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CASES / JURISPRUDENCE

Canadian Cases in Private International Law in 2022

Jurisprudence canadienne en matière de droit international privé en 2022

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1. Jurisdiction / compétence des tribunaux

A. Common law and federal

i. Jurisdiction in personam

Jurisdiction — non-resident defendant — insurance claim for business losses — jurisdiction established but declined

Altea Active Club Inc v Aviva Insurance Co of Canada, 2022 ONSC 243

The defendant, Aviva Insurance Company of Canada (Aviva), was granted a stay in an action by Altea Active Club (the plaintiff) because Manitoba was clearly the more appropriate forum. The plaintiffs owned and operated a fitness facility in Winnipeg, Manitoba. The defendant, headquartered in Ontario, issued the property insurance policy for that facility. Due to the global COVID-19 pandemic, the province of Manitoba declared a state of emergency and mandated the closure of all fitness facilities on 20 March 2020. This shutdown order required Altea Active Club to close its facility through 3 June 2020. Altea submitted a claim for coverage with Aviva for the business interruption losses under restricted access and negative publicity supplemental coverages insuring against outbreaks of contagious or infectious diseases. Aviva denied the claim advising that this coverage did not apply under the circumstances. Aviva maintained that the coverage relied on by the plaintiffs did not cover losses from various shutdown orders and general consequences of the pandemic but, rather, only an outbreak of contagious or infectious disease within twenty-five kilometres of the facility. In response, Altea brought this action seeking a declaration that its policy with Aviva covered sixty days of business interruption losses caused by the pandemic and that Aviva breached the policy in denying its claim, along with its duty of good faith.

Both parties agreed that the Ontario court had jurisdiction *simpliciter* and the sole issue was whether the court should nonetheless decline to exercise that jurisdiction as

forum non conveniens. The court applied the relevant factors,[1] finding that they favoured Manitoba. The location of the majority of the parties, the jurisdiction where factual matters arose, fair and efficient working of the Canadian legal system, and the contractual provisions of a policy governed by the laws of Manitoba all strongly favoured Manitoba.

The court reasoned that Altea placed too much weight on facts related to the activities of Aviva's executives and representatives in Ontario. The facts arose from the imposition of a shutdown order by the provincial government under Manitoba statutes and regulations due to the spread of COVID-19, leading to the closure of the fitness facility. This, in turn, resulted in the filing of a claim under a policy negotiated, issued, and administered in Manitoba and subject to Manitoba law. The court was required to make determinations on policy coverage, the nature of the provincial shutdown order and loss of business income — all related to Manitoba. It would not be fair or efficient to litigate claims in Ontario linked to business operations and losses in Manitoba due to Manitoba's shutdown order simply because the defendant's senior management team worked in Ontario. The province of Manitoba had legislated that Manitoba law applied to the policy, and the shutdown order that caused the alleged losses during the pandemic was also made under Manitoba law.

Jurisdiction — provincial and territorial defendants — crown immunity — claim for injury to person or damage to property or reputation — jurisdiction found and not declined

PS v Commissioner of Nunavut and Her Majesty the Queen in the Right of Ontario, 2022 NUCJ 18

The plaintiff sued for damages related to a sexual assault suffered while incarcerated in Ontario. He alleged that, while underage, he was taken into custody in Nunavut under the *Mental Health Act*[2] without consent and later sent to a mental health facility in Ontario. While there, he got into a fight with another resident and was sentenced to a jail term in Ontario, where he was allegedly placed in a cell with a known sex offender who assaulted him. The defendants, the governments of Nunavut and Ontario, each brought motions seeking the dismissal of the plaintiff's claim. The Government of Nunavut contested jurisdiction due to a lack of a real and substantial connection between the court and the subject matter of the dispute, while Ontario asserted crown immunity from suit. The court agreed that Ontario was entitled to rely on crown immunity from suit in another jurisdiction and dismissed the action against Ontario in Nunavut, requiring the plaintiff to sue in an Ontario court. The court, however, did dismiss the Government of Nunavut's jurisdictional motion, allowing the action against that territory to proceed.

The court found that the plaintiff had clearly met the real and substantive connection test in *Van Breda*.[3] The plaintiff was suing the Government of Nunavut alleging there was an obligation to ensure that he was not placed in harm's way while in Ontario, as he was sent there without consent under Nunavut's *Mental Health Act*.

[1] As set out in *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 [*Van Breda*].
[2] RSNWT (Nu) 1988, c M-10.
[3] *Van Breda*, *supra* note 1.

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The plaintiff resided in Nunavut and had done so his entire life, absent a brief amount of time spent time in Ontario by reason of the *Mental Health Act*.

Based on a *forum conveniens* analysis, the Nunavut court therefore concluded it should exercise this jurisdiction as a proper venue for litigants, domiciled in the territory, to litigate an alleged failure of obligations owed by the Government of Nunavut to an individual. The convenience of having the claim against the Government of Nunavut brought in Nunavut militated in favour of the exercise of jurisdiction. As the plaintiff claimed, there was no legal issue with the Nunavut court determining liability and damages for the alleged breach of a duty owed by the Government of Nunavut. The plaintiff could choose to continue a separate action against Ontario or not if it was satisfied with the result of the Government of Nunavut's claim. Enforcement of a decision against the Government of Nunvaut would not be an issue, and it was a fair and efficient operation of the legal system to have a lifelong resident of Nunavut litigate against the Government of Nunavut in a Nunavut court.

Jurisdiction simpliciter *— non-resident defendant — claim for membership benefits — jurisdiction not found*

Solo v Institute of Electrical and Electronics Engineers Inc, 2022 SKQB 185

The defendant, the Institute of Electrical and Electronics Engineers, successfully challenged the court's jurisdiction to hear a claim by the plaintiff, an electrical engineer living in Saskatchewan, that he was denied membership benefits. The institute was a not-for-profit corporation in the United States led by volunteers that advanced professional interests but did not provide credentials. The court found that it did not have territorial competence. The institute was not "ordinarily resident" in Saskatchewan within the meaning of the *Court Jurisdiction and Proceedings Transfer Act*.[4] The court did not accept the plaintiff's argument that the presence of branch offices at Canadian university engineering programs, known as McNaughton Centres, established a "place of business" or "location" in Saskatchewan.[5] To conclude otherwise, in the court's view, would give the concept of ordinary residence an overly broad definition. The principles of order and fairness at the heart of jurisdiction determinations required a more meaningful connection between a corporation's core operations and activities carried out in the "place of business" or "location" in the state in question.

There was also no real and substantial connection between the subject matter of the litigation and Saskatchewan. The plaintiff's membership contract came into existence when the institute received his application and dues. Whether this occurred in New Jersey or in New York was irrelevant, only that it did not occur in Saskatchewan. Even if it was wrong to conclude that the contract was not made in Saskatchewan, the question was more serendipitous than meaningful since the plaintiff's perceived entitlement to the benefit of serving on the institute's technical committees was not an entitlement confined to Saskatchewan. Considering where the alleged tort was committed, if the defendants had committed any of the asserted tortious acts,

[4]SS 1997, c C-41.1.

[5]*Ibid*, s 6c.

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none of their actions physically occurred in Saskatchewan. In addition, the institute did not carry out its principal business in Saskatchewan. Although the institute recruited members from Saskatchewan as part of its global presence, its principal business and core operations were directed to international scientific and educational activities related to a particular field of study and practice.

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

Thind v Polycon Industries, 2022 ONSC 2322

The plaintiff, Karamjeet Thind, was a truck driver who was injured after his cargo dislodged while being unstrapped on arrival in Hebron, Ohio. He claimed that the cargo was negligently loaded onto his vehicle in Guelph, Ontario, leading to the accident at his destination. One of the defendants, MPW Industrial Services, operating the facility in Ohio where the plaintiff was injured contested the jurisdiction of the Ontario Superior Court.

The court found a real and substantial connection between the subject matter of the jurisdiction and Ontario based on the connecting factors in *Van Breda*.[6] Two of the defendants were domiciled or resident in Ontario. A court in Ontario could assume jurisdiction where there were multiple defendants, some in Ontario and others outside the jurisdiction, who were joint tortfeasors in an action having inseparable damages.[7] Otherwise, a plaintiff would be forced to litigate in Ontario and bring separate actions against defendants in other jurisdictions, which made little sense and raised the real and unjust prospect of inconsistent verdicts. With two of three defendants located in Ontario and named as joint tortfeasors in the same action involving inseparable or indivisible damages, the court could assume jurisdiction, including the aspect that involved MPW Industrial Services located in Ohio.

Similarly, the alleged tort was multi-jurisdictional based on a wrongful act or omission in the jurisdiction and an injury outside the forum. The plaintiff relied on all defendants, including MPW Industrial Services, to have the cargo properly loaded onto his vehicle in Ontario. The plaintiff had a good arguable case of a real and substantial connection to Ontario where the alleged negligent acts or omissions by the defendants when the cargo was loaded in Guelph, purportedly caused the cargo to fall and injure him in Ohio. In a *forum conveniens* analysis, MPW Industrial Services had not shown that Ohio was clearly the more appropriate forum. Both Ontario and Ohio courts might be appropriate to hear the action, and most factors in the analysis were neutral. Fairness and efficiency, however, favoured Ontario as the appropriate forum. The court recognized that a connection existed between the tort claim and Ohio, which might support an action there — namely, the plaintiff was injured in the Ohio facility, and potential witnesses were all located in Ohio. Nevertheless, other issues of fairness for the parties had to be considered — the plaintiff resided in Ontario where his trucking business was located and the tortious acts in loading cargo

[6] *Van Breda*, *supra* note 1.

[7] Applying reasoning from, for example, *Cesario v Gondek*, 2012 ONSC 4563, 113 OR (3d) 466; *Best v Palacios*, 2016 NBCA 59, 410 DLR (4th) 367; *Stapper v Taylor*, 2021 ONSC 243 at para 33.

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occurred. If jurisdiction were refused, the plaintiff would be required to litigate in Ohio, which would likely be more onerous. MPW Industrial Services was the only party in Ohio. There was no suggestion of any juridical advantage or forum shopping involved in the claim proceeding in Ontario.

Jurisdiction — resident defendant — claim for wrongful dismissal — jurisdiction declined

Tims v Royal Bank of Canada, 2022 BCSC 1181, 80 CCEL (4th) 247

The defendants, the Royal Bank of Canada and RBC Dominion Securities Incorporated, sought to stay an action alleging wrongful dismissal on the grounds that Hong Kong was clearly the more appropriate forum. The plaintiff was employed with RBC in Canada and agreed to a three-year assignment to a management position in Hong Kong. He was later dismissed from his position in Hong Kong due to inappropriate conduct. The issue was whether the BC Supreme Court should decline to exercise jurisdiction under the *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA* (BC)).[8] Justice Peter Edelman accepted that the choice of law and residence of the parties favoured British Columbia and that there would be some additional cost and inconvenience to the plaintiff in pursing an action in Hong Kong. Nevertheless, the connections to Hong Kong in the underlying facts were overwhelming. The plaintiff lived and worked in Hong Kong leading up to his dismissal. The inappropriate behaviour took place entirely in Hong Kong where the individuals affected were also located. The majority of key witnesses were in Hong Kong. A virtual trial in British Columbia would present significant problems. Edelman J concluded that Hong Kong was the more appropriate forum — no significant unfairness resulted from requiring the plaintiff to litigate his termination where he had been employed and where his alleged inappropriate conduct took place.

Jurisdiction — non-resident defendant — insurance claim — jurisdiction found to exist and not declined

Vale Canada Limited v Royal & Sun Alliance Insurance Company of Canada, 2022 ONCA 862

This appeal involved a dispute over international insurance coverage. Vale was a mining company with operations in Canada and abroad insured through various policies for its environmental liabilities. Following a dispute, Vale commenced an action in the Ontario Superior Court of Justice immediately after one of its insurers, Travelers, started a lawsuit in New York. Travelers and its allied insurers took the position that the Ontario action should not proceed because the Ontario courts lacked jurisdiction. The motions judge dismissed a motion by various insurers contesting jurisdiction, with the exception of the North River Insurance Company. On appeal, the court concluded that Ontario had jurisdiction over the insurers and

[8] *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 11(2) [*CJPTA* (BC)].

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that they had not established Ontario as *forum non conveniens*, including when it came to North River.

The court turned to presumptive connecting factors discussed in *Van Breda*.[9] There was brief consideration given to a factor in US law focusing on "minimum contacts" in the context of indemnity insurance contracts.[10] The court found, however, that it did not need to define a new presumptive connecting factor relating to insurance contracts in this case. The concept of carrying on a business — an existing presumptive connecting factor — and the concept of establishing minimum contacts could inform one another in the jurisdictional analysis.

The court found that carrying on a business in Ontario was a presumptive connecting factor for claims under contract. Carrying on a business at the time the defendant entered into, or was to perform, a contact with the plaintiff meaningfully connected the defendant and the subject matter to the forum — in this instance, Ontario. The motions judge did not err by referring to the reasonable expectations of the insurers that they would be called on to answer claims in Ontario. When it came to the specifics of the insurance context, the court considered the statutory definitions of carrying on the business of insurance in Ontario.[11] The fact that an insurer was not registered in Canada or licensed in Ontario did not automatically mean that, for jurisdiction, its business activities were not in Ontario in a sense sufficient to connect them and the subject matter of a claim to Ontario. The more important consideration was the insurance contact itself — the location of the object of the insurance and of the contemplated performance, given the nature of the claim.

In this instance, the insurance policies put the parties into long-term relationships because they not only had policy periods of various lengths, but they were also occurrence based and thus created the potential for longer-term liabilities that might not be settled beyond the policy periods. Since a substantial aspect of Vale's operations were in Ontario, they maintained excess insurance to primary policies that applied to Vale's mining and other operations in Canada. The appellate court agreed with the motions judge on the conclusion but suggested that it did not need to make the bald claim that he did of universal jurisdiction over global insurance programs. The finding that an insurer's conduct constituted carrying on business in Ontario was sufficient, using the American frame of reference of the "minimum contacts" doctrine, for a jurisdictional connection.

Turning to the *forum conveniens* analysis,[12] the court found all factors favoured Ontario, and none suggested New York as clearly the more appropriate forum. Only having the Travelers's action in New York would prevent Vale from suing Royal & Sun Alliance, both Ontario entities, in Ontario's Superior Court of Justice for Ontario-based liabilities under Ontario-based insurance policies. Royal & Sun Alliance would also be unable to defend against Vale's claims. For this reason, the litigation should proceed in Ontario.

[9] *Van Breda*, *supra* note 1.

[10] In this regard, the court examined the significance of *Domtar, Inc v Niagara Fire Insurance Co*, 533 NW2d 25 (Minn) at para 31 (1995), cert. denied, 516 US 1017 (1995).

[11] *Foreign Insurance Companies Act*, RSC 1970, c I-16, s 2, 4; *Insurance Act*, RSO 1970, c 224, s 21.

[12] Relying on *Amchen Products Inc v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897; *Haaretz v Goldhar*, 2018 SCC 28, [2018] 2 SCR 3 at paras 3, 27; *Van Breda*, *supra* note 1.

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Jurisdiction — non-resident defendant — claim for breach of contract — jurisdiction established but declined

53385 Newfoundland and Labrador Incorporated v WorldWide Integrated Supply Chain Solutions, Inc, 2022 NLSC 173

The defendant, WorldWide Integrated Supply Chain Solutions Incorporated (WorldWide), successfully contested the jurisdiction of the Newfoundland and Labrador court. WorldWide entered into an agreement with Akita Equipment for the carriage of a drill pipe from Houston, Texas, to Paradise, Newfoundland, which it allegedly breached. The court found that the Supreme Court of Newfoundland and Labrador has concurrent jurisdiction to hear the matter. The agreement was entered into in both Iowa and Newfoundland and Labrador. The drill pipe was delivered by a Newfoundland and Labrador carrier, Akita Equipment. The breach commenced in Texas but continued until the load was transferred to Akita Equipment. Nevertheless, the court also found that the courts of Iowa — where the contract was entered into and the jurisdiction agreed to by the parties for issues arising from it — also had concurrent jurisdiction.

Iowa was, however, clearly the more appropriate forum.[13] Since Akita Equipment refrained from litigating the matter in Iowa, there was a default judgment in place. WorldWide should not be forced to litigate the action anew in Newfoundland and Labrador. While it was possible for the court to apply Iowa and US federal laws of contract and transportation, the courts of Iowa would be more familiar with them. Akita Equipment could have sued in Newfoundland and Labrador but chose not to do so until after WorldWide had commenced its claim in Iowa, making it undesirable to litigate the matter in multiple forums. These factors all favoured Iowa as the more appropriate forum. Akita Equipment made four mistakes: (1) in agreeing to a clause that attorned to Iowa's jurisdiction; (2) in not bringing its action in the Newfoundland and Labrador court in advance of WorldWide's action in Iowa; (3) in failing to argue, in Iowa, that the action should be heard in Newfoundland and Labrador; and, finally, (4) in failing to defend WorldWide's action in Iowa.

Jurisdiction — non-resident defendant — claim for negligence — jurisdiction not declined

Devlin v Haddad, 2022 NSSC 355

The defendant, Dr. Haddad, was successful on his motion to have claims against him by the plaintiff, Mr. Devlin, heard in New Brunswick rather than Nova Scotia. Devlin was incarcerated under the auspices of the Correctional Services of Canada (CSC) at the Atlantic Institution in New Brunswick, where he claimed that he was treated negligently by Haddad. For most of the claims, the *forum non conveniens* analysis proved crucial. With Devlin's individual claims, the court found that they arose in New Brunswick. After reviewing the relevant factors,[14] the plaintiffs had also failed to show that Nova Scotia was clearly the more appropriate forum. Considering the

[13] *Van Breda*, *supra* note 1.

[14] *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003, c 2 (2nd Sess), s 12 [*CJPTA* (NS)]; *Van Breda*, *supra* note 1.

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systemic claims raised by the John Howard Society, the court acknowledged that they arose in both Nova Scotia and New Brunswick — but presumed that these claims arose in Nova Scotia since it was the plaintiff's preference. The court concluded that the centre of gravity of the litigation was in New Brunswick, and having found that Devlin's individual claims should be brought there, the CSC had discharged its burden of establishing New Brunswick as clearly the more appropriate to also hear the John Howard Society claims. The court was satisfied that the comparative convenience and expense for the parties and witness would be best served by the proceeding being heard in New Brunswick, with the applicable law also that of New Brunswick. This was, in the court's view, most likely to ensure the fair and efficient working of the Canadian legal system.

Jurisdiction — non-resident defendant — claim in negligence — jurisdiction found to exist but declined

James et al v Hongkong and Shanghai Banking Corporation Limited, 2022 ONSC 4567

The defendant, the Hongkong and Shanghai Banking Corporation (HSBC Hong Kong), sought to stay an action on jurisdictional grounds. One of the plaintiffs, Tithe Holdings, was based in Panama, while the other, Mr. James, resided in Ontario. Both held accounts with the defendant in Hong Kong, and a dispute arose with the disposal of the funds from those accounts on their closure. The court found it had jurisdiction *simpliciter*. The defendant was not carrying on business in Ontario — one possible presumptive connecting factor advanced by the plaintiff. The plaintiff's use of HSBC Canada as a conduit for sending communications to the defendant in Hong Kong was not sufficient.[15] Taking the evidence as a whole, James was simply using his relationship with HSBC Canada, as a customer, to facilitate the delivery of disposal instructions to the defendant in Hong Kong. The core of the alleged tort of negligent misrepresentation, however, was received and acted upon in Ontario, establishing a different presumptive connecting factor.

Regardless, the court ultimately found Hong Kong to be the proper forum. The overall connection of the action to Hong Kong was stronger. The alleged torts were not themselves based on facts tied solely to Ontario. They were multi-jurisdictional torts, involving actions by the defendant that took place in Hong Kong. The contracts at issue were very closely tied to Hong Kong. Both plaintiffs demonstrated an ability to travel to Hong Kong to open the accounts. The applicable law was that of Hong Kong, and the disputed funds remained in Hong Kong. While several important factors favoured Hong Kong, and some were neutral, none favoured Ontario. The court stayed the action determining Ontario was *forum non conveniens*.

Jurisdiction — non-resident defendants — claim for financial loss — jurisdiction declined — temporary stay

Mitsubishi HC Capital America Inc v eCapital Trust Corp, 2022 ONSC 4161

The plaintiff, Mitsubishi HC Capital America Incorporated (Mitsubishi), brought this action in Ontario against affiliates of eCapital Corporation (eCapital). Mitsubishi

[15]Relying on *Van Breda*, *supra* note 1, and *Chevron Corp v Yaiguaje*, 2015 SCC 42, [2015] 3 SCR 69 [*Chevron*].

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also sued eCapital in New York, United States. Mitsubishi was a Delaware company operating in Connecticut that, prior to their dispute, offered financing and liquidity services to eCapital, an Ontario lender. The defendants, successfully sought to stay the action in Ontario, temporarily, pending the disposition of the proceedings in New York.

While the Ontario Superior Court had jurisdiction *simpliciter*, the issue was whether it should decline to exercise it as *forum non conveniens*.[16] While most factors were relatively neutral, the deciding factor for the court in this instance was the avoidance of multiple proceedings and conflicting decisions in different courts. Mitsubishi had sued eCapital in New York. The New York action would proceed despite the motion. Defendants in Ontario confirmed that they would not oppose being sued in New York on jurisdictional grounds. Since the facts and legal issues in the New York and Ontario actions substantially overlapped, if both proceeded, there was a risk of conflicting decisions. If the Ontario defendants were added to the New York action, that court would be able to fully adjudicate the issues raised between Mitsubishi and the Ontario defendants. New York was clearly the more appropriate forum.

A separate concern in this case was whether staying the Ontario action should be permanent or temporary.[17] The court found that, where the Ontario defendants were not parties to the New York action, a permanent stay would not be just. A temporary stay of the Ontario action was granted until the New York action was decided since it would allow Mitsubishi, if it desired, to add the Ontario defendants as parties to the New York action.

ii. Declining jurisdiction in personam

Forum selection clause — stay of proceedings

Kozlik's Mustard v Acasi Machinery Inc, 2022 ONSC 2356

Kozlik's Mustard was a family-owned Ontario company that manufactured and sold condiments. Kozlik contracted with Acasi Machinery Incorporated (Acasi), a Florida company, for a Trupiston Automated Piston Filler Machine (Trupiston) for its mustard products. Kozlik then sued Acasi claiming the Trupiston was defective. Acasi unsuccessfully brought this motion to stay the action based on a forum selection clause in favour of Florida. While the court acknowledged the forum selection clause was enforceable, there was also strong cause to avoid it consistent with the decisions in *ZI Pompey Industrie v ECU Line NV*[18] and *Douez v Facebook*.[19] The court reasoned that the agreement between Acasi and Kozlik was closer to a contract of adhesion than to a fully negotiated contract between sophisticated commercial parties. While both were seasoned businesses, they only negotiated price and machine specifications. The terms and conditions that contained the forum

[16] *Van Breda*, *supra* note 1.

[17] The court applied factors on whether a stay should be temporary pending foreign proceedings from *Catalyst Fund Limited Partnership II v Imax Corporation*, (2008) 92 OR (3d) 430 (ONSC).

[18] 2003 SCC 27, [2003] 1 SCR 450 [*Pompey*].

[19] 2017 SCC 33, [2017] 1 SCR 751 [*Douez*].

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selection clause were not negotiated or brought to the attention of Ms. Kessler, an employee of Koslik.

There was a real and substantial connection to Ontario as the place where both the negligent manufacturing claim and negligent misrepresentation took place. Acasi also failed to persuade the court that Ontario's jurisdiction *simpliciter* should be declined or that Florida was clearly the more appropriate forum. Considering the location of witnesses, the court noted that it became a less meaningful consideration in the zoom era and in the interests of justice and fairness to Acasi. The need for witnesses to travel between or within countries was eliminated by the availability of zoom testimony in the Ontario proceedings.[20] Acasi argued that Florida law could resolve the dispute but with no evidence from a person with knowledge of Florida law. In addition, the court upheld the *Moran* principle that a manufacturer selling outside of its jurisdiction should expect to defend negligent manufacture claims in the place where the allegedly defective productive was used.[21] While the principle originally arose in a case that did not have a forum selection clause to consider, it nevertheless also applied in this case where the party had not negotiated a forum selection clause or been directed to its existence. There was no hardship to Acasi that could override *Moran*. Acasi had to take additional steps to notify its customers that doing business with it involved resolving disputes in Florida. Overall, there was strong cause to avoid Acasi's forum selection clause and for Ontario to maintain jurisdiction.

Arbitration clause — stay of proceedings

General Entertainment and Music Inc v Gold Line Telemanagement Inc, 2022 FC 418, 192 CPR (4th) 112

The defendants, Gold Line Telemanagement Incorporated and its Bermuda-based subsidiary Ava Telecom Limited, successfully appealed the dismissal of their motion to stay proceedings in favour of arbitration in Bermuda. The defendants entered into a Content Acquisition and Licensing Agreement with the plaintiff. The plaintiff claimed that the defendants pirated its satellite television and infringed its rights under the *Copyright Act*,[22] the *Trademarks Act*,[23] and the *Radiocommunication Act*.[24] The plaintiffs were challenging the application and validity of the agreement, requiring an assessment of the corporate entities, whether they arise from the agreement, and whether the business relationship continued after the notice of termination. In the court's view, these were complex issues of law and fact that first had to be considered by an arbitrator. The court stressed the principle that arbitrators

[20]Note that discussion of the availability of zoom and/or videoconferencing as it impacts on the jurisdictional analysis when it comes to the availability of witnesses and evidence in locations outside the forum is likely to be raised more often post COVID-19 pandemic, which expanded the use of these technological capacities among Canadian courts and courts of other jurisdictions. For an initial discussion of this topical issue, see *Kore Meals LLC v Freshii Inc*, 2021 ONSC 2896, 156 OR (3d) 311, and as summarized in Ashley Barnes, "Canadian Cases in Private International Law in 2021" (2021) 59 CYIL 584 at 595–96.

[21]*Moran v Pyle National (Canada) Ltd*, [1975] 1 SCR 393, 43 DLR (3d) 239.

[22]RSC 1985, c C-42.

[23]RSC 1985, c T-13.

[24]RSC 1985, c R-2.

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are competent to determine their own jurisdiction.[25] A party should not be able to escape an arbitration clause by alleging termination of the contract containing that clause. The separability doctrine is a logical extension of the rule that a challenge to an arbitral tribunal's jurisdiction should be considered first by the tribunal itself. The burden on a plaintiff seeking to escape an arbitration clause is high, requiring that it is manifestly tainted. It was an error to rely on *Pompey*,[26] providing guidance on forum selection clauses but not on the enforcement of an arbitration clause. Also, the court rejected the plaintiff's argument that the proceedings should not be stayed in favour of arbitration because it was seeking statutory remedies. The court found that the *Copyright Act*, and other relevant legislation, did not expressly exclude arbitration.[27]

Forum selection clause — stay of proceedings

International Pre-owned Barcode Ltd v Agiliron Inc, 2022 NSSC 375

The defendant, Agiliron Incorporated, was successful in its motion for a stay of proceedings based on lack of jurisdiction. Agiliron Incorporated was a software company incorporated in Delaware, United States and managed from Oregon. Agiliron entered into an agreement with the plaintiff, International Pre-Owned Barcode (IPOB) for rights to its online business software, which included a forum selection clause. IPOB argued that it was presented with the agreement without an opportunity to discuss or negotiate terms, including a "unique, nonsensical forum selection clause." IPOB also claimed that, if it was compelled to pursue the action in San Francisco, it would incur prohibitively high expenses, with the disruption leading to further financial losses.

The court had to assess whether a real and substantial connection was presumed to exist between Nova Scotia and IPOB's claim.[28] The defendant, however, established the validity of the forum selection clause. IPOB's position that this resembled the situation in *Douez*[29] involving a consumer contract that was rejected by the court. Instead, the court noted that there were two incorporated companies, and while the Nova Scotia business was relatively small, IPOB had a director of operations and chose to enter into an agreement with a US-based software supplier. There was no evidence of inequality of bargaining power or an improvident bargain because IPOB could not protect its interests during the contracting process.[30] The forum selection clause was valid and enforceable. In addition, IPOB did not satisfy the court that there was "strong cause" not to be bound by it. This was a commercial contract between two companies in the competitive software marketplace. The only evidence of their relative positions was that Agiliron was an international company, while IPOB was a Nova Scotia company — there was nothing to suggest "drastic disparities" in bargaining power or a lack of sophistication, as alleged by IPOB.

[25]Referred to as the "competence-competence principle," see e.g. *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34, [2007] 2 SCR 801 at para 11; *Seidel v TELUS Communications Inc*, 2011 SCC 15, [2011] 1 SCR 531.

[26]*Pompey*, *supra* note 18.

[27]*Desputeaux c Editions Chouette*, 2003 SCC 17, [2003] 1 SCR 178 at paras 42–46.

[28]Based on *CJPTA* (NS), *supra* note 14, s 11(e)–(h). See also *Bouch v Penny*, 2009 NSCA at para 80.

[29]*Douez*, *supra* note 19.

[30]Referencing *Uber Technologies Inc v Heller*, 2020 SCC 16.

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iii. Class actions

Jurisdiction simpliciter *found to exist*

Stephens v JUUL Labs Canada Ltd, 2022 BCSC 1807

One of the defendants, Altria Group Incorporated (Altria), contested British Columbia's jurisdiction in a proposed class action for damages for personal injuries suffered as a result of using JUUL branded e-cigarettes. Altria was a US corporation with a business address in Richmond, Virginia. In the underlying action, the plaintiffs claimed that the defendants conspired in the design, manufacturing, marketing, distribution, and selling of highly addictive and unsafe e-cigarettes in Canada. Despite knowing the products were unsafe, the defendants allegedly engaged in a marketing campaign targeting young people.

The court was satisfied that the plaintiffs had established a good arguable case for jurisdiction under the *CJPTA* (BC).[31] The plaintiffs suffered injuries and damages in British Columbia. Altria's lack of presence in Canada was not determinative. What was critical were the injuries suffered in the jurisdiction. The lack of a physical presence in British Columbia was now less relevant than it had been in the past since online advertising and social media were the new reality in modern commerce. Evidence did not negate involvement by Altria in the advertising or marketing of JUUL products in British Columbia or Canada generally. The relationship between Altria and Juul Labs Incorporated (JLI), another defendant, went beyond a mere shareholder. Altria provided services to JLI related to JUUL products, and there was evidence of high-level communication between the companies indicative of collaboration or partnership. Consistent with the decision in *British Columbia v Imperial Tobacco Canada Ltd*[32] and *Fairhurst v DeBeers Canada Inc*,[33] the court found that this close relationship supported allegations of agency, joint venture, and conspiracy. There was a causal link to British Columbia — it was reasonably foreseeable to Altria that JUUL products would be used in British Columbia and that any negligence or breach of duty might result in injuries to consumers in British Columbia.

Altria was unable to rebut the presumption of jurisdiction by establishing a weak relationship between the subject matter of the litigation and British Columbia as the forum. The evidence fell short of establishing that it had no or minimal involvement in the sale, marketing, or distribution of JUUL products in British Columbia. The court did not embark on a *forum conveniens* analysis because, though Altria argued that this was a copycat litigation and the United States was the most appropriate forum, the notice of application had not raised the issue under the *CJPTA* (BC).[34]

Jurisdiction simpliciter *found to exist*

Klaus v Black Diamond Equipment Ltd, 2022 BCSC 1182

The representative plaintiff in this class action alleged harm suffered by the use of defective avalanche beacons sold in British Columbia and across Canada. This

[31] *CJPTA* (BC), *supra* note 8.
[32] 2006 BCCA 398, 273 DLR (4th) 711.
[33] 2012 BCCA 257, 35 BCLR (5th) 45.
[34] *CJPTA* (BC), *supra* note 8, s 11.

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motion by one of the defendants, Clarus Corporation (Clarus), contested the territorial competence of the BC court under the *CPJTA* (BC).[35] Clarus was a Delaware corporation, with headquarters in Salt Lake City, Utah. It was a holding company, which holds shares of subsidiaries that also hold shares of other subsidiaries operating a variety of businesses, including outdoor and consumer product businesses. The other defendants in the class action, Black Diamond and Pieps, were owned by subsidiaries of Claurus. Clarus maintained that it did not carry on business in British Columbia, and, as a consequence, there was no real and substantial connection to the jurisdiction.

The BC Supreme Court dismissed the motion, concluding that it had territorial competence over the class action and the defendants, including Clarus, under the *CJPTA* (BC).[36] A real and substantial connection was presumed to exist between British Columbia and the facts. Those facts supported a claim against the defendants, including Clarus, for unjust enrichment, which established the basis of a restitutionary obligation that arose to a large extent in British Columbia. In the court's view, Clarus also failed to rebut that presumption at the second stage of the analysis.[37] Clarus provided no evidence to demonstrate that the plaintiff would not be entitled to restitution on the basis that the defendants were unjustly enriched by their actions. The court was not satisfied that the restitutionary obligation only pointed to a weak connection between the subject matter of the litigation and the proposed forum of British Columbia.

Residence — standing to bring class proceeding

MM Fund v Excelsior Mining Corp, 2022 BCSC 1541

The plaintiff, MM Fund, brought this action under the *Class Proceedings Act* (*CPA*).[38] The defendant, Excelsior, argued that MM Fund lacked standing to commence a class proceeding under the *CPA* as it was not a resident of British Columbia.[39] While based in Toronto, MM Fund claimed that it was a BC resident governed by the province's *Securities Act*[40] as an issuer with a real and substantial connection to British Columbia that made securities available to investors in British Columbia through registered dealers in British Columbia. MM Fund insisted that this amounted to a "statutory seat" in British Columbia — a concept from the Hague Conference on Private International Law relevant to habitual residency and not expressly defined by Canadian courts.[41]

The court canvassed various authorities that could help in the interpretation of "resident" in section 2(1) of the *CPA*.[42] Whatever test or approach adopted, in the

[35]*Ibid.*

[36]*Ibid*, s 10(1).

[37]Relying on *Ewert v Hoeg Autoliners AS et al*, 2020 BCCA 181, 450 DLR (4th) 301 [*Ewert*]; *Stanway v Wyeth Pharmaceuticals Inc*, 2009 BCCA 592, 314 DLR (4th) 618.

[38]RSBC 1996, c 50.

[39]As required by *ibid*, s 2(1).

[40]RSBC 1996, c 418.

[41]See, for example, the discussion in Joost Blom, "The Court Jurisdiction and Proceedings Transfer Act and the Hague Conference's Judgments and Jurisdiction Projects" (2018) 55:1 Osgoode Hall LJ 257 at 276.

[42]These included, but were not limited to, *Ewert*, *supra* note 37; *Garron Family Trust (Trustee of) v R*, 2012 SCC 14, [2012] 1 SCR 520; and the approach used for the purposes of the *CJPTA* (BC), *supra* note 8, on what it means to be "ordinarily" resident in British Columbia.

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court's view, all led to the conclusion that MM Fund was resident in Ontario and not British Columbia. Ontario was the jurisdiction where MM Fund was registered to do business; where its central management and control was located, and where its trustee, along with its management and control, was located. MM Fund had no physical connection to British Columbia or to any other connection beyond selling its securities to some BC residents through BC dealers who were registered in British Columbia, where they were presumably resident. The court accepted Excelsior's argument that the MM Fund's limited connection to British Columbia was insufficient to establish residency. The only reason that MM Fund was a "reporting issuer" under the *Securities Act* in British Columbia was to enable it to sell units in its fund to BC residents (and others across Canada). The court noted that, while a person or corporation may have more than one residence, the fact that MM Fund was clearly a resident of Ontario did not automatically disentitle it from being a resident of British Columbia. Nevertheless, on the evidence before it, MM Fund failed to show that it was a resident of British Columbia in this case.

iv. Family law

Custody, parenting, and access — best interests of the children — serious harm

F v N, 2022 SCC 51

This appeal concerned how the "best interests of the children" are assessed for jurisdictional purposes in instances of international child abduction. The principal question was whether Ontario could exercise jurisdiction in the exceptional circumstances provided for in the *Children's Law Reform Act* (*CLRA*)[43] because the children would face "serious harm" if returned to their father in the United Arab Emirates (UAE).

The parents were both Pakistani nationals, while the mother was also a Canadian citizen. They were married in 2012 and lived together in Dubai. Despite having Canadian citizenship, the children had always been resident in Dubai — that is, until their mother brought them with her to Canada for a trip in 2020 and then informed their father that she would not be returning to Dubai. The father commenced proceedings in an Ontario court for an order returning the children to the UAE.[44] The mother asked the court to exercise jurisdiction to determine custody and access for the children, claiming that they would suffer "serious harm" if removed from Ontario.

At trial, an Ontario court found it did not have jurisdiction and ordered the children be returned to Dubai. The mother's appeal was also dismissed.[45] A majority of the Ontario Court of Appeal decided it could not exercise jurisdiction because the mother had failed to prove the availability of substantial evidence of the bests interests of the children in remaining in Ontario. The application of UAE custody law would not, on a balance of probabilities, harm the children. It was not enough to point to differences in the law in the UAE and suggest that a parent may have different rights in a foreign jurisdiction relative to Ontario.[46]

[43]RSO 1990, c C 12, s 23 [*CLRA*].
[44]Under *ibid*, s 40.
[45]*N v F*, 2021 ONCA 614, 464 DLR (4th) 571. See also the summary in Barnes, *supra* note 20.
[46]*Ibid.*

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The Supreme Court of Canada upheld that decision and dismissed the appeal. The court rejected the mother's position that the "serious harm" exception for exercising jurisdiction required a broad-based best-interests analysis.[47] Justice Nicholas Kasirer found that, rather than a broad-based best-interests analysis at the jurisdictional stage, an individualized assessment was required of the risk of serious harm. While separation from a primary caregiver could give rise to harm in and of itself, such separation without regard to the individualized circumstances would not always rise to the level required under the *CLRA*.[48] When assessing the severity of the harm, undertakings made by the left-behind parent to the primary caregiver could be joined to the return order. The trial judge had, in Kasirer J's view, considered the effects flowing from a possible separation, whatever the cause, and decided, at the end of the day, that it was in the children's best interests to return to Dubai.

Kasirer J also addressed whether inconsistencies between family law in the foreign jurisdiction (in this instance, the UAE) and Ontario should factor into a serious harm analysis — the issue that had proven divisive at the Ontario Court of Appeal. He found that, as long as the ultimate question of custody was determined on the basis of the best interests of the child, the *CLRA* did not prevent children from being returned to jurisdictions where the law differed in some respects from that of Ontario. The trial judge was aware that UAE law may conflict with Ontario's conception of the best interests of the children but nonetheless found, based on expert testimony, that the allocation of parental responsibilities based on gender were not automatic and imperative, allowing for judicial discretion on the best interests of the children.

Much like the case history in Ontario, these issues also proved divisive at the Supreme Court of Canada. Justice Mahmud Jamal, writing in dissent,[49] found material errors in the trial judge's approach to assessing the likelihood and severity of serious harm. In his view, the mother provided reasonable and legitimate reasons for refusing to return the children to Dubai, including her precarious residency status there, her bases for refusing the father's "with prejudice" settlement offer, and her legitimate concerns about living under the laws of the UAE as a woman. The trial judge's own factual findings regarding the expert evidence and the circumstances of the children, in Jamal J's view, demonstrated that the children would suffer serious harm if they lost their mother as their primary caregiver. He would have allowed the appeal.

Custody and access — habitual residence — declaration of appropriate forum

Aslanimehr v Hashemi, 2022 BCCA 248

The husband appealed a stay of proceedings and declaration that Ontario was an appropriate forum for decisions regarding his son. The parents were citizens of Iran and on vacation, staying with the husband's family in Vancouver in 2019, when they separated. Shortly thereafter, the wife moved with their son to Ontario to live with her parents. Justice Harvey Groberman dismissed the appeal. He found that no approach would lead to a finding that British Columbia was the son's "habitual residence"

[47]Having regard to all the factors set out in *CLRA*, *supra* note 43, s 24(3).

[48]*Ibid*, s 23.

[49]Andromache Karakatsanis, Russell Brown, and Sheilah Martin JJ concurring.

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within the meaning of the *Family Law Act* (*FLA*).[50] Rejecting the husband's proposed approach to interpretation and upholding that at first instance, the appellate judge found that a short-term arrangement to stay at a home during a vacation without any settled intention of remaining there long term could not establish "habitual residence." Residing included a notion of permanence or non-transient situation. The trial judge had carefully considered the evidence and the settled intentions of the parties. For the purposes of the *FLA*,[51] the place where the child most recently resided was with his parents in Iran. There was no error in rejecting the husband's contention that British Columbia was the son's habitual residence and concluding that British Columbia lacked jurisdiction.

In this case, however, it was not appropriate for a BC court to declare Ontario the most appropriate forum. British Columbia did not have the authority, nor had it been asked to transfer proceedings to Ontario. That issue was to be determined by the courts of the jurisdiction — in this case, Ontario, where a decision would have to be made on potential jurisdictional authority between itself or Iran, the family's prior home. Groberman JA therefore quashed the declaration concerning Ontario as the appropriate forum.

Child wrongfully retained — Hague Convention on Child Abduction — *habitual residence*

KF v JF, 2022 NLCA 33[52]

The mother appealed a decision finding that her seven-year-old daughter was habitually resident in Boston and wrongfully retained in St. John's, Newfoundland. The parties met in Boston, married in St. John's before returning to live in Boston. During the COVID-19 pandemic, the mother returned home with her daughter to attend school remotely. The father later joined them, working remotely until he returned to Boston in March 2021. Months later, the mother informed the father that she would not be returning to Boston with their daughter. The father commenced an application for his daughter's return under the *Hague Convention for Child Abduction*.[53]

Justice Lois Hoegg allowed the mother's appeal, setting aside the conclusion that the daughter was wrongfully retained in St. John's. The trial judge misapprehended the legal principles in *Balev*[54] in determining the daughter's habitual residence. Time-limited parental agreements were an aspect of parental intention, which is itself only one factor in the determination of a child's habitual residence, and a factor that *Balev* specifically directed not be overly relied upon. The focus of the child's life, contrary to the trial judge's reasoning, was not just a relevant consideration, it was the object of

[50]SBC 2011, c 25, s 72(2) [*FLA* (BC)]. Also relevant was the approach taken in *Office of the Children's Lawyers v Balev*, 2018 SCC 16, [2018] 1 SCR 398 [*Balev*].

[51]*FLA* (BC), *supra* note 50.

[52]Leave to appeal to SCC refused, 40321 (1 December 2022).

[53]*Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can TS 1983 No 35 (entered into force 1 December 1983) [*Hague Convention on Child Abduction*].

[54]*Balev*, *supra* note 50.

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the inquiry. The circumstances of the case, including the child's connections to each jurisdiction, the circumstances of the move to the present jurisdiction, and all other relevant facts including parental intention, were relevant considerations that informed a court's determination of the focus of the child's life for the purposes of habitual residence. The trial judge incorrectly instructed herself that the circumstances of the parents and their previous intention to live together in Boston, along with the daughter's historical connection, were the controlling factors. This approach did not give sufficient consideration to the daughter's life or current connections. The focal point of the daughter's life immediately before July 2021 was St. John's. She had been there for over a year at that time, had completed her full Grade 1 there, was integrated into the environment and social fabric of St. John's and settled into a stable family life with her mother and extended family. Her habitual residence had changed from Boston to St. John's during that time.

In dissent, Justice Noel Goodridge disagreed that the applications judge misapprehended the evidence, noting that appellate courts must defer on decisions relating to habitual residence. The applications judge, in his view, considered all relevant factors and applied the hybrid test from *Balev*.[55] He would have dismissed the appeal and ordered the mother to return the daughter to Boston.

Child abduction — Hague Convention on Child Abduction — *habitual residence*

Osaloni v Osaloni, 2022 ABKB 835

A father sought the return of his children to the United Kingdom under the *Hague Convention on Child Abduction*[56] after the mother travelled with them to Calgary. The family had been living together in Rainham, United Kingdom, prior to the children's removal. The court found, based on conflicting evidence, that the children were habitually resident in the United Kingdom.[57] They had never travelled to Canada and had no prior connection to Calgary. The father's deemed "parental responsibility" under UK law sufficiently aligned with the wording of the convention,[58] such that the father was exercising rights of custody at the time his children were taken to Canada. The mother had removed the children without the agreement of the father, breaching his right of custody, which included a right to participate in the decision on the residency of the children.[59] Allegations made by the mother in defence, if proved, would constitute domestic violence but were vehemently denied by the father. The United Kingdom had a robust family law justice system for the mother to seek legal remedies in the United Kingdom for herself or her children. The mother had not met her onus of establishing that the father consented to her taking the children or to demonstrate a grave risk to the children of physical or psychological harm. The court ordered the children returned to the United Kingdom.

[55]Consistent with *ibid* at para 38.
[56]*Hague Convention on Child Abduction*, *supra* note 53.
[57]Relying on *ibid*, art 3, and the hybrid analysis in *Balev*, *supra* note 50.
[58]*Ibid*, art 5.
[59]As in *ibid*, art 3.

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

AIP v KB, 2022 BCSC 54, 65 RFL (8th) 285

The father was unsuccessful in his application requiring the mother to return their child to Indonesia, having been wrongfully retained in Canada. The father was Indonesian, and the mother was Canadian. They lived in Bali, Indonesia, where their daughter was born. The daughter lived with her mother on separation and divorce by order of an Indonesian court. The father initially consented to the mother taking their daughter to Canada during the COVID-19 pandemic but insisted that this was a temporary trip. The mother maintained that she was never required to get the father's consent because she had been granted full custody of the daughter by an Indonesian court order.

The BC Supreme Court found that the mother had not exceeded her authority when declining to return to Bali with her daughter and continuing to reside in British Columbia. The Indonesian order gave her sole decision-making authority over the daughter, including where she lived. In determining habitual residence,[60] the court noted that these changes were reserved solely to custodial parents. The judge found that, based on expert evidence of Indonesian law, sole custody gave rise to a single parent having sole decision-making authority, despite parenting time being granted to the non-custodial parent. As a consequence, the father's consent was not necessary for the mother to change the daughter's habitual residence. The mother had also demonstrated a settled intention to make British Columbia the daughter's place of habitual residence. The daughter was not wrongfully detained.

Nevertheless, the court also found, based on relevant factors, that Indonesia was clearly the more appropriate forum to determine the daughter's guardianship, parenting arrangements, and so on.[61] The Indonesian court was seized of whether the current Indonesian order should be varied to grant the father additional parenting rights and responsibilities. Unless and until such a variation was made, the parenting rights and responsibilities conferred by the Indonesian court should be respected and the daughter not returned, allowing her to remain in her mother's care in British Columbia. Should the Indonesian court vary the father's responsibilities, he may be able to seek the assistance of a BC court at a later date.

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

Ajayi v Ajayi, 2022 ONSC 5268, 473 DLR (4th) 609 (Div Ct)[62]

The Divisional Court dismissed an appeal of a decision finding an Ontario court did not have jurisdiction to make a parenting order involving three children who were removed by their mother from Lagos, Nigeria, without their father's consent. The parties were dual citizens of Nigeria and Canada. They met in Canada but married

[60] *FLA* (BC), *supra* note 50, ss 72(2).
[61] *CJPTA* (BC), *supra* note 8, s 11(1).
[62] Aff'g 2022 ONSC 2678 (SCJ).

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and resided in Nigeria with their family. Ms. Ajayi left Nigeria with her children for Canada after a dispute with the family over their separation. Mr. Ajayi commenced proceedings for dissolution of marriage in Nigeria, while Ms. Ajayi made an application under the *Children's Law Reform Act* (*CLRA*) in Ontario.[63] Ms. Ajayi claimed at first instance that her children would suffer serious harm[64] if returned to Nigeria because she alleged family violence and that she had an affinity for/identified with the LBGTQIA+ community, with potential serious consequences in Nigeria, including with courts on matrimonial issues. Both parties presented expert evidence of family law and treatment of individuals who do not conform to heterosexual norms. The trial judge, however, preferred the expert whose evidence was more specific to family law and the application of the best-interests principle when it came to parenting time and decision-making for children. The lower court declined to assume jurisdiction[65] and left it to the Nigerian courts to assess the best interest of the children for a parenting order.

The appellate judges found that there was no error in applying section 23 of the *CLRA*.[66] The trial judge considered and ultimately rejected the appellant's evidence, including that of her expert, that she was a vulnerable person and that she and/or the children were at risk of harm if returned to Nigeria. The lower court was bound to follow the majority in *N v F*.[67] Evidence supported that Ms. Ajayi was born in Nigeria, had dual Canadian and Nigeria citizenship, and there was no legal impediment to her returning to, and staying in, Nigeria with the children. Ms. Ajayi was a privileged member of Nigerian society, well educated, had substantial means, and an influential family. She was also well situated to return to Nigeria. Findings regarding Nigerian law and its approach to assessing the best interests of the children were entitled to deference. There was also no error in concluding, given the findings of fact, that returning the children to Nigeria would not be contrary to their best interests, even if the trial judge did not expressly say so.[68]

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

BC v DE, 2022 BCSC 1597

The claimant sought a declaration that his child was habitually resident in British Columbia and wrongfully removed to Taiwan. The claimant was a Canadian citizen who moved to Taiwan in the late 1990s where he married a Taiwanese citizen and had a child. They have since lived at various times in both Taiwan and Vancouver, British Columbia. The mother left Vancouver and returned with the child to Taiwan in 2022, at which time an order was made regarding parenting of the child by a Taiwanese court. The court found that the parties were not habitually resident in British Columbia at the time the child was removed to Taiwan in 2022.[69] The child resided

[63]*CLRA*, *supra* note 43.
[64]*Ibid.*
[65]*Ibid*, s. 23.
[66]*Ibid.*
[67]2021 ONCA 614 (note the appellant attempted to rely on the dissent from Lauwers JA in this case, but the court rejected her position).
[68]Under *CLRA*, *supra* note 43, s 40.
[69]*FLA* (BC), *supra* note 50, s 74.

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in British Columbia for only approximately six months between 2021 and 2022, while she resided in Taiwan the remainder of her almost twelve years. On balance, the discussion about the move in 2019 tipped the balance against a finding of habitual residence, and, even if wrong, the judge noted, the intent changed after the return to Taiwan in 2020. The claimant also clearly impliedly consented to that relocation back to Taiwan. The parties were never habitually resident in British Columbia and clearly not at the time the child returned to Taiwan in 2022 or on the date of the commencement of the application. Even if the court had jurisdiction, the judge also found that Taiwan was clearly the more appropriate forum, notably considering such factors as avoiding a multiplicity of proceedings and the best interests of the child.

Family property, spousal and child support — jurisdiction not declined

Meik v Vachon, 2022 BCSC 1682

Mr. Vachon challenged the jurisdiction of the BC court to hear claims brought by his wife, Ms. Meik, for divorce, family property, and spousal support. He had previously commenced family law proceedings in the Superior Court of Washington in the United States, while his wife also commenced proceedings in a BC court. They conceded that matters relating to parenting of their child must be addressed by a BC court, and the dispute arose with the remaining claims. Both were Canadian citizens but lived and worked in Washington State before and during their relationship. They were married in British Columbia. The parties disputed whether, prior to their separation, they had relocated to a home in Whistler, British Columbia. Vachon agreed that they lived there as a safe haven during the COVID-19 pandemic but denied it was a permanent relocation. Vachon conceded a real and substantial connection existed sufficient for the BC court to have territorial competence but raised the issue of *forum conveniens.*

Justice Elizabeth McDonald determined that the BC court should not decline to exercise jurisdiction over Meik's claims. She considered the relevant factors under the *FLA* in deciding jurisdiction for property claims.[70] The overall inconvenience and expence associated with having two proceedings in different courts could be avoided if the court maintained jurisdiction over property division. The comparative convenience and expense of litigating in British Columbia versus in Washington weighed in favoured of not declining jurisdiction. Washington State had a regime of community property division. Nothing suggested that rules and procedures were incapable of efficiently managing the expert evidence that might be required for the BC action, including expert evidence related to the laws of Washington State.

McDonald J applied similar reasoning in assessing jurisdiction for child and spousal support claims.[71] This was not a situation where the claims for support would be impossible in one jurisdiction, or the applicable principles so profoundly different, that it weighed in favour of one jurisdiction over the other. Vachon had

[70] *Ibid*, s 106.
[71] *CJPTA* (BC), *supra* note 8, s 11.

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argued the issues of property and support were intertwined and that one court should decide both issues. Having decided not to decline jurisdiction for property, the judge was unwilling to do so for support. The court maintained territorial competence as the Superior Court of Washington was not a more appropriate forum.

B. Québec

i. Actions personnelles à caractère patrimonial

Compétence — litispendance — choix de soumettre les litiges à une autorité étrangère — articles 166, 491 CcP *— article 3148* CcQ

Ormuco inc c Ernst & Young, 2022 QCCA 405

The appellant, Ormuco Incorporated, sought to overturn a decision of the Superior Court rejecting its motion for a declinatory exception that Quebec courts did not have jurisdiction due to a forum selection clause. The Superior Court found the exception was raised late and did not conform to the *Code of Civil Procedure* (*Cpc*).[72] The judge also found that the appellant submitted to the jurisdiction of the Quebec courts within the meaning of Article 3148.[73] The appeal was dismissed. There was no error in refusing to allow the appellant's declinatory exception outside the time allowed by the *Cpc*.[74] Preliminary exceptions raising a lack of international jurisdiction had to be raised promptly unless there were "serious reasons," such as public order considerations, to warrant their consideration at a later time. Lack of jurisdiction due to a forum selection clause was not based on public order. Declinatory exceptions invoking a forum selection clause were governed by the time limits.[75] The appellant had to provide notice no later than 30 September 2020 when the case protocol was filed, and they did not do so until January 2021. The appellant had not established, or even alleged, serious reasons to submit outside the timeline as required.[76]

While not determinative, the court also found that it was an error to conclude that the appellant had clearly submitted to the jurisdiction of the Quebec courts. Between the filing of the originating application and the filing of the notice disclosing its declinatory exception, the only steps the appellant accomplished in the proceedings was filing its representation statement — which reserved the right to contest the jurisdiction of the Quebec Superior Court — and the filing of a notice of substitution of counsel. The appellant did not participate in the case in any other way. Though the appellant's counsel had certain discussions with respondent's counsel in preparing a case protocol, without discussing jurisdiction, those discussions were inconclusive.

[72]CQLR, c C-25.01, arts 166–491 [*Cpc*].
[73]*Civil Code of Quebec*, CCQ 1991, art 3148 [*CcQ*].
[74]*Cpc*, *supra* note 72, art 166.
[75]*Ibid.*
[76]*Ibid.*

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Compétence — litispendance — choix de soumettre les litiges à une autorité étrangère — article 167 Ccp — article 3148 CcQ

3235149 Canada Inc c Total Quality Logistics, 2022 QCCQ 5246

The plaintiff sued the defendant, Total Quality Logistics, for unpaid invoices totalling twenty-five thousand dollars. As an American limited liability company based in Ohio, the defendant brought a declinatory exception based on a choice-of-forum clause contained in written agreements with the plaintiff. That clause consented to the jurisdiction of the state court in Clermont County, Ohio, and required any dispute be brought before that court. The plaintiff opposed the declinatory exception because it was raised late and the procedural conduct of the defendant in the proceedings amounted to implicit recognition of the jurisdiction of the Quebec court.

Justice David Cameron relied on recent guidance on rules concerning time restrictions in *Ormuco Inc c Ernst & Young*.[77] Applying those rules, the court found that the preliminary exception based on the choice-of-forum clause was brought outside the applicable time limit — the day after the signing of the complementary statement of oral defence. Since the court's case protocol form required at least a summary statement of defence, it was possible to make a defence subject to the right to bring the preliminary exception, so long as the intention to bring that preliminary exception, further along in the process, was clearly stated at the outset.

Cameron J also agreed that the defendant had submitted to the court's jurisdiction. The situation in this case could be distinguished from *Ormuco*, where the only steps taken were filing a reply. This defendant, by contrast, was fully engaged in spelling out a defence, which may have appeared to be simply a question of form in the protocol but which was fully fleshed out in the subsequent document. It was clearly a case where time and energy had been spent furthering the proceedings before the Quebec court. The case had advanced to a point where it could be inscribed without any other steps.

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

Oslo Construction inc c GEA Refrigeration Canada inc, 2022 QCCS 10

The plaintiff, Oslo Construction Incorporated, sought $635213.68 in services rendered as part of a factory construction contract completed for the defendant, GEA Refrigeration. The defendant successfully brought a declinatory exception claiming that the Quebec court did not have jurisdiction due to the existence of a forum selection clause included with the contract. A subsequent purchase order relating to the contract referenced "Place of jurisdiction: Courts of Toronto, ON," and GEA Refrigeration's attached standard terms and conditions referred to the courts of British Columbia for adjudicating disputes leaving it inconsistent. The court found that the parties' intentions were clear on the courts of Toronto, in Ontario, after having ruled out those of British Columbia and Quebec. The plaintiff's silence on receiving the purchase order referencing the courts of Toronto amounted to tacit

[77] 2022 QCCA 405 (as summarized above) [*Ormuco*].

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acceptance of this substitution. It was necessary to look for the common intention of the parties to resolve ambiguity in the purchase order referring to the courts in Toronto. For this reason, Quebec did not have jurisdiction.

Compétence — défendeur a son domicile ou sa résidence au Québec — l'arbitrage — articles 3134, 3148. 3139 CcQ

Eurobank Ergasias v Bombardier Inc, 2022 QCCA 802[78]

This appeal addressed the enforceability of a bank letter of counter-guarantee. Bombardier Incorporated entered into a procurement contract for firefighting amphibious aircraft valued at US $252,151,899 with the Greek Ministry of National Defense. A dispute arose with the related offset contract that allowed Bombardier to subcontract some of the aircraft construction work to Greek suppliers. As part of the offsets contract, Bombardier was required to secure a letter of guarantee from a bank operating in Greece for potential liquidated damages. This letter of guarantee was ultimately held by the appellant, Eurobank Ergasias (Eurobank). Eurobank is also the beneficiary of a letter of counter-guarantee issued by the National Bank of Canada. Bombardier was unable to fulfill some of the obligations in the offsets contract, as it proved impossible to subcontract to Greek companies to meet the standards. The dispute proceeded to an International Chamber of Commerce (ICC) arbitral tribunal. The Greek Ministry of National Defense demanded, and even threatened, Eurobank to pay under the letter of guarantee. When Eurobank finally conceded, National Bank refused to pay under the letter of counter-guarantee. A final award of the ICC arbitral tribunal also confirmed Bombardier's position.

The Quebec Superior Court found it had jurisdiction over the letter of counter-guarantee as National Bank was domiciled and had an establishment in Quebec. Bombardier would suffer damages in Quebec, and the obligations were to be performed in Quebec. Justice André Wery also found that the letter of counter-guarantee was invalid as the actions of the Greek Ministry of National Defense in threatening Eurobank amounted to fraud. Since the ICC arbitral tribunal had concluded that the offsets contract was invalid *ab initio*, the letter of guarantee and letter of counter-guarantee had also become null and void. The two key issues raised on appeal were whether the justice erred in finding the court had jurisdiction and whether the letter of counter-guarantee was not enforceable.

Justice Robert Mainville, writing for the majority, allowed the appeal only in part. Since National Bank was domiciled in Quebec, the Superior Court of Quebec clearly had jurisdiction to hear and determine the matter.[79] Mainville rejected Eurobank's argument under Article 3139 of the *Civil Code of Quebec* (*CcQ*) when the principal demand (the performance of the letter of guarantee) is subject to a foreign jurisdiction, then the incidental demand (the performance of the letter of counter-guarantee) must also be subject to that foreign jurisdiction.[80] In his view, this was a "distorted and unacceptable interpretation," and Article 3139 of the *CcQ* did not apply in this

[78]Leave to appeal to SCC filed, 40350 (14 September 2022).
[79]Under *CcQ*, *supra* note 73, arts 3134, 3148.
[80]*Ibid.*

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case where there was only one principal demand — to declare the letter of counter-guarantee unenforceable. Bombardier was entitled to seek homologation of the ICC's arbitral award in Quebec, as a party, and to support its claims relating to enforceability of the letter of counter-guarantee. Nevertheless, Mainville JA set aside paragraph 245 of the trial judgment, purporting to have extraterritorial application. The Quebec Superior Court did not have jurisdiction with respect to the specific conclusion sought by Bombardier — an order for the Greek Ministry of National Defense to comply with the ICC's arbitral tribunal's Final Award. The trial judge also committed no error in finding the letter of counter-guarantee not enforceable due to fraud.[81]

2. Procedure / procédure

A. Common law and federal

i. Commencement of proceedings

Manner of service — Hague Service Convention — *non-resident defendant aware of claim*

Salguiero et al v Instant Brands Inc et al, 2022 ONSC 4345

The plaintiff suffered severe burns due the malfunction of her Instant Pot pressure cooker purchased online through Amazon.com. She sued Amazon, Instant Brands, and the alleged Chinese manufacturer (GD Midea). GD Midea and its insurers were aware of the litigation, but not served in China pursuant to the *Hague Service Convention*.[82] Under those rules, a litigant resident in China must be served through the "Central Authority," and the documents to be served in that fashion translated into Mandarin Chinese.[83] The question was whether the formalities of service were still required in a situation where it was clear that a defendant knew the particulars of the claim.

The court concluded that valid service under the convention was required for a foreign defendant — in this instance, GD Midea. Referring to prior case law,[84] Justice Calum MacLeod reiterated that the purpose of the convention was to put defendants on notice of claims and provide a uniform procedure in all contracting states. It was insufficient to simply bring the matter to the attention of the defendant or to demonstrate that a defendant was actually aware of the claim. While there might be circumstances where a party exhausted all remedies open to it and was unable to effectuate service, that was not the case here, as the plaintiff made no effort to comply. The insurer for the defendant assumed that service had been effected on all of the defendants and served a notice of defence in the face of a threat of being noted

[81]Note that Justice Stephen Hamilton also issued a dissenting judgment in the case.

[82]*Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 15 November 1965, 685 UNTS 163 (entered into force 10 February 1969) [*Hague Service Convention*]. It is also incorporated into domestic law though, for example, *Rules of Civil Procedure*, RRO 1990, Reg 194, rule 17.05 [*Rules of Civil Procedure*].

[83]*Hague Service Convention*, *supra* note 82.

[84]*Khan Resources Inc v Atomredmetzoloto*, 2013 ONCA 189, 361 DLR (4th) 446.

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in default. Unless a defendant purposefully and intentionally waived the service requirement, or perhaps where compliance with the convention was impossible, the court had no power to deem or validate service. MacLeod J also agreed that, while formal service was still required, there was no injustice in extending the time for twenty-four months to permit completion of those formalities.

Hague Service Convention — *order for service* ex juris — *non-compliant service*

Ball v 1979927 Alberta Ltd, 2022 ABKB 814

The applicants were not able to proceed against two foreign respondents who were not served a copy of a 2019 statement of claim or order for service *ex juris*. Of the two respondents, Seibert resided in the United States, and McKeever resided in the United Kingdom. Both countries were signatories to the *Hague Service Convention*.[85] The court found the failure to obtain an order for service *ex juris* was fatal to the application. The rules governing the service of documents outside Alberta and Canada had to be adhered to strictly, and the court could not sanction service outside the jurisdiction without careful consideration.

The failure to comply with the convention could also not be cured. Even if the 2019 statement of claim came to Seibert's or McKeever's attention, correcting the irregularity would undermine the convention's objectives and encroach on US and UK sovereignty. The court also found that service could not be validated.[86] Non-compliant service under the convention could only be validated in extraordinary circumstances. The standard is onerous because service that does not follow Article 15 of the convention can be regarded as a trespass on sovereign jurisdiction. The applicants could not rely on this rule because there was no evidence to suggest an attempt to serve Seibert or McKeever, no order for service *ex juris* was obtained, and the suggestion of reasonable belief that the respondents had notice is contradicted by letters between counsel. There were no grounds to extend the time for service or vary the time periods for service. Since the 2019 statement of claim was not served within the required time frame, the lawsuit against the respondents was exhausted.

3. Foreign judgments / jugements étrangers

A. Common law and federal

i. Conditions for recognition or enforcement

Common law recognition or enforcement — ricochet judgments

HMB Holdings Ltd v Antigua and Barbuda, 2022 ONCA 630, 473 DLR (4th) 184

This decision follows the most significant determination on recognition and enforcement in 2021 from the Supreme Court of Canada, elaborating on relevant factors in assessing whether an entity is "carrying on business" in a jurisdiction to support

[85] *Hague Service Convention*, *supra* note 82.

[86] Under the circumstances provided for in *Rules of Civil Procedure*, *supra* note 82, rule 11.27

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enforcement.[87] At issue in that first round of litigation was the recognition in Ontario, under its *Reciprocal Enforcement of Judgments Act* (*REJA*),[88] of a BC judgment enforcing a decision of the Judicial Committee of the Privy Council against Antigua for expropriation of property. The Supreme Court of Canada declined to enforce HMB Holding's judgment under Ontario legislation because Antigua was not "carrying on business" in British Columbia, the jurisdiction where the foreign judgment was first recognized.[89] While the Supreme Court of Canada avoided the explicit issue of "ricochet judgments" in 2021[90] — those that allowed enforcement in one jurisdiction and subsequently sought to be recognized in another — it became a key feature of this latest action.

HMB Holding instead sought recognition and enforcement of the BC judgment under common law separate from Ontario's legislative requirements. The action was dismissed by the motions judge and the Court of Appeal but for different reasons. HMB Holding argued that there were examples of Canadian courts permitting ricochet judgments and that there was no reason for refusing to do so in this case. Antigua responded that HMB Holding overstated the weight of these authorities and that common law did not permit recognition and enforcement of the BC judgment outside of British Columbia because such judgments were local in scope. Allowing recognition in Ontario would also amount to an abuse of process because it would circumvent Ontario's legislated recognition and enforcement rules, including the applicable two-year limitation period.

The Ontario Court of Appeal applied reasoning from *Morguard Investments Ltd v De Savoye*[91] and *Chevron*.[92] Writing for the court, Justice Lise Favreau concluded that the common law test for recognition and enforcement of foreign judgments did not contemplate the viability of ricochet judgments. She reasoned that there was a key difference between an original foreign judgment as opposed to a recognition and enforcement judgment when determining whether an Ontario court should recognize a BC judgment at common law. The decision by one court (in this case, British Columbia) of whether to recognize and enforce a foreign court decision (for example, from the Privy Council) was local in scope and dependent on local legislation and limitation periods. The BC judgment determined that the decision by the Privy Council should be enforced under British Columbia's laws but made no decision for other jurisdictions. Though comity required respect for the jurisdiction that granted the original judgment, that same concern did not arise with recognition and enforcement judgments.

Focusing on whether Ontario courts should recognize and enforce the BC judgement instead of the Privy Council decision circumvented what should be the focus — whether Ontario law was available to assist HMB Holding in accessing assets in Ontario to satisfy the original Privy Council decision. The existence of a ricochet judgment at common law — one that involved prior recognition and enforcement in

[87] *HMB Holdings Ltd v Antigua and Barbuda*, 2021 SCC 44, 462 DLR (4th) 642 [*HMB* (2021)]. See also summary in Barnes, *supra* note 20 at 612–13.

[88] RSO 1990, c R5 [*REJA* (ON)].

[89] *HMB* (2021), *supra* note 87.

[90] Note that this was commented on briefly in the dissent, *ibid*, where it was suggested that ricochet judgments were possible.

[91] [1990] 3 SCR 1077, 76 DLR (4th) 256.

[92] *Chevron*, *supra* note 15.

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another province — did not fit within the rationale for recognizing and enforcing an original foreign judgment. The BC judgment in this case could not be recognized and enforced in Ontario.

Reciprocal enforcement — carrying on business — attornment

687725 BC Ltd v Rakov, 2022 ABCA 311 aff'g 2021 ABQB 462

687725 BC Limited, the appellant, was unsuccessful in its appeal of a decision declining to enforce a BC default judgment under Alberta's *REJA* (*REJA* (AB)).[93] Rakov, the respondent, was a shareholder and one of the directors of a corporation that entered into a lease agreement with 687725. When that corporation defaulted on the lease, 687725 obtained the default judgment in British Columbia; 687725 then proceeded to register the judgment in Alberta, where it was initially successful before being overturned by the chambers judge. The first issue on appeal was whether Rakov could resist enforcement because he was not "carrying on business" in British Columbia.[94] 687725 argued that the chambers judge erred in not piercing the corporate veil and maintaining a distinction between the corporation and Rakov's role as shareholder and director instead of considering the relevant factors recently identified by the Supreme Court of Canada in *HMB* (2021).[95] Since that decision predated the chambers judge's conclusion, the appellate judges noted, they could not find an error.

In addition, the facts could be distinguished from this case where the corporation clearly had a presence in the jurisdiction, unlike in *HMB* (2021). The question was whether Rakov, in his personal capacity as shareholder and director, was carrying on business in British Columbia. The court noted that the chambers judge did not rely solely on the corporate veil argument and considered relevant factors later discussed in *HMB* (2021). The Alberta Court of Appeal also found no reviewable error in the interpretation of key clauses of the lease agreement, including that Rakov was not primarily liable for the debt and a non-competition clause referring to future conduct to conclude that Rakov was not carrying on business within the meaning of the *REJA*.

The second issue was whether Rakov otherwise attorned to British Columbia's jurisdiction. The appellate judges declined to accept 687725's argument that, by signing a lease with a choice of law provision in favour of the laws of British Columbia, Rakov had attorned to that jurisdiction. Signing a choice-of-law clause was not the same as agreeing to a particular jurisdiction for adjudication and enforcement.

Non-monetary judgment — cryptocurrency assets — final judgments

North Field Technology Ltd v Project Investors Inc, 2022 ONSC 5731

The applicant, North Field Technology Limited, sought recognition and enforcement of a default judgment and ancillary orders made by a US District Court in Florida.

[93] *Reciprocal Enforcement of Judgments Act*, RSA 2000, c R-6.
[94] As required under *ibid*, ss 2(6)(b).
[95] *HMB* (2021), *supra* note 87.

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The respondents, Project Investors Incorporated, aka "Cryptsy," operated a website for the exchange, investment, and trade of cryptocurrency. A class action was launched in Florida against Cryptsy claiming that cyrptocurrency was stolen, requiring that it be returned to users and seeking damages. The Florida court asserted jurisdiction over the action, placing Cryptsy in receivership and noting that the company and its director were in default. In addition, the Florida court authorized the plaintiffs to recover the stolen cryptocurrency assets. It also ordered any third parties that dealt with the stolen cryptocurrency assets to take all necessary steps to freeze them.

The court determined that the applicant had met the test for recognition and enforcement of the Florida judgments in Ontario.[96] Florida courts properly assumed jurisdiction, having a real and substantial connection to the subject matter and with the defendants. The Florida judgments were final as there were no further steps required in the proceedings. Considering the factors that should be applied to enforce a foreign equitable, non-monetary, order in Canada from *Pro-Swing*,[97] Justice Robert Centa concluded that they favoured enforcement. The terms of the Florida injunctions were simple, clear, and specific for the respondents to know what was precluded. They were also limited in scope while acknowledging the worldwide and portable nature of cryptocurrencies. Enforcing the order was not an undue burden for the Ontario justice system or the third parties affected, and they were prepared to cooperate. The order was consistent with what would be allowed for domestic litigants. There were no defences to recognizing the Florida judgments.

ii. Bankruptcy

Enforcement of foreign bankruptcy orders

In the matter of Voyager Digital Ltd, 2022 ONSC 4553

Voyager Digital Limited (Voyager) sought recognition of US Chapter 11 orders issued by the US Bankruptcy Court in New York. Voyager is incorporated in British Columbia and listed on the Toronto Stock Exchange (TSX). Voyager's US subsidiaries, and main interests, operate a cryptocurrency brokerage and custodial and lending services. The main question before the Ontario court was whether the US Bankruptcy Court proceedings were a "foreign main proceeding" for the purposes of recognition under the *Companies' Creditors Arrangement Act* (*CCAA*), providing for the administration of cross-border insolvencies.[98]

The court granted a stay after finding the applicants had established that the US bankruptcy proceedings constituted a "foreign main proceeding" within the meaning of the *CCAA*. This was dependent on the location of Voyager's "centre of main interests."[99] Considering relevant factors, the court noted that Voyager's principal assets and operations and management were in the United States. Despite the

[96] Applying relevant principles from *Beals v Saldanha*, 2003 SCC 72, 234 DLR (4th) 1; *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52, [2006] 2 SCR 612 [*Pro Swing*].

[97] *Pro Swing*, *supra* note 96 at para 30.

[98] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, ss 45(1), 46.

[99] With "centre of main interests" being a term defined in *ibid*, ss 45(1).

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existence of corporate records regulated by the TSX in Vancouver, this did not displace the more readily ascertainable principal place of Voyager's business, operations, and management. There was little that pointed to Canada as the principal place of Voyager's cryptocurrency business. The "centre of main interests" for Voyager was in the United States, and the US bankruptcy proceedings should be recognized on that basis, as a foreign main proceeding. No public policy concerns led the court to refuse to make that declaration.[100]

iii. Family law

Enforcement of foreign divorce decree

Abraham v Gallo, 2022 ONCA 874

This appeal concerned recognition under Canadian law of an Islamic talaq divorce (also referred to as a bare talaq divorce) performed in Ontario and subsequently registered with Egyptian authorities. Since a bare talaq divorce rests on the unilateral and exclusive right of the husband to dissolve the marriage, courts had declined to recognize them as contrary to public policy without adjudicative or official oversight.[101] At first instance, the motion judge nonetheless found the parties' talaq divorce was still presumptively valid under the *Divorce Act*[102] since it was later registered with Egyptian governmental agencies by attending to the Egyptian embassy in Ontario.

Justice Lois Roberts, writing for the Ontario Court of Appeal, concluded that the motion judge erred by failing to distinguish between the granting and registering of a divorce as required by Canadian law.[103] Registering the talaq divorce with Egyptian authorities was no more than an evidentiary attestation of the respondent husband's unilateral pronouncement. While a foreign divorce decree granted by a competent authority is presumptively valid, the onus on proving that this was the case rested with the party seeking to rely on it.[104] No expert evidence demonstrated that the Egyptian governmental authorities, who merely authenticated the talaq divorce by registration, were divorce-granting authorities or that the registered talaq divorce was a foreign divorce decree granted by a competent authority and presumptively valid under common law. For a divorce to be recognized, it had to be granted, not only administratively registered or recognized, by a competent authority.

In the alternative, Roberts J also concluded that it was an error to recognize the talaq divorce under common law as the parties did not have a real and substantial connection to Egypt at the time of the divorce, making it ineffective for Canadian purposes. Too much emphasis was placed on the historical connections between the parties and Egypt. The parties did not live in Egypt at the time of the talaq divorce or

[100]As provided for in *ibid*, s 61(2).

[101]See e.g. *Chaudhary v Chaudhary*, [1982] AII ER 1017 (CA) at 1032; *Amin v Canada (Citizenship and Immigration)*, 2008 FC 168, [2008] 4 FCR 531 at para 20 [*Amin*]; *Abdulla v Al-Kayem*, 2021 ONSC 3562 at para 21 [*Abdulla*].

[102]RSC 1985, c 3 (2nd Supp), s 22(3) [*Divorce Act*].

[103]*Ibid.*

[104]*Abdulla*, *supra* note 101.

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its subsequent registration. They had not lived in Egypt for many years. Substantial connections to Egypt, but only decades ago, were insufficient to rebut overwhelming evidence that, at the time of the divorce, the parties had no real and substantial connection. On either ground, the talaq divorce could not be recognized in Canada.

Enforcement of foreign divorce decree

Sonia v Ratan, 2022 ONSC 6340

This application concerned whether the court should recognize a couple's 2017 divorce in Bangladesh. The 2017 divorce satisfied the common law test for recognition in that there was a real and substantial connection between the parties and Bangladesh — it was where they married, lived, and had their children.[105] The failure to convene an arbitration council as required by Bangladeshi law was not a reason to refuse to recognize the divorce. There were also no additional grounds for refusal. No denial of natural justice occurred in obtaining the divorce as the applicant received proper notice under Bangladeshi law.

The applicant also raised potential public policy considerations for refusing to recognize the divorce.[106] Relying on recent jurisprudence,[107] she claimed that a bare "talaq" divorce, allowing a man to initiate a divorce unilaterally, was contrary to Canadian public policy. The court distinguished that jurisprudence noting that the reason for failing to recognize those bare talaq divorces in Canada was the lack of notice or failure of jurisdiction. Those cases had not found a bare "talaq" divorce inherently contrary to public policy. While they expressed understandable reservations about the appropriateness of recognizing a talaq divorce, the comments were made in circumstances where there were specific and well-established grounds for refusal. The court noted that talaq divorces had been recognized in other decisions.[108] Depending on the circumstances of the case, even a bare talaq divorce could be recognized as valid under Canadian law. Given the reasoning by the Ontario Court of Appeal in *Abraham v Gallo*,[109] which was issued almost immediately following this decision, it will be interesting to see if the approach to handling talaq divorces will be more harmonized and consistent in subsequent jurisprudence.

Public policy considerations in this instance ultimately militated in favour of recognizing the 2017 divorce since the applicant could not invoke principles of Canada public policy where she ignored or contradicted those same principles. The applicant commenced proceedings in bad faith, knowing that she had previously been divorced in Bangladesh. She then "doubled-down" on her bad faith by manufacturing forged documents for a fraudulent conspiracy. She also married someone else in Dhaka in 2020 while still insisting she was married to the respondent. The court recognized the divorce as valid for the purposes of Canadian law.[110]

[105]Presumed to be valid under *Divorce Act*, *supra* note 101, s 22(3).

[106]As considered in *Novikova v Lyzo*, 2019 ONCA 821, 31 RFL (8th) 140.

[107]*Amin*, *supra* note 101; *Al Sabki v Al Jajeh*, 2019 ONSC 6394, 148 OR (3d) 741; *Abdulla*, *supra* note 101.

[108]The court referenced the trial decision of *Abraham v Gallo*, 2022 ONSC 1135, rev'd in 2022 ONCA 874 (discussed above and is therefore problematic reasoning by the court); *Kadri v Kadri*, 2015 ONSC 321.

[109]2022 ONCA 874 (summarized above).

[110]*Divorce Act*, *supra* note 102; *Family Law Act*, RSO 1990, c F3.

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Interjurisdictional child support orders

Krause v Bourgine, 2022 ONCA 161, 468 DLR (4th) 532[111]

The Interjurisdictional Support Unit of the Family Responsibility Office (ISO Unit) in Ontario brought this appeal to determine if an Ontario court could hear a child support application under the *Interjurisdictional Support Act* (*ISO Act*)[112] where the registration of a foreign support order from a reciprocating jurisdiction (Finland) had been set aside. Mr. Bourgine and Ms. Krause were married in Finland in 2003 and had two children. Bougrine had resided in Ontario since 2007, while Krause resided in Finland, where she raised their children. A Finnish court awarded custody of the children to Krause and made a support order requiring Bourgine to pay child support. The ISO Unit received a letter in 2014 requesting that the Finnish order be registered for enforcement. Bourgine successfully contested this registration of the Finnish orders in Ontario, allowing them to be set aside.[113] It later became clear that the information provided by Bourgine on that motion was false, and he continued to live and work in Ontario. The ISO Unit commenced proceedings seeking child support, leading to separate orders in Ontario.[114] Bourgine appealed that decision to the Ontario Superior Court of Justice where it was found that the Ontario court was barred from dealing with child support in these circumstances.

The Ontario Court of Appeal noted that the purpose of the *ISO Act* was to facilitate enforcement of support obligations of persons resident in one jurisdiction whose dependants (spouse or children) are resident in another. Reciprocal support enforcement statutes were enacted due to historical difficulties for parties seeking to obtain, vary, or enforce a family support order when one party was no longer residing in the jurisdiction that made the original order.

In Justice James Macpherson's view, the language of the *ISO Act*[115] was triggered by Bourgine's conduct. He took steps to set aside the registration of the Finnish support order — removing his obligation, enforceable in Ontario, to provide support to his children. This result elicited an appropriate response from the ISO Unit — an attempt to remedy an egregious situation — where an Ontario court order was obtained dishonestly and permitted non-compliance with a valid Finnish order. The judge at first instance was specifically empowered by the *ISO Act* to hear a new support application in Ontario that took into account the unenforceable foreign order as well as other information the court considered necessary to make a new support order.

Macpherson JA also dismissed concerns about the Ontario orders creating the potential for double recovery. The international support order regime was grounded in cooperation between knowledgeable governments and their agencies that administer governing laws, treaties, and intergovernmental agreements. These international agreements provided high quality assistance in the enforcement of valid foreign orders, sharing information, and avoiding duplication. According to Macpherson JA,

[111]Leave to appeal to SCC refused, 40168 (13 October 2022).
[112]*Interjurisdictional Support Act*, SO 2022, c 13.
[113]Under *ibid*, s 20(2).
[114]*Ibid*, s 21.
[115]*Ibid*, s 12.

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the real problem was not double recovery but no recovery at all. The appeal was allowed, restoring the Ontario support orders.

4. Choice of law (including status of persons) / conflits de lois (y compris statut personnel)

A. Common law and federal

i. Tort

Claims for loss — vehicle accident — non-pecuniary damages

Harris v Hillyer, 2022 NLSC 53

The plaintiffs were injured in a bus collision in Nova Scotia but brought their action in the province where they were domiciled, Newfoundland and Labrador. Nova Scotia passed legislation limiting the award of general, non-pecuniary, damages for minor injuries. The court was asked to rule on the law to apply in calculating damages since the Nova Scotia legislation, if applied, would limit the damages that could be awarded to the plaintiffs.

Justice Vikas Khaladar adopted reasoning from *Tolofson v Jensen*[116] that, while the substantive rights of the parties to an action may be governed by foreign law, procedural matters are governed by the law of the forum. Since, in the court's view, Nova Scotia's cap on recovering damages for minor injuries was procedural as opposed to substantive, the law of Newfoundland and Labrador should be applied, allowing recovery without restriction of non-pecuniary damages. Considering case law from Ontario[117] and Australia,[118] Khaladar J summarized the relevant conflict-of-laws principles as follows: "In broad strokes the jurisdiction where the tort occurred determines whether damages are available and, if so, under what heads. This is substantive. It is the definition of a right. The forum, on the other hand, determines how to assess the damages under the heads that are available. This is procedural. It is the awarding, through calculation, of a remedy."[119]

Limitation period — proof of foreign law

Al-Marzouq v Nafissah, 2022 BCSC 1670

This action involved an alleged tort that occurred in Kuwait. The plaintiff originally launched a tort action in Kuwaiti courts, obtaining a judgment in 2015. Unable to enforce that judgment and on learning that the defendant was now also in Canada, the plaintiff was granted leave to advance an amended claim related to the Kuwait judgment. The defendant denied liability under either Kuwaiti or BC law, arguing *res judicata* based on the Kuwaiti proceedings and that the plaintiff's claim was statute barred under the Kuwait *Civil Code* due to a three-year limitation period.

[116][1994] 3 SCR 1022 at para 27 [*Tolofson*].
[117]*Somers v Fournier* (2002), 214 DLR (4th) 611.
[118]*Stevens v Head*, [1993] HCA 19 at para 12.
[119]*Harris (Guardian ad litem of) v Hillyer*, 2022 NLSC 53 at para 23.

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The BC Supreme Court focused on the availability of the limitations defence. Since the alleged wrongdoing took place in Kuwait — and the place where a tort is committed determines the applicable law[120] — the applicable limitation period came from the laws of Kuwait. Relevant experts in Kuwaiti law, however, disagreed on the expiry of the limitation period. Justice Nigel Kent therefore concluded that applicable Kuwaiti tort law was either not proven or insufficiently proven to permit summary judgment.[121]

Since foreign law could not be proved, the law of the forum was assumed to apply. Applying the limitation period under BC law, Kent J found that the claim was statute barred, regardless of whether old or new legislation applied in the circumstances. The plaintiff's claim was dismissed.

ii. Contract

Software Partner Agreement — choice of law and forum clause

Lambda Solutions Inc v Moodle Pty Ltd, 2022 BCSC 2280

The defendant, Moodle Pty Limited (Moodle), based in Perth, Western Australia, provided educational learning management systems. The plaintiff, Lambda Solutions Incorporated, based in Vancouver was a third-party developer that integrated Moodle's system into its products. A dispute arose between the two companies over their royalties agreement and whether the plaintiff's plug-ins (or software add-ons) should be listed on the Moodle directory. The question before the BC Supreme Court was whether the law of Western Australia governed the relationship between the parties. Initially the court considered the existence of a choice-of-law and forum clause in the partner agreement. The court found that the partner agreement did not impose any obligation on the defendant to review and publish the plaintiff's plug-in or that the partner agreement imposed Western Australian law on the dispute. The court also applied the principles in *Minera v Aquilline Argentina SA v IMA Exploration Inc and Inversiones Mineras Argentinas SA*,[122] none of which pointed to a clearly more applicable law. Both parties were multinational technological online businesses. While the defendant was a Western Australian company, the review process for the Moodle directory was international, with reviewers around the globe.

The court also rejected the plaintiff's reliance on the final *Minera* consideration that an injustice would result if it was unable to apply laws of Western Australia and put forward promissory estoppel as a cause of action, something not normally permitted under Canadian law. The court noted that the plaintiff had avoided five times the more natural application of the laws of Western Australia by the courts of that jurisdiction. The plaintiff elected not to bring its own independent claim or counterclaim in the Supreme Court of Western Australia but, instead, to seek a stay pending resolution in a BC court. Emphasis on this final consideration also raised another concern since the plaintiff did not propose that Western Australian law govern all aspects of the relationship and dispute but solely the use of promissory estoppel, while BC law governed everything else. This was seen as cherry-picking

[120] *Tolofson v Jensen*, *supra* note 116; *Lucas (Litigation Guardian of) v Gagnon*, [1994] 2 SCR 1022.
[121] See e.g. *Allen v Hay*, [1992] 64 SCR 76 at 80–81.
[122] 2006 BCSC 1102, 58 BCLR (4th) 217 [*Minera*].

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discrete and favourable aspects of a foreign law for application by a court that was not provided the full social and jurisprudential background of that law, including deficiencies that prompted the rise of promissory estoppel as a cause of action in Australia. In the judge's words, it also raised the "spectre of the application of a Frankenstein hodgepodge of Western Australian and British Columbia law that may unfairly privilege the party seeking only the advantageous aspects of each."[123] The court had to approach the task guardedly where it arose in rare circumstances in applying foreign law. Typically, the court noted the domestic party electing to bring the dispute in its domestic courts was the party opposing the defendant's application to transfer the proceedings or to apply foreign laws. The plaintiff, through its tactical litigation steps on two continents, had created a "topsy-turvy looking glass scenario."[124] If the BC court declined to apply Western Australia law, the plaintiff was "lying in a tangled bed of its own making."[125]

The court concluded that neither the law of British Columbia or of Western Australia had a clearly closer and more real connection to the relationship between the parties and the dispute. Private international law, the court reasoned, considers not only the relationship between litigants but also respect between courts of different nations and jurisdictions. The Supreme Court of Australia had already, in a judicial act of grace and comity, stayed the defendant's proceeding and deferred the primary decision to British Columbia. Even if the dispute were governed by the law of Western Australia, and the plaintiff could wield promissory estoppel as a sword rather than a shield, the plaintiff's claim would fail under that doctrine. It would also fail as the first Canadian application of promissory estoppel as a sword and not a shield.

B. Québec

Contrat de travail — articles 3118 CcQ

Glanzer v Construction Kiewit Cie, 2022 QCCS 4077

The plaintiff, Matthew Glanzer, was terminated from his employment and sought damages from his former employers. He argued that the laws of the province of Quebec governed his employment relationship while he was assigned to work on a project in Montreal. The defendants — his three alleged employers — maintained that Glazner was only temporarily assigned to the project and that his employment relationship remained with only one of the defendants, Construction Kiewit Cie (KIWC). That relationship was also governed by laws in the United States, specifically the State of Washington.

The Quebec Superior Court concluded that the plaintiff was employed solely by KIWC at the time of his termination and could only claim damages from that defendant. The court also addressed the question of which law applied to the plaintiff's employment contract. Glazner argued based on Article 3118 of the *CcQ* that the laws of Quebec should apply since he habitually carried out his work in the province of Quebec.[126] The court reasoned that, while Glazner's day-to-day tasks on

[123] *Lambda Solutions Inc v Moodle Pty Ltd*, 2022 BCSC 2280 at para 50.
[124] *Ibid* at para 52.
[125] *Ibid.*
[126] *CcQ*, *supra* note 73, art 3118.

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the project were performed in Quebec, it remained a temporary assignment. He required a visa to work in Canada, was paid in US currency, and received various benefits directly related to his status as an expatriate employee. The structure of the employment relationship, notably the temporary nature of assignments, meant that he could not have habitually carried out his work in the province. The employment relationship, the court reasoned, was also consistent with the objective of the *CcQ* that recognizes in cases of a mobile workforce that the employer's domicile or establishment should apply.[127] For this reason, the laws of the State of Washington, where KIWC is domiciled, applied to the plaintiff's employment relationship. Applying those laws to address Glazner's claims relating to employment security and an insufficient termination package, the court found that he was entitled to recover some damages totaling $49,963,10 related to his assignment on the project in Montreal.

[127] *Ibid.*

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