'utiliser les voies de recours habituelles — l'appel ou le contrôle judiciaire —, mais aussi la situation dans laquelle toute autre décision placerait l'intimée, militent contre un tel exercice. Stelco pourrait en effet se trouver dans l'étrange situation de devoir se conformer à la décision du surintendant en vertu de la loi de l'Ontario tout en étant tenue d'exécuter un jugement québécois contraire, du moins à l'égard d'anciens participants du Québec. Enfin, comme le souligne l'intervenant, un tel résultat pourrait remettre en cause le calcul des prestations de l'ensemble des retraités et les mesures prises pour assurer la solvabilité du régime de retraite.

La situation dans laquelle pourrait se trouver l'intimée si ce n'était l'application des règles de la

estoppel were not applied illustrates the danger of a collateral attack and of the failure to avail oneself in a timely manner of the recourses against decisions of administrative bodies or courts of law that are available in the Canadian legal system. The stability and finality of judgments are fundamental objectives and are requisite conditions for ensuring that judicial action is effective and that effect is given to the rights of interested parties. Modern adjective law and administrative law have gradually established various appeal mechanisms and sophisticated judicial review procedures, so as to reduce the chance of errors or injustice. Even so, the parties must avail themselves of those options properly and in a timely manner. Should they fail to do so, the case law does not in most situations allow collateral attacks on final decisions (*City of Toronto*, at paras. 33-34), which Arbour J. likened to a form of abuse of process (para. 34) (see also: *Quebec (Attorney General) v. Laroche*, [2002] 3 S.C.R. 708, 2002 SCC 72, at paras. 73-76). In the case at bar, the type of action brought by the appellants necessarily entailed an impermissible collateral attack on the Superintendent's decision, as can be seen from the analysis regarding *res judicata*. Consequently, the action was inadmissible.

chose jugée ou de la préclusion illustre le danger d'une contestation incidente et du défaut d'exercer en temps utile les recours que connaît le système judiciaire canadien contre la décision d'un organisme administratif ou d'une cour de justice. La stabilité et le caractère définitif des jugements constituent des objectifs fondamentaux et des conditions de l'efficacité de l'action judiciaire comme de l'effectivité des droits des intéressés. Le droit judiciaire et le droit administratif modernes ont graduellement établi des mécanismes d'appel divers, voire des procédures élaborées de contrôle judiciaire, pour réduire les possibilités d'erreur ou d'injustice. Encore faut-il que les parties sachent les utiliser à bon escient et en temps opportun. À défaut, la jurisprudence ne permettra pas, en règle générale, la contestation indirecte d'une décision devenue finale (*Ville de Toronto*, par. 33-34), que la juge Arbour assimilait d'ailleurs à une forme d'abus de procédure (par. 34) (voir aussi : *Québec (Procureur général) c. Laroche*, [2002] 3 R.C.S. 708, 2002 CSC 72, par. 73-76). En l'espèce, le type de recours exercé par les appelants emportait nécessairement la contestation indirecte inadmissible de la décision du surintendant, comme le montre d'ailleurs l'analyse relative à l'autorité de la chose jugée. En conséquence, le recours était irrecevable.

F. *Forum Non Conveniens*

F. *Le forum non conveniens*

In the alternative, if, in the circumstances of the instant case, the Quebec courts had found that it was still legally possible to contest the Superintendent's decision, a proper application of the doctrine of *forum non conveniens* would have justified them in declining jurisdiction. As we know, after a period of uncertainty and debate, the civil law of Quebec recognized the existence and applicability of this doctrine in the implementation of its conflict of laws rules (G. Goldstein and E. Groffier, *Droit international privé*, vol. I, *Théorie générale* (1998), at pp. 308-12). Moreover, the Quebec legislature expressly accepted the doctrine by codifying it in art. 3135 *C.C.Q.*:

Subsidiairement, dans les circonstances de l'espèce, si les tribunaux québécois concluaient qu'il est encore juridiquement possible de remettre en cause la décision du surintendant, une application correcte de la doctrine du *forum non conveniens* les justifierait de décliner compétence. On sait qu'après une période d'incertitude et de controverse, le droit civil québécois a reconnu l'existence et l'application de cette doctrine dans la mise en œuvre de ses règles en matière de conflits de lois (G. Goldstein et E. Groffier, *Droit international privé*, t. I, *Théorie générale* (1998), p. 308-312). Le législateur québécois l'a d'ailleurs expressément acceptée en la codifiant à l'art. 3135 *C.c.Q.* :

3135. Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it

3135. Bien qu'elle soit compétente pour connaître d'un litige, une autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette

considers that the authorities of another country are in a better position to decide.

37 The doctrine of *forum non conveniens* confers on the court a supplementary power to decline to exercise a jurisdiction that is otherwise granted to it by one of the conflict of laws rules provided for in the *C.C.Q.* The law attaches an exceptional character to this power, although the exercise of the power is not regarded as unusual (*Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78, at paras. 77 and 81; *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, 2005 SCC 46, at para. 33). Furthermore, the judge may exercise it only at the request of a party, and not on his or her own initiative. The application of this doctrine requires a review of various, and variable, criteria. On the basis of the Quebec Court of Appeal's decision in *Lexus Maritime inc. v. Oppenheim Forfait GmbH*, [1998] Q.J. No. 2059 (QL), at para. 18, Professor J. A. Talpis enumerated the most important factors as follows:

> The criteria most commonly used in the Quebec jurisprudence on *forum non conveniens* include: 1) the residence and domicile of the parties, 2) the location of the natural forum, 3) the location of the evidence, 4) the place of residence of the witnesses, 5) the location of the alleged conduct and transaction, including the place of formation and execution of the contract, 6) the existence of an action pending in another jurisdiction between the same parties (in an imperfect *lis pendens* situation) and the stage of such proceeding, 7) the law applicable to the dispute, 8) the ability to join all parties, 9) the need for enforcement in the alternative court, 10) the juridical advantages for the plaintiff, and 11) the interests of justice. As the Quebec Court of Appeal observes in *Oppenheim Forfait G.M.B.H. v. Lexus Maritime inc.*, these and other less frequently used criteria, have evolved from the jurisprudence in Quebec as well as in the common law jurisdictions. [Footnotes omitted.]
>
> (J. A. Talpis, "*If I am from Grand-Mère, Why Am I Being Sued in Texas?*" *Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001), at pp. 44-45; see also *Spar Aerospace*, at para. 71.)

compétence si elle estime que les autorités d'un autre État sont mieux à même de trancher le litige.

La doctrine du *forum non conveniens* confère au tribunal un pouvoir supplémentaire de refuser d'exercer une compétence que lui attribue par ailleurs l'une des règles de conflits de lois prévues par le *C.c.Q.* La loi attache un caractère d'exception à ce pouvoir, bien que son exercice ne soit pas considéré comme inhabituel (*Spar Aerospace Ltée c. American Mobile Satellite Corp.*, [2002] 4 R.C.S. 205, 2002 CSC 78, par. 77 et 81; *GreCon Dimter inc. c. J.R. Normand inc.*, [2005] 2 R.C.S. 401, 2005 CSC 46, par. 33). Le juge doit d'ailleurs l'exercer à la demande d'une partie, et non de son propre chef. L'application de cette doctrine exige l'examen de critères divers et variables. S'appuyant sur l'arrêt *Lexus Maritime inc. c. Oppenheim Forfait GmbH*, [1998] A.Q. nº 2059 (QL), par. 18, de la Cour d'appel du Québec, le professeur J. A. Talpis énumérait ainsi les facteurs les plus importants :

> [TRADUCTION] Les critères retenus le plus souvent par les tribunaux québécois pour l'application de la doctrine du *forum non conveniens* comprennent : 1) le lieu de résidence des parties et leur domicile, 2) l'emplacement du forum naturel, 3) l'emplacement des éléments de preuve, 4) le lieu de résidence des témoins, 5) le lieu où seraient survenus l'acte et l'opération allégués, y compris le lieu de formation et d'exécution du contrat, 6) l'existence d'une action à laquelle les mêmes personnes sont parties dans un autre ressort (dans un cas de litispendance imparfaite) et les étapes franchies dans cette instance, 7) le droit applicable au litige, 8) la possibilité de réunir toutes les actions, 9) la nécessité d'une procédure en exemplification dans l'autre ressort, 10) les avantages pour le demandeur sur le plan juridique et 11) l'intérêt de la justice. Comme la Cour d'appel du Québec le fait observer dans *Oppenheim Forfait G.M.B.H. c. Lexus Maritime inc.*, ces critères et d'autres moins usités sont issus de la jurisprudence québécoise et de celle des ressorts de common law. [Notes en bas de page omises.]
>
> (J. A. Talpis, « *If I am from Grand-Mère, Why Am I Being Sued in Texas?* » *Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001), p. 44-45; voir aussi *Spar Aerospace*, par. 71.)

In this appeal, the application of the most relevant factors would have led a Quebec court to recognize that an Ontario court would be in a better position to hear the action. Indeed, the principal object of the case is the judicial review of the decision of an Ontario administrative body that has been delegated the authority to administer the pension plan even with regard to plan members in Quebec. The natural forum for reviewing this body's decisions would appear to be an Ontario court, if only to reduce the risk of conflicting decisions and to adhere to the principle of administration set out in the memorandum of reciprocal agreement. This conclusion is all the more compelling in that the challenge by the Quebec plan members could affect the plan as a whole and the rights of the other members.

III. Conclusion

Since the action as brought is inadmissible, there is no need to consider the other issues raised by the parties. Consequently, for the reasons set out above, I concurred with my colleagues that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Rivest Schmidt, Montréal.

Solicitors for the respondent: McCarthy Tétrault, Montréal.

Solicitor for the intervener: Ministry of the Attorney General, Toronto.

38 Dans le présent pourvoi, l'application des facteurs les plus pertinents aurait amené une cour québécoise à reconnaître qu'un tribunal de l'Ontario était mieux placé pour connaître de la demande en justice. En effet, l'objet principal du litige serait la révision judiciaire de la décision de l'organisme administratif ontarien auquel est délégué le pouvoir d'administrer le régime même à l'égard des participants québécois. Il appert que le forum naturel du contrôle des décisions de cet organisme soit d'abord le tribunal de l'Ontario, ne serait-ce que pour réduire le risque de décisions contradictoires et pour respecter le principe d'administration prévu par l'accord de réciprocité. Cette conclusion s'imposerait d'autant plus que la contestation des participants québécois pourrait affecter l'ensemble du régime et les droits des autres participants.

III. Conclusion

39 En raison de l'irrecevabilité de la demande formulée, il est inutile d'examiner les autres questions soulevées par les parties. En conséquence, pour les motifs qui précèdent, j'ai été d'accord avec mes collègues pour rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelants : Rivest Schmidt, Montréal.

Procureurs de l'intimée : McCarthy Tétrault, Montréal.

Procureur de l'intervenant : Ministère du Procureur général, Toronto.

TAB 11

** Preliminary Version **

Case Name:

Club Resorts Ltd. v. Van Breda

Club Resorts Ltd., Appellant;

v.

Morgan Van Breda, Viktor Berg, Joan Van Breda, Tony Van Breda, Adam Van Breda and Tonnille Van Breda, Respondents, and Tourism Industry Association of Ontario, Amnesty International, Canadian Centre for International Justice, Canadian Lawyers for International Human Rights and Ontario Trial Lawyers Association, Interveners.

And between

Club Resorts Ltd., Appellant;

v.

Anna Charron, Estate Trustee of the Estate of Claude Charron, deceased, the said Anna Charron, personally, Jennifer Candace Charron, Stephanie Michelle Charron, Christopher Michael Charron, Bel Air Travel Group Ltd. and Hola Sun Holidays Limited, Respondents, and Tourism Industry Association of Ontario, Amnesty International, Canadian Centre for International Justice, Canadian Lawyers for International Human Rights and Ontario Trial Lawyers Association, Interveners.

[2012] S.C.J. No. 17

[2012] A.C.S. no 17

2012 SCC 17

[2012] 1 S.C.R. 572

[2012] 1 R.C.S. 572

291 O.A.C. 201

2012EXP-1452

J.E. 2012-788

EYB 2012-205198

429 N.R. 217

343 D.L.R. (4th) 577

212 A.C.W.S. (3d) 712

91 C.C.L.T. (3d) 1

10 R.F.L. (7th) 1

17 C.P.C. (7th) 223

2012 CarswellOnt 4268

2012 CarswellOnt 4269

File Nos.: 33692, 33606.

Supreme Court of Canada

Heard: March 21, 2011;
Judgment: April 18, 2012.

Present: McLachlin C.J. and Binnie*, LeBel, Deschamps, Fish, Abella, Charron*, Rothstein and Cromwell JJ.

(125 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Conflict of Laws -- Jurisdiction -- Determination of -- Real and substantial connection -- Forum conveniens -- Appeal by Club Resorts from the judgments which denied its appeals from two decisions dismissing motions to stay actions by Van Breda and the estate of Charron on grounds that Ontario courts lacked jurisdiction, dismissed -- Abstract concerns for order, efficiency or fairness in the system were no substitute for connecting factors giving rise to a "real and

substantial" connection for the purposes of the law of conflicts -- The existence of contracts made in Ontario that were connected with the litigations was a presumptive connecting factor that, on its face, entitled the courts of Ontario to assume jurisdiction in these cases -- It could not be said that the claims were unrelated to Resorts' business activities in the province -- Resorts did not show that a Cuban court would clearly be a more appropriate forum.

Appeal by Club Resorts Ltd. (Resorts) from the judgments which denied its appeals from two decisions dismissing motions to stay actions by Van Breda and the estate of Charron on grounds that Ontario courts lacked jurisdiction. Van Breda suffered catastrophic injuries and Charron died while they were both vacationing in Cuba. Suits, which sought damages for personal injury and punitive damages, were brought in Ontario against Resorts, the company managing the hotels where the accidents occurred, as well as other defendants. Incorporated in the Cayman Islands, Resorts sought to block those proceedings, arguing that the Ontario courts lacked jurisdiction and, in the alternative, that Cuban courts would be a more appropriate forum on the basis of the doctrine of forum non conveniens. In both cases, Resorts' motions were dismissed. The two cases were heard together in the Court of Appeal. After recasting the Muscutt test, the Court of Appeal unanimously held, in both cases, that the Ontario courts had jurisdiction over the claims and the parties. It then decided that the Ontario courts should not decline jurisdiction on the basis of forum non conveniens principles, because a Cuban court would not clearly be a more appropriate forum.

HELD: Appeal dismissed. Parties must be able to predict with reasonable confidence whether a court would assume jurisdiction in a case with an international or interprovincial aspect. Jurisdiction must be established primarily on the basis of objective factors connecting the legal situation or the subject matter of the litigation with the forum. This meant that the courts must rely on a basic list of factors that was drawn at first from past experience in the conflict of laws system and was then updated as the needs of the system evolved. Abstract concerns for order, efficiency or fairness in the system were no substitute for connecting factors giving rise to a "real and substantial" connection for the purposes of the law of conflicts. To meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction had the burden of identifying a presumptive connecting factor that linked the subject matter of the litigation to the forum. In a case concerning a tort, the following factors were presumptive connecting factors that, prima facie, entitled a court to assume jurisdiction over a dispute: the defendant being domiciled or resident in the province, the defendant carrying on business in the province, the tort being committed in the province and a contract connected with the dispute being made in the province. If a defendant raised an issue of forum non conveniens, the burden was on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The factors that a court could consider in deciding whether to apply forum non conveniens varied depending on the context and included the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the

two parties. The existence of contracts made in Ontario that were connected with the litigations was a presumptive connecting factor that, on its face, entitled the courts of Ontario to assume jurisdiction in these cases. Resorts business activities in Ontario were specifically directed at attracting residents of the province. It could not be said that the claims were unrelated to Resorts' business activities in the province. Resorts failed to rebut the presumption of jurisdiction that arose. Further, a trial held in Cuba would present serious challenges to the parties. Resorts did not show that a Cuban court would clearly be a more appropriate forum.

Statutes, Regulations and Rules Cited:

Civil Code of QuUbec, S.Q. 1991, c. 64, Article 3076-3168, Article 3135, Article 3148

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 92

Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, s. 11

Court Jurisdiction and Proceedings Transfer Act, S.N.S. 2003, c. 2,

Court Jurisdiction and Proceedings Transfer Act, S.S. 1997, c. C 41.1,

Court Jurisdiction and Proceedings Transfer Act, S.Y. 2000, c. 7,

Family Law Act, R.S.O. 1990, c. F.3,

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 17.02, Rule 17.02(f), Rule 17.02(g), Rule 17.02(h), Rule 17.02(o), Rule 17.02(p)

Prior History:

* Binnie and Charron JJ. took no part in the judgment.

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Private international law -- Choice of forum -- Court having jurisdiction -- Forum non conveniens -- Respondents injured while vacationing in Cuba -- Actions for damages brought in Ontario -- Defendants bringing motion to stay actions on grounds that Ontario court lacks jurisdiction, or alternatively, should decline to exercise jurisdiction on the basis of forum non conveniens -- Whether the Ontario court can assume jurisdiction over the actions -- If so, whether the Ontario court should decline to exercise its jurisdiction on the ground that the court of another jurisdiction

is clearly a more appropriate forum for the hearing of the actions.

Court Summary:

In separate cases, two individuals were injured while on vacation outside of Canada. Morgan Van Breda suffered catastrophic injuries on a beach in Cuba. Claude Charron died while scuba diving, also in Cuba. Actions were brought in Ontario against a number of parties, including the appellant, Club Resorts Ltd., a company incorporated in the Cayman Islands that managed the two hotels where the accidents occurred. Club Resorts sought to block those proceedings, arguing that the Ontario courts lacked jurisdiction and, in the alternative, that a Cuban court would be a more appropriate forum on the basis of the doctrine of *forum non conveniens*. In both cases, the motion judges found that the Ontario courts had jurisdiction with respect to the actions against Club Resorts. In considering *forum non conveniens*, it was also held that the Ontario court was clearly a more appropriate forum. The two cases were heard together in the Court of Appeal. The appeals were both dismissed.

Held: The appeals should be dismissed.

This case concerns the elaboration of the "real and substantial connection" test as an appropriate common law conflicts rule for the assumption of jurisdiction. In determining whether a court can assume jurisdiction over a certain claim, the preferred approach in Canada has been to rely on a set of specific factors which are given presumptive effect, as opposed to a regime based on an exercise of almost pure and individualized judicial discretion. Given the nature of the relationships governed by private international law, the framework for the assumption of jurisdiction cannot be an unstable, *ad hoc* system made up on the fly on a case-by-case basis - however laudable the objective of individual fairness may be. There must be order in the system, and it must permit the development of a just and fair approach to resolving conflicts. Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensure security and predictability in the law governing the assumption of jurisdiction by a court. The identification of a set of relevant presumptive connecting factors and the determination of their legal nature and effect will bring greater clarity and predictability to the analysis of the problems of assumption of jurisdiction, while at the same time ensuring consistency with the objectives of fairness and efficiency that underlie this branch of the law. From this perspective, a clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity.

To meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. Jurisdiction must be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with

the forum. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial" connection for the purposes of the law of conflicts. In a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:

(a) the defendant is domiciled or resident in the province;
(b) the defendant carries on business in the province;
(c) the tort was committed in the province; and
(d) a contract connected with the dispute was made in the province.

Although the factors set out in the list are considered presumptive, this does not mean that the list of recognized factors is complete, as it may be reviewed over time and updated by adding new presumptive connecting factors. When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors. Relevant considerations include:

(a) Similarity of the connecting factor with the recognized presumptive connecting factors;
(b) Treatment of the connecting factor in the case law:
(c) Treatment of the connecting factor in statute law; and
(d) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

The presumption of jurisdiction that arises where a recognized connecting factor -- whether listed or new -- applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must negate the presumptive effect of the listed or new factor and convince the court that the proposed assumption of jurisdiction would be inappropriate. This could be accomplished by establishing facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.

If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors -- whether listed or new -- apply or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, subject to the possible application of the forum of necessity doctrine. If jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens.*

A clear distinction must be drawn between the existence and the exercise of jurisdiction. Once

jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim. If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must show that the alternative forum is clearly more appropriate and that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to chose an alternative forum and to deny the plaintiff the benefits of his or her decision to select a forum. When it is invoked, the doctrine of *forum non conveniens* requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. It is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. The court however, should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. On the other hand, a court must refrain from leaning too instinctively in favour of its own jurisdiction. The doctrine focuses on the contexts of individual cases and the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context. Such factors might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties. Ultimately, the decision falls within the reasoned discretion of the trial court. This exercise of discretion will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts which takes place at an interlocutory or preliminary stage.

In *Van Breda*, a contract was entered into in Ontario. The existence of a contract made in Ontario that is connected with the litigation is a presumptive connecting factor that, on its face, entitles the courts of Ontario to assume jurisdiction in this case. Club Resorts has failed to rebut the presumption of jurisdiction that arises where this factor applies. Therefore, there was a sufficient connection between the Ontario court and the subject matter of the litigation. Club Resorts has not discharged its burden of showing that a Cuban court would clearly be a more appropriate forum. While a sufficient connection exists between Cuba and the subject matter of the litigation to support an action there, issues related to the fairness to the parties and to the efficient disposition of the claim must be considered. A trial held in Cuba would present serious challenges to the parties. All things considered, the burden on the plaintiffs clearly would be far heavier if they were required to bring their action in Cuba.

In *Charron*, the facts supported the conclusion that Club Resorts was carrying on a business in Ontario which is a presumptive connecting factor. Club Resorts' commercial activities in Ontario

went well beyond promoting a brand and advertising. Its representatives were in the province on a regular basis and it benefitted from the physical presence of an office in Ontario. It therefore follows that it has been established that a presumptive connecting factor applies and that the Ontario court is *prima facie* entitled to assume jurisdiction. Club Resorts has not rebutted the presumption of jurisdiction that arises from this connecting factor and therefore the Ontario court has jurisdiction on the basis of the real and substantial connection test. Furthermore, Club Resorts failed to discharge its burden of showing that a Cuban court would clearly be a more appropriate forum in the circumstances of this case. Considerations of fairness to the parties weigh heavily in favour of the plaintiffs.

Cases Cited

Explained: *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20; **referred to:** *Breeden v. Black*, 2012 SCC 19; *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63; *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *McLean v. Pettigrew*, [1945] S.C.R. 62; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Lemmex v. Bernard* (2002), 60 O.R. (3d) 54; *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68; *Sinclair v. Cracker Barrel Old Country Store, Inc.* (2002), 60 O.R. (3d) 76; *Leufkens v. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84; *Coutu v. Gauthier Estate*, 2006 NBCA 16, 296 N.B.R. (2d) 34; *Fewer v. Ellis*, 2011 NLCA 17, 305 Nfld. & P.E.I.R. 39; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460; *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321; *Oppenheim forfait GMBH v. Lexus maritime inc.*, 1998 CanLII 13001.

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History and Disposition:

APPEALS from a judgment of the Ontario Court of Appeal (O'Connor A.C.J.O. and Weiler, MacPherson, Sharpe and Rouleau JJ.A.), 2010 ONCA 84, 98 O.R. (3d) 721, 264 O.A.C. 1, 316 D.L.R. (4) 201, 71 C.C.L.T. (3d) 161, 77 R.F.L. (6) 1, 81 C.P.C. (6) 219, [2010] O.J. No. 402 (QL), 2010 CarswellOnt 549, affirming a decision of Pattillo J., 60 C.P.C. (6) 186, 2008 CanLII 32309, [2008] O.J. No. 2624 (QL), 2008 CarswellOnt 3867, and affirming a decision of Mulligan J., 92 O.R. (3d) 608, 2008 CanLII 53834, [2008] O.J. No. 4078 (QL), 2008 CarswellOnt 6165 (*sub nom. Charron Estate v. Village Resorts Ltd.*). Appeals dismissed.

Counsel:

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The judgment of the Court was delivered by

LeBEL J.:--

I. Introduction

1 Tourism has grown into one of the most personal forms of globalization in the modern world. Canadians look elsewhere for the sun, or to see new sights or seek new experiences. Trips are planned and taken with great expectations. But personal tragedies do happen. Happiness gives way to grief, as in the situations that resulted in these appeals. A young woman, Morgan Van Breda, suffered catastrophic injuries on a beach in Cuba. A family doctor and father, Dr. Claude Charron, died while scuba diving, also in Cuba. Actions were brought in Ontario against a number of parties, including the appellant Club Resorts Ltd. ("Club Resorts"), a company incorporated in the Cayman Islands that managed the two hotels where the accidents occurred. Club Resorts sought to block those proceedings, arguing that the Ontario courts lacked jurisdiction and, in the alternative, that a Cuban court would be a more appropriate forum on the basis of the doctrine of *forum non conveniens*. The same issues have now been raised in this Court. I will begin by summarizing the events that led to the litigation, the conduct of the litigation and the judgments of the courts below. I will then consider the principles that should apply to the assumption of jurisdiction and the doctrine of *forum non conveniens* under the common law conflicts rules of Canadian private international law. Finally, I will apply those principles to determine whether the Ontario courts have jurisdiction and, if so, whether they should decline to exercise it.

II. Background and Facts

A. *Van Breda*

2 In June 2003, the respondent Viktor Berg and his spouse, Ms. Van Breda, went on a trip to Cuba, where they stayed at the SuperClub's Breezes Jibacoa resort managed by Club Resorts. Mr. Berg, a professional squash player, had made arrangements for a one-week stay for two people at this hotel through René Denis, an Ottawa-based travel agent operating a business known as Sport au Soleil.

3 Mr. Denis's business involved arranging for racquet sport professionals for, among others, Club Resorts, in exchange for undisclosed compensation. Mr. Denis also received a fee from each professional. Once the arrangements for Mr. Berg were finalized, Mr. Denis sent him a letter on letterhead bearing the words "SuperClubs Cuba -- Tennis", which confirmed the details of the agreement with Club Resorts: Mr. Berg was to provide two hours of tennis lessons a day in exchange for bed and board and other services for two people at the hotel.

4 The accident happened on the first day of their stay. Ms. Van Breda tried to do some exercises on a metal structure on the beach, but the structure collapsed. She suffered catastrophic injuries and, as a result, became paraplegic. After spending a few days in a hospital in Cuba, she returned to Canada, going to Calgary where her family lived. She is now living in British Columbia with Mr. Berg. They never returned to Ontario, which they had planned to do after their holiday.

5 In May 2006, Ms. Van Breda, her relatives and Mr. Berg sued several defendants, including Mr. Denis, Club Resorts, and some companies associated with Club Resorts in the SuperClubs group, in the Ontario Superior Court of Justice. Their claim was framed in contract and in tort. They sought damages for personal injury, damages for loss of support, care, guidance and companionship pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3, and punitive damages.

6 Some of the parties, including those who were served outside Ontario under rule 17.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, moved to dismiss the action for want of jurisdiction. In the alternative, they asked the Superior Court of Justice to decline jurisdiction on the basis of *forum non conveniens*.

B. *Charron*

7 In January 2002, Dr. Charron and his wife booked a vacation package through a travel agent, Bel Air Travel Group Ltd. ("Bel Air"). This package was offered by Hola Sun Holidays Ltd. ("Hola Sun"), which sold packages offered by, among others, SuperClubs. It was an all-inclusive package -- at the Breezes Costa Verde hotel in Cuba -- that featured scuba diving. The hotel was owned by Gaviota SA (Ltd.) ("Gaviota"), a Cuban corporation, but was managed by the appellant, Club Resorts. Dr. and Mrs. Charron reached the Breezes Costa Verde on February 8, 2002. Four days later, Dr. Charron drowned during his second scuba dive.

8 Mrs. Charron and her children sued for breach of contract and negligence. Dr. Charron's estate sought damages for loss of future income, and the individual plaintiffs also sought damages for loss of love, care, guidance and companionship pursuant to the *Family Law Act*. The statement of claim was served on the Ontario defendants, Bel Air and Hola Sun. It was also served outside Ontario on several foreign defendants, including Club Resorts, under rule 17.02. The parties served outside Ontario included the diving instructor and the captain of the boat. Club Resorts and an associated company, Village Resorts International Ltd., which owned the SuperClubs trademark, moved to dismiss the action on the ground that the Ontario courts lacked jurisdiction or, in the alternative, to stay the action on the grounds that Ontario was not the most appropriate forum.

C. *Judicial History*

(1) *Van Breda* -- Ontario Superior Court of Justice, (2008), 60 C.P.C. (6th) 186

9 In *Van Breda*, Pattillo J. held that Club Resorts' motion turned on whether there was a real and

substantial connection in accordance with the test laid out by the Ontario Court of Appeal in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20. He found that there was a connection between Ontario and Club Resorts by virtue of the activities the company engaged in in Ontario through Mr. Denis. He also found on a *prima facie* basis that the agreement between Mr. Berg and Club Resorts had actually been concluded in Ontario. After reviewing the other factors from *Muscutt*, including unfairness to the defendants in assuming jurisdiction, unfairness to the plaintiffs in not doing so and the involvement of other parties to the suit, he held that there was a sufficient connection between Ontario and the subject matter of the litigation. Pattillo J. then considered the issue of *forum non conveniens*. Although he accepted that Cuba also had jurisdiction, he concluded that it had not been established that a Cuban court would clearly be a more appropriate forum. For these reasons, he held that the Ontario Superior Court of Justice should entertain the action as against Club Resorts.

(2) *Charron* -- Ontario Superior Court of Justice, (2008), 92 O.R. (3d) 608

10 In *Charron*, Mulligan J. held against Club Resorts. In his opinion, a contract had been entered into between Dr. Charron and Bel Air. The travel agency had booked an all-inclusive package at the Cuban hotel through Hola Sun, which had an agreement with Club Resorts. These facts weighed in favour of assuming jurisdiction. Mulligan J. also found that there was a connection between Ontario and the defendants. In his view, the resort relied heavily on international travellers to ensure its profitability. Club Resorts marketed the resort in Ontario by way of an agreement with Hola Sun. I note that the record indicated that Club Resorts or one of its associated companies had an office in Richmond Hill, Ontario. After reviewing the other factors from *Muscutt*, Mulligan J. held that the Ontario courts had jurisdiction with respect to Club Resorts. In considering *forum non conveniens*, Mulligan J. weighed several factors. He took into account the fact that more parties and witnesses were located in Ontario than in Cuba, that the damage had been sustained in Ontario and that a liability insurance policy was available to the foreign defendants in Ontario. In addition, Mrs. Charron and her children would lose the benefit of statutory family law remedies if the case were to proceed in Cuba. For these reasons, Mulligan J. held that the Ontario court was clearly a more appropriate forum than a Cuban court.

(3) Ontario Court of Appeal, 2010 ONCA 84, 98 O.R. (3d) 721

11 The two cases were heard together in the Court of Appeal. After ordering a rehearing, the Court of Appeal, in reasons written by Sharpe J.A., took the opportunity to review and reframe the *Muscutt* test. I will discuss this new framework below in reviewing the evolution of the common law policy relating to conflicts of jurisdiction and conflicts of laws.

12 Suffice it to say at this stage that, after recasting the *Muscutt* test, the Court of Appeal unanimously held, in both cases, that the Ontario courts had jurisdiction over the claims and the parties. It then decided that the Ontario courts should not decline jurisdiction on the basis of *forum non conveniens* principles, because a Cuban court would not clearly be a more appropriate forum.

13 The appeals in *Van Breda* and *Charron* were also heard together in this Court. They were

heard during the same session as two other appeals involving the issues of jurisdiction and *forum non conveniens*, which concerned actions in damages for defamation (*Breeden v. Black*, 2012 SCC 19, and *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18).

III. Analysis

Issues

(1) Nature and Scope of Private International Law

14 These appeals raise broad issues about the fundamental principles of the conflict of laws as this branch of the law has traditionally been known in the common law, or "private international law" as it is often called now (A. Briggs, *The Conflict of Laws* (2nd ed. 2008), at pp. 2-3; Manitoba Law Reform Commission, *Private International Law*, Report No. 119 (2009), at p. 2; J.-G. Castel, "The Uncertainty Factor in Canadian Private International Law" (2007) 52 McGill L.J. 555).

15 Although both appeals raise issues concerning both the determination of whether a court has jurisdiction (the test of jurisdiction *simpliciter*) and the principles governing a court's decision to decline to exercise its jurisdiction (the doctrine of *forum non conveniens*), those issues may have an impact on the development of other areas of private international law. Private international law is in essence domestic law, and it is designed to resolve conflicts between different jurisdictions, the legal systems or rules of different jurisdictions and decisions of courts of different jurisdictions. It consists of legal principles that apply in situations in which more than one court might claim jurisdiction, to which the law of more than one jurisdiction might apply or in which a court must determine whether it will recognize and enforce a foreign judgment or, in Canada, a judgment from another province (S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2010), at p. 1).

16 Three categories of issues -- jurisdiction, *forum non conveniens* and the recognition of foreign judgments -- are intertwined in this branch of the law. Thus, the framework established for the purpose of determining whether a court has jurisdiction may have an impact on the choice of law and on the recognition of judgments, and vice versa. Judicial decisions on choice of law and the recognition of judgments have played a central role in the evolution of the rules related to jurisdiction. None of the divisions of private international law can be safely analysed and applied in isolation from the others. This said, the central focus of these appeals is on jurisdiction and the appropriate forum.

(2) Issues Related to Jurisdiction: Assumption and Exercise of Jurisdiction

17 Two issues arise in these appeals. First, were the Ontario courts right to assume jurisdiction over the claims of the respondents Van Breda and Charron and over the appellant, Club Resorts? Second, were they right to exercise that jurisdiction and dismiss an application for a stay based on *forum non conveniens*?

18 To be able to resolve these issues, I must first discuss the evolution of the rules of jurisdiction *simpliciter* in Canadian private international law. It will be necessary to review the approach the Ontario Court of Appeal adopted in respect of the questions of assumption of jurisdiction and *forum non conveniens* in its judgments in the cases at bar and, in particular, its reconsideration of the principles that it had previously set out in *Muscutt*.

19 I will then propose an analytical framework and legal principles for assuming jurisdiction (jurisdiction *simpliciter*) and for deciding whether to decline to exercise it (*forum non conveniens*). On that basis, I will review the facts of the cases at bar to determine whether the Ontario courts made any reviewable errors when they decided to retain jurisdiction over them.

20 Before turning to these issues, however, it is important to consider the constitutional underpinnings of private international law in Canada. This part of the analysis is necessary in order to explain the origins of the "real and substantial connection test" as it is now known, its nature, and its impact on the development of the principles of private international law.

(3) Constitutional Underpinnings of Private International Law

21 Conflicts rules must fit within Canada's constitutional structure. Given the nature of private international law, its application inevitably raises constitutional issues. This branch of the law is concerned with the jurisdiction of courts of the Canadian provinces, with whether that jurisdiction should be exercised, with what law should apply to a dispute, and with whether a court should recognize and enforce a judgment rendered by a court of another province or country. The rules of private international law can be found, in the common law provinces, in the common law and in statute law and, in Quebec, in the *Civil Code of Québec*, S.Q. 1991, c. 64, which contains a well-developed set of rules and principles in this area (see *Civil Code of Québec*, Book Ten, arts. 3076 to 3168). The interplay between provincial jurisdiction and external legal situations takes place within a constitutional framework which limits the external reach of provincial laws and of a province's courts. The Constitution assigns powers to the provinces. But these powers are subject to the restriction that they be exercised within the province in question (see P. W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 1, at pp. 364-65 and 376-77; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at p. 569; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at paras. 26-28, *per* Major J.), and they must be exercised in a manner consistent with the territorial restrictions created by the Constitution (see *Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870, at para. 5, *per* Major J.; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63, at para. 51, *per* Binnie J.).

(4) Origins of the Real and Substantial Connection Test

22 The real and substantial connection test arose out of decisions of this Court that were aimed at establishing broad and flexible principles to govern the exercise of provincial powers and the actions of a province's courts. It was focussed on two issues: (1) the risk of jurisdictional overreach

by provinces and (2) the recognition of decisions rendered in other jurisdictions within the Canadian federation and in other countries. In developing the real and substantial connection test, the Court crafted a constitutional principle rather than a simple conflicts rule (see G. Goldstein and E. Groffier, *Droit international privé*, vol. I (1998), at p. 47). However, the test was born as a general organizing principle of the conflict of laws. Its constitutional dimension appeared only later. Courts have used the expression "real and substantial connection" to describe the test in both senses, and often in the same judgment. This has produced confusion about both the nature of the test and the constitutional status of the rules and principles of private international law. A clearer distinction needs to be drawn between the private international law and constitutional dimensions of this test.

23 From a constitutional standpoint, the Court has, by developing tests such as the real and substantial connection test, sought to limit the reach of provincial conflicts rules or the assumption of jurisdiction by a province's courts. However, this test does not dictate the content of conflicts rules, which may vary from province to province. Nor does it transform the whole field of private international law into an area of constitutional law. In its constitutional sense, it places limits on the reach of the jurisdiction of a province's courts and on the application of provincial laws to interprovincial or international situations. It also requires that all Canadian courts recognize and enforce decisions rendered by courts of the other Canadian provinces on the basis of a proper assumption of jurisdiction. But it does not establish the actual content of rules and principles of private international law, nor does it require that those rules and principles be uniform.

24 The first mention of a "real and substantial connection test" in the Court's modern jurisprudence can be found in the reasons of Dickson J. in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393. That case concerned a tort action with respect to manufacturer's liability. The main issue was whether the courts of Saskatchewan had jurisdiction over the claim and, if so, what substantive law governed it. Dickson J. suggested that the English courts seemed to be moving towards some form of "real and substantial connection test" (pp. 407-8) to resolve issues related to the assumption of jurisdiction by a province's courts and the appropriate choice of the law applicable to a tort. The test was formally adopted in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077. As had been the case in *Moran*, the Court's intention in *Morguard* was to develop an organizing principle of Canadian private international law, albeit with constitutional overtones. The test's constitutional role in the Canadian federation was confirmed a few years later in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289. Its Janus-like nature -- with a private international law face on the one hand and a constitutional face on the other -- crystallized in *Hunt* and remained a permanent feature of the subsequent jurisprudence.

25 In retrospect, it can be seen that in *Morguard*, the Court initiated a major shift in the framework governing the conflict of laws in Canada by accepting the validity of the real and substantial connection test as a principle governing the rules applicable to conflicts. In view of its importance, the case merits closer consideration. At issue in *Morguard* was an application to enforce, in British Columbia, a judgment rendered in Alberta against a resident of British Columbia. The claim related to a debt secured by a mortgage on property in Alberta. The parties were resident

in Alberta at the time the loan was made. La Forest J., writing for a unanimous Court, called for a re-evaluation of relationships between the courts of the provinces within the Canadian federation. The creation of the Canadian federation established an internal space within which exchanges should occur more freely than between independent states. The principle of comity and the principles of fairness and order applicable within a federal space required that the rules of private international law be adjusted (*Morguard*, at pp. 1095-96).

26 In *Morguard*, the Court held that the courts of a province must recognize and enforce a judgment of a court of another province if a real and substantial connection exists between that court and the subject matter of the litigation. Another purpose of the test was to prevent improper assumptions of jurisdiction by the courts of a province. Thus, the test was designed to ensure that claims are not prosecuted in a jurisdiction that has little or no connection with either the transactions or the parties, and it requires that a judgment rendered by a court which has properly assumed jurisdiction in a given case be recognized and enforced. La Forest J. did not seek to determine the precise content of this real and substantial connection test (*Morguard*, at p. 1108), nor did he elaborate on the strength of the connection. Rather, he held that the connections between the matters or the parties, on the one hand, and the court, on the other, must be of some significance in order to promote order and fairness. They must not be "tenuous" (p. 1110). La Forest J. added that the requirement of a real and substantial connection was consistent with the constitutional imperative that provincial power be exercised "in the province" (p. 1109). Because the appeal had not been argued on constitutional grounds, however, he refrained from determining whether the real and substantial connection test should be considered a constitutional test.

27 The Court's subsequent judgment in *Hunt* confirmed the constitutional nature of the real and substantial connection test. That case concerned the application of a "blocking" statute enacted by the Quebec legislature that prohibited the transfer to other jurisdictions of certain documents kept by corporations in Quebec, even in the context of court litigation. The Court found that the statute was not applicable to litigation conducted in British Columbia. It held that assumptions of jurisdiction by a province and its courts must be grounded in the principles of order and fairness in the judicial system. The real and substantial connection test from *Morguard* reflected the need for limits on assumptions of jurisdiction by a province's courts (*Hunt*, at p. 325). Any improper assumption of jurisdiction would be negated by the requirement that there be a "real and substantial connection" (p. 328; see C. Emanuelli, *Droit international privé québécois* (3rd ed. 2011), at p. 38).

28 Since *Hunt*, the real and substantial connection test has been recognized as a constitutional imperative in the application of the conflicts rules. It reflects the limits of provincial legislative and judicial powers and has thus become more than a conflicts rule. Its application was extended to the recognition and enforcement of foreign judgments in *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416.

29 But, in the common law, the nature of the conflicts rules that would accord with the constitutional imperative has remained largely undeveloped in this Court's jurisprudence. Although

the real and substantial connection test has been consistently applied both as a constitutional test and as a principle of private international law, since *Hunt*, the Court has generally declined to articulate the content of the private international law rules that would satisfy the test's constitutional requirements or to develop a framework for them. The Court has continued to affirm the relevance and importance of the test and has even extended it to foreign judgments, but without attempting to elaborate upon the rules it requires (see *Beals*, at paras. 23 and 28, *per* Major J.).

30 So the test does exist. But what does it mean? What rules would satisfy its status as a constitutional imperative? Two approaches are possible. One approach is to view the test not only as a constitutional principle, but also as a conflicts rule in itself. If it is viewed as a conflicts rule, its content would fall to be determined on a case-by-case basis by the courts in decisions in which they would attempt to implement the objectives of order and fairness in the legal system. The other approach is to accept that the test imposes constitutional limits on provincial powers, but to seek to develop a system of connecting factors and principles designed to make the resolution of conflict of laws issues more predictable in order to reduce the scope of judicial discretion exercised in the context of each case. Some academic commentators view the second approach as critical in order to maintain order, efficiency and predictability in this area of the law. Indeed, the real and substantial connection test itself has been criticized as being much too loose and unpredictable to facilitate an orderly resolution of conflicts issues (see Castel; J. Blom and E. Edinger, "The Chimera of the Real and Substantial Connection Test" (2005), 38 U.B.C. L. Rev. 373).

31 Thus, in the course of this review, we should remain mindful of the distinction between the real and substantial connection test as a constitutional principle and the same test as the organizing principle of the law of conflicts. With respect to the constitutional principle, the territorial limits on provincial legislative competence and on the authority of the courts of the provinces derive from the text of s. 92 of the *Constitution Act, 1867*. These limits are, in essence, concerned with the legitimate exercise of state power, be it legislative or adjudicative. The legitimate exercise of power rests, *inter alia*, upon the existence of an appropriate relationship or connection between the state and the persons who are brought under its authority. The purpose of constitutionally imposed territorial limits is to ensure the existence of the relationship or connection needed to confer legitimacy.

32 As can be observed from the jurisprudence, in Canadian constitutional law, the real and substantial connection test has given expression to the constitutionally imposed territorial limits that underlie the requirement of legitimacy in the exercise of the state's power of adjudication. This test suggests that the connection between a state and a dispute cannot be weak or hypothetical. A weak or hypothetical connection would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute.

33 The constitutionally imposed territorial limits on adjudicative jurisdiction are related to, but distinct from, the real and substantial connection test as expressed in conflicts rules. Conflicts rules include the rules that have been chosen for deciding when jurisdiction can be assumed over a given

dispute, what law will govern a dispute or how an adjudicative decision from another jurisdiction will be recognized and enforced. The constitutional territorial limits, on the other hand, are concerned with setting the outer boundaries within which a variety of appropriate conflicts rules can be elaborated and applied. The purpose of the constitutional principle is to ensure that specific conflicts rules remain within these boundaries and, as a result, that they authorize the assumption of jurisdiction only in circumstances representing a legitimate exercise of the state's power of adjudication.

34 This case concerns the elaboration of the "real and substantial connection" test as an appropriate common law conflicts rule for the assumption of jurisdiction. I leave further elaboration of the content of the constitutional test for adjudicative jurisdiction for a case in which a conflicts rule is challenged on the basis of inconsistency with constitutionally imposed territorial limits. To be clear, however, the existence of a constitutional test aimed at maintaining the constitutional limits on the powers of a province's legislature and courts does not mean that the rules of private international law must be uniform across Canada. Legislatures and courts may adopt various solutions to meet the constitutional requirements and the objectives of efficiency and fairness that underlie our private international law system. Nor does this test's existence mean that the connections with the province must be the strongest ones possible or that they must all point in the same direction.

35 Turning to the search for appropriate conflicts rules, the trend is towards retaining or establishing a system of connecting factors informed by principles for applying them, as opposed to relying on almost pure judicial discretion to achieve order and fairness. This trend is apparent in the laws passed by certain provincial legislatures and is reflected in a number of judicial decisions. These decisions include the important jurisprudential current that the Ontario Court of Appeal has been developing since *Muscutt*, which is in issue in the cases at bar. The real and substantial connection test should be viewed not in isolation, but rather in the context of its historical roots, contemporary legislative developments, the academic literature and initiatives aimed at developing and modernizing Canada's conflicts rules. The test was not born *ex nihilo*, without any awareness of the methods and techniques that evolved in the field of private international law. In this respect, both the common law and the civil law have relied largely on the selection and use of a number of specific objective factual connections.

36 In *Hunt*, La Forest J. cautioned against casting aside all the traditional connections. In commenting on the difficulties of framing an appropriate test for a reasonable assumption of jurisdiction and on the development of the real and substantial connection test, he wrote:

> The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these. However, though some of these may well require reconsideration in light of *Morguard*, the connections relied on under the traditional rules are a good place to start. [p. 325]

37 Not long after *Hunt*, the Court rendered its judgment in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, a case concerned mainly with determining what law should apply to a tort. In it, too, the Court's concern was to assure predictability in the application of the law of conflicts to tort claims. The Court established a new conflicts rule in respect of torts, abandoning the rule it had adopted in *McLean v. Pettigrew*, [1945] S.C.R. 62, that favoured the law of the forum (*lex fori*) and holding that, in principle, the law governing the tort should be that of the place where the tort occurred (*lex loci delicti*). The *situs* of the tort would also justify the assumption of jurisdiction by the courts of a province. The Court did not at that time rely solely on the real and substantial connection test as a conflicts rule. In a sense, it held that in this context, the objectives of fairness and efficiency in the conflicts system would be better served by relying on factual connections with the place where the tort occurred.

38 In La Forest J.'s opinion, *Morguard* prevented courts from overreaching by entering into matters in which they had little or no interest (*Tolofson*, at p. 1049). But he also cautioned against building a system of private international law based solely on the expectations of the parties and concerns of fairness in a specific case, as such a system could hardly be considered rational. A degree of predictability or reliability must be assured:

> The truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law. Indeed in the present context it wholly obscures the nature of the problem. In dealing with legal issues having an impact in more than one legal jurisdiction, we are not really engaged in that kind of interest balancing. We are engaged in a structural problem.
>
> (*Tolofson*, at pp. 1046-47)

To La Forest J. in *Tolofson*, order was needed in the conflicts system, and was even a precondition to justice (p. 1058). Certainty was one of the key purposes being pursued in framing a conflicts rule (p. 1061). With this in mind, the Court crafted what it hoped would be a clear conflicts rule for torts that would bring a degree of certainty to this part of tort law and private international law (pp. 1062-64). Subject to the constitutional requirement established in *Morguard*, this rule would make it possible to identify some connecting factors linking the court or the law to the matter and to the parties. The presence of such factors would not necessarily resolve everything. Specific torts might raise particular difficulties that could require crafting carefully defined exceptions (p. 1050). Such difficulties indeed arise in the companion cases of *Breeden* and *Éditions Écosociété Inc.* Nevertheless, a conflicts rule based on specific connections seemed likely to introduce greater certainty into the interpretation and application of private international law principles in Canada.

39 Legislative action since *Morguard* and *Hunt* points in the same direction. Without entering

into the details of the complex, often flexible and nuanced, system of conflicts rules that became part of the *Civil Code of Québec* in 1994, it is worth mentioning that the *Civil Code* sets out a number of specific conflicts rules that identify connecting factors to be applied in various international or interprovincial situations. This Court has discussed the *Civil Code*'s scheme on a number of occasions. In particular, in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, it reviewed the scheme applicable to the assumption by Quebec courts of jurisdiction over situations involving delictual or quasi-delictual liability in an international or interprovincial context.

40 Across Canada, various initiatives have been undertaken to flesh out the real and substantial connection test. For example, the Uniform Law Conference of Canada proposed a uniform Act to govern issues related to jurisdiction and to the doctrine of *forum non conveniens* (see *Uniform Court Jurisdiction and Proceedings Transfer Act* ("*CJPTA*") (online).

41 The *CJPTA* focusses mainly on issues related to the assumption of jurisdiction. Section 3(e) provides that a court may assume jurisdiction if "there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based" (text in brackets in original). Section 10 enumerates a variety of circumstances in which such a connection would be presumed to exist. For example, it lists a number of factors that might apply where the purpose of the proceeding is the determination of property rights or rights related to a contract. In the case of tort claims, s. 10(g) provides that the commission of a tort in a province would be a proper basis for the assumption of jurisdiction by that province's courts. Section 10 states that the list of connecting factors would not be closed and that other circumstances might be proven in order to establish a real and substantial connection. The *CJPTA* also includes specific provisions regarding forum of necessity (s. 6) and *forum non conveniens* (s. 11). A number of subsequent provincial statutes are clearly based on the *CJPTA* (see, e.g., *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28; *The Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c. 2; *Court Jurisdiction and Proceedings Transfer Act*, S.Y. 2000, c. 7).

42 In these statutes, the legislative scheme proposed in the *CJPTA* has been adopted, with some differences in wording, as they include non-exhaustive lists of prescriptive connecting factors which are presumed to establish a real and substantial connection. Unlike with Book Ten of the *Civil Code of Québec*, the legislatures that enacted them did not attempt to codify the entire field of private international law, but attached particular importance to issues related to the assumption and exercise of jurisdiction.

43 Unlike in these other provinces, the Ontario legislature has not enacted a statute based on the *CJPTA*. However, the province has established its own set of connecting factors for the purposes of service outside Ontario, which are set out in the Ontario *Rules of Civil Procedure*. These factors, which are found in rule 17.02, are similar, in part, to those of the *CJPTA* and of the statutes based on the *CJPTA*. It has been observed, though, that rule 17.02 is purely procedural in nature and does

not by itself establish jurisdiction in a case (P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2010), at p. 121).

(5) Understanding the Real and Substantial Connection Test -- The Ontario Court of Appeal in *Muscutt*

44 Given the absence of statutory rules, the Ontario Court of Appeal endeavoured to establish a common law framework for the application of the real and substantial connection test in its important judgment in *Muscutt*. At issue in that case was a claim in tort. An Ontario resident had been injured in a car crash in Alberta. The four defendants lived in Alberta at the time. One of them moved to Ontario after the accident. The plaintiff returned to Ontario and sued all the defendants in Ontario. Two of the Alberta defendants moved to stay the action for want of jurisdiction and, in the alternative, on the basis of *forum non conveniens*. They argued that the action should be stayed for want of jurisdiction. They also challenged the constitutional validity of the provisions of the Ontario rules on service outside the province. In their opinion, those provisions were *ultra vires* the province of Ontario because they had an extraterritorial effect. The Ontario Superior Court of Justice dismissed the constitutional challenge and assumed jurisdiction. The matter was then appealed to the Court of Appeal, which took the opportunity to consider the constitutional issues, although the main focus of its decision was on the content and the application of the real and substantial connection test.

45 The Court of Appeal quickly disposed of the argument that rule 17.02(h) was unconstitutional. It acknowledged that the real and substantial connection test imposed constitutional limits on the assumption of jurisdiction by a province's courts. But in its opinion, rule 17.02(h) was purely procedural and did not by itself determine the issue of the jurisdiction of the Ontario courts. The rule applied within the limits of the real and substantial connection test and did not resolve the issue of the assumption of jurisdiction (*Muscutt*, at paras. 50-52).

46 The Court of Appeal then turned to the central issue in the case: whether it was open to the Superior Court of Justice to assume jurisdiction. Sharpe J.A. first sought to draw a clear distinction between the assumption of jurisdiction itself and *forum non conveniens*, which concerns the court's discretion to decline to exercise its jurisdiction. He cautioned against conflating what he viewed as different analytical stages in a situation in which the assumption of jurisdiction is in issue. A court must determine whether it has jurisdiction by applying the appropriate principles governing the assumption of jurisdiction. If it does have jurisdiction, it might then have to consider whether it should decline to exercise that jurisdiction in favour of a more appropriate forum (*Muscutt*, at paras. 40-42). The critical step in this process consists in determining when a court can properly assume jurisdiction in light of the constitutional limits imposed by the real and substantial connection test.

47 Sharpe J.A. emphasized the importance of this Court's decisions -- from *Morguard* to *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 -- in the re-crafting of the traditional approaches to the resolution of conflicts in private international law.

The adoption of the real and substantial connection test mandated a flexible approach to the assumption of jurisdiction informed by the underlying requirements of order and fairness. This approach required a concrete analysis of a number of factors that would allow a court to decide whether a sufficient connection existed between the forum and the subject matter of the litigation rather than with the parties. The court was to look not for the strongest possible connection with the forum, but for a minimum connection sufficient to meet the constitutional requirement that the matter be linked to the forum (para. 44). The Court of Appeal held that a court should consider a variety of factors to determine whether it has jurisdiction. Sharpe J.A. recommended taking a broad approach to jurisdiction. The defendant's relationship with the forum might be an "important" connecting factor, but not a "necessary" one (para. 74) (emphasis deleted).

48 Although the Court of Appeal acknowledged the importance of flexibility, it stressed that clarity and certainty are also necessary characteristics of the conflicts system. It accordingly developed a list of eight factors to be considered when deciding whether an assumption of jurisdiction is justified:

(1) the connection between the forum and the plaintiff's claim;
(2) the connection between the forum and the defendant;
(3) unfairness to the defendant in assuming jurisdiction;
(4) unfairness to the plaintiff in not assuming jurisdiction;
(5) the involvement of other parties to the suit;
(6) the court's willingness to recognize and enforce an extraprovincial judgment rendered on the same jurisdictional basis;
(7) whether the case is interprovincial or international in nature; and
(8) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

49 In the Court of Appeal's opinion, no single factor should be determinative. In Sharpe J.A.'s words, "all relevant factors should be considered and weighed together" (*Muscutt*, at para. 76). The Court of Appeal held that the Superior Court of Justice could assume jurisdiction in the case before it. It turned briefly to the issue of *forum non conveniens*, but found that an Alberta court would not be a more appropriate forum (para. 115).

50 At the same time as its decision in *Muscutt*, the Court of Appeal applied this new template to four other cases in which the assumption of jurisdiction and *forum non conveniens* were in issue. In those appeals, it held that the Ontario courts should not assume jurisdiction, because the connections with Ontario were too insignificant to satisfy the real and substantial connection test. All four cases involved Ontario residents who had suffered injuries in accidents outside Canada and filed suits in Ontario courts (*Lemmex v. Bernard* (2002), 60 O.R. (3d) 54; *Gajraj v. DeBenardo* (2002), 60 O.R. (3d) 68; *Sinclair v. Cracker Barrel Old Country Store, Inc.* (2002), 60 O.R. (3d) 76; *Leufkens v. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84). All the actions were dismissed in respect of the foreign defendants. The Court of Appeal found that the facts that the plaintiffs

resided in Ontario and had sustained damage in the province did not create a real and substantial connection between the litigation and the Ontario courts. Since the courts lacked jurisdiction, there was no need for the Court of Appeal to consider the *forum non conveniens* arguments.

(6) Reconsideration of *Muscutt* by the Ontario Court of Appeal

51 A few years after *Muscutt*, the Court of Appeal decided that, in the cases now before this Court, a review of the existing framework for the assumption of jurisdiction by Ontario courts and of issues related to *forum non conveniens* had become necessary. Since *Muscutt*, Ontario courts had consistently been applying the framework adopted in that case. Outside Ontario, *Muscutt* was considered an influential authority, and its framework was often accepted as an appropriate one for resolving issues related to the assumption of jurisdiction. But as I mentioned above, a number of common law provinces preferred to adopt the framework proposed in the *CJPTA*. On occasion, courts outside Ontario expressed reservations about certain aspects of the *Muscutt* framework (*Coutu v. Gauthier Estate*, 2006 NBCA 16, 296 N.B.R. (2d) 34, at paras. 67-68; *Fewer v. Ellis*, 2011 NLCA 17, 305 Nfld. & P.E.I.R. 39). It was suggested that the *Muscutt* test gave judges too much latitude in exercising their discretion on a case-by-case basis and was thus incompatible with the objectives of order and predictability in the assumption of jurisdiction. The wide parameters of this broad jurisdiction might also lead a court to conflate the jurisdictional analysis and the application of the doctrine of *forum non conveniens* in a search for the better or more appropriate forum in any given case. The analysis under the *Muscutt* test could also generate an instinctive bias in favour of the forum chosen by the plaintiff.

(7) The New *Van Breda-Charron* Approach of the Ontario Court of Appeal

52 As the Court of Appeal noted, it had heard a variety of opinions and conflicting suggestions regarding the need to reframe the *Muscutt* test and how this should be done. Some of the litigants wanted to retain *Muscutt* as it was; others proposed the adoption of a test based on a list of presumptive connecting factors similar to that of the *CJPTA* (*Van Breda-Charron*, paras. 56-57). The Court of Appeal declined to craft a common law rule that would in substance reproduce the content of the *CJPTA*. Sharpe J.A. expressed the view that the unpredictability of the *Muscutt* test had been exaggerated, as had the degree of certainty and predictability that would result if the *CJPTA* scheme were adopted (para. 68). He proposed what he saw as a middle way. The Court of Appeal would retain the *Muscutt* test, but would modify it by simplifying it and bringing it closer to the *CJPTA* model. Sharpe J.A. stated: "In refining the *Muscutt* test, we can look to *CJPTA* as a worthy attempt to restate and update the Canadian law of jurisdiction ... and, in so doing, bring Ontario law into line with the emerging national consensus on appropriate jurisdictional standards" (para. 69).

53 On that basis, the Court of Appeal reframed the *Muscutt* test in part. The first change, as Sharpe J.A. stated, moved the existing framework closer to that of the *CJPTA*. It was the creation of a category-based presumption of jurisdiction modelled on s. 10 of the *CJPTA*. In the absence of

statutory connecting factors, the court decided to rely for this purpose on the factors governing service outside Ontario set out in rule 17.02 of the Ontario *Rules of Civil Procedure* (para. 71). Sharpe J.A. asserted that most of the connecting factors enumerated in rule 17.02, such as the fact that a contract was made in Ontario (rule 17.02(f)) or a tort was committed in the province (rule 17.02(g)), would presumptively confirm the jurisdiction of the Ontario court (para. 72). In other words, whenever one of these factors was established, a real and substantial connection justifying the assumption of jurisdiction by an Ontario court would be presumed to exist.

54 Sharpe J.A. added that where the presumption applied, it would be rebuttable. It would be open to a party to argue that, even though a presumptive connection existed, the real and substantial connection test had not been met (para. 72). Sharpe J.A. stated that these changes would be consistent with the incremental approach to the development of common law rules. In addition, almost all the post-*Muscutt* cases that he had reviewed seemed to have been resolved by one or another of the factors listed in rule 17.02 (paras. 74-75).

55 According to this view, the appropriate factors generally operate as reliable markers of jurisdiction at common law. The adoption of these markers would mitigate the complexity and unpredictability of the *Muscutt* test. Sharpe J.A. noted that the jurisprudence on service *ex juris* provides support for the use of these factors as indicators of a real and substantial connection. For example, in *Hunt*, La Forest J. had observed that, even if some of the traditional rules of jurisdiction might have to be recast in light of *Morguard*, the established factors could nevertheless be viewed as "a good place to start" (p. 325; see also *Spar Aerospace*, at paras. 55-56, on the provisions of the *Civil Code of Québec* applicable to the assumption by Quebec courts of jurisdiction over situations involving delictual and quasi-delictual liability). But Sharpe J.A. declined to give presumptive effect to the factors set out in rules 17.02(h) (damage sustained in Ontario) and 17.02(o) (necessary or proper party). Neither of these factors is included in the *CJPTA*. Nor have they gained broad acceptance as reliable indicators of jurisdiction. Indeed, the Court of Appeal found in *Muscutt* and its companion cases that the factor of "damage sustained in Ontario" was often not reliable and significant enough to justify an assumption of jurisdiction by an Ontario court.

56 Sharpe J.A. reaffirmed the need to draw a clear distinction between assuming jurisdiction and deciding whether to decline to exercise it on the basis of the *forum non conveniens* doctrine. He cautioned against confusing these two different steps in the resolution of a conflicts issue and emphasized that the factors that would justify a stay in the *forum non conveniens* analysis should not be worked into the jurisdiction *simpliciter* analysis (paras. 81-82 and 101). The conflation of the two analyses may have been the result of an unduly broad interpretation of the fairness factors of the *Muscutt* analysis (para. 81).

57 Building on this first principle that recognized the list of presumptive connecting factors, Sharpe J.A. re-crafted the *Muscutt* test. He retained part of the *Muscutt* analysis, merged some of its factors and reviewed the roles of other principles governing the assumption of jurisdiction. The defendants' connection with the court seized of the action continued to be a valid and important

consideration. However, the connection between the plaintiffs' claim and the forum was maintained as a core element of the real and substantial connection test (paras. 87-88). A test based solely on the defendant's contacts with the jurisdiction would be "unduly restrictive" (para. 86).

58 The Court of Appeal merged the two factors related to fairness to the parties of assuming or declining jurisdiction into a single one. At the same time, it recommended that judges avoid treating the consideration of fairness as a separate inquiry distinct from the core of the test, since fairness cannot compensate for weak connections. Sharpe J.A. understood, however, the need to retain fairness to the plaintiff and to the defendant as an analytical tool in assessing the relevance, quality and strength of the connections with the forum in order to determine whether assuming jurisdiction would accord with the principles of order and fairness (paras. 93, 95-96 and 98).

59 Sharpe J.A. went on to observe that considerations of fairness would support the view that the forum of necessity doctrine is an exceptional basis for assuming jurisdiction (para. 100). I add that the forum of necessity issue is not before this Court in these appeals, and I will not need to address it here.

60 According to Sharpe J.A., the involvement of other parties would remain a relevant factor, but its importance would be downgraded. It should not be routinely considered but would become relevant only if a party raised it as a connecting factor (para. 102).

61 He accepted that acts or conduct short of residence that take place in the jurisdiction will often support a finding that a real and substantial connection has been established (para. 92).

62 In the future, Sharpe J.A. stated, whether the courts would be willing to recognize and enforce a foreign judgment should not be treated as a separate factor to be weighed against the other connecting factors in determining jurisdiction. Rather, it is a general and overarching principle that constrains, or "disciplines", as he wrote, the assumption of jurisdiction against extraprovincial defendants. A court should not assume jurisdiction if it would not be prepared to recognize and enforce a foreign judgment rendered on the same jurisdictional basis (para. 103). Whether the case is international or interprovincial was also removed from the list of factors. This would be treated as a question of law liable to be considered in the real and substantial connection analysis (para. 106). The court adopted the same approach in respect of comity and the standards of jurisdiction and of recognition and enforcement of judgments prevailing elsewhere. These considerations, while remaining relevant to the real and substantial connection analysis, would no longer serve as specific factors (paras. 107-8).

63 Finally, the Court of Appeal held that considerations related to foreign law remain relevant to the issue of the assumption of jurisdiction. In Sharpe J.A.'s view, evidence on how foreign courts would treat such cases might be helpful (para. 107). I note in passing, however, that undue emphasis on juridical disadvantage as a factor in the jurisdictional analysis appears to be hardly consonant with the principle of comity that should govern legal relationships between modern democratic states, as this Court held in *Beals*. In particular, such an emphasis would seem hard to reconcile

with the principle of comity that should govern relationships between the courts of different provinces within the same federal state, as this Court held in *Morguard* and *Hunt*.

64 In summary, the *Van Breda-Charron* approach offers a simplified test in which the roles of a number of the factors of the *Muscutt* test have been modified. In short, when one of the presumptive connecting factors applies, the court will assume jurisdiction unless the defendant can demonstrate the absence of a real and substantial connection. If, on the other hand, none of the presumptive connecting factors are found to apply to the claim, the onus rests on the plaintiff to prove that a sufficient relationship exists between the litigation and the forum. In addition to the list of presumptive and non-presumptive factors, parties can rely on other connecting factors informed by the principles that govern the analysis.

65 I will now turn to the issue of whether the Court of Appeal was right to hold that it was open to the Ontario courts to assume jurisdiction in the two cases now before us. If I conclude that it was open to them to do so, I will then discuss whether they should have declined to exercise their jurisdiction under the principles of *forum non conveniens*.

(8) Framework for the Assumption of Jurisdiction

66 In this Court, as in the Court of Appeal, the parties and the interveners have expressed sharply different views about whether and how the law of conflicts should be changed in respect of the assumption of jurisdiction. As might be expected, the disagreements extend to the impact of possible changes on the outcome of these appeals. The conflicting approaches articulated in this Court reflect the tension between a search for flexibility, which is closely connected with concerns about fairness to individuals engaged in litigation, and a desire to ensure greater predictability and consistency in the institutional process for the resolution of conflict of laws issues related to the assumption and exercise of jurisdiction. Indeed, striking a proper balance between flexibility and predictability, or between fairness and order, has been a constant theme in the Canadian jurisprudence and academic literature since this Court's judgments in *Morguard*, *Hunt*, *Amchem* and *Tolofson*.

67 The real and substantial connection test is now well established. However, it is clear that dissatisfaction with it and uncertainty about its meaning and conditions of application have been growing, and that there is now a perceived need for greater direction on how it applies. I adverted above to the need to draw a distinction between the constitutional test and the rules of private international law -- two aspects of the law of conflicts that have sometimes been conflated in previous cases. At this point, it is necessary to clarify the rules of the conflict of laws in a way that is consistent with the constitutional constraints on the provinces' courts but does not turn every private international law issue into a constitutional one.

68 The legislatures of several provinces, as well as the Ontario Court of Appeal in *Muscutt* and *Van Breda-Charron*, have responded to these concerns and attempted to provide guidance for the application of the real and substantial connection test. We can build upon these legislative

developments and judgments. Indeed, Sharpe J.A. referred in *Van Breda-Charron* to what he described, perhaps with some optimism, as an emerging consensus in Canadian law on how to resolve these issues. On the basis of this perhaps fragile consensus and these developments and judgments, this Court must craft more precisely the rules and principles governing the assumption of jurisdiction by the courts of a province over tort cases in which claimants sue in Ontario, but at least some of the events that gave rise to the claims occurred outside Canada or outside the province. I will also consider how jurisdiction should be exercised or declined under the doctrine of *forum non conveniens*. This said, I remain mindful that the Court is not of course tasked with drafting a complete code of private international law. Principles will be developed as problems arise before the courts. Moreover, all my comments about the development of the common law principles of the law of conflicts are subject to provisions of specific statutes and rules of procedure.

69 When a court considers issues related to jurisdiction, its analysis must deal first with those concerning the assumption of jurisdiction itself. That analysis must be grounded in a proper understanding of the real and substantial connection test, which has evolved into an important constitutional test or principle that imposes limits on the reach of a province's laws and courts. As I mentioned above, this constitutional test reflects the limited territorial scope of provincial authority under the *Constitution Act, 1867*. At the same time, the Constitution acknowledges that international or interprovincial situations may have effects within a province. Provinces may address such effects in order to resolve issues related to conflicts with their own internal legal systems without overstepping the limits of their constitutional authority (see *Castillo*).

70 The real and substantial connection test does not mean that problems of assumption of jurisdiction or other matters, such as the choice of the proper law applicable to a situation or the recognition of extraprovincial judgments, must be dealt with on a case-by-case basis by discretionary decisions of courts, which would determine, on the facts of each case, whether a sufficient connection with the forum has been established. Judicial discretion has an honourable history, and the proper operation of our legal system often depends on its being exercised wisely. Nevertheless, to rely completely on it to flesh out the real and substantial connection test in such a way that the test itself becomes a conflicts rule would be incompatible with certain key objectives of a private international law system.

71 The development of an appropriate framework for the assumption of jurisdiction requires a clear understanding of the general objectives of private international law. But the existence of these objectives does not mean that the framework for achieving them must be uniform across Canada. Because the provinces have been assigned constitutional jurisdiction over such matters, they are free to develop different solutions and approaches, provided that they abide by the territorial limits of the authority of their legislatures and their courts.

72 What would be an appropriate framework? How should it be developed in the case of the assumption and exercise of jurisdiction by a court? A particular challenge in this respect lies in the fact that court decisions dealing with the assumption and the exercise of jurisdiction are usually

interlocutory decisions made at the preliminary stages of litigation. These issues are typically raised before the trial begins. As a result, even though such decisions can often be of critical importance to the parties and to the further conduct of the litigation, they must be made on the basis of the pleadings, the affidavits of the parties and the documents in the record before the judge, which might include expert reports or opinions about the state of foreign law and the organization of and procedure in foreign courts. Issues of fact relevant to jurisdiction must be settled in this context, often on a *prima facie* basis. These constraints underline the delicate role of the motion judges who must consider these issues.

73 Given the nature of the relationships governed by private international law, the framework for the assumption of jurisdiction cannot be an unstable, *ad hoc* system made up "on the fly" on a case-by-case basis -- however laudable the objective of individual fairness may be. As La Forest J. wrote in *Morguard*, there must be order in the system, and it must permit the development of a just and fair approach to resolving conflicts. Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court. Parties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect. The need for certainty and predictability may conflict with the objective of fairness. An unfair set of rules could hardly be considered an efficient and just legal regime. The challenge is to reconcile fairness with the need for security, stability and efficiency in the design and implementation of a conflict of laws system.

74 The goal of the modern conflicts system is to facilitate exchanges and communications between people in different jurisdictions that have different legal systems. In this sense, it rests on the principle of comity. But comity itself is a very flexible concept. It cannot be understood as a set of well-defined rules, but rather as an attitude of respect for and deference to other states and, in the Canadian context, respect for and deference to other provinces and their courts (*Morguard*, at p. 1095; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 47). Comity cannot subsist in private international law without order, which requires a degree of stability and predictability in the development and application of the rules governing international or interprovincial relationships. Fairness and justice are necessary characteristics of a legal system, but they cannot be divorced from the requirements of predictability and stability which assure order in the conflicts system. In the words of La Forest J. in *Morguard*, "what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice" (p. 1097; see also H. E. Yntema, "The Objectives of Private International Law" (1957), 35 *Can. Bar Rev.* 721, at p. 741.

75 The development and evolution of the approaches to the assumption of jurisdiction reviewed above suggest that stability and predictability in this branch of the law of conflicts should turn primarily on the identification of objective factors that might link a legal situation or the subject matter of litigation to the court that is seized of it. At the same time, the need for fairness and justice

to all parties engaged in litigation must be borne in mind in selecting these presumptive connecting factors. But in recent years, the preferred approach in Canada has been to rely on a set of specific factors, which are given presumptive effect, as opposed to a regime based on an exercise of almost pure and individualized judicial discretion.

76 For example, the statutes based on the *CJPTA*, and Book Ten of the *Civil Code of Québec* rely on specific facts linking the subject matter of the litigation to the jurisdiction. These factors are considered in order to determine whether a real and substantial connection exists for the purposes of the conflicts rules.

77 In the *CJPTA*, in the case of tort claims, s. 10(g) refers to the *situs* of a tort as a specific factor connecting the act with the jurisdiction. The identification of the *situs* of a tort may well lead to further questions, to which the *CJPTA* does not offer immediate answers, such as: Where did the acts that gave rise to the injury occur? Did they happen in more than one place? Where was the damage suffered or where did it become apparent? Other connecting factors might also become relevant, such as the existence of a contractual relationship (s. 10(e)) or a business carried on in the province (s. 10(h)). Jurisdiction can also be presence-based, when the defendant resides in the province (s. 3(d)). Likewise, the *Civil Code of Québec* contains a list of factors that must be considered in order to determine whether a Quebec authority has jurisdiction over a delictual or quasi-delictual action (art. 3148).

78 Some authors take the view that the true core of the revised *Van Breda-Charron* test consists of a set of objective factual connections. Likewise, the Court of Appeal stated in *Van Breda-Charron* that the issue was essentially about connections: "The core of the real and substantial connection test is the connection that the plaintiff's claim has to the forum and the connection of the defendant to the forum respectively" (para. 84; T. Monestier, "A 'Real and Substantial' Improvement? Van Breda Reformulates the Law of Jurisdiction in Ontario", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2010*, (2010) 185, at pp. 204-7). In my view, identifying a set of relevant presumptive connecting factors and determining their legal nature and effect will bring greater clarity and predictability to the analysis of the problems of assumption of jurisdiction, while at the same time ensuring consistency with the objectives of fairness and efficiency that underlie this branch of the law.

79 From this perspective, a clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity. These principles and analytical tools will inform their assessment in order to determine whether the real and substantial connection test is met. However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.

80 Before I go on to consider of a list of presumptive connecting factors for tort cases, I must define the legal nature of the list. It will not be exhaustive. Rather, it will, first of all, be illustrative of the factual situations in which it will typically be open to a court to assume jurisdiction over a matter. These factors therefore warrant presumptive effect, as the Court of Appeal held in *Van Breda-Charron* (para. 109). The plaintiff must establish that one or more of the listed factors exists. If the plaintiff succeeds in establishing this, the court might presume, absent indications to the contrary, that the claim is properly before it under the conflicts rules and that it is acting within the limits of its constitutional jurisdiction (J. Walker, "Reforming the Law of Crossborder Litigation: Judicial Jurisdiction", consultation paper for the Law Commission of Ontario (March 2009), at pp. 19-20). Although the factors set out in the list are considered presumptive, this does not mean that the list of recognized factors is complete, as it may be reviewed over time and updated by adding new presumptive connecting factors.

81 The presumption with respect to a factor will not be irrebuttable, however. The defendant might argue that a given connection is inappropriate in the circumstances of the case. In such a case, the defendant will bear the burden of negating the presumptive effect of the listed or new factor and convincing the court that the proposed assumption of jurisdiction would be inappropriate. If no presumptive connecting factor, either listed or new, applies in the circumstances of a case or if the presumption of jurisdiction resulting from such a factor is properly rebutted, the court will lack jurisdiction on the basis of the common law real and substantial connection test. I will elaborate on each of these points below.

(a) *List of Presumptive Connecting Factors*

82 Jurisdiction must -- irrespective of the question of forum of necessity, which I will not discuss here -- be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. The Court of Appeal was moving in this direction in the cases at bar. This means that the courts must rely on a basic list of factors that is drawn at first from past experience in the conflict of laws system and is then updated as the needs of the system evolve. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial" connection for the purposes of the law of conflicts.

83 At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario *Rules of Civil Procedure*. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction. They are generally consistent with the approach taken in the *CJPTA* and with the recommendations of the Law Commission of Ontario, although some of them are more detailed. They thus offer guidance for the development of this area of private international law.

84 I would not include general principles or objectives of the conflicts system, such as fairness, efficiency or comity, in this list of presumptive connecting factors. These systemic values may influence the selection of factors or the application of the method of resolution of conflicts. Concerns for the objectives of the conflicts system might rule out reliance on some particular facts as connecting factors. But they should not themselves be confused with the factual connections that will govern the assumption of jurisdiction.

85 The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law.

86 The presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor. (I will not discuss its relevance or importance in the context of the forum of necessity doctrine, which is not at issue in these appeals.) Absent other considerations, the presence of the plaintiff in the jurisdiction will not create a presumptive relationship between the forum and either the subject matter of the litigation or the defendant. On the other hand, a defendant may always be sued in a court of the jurisdiction in which he or she is domiciled or resident (in the case of a legal person, the location of its head office).

87 Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor.

88 The *situs* of the tort is clearly an appropriate connecting factor, as can be seen from rule 17.02(g), and from the *CJPTA*, the *Civil Code of Québec* and the jurisprudence of this Court since *Tolofson*. The difficulty lies in locating the *situs*, not in acknowledging the validity of this factor once the *situs* has been identified. Claims related to contracts made in Ontario would also be properly brought in the Ontario courts (rule 17.02(f)(i)).

89 The use of damage sustained as a connecting factor may raise difficult issues. For torts like defamation, sustaining damage completes the commission of the tort and often tends to locate the tort in the jurisdiction where the damage is sustained. In other cases, the situation is less clear. The problem with accepting unreservedly that if damage is sustained at a particular place, the claim

presumptively falls within the jurisdiction of the courts of the place, is that this risks sweeping into that jurisdiction claims that have only a limited relationship with the forum. An injury may happen in one place, but the pain and inconvenience resulting from it might be felt in another country and later in a third one. As a result, presumptive effect cannot be accorded to this connecting factor.

90 To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:

(a) the defendant is domiciled or resident in the province;
(b) the defendant carries on business in the province;
(c) the tort was committed in the province; and
(d) a contract connected with the dispute was made in the province.

(b) *Identifying New Presumptive Connecting Factors*

91 As I mentioned above, the list of presumptive connecting factors is not closed. Over time, courts may identify new factors which also presumptively entitle a court to assume jurisdiction. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors. Relevant considerations include:

(a) Similarity of the connecting factor with the recognized presumptive connecting factors;
(b) Treatment of the connecting factor in the case law;
(c) Treatment of the connecting factor in statute law; and
(d) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

92 When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order and fairness.

93 If, however, no recognized presumptive connecting factor -- whether listed or new -- applies, the effect of the common law real and substantial connection test is that the court should not assume jurisdiction. In particular, a court should not assume jurisdiction on the basis of the combined effect of a number of non-presumptive connecting factors. That would open the door to assumptions of

jurisdiction based largely on the case-by-case exercise of discretion and would undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system.

94 Where, on the other hand, a recognized presumptive connecting factor does apply, the court should assume that it is properly seized of the subject matter of the litigation and that the defendant has been properly brought before it. In such circumstances, the court need not exercise its discretion in order to assume jurisdiction. It will have jurisdiction unless the party challenging the assumption of jurisdiction rebuts the presumption resulting from the connecting factor. I will now turn to this issue.

(c) *Rebutting the Presumption of Jurisdiction*

95 The presumption of jurisdiction that arises where a recognized connecting factor -- whether listed or new -- applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.

96 Some examples drawn from the list of presumptive connecting factors applicable in tort matters can assist in illustrating how the presumption of jurisdiction can be rebutted. For instance, where the presumptive connecting factor is a contract made in the province, the presumption can be rebutted by showing that the contract has little or nothing to do with the subject matter of the litigation. And where the presumptive connecting factor is the fact that the defendant is carrying on business in the province, the presumption can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province. On the other hand, where the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province.

97 In each of the above examples, it is arguable that the presumptive connecting factor points to a weak relationship between the forum and the subject matter of the litigation and that it would accordingly not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction. In such circumstances, the real and substantial connection test would not be satisfied and the court would lack jurisdiction to hear the dispute.

98 However, where the party resisting jurisdiction has failed to rebut the presumption that results from a presumptive connecting factor -- listed or new -- the court must acknowledge that it has jurisdiction and hold that the action is properly before it. At this point, it does not exercise its discretion to determine whether it has jurisdiction, but only to decide whether to decline to exercise its jurisdiction should *forum non conveniens* be raised by one of the parties.

99 I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.

100 To recap, to meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. In these reasons, I have listed some presumptive connecting factors for tort claims. This list is not exhaustive, however, and courts may, over time, identify additional presumptive factors. The presumption of jurisdiction that arises where a recognized presumptive connecting factor -- whether listed or new -- exists is not irrebuttable. The burden of rebutting it rests on the party challenging the assumption of jurisdiction. If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors exist or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, subject to the possible application of the forum of necessity doctrine, which I need not address in these reasons. If jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*. I will now turn to that issue.

(9) Doctrine of *Forum Non Conveniens* and the Exercise of Jurisdiction

101 As I mentioned above, a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper application of the doctrine of *forum non conveniens*. *Forum non conveniens* comes into play when jurisdiction is established. It has no relevance to the jurisdictional analysis itself.

102 Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.

103 If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial

connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

104 This Court reviewed and structured the method of application of the doctrine of *forum non conveniens* in *Amchem*. It built on the existing jurisprudence, and in particular on the judgment of the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460. The doctrine tempers the consequences of a strict application of the rules governing the assumption of jurisdiction. As those rules are, at their core, based on establishing the existence of objective factual connections, their use by the courts might give rise to concerns about their potential rigidity and lack of consideration for the actual circumstances of the parties. When it is invoked, the doctrine of *forum non conveniens* requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. It is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. The court can stay proceedings brought before it on the basis of the doctrine.

105 A party applying for a stay on the basis of *forum non conveniens* may raise diverse facts, considerations and concerns. Despite some legislative attempts to draw up exhaustive lists, I doubt that it will ever be possible to do so. In essence, the doctrine focusses on the contexts of individual cases, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient. For example, s. 11(1) of the *CJPTA* provides that a court may decline to exercise its jurisdiction if, "after considering the interests of the parties to a proceeding and the ends of justice", it finds that a court of another state is a more appropriate forum to hear the case. Section 11(2) then provides that the court must consider the "circumstances relevant to the proceeding". To illustrate those circumstances, it contains a non-exhaustive list of factors:

> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
> (b) the law to be applied to issues in the proceeding;
> (c) the desirability of avoiding multiplicity of legal proceedings;
> (d) the desirability of avoiding conflicting decisions in different courts;
> (e) the enforcement of an eventual judgment; and
> (f) the fair and efficient working of the Canadian legal system as a whole. [s. 11(2)]

106 British Columbia's *Court Jurisdiction and Proceedings Transfer Act*, which is based on the *CJPTA*, contains an identical provision -- s. 11 -- on *forum non conveniens*. In *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321, at para. 22, this Court stated that s. 11 of the British Columbia statute was intended to "codify" *forum non conveniens*.

Article 3135 of the *Civil Code of Québec* provides that *forum non conveniens* forms part of the private international law of Quebec, but it does not contain a description of the factors that are to govern the application of the doctrine in Quebec law. The courts are left with the tasks of developing an approach to applying it and of identifying the relevant considerations.

107 Quebec's courts have adopted an approach that, although basically identical to that of the common law courts, is subject to the indication in art. 3135 that *forum non conveniens* is an exceptional recourse. A good example of this can be found in the judgment of the Quebec Court of Appeal in *Oppenheim forfait GMBH v. Lexus maritime inc.*, 1998 CanLII 13001, in which an action brought in Quebec was stayed in favour of a German court on the basis of *forum non conveniens*. Pidgeon J.A. emphasized the wide-ranging and contextual nature of a *forum non conveniens* analysis. The judge might consider such factors as the domicile of the parties, the locations of witnesses and of pieces of evidence, parallel proceedings, juridical advantage, the interests of both parties and the interests of justice (pp. 7-8; see also *Spar Aerospace*, at para. 71; J. A. Talpis, *"If I am from Grand-Mère, Why Am I Being Sued in Texas?", Responding with the collaboration of S. L. Kath, to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001), at pp. 44-45).

108 Regarding the burden imposed on a party asking for a stay on the basis of *forum non conveniens*, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. It was used in *Spiliada* and *Amchem*. On the other hand, it has not always been used consistently and does not appear in the *CJPTA* or any of the statutes based on the *CJPTA*, which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere. Nor is this expression found in art. 3135 of the *Civil Code of Québec*, which refers instead to the exceptional nature of the power conferred on a Quebec authority to decline jurisdiction: "... it may exceptionally and on an application by a party, decline jurisdiction ...".

109 The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

110 As I mentioned above, the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties.

111 Loss of juridical advantage is a difficulty that could arise should the action be stayed in favour of a court of another province or country. This difficulty is aggravated by the possible conflation of two different issues: the impact of the procedural rules governing the conduct of the trial, and the proper substantive law for the legal situation, that is, in the context of these two appeals, the proper law of the tort. In considering the question of juridical advantage, a court may be too quick to assume that the proper law naturally flows from the assumption of jurisdiction. However, the governing law of the tort is not necessarily the domestic law of the forum. This may be so in many cases, but not always. In any event, if parties plead the foreign law, the court may well need to consider the issue and determine whether it should apply that law once it is proved. Even if the jurisdictional analysis leads to the conclusion that courts in different states might properly entertain an action, the same substantive law may apply, at least in theory, wherever the case is heard.

112 A further issue that does not arise in these appeals is whether it is legitimate to use this factor of loss of juridical advantage within the Canadian federation. To use it too extensively in the *forum non conveniens* analysis might be inconsistent with the spirit and intent of *Morguard* and *Hunt*, as the Court sought in those cases to establish comity and a strong attitude of respect in relations between the different provinces, courts and legal systems of Canada. Differences should not be viewed instinctively as signs of disadvantage or inferiority. This factor obviously becomes more relevant where foreign countries are involved, but even then, comity and an attitude of respect for the courts and legal systems of other countries, many of which have the same basic values as us, may be in order. In the end, the court must engage in a contextual analysis, but refrain from leaning too instinctively in favour of its own jurisdiction. At this point, the decision falls within the reasoned discretion of the trial court. The exercise of discretion will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts, which, as I emphasized above, takes place at an interlocutory or preliminary stage. I will now consider whether the Ontario courts properly assumed jurisdiction in these cases and, if so, whether they should have declined to exercise it on the basis of *forum non conveniens*.

(10) Application

113 Before discussing the outcomes in the two appeals, I must note that the evidence was not the same in *Van Breda* and *Charron*, although they did raise similar legal issues and their factual matrices were the same in important aspects. The Court of Appeal rightly observed that the evidence about Club Resorts' activities in Ontario was not identical in the two cases. In particular,

the plaintiffs in *Charron*, unlike the plaintiffs in *Van Breda*, asserted that the SuperClubs group of companies, to which the appellant Club Resorts belonged, maintained an office near Toronto and that Club Resorts had availed itself of that office's services. They also relied on the fact that representatives of Club Resorts had travelled to Ontario to promote their business. Moreover, it is important to note that in considering the decisions of the courts below, this Court must show deference to the findings of fact of the judge of the Superior Court of Justice.

(a) *Van Breda*

114 In *Van Breda*, there is little evidence about the existence of sufficient factual connections. Ms. Van Breda's accident and physical injuries happened in Cuba. Mr. Berg and Ms. Van Breda were living in Ontario at the time of their trip. After the accident, however, they did not return to Ontario, as they moved first to Calgary and later to British Columbia, where they were living when they brought their action. Ms. Van Breda's damage, pain and suffering have happened mostly in British Columbia, like most of the treatments she has received. In addition, the evidence is essentially silent about Club Resorts' activities in Ontario, except on one point which I will address below. Moreover, I do not accept that evidence of advertising in Ontario would be enough to establish a connection. Advertising is often international, if not global. It is ubiquitous, crossing borders with ease. It does not, on its own, establish a connection between the claim and the forum. If advertising sufficed to create a connection with a forum, commercial organizations of a certain size could be sued in courts everywhere and anywhere in the world. The courts of a victim's place of residence would possess an almost universal jurisdiction over diverse and vast classes of consumer claims.

115 The motion judge and the Court of Appeal concluded, however, that a sufficient connection between the claim and the province arose out of the contractual relationship created between Mr. Berg and Club Resorts through the defendant Denis. Mr. Denis, who operated a specialized travel agency known as Sport au Soleil, had an agreement with Club Resorts under which he found tennis and squash professionals and sent them to Club Resorts hotels. In exchange for bed and board at a resort, each professional would give a few hours of instruction to guests of the hotel during his or her stay. It appears that Mr. Denis received some form of compensation from Club Resorts.

116 I find no reviewable error in the findings that Mr. Denis had the authority to represent Club Resorts and that a contract existed under which Mr. Berg was to provide services to Club Resorts. The benefit of this contract, accommodation at the resort, was extended to Ms. Van Breda, who was injured while there in the context of Mr. Berg's performance of his contractual obligation. Deference is owed to the motion judge's findings. No palpable and overriding error has been established. A contract was entered into in Ontario and a relationship was thus created in Ontario between Mr. Berg, Club Resorts and Ms. Van Breda, who was brought within the scope of this relationship by the terms of the contract.

117 The existence of a contract made in Ontario that is connected with the litigation is a

presumptive connecting factor that, on its face, entitles the courts of Ontario to assume jurisdiction in this case. The events that gave rise to the claim flowed from the relationship created by the contract. Club Resorts has failed to rebut the presumption of jurisdiction that arises where this factor applies. On this basis, I would uphold the Court of Appeal's conclusion that there was a sufficient connection between the Ontario court and the subject matter of the litigation.

118 Whether the Superior Court of Justice should have declined jurisdiction on the basis of the doctrine of *forum non conveniens* remains to be determined. Club Resorts had the burden of showing that a Cuban court would clearly be a more appropriate forum. I recognize that a sufficient connection exists between Cuba and the subject matter of the litigation to support an action there. The accident happened on a Cuban beach, at a hotel managed by Club Resorts. The initial injury was suffered there. Some of the potential defendants reside in Cuba. However, other issues related to fairness to the parties and to the efficient disposition of the claim must be considered. A trial held in Cuba would present serious challenges to the parties. There may be problems with witnesses, concerns about the application of local procedures, and expenses linked to litigating there. All things considered, the burden on the plaintiffs clearly would be far heavier if they were required to bring their action in Cuba. They would face substantial additional expenses and would be at a clear disadvantage relative to the defendants. They might also suffer a loss of juridical advantage. But on this point the evidence is far from clear and satisfactory. In the end, the appellant has not shown that a Cuban court would clearly be a more appropriate forum. I agree that the motion judge made no reviewable error in deciding not to decline to exercise his jurisdiction, and I would affirm the Court of Appeal's judgment dismissing the appeal from that decision.

(b) *Charron*

119 In *Charron*, the existence of a sufficient connection with the Ontario court was hotly disputed. As in *Van Breda*, the accident itself happened in Cuba. On the other hand, Mrs. Charron returned to Ontario after her husband's death and continued to reside in that province. The damage claimed by the respondents was sustained largely in Ontario. But these facts do not constitute presumptive connecting factors and do not support the assumption of jurisdiction on the basis of the real and substantial connection test.

120 However, the evidence does support the presumptive connecting factor of carrying on business in the jurisdiction. The Superior Court of Justice assumed jurisdiction, and the Court of Appeal upheld its decision, mainly on the basis of an active commercial presence in Ontario that was not limited to advertising campaigns targeting the Ontario market. In the opinion of the courts below, Club Resorts had an active presence in Ontario even though its corporate head office was not in that province. Its presence was not limited to advertising activities or to contacts with travel package wholesalers or travel agents. The courts below concluded that the appellant had engaged in significant commercial activities in Ontario, especially through the office of the SuperClubs group, before the Charrons booked their holiday. The booking resulted at least in part from those activities in Ontario. After reviewing the evidence, Sharpe J.A. wrote the following for the Court of Appeal in

respect of this factor:

> The record reveals that CRL [Club Resorts Ltd.] was directly involved in activity in Ontario to solicit business for the resort. Unlike the defendants in *Leufkens*, *Lemmex* and *Sinclair*, CRL did not confine its activities to its home jurisdiction:
>
> * pursuant to its contract with the Cuban hotel owner, CRL was required to and did promote and advertise the resort using the "SuperClubs" brand in Canada;
> * CRL relies on maintaining a high profile for the SuperClubs brand in Ontario as residents of Canada and Ontario represent a high proportion of CRL's target market;
> * CRL was licenced to use the "SuperClubs" label and itself "created" the "SuperClubs Cuba" label and used these labels to market the resort in Ontario
> * CRL's witness Abe Moore agreed on cross-examination:
>
> * "that CRL was in the business of carrying out activities in countries such as Canada to generate paying guests of the resort";
>
> * that to do so CRL had to "either directly or engage others to undertake the activity of solicitation, promotion and advertising" in Canada;
>
> * that CRL ensured that it had relationships with others to do so in Ontario to satisfy its contractual obligation to promote the resort;
>
> * CRL representatives regularly travel to Ontario to further CRL's promotional activity;
> * CRL arranged for the preparation and distribution of promotional materials in Ontario; and
> * as outlined in the following paragraph, CRL benefited from an office in Ontario that provided information and engaged in the promotion of the SuperClubs brand.

...

> In my view, one can fairly infer from this body of evidence that although CRL itself maintained no office in Ontario, CRL is implicated in and benefits from the physical presence in Ontario of an office and contact person held out to the public as representing the same "SuperClubs" brand CRL uses to carry on its business of promoting and operating the resort. [paras. 117 and 119]

121 The Superior Court of Justice considered this evidence at a preliminary stage on the basis of the parties' pleadings. The nature and weight of this evidence has been challenged in this Court. But the courts below made findings about its content and about what it meant. The appellant has not demonstrated that the motion judge made any reviewable errors, and deference must be shown to his findings of fact.

122 Although whether this factor applies was a very hard fought issue in these appeals, the motion judge's findings of fact lead to the conclusion that Club Resorts was carrying on business in Ontario. Club Resorts' commercial activities in Ontario went well beyond promoting a brand and advertising. Its representatives were in the province on a regular basis. It benefited from the physical presence of an office in Ontario. Most significantly, on cross-examination Club Resorts' witness admitted that it was in the business of carrying out activities in Canada. Together, these facts support the conclusion that Club Resorts was carrying on business in Ontario. It follows that the respondents have established that a presumptive connecting factor applies and that the Ontario court is *prima facie* entitled to assume jurisdiction.

123 Club Resorts has not rebutted the presumption of jurisdiction that arises from this presumptive connecting factor. Its business activities in Ontario were specifically directed at attracting residents of the province, including the Charron family, to stay as paying guests at the resort in Cuba where the accident occurred. It cannot be said that the claim here is unrelated to Club Resorts' business activities in the province. Accordingly, I find that the Ontario court has jurisdiction on the basis of the real and substantial connection test.

124 I also find that the motion judge made no error in declining to stay the proceedings on the basis of *forum non conveniens*. Club Resorts failed to discharge its burden of showing that a Cuban court would clearly be a more appropriate forum in the circumstances of this case. Considerations of fairness to the parties weigh heavily in the respondents' favour. The inconvenience to the individual plaintiffs of transferring the litigation is greater than the inconvenience to the corporate defendant of not doing so. On the question of juridical advantage, I refer to my comments about *Van Breda*. I would add that keeping the case in the Ontario courts will probably avert a situation in which the proceedings against the various defendants are split.

IV. Conclusion

125 For these reasons, I would dismiss Club Resorts' appeals with costs to the respondents other

than Bel Air Travel Group Ltd. and Hola Sun Holidays Limited.

Appeals dismissed with costs.

Solicitors:

Solicitors for the appellant (33692): Beard Winter, Toronto.

Solicitors for the respondents Morgan Van Breda et al. (33692): Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the appellant (33606): Fasken Martineau DuMoulin, Toronto.

Solicitors for the respondents Anna Charron et al. (33606): Adair Morse, Toronto.

Solicitors for the respondent Bel Air Travel Group Ltd. (33606): McCague Peacock Borlack McInnis & Lloyd, Toronto.

Solicitors for the respondent Hola Sun Holidays Limited (33606): Buie Cohen, Toronto.

Solicitors for the intervener Tourism Industry Association of Ontario (33606 and 33692): Torys, Toronto.

Solicitors for the interveners Amnesty International, Canadian Centre for International Justice and Canadian Lawyers for International Human Rights (33606 and 33692): Heenan Blaikie, Ottawa.

Solicitor for the intervener Ontario Trial Lawyers Association (33606 and 33692): Allan Rouben, Toronto.

TAB 12

SUPREME COURT OF CANADA

CITATION: Lapointe Rosenstein Marchand Melançon LLP *v.* Cassels Brock & Blackwell LLP, 2016 SCC 30

APPEAL HEARD: December 3, 2015
JUDGMENT RENDERED: July 15, 2016
DOCKET: 36087

BETWEEN:

Lapointe Rosenstein Marchand Melançon LLP,
Cabinet juridique Panneton inc., Heenan Blaikie LLP,
Cain Lamarre Casgrain Wells S.E.N.C.R.L., Dunton Rainville S.E.N.C.R.L.,
Jean-Pierre Barrette, Prévost Fortin D'Aoust S.E.N.C.R.L.,
Dominique Zaurrini, Francis Carrier Avocat inc.,
Parent, Doyon, Rancourt & Associés S.E.N.C.R.L.,
Claude Caron, Gérard Desjardins, Claude Cormier,
Guertin Lazure Crack S.E.N.C.R.L., Luc Boulais avocat inc.,
Lavery, de Billy, LLP, Grenier Verbauwhede Avocats inc.,
Zaurrini Avocats, Louis Riverin, Paul Langevin,
Roy Laporte inc., Norton Rose OR LLP, Girard Allard Guimond Avocats,
Langlois Kronström Desjardins avocats S.E.N.C.R.L., Perreault Avocat,
Cliche Lortie Ladouceur inc., Gilles Lavallée,
Lévesque Gravel & Associés S.E.N.C., Michel Paquin,
Sylvestre & Associés avocats S.E.N.C.R.L. and Nolet Ethier, avocats,
S.E.N.C.R.L.
Appellants

and

Cassels Brock & Blackwell LLP
Respondent

CORAM: McLachlin C.J. and Abella, Cromwell, Karakatsanis, Wagner, Gascon and Côté JJ.

REASONS FOR JUDGMENT: (paras. 1 to 61) — Abella J. (McLachlin C.J. and Cromwell, Karakatsanis, Wagner and Gascon JJ. concurring)

DISSENTING REASONS: (paras. 62 to 146) — Côté J.

**Lapointe Rosenstein Marchand Melançon LLP,
Cabinet juridique Panneton inc., Heenan Blaikie LLP,
Cain Lamarre Casgrain Wells S.E.N.C.R.L.,
Dunton Rainville S.E.N.C.R.L., Jean-Pierre Barrette,
Prévost Fortin D'Aoust S.E.N.C.R.L.,
Dominique Zaurrini, Francis Carrier Avocat inc.,
Parent, Doyon, Rancourt & Associés S.E.N.C.R.L.,
Claude Caron, Gérard Desjardins, Claude Cormier,
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Roy Laporte inc., Norton Rose OR LLP,
Girard Allard Guimond Avocats,
Langlois Kronström Desjardins avocats S.E.N.C.R.L.,
Perreault Avocat, Cliche Lortie Ladouceur inc.,
Gilles Lavallée, Lévesque Gravel & Associés S.E.N.C.,
Michel Paquin, Sylvestre & Associés avocats S.E.N.C.R.L. and
Nolet Ethier, avocats, S.E.N.C.R.L.** *Appellants*

v.

Cassels Brock & Blackwell LLP *Respondent*

Indexed as: Lapointe Rosenstein Marchand Melançon LLP *v.* Cassels Brock & Blackwell LLP

2016 SCC 30

File No.: 36087.

2015: December 3; 2016: July 15.

Present: McLachlin C.J. and Abella, Cromwell, Karakatsanis, Wagner, Gascon and Côté JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Private international law — Choice of forum — Court having jurisdiction — Forum non conveniens — Whether Ontario courts should assume jurisdiction over third party claim brought by Ontario law firm against several law firms located in Quebec in the context of national class action certified in Ontario — If so, whether Ontario courts ought to decline to exercise jurisdiction on ground that court of another jurisdiction is clearly a more appropriate forum for disposing of litigation.

One of the casualties of the financial crisis in 2008 was the Canadian automotive sector. To assist, the federal government bailed out some of the country's auto manufacturers in 2009, including General Motors of Canada Ltd (GM). A term of the government's bailout of GM was that it close dealerships across the country. Over 200 Canadian dealerships were closed. GM offered compensation to each dealer pursuant to Wind-Down Agreements. Two hundred and seven GM dealers who had been closed down started a class action in Ontario, alleging that GM had forced them to sign Wind-Down Agreements, and that the law firm of Cassels Brock & Blackwell LLP (Cassels Brock) was negligent in failing to provide appropriate legal advice. Cassels Brock added 150 law firms from across the country as third party defendants, seeking contribution and indemnity from the law firms who gave the individual dealers the independent legal advice required under the Agreements. Eighty-three

non-Ontario law firms challenged Ontario's jurisdiction, including 32 based in Quebec. The motions judge dismissed the challenge. Only the 32 Quebec law firms appealed. The Ontario Court of Appeal dismissed the appeal.

Held (Côté J. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and **Abella**, Cromwell, Karakatsanis, Wagner and Gascon JJ.: Before a court can assume jurisdiction over a claim, a real and substantial connection must be shown between the circumstances giving rise to the claim and the jurisdiction where the claim is brought. This Court's decision in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, sets out the test for establishing the requisite connection in tort claims, and identified four presumptive connecting factors. All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum where jurisdiction is proposed to be assumed.

This case engages the fourth factor: whether a contract connected with the dispute was made in the province. The fourth factor premises the determination of when a contract will be made in a given jurisdiction on the traditional rules of contract formation. All that is required is a connection between the claim and a contract that was made where jurisdiction is sought to be assumed. A connection does not necessarily require that an alleged tortfeasor be a party to the contract. Nothing in *Van Breda* suggests that the fourth factor is unavailable when more than one contract is involved, or that a different inquiry applies in these circumstances. Nor does *Van*

Breda limit this factor to situations where the defendant's liability flows immediately from his or her contractual obligations. It is sufficient that the dispute be connected to a contract made in the province or territory where jurisdiction is proposed to be assumed. This merely requires that a defendant's conduct brings him or her within the scope of the contractual relationship and that the events that give rise to the claim flow from the relationship created by the contract. The fact that another forum may also be connected with the dispute does not undermine the existence of a real and substantial connection.

The first step is identifying the dispute. The nucleus of the claim against Cassels Brock, as well as that of Cassels Brock's third party claim against the local lawyers who signed certificates of independent legal advice, relates to the claims that there was negligent legal advice about the Wind-Down Agreements. The dispute is therefore a tort claim for professional negligence.

The next question is whether a contract connected with this dispute was made in Ontario. The contract connected with this dispute is the Wind-Down Agreement, which is clearly connected to Cassels Brock's third party claims against the local lawyers. Valid acceptance of GM's offer required that each individual dealer obtain independent legal advice. The local lawyers' provision of legal advice brought them within the scope of the contractual relationship between GM and the dealers.

In Ontario, a contract is formed based on an offer by one party, accepted by the other, or by an exchange of promises, supported by consideration. Where the

contracting parties are located in different jurisdictions, the contract will be formed in the jurisdiction where the last essential act of contract formation, such as acceptance, took place. Here, the contract in question was made in Ontario. The last act essential to contract formation occurred at GM's office in Ontario, where its Vice President of Sales, Service & Marketing accepted and signed the Wind-Down Agreements that had been signed and returned by the dealers. Other contextual factors demonstrate that the Agreement was made in Ontario: the Agreement expressly provides that it is governed by Ontario law, GM's head office and the bulk of the affected dealers were located in Ontario, and the business relationships and the litigation are deeply related to Ontario.

Cassels Brock has therefore demonstrated a real and substantial connection between a contract made in the province (the Wind-Down Agreement) and the dispute (the third party negligence claim). The strength of this connection was not rebutted by the Quebec lawyers. The Ontario courts, therefore, properly assumed jurisdiction over the claim.

Once jurisdiction is established, the party contesting jurisdiction may raise the doctrine of *forum non conveniens*. The burden is on the defendant to demonstrate that a court of another jurisdiction has a real and substantial connection to the claim and that this alternative forum is clearly more appropriate than the one where jurisdiction may be assumed. This threshold will be met where the alternative forum would be fairer and more efficient for disposing of the litigation. It is not

sufficient that the alternative forum merely be comparable to the forum where jurisdiction has been found to exist. *Forum non conveniens* is not concerned only with fairness to the party contesting jurisdiction, it is also concerned with efficiency and convenience for the proceedings themselves.

In this case, the third party claims against the other 118 law firms will be heard in Ontario. This strongly weighs against finding that the Quebec courts are a clearly more appropriate forum for the 32 Quebec firms. Allowing the Quebec third party claims to proceed in Ontario along with the 118 other law firms, would clearly be a more efficient and effective solution. Because the third party claims involve a significant number of parties and require the mobilization of significant judicial resources, those resources should be allocated and expended with a view to making the litigation quicker, more economical and less complicated. Adjudicating all the third party claims in the same forum avoids the possibility of conflicting judgments and duplication in fact-finding and legal analysis, and will ensure that they are resolved in a timelier and more affordable manner. All of this leads to the conclusion that Ontario should assume jurisdiction over all the third party claims, including those involving the Quebec law firms.

Per **Côté** J. (dissenting): At the heart of this dispute is the fourth connecting factor set out in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, which provides Ontario with presumptive jurisdiction when a contract connected with the dispute was made in the province.

In this case, the relevant Wind-Down Agreements were simply not made in Ontario. Under the law of Ontario, a contract will be considered formed where the last essential act of contract formation takes place — in other words, where final acceptance is notified. Here, GM's notice of final acceptance was itself an essential condition for the Wind-Down Agreements to become binding, and was clearly the last essential formative act. In Ontario, acceptance of a contract will be considered notified in the place where it is received. In this case, GM's notice of final acceptance was transmitted to its Quebec dealers in Quebec. As such, the relevant Wind-Down Agreements in respect of the Quebec dealers would have been formed in Quebec. Contextual considerations, like the choice of law clause, and the fact that the bulk of the terminated dealers, as well as GM's head office, are located in Ontario, have nothing to do with where the Quebec dealers' Agreements were formed. Furthermore, if these considerations are given weight, the parties' own desires regarding where their contract is formed risk becoming irrelevant.

Even if the Agreements had been concluded in Ontario, they are not connected with these claims in the manner required by *Van Breda*'s fourth connecting factor. This fourth connecting factor only provides jurisdiction over claims where the defendant's liability in tort flows immediately from the defendant's own contractual obligations. Indeed, in these kinds of cases, the claim in tort will often resemble a claim in contract. This may occur in cases of concurrent liability, where a defendant's failure to exercise reasonable skill and care may constitute, at once, both a breach of contract and a tort. This may also occur in cases where a third party beneficiary to a

contract has a claim in tort for acts which occurred in the performance — and potential breach — of that contract. In these cases, the defendant's breach of contract and his tort are indissociable. Indeed, the duty of care the defendant owes stems from his contract. Establishing jurisdiction over these kinds of claims in tort represents the underlying rationale of *Van Breda*'s fourth connecting factor. It is what makes this factor both a defensible and a desirable conflicts rule. This may represent a narrow interpretation, but it reflects the way the fourth connecting factor was described, justified and applied in *Van Breda*.

On this narrow interpretation of *Van Breda*'s fourth factor, the courts of Ontario clearly do not have jurisdiction over Cassels Brock's third party claims. The only contracts that could possibly be close enough to the dispute are the retainer agreements concluded between the Quebec lawyers and their clients. The Wind-Down Agreements — the subject of the Quebec lawyers' legal advice — are simply too remote. The Quebec lawyers were never brought within the scope of the contractual relationship between GM and the dealers. They were not parties to the Agreements, never owed any obligations under them, were never owed any benefit under them, and are not being sued in tort for actions committed in their performance. Instead, their obligations flow entirely from their retainer agreements. The most that can be said is that the Wind-Down Agreements contributed to the factual circumstances following which an entirely separate fault or breach occurred.

The majority's approach to *Van Breda*'s fourth factor misconstrues what it means for a contract to be connected with a claim in tort. The broad scope given to *Van Breda*'s fourth connecting factor by the majority divorces it from its specific and limited foundations. In doing so, this broader approach will lead to jurisdictional overreach. In this case, the requirement of independent legal advice is entirely unrelated to the quality of the legal advice that was obtained in Quebec, and that forms the basis of each claim. Nor can this requirement bring the Quebec lawyers within the scope of the dealers' contractual relationship with GM. There is also nothing real or substantial about the fact that the allegedly negligent legal advice was about the Wind-Down Agreement. Every day, lawyers advise clients on contracts that will eventually be formed in another province. If these contracts are a fount of jurisdiction, then such lawyers could be sued for negligence wherever the contracts are entered into.

The majority's approach also muddies an area of the law that should be kept clear and jeopardizes the certainty and predictability that was promised by *Van Breda*'s purposefully specific connecting factors. On a more restrained approach, it should always be clear when the fourth connecting factor can serve as a basis for jurisdiction. By contrast, the majority's approach amounts to an open invitation for litigants to engage in long-winded jurisdictional debates, since the words "connected with" and "connection" are notoriously flexible and fact-specific.

There may also be harmful commercial implications that flow from the majority's broader approach to the fourth connecting factor, as well as negative repercussions on the practice of law itself. The majority's holding means that whenever a lawyer's advice is required before his client can accept an offer, that lawyer may later be sued for professional negligence wherever the resulting contract is formed, regardless of where his services were provided. Such lawyers may feel conflicted, since they will likely have a personal stake in where their client's contract is entered into.

With respect to the claims against the two national law firms which have offices both in Quebec and in Ontario, whatever jurisdiction the courts of Ontario have over these claims should be declined on the basis of *forum non conveniens*. It is clear that Quebec is the more appropriate forum for the third party claims against the two national law firms. If these claims were heard in Ontario, the lawyers and witnesses involved, who are all residents of Quebec, would all have to travel to testify, incurring significant costs. Furthermore, since Quebec law will govern the claims against the national law firms with offices in Quebec, additional costs would be incurred to provide an Ontario court with expertise on Quebec law. Finally, if the claims against the Quebec law firms were to be divided between Quebec and Ontario, there is a risk of conflicting decisions.

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By Côté J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, LaForme and Lauwers JJ.A.), 2014 ONCA 497, 120 O.R. (3d) 598, 53 C.P.C. (7th) 1, 374 D.L.R. (4th) 411, 322 O.A.C. 161, [2014] O.J. No. 3096 (QL), 2014 CarswellOnt 8775 (WL Can.), affirming a decision of Belobaba J., 2013 ONSC 2289, 51 C.P.C. (7th) 419, [2013] O.J. No. 2358 (QL), 2013 CarswellOnt 6666 (WL Can.). Appeal dismissed, Côté J. dissenting.

Jo-Anne Demers and *Jean-Olivier Lessard*, for the appellants.

Peter H. Griffin and *Jon Laxer*, for the respondent.

The judgment of McLachlin C.J. and Abella, Cromwell, Karakatsanis, Wagner and Gascon JJ. was delivered by

ABELLA J. —

[1] Even if the underlying facts involve another jurisdiction, a Canadian court can, if there is a sufficient connection, assume jurisdiction over a tort claim. In *Van Breda*,[1] this Court identified four "presumptive connecting factors" to assist in making this determination. This appeal focuses on the fourth factor, whereby jurisdiction can be assumed if a contract connected with the dispute was made in the province where the tort claim is brought.

[1] *Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572.

[2] The specific question in this appeal is whether the Ontario courts should assume jurisdiction over a third party claim brought by an Ontario law firm against several law firms located in Quebec in the context of a national class action.

Background

[3] One of the casualties of the financial crisis in 2008 was the Canadian automotive sector. To assist, the federal government bailed out some of the country's auto manufacturers in 2009, including General Motors of Canada Ltd. A term of the bailout was the requirement that GM Canada close dealerships across the country.

[4] Over 200 Canadian dealerships were closed. GM Canada offered compensation to each dealer pursuant to Wind-Down Agreements. The Agreements contained the following provisions of particular relevance:

> Article 13: "This Agreement is governed by the laws of the Province of Ontario."
>
> Article 19: "The parties consent and agree that the courts of the Province of Ontario have exclusive jurisdiction to hear and determine claims or disputes between the parties hereto pertaining to this Agreement."

[5] All dealers also had to agree to waive their rights under any and all applicable statutes, regulation or other law, including rights under provincial franchise laws.[2]

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[2] 5. Release; Covenant Not to Sue; Indemnity.

(a) Each Dealer and Dealer Operator on their own behalf and on behalf of any of their respective Affiliates, members, partners, venturers, shareholders, Dealer Owners, officers, directors, employees, agents, spouses, legal representatives, heirs, administrators, executors, successors, and assigns (collectively, the "Dealer Parties"), hereby absolutely and irrevocably . . . releases, settles, cancels, discharges, and acknowledges to be fully satisfied any and all claims, demands, complaints, damages, debts, liabilities, obligations, costs, expenses, liens, actions, and causes of action of every kind and nature whatsoever (including without limiting the generality of the foregoing, negligence), whether known or unknown, foreseen or unforeseen, suspected or unsuspected, in law or in equity ("Claims"), which any of the Dealer Parties may have as of the Effective Date or may thereafter have or acquire at any time against GM, its Affiliates, or any of its or their members, partners, venturers, shareholders, officers, directors, employees, agents, spouses, legal representatives, heirs, administrators, executors, successors, or assigns (collectively, the "GM Entities"), arising out of or relating to:

. . .

(v) . . . *any and all applicable statute, regulation, or other law, including Ontario's Arthur Wishart Act (Franchise Disclosure), 2000, Alberta's Franchises Act, Prince Edward Island's Franchises Act and/or any other similar franchise legislation which may be enacted or proclaimed in force in the future (collectively, the "Acts")*. Dealer and Dealer Operator acknowledge that it has always been and continues to be GM's position that the Acts are not applicable to the Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator. However, if a court were to conclude otherwise, Dealer and Dealer Operator specifically acknowledge that it and they are hereby waiving any and all rights given to it or them under the Acts and are hereby releasing GM and the other GM Entities from any obligation or requirement imposed on GM and/or any of the other GM Entities by the Acts and further acknowledge that they are doing so with full awareness of such rights, obligations and requirements, and intend to waive its and their rights to: (1) any Claim for a breach of the duty of fair dealing in the performance or enforcement of or exercise of any right under the Dealer Agreement; (2) any Claim for GM and/or any of the other GM Entities penalizing, attempting to penalize or threatening to penalize the Dealer and/or the Dealer Operator for associating with other GM dealers or retailers; (3) any Claim for damages for a misrepresentation contained in a disclosure document or a statement of material change; (4) any Claim for rescission for failure to provide a disclosure document or a statement of material change as required by the Acts; (5) any Claim for rescission for failure to provide a disclosure document or a statement of material change within the time required by the Acts; (f) any Claim for rescission for providing a deficient disclosure document or statement of material change as required by the Acts; and (g) any other Claims arising under one or more or all of the Acts; . . . [Emphasis added.]

[6] Attached to each Agreement was a letter dated May 20, 2009 from Marc Comeau, GM Canada's Vice President of Sales, Service & Marketing, sent from his office in Oshawa, Ontario. It states, in part:

> Our offer, as set out in the Wind-Down Agreement, is conditional upon all of the Non-Retained Dealers accepting the offer (the "Acceptance Threshold Condition") and executing and delivering their respective Wind-Down Agreements to GM Canada on or before May 26, 2009 at 6:00 pm EST (the "End of the Offer Period"). *GM Canada reserves the right, in its discretion, to waive the Acceptance Threshold Condition. Any Wind-Down Agreement signed and returned to GM Canada by the End of the Offer Period will not become effective unless and until GM Canada provides written notice to those dealers that the Acceptance Threshold Condition and any other required conditions have been met or have been waived by GM Canada.* [Emphasis added; emphasis in original deleted.]

[7] The letter also included a requirement that each dealer get independent legal advice and a certificate signed by the retained lawyer. The signed certificate was to be attached as an Exhibit to the Wind-Down Agreement:

> If you are interested in entering into the Wind-Down Agreement, you should review the Wind-Down Agreement with legal, tax and any other advisors of your choosing. To accept, please request your counsel to complete a certificate of independent legal advice (attached as an Exhibit to the Wind-Down Agreement). Please send the signed certificate together with the executed Wind-Down Agreement by the End of the Offer Period by pdf or fax to your Regional Zone Office Manager . . . with two original signed copies of the Agreement, each with an original signed Certificate, to follow by courier.

[8] The signed certificate of independent legal advice had to acknowledge that the lawyer had been retained by the dealer, had read the Wind-Down Agreement, and had fully explained the nature and effect of the Agreement to the dealer,

including an explanation of the waivers, releases and indemnification obligations contained in the Agreement. Each dealer, in turn, had to acknowledge on the certificate that he or she had carefully read it.

[9] Mr. Comeau sent another letter to the affected dealers 10 days later advising them that because of the high acceptance rate of dealers, GM Canada was waiving the threshold condition that *all* dealers sign the Wind-Down Agreements.

[10] Two hundred and seven GM Canada dealers started a class action against GM Canada in Ontario, alleging that GM Canada had forced them to sign the Wind-Down Agreements in breach of provincial franchise laws. They also alleged that the law firm of Cassels Brock & Blackwell LLP, counsel for the Canadian Automobile Dealers Association, was negligent in the legal advice it gave to the General Motors dealers who were members of the Canadian Automobile Dealers Association and therefore had access to that legal advice.

[11] Additionally, the dealers claimed that because Cassels Brock was on retainer to Industry Canada — from whom GM Canada needed funding — at the time it was retained by the Canadian Automobile Dealers Association, it had a conflict of interest.

[12] The total amount of damages claimed was $750 million.

[13] The class action was certified by Strathy J. in 2011. The Ontario Court of Appeal refused leave to appeal the certification in 2012.

[14] Relying on rule 29 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and the *Negligence Act*, R.S.O. 1990, c. N.1, Cassels Brock added 150 law firms as third party defendants. Sixty-seven were based in Ontario, 32 in Quebec, and 51 in the 8 remaining provinces — 19 in Alberta, 7 in Nova Scotia, 6 in each of British Columbia, Saskatchewan and Manitoba, 5 in New Brunswick, and 1 in each of Newfoundland and Labrador and Prince Edward Island. Six of these firms were national and had offices in Ontario.

[15] The basis for the third party claims was that if Cassels Brock was found to be negligent in failing to provide appropriate legal advice, it was seeking contribution and indemnity from the third party law firms who gave the individual dealers independent legal advice.

[16] The 32 law firms based in Quebec, and, separately, the other 51 non-Ontario law firms, claimed in two motions that because they were not domiciled or resident in Ontario and did not carry on business there, there was an insufficient connection between the third party claims and the Ontario courts. Nor did they give any legal advice in Ontario. Alternatively, they argued that even if the Ontario courts had jurisdiction, they ought to decline to exercise it based on *forum non conveniens*.

[17] Belobaba J. dismissed the motions.[3] In his view, the fourth *Van Breda* factor was met because there was a "real and substantial connection" between a contract made in the province (the Wind-Down Agreement) and the dispute (between Cassels Brock and the local lawyers).

[18] Belobaba J. based this conclusion on the fact that the Wind-Down Agreement expressly addressed the issue of the provision of legal advice. Any lawyer reviewing the Agreement would have known from the Agreement that it was governed by Ontario law and that all disputes were to be litigated in Ontario. More importantly, the Wind-Down Agreement itself contemplated and required the involvement of local lawyers: it required each dealer to obtain independent legal advice about the Agreement, and obliged the lawyer providing the advice to sign a certificate confirming the lawyer had read the Agreement and explained its nature and effect to the dealer. As a result, while the lawyers were not parties to the Wind-Down Agreement, they were brought within the scope of this contractual relationship by providing legal advice to the dealers. Finally, the third party tort claim deals squarely with the provision and adequacy of the local lawyers' legal advice. It should not, as a result, "surprise the local lawyers if they were added as third parties to the Ontario class action that was brought by their clients. Indeed it would be crazy for [Cassels Brock] not to do so".

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[3] *Trillium Motor World Ltd. v. General Motors of Canada Ltd.* (2013), 51 C.P.C. (7th) 419 (Ont. S.C.J.).

[19] Belobaba J. also refused to accede to the invitation to decline jurisdiction on the basis of *forum non conveniens*. Thirty-two law firms were based in Quebec and the 51 remaining firms were "scattered" across the other 8 provinces.

[20] He relied on *Breeden v. Black*, [2012] 1 S.C.R. 666, released the same day as *Van Breda*, and summarized the test as follows:

> When defendants are scattered over a number of jurisdictions and only one forum can be selected, the forum selected by the plaintiff can only be displaced if the defendants can point to an alternative forum that is "clearly more appropriate". [para. 48]

[21] Since Cassels Brock's third party action against the 67 Ontario-based law firms was already proceeding in Ontario, Belobaba J. concluded that it "cannot be seriously maintained" that Quebec, with only 32 firms, or Alberta, with only 19, were "clearly more appropriate" forums.

[22] Only the 32 Quebec law firms appealed Belobaba J.'s judgment. Lauwers J.A. agreed with Belobaba J.[4] He confirmed that the Wind-Down Agreement is the relevant contract in applying the fourth *Van Breda* factor to these third party actions. He also agreed that the Agreement was formed in Ontario and was governed by Ontario law. The real and substantial connection between the third party actions and the Agreement was also clear. While recognizing that satisfying the procedural requirements for third party claims does not necessarily give rise to a real and

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[4] *Trillium Motor World Ltd. v. General Motors of Canada Limited* (2014), 120 O.R. (3d) 598 (C.A.).

substantial connection for the purpose of jurisdiction, in this case there was an "integral relationship" between the Wind-Down Agreements, the retainers between the local lawyers and the Quebec class members, the advice the local lawyers gave, and the certificates of independent legal advice they were obliged to sign.

[23] The Court of Appeal also agreed that jurisdiction should not be declined on the basis of *forum non conveniens*. Because only the 32 Quebec law firms appealed, almost 120 law firms were going to have their cases determined in Ontario. This made it hard to accept that Quebec was a "clearly more appropriate" forum than Ontario, where all the other third party defendants were going to litigate what were essentially common defences.

[24] For the following reasons, I would dismiss the appeal.

Analysis

[25] Before a court can assume jurisdiction over a claim, a "real and substantial connection" must be shown between the circumstances giving rise to the claim and the jurisdiction where the claim is brought: *Van Breda*, at paras. 22-24; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, at para. 60; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1049; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at pp. 325-26 and 328; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1108-10.

[26] This Court's decision in *Van Breda* sets out the refined and revised test for establishing the requisite connection in tort claims. Writing for a unanimous Court, LeBel J. identified four non-exhaustive presumptive connecting factors:

1. The defendant is domiciled or resident in the province;

2. The defendant carries on business in the province;

3. The tort was committed in the province; or

4. A contract connected with the dispute was made in the province.

[27] As LeBel J. noted, "[a]ll presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum" where jurisdiction is proposed to be assumed: para. 92. The existence of this relationship makes it "reasonable to expect that the defendant would be called to answer legal proceedings in that forum": para. 92. The burden of establishing the application of a presumptive factor in a given case lies with the party asserting jurisdiction. There is no requirement that more than one factor be shown to apply in a given case. The presumption arising from each of these factors may be rebutted by the party resisting jurisdiction by showing that there is no real relationship — or only a weak relationship — between the subject matter of the litigation and the proposed forum: paras. 95-100; Joost Blom, "New Ground Rules for Jurisdictional Disputes: The *Van Breda* Quartet" (2012), 53 *Can. Bus. L.J.* 1, at pp. 9-10 and 14.

[28] As *Van Breda* makes clear, the underlying objective of *all* presumptive connecting factors is to pacify the tension between flexibility and predictability, a "constant theme" in the Canadian law of jurisdiction: para. 66; Tanya J. Monestier, "(Still) a 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2013), 36 *Fordham Int'l L.J.* 396, at p. 411.

[29] Under *Van Breda*, predictability is ensured by premising the assumption of jurisdiction on objective, factual connecting factors, giving the parties "reasonable confidence" as to whether jurisdiction will be assumed in a given case: para. 73; Monestier, at pp. 397-98 and 411.

[30] Flexibility is ensured by acknowledging "the need for fairness and justice to all parties engaged in litigation" when selecting and applying the presumptive connecting factors: *Van Breda*, at para. 75. In LeBel J.'s view, the list of presumptive connecting factors must be updated "as the needs of the system evolve": para. 82. *Van Breda* did not purport to set out "a complete code of private international law"; it specifically foresaw that the principles and factors governing jurisdiction would be "developed as problems arise before the courts": para. 68.

[31] The four *Van Breda* factors differ in the way they respectively seek to reconcile flexibility and certainty. The fourth factor promotes certainty by premising the determination of when a contract will be "made" in a given jurisdiction on the traditional rules of contract formation: see Blom, at pp. 16-17; Monestier, at p. 428; *Neophytou v. Fraser* (2015), 63 C.P.C. (7th) 13, at paras. 4-5; *Eco-Tec Inc. v. Lu*

(2015), 343 O.A.C. 140, at paras. 16-17.[5] These rules are well known, as are their exceptions, limitations and governing principles. The parties' ability to tailor these rules and principles also ensures "reasonable confidence" as to when jurisdiction will or will not be assumed under the fourth factor. They can, in other words, determine how and where a given contract will be formed.

[32] The fourth factor also promotes flexibility and commercial efficiency. As seen in *Van Breda*, all that is required is a connection between the claim and a contract that was made in the province where jurisdiction is sought to be assumed. A "connection" does not necessarily require that an alleged tortfeasor be a party to the contract. To so narrow the fourth presumptive factor would unduly narrow the scope of *Van Breda*, and undermines the flexibility required in private international law.

[33] Flexibility in applying the fourth factor does not amount to jurisdictional overreach. Conflict rules vary from one jurisdiction to another. In Quebec, for example, under art. 3148 of the *Civil Code of Québec*, Quebec authorities have jurisdiction over an action in extra-contractual liability where a fault was committed in Quebec or the injury was suffered there. Nonetheless, under art. 3139, if a Quebec authority has jurisdiction to rule on the principal demand, it would also have jurisdiction to rule on an incidental demand, which could include a third party claim. In a case like the one before us — and subject to any *forum non conveniens* argument — if the main contract had been made in Quebec and governed by the laws of

[5] Leave to appeal in *Eco-Tec Inc.* dismissed (May 5, 2016), Doc. 36825 (S.C.C.).

Quebec, Quebec would have jurisdiction not only over Quebec lawyers sued in the principal demand, but also over any Ontario lawyers sued by the Quebec lawyers in third party claims for any professional fault allegedly committed in Ontario by the Ontario lawyers.

[34] Further, the real and substantial connection test has never been concerned with showing "the strongest" possible connection between the claim and the forum where jurisdiction is sought to be assumed: *Van Breda*, at para. 34.

[35] Nor does the fact that another forum may also be connected with the dispute undermine the existence of a real and substantial connection. *Van Breda* expressly recognized that there will be "situations in which more than one court might claim jurisdiction": para. 15. However, the question of whether another forum is more appropriate plays no part in the analysis for assuming jurisdiction. This issue is only relevant once jurisdiction has *already* been assumed, and where the defendant seeks to convince the court that the other forum is "clearly more appropriate" under the doctrine of *forum non conveniens*: *Van Breda*, at paras. 101-2.

[36] Because this case engages the fourth presumptive connecting factor, namely whether a contract connected with the dispute was made in Ontario, it is necessary to identify the dispute. It must then be determined whether the dispute is connected to a contract "made" in the province where jurisdiction is proposed to be assumed: *Van Breda*, at para. 90.

[37] The first step is identifying the dispute.

[38] The nucleus of the claim against Cassels Brock, as well as that of Cassels Brock's third party claim against the local lawyers who signed certificates of independent legal advice, relates to the claims that there was negligent legal advice about the Wind-Down Agreements. It cannot therefore seriously be contested that the dispute is a tort claim for professional negligence.

[39] The next question is whether a contract connected with this dispute was made in Ontario: *Van Breda*, at para. 90. I agree with the motions judge and with the Court of Appeal that it was. In fact, at the motion stage, the Quebec lawyers conceded that the Wind-Down Agreement was made in Ontario. Only during oral argument before the Court of Appeal did the Quebec lawyers change their position. But even in the absence of this concession, no error was made by the motions judge or by the Court of Appeal which would justify this Court's intervention.

[40] In Ontario, a contract is formed based on an offer by one party, accepted by the other, or by an exchange of promises, supported by consideration: *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, [2007] 3 S.C.R. 679, at para. 16; John D. McCamus, *The Law of Contracts,* (2nd ed. 2012), at pp. 31-32. Where the contracting parties are located in different jurisdictions, the contract will be formed in the jurisdiction where the last essential act of contract formation, such as acceptance, took place: see McCamus, at pp. 77-78; see also S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at paras. 108-9.

[41] In this case, the clear conditions of acceptance, as well as the last essential act to contract formation, were set out in the May 20, 2009 letter from Marc Comeau, which was attached to the Wind-Down Agreement:

> Any Wind-Down Agreements signed and returned to GM Canada by the End of the Offer Period will not become effective unless and until GM Canada provides written notice to those dealers that the Acceptance Threshold Condition and any other required conditions have been met or have been waived by GM Canada.

[42] I agree with the Court of Appeal that the last act essential to contract formation occurred at GM Canada's office in Oshawa, Ontario, where Marc Comeau accepted and signed the Wind-Down Agreements that had been signed and returned by the dealers.

[43] The letter dated May 20, 2009 states that the agreement would take effect when GM Canada "provides written notice" to the terminated dealers who accepted its offer; it did not require that the dealers *receive* the notice for the Agreement to take effect. The notice merely *confirmed* that the conditions for the Agreement to become effective had been met, which means that its receipt in Quebec by the Quebec lawyers does not alter where the Agreement was made. As Lauwers J.A. held, "the stipulated manner in which the [Wind-Down Agreements] would become effective renders inapplicable the general rule that a contract transmitted instantaneously is made in the jurisdiction where acceptance is received": para. 67. The Wind-Down Agreement was, therefore, "made" in Ontario, the province where the claim was brought.

[44] It is worth noting that nothing in *Van Breda* suggests that the fourth factor is unavailable when more than one contract is involved, or that a different inquiry applies in these circumstances. Nor does *Van Breda* limit this factor to situations where the defendant's liability flows immediately from his or her contractual obligations, or require that the defendant be a *party* to the contract: *Pixiu Solutions Inc. v. Canadian General-Tower Ltd.*, 2016 ONSC 906, at para. 28 (CanLII). It is sufficient that the dispute be "connected" to a contract made in the province or territory where jurisdiction is proposed to be assumed: *Van Breda*, at para. 117. This merely requires that a defendant's conduct brings him or her within the scope of the contractual relationship and that the events that give rise to the claim flow from the relationship created by the contract: paras. 116-17.

[45] The basis of the Ontario courts assuming jurisdiction in *Van Breda* is illustrative. The contract was not made between Ms. Van Breda and the defendant Club Resorts Ltd., it was made between Club Resorts Ltd., an Ottawa travel agent, and Ms. Van Breda's husband. The travel agent's business involved finding racquet sport instructors for Club Resorts. Ms. Van Breda's husband was a squash player. In exchange for a few hours of tennis instruction to hotel guests, he and Ms. Van Breda were given free bed and board at the resort. As a result of serious injuries she suffered during her trip, Ms. Van Breda sued Club Resorts in tort.

[46] This Court concluded that the events giving rise to her claim flowed from the relationship created by the contract between Ms. Van Breda's husband and the

Ottawa travel agent. The Court acknowledged that the accident happened at the Cuban hotel managed by Club Resorts, and that Ms. Van Breda's initial injuries were suffered in Cuba. It also recognized that some of the potential defendants resided there, and that a sufficient connection existed between Cuba and the tort claim to support an action in that jurisdiction: *Van Breda*, at para. 118. Nonetheless, the Court held that the existence of the contract concluded in Ontario was sufficient to establish a real and substantial connection between the resort and Ms. Van Breda under the fourth presumptive connecting factor.

[47] Here, the Wind-Down Agreement is clearly connected to Cassels Brock's third party claims against the local lawyers. As noted, the Agreement itself contemplated and required the involvement of the local lawyers. Valid acceptance of GM Canada's offer required that each individual dealer return a signed copy of the certificate of independent legal advice. The certificate required the signature of the local lawyer retained by each dealer. The lawyer's signature attested to his or her having been retained by the dealer, having read the Wind-Down Agreement, and having explained the nature and effect of the Agreement to each dealer. This included an explanation of the releases, waivers and indemnification obligations *contained in the Agreement*. Each lawyer was also required to confirm his or her belief that the client dealer was fully advised about all of these matters. This cannot be divorced from the quality of the legal advice provided, and is inextricable from the third party claim. To use the language of *Van Breda*, the local lawyers' provision of legal advice

brought them within the scope of the contractual relationship between GM Canada and the dealers.

[48] Finally, Article 13 of the Wind-Down Agreement expressly provides that the Agreement is governed by Ontario law. Along with the facts that General Motors' head office was located in Ontario, that the bulk of the affected dealers were also located in Ontario, and that "[t]he underlying structure of the business relationships and the litigation are deeply related to Ontario" (para. 71), Lauwers J.A. found that this too was a contextual factor in demonstrating that the Agreement is a contract made in Ontario.

[49] Cassels Brock has therefore demonstrated a real and substantial connection between a contract made in the province (the Wind-Down Agreement) and the dispute (the third party negligence claim). The strength of this connection was not rebutted by the Quebec lawyers.

[50] The Ontario courts, therefore, properly assumed jurisdiction over the claim. This makes it unnecessary to accept Cassels Brock's invitation to recognize a new, fifth presumptive connecting factor relating to class actions, or to determine whether jurisdiction could be assumed under the second *Van Breda* factor.

[51] Finding that there is a real and substantial connection does not automatically mean that a court will assume jurisdiction over a claim: *Van Breda*, at paras. 100-102; *Breeden*, at para. 22. Once jurisdiction is established, the party

contesting jurisdiction may raise the doctrine of *forum non conveniens*, and attempt to "show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff": *Van Breda*, at para. 103.

[52] The burden is on the defendant to demonstrate that a court of another jurisdiction has a real and substantial connection to the claim and that this alternative forum is "*clearly* more appropriate" than the one where jurisdiction may be assumed: *Breeden*, at para. 37 (emphasis in original); and *Van Breda*, at para. 109 (emphasis added). This threshold will be met where, based on its "characteristics", the alternative forum "would be fairer and more efficient" for disposing of the litigation: *Van Breda*, at para. 109. It is not sufficient that the alternative forum merely be "comparable" to the forum where jurisdiction has been found to exist: para. 109. *Forum non conveniens* is not concerned only with fairness to the party contesting jurisdiction; it is also concerned with efficiency and convenience for the proceedings themselves: *Van Breda*, at para. 104.

[53] Several non-exhaustive factors were set out in *Van Breda* as being relevant to determining whether *forum non conveniens* should be applied. These may vary depending on the context, and include: the location of the parties and the witnesses; the cost of transferring the case to another jurisdiction; the cost of declining to stay the action; the possibility of conflicting judgments; and the impact of declining jurisdiction on the conduct of litigation or on related parallel proceedings: at para. 110.

[54] A motions judge's discretionary decision to refuse to decline jurisdiction on the basis of *forum non conveniens* is entitled to considerable deference on appeal: *Van Breda*, at para. 112. As this Court stated in *Éditions Écosociété Inc. v. Banro Corp.*, [2012] 1 S.C.R. 636, "an appeal court should intervene only if the motions judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision": para. 41. Errors of law, as well as "clear and serious error[s]" of fact may also give grounds for intervention: *Van Breda*, at para. 112. There were no errors in the motions judge's conclusion here, let alone any warranting intervention.

[55] In my view, the objective facts and factors to be considered in the *forum non conveniens* analysis confirm that the Quebec courts are not a "clearly more appropriate forum" for the third party claims against the 32 Quebec firms. Following the motions judge's decision, the Ontario Superior Court of Justice already has jurisdiction over 118 other lawyers or firms, including 67 Ontario-based lawyers added by Cassels Brock's third party action. The third party claims against the remaining 51 law firms located outside Ontario will therefore be heard in Ontario.

[56] This strongly weighs against finding that the Quebec courts are a "clearly" more appropriate forum for the 32 Quebec firms, especially in light of "the importance of having claims finally resolved in one jurisdiction": *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.), at para. 15.

[57] Against all this, the key factors on which the Quebec lawyers rely carry, with respect, little weight. Witnesses for the third party claims will, in any event, come from both Ontario and Quebec. Expert evidence on the law applicable to either the contract or the negligence claim will be required no matter where the trial takes place.

[58] Moreover, because the third party claims involve a significant number of parties and require the mobilization of significant judicial resources, those resources should be allocated and expended with a view to making the litigation quicker, more economical and less complicated: *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013] 2 S.C.R. 623, at para. 1; *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, [2015] 2 S.C.R. 139, at para. 78.

[59] Allowing the Quebec third party claims to proceed in Ontario along with the 118 other law firms, would clearly be a more efficient and effective solution. Adjudicating all the third party claims in the same forum avoids the possibility of conflicting judgments and duplication in fact-finding and legal analysis. While the third party claims are not class claims, they will, as Lauwers J.A. noted, have much in common:

> Given the common elements of the [Wind-Down Agreements], the [certificates of independent legal advice] and the content of Ontario law, it seems to me that the core of the legal advice that ought to have been given by local lawyers will be very similar for each, subject to any relevant differences in the applicable franchise legislation; such differences could still be addressed without resort to individual determinations. Although there may be some variation in the advice

> actually given and in the terms of the contracts for legal services, there is no reason to think that the case management judge would not be able to create efficient methods for adjudicating these issues, given the tools available under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 25. [para. 86]

[60] Overall, therefore, proceeding with all the third party claims before the Ontario courts will ensure that they are resolved in a timelier and more affordable manner: *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at para. 28. All of this leads, as it did in the prior proceedings, to the conclusion that Ontario should assume jurisdiction over all the third party claims, including those involving the Quebec law firms.

[61] I would dismiss the appeal with costs.

The following are the reasons delivered by

CÔTÉ J. —

[62] In disputes involving an international or interprovincial aspect, jurisdiction is a matter of crucial importance. It must be approached with rigour, or else the cardinal values of order, certainty, and fairness will be jeopardized.

[63] In *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, this Court outlined four "presumptive connecting factors" which determine whether the courts of Ontario are entitled to assume jurisdiction over a claim in tort. At the heart of this dispute is *Van Breda*'s fourth connecting factor, which provides Ontario

with presumptive jurisdiction when "a contract connected with the dispute was made in the province": para. 90.

I. Analysis

[64] This case comes in the wake of events in 2009, when a class action was commenced on behalf of 207 terminated General Motors of Canada Ltd. dealers. The terminated dealers claimed that General Motors had coerced them into signing Wind-Down Agreements in breach of Ontario franchise law, and that the respondent, Cassels Brock & Blackwell LLP, was negligent in providing legal advice to the Canadian Automobile Dealers Association on those Wind-Down Agreements, in addition to being in a conflict of interest.

[65] After this class action was certified, Cassels Brock instituted proceedings in Ontario, by way of third party claims, for contribution and indemnity against the 150 law firms that had provided local dealers, within their respective provinces, with independent legal advice on those same Wind-Down Agreements. As pleaded, the underlying cause of action of these third party claims sounds in tort: Cassels Brock alleges that these law firms each provided negligent legal advice to their clients. It is noteworthy that no legal action was brought against these law firms by the local dealers themselves.

[66] The law firms based in Quebec, as well as the two national law firms having offices both in Quebec and in Ontario, challenge Ontario's jurisdiction over

the third party claims against them. Cassels Brock argues in response that *Van Breda*'s fourth connecting factor is engaged, since the Wind-Down Agreements were "made in" Ontario and are sufficiently "connected with" these disputes. The Quebec law firms, for their part, argue that the Wind-Down Agreements were not "made in" Ontario and would not, in any event, be sufficiently "connected with" these disputes.

[67] I agree with the Quebec law firms on both counts, and would therefore overturn the decisions of the Ontario Superior Court of Justice and the Court of Appeal: see 2013 ONSC 2289, 51 C.P.C. (7th) 419, and 2014 ONCA 497, 120 O.R. (3d) 598.

[68] With regards to the first issue, I am of the view that the relevant Wind-Down Agreements, in respect of the Quebec dealers, were "made in" Quebec. The Agreements only became binding contracts once General Motors had provided its terminated dealers with notice that it had waived its "Acceptance Threshold Condition". Notice of this final acceptance was provided to the Quebec dealers in Quebec and the Agreements for those dealers were therefore formed in that province, and not in Ontario.

[69] With regards to the second issue, I am of the view that Cassels Brock has misconstrued what it means for a contract to be "connected with" a claim in tort. Cassels Brock has essentially asked this Court to divorce *Van Breda*'s fourth connecting factor from its limited, underlying rationale, all in the name of a "holistic

approach" to jurisdiction. This unduly broad approach will surely result in jurisdictional overreach. What is more, this so-called "holistic approach" will reintroduce persistent uncertainties in an area of the law that has always valued clarity and predictability.

[70] Nevertheless, the courts of Ontario have jurisdiction over the remaining claims against the two national law firms with offices in both Quebec and Ontario on the basis of *Van Breda*'s second connecting factor, that the "defendant carries on business in the province": para. 90. However, I am of the view that whatever jurisdiction the courts of Ontario have over these remaining claims should be declined on the basis of *forum non conveniens*.

A. *Where Were the Wind-Down Agreements "Made"?*

[71] I am of the view that the Wind-Down Agreements were not "made in" Ontario.

[72] Apparently, the Quebec law firms did not dispute the place of formation at first instance. However, leaving aside the possibility of withdrawing such an apparent concession on a question of law or mixed law and fact, this concession should be accorded little weight. Indeed, in the end, it merely reflects one party's legal opinion: see e.g. *Phipson on Evidence* (15th ed. 2000), at para. 28-11, cited in *Serra v. Serra*, 2009 ONCA 105, 93 O.R. (3d) 161, at para. 111. Moreover, this important and contentious issue — i.e. the place of contract formation — should not

be disregarded simply because it was conceded at first instance. After all, this issue was argued before the Ontario Court of Appeal, and Lauwers J.A. considered the argument without hesitation. It was also the subject of a fulsome debate before this Court. It must therefore be addressed.

[73] Like my colleague Abella J., I accept that in the present case, the law governing contract formation is the law of Ontario. As such, a contract will be considered formed where the last essential act of contract formation takes place — in other words, where final acceptance is notified: see S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at paras. 108-9.

[74] In this case, on General Motors' instruction, the Quebec dealers returned their signed acceptances of the Wind-Down Agreements to General Motors' offices in Pointe-Claire, Quebec. However, General Motors had previously outlined certain subsequent conditions that had to be met before the Wind-Down Agreements could become effective. These were described in Article 1 of each Wind-Down Agreement, as well as in a covering letter signed by Marc Comeau, General Motors' Vice President of Sales, Service & Marketing. The covering letter first states:

> Our offer, as set out in the Wind-Down Agreement, is conditional upon all of the Non-Retained Dealers accepting the offer (the "Acceptance Threshold Condition") and executing and delivering their respective Wind-Down Agreements to GM Canada on or before May 26, 2009 at 6:00 pm EST (the "End of the Offer Period"). GM Canada reserves the right, in its discretion, to waive the Acceptance Threshold Condition. [Emphasis in original deleted.]

[75] The covering letter goes on to state that:

> Any Wind-Down Agreements signed and returned to GM Canada by the End of the Offer Period will not become effective unless and until GM Canada provides written notice to those dealers that the Acceptance Threshold Condition and any other required conditions have been met or have been waived by GM Canada. [Emphasis added.]

[76] General Motors did not receive acceptances from all of its terminated dealers. However, on May 30, 2009, Mr. Comeau notified the terminated dealers by e-mail that General Motors had decided to waive its acceptance threshold condition and that the Wind-Down Agreements were, as of that moment, effective. Mr. Comeau's letter to the terminated dealers states as follows:

> While not all Non-Retained Dealers accepted our conditional offer, we are very pleased to inform you that a substantial number of the Non-Retained Dealers have accepted GM Canada's conditional offer to enter into the Wind Down Agreement. This letter will serve as notice pursuant to Section 1 of the Wind Down Agreement that GM Canada is hereby waiving the Acceptance Threshold Condition and, accordingly, the Wind Down Agreement that you executed and delivered to GM Canada shall become effective as of today, May 30, 2009. GM Canada will be executing and delivering to you a fully executed copy of the Wind Down Agreement in the near future for your records.

[77] This notice did not merely confirm that General Motors' conditions had been met. Rather, this notice of final acceptance was itself an essential condition for the Wind-Down Agreements to become binding. Echoing the provisions of the Agreements themselves, Mr. Comeau's first letter clearly states that each Wind-Down Agreement was not effective "unless and until GM Canada provides written notice to

those dealers that the Acceptance Threshold Condition and any other required conditions have been met or have been waived by GM Canada" (emphasis added). In other words, without this notice of waiver — this final acceptance — there is no binding agreement. In this light, General Motors' notice was clearly an essential act of contract formation. More than that, it was the *last* essential formative act. As Mr. Comeau's letter on May 30 makes clear, the Wind-Down Agreements became effective as of the date of notice.

[78] My colleague is of the view that General Motors' notice only confirmed that the relevant conditions had been met. With respect, I have difficulty squaring this reading with the express terms of Mr. Comeau's covering letter and Article 1 of the Wind-Down Agreements, which state that the Agreements will not be effective "unless and until" this final notice is provided.

[79] The only outstanding issue, then, is *where* this notice would have been provided. In Ontario, it is well established that when acceptance of a contract is transmitted instantaneously, acceptance will be considered notified in the place where it is received: *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 178 D.L.R. (4th) 409 (Ont. C.A.), at paras. 23 and 27-29, leave to appeal refused, [2000] 1 S.C.R. xi, citing *Brinkibon Ltd. v. Stahag Stahl und Stahlwarenhandelsgesellschaft m.b.H.*, [1983] 2 A.C. 34 (H.L.); *Inukshuk Wireless Partnership v. 4253311 Canada Inc.*, 2013 ONSC 5631, 117 O.R. (3d) 206, at

paras. 25-29; *Christmas v. Fort McKay First Nation*, 2014 ONSC 373, 119 O.R. (3d) 21, at para. 18.

[80] In this case, General Motors' notice of final acceptance was transmitted by e-mail, an instantaneous form of communication, to its dealers in Quebec. As such, the relevant Wind-Down Agreements in respect of the Quebec dealers would have been formed in Quebec — the same province, I would add, where General Motors' initial offer was received by the Quebec dealers, and where General Motors received the dealers' signed acceptances. Put simply, these are not contracts "made in" Ontario. They cannot therefore ground jurisdiction for the purposes of *Van Breda*'s fourth presumptive connection.

[81] Finally, to support her conclusion that the Wind-Down Agreements were "made in" Ontario, my colleague Abella J. appeals to certain extrinsic "contextual" considerations, like the Wind-Down Agreements' choice of law clause, and the fact that the bulk of the terminated dealers, as well as General Motors' head office, are located in Ontario: para. 48. However, these contextual factors have *nothing* to do with where the Quebec dealers' Agreements were formed. Furthermore, my colleague's appeal to these extrinsic considerations is at odds with both her view that "[t]he fourth factor promotes certainty by premising the determination of when a contract will be 'made' in a given jurisdiction on the traditional rules of contract formation", as well as her view that the parties to a contract can "determine how and where a given contract will be formed": para. 31. Indeed, if these contextual

considerations are given weight in the analysis, the parties' own desires regarding where their contract is formed risk becoming irrelevant. This cannot be.

B. *Are the Wind-Down Agreements "Connected With" the Third Party Claims in Tort?*

[82] Even if the Wind-Down Agreements had been concluded in Ontario, they are not "connected with" these claims for professional negligence in the manner required by *Van Breda*'s fourth connecting factor. In my view, this conclusion is supported by the way the fourth connecting factor was described, justified and applied in LeBel J.'s reasons.

[83] At the outset, it is worth distinguishing Cassels Brock's third party claims from the dispute in *Van Breda*. In that case, a professional squash player, Mr. Berg, had entered into a contract with Club Resorts Ltd. in Ontario through a local representative. The place where the contract was "made" was not in dispute. Club Resorts was to provide Mr. Berg and his wife, Ms. Van Breda, with room and board and other services at the SuperClubs Breezes Jibacoa resort it managed in Cuba. In exchange, Mr. Berg was to provide two hours' worth of tennis lessons per day for the resort's other guests. Ms. Van Breda was brought within the scope of this contractual relationship since "[t]he benefit of this contract" was "extended to" her: para. 116. On their first day there, a metal structure collapsed on the resort's beach, causing Ms. Van Breda to become paraplegic. She later sued Club Resorts in Ontario.

[84] In *Van Breda*, there was only *one* contract that was connected to the dispute, the contract concluded in Ontario between Club Resorts and Mr. Berg. This contract was integral to Club Resorts' liability in tort. The duty of care Club Resorts owed to Ms. Van Breda flowed *immediately* from its contractual obligations towards Mr. Berg. Furthermore, the very same conduct which would have constituted a breach of the Ontario contract — triggering Club Resorts' liability in contract towards Mr. Berg — would have also constituted a separate tortious act — triggering Club Resorts' liability in tort towards Ms. Van Breda.

[85] For Cassels Brock's third party claims, the situation is entirely different. Here, there are two kinds of contracts that are involved. First and foremost, there are the retainer agreements between the Quebec dealers and their various legal counsel. Second, there are the Wind-Down Agreements, the subject of the Quebec lawyers' legal advice. *Van Breda*, concerned as it was with a case featuring only one potentially connected contract, never said — and in my view, cannot be read as saying — that simply *any* contract connected with the dispute can support jurisdiction under the fourth factor.

[86] Moreover, the Quebec lawyers were never brought within the scope of the contractual relationship between General Motors and the dealers. The Quebec lawyers were not parties to the Wind-Down Agreements, they never owed any obligations under those Agreements, nor were they owed any benefit under those Agreements, as was the case in *Van Breda*. Instead, their obligations flow entirely

from their retainer agreements. As I will discuss below, the fact that these lawyers provided signed independent legal advice certificates does not, on its own, bring them within the scope of the Wind-Down Agreements. The *most* that can be said is that the Wind-Down Agreements contributed to the factual circumstances in which entirely separate faults or breaches — i.e. the provision of negligent legal advice — were alleged to have been committed.

[87] This distinction makes all the difference. In my view, the scope of *Van Breda*'s fourth connecting factor should be limited to claims in tort where the defendant's liability in tort flows immediately from his own contractual obligations, and where that contract was "made in" Ontario. This may represent a narrow interpretation, but it reflects the specific authority this Court relied on in establishing the fourth connecting factor in *Van Breda*.

[88] It is worth remembering that this fourth connecting factor describes a basis of jurisdiction that was, at that time, unprecedented: see e.g. V. Black, "Simplifying Court Jurisdiction in Canada" (2012), 8 *J. Priv. Int. Law* 411, at pp. 425-26. Traditionally, the only forum that has subject matter jurisdiction over a claim in tort is the forum where the tort was committed. I am aware of *no* conflicts regime that accepts that a forum has subject matter jurisdiction over a claim in tort simply because a contract "connected with" that claim was formed there. In this vein, one author has called the fourth connecting factor "odd" and "in need of explanation"

(Black, at p. 426), while in the present case, the motions judge Belobaba J. said that it lies on a "somewhat shaky foundation": para. 9.

[89] In identifying this fourth connecting factor, LeBel J. relied on only one authority for support, i.e. rule 17.02(f)(i) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194: *Van Breda*, at para. 88. LeBel J. recognized that the Ontario rules for service *ex juris* are not conflicts rules *per se*, although he stressed that they "offer guidance for the development of this area of private international law", since they represent the "experience drawn from the life of the law" and are "generally consistent" with approaches and recommendations to conflicts law made elsewhere: para. 83; see also J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. (loose-leaf)), at p. 11-44. However, rule 17.02(f)(i) only provides a basis for service outside of the jurisdiction for claims "in respect of a contract", and not for any claims in respect of a tort: T. J. Monestier, "(Still) a 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2013), 36 *Fordham Int'l L.J.* 396, at pp. 424-26.

[90] In my view, LeBel J.'s reliance on rule 17.02(f)(i) — despite the fact that such a rule does not expressly provide a basis for service in respect of a tort claim — reveals the fourth connecting factor's purpose and limitations: the fourth factor only provides jurisdiction over claims where the defendant's liability in tort flows immediately from the defendant's own contractual obligations. Indeed, in these kinds of cases, the claim in tort will often resemble a claim in contract. I expect that this may occur in two kinds of situations, although there may be others.

[91] First, there are cases of concurrent liability, where a defendant's failure to exercise reasonable skill and care may constitute, at once, both a breach of contract and a tort: see e.g. J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 739-40; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12. When a lawyer lacks reasonable care and diligence in advising his client, for instance, he may be liable towards his client in tort, in contract, and under the law of fiduciary obligations. As Cromwell J. observed in *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, a claim that a solicitor-client contract was breached for lack of diligence "is essentially a differently labelled repetition of the claim in negligence": para. 34.

[92] If a court can assume jurisdiction over a claim in contract on the basis that the contract that was breached was formed in the jurisdiction, then that same court should also possess jurisdiction over any concurrent claim in tort. After all, as this Court recognized in *Van Breda*, if "a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case": para. 99.

[93] Second, and more importantly, there may be cases where a third party beneficiary to a contract has a claim in tort for acts which occurred in the performance — and potential breach — of that contract: see e.g. A. Swan, *Canadian Contract Law* (2nd ed. 2009), at p. 178.

[94] On the basis of what was alleged in the statement of claim, *Van Breda* appears to represent this kind of case. However, such a situation can also occur in the context of providing legal services. For instance, if a solicitor is instructed by a testator to make changes to a will and the solicitor neglectfully fails to make the changes before the testator dies, the would-be beneficiaries may sue in tort: *Earl v. Wilhelm*, 2000 SKCA 1, 183 D.L.R. (4th) 45, at paras. 32-42; *White v. Jones*, [1995] 2 A.C. 207 (H.L.), at pp. 259-60 and 265-66; see also *Whittingham v. Crease & Co.* (1978), 88 D.L.R. (3d) 353 (B.C.S.C.).

[95] In these cases, the contract is at the very root of the defendant's liability in tort. The contract does not simply contribute to the factual circumstances in which an entirely separate tort is committed. Rather, the defendant's breach of contract and his tort are *indissociable*. The duty of care owed to the third party beneficiaries flows immediately from that contractual relationship: *White*, at pp. 274-76, per Lord Browne-Wilkinson, cited approvingly in *Earl*, at paras. 39-41. Moreover, in these cases, the defendant in tort will necessarily be a party to the contract formed in that jurisdiction, further strengthening that forum's connection to the dispute. Finally, it would fly in the face of order and fairness to allow a party to the contract to sue the defendant in the jurisdiction where the contract was formed, but to deny that same right to the third party beneficiary suing that same defendant in tort.

[96] Establishing jurisdiction over these kinds of claims in tort represents, in my view, the underlying rationale of *Van Breda*'s fourth connecting factor. It is what

makes this fourth factor both a defensible and a desirable conflicts rule. In this light, it should be clear that this approach to applying the fourth connecting factor is not a retreat from this Court's holding in *Van Breda*. Instead, it simply clarifies the fourth factor's meaning and justification.

[97] My colleague Abella J. adopts a broader interpretation, one which aligns with the "holistic approach" to jurisdiction urged by Cassels Brock. In my colleague's view, *Van Breda* recognized an entirely new basis of jurisdiction, one which has no near recognized equivalent in the rules for service *ex juris* or elsewhere. This expansive reading of *Van Breda* simply cannot be reconciled with LeBel J.'s pronouncement that courts can *only* recognize new connecting factors if they are similar to established bases of jurisdiction, if they have been recognized in case law or in statute law, or if they have been recognized as a basis of jurisdiction in the private international law of other similar legal systems: para. 91. To be sure, I believe that this expansive interpretation has other shortcomings as well. I will describe these more fully in the sections below.

[98] On the restrained approach I have described above — which in my view represents the only logical path forward — the courts of Ontario clearly do not have jurisdiction over Cassels Brock's third party claims.

[99] The only contracts that could possibly be close enough to the dispute between Cassels Brock and the Quebec lawyers are the retainer agreements concluded between the Quebec lawyers and their clients. The Wind-Down

Agreements are simply too remote. The defendants are not parties to the Wind-Down Agreements, nor are they being sued in tort for actions committed in the performance of these Agreements. The most that can be said is that each Wind-Down Agreement contributed to the factual circumstances in which an entirely separate tort was allegedly committed.

[100] However, this tort would have been committed in Quebec, by Quebec-based lawyers, harming their Quebec-based clients, in the course of fulfilling their professional obligations which flow from retainer agreements concluded in Quebec. By this, I do not mean to imply that only the forum with the *strongest* possible connection can assume jurisdiction. I simply wish to stress that *none* of the facts underlying this dispute and relating to the defendants' potential liability occurred in Ontario.

C. *The Broader Approach to Van Breda's Fourth Connecting Factor*

[101] It should be clear, by now, that I respectfully disagree with the broad scope given to *Van Breda*'s fourth connecting factor by my colleague Abella J.

[102] In my view, this broad and open-ended approach divorces the fourth connecting factor from its specific and limited foundations. In doing so, this broader approach confers jurisdiction in a case where Ontario simply has no real or substantial connection with the dispute. It also muddies an area of the law that should be kept clear and predictable.

(1) Jurisdictional Overreach

[103] As I have said, this broad and open-ended approach will lead to jurisdictional overreach — in this case, and in others.

[104] Under normal circumstances, these claims would have been instituted by the terminated Quebec dealers against their Quebec lawyers, for faults which would have been committed in Quebec, in the course of fulfilling contractual obligations which flow from retainer agreements concluded in Quebec. How could the resulting dispute possibly be connected to the province of Ontario?

[105] In response, Cassels Brock has stressed the importance of two links between the Wind-Down Agreements and these third party claims for contribution and indemnity, related to professional negligence.

[106] First, there is the fact that the Wind-Down Agreements expressly required each dealer to obtain independent legal advice before accepting General Motors' offer. However, this requirement to obtain legal advice is entirely unrelated to the actual *quality* of the legal advice that was obtained, and it is the quality of this advice that forms the basis of each claim. It is also worth noting that such a requirement to obtain independent legal advice is commonly inserted into agreements where the terms are dictated by one party. This routine requirement should not have the effect of supporting the assumption of jurisdiction over claims in professional negligence by

the courts of the province in which the agreement that is the subject of the legal advice happens to have been entered into.

[107] In my view, it is clear that this requirement, imposed on the dealers, to obtain independent legal advice, and to confirm that such advice had been given, does not bring the Quebec lawyers within the scope of the dealers' contractual relationship with General Motors, as is required by *Van Breda*: paras. 116-17. In that case, LeBel J. found that Ms. Van Breda was brought within the scope of Mr. Berg's contractual relationship with Club Resorts because she was owed a benefit under Mr. Berg's agreement: para. 116. In this case, the Quebec lawyers owe nothing and are owed nothing under the Wind-Down Agreements. Moreover, the requirement that the dealers provide General Motors with certificates confirming the receipt of independent legal advice was simply a matter of due diligence. It permitted General Motors to secure proof, for its own purposes, that its dealers had obtained advice on its standard-form offer. The signing of this certificate simply does not bring these lawyers within the scope of this contractual relationship.

[108] I would add that the fragility of this alleged connection is all the more obvious when compared to established bases of jurisdiction — for instance, the place where the tort was allegedly committed, or the place where the defendant's contractual obligations were to be performed.

[109] Second, Cassels Brock argues that the Wind-Down Agreements are inextricably linked to the Quebec lawyers' liability, since in each case the allegedly

negligent legal advice was *about* the Wind-Down Agreement. In my view, there is nothing "real" or "substantial" about this connection either. Every day, lawyers advise local clients on contracts that will eventually be formed in — and be subject to the law of — another province or state. If these contracts are accepted as a fount of jurisdiction, then local lawyers advising their local clients on such contracts could be sued for professional negligence wherever the contracts happen to be entered into. In my view, this cannot be. There could be no clearer evidence of jurisdictional overreach.

[110] Simply put, the only contracts that are capable of supporting the assumption of jurisdiction in this case are the retainer agreements between the Quebec lawyers and their clients, the Quebec dealers. These retainers were all concluded in Quebec, the same province where the lawyers' services were to be provided, where the breaches or faults would have occurred, and where the damages would have been suffered. The Wind-Down Agreements, by contrast, are too remote. It is also no speculation to say that, had the Quebec dealers brought actions for damages against their own lawyers, it is unlikely that they would have instituted proceedings in Ontario.

[111] In light of all of this, I am of the view that the broader approach to the fourth connecting factor proposed by Cassels Brock and adopted by my colleague Abella J. leads to jurisdictional overreach.

[112] This conclusion is supported by the fact that every other jurisdiction I have surveyed and that I discuss below — including some "equally concerned about order and fairness as our own" (*Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69, at para. 58) — would not have assumed subject matter jurisdiction over the underlying cause of action against the Quebec law firms in these circumstances.

[113] The *Uniform Court Jurisdiction and Proceedings Transfer Act* ("*CJPTA*") (online) provides that a province will only have a presumptively real and substantial connection over a claim in tort if the tort was committed in the province: s. 10(g). As this Court has stressed before, the *CJPTA* is an important Canadian benchmark: see *Van Breda*, at paras. 40-41; *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666, at para. 28; and *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321, at paras. 21-22. It was proposed by the Uniform Law Conference of Canada as an attempt to give meaning to the real and substantial connection test in a variety of circumstances, and forms the basis of provincial legislation in British Columbia, Saskatchewan, Nova Scotia and the Yukon: *The Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28; *Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1; Court Jurisdiction and Proceedings Transfer Act, S.N.S. 2003 (2nd Sess.), c. 2; *Court Jurisdiction and Proceedings Transfer Act*, S.Y. 2000, c. 7 (not yet in force).

[114] For its part, the *Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments*

in civil and commercial matters, [2001] O.J. L. 12/1 (the "*Brussels Regulation I*"), only provides subject matter jurisdiction over a claim "in matters relating to tort" in the courts "for the place where the harmful event occurred or may occur": art. 5(3). The *Brussels Regulation I* is an important international benchmark, as it applies to all European Community Member States with the exception of Denmark, in cases where the defendant is domiciled in any one of those Member States: see J. Fawcett and J. Carruthers, *Cheshire, North & Fawcett Private International Law* (14th ed. 2008), at pp. 200 and 204-5.

[115] Finally, under the *Civil Code of Québec* ("*C.C.Q.*"), Quebec authorities will only have subject matter jurisdiction over an action in extra-contractual liability where "a fault was committed in Québec" or where the "injury was suffered in Québec": art. 3148 para. 1(3) *C.C.Q.*

[116] I would add that neither the *CJPTA*, the *Brussels Regulation I*, nor the *C.C.Q.* even accept that a claim *in contract* can proceed in a jurisdiction merely because the contract was concluded there. Those instruments prefer to accord subject matter jurisdiction to the place where the defendant's contractual obligation was to be performed: s. 10(e)(i) *CJPTA*; art. 5(1) *Brussels Regulation I*; art. 3148 para. 1(3) *C.C.Q.*

[117] In response to these concerns of jurisdictional overreach, my colleague offers up only one line of defence. She suggests that, under art. 3139 of the *C.C.Q.*, a Quebec authority will always have jurisdiction over an incidental claim, including a

third party claim, if it has jurisdiction over the principal demand. And so, my colleague implies, it would not be overreaching for the courts of Ontario to have jurisdiction over the third party claims against the Quebec law firms in this case, given that the courts of Ontario have jurisdiction over the principal action against Cassels Brock.

[118] This argument simply fails to respond to my concern. This Court has not been asked to recognize, in the common law, an equivalent to art. 3139 of the *C.C.Q.* The issue before this Court is whether the subject matter of these third party claims is sufficiently connected with the province of Ontario. Nothing in art. 3139 of the *C.C.Q.* speaks to this issue.

[119] It is worth recalling that art. 3139's unique purpose is "to ensure the efficient use of juridical resources . . . by fostering the joinder of proceedings": *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 30. As such, art. 3139, a "product of domestic procedural considerations" (*GreCon*, at para. 30), lends *no* support for my colleague's conclusion that there is a sufficiently strong connection between the subject matter of these third party claims and the province of Ontario. Rather, art. 3139 reflects the sort of fairness and efficiency concerns that, after *Van Breda*, have no role to play in establishing jurisdiction. As LeBel J. remarked:

> Jurisdiction must — irrespective of the question of forum of necessity, which I will not discuss here — be established primarily on the basis of objective factors that connect the legal situation or the subject

> matter of the litigation with the forum. The Court of Appeal was moving in this direction in the cases at bar. This means that the courts must rely on a basic list of factors that is drawn at first from past experience in the conflict of laws system and is then updated as the needs of the system evolve. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial" connection for the purposes of the law of conflicts. [emphasis added; para. 82]

[120] Finally, my colleague's interpretation of art. 3139 risks pre-emptively settling, in *obiter*, a question of Quebec law that was not before this Court. It is not enough that a claim be incidental to a principal action for art. 3139 to be engaged. If there was simply *no* connection between the incidental action and the forum seized of the principal action, art. 3139 would be at risk of running afoul of the constitutional limitations placed on the jurisdiction of the courts of the Canadian provinces: see e.g. *Van Breda*, at paras. 21-22 and 31-32, citing G. Goldstein and E. Groffier, *Droit international privé*, vol. I, *Théorie générale* (1998), at p. 47. In this vein, LeBel J. in *GreCon* stressed that, while art. 3139 "does not mention this factor expressly, there must be some connexity between the principal action and the incidental action": para. 31. He added that art. 3139 has to be assessed in light of private international law imperatives, such as "the need to avoid enlarging the jurisdiction of states unduly": para. 30. Precisely what this means strikes me as an important and unresolved issue, one that this Court should not settle without fulsome debate.

[121] In the end, as I have said, the proposed broader approach to the fourth connecting factor risks supporting the assumption of jurisdiction by the courts of Ontario and other common law provinces where there is simply no convincing

connection between the province and the subject matter of the dispute. A narrower approach is in my view required.

(2) Certainty and Predictability

[122] As I see it, this broader approach also jeopardizes the certainty and predictability that was promised when *Van Breda*'s presumptive bases of jurisdiction replaced the discretionary list of factors outlined in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.).

[123] On my restrained approach, it should always be clear when this fourth connecting factor can serve as a basis for jurisdiction. By contrast, my colleague's approach amounts to an open invitation for litigants to engage in long-winded jurisdictional debates, since the words "connected with" and "connection" are notoriously flexible and fact-specific. It is worth remembering that it was the vagueness of the word "connection" that led some authors to criticize the "real and substantial connection" test for being "too loose and unpredictable to facilitate an orderly resolution of conflicts issues": *Van Breda*, para. 30, citing J.-G. Castel, "The Uncertainty Factor in Canadian Private International Law" (2007), 52 *McGill L.J.* 555, and J. Blom and E. Edinger, "The Chimera of the Real and Substantial Connection Test" (2005), 38 *U.B.C. L. Rev.* 373. Echoing that criticism after *Van Breda*, some authors expressed the view that the fourth connecting factor "would seem in need of explanation": Black, at p. 426.

[124] Small variations of the facts of the case at bar illustrate this point. If independent legal advice was required for multiple contracts concluded in different jurisdictions, the parties would have had to spar over whether any one of those contracts could ground a claim in professional negligence. Future litigants may also wonder whether the requirement of obtaining independent legal advice was actually necessary to establish a connection between the contract and the dispute, or whether simply providing negligent advice on such a contract is sufficient.

[125] Future cases with entirely different facts will surely yield other fine-grained debates about the sufficiency of the contract's connection. These will compromise parties' ability "to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect", as LeBel J. stressed they must be able to do: *Van Breda*, at para. 73.

[126] My colleague suggests that the fourth connecting factor achieves sufficient certainty by premising the determination of where a contract will be "made" on the traditional rules of contract formation: para. 31. In my colleague's view, once parties are able to determine where a contract will be formed, they will also be able to determine with "reasonable confidence" when jurisdiction can or cannot be assumed under the fourth factor.

[127] I respectfully disagree. If the parties are not able to predict with certainty *which* contracts will be "connected with" a potential tort claim, their ability to predict where any particular contract will be formed will be of little assistance. More

troublingly still, under my colleague's approach, the defendant in tort may not even be a party to the contract, and there is no reason why we should expect that individuals who are not parties to a contract will know, or will be able to predict, where any given contract will be formed.

[128] The need for certainty and predictability in shaping conflicts rules can hardly be overstated. As La Forest J. stressed in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, "[o]ne of the main goals of any conflicts rule is to create certainty in the law": p. 1061. This yearning for "fixed, clear and predictable" conflicts rules has long guided this Court, and has been urged by a number of authors: T. J. Monestier, "A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2007), 33 *Queen's L.J.* 179, at p. 192; Castel; Blom and Edinger.

[129] Among other benefits, "[c]lear application of law promotes settlement" (*Tolofson*, at p. 1062) and discourages what my colleague Gascon J. has called the "needless and wasteful jurisdictional inquiries that merely thwart the proceedings from their eventual resumption": *Chevron Corp.*, at para. 69. Like Gascon J., I am of the view that courts "should exercise care in interpreting rules and developing legal principles so as not to encourage unnecessary" jurisdictional motions: G. D. Watson and F. Au, "Constitutional Limits on Service Ex Juris: Unanswered Questions from Morguard" (2000), 23 *Adv. Q.* 167, at p. 205, cited in *Chevron Corp.*, at para. 69.

[130] Of course, LeBel J. did observe that "striking a proper balance between flexibility and predictability, or between fairness and order, has been a constant theme

in the Canadian jurisprudence": *Van Breda*, at para. 66. However, LeBel J. went on to note that "in recent years" the preferred approach to the law of jurisdiction in Canada "has been to rely on a set of specific factors, which are given presumptive effect": para. 75 (emphasis added).

[131] Writing for the entire Court, LeBel J. explained this modern preference by outlining what I view to be a fundamental proposition in jurisdictional matters — that while "[j]ustice and fairness are undoubtedly essential purposes of a sound system of private international law", those objectives "cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court": *Van Breda*, at para. 73 (emphasis added). As such, "[p]arties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect": para. 73 (emphasis added).

[132] In LeBel J.'s view, the four connecting factors were meant to be "specific", not flexible and diffuse. It must be remembered that *Van Breda* sought to put an end to a "framework for the assumption of jurisdiction" that was "unstable, *ad hoc*" and "made up 'on the fly' on a case-by-case basis": para. 73. Nowhere in his reasons does LeBel J. stress the need to avoid a disciplined and rigorous approach to the four connecting factors. After all, courts may always identify *new* presumptive connecting factors in order to adapt the law "as the needs of the system evolve": para. 82.

(3) Potential Implications on the Practice of Law

[133] In addition, one must not ignore that there may be harmful commercial implications that flow from a broader approach to the fourth connecting factor.

[134] As I have said, jurisdiction matters. In the context of this case, an expansive approach to jurisdiction means that whenever a lawyer's advice is required before his client can accept an offer, that lawyer may later be sued for professional negligence wherever the contract on which he provided legal advice is ultimately formed, regardless of where his contract for legal services was entered into, and where his services were provided. It is worth remembering that once jurisdiction is deemed to exist, it can only be declined in the clearest of cases: *Van Breda*, at para. 109.

[135] With respect, my colleague's position risks causing, in the end, certain negative repercussions on the practice of law itself. Where a lawyer's advice is required before a contract can be concluded, the lawyers who are retained to provide advice may feel conflicted, since they will likely have a personal stake in where their client's contract is entered into. Our modern-day, cosmopolitan legal practice may even be impeded, a risk that is aggravated by the fact that a lawyer's professional liability insurance is often subjected to lower coverage for claims instituted outside the lawyer's own jurisdiction. As an illustration of this, during oral argument, counsel for the Quebec law firms reminded the Court that the Barreau du Québec's liability

insurance policy indemnifies lawyers sued for professional negligence for up to $10 million if sued in Quebec, but only up to $1 million if sued outside the province.

D. *Forum Non Conveniens*

[136] Finally, there remains the issue regarding the claims against the two national law firms which have offices both in Quebec and in Ontario. In my view, Ontario has jurisdiction over these claims on the basis of the second connecting factor, namely, that the "defendant carries on business in the province": *Van Breda*, at para. 90.

[137] It thus falls on those national law firms contesting jurisdiction to establish that another jurisdiction is clearly more appropriate: *Van Breda*, at paras. 102-3. In the past, this Court has turned to the following factors to determine if this is the case:

(1) the place of residence of the parties and witnesses;

(2) the location of the evidence;

(3) the place of formation and execution of the contract;

(4) the existence of proceedings pending between parties in another jurisdiction and the stage of any such proceeding;

(5) the location of the defendant's assets;

(6) the applicable law;

(7) the advantage conferred on the plaintiff by its choice of forum;

(8) the interests of justice;

(9) the interests of the two parties;

(10) the need to have the judgment recognized in another jurisdiction.

(*Breeden*, at para. 25, citing *Oppenheim forfait GMBH v. Lexus maritime inc.*, 1998 CanLII 13001 (Que. C.A.), at pp. 7-8.)

[138] In evaluating these factors, my colleague's conclusion is strongly influenced by her view that all of the third party claims can be disposed of within one trial, thereby avoiding "the possibility of conflicting judgments and duplication in fact-finding and legal analysis" (para. 59). Respectfully, that is not the nature of the third party proceedings before us.

[139] The trial in the class action against Cassels Brock was held from September 9 to December 19, 2014. McEwen J. rendered judgment on July 8, 2015, concluding that Cassels Brock was responsible for $45 million in damages to the class members for failing to fulfill its contractual and fiduciary obligations, and for failing to meet the standard of care of a reasonably prudent solicitor or law firm: *Trillium Motor World Ltd v. General Motors of Canada Ltd.*, 2015 ONSC 3824, 30 C.B.R. (6th) 1. In its written submissions, Cassels Brock indicated that this judgment is currently under appeal.

[140] On December 23, 2011, Cassels Brock instituted proceedings seeking indemnity and contribution from 150 other lawyers and law firms. These third party claims are not a class action, but represent instead a combination of separate actions which are *not* identical. These claims are simply not in the nature of proceedings where common issues can be resolved for an entire group. As the motions judge

found, "[e]ach case would be fact-specific and would depend on the particular advice that was given by each local lawyer to his or her particular dealer/client": para. 24 (emphasis added).

[141] To this, I would add that the lawyers' level of care and diligence may vary from case to case, as may each dealer's relationship with his or her counsel. Some lawyers may have given their advice far too quickly, while others may have undertaken thorough research and analysis before providing theirs. Some lawyers may have had more experience than others in these matters. The financial situation of each dealer may also have come into play. A dealer may have been advised not to enter into the Wind-Down Agreement, but may have decided to do so, regardless. In the end, there may be as many defences as there are defendants. As such, some claims may be dismissed while others may be granted. The quantum of damages may also vary from case to case. Simply put, there is a great deal of potential divergence between each of these 150 third party claims.

[142] Moreover, as I have already decided above, the courts of Ontario should not have jurisdiction over the third party claims against the law firms based solely in Quebec. As such, there is no possibility that any of these claims would be resolved in Ontario. If, in my view, these claims would be heard separately, and if most of the claims against Quebec lawyers would proceed in Quebec anyway, it is clear that Quebec is the more appropriate forum for the remaining claims against the two national law firms.

[143] Most of these lawyers from the national law firms are domiciled in Quebec, where they practise their profession as members of the Barreau du Québec. The other witnesses — notably the dealers' representatives — are also residents of Quebec. If these claims against the national firms were heard in Ontario, these witnesses would all have to travel there to testify, incurring significant additional costs. Furthermore, Quebec law will govern the claims against the national law firms with offices in Quebec on the basis that the fault would have occurred in Quebec. As such, additional costs would have to be incurred to provide an Ontario court with expert opinions on Quebec law. Finally, if the claims against the Quebec law firms were to be divided between Quebec and Ontario, there is a risk that the courts of Ontario and Quebec may render conflicting decisions *while applying Quebec civil law*.

[144] For these reasons, it is clear that Quebec is the more appropriate forum for these remaining claims, and that whatever jurisdiction the courts of Ontario possess over these national firms should be declined.

[145] As a final matter, I recognize that my analysis regarding *forum non conveniens* would result in overturning the motions judge's discretionary decision, one which is owed significant deference on appeal: *Van Breda*, at para. 112. However, the motions judge's analysis of the *forum non conveniens* issue began on the premise that all of the third party claims, including those against the Quebec law firms, could be heard in Ontario. As I have concluded, the courts of Ontario should

not have jurisdiction over the third party claims against the law firms based exclusively in Quebec. This provides sufficient grounds for intervention: *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636, at para. 41.

II. Disposition

[146] I would allow the appeal with costs.

Appeal dismissed with costs, CÔTÉ J. *dissenting.*

Solicitors for the appellants: Clyde & Cie Canada, Montréal.

Solicitors for the respondent: Lenczner Slaght Royce Smith Griffin, Toronto.

TAB 13

Intitulé de la cause :

Stanford International Bank Ltd. (Liquidation de)

MARCUS A. WIDE, de Grant Thornton (British Virgin Islands) Limited
et
HUGH DICKSON, de Grant Thornton Specialist Services (Cayman) Ltd., Agissant en leur qualité de liquidateurs conjoints, au nom et pour le compte de Stanford International Bank Limited (en liquidation), demandeurs
c.
LA BANQUE TORONTO-DOMINION, défenderesse

[2014] J.Q. no 425

[2014] Q.J. No. 425

2014 QCCS 204

2014EXP-462

J.E. 2014-243

EYB 2014-232295

No : 500-11-042971-123

Cour supérieure du Québec
District de Montréal

L'honorable Claude Auclair, J.C.S.

Entendu : 15, 16, 17 octobre 2012, 11, 12, 13 novembre 2013.
Rendu : 28 janvier 2014.

(82 paragr.)

Droit international privé -- Conflits de juridictions -- Forum non conveniens -- Emplacement de la preuve et des témoins -- Intérêt de la justice -- Loi applicable au litige -- Litispendance -- Il n'a pas

été démontré que les liquidateurs jouiraient d'un avantage important à ce que la cause soit entendue ou continuée au Québec ni démontré des créanciers du Québec intéressés à témoigner ou à réclamer -- Diverses autres procédures entamées - tant en Alberta qu'en Ontario à la suite de l'effondrement de SIB en février 2009 - tendent à démontrer que l'Ontario est le tribunal nettement plus approprié que le Québec pour entendre la demande des liquidateurs -- Requête en forum non conveniens accueillie en partie -- Code civil du Québec, art. 3135.

La Banque Toronto-Dominion (Banque TD) sollicite le rejet de la requête introductive d'instance des liquidateurs pour le compte de Stanford International Bank Limited (SIB). Les liquidateurs, nommés par la Cour d'Antigua, ont recherché des dommages au nom de la SIB et de ses créanciers. La SIB, une banque "offshore" opérant à Antigua, a eu une relation d'affaires avec la Banque TD pendant plus de 20 ans. Les liquidateurs ont reproché à la Banque TD d'avoir su - ou qu'elle aurait dû savoir - à titre de correspondant bancaire - qu'Allen Stanford et certains autres conspirateurs orchestraient une fraude importante aux dépens de la SIB. Cette connaissance - réelle ou présumée - de la Banque TD découlerait spécifiquement des services fournis à la SIB, d'où la réclamation de 20 millions $. Banque TD invoque la théorie du "forum non conveniens" pour demander la suspension du dossier ou son rejet.

DISPOSITIF : Requête accueillie en partie. Plus de 70 pour cent des créanciers canadiens résident hors Québec. L'Ontario est le forum nettement plus approprié pour entendre le litige entre les liquidateurs et la Banque TD à moins que le tribunal le plus approprié ne soit à Houston ou à Antigua et non au Québec où se situait le bureau de représentations, bureau artificiel car tout se décidait et se négociait ailleurs. S'il s'agit d'une faute contractuelle, le for le plus approprié serait celui de l'Ontario puisque les contrats ont été signés en Ontario, à Houston ou Antigua, y précisant que la loi applicable serait celle de l'Ontario. S'il s'agit d'une faute extracontractuelle, le juge du fond aura à déterminer à quels endroits les fautes ont été commises, à quels endroits le dommage a été subi et il devra déterminer - par la suite - la loi applicable. Il n'a pas été démontré que les liquidateurs jouiraient d'un avantage important à ce que la cause soit entendue ou continuée au Québec ni démontré des créanciers du Québec intéressés à témoigner ou à réclamer. Diverses autres procédures entamées - tant en Alberta qu'en Ontario à la suite de l'effondrement de SIB en février 2009 - tendent à démontrer que l'Ontario est le tribunal nettement plus approprié que le Québec pour entendre la demande des liquidateurs. Il y a lieu que le litige soit entendu en Ontario, car - selon l'engagement pris lors de l'audition qu'advenant le rejet au fond de la requête introductive d'instance au Québec - les liquidateurs désirent continuer le recours en Ontario.

Législation citée :

Code civil du Québec, art. 3135

Loi sur les banques, L.C. 1991, ch. 46, art. 522(a)

Avocats :

Me Guy de Blois, Me Stefan Chripounoff, Me Gerry Apostolatos, Me Dimitri Maniatis, Langlois Kronström Desjardins, pour les demandeurs.

Me Mason Poplaw, Me Miguel Bourbonnais, McCarthy Tétrault, pour la défenderesse.

JUGEMENT

1 Le Tribunal est saisi d'une requête de la défenderesse - la Banque Toronto-Dominion (Banque TD) - pour rejeter la requête introductive d'instance amendée des demandeurs sur la base de "forum non conveniens" ou pour suspendre les procédures des demandeurs pour litispendance (cote 30 du plumitif).

2 Ce débat est âprement contesté et rien n'est laissé au hasard. L'audition s'est tenue sur une année, ayant été suspendue par une requête en déclaration d'inhabilité des procureurs de la défenderesse dont le jugement[1] a fait l'objet d'une permission d'appeler, laquelle a été rejetée par la Cour d'appel[2].

LES FAITS

3 Les demandeurs sont les liquidateurs conjoints de la Stanford International Bank (SIB) nommés par la Cour d'Antigua et recherchent des dommages au nom de la SIB et de ses créanciers, comme ils l'annoncent dans leur requête introductive d'instance amendée :

> "31. The Joint Liquidators have commenced these proceedings both in the name and on behalf of SIB and on behalf of SIB's creditors. As such, the Joint Liquidators seek damages on behalf of SIB and its creditors."

4 La SIB est une banque "offshore" opérant à Antigua qui a eu une relation d'affaires avec la Banque TD pendant plus de 20 ans pour :

> 4.1. Services de correspondance bancaire (correspondent banking services);
> 4.2. Services de financement commerciaux (commercial, financing and treasury);
> 4.3. Services de gestion de portefeuilles et d'investissements.

5 Les demandeurs reprochent à la Banque TD d'avoir su - ou qu'elle aurait dû savoir - à titre de correspondant bancaire - que Robert Allen Stanford et certains autres conspirateurs orchestraient une fraude importante aux dépens de la SIB. Cette connaissance - réelle ou présumée - de la Banque TD découlerait spécifiquement des services fournis à la SIB, d'où la réclamation de 20 millions $.

6 En 2004, la SIB a ouvert un bureau de représentations à Montréal en vertu de l'article 522 a) de la *Loi des banques*[3], et ce, jusqu'au 20 février 2009. À cette date, le Bureau du surintendant des institutions financières (BSIF) a autorisé la SIB à maintenir un bureau pour "*allow the representative office to remain open to assist Canadian clients in trying to recover the investments made with Stanford International Bank in Antigua*[4]". (Le Tribunal souligne)

7 Les fonctions des cinq personnes employées au bureau montréalais touchaient au marketing de certificats de dépôt auprès de clients potentiels au Québec et la SIB y aurait maintenu ses installations de sauvegarde électronique en cas de désastre. Ce bureau a été fermé au printemps 2009 par les liquidateurs antiguais précédents, ces derniers agissant après que la SEC eut nommé d'autres liquidateurs pour agir aux États-Unis.

8 Le 11 septembre 2009, le soussigné rendait deux jugements[5] dans le dossier d'insolvabilité de la SIB. Le liquidateur américain a été reconnu comme le représentant étranger pour agir au Canada, et ce, au détriment du liquidateur antiguais Vantis. Le Tribunal[6] se prononce - entre autres - sur le lien réel et substantiel et voici comment il traite de cette question :

> "Le lien réel et substantiel
>
> [13] Vantis soumet que le lien important et réel est à Antigua. Le Tribunal a déclaré irrecevable la requête de Vantis.
>
> [14] SIB est une banque étrangère au sens de la loi d'Antigua et ne peut recevoir les dépôts de citoyens d'Antigua. Il s'agit d'une banque *offshore* où l'argent ne reste pas dans les coffres à Antigua mais transite plutôt par des banques situées à l'extérieur du territoire d'Antigua.
>
> [15] Plus de 37 % en valeurs des détenteurs de certificats de dépôts sont des Américains, soit plus que tous autres citoyens d'autres pays.
>
> [16] Vantis, dans ses Notes et Autorités, reconnaît que SIB fait partie d'un réseau mondial de sociétés de Stanford.
>
> [17] Allen Stanford, président et actionnaire de toutes les corporations du groupe Stanford a la double citoyenneté : américaine et antiguaise, et est actuellement détenu en prison aux Etats-Unis.

[18] Le FSRC est le requérant à Antigua qui a demandé la nomination du *receivership* et plus tard, celle du liquidateur.

[19] Le Tribunal précise toutefois que les procédures ne sont pas signées par Leroy King, lui aussi accusé aux États-Unis comme complice de Stanford dans une plainte de blanchiment d'argent.

[20] Toutes les parties aux présentes reconnaissent l'insolvabilité de tout le groupe, y compris de SIB, et que SIB a des clients dans 113 pays différents.

[21] Le plus grand nombre de créanciers investisseurs clients provient de l'extérieur d'Antigua.

[22] Les actifs immobiliers à Antigua ont été expropriés par le gouvernement d'Antigua sans compensation et ce, en prévision de l'impact négatif du *receivership* américain à l'égard de l'économie antiguaise, selon la résolution du gouvernement antiguais.

[23] Dans ses Notes et Autorités, Vantis reconnaît que les sociétés clés du groupe Stanford sont les suivantes :

- Stanford Group Company (SGC) maison de courtage inscrite aux États-Unis et broker dealer;
- Stanford Financial Group Global Management (SFGGML) et Stanford Global Advisory LLC, deux sociétés des îles vierges américaines qui ont imputé d'importantes sommes à SIB, officiellement pour des services de conseil.

[24] Dans ses Notes et Autorités quant aux actifs, Vantis décrit ce qui suit :

> Ces avoirs qui ont été repérés jusqu'ici sont décrits dans le Deuxième affidavit de Hamilton-Smith. La valeur attribuée à certains des placements peut se révéler inexacte, et, lorsque l'institution financière qui détenait des avoirs a refusé jusqu'à maintenant d'en communiquer le solde courant, ces avoirs n'ont pas été inclus. Ces avoirs comprennent donc :

i. encaisses (au Canada (19 M$), à Antigua (10 M$) et aux États-Unis (9 M$)) ("Avoirs de catégorie 1");
ii. fonds investis auprès d'institutions financières internationales (en Suisse (117 M$), au Royaume-Uni (105 M$) et aux États-Unis (12 M$)) ("Avoirs de catégorie 2"); et
iii. autres avoirs, y compris des titres de participation, des comptes clients, des biens immobiliers situés à Antigua et des créances sur Stanford et d'autres entités de Stanford, y compris des réclamations de retraçage éventuelles à l'encontre d'actifs qu'ils ont achetés, par exemple, des placements effectués par Stanford à l'aide de la somme de 1,6 G$ que lui aurait "prêtée" SIB ("Avoirs de catégorie 3").

[25] La High Court of Justice, Chancery Divison, (Companies Court) a reconnu que le groupe Stanford est à l'origine d'une fraude de style *Ponzi*.

[26] Toutes les opérations frauduleuses relient toutes les corporations du groupe Stanford.

[27] Une partie importante des opérations du groupe Stanford est située à Houston. Le groupe Stanford exécute pour 268 M$ de services rendus pour la SIB alors que la SIB a une dépense de salaire de 3 M$, ce qui démontre l'ampleur des services rendus à l'extérieur d'Antigua et démontre que SIB n'est qu'un paravent fiscal.

[28] Quant à Stanford Trust, il avait trois fois plus d'employés aux États-Unis qu'à Antigua.

[...]

[32] Le Tribunal paraphrase cette dernière phrase en ces mots : le lien réel et important doit tenir compte du mode de vie particulier des banques *offshore*.

[33] Le Tribunal y voit là un parallèle important avec notre affaire où SIB, une

banque *offshore*, ne sert que de paravent et d'outil à l'opération frauduleuse, gigantesque de plusieurs milliards de dollars, et reliée à tout le groupe Stanford où les victimes sont dispersées dans plus de 113 pays.

[34] Or, le Tribunal, pour paraphraser la Cour suprême, est d'avis que "le mode de vie" de cette banque *offshore* est directement relié au siège social du groupe Stanford situé à Houston, SIB à Antigua n'en étant qu'un jalon et un maillon dans l'affaire.

[35] Le Tribunal est d'avis que pour des fraudes de style *Ponzi*, le lien réel et important se situe à la place d'affaires du centre nerveux ou comme on pourrait l'appeler, le centre de la toile d'araignée de cette fraude.

[36] L'importance du centre névralgique de Houston est incontestable. Et le plus équitable est que le Tribunal reconnaisse comme *foreign proceeding* le *receivership* et comme représentant étranger le US Receiver Janvey.

(Le Tribunal souligne)

9 Les deux jugements[7] rendus le 11 septembre 2009 ont été maintenus par la Cour d'appel[8] et la demande d'autorisation d'appel à la Cour suprême a été rejetée le 22 décembre 2011[9].

10 Suite au gel des opérations à travers le monde, il s'en suivit une série de procédures. Une chronologie des procédures judiciaires au Canada - en lien avec la SIB - a été préparée conjointement par les procureurs des parties. En voici le résultat :

"CHRONOLOGIE DES PROCÉDURES JUDICIAIRES AU CANADA

EN LIEN AVEC STANFORD INTERNATIONAL BANK LTD. ("SIB")

26 novembre 2013

1. 25 février 2009 : Institution d'un recours collectif en Alberta (NOTE : cette action a fait l'objet d'un désistement le 30 mars 2009.)

   Dynasty Furniture Manufacturing Ltd. (as representative plaintiff) c. SIB, Stanford Group Company, Stanford Capital Management LLC, R. Allen Stanford, James M. Davis, Laura Pendergest-Holt, ABC Corp. 1 to 9, John Doe 1 to 9 and Jane Doe 1 to 9 (les "Défendeurs Stanford"); No.

0901-02821

2. 6 avril 2009 : Reconnaissance initiale de la nomination des anciens liquidateurs et du statut de ceux-ci en tant que représentants étrangers dans le cadre du dossier de faillite de SIB au Canada (Cour supérieure du Québec (Chambre commerciale) - dossier actif)

   Stanford International Bank Ltd. and Stanford Trust Company Ltd. (Receivership of); No. 500-11-036045-090

3. 17 avril 2009 : Institution de l'Action pour fraude en Alberta (NOTE : ce recours est suspendu depuis le 24 juin 2009.)

   - Pièce I-1 (Pour suspension, voir la Pièce TD-1, par. 23)

     Dynasty Furniture Manufacturing Ltd., Shafiq Hirani, Hanif Asaria, Dinmohamed Sunderji and 2645-1252 Quebec Inc. (le "Groupe Dynasty") c. Défendeurs Stanford; No. 0901-05677

4. 17 avril 2009 : Institution de l'Action Norwich en Alberta (NOTE : ce recours a été suspendu le 24 juin 2009.)

   - Pièce I-2 (Pour suspension, voir la Pièce TD-1, par. 23)

     Groupe Dynasty c. Banque TD; No. 0901-05717

5. 24 avril 2009 : Institution du Recours en confiscation en Ontario (NOTE : ce recours a été réglé hors cour le 27 août 2013; Règlement approuvé par l'Hon. juge Auclair le 13 septembre 2013 et par l'Hon. juge Campbell le 23 septembre 2013.)

   - Pièce I-3 (Pour règlement, voir la Pièce I-6A et I-6B)

Attorney General of Ontario c. The Contents of Various Financial Accounts Held With the TD-Bank and T-D Waterhouse (IN REM); No. CV-09-8154-OOCL

6. 24 juin 2009 : Jugement de la *Court of Queen's Bench of Alberta* suspendant l'Action pour fraude en Alberta et l'Action Norwich en Alberta

- Pièce TD-1, par. 23

Groupe Dynasty c. Défendeurs Stanford; No. 0901-05677, [2009] A.J. No. 694

Groupe Dynasty c. Banque TD; No. 0901-05717

7. 29 juillet 2009 : Institution de l'Action Norwich en Ontario (NOTE : l'abandon de cette action est confirmé dans le règlement hors cour approuvé par l'Hon. juge Campbell le 23 septembre 2013.)

- Pièce I-5 (Pour confirmation d'abandon, voir Pièce I-6B)

Groupe Dynasty c. Banque TD; No. 09-8300-00CL

8. 26 août 2009 : Institution du Recours Dynasty en Ontario (NOTE : ce recours est suspendu depuis le 3 juillet 2012 selon les termes du paragraphe 28 du jugement rendu par l'Hon. Juge Cumming le 3 juillet 2012)

- Pièce TD-2 (Pour suspension, voir Pièce I-12)

Groupe Dynasty c. Banque TD; No. 09-8373-00CL (1), [2012] O.J. No. 3389

(1) Anciennement CV-09-385834.

9. 11 septembre 2009 : Jugement de l'Hon. Juge Auclair de la Cour supérieure du Québec (Chambre commerciale) nommant Ernst & Young Inc. à titre de séquestre intérimaire de SIB et l'autorisant notamment à entreprendre des certains recours judiciaires sur approbation préalable de la Cour selon les termes et conditions qui y sont prévus.

- Pièce TD-8 (Voir aussi TD-28)

  SIB, Nigel Smith, Peter Wastell, Ralph S. Janvey *et al.*; No. 500-11-036045-090 [2009] J.Q. no 9162

10. 21 janvier 2010 : Jugement de la Cour supérieure de l'Ontario ordonnant la radiation d'allégations du Recours Dynasty (NOTE : ce jugement a été confirmé en appel le 21 juillet 2010.)

- Pièce TD-3 (Voir aussi Pièce TD-4)

  Groupe Dynasty c. Banque TD; No. 09-8373-00CL, [2010] O.J. No. 2703.
  (En appel : Groupe Dynasty c. Banque TD; C51698), [2010] O.J. No. 3101.

11. 19 août 2011 : Jugement de l'Hon. juge Corriveau de la Cour supérieure du Québec (Chambre commerciale) accordant à Marcus A. Wide et à Hugh Dickson (les "Liquidateurs") la permission d'intenter une action en dommages contre la Banque TD selon les termes et conditions qui y sont prévus.

- Pièce TD-10

  SIB, Liquidateurs, Ralph S. Janvey *et al.*; No. 500-11-041205-119

12. 22 août 2011 (10h53) : Émission au dossier de la Cour du Recours québécois (dossier actif)

- Pièces I-22

Liquidateurs c. Banque TD; No. 500-11-042971-123 (2)

(2) Anciennement 500-17-067367-113.

13. 22 août 2011 (14h40) : Émission au dossier de la Cour de la *Placeholder Action* (telle que définie par le juge Cumming au par. 6 de I-12) en Ontario (NOTE : ce recours est suspendu depuis le 3 juillet 2012 selon les termes du paragraphe 27 du jugement rendu par l'Hon. Juge Cumming le 3 juillet 2012; cette suspension a été confirmée par la Cour divisionnaire le 5 octobre 2012.)

- Pièces I-7 et I-23 (Pour suspension, voir les Pièces I-12 et I-12A)

Liquidateurs c. Banque TD; No. CV-12-9780-00CL (3) (En Cour divisionnaire : No. 366/12), [2012] O.J. No. 4918

(3) Anciennement CV-11-433385, [2012] O.J. No. 3389.

14. 17 février 2012 : Signification de la Requête introductive d'instance et de la Requête introductive d'instance amendée.

15. 3 juillet 2012 : Jugement rendu par l'Hon. juge Cumming ordonnant la suspension du Recours Dynasty (voir #8) et de la *Placeholder Action* (voir #13) aux termes des paragraphes 27 et 28.

- Pièces I-12

Liquidateurs c. Banque TD; CV-11-43385

Groupe Dynasty c. Banque TD; No. 09-8373-00CL

16. 23 septembre 2013 : Approbation du règlement hors cour intervenu dans le Recours en confiscation en Ontario (voir #5) et dans l'Action Norwich en Ontario (voir #7), par l'Hon. juge Campbell, suite à l'approbation de l'Hon. juge Auclair du 13 septembre 2013

- Pièces I-6B (Voir aussi Pièce I-6A)

Attorney General of Ontario c. The Contents of Various Financial Accounts Held With the TD-Bank and T-D Waterhouse (IN REM); No. CV-09-8154-OOCL

Groupe Dynasty c. Banque TD; No. 09-8300-00CL"

11 Le demandeur Wide a admis[10] qu'une somme de 45 788 864 $ US représentait la valeur brute des investissements canadiens sur une fraude de plus de 4.4 milliards $ US.

12 La portion d'investisseurs du Québec serait de l'ordre de 12 millions $, sans compter monsieur Cohen qui a un investissement de 15 millions $, mais qui était résident américain au moment de la cessation des opérations de la SIB. C'est donc dire que plus de 70 % des créanciers canadiens de la SIB résident hors Québec.

13 La Banque TD est l'une des nombreuses banques correspondantes agissant pour la SIB[11] et les créanciers canadiens en valeur représentent moins de 1 % de la valeur de la fraude totale.

14 La SIB opérait quatorze comptes à la Banque TD localisée à Toronto, selon les relevés bancaires et d'après le témoignage du demandeur Wide.

15 Les lettres de crédit ont été émises à Toronto "from the global business services" de la Banque TD[12][13].

16 Le service de gestion de portefeuille était situé à Toronto.

17 Lors de la prise de possession par les liquidateurs antiguais et de la fermeture du bureau de Montréal, aucune somme d'argent ou aucun compte bancaire n'a été retracé à Montréal[14].

18 Quelques mois avant l'écroulement de la SIB - soit à l'automne 2008 - cette dernière et la Banque TD signaient une convention[15] régissant les termes et conditions des "Correspondent Banks". Cette convention stipulait - entre autres :

"These Terms and Conditions form an agreement (the "Terms and Conditions") between The Toronto-Dominion Bank ("TD") and each customer ("Correspondent") maintaining one or more demand deposit accounts with TD (all such accounts are herein called the "Account"). For the purpose of these Terms and Conditions, a Correspondent is defined as a bank or non-bank financial institution holding an Account. By accepting this documentation, or by using the Account, the Correspondent agrees to be legally bound by these Terms and Conditions, as amended from time to time. Other terms and conditions contained in a separate agreement (each called a "Service Schedule") or instructions and user manuals (the "Guides") between Correspondent and TD related to certain account services provided by TD shall also apply to the Account. All prior general terms and conditions are superseded by this document.

TD reserves the right to amend these Terms and Conditions, and shall provide the Correspondent with prior notice of such changes. Changes to these Terms and Conditions required by law or regulation may be implemented immediately, if so required, or otherwise upon reasonable notice to Correspondent.

[...]

Cash Letter Deposit Service

A Correspondent with an Account may send Cash Letters for items eligible for Canadian clearing to TD at the address provided herein under the Notice section or if agreed to between TD and Correspondent to TD's designated processing centre (the "Designated Processing Centre"), located at the following address:

TD Bank Financial Group

c/o Symcor Inc.

8 Prince Andrew Place

Toronto, Ontario

M3C 2H4 CANADA

Items eligible for Canadian clearing are:

- Canadian Dollar or US Dollar commercial cheques drawn on banks

in Canada;
- Canadian Dollar or US Dollar bank drafts payable in Canada;
- Canadian Dollar Travelers cheques drawn on institutions in Canada.

This Cash Letter Service cannot be used to transport banknotes, coins or any type of negotiable securities. All deposited items are subject to final payment.

[...]

Applicable Laws

These Terms and Conditions shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein. TD and Correspondent hereby submit to the non-exclusive jurisdiction of the courts of the Province of Ontario.

[...]

Notice

Any notices which may be required from Correspondent or which may be provided by Correspondent shall be directed to TD at the address below:

TD Bank Financial Group, Head Office

Global Business Services

222 Bay St.

15th floor

Toronto, Ontario

Canada M5K 1A2

SWIFT Address: TDOMCATTTOR

Telephone: 416.982.2441

Facsimile: 416.982.5671"

(Le Tribunal souligne)

19 Le 14 novembre 2008, la SIB et la Banque TD amendent leur entente. Cet amendement - tout comme la convention TD-15 - n'est pas signé au Québec et contient l'engagement suivant :

> "4. Except as amended herein, all of the other Terms and Conditions shall continue in full force and effect. For greater certainty, TD reserves the right to further amend these Terms and Conditions and to terminate this Amending Agreement on prior written notice to the Correspondent."

20 On constate - des différents documents[16] signés et qui régissaient les parties à l'époque - que les lois applicables étaient celles de l'Ontario et que ce choix remonte au moins à l'an 2003.

21 Les représentants de la Banque TD - responsables des relations avec la SIB - étaient à Toronto.

22 Lors de la dernière journée d'audition, les procureurs des demandeurs ont déposé un engagement à propos de l'autre recours déposé en Ontario le même jour que l'émission de la requête introductive d'instance de la présente affaire. Cet engagement se lit comme suit :

> "13.11.2013
>
> The Joint Liquidators undertake not to reactivate or cause to be reactivated the Ontario Dynasty Action unless the Quebec Action is dismissed or the Toronto-Dominion's Motion for Forum Non Conveniens is granted."

LE LITIGE

23 La défenderesse reconnaît que la Cour supérieure du Québec a compétence. Par contre, elle invoque la théorie du "forum non conveniens" pour demander la suspension du dossier ou son rejet.

LE DROIT

24 Au Québec, le *Code civil* énonce - à l'article 3135 :

> "3135. Bien qu'elle soit compétente pour connaître d'un litige, une autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette compétence si elle estime que les autorités d'un autre État sont mieux à même de trancher le litige."

25 La Cour suprême du Canada - sous la plume de l'honorable Le Bel - mentionne dans l'affaire *Club Resort*[17] :

> "[103] Le défendeur qui soulève l'application du *forum non conveniens* a le fardeau de démontrer pourquoi le tribunal devrait décliner sa compétence et renvoyer le litige dans un ressort autre que celui que le demandeur a choisi. Le défendeur doit désigner un autre tribunal ayant des liens appropriés selon les règles du droit international privé, et indiquer que ce tribunal pourrait trancher le litige. Le défendeur doit démontrer les liens qui existent entre cet autre tribunal et l'objet du litige au moyen de la même méthode d'analyse que celle employée pour établir l'existence d'un lien réel et substantiel avec le tribunal local. Enfin, la partie qui demande une suspension d'instance pour cause de *forum non conveniens* doit alors démontrer qu'il serait préférable que l'affaire soit soumise au tribunal proposé et qu'il faut considérer que ce dernier est plus approprié.
>
> [104] Notre Cour a examiné et structuré l'application de la doctrine du *forum non conveniens* dans l'arrêt *Amchem*, [1993] 1 R.C.S. 897. Elle s'est alors inspirée de la jurisprudence de l'époque, plus particulièrement de l'arrêt de la Chambre des lords dans *Spiliada Maritime Corp. c. Cansulex Ltd.*, [1987] A.C. 460. La doctrine vient atténuer les effets d'une application stricte des règles régissant la déclaration de compétence. Puisque ces règles se fondent essentiellement sur l'établissement de l'existence de liens factuels objectifs, leur application par les tribunaux pourrait susciter des inquiétudes quant à leur rigidité éventuelle et au fait qu'ils ne prennent pas en compte la situation véritable des parties. Si elle est invoquée, la doctrine du *forum non conveniens* oblige le tribunal à passer outre à l'application stricte du critère régissant la reconnaissance et la déclaration de compétence. Cette doctrine reconnaît que les tribunaux de common law conservent le pouvoir résiduel de ne pas exercer leur compétence dans des circonstances appropriées, quoique limitées, afin d'assurer l'équité envers les parties et le règlement efficace du litige. Les tribunaux peuvent, sur la base de cette doctrine, suspendre les procédures engagées devant eux.
>
> [105] Une partie qui sollicite une suspension d'instance pour cause de forum non conveniens peut invoquer des faits, considérations et préoccupations divers. Je doute que l'on puisse un jour en dresser une liste exhaustive malgré les quelques tentatives en ce sens du législateur. La doctrine est axée essentiellement sur le contexte de chaque affaire, et elle vise à assurer l'équité envers les deux parties et l'efficacité de la démarche menant au règlement du litige. Par exemple, le par. 11(1) de la *LUCTRI* prévoit qu'"[a]près avoir pris en considération l'intérêt des parties à une instance et les fins de la justice", le tribunal peut refuser d'exercer sa

compétence si, à son avis, il conviendrait mieux que l'instance soit instruite par un tribunal d'un autre État. Le paragraphe 11(2) prévoit ensuite que le tribunal doit prendre en considération les "circonstances pertinentes [à l'instance]". Il dresse une liste non exhaustive de facteurs comme exemples de telles circonstances :

> a) dans quel ressort il serait plus commode et moins coûteux pour les parties à l'instance et leurs témoins d'être entendus;
> b) la loi à appliquer aux questions en litige;
> c) le fait qu'il est préférable d'éviter la multiplicité des instances judiciaires;
> d) le fait qu'il est préférable d'éviter que des décisions contradictoires soient rendues par différents tribunaux;
> e) l'exécution d'un jugement éventuel;
> f) le fonctionnement juste et efficace du système judiciaire canadien dans son ensemble. [par. 11(2)]

[106] La *Court Jurisdiction and Proceedings Transfer Act* de la Colombie-Britannique, inspirée de la *LUCTRI*, prévoit à son art. 11 une disposition quasi identique au sujet du *forum non conveniens*. Dans *Teck Cominco Metals Ltd. c. Lloyd's Underwriters* 2009 CSC 11, [2009] 1 R.C.S. 321, au par. 22, notre Cour a affirmé que l'art. 11 de la loi de la Colombie-Britannique visait à"codifier" la doctrine du *forum non conveniens*. L'article 3135 du *Code civil du Québec* prévoit aussi que le forum non conveniens fait partie du droit international privé du Québec, mais il n'indique pas les facteurs qui doivent régir l'application de cette doctrine en droit québécois. On laisse aux tribunaux le soin d'élaborer une méthode d'application de la doctrine et de déterminer les considérations pertinentes.

[107] Les tribunaux québécois ont retenu une méthode essentiellement identique à celle employée par les tribunaux de common law, sous réserve du texte de l'art. 3135, selon lequel le *forum non conveniens* constitue un recours exceptionnel. On trouve un bon exemple d'application du *forum non conveniens* dans l'arrêt *Oppenheim forfait GMBH c. Lexus maritime inc.*, 1998 CanLII 13001, où la Cour d'appel du Québec a suspendu, pour cause de *forum non conveniens*, une action intentée dans cette province en faveur d'un tribunal allemand. Le juge Pidgeon a souligné le caractère large et contextuel de l'analyse relative au *forum non conveniens*. Le juge peut tenir compte de facteurs tels le domicile des parties, l'endroit où se trouvent les témoins et les éléments de preuve, l'existence d'un

recours parallèle, l'avantage juridique, l'intérêt des deux parties et l'intérêt de la justice (p. 7 et 8; voir aussi *Spar Aerospace*, [2002] 4 R.C.S. 205, par. 71; J. A. Talpis, avec la collaboration de S. L. Kath, "If I am from Grand-Mère, Why Am I Being Sued in Texas?" Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation (2001), p. 44-45).

[108] Selon la jurisprudence qui traite du fardeau imposé à la partie qui sollicite une suspension d'instance pour cause de *forum non conveniens*, la partie doit démontrer que l'autre tribunal est nettement plus approprié. L'expression "nettement plus approprié" est bien établie. Elle figure dans *Spiliada* et *Amchem*. Par contre, elle n'a pas toujours été employée invariablement et elle n'apparaît pas dans la *LUCTRI* ni dans les lois inspirées de cette dernière, qui exigent simplement que la partie demandant une suspension d'instance démontre l'existence quelque part d'un "tribunal plus approprié". L'expression "nettement plus approprié" ne figure pas non plus à l'art. 3135 du *Code civil du Québec*, qui signale toutefois en ces termes le caractère exceptionnel du pouvoir d'une autorité du Québec de décliner compétence : "... une autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette compétence..."

"[109] Il faut voir dans l'emploi des termes"nettement" et "exceptionne[l]" une reconnaissance du fait qu'en règle générale, le tribunal doit exercer sa compétence lorsqu'il se déclare à juste titre compétent. Il incombe à la partie qui veut écarter l'application de la règle générale de prouver que, compte tenu des caractéristiques de l'autre tribunal, il serait plus juste et plus efficace de refuser au demandeur les avantages liés à sa décision de choisir un tribunal approprié suivant les règles de droit international privé. Le tribunal ne peut, dans l'exercice de son pouvoir discrétionnaire, suspendre l'instance uniquement parce qu'il conclut, après avoir examiné toutes les considérations et tous les facteurs pertinents, à l'existence de tribunaux comparables dans d'autres provinces ou États. Il ne s'agit pas de jouer à pile ou face. Un tribunal saisi d'une demande de suspension d'instance doit conclure qu'il existe un tribunal mieux à même de trancher le litige de façon équitable et efficace. Le tribunal doit cependant garder à l'esprit que sa compétence, établie en application des règles de droit international privé, peut parfois être fonction d'une norme peu rigoureuse. Le recours à la doctrine du *forum non conveniens* peut jouer un rôle important dans la recherche d'un tribunal nettement plus approprié pour trancher le litige et pour assurer ainsi l'équité envers les parties et leur permettre de résoudre plus efficacement leur conflit.

> [110] Je tiens à répéter que les facteurs dont le tribunal peut tenir compte dans sa décision d'appliquer la doctrine du *forum non conveniens* sont susceptibles de varier selon le contexte. Ils peuvent inclure, par exemple, l'endroit où se trouvent les parties et les témoins, les frais occasionnés par le renvoi de l'affaire à une autre juridiction ou par le refus de suspendre l'instance, les répercussions du changement de juridiction sur le déroulement du litige ou sur des procédures connexes ou parallèles, le risque de décisions contradictoires, les problèmes liés à la reconnaissance et à l'exécution des jugements ou la solidité relative des liens avec les deux parties."
>
> (Le Tribunal souligne)

26 Et la Cour suprême du Canada - toujours sous la plume de l'honorable Le Bel - mentionne dans l'arrêt *Breeden c. Black*[18] :

> "III. Conclusion
>
> [37] Pour conclure, certains des facteurs pertinents dans l'analyse relative au *forum non conveniens* favorisent la tenue du procès en Illinois, alors que d'autres facteurs favorisent sa tenue en Ontario. L'analyse relative au *forum non conveniens* n'exige pas que ces facteurs convergent tous vers un seul et même ressort ou que l'on procède à un simple décompte numérique de ceux-ci. Elle exige toutefois qu'un ressort apparaisse comme étant nettement plus approprié. La partie qui soulève la doctrine du *forum non conveniens* a le fardeau d'établir que son ressort est nettement plus approprié. De plus, la décision par un tribunal de ne pas exercer sa compétence et de suspendre une action en application de la doctrine du *forum non conveniens* est une décision discrétionnaire. [...]"
>
> (Le Tribunal souligne)

27 Le juge Vézina - dans la récente affaire *Stormbreaker*[19] - mentionne :

> "[77] Selon le Juge, le fait que le tribunal étranger soit "mieux à même de trancher le litige" entraîne qu' "il y a lieu, exceptionnellement, de décliner compétence". S'il élabore sur les motifs pour conclure sur le premier point, il n'ajoute rien pour justifier le second, l' "exceptionnellement".
>
> [78] Or, il s'agit bien de deux critères différents. Chacun doit être satisfait. On ne peut s'arrêter au premier sans motiver et justifier le second.

> [79] Cela ressort du texte même de l'article 3135 *C.c.Q.* et de l'enseignement de la Cour suprême dans *Spar Aerospace Ltée* c. *American Mobile Satellite Corp.* de 2002 :
>
> > 69 ... deux éléments essentiels ressortent du texte de l'art. 3135 : sa nature exceptionnelle et l'exigence qu'un autre État soit mieux à même de trancher le litige (voir E. Groffier, *La réforme du droit international privé québécois : supplément au Précis de droit international privé québécois* (1993), p. 130).
> >
> > 70 Ces deux caractéristiques de la doctrine du *forum non conveniens*, énoncées à l'art. 3135, sont conformes à l'exigence de common law énoncée par la Chambre des lords dans l'arrêt de principe *Spiliada Maritime Corp. c. Cansulex Ltd.*, [1987] 1 A.C. 460, p. 476, et par notre Cour dans les arrêts *Amchem*, précité, p. 919-921, et *Holt Cargo*, [2001] 3 R.C.S. 907, précité, par. 89. [...]

[80] Les auteurs sont du même avis.

[...]

> [86] En bref, le *Code civil* ne permet au tribunal de décliner compétence qu' "exceptionnellement". Comme toute décision, celle-ci doit être motivée, ce qui n'est pas le cas dans le jugement attaqué. Il y a donc lieu d'analyser les circonstances de l'affaire pour déterminer si cette seconde condition est satisfaite.
>
> [87] Le *Code civil* ne précise aucun critère d'application de l' "exceptionnellement" outre le mot lui-même qui évoque l'idée de rare, d'inhabituel, de circonstances spéciales, hors de l'ordinaire.
>
> [88] Les auteurs Guillemard, Prujiner et Sabourin ajoutent à leurs remarques déjà citées la proposition que l'exception ne doit pas réduire indûment la portée de la règle d'attribution de compétence :
>
> > Il reste à préciser les conditions de cette exception.

[...]

> *Seconde proposition* : le caractère exceptionnel de la règle de l'article 3135 exige la présence de circonstances qui permettent d'écarter un rattachement prévu par le Code sans en détruire le principe. Ce n'est donc pas une évaluation *in abstracto* de la faiblesse ou de l'importance de la relation entre le litige et le tribunal qui doit être prise en considération, mais le fait que le rattachement du litige au Québec est tellement faible, même du point de vue de la politique juridictionnelle du Code, qu'il est justifié de l'écarter au profit de la relation "beaucoup plus étroite" en faveur d'une autre juridiction.
>
> Dans ces conditions, il devient possible de réconcilier la logique du Code et celle de l'article 3135 C.c.Q. Le tribunal s'assure alors que ce sont des circonstances vraiment "exceptionnelles" qui entraînent la mise à l'écart d'un rattachement dont l'application normale n'est pas menacée par cette décision.

[89] La Cour suprême a récemment rendu l'arrêt *Club Resorts Ltd. c. Van Breda* où l'on trouve un enseignement semblable. Bien qu'il s'agisse d'un arrêt de common law, le juge LeBel, pour la Cour, y traite de l'article 3135 *C.c.Q.* :

[...]

[91] Le Juge à qui était demandé de décliner compétence devait donc soupeser, d'une part, la protection accordée à l'Appelante par la possibilité de procéder au Québec versus, d'autre part, les circonstances qui permettraient de qualifier l'affaire d'exceptionnelle.

[92] La protection est importante. La partie qui obtient la tenue du procès chez elle est en situation de force. Les acteurs judiciaires et les règles, y compris celles non écrites, lui sont familières. Livrer bataille en terrain connu est un atout. Un amateur de hockey parlerait de l'avantage de la glace. À mon avis, c'est le principal facteur à considérer en l'instance.

[...]

> [104] Au départ, il me semble qu'une question de gros sous ne saurait être suffisante à faire perdre à un justiciable une protection que la loi lui accorde. D'autant plus s'il est manifestement prêt à engager les frais qu'on veut lui épargner, comme c'est le cas de l'Appelante ici.
>
> [105] D'ailleurs, les frais additionnels me semblent peu considérables.
>
> [...]
>
> [110] Sur le plan de l'équité, il me semble que celle-ci favorise aussi la tenue du procès ici, comme le veut l'Appelante.
>
> [111] En effet, celle-ci a dès le départ recherché la protection que tout litige soit réglé au Québec et selon ses lois. C'est la clause déjà citée du Contrat P-1."
>
> (Le Tribunal souligne)

28 Il a été clairement et unanimement établi par la jurisprudence que - pour déterminer s'il est approprié de décliner compétence - le Tribunal doit procéder à une analyse globale du dossier en fonction des faits particuliers de l'espèce. Les facteurs pertinents qui sont applicables à une affaire sont essentiellement tributaires des caractéristiques propres à celle-ci.

29 Aucun facteur énuméré par la Cour suprême du Canada n'est déterminant en soi et la liste de ceux-ci n'a pas été établie comme un carcan rigide, mais plutôt comme une liste d'exemples de facteurs que le Tribunal peut prendre en considération parmi d'autres. C'est donc en fonction des facteurs propres au présent dossier que le Tribunal doit décider de la question soulevée.

30 Dans un premier temps, le Tribunal examinera les divers facteurs - suggérés par les demandeurs - qui sont reliés au critère du ressort nettement plus approprié, soit :

a. le lieu de résidence des parties et des témoins ordinaires et experts;
b. la situation des éléments de preuve;
c. le lieu de formation et d'exécution du contrat qui donne lieu à la demande;
d. l'existence et le contenu d'une autre action intentée à l'étranger et le progrès déjà effectué dans la poursuite de cette action;
e. la situation des biens appartenant au défendeur;

f. la loi applicable au litige;
g. l'avantage dont jouit la demanderesse dans le for choisi;
h. l'intérêt de la justice;
i. l'intérêt des deux parties;
j. la nécessité éventuelle d'une procédure en exemplification à l'étranger.

31 Dans un deuxième temps, le Tribunal examinera le critère exceptionnel.

I.

LE CRITÈRE DU RESSORT NETTEMENT PLUS APPROPRIÉ

32 Le Tribunal examine maintenant les dix facteurs qui sont couramment pris en compte dans l'analyse du nettement plus approprié.

a.

Le lieu de résidence des parties et des témoins ordinaires et experts

33 Le Tribunal ne partage pas le point de vue des demandeurs à savoir que la majorité des créanciers canadiens résident au Québec et qu'ils y ont substantiellement subi les préjudices. Le fait que plus de 70 % des créanciers canadiens résident hors Québec contredit cette affirmation.

34 Quant à l'emplacement des témoins, les demandeurs plaident que l'emplacement des témoins ne milite pas en faveur de l'Ontario, ce qui est un peu surprenant dans la présente affaire.

35 Les procureurs des demandeurs reconnaissent - dans leur plan d'argumentation :

> "46. En ce qui a trait à la preuve de la faute commise par la Banque TD, les demandeurs devront notamment mettre en preuve :
> a. Le Pillage de SIB par le biais de témoignage de représentants de SIB, d'enquêteurs et autres témoins tiers, et de représentants de Grant Thornton;
> b. Les agissements qu'aurait eu un banquier raisonnable relativement aux activités de SIB et au Pillage de SIB, par le biais, *inter alia*, de représentants d'autres institutions financière ayant refusé de transiger avec SIB, des experts, et des représentants d'organismes de réglementation; et
> c. Les agissements ou manquements de la Banque TD, par le biais de témoignage de représentants de la Banque TD en regard du Pillage de SIB et des standards d'un banquier raisonnable.
> 47. Quant à l'établissement des dommages subis par SIB et/ou ses créanciers, nous anticipons que cela nécessitera le témoignage étendu de représentants de Grant Thornton (dont notamment celui des demandeurs), ainsi que de représentants de SIB.
> 48. En ce qui a trait au lien de causalité entre les actes fautifs et/ou omissions de la

Banque TD et les dommages qui en ont découlé, les témoignages de représentants de Grant Thornton, de représentants de SIB, ainsi que d'enquêteurs et autres témoins tiers seront requis.

49. En somme, il y a déjà lieu d'anticiper que la preuve par témoins à être administrée nécessitera le témoignage d'au moins neuf (9) représentants de SIB, huit (8) représentants de la Banque TD, quatre (4) représentants de Grant Thornton, et quinze (15) personnes tierces incluant des enquêteurs et des représentants d'organismes de réglementation.

50. Sur le plan géographique, la Banque TD ne peut guère prétendre que les témoins clés sont situés majoritairement en Ontario puisque parmi les personnes recensées de façon préliminaire par les demandeurs, sept (7) personnes résideraient au Québec, sept (7) personnes résideraient aux États-Unis, huit (8) personnes résideraient en Ontario, quatre (4) personnes résideraient aux îles Vierges britanniques, deux (2) personnes résideraient au Royaume-Uni, trois (3) personnes résideraient à Antigua, une (1) personne résiderait en Alberta, une (1) personne résiderait aux îles Caiman, une (1) personne résiderait en Suisse, une (1) personne résiderait à Trinidad and Tobago et une (1) personne résiderait à la Barbade.

51. Il ne fait aucun doute que les interrogatoires préalables à être menés dans ce dossier sont susceptibles de révéler l'identité d'autres témoins qui seraient possiblement situés dans plusieurs juridictions différentes. En guise d'exemple, il suffit de se référer à la composition du *Risk Committee* de la Banque TD, tel qu'il appert du Rapport Annuel 2011 de la Banque TD pour constater que ces membres résident dans des juridictions différentes.

52. En raison du caractère international des opérations de la Banque TD et du fait qu'il y a "four key businesses operating in a number of locations in key financial centers around the globe", nous ignorons à ce stade où les témoins au mérite liés à la Banque TD résident.

53. Le demandeur Marcus Wide a d'ailleurs témoigné lors de l'audition à l'effet que la Banque TD a mis en oeuvre ses mesures de surveillance pour lutter contre le blanchiment d'argent en lien avec SIB à une certaine époque à Montréal et au New Jersey en ce qui a trait aux comptes de SIB en dollars américains. Plus encore, la grande majorité des comptes de SIB détenus par la Banque TD étaient en dollars américains de sorte qu'il est possible que des représentants et témoins importants de la Banque TD soient situés au New Jersey. Les demandeurs poursuivent leur enquête à cet égard."

(Le Tribunal souligne)

36 De plus, Wide témoigne[20] :

"You were asked... You were referred to your amended motion and you were

asked about your intentions with respect to demonstrating whether TD's conduct was compliant with all those different standards that Me Poplaw took you through that you've indentified in your proceeding, and then, ultimately you were asked a very interesting question, "Assuming that the TD people were in Toronto, you would be calling these TD witnesses on the compliance standards". You said in response that you emphasized that that was a big assumption.

A. Yes.
Q. Could you explain to the Court why you emphasized that?
A. Certainly. Our investigation suggests that as these US dollar accounts, there's a very strong probability and perhaps an obligation on TD Bank to run a know-your-client and anti-money laundering operations for this money in New Jersey.

[...]

Q. Would you please answer the question and elaborate on what your investigation has revealed with respect to the TD people doing their compliance?
A. Some, I believe their compliance with these accounts was taking place in New Jersey, and also note that at one point during this period anyway, the head of AML was located in Montreal for TD Bank.
Q. What is the... You spoke previously to the fact that some of the accounts were US dollars and some were Canadian dollars. What is, to the best of your knowledge, the relative proportion of the money flows that went through TD in terms of the currency?
A. Very heavily in favour of the US dollars.
Q. Why don't you have or why aren't there on the list of witnesses TD representatives from New Jersey?
A. This was a finding that we only recently made and we have not identified as yet persons who might be witnesses in that."

37 La défenderesse soumet - dans ses notes et autorités - que la preuve révèle, du témoignage de monsieur Boaden[21], que ce dernier a admis qu'à sa connaissance, messieurs Collin, Doyle, Mercer, Mersch, Musafar, Rotwell et Zebensky - les seuls représentants de la Banque TD - à l'exception de Mme Gold - qui sont énumérés dans la liste de témoins[22] - étaient tous basés à Toronto au moment des faits en litige.

38 Les notes et autorités de la défenderesse soulignent également - du témoignage de monsieur Wide[23] - que ce dernier avait une méconnaissance des faits pertinents :

"Q. So you have no knowledge of any TD corresponding banking services people being in Montreal and dealing with SIB?

A. I don't know exactly who they dealt with, no, face-to-face, day-to-day.
Q. [...] So if I suggested the corresponding banking services people were based in Toronto, you can't disagree with that?
A. Today I'm not going to disagree.

[...]

Q. I understand your evidence that you don't know and investigations are ongoing, but I suggest to you that you cannot, sitting here today, identify any service in paragraph 137 that TD personnel were based in Quebec and allegedly provided to either SIB or BOA?
A. The answer today is I don't know.

[...]

Q. Sitting here today, you, similarly I take it, can't identify these 14 separate accounts as having been opened somewhere in Quebec as opposed to somewhere in Ontario?
A. No.
Q. You just don't know?
A. Exactly.
Q. Overall, I take it you haven't - at this point, you're not able to identify any TD personnel based in Quebec that had anything to do with any of the allegations that are raised in the Quebec action?
A. I simply don't know where TD personnel sat, physically."

39 Le Tribunal souligne que - des sept témoins annoncés par monsieur Boaden qui proviendraient du Québec - cinq sont des ex-employés résidant à Montréal s'occupant de marketing, les deux autres témoins étant le président de Bombardier qui a financé - par un contrat de "leasing" - l'achat d'un avion et l'avocat de la SIB qui représentait cette dernière auprès du Surintendant des institutions financières. Comme on peut le constater, ces personnes - si elles témoignent - ont un apport très relatif et très limité au litige contre la Banque TD dans le cadre de ce qu'il lui est reproché. Comme le reconnaissaient les demandeurs dans leurs notes et autorités :

"54. La preuve révèle donc clairement que les témoins "clés" au mérite de cette affaire se situent dans une multitude de juridictions.

[...]

58. Ceci est d'autant plus vrai considérant que, tel qu'indiqué dans la Requête amendée, des cadres de la Banque TD et/ou de TD Waterhouse se sont rendus à plusieurs reprises à Houston, au Texas, ainsi qu'à Antigua pour rencontrer les dirigeants de SIB. Qui plus est, les dirigeants de la Banque TD ont également rencontré ceux de SIB à Montréal, au Québec."

(Le Tribunal souligne)

40 Le Tribunal est d'avis que l'Ontario est le forum nettement plus approprié pour entendre le litige entre les liquidateurs et la Banque TD à moins que le tribunal le plus approprié ne soit à Houston ou à Antigua et non au Québec où se situait le bureau de représentations, bureau artificiel car tout se décidait et se négociait ailleurs.

41 Les paragraphes 46 à 53 des notes et autorités des demandeurs - reproduits précédemment au paragraphe 35 du présent jugement - ne spécifient pas quels témoins démontreront le pillage. Les représentants de la SIB? À Houston ou Antigua? Quels sont les banquiers qui démontreront le caractère de banquier raisonnable? Quelles sont les autres institutions financières qui ont refusé de transiger avec la SIB? D'où proviennent les enquêteurs que les demandeurs désirent faire témoigner? Les demandeurs ne l'ont pas mentionné[24] mais force est de constater qu'ils ne sont pas du Québec.

42 Les notes et autorités des demandeurs - sur ce sujet - reflètent la réalité : les témoins proviennent ailleurs que du Québec. Aucun créancier québécois n'apparaît à leur liste des témoins[25]. C'est donc dire que les demandeurs n'entendent pas - à ce stade - les faire témoigner.

43 Sur ce point, le Tribunal conclut que l'Ontario est un forum plus approprié que le Québec.

b.

La situation des éléments de preuve

44 Les demandeurs reconnaissent que la documentation pertinente au recours québécois provient de plusieurs juridictions différentes. Ce facteur ne favorise aucunement que la cause doive être entendue au Québec. Quant à la Banque TD, toute sa documentation est à Toronto, bien qu'elle soit plus facilement accessible maintenant qu'elle a été numérisée.

45 Cet élément n'est pas un facteur déterminant.

c.

le lieu de formation et d'exécution du contrat qui donne lieu à la demande

46 Bien que les demandeurs précisent qu'il s'agit d'un recours en dommages qui peut être soit contractuel, soit délictuel, ils s'appuient principalement sur la décision de la *Banque de Montréal c. la Banque de la Nouvelle-Écosse*[26] où la Cour d'appel du Québec a - sous la plume du juge Gascon - déterminé que l'abus de droit était la suite d'une faute extracontractuelle.

47 Suivant le témoignage de monsieur Mersch - les transactions s'effectuaient avec Houston et non pas avec le bureau de Montréal. S'il s'agit d'une faute contractuelle, le for le plus approprié serait celui de l'Ontario puisque les contrats ont été signés en Ontario, à Houston ou Antigua, y précisant que la loi applicable serait celle de l'Ontario.

48 Et, s'il s'agit d'une faute extracontractuelle, le juge du fond aura à déterminer à quels endroits les fautes ont été commises, à quels endroits le dommage a été subi et il devra déterminer - par la suite - la loi applicable. Ce facteur milite en faveur d'un transfert en Ontario. La faute ou le préjudice a-t-il été subi à Antigua, Houston, Toronto ou Montréal. Rappelons que les créanciers en valeur ne sont qu'à la hauteur de 44 millions $ sur un déficit de 4 milliards $. Il n'a pas été démontré que les demandeurs jouiraient d'un avantage important à ce que la cause soit entendue ou continuée au Québec ni démontré des créanciers du Québec intéressés à témoigner ou à réclamer, et ce, suivant la liste des témoins[27] qui ne le démontre pas. Bien au contraire.

49 Cet élément milite en faveur d'un transfert en Ontario, for nettement plus approprié dans les circonstances.

d.

l'existence et le contenu d'une autre action intentée à l'étranger et le progrès déjà effectué dans la poursuite de cette action

50 Comme la chronologie des procédures judiciaires au Canada[28] nous l'a démontré, diverses autres procédures entamées - tant en Alberta qu'en Ontario à la suite de l'effondrement de SIB en février 2009 - tendent à démontrer que l'Ontario est le tribunal nettement plus approprié que le Québec pour entendre la demande des liquidateurs.

51 Les procureurs de la défenderesse ont fait la démonstration de la grande similitude entre le recours ontarien et le recours québécois entrepris par les liquidateurs.

52 D'ailleurs, le recours du "Placeholder Action" a été suspendu temporairement par le tribunal ontarien[29] :

> "[28] The motion is granted for an Order temporarily staying the Dynasty Creditors Action until such further order which this Court may grant after the

> Quebec Superior Court has made its determination with finality as to whether the Quebec Creditors Action is to be heard in Quebec. The very limited purpose of this Order is to hold the Dynasty Creditors Action in abeyance pending the determination in Quebec as to whether the Joint Liquidators can continue to pursue the claims advanced in the Quebec Creditors Action. If TD Bank is successful in disputing Quebec's jurisdiction or, alternatively, is successful in an argument as to Quebec not being the *forum conveniens*, then the continuation of the Ontario Creditors Action (i.e. the Placeholder Action) should be case managed in tandem with the Dynasty Creditors Action. Conversely, if TD Bank is unsuccessful in disputing Quebec's jurisdiction in the Quebec Creditors Action, then while the Placeholder Action is moot, the Dynasty Creditors Action shall proceed in Ontario."
>
> sujet à être réactivé sur demande d'ordonnance auprès du tribunal ontarien[30], et ce, suivant le dénouement de la présente requête en *forum non conveniens*.

53 À la lumière de ces arguments, le Tribunal est convaincu que le dossier en Ontario a le plus progressé. De plus, les liquidateurs reconnaissent - dans leur engagement - que s'ils n'ont pas gain de cause sur le fond de la requête introductive d'instance dans le présent dossier, ils continueront le recours émis la même journée en Ontario, ce qui milite que - pour une saine administration de la justice - l'Ontario soit le for le plus approprié puisque les recours pourraient être réunis, à la discrétion du tribunal ontarien.

e.

la situation des biens appartenant au défendeur

54 Ce point n'est pas contesté, étant donné que la Banque TD détient des actifs importants au Québec.

f.

la loi applicable au litige

55 Les demandeurs allèguent que la Banque TD est soumise au droit applicable du Québec et soutiennent que cette dernière avait le devoir d'informer la SIB de la fraude perpétuée par le petit groupe d'initiés - dont Robert Allen Stanford - et qu'il était prévisible que la SIB et ses créanciers subissent un préjudice au Québec. Les demandeurs ne précisent pas qui la Banque TD devait informer : les autres dirigeants de la SIB ou les créanciers qui n'étaient pas clients de la Banque TD?

56 D'autre part - si le recours est contractuel - les documents TD-15 et TD-16 seraient sujets à la loi applicable de l'Ontario.

57 Les demandeurs plaident que ces élections de lois applicables ne s'appliquent qu'à compter de leur date d'entrée en vigueur. Par la suite - au paragraphe 131 de leur argumentation - ils précisent :

> "131. Or, bien que SIB se soit effondrée en 2009, la période pertinente au litige s'étale sur près de 20 ans. Le comportement reproché à la Banque TD est composé d'une série d'actes fautifs (ou d'omissions) commis de façon continue tout au long de cette période. Ainsi, la grande majorité des gestes ou omissions fautives reprochés à la Banque TD sont susceptibles, vu la durée de la fraude, de s'être étalés sur une longue période de temps avant à l'entrée en vigueur des 2008 T&Cs et 2007 T&Cs."

(Le Tribunal souligne)

58 Le Tribunal ajoute que la preuve a révélé - du témoignage de monsieur Mersch - qu'il n'y avait pas de relations d'affaires entre la Banque TD et les représentants de la SIB à Montréal.

59 Or, en se reposant sur les activités de près de 20 ans, la SIB n'avait pas d'opérations à Montréal avant 2004; les demandeurs plaident donc les contraires. Il n'y avait donc pas de rattachement au Québec pendant plus de 15 ans. En conséquence, ce point milite en faveur d'une audition en Ontario.

60 Bien qu'à ce stade-ci le Tribunal soit incapable de déterminer quelle serait la loi applicable au mérite de l'affaire, il est évident que ce point n'est pas déterminant dans le cadre de l'analyse relative au "forum non conveniens" mais démontre qu'il y a un plus grand rattachement avec Toronto et que Toronto est le for nettement plus approprié que Montréal, à ce stade.

g.

l'avantage dont jouit la demanderesse dans le for choisi

61 Les demandeurs ne sont pas résidents du Québec. Ils opèrent pour l'un dans les Îles Vierges britanniques et pour l'autre aux Îles Cayman. Ils devront - de toute façon - se déplacer, peu importe l'endroit où aura lieu le procès. La documentation, suivant monsieur Wide, est disponible numériquement. On a souligné - du bout des lèvres - que le recours ne serait pas prescrit au Québec. Or, la loi applicable à ce stade-ci n'est pas déterminée et ce sera le rôle du juge au fond de déterminer quelle est la loi applicable. Mais rappelons que plus de 32 millions $ sur les 44 millions $ de réclamations canadiennes potentielles proviendraient de créanciers canadiens hors Québec. Le Tribunal ne peut conclure que les demandeurs ont un avantage certain à procéder au Québec, d'autant plus que les créanciers québécois ne sont pas dénoncés comme témoins[31] à ce stade-ci.

h.

l'intérêt de la justice

62 Dans la présente affaire, il y a lieu que le litige soit entendu en Ontario, car - selon l'engagement pris lors de l'audition qu'advenant le rejet au fond de la requête introductive d'instance au Québec - les demandeurs désirent continuer le recours en Ontario. Il serait donc dans l'intérêt d'une saine administration de la justice que le recours ontarien et celui du Québec soient entendus ensemble, et ce, sans me prononcer sur la gestion de ces deux dossiers, le juge qui sera saisi du dossier décidera de la marche à suivre.

63 Les coûts reliés militent en faveur de l'Ontario puisque - de toute façon - les demandeurs ne sont pas résidents du Québec et que - du témoignage de monsieur Mersch - il est évident que les témoins de la défenderesse sont essentiellement tous à Toronto et qu'une infime partie des créanciers résident au Québec.

i.

l'intérêt des deux parties

64 Les liquidateurs allèguent que la Banque TD a autant d'intérêts à procéder au Québec - compte tenu de ses attaches à l'échelle nationale - et qu'elle est au Québec depuis 152 ans.

65 Le fait que les demandeurs ne soient pas canadiens n'est pas un élément qui milite en faveur du Québec ou de l'Ontario dans la présente affaire.

66 Le Tribunal conclut que l'Ontario a des liens plus étroits avec ce litige et les parties, car le tribunal ontarien a un lien plus réel et plus substantiel dans la relation d'affaires de la SIB et de la Banque TD. Les demandeurs sont incapables de fournir un élément reliant la Banque TD avec la SIB au Québec, pas même un dépôt.

j.

la nécessité éventuelle d'une procédure en exemplification à l'étranger

67 Ce facteur ne s'applique pas dans la présente cause.

2.

LA SITUATION EXCEPTIONNELLE

68 Le Tribunal constate la faiblesse des rattachements de ce dossier au Québec.

69 D'autre part, les circonstances de la présente affaire sont assez exceptionnelles. Tel que mentionné précédemment, le juge Vézina mentionne dans l'affaire *Stormbreaker*[32] :

> "[87] Le *Code civil* ne précise aucun critère d'application de l'
> "exceptionnellement" outre le mot lui-même qui évoque l'idée de rare,

d'inhabituel, de circonstances spéciales, hors de l'ordinaire."

70 Comment ne pas prétendre qu'il s'agit d'un cas exceptionnel lorsque - lors de l'écroulement du groupe Stanford :

70.1. la SIB avait des créanciers dans 113 pays;

70.2. malgré le fait que son siège social était à Antigua - une partie importante des opérations émanaient de Houston[33];

70.3. comme le Tribunal l'a mentionné dans son jugement[34] du 11 septembre 2009, la toile d'araignée et le centre nerveux étaient Houston et qu'il s'agissait d'un stratagème à la Ponzi;

70.4. que l'"Attorney General of Ontario" a exercé un recours en confiscation de toutes les sommes détenues par la Banque TD. Ce dossier a été réglé par le syndic Janvey, la Banque TD ayant remis toutes les sommes qu'elle détenait, soit environ 20 millions $;

70.5. qu'il s'agit d'une fraude à l'échelle du globe dont le déficit est de plus de 4 milliards $ et dont la complexité est admise par les demandeurs;

70.6. que le président de la SIB est en prison à Houston;

70.7. que - suivant les représentants des demandeurs - ils auront besoin d'experts, possiblement du New Jersey;

70.8. que la SIB n'avait qu'un bureau de représentations à Montréal;

70.9. que les relations d'affaires entre la SIB et la Banque TD se sont maintenues pendant plus de 20 ans alors que le bureau de Montréal n'a eu d'existence que pendant près de cinq ans dans la phase finale des opérations de la SIB;

70.10. que selon le témoignage[35] de monsieur Mersch :

> "31Q- So let me get this straight, so that I understand. Again, to bring it to a tangible level, if SIB sought to obtain the issuance of an LC by TD Bank, can you tell us who from SIB would call who at TD Bank, and how the process or how the different steps leading to the issuance of the LC would take place?
>
> A- So, normally, il will be... the primary contact for SIB with our group was Patricia Moldonado, out of SIB Houston office. Generally, requests would... would come through her... or in conjunction with the Antiguan office as well. Those requests would be made to the Relationship... SIB Relationship Management team

in correspondent [...]

[...]

94Q- These are the bank accounts of SIB; can you, for the benefit of the Court, tell us where were those bank accounts opened, maintained and managed?

A- They were opened, maintained and managed in Toronto.

95Q- And can you, please, explain to the Court, what do you mean by "maintaining bank accounts in relation to the corresponding banking services that were provided to SIB"?

A- Yes. I think I need to start with... with the opening of an account. So, if SIB wanted to open up an account, they would contact their Relationship Management team in Toronto. The Relationship Management team then would discuss with the SIB personnel out of the U.S., generally. Again, primary contact was Miss Moldonado in Houston; any sort of specific terms and conditions and any sort of pricing, that sort of stuff.

From there, the Relationship manager... Management team would then liaise with our Operations area in Toronto for the actual opening of the account, because the accounts were housed at our operations area in Toronto.

And the on an ongoing basis, from a maintenance of the account, if there are any sort of... any sort of billing, any sort of account statements, that sort of stuff would have come out of Toronto to SIB in Antigua... and the U.S. If there was any sort of inquiries in terms of wires, they would come into our help desk in Toronto. If there was any general relationship management issues, they would come into the Relationship team in Toronto.

> And then, there was also visits between the Relationship team and the SIB personnel, from an overall relationship standpoint.
>
> [...]
>
> 97Q- What about wires, where the activities in respect of the issuance of any wires were handled from?
>
> A- The wire activity would have... was out of our Operations area, the core operations area being in one of the TD tours, it's in the Ernst & Young tower presently. So any sort of wire activity, that's where our wire engine is, so to speak, in terms of where transactions take place.
>
> 98Q- Where is the E&G tour?
>
> [...]
>
> 99Q- In Toronto?
>
> A- In Toronto, correct."

71 Alors, le Tribunal n'a aucune hésitation à paraphraser le juge Vézina pour dire que la présente affaire évoque l'idée de rare, de cas inhabituel, de circonstances spéciales, hors de l'ordinaire. D'ailleurs, les demandeurs reconnaissent que des témoins viendront de partout dans le monde[36].

72 À ce stade, il n'y a rien dans la preuve qui démontre que des créanciers québécois témoigneront à titre de victimes d'un préjudice par la Banque TD. Nous avons le liquidateur antiguais qui agit au nom de la SIB et au nom des créanciers du recours Dynasty, dont aucun des membres n'a été identifié comme québécois. Le rattachement au Québec que les demandeurs ont subi un préjudice au Québec est mince puisqu'on n'annonce aucun créancier québécois dans la liste[37] des témoins.

73 En conclusion, le Tribunal est d'avis que - devant cette situation exceptionnelle - les tribunaux de l'Ontario sont plus à même de trancher le litige.

74 Le Tribunal est convaincu que le lien le plus substantiel avec les parties et le litige en tant que tel est soit l'Ontario, Houston ou Antigua, mais pas Montréal. Le Tribunal a déjà écrit que le centre de la toile d'araignée est à Houston et que - selon le témoignage de monsieur Mersch - les

communications étaient Toronto/Houston et quelques fois Antigua, mais pas Montréal.

75 D'ailleurs, ce n'est pas par hasard que les demandeurs ont déposé simultanément un autre recours en Ontario, le même jour que le présent recours, et ce, à quelques minutes d'intervalle.

76 Les circonstances de la présente affaire sont différentes de l'affaire *Stormbreaker*[38] quant à la nature même du recours et quant aux difficultés liées au recours.

77 Le Tribunal conclut qu'il serait plus juste et plus efficace que l'affaire soit entendue avec celle de l'Ontario afin d'assurer l'équité envers les parties et éviter de dédoubler les efforts, car - n'oublions pas que :

77.1. le recours ontarien déposé en parallèle continuera, advenant le rejet du recours québécois;
77.2. les coûts pour la défenderesse seront moindres si le procès a lieu en Ontario alors que - pour les demandeurs - il n'y a aucune différence, car ils ne sont pas du Québec;
77.3. il s'agit des mêmes témoins et de la même situation factuelle dans les procédures connexes;
77.4. il s'agit - dans la présente affaire - d'une situation exceptionnelle où le dossier - tel que constitué par les demandeurs - démontre une faiblesse de rattachement au Québec dans une action en responsabilité de la Banque TD.

78 Le fait que le soussigné gère le dossier d'insolvabilité de la SIB ne rend pas le tribunal québécois le ressort le plus approprié puisque le recours intenté par les demandeurs en est un d'action en responsabilité civile, soit contractuelle, soit extracontractuelle contre la Banque TD.

PAR CES MOTIFS, LE TRIBUNAL :

79 **ACCUEILLE** en partie la requête en "forum non conveniens";

80 **DÉCLINE** juridiction pour entendre la requête introductive d'instance amendée ("Amended Motion to Introduce Proceedings") et **TRANSFÈRE** le dossier en Ontario;

81 **REJETTE** la requête introductive d'instance amendée ("Amended Motion to Introduce Proceedings");

82 **LE TOUT, AVEC DÉPENS.**

CLAUDE AUCLAIR, J.C.S.

1 *Stanford International Bank Ltd (Syndic de)*, 2013 QCCS 1693.

2 *Stanford International Bank Ltd (Syndic de)*, 2013 QCCA 988.

3 *Loi sur les banques*, L.C. 1991, ch. 46.

4 Pièce I-16 : En liasse : Announcement of Office of the Superintendant of Financial Institutions dated February 20, 2009 and related press release dated February 23, 2009.

5 *Stanford International Bank Ltd (Syndic de)*, 2009 QCCS 4106 et 2009 QCCS 4109.

6 *Stanford International Bank Ltd (Syndic de)*, 2009 QCCS 4109.

7 *Stanford International Bank Ltd (Syndic de)*, précité note 5.

8 *Stanford International Bank Ltd (Dans l'affaire de la liquidation de)*, 2009 QCCA 2475.

9 *Marcus A. Wide and Hugh Dickson v. Ralph S. Janvey*, No. 33568, [2010] C.S.C.R. no 65.

10 Requête introductive d'instance amendée du 17 février 2012, par. 27.

11 Transcription de la journée d'audition du 15 octobre 2012, contre-interrogatoire de monsieur Wide, p. 167.

12 *Id.*, p. 138 à 140.

13 Transcription de la journée d'audition du 16 octobre 2012, contre-interrogatoire de monsieur Wide, p. 103 à 105 et p. 169.

14 *Id.*, p. 170.

15 Pièce TD-15 : The Toronto-Dominion Bank - Terms and Conditions for Correspondent Banks, effective October 1, 2008.

16 Pièces TD-15, TD-17, TD-18, TD-19, TD-20 et TD-21.

17 *Club Resorts Ltd. c. Van Breda*, 2012 CSC 17.

18 *Breeden c. Black*, 2012 CSC 19.

19 *Stormbreaker Marketing and Productions Inc. c. Weinstock*, 2013 QCCA 269.

20 Transcription de l'audition du 16 octobre 2012, ré-interrogatoire de monsieur Wide, p. 197

à 199.

21 Transcription de l'audience du 15 octobre 2012, contre-interrogatoire de monsieur Boaden, p. 69 à 71.

22 Pièce I-20 : Joint Liquidators' Preliminary List of Witnesses, en date du 13 août 2012.

23 Transcription de l'interrogatoire au préalable de monsieur Wide, tenu le 7 mai 2012 à Toronto, p. 44 à 47.

24 Pièce I-20 : précité note 22.

25 *Id.*

26 *Banque de Montréal c. la Banque de la Nouvelle-Écosse*, 2013 QCCA 1548.

27 Pièce I-20 : précité note 22.

28 Chronologie des procédures judiciaires au Canada en lien avec la SIB, reproduite au par. 10 du présent jugement.

29 Pièce I-12 : Decision of Justice Cumming of the Ontario Superior Court of Justice (Commercial List) dated July 3, 2012.

30 Pièce I-12A : Oral Reasons for Judgment rendered by Justice Kiteley of the Ontario Superior Court of Justice in docket number 366/12 dated October 4, 2012, [2012] O.J. No. 4918.

31 Pièce I-20 : précité note 22.

32 *Stormbreaker Marketing and Productions Inc. c. Weinstock*, précité note 19.

33 *Stanford International Bank ltd. (Syndic de)*, précité note 5, par. 27.

34 *Stanford International Bank ltd. (Syndic de)*, précité note 5, par. 35.

35 Transcription de l'audition du 11 novembre 2013, contre-interrogatoire de monsieur Mersch, p. 23, 47, 48 et 49.

36 Plan d'argumentation des demandeurs, par. 46 à 53 reproduits au par. 35 du présent jugement et par. 54 et 58 reproduits au par. 39 du présent jugement.

37 Pièce I-20 : précité note 22.

38 *Stormbreaker Marketing and Productions Inc. c. Weinstock*, précité note 19.

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TAB 14

1998 CarswellQue 638
Cour d'appel du Québec

Lexus Maritime inc. c. Oppenheim Forfait Gmbh

1998 CarswellQue 638, [1998] A.Q. No. 2059, [1998] J.Q. No. 2059, 82 A.C.W.S. (3d) 46, J.E. 98-1592, REJB 1998-07102

Oppenheim Forfait Gmbh,Appelante - défenderessec.Lexus Maritime Inc,Intimée - demanderesse

JJ.C.A. Proulx, Deschamps, Pidgeon

Audience: 29 mai 1998
Jugement: 9 juillet 1998
Dossier: C.A. Montréal 500-09-006253-983

Avocat: *Me Hélène Lapointe*, Pour l'appelante.
Me Andrew Ness,Pour l'intimée.

Sujet: International; Corporate and Commercial; Civil Practice and Procedure

Per Curiam:

1 *LA COUR*: Statuant sur le pourvoi de l'appelante contreun jugement interlocutoire de la Cour supérieure du district deMontréal (l'honorable Gilles Hébert) rendu le 11 février 1998 quirejetait sa requête soulevant un moyen déclinatoire;

2 Après étude du dossier, audition et délibéré:

3 Pour les motifs exprimés dans l'opinion écrite demonsieur le juge Robert Pidgeon, déposée au présent arrêt, auxquelssouscrivent monsieur le juge Michel Proulx et madame la juge MarieDeschamps:

4 *ACCUEILLE* le présent pourvoi avec dépens et procédant àrendre le jugement qui aurait dû être rendu en Cour supérieure:

5 *ACCUEILLE* la requête en exception déclinatoire;

6 *DÉCLINE* compétence en faveur des tribunaux allemands, letout avec dépens.

***Pidgeon J.C.A.*:**

7 Oppenheim Forfait Gmbh (ci-après Oppenheim), une institution financière et filiale d'une banque privée allemande qui assure le financement de certaines transactions internationales, se pourvoit à l'encontre d'un jugement interlocutoire de la Cour supérieure, district de Montréal (l'Honorable Juge Gilles Hébert), rendu le 11 février 1998 qui rejetait sa requête soulevant un moyen déclinatoire.

8 Le juge de première instance a reconnu la juridiction des tribunaux québécois pour disposer de la présente affaire et refusé de décliner compétence en faveur des tribunaux allemands en application de la doctrine du *forum non conveniens*. Oppenheim ne conteste pas la compétence du tribunal québécois, son appel se limite à soulever que le litige possède des liens beaucoup plus étroits avec l'autorité allemande.

Les Faits

9 Le 12 avril 1995, l'intimée, Lexus Maritime Inc. (ci-après Lexus), une compagnie canadienne ayant son siège social à Montréal, province de Québec, signait un contrat avec une compagnie roumaine selon lequel elle s'engageait à fournir les plans et manuels pour la construction d'une manufacture de torréfaction de café et l'équipement à y être installé.

10 En retour, comme partie du prix d'achat, Lexus a obtenu deux billets promissoires venant à maturité le 25 février 1996. Une analyse du dossier démontre que voulant sécuriser ses fournisseurs allemands, elle a décidé de faire affaires avec Oppenheim à qui elle a vendu les billets promissoires.

11 Elle réclame maintenant d'Oppenheim la différence entre le montant des deux billets promissoires et les montants payés aux fournisseurs allemands, Probat et Bosch. Elle prétend qu'Oppenheim refuse sans droit de transférer ce montant à sa banque à Montréal.

12 Oppenheim soutient qu'elle n'a pas à payer ce montant car Lexus aurait omis d'exécuter certains engagements prévus à la Convention de financement - elle aurait fait défaut de fournir une garantie additionnelle sur le deuxième billet promissoire - . Or, en raison de cela, Oppenheim n'aurait jamais été payée lorsqu'elle a présenté, pour paiement, le second effet de commerce, à maturité.

Jugement de Première Instance

13 En première instance, Oppenheim, se basant sur l'article 68 C.p.c. et l'article 1387 C.c.Q., a soutenu que le contrat avait été formé en Allemagne, lieu de son domicile réel.

14 Lexus, pour sa part, a invoqué l'article 3148 C.c.Q. et particulièrement son paragraphe 3 qui prévoit que les autorités québécoises sont compétentes, entre autres, lorsque l'une des obligations découlant d'un contrat devait y être exécutée.

15 Après avoir analysé la preuve et pris connaissance des pièces, le premier juge a conclu que la présente requête est régie non pas par l'article 68 C.p.c. mais par l'article 3148 C.c.Q. puisque le dernier paiement devait être versé à la Banque de Montréal, à Montréal.

16 Il écarte ensuite les décisions auxquelles l'a référé Oppenheim au motif qu'elles visaient le droit interne québécois et la compétence des différents districts judiciaires relevant de l'autorité judiciaire québécoise.

17 Il évalue ensuite si exceptionnellement il y a lieu que l'autorité québécoise décline compétence, compte tenu que les tribunaux allemands seraient plus à même de trancher le litige (art. 3135 C.c.Q.). De l'avis du premier juge, Oppenheim a fait défaut d'établir, par une preuve prépondérante, que les tribunaux allemands seraient en meilleure position. Les motifs de son jugement sont, d'une part, que Oppenheim semble avoir tenu pour acquis que le litige était soumis à la loi allemande ce qui, à son avis, est loin d'être clair et, d'autre part, que les arguments des parties relativement au déplacement des témoins s'équivalent. Il conclut, enfin, que « la preuve testimoniale et les documents produits ne lui permettent pas de considérer d'autres éléments ».

Analyse et Discussion

18 La doctrine du *forum non conveniens* est désormais codifiée à l'article 3135 du C.c.Q.:

> **Art. 3135. Bien qu'elle soit compétente pour connaître d'un litige, une autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette compétence si elle estime que les autorités d'un autre État sont mieux à même de trancher le litige.**

19 Force nous est de constater que le tribunal de première instance possède une large discrétion. De surcroît, l'article 3135 C.c.Q. dispose que ce n'est qu'exceptionnellement que le tribunal québécois déclinera compétence et ce, s'il estime que les autorités d'un autre État sont plus à même de trancher le litige. La règle est donc que si l'autorité québécoise

est régulièrement saisie d'un litige, elle en demeure saisie sauf situation exceptionnelle. À cet égard, il est intéressant de relever les propos du juge Bishop *dans l'affaire Czajka* [1] :

> **The Court assume that the world "Exceptionnaly" was used by the legislature to require defendant to establish that another juridiction is clearly the more appropriate forum to hear the action. It was intended that the Quebec Court would decline to exercise its juridiction only under exceptionnal circumstances.**

20 Rappelons ici que la compétence des tribunaux québécois ne fait pas l'objet du présent appel, Oppenheim la reconnaît. Ainsi, il s'agit uniquement de déterminer si le premier juge a erré dans l'exercice de sa discrétion en refusant de décliner compétence en faveur des tribunaux allemands en application de la doctrine du *forum non conveniens*.

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22 Le juge saisi d'un moyen déclinatoire doit considérer plusieurs facteurs afin de déterminer s'il est en présence d'une situation exceptionnelle. Au cours des dernières années, les tribunaux ont précisé le sens et la portée de l'article 3135 C.c.Q. [2]. Les critères à considérer comprennent, entre autres:

1) le lieu de résidence des parties et des témoins ordinaires et experts;

2) la situation des éléments de preuve;

3) le lieu de formation et d'exécution du contrat qui donne lieu à la demande;

4) l'existence et le contenu d'une autre action intentée à l'étranger et le progrès déjà effectué dans la poursuite de cette action;

5) la situation des biens appartenant au défendeur;

6) la loi applicable au litige;

7) l'avantage dont jouit la demanderesse dans le for choisi;

8) l'intérêt de la justice;

9) l'intérêt des deux parties;

10) nécessité éventuelle d'une procédure en exemplificationà l'étranger.

23 Aucun de ces critères n'est déterminant en soi, il faut plutôt les évaluer globalement et garder à l'esprit que le résultat de leur application doit désigner de façon claire un forum unique. Donc, s'il ne se dégage pas une impression nette tendant vers un seul et même forum étranger, le tribunal devrait alors refuser de décliner compétence [3] particulièrement lorsque les facteurs de rattachement sont contestables [4].

24 En l'espèce, les facteurs de rattachement sont au coeur du litige. L'une ou l'autre des parties conteste soit la nature des activités de Lexus, soit le lieu de formation et d'exécution du contrat, soit la loi applicable au contrat et même la considération principale de la Convention de financement.

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Nature des activités de Lexus et lieu de paiement

26 Bien que le premier juge ait pu considérer à tort que Lexus était un fabriquant de four pour torréfier du café, cela n'a eu, à mon avis, aucune incidence sur le dispositif du jugement de première instance. En effet, l'analyse doit se limiter aux obligations des parties en vertu de la Convention de financement et ce, peu importe la nature de l'étendue de leurs activités.

27 À la lumière de la Convention de financement et des communications entre les parties, il apparaît manifeste que la prestation caractéristique du contrat est le financement d'effets de commerce par Oppenheim. Ce financement a été effectué en Allemagne car Lexus voulait sécuriser ses fournisseurs allemands.

28 Selon Oppenheim, le lieu de paiement n'étant pas désigné dans la Convention de financement, la dette est alors quérable au domicile du débiteur en vertu de l'article 1566 C.c.Q. soit au siège social de ce dernier, en Allemagne.

29 Par ailleurs, les parties n'ont pas prévu dans leur contrat les modalités de paiement du reliquat à Lexus ni le lieu de ce paiement. Je note, toutefois, qu'à la suite du paiement des fournisseurs allemands des sommes ont été versées par Oppenheim à la convenance et au nom de Lexus dans différents pays dont l'Allemagne, la Roumanie, l'Angleterre, les États-Unis. Fait à souligner, un seul paiement a été effectué à Lexus elle-même à Montréal. Ainsi, il est impossible de déduire de ces faits, comme le prétend Lexus, une quelconque entente « implicite » sur le lieu de paiement des sommes restantes.

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Loi applicable à la Convention de financement

31 La détermination de la loi applicable à la Convention de financement doit s'analyser à la lumière des dispositions du titre deuxième du C.c.Q. portant sur les conflits des lois, plus particulièrement les articles 3112 et 3113 qui se lisent comme suit:

> **Art. 3112. En l'absence de désignation de la loi dans l'acte ou si la loi désignée rend l'acte juridique invalide, les tribunaux appliquent la loi de l'État qui, compte tenu de la nature de l'acte et des circonstances qui l'entourent, présente les liens les plus étroits avec cet acte.**
>
> **Art. 3113. Les liens les plus étroits sont présumés exister avec la loi de l'État dans lequel la partie qui doit fournir la prestation caractéristique de l'acte à sa résidence ou, si celui-ci est conclu dans le cours des activités d'une entreprise, son établissement.**

32 Ici, la loi applicable n'a pas été prévue dans l'acte. Il faut donc déterminer la loi de l'état avec laquelle celui-ci présente les liens les plus étroits. Pour y parvenir, on doit tenir compte de la nature de l'acte juridique et des circonstances qui ont entouré sa signature, à titre d'exemples, le lieu de conclusion du contrat, le lieu de son exécution principale, la situation de l'objet de l'acte, le domicile, la résidence, la nationalité, le centre d'affaires des parties, la forme de la rédaction de l'acte, la monnaie de paiement, la langue employée, la teneur des lois en conflit, les clauses d'arbitrage ou attributives de compétence et, enfin, l'attitude des parties [5].

33 En l'espèce, le contrat de financement selon une des allégations de la requête en exception déclinatoire, laquelle est appuyée d'une déclaration sous serment d'une représentante d'Oppenheim, a été conclu en Allemagne, le lieu de réception de l'acceptation de l'offre de contracter (art. 1387 C.c.Q.). La convention visait le financement de billets promissoires par Oppenheim dont le siège social est en Allemagne et qui n'a pas de filiale au Canada, la monnaie de paiement est le

mark allemand, la langue employée entre les parties est l'anglais, toutefois, les communications entre Oppenheim et les fournisseurs allemands se sont effectuées en allemand. Enfin, le paiement par Oppenheim des fournisseurs allemands de Lexus s'est effectué en Allemagne.

34 Bref, l'application des articles 3112 et 3113 C.c.Q. favorise la thèse de Oppenheim que la loi applicable à la Convention de financement est celle de l'Allemagne, l'état présentant les liens les plus étroits avec le contrat.

35 En outre, la position d'Oppenheim est confirmée par l'application de la présomption définie à l'article 3113 C.c.Q. soit que les liens les plus étroits sont présumés exister avec la loi de l'État ou la partie qui doit fournir la prestation caractéristique de l'acte, à sa résidence. Or, en l'espèce, le financement des billets promissoires - la prestation caractéristique de l'acte - est réalisé par Oppenheim qui a son siège social en Allemagne. La loi allemande est donc présumée présenter les liens les plus étroits avec la Convention de financement. Je retiens donc de ce qui précède que la loi applicable à la Convention est celle de l'Allemagne.

36 Même si l'on devait retenir l'argument de Lexus que l'obligation principale du contrat réside dans le paiement par Oppenheim à la banque de cette dernière à Montréal du solde des billets promissoires, cela ne modifie en rien la situation puisque la partie devant fournir la prestation caractéristique, Oppenheim, à son établissement à Francfort, en Allemagne.

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37 ellipsis;

38 Ainsi, à la lumière de l'analyse globale des critères à prendre en considération pour l'application de la doctrine du *forum non conveniens*, je suis d'avis que les tribunaux allemands sont clairement mieux placés pour disposer de ce litige. En effet, l'ensemble des facteurs de rattachement milite en faveur de la thèse de l'appelante, c'est-à-dire que le litige a des liens plus étroits avec l'autorité allemande.

39 Ici, le juge de première instance a erronément considéré que Oppenheim n'avait pas démontré, selon la balance des probabilités, que les tribunaux allemands étaient le forum le plus approprié pour trancher le présent litige. Les motifs de sa décision reposent sur le fait qu'il n'était pas clair que la loi applicable à la convention était celle de l'Allemagne et aussi parce que la situation des témoins était tout aussi préjudiciable pour les deux parties et, enfin, que le dossier ne présentait aucun autre élément de rattachement aux tribunaux allemands. À mon avis, il a commis une première erreur en concluant qu'il était loin d'être clair que le droit allemand était applicable. Deuxièmement, la preuve démontre clairement que le litige possède plusieurs facteurs de rattachement avec l'autorité allemande. La nature du contrat, le lieu où il a été conclu, son caractère international, la monnaie de paiement utilisée, le fait que Lexus ait choisi de transiger avec une institution financière allemande dans le but évident de sécuriser ses fournisseurs allemands, l'absence de lieu de paiement indiqué au contrat et, finalement, le fait que Lexus devra, de toute façon, faire exemplifier son jugement par les tribunaux allemands sont autant d'éléments qui, considérés globalement, indiquent clairement que le forum approprié est celui de l'Allemagne. Compte tenu de ce qui précède, je suis d'avis que le premier juge se trouvait en présence d'une situation exceptionnelle justifiant le transfert du dossier devant les tribunaux allemands.

40 En terminant, je crois opportun de rappeler les propos du juge La Forest, de la Cour suprême, dans l'affaire *Hunt v. T & N plc*[6]:

> Whatever approach is used, the assumption of and the discretion not to exercice juridiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts and connections.
>
> (j'ai souligné)

41 Pour ces motifs, je propose d'accueillir le présent pourvoi avec dépens et, procédant à rendre le jugement qui aurait dû être rendu en Cour supérieure: d'accueillir la requête en exception déclinatoire et décliner compétence en faveur des tribunaux allemands, le tout avec dépens.

Notes de bas de page

1 *Czajka c. The Life Investors Insurance Company of America* (1995), JE 95-765 (C.S. Que.), [1995 CarswellQue 535 (C.S. Que.)] p-14-15

2 *Banque Toronto Dominion c. Cloutier*, [1994] R.J.Q. 386 (C.S. Que.); *Droit de la famille - 2032*, [1994] R.J.Q. 2218 (C.S. Que.); *Malden Mills Industries Inc. c. Huntingdon Mills (Canada) Ltd.*, [1994] R.J.Q. 2227 (C.S. Que.) (appel rejeté); *Banque Toronto Dominion c. Arsenault*, [1994] R.J.Q. 2253 (C.S. Que.) (désistement en appel); *Simcoe & Erie General Insurance Co. c. Arthur Andersen Inc.*, [1995] R.J.Q. 2222 (C.S. Que.) (désistement en appel); *Société Toon Boom Technologies c. Société 2001 S.A.* (1996), J.E. 96-474 (C.A. Que.) [1996 CarswellQue 138 (C.A. Que.)] *2493136 Canada inc. c. Sunburst Products Inc.* (1996), J.E. 96-1062 (C.S. Que.), [1996 CarswellQue 1514 (C.S. Que.)] , *Reklitis, Re*, [1996] R.J.Q. 3035 (C.S. Que.) (en appel); *H.L. Boulton & Co. S.A.C.A. c. Banque Royale* (1994), [1995] R.J.Q. 213 (C.S. Que.); *Droit de la famille - 2094*, [1996] R.J.Q. 276 (C.A. Que.); *S. (S.) c. M. (N.)*, J.E. 97-262 (C.A. Que.) , [1996 CarswellQue 1135 (C.A. Que.)]

3 *H.L. Boulton*, précité note 2

4 J.A. TALPIS et Jean-Guy CASTE, "Le Code civil du Québec: interprétation des règles du droit international privé", dans Barreau du Québec et Chambre des notaires du Québec, *La réforme du Code civil: priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires.*, Tome 3, Ste-Foy: P.U.L., 1993 p-808

5 "Commentaires du ministre de la Justice", Tome II, articles 3112 et 3113 C.c.Q.

6 [1993] 4 S.C.R. 289 (S.C.C.)

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TAB 15

Richard C. Breeden, Richard C. Breeden & Co., Gordon A. Paris, James R. Thompson, Richard D. Burt, Graham W. Savage and Raymond G. H. Seitz *Appellants*

v.

Conrad Black *Respondent*

- and -

Richard C. Breeden, Richard C. Breeden & Co., Gordon A. Paris, James R. Thompson, Richard D. Burt, Graham W. Savage and Raymond G. H. Seitz *Appellants*

v.

Conrad Black *Respondent*

- and -

Richard C. Breeden, Richard C. Breeden & Co., Gordon A. Paris, James R. Thompson, Richard D. Burt, Graham W. Savage and Raymond G. H. Seitz *Appellants*

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c.

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- et -

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Savage, Raymond G. H. Seitz and Paul B. Healy *Appellants*

v.

Conrad Black *Respondent*

- and -

Richard C. Breeden, Richard C. Breeden & Co., Gordon A. Paris, James R. Thompson, Richard D. Burt, Graham W. Savage, Raymond G. H. Seitz, Shmuel Meitar and Henry A. Kissinger *Appellants*

v.

Conrad Black *Respondent*

and

British Columbia Civil Liberties Association *Intervener*

INDEXED AS: BREEDEN *v.* BLACK

2012 SCC 19

File No.: 33900.

2011: March 22; 2012: April 18.

Present: McLachlin C.J. and Binnie,* LeBel, Deschamps, Fish, Abella, Charron,* Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Private international law — Choice of forum — Court having jurisdiction — Forum non conveniens — Libel actions commenced in Ontario in respect of statements posted on U.S. company's website and in its annual report and republished by three Canadian newspapers — Defendants bringing motion to stay actions on grounds that Ontario court lacks jurisdiction or, alternatively, should decline to exercise its jurisdiction on basis

* Binnie and Charron JJ. took no part in the judgment.

Savage, Raymond G. H. Seitz et Paul B. Healy *Appelants*

c.

Conrad Black *Intimé*

- et -

Richard C. Breeden, Richard C. Breeden & Co., Gordon A. Paris, James R. Thompson, Richard D. Burt, Graham W. Savage, Raymond G. H. Seitz, Shmuel Meitar et Henry A. Kissinger *Appelants*

c.

Conrad Black *Intimé*

et

Association des libertés civiles de la Colombie-Britannique *Intervenante*

RÉPERTORIÉ : BREEDEN *c.* BLACK

2012 CSC 19

N° du greffe : 33900.

2011 : 22 mars; 2012 : 18 avril.

Présents : La juge en chef McLachlin et les juges Binnie*, LeBel, Deschamps, Fish, Abella, Charron*, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit international privé — Choix du tribunal — Juridiction compétente — Forum non conveniens — Actions en diffamation introduites en Ontario relativement à certains propos publiés sur le site Web et dans le rapport annuel d'une société américaine, et repris par trois journaux canadiens — Demande de suspension de l'instance par les défendeurs au motif que le tribunal ontarien n'a pas compétence ou, subsidiairement, qu'il

* Les juges Binnie et Charron n'ont pas participé au jugement.

of forum non conveniens — Whether Ontario court can assume jurisdiction over actions — If so, whether Ontario court should decline to exercise its jurisdiction on ground that court of another jurisdiction is clearly a more appropriate forum for hearing of actions.

B is a well-known business figure who established a reputation as a newspaper owner and publisher in Canada and internationally. While B served as the chairman of a publicly traded U.S. company, the legitimacy of certain payments that had been made to B were questioned. A special committee formed to conduct an investigation concluded that the company had made unauthorized payments to B. The committee's report was posted on the company's website, which was accessible worldwide, along with press releases containing contact information directed at Canadian media. Statements were also published in the company's annual report summarizing the committee's findings.

B commenced six libel actions in the Ontario Superior Court of Justice against the 10 appellants, who are directors, advisors and a vice-president of the company. B alleges that the press releases and reports issued by the appellants and posted on the company's website contained defamatory statements that were downloaded, read and republished in Ontario by three newspapers. He claims damages for injury to his reputation in Ontario.

The appellants brought a motion to have the actions stayed on the grounds that there was no real and substantial connection between the actions and Ontario, or, alternatively, that a New York or Illinois court was the more appropriate forum. The motion judge dismissed the motion, finding that a real and substantial connection to Ontario had been established and that Ontario was a convenient forum to hear the actions. The Ontario Court of Appeal unanimously dismissed the appeal. It found that a real and substantial connection was presumed to exist on the basis that a tort was committed in Ontario, and that the appellants had failed to rebut this presumption. It also found that there was no basis on which to interfere with the motion judge's exercise of discretion with regard to *forum non conveniens*.

Held: The appeal should be dismissed.

In the case at bar, it is necessary to engage in the real and substantial connection analysis to determine whether the Ontario court may properly assume jurisdiction

devrait décliner compétence pour cause de forum non conveniens — Le tribunal ontarien peut-il se déclarer compétent à l'égard des actions? — Dans l'affirmative, le tribunal ontarien devrait-il refuser d'exercer sa compétence au motif que le tribunal d'un autre ressort est nettement plus approprié pour instruire les actions?

B est un homme d'affaires bien connu qui s'est bâti une réputation de propriétaire de journaux et d'éditeur au Canada et à l'échelle internationale. Alors qu'il était président d'une société ouverte américaine, la légitimité de certains paiements qui lui avaient été versés a été mise en doute. Un comité spécial chargé de mener une enquête a conclu que la société avait fait des paiements non autorisés à B. Le rapport du comité, ainsi que des communiqués de presse contenant des coordonnées destinées aux médias canadiens, ont été affichés sur le site Web de la société, lequel était accessible à l'échelle mondiale. Certains propos résumant les conclusions du comité ont également été publiés dans le rapport annuel de la société.

B a intenté en Cour supérieure de justice de l'Ontario six actions en diffamation contre les 10 appelants, qui sont des administrateurs, des conseillers ainsi qu'un vice-président de la société. B soutient que les communiqués de presse et les rapports publiés par les appelants et affichés sur le site Web de la société contenaient des propos diffamatoires qui ont été téléchargés, lus et repris en Ontario par trois journaux. Il réclame des dommages-intérêts pour le tort causé à sa réputation en Ontario.

Les appelants ont demandé qu'il soit sursis aux instances au motif qu'il n'y avait pas de lien réel et substantiel entre ces instances et l'Ontario ou, subsidiairement, qu'un tribunal de New York ou de l'Illinois constituaient des ressorts plus appropriés. Le juge saisi de la motion a rejeté la motion, concluant qu'un lien réel et substantiel avec l'Ontario avait été établi et que l'Ontario était le lieu où il convenait d'introduire les actions. La Cour d'appel de l'Ontario a rejeté à l'unanimité l'appel. Elle a conclu que l'existence d'un lien réel et substantiel était présumée du fait qu'un délit avait été commis en Ontario, et que les appelants n'avaient pas réussi à réfuter cette présomption. Elle a également conclu, en ce qui concerne la doctrine du *forum non conveniens*, qu'il n'y avait aucune raison de modifier la décision rendue par le juge saisi de la motion dans l'exercice de son pouvoir discrétionnaire.

Arrêt : Le pourvoi est rejeté.

Il est nécessaire en l'espèce de procéder à l'analyse du lien réel et substantiel pour déterminer si la cour ontarienne peut à bon droit se déclarer compétente pour

over the actions. The framework for the assumption of jurisdiction was recently set out by this Court in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572. The issue of assumption of jurisdiction is easily resolved in this case based on a presumptive connecting factor — the alleged commission of the tort of defamation in Ontario. It is well established in Canadian law that the tort of defamation occurs upon publication of a defamatory statement to a third party, which, in this case, occurred when the impugned statements were read, downloaded and republished in Ontario by three newspapers. It is also well established that every repetition or republication of a defamatory statement constitutes a new publication, and that the original author of the statement may be held liable for the republication where it was authorized by the author or where the republication is the natural and probable result of the original publication. The republication in the three newspapers of statements contained in press releases issued by the appellants clearly falls within the scope of this rule. In the circumstances, the appellants have not displaced the presumption of jurisdiction that results from this connecting factor.

Having found that a real and substantial connection exists between the action and Ontario, it must be determined whether the Ontario court should decline to exercise its jurisdiction on the ground that the court of another jurisdiction is clearly a more appropriate forum for the hearing of the actions. Under the *forum non conveniens* analysis, the burden is on the party raising the issue to demonstrate that the court of the alternative jurisdiction is a clearly more appropriate forum. The factors to be considered by a court in determining whether an alternative forum is clearly more appropriate are numerous and will vary depending on the context of each case. The *forum non conveniens* analysis does not require that all the factors point to a single forum, but it does require that one forum ultimately emerge as clearly more appropriate. The decision not to exercise jurisdiction and to stay an action based on *forum non conveniens* is a discretionary one, and the discretion exercised by a motion judge will be entitled to deference from higher courts, absent an error of legal principle or an apparent and serious error on the determination of relevant facts.

When the *forum non conveniens* analysis is applied to the circumstances of the instant appeal, it becomes apparent that both the courts of Illinois and Ontario are appropriate forums for the trial of the libel actions. The factors of comparative convenience and expense for the parties and witnesses, location of the parties, avoidance of a multiplicity of proceedings and conflicting

connaître des actions. Notre Cour a récemment exposé le cadre de la déclaration de compétence dans l'arrêt *Club Resorts Ltd. c. Van Breda*, 2012 CSC 17, [2012] 1 R.C.S. 572. La question de la déclaration de compétence est facile à trancher en l'espèce, compte tenu d'un facteur de rattachement créant une présomption — le délit de diffamation qui aurait été commis en Ontario. Le droit canadien admet depuis longtemps que le délit de diffamation se manifeste dès qu'il y a diffusion d'un propos diffamatoire destiné à un tiers, laquelle, en l'espèce, a eu lieu lorsque les communiqués contestés ont été lus, téléchargés et repris en Ontario par trois journaux. Il est également bien établi que chaque répétition ou reprise d'un propos diffamatoire constitue une nouvelle diffusion, et que l'auteur initial de ce propos peut être tenu responsable de la reprise dès lors qu'il l'a autorisée ou que la reprise est le résultat naturel et probable de la diffusion initiale. La règle s'applique clairement à la reprise, par les trois journaux, des propos figurant dans les communiqués de presse émis par les appelants. Dans les circonstances, les appelants n'ont pas réfuté la présomption de compétence découlant de ce facteur de rattachement.

Après avoir conclu à l'existence d'un lien réel et substantiel entre les actions et l'Ontario, il faut déterminer si le tribunal ontarien devrait décliner compétence au motif que le tribunal d'un autre ressort constitue clairement un tribunal plus approprié pour instruire les actions. Dans l'analyse relative au *forum non conveniens*, il incombe à la partie qui soulève cette question de démontrer que le tribunal de l'autre ressort constitue un tribunal nettement plus approprié. Les facteurs à prendre en compte pour déterminer si un autre tribunal est nettement plus approprié sont nombreux et varient selon le contexte de chaque affaire. L'analyse relative au *forum non conveniens* n'exige pas que ces facteurs convergent tous vers un seul et même ressort; elle exige toutefois qu'un ressort apparaisse comme étant nettement plus approprié. La décision par un tribunal de ne pas exercer sa compétence et de suspendre une action en application de la doctrine du *forum non conveniens* est une décision discrétionnaire, et en l'absence d'une erreur de droit ou d'une erreur manifeste et grave dans l'établissement des faits pertinents, les juridictions supérieures feront preuve de déférence à l'égard de l'exercice du pouvoir discrétionnaire du juge.

En appliquant l'analyse relative au *forum non conveniens* aux circonstances du présent pourvoi, il ressort à l'évidence que les tribunaux de l'Illinois et de l'Ontario constituent tous deux des ressorts appropriés pour l'instruction des actions en diffamation. Les facteurs du coût et de la commodité pour les parties à l'instance et leurs témoins, du lieu de résidence des parties, de

decisions, and enforcement of judgment favour the Illinois court as a more appropriate forum, whereas the factors of applicable law and fairness to the parties favour the Ontario court. In the end, however, considering the combined effect of the relevant facts, and in particular the weight of the alleged harm to B's reputation in Ontario, and giving due deference to the motion judge's decision, the Illinois court does not emerge as a clearly more appropriate forum than an Ontario court for the trial of the libel actions.

Cases Cited

Applied: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; **referred to:** *Charron Estate v. Village Resorts Ltd.*, 2010 ONCA 84, 98 O.R. (3d) 721; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20; *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321; *Oppenheim forfait GMBH v. Lexus maritime inc.*, 1998 CanLII 13001; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

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l'opportunité d'éviter la multiplicité des recours et les décisions contradictoires, et de l'exécution du jugement, favorisent le tribunal de l'Illinois comme étant un ressort plus approprié, alors que les facteurs de la loi applicable et de l'équité envers les parties favorisent la tenue du procès en Ontario. En définitive, toutefois, compte tenu de l'effet combiné des faits de l'espèce — et en particulier du poids de l'atteinte que subirait la réputation de B en Ontario —, et en faisant preuve de la déférence qui s'impose à l'égard de la décision du juge saisi de la motion, le tribunal de l'Illinois n'apparaît pas comme un ressort nettement plus approprié qu'un tribunal de l'Ontario pour l'instruction des actions en diffamation.

Jurisprudence

Arrêt appliqué : *Club Resorts Ltd. c. Van Breda*, 2012 CSC 17, [2012] 1 R.C.S. 572; **arrêts mentionnés :** *Charron Estate c. Village Resorts Ltd.*, 2010 ONCA 84, 98 O.R. (3d) 721; *Muscutt c. Courcelles* (2002), 60 O.R. (3d) 20; *Teck Cominco Metals Ltd. c. Lloyd's Underwriters*, 2009 CSC 11, [2009] 1 R.C.S. 321; *Oppenheim forfait GMBH c. Lexus maritime inc.*, 1998 CanLII 13001; *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897; *Éditions Écosociété Inc. c. Banro Corp.*, 2012 CSC 18, [2012] 1 R.C.S. 636; *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130.

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No. 1292 (QL), 2009 CarswellOnt 1730. Appeal dismissed.

Paul B. Schabas, *Ryder L. Gilliland* and *Erin Hoult*, for the appellants Richard C. Breeden and Richard C. Breeden & Co.

Robert W. Staley and *Julia Schatz*, for the appellants Gordon A. Paris, James R. Thompson, Richard D. Burt, Graham W. Savage, Raymond G. H. Seitz, Paul B. Healy, Shmuel Meitar and Henry A. Kissinger.

Earl A. Cherniak, *Q.C.*, *Kirk F. Stevens* and *Lisa C. Munro*, for the respondent.

Robert D. Holmes, *Q.C.*, for the intervener.

The judgment of the Court was delivered by

LeBel J. —

I. Introduction

A. *Overview*

[1] This appeal concerns the manner in which the law of jurisdiction and the doctrine of *forum non conveniens*, which this Court recently reviewed in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572 ("*Club Resorts*"), are to be applied to a multistate defamation claim. The respondent, Conrad Black, filed six libel actions in the Ontario Superior Court of Justice against the 10 appellants, who are directors, advisors and a vice-president of Hollinger International, Inc. ("International"). Lord Black alleges that certain statements issued by the appellants and posted on International's website are defamatory and were published in Ontario when they were downloaded, read and republished in the province by three newspapers. The appellants counter that the Ontario court should not assume jurisdiction over the actions because they are essentially American in substance or, alternatively, because the Illinois court is a more appropriate forum than the Ontario court.

[2009] O.J. No. 1292 (QL), 2009 CarswellOnt 1730. Pourvoi rejeté.

Paul B. Schabas, *Ryder L. Gilliland* et *Erin Hoult*, pour les appelants Richard C. Breeden et Richard C. Breeden & Co.

Robert W. Staley et *Julia Schatz*, pour les appelants Gordon A. Paris, James R. Thompson, Richard D. Burt, Graham W. Savage, Raymond G. H. Seitz, Paul B. Healy, Shmuel Meitar et Henry A. Kissinger.

Earl A. Cherniak, *c.r.*, *Kirk F. Stevens* et *Lisa C. Munro*, pour l'intimé.

Robert D. Holmes, *c.r.*, pour l'intervenante.

Version française du jugement de la Cour rendu par

Le juge LeBel —

I. Introduction

A. *Aperçu*

[1] Le présent pourvoi porte sur la manière dont les règles de droit relatives à la compétence et la doctrine du *forum non conveniens*, que notre Cour a récemment examinées dans l'arrêt *Club Resorts Ltd. c. Van Breda*, 2012 CSC 17, [2012] 1 R.C.S. 572 (« *Club Resorts* »), doivent s'appliquer dans le cadre d'une action en diffamation multi-États. L'intimé, Conrad Black, a intenté en Cour supérieure de justice de l'Ontario six actions en diffamation contre les 10 appelants, qui sont des administrateurs, des conseillers ainsi qu'un vice-président de Hollinger International, Inc. (« International »). Lord Black soutient que certains propos publiés par les appelants et affichés sur le site Web de International sont diffamatoires et qu'ils ont été diffusés en Ontario dès lors qu'ils ont été téléchargés, lus et repris dans cette province par trois journaux. Les appelants répliquent que l'Ontario ne devrait pas se déclarer compétente à l'égard des actions parce que ce sont, en substance, des instances essentiellement américaines ou, subsidiairement, parce que le tribunal de l'Illinois constitue un ressort plus approprié que celui de l'Ontario.

[2] I find in this case that the Ontario court is entitled to assume jurisdiction as there exists a real and substantial connection between Ontario and the libel actions. Giving due deference to the motion judge's exercise of discretion, I further find that the appellants have not shown that the Illinois court is a clearly more appropriate forum for the trial of these claims. Accordingly, I would dismiss the appeal. Reaching this result requires some discussion of the relationship between the law of jurisdiction, the doctrine of *forum non conveniens* and the tort of defamation.

B. *Background Facts*

[3] Lord Black is a well-known business figure who established a reputation as a newspaper owner and publisher first in Canada, and then internationally. He was a Canadian citizen until 2001, when he abandoned his citizenship in order to accept an appointment to the British House of Lords. Until January 2004, Lord Black served as the chairman of International, a publicly traded company incorporated in Delaware and headquartered at different times in New York and Chicago. Lord Black and his Canadian associates exercised effective control over International through The Ravelston Corporation ("Ravelston") and Hollinger Inc., two privately held Ontario companies.

[4] In May 2003, a minority shareholder of International questioned the legitimacy of certain "non-compete" and "management service" payments that had been made to Lord Black or to companies under his ownership or control. International's Board of Directors formed a Special Committee to conduct an investigation ("Committee") and retained the appellant Richard C. Breeden and his consulting firm as outside legal counsel to advise the Committee. In October 2003, the Committee concluded that International had made US$32.15 million in unauthorized "non-compete" payments to Lord Black, Hollinger Inc., and certain senior managers, and that Lord Black himself had received US$7.2 million. The Committee completed a report

[2] Je conclus en l'espèce que le tribunal ontarien est autorisé à se déclarer compétent car il existe un lien réel et substantiel entre l'Ontario et les actions en diffamation. En faisant preuve de la déférence qui s'impose à l'égard de l'exercice du pouvoir discrétionnaire du juge saisi de la motion, je conclus également que les appelants n'ont pas établi que le tribunal de l'Illinois constitue un forum nettement plus approprié pour l'instruction de ces instances. En conséquence, je suis d'avis de rejeter le pourvoi. Cette décision découle de l'examen de la relation qui existe entre le droit relatif à la compétence, la doctrine du *forum non conveniens* et le délit de diffamation.

B. *Le contexte*

[3] Lord Black est un homme d'affaires bien connu qui s'est bâti une réputation de propriétaire de journaux et d'éditeur, d'abord au Canada, puis à l'échelle internationale. Il a été citoyen canadien jusqu'en 2001, date à laquelle il a répudié sa citoyenneté pour accepter une nomination à la Chambre des lords britannique. Jusqu'en janvier 2004, lord Black a occupé le poste de président du conseil de International, une société ouverte, constituée au Delaware et ayant eu son siège social, selon les époques, à New York ou Chicago. Lord Black et ses associés canadiens détenaient le contrôle effectif de International par l'intermédiaire de The Ravelston Corporation (« Ravelston ») et Hollinger Inc., deux sociétés fermées de l'Ontario.

[4] En mai 2003, un actionnaire minoritaire de International a mis en doute la légitimité de certains paiements versés à lord Black ou à des sociétés dont il détenait la propriété ou le contrôle dans le cadre d'ententes de « non-concurrence » et de « services de gestion ». Le conseil d'administration de International a chargé un comité spécial (« comité ») de mener une enquête et a retenu les services de Richard C. Breeden, l'un des appelants, et de son cabinet-conseil pour agir en tant que conseiller juridique externe auprès du comité. En octobre 2003, le comité a conclu que International avait fait des paiements non autorisés de « non-concurrence » totalisant 32,15 millions de dollars américains à lord Black, à Hollinger Inc. et à certains gestionnaires

in August 2004. Pursuant to a U.S. consent order relating to an injunctive complaint filed by the U.S. Securities and Exchange Commission ("SEC") against International in Illinois, the SEC and the U.S. District Court for the Northern District of Illinois were provided with the report; it was also posted on International's website.

principaux, et que lord Black lui-même avait reçu 7,2 millions de dollars américains. Le rapport du comité a été rédigé en août 2004. À la suite d'une ordonnance sur consentement prononcée aux États-Unis en relation avec une demande d'injonction présentée par la Securities and Exchange Commission des États-Unis (« SEC ») à l'encontre de International en Illinois, la SEC et la Cour de district des États-Unis pour le district du nord de l'Illinois ont obtenu le rapport; celui-ci a également été affiché sur le site Web de International.

[5] Lord Black filed six actions in the Ontario Superior Court of Justice between February 2004 and March 2005. The first four actions relate to press releases that were posted on International's website in January 2004 (the first three actions) and May 2004 (the fourth action). The fifth action relates to the Committee's report, and the sixth relates to statements published in International's annual report summarizing the Committee's findings. The press releases contained contact information directed at Canadian media. International's website was accessible worldwide.

[5] Entre février 2004 et mars 2005, lord Black a introduit six actions en Cour supérieure de justice de l'Ontario. Les quatre premières poursuites ont trait à des communiqués de presse affichés sur le site Web de International en janvier 2004 (les trois premières poursuites) et en mai 2004 (la quatrième poursuite). La cinquième poursuite porte sur le rapport du comité, et la sixième vise les communiqués publiés dans le rapport annuel de International résumant les conclusions du comité. Les communiqués de presse contenaient des coordonnées destinées aux médias canadiens. Le site Web de International était accessible à l'échelle mondiale.

[6] Lord Black alleges that the press releases and reports issued by the appellants and posted on International's website contained defamatory statements that were downloaded, read and republished in Ontario by *The Globe and Mail*, the *Toronto Star* and the *National Post*. He claims damages for injury to his reputation in Ontario. The allegations contained in the press releases posted on International's website were summarized as follows by the motion judge ((2009), 309 D.L.R. (4th) 708, at para. 16):

[6] Lord Black soutient que les communiqués de presse et les rapports publiés par les appelants et affichés sur le site Web de International contenaient des propos diffamatoires qui ont été téléchargés, lus et repris en Ontario par le *Globe and Mail*, le *Toronto Star* et le *National Post*. Il réclame des dommages-intérêts pour le tort causé à sa réputation en Ontario. Le juge saisi de la motion a résumé comme suit les allégations figurant dans les communiqués de presse affichés sur le site Web de International ((2009), 309 D.L.R. (4th) 708, par. 16) :

- Black took money from [International] in the form of unauthorized non-compete payments, improperly enriching himself;
- Black misappropriated more than US $200 million from [International] by engaging in repeated and systematic schemes to wrongfully divert corporate assets to himself and his associates;

[TRADUCTION]

- M. Black a soutiré de l'argent à [International] sous forme de versements non autorisés de non-concurrence, s'enrichissant personnellement de façon irrégulière;
- M. Black a détourné plus de 200 millions de dollars américains de [International] en recourant de façon répétée et systématique à des stratagèmes en vue de détourner injustement à son profit et au profit de ses associés des éléments d'actif de la société;

- Black presided over a corporate kleptocracy that was engaged in a systematic, willful and deliberate looting of [International];
- Black created an entity in which ethical corruption was a defining characteristic of the leadership team;
- Black misled the board, breached his fiduciary duties, engaged in self-dealing, lined his pockets at the expense of [International] almost every day, engaged in tax evasion, and used company money to make millions of dollars worth of charitable donations in his own name;
- Black took US $500 million from [International] for himself and his associates;
- Black would continue to use his position as the controlling shareholder to act to the detriment of [International] and its public shareholders and in breach of US securities law.

[7] The appellants brought a motion to have the six libel actions stayed on the grounds that there was no real and substantial connection between the actions and Ontario or, alternatively, that a New York or Illinois court was the more appropriate forum. At the hearing before this Court, counsel for the appellants argued that an Illinois court was the most appropriate forum.

[8] Five of the appellants are defendants in all six of the actions; namely, Richard C. Breeden, Richard C. Breeden & Co., Gordon A. Paris, Graham W. Savage and Raymond G. H. Seitz. James R. Thompson and Richard D. Burt are defendants in the first four actions. Paul B. Healy is a defendant in the fifth action and James R. Thompson, Richard D. Burt, Shmuel Meitar and Henry A. Kissinger are defendants in the sixth action. Mr. Savage lives in Ontario and Mr. Meitar in Israel; the remainder of the appellants live in the U.S., including three in Connecticut (Mr. Breeden, Richard C. Breeden & Co. and Mr. Kissinger), two in New York (Mr. Paris and Mr. Healy) and one each in Illinois (Mr. Thompson), the District of Columbia (Mr. Burt) and New Hampshire (Mr. Seitz). The parties did

- M. Black présidait une cleptocratie d'entreprise dont l'activité consistait à piller [International] de façon systématique, volontaire et délibérée;
- M. Black a fondé une entité où l'immoralité était une caractéristique intrinsèque de l'équipe qui en assumait la direction;
- M. Black a induit en erreur le conseil d'administration, a manqué à ses obligations de fiduciaire, a commis des délits d'initié, s'est rempli les poches aux dépens de [International] presque quotidiennement, a pratiqué l'évasion fiscale et utilisé l'argent de la société pour faire en son nom propre des dons de charité valant des millions de dollars;
- M. Black a empoché 500 millions de dollars américains de [International] pour son bénéfice personnel et celui de ses associés;
- M. Black a usé de façon continue de sa position d'actionnaire de contrôle pour agir au détriment de [International] et de ses actionnaires publics, et en contravention des lois américaines sur les valeurs mobilières.

[7] Les appelants ont demandé qu'il soit sursis aux six instances en diffamation au motif qu'il n'y avait pas de lien réel et substantiel entre ces instances et l'Ontario ou, subsidiairement, qu'un tribunal de New York ou de l'Illinois constituaient des ressorts plus appropriés. À l'audience devant notre Cour, l'avocat des appelants a soutenu qu'un tribunal de l'Illinois constituait le ressort le plus approprié.

[8] Cinq des appelants agissent en défense dans chacune des six poursuites, soit, Richard C. Breeden, Richard C. Breeden & Co., Gordon A. Paris, Graham W. Savage et Raymond G. H. Seitz. James R. Thompson et Richard D. Burt ont été constitués comme défendeurs dans les quatre premières poursuites. Paul B. Healy a été ajouté comme défendeur dans la cinquième, et James R. Thompson, Richard D. Burt, Shmuel Meitar ainsi que Henry A. Kissinger l'ont été dans la sixième. M. Savage vit en Ontario et M. Meitar en Israël; les autres appelants vivent aux États-Unis, dont trois au Connecticut (M. Breeden, Richard C. Breeden & Co. et M. Kissinger), deux à New York (M. Paris et M. Healy) et un en Illinois (M. Thompson), un dans le district de Columbia (M. Burt) et un autre

not differentiate between the six actions for the purposes of the motion; nor did the courts below.

[9] It should be noted that in addition to this litigation, several other civil and criminal proceedings were commenced in both the U.S. and Canada following the release of the Committee's report. In 2007, Lord Black was convicted of three counts of mail fraud and one count of obstruction of justice and sentenced to six and a half years in prison. Two of the convictions for mail fraud were later vacated on appeal. The argument that these convictions are relevant to the litigation since they affect Lord Black's admissibility into Canada was made in the courts below. In June 2011, subsequent to the hearing before this Court, Lord Black was resentenced to 42 months in prison. He is now incarcerated in the United States.

[10] Two civil actions commenced against Lord Black by International in Delaware and Illinois are also relevant to this litigation. The Delaware action included claims against Lord Black and Hollinger Inc. for breach of their contractual and fiduciary duties under Delaware law. The Illinois action alleges that Lord Black and his associates received more than US$90 million in unauthorized or improperly authorized non-compete payments, and claims that management service fees paid to Ravelston and Hollinger Inc. were improperly negotiated and grossly excessive. The Illinois action was stayed pending resolution of the criminal proceedings against Lord Black. The existence of the actions in Delaware and Illinois was taken into account by the courts below.

C. *Judicial History*

(1) Ontario Superior Court of Justice (2009), 309 D.L.R. (4th) 708 (Belobaba J.)

[11] Writing prior to the Ontario Court of Appeal's decision in *Charron Estate v. Village Resorts Ltd.*,

au New Hampshire (M. Seitz). Ni les parties ni les instances inférieures n'ont fait de distinction entre les six poursuites pour les besoins de la motion.

[9] Précisons qu'en plus de ces litiges, plusieurs autres poursuites civiles et criminelles ont été intentées tant aux États-Unis qu'au Canada à la suite de la diffusion du rapport du comité. En 2007, lord Black a été déclaré coupable de trois chefs de fraude postale et d'un chef d'entrave à la justice, et il a été condamné à six ans et demi d'emprisonnement. Deux des déclarations de culpabilité pour fraude postale ont par la suite été annulées en appel. On a fait valoir devant les instances inférieures que ces condamnations constituaient un fait pertinent quant au litige en raison de leur incidence sur l'admissibilité de lord Black au Canada. En juin 2011, postérieurement à l'audition du pourvoi par notre Cour, une nouvelle peine de 42 mois d'emprisonnement a été infligée à lord Black. Il est actuellement incarcéré aux États-Unis.

[10] Deux poursuites civiles instituées contre lord Black par International au Delaware et en Illinois sont également pertinentes quant aux litiges en l'espèce. Au Delaware, lord Black et Hollinger Inc. sont poursuivis pour manquement à leurs obligations contractuelles et fiduciaires sous le régime des lois de cet État. Dans l'action instituée en Illinois, on reproche à lord Black et à ses associés d'avoir reçu plus de 90 millions de dollars américains sous forme de versements de non-concurrence non autorisés ou indûment autorisés, et on allègue que les frais de services de gestion versés à Ravelston et Hollinger Inc. ont été négociés de façon irrégulière et sont exorbitants. L'action intentée en Illinois a été suspendue en attendant la fin des procédures criminelles intentées contre lord Black. L'existence des actions intentées au Delaware et en Illinois a été prise en compte par les tribunaux d'instance inférieure.

C. *Historique judiciaire*

(1) Cour supérieure de justice de l'Ontario (2009), 309 D.L.R. (4th) 708 (le juge Belobaba)

[11] Dans ses motifs rédigés avant la publication de la décision de la Cour d'appel de l'Ontario

2010 ONCA 84, 98 O.R. (3d) 721 ("*Van Breda-Charron*"), Belobaba J. considered himself to be bound to apply *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.). Applying the eight *Muscutt* factors for assumption of jurisdiction, Belobaba J. found that a real and substantial connection to Ontario had been established. First, the actions could be connected to Ontario on the basis that Lord Black was claiming damages for a tort committed in Ontario and had long-standing ties to Ontario. Second, the appellants could be connected to Ontario on the basis that it would have been reasonably foreseeable to them that the statements posted on International's website could result in injury to Lord Black's reputation in Ontario. Of the six remaining *Muscutt* factors, Belobaba J. considered that only one — the international nature of the case — clearly favoured the appellants. Jurisdiction *simpliciter* was thus established.

dans l'affaire *Charron Estate c. Village Resorts Ltd.*, 2010 ONCA 84, 98 O.R. (3d) 721 (l'affaire « *Van Breda-Charron* »), le juge Belobaba s'est considéré lié par l'arrêt *Muscutt c. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.). Appliquant les huit facteurs énoncés dans cet arrêt en ce qui concerne la déclaration de compétence, le juge Belobaba a conclu qu'un lien réel et substantiel avec l'Ontario avait été établi. Premièrement, il était possible de lier les actions à l'Ontario au motif que lord Black réclamait des dommages-intérêts pour un délit commis en Ontario et qu'il y maintenait des liens depuis longtemps. Deuxièmement, il était possible d'établir un lien entre les appelants et l'Ontario en raison du fait qu'ils auraient raisonnablement pu prévoir que les communiqués affichés sur le site Web de International pouvaient nuire à la réputation de lord Black en Ontario. Parmi les six autres facteurs énoncés dans l'arrêt *Muscutt*, le juge Belobaba a estimé qu'un seul favorisait nettement les appelants, soit le caractère international de l'affaire. Le demandeur avait donc établi que la Cour supérieure de justice avait compétence pour se saisir de l'affaire.

[12] Belobaba J. also found that Ontario was a convenient forum to hear the actions and that neither New York nor Illinois was clearly more appropriate. In his view, only one of the six traditional *forum non conveniens* factors — the location of key witnesses and evidence — favoured the appellants, and Belobaba J. was unable to measure the extent to which this factor weighed in their favour. Accordingly, Belobaba J. exercised his discretion to dismiss the motion to stay the actions.

[12] Le juge Belobaba a également conclu que l'Ontario était le lieu où il convenait d'introduire les actions et que ni New York ni l'Illinois ne constituaient un ressort nettement plus approprié. À son avis, un seul des six facteurs habituels du *forum non conveniens* favorisait les appelants, soit celui du lieu où se trouvent les témoins et les éléments de preuve clés, et le juge Belobaba n'a pu déterminer dans quelle mesure ce facteur penchait en leur faveur. En conséquence, le juge Belobaba a exercé son pouvoir discrétionnaire de rejeter la demande de suspension des instances.

(2) Ontario Court of Appeal, 2010 ONCA 547, 102 O.R. (3d) 748 (Doherty, Juriansz and Karakatsanis JJ.A.)

(2) Cour d'appel de l'Ontario, 2010 ONCA 547, 102 O.R. (3d) 748 (les juges Doherty, Juriansz et Karakatsanis)

[13] In a judgment rendered subsequent to the release of its decision in *Van Breda-Charron*, the Ontario Court of Appeal unanimously dismissed the appeal brought by the appellants. Applying the approach set out in *Van Breda-Charron*, the

[13] Dans un jugement postérieur à la publication de sa décision dans l'affaire *Van Breda-Charron*, la Cour d'appel de l'Ontario a rejeté à l'unanimité l'appel interjeté par les appelants. Appliquant la méthode retenue dans *Van Breda-Charron*, la Cour

Court of Appeal found that a real and substantial connection was presumed to exist on the basis that a tort was committed in Ontario, pursuant to rule 17.02(g) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The appellants had failed to rebut this presumption. The Court of Appeal found that the existence of a real and substantial connection was also supported by the principles of fairness and order and the "general principles" identified in *Van Breda-Charron*. While the Court of Appeal did not consider it to be necessary to determine whether a "targeting" approach should be adopted in Canadian law, it nonetheless found that there was evidence on the record that the appellants did target and direct their statements at Ontario.

[14] With regard to *forum non conveniens*, the Court of Appeal found that there was no basis on which to interfere with the motion judge's exercise of discretion. In the Court of Appeal's view, Belobaba J. had correctly set out the relevant factors and was entitled to determine the significance he would give to each one. Accordingly, the appeal was dismissed.

II. Analysis

A. *Position of the Parties*

[15] The appellants allege that Lord Black is a libel tourist. In their view, the "place of reading" approach to libel should be eschewed in cases involving transnational libel claims in favour of an approach that considers whether a real and substantial connection exists between the forum and the *substance* of the action. In the case of a libel claim, that is the subject matter and conduct giving rise to the words complained of and the context in which they were made. The appellants contend that the substance of Lord Black's actions is American and that both New York and Illinois are clearly more appropriate forums for the trial of the actions than Ontario.

d'appel s'est appuyée sur l'al. 17.02g) des *Règles de procédure civile* de l'Ontario, R.R.O. 1990, Règl. 194, pour conclure que l'existence d'un lien réel et substantiel était présumée du fait qu'un délit avait été commis en Ontario. Les appelants n'avaient pas réussi à réfuter cette présomption. La Cour d'appel a conclu que l'existence d'un lien réel et substantiel reposait aussi sur les principes d'équité et d'ordre et sur les [TRADUCTION] « principes généraux » énoncés dans *Van Breda-Charron*. Bien que la Cour d'appel n'ait pas estimé nécessaire de trancher la question de savoir s'il convenait d'adopter la notion de « stratégie de la cible » en droit canadien, elle a tout de même conclu que la preuve au dossier démontrait que les appelants avaient effectivement ciblé l'Ontario et qu'ils y avaient dirigé leurs communiqués.

[14] En ce qui concerne la doctrine du *forum non conveniens*, la Cour d'appel a conclu qu'il n'y avait aucune raison de modifier la décision rendue par le juge saisi de la motion dans l'exercice de son pouvoir discrétionnaire. De l'avis de la Cour d'appel, le juge Belobaba avait énoncé correctement les facteurs pertinents et il pouvait décider de l'importance à accorder à chacun. En conséquence, l'appel a été rejeté.

II. Analyse

A. *Position des parties*

[15] Les appelants soutiennent que lord Black pratique le tourisme diffamatoire. Selon eux, l'approche dite [TRADUCTION] « du lieu de lecture » en matière de diffamation devrait, dans des actions transnationales, être écartée au profit d'une démarche fondée sur l'existence d'un lien réel et substantiel entre le ressort et le *fond* de l'action. Dans une action en diffamation, l'objet de la poursuite, la conduite ayant donné lieu aux propos reprochés et le contexte dans lequel ils ont été publiés sont des questions de fond. Les appelants prétendent que les actions intentées par lord Black sont américaines quant au fond et que New York et l'Illinois sont tous deux des ressorts nettement plus appropriés que l'Ontario pour l'instruction de ces instances.

[16] The appellants also reject the focus of the courts below on damage sustained in the jurisdiction as misplaced and contend that the analogy to product liability cases is inappropriate. In addition, they submit that whether or not the "targeting" approach is adopted in Canadian law, there was an insufficient basis to make such a finding on these facts. With regard to choice of law, the appellants reject the use by the courts below of the *lex loci delicti* test. In their view, *lex loci delicti* is ill-suited to transnational defamation claims if it is determined solely on the basis of where damage occurs, as damage may occur in multiple jurisdictions. The appellants submit that American law should be applied to the actions, reflecting their substance.

[16] Les appelants soutiennent également que les instances inférieures ont à tort mis l'accent sur le ressort dans lequel les dommages ont été subis et font valoir qu'il est inapproprié de faire une analogie avec les affaires mettant en cause la responsabilité du fabricant. Ils soutiennent en outre qu'indépendamment de l'adoption en droit canadien de la notion de « stratégie de la cible », en l'espèce, une conclusion en ce sens ne repose sur aucun fondement factuel. À propos du choix de la loi applicable, les appelants rejettent l'application du critère de la *lex loci delicti* par les tribunaux d'instance inférieure. Selon eux, ce critère convient mal pour les actions transnationales en diffamation dans la mesure où la loi applicable est déterminée uniquement en fonction du lieu où les dommages peuvent se manifester, étant donné qu'ils peuvent se manifester dans de nombreux ressorts. Les appelants soutiennent que le droit applicable aux actions est le droit américain, en raison des questions de fond qu'elles soulèvent.

[17] Lord Black rejects the allegation that he is a libel tourist. He submits that when properly applied to transnational defamation claims, the real and substantial connection test is satisfied where (a) there is substantial publication in the jurisdiction, (b) the plaintiff has a substantial reputation to protect in the jurisdiction, and (c) the defendant is in a position to reasonably foresee substantial publication in the jurisdiction and to know of the plaintiff's substantial reputation there. In Lord Black's view, the courts below correctly applied this test to find that all three conditions were satisfied on the facts of this case.

[17] Lord Black se défend de pratiquer le tourisme diffamatoire. Il soutient qu'il est satisfait au critère du lien réel et substantiel, s'il est correctement appliqué aux actions transnationales en diffamation, lorsque a) la diffusion dans le ressort est importante, b) le plaignant a dans le ressort une bonne réputation à protéger et c) le défendeur est en mesure de prévoir raisonnablement une diffusion importante dans le ressort et de connaître la bonne réputation du plaignant en cet endroit. Selon lord Black, les tribunaux d'instance inférieure ont appliqué correctement ce critère pour conclure que les trois conditions étaient remplies, compte tenu des faits de l'espèce.

[18] Lord Black also contends that the approach advocated by the appellants would improperly shift the focus of Canada's defamation law from the reputation of the plaintiff to the conduct of the defendant. With regard to choice of law, Lord Black submits that this Court has established that *lex loci delicti* is the choice of law rule for tort claims. In libel cases, that is the place of publication, which in this case is Ontario.

[18] Lord Black soutient également que l'approche préconisée par les appelants détournerait indûment l'attention que porte le droit canadien de la diffamation à la réputation de plaignant pour la faire porter plutôt sur la conduite du défendeur. En ce qui concerne le choix de la loi applicable, lord Black fait valoir que notre Cour a établi que la règle de la *lex loci delicti* est celle qui doit prévaloir dans les actions en responsabilité délictuelle. Dans les affaires de diffamation, la loi applicable est celle du lieu de diffusion, soit, en l'espèce, l'Ontario.

B. *Jurisdiction Simpliciter*

[19] Presence and consent are the two traditional bases of court jurisdiction in private international law. As discussed above, however, in this case, only one of the 10 defendants is resident in Ontario and none of the other nine has consented to submit to the jurisdiction of the Ontario court. It is therefore necessary to engage in the real and substantial connection analysis to determine whether the Ontario court may properly assume jurisdiction over the six libel actions brought by Lord Black. The framework for the assumption of jurisdiction was recently set out by this Court in *Club Resorts*.

[20] The issue of the assumption of jurisdiction is easily resolved in this case based on a presumptive connecting factor — the alleged commission of the tort of defamation in Ontario. It is well established in Canadian law that the tort of defamation occurs upon publication of a defamatory statement to a third party. In this case, publication occurred when the impugned statements were read, downloaded and republished in Ontario by three newspapers. It is also well established that every repetition or republication of a defamatory statement constitutes a new publication. The original author of the statement may be held liable for the republication where it was authorized by the author or where the republication is the natural and probable result of the original publication (R. E. Brown, *The Law of Defamation in Canada* (1987), vol. 1, at pp. 253-54). In my view, the republication in the three newspapers of statements contained in press releases issued by the appellants clearly falls within the scope of this rule. In the circumstances, the appellants have not displaced the presumption of jurisdiction that results from this connecting factor.

[21] Having established that there is a real and substantial connection between Ontario and the libel actions, I must now turn to the question of whether the Ontario court *should* exercise jurisdiction over the actions — the issue of *forum non conveniens*.

B. *Simple reconnaissance de la compétence*

[19] En droit international privé, la compétence de la cour s'appuie traditionnellement sur deux fondements, la présence et le consentement. Comme nous l'avons vu cependant, un seul des 10 défendeurs réside en Ontario et aucun des neuf autres n'a consenti à se soumettre à la compétence de la cour ontarienne. Il devient donc nécessaire de procéder à l'analyse du lien réel et substantiel pour déterminer si la cour ontarienne peut à bon droit se déclarer compétente pour connaître des six actions en diffamation introduites par lord Black. Notre Cour a récemment exposé le cadre de la déclaration de compétence dans l'arrêt *Club Resorts*.

[20] En l'espèce, la question de la déclaration de compétence est facile à trancher compte tenu du facteur de rattachement créant une présomption — le délit de diffamation qui aurait été commis en Ontario. Le droit canadien admet depuis longtemps que le délit de diffamation se manifeste dès qu'il y a diffusion d'un propos diffamatoire destiné à un tiers. En l'espèce, il y a eu diffusion lorsque les communiqués contestés ont été lus, téléchargés et repris en Ontario par trois journaux. Il est également bien établi que chaque répétition ou reprise d'un communiqué diffamatoire constitue une nouvelle diffusion. L'auteur initial du communiqué peut être tenu responsable de la reprise dès lors qu'il l'a autorisée ou que la reprise est le résultat naturel et probable de la diffusion initiale (R. E. Brown, *The Law of Defamation in Canada* (1987), vol. 1, p. 253-254). À mon avis, la règle s'applique clairement à la reprise, par les trois journaux, des propos figurant dans les communiqués de presse émis par les appelants. Dans les circonstances, les appelants n'ont pas réfuté la présomption de compétence découlant de ce facteur de rattachement.

[21] Après avoir établi l'existence d'un lien réel et substantiel entre l'Ontario et les actions en diffamation, je dois maintenant aborder la question de savoir si le tribunal ontarien *devrait* exercer sa compétence pour entendre les actions — la question du *forum non conveniens*.

C. *Forum Non Conveniens*

[22] Having found that a real and substantial connection exists between the actions and Ontario, I must now determine whether the Ontario court should nonetheless decline to exercise its jurisdiction on the ground that a court of another jurisdiction is clearly a more appropriate forum for the hearing of the actions. The appellants contend that Illinois is a clearly more appropriate forum than Ontario. For the reasons that follow, I disagree.

[23] Under the *forum non conveniens* analysis, the burden is on the party raising the issue to demonstrate that the court of the alternative jurisdiction is a clearly more appropriate forum (*Club Resorts*, at para. 103). The factors to be considered by a court in determining whether an alternative forum is clearly more appropriate are numerous and variable. While they are a matter of common law, they have also been codified, for example, in a non-exhaustive list in s. 11(2) of the British Columbia *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. That Act and others are themselves based on a uniform Act proposed by the Uniform Law Conference of Canada (*Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321, at para. 22; *Club Resorts*, at paras. 105-6), the *Uniform Court Jurisdiction and Proceedings Transfer Act* ("*CJPTA*"). Section 11 of the *CJPTA* states:

11(1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside [enacting province or territory] is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including:

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;

C. *Forum non conveniens*

[22] Après avoir conclu à l'existence d'un lien réel et substantiel entre les actions et l'Ontario, je dois maintenant déterminer si le tribunal ontarien devrait néanmoins décliner compétence au motif que le tribunal d'un autre ressort constitue clairement un tribunal plus approprié pour instruire les actions. Les appelants soutiennent que l'Illinois est un ressort nettement plus approprié que l'Ontario. Pour les motifs qui suivent, je ne souscris pas à cette conclusion.

[23] Dans l'analyse relative au *forum non conveniens*, il incombe à la partie qui soulève cette question de démontrer que le tribunal de l'autre ressort constitue un tribunal nettement plus approprié (*Club Resorts*, par. 103). Les facteurs à prendre en compte pour déterminer si un autre tribunal est nettement plus approprié sont nombreux et variables. Bien qu'ils émanent de la common law, ils ont aussi été codifiés, par exemple dans une liste non exhaustive au par. 11(2) de la *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, ch. 28, de la Colombie-Britannique. Cette loi, tout comme d'autres lois, est inspirée d'une loi uniforme proposée par la Conférence pour l'harmonisation des lois au Canada (*Teck Cominco Metals Ltd. c. Lloyd's Underwriters*, 2009 CSC 11, [2009] 1 R.C.S. 321, par. 22; *Club Resorts*, par. 105-106) — la *Loi uniforme sur la compétence des tribunaux et le renvoi des instances* (« *LUCTRI* »). L'article 11 de la *LUCTRI* est ainsi libellé :

11(1) Après avoir pris en considération l'intérêt des parties à une instance et les fins de la justice, le tribunal peut refuser d'exercer sa compétence territoriale à l'égard de l'instance si, à son avis, il conviendrait mieux qu'un tribunal d'un autre État entende l'instance.

(2) Lorsqu'il détermine si c'est lui ou un tribunal à l'extérieur de *[province ou territoire qui adopte la Loi]* qui constitue le ressort approprié pour entendre l'instance, le tribunal doit prendre en considération les circonstances pertinentes, notamment :

a) dans quel ressort il serait plus commode et moins coûteux pour les parties à l'instance et leurs témoins d'être entendus;

(b) the law to be applied to issues in the proceeding;

(c) the desirability of avoiding multiplicity of legal proceedings;

(d) the desirability of avoiding conflicting decisions in different courts;

(e) the enforcement of an eventual judgment; and

(f) the fair and efficient working of the Canadian legal system as a whole. [Text in brackets in original.]

[24] As the drafters of the *CJPTA* confirm in their comments on s. 11, the factors enumerated in s. 11(2) reflect "factors that have been expressly or implicitly considered by courts in the past". Section 11 of the *CJPTA* is also similar to the *forum non conveniens* provision of the *Civil Code of Québec*, S.Q. 1991, c. 64, and the factors considered by Quebec courts in exercising their discretion under that provision. Article 3135 of the *Civil Code* states:

Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

[25] As stated in *Club Resorts*, the use of the term "exceptionally" in art. 3135, like "clearly more appropriate" forum, reflects "an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed" (para. 109). The factors most commonly considered by Quebec courts in exercising this discretion were reviewed in *Oppenheim forfait GMBH v. Lexus maritime inc.*, 1998 CanLII 13001, where the Quebec Court of Appeal established that the relevant considerations include, among others, the following factors which are not individually determinative but must be considered globally (para. 18):

(1) the place of residence of the parties and witnesses;

b) la loi à appliquer aux questions en litige;

c) le fait qu'il est préférable d'éviter la multiplicité des instances judiciaires;

d) le fait qu'il est préférable d'éviter que des décisions contradictoires soient rendues par différents tribunaux;

e) l'exécution d'un jugement éventuel;

f) le fonctionnement juste et efficace du système judiciaire canadien dans son ensemble. [Texte entre crochets dans l'original.]

[24] Comme les rédacteurs de la *LUCTRI* le confirment dans leurs commentaires portant sur l'art. 11, les facteurs énumérés au par. 11(2) sont des « facteurs qui ont déjà été expressément ou implicitement pris en considération par les tribunaux ». L'article 11 de la *LUCTRI* est aussi semblable à la disposition du *Code civil du Québec*, L.Q. 1991, ch. 64, portant sur le *forum non conveniens*, et reprend les facteurs examinés par les tribunaux du Québec dans l'exercice de leur pouvoir discrétionnaire au titre de cette disposition. L'article 3135 du *Code civil* est ainsi libellé :

Bien qu'elle soit compétente pour connaître d'un litige, une autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette compétence si elle estime que les autorités d'un autre État sont mieux à même de trancher le litige.

[25] Ainsi que notre Cour l'a affirmé dans *Club Resorts*, le terme « exceptionnellement » utilisé à l'art. 3135, tout comme l'expression tribunal « nettement plus approprié », reflète « une reconnaissance du fait qu'en règle générale, le tribunal doit exercer sa compétence lorsqu'il se déclare à juste titre compétent » (par. 109). Les facteurs les plus souvent pris en compte par les tribunaux du Québec dans l'exercice de ce pouvoir discrétionnaire ont été examinés dans l'arrêt *Oppenheim forfait GMBH c. Lexus maritime inc.*, 1998 CanLII 13001, où la Cour d'appel du Québec a établi que, parmi les critères pertinents, il y a lieu d'examiner notamment les facteurs suivants, dont aucun n'est déterminant en soi, mais qui doivent être évalués globalement (par. 18) :

(1) le lieu de résidence des parties et des témoins;

(2) the location of the evidence;

(3) the place of formation and execution of the contract;

(4) the existence of proceedings pending between parties in another jurisdiction and the stage of any such proceeding;

(5) the location of the defendant's assets;

(6) the applicable law;

(7) the advantage conferred on the plaintiff by its choice of forum;

(8) the interests of justice;

(9) the interests of the two parties;

(10) the need to have the judgment recognized in another jurisdiction.

[26] With the exception of juridical advantage, the *Oppenheim* factors appear to largely correspond to the factors enumerated in s. 11(2) of the *CJPTA*. The *CJPTA* does not provide for consideration of any factor corresponding to the advantage conferred on the plaintiff by its choice of forum, although it also does not specifically exclude consideration of this factor where it is relevant. This approach is consistent with this Court's observation in *Club Resorts* that an emphasis on juridical advantage may be inconsistent with the principles of comity. In particular, a focus on juridical advantage may put too strong an emphasis on issues that may reflect only differences in legal tradition which are deserving of respect, or courts may be drawn too instinctively to view disadvantage as a sign of inferiority and favour their home jurisdiction (para. 112).

[27] Juridical advantage not only is problematic as a matter of comity, but also, as a practical matter, may not add very much to the jurisdictional

(2) la situation des éléments de preuve;

(3) le lieu de formation et d'exécution du contrat;

(4) l'existence d'une autre action intentée à l'étranger et le progrès déjà effectué dans la poursuite de cette action;

(5) la situation des biens appartenant au défendeur;

(6) la loi applicable au litige;

(7) l'avantage dont jouit la demanderesse dans le for choisi;

(8) l'intérêt de la justice;

(9) l'intérêt des deux parties;

(10) la nécessité éventuelle d'une procédure en exemplification à l'étranger.

[26] À l'exception de l'avantage juridique, les facteurs énoncés dans *Oppenheim* semblent correspondre étroitement aux facteurs énumérés au par. 11(2) de la *LUCTRI*. Cette loi ne prévoit pas la prise en compte d'un facteur correspondant à l'avantage dont jouit le demandeur dans le for choisi, bien qu'elle ne l'exclue pas expressément lorsque ce facteur est pertinent. Ce point de vue s'harmonise bien avec le commentaire de notre Cour dans *Club Resorts*, selon lequel mettre l'accent sur l'avantage juridique serait incompatible avec les principes de la courtoisie. Plus particulièrement, il se peut que l'accent mis sur l'avantage juridique incite les tribunaux à accorder trop d'importance à des questions tenant uniquement aux différences de tradition juridique et qui commandent la déférence, ou encore à considérer spontanément le désavantage juridique comme un signe d'infériorité du forum concurrent et à favoriser le tribunal interne (par. 112).

[27] L'avantage juridique pose non seulement problème quant à la courtoisie, mais peut aussi, en pratique, constituer un exercice superflu dans

analysis. As this Court emphasized in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, "[a]ny loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if any, to the defendant in the foreign jurisdiction if the action is tried there rather than in the domestic forum" (p. 933). Juridical advantage therefore should not weigh too heavily in the *forum non conveniens* analysis.

[28] In addition to the list of factors that a court may consider in determining whether to decline to exercise its jurisdiction, the *CJPTA* also sets out the role that considerations of fairness to both parties play in the *forum non conveniens* analysis: s. 11(1) states that "[a]fter considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding". While the factors relevant to the *forum non conveniens* analysis will vary depending on the context of each case, s. 11 of the *CJPTA* serves as a helpful reference.

[29] When the *forum non conveniens* analysis is applied to the circumstances of the instant appeal, it becomes apparent that both the courts of Illinois and Ontario are appropriate forums for the trial of the libel actions. Indeed, many of the relevant factors favour proceeding in Illinois. Others favour a trial in Ontario. In the end, however, giving due deference to the motion judge's exercise of discretion, I am not convinced that the appellants have established that the Illinois court emerges as a *clearly* more appropriate forum and that the motion judge made a reviewable error. I will consider each of the relevant factors in turn.

l'analyse relative à la compétence. Comme l'a souligné notre Cour dans *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897, « [l]a perte d'avantages subie par le demandeur à l'étranger doit être mise en balance avec la perte d'avantages, s'il en est, que subirait le défendeur devant le tribunal étranger au cas où l'action serait jugée par celui-ci et non par le tribunal interne » (p. 933). Il convient donc de ne pas accorder trop d'importance à l'avantage juridique dans l'analyse relative au *forum non conveniens*.

[28] Outre la liste des facteurs que le tribunal peut prendre en compte pour déterminer s'il y a lieu de décliner compétence, la *LUCTRI* définit également le rôle que jouent, dans l'analyse relative au *forum non conveniens*, les considérations d'équité envers les parties. Le paragraphe 11(1) prévoit en effet qu'« [a]près avoir pris en considération l'intérêt des parties à une instance et les fins de la justice, le tribunal peut refuser d'exercer sa compétence territoriale à l'égard de l'instance si, à son avis, il conviendrait mieux qu'un tribunal d'un autre État entende l'instance ». Bien que les facteurs pertinents quant à l'analyse relative au *forum non conveniens* varient selon le contexte de chaque affaire, l'art. 11 de la *LUCTRI* constitue une référence utile.

[29] En appliquant l'analyse relative au *forum non conveniens* aux circonstances du présent pourvoi, il ressort à l'évidence que les tribunaux de l'Illinois et de l'Ontario constituent tous deux des ressorts appropriés pour l'instruction des actions en diffamation. En fait, bon nombre de facteurs pertinents militent en faveur de la tenue du procès en Illinois. D'autres facteurs favorisent la tenue du procès en Ontario. En définitive, toutefois, en faisant preuve de la déférence qui s'impose à l'égard de l'exercice du pouvoir discrétionnaire du juge saisi de la motion, je ne suis pas convaincu que les appelants ont établi que le tribunal de l'Illinois apparaît comme un ressort *nettement* plus approprié et que le juge saisi de la motion a commis une erreur donnant lieu à révision. Je vais examiner successivement chacun des facteurs pertinents.

(1) Comparative Convenience and Expense for Parties and Witnesses

[30] In my view, the comparative convenience and expense for the parties and their witnesses favours a trial in Illinois. First, as the motion judge found, most of the witnesses and the bulk of the evidence are located in the U.S. It is significant in this regard that International was headquartered, at least for a time, in Illinois. In addition and as the motion judge noted, rule 45 of the *Federal Rules of Civil Procedure*, 28 U.S.C. app., facilitates the movement of witnesses and evidence between states. The location of the witnesses and evidence thus makes a trial in Illinois more convenient than a trial in Ontario.

[31] The same can be said of the location of the parties. While no single jurisdiction is home to a majority of the parties, it is significant that nine of the eleven parties, including Lord Black, reside in the U.S. Indeed, Lord Black is currently incarcerated in Florida. Moreover, owing to his criminal convictions and the fact that he abandoned his Canadian citizenship, Lord Black will not be able to enter Canada without the special permission of the Minister of Citizenship and Immigration even once he has finished serving his sentence. It may be, however, that a writ of *habeas corpus ad testificandum* could allow Lord Black to participate in person in a trial held in the U.S.; otherwise, Lord Black would have to participate through video conferencing. As for the eight appellants who reside in the U.S., they are spread between different states, but it does not appear that financial considerations would impede the ability of any of them to participate in a trial in Illinois.

(2) Applicable Law

[32] In the companion case of *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636, I discuss the implications of choice of law in the context of multistate defamation claims. Without resolving the issue, I note that there is

(1) Le coût et la commodité pour les parties à l'instance et leurs témoins

[30] J'estime que le coût et la commodité pour les parties à l'instance et leurs témoins militent en faveur de la tenue d'un procès en Illinois. Tout d'abord, comme l'a conclu le juge saisi de la motion, la plupart des témoins et la majeure partie des éléments de preuve se trouvent aux États-Unis. À cet égard, il est révélateur que International ait eu son siège, pendant un certain temps du moins, en Illinois. De plus et comme l'a fait remarquer le juge saisi de la motion, la règle 45 des *Federal Rules of Civil Procedure*, 28 U.S.C. app., facilite le déplacement des témoins et des éléments de preuve entre les États. Le lieu de résidence des témoins et l'emplacement des éléments de preuve font en sorte qu'il serait plus commode de tenir un procès en Illinois qu'en Ontario.

[31] Il en va de même du lieu de résidence des parties. Bien que la majorité des parties n'habitent pas dans un même ressort, il est révélateur que neuf des onze parties, y compris lord Black, résident aux États-Unis. En fait, lord Black est présentement incarcéré en Floride. De plus, puisqu'il a été déclaré coupable d'actes criminels et qu'il a répudié la citoyenneté canadienne, lord Black ne pourra pas rentrer au Canada sans l'autorisation spéciale du ministre de la Citoyenneté et de l'Immigration même une fois sa peine purgée. Il se peut toutefois qu'un bref d'*habeas corpus ad testificandum* lui permette de participer en personne à un procès tenu aux États-Unis, à défaut de quoi il devrait y participer par vidéoconférence. Les huit appelants résidant aux États-Unis proviennent de différents États, mais il ne semble pas que des considérations de nature financière les empêcheraient de participer à un procès tenu en Illinois.

(2) La loi applicable

[32] Dans l'arrêt connexe *Éditions Écosociété Inc. c. Banro Corp.*, 2012 CSC 18, [2012] 1 R.C.S. 636, j'analyse les conséquences du choix de la loi applicable dans le contexte d'actions en diffamation multi-États. Sans trancher la question,

some question as to whether the *lex loci delicti* rule, according to which the applicable law is that of the place where the tort occurred, ought to be abandoned in favour of an approach based on the location of the most harm to reputation. I need not address this issue here as, even under the alternative approach examined in *Éditions Écosociété*, the applicable law is that of Ontario.

[33] Indeed, this case is somewhat unique in that Lord Black has undertaken not to bring any libel action in any other jurisdiction, and has limited his claim to damages to his reputation in Ontario. As a result, only harm resulting from publication in Ontario need be considered. The evidence establishing Lord Black's reputation in Ontario is significant. As the motion judge found, while Lord Black is no longer ordinarily resident in Ontario, he spent most of his adult life in Ontario, first established his reputation as a businessman in Ontario, is a member of the Order of Canada, the Canadian Business Hall of Fame and the Canadian Press Hall of Fame, and is the subject of five books written by Toronto-area authors. Lord Black's close family also lives in Ontario. Lord Black's undertaking and the evidence of his reputation in Ontario therefore suggest that, under the "most substantial harm to reputation" approach discussed in *Éditions Écosociété*, Ontario law should be applied to the libel actions. Alternatively, as the alleged tort of defamation was committed in Ontario, under *lex loci delicti*, Ontario law would also apply. In the circumstances, the applicable law factor supports proceedings in Ontario.

(3) Avoidance of a Multiplicity of Proceedings and Conflicting Decisions

[34] The Delaware and Illinois civil actions raise concerns about a multiplicity of legal proceedings. The motion judge accepted that neither of those actions involves a libel claim. He also accepted, however, that the focus of the trial of the libel actions

je signale qu'il faut se demander si la règle de la *lex loci delicti* — selon laquelle la loi applicable est celle du lieu du délit — devrait être abandonnée et remplacée par une approche fondée sur le lieu où la réputation a subi la plus grande atteinte. Je n'ai pas à me prononcer sur ce point en l'espèce car, même selon l'approche examinée dans *Éditions Écosociété*, la loi applicable est celle de l'Ontario.

[33] En fait, la présente affaire s'avère quelque peu particulière, en ce sens que lord Black s'est engagé à ne pas intenter d'action en diffamation dans un autre ressort et qu'il a entrepris sa poursuite en justice uniquement à l'égard de l'atteinte à sa réputation subie en Ontario. Par conséquent, il faut prendre uniquement en considération le préjudice causé par la diffusion en Ontario. La preuve établissant la réputation de lord Black en Ontario est substantielle. Comme l'a conclu le juge saisi de la motion, bien que lord Black ne réside plus habituellement en Ontario, il a vécu la majeure partie de sa vie adulte dans cette province. Il s'y est établi une réputation d'homme d'affaires. Il est membre de l'Ordre du Canada, du Temple de la renommée de l'entreprise canadienne, du Temple de la renommée de la presse canadienne, et il a fait l'objet de cinq ouvrages écrits par des auteurs de la région de Toronto. Sa famille immédiate vit également en Ontario. Selon l'approche de l'« atteinte la plus substantielle à la réputation » analysée dans l'arrêt *Éditions Écosociété*, l'engagement de lord Black et la preuve de sa réputation en Ontario indiquent donc qu'il convient d'appliquer la loi ontarienne aux actions en diffamation. Par ailleurs, comme le délit de diffamation reproché a été commis en Ontario, la loi ontarienne s'appliquerait également selon la règle de la *lex loci delicti*. Dans les circonstances, le facteur de la loi applicable favorise la tenue du procès en Ontario.

(3) Éviter la multiplicité des recours et les décisions contradictoires

[34] Les actions civiles intentées au Delaware et en Illinois soulèvent des craintes relatives à la multiplicité des recours. Le juge saisi de la motion a reconnu que ni l'une ni l'autre de ces actions ne concernent une réclamation pour diffamation. Il a

will be the truth of what was said in the allegedly defamatory statements, which would also appear to be the very substance of the Delaware and Illinois civil actions. Many of the same transactions that will need to be proven through intensive litigation in the course of the Delaware and Illinois civil actions will likely also need to be proven in the libel actions. The differing form of these actions should not be emphasized at the expense of their substance. This suggests that there may be a risk of conflicting judgments, a consideration that favours the Illinois court as a more appropriate forum.

cependant également accepté que le point central des actions en diffamation portera sur la véracité des communiqués censément diffamatoires, ce qui semble également constituer le fond même des actions civiles intentées au Delaware et en Illinois. Bon nombre des mêmes opérations dont la preuve nécessitera d'intenses débats dans le cadre des actions civiles au Delaware et en Illinois devront probablement être également prouvées dans le cadre des actions en diffamation. La forme différente que prennent ces actions ne devrait pas l'emporter sur leur fond. Des jugements contradictoires risquent donc d'être rendus, ce qui favorise le tribunal de l'Illinois comme étant le ressort le plus approprié.

(4) Enforcement of Judgment

[35] Lord Black appears to concede that an Ontario judgment would be unenforceable in the U.S. He contends, however, that this factor should have no bearing on the *forum non conveniens* analysis because the lack of an actual malice requirement in Canadian defamation law affords him a legitimate juridical advantage. As discussed above, juridical advantage should not weigh too heavily in the *forum non conveniens* analysis. This caution is especially significant in a case such as this, where the American actual malice requirement reflects a deeply rooted and distinctive legal tradition that this Court has declined to adopt (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 137), but which comity requires we respect in foreign jurisdictions. Moreover, even if this advantage to Lord Black were taken into account, it would have to be balanced against the corresponding and very significant juridical disadvantage that the appellants would face if the trial were to proceed in Ontario. As a result, the fact remains that an Ontario judgment would be enforceable against only one of the 10 appellants. On balance, this is an indication that an Illinois court may be a more appropriate forum for the actions to be heard in than an Ontario court.

(4) L'exécution du jugement

[35] Lord Black semble admettre qu'un jugement ontarien ne serait pas exécutoire aux États-Unis. Il soutient toutefois que ce facteur ne devrait avoir aucune incidence sur l'analyse relative au *forum non conveniens* parce que l'absence, en droit canadien de la diffamation, d'une exigence concernant la malveillance véritable lui confère un avantage juridique légitime. Comme je l'ai déjà indiqué, il convient de ne pas accorder trop d'importance à l'avantage juridique dans l'analyse relative au *forum non conveniens*. Cette prudence est particulièrement de mise dans une affaire comme en l'espèce, où l'exigence d'une malveillance véritable en droit américain reflète une tradition juridique distinctive et profondément enracinée que notre Cour a refusé d'adopter (*Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, par. 137), mais que la courtoisie nous commande de respecter à l'étranger. De plus, même si cet avantage conféré à lord Black était pris en compte, il faudrait l'évaluer en fonction du désavantage juridique correspondant et très important que les appelants subiraient si le procès devait avoir lieu en Ontario. Par conséquent, il demeure qu'un jugement ontarien ne serait exécutoire que contre l'un des 10 appelants. Tout bien pesé, cela indique que l'Illinois peut constituer un ressort plus approprié que l'Ontario pour l'instruction des actions en diffamation.

(5) Fairness to the Parties

[36] This Court observed in *Club Resorts* that in addition to seeking to assure the efficacy of the litigation process, the doctrine of *forum non conveniens* also seeks to assure fairness to both parties. The courts below agreed that the balance of fairness favours litigation in Ontario because it would be unfair to prevent Lord Black from suing in the community in which his reputation was established, whereas there would be no unfairness to the appellants if the actions were to proceed in Ontario because it would have been reasonably foreseeable to them that posting the impugned statements on the internet and targeting the Canadian media would cause damage to Lord Black's reputation in Ontario. I would agree, although I would also emphasize that the question of whether a targeting approach should be adopted in Canadian law does not arise on this appeal. As discussed above, the importance of permitting a plaintiff to sue for defamation in the locality where he enjoys his reputation has long been recognized in Canadian defamation law. Given the importance of his reputation in Ontario, this factor weighs heavily in favour of Lord Black.

III. Conclusion

[37] In the end, some of the factors relevant to the *forum non conveniens* analysis favour the Illinois court, while others favour the Ontario court. The *forum non conveniens* analysis does not require that all the factors point to a single forum or involve a simple numerical tallying up of the relevant factors. However, it does require that one forum ultimately emerge as *clearly* more appropriate. The party raising *forum non conveniens* has the burden of showing that his or her forum is *clearly* more appropriate. Also, the decision not to exercise jurisdiction and to stay an action based on *forum non conveniens* is a discretionary one. As stated in *Club Resorts*, the discretion exercised by a motion judge in the *forum non conveniens* analysis "will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts" (para. 112). In the

(5) L'équité envers les parties

[36] Notre Cour a fait observer dans *Club Resorts* qu'en plus de vouloir garantir l'efficacité du processus judiciaire, la doctrine du *forum non conveniens* vise à assurer l'équité envers les deux parties. Les tribunaux d'instance inférieure ont convenu que l'équité favorise la tenue du procès en Ontario parce qu'il serait injuste d'empêcher lord Black d'intenter une action dans la communauté au sein de laquelle il a établi sa réputation, alors que l'instruction des actions en Ontario n'entraînerait aucune iniquité envers les appelants parce que ceux-ci auraient raisonnablement pu prévoir que l'affichage des communiqués contestés sur Internet et le ciblage des médias canadiens porteraient atteinte à la réputation de lord Black en Ontario. Je suis d'accord, mais je tiens aussi à souligner que la question de l'opportunité d'adopter la notion de stratégie de la cible en droit canadien ne se pose pas dans le présent pourvoi. Comme je l'ai déjà indiqué, le droit canadien reconnaît depuis longtemps l'importance de permettre à un demandeur d'intenter une action en diffamation dans la localité où il jouit d'une réputation. Vu l'importance de la réputation dont lord Black bénéficie en Ontario, ce facteur le favorise fortement.

III. Conclusion

[37] Pour conclure, certains des facteurs pertinents dans l'analyse relative au *forum non conveniens* favorisent la tenue du procès en Illinois, alors que d'autres facteurs favorisent sa tenue en Ontario. L'analyse relative au *forum non conveniens* n'exige pas que ces facteurs convergent tous vers un seul et même ressort ou que l'on procède à un simple décompte numérique de ceux-ci. Elle exige toutefois qu'un ressort apparaisse comme étant *nettement* plus approprié. La partie qui soulève la doctrine du *forum non conveniens* a le fardeau d'établir que son ressort est *nettement* plus approprié. De plus, la décision par un tribunal de ne pas exercer sa compétence et de suspendre une action en application de la doctrine du *forum non conveniens* est une décision discrétionnaire. Comme l'a souligné la Cour dans *Club Resorts*, « [e]n l'absence d'une erreur de droit ou d'une

absence of such an error, it is not the role of this Court to interfere with the motion judge's exercise of his discretion.

[38] Considering the combined effect of the relevant facts, and in particular the weight of the alleged harm to Lord Black's reputation in Ontario, and giving due deference to the motion judge's decision, as I must, I conclude that an Illinois court does not emerge as a clearly more appropriate forum than an Ontario court for the trial of the libel actions brought against the appellants by Lord Black. Accordingly, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants Richard C. Breeden and Richard C. Breeden & Co.: Blake, Cassels & Graydon, Toronto.

Solicitors for the appellants Gordon A. Paris, James R. Thompson, Richard D. Burt, Graham W. Savage, Raymond G. H. Seitz, Paul B. Healy, Shmuel Meitar and Henry A. Kissinger: Bennett Jones, Toronto.

Solicitors for the respondent: Lerners, Toronto.

Solicitors for the intervener: Holmes & King, Vancouver.

erreur manifeste et grave dans l'établissement des faits pertinents [. . .], les juridictions supérieures feront preuve de déférence » (par. 112) à l'égard de l'exercice du pouvoir discrétionnaire du juge saisi de la motion dans l'analyse relative au *forum non conveniens*. En l'absence d'une telle erreur, il n'appartient pas à la Cour de s'ingérer dans l'exercice du pouvoir discrétionnaire du juge saisi de la motion.

[38] Compte tenu de l'effet combiné des faits de l'espèce — et en particulier du poids de l'atteinte que subirait la réputation de lord Black en Ontario —, et en faisant preuve de la déférence qui s'impose à l'égard de la décision du juge saisi de la motion, je conclus qu'un tribunal de l'Illinois n'apparaît pas comme un ressort nettement plus approprié qu'un tribunal de l'Ontario pour l'instruction des actions en diffamation intentées contre les appelants par lord Black. Je suis donc d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelants Richard C. Breeden et Richard C. Breeden & Co. : Blake, Cassels & Graydon, Toronto.

Procureurs des appelants Gordon A. Paris, James R. Thompson, Richard D. Burt, Graham W. Savage, Raymond G. H. Seitz, Paul B. Healy, Shmuel Meitar et Henry A. Kissinger : Bennett Jones, Toronto.

Procureurs de l'intimé : Lerners, Toronto.

Procureurs de l'intervenante : Holmes & King, Vancouver.

TAB 16

The Exceptional as Commonplace in Quebec *Forum Non Conveniens* Law: *Cambior*, a Case in Point

Jeffrey TALPIS* and Shelley L. KATH**

Résumé

Le forum non conveniens est une doctrine discrétionnaire en vertu de laquelle une cour peut décliner juridiction s'il lui est démontré qu'une autre juridiction est plus appropriée à trancher le litige. Traditionnellement, cette doctrine se retrouve plutôt dans les juridictions de common law que dans les juridictions de droit civil. Cependant, l'application varie d'un pays à l'autre de manière subtile mais substantielle (par exemple, quelles sont les normes utilisées pour décliner juridiction; qui détient le fardeau de la preuve). En pratique, ces différences peuvent déterminer s'il y a lieu ou non de décliner juridiction en faveur d'un forum étranger.

En 1994, le Québec a introduit sa propre version de la doctrine du forum non conveniens. En respectant l'approche adoptée au titre III du livre X du Code civil du Québec *régissant les règles de droit international privé et en tenant compte de la règle traditionnelle du droit civil per-*

Abstract

Forum non conveniens *is a discretionary doctrine by which a court may decline to exercise its jurisdiction over a dispute if it finds that an alternative forum is more convenient or appropriate. Traditionally found in common-law rather than civil-law jurisdictions, applications of this doctrine vary in subtle but critical ways (e.g. the specific threshold used for dismissal, who bears the burden of proof). In practice, these differences may determine whether or not a case would be dismissed in favour of a foreign forum.*

In 1994, Québec introduced its own formulation of forum non conveniens. *In keeping with the approach to private international law embodied in Title III of Book Ten C.c.Q. and in light of the traditional civil law rule allowing suit in the defendant's domicile, article 3135 C.c.Q. stipulates that the doctrine may only be applied "exceptionally". As the authors demonstrate, how-*

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mettant d'introduire un litige au domicile du défendeur, l'article 3135 C.c.Q. prévoit que la doctrine ne peut être appliquée qu'exceptionnellement. Cependant, la jurisprudence québécoise a tendance à ignorer la nature particulière de la version québécoise de cette doctrine en accordant trop de poids à la jurisprudence des juridictions de common law sur le forum non conveniens.

En ignorant l'exigence d'exception, les tribunaux ont eu tendance à appliquer cette doctrine à l'excès, laquelle a créé un état d'incertitude, s'est avérée inefficace dans les décisions judiciaires, s'est traduite par une augmentation des coûts et a souvent mené à une injustice envers les parties.

Cette surapplication a aussi affecté de façon négative l'application d'autres règles discrétionnaires touchant à la juridiction tels la litispendance, les demandes incidentes et la reconnaissance des jugements étrangers.

Après avoir examiné l'interprétation des tribunaux québécois relativement à l'article 3135 C.c.Q. et avoir procédé à une analyse approfondie d'un cas typique, Cambior c. Recherches Internationales Québec, *les auteurs proposent une application plus restrictive de la doctrine. Cette proposition vise à interdire complètement le* forum non conveniens *dans certaines situations et exige une preuve de l'existence d'un forum alternatif adéquat avant même l'appréciation des critères. Elle vise aussi à l'élimination de certains critères (par exemple, celui de la loi applicable) tout en limitant l'utilisation de certains autres.*

ever, Québec jurists have tended to ignore the specific nature of the Québec version, giving undue weight to forum non conveniens jurisprudence from common-law jurisdictions. In ignoring the "exceptionality" requirement, they have tended to substantially overapply the doctrine which, in turn, has created uncertainty and inefficiency in judicial decision-making as well as greater costs and even insufficient justice for the parties. It has also adversely affected the application of other discretionary rules affecting jurisdiction such as lis pendens, *treatment of incidental or related actions and recognition of foreign judgments.*

Following a critique of the Québec courts' interpretation of article 3135 C.c.Q. and an in-depth look at a typical case, Cambior *v.* Recherches internationales Québec, *the authors offer a proposal for a more restrictive application of the doctrine. The proposal would prohibit* forum non conveniens *altogether in certain types of cases, require that the existence of an adequate alternative forum be demonstrated prior to the weighing of connecting factors (criteria) and eliminate certain criteria from consideration (e.g. applicable law), while limiting the use of other criteria.*

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In the litigation of private international law cases, *forum non conveniens* motions have become increasingly commonplace in North America, as well as in common law nations elsewhere. *Forum non conveniens*, simply put, is a procedural device, developed originally in the common law jurisdictions[1], which allows defendants to challenge the plaintiff's choice of forum and, depending upon the jurisdictional rules involved, to move for a stay or dismissal of the case on grounds that the case is more closely linked and/or would be more effectively heard in a different jurisdiction. While there are many variations in the specific tests employed by different jurisdictions to determine when the existence of an alternative forum justifies dismissal or stay, this explanation captures the essence of the doctrine's function in private international law. It must be emphasized at the outset, however, that seemingly subtle differences in the various versions of *forum non conveniens* employed in the common law jurisdictions and in Quebec can have substantial implications in practice. While the primary purpose of this paper is to undertake a critical analysis of the doctrine of *forum non conveniens* currently followed in Quebec, its secondary purpose will be to demonstrate how minor differences in *forum non conveniens* doctrines can have major impacts in the disposition of cases involving the doctrine.

The popularity of *forum non conveniens* as a tool for defendants seeking to resist suit in their own "backyard" has no doubt been heightened by the use of the doctrine in a number of high-profile

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1 See e.g.: Perry MEYER, "The Jurisdiction of the Courts as Affected by the Doctrine of *Forum Non Conveniens*", (1964) *R. du B.* 565, 567, 569, 572; Peter HERZOG, "La théorie du *forum non conveniens* en droit anglo-américain: un aperçu", (1976) *R.C.D.I.P.* 1, 2, 4; Sylvette GUILLEMARD, Alain PRUJINER and Frédérique SABOURIN, "Les difficultés de l'introduction du *forum non conveniens* en droit québécois", (1995) 36 *C. de D.* 913, 915-928; E.L. BARRETT, Jr., "The Doctrine of *Forum Non Conveniens*", 35 *Cal. L. Rev.* 380, 386 and 387 (1947); P. BLAIR, "The Doctrine of *Forum Non Conveniens* in Anglo-American Law", 29 *Columb. L.R.* 1, 20-23 (1929); R. BRAUCHER, "The Inconvenient Federal Forum", 60 *Harv. L. Rev.* 908, 909-911 (1947); James J. FAWCETT, *Declining Jurisdiction in Private International Law. Reports to the XIVth Congress of the International Academy of Comparative Law*, Oxford, Clarendon Press, 1995, Canadian Report by J. Blom and Quebec Report by Gérald Goldstein; Geneviève SAUMIER, "*Forum Non Conveniens*, Where are we now?", (2000), 12 *S.C.L.R.* (2d) 121.

cases in North America and the United Kingdom. Some of the more well-known and colourful cases which have contributed to making *forum non conveniens* a well-known tool for defendants carrying on business abroad come from the federal courts of the United States of America (hereinafter "United States" or "U.S.").

Consider, for example, the groups of indigenous peoples from Ecuador who brought suit in New York for property damage, personal injuries and increased risk of cancer alleged to have resulted from leaking oil pipelines in their country which were owned by a U.S. company, Texaco. While a U.S. District Court granted the defendant's motion for dismissal on grounds of *forum non conveniens*, the U.S. Court of Appeals, Second Circuit, reversed the decision on grounds that, *inter alia*, the dismissal was inappropriate because it "rested entirely on adoption of another district court's weighing of the relevant factors"[2]. (A similar suit had been brought and dismissed in a federal court in Texas[3].)

Consider, as well, a case brought by female plaintiffs of Australia, Canada and England against U.S. corporations in Alabama who designed and manufactured silicone breast implants which allegedly were defective and caused serious physical harm[4]. The defendants successfully challenged the ability of the foreign plaintiffs to sue them in their own jurisdiction.

Another high-profile case involved Costa Rican employees of a fruit company who brought suit against two large U.S. corporations, Dow Chemical Co. and Shell Oil Co., for damages due to personal injuries suffered as a result of a highly toxic pesticide which both companies manufactured in the U.S.[5]. Although the plaintiffs were successful in obtaining a favourable judgment from the Texas Supreme Court – the Court ruled that Texas law would not permit the foreign citizens to be denied the ability to sue for personal

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2 *Maria Aguinda* v. *Texaco, Inc.*, 945 F. Supp. 625 (S.D. N.Y. 1996), rev'd (*sub nom. Jota* v. *Texaco, Inc.*), 157 F.3d 153 (2d Cir. 1998) 2.

3 *Sequihua* v. *Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994).

4 *In re Silicone Breast Implants Product Liability Litigation*, 887 F.Supp. 1469 (N.D. Ala. 1995). For other *forum non conveniens* cases involving products liability claims, see, for example: D.W. DUNHAM and E.F. GLADBACH, "Forum Non Conveniens and Foreign Plaintiffs in the 1990s", 24 *Brook. J. Int'l L.* 665 (1999).

5 *Dow Chemical Co.* v. *Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), cert. denied, 498 U.S. 1024 (1991) (hereinafter *Alfaro*). In a concurring opinion, it is reported that Dow went so far as to "argue that the one part of this equation that should not be American is the legal consequences of their actions": *id.*, 681.

injuries, even if such injuries occurred outside of Texas – the state passed legislation shortly thereafter which established the doctrine of *forum non conveniens* for foreign plaintiffs, and thus effectively overruled *Alfaro*[6].

Finally, the case involving the Indian Government's suit in New York on behalf of countless Indian citizens who suffered damages from deaths and injuries in the 1984 lethal gas release disaster at a Union Carbide chemical plant in Bhopal, India is now well-known by lawyers and laymen alike[7]. This case was dismissed from a U.S. court at the request of the corporate plaintiff on the basis of *forum non conveniens*.

Obviously, as transnational activity grows, so grows transnational litigation, and a necessary concomitant of this trend is an increase in forum shopping, of both the legitimate and illegitimate (or evasive) varieties. Where forum shopping is feared, *forum non conveniens* motions are ready at the draw in those jurisdictions which allow them. Hence as the world becomes smaller and everyone's backyard becomes bigger due to increased transnational commercial and corporate activity, we should expect to see more and more *forum non conveniens* cases, as well as more *lis pendens*[8] motions and motions for declaratory judgments of non-liability, both of which allow defendants to preempt or to challenge the plaintiff's choice of jurisdiction and thus operate as procedural cousins to *forum non conveniens*.

Similarly, we should expect to see an increase in cases in which the plaintiffs are foreigners in the jurisdiction in which they are suing, while the defendants are citizens. In fact, it seems well established that many international *forum non conveniens* cases involve private individuals seeking recourse for damage done by

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6 See, for example: D. SOLEN, "Forum Non Conveniens and the International Plaintiff", 9 *Fla. J. Int'l L.* 343, notes 39 and 44 and accompanying text (1994).

7 *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986) (hereinafter *Union Carbide*), aff'd, 809 F.2d 195, 200 (2nd Cir. 1987), cert. denied, 484 U.S. 878 (1987).

8 *Lis alibi pendens* is defined as "[a] suit pending elsewhere ": *Black's Law Dictionary*, 6th ed., p. 931 (1990). While this concept is referred to simply as *lis pendens* in Quebec, it should be noted that, in American law, *lis pendens* refers to notice given to potential purchasers or encumbrancers of a specific partial of property that such property is the subject of pending litigation. See: *Black's Law Dictionary*, *id.*, p 932; see also: Quebec's statutory provision on *lis pendens* in article 3137 C.c.Q., the text of which appears, *infra*, note 336.

multinational corporate defendants based elsewhere[9]. Numerous articles have appeared in U.S. law journals, particularly since 1990, which have commented – sometimes critically, sometimes favourably – on *forum non conveniens* cases fitting the hallmark pattern of foreign plaintiffs and domestic corporate defendants[10]. Such cases often involve environmental impacts, product liability, personal injury or human rights.

Despite the fact that *forum non conveniens* is a relatively recent legal phenomenon in Quebec, with its strong civil-law tradition, the province has already seen a number of colourful cases of *forum non conveniens* of its own involving foreign plaintiffs and corporate defendants. One such example is *Cambior* v. *Recherches internationales Québec*[11], an environmental class action arising from a massive mining accident in Guyana, in which the Guyanese plaintiffs took an action in Quebec, where the corporate defendant's headquarters were located. This case serves as the centrepiece for our critical analysis of the current approach to *forum non*

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9 See e.g.: J.R. PAUL, "Comity and International Law", 32 *Harv. Int'l L.J.* 1 (1991); J. DUVAL-MAJOR, "One-Way Ticket Home: The Federal Doctrine of *Forum Non Conveniens* and the International Plaintiff", 77 *Cornell L. Rev.* 650 (1992); M.M. WHITE, "Home Field Advantage: the Exploitation of Federal *Forum Non Conveniens* by United States Corporations and its Effects on International Environmental Litigation", 26 *Loy. L.A. L. Rev.* 491 (1993); L.J. SILBERMAN, "Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard", 28 *Tex. Int'l L. J.* 501 (1993); C. SPEER, "The Continued Use of *Forum Non Conveniens*: Is it Justified?", (1993) 58 *J. Air. L. & Com.* 845; V.C. ARTHAUD, "Environmental Destruction in the Amazon: Can U.S. Courts Provide a Forum for the Claims of Indigenous Peoples", 7 *Geo. Int'l Envtl. L. R.* 195 (1994); D. SOLEN, *loc. cit.*, note 6; D.W. ROBERTSON, "The Federal Doctrine of Forum Non Conveniens: 'An Object Lesson in Uncontrolled Discretion'", 29 *Tex. L.J.* 353 (1994); R.J. WEINTRAUB, "International Litigation and Forum Non Conveniens", 29 *Tex. Int'l L.J.* 321 (1994); B. CLAGETT, "Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign Plaintiffs", 9 *Tul. Envtl. L.J.* 513 (1996); K.L. BOYD, "The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation", 39 *Va. J. Int'l L.* 41 (1998); D.J. DORWARD, "The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs", 19 *U. Pa. J. Int'l Econ. L.* 141 (1998); A.M. KEARSE, "Forfeiting the Home-Court Advantage: the Federal Doctrine of Forum Non Conveniens", 49 *S.C.L. Rev.* 1303 (1998); D.W. DUNHAM and E.F. GLADBACH, *loc. cit.*, note 4.

10 *Id.*

11 J.E. 98-1905 (Sup. Ct.), [1998] Q.J. (Quicklaw) No. 2544 (hereinafter *Cambior*).

conveniens in Quebec, and thus will be considered in greater detail later in the paper[12].

Forum non conveniens can be defined as a general discretionary power of a court to decline to exercise jurisdiction that otherwise properly belongs to it on the grounds that another forum has been shown to be more convenient or appropriate. While numerous decisions in Quebec and the common law jurisdictions treat the term as if it meant "inconvenient forum", it actually appears to be a "neo-Latin" translation of "inappropriate forum"[13]. Indeed, the more modern formulations of *forum non conveniens* used in most North American and Commonwealth jurisdictions today involve analysis focused on the appropriateness rather than the convenience of the alternative forum. The central idea behind the use of *forum non conveniens* in many cases today is that it serves as a mechanism for justifying dismissals on grounds of convenience and comity rather than on the basis of jurisdiction, *per se*.

In order to allow the defendant to remove the case from the plaintiff's chosen forum, the Quebec Legislator introduced, albeit "exceptionally", the doctrine of *forum non conveniens* into the civil law through article 3135 C.c.Q. when the *Civil Code of Quebec* was adopted in 1994. We will show that although the courts give lip service to this notion of "exceptional," the frequency with which *forum non conveniens* motions are granted in Quebec has led to their being filed systematically in transnational litigation.

Our inquiry into the use and abuse of Quebec's *forum non conveniens* provision, article 3135 C.c.Q., will begin, in Section I, with a quick overview of the current status of *forum non conveniens*

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12 We will consider the case in detail in Section III, where it is presented as a typical example of *forum non conveniens* jurisprudence in Quebec, and in Section VI, where we explore how the reasoning in the decision compares to the new approach to *forum non conveniens*, which we present in Section V.

13 *The Spiliada Maritime Corp.* v. *Cansulex Ltd.*, [1986] 3 All E.R. 843, 853 and 854 (H.L.) (hereinafter *The Spiliada*), at 853-854; see also e.g.: *The Atlantic Star*, [1974] A.C. 436 (H.L.). Additionally, an American author observes that "[d]espite its appearance, 'conveniens' is not a Latin cognate for convenient. It is a participle of the verb 'convenio', which translates to appropriate or suitable (footnotes omitted): P.J. CARNEY, "International Forum Non Conveniens: 'Section 1404.5' A Proposal in the Interest of Sovereignty, Comity and Individual Justice", 45 *Am. U.L. Rev.* 415, note 6 (1995). For further discussion on this subject, see also e.g.: R. BRAUCHER, *loc. cit.*, note 1, 909; A.R. STEIN, "*Forum Non Conveniens* and the Redundancy of Court-Access Doctrine", 133 *U. Penn. L.R.* 781, 784 (1985).

law in four common law jurisdictions – the United Kingdom, Canada (specifically, the common law provinces and the federal courts), Australia and the United States. Through an examination of decisions illustrative of the case law in each country[14], we will explore the manner in which each of these jurisdictions (and sometimes even inferior jurisdictions within them) has formulated its own, unique rules and tests for *forum non conveniens*.

We will then, in Section II, examine the nature of the *forum non conveniens* doctrine in Quebec. In particular, we will look closely at how article 3135 C.c.Q. is being applied in Quebec jurisprudence, and will inquire as to whether or not the Quebec courts are following the "legislated" version of the doctrine.

In Section III, we will undertake a case study of *Cambior* which, in many respects, represents a typical *forum non conveniens* decision in Quebec. We will review the facts briefly, and then examine the court's decision-making process on the *forum non conveniens* motion brought by the defendants in that case.

In Section IV, we will present and justify a plea for redefining the approach to the term "exceptional" currently taken in Quebec jurisprudence.

Following our critique of how *forum non conveniens* is currently being applied in Quebec, we describe in Section V a proposal for interpreting the term "exceptional" in article 3135 C.c.Q. The reader is here forewarned that the approach advanced in our proposal may seem drastic, but, in our opinion, the regularity with which the courts in Quebec are accepting *forum non conveniens* motions necessitates drastic measures, especially if the Legislator's intention that *forum non conveniens* exists as an exceptional remedy *only*, is to be respected. We will also demonstrate, briefly, how the proposal for a renewed approach to *forum non conveniens* in Quebec fits well with current trends in the jurisprudential treatment of the doctrine in the common law countries.

Finally, in Section VI we will revisit *Cambior* in light of our proposal, in order to demonstrate how a different approach might have been taken in that decision.

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[14] The jurisprudence of the common law jurisdictions is presented only for illustrative purposes; the intent was not to undertake a complete review of the cases in these jurisdictions.

I. Comparative *Forum Non Conveniens*: Unique Approaches in Different Countries

It is at once critically important and commonly overlooked that, in general, *each country utilizing the doctrine of* forum non conveniens *employs its own, unique version.* It is primarily the common law countries which utilize the discretionary mechanism of *forum non conveniens* and, at a very general level, the basic concept used in these jurisdictions is quite similar. Beyond the fundamental level of generality, however, differences emerge which are often quite substantial.

In this section, we will present a brief overview of the tests for *forum non conveniens* currently applied in the common law jurisdictions of the United Kingdom, Canada and the United States and the leading cases giving rise to them. Our goal here is to examine the tests themselves, rather than to undertake a comprehensive summary of the *forum non conveniens* jurisprudence in each jurisdiction. Further, although the history of the doctrine's development in each country is rich and compelling[15], we will restrict ourselves here primarily to descriptions of the tests currently applied in each jurisdiction, and historical points will be made only where necessary to provide the necessary context for understanding the current test.

A. The United Kingdom: the Modern Approach Presented in *The Spiliada*

The courts in the U.K. resisted the infiltration of the doctrine of *forum non conveniens* for many years. In fact, the modern formulation of the doctrine was not rooted in English law until the 1984 House of Lords case, *The Abidin Daver*[16]. It was in this case that *forum non conveniens* was formally recognized by name and fully accepted into English law. Whereas the progenitors of the English doctrine were extremely pro-plaintiff, requiring essentially that the defendant prove that the plaintiff's choice of the domestic forum was abusive or vexatious, the modern formulation took a much more neutral stance and produced a test that was much

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15 See, *supra*, note 1 for sources on the history of *forum non conveniens* in various jurisdictions.

16 [1984] 1 All E.R. 470 (H.L.).

easier for defendants to meet. Two years later, in *The Spiliada*[17], the House of Lords refined the approach in *The Abidin Daver*, and articulated the *forum non conveniens* test followed today in the U.K. In *The Spiliada*, Lord Goff stated the basic test succinctly, as follows:

> *The basic principle is that a stay will only be granted on the ground of* forum non conveniens *where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.*[18]

Later in the judgment, Lord Goff clarifies that the proper threshold for the test is whether the alternative forum is "clearly or distinctly more appropriate"[19].

The Spilada links the question of who bears the burden of proof in *forum non conveniens* to the English rules for service. It must be recalled that under English law, leaving aside the various changes coming about through the influence of European Community law, the grounds for jurisdiction are implicit in the rules for the service of process. Where the proceedings are served on a defendant who is present in England and who thus may be served "as of right", the defendant bears the burden of proving that the alternative court is clearly more appropriate than the English forum for the trial of the action.

The test presented in *The Spiliada* is applied in two steps:

(1) The defendant must prove that there is an alternative court and that it is clearly more appropriate than the domestic forum, based on the interest of the parties and the ends of justice[20];

(2) If this burden is met *at a prima facie level*, then the plaintiff must show special circumstances that justify retaining the action in the domestic forum – the forum of the plaintiff's choice[21].

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17 *Supra*, note 13.
18 *Id.*, 854.
19 *Id.*, 855.
20 *Id.*, 854.
21 *Id.*, 856.

Where the defendant is served *ex juris*, the burden is reversed from the beginning and the plaintiff must establish why the domestic forum is "clearly more appropriate".

The Spiliada[22], which has served as the primary source of *forum non conveniens* rules in the U.K. since 1986, is still considered the leading case. This is evident from its treatment as such in several recent House of Lords decisions, including a seminal decision on anti-suit injunctions, *Airbus* v. *Patel*[23], and a recent *forum non conveniens* case, *Connelly* v. *RTZ Corp.*[24], which concerned a suit by a Scottish employee against his London-based corporate employer for health damages sustained from cancer allegedly contracted while working at a uranium mine in Namibia, which was owned by one of the defendant's subsidiary corporations. In *Connelly* v. *RTZ Corp.*, Lord Goff reiterated an important qualification to the plaintiff's burden in the second step of *The Spiliada* test, which he had made in an earlier House of Lords case, *de Dampierre* v. *de Dampierre*[25]. He stated that a stay would be granted unless the plaintiff established that "substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate [alternative] forum"[26]. In *Connelly* v. *RTZ Corp.*, the plaintiffs met this test easily by showing that "substantial justice" could not be done unless the case proceeded in England, where financial assistance for the plaintiffs was available. On this point, Lord Goff stated that:

> *There is every reason to believe that this case calls for highly professional representation, by both lawyers and scientific experts, for the achievement of substantial justice, and that such representation cannot be achieved in Namibia. In these circumstances, to revert to the underlying principle, the Namibian forum is not one in which the case can be tried more suitably for the interests of all the parties and for the ends of justice.*[27]

The British courts, then, must be satisfied that if a stay is granted, the plaintiffs will be able to receive *substantial* rather than rudimentary justice in the alternative forum. Other recent cases

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22 *Supra*, note 13.

23 [1998] 2 All E.R. 257.

24 [1997] 4 All E.R. 335.

25 [1987] 2 All E.R. 1, 11 and 12.

26 *Supra*, note 24, 346.

27 *Id.*, 347. For an example of how the "substantial justice" test worked in the defendant's, rather than plaintiff's favour, see e.g.: *Herceg Novi (owners)* v. *Ming Galaxy (owners)*, [1998] 4 All E.R. 238.

from the English Court of Appeals show similar signs that the courts there are taking very seriously the needs of plaintiffs to follow the defendant to his own forum in order to seek meaningful justice[28].

B. Canada – The Common Law Provinces: the Leading Cases of *Antares Shipping* and *Amchem Products*

To fully understand the operation of *forum non conveniens* in common law Canada, it is necessary to recognize that, just as in the English system, the application of the doctrine is fundamentally affected by the fact that jurisdiction is generally grounded in the rules for service of process. This owes to the fact that, under traditional common law rules, jurisdiction was largely based upon control over the person of the defendant, and was achieved by way of personal service of a writ of summons. Today, the rules for service – and thus for jurisdiction – have expanded to include alternatives to personal service, as well as special rules for service outside the jurisdiction's geographical boundaries. The rules for service within and outside the common law jurisdictions of Canada are contained in the rules of court or rules of civil procedure followed in the various provinces and territories[29], and at the federal level, by the Federal Court Rules[30]. Once served, a defendant against whom action is being taken in one Canada's common law courts may, generally, move for a dismissal or stay[31] of proceedings on

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28 *Lubbe* v. *Cape Plc*, Court of Appeal (Civil Div.), (Transcript: Smith Bernal), 30 July 1998, Lexis (hereinafter *Lubbe*); *Sithole* v. *Thor Chemical Holdings Limited*, Court of Appeal (Civil Div.), The Times, 15 February 1999 (Transcript: Smith Bernal), 3 February 1999, Lexis (hereinafter *Sithole*); *Berezovsky* v. *Forbes Inc.*, Court of Appeal (Civil Div.) The Times, 27 November 1998 (Transcript: Smith Bernal), 19 November 1998, Lexis (hereinafter *Berezovsky*). The *Lubbe* and *Sithole* cases, which bear strong similarities to *Cambior*, *supra*, note 11, in that they involve foreign plaintiffs with few resources taking suit in England for environmental and health damages caused by English companies in other, less-developed countries, are discussed in more detail, below, in Section F.

29 See e.g.: *Ontario, Rules of Civil Procedure*, r. 14.01(1) and r. 16.02-17.06; *Alberta Rules of Court*, r. 6.1, r. 14, r. 15 and r. 30; *Saskatchewan, Rules of Court*, r. 8, r. 13 and r. 31.

30 *Federal Court Rules*, r. 127-137. The rule allowing defendants outside Canada to respond on the basis of *forum non conveniens* without attorning to jurisdiction is contained in r. 208(c). An example of the application of these rules is found in *North Shore Health Region* v. *Cosmos Shipping Lines S.A.*, [1998] F.C.J. (Quicklaw) No. 1681.

31 Whether the jurisdiction concerned will allow a dismissal, a stay, or both depends upon the rules of court or rules of civil procedure for a given jurisdiction.

grounds of *forum non conveniens*. In any event, the exercise of jurisdiction of all Canadian courts must not contravene the constitutional territorial limitation that there be a real and substantial connection between the jurisdiction and the action[32].

While *forum non conveniens* has appeared sporadically in Canada for many years in common law jurisprudence, the approach used in recent times derives primarily from two Supreme Court cases, *Antares Shipping Corp.* v. *The Ship "Capricorn"*[33], and *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*[34]. *Antares Shipping*, decided in 1977 – a good deal earlier than the leading English cases mentioned above – contains the basic test. Ritchie J., speaking for the majority, explained in that decision that the Court's primary consideration in exercising discretion in *forum non conveniens* decisions was the existence of "some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice"[35]. In *Amchem Products*, decided in 1993, Sopinka J. clarified the Canadian approach in *dicta* made within the context of a decision concerning an anti-suit injunction[36]. The vast majority of the Canadian cases and doctrine, which now rely primarily on the *Amchem Products* approach, have been identified and discussed by Prof. Castel, along with the earlier Canadian cases on *forum non conveniens*, and hence will not be discussed further here[37].

Sopinka J. made clear in *Amchem Products* that although the threshold for dismissal is the same in Canada as that in the U.K., – namely, that the alternative forum must be "clearly more appropriate" – the mechanics of the test are quite different. Specifically, he took the view that the approach to be followed in Canada is *not* the two-step approach described in *The Spiliada*[38], but rather a single-step test in which many of the connecting factors and other criteria are considered together in an effort to identify the

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32 The constitutional guidelines were articulated in *Hunt* v. *T&N plc*, [1993] 4 S.C.R. 289 (hereinafter *Hunt*); *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077.

33 [1977] 2 S.C.R. 422 (hereinafter *Antares Shipping*).

34 [1993] 1 S.C.R. 897 (hereinafter *Amchem Products*).

35 *Supra*, note 33, 448.

36 *Supra*, note 34, 931 and 932.

37 Jean-Gabriel CASTEL, *Canadian Conflict of Laws*, Toronto, Butterworths, 1997, 248 ff.

38 *Supra*, note 13, 855 and 856.

natural forum, defined as the forum having a real and substantial connection with the parties and the action[39]. Hence, unlike the English test, described above, the Canadian test has the effect of keeping the burden of proving that another forum is "clearly more appropriate" on the moving party, usually the defendant, the entire time: there is no shifting of the burden to the plaintiff if the defendant makes a successful *prima facie* case. Sopinka J. noted, however, that generally "[t]he burden of proof should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties"[40]. He also found that, generally, the English practice of putting the burden of proof on the plaintiff throughout the analysis when the service is made *ex juris* would not apply in Canada because "[i]n most provinces in Canada, leave to serve *ex juris* is no longer required[41]. In clarifying the rule in Canada, he stated that:

> *Whether the burden of proof should be on the plaintiff in ex juris cases will depend on the rule that permits service out of the jurisdiction. If it requires that service out of the jurisdiction be justified by the plaintiff* [...] *then the rule must govern.*[42]

Only a few courts have adopted this revised test to accommodate special rules for *ex juris* cases in certain provinces, particularly Alberta, Ontario and British Columbia[43].

As mentioned above, the threshold for dismissal under the Canadian approach is essentially the same as in the English test: the alternative forum must be "clearly more appropriate"[44]. Recently, however, the courts in many provinces are showing signs of greater restrictiveness in the use of the "clearly more appropriate" standard and have been somewhat less willing to

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39 *Supra*, note 34, 919-921. Sopinka J. based his choice of a single-step test primarily on the idea that as long as the first step of the test is comprehensive, that is, all of the factors are considered which might tend to point toward a more appropriate forum, then there is no need to afford the parties the opportunity, at the second step, to deal specially with the issue of loss or gain of juridical advantage. *Id.*, 920.

40 *Id.*, 921.

41 *Id.*

42 *Id.*

43 See e.g.: *United Oilseed Products Ltd. v. Royal Bank of Canada*, (1988), 29 C.P.C. (2d) 28 (Alta. C.A.); *Frymer v. Brettschneider*, (1994), 19 O.R. (3d) 60; *Bushell v. T & N Plc*, (1992), 67 B.C.L.R. (2d) 330 (C.A.).

44 *Supra*, note 34, 921; *The Spiliada*, *supra*, note 13, 855.

grant dismissals based on *forum non conveniens*[45]. This is especially true of the federal courts which, in all but the very rare instance, will tend to deny the defendant relief under the doctrine[46]. Like some of the recent English cases[47], the more recent Canadian cases are treating "clearly more appropriate" as a truly exceptional limitation. The trend toward greater restrictiveness, and hence toward the use of a more "exceptional-cases only" standard, is discussed further below[48].

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45 See e.g.: *Tomlinson* v. *Turner*, [1993] P.E.I.J. (Quicklaw) No. 42 (DRS 93-13411) (C.A.); *Shannon* v. *Insurance Corp. of British Columbia*, [1996] B.C.J. (Quicklaw) No. 2313 (DRS 97-02718) (C.A.); *Dennis* v. *Salvation Army Grace General Hospital*, [1997] N.S.J. (Quicklaw) No. 19 (DRS 97-06357) (C.A.) (hereinafter *Dennis*); *679927 Ontario Ltd.* v. *Wall*, [1997] N.S.J. (Quicklaw) No. 18 (DRS 97-06356) (C.A.); *3315207 Canada Inc. (c.o.b. Chartermasters)* v. *Decoexsa Global Logistics Inc.*, [1998] P.E.I.J. (Quicklaw) No. 87 (DRS 98-19067) (T.D.) (hereinafter *Decoexsa Global Logistics*); *Ontario New Home Waranty Program* v. *General Electric Company*, 36 O.R. (3d) 787, [1998] O.J. (Quicklaw) No. 173 (Gen. Div.); *Burrell* v. *Logican Technologies Inc.*, [1998] N.S.J. (Quicklaw) No. 117 (DRS 98-20179) (Sup. Ct.); *Sydney Steel Corp.* v. *Canadian National Railway Co.*, [1998] N.S.J. (Quicklaw) No. 72 (S.S.N. No. 106192) (Sup. Ct.) (hereinafter *Sydney Steel Corp.*); *472900 B.C. Ltd.* v. *Thrifty Canada Ltd.*, (1998) 168 D.L.R. (4th) 602 (B.C.C.A.). However, see: *Westec Aerospace Inc.* v. *Raytheon Aircraft Co.*, [1999] B.C.J. 871 which regrettably counters this trend and with respect to which leave to Appeal to the Supreme Court of Canada was granted on April 20, 2000, decision number 27356, and has since been denied, *Montagne Laramee Developments Inc.* v. *Creit Properties Inc.*, 47 O.R. 3d 729 (Sup. Ct.).

46 See e.g.: *Discreet Logic Inc.* v. *Canada (Registrar of Copyrights)*, [1994] F.C.J. (Quicklaw) No. 582 (C.A.) (hereinafter *Discreet Logic*); *Napa* v. *Abta Shipping Co.*, [1998] A.C.F. (Quicklaw) No. 1726 (T.D.) (hereinafter *Napa*); *Cytoven* v. *Cytomed-Peptos*, [1994] F.C.J. (Quicklaw) No. 1572 (T.D.) (hereinafter *Cytoven*); *Donohue Inc.* v. *The Ocean Link*, [1995] F.C.J. (Quicklaw) No. 396 (T.D.); *Underwriters at Lloyd's* v. *Mauran*, [1997] F.C.J. (Quicklaw) No. 1701 (T.D.); see also: *Holt Cargo Systems Inc.* v. *ABC Containerline N.V. (Trustee of)*, [1997] 3 F.C. 187 (T.D.), aff'd [1999] F.C.J. (Quicklaw) No. 337 (F.C.) (hereinafter *Holt Cargo Systems*), in which the Federal Court, Trial Division used the test in *Antares Shipping*, *supra*, note 33, in an extremely restrictive fashion, refusing to stay a case that had only one tie with Canada (the ship serving as the primary property in the case was arrested in Canadian waters). See also: *Kuhr* v. *The Ship Friedrich Busse and Hochseefischeret Nordstern A.G.*, [1982] 2 F.C. 709 (C.A.) (hereinafter *The Ship Friedrich Busse*) in which the Federal Court of Appeal, using the same, restrictive test in *Antares Shipping*, took a very similar approach and denied a stay.

47 See e.g.: *Lubbe*, *supra*, note 28; *Berezovsky*, *supra*, note 28; *Sithole*, *supra*, note 28; *Connelly* v. *RTZ Corp.*, *supra*, note 24.

48 See, Section F below.

With respect to the connecting factors, typically referred to in Canadian and other *forum non conveniens* tests as "criteria", the basic notion is that the court weighs the appropriateness of the alternative forum by assessing specific facts such as the difficulty and expense under which the parties must make their case before the forum, the witnesses which will be called by either party, the applicable law, the avoidance of multiple lawsuits, and a host of other considerations.

C. Australia: *Voth* v. *Manildra Flour Mills*: Advocating Restraint of the Doctrine

According to the leading case of the High Court of Australia, *Voth* v. *Manildra Flour Mills*[49], an Australian court will decline to exercise jurisdiction in favour of a foreign court only if the Australian court is a "clearly *inappropriate*" forum. Unlike the tests reviewed thus far, this test operates to favour trial in the local forum because the defendant must show *both* that another forum is clearly more appropriate and that the local forum is clearly inappropriate. Thus, if the local forum is an appropriate forum, then there can be no stay under the Australian doctrine of *forum non conveniens*. This contrasts with the version employed in the U.K., under which a stay might be granted as long as the alternative forum is clearly more appropriate.

D. The United States: a Federation of Doctrines

1. The Federal Test: *Gulf Oil* v. *Gilbert* and *Piper* v. *Reyno*

The doctrine of *forum non conveniens* was rarely used before the 1945 Supreme Court case, *International Shoe* v. *Washington*[50] which, through the "minimal contacts" doctrine, expanded the personal jurisdiction of the courts. Thus, the doctrine's development was largely a response to the enlargement of jurisdiction of the American Courts. The tests for *forum non conveniens* followed in the federal courts of the U.S., and in many courts of those states which

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49 (1990) 65 A.L.J.R. 83, 90 (hereinafter *Voth*). For a brief discussion of the rule in *Voth*, see e.g.: P. NYGH, "Choice-of-Law Rules and Forum Shopping in Australia", 46 *S. C. L. R.* 899, 902 and 903 (1995).

50 326 U.S. 310 (1945).

allow the doctrine[51], were developed in two Supreme Court cases, *Gulf Oil* v. *Gilbert*[52] and *Piper Aircraft Co.* v. *Reyno*[53]. The first case in which the U.S. Supreme Court laid out an American *forum non conveniens* doctrine was *Gulf Oil*[54]. Despite the fact that this case involved solely domestic elements and parties[55], it ultimately became a leading case not just for federal cases involving interstate disputes[56], but for international cases[57] arising in federal courts as well. *Gulf Oil* was followed by the seminal case, *Piper* v. *Reyno*[58], in which the U.S. Supreme Court refined the *Gulf Oil* principles with respect to international cases by presenting a weaker standard for dismissal through its recommendation of less deference to foreign plaintiffs. Since both *Gulf Oil* and *Piper* are very well-known cases often referenced by courts outside the U.S., it is useful to summarize each case briefly.

a. *Gulf Oil* v. *Gilbert*: Creation of the Public and Private Interest Criteria

In 1947, the U.S. Supreme Court set out in *Gulf Oil* the foundation for the *forum non conveniens* approach followed today in American cases. Essentially, the Court made clear that unless the balance of criteria considered is "strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed"[59]. The Court substantially qualified this approach, however, by presenting as a fundamental principle of *forum non conveniens* that the

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51 See discussion on state variations in American *forum non conveniens* jurisprudence in Section I, D, 2 below.

52 330 U.S. 501 (1946) (hereinafter *Gulf Oil*).

53 454 U.S. 235 (1981) (hereinafter *Piper* v. *Reyno*, or *Piper*).

54 *Supra*, note 52.

55 *Id.* In *Gulf Oil*, an action for damages was filed in New York despite the fact that both parties and most of the relevant events took place in Virginia.

56 See e.g.: *Quackenbush* v. *Allstate Insurance Co.*, 116 Sup. Ct. 1712 (1996); *Ferens* v. *John Deere Co.*, 494 U.S. 516 (1990); *Metropolitan Life* v. *Aetna Cas. & Sur.*, 728 So.2d 573 (Miss. 1999).

57 See e.g.: *Contact Lumber Co.* v. *P.T. Moges Shipping Co.*, 918 F.2d 1446 (9th Cir. 1990); *Capital Currency Exchange, N.V.* v. *Nat'l Westminster Bank PLC*, 155 F.3d 603 (2d Cir. 1998); *R. Maganlal & Co.* v. *M.G. Chem. Co.*, 942 F.2d 164 (2d Cir. 1991); *Potomac Capital Investment Corp.* v. *Koninklijke Luchtvaapt Maatschapplj N.V. D/B/A KLM*, No. 97 Civ. 8141 (AJP) (RLC), 1998 WL 92416 (S.D.N.Y. March 4, 1998). Again, most of the international cases relying on *Gulf Oil*, *supra*, note 52, also cite *Piper*, *supra*, note 53, which qualified the *Gulf Oil* doctrine for foreign plaintiffs.

58 *Supra*, note 53.

59 *Supra*, note 52, 508.

presumption in favour of the plaintiff's choice may be overcome by a demonstration that relevant factors relating to both the private interests of the litigants and the public interests of the court seized of the case clearly outweigh the deference to be afforded to plaintiff's selected forum[60].

According to *Gulf Oil*, the term "private interests" refers to the interests of the each of the parties in having the case heard in the forum that is most convenient to them[61]. "Public interests", on the other hand, refers both to the interests of the court itself, in having the case disposed in an efficient manner, as well as the interests of the court and society in general to have "localized controversies decided at home" rather than in remote locations having little connection to the litigation[62]. These two categories of factors are more clearly understood through the specific criteria developed in *Gulf Oil*[63] for each category, presented below.

i. Private Interests of the Parties

Gulf Oil identified the following factors as important considerations relating to the "private interests of the parties": the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, the possibility of on-site view of the premises, and "all other practical problems" that could interfere with the ease, expeditiousness or costs of a trial[64]. The Court also mentioned that the enforceability of a judgment may be considered[65]. Finally, the Court acknowledged that defendants have an interest in not being subjected to a vexatious or oppressive suit which inflict upon them "expense or trouble" which is not necessary to ensure that the plaintiff's right to pursue his remedy against the defendant is respected. It warned, however, that in such situations, the "plaintiff's choice of forum should rarely be

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60 *Id.*, 507-509.
61 *Id.*, 508.
62 *Id.*, 509.
63 *Id.*, 508 and 509.
64 *Id.*, 508.
65 *Id.*

disturbed" and thus the defendant would have a strong burden to bear if he wished to argue otherwise[66].

ii. Public Interests

The Court in *Gulf Oil* also identified several "public interest" factors that should be taken into consideration in the balancing test described above. Specifically, the Court identified five such factors[67]. The U.S. Supreme Court summarized these factors, later, in *Piper*, in the following way:

> *The public factors* [...] *included the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflicts of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.*[68]

With respect to the public interest criterion of application of foreign law, the Supreme Court later stipulated in *Piper* that the law to be applied in another forum should *not* be taken into account in deciding a motion to dismiss on grounds of *forum non conveniens*[69]. The Court stated that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry"[70]. This development represented a departure from typical practice in international cases in that, usually, the fact that the case concerns a contract or a tort tends to favour the hearing of the action in the country whose law is applicable to the merits. As already mentioned, *Piper* involved several other, equally if not more important, qualifications of the approach set out in *Gulf Oil*. The brief summary of this case which follows describes these developments.

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66 *Id.*

67 *Id.*, 508 and 509.

68 *Supra*, note 53, 241, note 6. It should be noted that in U.S. case law, the term "diversity cases" simply refers to those cases in which, under U.S. Const. Art. III, § 2, federal courts have jurisdiction where the dispute is between citizens of different states, or between a citizen of a state and an alien (any person not a citizen or national of the U.S.). See definition for "diversity of citizenship", *Black's Law Dictionary*, *op. cit.*, note 8, p. 477.

69 *Supra*, note 53, 247.

70 *Id.*

b. *Piper v. Reyno*: Setting a Double Standard for Foreign Plaintiffs

The leading case on application of the *forum non conveniens* doctrine in U.S. cases involving international elements is *Piper* v. *Reyno*[71]. This case involved a wrongful death action brought in California for damages resulting from deaths caused by the crash, in Scotland, of an American-manufactured airplane carrying a number of Scottish passengers[72]. In its ruling, the Supreme Court not only reaffirmed the federal doctrine but also expanded it in a way that significantly increased the ability of U.S. defendants to challenge a foreign plaintiff's decision to bring suit in a U.S. court. One way it achieved this was through its refinement of the public and private interests analysis presented in *Gulf Oil*. In undertaking its analysis, the Court, which endorsed the trial court's finding that the weight of public and private interests favoured a Scottish forum, emphasized that no single factor, considered alone, could be given greater significance over the others[73]. Hence, the domicile or residence of the defendant were not to be afforded special significance.

The Court in *Piper* also used a stronger and more direct method for increasing the ability of U.S. defendants to succeed in obtaining *forum non conveniens* dismissals in cases involving foreign elements: it presented several guidelines to strongly reduce the attractiveness of American courts to foreign plaintiffs contemplating American lawsuits for torts or other legal wrongs committed abroad. First, the Court approved the notion that *Gulf Oil*'s presumption that the plaintiff's choice of forum should rarely be disturbed should apply with less force when the plaintiff or real parties in interest[74] are foreign. Essentially, it argued that when the plaintiff or real parties are foreign, it is "much less reasonable" an assumption that their choice of forum is convenient, and hence their choice should be paid less deference[75]. Second, the Court emphasized that plaintiffs faced

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71 *Supra*, note 53.

72 The facts of *Piper* are summarized more thoroughly below in Section IV, B, 7, where the case is discussed as an example of how *forum non conveniens* dismissals can often be outcome-determinative.

73 *Supra*, note 53, 249 and 250.

74 While the plaintiff was American, she was acting as the representative of the estates of several of the deceased, all of whom were Scottish citizens or residents. *Id.*, 239 and 240.

75 *Id.*, 255 and 256.

with *forum non conveniens* motions may not defeat a motion to dismiss merely by showing that the substantive law of the alternative forum is less favourable than that of the chosen forum[76].

2. Statewide Variations in *Forum Non Conveniens* in the U.S.

The standards applied in *Piper* and *Gulf* are relied upon in the majority of state courts in the U.S. They are not, however, binding on state courts[77] and, thus, some states have either developed their own, specific formulations of *forum non conveniens* or have rejected it altogether. Of those states that have followed an alternative to the federal doctrine, several have utilized the version of *forum non conveniens* recommended in Section 1.05 of the *Uniform Interstate and International Procedure Act of 1962* (hereinafter the *U.I.I.P.A.*)[78]. According to this approach, where a court finds that the "interests of *substantial justice*" require that the action be heard in the court of another state in the U.S. or another country, then the court "may stay or dismiss the action on any conditions that may be just"[79]. This decision can involve numerous factors. A California appellate court, for example, identified more than 25 factors which could be taken into account[80]. Other states have only weakly or partially

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76 *Id.*, 247-255.

77 See e.g.: *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 149 and 150 (1988) (holding that states are not bound by the federal doctrine where state law on *forum non conveniens* is incompatible with federal doctrine). Earlier, a California Court of Appeals had emphasized the difference between the version of *forum non conveniens* followed in California state courts and the federal doctrine of *forum non conveniens*: *Holmes* v. *Syntex Lab. Inc.*, 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984). It should also be noted that in *American Dredging* v. *Miller*, 510 U.S. 443 (1994), the U.S. Supreme Court held that, in deciding admiralty cases, state courts are not bound by the federal doctrine for *forum non conveniens*.

78 11 *Am. J. Comp. L.* 418 (1962). Reus reports that the states utilizing this approach include Alabama, California, Louisiana, New York, North Carolina and Wisconsin. See: A. REUS, "Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany", 16 *Loy. L.A. Int'l & Comp. L.J.* 455, notes 45 and 46 (1994).

79 See: N.Y. Civ. Prac. L & R. 327 (McKinney, 1990), in which the doctrine according to the *U.I.I.P.A.* is implemented.

80 *Great N. Ry.* v. *Alameda County*, 12 Cal. App. 3d 105, 113 and 114, cert. denied, 401 U.S. 1013 (1970).

accepted the federal doctrine[81]. Finally, some states, such as Florida, Georgia, Montana, Virginia, Louisiana and Texas, place substantial restrictions on the use of *forum non conveniens* or reject the use of the doctrine altogether[82].

E. Conclusion on the Common Law Approach[83]

1. Similarities Among Common Law Jurisdictions

When considered together, several strong similarities are seen in the way in which the common law jurisdictions of the U.K., Canada and the U.S. employ the doctrine of *forum non conveniens*. Specifically, the primary similarities are that: 1) there must exist an alternative forum abroad, 2) private interest factors are always considered, and 3) the court is generally authorized to either dismiss *or* stay the case.

2. Differences Among Common Law Jurisdictions

While the similarities among the jurisdictions are interesting, the differences among the various formulations of *forum non conveniens* in different countries are perhaps more important. This

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81 D.W. ROBERTSON and P.K. SPECK, "Access to State Courts in Transnational Personal Injury Cases: *Forum Non Conveniens* and Antisuit Injunctions" 68 *Tex. L. Rev.* 937, note 76 (1990). Robertson and Speck give a fairly thorough overview of state variation in *forum non conveniens* as it stood in 1990, *id.*, 949-954.

82 These restrictions and rejections of the doctrine are summarized by R. WEINTRAUB, *loc. cit.*, note 9, note 102. Even some of these states, however, focus their restrictions of the doctrine on domestic matters, and hence *do* allow limited use of *forum non conveniens* in cases involving foreign plaintiffs. Florida, Georgia and Texas, for example, follow this pattern. See also D.W. ROBERTSON and P.K. SPECK, *loc. cit.*, note 81, 950-952 and accompanying footnotes (especially notes 77-80).

83 It should be noted that the conclusions on comparative *forum non conveniens* herein presented are intended as a cursory analysis only. For a more in-depth comparative analysis of *forum non conveniens* among the common law (and certain civil law) jurisdictions, see *e.g.*: D.J. CARNEY, "*Forum Non Conveniens* in the United States and Canada", 3 *Buff. J. Int'l L.* 117 (1996) (which includes a criterion-by-criterion analysis for these two jurisdictions); Ellen L. HAYES, "*Forum Non Conveniens* in England, Australia and Japan: the Allocation of Jurisdiction in Transnational Litigation", (1992) 26 *U.B.C. L. Rev.* 41; Wendy KENNETT, "*Forum Non Conveniens* in Europe", (1995) 54 *Cambr. Law J.* 552; A. REUS, *loc. cit.*, note 78. See: J.J. FAWCETT, *op. cit.*, note 1, and G. SAUMIER, *op. cit.*, note 1.

is because different formulations can easily lead to different, if not counterposed, results – even in cases having very similar facts. This simple fact is critical to understand and recognize in light of the fact that countries utilizing *forum non conveniens* sometime "borrow" jurisprudence and, occasionally, concepts from other jurisdictions[84]. One of these differences is that public interest factors are utilized in the U.S., but not in the U.K. or Canada. Additionally, in U.S. *forum non conveniens* cases, a court can dismiss of its own accord: it need not wait for a motion from one of the parties to do so. Another difference existing between the U.S. and other common law jurisdictions is that where, in the U.S., a presumption exists in favour of choice of forum by local (but not foreign) plaintiffs, in the U.K. and Canada, no such presumption exists.

Other differences in the approach to *forum non conveniens* among the common law countries centre on the issues of burden of proof and thresholds for dismissal. For example, in the U.K., unlike in Canada or the U.S., the burden of proof in *forum non conveniens* shifts from the party proposing the *forum non conveniens* dismissal (typically the defendant), who need only demonstrate a *prima facie* case that a clearly more appropriate forum exists, to the opposing party (typically the plaintiff) who must show special circumstances why the case should remain in the original forum. In Canada and the U.S., the burden of demonstrating the need to remove a case on the basis of *forum non conveniens* always stays with the moving party. With respect to thresholds for dismissal, the rules in each jurisdiction are different. In Australia, *forum non conveniens* occurs if the local forum is *clearly inappropriate*. In the U.S., the threshold is "seriously inconvenient", whereas in the U.K. and Canada, the standard is "clearly more appropriate."

It is the differences in the thresholds for application of *forum non conveniens* which are most relevant for our examination and critique of the test in Quebec. We address the comparative differences in thresholds in greater detail in Section II, below.

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84 This was the situation in *Cambior*, which cited American as well as British cases and which, as explained below, imported certain aspects of *forum non conveniens* that are simply not based in Quebec law: *supra*, note 11, 15-19.

F. Current Trends in Common Law Applications of *Forum Non Conveniens*

In most jurisdictions employing a doctrine of *forum non conveniens*, the use of the doctrine increased rapidly after its introduction. Today, however, there are strong signs among the common law countries that the pendulum may be starting to swing the other way. That is, a number of the decisions in the common law courts are reflecting tendencies to reign in the fast horse of *forum non conveniens*. While this is perhaps more true of the U.K. than the other common law jurisdictions, even in the U.S., where *Piper* changed the amount of deference to be paid to plaintiffs' forum choices where the plaintiffs are foreign, a new trend is afoot[85].

In 1996, for example, the U.S. Supreme Court in *Quackenbush* v. *Allstate Ins. Co.*[86] reaffirmed its earlier position in *Gulf Oil* that the application of the doctrine of *forum non conveniens* should be "rare"[87]. Specifically, it emphasized that only in "rare circumstances" may the federal courts "relinquish their jurisdiction in favor of another forum"[88]. Earlier, in 1991, the Federal Court of Appeals, Eighth Circuit, stated in *Reid-Whalen* v. *Hansen*[89], that "in this unusual situation, where the forum resident seeks dismissal, this fact should weigh strongly against dismissal". In the same year, the Third Circuit stated in *Lony* v. *E.I. Du Pont de Nemours & Co.*[90] that it was "puzzling" that DuPont wanted to give up its home court advantage. The Court, observing that Du Pont was seeking to move

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85 For example, see: *PT Kiani Kevdas* v. *Helon*, (2000) B.C.J., No. 1472 (Hendersen J.) and *Conor Pacific Environmental Technologies Inc.* v. *Risk Management Research Institute Ltd.*, (2000) B.C.J., No. 1342 (William J.). As in previous sections, the cases discussed here are illustrative only, and are not intended to serve as a comprehensive presentation of the jurisprudence.

86 *Supra*, note 56.

87 *Supra*, note 52, 509.

88 *Supra*, note 56, 1724. It should be noted, however, that *Quackenbush* is a domestic, rather than international case, and the Court's observations should be viewed in that context. Nonetheless, the case has been relied upon by at least two federal trial courts to support the notion that, in international cases, the federal *forum non conveniens* test is to be applied only in exceptional circumstances. See e.g.: *Eastman Kodak Co.* v. *Kavlin*, 978 F.Supp. 1078, 1095 (S.D. Fla. 1997); *Abdullah Sayid Rajab Al-Rifai & Sons W.L.L.* v. *McDonnell Douglas Foreign Sales Corp.*, 1997 U.S. Dist. Lexis 20587, 12 (E.D. Mo. Dec. 10, 1997). This use of *Quackenbush* has been criticized by L.E. TEITZ, "Parallel Proceedings: Treading Carefully", 32 *Int'l Law* 223, 227 (1998).

89 933 F.2d 1390, 1395 (8th Cir. 1991).

90 935 F.2d 604, 608 and 609 (3d Cir. 1991).

the action to a forum more than 3000 miles away, remarked: "It is like Alice said, 'curiouser and curiouser'"[91]. The Third Circuit made similar observations in an earlier case, *Lacey* v. *Cessna Aircraft Co.*[92], which is examined in more detail, below[93].

Some of the federal trial courts in the U.S. are showing similar signs of restricting the doctrine, even where the plaintiffs are foreign. In *Manela* v. *Garantia Banking Ltd.*[94], a 1996 case in federal trial in New York, the Court observed that a defendant is in an "unusual" position when it asserts that the forum in which its headquarters are found is "inconvenient"[95]. Using a somewhat different approach, a U.S. District court in Florida found, in *Eastman Kodak Co.* v. *Kavlin*, that despite the fact that both the private and public interest factors pointed strongly toward Bolivia as the alternative forum, dismissal on grounds of *forum non conveniens* was not warranted because corruption in the Bolivian justice system made unavailable an "adequate alternative forum" and because the plaintiffs could not reinstate their suit in Bolivia without undue inconvenience and prejudice to their case[96]. It should be noted that the Court came to this result using a four-part test distilled from principles in *Gulf Oil* and developed by the Eleventh Circuit, in which the analysis involves consideration of: a) an adequate alternative forum, b) balance of private interests, c) balance of public interests, and d) lack of undue inconvenience or prejudice to the plaintiff[97].

These recent decision notwithstanding, there are still some U.S. authors who favour keeping the doctrine of *forum non conveniens* expansive, acting as a dam against the floodwaters of forum-shopping plaintiffs. Linda J. Silberman, for example, favours the enactment of a Federal statute to establish, as a presumptive matter, that litigation by foreign plaintiffs arising abroad should not be brought in U.S. courts where an alternative court is available[98]. Such a rule would shift, and no doubt increase, the burden of proof for foreign plaintiffs. Similarly, Daniel J. Dorward argues that the

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91 *Id.*, 608.
92 862 F.2d 38 (3d Cir. 1988).
93 See Section IV, B, 2 below.
94 *Manela* v. *Garantia Banking, Ltd.*, 940 F. Supp. 584 (S.D. N.Y. 1996).
95 *Id.*, 592.
96 *Supra*, note 88, 1086 and 1087.
97 *Id.*, 1083.
98 *Loc. cit.*, note 9, 530.

Piper approach must be kept intact in order to discourage forum shopping by foreign plaintiffs[99].

With respect to current trends in the U.K., there have been several recent decisions which support the notion of a more restricted application of the doctrine of *forum non conveniens*. For example, the House of Lords in *Connelly* v. *RTZ Corp.*[100] seemed to take notice of the relative strength of the parties in terms of financial resources when it ruled that an action taken in England was to remain in that jurisdiction rather than be stayed for hearing in Namibia because the plaintiff individual needed financial assistance, available only in England, to pursue his suit against a subsidiary of a London-based multinational[101]. As mentioned in the Introduction, the House of Lords retained the case on the rationale that because of the unavailability of legal aid in Namibia, the plaintiff could not be assured that "substantial justice" could be done in the alternative forum. What is striking is that the House of Lords took this position despite the fact that it was not disputed that, on the whole, the Namibian forum was "clearly or distinctly more appropriate" than the English forum[102].

The English Court of Appeal has similarly been increasingly protective of the "little guy" in *forum non conveniens* cases in which the plaintiff had taken action against a multinational corporation. In *Lubbe*[103], for example, a number of asbestos workers from South Africa brought suit against a company which was operating there but incorporated and domiciled in England, for damages suffered from breathing asbestos dust at a mine run by a wholly owned subsidiary of the defendant corporation. The Court of Appeal, referring to this kind of situation as "forum shopping in reverse," allowed an appeal against a judgment staying proceedings on the grounds of *forum non conveniens*[104]. Similarly, in *Sithole*[105], South African workers sued the parent corporation domiciled in England for damages suffered due to mercury exposure at a plant which manufactured and reprocessed mercury compounds. As in *Lubbe*,

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99 *Loc. cit.*, note 9, 168.
100 *Supra*, note 24.
101 This case was presented briefly in the Introduction.
102 *Supra*, note 24, 344.
103 *Supra*, note 28.
104 *Id.*, 10.
105 *Supra*, note 28.

this situation involved a plant operated in South Africa by a wholly owned subsidiary of the English corporation.

Canada, as well, has seen a recent trend toward a more restrictive view of *forum non conveniens* in both the federal courts and in some of the common law provinces. The federal courts, for example, have refused to authorise stays in the vast majority of *forum non conveniens* cases that have come before them at both the trial and appellate levels[106]. For example, in *Holt Cargo Systems*[107], the Federal Court of Appeal held that an arrest of a ship in Canadian waters can provide a "real and substantial connection" to Canada, even though most of the ties are with another jurisdiction. It also affirmed the idea that a party with such a connection can legitimately claim the advantages that that jurisdiction provides, echoing Sopinka J. in *Amchem*. Similarly, in *The Ship Friedrich Busse*[108], the Court of Appeal denied the request for a stay, despite the fact that the only link with Canada was that the ship had been arrested in a Canadian port, where it was undergoing repairs[109]. Strict application of *forum non conveniens* doctrines may also be seen in numerous provincial cases[110]. The Nova Scotia Court of Appeal, for example, has recently emphasized that the plaintiff's choice of forum must not be easily disturbed and that the domestic forum must serve as the "default" forum where any doubt arises[111], and the courts of Prince Edward Island have continued, even after *Amchem Products*, to find that a "heavy onus" lies with the defendant

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106 See *Discreet Logic*, *supra*, note 46; *Napa*, *supra*, note 46; *Holt Cargo Systems*, *supra*, note 46; *The Ship Friedrich Busse*, *supra*, note 46; *Donohue Inc.* v. *The Ocean Link*, *supra*, note 46; *Cytoven*, *supra*, note 46; *Underwriters at Lloyd's v. Mauran*, *supra*, note 46; *Yasuda Fire & Marine Insurance Co.* v. *The Nostra Lin*, [1984] F.C. 895 (C.A.); *Peter Cremer Befrechtungskontor GMBH* v. *Amalgamet Canada Ltd.*, [1989] F.C.J. (Quicklaw) No. 136 (T.D.). One of the only federal court cases since *Amchem Products*, *supra*, note 34, which has resulted in acceptance of a *forum non conveniens* motion and an order to stay is *Saraft* v. *Iran Afzal (The)*, [1996] 2 F.C. 954 (F.C.T.D).

107 *Supra*, note 46.

108 *Supra*, note 46.

109 It should be noted, however, that maritime cases merit special treatment in the assessment of connecting factors because, as Addy J. pointed out in *The Ship Friedrich Busse*, *supra*, note 46, 715: "a ship, because of its very mobility is an elusive asset which can easily be disposed of in some distant place and the proceeds of the sale can easily be put beyond the reach of a legitimate claimant".

110 See decisions cited in note 45, *supra*.

111 *Dennis*, *supra*, note 45; *Ontario Ltd.* v. *Wall*, *supra*, note 45.

who must demonstrate that the alternative forum is more appropriate[112].

Finally, there is evidence of an interest in restricting the scope of *forum non conveniens* on the international level as well. There appears to be, for example, a willingness on the part of the common law nations at the Hague Conference on Private International Law [hereinafter "Hague Conference"] to limit the operation of the *forum non conveniens* doctrine. More will be said later in the paper on this development[113].

II. The Quebec Rule and its Unravelling in Quebec Jurisprudence

A. The Quebec Rule: Article 3135 C.c.Q.

It is essential, of course, to begin our examination with the text of the Code. In 1994, Quebec introduced its own version of *forum non conveniens* into Quebec civil law through article 3135 C.c.Q., which reads as follows:

> *Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.*
>
> *Bien qu'elle soit compétente pour connaître d'un litige, une autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette compétence si elle estime que les autorités d'un autre État sont mieux à même de trancher le litige.*

The essential requirements contained within this provision were isolated and presented very helpfully in 1995 by S. Guillemard, Alain Prujiner and F. Sabourin in an article which made a very thorough study of the Quebec *forum non conveniens* cases from 1994-1995[114]. The authors identified four requirements in article 3135 C.c.Q.:

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112 See especially: *Oulton Agencies Inc.* v. *Knolloffice Inc.*, (1988) 66 Nfld & P.E.I.R. 207 (P.E.I.S.C.); *Decoexsa Global Logistics*, *supra*, note 45; *Tomlinson* v. *Turner*, *supra*, note 45.

113 See, Section VII, below.

114 *Loc. cit.*, note 1, 930-951.

1) There must be an authority in Quebec which is competent to hear the case.

2) It must be an exceptional case.

3) The doctrine is invoked only at the request of one of the parties.

4) In order to dismiss the case, the judicial authority of the other state must be better placed to decide the matter in dispute.

We agree that these four points constitute the critical elements of article 3135 C.c.Q. As such, they form the starting point for our examination and critique of the Quebec jurisprudence generally, as well as for our critique of the *Cambior* decision in particular.

B. Quebec Jurisprudence on *Forum Non Conveniens*: Inconsistent Interpretation of Article 3135 C.c.Q.

Given the four essential elements of article 3135 C.c.Q. outlined above, it would be reasonable to expect that the courts would rarely invoke the doctrine in Quebec. In fact, however, it has been invoked with great frequency since 1994. Additionally, it has now penetrated nearly every discretionary power in the exercise of jurisdiction in Quebec, affecting decisions to stay proceedings in motions for lis *pendens* (art. 3137 C.c.Q.), to trump jurisdiction over incidental or related actions (art. 3139 C.c.Q.)[115], to issue anti-suit injunctions[116], and to second-guess the exercise of jurisdiction by a foreign court in the context of a motion to recognize a foreign judgment[117]. Furthermore, far more cases are dismissed on the basis of *forum non conveniens* than one would expect for a procedural recourse that is, according to its legislative basis in article 3135 C.c.Q., to be used only "exceptionally". According to a study by Judge Chamberlain in 1995, about one-third of the cases are sent away to

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115 See: *Crestar* v. *Canadian National Railways Co.*, [1999] R.J.Q.1190 (Sup. Ct.) (hereinafter *Crestar*); *Birdsall Inc.* v. *In any Event*, [1999] R.J.Q. 1344 (C.A.) (hereinafter *Birdsall*).

116 See, for example: *Droit de la famille – 2398*, [1996] R.J.Q. 1010 (Sup. Ct.).

117 See: *Cortas Canning* v. *Suidan Bros.*, [1999] R.J.Q. 1227 (Sup. Ct.) (hereinafter *Cortas Canning*); *Les Entreprises Claude Chagnon* v. *Aqua Dyne Inc.*, Sup. Ct. Ste Hyacinthe No. 500-17-000164-990, January 20 2000; leave to appeal refused.

the alternative forum as a result of acceptance of *forum non conveniens* motions[118]. As of December 1999, the Quebec courts had decline jurisdiction in favour of the alternative forum in 27 out of 77 cases[119].

The 1990's have seen an explosion of litigation in international commercial activity in Quebec, and this has unfortunately occurred in a context in which judicial guidelines on when *forum non conveniens* will apply have been sorely lacking. Unfortunately, the Quebec jurisprudence reveals few guidelines to help lawyers predict whether the Quebec Court will choose to decline its jurisdiction. *The jurisprudence in Quebec is problematic because it does not reflect a clear, Quebecois version of* forum non conveniens*:*

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[118] Unpublished conference paper presented at a meeting of the Canadian Bar Association (Quebec Division), Montreal, May 15, 1995.

[119] Quebec courts declined jurisdiction in the following cases: *Banque Toronto-Dominion* v. *Arsenault*, [1994] R.J.Q. 2253 (Sup. Ct.) (hereinafter *Arsenault*); *Carrier* v. *Frigon*, J.E. 95-309 (C.Q.) (hereinafter *Carrier*); *Czajka* v. *Life Investors Insurance Co. of America*, J.E. 95-765 (Sup. Ct.) (hereinafter *Czajka*); *Droit de la famille – 2032*, [1994] R.J.Q. 2218 (Sup. Ct.); *Garantie (La), compagnie d'assurances de l'Amérique du Nord* v. *Gordon Capital Corp.*, [1995] R.D.J. 537 (C.A.) (hereinafter *Gordon Capital (C.A.)*); *H.L. Boulton & Co. S.A.C.A.* v. *Banque Royale du Canada*, [1995] R.J.Q. 213 (Sup. Ct.) (hereinafter *Boulton*); *Lumbermen's Mutual Casualty Co.* v. *Midland Transport Ltd.*, J.E. 95-1794 (C.Q.) (hereinafter *Lumbermen's Mutual*); *United Color & Chemicals International Inc.* v. *Carmichael Ltd.*, J.E. 95-1374 (Sup. Ct.) (hereinafter *United Color*); *Allstate Insurance Co.* v. *Transport Perez inc.*, B.E. 97BE-40 (C.Q.) (hereinafter *Transport Perez*); *Birdsall*, *supra*, note 115; *Cambior*, *supra*, note 11; *Colida* v. *Motorola Inc.*, J.E. 99-1710 (Sup. Ct.); *Droit de la famille – 2378* [1996] R.J.Q. 2993 (Sup. Ct.); *Droit de la famille – 2577*, J.E. 97-262 (C.A.); *Droit de la famille – 3064*, J.E. 98-1663 (Sup. Ct.); *Droit de la famille – 3146*, J.E. 98-2285 (Sup. Ct.); *E.S.* v. *O.S.*, Sup. Ct. Montreal 500-04-004226-958, December 19 1996; *J.S. Finance Canada inc.* v. *J.S. Holdings S.A.*, Sup. Ct. Montreal 500-05-041089-986, May 19 1998 (hereinafter *J.S. Finance Canada inc.*); *Kingsway General Insurance Co.* v. *Komatsu Canada ltée*, [1999] R.J.Q. 2715 (Sup. Ct.); *L.Y.* v. *M.D.*, Sup. Ct. Quebec 200-12-039883-898, November 23 1998; *Oppenheim Forfait G.M.B.H.* v. *Lexus Maritime inc.*, J.E. 98-1592 (C.A.) (hereinafter *Lexus Maritime (C.A.)*); *Red Falcon Holdings Ltd.* v. *Yellow Eagle Mining Inc.*, Sup. Ct. Montreal 500-17-004315-985, April 15 1999; *Société Toon Boom Technologies* v. *Société 2001 S.A.*, J.E. 96-474 (C.A.) (hereinafter *Société Toon Boom (C.A.)*); *Sony Music Canada inc.* v. *Kardiak Productions inc.*, J.E. 97-1395 (C.A.); *Tribute Carpets* v. *Perfection Rug*, J.E. 96-470 (C.Q.); *Unifirst Federal Savings Bank* v. *Lagarde*, B.E. 98BE-628 (Sup. Ct.); *Zurich, compagnie d'assurances* v. *Plastic Technologies Inc.*, J.E. 97-1707 (Sup. Ct.) (hereinafter *Zurich*); *Protection de la jeunesse – 1120*, J.E. 2000-621 (Sup. Ct.); *Droit de la famille – 3507*, J.E. 2000-249 (Sup. Ct.); *Droit de la famille – 3459*, [1999] R.J.Q. 2971, [1999] R.D.F. 807; *Amiel Distributions Ltd.* v. *Amana Company L.P.*, (2000) I.Q., No. 4958.

the cases offer no clear understanding of the term "exceptional" in article 3135 C.c.Q. As a result of this uncertainty, *forum non conveniens* is raised with great frequency by defendants, and thus plays a more prominent role in determining the appropriateness of the Quebec forum than it otherwise should in international and inter-provincial cases. This development is troublesome in that it leads to the replacement of the rule of law with informal and intuitive judicial decision-making.

The absence of guidelines for litigants and lawyers also causes uncertainty in the decision whether to defend an action abroad or in Quebec due to the fact that Quebec law allows for an evaluation of the appropriateness of the jurisdiction of a foreign court by injecting Quebec's own *forum non conveniens* doctrine into the analysis. This is because Quebec law allows judges, in evaluating whether a foreign court has jurisdiction, to consider, *inter alia*, the elements of the case which gave those authorities *forum conveniens*[120]. Hence, Quebec courts may, relying on article 3164 C.c.Q., employ the "little mirror" principle to refuse recognition of a foreign judgment where, had the foreign jurisdiction applied Quebec's version of *forum non conveniens* rather than its own, the foreign court would have declined to exercise its jurisdiction.

Because Quebec courts have strayed far from the original formulation of the *forum non conveniens* rule in Quebec, what

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120 See: Gérald GOLDSTEIN and Jeffrey TALPIS, *L'effet au Québec des jugements étranger en matière de droits patrimoniaux*, Montréal, Éditions Thémis, 1991, p. 270, par. 101; Jeffrey TALPIS and Jean-Gabriel CASTEL, "Le Code Civil du Québec : interprétation des règles du droit international privé", in Barreau du Québec et Chambres des notaires du Québec, *La réforme du Code civil : priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires*, Vol. 3 (hereinafter *La réforme du Code civil*), Sainte-Foy, Presses de l'Université Laval, 1993, p. 917, par. 487; H. Patrick GLENN, "Droit international privé", in Barreau du Québec et Chambres des notaires du Québec, *La réforme du Code civil*, Vol. 3, p. 770, par. 117; H. Patrick GLENN, "Recognition of Foreign Judgments in Quebec", (1997) 28 *Can. Bus. L.J.* 404, 411; Gérald GOLDSTEIN and Jeffrey TALPIS, "Les perspectives en droit civil québécois de la Réforme des règles relatives à l'effet des décisions étrangères au Canada", (1995) 74 *Can. Bar Rev.* 641, 664 and (1996) 75 *Can. Bar Rev.* 115, 145; Gérald GOLDSTEIN and Éthel GROFFIER, *Droit international privé québécois, théorie générale*, T. 1, Cowansville, Éditions Yvon Blais, 1998, 573; see also: art. 3164 and 3135 C.c.Q. Additionally, application of the doctrine of *forum non conveniens* to the recognition of foreign judgments was the basis for refusing to recognize the jurisdiction of a Texas court in *Cortas Canning*, *supra*, note 117, 1237-1239.

should have been a mere trickle of cases has turned into a torrential downpour since 1994 when article 3135 C.c.Q. came into effect. Furthermore, while the Quebec rule in article 3135 C.c.Q. is still faithfully cited in most of these cases, the rule's focus on exceptionality has been largely overtaken by *ad hoc* judicial rulemaking and the influence of practices in other jurisdictions.

A review of the vast majority of the *forum non conveniens* decisions in Quebec reveals a rather unwieldy number of approaches to the interpretation of article 3135 C.c.Q., none of which truly addresses the issue of exceptionality. In the subsections below, we offer a classification of these approaches into seven, basic categories:

1. "Exceptional" is found in the *Minister's Commentaries*.
2. "Exceptional" is found through weighing various criteria.
3. "Exceptional" means what one chooses it to mean.
4. "Exceptional" means that the alternative court is better suited to decide.
5. "Exceptional" means that the interests of justice require dismissal".
6. "Exceptional" means that the other forum is "clearly more appropriate".
7. "Exceptional" means respecting Quebec as the default forum, especially when the criteria used to weigh the nexus to the alternative forum are questionable.

Before illustrating how each of these approaches has been utilized in the Quebec jurisprudence on *forum non conveniens*, a few preliminary remarks are in order. First, while some Quebec cases rely on only one of these seven approaches, more commonly, cases rely on some combination of them. Even the use of multiple approaches, however, generally fails in communicating successfully what makes a case "exceptional". Second, as will be seen in the analysis which follows, the approaches toward the end of the list come closer to following the Quebec rule than the approaches at the beginning. Nonetheless, even they do not create sufficient guidance for the identification of "exceptional" cases, worthy of dismissal under article 3135 C.c.Q.

1. Approach 1: "Exceptional" Is Found in the *Minister's Commentaries*

One approach frequently taken in Quebec is for the Court to announce that article 3135 C.c.Q. may be used only exceptionally, and then to quote parts of the *Minister's Commentaries on the Civil Code of Quebec*[121] as if they contained the definition of "exceptional". This approach can be seen, for example, in *N.M.* v. *S.S. (Droit de la famille - 2577)*[122], *Stageline Mobile Stage Inc.* v. *Fireman's Fund Insurance Co.*[123], *N.S. Inter Inc.* v. *Pellemon International Inc.*[124] and the recent case, *Opron Inc.* v. *Aero System Engineering Inc.*[125]. It is also seen in the *Cambior*[126] decision. Additionally, the *Minister's Commentaries* are also often quoted in cases which make no mention at all of the "exceptional" requirement in article 3135 C.c.Q. The Minister provides the following view on article 3135 C.c.Q.:

> *Cet article, de droit nouveau, codifie l'exception du forum non conveniens, fréquemment utilisée dans les systèmes de common law. L'exception fait l'objet de controverses doctrinale et jurisprudentielle en droit québécois, relativement à sa recevabilité en l'absence de disposition législative permettant au tribunal de décliner sa compétence.*
>
> *Le forum non conveniens permet, en effet, à un tribunal de décliner sa compétence quand il juge que les intérêts de la justice seraient mieux servis si l'affaire dont il est saisi était instruite par un autre tribunal.*
>
> *Étant donné les avantages que peut présenter, en droit international privé, le* forum non conveniens, *notamment quant à l'efficacité des jugements à rendre, l'article 3135 étend également son application à toutes les autorités du Québec visées par ce titre troisième. L'article devrait faciliter l'administration de la justice en tenant compte de l'intérêt bien compris des parties.* ***Son application est cependant limitée à des cas exceptionnels.***
>
> ***Pourraient donner ouverture à ces cas exceptionnels, les considérations suivantes*** *: la disponibilité des témoins, l'absence de familiarité de l'autorité appelée à trancher le litige avec le droit applicable,*

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121 GOUVERNEMENT DU QUÉBEC, *Commentaires du ministre de la Justice, le Code civil du Québec*, t. 2, Québec, Publications du Québec, 1993, p. 1999 and 2000 (hereinafter *Minister's Commentaries*).

122 *Droit de la famille - 2577*, *supra*, note 119.

123 J.E. 98-910 (Sup. Ct.) (hereinafter *Stageline*).

124 J.E. 96-1532 (Sup. Ct.) (hereinafter *Pellemon*).

125 [1999] R.J.Q. 757 (Sup. Ct.) (hereinafter *Opron*).

126 *Supra*, note 11.

la faiblesse du rattachement du litige à cette autorité, le litige se trouvant en relation beaucoup plus étroite avec les autorités d'un autre État.[127]

A number of *forum non conveniens* decisions in Quebec have treated the last paragraph as containing the key to what the Legislator meant by the word "exceptional". There are, however, several reasons why this paragraph does not suffice as a definition, or even working explanation, of "exceptional" for purposes of interpreting article 3135 C.c.Q. First, all that is provided in the last paragraph is a short list of factors which could be considered, and a list, of course, is not a definition. Second, the Minister's use of the term *could* ("pourraient") in front of the list of criteria implies the discretion to use or not use the criteria in the list, and this creates uncertainty that further detracts from the idea that the list provides a workable explanation for "exceptional". Third, and perhaps most importantly, the list simply contains factors that *can* be used in making the decision to dismiss: each item on its own is obviously not meant to trigger a dismissal every time, but beyond this necessary assumption, there is no indication as to how they *should* be used.

The jurisprudence, borrowing from the common law, has generally assumed that the criteria are to be considered together, in a "global manner"[128], but the text of the *Minister's Commentaries* says nothing about conducting a global analysis. In short, the list of factors by itself does not help identify what instances should be considered "exceptional". Guillemard, Prujiner and Sabourin make a similar point when they observe that rather than representing exceptional cases, the first two criteria mentioned – availability of witnesses and lack of familiarity with foreign law – are simply illustrations of cases where the authority of another state might be better placed to decide the case[129].

Another point to consider in assessing the import of the last paragraph in the *Minister's Commentaries* is the issue of whether the list of criteria was intended to be open or closed. The language of the text is somewhat ambiguous on this point. While a reasonable interpretation is that it is a closed list, the last two "criteria"

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127 *Op. cit.*, note 121 (emphasis added).

128 See e.g.: *Boulton*, *supra*, note 119; *Lexus Maritime (C.A.)*, *supra*, note 119; *Encaissement de chèque Montréal ltée* v. *Softwise inc.*, Sup. Ct. Montreal 500-05-044589-981, January 19 1999 (hereinafter *Softwise*).

129 *Loc. cit.*, note 1, 950.

mentioned – "la faiblesse du rattachement du litige à cette autorité, le litige se trouvent en relation beaucoup plus étroite avec les autorités d'un autre État"[130] – are so general that on their own they could conceivably open the door to the use of a number of more specific factors. In fact, most of the Quebec cases which cite the *Minister's Commentaries* utilize specific criteria that are not mentioned by name in the last paragraph and perhaps it is through this door that they are intended to enter. The problem here is that, while the clause is perhaps not completely open – it really only refers to points of contact – it is open enough that it has the effect of making the list *itself* open-ended, and an open-ended list is even less able to serve as a guide to what is "exceptional" than a closed list, since a list is not a definition.

Another persuasive observation made by Guillemard, Prujiner and Sabourin on the last clause of the Minister's list is that they observe that the phrase "la faiblesse du rattachement du litige à cette autorité" in the *Minister's Commentaries*[131] is not really a criterion at all, but rather a *raison d'être* for making the dismissal decision[132]. Further, they warn that instead of providing guidance as to what is exceptional, the clause actually has the opposite effect because it opens the door to limitless derogation from the established conflict rules[133]. In other words, the use of the concept, "closer attachment to the foreign jurisdiction"[134] as an established criterion for dismissal almost forges the exception into the rule.

There is one other feature of the *Minister's Commentaries* which we feel is particularly important and yet which has been largely ignored: the important role of the "interests of justice", in the second paragraph. Very often, the Quebec cases simply attach the "interests of justice" to the end of the long list of criteria which have been chosen for consideration in the weighing process. Clearly, had the Minister intended to convey that this should be done, he would have included "interests of justice" in the list of criteria in the last paragraph. But he did not. We believe that by stating, as he does in the second paragraph, that: "[l]e *forum non conveniens* permet, en effet, à un tribunal de décliner sa compétence quand il juge que

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130 *Op. cit.*, note 121. See par. 4 of the *Minister's Commentaries* on art. 3135 C.c.Q., reproduced above on p. 799 et 800.

131 *Id.*, p. 2000.

132 *Loc. cit.*, note 1, 948.

133 *Id.*

134 *Id.*, 949.

les intérêts de la justice seraient mieux servis si l'affaire dont il est saisie était instruite par un autre tribunal"[135], he intended to convey that factors relating to the interests of justice should be given an important role, prior to and above consideration of the connecting factors and other specific criteria. As we will argue later, the characteristics of the situation which are often placed under the heading of "interests of justice" are more properly considered as part of a determination of whether the alternative forum is sufficiently competent to warrant further consideration under the *forum non conveniens* analysis.

2. Approach 2: "Exceptional" Is Found in the Weighing of Criteria

This approach is also quite common in the jurisprudence. Essentially, the argument goes that, in order to determine whether or not a case is exceptional, one must analyze different criteria, such as the location of the parties, witnesses, evidence, etc. If the criteria point of dismissal, then the case is exceptional. The tautological quality of this approach makes it less than satisfying. The approach can be seen in cases such as *Transport Perez*[136], and in *Lexus Maritime (C.A.)*[137], in which Pidgeon J.A. states that "[l]e juge saisi d'un moyen déclinatoire doit considérer plusieurs facteurs afin de déterminer s'il est en présence d'une situation exceptionnelle"[138].

3. Approach 3: "Exceptional" Means What One Chooses It to Mean

Some decisions simply conclude that the criteria themselves, which have been identified and weighed, are the "exceptional circumstances" that demand dismissal on *forum non conveniens* grounds. Obviously, this *ad hoc* approach does not help to define what "exceptional" means. This is tantamount to Humpty Dumpty's assertion that, "When I use a word, it means just what I choose it to mean – neither more nor less." Examples of this approach can

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135 *Op. cit.*, note 121.

136 *Supra*, note 119.

137 *Supra*, note 119.

138 *Id.*, 6. "The judge faced with a declinatory motion must consider many factors in determining if there are exceptional circumstances that warrant declining jurisdiction." (Our translation.)

be seen in cases such as *N.M.* v. *S.S.*[139], *Al-Kishtaini* v. *Yesrasien Investments, Inc.*[140] and *Droit de la famille – 2555*[141]. *Cambior* also makes reference to "exceptional circumstances", but does not define what they are: the decision refers simply to the *Minister's Commentaries*[142].

4. Approach 4: "Exceptional" Means That the Alternative Court Is Better Suited to Decide

Cases using this type of approach typically make statements such as: "The court can only "exceptionally" decline when the other court is in a better position to decide." The flaw in this reasoning is obvious: it says that whenever the court considers the alternative forum better suited to decide the case, *that* constitutes "exceptional". Tautological approaches such as this are clearly not helpful in narrowing the field of cases to which the *forum non conveniens* test might apply. Examples of this approach are present in *Zurich*[143], *Société Toon Boom Technologies* v. *Société 2001 S.A.*[144] and in *Amiel Distributions Ltd.* v. *Amana Company L.P.*[145].

5. Approach 5: "Exceptional" Means That the Interests of Justice Require Dismissal

This approach is somewhat similar to the previous approach in that it is backward- rather than forward-looking and is, therefore, of little help in identifying exceptional cases prior to the conclusion of the *forum non conveniens* analysis. Thus, in *Defosses et Plante inc.* v. *Distribution Desilets inc.*, the Superior Court took the position that only if the interests of justice would be better served by sending the case away should Quebec decline to exercise jurisdiction[146]. As in Approach 4, this method performs the *forum non conveniens* analysis without reference to exceptionality, then

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139 Sup. Ct. Montreal 500-05-014008-948, March 6 1995.

140 B.E. 98BE-349 (Sup. Ct.).

141 [1997] R.D.F. 1 (C.A.).

142 *Cambior*, *supra*, note 11, 15.

143 *Supra*, note 119.

144 J.E. 96-630 (Sup. Ct.) (hereinafter *Société Toon Boom (S.C.)*), reversed by the Court of Appeal on Feb. 19, 1996.

145 *Supra*, note 119, par. 59. The court (Larouche J.) declares : "Ce cas nous apparaît exceptionnel en ce sens que nous estimons que les autorités américaines sont mieux à même de trancher le litige".

146 B.E. 99BE-53 (Sup. Ct.).

labels as "exceptional" those cases which result in acceptance of the motion and dismissal of the case. Other cases taking this approach include and *Société Toon Boom Technologies (C.A.)*[147], *Transport Perez*[148] and *Rosdev Investments Inc.* v. *Allstate Insurance Co. of Canada*[149].

On the positive side, however, this approach seems to pull the "interests of justice" up out of the chaos of other factors that are considered during the global weighing of criteria, and places it in a more important light. As we mentioned earlier, it is our contention that the "interests of justice" should play a very strong role, especially where the term is being used to discuss things which make the alternative forum an adequate forum for litigating a particular case. It is useful to note that in a 1994 case cited regularly in *forum non conveniens* cases, *Arsenault*[150], Grenier J. remarks that article 3135 C.c.Q., as an exceptional rule of private international law, has as its sole objective the good administration of justice. We believe that this *must necessarily* include the interests of justice.

6. Approach 6: "Exceptional" Means the Other Forum Is "Clearly More Appropriate"

This approach borrows directly from the threshold for dismissal found in the *forum non conveniens* formulation used in common law Canada and the U.K., which puts the burden of proof upon the moving party, who is almost always the defendant. As was described earlier, the leading Supreme Court of Canada case *Amchem Products*[151] recommends dismissal only where the alternative forum has been shown by the moving party to be "clearly more appropriate" than the domestic forum. This approach has been used in a number of Quebec cases such as *Czajka* v. *Life Investors Insurance Co. of America*[152], *Cameron Billard* v. *2779340 Canada Inc.*[153], *Lexus*

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147 *Supra*, note 119.

148 *Supra*, note 119.

149 *Rosdev Investments Inc.* v. *Allstate Insurance Co. of Canada*, [1994] R.J.Q. 2966, 2969 (Sup. Ct.) (hereinafter *Rosdev Investments*).

150 *Supra*, note 119.

151 *Supra*, note 34, 921.

152 *Supra*, note 119.

153 REJB 97-4876 (Sup. Ct.), aff. in appeal REJB 97-2552 (hereinafter *Cameron Billard*).

Maritime (C.A.)[154], *Opron*[155], *Droit de la famille - 2451*[156], *Stageline*[157] and *Entreprises Exulon inc. v. 1220103 Ontario Ltd.*[158].

The language of this approach may be seen in the Court of Appeal case *Lexus Maritime (C.A.)*[159] and, more recently, in *Opron*, in which Kennedy J. stated that "[s]'il ne se dégage pas une impression nette tendant vers un seul et même forum étranger, le tribunal devrait [...] refuser [...] de décliner juridiction"[160]. Similarly, in *Cameron Billard*, the Superior Court explained that because of the exceptional nature of article 3135 C.c.Q., the various criteria that are weighed when evaluating the alternative forum must, together, "*tendre véritablement, de façon concordante, vers une solution nette à l'effet que le tribunal d'un autre état est mieux à même de trancher le litige, que c'est également le ressort nettement logique*"[161].

What is both interesting and ironic about this importation of the common law *forum non conveniens* threshold for dismissal is that in a great number of common law cases, the standard is actually used in a very restrictive manner, that is, to deny dismissal. Most of the federal *forum non conveniens* cases, for example, take this approach[162]. It is interesting that they are able to accomplish this because, on its face, the phrase "clearly more appropriate" does not ensure that only exceptional cases will be dismissed. Still, given the narrow way in which the standard is being applied in many of the common law provinces and in the federal courts, it could be argued that this approach provides at least some support for the notion of "exceptional". In our view, "exceptional" is an even more restrictive qualifier than "clearly more appropriate." The "better suited to decide" phrase in article 3135 C.c.Q. goes to the

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154 *Supra*, note 119.
155 *Supra*, note 125.
156 [1996] R.D.F. 509 (Sup. Ct.).
157 *Supra*, note 123.
158 B.E. 98BE-627 (C.Q.) (hereinafter *Entreprises Exulon*).
159 *Supra*, note 119, 7.
160 *Supra*, note 125, 776 and 777. "If after the weighing of factors it does not become clear that there is a clear impression tending toward the alternative forum, this court must refuse to decline jurisdiction." (Our translation.)
161 *Supra*, note 153.
162 See e.g.: *Underwriters at Lloyd's v. Mauran*, *supra*, note 46; *Donohue Inc. v. Ocean Link*, *supra*, note 46; *Cytoven*, *supra*, note 46.

mechanism of decision, not to the frequency with which the decision to dismiss is to be applied.

Finally, it is important to recall that in the Supreme Court's decision in *Amchem Products*, a case cited frequently in Quebec *forum non conveniens* cases, Sopinka J. stated that, "often there is no one forum that is clearly more appropriate than others"[163]. This point was picked up, in fact, by the Quebec Superior Court case, *2493136 Canada inc.* v. *Sunburst*[164]. We suggest that, if this is true, then we should see dismissals only rarely.

7. Approach 7: "Exceptional" Means Respecting Quebec as the Default Forum

This approach is often used in conjunction with the approach above, and may well represent a movement on the part of the courts toward a somewhat more restrictive application of *forum non conveniens*, in that the domestic forum, which typically represents the plaintiff's choice of forum, is given somewhat renewed importance. Additionally, as in the previous approach, the burden of proof is placed squarely on the defendant to establish that the alternative forum is in a better position to decide the case. In *Lexus Maritime (C.A.)*[165], the Court of Appeal emphasized that if the Quebec authority is properly seized of a case, then it should remain so except in exceptional circumstances, particularly when the criteria used to evaluate the nexus to the alternative forum are questionable.

This implies that the default forum is Quebec, except under exceptional circumstances. This approach is also seen in several other cases, notably, *Pellemon*[166], *Opron*[167] and *Softwise*[168]. The concept of default forum is also used very frequently in common law *forum non conveniens* cases. For example, in *Amchem Products*, Sopinka J., speaking on the topic of *forum non conveniens*, stated that "where there is no one forum that is the most appropriate, *the*

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163 *Supra*, note 34, 912.
164 J.E. 96-1062 (Sup. Ct.) (hereinafter *Sunburst*).
165 *Supra*, note 119, 7.
166 *Supra*, note 124.
167 *Supra*, note 125.
168 *Supra*, note 128.

domestic forum wins out by default and refuses a stay, provided it is an appropriate forum"[169].

As with the use of the "clearly more appropriate" standard, this approach limits the declining of jurisdiction to cases that are truly "exceptional". The use of this type of approach as a limitation on *forum non conveniens* is supported by the fact that some of the common law cases using this approach turn the standard into a fairly narrow threshold through which not many cases escape[170]. As mentioned earlier, however, even this standard is inadequate since it merely establishes a necessary condition for *forum non conveniens* dismissal that underlies the rationale for exceptional application of article 3135 C.c.Q., without actually providing guidance for its application.

C. Other Observations on the Treatment of "Exceptional" in Quebec Jurisprudence

Clearly, several of the approaches to the interpretation of article 3135 C.c.Q. currently in use today in Quebec seem to contain some support for the notion of "exceptional", and Quebec jurisprudence contains examples of specific situations in which the court is not predisposed to allow dismissal. Several cases, for example, have denied the use of *forum non conveniens* where bankruptcy legislation was involved[171] or where a Quebec law of immediate application had to be applied[172]. The Superior Court has also, in somewhat similar fashion, held that, since according to Quebec law, competence for custody is *exclusive*, a court is not at liberty to let *forum non conveniens* interfere with Quebec's jurisdiction[173]. Specifically, the Court found that it could not dismiss a custody case in which the return of the child had been ordered following a successful application under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*[174].

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169 *Supra*, note 34, 931 (emphasis added).

170 For Canadian cases, see: *supra*, note 45 and *supra*, note 46; for U.K. cases, see: *supra*, note 47.

171 See *e.g.*: *Reklitis (Syndic de)*, [1996] R.J.Q. 3035 (Sup. Ct.) (hereinafter *Reklitis*).

172 See *e.g.*: *3141705 Canada inc. v. Brueckner Group*, J.E. 97-2002 (Sup. Ct.) (hereinafter *Brueckner*).

173 *Droit de la famille - 2739*, [1997] R.D.F. 581 (Sup. Ct.).

174 *Id.*

Despite these signs that "exceptional" may still be alive in Quebec law, there persist various dynamics in the jurisprudence which tend to detract from the "exceptional" nature of *forum non conveniens* in Quebec. For example, the application of article 3135 C.c.Q. to actions instituted prior to January 1, 1994, did not respect the spirit of the "exceptional" requirement. Furthermore, the granting of a stay or conditional dismissal – as opposed to outright dismissal, which is the only order authorized under article 3135 C.c.Q. – expands the use of *forum non conveniens* and consequently erodes further the idea that it should be used only exceptionally. Quebec courts granted stays in cases such as *Arsenault*[175], *Czajka*[176], *Droit de la famille – 2032*[177] and *United Color*[178]. Finally, the courts of Quebec essentially disregard the "exceptional" requirement when they allow *forum non conveniens* applications to be made outside of the delays prescribed in arts. 161, 165 C.C.P. This occurred, for example, in *Simcoe* v. *Arthur Andersen Inc.*[179].

D. The Criteria Currently used in Quebec *Forum Non Conveniens* Decisions

As with all formulations of the doctrine of *forum non conveniens*, the Quebec version involves the weighing of a number of various factors as part of the test for determining whether the alternative forum would be better placed to decide the matter under litigation. The weighing of factors has been the primary focus of the test in many Quebec decisions on *forum non conveniens* and this, in our view, is unfortunate. As we will make clear shortly, the global consideration of factors should be made only *after* it has been found that the alternative forum is truly adequate.

That said, it is important to acknowledge the various factors, or "criteria" as they are commonly called, generally seen in the Quebec jurisprudence. In the sub-sections below, we will identify and discuss the criteria most commonly used in Quebec[180]. It must

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175 *Supra*, note 119.

176 *Supra*, note 119.

177 *Supra*, note 119.

178 *Supra*, note 119.

179 [1995] R.J.Q. 2222 (Sup. Ct.) (hereinafter *Simcoe*); see, for a thorough study of the problem: Geneviève SAUMIER, "Les objections à la compétence internationale des tribunaux québécois: nature et procédure", (1998) 58 *R. du B.* 145.

180 This survey of criteria relies upon and extends that in S. GUILLEMARD, A. PRUJINER and F. SABOURIN, *loc. cit.*, note 1, 935-947.

be emphasized at the outset, however, that rarely are all of the criteria discussed in any one case. In some cases, criteria are not discussed because they simply are not relevant, while in others, the selection of criteria is influenced by the particular factors raised by the parties in their pleadings, and/or which criteria the Court views as significant for a particular set of circumstances. It is also important to recognize that the actual weight accorded to most of the criteria identified here has varied widely in the case law. Perhaps some of this variation is due to the unique character of certain cases, but we fear that some is due to a simple lack of consensus on the proper weight given to particular criteria as well as to the fact that trial judges have great discretion in these matters[181].

Perhaps the most important thing to note in surveying the use of criteria in the jurisprudence, however, is that sometimes a particular criterion used to support dismissal in one case is used in another case to deny dismissal. This points up one of the major problems with relying too heavily on the "weighing of factors" phase of the *forum non conveniens* test: the criteria are not applied in a consistent fashion across cases. We will identify several of the more important instances where this occurs, but generally, our objective here is to provide an overview of the criteria used. It should also be noted that the cases mentioned in conjunction with each category of criteria are illustrative only, and are not meant to represent the full list of cases which have utilized each criterion.

The criteria most commonly used in the Quebec jurisprudence on *forum non conveniens* include: 1) residence and domicile of the defendant, 2) location of the natural forum, 3) place of residence of the witnesses, 4) place of formation and execution of the contract, 5) existence of another action pending in another jurisdiction, and the stage of such proceeding, 6) the law applicable to dispute, 7) juridical advantages for the plaintiff, and 8) the interests of justice. Next, we will review briefly these eight criteria as they are represented in the Quebec's *forum non conveniens* jurisprudence, and follow with an overview of other notable but less frequently used criteria.

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[181] See, e.g.: *Lexus Maritime (C.A.)*, *supra*, note 119, 5; *Entreprises Exulon*, *supra*, note 158, 3.

1. Residence and Domicile of the Defendant

The domicile of the defendant is given little or no importance in cases such as *Boulton*[182], *Gordon Capital (C.A.)*[183], *Stageline*[184], *Lexus Maritime inc* v. *Oppenheim Forfait GmbH*[185] and *Société Toon Boom (C.A.)*[186]. As will be discussed in more detail later[187], this is a fundamental error. Domicile of the defendant was, and still is, very much the natural forum in civil law jurisdictions generally: *actor sequitur forum rei*. This rule is codified in article 3134 C.c.Q., the general provision relating to international jurisdiction of Quebec authorities. It also may be seen in articles 3141 through 3147, 3148(1), 3149 and 3153 C.c.Q., which demonstrate, in various ways, the important role that domicile plays in determining jurisdiction under Quebec conflict rules.

2. Natural Forum

While the notion of the natural forum was rejected in Boulton, it was admitted in the more recent case, *Entreprises Exulon*[188]. In that case, it was held that *forum non conveniens* does not apply if Quebec is found to be the natural forum. Again, this kind of inconsistency runs rampant throughout the Quebec jurisprudence on *forum non conveniens* and makes the process of weighing criteria simply unreliable[189].

3. Place of Residence of Witnesses

The jurisdiction in which the witnesses reside is often considered both with respect to the convenience of witnesses in travelling to the court seized of the case and with respect to the potential problems

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182 *Supra*, note 119.
183 *Supra*, note 119.
184 *Supra*, note 123.
185 B.E. 98BE-350 (Sup. Ct.), rev'd J.E. 98-1592 (C.A.) (hereinafter *Lexus Maritime (S.C.)*).
186 *Supra*, note 119.
187 See Section V, D, 1, b, below.
188 *Supra*, note 158.
189 See: *Zurich*, *supra*, note 119; *Tribute Carpets* v. *Perfection Rug*, *supra*, note 119.

associated with compelling attendance of witnesses[190]. Additionally, the location of various of elements of proof may be an issue. Numerous cases refer to these elements when deciding upon whether or not to dismiss on grounds of *forum non conveniens*[191]. In some cases, the court will not dismiss even though witnesses and elements of proof are situated outside Quebec[192]. Furthermore, in some cases the court simply states that the travel situation or ability to compel witnesses is a problem that is equally serious from both jurisdictions, and hence not a determinative factor[193].

4. Place of Formation and Execution of Contract

These two criteria, place of formation of the contract and execution of the contract, are self-explanatory. Examples of their application in Quebec may be seen in *Boulton*[194], *Simcoe*[195], *United Color*[196] and *Czajka*[197].

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190 See e.g.: *Colida* v. *Motorola Inc.*, *supra*, note 119; *Droit de la famille – 2577*, *supra*, note 119; *Droit de la famille – 3064*, *supra*, note 119; *Lexus Maritime (C.A.)*, *supra*, note 119; *Unifirst Federal Savings Bank* v. *Lagarde*, *supra*, note 119; *Pellemon*, *supra*, note 124; *Société Toon Boom (S.C.)*, *supra*, note 144; *Sunburst*, *supra*, note 164; *Red Falcon Holdings Ltd.* v. *Yellow Mining Inc.*, J.E. 99-975 (Sup. Ct.).

191 See e.g.: *Boulton*, *supra*, note 119 (witnesses in B.C.); *Carrier*, *supra*, note 119 (all in Florida); *Droit de la famille – 2032*, *supra*, note 119 (Belgium); *United Color*, *supra*, note 119; *Lumbermen's Mutual*, *supra*, note 119; *Société Toon Boom (S.C.)*, *supra*, note 144; *Cameron Billard*, *supra*, note 153; *Protection de la jeunesse – 925*, [1998] R.J.Q. 1656 (C.Q.); *Droit de la famille – 3064*, *supra*, note 119; *Droit de la famille – 2378*, *supra*, note 119.

192 See e.g.: *Rosdev Investments*, *supra*, note 149; *Simcoe*, *supra*, note 179; *A.V.S. Technologies Inc.* v. *Goldstar Co.*, J.E. 95-2048 (Sup. Ct.) (hereinafter *A.V.S. Technologies*); *Malden Mills Industries Inc.* v. *Huntingdon Mills Canada Ltd.*, [1994] R.J.Q. 2227 (Sup. Ct.) (hereinafter *Malden Mills*); *Droit de la famille – 2223*, [1995] R.J.Q. 1792 (Sup. Ct.).

193 See e.g.: *Lexus Maritime (S.C.)*, *supra*, note 185.

194 *Supra*, note 119.

195 *Supra*, note 179.

196 *Supra*, note 119.

197 *Supra*, note 119; see also: *A.V.S. Technologies*, *supra*, note 192.

5. Existence and Progress of an Action Pending Elsewhere

As with other criteria, the existence and the stage of another action pending elsewhere has been used both to dismiss cases on the basis of *forum non conveniens*[198], as well as to retain them[199]. The court's concern in relying on this criterion is generally the same as the rationale behind *lis pendens*, the avoidance of the possibility of contradictory judgments[200]. Another criterion sometimes held by the court to be important is whether an action has already been taken in an alternative court. This concern was articulated by the court in *Droit de la famille – 2094*[201].

6. Law Applicable to the Dispute

This factor is considered in many Quebec cases, as well as in the *Minister's Commentaries*[202] on article 3135 C.c.Q. The principle idea underlying this criterion is that the lack of familiarity with foreign law is a problem for the administration of justice. Some recent examples of cases utilizing this criterion include *Amiouny* v. *Avalon Beverage Co.*[203], *Lexus Maritime (S.C.)*[204], *Barre* v. *J.J. Mackay Canadian ltée*[205], *Zurich*[206], *Société Toon Boom (S.C.)*[207] and *Leonard* v. *Québec (Ministre des Transports)*[208]. It must be emphasized, that these represent but a fraction of the Quebec cases in which this criterion appears.

The problem with the frequency of this criterion is, as Guillemard, Prujiner and Sabourin have argued[209], that treating the

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198 See e.g.: *Arsenault*, *supra*, note 119; *Droit de la famille – 2032*, *supra*, note 119; *Gordon Capital (C.A.)*, *supra*, note 119; *United Color*, *supra*, note 119.

199 See e.g.: *Banque de Toronto-Dominion* v. *Cloutier*, [1994] R.J.Q. 386 (Sup. Ct.) (hereinafter *Cloutier*); *Malden Mills*, *supra*, note 192; *Simcoe*, *supra*, note 179; *Droit de la famille – 2094*, [1996] R.J.Q. 276 (C.A.); *Opron*, *supra*, note 125.

200 See e.g.: *Société Toon Boom (C.A.)*, *supra*, note 119.

201 *Supra*, note 199.

202 *Op. cit.*, note 121.

203 J.E. 97-2181 (Sup. Ct.) (hereinafter *Amiouny*).

204 *Supra*, note 185.

205 J.E. 99-27 (Sup. Ct.) (hereinafter *Barre*).

206 *Supra*, note 119.

207 *Supra*, note 144.

208 (2000) J.Q. 25. Since, in this case, the applicable law remained to be determined, no importance could be attributed to it as a *forum non conveniens* criterion.

209 *Loc. cit.*, note 1, 949.

applicable law as an important criterion in the decision whether to accept or reject *forum non conveniens* in a particular case is destructive of private international law. Occasionally, however, there are signs in the jurisprudence that the importance of applicable law is on the decline in Quebec. In *Contant* v. *Robben Industries Ltd.*[210], for example, the Superior Court emphasized that the fact that a contract is to be interpreted according to the laws of Ontario does not, itself, warrant the application of article 3135 C.c.Q. In *J.S. Finance Canada Inc.* v *J.S. Holding S.A.*, the Appeal Court was of the view that the fact that the contract in question was governed by the laws of Switzerland was not significant to justify a dismissal under *forum non conveniens*[211].

7. Juridical Advantages for the Plaintiff in Proceeding Before the Chosen Forum

Another criterion commonly seen in Quebec cases is the presence of distinct juridical advantages for the plaintiff in taking the action in the chosen forum[212]. For instance, in *Gordon Capital Corp.* v. *Garantie (La), compagnie d'assurances de l'Amérique du Nord*[213], the Court rejected the defendant's motion to have the action stayed pending resolution of proceedings in Ontario. The Court accepted the plaintiff's argument that the Quebec proceedings should continue because they potentially offered him juridical advantage[214]. Other more recent cases in which juridical advantage was invoked include *Stageline*[215], *Sunburst*[216] and *Habberfield Estate* v. *Propair Inc.*[217].

8. Interests of Justice

This term refers to the notion that, where more than one competent forum exists, the decision as to which forum should hear the case should take into account which better serves "the interests

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210 *Contant* v. *Robben Industries Ltd.*, B.E. 98BE-319 (Sup. Ct.),

211 J.E. 99-1067 (C.A.).

212 *Boulton*, *supra*, note 119; *Czajka*, *supra*, note 119; *Arsenault*, *supra*, note 119; *Simcoe supra*, note 179; *Lexus Maritime (C.A.)*, *supra*, note 119.

213 J.E. 94-110 (Sup. Ct.).

214 The result in this case was reversed by the Court of Appeal in *Gordon Capital (C.A.)*, *supra*, note 119.

215 *Supra*, note 123.

216 *Supra*, note 164.

217 2000 Q.J., No. 5955; J.E. 2001-47 (Sup. Ct.) (hereinafter *Habberfield Estate*).

of justice". This idea is expressed by Quebec courts in *Arsenault*[218], *Simcoe*[219], *Rosdev Investments*[220] and *Habberfield Estate*[221]. It is addressed in detail below[222].

9. Other Criteria

In addition to the criteria mentioned above, which have been utilized in numerous cases since the doctrine of *forum non conveniens* came into force in Quebec, there are several other criteria which have been used less frequently but which deserve brief mention. First, several cases have considered the **residence of legal counsel** as a valid criterion, among them *Czajka*[223], *Malden Mills*[224] and *Protection de la jeunesse – 925*[225]. The Court in these cases appeared to utilize this criterion as a way of helping to keep cases in Quebec which involved plaintiffs from outside Quebec who had chosen to bring actions in Quebec.

Second, the notion of the **"sufficient link"** has been used as a criterion in Quebec jurisprudence. A relatively recent example of the use of this criterion is seen in *Droit de la famille – 2847*[226].

Third, the criterion of the **"abusive character"** of the litigation is sometimes used. The notion that *forum non conveniens* could be triggered by a finding that the plaintiff's choice of forum was abusive is one which has a substantial history in other jurisdictions, particularly the U.K. and common law Canada[227]. In Quebec, this

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218 *Supra*, note 119.

219 *Supra*, note 179.

220 *Supra*, note 149; see also: *Transport Perez*, *supra*, note 119; *Droit de la famille – 3146*, *supra*, note 119; *Arsenault*, *supra*, note 119; *Droit de la famille – 2032*, *supra*, note 119; *Gordon Capital (C.A.)*, *supra*, note 119; *United Color*, *supra*, note 119; *Cloutier*, *supra*, note 199; *Malden Mills*, *supra*, note 192; *Simcoe*, *supra*, note 179; *Société Toon Boom (C.A.)*, *supra*, note 119; *Droit de la famille – 2094*, *supra*, note 199.

221 *Supra*, note 217.

222 See Section VI, B, 3, c, below.

223 *Supra*, note 119.

224 *Supra*, note 192.

225 *Supra*, note 191.

226 *Droit de la famille – 2847*, B.E. 97BE-1050 (Sup. Ct.).

227 The primary cases are discussed in S. GUILLEMARD, A. PRUJINER and F. SABOURIN, *loc. cit.*, note 1, 923.

criterion was relied upon by the court in *United Color*[228]. More recently, it was also relied upon in *Sunburst*[229].

Fourth, the **best interests of the children** has been considered a valid criterion. In *Droit de la famille – 2223*[230], for example, it was held that where children are involved, removal of the case to an alternative jurisdiction is acceptable where it is in the best interest of the children to do so. More recently, this issue has been addressed in *Droit de la famille – 2739*[231] and in *L.Y.* v. *M.D.*[232].

Fifth, the involvement of a **law of immediate application** has sometimes been relied upon as a powerful criterion in favour of keeping cases in Quebec. In both *Reklitis*[233] and *Eagle River International Ltd. (Syndic de)*[234], the Superior Court has indicated that article 3135 C.c.Q. cannot apply in bankruptcy cases: Quebec's interest in having the law on bankruptcy respected takes precedence over the defendant's ability to rely on the jurisdictional argument of *forum non conveniens*. The Court used a similar approach in *Brueckner*[235], where it refused to decline jurisdiction on grounds of *forum non conveniens* because it was in the public interest to do so in order to respect the *Loi sur la concurrence* (*Competition Law*).

Sixth, the **inability to renounce jurisdiction in certain labour and consumer cases** has been used as a criterion in applying *forum non conveniens*. The notion that where a jurisdiction cannot be renounced by workmen or consumers, *forum non conveniens* may be restricted is seen in *Barre*[236].

Seventh, the assertion of jurisdiction over an **incidental or related dispute** has been used in a *forum non conveniens* analysis both to send the incidental demand to an alternative court, as the court did in *Stageline Mobile Stage Inc.* v. *In Any Event*[237], as well as to refuse to do so, as decided in *Crestar*[238]. However, a recent

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228 *Supra*, note 119.
229 *Supra*, note 164.
230 *Supra*, note 192.
231 *Supra*, note 173.
232 *Supra*, note 119.
233 *Supra*, note 171.
234 [1999] R.J.Q. 1497 (Sup. Ct.), aff'd [2000] R.J.Q. 392 (C.A.).
235 *Supra*, note 172.
236 *Supra*, note 205.
237 B.E. 98BE-1265 (Sup. Ct.), rev'd (*sub nom. Birdsall*), *supra*, note 115.
238 *Crestar*, *supra*, note 115.

ruling by the Quebec Court of Appeal suggests curiously that convenience is an element to be considered in the right to assert jurisdiction over a related matter[239].

E. Conclusion: the Application of Article 3135 C.c.Q. in Quebec

The ways in which *forum non conveniens* is being employed in Quebec through the application of article 3135 C.c.Q. may be summarized by three observations. First, the Quebec version of *forum non conveniens* is not being followed by the Quebec courts. Common law approaches, which at times deviate significantly from the legislated approach in Quebec, are referred to approvingly in many Quebec cases, as well as in doctrine[240]. In particular, the Court stated in *Boulton* said it was acceptable to retain the criteria applied in *Amchem Products*[241]. Referring to the common law origins of the rule in article 3135 C.c.Q., the court states: "il a été retenu suivant la formulation employée à l'article, les règles d'application des pays du common law." As Profs. Gérald Goldstein and Éthel Groffier suggest however, a preferable approach is to "s'inspirer intelligemment (critiques)"[242]. Unfortunately, this advice was not heeded by the court in *Cambior*, which seemed to follow both *Piper* and *Union Carbide* unquestionably[243]. Furthermore, the courts in Quebec have sometimes followed the modern American view that the power to sue the defendant at its domicile is not absolute[244].

Second, the reasoning in the decisions represents, at best, a "crazy-quilt of *ad hoc*, capricious and inconsistent"[245] approaches, without sufficient explanation of the combination and weight of factors which will – or will not – lead to dismissal. In other words,

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239 In *Birdsall*, *supra*, note 115, the Court of Appeal stated what appears to be a new rule on incidental actions. It indicated that in private international law cases, the rule that an incidental action, such as an action in warranty, must be disposed of with the principal action (art. 222 C.c.p.) can sometimes be disregarded, and that art. 3139 C.c.Q. affords the Court this flexibility. *Id.*, 1353.

240 See e.g.: *Johns-Mansfield Corp.* v. *The Dominion of Canada General Insurance Company*, [1991] R.D.J. 616 (C.A.).

241 *Boulton*, *supra*, note 119, 220; *Amchem Products*, *supra*, note 34.

242 *Op. cit.*, note 120, p. 313.

243 In fact, both cases were cited in the decision: *supra*, note 11, 17.

244 See e.g.: *Boulton*, *supra*, note 119; *Arsenault*, *supra*, note 119.

245 This phrase was used by A.R. Stein to describe a similar problem with American *forum non conveniens* cases: A.R. STEIN, *loc. cit.*, note 13, 785.

the Quebec courts have not yet clearly explained why the same points of contact may compel dismissal in one case, but not in another. The Quebec courts have introduced essentially all of the *forum non conveniens* criteria utilized in the common law, without describing the importance to be given to one criteria or another. Furthermore, the list of criteria used in the common law cases is so lengthy and indeterminate that it provides virtually no guidance at all. Thus, *forum non conveniens* in Quebec has become not a doctrine, but rather a state of habitual practices and attitudes. Furthermore, such uncertainty and inconsistency in *forum non conveniens* decisions can, if unchecked, result in a use of discretion that is capable of unwarranted interventions into jurisdictional rules. An American commentator, A. R. Stein, made the following observation about how inconsistent *forum non conveniens* rules can "undo" what has supposedly been "done" earlier when a court considers personal jurisdiction:

> *The net of effect is that policies advanced under a jurisdictional doctrine can be nullified by a subsequent forum non conveniens ruling.*
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> [...]
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> *In short, the very qualities presumably considered under jurisdictional rules are again considered under forum non conveniens because the jurisdictional rules were underinclusive: the rules were not effective in selecting those cases that were appropriate or inappropriate for resolution in the forum. In other words, someone has cut a hole in the jurisdictional filter.* [246]

Finally, one last comment on Quebec *forum non conveniens* jurisprudence concerns the style of the decisions: they are often only a few pages in length, with many consisting primarily of a reproduction of the *Minister's Commentaries*[247], which as will be recalled, simply elucidate certain of the criteria to be considered[248].

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246 *Loc. cit.*, note 13, 794 and 795.

247 *Op. cit.*, note 121.

248 *See e.g.*: *Arsenault*, *supra*, note 119; *Droit de la famille - 2032*, *supra*, note 119; *Malden Mills*, *supra*, note 192; *Cloutier*, *supra*, note 199; *Rosdev Investments*, *supra*, note 149; *Simcoe*, *supra*, note 179; *A.V.S. Technologies*, *supra*, note 192; *Droit de la famille - 2223*, *supra*, note 192; *Droit de la famille - 2094*, *supra*, note 199.

III. A Typical Example: *Cambior* v. *Recherches internationales Québec*

For purposes of analyzing and critiquing *forum non conveniens* in Quebec, the *Cambior* decision provides a very useful case in point for four reasons. First, it is illustrative of the approach frequently taken by Quebec courts, in that it fails to define correctly the term "exceptional" in article 3135 C.c.Q., thereby ignoring the Quebec version of *forum non conveniens*. Second, it is a case which, by its result, illustrates some level of discrimination against foreign plaintiffs who have suffered damage outside of Quebec for acts occurring outside Quebec. Third, it deals squarely with a policy of accountability of a Canadian multinational corporation who, acting through one of its many subsidiaries, creates an environmental disaster abroad. Fourth, it is one of the few, if not the first, cases appearing before the Quebec courts dealing with a class action in an international context.

A. The Facts

In August of 1995, one of the worst environmental catastrophes in gold mining history occurred in Guyana[249]. A dam holding back the tailings (liquid mine waste) of a gold mine broke and consequently released "2.3 billion litres of liquid containing cyanide, heavy metals and other pollutants"[250] into two rivers, one of which, the Essequibo River, serves as both Guyana's primary transportation route to the interior of the country and a primary source of fresh water. The gold mine is operated by Omai Gold Mines Limited (hereinafter "O.G.M.L."), a Guyanese corporation which is 65% owned by Cambior, a corporation formed under the laws of Quebec. Cambior closely controlled many aspects of O.G.M.L.'s management and operation from its headquarters in Quebec.

The disaster resulted in the institution of a class action in Quebec, when some of the 23,000 victims of the spill called upon Recherches internationales Québec (RIQ), a Quebec organization, to act on their behalf and sue Cambior in its "home" jurisdiction for $69 million in damages. As a result of the spill, the river was contaminated with cyanide and heavy metals, some of which persist

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249 These are the words chosen by Maughan J. to describe the spill: *Cambior*, *supra*, note 11, 2.

250 *Id.*

over long periods of time and this contamination was alleged to be the source of numerous harms suffered by the residents. A Commission set up by the Guyanese government found that the cause of the spill from the mine was due to the faulty placement of the rockfill from which the dam was built[251]. The Commission also found O.G.M.L. responsible for the loss since it was the party responsible for bringing the cyanide on-site[252].

The plaintiffs brought their action in Superior Court, and Cambior contested, by way of a declinatory exception, the jurisdiction of the Quebec court to hear the case. It also requested, in the alternative, that the Quebec Superior Court decline to exercise its jurisdiction on the basis of the *forum non conveniens* relief available in article 3135 C.c.Q.

B. Summary of the Court's Findings and Decision

The decision in *Cambior* was rendered by Judge G.B. Maughan in the Montreal district of Quebec Superior Court in August 1998.

Maughan J. found that both courts, those of Guyana and those of Quebec, had jurisdiction to try the issues[253]. In the end, however, he concluded that neither the victims nor their action had any real connection with Quebec because the mine was located in Guyana, the victims resided in Guyana, the damage was suffered in Guyana, the law that would determine the rights and obligations of the parties was that of Guyana, and the elements of proof upon which the court would base its judgment were in Guyana[254]. Accordingly, Maughan J. held that these factors pointed to Guyana, not Quebec, as the natural and appropriate forum for disposition of the case[255].

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251 *Report of Commission of Inquiry into Discharge of Cyanide and Other Noxious Substances into the Omai and Essequibo Rivers*, 5 January 1996, p. 55, written and published by the Commission of Inquiry.

252 *Id.*

253 *Cambior, supra*, note 11, 4. Interestingly, the Court largely ignored the issue of whether, in a class action in which the class members are non-residents, the same jurisdictional rules apply. *Cambior* seems to stand for the proposition that the residence of the members of the class is irrelevant for the purpose of deciding jurisdiction. This conforms to the opinion of Winkler J. in the Ontario case, *Carom* v. *Bre-X Minerals*, (1999) 43 O.R. 441. See, for a discussion of transnational class actions: H. Patrick GLENN, "The Bre-X Affair and Cross Border Class Actions", (2000) 79 *R.B.C.* 989.

254 *Cambior, supra*, note 11, 4 and 5.

255 *Id.*, 5.

He also found that the victims would not be denied justice if the Court chose to decline jurisdiction, which it could otherwise exercise[256]. He observed that while they clearly would lose the benefit of a class action, they nonetheless had access to what is called a "representative action" in Guyana[257]. A representative action would not provide the plaintiffs with the same procedural and evidentiary advantages as a class action, but it would allow them to sue Cambior collectively, though with some burdensome restraints. Additionally, Maughan J. noted that the victims could also proceed by way of individual actions if they so chose.

The Court was also of the opinion that Guyana's judicial system would provide the victims with a fair and impartial hearing[258]. It thus rejected RIQ's proof that the administration of justice was in such a state of array that to force the plaintiffs to litigate there would constitute an injustice to the victims to have their case litigated in Guyana.

In following the jurisprudence in Quebec and in other jurisdictions, and deciding that the Quebec court was *forum non conveniens*, the Court in *Cambior* did several things which are at odds with the Quebec version encapsulated in article 3135 C.c.Q.

First, it failed to recognize that there is a Quebec version of *forum non conveniens*. Rather, it emphasized that it was the well-established common law doctrine of *forum non conveniens* which was incorporated in article 3135 C.c.Q.[259]. This approach, in turn, led the Court to: (1) accept common law precedents as a useful guide in interpreting article 3135 C.c.Q., thereby denying the existence of a truly Quebec version[260]; (2) disregard or lessen the importance of the codal rule on burden of proof[261]; and (3) cite the U.S. Supreme Court ruling of *Piper*[262] approvingly, with its express diminishment of plaintiff's choice of forum where the plaintiff is foreign[263].

Second, in determining whether exceptional circumstances existed which would permit a Quebec court to decline to exercise

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256 *Id.*
257 *Id.*
258 *Id.*, 6.
259 *Id.*, 14.
260 *Id.*, 15.
261 *Id.*
262 *Supra*, note 53.
263 *Cambior, supra*, note 11, 17 and 18.

its statutory jurisdiction, the Court reproduced the *Minister's Commentaries*[264] which, as we demonstrated earlier, do not provide sufficient guidance as to how to select exceptional cases in the application of article 3135 C.c.Q.

Third, the Court evaluated the factors which a court should consider in determining whether it should keep or decline jurisdiction set forth by Grenier J. in *Arsenault*[265] and reproduced subsequently in other cases[266]. We will now turn to how the Court in *Cambior* viewed each of these criteria.

With respect to the role of the **residence of the parties**, the Court lifted the corporate veil of R.I.Q., a Quebec corporation representing the plaintiffs, and focuses upon the fact that the plaintiffs reside in Guyana. By contrast, the Court gave little weight to the fact that the defendant, Cambior, is domiciled in Quebec[267]. To substantiate its view on the role of defendant's domicile, the Court, citing Rochon J. in *Boulton*, asserted that the natural forum is not defined by the domicile of the defendant[268]. In his concluding comments on this issue, however, Maughan J. went well beyond the stance in *Boulton* and stated simply that the Court does not "consider that the location of Cambior's domicile in Quebec is a factor of significant importance"[269] in determining the appropriate forum. With respect to the location of witnesses, the Court clearly favoured Guyana as the appropriate forum[270]. With respect to the **location of the elements of proof**, the Court found that most, if not all, of the elements of proof were located in Guyana[271].

The Court also considered the **place where the fault occurred** an important criterion, and its view that the fault occurred in Guyana clearly worked toward favouring Guyana as the appropriate forum[272]. The Court found that the fact that the dam was built, managed and operated on a daily basis in Guyana was more

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264 *Id.*, 15. The text of the *Minister's Commentaries* are reproduced above in Section II, B, 1.

265 *Arsenault*, *supra*, note 119, 2255.

266 See e.g.: *Droit de la famille - 2577*, *supra*, note 119, 10; *Boulton*, *supra*, note 119, 221; *Simcoe*, *supra*, note 179, 2228; *Amiouny*, *supra*, note 203, 9.

267 *Cambior*, *supra*, note 11, 21 and 22.

268 *Id.*

269 *Id.*, 22.

270 *Id.*, 26.

271 *Id.*, 26 and 27.

272 *Id.*, 27 and 28.

important than the fact that it was designed elsewhere[273]. With respect to the issue of **pending litigation**, the Court gave little weight to the fact that there was pending litigation on this matter in Guyana, as the Guyana litigation named O.G.M.L. as defendant, not Cambior[274].

On the issue of the **location of the defendant's assets**, the Court attributed little importance to fact that Cambior had assets in Montreal, observing that the company also had assets in Guyana[275]. In considering the **law applicable to the dispute**, the Court found that the Guyanese court was in a better position to apply Guyana's law, which would apply to the question of liability by virtue of article 3126 C.c.Q.[276].

Finally, with respect to **advantages to the plaintiff** of suing in the chosen forum, the Court observed that, due to the availability of the class action procedure in Quebec, it was more advantageous to the plaintiffs to sue in Quebec than to take a representative action in Guyana. It also observed that class actions are particularly useful in cases of environmental damages. Despite these advantages, however, the Court ruled that the availability of the class action procedure in Quebec could not form an overriding consideration in the *forum non conveniens* analysis[277].

The Court in *Cambior* also considered "**the interests of justice**" in its analysis. It rejected RIQ's claim that the victims would be denied justice if the case were heard in Guyana. Specifically, Maughan J. rejected the report of expert witness Prof. William Schabas, which concluded that the Guyanese justice system was both substantially lacking in impartiality[278] and inefficient, with cases remaining unresolved for as long as 5 years[279]. Maughan J. stated that if the Court were to accept Prof. Schabas' report, it would have to dismiss Cambior's *forum non conveniens* motion, since the victims in a corrupt and inefficient justice system would be largely

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273 *Id.*
274 *Id.*, 28.
275 *Id.*, 28 and 29.
276 *Id.*, 31.
277 *Id.*, 33 and 34.
278 Affidavit of William A. Schabas, dated 18 October 1997, par. 30.
279 *Id.* par. 31.

unable to receive justice[280]. The Court, however, dismissed the report[281], finding fault with its reliance on what were viewed as "secondary sources"[282], and preferred instead the testimony of former Guyana Justice Mr. Kenneth George, who had served as a Judge in Guyana for 29 years. Mr. George portrayed Guyana's judicial system as one of integrity and downplayed, to Maughan J.'s satisfaction, the role of political influence and corruption in Guyana's judicial system[283]. The Court thus concluded that Guyana was clearly the appropriate forum in which to decide the issue[284].

IV. A Plea for Redefining "Exceptional" in the Application of Article 3135 C.c.Q.

A. Overview

Our survey of the jurisprudence generally, and the *Cambior* decision in particular, has shown that the courts have clearly misunderstood the *exceptional* use which was intended for *forum non conveniens* by the Legislator in 1994. In our opinion, this must be rectified. The rationale for reforming the way in which Quebec courts treat *forum non conveniens* is twofold. First, reform is necessary in order to ensure a more predictable regime of access to Quebec court by reducing the uncertainty which tend to encourage expansive inquiries on *forum non conveniens*. Second, reform is critical for ensuring the proper operation of Book Ten, "Private International Law" (hereinafter "Book Ten") of the *Civil Code of Quebec*. The jurisdiction of Quebec courts must not be limited to the situation where Quebec law is applicable. In general, the Courts must redefine "*exceptional*" in accordance with the text of the Code and the legislative policy underlying it.

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280 *Cambior, supra*, note 11, 37.

281 *Id.*, 38-40.

282 *Id.*, 38. It needs to be recognized that, with all due respect to Maughan J., these "secondary sources" were generally of very high caliber. See discussion below, p. 854 et 855.

283 *Cambior, supra*, note 11, 38.

284 *Id.*, 43.

B. Justification

1. The Historical Evolution and Specificity of the Quebec Version

Forum non conveniens was rejected by the Quebec Court of Appeal in 1985, in the context of *Aberman* v. *Solomon*[285]. In Quebec, as in most civil law jurisdictions, judicial discretion, particularly in the exercise of jurisdictional powers, is of questionable value and is commonly limited to those situations expressly authorizing its use. Given this context, it follows naturally that, in introducing a *forum non conveniens* doctrine into Quebec law, the Legislator clearly intended that the use of this discretionary mechanism be rare. That is, the Legislator sought to implement a very specific version of *forum non conveniens* in Quebec.

2. The Liberal Use of *Forum Non Conveniens* Is Not Warranted in Quebec

There are a number of reasons why *forum non conveniens* should not enjoy liberal use by the courts of Quebec. First, unlike common law jurisdictions where the defendant may view *forum non conveniens* as an antidote to wide bases of jurisdiction[286], Quebec employs more limited bases for determining jurisdiction. Hence, the use of the doctrine for countering the use of "long-arm" jurisdictional mechanisms is not appropriate in Quebec. Unlike in common law jurisdictions, the service of proceedings does not constitute a basis for jurisdiction. Furthermore, with the exception of article 3148 (3) C.c.Q., the rules stipulating acceptable bases for jurisdiction *already* require a real and substantial connection of the dispute or the parties (especially the defendant) to Quebec.

Second, the notion that *forum non conveniens* is simply an answer to forum shopping, a claim popular in common law jurisdictions, cannot enjoy great credibility in Quebec. The "attractive" procedural amenities which may sometimes draw

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285 [1986] R.D.J. 385 (C.A.), [1987] 1 Q.A.C. 40. For a recent discussion of this case, see the Court of Appeal decision in *Lamborghini (Canada) Inc.* v. *Automobili Lamborghini S.P.A.*, J.E. 95-718 (Sup. Ct.); [1997] R.J.Q. 58 (C.A.).

286 For a recent source on this point, see e.g.: M.S. GILL, "Turbulent Times or Clear Skies Ahead?: Conflict of Laws in Aviation Delict and Tort", 64 *J. Air L. & Com.* 195, 237 and 238 (1998).

plaintiffs to the courts of the U.S., such as liberal discovery rules, availability of jury trials, use of contingency fees and high damage awards, are simply not customary or part of accepted law in Quebec. Plaintiffs do *not* flock to Quebec to find advantageous procedural mechanisms or practices. Rather, parties *typically* take action in Quebec because assets or persons are situated here, or because they have no choice (*e.g.* they are precluded from suing in their own country due to rules on prescription, exclusive competency, etc.). Further, application of foreign law in Quebec courts is often dictated by the codal rules on private international law, making it much less likely that foreign plaintiffs will come to Quebec in search of more favourable substantive laws.

Third, while *forum non conveniens* is often viewed as something which increases flexibility in judicial decision-making, thanks to its largely discretionary character[287], this benefit is offset by the fact that the mere possibility of dismissal by *forum non conveniens* creates insecurity and lack of predictability. Even the U.S. Supreme Court has acknowledged this point:

> *But to tell the truth,* forum non conveniens *cannot really be relied upon in making decisions about secondary conduct – in deciding, for example, where to sue or where one is subject to being sued. The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application* [...] *make uniformity and predictability of outcome almost impossible.*[288]

Indeed, parties may feel the need to take procedures in different fora in order to protect their rights. As a result, the use of *forum non conveniens* may actually multiply the number of proceedings taken, delay debate on the merits[289] and increase costs. In the words of one observer:

> *As parallel proceedings continue to increase in frequency with no immediate relief in view, theoretical bases for analysis proliferate leaving the litigant with little certainty about what course to take and which litigation to pursue. Indeed, the myriad of approaches would induce many a litigant to file parallel proceedings to increase the cost to an opponent as well as to increase the likelihood of subsequent enforceability of a judgment.*[290]

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287 It is conceded that such flexibility may be quite useful in truly exceptional situations.

288 *American Dredging* v. *Miller, loc. cit.*, note 77, 448.

289 S. GUILLEMARD, A. PRUJINER and F. SABOURIN, *loc. cit.*, note 1, 948.

290 L.E. TEITZ, *loc. cit.*, note 88, 229.

The seminal U.S. case of *Lacey* v. *Cessna Aircraft Co.*[291] illustrates the consequences of the flexible and subjective nature of the doctrine: due largely to *forum non conveniens* motions, the litigation arising from the crash resulted in *seven* published opinions from various courts in the U.S., and did not end until 10 years later (1994), when the Court decided that the case would *not* be dismissed on grounds of *forum non conveniens*[292].

Fourth, to the extent that *forum non conveniens* is sometimes relied upon to help ease congestion of courts, its use for this purpose is not warranted in Quebec. Since there are few private international law cases in Quebec relative to domestic cases, it cannot be convincingly argued that international litigation results in the delay of domestic trials. Even in the U.S., where many international law cases are heard, is has been argued that *forum non conveniens* does not clear court dockets, because of the length of the hearings on these motions[293]. Again, there is no need, nor is it an efficient use of judicial resources, to prevent a flood where the likelihood of flooding is remote.

Fifth, while *forum non conveniens* could be useful in solving the problems which arise from shopping in an inconvenient foreign forum by second-guessing the foreign court's discretion on the basis of Quebec's version of *forum non conveniens* (as provided for in Quebec law[294]), a better strategy would be: (a) to use the substantial connection qualifier on the foreign court's jurisdiction in article 3164 C.c.Q.; (b) to strengthen Quebec's provision on *lis pendens* (art. 3137 C.c.Q.), e.g. by applying it where the defendant has taken a declaratory judgment of nonliability in the foreign jurisdiction; and (c) to liberalize the use of anti-suit injunctions[295].

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291 *Supra*, note 92.

292 *Id.*

293 J. DUVAL-MAJOR, *loc. cit.*, note 9, 676.

294 *Supra*, note 117.

295 See: Jeffrey TALPIS, "If Iam from Grand'Mère, Why Am I Being Sued in Texas? Responding to Inappropriate Foreign Jurisdiction in Quebec U.S. Crossborder Litigation", to be published in 2001/04/27.

3. The Legislator Intended to Make Quebec a Centre for Resolution of International Disputes

Beginning with the introduction of legislation on international arbitration in Quebec in 1986[296], the Legislator demonstrated an intent to make Quebec a centre for resolution of international disputes. The Legislator clearly viewed Quebec as a "good place to shop"[297], especially in light of Quebec's mixed civil law/common law heritage. Recognizing that in a globalized world, opportunities for private litigants should be equally globalized, the Legislator, in introducing *forum non conveniens* to Quebec, wanted to extend to the judicial sphere the philosophy it had chosen as the guiding policy for arbitration.

4. There Is No Consistent View on the Acceptability of Forum Shopping and Levels of Tolerance by the Courts

As something inherent and, indeed, prevalent in private international law, it seems clear that forum shopping, seen objectively, is a benign and neutral practice. Despite the fact that "forum shopping" has often been painted as a problem to be eradicated or controlled[298], we assert that it can also be viewed as something that provides important remedies to parties, and which even encourages reform of substantive laws. On the former point, there would seem to be some merit in Lord Simon's argument in *The Atlantic Star* that:

> *"Forum-shopping" is a dirty word; but it is only a pejorative way of saying that if you offer a plaintiff a choice of jurisdictions, he will naturally choose*

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296 S.Q. 1986, c. 73, s. 2.

297 In the English Court of Appeal case, *The Atlantic Star*, [1972] 3 All E.R. 705, 709 (C.A.), Lord Denning, M.R. provided his now famous comment on England serving as a "good place to shop": "No one who comes to these courts asking for justice should come in vain [...] This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of the service."

298 A leading critic of the doctrine of *forum non conveniens* even lamented that sanitizing the term "forum shopping" "is a forlorn hope": D.W. ROBERTSON, *loc. cit.*, note 9, 357.

the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor indignation. [299]

Similarly, Prof. Castel who has described forum shopping as a "perfectly legitimate tactic"[300], has stated that:

In Canada, forum shopping is used by any lawyer familiar with the conflict of laws and the jurisdiction rules of the various states or provinces that have some connection with the action or the parties, in order to gain a definite substantive or procedural advantage for the plaintiff which he or she represents. [301]

Perhaps a more important reason, however, to view forum shopping by plaintiffs as a legitimate activity is that plaintiffs have a perfectly good right to "shop" in those fora in which the action has a real and substantial connection[302]. In *Amchem Products*, Sopinka J. recognized the legitimate side of forum selection by observing that:

If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.[303]

While we do not agree that the term "forum shopping" should be limited to those instances of *illegitimate* forum choices, we do agree with the view that parties with a legitimate claim to a forum should be afforded every opportunity to pursue their case in that forum.

5. Limiting *Forum Non Conveniens* Would Not Compromise Principles of Judicial Comity

It is our contention that comity would not be substantially affected by a reform which limited Quebec's application of *forum non conveniens*. Obviously, the lack of a formally-recognized *forum non*

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299 *Supra*, note 13, 471.
300 J.-G. CASTEL, *op. cit.*, note 37, p. 242.
301 *Id.*, p. 241 and 242.
302 This point is discussed further in Section V, C, below.
303 *Supra*, note 34, 920.

conveniens doctrine in the civil law countries of France and Germany[304] does not render those countries hostile to comity, nor does the omission of the doctrine from the *1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*[305] leave comity in tatters for the nations adhering to that Convention. Hence, the simple restriction of the doctrine in Quebec could not be prohibited on grounds that it would destroy or damage respect for comity in Quebec. Similarly, it cannot seriously be suggested that a Quebec court's refusal to dismiss a case in which the act took place outside of Quebec but the defendant's domicile was Quebec would hinder foreign relations. Likewise, it seems unlikely that a Quebec court would offend the sovereignty of another country if it refused to decline a case because "there is a local interest in having localized controversies decided at home"[306], an approach taken in some U.S. cases.

In fact, some argue that forum shopping can be entirely appropriate:

> *If comity requires respect for diversity, it follows that one should accept any tendency of plaintiffs to gravitate towards a forum that offers particular advantages of expertise. In spite of Lord Reid's evident embarrassment at Lord Denning's dicta on forum-shopping in the* Atlantic Star *case, which are at best insular and at worst jingoistic, there is a sense in which Lord Denning was right that forum-shopping is an acceptable consequence of specialisation. English courts have considerable experience with many aspects of commercial litigation and arbitration, particularly as they concern shipping and maritime insurance (which is why foreign parties often choose English law as the law of their contracts, and base their insurance policies on Lloyd's); Belgian and South African courts are presumably well versed in disputes involving the diamond trade, given than Antwerp and Johannesburg are the global centres of this trade; the courts of New York, Hong Kong and Japan have special expertise in securities law; German, Swiss, Luxembourg and Bermuda courts in banking law; Canadian courts in mining law.*[307]

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304 For a discussion of "civilian hostility" to *forum non conveniens* in both law and doctrine, see: W. KENNETT, *loc. cit.*, note 83,. 552, 554-556, 570 and 571. For further information on the approach to *forum non conveniens* in Germany, including evidence of some softening of the original position, see A. REUS, *loc. cit.*, note 78, 490-511.

305 The *Convention*, as amended by the *1978 Accession Convention*, is reprinted in 18 I.L.M. 20 (1979).

306 *Gulf Oil*, *supra*, note 52, 509.

307 Neil GUTHRIE, "'A Good Place to Shop': Choice of Forum and the Conflict of Laws", (1995) 27 *Ottawa L. Rev.* 201, 224 (footnotes omitted).

Of course, it is possible that in certain contexts, especially where there are tight links between the government of the foreign jurisdiction and a multinational corporation ("hereinafter "MNC") whose actions in that country are the subject of the litigation, refusal to dismiss may be viewed as problematic for comity. Still, it must be recognized that refusals to dismiss in cases such as *Cambior*[308], or the well-known Bhopal disaster case, *Union Carbide*[309], could do more to force MNCs to do things such as upgrade plants, supervise maintenance, or tighten safety measures than could government regulations, at least in those countries in which governmental action is constrained by the politics of hosting large, revenue-producing corporations from affluent countries. It must be remembered that many of the jurisdictions from which actions by foreign plaintiffs emanate tend to attract MNCs who seek to take advantage of lower costs of doing business, and thus reap higher returns on their investments. In fact, some commentators have expressly argued that the role of comity be limited and *forum non conveniens* dismissals restricted in those areas of law in which corporate industries commonly seek the jurisdictions of countries in which weaker regulatory systems are found[310].

6. *Forum Non Conveniens* Inquiries Are Inefficient, Wasteful and Time Consuming for Both the Parties and the Courts

It can be argued that the inquiry courts must undertake when faced with *forum non conveniens* motions is wholly inefficient. Litigating in order to determine where to litigate does not serve the ends of justice, especially where justice is greatly delayed or made prohibitively expensive by virtue of the enormous preparation typically required by both the party advocating and the party fighting a *forum non conveniens* motion. The very presence of the doctrine can invite "reverse forum shopping" by defendants who choose to use the doctrine as a sword rather than a shield. In fact, some common law decisions and doctrine have utilized the term "reverse forum shopping" or have identified in other words the

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308 *Supra*, note 11.

309 *Supra*, note 7.

310 See e.g.: J.R. PAUL, *loc. cit.*, note 9; see also *Alfaro*, *supra*, note 5, 688, Doggett J., concurring. In any event, a comity-based approach to jurisdiction is not and never was part of Quebec civil law.

practice it represents[311]. F.K. Juenger, for example, has observed that where less deference is paid to foreign plaintiffs, as in the *Piper*[312] approach to *forum non conveniens*, there are inevitably greater opportunities for defendants to engage in reverse forum shopping[313]. Likewise, some critics of the doctrine have observed that *forum non conveniens* has become nothing more than a procedural ploy designed to elicit the discomfort of plaintiffs rather than an instrument for the furtherance of justice[314].

7. *Forum Non Conveniens* Is Often Outcome-Determinative, Which Is Contrary to its Original Intent

When a corporate defendant moves to dismiss a case brought in its own jurisdiction on the grounds of *forum non conveniens*, it may simply be trying to evade responsibility rather than promote the convenience of the parties[315]. Unfortunately for resource-strapped plaintiffs, a ruling in favour of dismissal is often tantamount to a finding in favour of such defendants. This tendency for *forum non conveniens* cases to be "outcome-determinative"[316] has

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311 For a British example, see: *Lubbe*, *supra*, note 28, 15; for a U.S. example, see: *Pain* v. *United Technologies Corp.*, 637 R.2d 775, 793 and 794 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981); for a Canadian example, see: *472900 B.C. Ltd.* v. *Thrifty Canada Ltd.*, [1997] B.C.J. No. 1229, Lexis (C.A.) in which the B.C. Court of Appeal characterized the defendant's "race to the courthouse" in order to make a motion for dismissal on grounds of *forum non conveniens* as a case of forum shopping in "bad faith". See also: C. SPEER, *loc. cit.*, note 9, 855; D.W. ROBERTSON, *loc. cit.*, note 9, 364; A.M. KEARSE, *loc. cit.*, note 9, 1311.

312 *Supra*, note 53.

313 F.K. JUENGER, "Forum Shopping, Domestic and International", 63 *Tul. L. Rev.* 553, 563 (1989). It should be noted that in making this comment, Juenger cites *Piper*, *supra*, note 53, 252, note 19, in which the U.S. Supreme Court states that "[w]e recognize, of course that Piper and Hartzell [the defendants] may be engaged in reverse forum-shopping."

314 *Manu Int'l, S.A.* v. *Avon Prods., Inc.*, 641 F.2d 62, 68 (2d Cir. 1981), quoted in A.M. KEARSE, *loc. cit.*, note 9, 1311, note 74.

315 See e.g.: V.C. ARTHAUD, *loc. cit.*, note 9; B. CLAGETT, *loc. cit.*, note 9; J. DUVAL-MAJOR, *loc. cit.*, note 9; A.M. KEARSE, *loc. cit.*, note 9; J.R. PAUL, *loc. cit.*, note 9; D.W. ROBERTSON, *loc. cit.*, note 9, 362-366; D. SOLEN, *loc. cit.*, note 6; C. SPEER, *loc. cit.*, note 9; M.M. WHITE, *loc. cit.*, note 9. For a good summary of the opposing position, see e.g.: D.J. DORWARD, *loc. cit.*, note 9.

316 That dismissals for *forum non conveniens* can be "outcome-determinative" is a point emphasized by several authors; see especially: M.M.WHITE, *loc. cit.*, note 9, 518 and 519.

been demonstrated in a number of lawsuits involving MNC defendants[317].

MNC defendants often work hard to see that a case is dismissed because they know that, once dismissed, the litigation will likely be discontinued. A perfect illustration of this occurred in *Piper*[318], a case representing the typical scenario in which plaintiffs not residing in the U.S. seek hearing in U.S. courts in order to gain access to various plaintiff-friendly remedies and procedural devices not available in their own jurisdictions, such as contingency fees and extensive discovery. The defendant in *Piper* preferred to see the case brought in a jurisdiction without such options, as well as one in which settlement might be easier. While the plane crash giving rise to the suit occurred in Scotland and the pilot and all of the decedents' heirs and next of kin were Scottish, the defendant manufacturer carried on business and manufactured the plane in Pennsylvania[319]. The *Piper* case involved a juridical journey so long and complex that it is safe to assume that the resources of the plaintiff were significantly, if not severely, taxed. The case, originally brought in a California state court by the representative of the estates of several Scottish persons killed in the crash, was removed first to a Federal District court in California, then to a federal trial court in Pennsylvania, which granted the motion to dismiss; ultimately, the plaintiff's successful appeal to the federal appeal court of the Third Circuit was reversed by the U.S. Supreme Court[320], which reinstated the federal trial court's ruling in favour of a Scottish forum. Each of these removals no doubt increased the chances for settlement as the plaintiff's resources dwindled.

Cases such as this which involve many changes in jurisdiction may also have less conspicuous but equally damaging impacts on

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317 Paula C. JOHNSON, "Regulation, Remedy, and Exported Tobacco Products: The Need for a Response from the United States Government", 25 *Suffolk U.L. Rev.* 1, 52 (1991) (quoted in A.M. KEARSE, *loc. cit.*, note 9, 1311, note 73).

318 *Supra*, note 53.

319 There were a number of links to other locations as well: the company that manufactured the propellers did so in Ohio, the plane was registered in and operated by companies in the U.K. and the representative of the estates of several citizens and residents of Scotland who were killed was located in California: *supra*, note 53, 238-241.

320 *Id.*, 235, 238.

the outcome when lawyers in the forum in which the case originates have to share the work with lawyers elsewhere and must split fees and suffer the timing and other practical risks inherent in working cooperatively at long distances. In *Piper*, the lawyer who filed the original action and the personal representative of the estates of those deceased (the lawyer's legal secretary, appointed representative by a California probate court) were located in California[321], but as seen from the description of the lawsuit's evolution above, much of the litigation occurred elsewhere in the U.S. By the time the case was sent away from U.S. courts in favour of the Scottish forum, the plaintiff had lost the ability to sue under the favourable California tort law, had lost the right to a jury trial, had lost the opportunity to avail itself of contingency fee arrangements, and had lost the right to discovery. This undoubtedly hurt the settlement value immensely. Furthermore, outside of the parties' interests, it is plain to see how enormous the drain on judicial efficiency and resources can be when resort is made to *forum non conveniens*. Cases like *Piper*, certainly give one pause in the face of arguments that *forum non conveniens* helps to ease the burden on strained court systems.

Another example of a case in which foreign plaintiffs are ultimately blocked from litigating the merits of their action in the courts of the defendant's jurisdiction, and one which bears certain similarities to *Cambior*, is *Union Carbide*[322]. This case arose in response to the 1984 lethal gas leak disaster at the Union Carbide plant in Bhopal, India, which killed over 2,000 people and injured more than 200,000. It stands as both a striking and typical example of how *Piper* is used in American courts to weaken greatly or eliminate any deference to the foreign plaintiff's choice of forum[323]. Union Carbide's motion to dismiss on grounds of *forum non conveniens* was granted by the federal trial court in the Southern District of New York[324] on several conditions, all of which centred on the requirement that the claims be heard in India. The

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321 *Id.*, 239.

322 *Supra*, note 7.

323 See discussion of *Piper's* harsher *forum non conveniens* approach for foreign plaintiffs, in Section D, 1, b, above.

324 *Union Carbide, supra*, note 7, 867.

federal Court of Appeal (Second Circuit) upheld the dismissal on the basis of *Piper* and even reversed two of the conditions imposed by the lower court[325]. During the proceedings, a great irony occurred when the Indian government, acting on behalf of the victims, came to the American court arguing the incompetence of their own courts and the superiority of the U.S. courts, while at the same time, Union Carbide was arguing the contrary[326].

While the plaintiffs in the Bhopal litigation *did* seek and receive hearing of their case in the courts of India[327], many cases dismissed on grounds of *forum non conveniens* are never heard in the forum adjudged by the original court to be "more appropriate". In a study of 180 cases dismissed on grounds of *forum non conveniens* from 1947 to 1984 in the U.S., it was reported that only three were litigated in the alternative forum (none of which resulted in rulings for the plaintiff), and that settlements were rarely more than 10% of the estimated value of the claims[328]. *Union Carbide* is a stunning example of the latter point. The final result was settlement at a level far lower than the estimated damages: while the Union of India originally sought $3.3 billion dollars (U.S.) from the defendant in the Indian courts, the final settlement was for $470 million, less than 1/7th of the original claim[329]. The individual plaintiffs, however, have largely felt the settlement deal to be inadequate and on November 15, 1999, just prior to the 15th anniversary of the disaster, they filed a fresh lawsuit in the U.S. District Court for the

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325 *Id.* For a thorough discussion of the trial and appeal cases relating to the Bhopal disaster, see e.g.: Jamie CASSELS, *The Uncertain Promise of Law: Lessons from Bhopal*, Toronto, University of Toronto, Press, 1993, c. 6.

326 See e.g.: J. CASSELS, *op. cit.*, note 325, p. 128 and 129.

327 See: *Union Carbide* v. *Union of India*, [1989] 3 S.C.R. 128 (India Sup. Ct.). For details on the litigation in India, see e.g.: J. CASSELS, *op. cit.*, note 325, c. 7.

328 D.W. ROBERTSON, "*Forum Non Conveniens* in America and England: 'A Rather Fantastic Fiction'", (1987) 103 L.Q. Rev. 398, 418-420; see also: D.W. ROBERTSON, *loc. cit.*, note 9, 363 and 364.

329 See e.g.: D.W. ROBERTSON, *loc. cit.*, note 9, 375; J. CASSELS, *op. cit.*, note 325, p. 163.

Southern District of New York charging Union Carbide Corp. with fraud and civil contempt in an effort to seek further damages[330].

Given the realities associated with *forum non conveniens* dismissals, then, it seems that often *forum non conveniens* is simply another legal fiction with a fancy name to shield alleged wrongdoers, rather than an important tool for the wise and efficient administration of justice. Clearly the tendency for *forum non conveniens* inquiries to be outcome-determinative adds another strong rationale for the reform of the current, liberal approach in Quebec.

8. The Arguments Favouring Rare Use of *Forum Non Conveniens*: a Summary

In this section, we have introduced a number of arguments as to why Quebec courts should invoke the doctrine of *forum non conveniens* only rarely. Before continuing with a more in-depth critique and proposal, it is useful to review these arguments briefly. First, it must be recognized that while *forum non conveniens* emanates from the common law, it was imported into Quebec's civil law system and the civil law context naturally provides its own restraints: clearly the Legislator desired only to make a narrow exception when he decided to reverse years and years of juridical history in Quebec during which the doctrine was simply not tolerated. Second, the liberal use of *forum non conveniens* is not warranted in Quebec because concerns about countering long-arm jurisdiction and attracting large numbers of forum shopping plaintiffs are not realistic: again, Quebec does not employ a lot of the features in its judicial system that attract forum shopping plaintiffs. Third, the introduction of the provision occurred in an historical context in which the Legislator was interested in making Quebec a centre for international dispute resolution. Fourth, there

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330 "Bhopal Gas Disaster Victims File Class Action Suit Against Union Carbide", November 15, 1999, web site: [http://news.excite.com:80/news/pr/99115/hy-bhopal-union-carbd]. The victims met again with disappointment, however, when the Federal Court dismissed their case in September 2000. See: "Gas Victims Protest U.S. Court Decision", September 3, 2000, The Times of India News Service; web site: [http://www.timesofindia.com/03indi32.htm].

is no clear, consistent consensus on the desirability or undesirability of judicial tolerance of forum shopping. Fifth, limiting *forum non conveniens* would not likely compromise principles of judicial comity. Sixth, the inquiries necessary when *forum non conveniens* motions are presented are inefficient, wasteful and time-consuming for the parties as well as for the courts. Seventh, and last, dismissals based on a determination that an alternative court is "more appropriate" often do not result in the case actually being heard in that forum.

V. A Proposal for Interpreting "Exceptional" in Article 3135 C.c.Q.

A. The Proposal

At the centre of our proposal for a redefined approach to article 3135 C.c.Q. is the idea that "exceptional" means just that – exceptional. This implies prohibiting *forum non conveniens* inquiries altogether in some cases, and greatly restricting its application in others. This general approach translates into **three specific recommendations** aimed at different stages of the process by which a Court considers an application for dismissal on grounds of *forum non conveniens*:

> **First**, certain cases should be excluded from *forum non conveniens* considerations altogether, on the basis of policies or provisions currently found in the *Civil Code of Quebec* or elsewhere in the laws applicable in Quebec.
>
> **Second**, for those cases not excluded, a determination must be made whether a competent alternative court actually exists, and if one does not, no further inquiry or consideration of connecting factors should be made, and the request for dismissal or stay should be denied.
>
> **Third**, where a *forum non conveniens* analysis is appropriate and an analysis of criteria is undertaken, certain criteria should be eliminated from consideration altogether, while others may be included, but only according to certain guidelines and restrictions.

Before considering each of these recommendations in depth, some preliminary comments must be made on the textual

justification for our general proposition which, stated as briefly as possible, is that "exceptional" should mean eliminating certain kinds of cases from the reach of *forum non conveniens* altogether, and for the remainder, limiting the consideration of certain criteria during the analysis.

B. Textual Justification

The codal text itself justifies this proposition, and this becomes evident when article 3135 C.c.Q. is considered, as it should be of course, in the context of related codal provisions. In the general provisions of Title III ("International Jurisdiction of Quebec Authorities") of Book Ten, there are several provisions other than article 3135 C.c.Q. which grant the court discretionary power to decline or accept jurisdiction in certain cases. In each of these provisions – article 3136 C.c.Q. on forum of necessity, article 3137 C.c.Q. on *lis pendens*, and article 3140 C.c.Q. on emergency measures –, the word "may" appears with no qualification. Looking at article 3137 C.c.Q., the court, for example "*may* stay its ruling on an action brought before it" under certain circumstances. Only in the rule on *forum non conveniens* in article 3135 C.c.Q. does the qualifier "exceptional" appear together with "may": specifically, the provision states that a Quebec authority having jurisdiction to hear a dispute "may exceptionally and on an application by a party, decline jurisdiction"[331]. According to generally accepted rules of statutory interpretation, this indicates that "exceptional" is imbued with special significance.

It is also important to recognize that Book Ten, encompassing all the essential rules of private international law in Quebec, operates, as a code-within-a-code, and that the general principles of interpretation used in conjunction with the code generally, apply equally to the provisions found within Book Ten. As such, the maxim *exceptio est strictissimae interpretationi* (an exception is to be construed restrictively) must be respected.

Another contextual consideration involves article 3082 C.c.Q., which *does* contain the word "exceptionally". This provision constitutes an "escape" clause which, by its very nature, is designed to be used only sparingly for the purpose of effecting a derogation

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[331] The full text of art. 3135 C.c.Q. may be found above, on p. 794.

from general conflict rules and which can allow the court, where it sees fit to do so, to apply the law of a more closely connected country. By placing the word "exceptionally" at the beginning of the provision, the Legislator has signalled that its application is to be strictly limited. In one of the few, if not only, reported cases in which Quebec courts had occasion to use the "exceptional" escape clause to derogate from the law otherwise applicable, the court refused to do so even though it was a situation where such a derogation seemed to be warranted[332]. It stands to reason that since the term "exceptionally" clearly implies that article 3082 C.c.Q. is to be applied very sparingly, the term should be given the same interpretation in other provisions of Book Ten, namely article 3135 C.c.Q.

C. Impact of the Constitution of Canada

Support for an "exceptional" application of the doctrine in Canada is also found in the constitutional guidelines relating to the principles of "order and fairness" which were articulated in *Hunt*[333] and *Morguard Investments Ltd.* v. *De Savoye*[334]. It was advanced in *Hunt*, for example, that if there is a "real and substantial connection" between a particular provincial jurisdiction and the action or parties before it in a particular case, the plaintiff should be allowed to pursue his action before the courts of that province[335]. It would seem to follow that an interpretation of *forum non conveniens* which would result in forcing the plaintiff to sue elsewhere compromises these principles, even though there may, in fact, be some merit in having the case removed. To the extent that this premise is valid, then the notion that there should rarely be a dismissal for *forum non conveniens* where a real and substantial connection to the court

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332 *Droit de la famille - 2210*, [1995] R.J.Q. 1513 (Sup. Ct.).

333 *Supra*, note 32.

334 *Morguard Investments Ltd.* v. *De Savoye*, *supra*, note 32.

335 *Supra*, note 32, 325.

exists, even in those cases where another court might be "more appropriate", is both reasonable and credible.

D. Restrictions and Conditions for the Application of *Forum Non Conveniens*

With these preliminary comments made, it is now possible to look more closely at the three fundamental recommendations we have made for reforming and refining the "exceptional" requirement in article 3135 C.c.Q.

1. *Forum Non Conveniens* Should Be Prohibited in Certain Cases

A critical step in ensuring that *forum non conveniens* is applied only "exceptionally" in Quebec is to "screen" each case for features that should disqualify it from further analysis under the doctrine. Toward this end, it is recommended that cases having any one or more of the following features should be removed from consideration for a dismissal based on *forum non conveniens* and that, further, courts presented with such cases deny the motion to decline jurisdiction based on article 3135 C.c.Q.:

- where a judgment by an alternative court would not be enforceable in Quebec;
- when the defendant is domiciled in Quebec *and* there exists real and substantial connections between the subject matter of the action and Quebec;
- where the parties have selected a Quebec court to hear any dispute arising out of their contract;
- where the jurisdiction of a Quebec court is established to protect a certain class of persons, or to accommodate an urgent matter.

Furthermore, the Quebec court should not invoke the *forum non conveniens* doctrine to evaluate the jurisdiction of a foreign court for purposes of recognition and enforcement of a foreign

judgment. The rationale for each of these recommended restrictions will be addressed in turn.

a. Where a Judgment by an Alternative Court Would Not Be Enforceable in Quebec

Forum non conveniens should not apply where a judgment by an alternative court would not be enforceable in Quebec. This rule involves prospective recognition of judgment, and would bring article 3135 C.c.Q. in line with the rule currently contained in Quebec's codal provision on *lis pendens*, article 3137 C.c.Q. According to this provision, a Quebec court may stay its ruling on the theory of *lis pendens* "provided that the [...] action can result in a decision which may be recognized in Quebec"[336]. Thus, if the judgment would not be enforceable in Quebec, the Court could not stay the action.

b. When the Defendant Is Domiciled in Quebec *and* There Exists Real and Substantial Connections with the Dispute and Quebec

The rejection of the importance of the "domicile" of the defendant as a natural forum was first advanced in *Arsenault*[337] and then reaffirmed in *Boulton*[338]. With respect, such a stance totally disregards an important part of Quebec's civil law heritage. In *Boulton*, Rochon J. offers several rationales for discounting the importance of the defendant's domicile, but each of them is problematic. The first of these arguments – that since there is no particular codal exception making *forum non conveniens* inapplicable where the domicile of the defendant is Quebec, then no special consideration needs be given to this factor – is fundamentally flawed because it ignores the larger, civil law context within which article 3135 C.c.Q. necessarily operates. Specifically, it ignores the presence of the word "exceptional" in the provision itself, which, by its very nature, necessitates that there be no disregard of traditional features of the civil law, such as domicile of the defendant.

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336 See art. 3137 C.c.Q.: "On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority."

337 *Arsenault*, *supra*, note 119.

338 *Boulton*, *supra*, note 119.

The second rationale offered by Rochon J. is that the new code changed the traditional, almost universal rule, acknowledging the acceptance of the domicile as the natural forum under pre-code law. There is simply no justification for this claim. There is no evidence that the Legislator intended, by the introduction of article 3135 C.c.Q., to effect a wholesale rejection of the traditional rule, *actor forum rei sequitur*. Once again, the word "exceptional" in the provision works strongly against the validity of such an extreme conclusion. To put this issue to rest, we need only acknowledge that article 3135 C.c.Q. follows closely on the heels of article 3134 C.c.Q. (the provision which opens the chapter on General Provisions under Title Three, "International Jurisdiction of Quebec Authorities"), which specifically states that: "In the absence of any special provision, the Quebec authorities have jurisdiction when the defendant is domiciled in Quebec." By including this provision in the new code, the Legislator clearly intended to send a message that the defendant's domicile maintains a place of primacy in Quebec's civil law. The opposite conclusion is simply not tenable in light of this fact.

One last comment on the downgrading of the role of defendant's domicile in some of the *forum non conveniens* jurisprudence is that this kind of approach could, potentially, lead to a situation in which foreign enterprises become discouraged from purchasing Canadian products because of the risk of being unable to sue the manufacturer in Quebec. Such a development, of course, would work against efforts to make Canadian firms and products more competitive internationally. In fact, one Canadian commentator on *forum non conveniens*, in the context of arguing that not all forum shopping is negative and that forum shopping may produce greater uniformity and higher quality of substantive laws, has stated:

> *It is my contention that competition amongst jurisdictions, including tolerance of forum-shopping by litigants, promotes harmonization of laws from jurisdiction to jurisdiction and higher, rather than lower standards.*[339]

Having made the above criticisms, we are not recommending that cases be excluded from the reach of *forum non conveniens* on the sole basis of defendant's domicile where the nexus with Quebec is otherwise weak or tenuous, even though, in our view, it *could* be argued that domicile alone constitutes a "real and substantial

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339 N. GUTHRIE, *loc. cit.*, note 307.

connection". Rather, we advocate a threshold that can be described most simply as the defendant's domicile plus "something more". To clarify, by "something more" we refer to a minimal level of factual connections to Quebec *beyond* the defendant's domicile. They need not be, by themselves, substantial.

c. Where the Parties Have Chosen Quebec Courts Through a Forum Selection Clause

Forum non conveniens should not apply where the parties have chosen the Quebec court by means of a valid, freely negotiated forum selection clause[340]. This is clearly justified by the policy of predictability in transactional business dealings. It also is a logical interpretation given the clear respect for mutual choice of a foreign forum which is mandated by article 3148 (2) C.c.Q. Prohibiting *forum non conveniens* in the presence of forum selection clauses would also parallel the exclusion of the discretionary power under the escape clause, article 3082 C.c.Q., where the parties have designated the applicable law in a juridical act.

Furthermore, in the presence of a valid arbitration clause, a *forum non conveniens* inquiry should not be allowed. Rather, the court should simply proceed as it normally would, with an order compelling the parties to arbitrate in Quebec or in any other forum provided for in their agreement[341].

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340 Generally speaking, Quebec courts give effect to forum selection clauses: see *Lamborghini*, *supra*, note 285; *2736349 Canada Inc.* v. *Rogers Cantel*, REJB 98-6854, J.E. 98-1178 (Sup. Ct.); *2617-3138 Quebec Inc.* v. *Rogers Cantel Inc.*, REJB 98-5699 (Sup. Ct.); see however: *Crestar*, *supra*, note 115, and *J.S. Finance Canada Inc.*, *supra*, note 119, where jurisdiction was asserted by Quebec courts in spite of a foreign forum selection clause. In any event, courts unfortunately engage in a *forum non conveniens* enquiry in order to determine whether the forum previously chosen, with the inconvenience factor presumably having been considered, is now, at the time of litigation, convenient.

341 See e.g.: art. 3148 (2) C.c.Q.; *UNCITRAL Model Law on International Commercial Arbitration*, June 21, 1985, Vienna, U.N. Doc. A/40/17; *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 330 U.N.T.S. 38 (commonly known as the "New York Convention"); *contra*: *Guns N Roses Missouri Storm* v. *Productions musicales Donald K Donald*, [1994] R.J.Q. 113 (C.A.)

d. Where the Jurisdiction of a Quebec Court Is Established to Protect a Certain Party or for an Urgent Matter

Forum non conveniens should not apply where the basis of the jurisdictional rule is to protect certain weaker parties such as consumers in claims relating to consumer contracts or employees in claims relating to contracts of employment (art. 3149 C.c.Q.). In fact, the Superior Court took this stance recently in *Barre*[342], a case involving unlawful dismissal of a person residing and working in Quebec. *Forum non conveniens* should also not apply in a custody action upon a successful enforcement of a Hague proceeding ordering a child returned to Quebec.

As well, *forum non conveniens* should not apply where the court is seized with a matter of urgency, a policy clearly supported by article 3140 C.c.Q., which stipulates that "[i]n cases of emergency or serious inconvenience, Quebec authorities may also take such measures as they consider necessary for the protection of the person or property of a person present in Quebec." In fact, in *Droit de la famille – 2573*,[343] Senecal J. ruled in favour of keeping the action in Quebec because the child involved suffered from serious asthma, even though the *forum non conveniens* analysis pointed to the courts of Vermont.

e. The Quebec Court Should Not Second Guess the Exercise of the Jurisdiction of a Foreign Court by Using Its Own *Forum Non Conveniens* Doctrine

We have previously mentioned the rule in Quebec law allowing the reviewing Quebec court to reevaluate the convenience of the jurisdiction of the foreign court in the context of recognition of foreign judgments. In spite of the advantages of deterring forum shopping in inappropriate foreign jurisdictions, this is not a desirable solution even though there is a literal codal interpretation justifying it, supporting case law, and supporting doctrine[344]. To deny recognition of a judgment for failure to do something that is only discretionary in the first court – namely, to accept a motion for *forum non conveniens* – would seem to contradict the exceptionality requirement in Quebec's *forum non conveniens* law.

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342 *Supra*, note 205.

343 J.E. 97-207 (Sup. Ct.).

344 See cases cited, *supra*, note 117 and H.P. GLENN, *loc. cit.*, note 120, 170, par. 117; H.P. GLENN, *loc. cit.*, note 120, 411.

2. The Alternative Forum Must, at a Minimum, Be Adequate and Competent in its Capacity to Litigate the Dispute

Since article 3135 C.c.Q. expressly mentions that in order for *forum non conveniens* to be considered, the alternative forum must be "in a better position to decide", it must be that this alternative forum is – at a minimum – competent and adequate in respect of the matter to be litigated. Given this, the will of the Legislator would be better respected by requiring a much more demanding test for adequacy of the alternative forum than merely that there be no major procedural barriers or prescription problems, which is the common practice now. The word "exceptional" suggests that the inquiry into the adequacy of the alternative forum should be made at the outset, rather than during the weighing of the connecting factors which is conducted at the later stage of the *forum non conveniens* analysis. Seen this way, dismissal on grounds of *forum non conveniens* should be excluded *a priori* where proof has been made that there will be extreme delay in getting to trial, that the alternative court could not hear the kind of claim being pursued and that no adequate alternate remedy exists, or that the plaintiff cannot be represented by attorney.

We propose that, since the text of article 3135 C.c.Q. affords a prominent place to the identification of an alternative forum, then the test used to apply the provision should also give primacy to the question of the existence of an adequate alternative forum. This question should be addressed at the front of the process, rather than being relegated to the status of just one of the numerous criteria typically considered in the "global analysis" undertaken in most *forum non conveniens* inquiries.

3. Certain Exclusions and Limitations Must Apply in the Consideration of Criteria

Even for situations within the reach of *forum non conveniens*, certain criteria should be excluded, and others should be given reduced weight during the phase of the *forum non conveniens* inquiry in which the court weighs criteria to assess the strength of the links with the alternative forum. First, we will present those criteria which we believe should be excluded from the analysis, then we will present those criteria which we believe may be included in the analysis, but only within certain, specific limitations.

a. Criteria Which Must Be Excluded

In determining the appropriateness of the forum, the court should *not* consider either the law applicable to the merits or the nationality of the plaintiff. The reasons for these exclusions will now be addressed briefly.

i) The Law Applicable to the Merits

The primary argument in favour of taking applicable law into account in a *forum non conveniens* analysis is that if the foreign law will be applied by the chosen court, the foreign court must surely be in a better place to apply it and understand all the subtleties. We disagree, and adhere to the position of Guillemard, Prujiner and Sabourin in their 1995 study of *forum non conveniens* in Quebec that, in general, taking the law applicable to the merits into account is not appropriate[345]. The only possible place for consideration of the applicable law at this stage might be in those situations where it is necessary to consider the applicable law in order to interpret one of the bases for jurisdiction in the codal rules, especially article 3148 C.c.Q.

The primary reason for our contention is that, if application of foreign law justifies dismissal, then Book Ten is meaningless, because the implication is that Quebec Courts are only competent and appropriate to apply Quebec law. Thus, taking the law applicable to the merits into consideration during the *forum non conveniens* analysis runs counter to the very rationale underlying Quebec's private international law rules. Quebec courts are required to and do apply foreign law on a regular basis. In fact, article 2809 C.c.Q. was intended to facilitate proof of foreign law, and indeed does make such proof easier now. Finally, taking the applicable law into consideration presumes that it is an easy task to determine which law or laws apply, and it may be the case that the foreign law will apply, to only part of the issue in dispute. In any event, in all but the simplest cases, such an inquiry creates unnecessary delays and opens up a discussion on the applicable law which is best left for consideration later, prior to a hearing on the merits. A number of common law cases now take the view that the applicable

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345 S. GUILLEMARD, A. PRUJINER and F. SABOURIN, *loc. cit.*, note 1.

law should not be considered during *forum non conveniens* analysis, or, at most, that it should be given very little weight[346].

ii. Nationality of the Plaintiff

Treating aliens differently is likely to be in violation of Quebec's *Charter of human rights and freedoms*[347], unconstitutional, and is, in any case, not wise in today's world. It is possible that a similar prohibition should be extended to the residence or domicile of the plaintiff. More will be said on this, below, where we reconsider *Cambior* in light of our proposal.

b. Criteria Which May Be Applied But With Certain Restrictions and Qualifications

In determining the appropriateness of the forum, the court may consider a variety of other factors, but within the following limitations and guidelines.

i. Location of Witnesses and Evidence

In our opinion, the location of the witnesses should not be accorded more than minimal weight. Given modern technology – overnight delivery of documents, facsimiles, email and other internet utilizations, along with world-wide economy air travel – many of the problems associated with distant witnesses are easily overcome. No forum is as inconvenient today as it was in the past. In fact, modern technology has rendered some of the private factors invoked in cases like *Boulton*[348], *Arsenault*[349] and *Cambior*[350] virtually obsolete.

ii. Overriding Public Interests of the State

An overriding public interest of the state, whether narrowly or liberally construed, should outweigh convenience. For example, the need to retain jurisdiction to ensure the protection and compliance with important social and economic policies, such as competition legislation, securities regulation and other laws that

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346 See e.g.: *Cytoven*, *supra*, note 46; *Discreet Logic*, *supra*, note 46; *Sydney Steel Corp.*, *supra*, note 45; similarly, see in Quebec: *J.S. Finance Canada Inc.*, *supra*, note 119.

347 R.S.Q., c. C-12.

348 *Boulton*, *supra*, note 119.

349 *Arsenault*, *supra*, note 119.

350 *Supra*, note 11.

qualify as laws of immediate application should override convenience[351]. Many of these laws involve transnational regulation, where the basic issue is not jurisdiction to adjudicate, but jurisdiction to prescribe law. Where the latter exists, how can the doctrine of *forum non conveniens* be invoked, "when there is no other forum in which the case can be heard but the defendant argues that jurisdiction to prescribe does not exist"[352]?

Another matter where the overriding public interests of the state is concerned is in the matter of human rights cases. It is our contention that *forum non conveniens* is not appropriate in human rights cases, a point which has been argued forcefully in a recent article by Kathryn Lee Boyd in the *Virginia Journal of International Law*[353], since it seems obvious that fundamental human rights should supersede convenience of either the parties or the forum. Furthermore, the *Universal Declaration of Human Rights*[354] is essentially now binding on all U.N. member states, and Canada is also a party to a number of U.N. Conventions, Protocols and covenants relating to human rights, including the *International Convention on the Elimination of All Forms of Racial Discrimination*[355], the *International Covenant on Economic, Social and Cultural Rights*[356], the *International Covenant on Civil and Political Rights*[357], the *Optional Protocol* to that Covenant[358], the *Convention on Rights of the Child*[359] and a number of others[360]. While we are unaware of any cases in Quebec in which a *forum non conveniens* dismissal has been raised in the context of a human rights case, the principle enunciated here should be observed if the opportunity arises in the future. Finally, we would encourage a similar approach with

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351 *Brueckner, supra*, note 172.

352 See: Jean-Gabriel CASTEL, *Extra-territoriality in International Trade*, Toronto, Butterworth's, 1988, p. 265 ff.

353 *Supra*, note 9.

354 (1948) UN Doc A/810.

355 (1969) 660 U.N.T.S. 195.

356 (1966) 993 U.N.T.S. 3, 1976 Can. T.S. No. 46.

357 (1966) 999 U.N.T.S. 171, 1976 Can. T.S. No. 47.

358 (1966), 999 U.N.T.S. 302, 1976 Can. T.S. No. 47.

359 (1989) UNGA Doc A/RES/44/25.

360 See e.g.: Hugh M. KINDRED (ed.), *International Law, Chiefly as Interpreted and Applied in Canada*, 5th ed., Toronto, Emond Montgomery Publications Ltd., 1993, p. 599-602.

respect to Canada's international commitments on environmental protection[361], which could also be treated as overriding public interests of the state.

iii. Legitimate Expectations of the Parties

The legitimate expectations of the parties with respect to the place of litigation is a factor which, in our opinion, could be properly considered during the *forum non conveniens* analysis. It would seem, for example, that in most circumstances a defendant could reasonably expect to be sued in the jurisdiction within which he resides, or in the case of a corporate defendant, in the jurisdiction in which corporate headquarters are located.

iv. Related or Incidental Actions

The involvement of third parties and incidental or related disputes should be given a great deal of weight when a court considers a *forum non conveniens* motion. In most such cases, such concerns should lead to denial of a request for dismissal. This follows from the fact that article 3139 C.c.Q. allows the Quebec courts to take jurisdiction over parties in incidental or related actions, so as to avoid litigating such matters in different fora. However, in some cases it is clearly inappropriate to exercise jurisdiction over the related matter, as in *Birdsall Inc.* v. *In any Event*[362].

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361 See e.g.: *Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES)* (3 March 1973), 993 UNTS 243, 27 UST 1087, TIAS 8249, UKTS No. 101 (1976), Cmnd 6647; *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (22 March 1989), U.N. Doc. UNEP/WG.190/4, UNEP/IG.80/3 (1989); *Vienna Convention for the Protection of the Ozone Layer* (22 March 1985), 26 I.L.M. 1529 (1987); *Montreal Protocol on Substances that Deplete the Ozone Layer* (16 September 1987), 26 I.L.M. 1550 (1987); *United Nations Framework Convention on Climate Change* (29 May 1992), 31 I.L.M. 849 (1992).

362 *Supra*, note 115.

E. General Principles for Deciding Cases in Which *Forum Non Conveniens* Is Allowed

1. Where No Forum Is Clearly More Convenient or Appropriate, the Case Must Stay in Quebec

Where the convenience or inconvenience of the Quebec court and foreign court are equal and no forum is "clearly more appropriate", the court should not dismiss on the grounds of *forum non conveniens*. The case should remain in the chosen forum. This is critical since it is really the only reasonable interpretation of the word "exceptional" in article 3135 C.c.Q. Fortunately, this approach already seems to have taken root in our jurisprudence since it forms the basis of decisions in several cases, such as *Sunburst*[363], *Droit de la famille - 2546*[364], *Stageline*[365] and *Cameron Billard*[366].

This proposition should also extend to any controversy on one of the criteria. If it is an important element in the case which could swing the result to one side or the other, then the courts should dismiss a motion for *forum non conveniens* and keep the case in the domestic forum.

2. Dismissal Should Be Allowed Only if the Quebec Court Is Clearly Inappropriate

Even if the foreign court is clearly *more* appropriate, the court should only dismiss if the Quebec court is clearly *in*appropriate (an approach similar to Australia's version of *forum non conveniens*[367]). In other words, if the global consideration of criteria in the *forum non conveniens* inquiry leads the court to conclude that the balance tips only slightly in favour of declining jurisdiction, then the motion to dismiss should be denied *unless* the Quebec court is shown to be clearly *inappropriate*. While this view does not appear to have yet

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363 *Supra*, note 164.
364 J.E. 96-2263 (C.A.)
365 *Supra*, note 123.
366 *Supra*, note 153.
367 See Section I, C, above.

taken hold in Quebec jurisprudence, it has been followed in certain common law jurisdictions[368]. Again, the presence of any "real and substantial connection", liberally construed (as the court in *Hunt*[369] intended), should take precedence over a conclusion reached through a balancing exercise alone.

3. Where *Forum Non Conveniens* Has Been Asserted, the Burden of Proof Should Stay with the Moving Party

The burden of proof in evaluating whether a more appropriate alternative forum exists should remain on the moving party and should not shift automatically to the plaintiff once the defendant states a *prima facie* case[370]. The two-step approach of the English courts, under *The Spiliada*[371], is not authorized under the view of the Supreme Court of Canada in *Amchem Products*[372], and clearly article 3135 C.c.Q. authorises no such shift[373].

4. In Declining Exercise of Jurisdiction, the Quebec Court Should Dismiss, Rather Than Stay, the Action

In general, where the court has decided to grant a motion for *forum non conveniens*, we believe that the court should respect the text of the Quebec version in article 3135 C.c.Q. and "decline" jurisdiction altogether, rather than stay the action. If the Legislator had intended to allow a stay rather than dismissal, he likely would have specified a stay, as he did in article 3137 C.c.Q. in the provision on *lis pendens*[374]. That said, it may be useful in some circumstances to employ a somewhat more liberal interpretation of article 3135 C.c.Q. and allow for the possibility of conditional

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368 See e.g.: *Ontario New Home Warranty Program* v. *General Electric Company*, *supra*, note 45. A dramatic statement of this approach is seen in the U.S. Court of Appeals case, *Lacey* v. *Cessna Aircraft Co.* 932 F.2d 170, 180 (3d Cir. 1991), where it was suggested that even if the private and public interest factors "lean only slightly toward dismissal [on grounds of *forum non conveniens*], the motion to dismiss must be denied." See also A.M. KEARSE, *loc. cit.*, note 9, 1313.

369 *Supra*, note 32.

370 Some support for this stance is evident in the Quebec jurisprudence. See e.g.: *Lorenzetti* v. *McLachlan*, [1996] R.J.Q. 1311, 1314 (Sup. Ct.); *Rosdev Investments*, *supra*, note 149, 2969.

371 *Supra*, note 13, 854 and 856.

372 *Supra*, note 34, 919-921.

373 For the text of art. 3135 C.c.Q., see p. 794.

374 See, *supra*, note 336 for the full text of article 3137 C.c.Q.

dismissals in *forum non conveniens* cases. If dismissals are conditioned upon such things as the plaintiff's ability to gain access to the foreign court, this may help to alleviate some, but not all, of the problems we have identified thus far.

5. *Forum Non Conveniens* Motions Must Follow the Delays for Contesting Jurisdiction

Application for dismissals on the basis of *forum non conveniens* should be made at an early stage of the proceedings, specifically, within the delays available to those who wish to contest jurisdiction. Any derogation from this rule is against the goal of administrative efficiency that the rule presumably is intended to respect.

VI. Revisiting *Cambior*

A. General Comments

Cambior[375] is part of a trend in the Quebec jurisprudence that could ultimately lead to the unravelling of the rule of law in international *forum non conveniens* cases. We chose this case not only for the purpose of focusing our criticisms on the doctrine of *forum non conveniens* as it stands today in Quebec, but also to demonstrate how the expansive notion of *forum non conveniens* that has taken hold of Quebec's courts can have ramifications that reach well beyond Quebec's borders. The late Honourable Judge Maughan, in rendering the well-written and thoroughly considered *Cambior* decision, committed no greater sin than have other distinguished judges of the Superior Court and Court of Appeal who have likewise ignored the Quebec version of the doctrine, which clearly requires only an "exceptional" use of *forum non conveniens*.

B. *Cambior* Applied Common Law *Forum Non Conveniens* Rather Than Quebec's Version

Instead of utilizing the definition of the Quebec doctrine of *forum non conveniens* provided in article 3135 C.c.Q., the court in *Cambior* refers expressly and implicitly to the common law versions of the doctrine[376] used in the other provinces as well as

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375 *Supra*, note 11.

376 *Id.*, 14.

in the U.K. and U.S. In doing so, the Court adopts a test with a hopelessly low threshold for accepting the existence of a competent alternative court – a threshold that is not acceptable in light of the restrictive language of article 3135 C.c.Q. Further, the court gives weight to certain factors which should *not* be considered, and refuses to attribute importance to other factors which *should* have been considered. Lastly, the court seems to adopt the U.K.'s method of shifting the burden of proof to the plaintiff; yet there is nothing in article 3135 C.c.Q. to suggest that requiring the plaintiff to justify the connections of the case to the forum is remotely appropriate. In fact, considering that article 3135 C.c.Q. follows a provision which proclaims that "[i]n the absence of any special provision, the Quebec authorities have jurisdiction when the defendant is domiciled in Quebec"[377], it seems reasonable to assume that the burden of proof in article 3135 C.c.Q. would rest squarely on the defendant.

As suggested in the proposal outlined earlier, "exceptional" requires, first, that a *forum non conveniens* analysis should not even be undertaken in certain cases, second, that there be an analysis of whether a competent alternative court indeed exists, and third, that there be a limited use in all other situations. We will now consider how the *Cambior* decision[378] fares in light of this approach.

1. The Role of Domicile of the Defendant

The Court gave no particular weight to the domicile of Cambior in Quebec, and thus essentially dismissed the traditional view in Quebec civil law that the court of the domicile of the defendant is the natural forum. As we suggested earlier, the "exceptional" doctrine should require the courts to refuse to dismiss where the defendant is domiciled in Quebec so long as the action has some real and substantial connection to Quebec, although it may be argued that domicile, standing on its own, constitutes a real and substantial connection. At this point in the inquiry, the court should simply ensure that there are significant links to Quebec, including the domicile. If there are, this should be sufficient to retain

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377 Art. 3134 C.c.Q. It should be noted that this provision serves as the introductory provision to Book Ten, Title III, International Jurisdiction of Québec Authorities, c. I, General Provisions.

378 *Supra*, note 11.

jurisdiction. In *Cambior*[379], the domicile of the defendant was considered just one element among many others[380]. We must take the Court in *Cambior* and cases such as *Boulton*[381] to task for this. Such an approach is totally repugnant to the Roman-civilian tradition in Quebec in most civil law jurisdictions.

In this context, if our theory and proposition were to have been applied, there should not have been any dismissal since there was a real and substantial connection to Quebec even beyond the domicile of the defendant. Some decisions concerning the mine's construction were made in Quebec. Quebec was also the residency and domicile of Cambior's directors. Quebec is truly the centre of gravity for Cambior, and, by extension, O.G.M.L. How can the domicile of the defendant be an inconvenient or inappropriate forum?

2. Adequacy of the Alternative Court

In *Cambior*, the court failed to consider the identification of an adequate, alternative forum at the beginning of the analysis, and instead addressed the question of adequacy only at the end of its inquiry. As we stated above[382], this is problematic because article 3135 C.c.Q. requires, as a threshold condition, that the alternative court must be competent. While we concede that the requirement is implied rather than express, any other interpretation would be perplexing in that part of being "in a better position to decide" would necessarily require competence of the forum considered.

Specifically, Maughan J. viewed the impartiality of the courts, the delays, the level of judicial integrity, the ability to hear a technical class action suit, and the adequacy of the remedy as nothing more than subordinate factors to be considered under the heading of "interests of justice", which in turn was just one of a number of other factors considered in the evaluation of whether Guyana was the more appropriate forum. After undertaking the laborious process of considering and weighing a number of factors, the last of which were considered under the heading, "Interests of Justice", Maughan J. remarked that if he had been swayed by the

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379 *Id.*

380 *Id.*, 21.

381 *Supra*, note 119, 231 and 232.

382 See : Section V, D, 2 above.

plaintiff's evidence on the problems with the Guyanese justice system, he would have dismissed Cambior's request that the Court decline jurisdiction "without hesitation".

This illustrates, and indeed supports the argument that the question of adequacy of the alternative forum should be dealt with at the beginning of the *forum non conveniens* analysis rather than at the end. Efficiency of judicial process – so often considered an important factor in *forum non conveniens* analysis – would demand nothing less. Another reason for undertaking an evaluation of the adequacy of the foreign court *prior* to the consideration and weighing of criteria is that the question of adequacy simply should not be on an equal footing with the other criteria: it should be treated as a threshold issue and not as one of numerous interest factors to be considered.

Maughan J. found the court in Guyana to be an adequate alternative court, despite the presence of substantial evidence in the file to the contrary. An expert report of Prof. Schabas called into question the impartiality and integrity of the courts and attested to the existence of unreasonable delays, the inability to hear a class action, and the inadequacy of the alternate remedy available (representative action). Based on various written sources of information, as well as on a one-week fact-finding mission, Prof. Schabas found the Guyanese judicial system to be far from reliable, fair or impartial[383]. The Court rejected Prof. Schabas' analysis on the basis of the counter-testimony of a retired judge from Guyana[384]. While it may be true that, as witnesses, judges are likely to be accorded more credibility than the average person, this should not prevent a court from questioning the usefulness of a judge's testimony where the appearance of bias or similar problems arise.

Of course, there might also be political ramifications if a Canadian court were to conclude that the Guyanese court was not an adequate alternative forum, and this may well have been in the mind of the Court in *Cambior*. However, it is important to note that Prof. Schabas' report was based in large part on sources of very high calibre. For example, he relied on the U.S. State Department 1996

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383 *Supra*, note 278.

384 *Supra*, note 11, 38-40. The Judge's testimony was supported by that of two other Guyanese jurists, as well as that of a retired justice of the Quebec Court of Appeal: *id.*, 40-42.

Country Report on Guyana, which stated that "[t]he inefficiency of the judicial system is so great as to undermine due process"[385], but this evidence was given short shrift by Maughan J. Prof. Schabas also referred to a memo written at the request of then-President Cheddi Jagan to Guyana's Attorney General in 1994 by six of Guyana's most senior lawyers, which stated, *inter alia*, that "[t]he administration of law in Guyana has reached a state of collapse"[386], but again, Maughan J. gave the evidence minimal weight. By contrast, a U.S. federal trial court in the 1997 case, *Eastman Kodak Company* v. *Kavlin*, relied on very similar sources (e.g. State Department Reports, World Bank Reports, evidence from a Bolivian attorney of high calibre and a Bolivian newspaper article quoting the Bolivian Minister of Justice criticising his own judicial system) in arriving at the conclusion that corruption in the Bolivian justice system precluded dismissal of action from the U.S. court on grounds of *forum non conveniens*[387].

Indeed, there are serious questions as to whether the plaintiffs could, in fact, achieve the result they sought in the courts of Guyana. It should not be overlooked, for example, that Cambior, along with its subsidiary O.G.M.L., had been allowed to conduct its operations in Guyana by invitation of and cooperation with the Guyanese government. Furthermore, it is not insignificant that revenues from the Omai mine are extremely important to the Government of Guyana, which holds a 5% share in the mine[388].

In addition to the integrity of the justice system, however, an equally important issue in assessing the adequacy of the alternative forum is whether that forum affords the plaintiff the remedy he has come to court to obtain. With respect to the *Cambior* case, there are obvious and important differences between the procedures used by the courts of Guyana compared to the courts of Quebec. First, Guyanese law does not currently recognize the specific type of action taken in *Cambior*, the "class action". Instead, the Guyanese system provides for a "representative action", which is quite different than the class action in several important respects. For example,

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385 *Supra*, note 278, par. 14.
386 *Id.*
387 *Supra*, note 88, 1085 and 1086.
388 *Op. cit.*, note 251, p. 3.

Guyana's rule on representative actions, modelled closely on the British rule[389], requires that all the applicants share "the same" interest in the litigation[390], whereas the Quebec class action allows "similar or related" interests among members of the class[391]. This is an important distinction, since British case law, which frequently serves as a source of law for Guyanese jurists, has taken a very strict approach to this distinction, essentially rejecting representative actions in which there was no exact identity of interest among the plaintiffs[392]. Further, the Guyanese representative action requires each plaintiff to prove the damages caused by the defendant[393]; damages may not be awarded to a representative plaintiff on behalf of members of the class[394].

Many of these distinctions were expressly recognized by the Court in *Cambior*, which responded to Cambior's claim that the representative action was essentially the same as a class action by

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389 R.S.C., Order 15, Rule 12. The British rule also does not provide for a class action procedure, though it is currently under consideration. See e.g.: J. BURNETT-HITCHCOCK and S. BURN, "Class Action – A Radically Different Approach to Handling Multi-party Actions is Outlined in a New Law Society Report", (1995) 92 *Law Society's Guardian Gazette* 16.

390 Order 14, Rule 8 of the *Rules of the High Court of Guyana*. Maughan J. also discusses this distinction, *supra*, note 11, 31.

391 Art. 1003(a) *Code of Civil Procedure* of Quebec, R.S.Q., c. C-25.

392 See e.g.: *Markt & Co., v. Knight Steamship Company*, (1910) 2 K.B. 1021; *Consorzio del Prociuto di Parma v. Marks & Spencer PLC*, (1991) R.P.C. 351 (C.A. Civil Div.). Maughan J. dismissed this concern by observing that "No proof was made whether the High Court of Guyana would interpret Order 14, Rule 8 liberally or restrictively." He also, however, observed that very little case law exists in Guyana on this point: *supra*, note 11, 32. This would seem to point toward an even greater likelihood that the British cases would inform the interpretation of the Guyanese rule.

393 *Id.*

394 This point is among those addressed by British authors in an article lamenting the fact that the U.K. allows representative actions but not class actions. The authors also argued that: "The representative of the class may settle the action to the possible detriment of the members represented as there is no provision for the supervision necessary to make the representative truly accountable. The procedure does not therefore provide the necessary access to the courts for large numbers of potential litigants." R. CAMPBELL and W. MORRISON, "Class Actions" (1987) 84 *Law Society's Guardian Gazette* 2583-2585.

stating that, "the Court is not satisfied on the proof that this is so"[395]. Despite this recognition, however, the Court took a position closely resembling that of the U.S. District Court in *Union Carbide*[396], and consequently attached very little importance to this fact. The Court stated: "If the door to the representative action is closed to some or all [of the plaintiffs], they still have the right to institute individual actions against Cambior before the High Court of Guyana and make whatever proof is required by the laws of Guyana to establish Cambior's fault, their damages and causality"[397]. This, however, is cold comfort, at best, to many of the plaintiffs, who are poor and whose residence in remote parts of the Guyanese jungle make these tasks extremely burdensome[398]. Further, this pronouncement establishes an extremely low threshold for "justice", one which we believe is much less preferable than the requirement of "*substantial* justice", above and beyond a *de minimus* level, currently used in the U.K.[399]. In our view, then, the Court paid insufficient attention to the important implications stemming from the unavailability of the class action in Guyana, especially in light of the special context of the capacities of the plaintiffs. We submit that the alternative forum contemplated in article 3135 C.c.Q. *must*, among other things, be a forum which has authority and capability to hear the *specific* type of action introduced by the plaintiff.

With respect to the Court's analysis of the adequacy of the alternative court, then, we believe that the Superior Court should have taken up the question of its adequacy at the outset of the *forum non conveniens* inquiry, and that it could have, and should have, stopped its analysis at that point by concluding that there *was* no adequate alternative court available.

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395 *Supra*, note 11, 31.

396 *Supra*, note 7, 851. The Court in Union Carbide essentially took the view that unless the deficiency in the remedy available in the alternative forum amounts to "no remedy", then the difference between the two remedies should not be determinative.

397 *Supra*, note 11, 33.

398 The claimants have not been successful in trying to launch a representative action in Guyana due to more fundamental problems of procedure. See Section IV, C, below.

399 See e.g.: *Connelly* v. *RTZ Corp.*, *supra*, note 24, 346; *de Dampierre* v. *de Dampierre*, *supra*, note 25, 11 and 12.

3. The Importance the Court Attributed to Certain Interest Factors

As previously suggested, in any *forum non conveniens* inquiry undertaken according to the theory of "exceptionality" proposed above, certain factors should be given little or no value, in most cases. In our opinion, the court in *Cambior*[400] erred in the importance it attributed to a number of these factors.

a. Characteristics of the Parties, Location of Witnesses and Location of the Evidence

We have already commented disapprovingly of the lack of importance given by the courts generally, to the domicile of the defendant, thus we will not repeat here the arguments made above[401]. Rather, we will focus here on *Cambior*'s approach to the nationality of the plaintiff and the residence of the witnesses.

With respect to the **treatment of plaintiff's nationality**, it seems clear that while the Court refrained from any express reference to the Guyanese citizenship of the plaintiffs represented, it obviously gave the factor important consideration. In fact, the Court without saying as much, followed the well-known U.S. *forum non conveniens* case, *Piper*[402], very closely and in fact, cited *Piper* for this purpose[403]. It will be recalled that *Piper* discriminates against foreign plaintiffs, who wish to use the U.S. courts to redress injuries suffered abroad, by imposing a heavy burden on them to convince U.S. courts that they are the most appropriate fora.

In our opinion, the court in *Cambior* did what many American courts have done since *Piper*: it looked to "residency" abroad as an indication of perceived inconvenience. The message of *Piper* and *Cambior* is that American and Canadian Courts are for Americans and Canadians, respectively[404]. This type of approach is clearly in contradiction to the Quebec version, in that the Quebec's *forum non*

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400 *Supra*, note 11.

401 *Supra*, Section V, D, 1, b.

402 *Supra*, note 53.

403 *Supra*, note 11, 17 and 18.

404 For a discussion of potential problems in U.S. constitutional and federal law with respect to treating foreign plaintiffs differently in *forum non conveniens* cases, see e.g.: W.R. REYNOLDS, "The Proper Forum for a Suit: Transnational *Forum Non Conveniens* and Counter-Suit Injunctions in the Federal Courts", 70 *Tex. L. Rev.* 1663, 1691-1696 (1992).

conveniens provision is located in a section of the Code which essentially prohibits such discrimination. It was clearly in the mind of the Legislator, in formulating the provisions of Book Ten, in which article 3135 C.c.Q. is found, to avoid anything which could be construed as discriminatory, and many of the rules therein reflect this intention either directly or indirectly[405]. These considerations justify our conclusion that, under Quebec law, the weight given to nationality as a factor in the *forum non conveniens* analysis should be very slight. Indeed, it may be questioned whether any weight should be given to it at all. Non-residents in this globalized world should not be forced to choose their forum on the basis of any transnational allocation of responsibility.

With respect to the **residence of the witnesses and location of evidence**, these elements were, as noted earlier, more important in the 1950's, before modern technology gave us faxes, videocassettes, and economic air travel. For purposes of a trial proceeding in *Cambior*, the physical presence in Quebec of all of the witnesses would not have been necessary. In fact, one of the primary purposes of a class action is to avoid bringing in all the victims. In terms of evidence, it is true that the location of the mine in Guyana was significant. Much of the evidence with respect to the design flaws in the dam, however, was in the form of letters, papers and reports, all things easily transportable through one of the modern methods mentioned earlier. As in the case of the residence of the witnesses, the weight given to the location of evidence generally should be minimal.

Another issue which was important to the *forum non conveniens* analysis, and which involves the characteristics of the parties, is the question of whether Cambior had effective control over O.G.M.L. with respect to the design, building, maintenance and operation of the dam at the mine in Guyana. If the plaintiff, R.I.Q., was correct in its pretensions that Cambior did, in fact, exercise effective control over O.G.M.L. and that some of the decisions leading to the damage of the dam were made in Quebec, then this contributes to the argument that the defendant is located in Quebec and thus, under traditional civil law rules, should be vulnerable to suit in his own domicile. While it is not appropriate here to examine the details of the arguments in this particular case[406], it is important to recognize

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[405] See e.g.: J. TALPIS and J.-G. CASTEL, *op. cit.*, note 120, 816, par. 30.

[406] *Cambior* made proof to the contrary: see *supra*, note 11, 27.

that the relationship between parent corporations and their subsidiaries is one that is frequently raised in *forum non conveniens* cases[407], and hence deserves further examination.

b. The Law Applicable to the Dispute

In *Cambior*, the court argued that if foreign law is applicable, then the foreign court is more convenient than the Quebec court otherwise having jurisdiction. We must take Maughan J., and other honourable members of the Quebec courts who have viewed choice of law as important, to task for this assertion. Applied as generally as it has been, this line of thinking has the potential to weaken the whole system of private international law. The Quebec courts *do* apply foreign law with some regularity, and under article 2809 C.c.Q., proof of foreign law can now be made very easily. While it goes without saying that any court will find it easier to apply its own law, private international law cannot allow rules which place "what is easy" over what is required by the conflict rules or other principles. The conflict rules in the Code define many situations where Quebec courts must apply foreign law. Only very rarely should a court, applying an exception like *forum non conveniens*, second-guess or derogate from this determination.

c. Overriding Public Interest of the State

Just as with Canadian international commitments on human rights, Canadian international commitments on environmental protection should also be treated as overriding public interests of the state. Thus in our view, the Court could have considered, as within its analysis of the "interests of justice" criterion, a public interest in deterring Canadian corporations from engaging in harmful conduct abroad, and in furthering protection of the international environment. Again, this approach would be possible even though the text of article 3135 C.c.Q. implicitly speaks to "private" interests, because the jurisprudence in Quebec clearly supports consideration of "the interests of justice", which can easily be seen as including the respecting of international agreements.

Such an approach has already been applied by the Supreme Court of Canada, which reaffirmed the importance of making Canadians accountable for environmental violations in other

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[407] See e.g.: *Union Carbide*, *supra*, note 7; *Stilhole*, *supra*, note 28.

countries when it refused to hear an appeal of a case from the Ontario Court of Appeal, *United States of America* v. *Ivey*[408], which had upheld a U.S. judgment ordering Canadian defendants to pay the cost of cleaning up a hazardous waste site in Michigan.

The forum's overriding public interest may also be defined more broadly, since countries share a global interest in the enforcement of laws which protect the global environment. Again, as a U.N. member, Canada operates under the influence of a number of multilateral instruments on the environment, including the *Stockholm Declaration on the Human Environment*[409], which has been described as the "basic charter laying down the foundation" of international environmental law[410]. Principle 21 of the *Declaration*, considered by many to represent an existing rule of customary international law, could perhaps serve as the basis for an argument that states do indeed have environmental obligations outside their own territory, at least to the extent that they exercise control over environmentally injurious conduct[411]. Principle 21 states:

> *States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction* ***or control*** *do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.*[412]

Similarly, Article 2 of the *Rio Declaration on Environment and Development*[413], signed by 130 countries at the Earth Summit, including Canada, provides that: "*States have* [...] *the responsibility to ensure that authorities under their* [...] *control do not cause damage to the environment of other states.*" This statement supports Quebec's interest in denying dismissal of a motion for *forum non*

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408 (1996) 30 O.R. (3d) 370 (C.A.); Lv. to appeal ref'd, May 29, 1997, S.C.C. Bulletin, 1997, p. 687.

409 U.N. Doc. A/CONF. 48/14/Rev. 1 (1973); (1972) 11 Int. Leg. Mat. 1416.

410 H.M. KINDRED (ed.), *op. cit.*, note 361, p. 759.

411 *Id.*, p. 17 and 18.

412 *Supra*, note 409, emphasis added.

413 Agenda, Item 9, 1, U.N. Doc. A, conf. 15/5/Dec. 1992.

conveniens in order to remedy environmental damage caused by an entity within the control of Quebec courts.

It could also be argued that Canadians surely have a strong interest in remedying harms suffered by indigenous peoples. In Guyana, many of the plaintiffs who suffered various harms – physical, economic and even social and psychological – as a result of the damage to the Essequibo River were indigenous people. The damage done may well affect their health and way of life for years to come. It is our contention that the Court in *Cambior* could have looked at the case from the larger context of impacts on the well-being of indigenous peoples. It chose, however, not to do so.

4. The Burden of Proof and Who Bears It

With respect to the burden of proof and the question of who bears it, Maughan J. clearly was influenced by the way in which the burden of proof is shifted to the plaintiff in the English formulation of *forum non conveniens*. This was wholly inappropriate for two reasons. First, the Quebec version encapsulated in article 3135 C.c.Q. contains nothing which could be construed as an instruction to shift the burden to the plaintiff in the case where the defendant has demonstrated *prima facie* that a more appropriate forum is available. This is the test according to the English case, *The Spiliada*[414]. Second, Maughan J. neglected to observe that in articulating the proper test in Canada for *forum non conveniens*, Sopinka J., in *Amchem Products*[415], expressly rejected the two-step formulation in *The Spiliada* and adopted instead a single-step global analysis of factors in which the burden of proof is generally borne by the moving party and there is no shifting of the burden to the plaintiff later in the analysis[416].

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414 *Supra*, note 13.

415 *Supra*, note 34.

416 A more detailed discussion of these points is presented above, on p. 779 and 780.

C. Conclusion on *Cambior*

We believe that the *Cambior* decision[417], like numerous other Quebec decisions which misapply article 3135 C.c.Q., contains a number of flaws that demonstrate how the Quebec version of *forum non conveniens* has been ignored. First, the lack of importance given to the domicile of the defendant is, as we emphasized earlier, simply not in keeping with the civil law tradition of giving domicile a central role in matters of jurisdiction. The Court in *Cambior* did not acknowledge the importance of the defendant's domicile in Quebec and, in fact, downplayed its importance greatly. In so doing, the Court turned its back on a fundamental principle in civilian jurisdictions: *actor sequitur forum rei.*

Under the theory we proposed earlier, the fact of the defendant's domicile in Quebec, plus "something more" should lead a court to refuse to displace the plaintiff's choice of forum. In our view, there was clearly "something more" in *Cambior* because, in addition to the fact that the defendant company's principal officers resided in Quebec, there were acts carried out and decisions made in Quebec which very likely influenced O.G.M.L.'s activities in Guyana, specifically, the construction, management and use of the dam which failed and led to the spill of mining wastes. Furthermore, the plaintiffs' lawyers, who took the case *pro bono*, were located in Quebec. Thus, in our view there were plenty of factors that militated towards refusal of the defendant's motion for dismissal. Furthermore, the possibility of an overriding state interest, interpreted narrowly *or* broadly, was not even entertained. Had it been considered, this could have provided further support for refusing to transfer the litigation to the jurisdiction of a foreign court.

The *Cambior* decision, then, like many others before it, treated the codal provision on *forum non conveniens* as if the word "exceptional" were not even there. One wonders exactly whether judgments such as this would look any different if they had been based on article 3135 C.c.Q. *without* the "exceptional" requirement.

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[417] *Supra*, note 11.

As a postscript on this case, it is interesting to note that the case seems to be following the fate of many *forum non conveniens* cases which are ultimately sent to foreign jurisdictions. The case, which had been picked up by Guyanese lawyers and brought before the courts of Guyana never "made it out of the starting gate", with respect to a hearing on the merits. Unfortunately for the plaintiffs, the case was dismissed in March 2000 on the basis of a defect of service for which no cure was allowed (leave to serve writ outside of Guyana, upon Cambior, had not been obtained). This is especially interesting in light of the fact that Cambior had indicated, in its arguments before the Quebec Court, that it would accept jurisdiction in Guyana, while maintaining its claim of nonliability. In fact, Maughan J.'s decision to dismiss the case was greatly influenced by this concession and the dismissal granted was nearly tantamount to a conditional dismissal. Furthermore, Maughan J. made his judgment granting the declinatory exception conditional upon Cambior's undertaking that it would not, in a Guyanese court, invoke any ground based on *forum non conveniens*.

Interestingly enough, in the two months between the hearing of the *Cambior* case – a hearing which lasted twelve days – and the delivery of Maughan, J.'s decision, the Court of Appeal in England rendered a decision in the opposite direction, made on the basis of very similar facts. In *Lubbe*[418], the Court of Appeal referred to this kind of situation as "forum shopping in reverse" and allowed an appeal of a judgment staying proceedings on the grounds of *forum non conveniens*[419].

Additionally, in February 1999, the English Court of Appeal rendered a similar judgment in favour of foreign plaintiffs in *Sithole*[420]. As in *Lubbe*[421], this situation involved a plant operated in South Africa by a wholly owned subsidiary of an English corporation.

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418 *Supra*, note 28. The facts in *Lubbe* are described above on p. 792.

419 *Id.*, 10.

420 *Supra*, note 28. The facts in *Sithole* are described above on p. 792.

421 *Supra*, note 28.

VII. A New International Model for *Forum Non Conveniens* in the *Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*

As anticipated, there really was no choice but to include a *forum non conveniens* doctrine in the new *Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*[422] (hereinafter *Draft Convention*) of the Hague Conference, adopted on 30 October, 1999. The *Draft Convention*, which was developed to facilitate global uniformity in jurisdiction and foreign judgments, sets forth its own version of *forum non conveniens* in Article 22, styling it "Exceptional circumstances for declining jurisdiction", and adopting an autonomous concept to avoid identification with a particular system of law[423]. While this version should probably be satisfactory to the common law jurisdictions and while it conforms to that which is currently applied by the Quebec Courts, the question remains: is it better than the Quebec version as intended by the Legislator in 1994, and, if not, is it an acceptable compromise? The article provides:

Article 22 Exceptional circumstances for declining jurisdiction

1. *In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 13, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at time of the first defence on the merits.*

2. *The court shall take into account, in particular-*

   a) *any inconvenience to the parties in view of their habitual residence;*

   b) *the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;*

   c) *applicable limitation or prescription periods;*

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422 Web site: [http://www.hcch.net/e/conventions/draft36e.html].

423 See: G. SAUMIER, *loc. cit.*, note 1.

d) the possibility of obtaining recognition and enforcement of any decision on the merits.

3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

4. If the court decides to suspend its proceedings, under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 19, unless the defendant establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced.

5. When the court has suspended its proceedings under paragraph 1,

a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or

b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

In our view, although the *Draft Convention* version does not go far enough to eliminate the evils of *forum non conveniens* (e.g., uncertainty as to where the battle will be fought, litigating where to litigate, etc.), it is a good beginning. Hopefully, a more restrictive version will be negotiated at the Diplomatic Conference, scheduled to begin in June 2001.

Although we approve of the "exceptional circumstances" qualifier in Article 22, par. 1, which is somewhat similar to the Quebec version, as well as the elimination of any inquiry as to the appropriateness or convenience of the Court in the case of a choice of court (art. 4), consumer contract (art. 7), individual employment contract (art. 8), and in specific cases of exclusive jurisdiction, we would have preferred to see an elimination of such inquiry also in those situations where the defendant's domicile is in the State of the court seized (perhaps with the qualification that, as we have suggested above, some minimal connection beyond domicile is also required). A similar proposal was put forward in Working Document No. 240 of the Drafting Committee, and Proposal No. 248 of France and Germany.

Where a *forum non conveniens* inquiry is not precluded, we also approve of the language in Article 22 whereby, for a *forum*

non conveniens motion to succeed, the Court seized must be "clearly inappropriate", and the alternative Court must be "clearly more appropriate". Together, with the requirement that the application be made at an early stage, and the mechanisms included in paragraphs 4 and 5 of Article 22 seeking to limit recourse to the doctrine, this language should reinforce the Draft's "exceptional circumstances" guideline and discourage defendants from challenging what is otherwise a legitimate jurisdiction established under the convention.

However, even with such a guideline and the restrictive language of "clearly inappropriate" and "clearly more appropriate", in those cases where no exclusion takes place and a *forum non conveniens* inquiry *does* go forward, the open-ended list of factors that a court might take into account shifts the restrictive version of the draft back to the liberal *forum non conveniens* doctrine of the common law jurisdiction. This becomes all the more serious when one examines the rather broad jurisdictional bases set forth in the *Draft Convention*. One would have expected that the civil law jurisdictions would at least have been able to negotiate a list of criteria which the courts would *not* be able to consider (perhaps together with an exhaustive positive list), as we have proposed.

As a final observation, we approve of Article 27, par. 3 of the *Draft Convention*[424] which differs from Quebec law which, as mentioned earlier, allows a Quebec Court faced with a request to enforce a foreign judgment to evaluate the appropriateness and convenience of the authority of the foreign court through application of articles 3164 and 3168.

> *27 (3). Recognition or enforcement of a judgment may not be refused on the ground that the court addressed considers that the court of origin should have declined jurisdiction in accordance with Article 22.*

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[424] *Op. cit.*, note 422.

In our view, in the context of an international convention in which the bases for jurisdiction are not tenuous, the *Draft Convention*'s rule on *forum non conveniens* makes good sense.

Conclusion: Reformulating *Forum Non Conveniens* in Quebec

We argued earlier that the Quebec jurisprudence on *forum non conveniens* has strayed far from the Legislator's original intention in introducing article 3135 C.c.Q. into Quebec law. Beyond undertaking the kind of substantial reformulation of *forum non conveniens* analysis in judicial practice that we have suggested in this paper, there are three legislative options that might be considered: repeal of article 3135 C.c.Q., reformulation of the jurisdictional rules in Book Ten of the C.c.Q., or integration of the rules which will eventually be adopted at the Hague Conference.

The first option – to repeal article 3135 C.c.Q. completely – is obviously an extreme solution to the problem we have identified. Repeal seems an unlikely and perhaps counter-productive idea, given the fact that in some limited, truly "exceptional" circumstances, the availability of *forum non conveniens* could prove quite valuable.

The second legislative option – reformulating Quebec's rules on jurisdiction – is oriented toward one of the chief concerns underlying the current use of *forum non conveniens*, forum shopping by foreign plaintiffs. Specifically, if Quebec believes that it is undesirable to allow foreign plaintiffs to sue Quebec domiciliaries for acts done or damage suffered abroad, the Legislator could provide for such a prohibition through a reformulated jurisdictional rule. To do so, however, would require establishing very detailed rules. While this would make the law more predictable, the use of highly detailed rules may well run contrary to the spirit of Quebec's civil law tradition. Furthermore, the decisions of Quebec courts may well, in the long run, provide such rules.

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425 It should be recognized that domestic rules will exist in parallel with the *Convention*'s rules.

The third option is to follow the rules developed at the Hague Conference. To date, the discussions of *forum non conveniens* have pointed toward the adoption of a *limited* rule. While it is always possible, of course, to employ domestic rules in those situations in which the proposed *Convention* does not apply[425], it may well be generally preferable, for reasons described in the preceding section, for Quebec to reformulate its *forum non conveniens* rule to follow more closely the version presented in the *Draft Convention*[426].

In the interim, however, we suggest that the courts of Quebec endeavour to redefine article 3135 C.c.Q. in the jurisprudence so that its threshold characteristic – exceptionality – is clearly respected and understood[427]. This implies prohibiting *forum non conveniens* inquiries by the courts altogether in some cases, and greatly restricting its application in others. By taking such steps now, perhaps we will be able to avoid asking the question a few years from now, "[E]xactly *what* is exceptional about the exceptionality requirement in article 3135 C.c.Q.?" It is our hope that by reigning in the use of the *forum non conveniens* recourse made available in article 3135 C.c.Q., the courts will help push the pendulum back so that the provision can take its place in Quebec's civil law as the *exceptional* rule that it was meant to be.

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426 *Op. cit.*, note 422.

427 This is not imply that all judges are not interpreting the article pursuant to the legislator's intent. We totally endorse the approach taken by Nicole Duval-Hessler, J. in the case of *Spar Aerospace Ltd.* v. *American Mobile Satellite Corp.*, (1999) Q.J. 4580, J.E. 99-0973, reversed on appeal on other grounds (2000) J.Q. 1717, J.E. 00-1597; leave for appeal to Supreme Court was Granted on April 19, 2001.

Chroniques sectorielles

TAB 17

COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE QUÉBEC

N° : 200-09-007312-116
(415-17-000390-058)

DATE : 19 septembre 2012

CORAM : LES HONORABLES ANDRÉ FORGET, J.C.A.
LORNE GIROUX, J.C.A.
JEAN BOUCHARD, J.C.A.

BOMBARDIER PRODUITS RÉCRÉATIFS INC. (BRP)
APPELANTE – défenderesse

c.

CHRISTIAN MOTO SPORT INC. (CMS)
INTIMÉE – demanderesse

ARRÊT

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[1] L'appelante se pourvoit contre un jugement rendu le 25 janvier 2011 par la Cour supérieure, district d'Arthabaska (l'honorable Martin Dallaire), qui a accueilli en partie la requête introductive d'instance de l'intimée et l'a condamnée à payer à cette dernière la somme de 526 054,68 $ avec intérêts, l'indemnité additionnelle et les dépens, y compris les frais de l'expert de 75 164,89 $;

[2] Pour les motifs du juge Bouchard, auxquels souscrivent les juges Forget et Giroux, la Cour :

[3] **ACCUEILLE** l'appel;

[4] **INFIRME** le jugement de première instance;

[5] **REJETTE** la requête introductive d'instance de l'intimée;

[6] Le tout avec les entiers dépens devant les deux cours.

ANDRÉ FORGET, J.C.A.

LORNE GIROUX, J.C.A.

JEAN BOUCHARD, J.C.A.

Me Martin F. Sheehan et Me Noah Boudreau
Fasken, Martineau
Pour l'appelante

Me Mario Welsh et Me Nicolas Croteau
Heenan, Blaikie
Pour l'intimée

Date d'audience : 29 mars 2012

MOTIFS DU JUGE BOUCHARD

[7] Le pourvoi porte sur la fin de la relation commerciale entre Bombardier et un de ses concessionnaires de produits récréatifs.

[8] Christian Moto Sport inc., le concessionnaire en question, soutient que Bombardier a agi de manière abusive en ne renouvelant pas à échéance son contrat de concession, d'où le recours en dommages-intérêts entrepris contre cette dernière et le jugement de première instance qui lui a donné gain de cause après avoir retenu que la théorie de l'abus de droit contractuel trouvait application[1].

Les faits

[9] Comme je propose d'infirmer le jugement de première instance et qu'il s'agit essentiellement de questions de fait pour lesquelles une cour d'appel doit faire montre de déférence à moins d'erreurs manifestes et dominantes commises par le juge, je puiserai abondamment dans la preuve de manière à démontrer où ce dernier, soit dit avec égards, a erré.

[10] L'intimée, Christian Moto Sport inc. (ci-après CMS), est une personne morale spécialisée dans le commerce des motoneiges et des véhicules tout-terrains (VTT). Le principal actionnaire, M. Christian Goulet, détient 80 % des actions et son père, M. Gérard Goulet, 20 %. L'établissement principal de CMS est situé à Victoriaville.

[11] C'est en 1995 qu'une première convention de concessionnaire intervient entre les parties. Celle-ci ne vise que les motoneiges. En 1998, s'ajoutent les VTT. Par la suite, ces conventions, qui expirent pour les motoneiges le 31 mars de chaque année, et pour les VTT, le 31 mai, seront renouvelées d'année en année jusqu'en 2005.

[12] En 2003, Christian Goulet est intéressé à démarrer une concession Yamaha à Drummondville pour y vendre des motoneiges de cette marque. Il en discute tout d'abord avec son représentant Bombardier, M. Pierre Lauzon. Ce dernier lui rappelle que son contrat de concession ne lui permet pas directement ou indirectement de promouvoir les motoneiges d'un compétiteur. Il en rediscute ensuite au mois de mai 2003 avec M. Claude Joncas, directeur national des ventes pour Bombardier, et Pierre Lauzon. Prétendant à l'illégalité de la clause de non-concurrence contenue à son contrat, Christian Goulet leur demande de modifier celle-ci pour qu'il puisse aller de l'avant avec son projet. Claude Joncas s'engage à vérifier cette avenue auprès de ses supérieurs même s'il n'y croit pas vraiment.

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[1] *Christian Moto Sport inc.* c. *Bombardier Produits Récréatifs inc.*, 2011 QCCS 269.

[13] Entretemps, Christian Goulet ne demeure pas inactif. Le 28 juillet 2003, il incorpore une compagnie connue sous le nom de CMS Extrême inc. dans le but d'exploiter sa concession Yamaha à Drummondville. Puis, le 18 septembre 2003, Claude Joncas l'avise par écrit que Bombardier refuse de modifier la clause de non-concurrence contenue à son contrat et que le non-respect de cette clause pourra mener à la terminaison de leur relation contractuelle. Cette lettre est ainsi libellée :

> Monsieur Goulet,
>
> Nous avons récemment discuté ensemble de votre projet potentiel de vous approprier les produits récréatifs de Yamaha. D'ailleurs, nous apprécions grandement l'honnêteté avec laquelle vous avez abordé la question et vous en remercions. Le but de cette lettre est de vous informer par écrit de la position de Bombardier Inc.
>
> Nous considérons Christian Motosport Inc. comme un partenaire stratégique et accordons beaucoup de valeur à notre relation d'affaires. D'autre part, il est primordial pour Bombardier de s'assurer de traiter tous nos concessionnaires de manière équitable.
>
> Dans ce contexte, nous désirons vous informer que Bombardier ne peut modifier votre convention de concessionnaire pour accommoder votre projet relatif aux produits Yamaha. La politique d'exclusivité de Bombardier sera maintenue et la clause au contrat prévoyant que Christian Motosport Inc. ne peut pas, directement ou indirectement, promouvoir des produits en compétition avec les produits Bombardier demeurera. Nous devons aussi vous rappeler que le non-respect de cette clause pourrait être un motif de terminaison de votre contrat. Nous préférons vous aviser dès maintenant de notre position, pour que vous puissiez agir en conséquence.
>
> Nous sommes confiants que vous comprendrez que notre position repose sur notre désir de traiter équitablement tous nos concessionnaires.
>
> Nous demeurons à votre disposition pour approfondir la situation. Sachez, monsieur Goulet, que nous apprécions grandement faire affaires avec vous.
>
> Cordialement,
>
> Claude Joncas
> Directeur des ventes nationales – Canada
>
> [je souligne]

[14] À la même époque, et soucieuse de garder CMS comme partenaire d'affaires, Bombardier lui propose plutôt d'acquérir une autre de ses concessions située à

Shawinigan, offre que Christian Goulet décline. Ce dernier préfère aller de l'avant avec Yamaha. Le 2 décembre 2003, à l'insu de Bombardier, il signe donc, au nom de CMS Extrême inc., un bail pour exploiter sa concession Yamaha à Drummondville.

[15] Christian Goulet débute les opérations de sa nouvelle concession au mois d'avril 2004. Bombardier en est informée peu de temps après par un de ses représentants qui dessert ce territoire. Constatant avec regret que CMS a ignoré ses avertissements, Bombardier, le 18 juin 2004, avise CMS par écrit qu'à l'expiration de sa convention de concessionnaire (le 31 mars 2005 pour les motoneiges et le 31 mai pour les VTT) celle-ci ne sera pas renouvelée. Voici les termes de la lettre par laquelle Christian Goulet est informé de cette décision :

> Cher Monsieur Goulet,
>
> La présente est pour vous aviser formellement que Bombardier Produits Récréatifs inc. (« BRP ») a décidé de ne pas renouveler la convention de concessionnaires de Christian Motosports Inc. pour les motoneiges Ski-Doo et les VTT Bombardier. Ces non-renouvellements seront effectifs à la fin des années modèles respectives en cours. BRP honorera donc le contrat présentement en vigueur jusqu'à son expiration, soit le 31 mars 2005 pour les motoneiges, et le 31 mai 2005 pour les VTT. Par la suite, notre relation d'affaire cessera définitivement.
>
> Selon les termes de la convention, BRP n'est pas tenu d'avoir de motif justifiant son choix et BRP peut décider, sans que sa discrétion ne soit limitée de quelque manière que ce soit, de ne pas renouveler la convention. Par contre, plusieurs facteurs ont été considérés dans le cas présent, y inclus sans s'y limiter, le fait que les plans d'affaire de BRP et de votre entreprise ne soient pas convergeants. Le marché des motoneiges et autres véhicules récréatifs est un marché mature, et BRP estime que l'engagement des concessionnaires envers la marque Ski-Doo est un facteur clé de son succès. BRP considère que l'ouverture récente d'un concessionnaire de motoneiges Yamaha par l'entremise d'une corporation que vous détenez à 100% comme une démonstration claire du manque d'engagement de Christian Motosports Inc. et de vous personnellement envers la marque Ski-Doo et BRP.
>
> [...]
>
> Soyez assuré que, pour les saisons de ventes 2005 Ski-Doo et VTT, BRP vous offrira les mêmes conditions celles offertes à tous les concessionnaires, et que vous ne serez en rien désavantagé.
>
> [...]

> Une fois les années modèles en cours finies, BRP pourrait vous soumettre des offres d'achat pour vos inventaires, bien qu'aucune obligation en ce sens ne lie BRP. Si vous désirez que de telles offres vous soient faites, vous devrez nous transmettre les listes d'inventaire suivantes:
>
> [...]
>
> Suite à la réception de la documentation ci-haut décrite, BRP vous communiquera, s'il y a lieu, l'offre de rachat applicable.
>
> En conclusion, nous désirons vous faire part de notre disponibilité pour toute discussion. Nous souhaitons que cette dernière année ensemble se passe le mieux possible et nous sommes prêts à considérer tout aménagement que vous estimeriez souhaitable. [...]
>
> Avec nos salutations respectueuses,
>
> René Quenneville
> Directeur,
> Support réseau et développement des concessionnaires
>
> [je souligne]

[16] Deux mois s'écoulent ensuite avant que CMS prenne contact avec un représentant de Bombardier. Le 11 août 2004, Christian Goulet et son père rencontrent Pierre Lauzon pour tenter de remédier à la situation et éviter que leur relation d'affaires avec Bombardier se termine. La possibilité que le père de Christian Goulet se porte acquéreur des actions de CMS Extrême inc. est alors évoquée. Gérard Goulet veut cependant mesurer les impacts financiers et fiscaux d'un tel scénario avant d'aller de l'avant car il est loin d'avoir l'assurance que celui-ci satisfera Bombardier. Voici comment il témoigne à ce sujet :

> Q- O.K. Je comprends que, suite à ça, vous dites vous avez rencontré monsieur Lauzon...
>
> R- Oui.
>
> Q- ... puis c'est ce que... et vous dites que monsieur Lauzon a suggéré quoi, là, pour régler le problème, là?
>
> R- Bien, c'est parce qu'il fallait séparer les commerces, il fallait absolument se... mettre le... il nous avait dit, tout simplement : "Mets ça au nom de ton père", ça fait que...
>
> Q- O.K.

R- ... son père, c'est moi.

Q- O.K. Puis vous, son père, vous avez répondu quoi à ça?

R- Bien, j'ai dit : "Il y a des possibilités, c'est sûr". Seulement que, sur le coup, là, je me souviens, j'y avais dit : "Écoute un peu, il y a des implications financières, il y a des... il va falloir faire une étude là-dessus, puis tout ça." Et puis... mais seulement, j'ai dit : "Ça, c'est une affaire qui peut se faire". Je voyais pas de problèmes trop, trop, là.

Q- O.K. Ça fait que vous, par rapport à cette lettre-là ou par rapport à la possibilité d'arrêter la concession, cette rencontre-là, ça vous disait quoi, là? Ça vous mettait dans quel...

R- Bien, moi, étant donné que... je répète que j'étais le bâilleur de fonds, j'ai... à un moment donné, après la visite de monsieur Lauzon, on s'est posé des questions là-dessus, puis il fallait faire une étude au niveau financier, comment c'était pour... comment on pouvait partager ça pour satisfaire pleinement Bombardier.

Et puis ça prenait... je voulais qu'on fasse en même temps une étude, regarder pour une étude fiscale parce que je suis impliqué. Ça fait que... mais la question que je me suis posée, quand on a avancé un peu dans le temps, je me suis dit : si on fait tout ça, est-ce que Christian ou Christian Moto Sport va conserver son... sa franchise? Ça fait que...

Q- Êtes-vous...

R- ... ça, c'est une réponse que je peux pas donner. Est-ce qu'il va... t'sais, on fait tout ça, là, puis, à un moment donné, bien, ils enlèvent la franchise pareil, selon ces lettres-là. Ça fait que c'est là-dessus que, à un moment donné, j'ai dit : "il faut rencontrer les gens de Bombardier."

[17] Il faut retenir de cette réunion du 11 août 2004 qu'une piste de solution, certes, a été avancée, mais aucun accord ayant pour effet de mettre de côté l'avis de non-renouvellement daté du 18 juin 2004 n'est intervenu entre les parties. Le délai prévu à cet avis continue donc à courir et CMS exploite pendant cette période deux concessions, l'une à Victoriaville et l'autre à Drummondville, en contravention de sa convention de concessionnaire avec Bombardier.

[18] Le 13 octobre suivant, soit deux mois après la rencontre du 11 août 2004, Christian Goulet répond officiellement à l'avis de non-renouvellement. Voici ce qu'il écrit à Claude Joncas :

En réponse à votre lettre du 18 juin 2004.

Cher Monsieur,

Bien que je ne sois pas d'accord avec le contenu de votre lettre du 18 juin 2004, une rencontre a eu lieu le 11 août 2004 à mon bureau avec M. Pierre Lauzon et M. Gérard Goulet concernant Christian Moto Sport.

Depuis l'obtention de la concession Bombardier et sur incitation de vos représentants des investissements considérables et très onéreux ont été faits dans le but de promouvoir les produits Bombardier. La concession a respecté toutes les exigences de Bombardier tel que le contrat stipule.

Cependant il a été convenu à la réunion que Christian Moto Sport regarderait la possibilité d'enlever les irritants que vous soulignez, mais qui sont de toute évidence erronés.

Toutefois, il serait extrêmement important de la part de "BRP" d'éliminer également les irritants qui nous harcèlent et qui vous ont été soumis à plusieurs reprises soit par courrier ou verbalement (vente souterraine des produits Bombardier par des commerçants non autorisés et qui nous cause un tort immense).

Cordialement

Christian Goulet
Christian Moto Sport inc.

[je souligne]

[19] Il faut comprendre de cette réponse de CMS à l'avis de non-renouvellement que cette dernière conteste toujours les prétentions de Bombardier quant à la portée de la clause de non-concurrence contenue à la convention de concessionnaire. C'est le sens à donner aux premier et troisième paragraphes de cette lettre. Quant aux irritants mentionnés au dernier paragraphe, il s'agit de doléances de CMS à l'endroit de Bombardier à propos d'un concessionnaire (JGR Sport) à Plessisville qui lui ferait du tort en vendant illégalement des motoneiges neuves de marque Bombardier.

[20] Cette dernière problématique est d'ailleurs rappelée deux semaines plus tard par Christian Goulet à Pierre Lauzon lors de l'envoi du courriel suivant daté du 1er novembre 2004 :

Bonjour Pierre,

Je voudrais régler une situation difficile pour CMS et BRP.

Comme je vous l'ai mentionné il y a eu 6 Mach Z 2005 de commandés chez BRP et nous en avons vendu 4. Donc il ne devrait pas y avoir aucun problème à

> fournir ces motoneiges au clients mais je constate que BRP nous a réservé seulement 2 Mach Z 2005. Je crois que ces clients ont droit de recevoir leurs produits tels que convenu. De plus je trouve anormal qu'il y a des Mach Z chez plusieurs concessionnaires et même le revendeur JGR Sport de Plessisville en a de disponible à la vente et que nous ne pouvons en avoir. J'aimerais préciser que vous devez régler le problème avec ce revendeur (JGR Sport) qui nous cause un tord immense depuis plus de 8 ans dans nos ventes et notre service. Vous avez été informé de cette situation depuis 1996 par nous et par d'autres concessionnaires. Nous vous avons fournis des Photos de déchargement de motoneige neuves, des photos de l'exposition des pièces Bombardier et vêtements Bombardier de sa salle de montre, le nom de plusieurs clients, des numéros de série des véhicules vendu par JGR et le dossier n'est toujours pas réglé. Je crois que vous prenez ce dossier à la légère alors que vous ne faites rien pour nous conserver comme concessionnaire BRP et que vous voulez tout simplement vous débarrassé de ce problème en nous enlevant la concession sans aucunes raisons. Tel que je vous l'ai dit au téléphone ce 1 Novembre 2004 et dans ma lettre du 13 Octobre 2004, je suis prêt à enlever les irritants que vous soulignez (mais qui sont erronés) aussitôt que vous nous démontrez que vous allez prendre les moyen nécessaires pour arrêter les irritants qui nous harcèles depuis plus de 8 ans.
>
> Christian Goulet
>
> [je souligne et retranscris tel quel]

[21] Il ressort de la fin de ce courriel que c'est donnant, donnant. CMS, qui n'est toujours pas d'accord avec les prétentions de Bombardier, accepte de « rentrer dans les rangs »[2] seulement si Bombardier, de son côté, agit pour faire cesser les ventes illégales de JGR Sport à Plessisville.

[22] Une autre période de trois mois s'écoule donc pendant laquelle Christian Goulet opère ses deux concessions à Victoriaville et à Drummondville et ne fait rien pour se départir de ses actions dans celle située à ce dernier endroit :

> Q- Oui. Qu'est-ce que vous avez fait concrètement?
>
> R- Jusqu'à la rencontre... jusqu'à la rencontre de René Quenneville, de octobre à février, je vais vous dire, regardez, on reçoit nos machines, c'est quand même des volumes importants. Il faut livrer les machines aux clients. On est dans... on a la broue dans le toupet. L'autre commerce, c'est la même affaire les deux (2) places, on a la broue dans le toupet. J'ai pas rien fait avant de demander la rencontre début janvier, autrement

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[2] Expression utilisée par le juge de première instance. Voir *supra*, note 1, paragr. 143 et 156.

dit octobre, t'sais, tout de suite octobre, treize (13) octobre, à novembre-décembre.

Q- Je vous ai demandé...

R- Puis c'est le temps des Fêtes.

[...]

Q- ... entre octobre puis février deux mille cinq (2005), qu'est-ce que vous avez fait? Vous m'avez dit : "Rien, j'avais des bookings...

R- Non...

Q- ...j'ai reçu des machines, j'ai..."

R- Moi, personnellement, j'ai rien fait parce que c'était mon père...

Q- O.K.

R- ... qui pouvait mettre ça à son nom. Moi, j'ai pas de pouvoir décisionnel sur mon père.

Q- Laissez-moi reformuler ma question. Votre père a fait quoi, entre octobre deux mille quatre (2004) et janvier deux mille cinq (2005), pour acheter CMS Drummondville?

R- Sur mon bord à moi, j'ai pas eu d'informations parce que c'était point de vue fiscal qu'il regardait. Moi, je...il a plusieurs compagnies, mon père. Ça fait qu'il me donnait pas les informations de ses compagnies puis ces choses-là.

Q- Alors...

R- La seule démarche qu'il y a eu, c'est qu'au mois de janvier, on a demandé une rencontre avec monsieur Quenneville.

[23] Comme question de fait, une réunion se tient ensuite à Sherbrooke le 28 janvier 2005. Sont présents : Christian Goulet, Gérard Goulet et René Quenneville, la personne en autorité chez Bombardier qui a signé l'avis de non-renouvellement daté du 18 juin 2004.

[24] Plusieurs sujets de discussion sont abordés lors de cette rencontre. En premier lieu, René Quenneville écarte, comme piste de solution, le scénario suivant lequel Gérard Goulet se porte acquéreur des actions de CMS Extrême inc. La haute direction de Bombardier considère que le père ne serait qu'une façade. De plus, ce dernier est

également actionnaire à 20 % de CMS. Aussi, même s'il se portait acquéreur des actions de CMS Extrême inc., CMS se trouverait néanmoins à promouvoir la vente de produits concurrents au sens de la clause de non-concurrence contenue à la convention de concessionnaire.

[25] Le second sujet de discussion abordé porte sur le délai additionnel que René Quenneville aurait accordé à CMS pour procéder à la vente du commerce de Drummondville à un tiers non relié à CMS. La preuve, ici, est nettement contradictoire. J'y reviendrai lors de mon analyse. Retenons à ce stade-ci, que selon Christian et Gérard Goulet, René Quenneville leur aurait accordé, lors de cette rencontre du 28 janvier 2005, un délai additionnel d'un an ou encore, jusqu'au 1er décembre 2005. Selon Quenneville, CMS devait plutôt trouver un acheteur indépendant avant le 31 mars 2005 et ce n'est que dans cette éventualité que CMS aurait alors jusqu'au 31 décembre 2005 pour finaliser la vente. Voici ce que rapportent les participants à cette rencontre. Prenons tout d'abord le témoignage de Christian Goulet :

> Q- Et c'était pour quoi, le but de la rencontre avec monsieur Quenneville? Qu'est-ce que vous lui aviez présenté, à monsieur Quenneville, à ce moment-là?
>
> R- Bien, le but de la rencontre, justement, c'était encore de transférer les actions à mon père, mais, là, ça a été tout de suite : "Non, non, non, il n'en est pas question, tu peux pas mettre ça au nom de ton père, au nom de ta sœur, au nom de quelque famille que ce soit." Ça fait que, là, c'est sûr que ça changeait un petit peu nos choses.
>
> Mais, là, on disait qu'on avait la fameuse lettre qui disait que ça finissait le trente et un (31) mars, que, là, vendre un commerce ou ces choses-là, ça se faisait pas, là, je veux dire, en si peu de temps. Ça fait qu'on avait négocié un temps, on a demandé : "On peux-tu avoir un (1) an?" Il y avait pas de problème pour avoir un (1) an.

[26] Le témoignage de Gérard Goulet, à quelques nuances près, est au même effet :

> Ça fait que c'est là que monsieur Quenneville, bien, ça m'a frappé un peu, là il dit : "Non, vous pourrez pas mettre ça à votre nom, parce que – il dit – c'est la même..." Il parlait que c'était la même union, mon fils puis moi, là. Ça fait qu'il dit : "Il faut que ça soit..." Là, il dit : "Il faut que ça soit séparé avec des personnes complètement étrangères ou bien donc, ça fonctionne pas."
>
> Ça fait que là, bien, quand on a vu ça, j'ai dit : "Écoute un peu, là, c'est... ça me donne pas grand temps". Ça fait que moi, je sais bien que c'est moi qui ai posé la question, j'ai dit : "Est-ce qu'on peut avoir un délai pour..." Il avait été question, j'ai dit : "Il faudrait avoir au moins un délai, si on veut vendre la compagnie ou si on veut la réorganiser, tout ça". J'ai dit : "Ça peut pas se faire

dans deux-trois (2-3) jours." Puis lui, il nous avait dit : "Bien – il dit – vous avez deux (2) mois."

Puis seulement que quand on a parlé d'avoir un délai, aller au premier (1er) décembre suivant, il nous a dit... il était d'accord avec ça. Il dit : "Moi – il dit – je vais le soumettre", puis tout ça. Mais seulement que, lui, il était d'accord avec ça. Ça fait qu'on a dit : "On va prendre les dispositions nécessaires puis..." Parce que ça prenait... vendre une compagnie, là, qui avait déjà un million (1000 000) d'investi dedans, ça se fait pas du jour au lendemain puis dans deux (2) mois, ca là, là, il fallait quand même avoir les ressources pour... parce... mais ça se serait fait dans l'espace de sept-huit (7-8) mois, dix (10) mois. C'est pour ça qu'on avait demandé jusqu'au premier (1er) décembre.

[...]

[27] Quant à René Quenneville, sa version des faits est la suivante :

R- Oui, oui. Pour se mettre dans le contexte de la discussion, on parlait que, potentiellement, des employés pouvaient prendre la direction des commerces. Parce que des employés avaient eu vent de ce qui arrivait au niveau contractuel et qu'il y avait des inquiétudes auprès des employés que certains employés étaient intéressés potentiellement, s'ils avaient la capitalisation nécessaire, à prendre possession d'un (1) des deux (2) commerces. Et... ça a fait partie des discussions où on disait : "À ce moment-là, donnons-nous le temps d'arriver avec des offres sérieuses et dans un échéancier rapide. Par contre, le transfert, on est prêt à étendre plus loin la notion de transfert." Le transfert complet des actifs pour, justement, donner de l'air à l'organisation de CMS à faire un transfert adéquat.

Q- Je n'ai pas tout à fait saisi votre... l'exercice. J'essaie de... et c'est peut-être moi, là, qui ai pas compris, mais je vais juste revenir de façon un petit peu plus précise. Je comprends que ce que vous nous dites, effectivement, vous vous souvenez que monsieur Goulet père et fils vous aient demandé, compte tenu que, là, on voulait que ce soit complètement des tiers, de pouvoir le faire jusqu'à la fin de l'année.

R- Um-hum.

Q- Ça, on est d'accord?

R- O.K.

Q- D'accord. Est-ce que... Et je comprends que la fin de la rencontre, vous l'avez bien dit, ça s'est bien fini. Les gens n'étaient pas... n'étaient pas fâchés, là, puis ça s'est bien fini, c'est bien ça?

R- Il y avait pas d'animosité puis on était pas fâchés, le ton était pas mauvais.

Q- Il était correct. Bon. Donc, leur demande de pouvoir le faire au moins jusqu'à la fin de l'année, n'est-il pas exact que vous n'avez pas refusé ça à ce moment-là, que vous étiez d'accord à ce qu'il y ait... qu'ils puissent au moins avoir jusqu'à la fin de l'année pour trouver un acheteur, pour vendre la concession, être totalement indépendant, la concession de Drummondville? Que, au moment de la rencontre, c'est comme ça que ça s'est terminé?

R- Non, je pourrais pas dire ça.

Q- D'accord.

[28] Dans les jours qui suivent la rencontre du 28 janvier 2005, le 2 février plus précisément, René Quenneville écrit à Christian Goulet. Il lui mentionne tout d'abord que Bombardier maintient son avis de non-renouvellement en raison des intérêts qu'il détient dans la concession Yamaha de Drummondville. Il lui propose cependant un plan d'action qui pourrait permettre à CMS de se qualifier de nouveau comme concessionnaire Bombardier. Ce plan, pour l'essentiel, oblige Christian Goulet à vendre son commerce de Drummondville à un tiers indépendant avant le 31 mars 2005 et lui donne « jusqu'au 31 décembre 2005 pour transférer complètement les actifs et les opérations de ce commerce ». Enfin, Quenneville promet que Bombardier enquêtera sur les activités de JGR à Plessisville et prendra les actions nécessaires, le cas échéant, pour mettre fin aux pratiques illégales de ce commerçant.

[29] À la suite de la réception de cette lettre, Christian Goulet consulte un avocat. C'est par l'entremise de ce dernier que CMS, le 7 mars 2005, fait connaître à Bombardier sa position relativement au plan d'action proposé par cette dernière. Une contre-proposition comportant plusieurs points est soumise, dont un qui porte sur le délai pour vendre la concession de Drummondville ou celle de Victoriaville. Cette lettre, qui prend la forme d'une mise en demeure adressée à René Quenneville, débute en ces termes :

> Monsieur,
>
> Nous sommes les procureurs de CHRISTIAN MOTO SPORT INC. et MONSIEUR CHRISTIAN GOULET, lesquels nous ont mandaté de vous transmettre la présente lettre.

> Le 2 février 2005, vous écriviez à monsieur Christian Goulet afin de l'informer que Bombardier Produits Récréatifs Inc. (ci-après BRP) maintenait sa décision de ne pas renouveler le contrat de concessionnaire de Christian Moto Sport Inc. Par cette lettre, vous mettiez un terme aux négociations entreprises depuis l'avis de non renouvellement du 18 juin 2004. BRP reproche à monsieur Christian Goulet l'ouverture et l'opération d'un concessionnaire de motoneiges Yamaha à Drummondville.
>
> Suivant l'avis de non renouvellement de BRP, sa relation d'affaire avec Christian Moto Sport Inc. se terminera le 31 mars 2005 pour les motoneiges et le 31 mai 2005 pour les VTT. Vous proposez un plan d'action en cinq (5) points qui pourrait permettre à [Christian Moto Sport Inc.] de se qualifier à nouveau comme concessionnaire des produits Ski-Doo et Bombardier VTT.
>
> Premièrement, il va de soi que nos clients ne désirent pas s'engager dans quelque plan d'action sans un engagement clair de BRP à signer une nouvelle entente de concessionnaire Ski-Doo et VTT avec Christian Moto Sport Inc. En effet, vous comprendrez que monsieur Christian Goulet ne peut se départir de la concession Yamaha de Drummondville sans l'engagement préalable de BRP pour les concessions de Christian Moto Sport Inc. à Victoriaville.
>
> Nos clients sont en total désaccord avec votre interprétation du contrat de concession quant à leurs droits d'opérer la concession d'un compétiteur sur un autre territoire que celui visé par le contrat. Cependant, nos clients sont disposés à satisfaire BRP en vendant l'une ou l'autre des deux (2) concessions (Bombardier à Victoriaville ou Yamaha à Drummondville).
>
> Il est utopique de croire que la vente d'un tel commerce peut se concrétiser en moins de soixante (60) jours. Le terme du 31 mars que vous proposez est irréaliste. Nos clients estiment qu'un délai minimal de douze (12) mois, soit jusqu'au 31 mars 2006, est nécessaire pour vendre un ou l'autre des deux (2) commerces. De plus, considérant les coûts importants reliés à l'acquisition de ce type de commerce, BRP doit accepter que monsieur Christian Goulet puisse demeurer, le cas échéant, créancier en solde du prix de vente de l'acquéreur éventuel et cela au-delà du 31 décembre 2006.
>
> [...]
>
> [je souligne]

[30] Une rencontre ultime se tient entre Christian Goulet et Claude Joncas la veille de l'échéance fixée à l'avis de renouvellement, mais Bombardier maintient la position qu'elle a prise neuf mois auparavant. Christian Goulet doit donc se résoudre à fermer CMS vers la mi-avril 2005.

[31] Le 17 mai suivant, Bombardier soumet à CMS une proposition de rachat d'inventaire plus généreuse que celle prévue à sa convention de concessionnaire. Comme Bombardier exige de CMS une quittance, cette dernière refuse, le 3 juin 2005, de se prévaloir de cette offre. CMS liquidera donc elle-même son inventaire.

[32] C'est sur la base de cette trame factuelle, que je compléterai lors de mon analyse de la preuve, que le juge de première instance a conclu que Bombardier a abusé de son droit de ne pas renouveler la convention de concessionnaire la liant à CMS. Ses motifs sont les suivants.

Le jugement de première instance

[33] Parlant de la convention de concessionnaire, le juge de première instance se dit tout d'abord « convaincu qu'il s'agit d'une illustration évidente de ce qu'est un contrat d'adhésion[3]. Il discute ensuite de l'avis de non-renouvellement du 18 juin 2004 et se dit d'avis que les manquements de CMS qui y sont dénoncés « sont sérieux et justifiés »[4].

[34] Malgré cette première conclusion, le juge poursuit son analyse après avoir constaté qu'il y a continuation des relations entre les parties après l'envoi de l'avis de non-renouvellement. C'est d'ailleurs sur la base de ces relations qu'il conclut que Bombardier a abusé de ses droits. Il formule alors plusieurs reproches à l'endroit de cette dernière, le premier étant l'incohérence du canal de communication résultant de l'intervention de plusieurs représentants de Bombardier lors des discussions qui suivent l'avis de non-renouvellement :

> [142] Dans toutes ces démarches, nous ne retrouvons pas le même intervenant. Dans cette course, comment ne pas échapper le témoin et ne pas y voir de quiproquo dans ces échanges? À ce chapitre, la demanderesse n'a pas à en subir les conséquences.

[35] Le juge reproche également à Bombardier de ne pas avoir laissé une seconde chance à CMS après que cette dernière eut avoué sa faute et manifesté sa volonté de remédier à son défaut. Voici comment il s'exprime à ce sujet :

> [143] À partir du moment où CMS met le genou à terre et signifie son intention de rentrer dans les rangs, BRP se devait de ramener son délinquant à la maison. Pour reprendre ce que Raynald Fréchette disait dans la décision Kubota, CMS était une entreprise crédible et sérieuse, elle jouissait d'une bonne réputation. Depuis le début de ses relations d'affaires avec BRP, elle progressait dans ses ventes et son chiffre d'affaires. Elle prenait de l'expansion et se montrait ambitieuse et opiniâtre, sans doute trop au goût de BRP.

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3 *Supra*, note 1, paragr. 115.
4 *Ibid.*, paragr. 127 et 128.

> [144] Elle ne déméritait pas, ayant à son bénéfice des tableaux de reconnaissance par BRP sur différents trophées et certificats qu'elle ramassait au fil des ans et une bague de reconnaissance que monsieur Goulet porte encore curieusement aujourd'hui avec fierté.
>
> [145] Lorsque l'on a de semblables états de service, le tribunal considère que l'on a droit à une certaine considération lorsqu'on avoue notre faute. À partir du moment où CMS signifiait sa volonté de cesser son défaut, elle avait droit à une seconde chance en raison de son application passée dans ses relations d'affaires. Et d'ailleurs, ce n'est pas autrement que BRP comprenait la démarche puisqu'elle a continué d'entretenir des relations d'affaires et un canal de communication pour en discuter avec elle.

[36] De même, alors que Bombardier, selon le juge, manifeste de la tolérance à l'égard de ses autres concessionnaires qui vendent des produits concurrents, il a de la difficulté à comprendre qu'elle se montre intraitable envers CMS, ce qu'il qualifie d'incohérence dans la rigueur[5].

[37] Le juge est aussi d'avis que Bombardier a abusé de ses droits en raison du délai trop court accordé à CMS pour se départir de son commerce à Drummondville. En acceptant de négocier avec CMS, le juge croit en effet que Bombardier a renoncé au délai accordé dans l'avis de non-renouvellement (31 mars 2005 pour les motoneiges et le 31 mai pour les VTT), un nouveau délai ayant commencé à courir à partir du moment où CMS avoue sa faute et manifeste sa volonté de rentrer dans les rangs :

> [153] À partir de la réunion de janvier 2005 et du courriel du 3 février 2005, on comprend que le non-renouvellement ne sera pas invoqué si CMS se départit de ses intérêts dans le délai imparti, soit deux mois, pour vendre la totalité de ses actions. Or, CMS a deux mois pour vendre ses actions et il y a, selon la preuve, un investissement de tout près de deux millions, un bail signé, de l'inventaire, des employés et du matériel roulant. Il faut donc mettre en œuvre une machine lourde et onéreuse soit la vente des actions. Il s'agit donc de mettre en œuvre toutes les opérations comptables et financières auprès des différents banquiers et intervenants.
>
> [154] Pour BRP, cela peut sembler être du gâteau, mais pour une petite PME, ce n'est pas une mince tâche. Le tribunal est convaincu que le délai accordé dans une conjoncture de réalisation, dans le contexte économique et juridique qui prévaut est totalement déraisonnable.
>
> [155] D'ailleurs, la lettre du procureur du 7 mars est encore une fois une manifestation éloquente et sérieuse que le concessionnaire cherchait à rentrer

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5 *Supra*, note 1, paragr. 146 à 152.

> dans les rangs et voulait démontrer tous les efforts requis. La seule contrainte était le temps, deux mois étaient un délai manifestement trop court.
>
> [156] Évidemment, BRP prétend que ce délai court depuis 2003 et que CMS a trop tardé pour réagir. Le tribunal considère que le seul délai qui commence à courir est à partir du moment où CMS avoue sa faute, manifeste sa volonté de rentrer dans les rangs et négocie avec BRP. C'est cette base de négociation qui est considérée par le présent tribunal comme trop court.

[38] Enfin, le juge considère que la clause de rachat d'inventaire à la seule discrétion de Bombardier est abusive. Selon le juge, un concessionnaire qui voit son contrat de concession non renouvelé est en droit de s'attendre à ce que son inventaire soit repris. Étant en présence d'un contrat d'adhésion, il déclare donc nulle, en vertu de l'article 1437 *C.c.Q.*, la clause 22.2 de la convention intervenue entre les parties[6].

[39] C'est en raison de l'ensemble de ces circonstances que le juge de première instance qualifie d'abusive la conduite de Bombardier faisant suite à l'envoi de l'avis de non-renouvellement même si, à ses yeux, il n'y a pas eu de malice ou de mauvaise foi de la part de Bombardier[7]. Après avoir évalué les dommages subis par CMS à 526 054,68 $, il condamne donc Bombardier à payer ce plein montant à CMS ainsi que les frais de l'expert de cette dernière même si celui-ci n'a pas témoigné devant le tribunal, lesquels frais totalisent la somme de 75 164,89 $.

La question en litige

[40] La seule véritable question en litige consiste à déterminer si Bombardier a agi de manière abusive dans l'exercice de son droit de ne pas renouveler la convention de concessionnaire de CMS. Les faits étant très largement tributaires de la réponse à donner à cette question, j'examinerai tour à tour si les inférences que le juge de première instance a tirées de ceux-ci sont fondées tout en étant pleinement conscient que seule une erreur manifeste et dominante peut m'autoriser à intervenir pour modifier sa conclusion que Bombardier a abusé de son droit[8].

Le droit

[41] Ce n'est pas parce qu'une partie contractante est titulaire d'un droit qu'elle peut en user de manière abusive[9]. Ce principe, qui a déjà donné lieu à un certain flottement en doctrine et en jurisprudence, est maintenant codifié aux articles 7 et 1375 du *Code civil du Québec* qui sont ainsi libellés :

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6 *Supra*, note 1, paragr. 157 à 171 et 209.
7 *Ibid.*, paragr. 169.
8 *Housen* c. *Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33, paragr. 1.
9 Jean-Louis Baudouin et Pierre-Gabriel Jobin, *Les Obligations*, 6e éd., Pierre-Gabriel Jobin avec la collaboration de Nathalie Vézina, Cowansville, Éditions Yvon Blais, 2005, p. 173.

> Art. 7. Aucun droit ne peut être exercé en vue de nuire à autrui ou d'une manière excessive et déraisonnable, allant ainsi à l'encontre des exigences de la bonne foi.
>
> Art. 1375. La bonne foi doit gouverner la conduite des parties, tant au moment de la naissance de l'obligation qu'à celui de son exécution ou de son extinction.

[42] Quant à la norme de conduite que ce principe juridique impose aux parties contractantes, il est reconnu que le critère de la malice ou de la mauvaise foi « s'est élargi pour inclure maintenant le critère de l'exercice raisonnable d'un droit »[10]. Constitue donc un abus de droit « tout exercice négligent, de même que tout usage d'un droit qui est déraisonnable, c'est-à-dire incompatible avec la conduite d'un individu prudent et diligent »[11].

[43] Ce principe, appliqué au droit conventionnel du constructeur de ne pas renouveler le contrat de concession à son échéance sans invoquer de raison à l'appui de sa décision, ne saurait cependant être interprété comme conférant au concessionnaire un droit au renouvellement de son contrat à perpétuité. C'est là une première balise posée par l'arrêt *BMW Canada inc.* c. *Automobilles Jalbert inc.*[12] :

> [142] Quant à l'obligation d'agir de bonne foi et équitablement, celle-ci ne saurait changer les termes du contrat liant les parties et créer une obligation de renouvellement, pour l'éternité, alors que le contrat comporte un terme et est totalement muet quant à un éventuel renouvellement
>
> [...]
>
> [146] La décision du constructeur de ne pas renouveler le contrat de concession, sans invoquer de raison à l'appui de sa décision, ne va pas nécessairement contre le devoir de ce dernier d'agir de bonne foi et de façon équitable. Cette obligation implicite d'agir de bonne foi et de façon équitable ne peut pas, et ne doit pas, avoir pour effet de rendre caduques les règles contractuelles. Le principe de la bonne foi est plutôt pertinent à la longueur du délai et joue même, selon les circonstances, contre une résiliation intempestive du contrat.

[44] S'agissant de plus, comme c'est souvent le cas, d'un pouvoir discrétionnaire, il faut aussi garder à l'esprit que l'abus ne peut résulter du seul exercice de ce droit. Par

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10 *Houle* c. *Banque Canadienne Nationale*, [1990] 3 R.C.S. 122, p. 164.
11 Jean-Louis Baudouin et Pierre-Gabriel Jobin, *supra*, note 9, p. 175.
12 2006 QCCA 1068.

souci d'assurer la stabilité dans les contrats, la partie qui plaide que l'autre a abusé de son droit devra donc apporter des motifs convaincants à ses prétentions[13].

[45] Avant d'appliquer ces principes aux faits de l'espèce, il importe de citer en dernier lieu les dispositions pertinentes de la convention de concessionnaire intervenue entre les parties, laquelle vient à échéance, pour les motoneiges le 31 mars 2005 et pour les VTT, le 31 mai de la même année.

La convention de concessionnaire

[46] Les clauses pertinentes de cette convention sont les suivantes :

> Clause 3.1 :
>
> La présente convention (...) prendra effet à compter de sa signature par Bombardier (la « Date d'entrée en vigueur ») et demeurera en vigueur, pour chaque Ligne de Produits, jusqu'à la fin de la Saison de vente concernée, tel que définie à (aux) l'Annexe(s) B, ou jusqu'à la fin du Renouvellement pertinent (tel que défini à l'article 3.3), pour chaque Ligne de Produits couverte par cette convention, sauf en cas de terminaison conformément à l'article 20 des présentes (« Terme »).
>
> Clause 3.5 :
>
> Si non renouvelée, cette convention expirera à la fin des Termes respectifs pour chaque Ligne de Produits concernée et n'aura plus cours ni effet sans avis d'une ou l'autre des parties.
>
> Clause 20.1 :
>
> La partie qui décide de terminer ou de ne pas renouveler cette convention peut, à son choix, le faire pour une ou toutes les Lignes de Produits couvertes par cette convention.
>
> Clause 20.8 :
>
> Si Bombardier décide, à sa seule discrétion, de ne pas renouveler cette convention pour n'importe laquelle ou toutes les Lignes de Produits au-delà du Terme pour chaque Ligne de Produits, Bombardier peut donner un avis au Concessionnaire que Bombardier désire ne pas renouveler la convention au-delà du Terme approprié, que le Concessionnaire soit en défaut ou non de se conformer aux présentes. Cet avis devra être donné selon l'article 31 et sera

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[13] Jean-Louis Baudouin et Pierre-Gabriel Jobin, supra, note 9, p. 176-177; par analogie, voir également l'arrêt *Ponce* c. *Montrusco & Associés inc.*, 2008 QCCA 329, paragr. 22 et 28, portant sur la faculté unilatérale de résiliation énoncée à l'article 2091 *C.c.Q.* en matière de contrat à durée indéterminée.

effectif à partir de sa réception ou de sa mise à la poste, selon ce qui arrive en premier.

Clause 20.10 :

La présente Convention deviendra, à l'expiration du Terme pour chaque Ligne de Produits, nulle et sans effet pour cette Ligne de Produits, sans obligation de donner un avis écrit par l'une ou l'autre des parties. Si cette convention est terminée, n'est pas renouvelée ou expire, le Concessionnaire accepte qu'aucune compensation ne lui est due pour son achalandage ou sa réputation. Le Concessionnaire accepte également qu'aucune compensation, remboursement ou dédommagement ne lui est dû pour perte de profits éventuels, les ventes anticipées, les comptes de dépenses, l'investissement, l'inventaire, les baux, les améliorations immobilières ou tous autres engagements relatifs aux affaires du Concessionnaire.

Clause 21.1 :

Pendant le Terme de cette convention, et pour deux (2) ans après la terminaison, le non-renouvellement ou l'expiration de cette convention (peu importe la raison et la partie ayant initié la terminaison, le non-renouvellement ou l'expiration), le Concessionnaire ne pourra, directement ou indirectement :

21.1.1 Promouvoir ou participer au développement ou à la production de produits en compétition avec les Produits de Bombardier; ou (...)

Clause 22.2 :

Sur terminaison, non-renouvellement ou expiration de la présente pour une ou toutes les Lignes de Produits, Bombardier aura l'option, sans y être aucunement obligé, de racheter la totalité ou une partie des inventaires nouveaux, inutilisés et non désuets de Produits Bombardier en possession du Concessionnaire. (...)

Clause 30 :

Il est expressément entendu entre les parties que le présent document, le Manuel de Service après vente et garantie du Concessionnaire applicable et les Manuels annuels de Concessionnaire ou documentation de prise de commande pour chaque Ligne de Produits contiennent la totalité des ententes entre les parties et remplace toute convention antérieure (qu'elle ait été verbale ou écrite) et qu'aucun autre engagement, condition, convention ou garantie ne saurait avoir d'effet sauf si fait par écrit et signé par Bombardier et le Concessionnaire spécifiquement et s'il y est fait référence comme faisant partie des présentes.

Clause 31.1 :

Tout avis, requête ou demande devant être donné ou émis à l'une ou l'autre des parties devra, pour être considéré valablement donné et complet, être par écrit, signé par un dirigeant et soit :

31.1.1 livré personnellement à l'autre partie, et dans le cas d'une corporation, livré personnellement à un de ses dirigeants à quelque endroit que ce soit ou à une personne en charge à la place d'affaires de ladite corporation;

31.1.2 expédié par courrier recommandé aux adresses indiquées à la présente convention ou à toute autre adresse qu'une partie aurait pu faire parvenir ultérieurement à l'autre partie, conformément à la présente procédure, et dans un tel cas, la date de réception est établie à trois (3) jours de la date d'oblitération apparaissant sur l'enveloppe de mise à la poste.

[je souligne]

Analyse

[47] Je débuterai mon analyse en rappelant que CMS sait depuis le mois de mai 2003, et à coup sûr depuis le 18 septembre 2003[14], que son projet d'opérer une concession Yamaha à Drummondville va à l'encontre de la politique d'exclusivité de Bombardier et peut constituer un motif de terminaison de son contrat. Il n'est pas contesté non plus que lorsque Bombardier transmet un an plus tard à CMS son avis de non-renouvellement en raison de la participation de cette dernière à la promotion des produits Yamaha, elle a des motifs sérieux de le faire, motifs avec lesquels le juge de première instance est d'accord. Voici d'ailleurs comment il s'exprime à ce sujet :

[127] Les manquements énoncés par BRP dans cette lettre sont sérieux et justifiés. Il ne fait aucun doute que BRP, qui est le chef de file en matière de distribution de motoneiges, veut s'assurer que tous les efforts consacrés au fil des ans, afin d'atteindre cette excellence et cette notoriété, soient conservés et que les principes contractuels émanant de la liberté de contracter soient respectés entre les parties. C'est sa volonté et celle-ci doit faire l'objet d'un consensus pour faire affaire avec elle.

[128] Il est évident qu'à la lecture de cette lettre et selon les intentions énoncées par CMS que BRP est justifiée d'envoyer son avis de non-renouvellement.

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[14] Voir la lettre du 18 septembre 2003 citée au paragraphe 13 des présents motifs.

[48] Il faut donc tenir pour acquis que, selon le juge de première instance, la transmission de l'avis de non-renouvellement n'est pas abusive, mais en tout point conforme à la volonté exprimée par les parties à la clause 20.8 de la convention de concessionnaire[15] qui ne souffre d'aucune ambiguïté. Il en va autrement toutefois, à son avis, avec la conduite de Bombardier postérieure à l'avis de non-renouvellement.

[49] Le juge reproche tout d'abord à Bombardier l'incohérence de son canal de communication en raison du fait que CMS a eu pour interlocuteurs différentes personnes pendant la période comprise entre le 18 juin 2004[16] et le 31 mars 2005[17]. Cette situation, de l'avis du juge, ne pouvait créer que des quiproquos[18]. Ce reproche étonne dans la mesure où nulle part dans la preuve ne retrouve-t-on de doléances de CMS à cet égard qui, au contraire, demande à Pierre Lauzon d'organiser une rencontre avec ses supérieurs[19].

[50] De plus, c'est René Quenneville qui signe l'avis de non-renouvellement du 18 juin 2004, c'est René Quenneville qui rencontre, à leur demande, Christian et Gérard Goulet et c'est encore René Quenneville qui signe la lettre du 2 février 2005 qui propose un plan d'action à CMS pour lui permettre de se qualifier de nouveau comme concessionnaire Bombardier.

[51] Enfin, que ce soit Pierre Lauzon, Claude Joncas ou encore René Quenneville, le discours de Bombardier est toujours demeuré le même depuis le mois de mai 2003. Le projet de CMS ne cadre pas avec le plan d'affaires de Bombardier et si CMS persiste, cela mènera à la terminaison de la relation contractuelle entre les parties.

[52] C'est donc à tort que le juge de première instance a qualifié d'incohérent le canal de communication mis en place par Bombardier à la suite de l'envoi de l'avis de non-renouvellement.

[53] Le second reproche du juge à l'endroit de Bombardier réside dans la soi-disant inaction de cette dernière à l'égard de ses autres concessionnaires qui, comme CMS, vendent des produits concurrents et ne seraient pas traités aussi rudement[20]. Le cas de quatre concessionnaires a été porté à la connaissance du juge.

[54] Combien y a-t-il de concessionnaires Bombardier au Québec? La preuve ne permet pas de répondre à cette question. Or, ceci enlève beaucoup de poids à l'argument retenu par le juge. La réalité sera en effet tout autre selon qu'il y a, pour prendre un exemple théorique, dix ou cent concessionnaires Bombardier au Québec.

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15 *Supra*, paragr. 46 des présents motifs.
16 Date de l'avis de non-renouvellement.
17 Date de terminaison de la convention de concessionnaire pour les motoneiges.
18 *Supra*, note 1, paragr. 142.
19 Voir, à titre d'exemple, l'extrait du témoignage de Christian Goulet cité au paragraphe 22 des présents motifs.
20 *Supra*, note 1, paragr. 146 à 152.

Bref, chaque cas étant un cas d'espèce devant être évalué à son mérite, je ne vois pas comment le juge, sur la base d'une preuve aussi fragmentaire, pouvait tirer comme conclusion que Bombardier s'est montrée intraitable à l'endroit de CMS et « lénifiante » vis-à-vis les autres.

[55] Plus encore, le juge a ignoré une partie importante de la preuve, soit le témoignage de Claude Joncas[21] qui, pièces à l'appui[22], démontre méthodiquement les mesures prises par Bombardier pour faire cesser les pratiques illégales de ces quatre concessionnaires dès qu'elle en a été informée. La preuve révèle donc plutôt que la conduite de Bombardier est constante. À toutes les fois qu'elle est avisée qu'un concessionnaire vend des produits concurrents, elle prend des mesures pour faire cesser cette pratique.

[56] Le troisième reproche du juge à l'endroit de Bombardier apparaît aux paragraphes 143 et 145 de son jugement[23] lorsqu'il conclut que cette dernière devait donner une seconde chance à CMS parce qu'elle a avoué sa faute et manifesté sa volonté de « rentrer dans les rangs ».

[57] Je répondrai de deux manières à cette conclusion du juge de première instance.

[58] Tout d'abord, sur le plan des faits, CMS n'a jamais démontré à Bombardier qu'elle souhaitait « rentrer dans les rangs ». Au contraire, CMS conteste les prétentions de Bombardier. De plus, ce n'est que si cette dernière accepte d'agir pour faire cesser les ventes illégales de JGR Sport à Plessisville qu'elle se dit prête à enlever les irritants soulevés par Bombardier dans l'avis de non-renouvellement[24].

[59] CMS n'a jamais non plus présenté à Bombardier un projet concret de se départir de sa concession de Drummondville. Certes, les avocats de CMS transmettent bel et bien, le 7 mars 2005, une lettre à Bombardier dans laquelle ils évoquent la possibilité de vendre soit la concession de Victoriaville ou celle de Drummondville, mais il ne reste que quelques jours à la relation contractuelle et CMS n'a toujours pas de plan concret pour régler le différend.

[60] En second lieu, même si l'on devait accepter la proposition erronée du juge de première instance selon laquelle CMS a accepté de « rentrer dans les rangs », ceci ne change rien à l'affaire. Je m'explique.

[61] L'avis du 18 juin 2004 transmis par Bombardier à CMS est un avis de non-renouvellement qui découle de l'article 20.8 du contrat de concession et par lequel Bombardier avise CMS, non pas de remédier au défaut, mais que son contrat prendra

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21 Mémoire de l'appelante, vol. XX, p. 6417 à 6440.

22 D-49 en liasse, D-50 en liasse, D-51 en liasse.

23 *Supra*, paragr. 35 des présents motifs.

24 Voir la lettre du 13 octobre 2004 et le courriel du 1er novembre 2004 cités aux paragraphes 18 et 20 des présents motifs.

fin à l'expiration de son terme. Puisque aucune justification n'est nécessaire pour la transmission d'un avis de non-renouvellement, la disparition des motifs d'affaires pour lesquels le préavis est transmis est non pertinente et ne saurait donc entraîner l'obligation pour Bombardier de le retirer.

[62] Lorsqu'elle découvre en mai 2004 que CMS viole ses obligations contractuelles, Bombardier a en effet le choix de lui acheminer un avis de terminaison pour cause. Ce n'est pas cependant ce qu'elle fait. Elle décide plutôt de poursuivre sa relation contractuelle avec CMS jusqu'à l'arrivée de son terme tout en l'avisant qu'à l'expiration de celui-ci, la convention ne sera pas renouvelée.

[63] À la lumière de l'arrêt rendu par notre cour dans *BMW Canada inc.* c. *Automobiles Jalbert inc.*, l'obligation de Bombardier d'agir de bonne foi et de ne pas abuser de son droit devait donc se mesurer uniquement en fonction de la longueur du délai accordé à CMS, non pas pour s'amender, mais pour mitiger ses dommages[25]. Or, parlant de ce délai de neuf mois pour les motoneiges et de onze mois pour les VTT, je ne peux y voir là une terminaison intempestive du contrat de concession de CMS donnant ouverture à l'application de la théorie de l'abus de droit contractuel.

[64] Comme quatrième reproche à l'endroit de Bombardier, le juge qualifie de « totalement déraisonnable le délai accordé à CMS pour vendre la concession de Drummondville »[26]. Le juge a alors en tête un délai d'une durée de deux mois à compter de la réunion du 28 janvier 2005, faisant fi du temps écoulé depuis l'avis de non-renouvellement du 18 juin 2004.

[65] Il faut donc comprendre que le juge retient de la preuve la version de Christian et Gérard Goulet selon laquelle René Quenneville aurait consenti à CMS, lors de cette réunion, un nouveau délai d'un an, puis fait volte-face quelques jours après dans sa lettre du 2 février 2005 en venant préciser que CMS devait trouver un acheteur au plus tard le 31 mars 2005, la vente pouvant alors être finalisée jusqu'au 31 décembre 2005.

[66] La version de René Quenneville est tout autre[27], sa lettre du 2 février ne venant que confirmer la teneur des discussions abordées lors de la rencontre du 28 janvier 2005.

[67] Il va de soi que, comme juge siégeant en appel, je ne peux pas substituer simplement mon appréciation de la preuve à celle du juge de première instance. Je ne peux toutefois m'empêcher de penser que si les choses s'étaient réellement passées comme le décrivent Christian et Gérard Goulet lors de cette réunion tenue le 28 janvier et que René Quenneville était grossièrement revenu sur sa parole à peine quelques jours plus tard, c'est le premier reproche qui aurait été soulevé par les avocats de CMS

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[25] *Supra*, note 12, paragr. 146.
[26] *Supra*, note 1, paragr. 154.
[27] *Supra*, paragr. 27 des présents motifs.

dans la mise en demeure du 7 mars 2005 transmise à Bombardier[28]. Or, ceux-ci ne font que déplorer la fin des négociations.

[68] À mon avis, la preuve établit plutôt que le délai signifié à CMS, le 18 juin 2004, n'a jamais cessé de courir, la position de Bombardier ayant toujours été que la convention ne serait pas renouvelée à son échéance. Qui plus est, à supposer que les parties aient convenu d'un nouveau délai, un avis écrit à cet effet aurait dû alors être transmis en vertu des articles 30 et 31 de la convention[29], faute de quoi cette nouvelle entente serait demeurée lettre morte.

[69] Ceci nous amène au dernier reproche du juge à l'endroit de Bombardier. Ce dernier a déclaré abusive la clause 22.2 de la convention portant sur la faculté pour Bombardier de racheter l'inventaire de CMS[30]. Son raisonnement, à cet égard, souffre de plusieurs lacunes, la première étant qu'il se fonde sur ce qu'il croit être l'état du droit américain sur la question. Ceci l'amène à conclure qu'un concessionnaire devrait être en droit de s'attendre à ce que son inventaire soit repris à la fin de son contrat. Voici comment le juge s'exprime à ce sujet :

> [157] Lorsqu'on est fort et puissant, on doit faire preuve de discernement dans la réalisation de sa force. On sait que BRP, selon son contrat, n'est pas tenu de racheter son inventaire :
>
> > « Clause 22.2 :
> >
> > Sur terminaison, non-renouvellement ou expiration de la présente pour une ou toutes les Lignes de Produits, Bombardier aura l'option, sans y être aucunement obligé, de racheter la totalité ou une partie des inventaires nouveaux, inutilisés et non désuets de Produits Bombardier en possession du Concessionnaire. (...)
> >
> > [je souligne]
>
> [158] Par ailleurs, on sait également que par les témoins Harvey et Quenneville de BRP que certains États américains obligent la réalisation d'inventaire par le fabricant. Il y a de quoi s'étonner que dans le pays de la libre entreprise, de telles contraintes existent. Et que dire ici, dans une province où le Code civil règle les relations entre les parties et/ou particulièrement les articles de l'abus de droit sont énoncés.
>
> [159] Le tribunal en conclut que chez certains États de nos voisins, par voie législative, l'État légifère la reprise d'inventaire puisqu'il estime obligatoire

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28 Mise en demeure citée au paragraphe 29 des présents motifs.
29 *Supra*, paragr. 46.
30 Cette clause est citée au paragraphe 46 des présents motifs.

> d'assujettir dans un contrat de concession, l'obligation de reprendre ses inventaires, dans le but manifeste d'équilibrer un rapport de force. Ce n'est pas étonnant car autrement, on contraint un concessionnaire à vendre des produits qu'il n'est plus autorisé à vendre. Pour reprendre une expression populaire, « méchant problème ».
>
> [160] Dans le contexte social et économique qui prévaut aujourd'hui dans notre société, le tribunal n'a aucune difficulté à comprendre qu'un concessionnaire, qui voit son contrat de concession non renouvelé, est en droit de s'attendre que son inventaire soit repris.

[70] Le droit étranger (américain) n'ayant pas été allégué ni prouvé par CMS en vertu de l'article 2809 *C.c.Q.*, le juge ne pouvait tout simplement pas y référer et encore moins se fonder sur celui-ci pour conclure que la clause de rachat d'inventaire est abusive.

[71] Plus loin, le juge prend appui cette fois sur le fait que dans l'arrêt *BMW*[31], il note que le contrat de concession prévoit une clause de rachat d'inventaire au gré du concessionnaire. De l'avis du juge « Voilà une illustration de l'ordre naturel des choses en affaires et qui apparaît comme une pratique contractuelle acceptée et à laquelle un concessionnaire est en droit de s'attendre »[32].

[72] À mon avis, c'est bien peu pour conclure qu'il existe un usage commercial ayant pour effet de soumettre un constructeur ou un fabricant à l'obligation de racheter l'inventaire de son concessionnaire à la fin de son contrat.

[73] Référant de nouveau à notre arrêt dans l'affaire *BMW*, je retiens plutôt que la preuve d'un tel usage sera concluante uniquement s'il est démontré que celui-ci est « ancien, fréquent, général, public et uniforme »[33]. Comme CMS n'a pas fait cette preuve, le juge ne pouvait pas conclure que la clause de rachat d'inventaire au gré de Bombardier est abusive.

[74] Du reste, il est en preuve que, le 17 mai 2005, Bombardier a transmis à CMS une proposition quant au rachat des motoneiges, VTT et pièces que le juge qualifie de « plus que généreuse » :

> [88] Le 17 mai 2005, dans le but de terminer ce que la défenderesse appelle amicalement sa relation avec CMS, elle lui soumet une proposition de rachat d'inventaire et de VTT (pièce D-30) pour une offre qui est substantiellement plus favorable que ses politiques de reprise de service suivant ses politiques internes

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31 *Supra*, note 12.
32 *Supra*, note 1, paragr. 167.
33 *BMW Canada inc.* c. *Automobiles Jalbert inc.*, *supra*, note 12, paragr. 140.

de gestion d'inventaire et de ses propres stipulations contractuelles à l'intérieur du contrat de concession.

[89] Elle estime que bien que non tenue de racheter ces inventaires, elle souhaite le faire afin que les relations entre BRP et son concessionnaire s'achèvent sur une bonne note. Mais voilà, il y avait dans cette offre de rachat, plus que généreuse, une condition, soit que Christian Goulet, qui avait annoncé dès le mois de mars son intention de contester l'attitude de son franchiseur, signe une quittance. Ainsi, hors quittance, point de salut. Comme Christian Goulet maintenait sa position, il a donc refusé cette offre le 3 juin 2005.

[je souligne]

[75] Or, malgré cette offre « substantiellement plus favorable », le juge reproche à Bombardier d'avoir exigé une quittance :

[164] Sous l'angle de l'abus de droit et du rapport de force, on n'avait pas à utiliser la quittance comme monnaie d'échange. Il semble au tribunal que c'est justement ce type de conduite qui doit être réfrénée par un tribunal.

[76] Avec respect, cette conclusion est erronée. Non seulement il n'était pas abusif pour Bombardier d'exiger une quittance, mais étant donné qu'elle présentait à CMS une offre supérieure à ce qui est prévu à la convention, cette exigence était normale et justifiée.

Conclusion

[77] Au terme de cette revue de la preuve, je suis d'avis que c'est à tort que le juge de première instance a conclu que :

- les représentants de CMS ont été confondus par ceux de Bombardier,
- CMS a été injustement traitée par rapport aux autres concessionnaires,
- CMS aurait dû se voir accorder une seconde chance,
- le délai accordé par Bombardier était trop court,
- la clause de rachat d'inventaire était abusive.

[78] Il s'agit là d'erreurs manifestes et dominantes qui permettent d'écarter la conclusion du juge que Bombardier a abusé de son droit de ne pas renouveler à échéance la convention de concessionnaire de CMS.

[79] Il ne sera donc pas nécessaire d'examiner la question des dommages et celle portant sur les frais d'expertise.

[80] En conséquence, je propose d'accueillir l'appel, d'infirmer le jugement de première instance et de rejeter la requête introductive d'instance avec dépens.

JEAN BOUCHARD, J.C.A.

TAB 18

COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE QUÉBEC

N° : 200-09-005238-057
(200-17-003325-032)

DATE : LE 27 MARS 2008

CORAM : LES HONORABLES J.J. MICHEL ROBERT, J.C.Q.
PIERRE J. DALPHOND, J.C.A.
YVES-MARIE MORISSETTE, J.C.A.

RÉJEAN CLOUTIER
APPELANT – INTIMÉ INCIDENT – Demandeur
c.

LA SOCIÉTÉ CANADA TRUST
INTIMÉE – APPELANTE INCIDENTE – Défenderesse

ARRÊT

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[1] **LA COUR;** Statuant sur l'appel d'un jugement rendu le 5 mai 2005 par la Cour supérieure du Québec, district de Québec (l'honorable Bruno Bernard) qui a rejeté la demande d'indemnisation de l'appelant avec dépens;

[2] Après avoir étudié le dossier, entendu les parties et avoir délibéré;

[3] Pour les motifs du juge Dalphond, auxquels souscrivent le juge en chef Robert et le juge Morissette :

[4] **REJETTE** l'appel et l'appel incident, sans frais vu les circonstances.

J.J. MICHEL ROBERT, J.C.Q.

PIERRE J. DALPHOND, J.C.A.

YVES-MARIE MORISSETTE, J.C.A.

Me Alain Vachon
Dussault Larochelle Gervais Thivierge
Avocat de l'appelant

Me Sylvain Deslauriers
Deslauriers Jeansonne
Avocat de l'intimée

Date d'audience : 31 mai 2007

MOTIFS DU JUGE DALPHOND

[5] La jurisprudence ayant reconnu la saisissabilité, faute d'un véritable contrat de rente ou de la constitution d'une fiducie, des contributions faites dans un Régime enregistré d'épargne retraite (REÉR), le législateur québécois est intervenu à deux reprises pour modifier le droit et prévoir l'indemnisation de certaines personnes : *Loi modifiant la Loi sur les assurances et d'autres dispositions législatives*, L.Q. 2002, c. 70 (Loi n°1) et *Loi modifiant la Loi sur les assurances et la Loi sur les sociétés de fiducie et les sociétés d'épargne*, L.Q. 2005, c. 51 (Loi n° 2).

[6] Le pourvoi porte sur les conditions préalables à l'indemnisation prévue à ces lois.

CONTEXTE

[7] En mars 1998, aux prises avec d'importantes dettes fiscales résultant d'investissements désavoués par le fisc, l'appelant, un médecin, fait cession de ses biens. En décembre 1998, l'avocat du syndic demande formellement à l'intimée[1] de lui remettre le capital du REÉR autogéré détenu par elle pour le compte de l'appelant. D'avis que ce capital était saisissable, l'intimée remet successivement au syndic en janvier 2000, 43 054,47 $ et 306,22 $, des montants nets, après les retenues fiscales requises, provenant de la liquidation du REÉR qui a rapporté au total 69 936,87 $.

[8] Peu après l'entrée en vigueur de la Loi n° 1, le 19 décembre 2002, l'appelant intente une action en Cour supérieure afin de forcer l'intimée à l'indemniser en vertu de l'art. 187 de cette loi. Par jugement rendu le 5 mai 2005, *Cloutier c. Société Canada Trust*, J.E. 2005-1011 (C.S.), sa demande est rejetée au motif que l'une des conditions prévues à cette disposition, soit la faculté de retrait total ou partiel, est manquante.

[9] Début juin 2005, l'appelant inscrit en appel.

[10] Le 16 décembre 2005, la Loi n° 2 entre en vigueur, sauf les articles 1, 2 et 5 qui sont reportés au 1er mars 2006. Les moyens d'appel sont ensuite modifiés pour tenir compte de la nouvelle loi; sous cet angle, le débat devant nous diffère de celui en Cour supérieure. Profitant de l'occasion, l'intimée se porte appelante incidente pour faire déclarer que le contrat intervenu avec l'appelant n'est pas un contrat de rente contrairement à ce que semble affirmer le juge de première instance.

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[1] En réalité, une société de fiducie qui sera subséquemment fusionnée avec l'intimée.

PRÉTENTIONS DES PARTIES

[11] L'appelant soutient que, tant en vertu de l'art. 187 de la Loi n° 1 que de l'art. 9 de la Loi n° 2, l'intimée a l'obligation de lui rembourser le capital de son REÉR. De plus, il prétend avoir droit au remboursement de ses honoraires judiciaires et extrajudiciaires en vertu de l'art. 10 de la Loi n° 2.

[12] L'intimée, qui soutient que le contrat comportait une faculté de retrait[2], rétorque qu'il ne s'agit pas d'un contrat de rente. Par conséquent, la Loi n° 1 ne peut s'appliquer. De plus, il n'y aurait eu aucune saisie dans une instance ou aucune procédure de revendication au sens de l'une ou l'autre des lois invoquées. Sur le droit à une indemnisation pour honoraires, elle fait valoir qu'il ne peut s'appliquer qu'aux honoraires judiciaires et extrajudiciaires encourus dans le cadre de procédures de saisie ou de revendication du capital par un tiers et non lors d'une action subséquente contre le détenteur du capital comme celle de l'appelant en l'instance.

DISPOSITIONS LÉGISLATIVES APPLICABLES

[13] L'art. 187 de la Loi n° 1 est ainsi rédigé :

> 187. Une faculté de retrait total ou partiel du capital stipulée dans un contrat constitutif de rente n'empêche pas celui-ci d'être considéré comme un contrat de rente au sens de l'article 2367 du Code civil dans la mesure où la rente est constituée auprès d'une société de fiducie conformément à l'article 178 de la *Loi sur les sociétés de fiducie et les sociétés d'épargne* (L.R.Q., chapitre S-29.01) ou auprès d'un assureur.
>
> Cet article est déclaratoire, mais il ne porte pas atteinte aux droits des parties dans les causes pendantes devant les tribunaux le 16 décembre 2002. Cependant, les assureurs et les sociétés de fiducie qui ont conclu un contrat de rente comportant une faculté de retrait total ou partiel du capital doivent indemniser le contractant, ou selon le cas, le crédirentier, le titulaire ou le bénéficiaire de ce contrat, sur demande, pour toute saisie dans une instance commencée ou terminée avant la date ci-dessus mentionnée et effectuée sur le capital constitutif de la rente, jusqu'à concurrence des sommes saisies.
>
> (je souligne)

[14] Les dispositions pertinentes de la Loi n° 2 sont :

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[2] Elle dit voir à l'art. 5 b) du contrat une faculté de retrait partiel.

7. Tout contrat conclu avec une compagnie d'assurance ou une société de fiducie antérieurement au 1er mars 2006, qui a été offert au cocontractant à titre de contrat de rente et qui n'est pas conforme à l'article 2367 du Code civil, emporte dès sa conclusion l'insaisissabilité du capital accumulé comme si celui-ci avait été accumulé aux termes d'un contrat de rente.

Cette insaisissabilité demeure subordonnée à la désignation, conformément aux articles 2457 ou 2458 du Code civil, d'une personne habilitée à recevoir le capital ou la rente en découlant au décès du crédirentier ou de la personne qui fournit le capital. Elle subsiste jusqu'à la fin du contrat.

Le présent article ne s'applique qu'aux types de contrats qu'une compagnie d'assurance ou une société de fiducie a offerts au public avant le 6 décembre 2005.

9. Une compagnie d'assurance ou une société de fiducie partie à un contrat qui a été offert au cocontractant à titre de contrat de rente alors que celui-ci n'est pas conforme à l'article 2367 du Code civil doit, à titre d'indemnité, rétablir à ses frais le capital accumulé aux termes de ce contrat, lorsque ce capital a été remis à un tiers, en tout ou en partie, à la suite d'un jugement rendu avant le 6 décembre 2005 ou d'une procédure de saisie ou de revendication signifiée avant cette date. Le montant de cette indemnité est égal aux sommes ainsi remises. Le capital ainsi rétabli est insaisissable suivant les conditions prévues à l'article 7.

Le rétablissement du capital accumulé par la compagnie d'assurance ou la société de fiducie emporte la remise en vigueur du contrat entre les parties qui l'avaient conclu, lorsque la totalité du capital accumulé a été remise à un tiers à la suite d'un jugement ou d'une procédure de saisie ou de revendication.

Le fait qu'une compagnie d'assurance ou une société de fiducie rétablisse le capital accumulé conformément au premier alinéa ne lui donne pas le droit de réclamer la restitution des sommes qui avaient été remises à un tiers à la suite d'un jugement ou d'une procédure de saisie ou de revendication.

10. Une compagnie d'assurance ou une société de fiducie partie à un contrat qui a été offert au cocontractant à titre de contrat de rente alors que celui-ci n'est pas conforme à l'article 2367 du Code civil et qui, en raison de cette non-conformité, fait l'objet d'une instance en cour le 6 décembre 2005 ou terminée avant cette date, est tenue d'indemniser le cocontractant pour tous les frais judiciaires et extrajudiciaires que ce dernier a pu assumer concernant *la saisie* ou la revendication du capital accumulé aux termes de ce contrat.

11. Les articles 7 et 8 sont déclaratoires, mais ne s'appliquent pas à une procédure en cours le 6 décembre 2005 ayant pour objet la saisie ou la

revendication du capital accumulé aux termes d'un contrat visé à l'article 7 ni à un contrat conclu à compter du 1er mars 2006.

(je souligne)

[15] Quant au contrat de rente, il est ainsi défini au *Code civil du Québec* :

2367. Le contrat constitutif de rente est celui par lequel une personne, le débirentier, gratuitement ou moyennant l'aliénation à son profit d'un capital, s'oblige à servir périodiquement et pendant un certain temps des redevances à une autre personne, le crédirentier.

Le capital peut être constitué d'un bien immeuble ou meuble; s'il s'agit d'une somme d'argent, il peut être payé au comptant ou par versements.

(je souligne)

LE CONTRAT RÉGISSANT LE REÉR

[16] Les parties pertinentes du contrat qui serait intervenu entre l'appelant et le fiduciaire[3] sont :

La Société Canada Trust déclare qu'elle accepte de faire fonction de Fiduciaire pour le compte du demandeur, le « rentier » en vertu d'un Régime d'épargne-retraite dans le but de vous faire bénéficier d'un revenu de retraite selon les conditions suivantes :

[...]

4. Cotisations

a) Les cotisations au Régime versées par vous ou votre conjoint pour les montants permis par la législation fiscale applicable et le revenu qui y est indiqué seront détenues en fiducie par le Fiduciaire pour vous procurer un revenu de retraite conformément à l'article 12 des présentes.

b) Le Fiduciaire, sur vos instructions écrites ou verbales, investira les biens du RÉGIME...

[...]

[3] Le seul contrat au dossier est celui utilisé par l'intimée et non TD Trust, le fiduciaire originel. Les parties tiennent pour acquis que cela ne cause aucune difficulté en l'instance.

5. Retraits

Les biens du RÉGIME ne peuvent être retirés, transférés, attribués ou cédés, en tout ou en partie, sauf s'ils sont payés ou transférés :

a) à vous, à titre de conversion totale ou partielle du revenu de retraite en vertu du RÉGIME[4];

b) à vous, aux termes de l'article 6 des présentes[5];

c) à un régime de retraite agréé, un REER ou un FERR, aux termes de l'article 14 des présentes[6];

d) par suite de la rupture de mariage, aux termes de l'article 15 des présentes;

e) à votre décès, aux termes de l'article 13 des présentes; ou

f) tel que permis autrement par la Loi.

Si la Loi l'exige, le Fiduciaire retiendra l'impôt des paiements effectués à même le RÉGIME.

6. Remboursements

Sous réserve de la législation fiscale applicable, le Fiduciaire, sur réception d'une demande écrite et d'une autorisation de votre part, rembourse à vous ou à votre conjoint, selon les instructions figurant dans la demande, un montant destiné à réduire les impôts qui, autrement, seraient payables aux termes de la partie X.1 de la Loi. Le Fiduciaire n'aura nullement la responsabilité de déterminer le montant prévu à l'article précédent à l'égard de tout régime enregistré d'épargne-retraite.

[...]

12. Revenu de retraite

a) Votre RÉGIME échoira à une date (« date d'échéance ») ne devant pas être postérieure au 31 décembre de l'année au cours de laquelle vous aurez atteint 69 ans. Sur préavis écrit d'au moins 90 jours au Fiduciaire ou sur préavis plus court que le Fiduciaire peut permettre à son seul gré, vous :

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4 Option qui ne semble possible qu'après la liquidation du régime et le paiement d'une rente.

5 Option possible s'il y a des contributions excédentaires assujetties à taxation (voir art. 6). On peut se demander s'il s'agit véritablement d'une faculté de retrait partiel.

6 Option en faveur du fiduciaire et non du client.

(i) préciserez la date d'échéance du RÉGIME et le début d'un revenu de retraite (date ne pouvant être postérieure au dernier jour de l'année civile dans laquelle vous aurez atteint 69 ans);

(ii) fournirez tous les documents nécessaires exigés par le Fiduciaire; et

(iii) fournirez des instructions par écrit au Fiduciaire afin d'utiliser les biens du RÉGIME au versement d'un revenu de retraite au moyen de :

(1) une rente payable à vous pour la vie (ou, si vous le désignez ainsi, à vous pour les vies conjointement de vous-même et de votre conjoint et au survivant de l'un et l'autre pour toute sa vie) à compter de la date d'échéance et avec ou sans une période garantie n'excédant pas la période calculée conformément à la formule figurant au paragraphe 2 ci-dessous; ou

(2) une rente commençant à la date d'échéance payable à vous, ou à vous pour votre vie et à votre conjoint après votre décès, pour un nombre d'années égal à 90 moins votre âge en années entières à l'échéance du régime, ou si votre conjoint est plus jeune que vous et que vous le choisissiez ainsi, l'âge en années entières de votre conjoint à l'échéance du RÉGIME;

(3) l'achat d'un fonds enregistré de revenu de retraite conformément à la Loi[7]; ou

(4) toute combinaison de ce qui précède.

b) À la date d'échéance fixée par vous, et ne devant pas être postérieure au 31 décembre de l'année au cours de laquelle vous aurez atteint 69 ans, le Fiduciaire liquidera les éléments d'actif dans votre compte et en utilisera le produit pour constituer votre revenu de retraite, comme le prévoit la législation fiscale applicable, sous réserve des conditions suivantes :

(i) le revenu de retraite sera versé par une société habilitée à le faire en vertu de la législation fiscale applicable;

(ii) toute rente vous sera payable en versements égaux annuels ou plus fréquents jusqu'à règlement complet ou conversion partielle du revenu de retraite et, dans le cas d'une conversion partielle, en versements égaux annuels ou plus fréquents par la suite;

(iii) aucune rente ne pourra être cédée, en tout ou en partie;

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[7] Appelé un FERR.

(iv) lorsque la rente à une période garantie, cette période ne peut dépasser un nombre d'années égal à 90 moins votre âge en années entières à la date d'échéance, ou, à votre gré, et si votre conjoint est plus jeune que vous, l'âge en années entières de votre conjoint à la date d'échéance;

(v) toute rente ainsi constituée peut être coordonnée avec toute pension de sécurité de la vieillesse;

(vi) toute rente ainsi constituée peut être augmentée en tout ou en partie pour refléter les hausses de l'indice des prix à la consommation (définie dans la législation fiscale applicable), ou des hausses à un taux spécifié dans la rente, mais sans excéder 4 % par année;

(vii) toute rente, sous réserve des alinéas 12(b)(v) et (vi), prévoira des versements périodiques égaux annuels ou plus fréquents jusqu'à règlement complet ou conversion partielle de la rente, et, dans le cas d'une conversion partielle, prévoira des versements périodiques égaux annuels ou plus fréquents par la suite;

(viii) toute rente ne permettra pas que le montant global des versements périodiques au cours d'une année après votre décès excède le montant global des versements périodiques dans une année avant votre décès;

(ix) toute rente permettra une conversion si la rente devient payable à une autre personne que vous-même ou, à votre décès, à votre conjoint.

(c) Advenant que vous n'ayez pas donné d'instructions à l'Agent ou au Fiduciaire dans les 90 jours précédant le dernier jour de l'année au cours de laquelle vous aurez atteint 69 ans (ou à l'intérieur d'un délai plus court que le Fiduciaire peut fixer à l'occasion, à son seul gré) pour vous constituer un revenu de retraite, l'Agent ou le Fiduciaire liquidera les éléments d'actif du RÉGIME et peut, à son gré, se servir du capital du RÉGIME pour constituer un revenu de retraite en vertu des dispositions du présent article. Le Fiduciaire :

(i) lorsque la valeur des biens dans le RÉGIME est égale ou supérieure à 10 000 $ (ou au montant supérieur ou moindre que le Fiduciaire peut à son seul gré fixer à l'occasion), transférera avant la fin de l'année au cours de laquelle vous aurez atteint 69 ans, les biens dans le RÉGIME à un fonds enregistré de revenu de retraite dont vous êtes le rentier et pour lequel le Fiduciaire agira comme émetteur conformément à la législation fiscale applicable et vous

> nommez par les présentes l'Agent à titre de fondé de pouvoir pour signer tous les documents et effectuer les choix nécessaires dans le but d'établir et d'exploiter le fonds enregistré de revenu de retraite; et
>
> (ii) ...

[17] Je signale que ce contrat ne contient aucune stipulation d'insaisissabilité[8]. Finalement, dans un contrat séparé, intervenu entre l'appelant et le courtier désigné pour gérer de fait le capital, l'épouse de l'appelant est désignée bénéficiaire du capital en cas de décès de ce dernier.

ANALYSE

I. Remarques préliminaires :

[18] Le document qui nous a été remis comme représentatif du contrat entre les parties mentionne en son art. 18 qu'il est régi par les lois d'Ontario. Cependant, les parties n'ont pas allégué le droit ontarien, ni offert aucune preuve de celui-ci; en réponse à une question du soussigné, elles ont déclaré, avec raison, que le droit en vigueur au Québec devait être appliqué en vertu de l'art. 2809 C.c.Q.

[19] L'appel comme l'appel incident visent à faire modifier le dispositif d'un jugement d'un tribunal inférieur. Ils ne sont cependant pas possibles pour obtenir une analyse différente menant à la même conclusion (*Del Guidice c. Honda Canada inc.*, [2007] R.J.Q. 1496 (C.A.), paragr. 22; *Société canadienne des postes c. Blouin*, [1996] R.D.J. 88 (C.A.), paragr. 94). L'appel incident sera donc rejeté.

II. La loi n° 1 ne s'applique pas :

[20] À la suite des jugements dans le dossier *Thibault* de la Cour supérieure, J.E. 99-2329, et de la Cour, [2001] R.J.Q. 2099, le législateur est intervenu en adoptant la Loi n° 1. Selon la Cour suprême, appelée à statuer en dernier ressort dans le dossier *Thibault*, (*Banque de Nouvelle-Écosse c. Thibault*, [2004] 1 R.C.S. 758), la Loi n° 1 n'a pas modifié les conditions requises pour conclure en l'existence d'un contrat de rente, mais n'a fait qu'ajouter que la nature du contrat et l'insaisissabilité du capital pouvant en résulter n'étaient pas altérées du simple fait que le contrat permette un ou des retraits partiels durant son existence ou même un retrait total amenant résiliation, faisant ainsi un parallèle avec le contrat d'assurance-vie avec valeur de rachat (*BNE c. Thibault*, paragr. 45, 57).

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[8] L'insaisissabilité ne peut résulter de la seule volonté des parties; la loi seule peut accorder une telle protection (*BNE c. Thibault*, supra, paragr. 2).

[21] Quant à l'obligation d'indemniser sous l'art. 187 de la Loi n° 1, il ressort de cette disposition qu'elle est limitée aux contrats de rente qui, en raison de leur faculté de retrait total ou partiel, ont fait l'objet d'une saisie dans une instance commencée ou terminée avant le 16 décembre 2006.

[22] Comme le souligne le juge de première instance, pour réussir sous l'art. 187 de la Loi n° 1, l'appelant avait donc le fardeau de prouver l'existence de :

- un cocontractant qui est une société de fiducie ou un assureur;

- un contrat de rente;

- une faculté de retrait du capital;

- une saisie effectuée sur le capital constitutif de la rente;

- une instance commencée ou terminée avant le 16 décembre 2002.

[23] En l'espèce, le contrat est intervenu avec une société de fiducie au sens de l'art. 178 de la *Loi sur les sociétés de fiducie et les sociétés d'épargne*, L.R.Q., c. S-29.01, une entité autorisée à établir des rentes à terme susceptibles d'être insaisissables si un bénéficiaire est désigné conformément à l'art. 2457 ou 2458 C.c.Q.

[24] Pour conclure en l'existence d'un contrat de rente à titre onéreux, les conditions prévues à l'art. 2367 C.c.Q. doivent être satisfaites. Cela implique l'existence des cinq éléments suivants énoncés par la Cour suprême dans *BNE c. Thibault*, précité :

(i) un crédirentier (une personne bénéficiaire de la rente);

(ii) un débirentier (une personne qui s'est engagée à payer une rente);

(iii) une aliénation du capital au profit du débirentier (par exemple, le transfert définitif d'une somme d'argent au comptant ou par versements périodiques);

(iv) une obligation de payer par le débirentier à partir d'un moment prédéterminé;

(v) une périodicité de paiements (par exemple, mensuellement ou hebdomadairement).

Ces éléments sont analysés par M^e^ Jean-François Michaud, « L'insaisissabilité de certains contrats émis par des assureurs : une mise à jour », *Développements récents en droit des assurances*, vol. 222, Service de la formation permanente du Barreau du Québec, Éd. Yvon Blais, 2005, aux pages 135 à 141.

[25] Je suis en désaccord avec la conclusion implicite du premier juge selon laquelle nous sommes en présence d'un contrat de rente. L'intimée ne s'est pas engagée à verser une rente; en effet, ni le montant ni la durée de celle-ci (elle doit être à terme lorsque offerte par une société de fiducie) ne sont précisés dans le contrat, ni déterminables selon ses termes. Il revient plutôt au constituant d'arrêter ces modalités plus tard (art. 12); il peut même alors exiger que la valeur du REÉR serve à l'achat d'un FERR plutôt que d'une rente (art. 12b) (iii)) ou une combinaison des deux. À défaut d'instructions, le fiduciaire transfère les fonds du régime dans un FERR.

[26] Ce n'est donc qu'à l'échéance du REÉR qu'il y aura liquidation de l'actif en vue de possiblement constituer une rente. En cours de régime, on ne trouve pas encore un débirentier, un crédirentier, une obligation de payer une rente et encore moins une périodicité de paiements déterminés ou déterminables. Nous ne sommes donc pas en présence d'un contrat constitutif de rente au sens de l'art. 2637 C.c.Q., indépendamment de savoir s'il est assorti ou non d'une faculté de retrait.

[27] Le contrat est plutôt indicatif de la volonté de confier à un fiduciaire des sommes pour une éventuelle retraite, comme dans l'affaire *Pierre Roy et associés c. Bagnoud,* 2005 QCCA 492, SOQUIJ AZ-50313037, J.E. 2005-978, [2005] R.J.Q. 1378 (C.A.).

[28] Il s'agit d'un contrat de placement avec l'option d'obtenir une rente (voir l'analyse de M^{e} Luc Plamondon, « L'arrêt Thibault et le contrat de rente », (2007) 52 R. D. McGill 339-379, paragr. 64 et suivants). Cependant contrairement à l'affaire *Bagnoud*, le constituant s'est réservé ici la pleine autorité quant à l'administration du capital (art. 4 du contrat). S'il est vrai que l'intimée détient le capital, il est par ailleurs clair qu'elle ne l'administre pas au sens de l'art. 1260 C.c.Q. À la lumière des enseignements de la Cour suprême dans l'arrêt *BNE c. Thibault*, au paragr. 37, je ne peux conclure que l'intimée a la maîtrise et l'administration exclusive du patrimoine fiduciaire et, par voie de conséquence, il ne peut s'agir d'une fiducie au sens du *Code civil du Québec* (*BNE c. Thibault*, paragr. 41).

[29] En somme, le capital ne peut être considéré comme insaisissable faute d'un contrat de rente ou de la constitution d'un patrimoine distinct par une fiducie.

[30] Reste alors à déterminer si nous sommes néanmoins en présence d'une situation donnant droit à une indemnisation en vertu de la Loi n^{o} 2.

III. La portée de la Loi n^{o} 2 :

[31] À la suite du jugement de la Cour suprême dans le dossier *Thibault*, le législateur québécois est intervenu à nouveau en adoptant la Loi n^{o} 2. Si la Loi n^{o} 1 ne faisait que préciser qu'un contrat de rente ne cessait pas de l'être en raison de l'existence d'une faculté de retrait, la Loi n^{o} 2 va beaucoup plus loin.

[32] D'abord, comme l'indique l'art. 7 cité plus haut, le législateur a choisi de conférer l'insaisissabilité à tout contrat conclu avec un assureur ou une société de fiducie qui « a été offert au cocontractant à titre de contrat de rente et qui n'est pas conforme à l'article 2367 du Code civil ». Il faut cependant que dans ce contrat, qui en droit n'en est pas un de rente, le bénéficiaire désigné en cas de décès du cocontractant soit l'une des personnes prévues aux art. 2457 ou 2458 C.c.Q.

[33] Ensuite, l'art. 9 élargit les cas où l'assureur ou la société de fiducie doit indemniser le cocontractant. Désormais, l'obligation naît de la remise du capital à un tiers à la suite d'un jugement ou d'une procédure de saisie ou de revendication, alors que la Loi n° 1 ne s'appliquait qu'aux saisies pratiquées dans le cadre d'une instance judiciaire.

[34] Finalement, l'art. 10 innove en obligeant l'assureur ou la société de fiducie à assumer les honoraires judiciaires et extrajudiciaires du cocontractant encourus dans le cadre de la saisie ou de la revendication du capital par un tiers.

[35] Il ressort de ces dispositions que l'élément déterminant à leur application est l'offre par un assureur ou une société de fiducie d'un contrat comme en étant un de rente. En d'autres mots, le fait de représenter ou laisser croire qu'il s'agissait d'un contrat de rente.

IV. La preuve n'établit pas que l'intimée a offert un contrat de rente :

[36] Cette question n'a pas été discutée en Cour supérieure puisque la Loi n° 2 n'existait pas alors.

[37] La preuve devant nous se résume au contrat intitulé « Déclaration de fiducie ». Ce dernier décrit l'appelant comme un rentier et non un crédirentier, l'intimée comme un fiduciaire et non un débirentier; il parle d'une possible rente uniquement après la liquidation du régime. Nulle part ne fait-on référence au fait que les parties voulaient un contrat qui puisse entraîner l'insaisissabilité du capital.

[38] J'en retiens que l'appelant n'a pas démontré que l'intimée ou son auteur lui avait offert un produit décrit comme un contrat de rente; il s'agit plutôt d'un produit décrit comme la constitution d'une fiducie. Il ne s'agit pas du genre de situation visée par l'art. 7 de la Loi n° 2. Ceci règle ce moyen.

[39] Cela dit, je tiens à mentionner que la remise au syndic du capital s'est faite dans le cadre d'une procédure de revendication au sens de la Loi n° 2. Par l'effet de la cession de biens, tous les biens saisissables de l'appelant sont passés sous la saisine du syndic en vertu de l'art. 71 de la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), c. B-3. Le syndic, un officier de la cour, est alors autorisé par cette loi, c'est même son devoir, de revendiquer la possession desdits biens afin de les liquider au bénéfice des créanciers. La lecture des commentaires du ministre des Finances devant la

commission parlementaire qui étudiait le projet de loi confirme que la revendication renvoie à la démarche du syndic dans le cadre d'une faillite par opposition à la saisie à l'initiative d'un créancier (Journal des débats, Commission permanente des finances publiques, le vendredi 9 décembre 2005, vol. 38, n° 102).

[40] Considérant la nature de la Loi n° 2 et l'interprétation libérale qu'elle requiert pour donner pleinement effet à l'intention du législateur, je suis d'avis qu'il faut considérer l'envoi de la lettre par l'avocat du syndic à l'intimée, avec copie à l'appelant, comme une procédure de revendication « signifiée » avant le 6 décembre 2005. Exiger de l'intimée qu'elle requière une requête formelle dans le dossier de faillite, alors ouvert, avant de faire remise ne serait que prêcher pour un formalisme coûteux à la fois pour la masse et l'intimée.

[41] Un dernier commentaire à l'intention du fisc. Il m'apparaît que les retenues fiscales effectuées perdent leur justification lorsqu'il y a remise du capital par un assureur ou une société de fiducie. Le fisc doit alors les rembourser à l'assureur ou à la société de fiducie, selon le cas, situation qui m'apparaît clairement non visée par le dernier alinéa de l'art. 9 de la Loi n° 2 qui empêche un recours contre le tiers qui a bénéficié de la saisie ou de la revendication.

V. Remboursement des honoraires extrajudiciaires :

[42] Puisque la Loi n° 2 ne s'applique pas, ce moyen doit aussi être rejeté. J'ajoute que l'art. 10 de la Loi n° 2 ne couvre que les frais judiciaires et extrajudiciaires assumés dans le cadre de la saisie ou de la revendication du capital accumulé par un tiers. En l'instance, l'appelant réclame les honoraires de son avocat pour forcer son indemnisation par l'intimée, ce qui n'est pas couvert par l'exception énoncée à l'art. 10 de la Loi n° 2.

DISPOSITIF

[43] Pour ces motifs, je propose de rejeter l'appel et l'appel incident, sans frais vu les circonstances.

PIERRE J. DALPHOND, J.C.A.

TAB 19

Court of Queen's Bench of Alberta

Citation: Swimwear Etc. v. Raymark Xpert Business Systems Inc., 2006 ABQB 82

Date: 20060127
Docket: 0503 16799
Registry: Edmonton

Between:

Swimwear Etc.

Plaintiff

- and -

Raymark Xpert Business Systems Inc.

Defendant

Reasons for Decision
of the
Honourable Mr. Justice M.A. Binder

I. Introduction

[1] Raymark Xpert Business Systems Inc. ("Raymark") is the Applicant and Swimwear Etc. ("Swimwear") is the Respondent in this application.

[2] Raymark is seeking a stay of the action commenced by Swimwear in Alberta, on the grounds that the *forum conveniens* for the action is Quebec.

[3] Raymark did not bring an application to set aside the order for service *ex juris*. As a result, I do not need to address whether Rule 30 has been satisfied, nor do I need to discuss in any detail whether Alberta has a real and substantial connection to this action. In my view, both Alberta and Quebec have a real and substantial connection to this action.

[4] The sole issue in this application is the determination of the *forum conveniens*.

II. Facts

[5] Raymark is a company that develops and markets software packages for retail businesses. Its website indicates that it is a global provider of its software products. Raymark is incorporated under the *Canada Business Corporations Act* and its offices, officers and employees in Canada are located within Quebec.

[6] Swimwear is an Alberta corporation which operates a retail business selling swimwear and related leisure clothing. It is based in Edmonton and carries on business in Alberta, British Columbia and Manitoba.

[7] In Spring 2003, Raymark initiated contact with Swimwear at Swimwear's offices in Edmonton and attempted to sell its software to Swimwear. Raymark and Swimwear commenced negotiations for a contract under which Raymark would supply computer software to Swimwear for Swimwear's use in its retail business operations. A web demonstration occurred on March 13, 2003, during which Swimwear employees were located in Edmonton and Raymark representatives were located in Quebec.

[8] Raymark refers to a subsequent set of meetings which occurred in Quebec. Swimwear refers to a number of meetings which occurred in Edmonton. I am satisfied that during contract negotiations, meetings occurred in both Alberta and Quebec.

[9] On June 19, 2003, Mr. Gowing signed a Licensing Agreement with Raymark on behalf of Swimwear at Mr. Gowing's cabin at Pigeon Lake, Alberta. Subsequently, and also on June 19, 2003, Mr. Cyr signed the Licensing Agreement on behalf of Raymark at its offices in Montreal, Quebec. The fully executed Licensing Agreement was then faxed to Alberta. The Licensing Agreement contains a choice of law provision which indicates the Agreement is governed by the laws of Quebec.

[10] Raymark indicates the software package was a standard product developed in Quebec, and that customizations for the software were developed at its offices in Quebec. Raymark also suggests that support functions for the product took place its offices in Quebec. Raymark agrees that its employees attended in Alberta to provide training and project management on the use of the software product.

[11] However, Swimwear points out that the software was installed on its hardware in Alberta, rather than in Quebec as was initially planned. Swimwear states that after it began to experience problems with the software, Raymark sent some of its employees to Edmonton to provide assistance to Swimwear, and also conducted another web demonstration.

[12] Swimwear commenced an action against Raymark in Alberta. The Statement of Claim, which alleges breach of contract and negligent misrepresentation, was filed on October 3, 2005. Swimwear attained an Order for service *ex juris* on October 13, 2005, such that Raymark was served at its head office in Montreal, Quebec.

[13] Raymark states that to defend this action, it will require at least twelve witnesses. It notes that four of these witnesses are no longer employed by Raymark. Raymark indicates it will need to hire at least one expert on Quebec civil law, and one expert on the software product who will need to be familiar with the product and its use.

[14] Swimwear indicates none of its employees who had dealings with Raymark speak French, and that all discussions between Swimwear and Raymark employees and representatives were conducted in English. Swimwear notes that if this matter proceeds to trial, it will need to call at least six of its Edmonton employees and seventeen non-employees. Six of these witnesses are from Edmonton, five are from Calgary, and the remainder reside in Western Canada.

III. Parties' Positions

Applicant's Position

[15] Raymark submits that Swimwear has the onus to establish Alberta is the *forum conveniens* because service was effected *ex juris*. Raymark argues that Quebec is the *forum conveniens* because:

(a) The contract is governed by the law of Quebec, and the governing law in a contract dispute is the paramount factor in determining the *forum conveniens*.
(b) Some of the negotiations and meetings between the parties occurred in Quebec.
(c) The situs of the contract is Quebec because the contract was executed by Raymark in Quebec after Swimwear had executed the contract in Alberta.
(d) The product was developed in Quebec.
(e) Many of the witnesses are located in Quebec and there will be difficulties in getting at least four of those witnesses to attend trial in Alberta.

[16] Raymark maintains that because Swimwear has sued for contractual breaches, the application of Quebec civil law to the exclusion and limitation of damages clauses in the Licensing Agreement is critical. Raymark also argues that because Swimwear has alleged fraud, the court will have to apply Quebec civil law on fraud.

Respondent's Position

[17] Swimwear submits that the courts should not lightly interfere with the jurisdiction chosen by a plaintiff, and argues that Alberta is the *forum conveniens* because:

(a) Both parties carry on business in Alberta while only Raymark carries on business in Quebec. Further, Raymark took active steps to solicit Swimwear's business in Alberta.
(b) Swimwear's claims of negligent misrepresentation and breach of contract crystallized in Alberta because that is where the loss or damage was suffered.
(c) The situs of the contract is Alberta because Raymark's acceptance of the contract was communicated to Swimwear in Alberta.
(d) Swimwear would enjoy a juridical advantage because the litigation steps it has already taken would not be wasted, and because the claim would be conducted in a language that key witnesses and employees understand.
(e) There will be inconvenience to both Swimwear's and Raymark's witnesses regardless of where the matter is tried.
(f) The substantive law of this contract is the contract itself, and neither the law of Alberta nor Quebec. There is no difficulty proving foreign law because an Alberta Court can read the Licensing Agreement as readily as any Quebec Court.

[18] Swimwear emphasizes that when a foreign defendant harms a plaintiff within the domestic jurisdiction, this favours trying the action in the domestic jurisdiction.

IV. Analysis

The Law

[19] Canadian courts may decline to exercise jurisdiction when there is clearly a more appropriate forum elsewhere. One of the means by which a court can decline to exercise jurisdiction is through a stay of proceedings.

[20] The test for *forum conveniens* is well established. The inquiry is not simply whether a forum has a real and substantial connection. Rather, the question is whether the forum is inappropriate because there is a more appropriate forum elsewhere for the pursuit of the action and securing the ends of justice: ***United Oilseed Products Ltd. v. Royal Bank*** (1988), 87 A.R. 337 at para. 33; ***Amchem Products Inc. v. British Columbia (Workers' Compensation Board)***, [1993] 1 S.C.R. 897.

[21] Alberta Courts have set out a list of factors to be considered in determining the most appropriate forum: ***Royal and Sun Alliance Insurance Company of Canada v. Wainoco Oil and Gas Co. et al*** (2005), 367 A.R. 177, 2005 ABCA 198; ***Camco International (Canada) Ltd. v. Porodo*** (1997), 211 A.R. 71 (Q.B.); ***Kuffner v. Manitoba Public Insurance Corporation***, [2005] A.J. No. 1749, 2005 ABCA 440. These factors include:

(a) Where each party resides
(b) Where each party carries on business
(c) Where the cause of action arose
(d) Where the loss or damage occurred
(e) Any juridical advantage to the plaintiff in the action
(f) Any juridical disadvantage to the defendant in the action
(g) Convenience or inconvenience to potential witnesses
(h) Costs of conducting litigation in the jurisdiction
(i) Applicable substantive law
(j) Difficulty in proving foreign law, if necessary

[22] The test for *forum conveniens* is a discretionary test which requires the court to focus on the particular facts of the parties and the case.

[23] With respect to the issue of the burden of proof in establishing the *forum conveniens*, the Supreme Court of Canada stated in ***Amchem***, *supra* at 921 that:

> Whether the burden of proof should be on the plaintiff in *ex juris* cases will depend on the rule that permits service out of the jurisdiction. If it requires that service out of the jurisdiction be justified by the plaintiff, whether on an application for an order or in defending service *ex juris* where no order is required, then the rule must govern.

[24] I interpret the Supreme Court of Canada's comments in ***Amchem***, *supra* to mean that if the plaintiff must justify service *ex juris* under the Rule which permits service out of the jurisdiction, then the plaintiff also has the burden of proof in establishing *forum conveniens*. This is consistent with the Alberta Court of Appeal's comments on the burden of proof in ***United Oilseed***, *supra* at para. 33.

[25] Swimwear refers to the Alberta Court of Appeal's comments in ***Kuffner***, *supra* as authority for the proposition that the defendant bears the onus of proof in cases involving service *ex juris*. The court states at para. 16 that "the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff." Reading these comments in context, and alongside ***Amchem***, *supra* and ***United Oilseed***, *supra*, it is my view that the court was not commenting on the issue of burden of proof, but rather the issue of standard of proof.

[26] However, I also note that the Supreme Court in ***Amchem***, *supra* at 921 emphasized that the burden of proof "should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties."

[27] Under Rule 30 of the *Alberta Rules of Court*, a plaintiff must justify service out of the jurisdiction when obtaining an order for service *ex juris*. As a result, in *ex juris* cases where the

forum conveniens is at issue, the plaintiff has the burden of proof. However, in the majority of cases, this burden of proof will play a minimal role.

Application

[28] The burden of proof does not apply in this case, as I am able to come to a decision based on the parties' submissions and the application of the test for *forum conveniens*.

[29] There are a number of factors which are neutral to determining the issue of *forum conveniens* in this case. The residence of each of the parties is neutral, given that Raymark resides in Quebec and Swimwear resides in Alberta. Inconvenience to witnesses is also a neutral factor because there will be inconvenience to witnesses on each side if the trial is held in the opposite jurisdiction. This inconvenience to witnesses can also be alleviated by recent technological advancements which permit witnesses to testify via video-conference in certain circumstances.

[30] Further, there does not appear to be any notable juridical advantage or disadvantage to either party with respect to the forum, so I find this to be a neutral factor as well. I do not consider whether the action would proceed in French or English to be a relevant consideration, given that parties are entitled to plead and testify in the official language of their choice by virtue of s. 19 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982 (U.K.), 1982,* c. 11. See also ***Bonaventure Systems Inc. v. Royal Bank of Canada*** (1986), 32 D.L.R. (4th) 721 at 731 (Ont. H.C.).

[31] A number of factors support the argument that Alberta is the *forum conveniens*. First, both parties carry on business in Alberta while only Raymark carries on business in Quebec. Second, Raymark holds itself out as a global company, and actively solicited Swimwear's business in Alberta.

[32] In addition, a substantial portion of the cause of action arose in Alberta and Swimwear's alleged damage was suffered here. I agree with Swimwear that the contract was formed in Alberta, because Raymark's acceptance of the contract was communicated to Swimwear in Alberta. Further, at least a portion of the alleged breaches of contract occurred in Alberta, because that is where the software product was installed and would have failed.

[33] Finally, I acknowledge that some litigation steps have already occurred in Alberta, and any duplication of litigation efforts in Quebec could increase litigation costs. However, because the proceedings are at a preliminary stage I give this factor minimal weight.

[34] There are also a number of factors which could suggest that Quebec is the *forum conveniens* . Most significantly, the governing law of the contract is Quebec civil law. I also note that litigation costs will be increased if the trial is held in Alberta because the defence will have to retain expert evidence on Quebec civil law.

[35] In my view, the most significant factors which come into play in this case are the fact that Quebec civil law governs the contract, and the fact that Raymark took active steps to solicit Swimwear's business in Alberta.

[36] Raymark cites a number of authorities to support its proposition that the governing law of the contract is the most important factor to consider in determining the *forum conveniens*. While I agree that in many cases, a choice of law clause is a factor militating in favour of a particular jurisdiction, it is not a determinative factor. Moreover, upon a review of Raymark's authorities, I find these authorities distinguishable.

[37] In ***Shell Canada Ltd. v. CIBC Mellon Trust Co.*** (2003), 349 A.R. 276, 2003 ABQB 1058 the court found that Alberta was a more appropriate forum than New York not only because the governing law was Canadian law, but because there was a large element of Canadian public policy involved in the decision. In this application, there is no element of Canadian public policy.

[38] In ***Thod Investment Ltd. (c.o.b. Jeff Parry Promotions) v. André-Philippe Gagnon Inc.***, [2005] A.J. No. 1105, 2005 ABQB 601, the Master found that Alberta was *forum non conveniens* in a scenario where the contract specified both a choice of law clause and a choice of residence clause, and all of the parties carried on business in many of the same jurisdictions, including both Alberta and Quebec. In this application, it is common ground that Swimwear does not carry on business in Quebec, and that Swimwear's business was solicited by Raymark in Alberta.

[39] Further, in a number of cases, a particular forum was found to be *forum non conveniens* notwithstanding the existence of a choice of law or choice of jurisdiction clause in the contract: ***Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.*** (1985) 65 A.R. 271 (C.A.); ***Old North State Brewing Co. v. Newlands Services Inc.*** (1998), 58 B.C.L.R. (3d) (C.A.).

[40] Swimwear refers to case authority which suggests that when a foreign defendant injures a plaintiff within the domestic jurisdiction, this favour trying the action in the domestic jurisdiction selected by the Plaintiff. In ***Moran v. Pyle National (Canada) Ltd.***, [1975] 1 S.C.R. 393 at 409, the Supreme Court of Canada stated:

> By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods

[41] While this comment was made within the context of determining the place of commission of a tort relating to a defective product causing death, I see no reason why this approach should not apply in this application. Swimwear did not initiate contact with Raymark. Rather, Raymark took unmistakable steps to solicit Swimwear's business within Alberta. When a company

actively pursues business within a particular jurisdiction solely on its own initiative, it should not be surprised when it is sued within that jurisdiction.

[42] Moreover, I find it significant that much of the negotiations occurred in Alberta, the execution of the final contract was communicated in Alberta, the software product was serviced by Raymark in Alberta, and the damage was incurred in Alberta. As a result, I find that Alberta is the *forum conveniens*.

V. Disposition

[43] Based on a consideration of all of the factors which assist the court in a determination of the issue of *forum conveniens*, I find as follows:

1. This action has the most substantial connection with Alberta.

2. Alberta is the *forum conveniens*.

3. Raymark's application for a stay is dismissed.

VI. Costs

[44] Swimwear is entitled to costs in any event of the cause. However, I limit Swimwear's costs to one - half of the costs Swimwear is entitled to under Schedule "C" of the Rules of Court plus disbursements as a significant portion of Swimwear's brief was devoted to arguments regarding the validity of the Order for service *ex juris*, which was not at issue in this application.

Heard on the 17th day of January, 2006.
Dated at the City of Edmonton, Alberta this 27th day of January, 2006.

M.A. Binder
J.C.Q.B.A.

Appearances:

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Fraser Milner Casgrain LLP
for the Respondent

N° / No.: 500-11-048114-157

SUPERIOR COURT
(COMMERCIAL DIVISION)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC.,

Petitioners

- and -

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

- and -

FTI CONSULTING CANADA INC.

Monitor

ORIGINAL

- and -

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL & NEIL JOHNSON

OBJECTING PARTIES-Mises-en-cause

- and -

UNITED STEELWORKERS, LOCAL 6254, UNITED STEELWORKERS, LOCAL 6285

Mises-en-cause

- and -

MORNEAU SHEPELL

Mise-en-cause

BOOK OF AUTHORITIES in support of
Factum of the Representatives of the Salaried Employees and Retirees in response to the Motion by the Monitor for Directions with respect to Pension Claims and the transfer of certain questions to the Newfoundland Court

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AS-0G41

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