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# The Exceptional as Commonplace in Quebec *Forum Non Conveniens* Law: *Cambior*, a Case in Point

Jeffrey TALPIS* and Shelley L. KATH**

**Résumé**

*Le forum non conveniens est une doctrine discrétionnaire en vertu de laquelle une cour peut décliner juridiction s'il lui est démontré qu'une autre juridiction est plus appropriée à trancher le litige. Traditionnellement, cette doctrine se retrouve plutôt dans les juridictions de common law que dans les juridictions de droit civil. Cependant, l'application varie d'un pays à l'autre de manière subtile mais substantielle (par exemple, quelles sont les normes utilisées pour décliner juridiction; qui détient le fardeau de la preuve). En pratique, ces différences peuvent déterminer s'il y a lieu ou non de décliner juridiction en faveur d'un forum étranger.*

*En 1994, le Québec a introduit sa propre version de la doctrine du forum non conveniens. En respectant l'approche adoptée au titre III du livre X du* Code civil du Québec *régissant les règles de droit international privé et en tenant compte de la règle traditionnelle du droit civil per-*

**Abstract**

Forum non conveniens *is a discretionary doctrine by which a court may decline to exercise its jurisdiction over a dispute if it finds that an alternative forum is more convenient or appropriate. Traditionally found in common-law rather than civil-law jurisdictions, applications of this doctrine vary in subtle but critical ways (e.g. the specific threshold used for dismissal, who bears the burden of proof). In practice, these differences may determine whether or not a case would be dismissed in favour of a foreign forum.*

*In 1994, Québec introduced its own formulation of* forum non conveniens*. In keeping with the approach to private international law embodied in Title III of Book Ten C.c.Q. and in light of the traditional civil law rule allowing suit in the defendant's domicile, article 3135 C.c.Q. stipulates that the doctrine may only be applied "exceptionally". As the authors demonstrate, how-*

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*mettant d'introduire un litige au domicile du défendeur, l'article 3135 C.c.Q. prévoit que la doctrine ne peut être appliquée qu'exceptionnellement. Cependant, la jurisprudence québécoise a tendance à ignorer la nature particulière de la version québécoise de cette doctrine en accordant trop de poids à la jurisprudence des juridictions de common law sur le forum non conveniens.*

*En ignorant l'exigence d'exception, les tribunaux ont eu tendance à appliquer cette doctrine à l'excès, laquelle a créé un état d'incertitude, s'est avérée inefficace dans les décisions judiciaires, s'est traduite par une augmentation des coûts et a souvent mené à une injustice envers les parties.*

*Cette surapplication a aussi affecté de façon négative l'application d'autres règles discrétionnaires touchant à la juridiction tels la litispendance, les demandes incidentes et la reconnaissance des jugements étrangers.*

*Après avoir examiné l'interprétation des tribunaux québécois relativement à l'article 3135 C.c.Q. et avoir procédé à une analyse approfondie d'un cas typique,* Cambior *c.* Recherches Internationales Québec, *les auteurs proposent une application plus restrictive de la doctrine. Cette proposition vise à interdire complètement le* forum non conveniens *dans certaines situations et exige une preuve de l'existence d'un forum alternatif adéquat avant même l'appréciation des critères. Elle vise aussi à l'élimination de certains critères (par exemple, celui de la loi applicable) tout en limitant l'utilisation de certains autres.*

*ever, Québec jurists have tended to ignore the specific nature of the Québec version, giving undue weight to forum non conveniens jurisprudence from common-law jurisdictions. In ignoring the "exceptionality" requirement, they have tended to substantially overapply the doctrine which, in turn, has created uncertainty and inefficiency in judicial decision-making as well as greater costs and even insufficient justice for the parties. It has also adversely affected the application of other discretionary rules affecting jurisdiction such as* lis pendens, *treatment of incidental or related actions and recognition of foreign judgments.*

*Following a critique of the Québec courts' interpretation of article 3135 C.c.Q. and an in-depth look at a typical case,* Cambior *v.* Recherches internationales Québec, *the authors offer a proposal for a more restrictive application of the doctrine. The proposal would prohibit* forum non conveniens *altogether in certain types of cases, require that the existence of an adequate alternative forum be demonstrated prior to the weighing of connecting factors (criteria) and eliminate certain criteria from consideration (e.g. applicable law), while limiting the use of other criteria.*

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In the litigation of private international law cases, *forum non conveniens* motions have become increasingly commonplace in North America, as well as in common law nations elsewhere. *Forum non conveniens*, simply put, is a procedural device, developed originally in the common law jurisdictions[1], which allows defendants to challenge the plaintiff's choice of forum and, depending upon the jurisdictional rules involved, to move for a stay or dismissal of the case on grounds that the case is more closely linked and/or would be more effectively heard in a different jurisdiction. While there are many variations in the specific tests employed by different jurisdictions to determine when the existence of an alternative forum justifies dismissal or stay, this explanation captures the essence of the doctrine's function in private international law. It must be emphasized at the outset, however, that seemingly subtle differences in the various versions of *forum non conveniens* employed in the common law jurisdictions and in Quebec can have substantial implications in practice. While the primary purpose of this paper is to undertake a critical analysis of the doctrine of *forum non conveniens* currently followed in Quebec, its secondary purpose will be to demonstrate how minor differences in *forum non conveniens* doctrines can have major impacts in the disposition of cases involving the doctrine.

The popularity of *forum non conveniens* as a tool for defendants seeking to resist suit in their own "backyard" has no doubt been heightened by the use of the doctrine in a number of high-profile

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1 See e.g.: Perry MEYER, "The Jurisdiction of the Courts as Affected by the Doctrine of *Forum Non Conveniens*", (1964) *R. du B.* 565, 567, 569, 572; Peter HERZOG, "La théorie du *forum non conveniens* en droit anglo-américain: un aperçu", (1976) *R.C.D.I.P.* 1, 2, 4; Sylvette GUILLEMARD, Alain PRUJINER and Frédérique SABOURIN, "Les difficultés de l'introduction du *forum non conveniens* en droit québécois", (1995) 36 *C. de D.* 913, 915-928; E.L. BARRETT, Jr., "The Doctrine of *Forum Non Conveniens*", 35 *Cal. L. Rev.* 380, 386 and 387 (1947); P. BLAIR, "The Doctrine of *Forum Non Conveniens* in Anglo-American Law", 29 *Columb. L.R.* 1, 20-23 (1929); R. BRAUCHER, "The Inconvenient Federal Forum", 60 *Harv. L. Rev.* 908, 909-911 (1947); James J. FAWCETT, *Declining Jurisdiction in Private International Law. Reports to the XIVth Congress of the International Academy of Comparative Law*, Oxford, Clarendon Press, 1995, Canadian Report by J. Blom and Quebec Report by Gérald Goldstein; Geneviève SAUMIER, "*Forum Non Conveniens*, Where are we now?", (2000), 12 *S.C.L.R.* (2d) 121.

cases in North America and the United Kingdom. Some of the more well-known and colourful cases which have contributed to making *forum non conveniens* a well-known tool for defendants carrying on business abroad come from the federal courts of the United States of America (hereinafter "United States" or "U.S.").

Consider, for example, the groups of indigenous peoples from Ecuador who brought suit in New York for property damage, personal injuries and increased risk of cancer alleged to have resulted from leaking oil pipelines in their country which were owned by a U.S. company, Texaco. While a U.S. District Court granted the defendant's motion for dismissal on grounds of *forum non conveniens*, the U.S. Court of Appeals, Second Circuit, reversed the decision on grounds that, *inter alia*, the dismissal was inappropriate because it "rested entirely on adoption of another district court's weighing of the relevant factors"[2]. (A similar suit had been brought and dismissed in a federal court in Texas[3].)

Consider, as well, a case brought by female plaintiffs of Australia, Canada and England against U.S. corporations in Alabama who designed and manufactured silicone breast implants which allegedly were defective and caused serious physical harm[4]. The defendants successfully challenged the ability of the foreign plaintiffs to sue them in their own jurisdiction.

Another high-profile case involved Costa Rican employees of a fruit company who brought suit against two large U.S. corporations, Dow Chemical Co. and Shell Oil Co., for damages due to personal injuries suffered as a result of a highly toxic pesticide which both companies manufactured in the U.S.[5]. Although the plaintiffs were successful in obtaining a favourable judgment from the Texas Supreme Court – the Court ruled that Texas law would not permit the foreign citizens to be denied the ability to sue for personal

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2 *Maria Aguinda* v. *Texaco, Inc.*, 945 F. Supp. 625 (S.D. N.Y. 1996), rev'd (*sub nom. Jota* v. *Texaco, Inc.*), 157 F.3d 153 (2d Cir. 1998) 2.

3 *Sequihua* v. *Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994).

4 *In re Silicone Breast Implants Product Liability Litigation*, 887 F.Supp. 1469 (N.D. Ala. 1995). For other *forum non conveniens* cases involving products liability claims, see, for example: D.W. DUNHAM and E.F. GLADBACH, "Forum Non Conveniens and Foreign Plaintiffs in the 1990s", 24 *Brook. J. Int'l L.* 665 (1999).

5 *Dow Chemical Co.* v. *Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), cert. denied, 498 U.S. 1024 (1991) (hereinafter *Alfaro*). In a concurring opinion, it is reported that Dow went so far as to "argue that the one part of this equation that should not be American is the legal consequences of their actions": *id.*, 681.

injuries, even if such injuries occurred outside of Texas – the state passed legislation shortly thereafter which established the doctrine of *forum non conveniens* for foreign plaintiffs, and thus effectively overruled *Alfaro*[6].

Finally, the case involving the Indian Government's suit in New York on behalf of countless Indian citizens who suffered damages from deaths and injuries in the 1984 lethal gas release disaster at a Union Carbide chemical plant in Bhopal, India is now well-known by lawyers and laymen alike[7]. This case was dismissed from a U.S. court at the request of the corporate plaintiff on the basis of *forum non conveniens*.

Obviously, as transnational activity grows, so grows transnational litigation, and a necessary concomitant of this trend is an increase in forum shopping, of both the legitimate and illegitimate (or evasive) varieties. Where forum shopping is feared, *forum non conveniens* motions are ready at the draw in those jurisdictions which allow them. Hence as the world becomes smaller and everyone's backyard becomes bigger due to increased transnational commercial and corporate activity, we should expect to see more and more *forum non conveniens* cases, as well as more *lis pendens*[8] motions and motions for declaratory judgments of non-liability, both of which allow defendants to preempt or to challenge the plaintiff's choice of jurisdiction and thus operate as procedural cousins to *forum non conveniens*.

Similarly, we should expect to see an increase in cases in which the plaintiffs are foreigners in the jurisdiction in which they are suing, while the defendants are citizens. In fact, it seems well established that many international *forum non conveniens* cases involve private individuals seeking recourse for damage done by

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6 See, for example: D. SOLEN, "Forum Non Conveniens and the International Plaintiff", 9 *Fla. J. Int'l L.* 343, notes 39 and 44 and accompanying text (1994).

7 *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986) (hereinafter *Union Carbide*), aff'd, 809 F.2d 195, 200 (2nd Cir. 1987), cert. denied, 484 U.S. 878 (1987).

8 *Lis alibi pendens* is defined as "[a] suit pending elsewhere ": *Black's Law Dictionary*, 6th ed., p. 931 (1990). While this concept is referred to simply as *lis pendens* in Quebec, it should be noted that, in American law, *lis pendens* refers to notice given to potential purchasers or encumbrancers of a specific partial of property that such property is the subject of pending litigation. See: *Black's Law Dictionary, id.*, p 932; see also: Quebec's statutory provision on *lis pendens* in article 3137 C.c.Q., the text of which appears, *infra*, note 336.

multinational corporate defendants based elsewhere[9]. Numerous articles have appeared in U.S. law journals, particularly since 1990, which have commented – sometimes critically, sometimes favourably – on *forum non conveniens* cases fitting the hallmark pattern of foreign plaintiffs and domestic corporate defendants[10]. Such cases often involve environmental impacts, product liability, personal injury or human rights.

Despite the fact that *forum non conveniens* is a relatively recent legal phenomenon in Quebec, with its strong civil-law tradition, the province has already seen a number of colourful cases of *forum non conveniens* of its own involving foreign plaintiffs and corporate defendants. One such example is *Cambior* v. *Recherches internationales Québec*[11], an environmental class action arising from a massive mining accident in Guyana, in which the Guyanese plaintiffs took an action in Quebec, where the corporate defendant's headquarters were located. This case serves as the centrepiece for our critical analysis of the current approach to *forum non*

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9 See e.g.: J.R. PAUL, "Comity and International Law", 32 *Harv. Int'l L.J.* 1 (1991); J. DUVAL-MAJOR, "One-Way Ticket Home: The Federal Doctrine of *Forum Non Conveniens* and the International Plaintiff", 77 *Cornell L. Rev.* 650 (1992); M.M. WHITE, "Home Field Advantage: the Exploitation of Federal *Forum Non Conveniens* by United States Corporations and its Effects on International Environmental Litigation", 26 *Loy. L.A. L. Rev.* 491 (1993); L.J. SILBERMAN, "Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard", 28 *Tex. Int'l L. J.* 501 (1993); C. SPEER, "The Continued Use of *Forum Non Conveniens*: Is it Justified?", (1993) 58 *J. Air. L. & Com.* 845; V.C. ARTHAUD, "Environmental Destruction in the Amazon: Can U.S. Courts Provide a Forum for the Claims of Indigenous Peoples", 7 *Geo. Int'l Envtl. L. R.* 195 (1994); D. SOLEN, *loc. cit.*, note 6; D.W. ROBERTSON, "The Federal Doctrine of Forum Non Conveniens: 'An Object Lesson in Uncontrolled Discretion'", 29 *Tex. L.J.* 353 (1994); R.J. WEINTRAUB, "International Litigation and Forum Non Conveniens", 29 *Tex. Int'l L.J.* 321 (1994); B. CLAGETT, "Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign Plaintiffs", 9 *Tul. Envtl. L.J.* 513 (1996); K.L. BOYD, "The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation", 39 *Va. J. Int'l L.* 41 (1998); D.J. DORWARD, "The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs", 19 *U. Pa. J. Int'l Econ. L.* 141 (1998); A.M. KEARSE, "Forfeiting the Home-Court Advantage: the Federal Doctrine of Forum Non Conveniens", 49 *S.C.L. Rev.* 1303 (1998); D.W. DUNHAM and E.F. GLADBACH, *loc. cit.*, note 4.

10 *Id.*

11 J.E. 98-1905 (Sup. Ct.), [1998] Q.J. (Quicklaw) No. 2544 (hereinafter *Cambior*).

*conveniens* in Quebec, and thus will be considered in greater detail later in the paper[12].

*Forum non conveniens* can be defined as a general discretionary power of a court to decline to exercise jurisdiction that otherwise properly belongs to it on the grounds that another forum has been shown to be more convenient or appropriate. While numerous decisions in Quebec and the common law jurisdictions treat the term as if it meant "inconvenient forum", it actually appears to be a "neo-Latin" translation of "inappropriate forum"[13]. Indeed, the more modern formulations of *forum non conveniens* used in most North American and Commonwealth jurisdictions today involve analysis focused on the appropriateness rather than the convenience of the alternative forum. The central idea behind the use of *forum non conveniens* in many cases today is that it serves as a mechanism for justifying dismissals on grounds of convenience and comity rather than on the basis of jurisdiction, *per se*.

In order to allow the defendant to remove the case from the plaintiff's chosen forum, the Quebec Legislator introduced, albeit "exceptionally", the doctrine of *forum non conveniens* into the civil law through article 3135 C.c.Q. when the *Civil Code of Quebec* was adopted in 1994. We will show that although the courts give lip service to this notion of "exceptional," the frequency with which *forum non conveniens* motions are granted in Quebec has led to their being filed systematically in transnational litigation.

Our inquiry into the use and abuse of Quebec's *forum non conveniens* provision, article 3135 C.c.Q., will begin, in Section I, with a quick overview of the current status of *forum non conveniens*

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12 We will consider the case in detail in Section III, where it is presented as a typical example of *forum non conveniens* jurisprudence in Quebec, and in Section VI, where we explore how the reasoning in the decision compares to the new approach to *forum non conveniens*, which we present in Section V.

13 *The Spiliada Maritime Corp.* v. *Cansulex Ltd.*, [1986] 3 All E.R. 843, 853 and 854 (H.L.) (hereinafter *The Spiliada*), at 853-854; see also e.g.: *The Atlantic Star*, [1974] A.C. 436 (H.L.). Additionally, an American author observes that "[d]espite its appearance, 'conveniens' is not a Latin cognate for convenient. It is a participle of the verb 'convenio', which translates to appropriate or suitable (footnotes omitted): P.J. CARNEY, "International Forum Non Conveniens: 'Section 1404.5' A Proposal in the Interest of Sovereignty, Comity and Individual Justice", 45 *Am. U.L. Rev.* 415, note 6 (1995). For further discussion on this subject, see also e.g.: R. BRAUCHER, *loc. cit.*, note 1, 909; A.R. STEIN, "*Forum Non Conveniens* and the Redundancy of Court-Access Doctrine", 133 *U. Penn. L.R.* 781, 784 (1985).

law in four common law jurisdictions – the United Kingdom, Canada (specifically, the common law provinces and the federal courts), Australia and the United States. Through an examination of decisions illustrative of the case law in each country[14], we will explore the manner in which each of these jurisdictions (and sometimes even inferior jurisdictions within them) has formulated its own, unique rules and tests for *forum non conveniens.*

We will then, in Section II, examine the nature of the *forum non conveniens* doctrine in Quebec. In particular, we will look closely at how article 3135 C.c.Q. is being applied in Quebec jurisprudence, and will inquire as to whether or not the Quebec courts are following the "legislated" version of the doctrine.

In Section III, we will undertake a case study of *Cambior* which, in many respects, represents a typical *forum non conveniens* decision in Quebec. We will review the facts briefly, and then examine the court's decision-making process on the *forum non conveniens* motion brought by the defendants in that case.

In Section IV, we will present and justify a plea for redefining the approach to the term "exceptional" currently taken in Quebec jurisprudence.

Following our critique of how *forum non conveniens* is currently being applied in Quebec, we describe in Section V a proposal for interpreting the term "exceptional" in article 3135 C.c.Q. The reader is here forewarned that the approach advanced in our proposal may seem drastic, but, in our opinion, the regularity with which the courts in Quebec are accepting *forum non conveniens* motions necessitates drastic measures, expecially if the Legislator's intention that *forum non conveniens* exists as an exceptional remedy *only*, is to be respected. We will also demonstrate, briefly, how the proposal for a renewed approach to *forum non conveniens* in Quebec fits well with current trends in the jurisprudential treatment of the doctrine in the common law countries.

Finally, in Section VI we will revisit *Cambior* in light of our proposal, in order to demonstrate how a different approach might have been taken in that decision.

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[14] The jurisprudence of the common law jurisdictions is presented only for illustrative purposes; the intent was not to undertake a complete review of the cases in these jurisdictions.

## I. Comparative *Forum Non Conveniens*: Unique Approaches in Different Countries

It is at once critically important and commonly overlooked that, in general, *each country utilizing the doctrine of* forum non conveniens *employs its own, unique version.* It is primarily the common law countries which utilize the discretionary mechanism of *forum non conveniens* and, at a very general level, the basic concept used in these jurisdictions is quite similar. Beyond the fundamental level of generality, however, differences emerge which are often quite substantial.

In this section, we will present a brief overview of the tests for *forum non conveniens* currently applied in the common law jurisdictions of the United Kingdom, Canada and the United States and the leading cases giving rise to them. Our goal here is to examine the tests themselves, rather than to undertake a comprehensive summary of the *forum non conveniens* jurisprudence in each jurisdiction. Further, although the history of the doctrine's development in each country is rich and compelling[15], we will restrict ourselves here primarily to descriptions of the tests currently applied in each jurisdiction, and historical points will be made only where necessary to provide the necessary context for understanding the current test.

### A. The United Kingdom: the Modern Approach Presented in *The Spiliada*

The courts in the U.K. resisted the infiltration of the doctrine of *forum non conveniens* for many years. In fact, the modern formulation of the doctrine was not rooted in English law until the 1984 House of Lords case, *The Abidin Daver*[16]. It was in this case that *forum non conveniens* was formally recognized by name and fully accepted into English law. Whereas the progenitors of the English doctrine were extremely pro-plaintiff, requiring essentially that the defendant prove that the plaintiff's choice of the domestic forum was abusive or vexatious, the modern formulation took a much more neutral stance and produced a test that was much

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15 See, *supra*, note 1 for sources on the history of *forum non conveniens* in various jurisdictions.

16 [1984] 1 All E.R. 470 (H.L.).

easier for defendants to meet. Two years later, in *The Spiliada*[17], the House of Lords refined the approach in *The Abidin Daver*, and articulated the *forum non conveniens* test followed today in the U.K. In *The Spiliada*, Lord Goff stated the basic test succinctly, as follows:

> *The basic principle is that a stay will only be granted on the ground of* forum non conveniens *where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.*[18]

Later in the judgment, Lord Goff clarifies that the proper threshold for the test is whether the alternative forum is "clearly or distinctly more appropriate"[19].

*The Spilada* links the question of who bears the burden of proof in *forum non conveniens* to the English rules for service. It must be recalled that under English law, leaving aside the various changes coming about through the influence of European Community law, the grounds for jurisdiction are implicit in the rules for the service of process. Where the proceedings are served on a defendant who is present in England and who thus may be served "as of right", the defendant bears the burden of proving that the alternative court is clearly more appropriate than the English forum for the trial of the action.

The test presented in *The Spiliada* is applied in two steps:

(1) The defendant must prove that there is an alternative court and that it is clearly more appropriate than the domestic forum, based on the interest of the parties and the ends of justice[20];

(2) If this burden is met *at a prima facie level*, then the plaintiff must show special circumstances that justify retaining the action in the domestic forum – the forum of the plaintiff's choice[21].

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17 *Supra*, note 13.
18 *Id.*, 854.
19 *Id.*, 855.
20 *Id.*, 854.
21 *Id.*, 856.

Where the defendant is served *ex juris*, the burden is reversed from the beginning and the plaintiff must establish why the domestic forum is "clearly more appropriate".

*The Spiliada*[22], which has served as the primary source of *forum non conveniens* rules in the U.K. since 1986, is still considered the leading case. This is evident from its treatment as such in several recent House of Lords decisions, including a seminal decision on anti-suit injunctions, *Airbus* v. *Patel*[23], and a recent *forum non conveniens* case, *Connelly* v. *RTZ Corp.*[24], which concerned a suit by a Scottish employee against his London-based corporate employer for health damages sustained from cancer allegedly contracted while working at a uranium mine in Namibia, which was owned by one of the defendant's subsidiary corporations. In *Connelly* v. *RTZ Corp.*, Lord Goff reiterated an important qualification to the plaintiff's burden in the second step of *The Spiliada* test, which he had made in an earlier House of Lords case, *de Dampierre* v. *de Dampierre*[25]. He stated that a stay would be granted unless the plaintiff established that "substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate [alternative] forum"[26]. In *Connelly* v. *RTZ Corp.*, the plaintiffs met this test easily by showing that "substantial justice" could not be done unless the case proceeded in England, where financial assistance for the plaintiffs was available. On this point, Lord Goff stated that:

> *There is every reason to believe that this case calls for highly professional representation, by both lawyers and scientific experts, for the achievement of substantial justice, and that such representation cannot be achieved in Namibia. In these circumstances, to revert to the underlying principle, the Namibian forum is not one in which the case can be tried more suitably for the interests of all the parties and for the ends of justice.*[27]

The British courts, then, must be satisfied that if a stay is granted, the plaintiffs will be able to receive *substantial* rather than rudimentary justice in the alternative forum. Other recent cases

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22 *Supra*, note 13.
23 [1998] 2 All E.R. 257.
24 [1997] 4 All E.R. 335.
25 [1987] 2 All E.R. 1, 11 and 12.
26 *Supra*, note 24, 346.
27 *Id.*, 347. For an example of how the "substantial justice" test worked in the defendant's, rather than plaintiff's favour, see e.g.: *Herceg Novi (owners)* v. *Ming Galaxy (owners)*, [1998] 4 All E.R. 238.

from the English Court of Appeals show similar signs that the courts there are taking very seriously the needs of plaintiffs to follow the defendant to his own forum in order to seek meaningful justice[28].

### B. Canada – The Common Law Provinces: the Leading Cases of *Antares Shipping* and *Amchem Products*

To fully understand the operation of *forum non conveniens* in common law Canada, it is necessary to recognize that, just as in the English system, the application of the doctrine is fundamentally affected by the fact that jurisdiction is generally grounded in the rules for service of process. This owes to the fact that, under traditional common law rules, jurisdiction was largely based upon control over the person of the defendant, and was achieved by way of personal service of a writ of summons. Today, the rules for service – and thus for jurisdiction – have expanded to include alternatives to personal service, as well as special rules for service outside the jurisdiction's geographical boundaries. The rules for service within and outside the common law jurisdictions of Canada are contained in the rules of court or rules of civil procedure followed in the various provinces and territories[29], and at the federal level, by the Federal Court Rules[30]. Once served, a defendant against whom action is being taken in one Canada's common law courts may, generally, move for a dismissal or stay[31] of proceedings on

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28 *Lubbe* v. *Cape Plc*, Court of Appeal (Civil Div.), (Transcript: Smith Bernal), 30 July 1998, Lexis (hereinafter *Lubbe*); *Sithole* v. *Thor Chemical Holdings Limited*, Court of Appeal (Civil Div.), The Times, 15 February 1999 (Transcript: Smith Bernal), 3 February 1999, Lexis (hereinafter *Sithole*); *Berezovsky* v. *Forbes Inc.*, Court of Appeal (Civil Div.) The Times, 27 November 1998 (Transcript: Smith Bernal), 19 November 1998, Lexis (hereinafter *Berezovsky*). The *Lubbe* and *Sithole* cases, which bear strong similarities to *Cambior, supra,* note 11, in that they involve foreign plaintiffs with few resources taking suit in England for environmental and health damages caused by English companies in other, less-developed countries, are discussed in more detail, below, in Section F.

29 See e.g.: *Ontario, Rules of Civil Procedure*, r. 14.01(1) and r. 16.02-17.06; *Alberta Rules of Court*, r. 6.1, r. 14, r. 15 and r. 30; *Saskatchewan, Rules of Court*, r. 8, r. 13 and r. 31.

30 *Federal Court Rules*, r. 127-137. The rule allowing defendants outside Canada to respond on the basis of *forum non conveniens* without attorning to jurisdiction is contained in r. 208(c). An example of the application of these rules is found in *North Shore Health Region* v. *Cosmos Shipping Lines S.A.,* [1998] F.C.J. (Quicklaw) No. 1681.

31 Whether the jurisdiction concerned will allow a dismissal, a stay, or both depends upon the rules of court or rules of civil procedure for a given jurisdiction.

grounds of *forum non conveniens.* In any event, the exercise of jurisdiction of all Canadian courts must not contravene the constitutional territorial limitation that there be a real and substantial connection between the jurisdiction and the action[32].

While *forum non conveniens* has appeared sporadically in Canada for many years in common law jurisprudence, the approach used in recent times derives primarily from two Supreme Court cases, *Antares Shipping Corp.* v. *The Ship "Capricorn"*[33], and *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*[34]. A*ntares Shipping*, decided in 1977 – a good deal earlier than the leading English cases mentioned above – contains the basic test. Ritchie J., speaking for the majority, explained in that decision that the Court's primary consideration in exercising discretion in *forum non conveniens* decisions was the existence of "some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice"[35]. In *Amchem Products*, decided in 1993, Sopinka J. clarified the Canadian approach in *dicta* made within the context of a decision concerning an anti-suit injunction[36]. The vast majority of the Canadian cases and doctrine, which now rely primarily on the *Amchem Products* approach, have been identified and discussed by Prof. Castel, along with the earlier Canadian cases on *forum non conveniens*, and hence will not be discussed further here[37].

Sopinka J. made clear in *Amchem Products* that although the threshold for dismissal is the same in Canada as that in the U.K., – namely, that the alternative forum must be "clearly more appropriate" – the mechanics of the test are quite different. Specifically, he took the view that the approach to be followed in Canada is *not* the two-step approach described in *The Spiliada*[38], but rather a single-step test in which many of the connecting factors and other criteria are considered together in an effort to identify the

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32 The constitutional guidelines were articulated in *Hunt* v. *T&N plc*, [1993] 4 S.C.R. 289 (hereinafter *Hunt*); *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077.

33 [1977] 2 S.C.R. 422 (hereinafter *Antares Shipping*).

34 [1993] 1 S.C.R. 897 (hereinafter *Amchem Products*).

35 *Supra*, note 33, 448.

36 *Supra*, note 34, 931 and 932.

37 Jean-Gabriel CASTEL, *Canadian Conflict of Laws*, Toronto, Butterworths, 1997, 248 ff.

38 *Supra*, note 13, 855 and 856.

natural forum, defined as the forum having a real and substantial connection with the parties and the action[39]. Hence, unlike the English test, described above, the Canadian test has the effect of keeping the burden of proving that another forum is "clearly more appropriate" on the moving party, usually the defendant, the entire time: there is no shifting of the burden to the plaintiff if the defendant makes a successful *prima facie* case. Sopinka J. noted, however, that generally "[t]he burden of proof should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties"[40]. He also found that, generally, the English practice of putting the burden of proof on the plaintiff throughout the analysis when the service is made *ex juris* would not apply in Canada because "[i]n most provinces in Canada, leave to serve *ex juris* is no longer required[41]. In clarifying the rule in Canada, he stated that:

> *Whether the burden of proof should be on the plaintiff in ex juris cases will depend on the rule that permits service out of the jurisdiction. If it requires that service out of the jurisdiction be justified by the plaintiff* [...] *then the rule must govern.*[42]

Only a few courts have adopted this revised test to accommodate special rules for *ex juris* cases in certain provinces, particularly Alberta, Ontario and British Columbia[43].

As mentioned above, the threshold for dismissal under the Canadian approach is essentially the same as in the English test: the alternative forum must be "clearly more appropriate"[44]. Recently, however, the courts in many provinces are showing signs of greater restrictiveness in the use of the "clearly more appropriate" standard and have been somewhat less willing to

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39 *Supra*, note 34, 919-921. Sopinka J. based his choice of a single-step test primarily on the idea that as long as the first step of the test is comprehensive, that is, all of the factors are considered which might tend to point toward a more appropriate forum, then there is no need to afford the parties the opportunity, at the second step, to deal specially with the issue of loss or gain of juridical advantage. *Id.*, 920.

40 *Id.*, 921.

41 *Id.*

42 *Id.*

43 See e.g.: *United Oilseed Products Ltd.* v. *Royal Bank of Canada*, (1988), 29 C.P.C. (2d) 28 (Alta. C.A.); *Frymer* v. *Brettschneider*, (1994), 19 O.R. (3d) 60; *Bushell* v. *T & N Plc*, (1992), 67 B.C.L.R. (2d) 330 (C.A.).

44 *Supra*, note 34, 921; *The Spiliada*, *supra*, note 13, 855.

grant dismissals based on *forum non conveniens*[45]. This is especially true of the federal courts which, in all but the very rare instance, will tend to deny the defendant relief under the doctrine[46]. Like some of the recent English cases[47], the more recent Canadian cases are treating "clearly more appropriate" as a truly exceptional limitation. The trend toward greater restrictiveness, and hence toward the use of a more "exceptional-cases only" standard, is discussed further below[48].

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45 See e.g.: *Tomlinson* v. *Turner*, [1993] P.E.I.J. (Quicklaw) No. 42 (DRS 93-13411) (C.A.); *Shannon* v. *Insurance Corp. of British Columbia*, [1996] B.C.J. (Quicklaw) No. 2313 (DRS 97-02718) (C.A.); *Dennis* v. *Salvation Army Grace General Hospital*, [1997] N.S.J. (Quicklaw) No. 19 (DRS 97-06357) (C.A.) (hereinafter *Dennis*); *679927 Ontario Ltd.* v. *Wall*, [1997] N.S.J. (Quicklaw) No. 18 (DRS 97-06356) (C.A.); *3315207 Canada Inc. (c.o.b. Chartermasters)* v. *Decoexsa Global Logistics Inc.*, [1998] P.E.I.J. (Quicklaw) No. 87 (DRS 98-19067) (T.D.) (hereinafter *Decoexsa Global Logistics*); *Ontario New Home Waranty Program* v. *General Electric Company*, 36 O.R. (3d) 787, [1998] O.J. (Quicklaw) No. 173 (Gen. Div.); *Burrell* v. *Logican Technologies Inc.*, [1998] N.S.J. (Quicklaw) No. 117 (DRS 98-20179) (Sup. Ct.); *Sydney Steel Corp.* v. *Canadian National Railway Co.*, [1998] N.S.J. (Quicklaw) No. 72 (S.S.N. No. 106192) (Sup. Ct.) (hereinafter *Sydney Steel Corp.*); *472900 B.C. Ltd.* v. *Thrifty Canada Ltd.*, (1998) 168 D.L.R. (4th) 602 (B.C.C.A.). However, see: *Westec Aerospace Inc.* v. *Raytheon Aircraft Co.*, [1999] B.C.J. 871 which regrettably counters this trend and with respect to which leave to Appeal to the Supreme Court of Canada was granted on April 20, 2000, decision number 27356, and has since been denied, *Montagne Laramee Developments Inc.* v. *Creit Properties Inc.*, 47 O.R. 3d 729 (Sup. Ct.).

46 See e.g.: *Discreet Logic Inc.* v. *Canada (Registrar of Copyrights)*, [1994] F.C.J. (Quicklaw) No. 582 (C.A.) (hereinafter *Discreet Logic*); *Napa* v. *Abta Shipping Co.*, [1998] A.C.F. (Quicklaw) No. 1726 (T.D.) (hereinafter *Napa*); *Cytoven* v. *Cytomed-Peptos*, [1994] F.C.J. (Quicklaw) No. 1572 (T.D.) (hereinafter *Cytoven*); *Donohue Inc.* v. *The Ocean Link*, [1995] F.C.J. (Quicklaw) No. 396 (T.D.); *Underwriters at Lloyd's* v. *Mauran*, [1997] F.C.J. (Quicklaw) No. 1701 (T.D.); see also: *Holt Cargo Systems Inc.* v. *ABC Containerline N.V. (Trustee of)*, [1997] 3 F.C. 187 (T.D.), aff'd [1999] F.C.J. (Quicklaw) No. 337 (F.C.) (hereinafter *Holt Cargo Systems*), in which the Federal Court, Trial Division used the test in *Antares Shipping*, *supra*, note 33, in an extremely restrictive fashion, refusing to stay a case that had only one tie with Canada (the ship serving as the primary property in the case was arrested in Canadian waters). See also: *Kuhr* v. *The Ship Friedrich Busse and Hochseefischerei Nordstern A.G.*, [1982] 2 F.C. 709 (C.A.) (hereinafter *The Ship Friedrich Busse*) in which the Federal Court of Appeal, using the same, restrictive test in *Antares Shipping*, took a very similar approach and denied a stay.

47 See e.g.: *Lubbe*, *supra*, note 28; *Berezovsky*, *supra*, note 28; *Sithole*, *supra*, note 28; *Connelly* v. *RTZ Corp.*, *supra*, note 24.

48 See, Section F below.

With respect to the connecting factors, typically referred to in Canadian and other *forum non conveniens* tests as "criteria", the basic notion is that the court weighs the appropriateness of the alternative forum by assessing specific facts such as the difficulty and expense under which the parties must make their case before the forum, the witnesses which will be called by either party, the applicable law, the avoidance of multiple lawsuits, and a host of other considerations.

### C. Australia: *Voth* v. *Manildra Flour Mills*: Advocating Restraint of the Doctrine

According to the leading case of the High Court of Australia, *Voth* v. *Manildra Flour Mills*[49], an Australian court will decline to exercise jurisdiction in favour of a foreign court only if the Australian court is a "clearly *inappropriate*" forum. Unlike the tests reviewed thus far, this test operates to favour trial in the local forum because the defendant must show *both* that another forum is clearly more appropriate and that the local forum is clearly inappropriate. Thus, if the local forum is an appropriate forum, then there can be no stay under the Australian doctrine of *forum non conveniens*. This contrasts with the version employed in the U.K., under which a stay might be granted as long as the alternative forum is clearly more appropriate.

### D. The United States: a Federation of Doctrines

#### 1. The Federal Test: *Gulf Oil* v. *Gilbert* and *Piper* v. *Reyno*

The doctrine of *forum non conveniens* was rarely used before the 1945 Supreme Court case, *International Shoe* v. *Washington*[50] which, through the "minimal contacts" doctrine, expanded the personal jurisdiction of the courts. Thus, the doctrine's development was largely a response to the enlargement of jurisdiction of the American Courts. The tests for *forum non conveniens* followed in the federal courts of the U.S., and in many courts of those states which

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[49] (1990) 65 A.L.J.R. 83, 90 (hereinafter *Voth*). For a brief discussion of the rule in *Voth*, see e.g.: P. NYGH, "Choice-of-Law Rules and Forum Shopping in Australia", 46 *S. C. L. R.* 899, 902 and 903 (1995).

[50] 326 U.S. 310 (1945).

allow the doctrine[51], were developed in two Supreme Court cases, *Gulf Oil* v. *Gilbert*[52] and *Piper Aircraft Co.* v. *Reyno*[53]. The first case in which the U.S. Supreme Court laid out an American *forum non conveniens* doctrine was *Gulf Oil*[54]. Despite the fact that this case involved solely domestic elements and parties[55], it ultimately became a leading case not just for federal cases involving interstate disputes[56], but for international cases[57] arising in federal courts as well. *Gulf Oil* was followed by the seminal case, *Piper* v. *Reyno*[58], in which the U.S. Supreme Court refined the *Gulf Oil* principles with respect to international cases by presenting a weaker standard for dismissal through its recommendation of less deference to foreign plaintiffs. Since both *Gulf Oil* and *Piper* are very well-known cases often referenced by courts outside the U.S., it is useful to summarize each case briefly.

### a. *Gulf Oil* v. *Gilbert*: Creation of the Public and Private Interest Criteria

In 1947, the U.S. Supreme Court set out in *Gulf Oil* the foundation for the *forum non conveniens* approach followed today in American cases. Essentially, the Court made clear that unless the balance of criteria considered is "strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed"[59]. The Court substantially qualified this approach, however, by presenting as a fundamental principle of *forum non conveniens* that the

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51 See discussion on state variations in American *forum non conveniens* jurisprudence in Section I, D, 2 below.

52 330 U.S. 501 (1946) (hereinafter *Gulf Oil*).

53 454 U.S. 235 (1981) (hereinafter *Piper* v. *Reyno*, or *Piper*).

54 *Supra*, note 52.

55 *Id.* In *Gulf Oil*, an action for damages was filed in New York despite the fact that both parties and most of the relevant events took place in Virginia.

56 See e.g.: *Quackenbush* v. *Allstate Insurance Co.*, 116 Sup. Ct. 1712 (1996); *Ferens* v. *John Deere Co.*, 494 U.S. 516 (1990); *Metropolitan Life* v. *Aetna Cas. & Sur.*, 728 So.2d 573 (Miss. 1999).

57 See e.g.: *Contact Lumber Co.* v. *P.T. Moges Shipping Co.*, 918 F.2d 1446 (9th Cir. 1990); *Capital Currency Exchange, N.V.* v. *Nat'l Westminster Bank PLC*, 155 F.3d 603 (2d Cir. 1998); *R. Maganlal & Co.* v. *M.G. Chem. Co.*, 942 F.2d 164 (2d Cir. 1991); *Potomac Capital Investment Corp.* v. *Koninklijke Luchtvaapt Maatschapplj N.V. D/B/A KLM*, No. 97 Civ. 8141 (AJP) (RLC), 1998 WL 92416 (S.D.N.Y. March 4, 1998). Again, most of the international cases relying on *Gulf Oil, supra*, note 52, also cite *Piper*, *supra*, note 53, which qualified the *Gulf Oil* doctrine for foreign plaintiffs.

58 *Supra*, note 53.

59 *Supra*, note 52, 508.

presumption in favour of the plaintiff's choice may be overcome by a demonstration that relevant factors relating to both the private interests of the litigants and the public interests of the court seized of the case clearly outweigh the deference to be afforded to plaintiff's selected forum[60].

According to *Gulf Oil*, the term "private interests" refers to the interests of the each of the parties in having the case heard in the forum that is most convenient to them[61]. "Public interests", on the other hand, refers both to the interests of the court itself, in having the case disposed in an efficient manner, as well as the interests of the court and society in general to have "localized controversies decided at home" rather than in remote locations having little connection to the litigation[62]. These two categories of factors are more clearly understood through the specific criteria developed in *Gulf Oil*[63] for each category, presented below.

### *i. Private Interests of the Parties*

*Gulf Oil* identified the following factors as important considerations relating to the "private interests of the parties": the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, the possibility of on-site view of the premises, and "all other practical problems" that could interfere with the ease, expeditiousness or costs of a trial[64]. The Court also mentioned that the enforceability of a judgment may be considered[65]. Finally, the Court acknowledged that defendants have an interest in not being subjected to a vexatious or oppressive suit which inflict upon them "expense or trouble" which is not necessary to ensure that the plaintiff's right to pursue his remedy against the defendant is respected. It warned, however, that in such situations, the "plaintiff's choice of forum should rarely be

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60 *Id.*, 507-509.
61 *Id.*, 508.
62 *Id.*, 509.
63 *Id.*, 508 and 509.
64 *Id.*, 508.
65 *Id.*

disturbed" and thus the defendant would have a strong burden to bear if he wished to argue otherwise[66].

### *ii. Public Interests*

The Court in *Gulf Oil* also identified several "public interest" factors that should be taken into consideration in the balancing test described above. Specifically, the Court identified five such factors[67]. The U.S. Supreme Court summarized these factors, later, in *Piper*, in the following way:

> *The public factors* [...] *included the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflicts of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.*[68]

With respect to the public interest criterion of application of foreign law, the Supreme Court later stipulated in *Piper* that the law to be applied in another forum should *not* be taken into account in deciding a motion to dismiss on grounds of *forum non conveniens*[69]. The Court stated that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry"[70]. This development represented a departure from typical practice in international cases in that, usually, the fact that the case concerns a contract or a tort tends to favour the hearing of the action in the country whose law is applicable to the merits. As already mentioned, *Piper* involved several other, equally if not more important, qualifications of the approach set out in *Gulf Oil*. The brief summary of this case which follows describes these developments.

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66 *Id.*

67 *Id.*, 508 and 509.

68 *Supra*, note 53, 241, note 6. It should be noted that in U.S. case law, the term "diversity cases" simply refers to those cases in which, under U.S. Const. Art. III, § 2, federal courts have jurisdiction where the dispute is between citizens of different states, or between a citizen of a state and an alien (any person not a citizen or national of the U.S.). See definition for "diversity of citizenship", *Black's Law Dictionary*, *op. cit.*, note 8, p. 477.

69 *Supra*, note 53, 247.

70 *Id.*

### b. *Piper* v. *Reyno*: Setting a Double Standard for Foreign Plaintiffs

The leading case on application of the *forum non conveniens* doctrine in U.S. cases involving international elements is *Piper* v. *Reyno*[71]. This case involved a wrongful death action brought in California for damages resulting from deaths caused by the crash, in Scotland, of an American-manufactured airplane carrying a number of Scottish passengers[72]. In its ruling, the Supreme Court not only reaffirmed the federal doctrine but also expanded it in a way that significantly increased the ability of U.S. defendants to challenge a foreign plaintiff's decision to bring suit in a U.S. court. One way it achieved this was through its refinement of the public and private interests analysis presented in *Gulf Oil*. In undertaking its analysis, the Court, which endorsed the trial court's finding that the weight of public and private interests favoured a Scottish forum, emphasized that no single factor, considered alone, could be given greater significance over the others[73]. Hence, the domicile or residence of the defendant were not to be afforded special significance.

The Court in *Piper* also used a stronger and more direct method for increasing the ability of U.S. defendants to succeed in obtaining *forum non conveniens* dismissals in cases involving foreign elements: it presented several guidelines to strongly reduce the attractiveness of American courts to foreign plaintiffs contemplating American lawsuits for torts or other legal wrongs committed abroad. First, the Court approved the notion that G*ulf Oil*'s presumption that the plaintiff's choice of forum should rarely be disturbed should apply with less force when the plaintiff or real parties in interest[74] are foreign. Essentially, it argued that when the plaintiff or real parties are foreign, it is "much less reasonable" an assumption that their choice of forum is convenient, and hence their choice should be paid less deference[75]. Second, the Court emphasized that plaintiffs faced

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71 *Supra*, note 53.

72 The facts of *Piper* are summarized more thoroughly below in Section IV, B, 7, where the case is discussed as an example of how *forum non conveniens* dismissals can often be outcome-determinative.

73 *Supra*, note 53, 249 and 250.

74 While the plaintiff was American, she was acting as the representative of the estates of several of the deceased, all of whom were Scottish citizens or residents. *Id.*, 239 and 240.

75 *Id.*, 255 and 256.

with *forum non conveniens* motions may not defeat a motion to dismiss merely by showing that the substantive law of the alternative forum is less favourable than that of the chosen forum[76].

### 2. Statewide Variations in *Forum Non Conveniens* in the U.S.

The standards applied in *Piper* and *Gulf* are relied upon in the majority of state courts in the U.S. They are not, however, binding on state courts[77] and, thus, some states have either developed their own, specific formulations of *forum non conveniens* or have rejected it altogether. Of those states that have followed an alternative to the federal doctrine, several have utilized the version of *forum non conveniens* recommended in Section 1.05 of the *Uniform Interstate and International Procedure Act of 1962* (hereinafter the *U.I.I.P.A.*)[78]. According to this approach, where a court finds that the "interests of *substantial justice*" require that the action be heard in the court of another state in the U.S. or another country, then the court "may stay or dismiss the action on any conditions that may be just"[79]. This decision can involve numerous factors. A California appellate court, for example, identified more than 25 factors which could be taken into account[80]. Other states have only weakly or partially

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76 *Id.*, 247-255.

77 See e.g.: *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 149 and 150 (1988) (holding that states are not bound by the federal doctrine where state law on *forum non conveniens* is incompatible with federal doctrine). Earlier, a California Court of Appeals had emphasized the difference between the version of *forum non conveniens* followed in California state courts and the federal doctrine of *forum non conveniens*: *Holmes* v. *Syntex Lab. Inc.*, 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984). It should also be noted that in *American Dredging* v. *Miller*, 510 U.S. 443 (1994), the U.S. Supreme Court held that, in deciding admiralty cases, state courts are not bound by the federal doctrine for *forum non conveniens*.

78 11 *Am. J. Comp. L.* 418 (1962). Reus reports that the states utilizing this approach include Alabama, California, Louisiana, New York, North Carolina and Wisconsin. See: A. REUS, "Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany", 16 *Loy. L.A. Int'l & Comp. L.J.* 455, notes 45 and 46 (1994).

79 See: N.Y. Civ. Prac. L & R. 327 (McKinney, 1990), in which the doctrine according to the *U.I.I.P.A.* is implemented.

80 *Great N. Ry.* v. *Alameda County*, 12 Cal. App. 3d 105, 113 and 114, cert. denied, 401 U.S. 1013 (1970).

accepted the federal doctrine[81]. Finally, some states, such as Florida, Georgia, Montana, Virginia, Louisiana and Texas, place substantial restrictions on the use of *forum non conveniens* or reject the use of the doctrine altogether[82].

### E. Conclusion on the Common Law Approach[83]

#### 1. Similarities Among Common Law Jurisdictions

When considered together, several strong similarities are seen in the way in which the common law jurisdictions of the U.K., Canada and the U.S. employ the doctrine of *forum non conveniens*. Specifically, the primary similarities are that: 1) there must exist an alternative forum abroad, 2) private interest factors are always considered, and 3) the court is generally authorized to either dismiss *or* stay the case.

#### 2. Differences Among Common Law Jurisdictions

While the similarities among the jurisdictions are interesting, the differences among the various formulations of *forum non conveniens* in different countries are perhaps more important. This

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81 D.W. ROBERTSON and P.K. SPECK, "Access to State Courts in Transnational Personal Injury Cases: *Forum Non Conveniens* and Antisuit Injunctions" 68 *Tex. L. Rev.* 937, note 76 (1990). Robertson and Speck give a fairly thorough overview of state variation in *forum non conveniens* as it stood in 1990, *id.*, 949-954.

82 These restrictions and rejections of the doctrine are summarized by R. WEINTRAUB, *loc. cit.*, note 9, note 102. Even some of these states, however, focus their restrictions of the doctrine on domestic matters, and hence *do* allow limited use of *forum non conveniens* in cases involving foreign plaintiffs. Florida, Georgia and Texas, for example, follow this pattern. See also D.W. ROBERTSON and P.K. SPECK, *loc. cit.*, note 81, 950-952 and accompanying footnotes (especially notes 77-80).

83 It should be noted that the conclusions on comparative *forum non conveniens* herein presented are intended as a cursory analysis only. For a more in-depth comparative analysis of *forum non conveniens* among the common law (and certain civil law) jurisdictions, see *e.g.*: D.J. CARNEY, "*Forum Non Conveniens* in the United States and Canada", 3 *Buff. J. Int'l L.* 117 (1996) (which includes a criterion-by-criterion analysis for these two jurisdictions); Ellen L. HAYES, "*Forum Non Conveniens* in England, Australia and Japan: the Allocation of Jurisdiction in Transnational Litigation", (1992) 26 *U.B.C. L. Rev.* 41; Wendy KENNETT, "*Forum Non Conveniens* in Europe", (1995) 54 *Cambr. Law J.* 552; A. REUS, *loc. cit.*, note 78. See: J.J. FAWCETT, *op. cit.*, note 1, and G. SAUMIER, *op. cit.*, note 1.

is because different formulations can easily lead to different, if not counterposed, results – even in cases having very similar facts. This simple fact is critical to understand and recognize in light of the fact that countries utilizing *forum non conveniens* sometime "borrow" jurisprudence and, occasionally, concepts from other jurisdictions[84]. One of these differences is that public interest factors are utilized in the U.S., but not in the U.K. or Canada. Additionally, in U.S. *forum non conveniens* cases, a court can dismiss of its own accord: it need not wait for a motion from one of the parties to do so. Another difference existing between the U.S. and other common law jurisdictions is that where, in the U.S., a presumption exists in favour of choice of forum by local (but not foreign) plaintiffs, in the U.K. and Canada, no such presumption exists.

Other differences in the approach to *forum non conveniens* among the common law countries centre on the issues of burden of proof and thresholds for dismissal. For example, in the U.K., unlike in Canada or the U.S., the burden of proof in *forum non conveniens* shifts from the party proposing the *forum non conveniens* dismissal (typically the defendant), who need only demonstrate a *prima facie* case that a clearly more appropriate forum exists, to the opposing party (typically the plaintiff) who must show special circumstances why the case should remain in the original forum. In Canada and the U.S., the burden of demonstrating the need to remove a case on the basis of *forum non conveniens* always stays with the moving party. With respect to thresholds for dismissal, the rules in each jurisdiction are different. In Australia, *forum non conveniens* occurs if the local forum is *clearly inappropriate*. In the U.S., the threshold is "seriously inconvenient", whereas in the U.K. and Canada, the standard is "clearly more appropriate."

It is the differences in the thresholds for application of *forum non conveniens* which are most relevant for our examination and critique of the test in Quebec. We address the comparative differences in thresholds in greater detail in Section II, below.

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84 This was the situation in *Cambior*, which cited American as well as British cases and which, as explained below, imported certain aspects of *forum non conveniens* that are simply not based in Quebec law: *supra*, note 11, 15-19.

### F. Current Trends in Common Law Applications of *Forum Non Conveniens*

In most jurisdictions employing a doctrine of *forum non conveniens*, the use of the doctrine increased rapidly after its introduction. Today, however, there are strong signs among the common law countries that the pendulum may be starting to swing the other way. That is, a number of the decisions in the common law courts are reflecting tendencies to reign in the fast horse of *forum non conveniens*. While this is perhaps more true of the U.K. than the other common law jurisdictions, even in the U.S., where *Piper* changed the amount of deference to be paid to plaintiffs' forum choices where the plaintiffs are foreign, a new trend is afoot[85].

In 1996, for example, the U.S. Supreme Court in *Quackenbush* v. *Allstate Ins. Co.*[86] reaffirmed its earlier position in *Gulf Oil* that the application of the doctrine of *forum non conveniens* should be "rare"[87]. Specifically, it emphasized that only in "rare circumstances" may the federal courts "relinquish their jurisdiction in favor of another forum"[88]. Earlier, in 1991, the Federal Court of Appeals, Eighth Circuit, stated in *Reid-Whalen* v. *Hansen*[89], that "in this unusual situation, where the forum resident seeks dismissal, this fact should weigh strongly against dismissal". In the same year, the Third Circuit stated in *Lony* v. *E.I. Du Pont de Nemours & Co.*[90] that it was "puzzling" that DuPont wanted to give up its home court advantage. The Court, observing that Du Pont was seeking to move

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85 For example, see: *PT Kiani Kevdas* v. *Helon*, (2000) B.C.J., No. 1472 (Hendersen J.) and *Conor Pacific Environmental Technologies Inc.* v. *Risk Management Research Institute Ltd.*, (2000) B.C.J., No. 1342 (William J.). As in previous sections, the cases discussed here are illustrative only, and are not intended to serve as a comprehensive presentation of the jurisprudence.

86 *Supra*, note 56.

87 *Supra*, note 52, 509.

88 *Supra*, note 56, 1724. It should be noted, however, that *Quackenbush* is a domestic, rather than international case, and the Court's observations should be viewed in that context. Nonetheless, the case has been relied upon by at least two federal trial courts to support the notion that, in international cases, the federal *forum non conveniens* test is to be applied only in exceptional circumstances. See e.g.: *Eastman Kodak Co.* v. *Kavlin*, 978 F.Supp. 1078, 1095 (S.D. Fla. 1997); *Abdullah Sayid Rajab Al-Rifai & Sons W.L.L.* v. *McDonnell Douglas Foreign Sales Corp.*, 1997 U.S. Dist. Lexis 20587, 12 (E.D. Mo. Dec. 10, 1997). This use of *Quackenbush* has been criticized by L.E. TEITZ, "Parallel Proceedings: Treading Carefully", 32 *Int'l Law* 223, 227 (1998).

89 933 F.2d 1390, 1395 (8th Cir. 1991).

90 935 F.2d 604, 608 and 609 (3d Cir. 1991).

the action to a forum more than 3000 miles away, remarked: "It is like Alice said, 'curiouser and curiouser'"[91]. The Third Circuit made similar observations in an earlier case, *Lacey* v. *Cessna Aircraft Co.*[92], which is examined in more detail, below[93].

Some of the federal trial courts in the U.S. are showing similar signs of restricting the doctrine, even where the plaintiffs are foreign. In *Manela* v. *Garantia Banking Ltd.*[94], a 1996 case in federal trial in New York, the Court observed that a defendant is in an "unusual" position when it asserts that the forum in which its headquarters are found is "inconvenient"[95]. Using a somewhat different approach, a U.S. District court in Florida found, in *Eastman Kodak Co.* v. *Kavlin*, that despite the fact that both the private and public interest factors pointed strongly toward Bolivia as the alternative forum, dismissal on grounds of *forum non conveniens* was not warranted because corruption in the Bolivian justice system made unavailable an "adequate alternative forum" and because the plaintiffs could not reinstate their suit in Bolivia without undue inconvenience and prejudice to their case[96]. It should be noted that the Court came to this result using a four-part test distilled from principles in *Gulf Oil* and developed by the Eleventh Circuit, in which the analysis involves consideration of: a) an adequate alternative forum, b) balance of private interests, c) balance of public interests, and d) lack of undue inconvenience or prejudice to the plaintiff[97].

These recent decision notwithstanding, there are still some U.S. authors who favour keeping the doctrine of *forum non conveniens* expansive, acting as a dam against the floodwaters of forum-shopping plaintiffs. Linda J. Silberman, for example, favours the enactment of a Federal statute to establish, as a presumptive matter, that litigation by foreign plaintiffs arising abroad should not be brought in U.S. courts where an alternative court is available[98]. Such a rule would shift, and no doubt increase, the burden of proof for foreign plaintiffs. Similarly, Daniel J. Dorward argues that the

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91 *Id.*, 608.
92 862 F.2d 38 (3d Cir. 1988).
93 See Section IV, B, 2 below.
94 *Manela* v. *Garantia Banking, Ltd.*, 940 F. Supp. 584 (S.D. N.Y. 1996).
95 *Id.*, 592.
96 *Supra*, note 88, 1086 and 1087.
97 *Id.*, 1083.
98 *Loc. cit.*, note 9, 530.

*Piper* approach must be kept intact in order to discourage forum shopping by foreign plaintiffs[99].

With respect to current trends in the U.K., there have been several recent decisions which support the notion of a more restricted application of the doctrine of *forum non conveniens*. For example, the House of Lords in *Connelly* v. *RTZ Corp.*[100] seemed to take notice of the relative strength of the parties in terms of financial resources when it ruled that an action taken in England was to remain in that jurisdiction rather than be stayed for hearing in Namibia because the plaintiff individual needed financial assistance, available only in England, to pursue his suit against a subsidiary of a London-based multinational[101]. As mentioned in the Introduction, the House of Lords retained the case on the rationale that because of the unavailability of legal aid in Namibia, the plaintiff could not be assured that "substantial justice" could be done in the alternative forum. What is striking is that the House of Lords took this position despite the fact that it was not disputed that, on the whole, the Namibian forum was "clearly or distinctly more appropriate" than the English forum[102].

The English Court of Appeal has similarly been increasingly protective of the "little guy" in *forum non conveniens* cases in which the plaintiff had taken action against a multinational corporation. In *Lubbe*[103], for example, a number of asbestos workers from South Africa brought suit against a company which was operating there but incorporated and domiciled in England, for damages suffered from breathing asbestos dust at a mine run by a wholly owned subsidiary of the defendant corporation. The Court of Appeal, referring to this kind of situation as "forum shopping in reverse," allowed an appeal against a judgment staying proceedings on the grounds of *forum non conveniens*[104]. Similarly, in *Sithole*[105], South African workers sued the parent corporation domiciled in England for damages suffered due to mercury exposure at a plant which manufactured and reprocessed mercury compounds. As in *Lubbe*,

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99 *Loc. cit.*, note 9, 168.
100 *Supra*, note 24.
101 This case was presented briefly in the Introduction.
102 *Supra*, note 24, 344.
103 *Supra*, note 28.
104 *Id.*, 10.
105 *Supra*, note 28.

this situation involved a plant operated in South Africa by a wholly owned subsidiary of the English corporation.

Canada, as well, has seen a recent trend toward a more restrictive view of *forum non conveniens* in both the federal courts and in some of the common law provinces. The federal courts, for example, have refused to authorise stays in the vast majority of *forum non conveniens* cases that have come before them at both the trial and appellate levels[106]. For example, in *Holt Cargo Systems*[107], the Federal Court of Appeal held that an arrest of a ship in Canadian waters can provide a "real and substantial connection" to Canada, even though most of the ties are with another jurisdiction. It also affirmed the idea that a party with such a connection can legitimately claim the advantages that that jurisdiction provides, echoing Sopinka J. in *Amchem.* Similarly, in *The Ship Friedrich Busse*[108], the Court of Appeal denied the request for a stay, despite the fact that the only link with Canada was that the ship had been arrested in a Canadian port, where it was undergoing repairs[109]. Strict application of *forum non conveniens* doctrines may also be seen in numerous provincial cases[110]. The Nova Scotia Court of Appeal, for example, has recently emphasized that the plaintiff's choice of forum must not be easily disturbed and that the domestic forum must serve as the "default" forum where any doubt arises[111], and the courts of Prince Edward Island have continued, even after *Amchem Products*, to find that a "heavy onus" lies with the defendant

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106 See *Discreet Logic, supra*, note 46; *Napa, supra*, note 46; *Holt Cargo Systems, supra*, note 46; *The Ship Friedrich Busse, supra*, note 46; *Donohue Inc.* v. *The Ocean Link, supra*, note 46; *Cytoven, supra*, note 46; *Underwriters at Lloyd's v. Mauran, supra*, note 46; *Yasuda Fire & Marine Insurance Co.* v. *The Nosira Lin*, [1984] F.C. 895 (C.A.); *Peter Cremer Befrechtungskontor GMBH* v. *Amalgamet Canada Ltd.*, [1989] F.C.J. (Quicklaw) No. 136 (T.D.). One of the only federal court cases since *Amchem Products, supra*, note 34, which has resulted in acceptance of a *forum non conveniens* motion and an order to stay is *Sarafi* v. *Iran Afzal (The)*, [1996] 2 F.C. 954 (F.C.T.D).

107 *Supra*, note 46.

108 *Supra*, note 46.

109 It should be noted, however, that maritime cases merit special treatment in the assessment of connecting factors because, as Addy J. pointed out in *The Ship Friedrich Busse, supra*, note 46, 715: "a ship, because of its very mobility is an elusive asset which can easily be disposed of in some distant place and the proceeds of the sale can easily be put beyond the reach of a legitimate claimant".

110 See decisions cited in note 45, *supra.*

111 *Dennis, supra*, note 45; *Ontario Ltd.* v. *Wall, supra*, note 45.

who must demonstrate that the alternative forum is more appropriate[112].

Finally, there is evidence of an interest in restricting the scope of *forum non conveniens* on the international level as well. There appears to be, for example, a willingness on the part of the common law nations at the Hague Conference on Private International Law [hereinafter "Hague Conference"] to limit the operation of the *forum non conveniens* doctrine. More will be said later in the paper on this development[113].

## II. The Quebec Rule and its Unravelling in Quebec Jurisprudence

### A. The Quebec Rule: Article 3135 C.c.Q.

It is essential, of course, to begin our examination with the text of the Code. In 1994, Quebec introduced its own version of *forum non conveniens* into Quebec civil law through article 3135 C.c.Q., which reads as follows:

> *Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.*
>
> *Bien qu'elle soit compétente pour connaître d'un litige, une autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette compétence si elle estime que les autorités d'un autre État sont mieux à même de trancher le litige.*

The essential requirements contained within this provision were isolated and presented very helpfully in 1995 by S. Guillemard, Alain Prujiner and F. Sabourin in an article which made a very thorough study of the Quebec *forum non conveniens* cases from 1994-1995[114]. The authors identified four requirements in article 3135 C.c.Q.:

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112 See especially: *Oulton Agencies Inc.* v. *Knolloffice Inc.*, (1988) 66 Nfld & P.E.I.R. 207 (P.E.I.S.C.); *Decoexsa Global Logistics, supra*, note 45; *Tomlinson* v. *Turner*, *supra*, note 45.

113 See, Section VII, below.

114 *Loc. cit.*, note 1, 930-951.

1) There must be an authority in Quebec which is competent to hear the case.

2) It must be an exceptional case.

3) The doctrine is invoked only at the request of one of the parties.

4) In order to dismiss the case, the judicial authority of the other state must be better placed to decide the matter in dispute.

We agree that these four points constitute the critical elements of article 3135 C.c.Q. As such, they form the starting point for our examination and critique of the Quebec jurisprudence generally, as well as for our critique of the *Cambior* decision in particular.

### B. Quebec Jurisprudence on *Forum Non Conveniens*: Inconsistent Interpretation of Article 3135 C.c.Q.

Given the four essential elements of article 3135 C.c.Q. outlined above, it would be reasonable to expect that the courts would rarely invoke the doctrine in Quebec. In fact, however, it has been invoked with great frequency since 1994. Additionally, it has now penetrated nearly every discretionary power in the exercise of jurisdiction in Quebec, affecting decisions to stay proceedings in motions for *lis pendens* (art. 3137 C.c.Q.), to trump jurisdiction over incidental or related actions (art. 3139 C.c.Q.)[115], to issue anti-suit injunctions[116], and to second-guess the exercise of jurisdiction by a foreign court in the context of a motion to recognize a foreign judgment[117]. Furthermore, far more cases are dismissed on the basis of *forum non conveniens* than one would expect for a procedural recourse that is, according to its legislative basis in article 3135 C.c.Q., to be used only "exceptionally". According to a study by Judge Chamberlain in 1995, about one-third of the cases are sent away to

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115 See: *Crestar* v. *Canadian National Railways Co.*, [1999] R.J.Q.1190 (Sup. Ct.) (hereinafter *Crestar*); *Birdsall Inc.* v. *In any Event*, [1999] R.J.Q. 1344 (C.A.) (hereinafter *Birdsall*).

116 See, for example: *Droit de la famille – 2398*, [1996] R.J.Q. 1010 (Sup. Ct.).

117 See: *Cortas Canning* v. *Suidan Bros.*, [1999] R.J.Q. 1227 (Sup. Ct.) (hereinafter *Cortas Canning*); *Les Entreprises Claude Chagnon* v. *Aqua Dyne Inc.*, Sup. Ct. Ste Hyacinthe No. 500-17-000164-990, January 20 2000; leave to appeal refused.

the alternative forum as a result of acceptance of *forum non conveniens* motions[118]. As of December 1999, the Quebec courts had decline jurisdiction in favour of the alternative forum in 27 out of 77 cases[119].

The 1990's have seen an explosion of litigation in international commercial activity in Quebec, and this has unfortunately occurred in a context in which judicial guidelines on when *forum non conveniens* will apply have been sorely lacking. Unfortunately, the Quebec jurisprudence reveals few guidelines to help lawyers predict whether the Quebec Court will choose to decline its jurisdiction. *The jurisprudence in Quebec is problematic because it does not reflect a clear, Quebecois version of* forum non conveniens*:*

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[118] Unpublished conference paper presented at a meeting of the Canadian Bar Association (Quebec Division), Montreal, May 15, 1995.

[119] Quebec courts declined jurisdiction in the following cases: *Banque Toronto-Dominion* v. *Arsenault*, [1994] R.J.Q. 2253 (Sup. Ct.) (hereinafter *Arsenault*); *Carrier* v. *Frigon*, J.E. 95-309 (C.Q.) (hereinafter *Carrier*); *Czajka* v. *Life Investors Insurance Co. of America*, J.E. 95-765 (Sup. Ct.) (hereinafter *Czajka*); *Droit de la famille – 2032*, [1994] R.J.Q. 2218 (Sup. Ct.); *Garantie (La), compagnie d'assurances de l'Amérique du Nord* v. *Gordon Capital Corp.*, [1995] R.D.J. 537 (C.A.) (hereinafter *Gordon Capital (C.A.)*); *H.L. Boulton & Co. S.A.C.A.* v. *Banque Royale du Canada*, [1995] R.J.Q. 213 (Sup. Ct.) (hereinafter *Boulton*); *Lumbermen's Mutual Casualty Co.* v. *Midland Transport Ltd.*, J.E. 95-1794 (C.Q.) (hereinafter *Lumbermen's Mutual*); *United Color & Chemicals International Inc.* v. *Carmichael Ltd.*, J.E. 95-1374 (Sup. Ct.) (hereinafter *United Color*); *Allstate Insurance Co.* v. *Transport Perez inc.*, B.E. 97BE-40 (C.Q.) (hereinafter *Transport Perez*); *Birdsall, supra*, note 115; *Cambior*, *supra*, note 11; *Colida* v. *Motorola Inc.*, J.E. 99-1710 (Sup. Ct.); *Droit de la famille – 2378* [1996] R.J.Q. 2993 (Sup. Ct.); *Droit de la famille – 2577*, J.E. 97-262 (C.A.); *Droit de la famille – 3064*, J.E. 98-1663 (Sup. Ct.); *Droit de la famille – 3146*, J.E. 98-2285 (Sup. Ct.); *E.S.* v. *O.S.*, Sup. Ct. Montreal 500-04-004226-958, December 19 1996; *J.S. Finance Canada inc.* v. *J.S. Holdings S.A.*, Sup. Ct. Montreal 500-05-041089-986, May 19 1998 (hereinafter *J.S. Finance Canada inc.*); *Kingsway General Insurance Co.* v. *Komatsu Canada ltée*, [1999] R.J.Q. 2715 (Sup. Ct.); *L.Y.* v. *M.D.*, Sup. Ct. Quebec 200-12-039883-898, November 23 1998; *Oppenheim Forfait G.M.B.H.* v. *Lexus Maritime inc.*, J.E. 98-1592 (C.A.) (hereinafter *Lexus Maritime (C.A.)*); *Red Falcon Holdings Ltd.* v. *Yellow Eagle Mining Inc.*, Sup. Ct. Montreal 500-17-004315-985, April 15 1999; *Société Toon Boom Technologies* v. *Société 2001 S.A.*, J.E. 96-474 (C.A.) (hereinafter *Société Toon Boom (C.A.)*); *Sony Music Canada inc.* v. *Kardiak Productions inc.*, J.E. 97-1395 (C.A.); *Tribute Carpets* v. *Perfection Rug*, J.E. 96-470 (C.Q.); *Unifirst Federal Savings Bank* v. *Lagarde*, B.E. 98BE-628 (Sup. Ct.); *Zurich, compagnie d'assurances* v. *Plastic Technologies Inc.*, J.E. 97-1707 (Sup. Ct.) (hereinafter *Zurich*); *Protection de la jeunesse – 1120*, J.E. 2000-621 (Sup. Ct.); *Droit de la famille – 3507*, J.E. 2000-249 (Sup. Ct.); *Droit de la famille – 3459*, [1999] R.J.Q. 2971, [1999] R.D.F. 807; *Amiel Distributions Ltd.* v. *Amana Company L.P.*, (2000) I.Q., No. 4958.

*the cases offer no clear understanding of the term "exceptional" in article 3135 C.c.Q.* As a result of this uncertainty, *forum non conveniens* is raised with great frequency by defendants, and thus plays a more prominent role in determining the appropriateness of the Quebec forum than it otherwise should in international and inter-provincial cases. This development is troublesome in that it leads to the replacement of the rule of law with informal and intuitive judicial decision-making.

The absence of guidelines for litigants and lawyers also causes uncertainty in the decision whether to defend an action abroad or in Quebec due to the fact that Quebec law allows for an evaluation of the appropriateness of the jurisdiction of a foreign court by injecting Quebec's own *forum non conveniens* doctrine into the analysis. This is because Quebec law allows judges, in evaluating whether a foreign court has jurisdiction, to consider, *inter alia*, the elements of the case which gave those authorities *forum conveniens*[120]. Hence, Quebec courts may, relying on article 3164 C.c.Q., employ the "little mirror" principle to refuse recognition of a foreign judgment where, had the foreign jurisdiction applied Quebec's version of *forum non conveniens* rather than its own, the foreign court would have declined to exercise its jurisdiction.

Because Quebec courts have strayed far from the original formulation of the *forum non conveniens* rule in Quebec, what

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120 See: Gérald GOLDSTEIN and Jeffrey TALPIS, *L'effet au Québec des jugements étranger en matière de droits patrimoniaux*, Montréal, Éditions Thémis, 1991, p. 270, par. 101; Jeffrey TALPIS and Jean-Gabriel CASTEL, "Le Code Civil du Québec : interprétation des règles du droit international privé", in Barreau du Québec et Chambres des notaires du Québec, *La réforme du Code civil : priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires*, Vol. 3 (hereinafter *La réforme du Code civil*), Sainte-Foy, Presses de l'Université Laval, 1993, p. 917, par. 487; H. Patrick GLENN, "Droit international privé", in Barreau du Québec et Chambres des notaires du Québec, *La réforme du Code civil*, Vol. 3, p. 770, par. 117; H. Patrick GLENN, "Recognition of Foreign Judgments in Quebec", (1997) 28 *Can. Bus. L.J.* 404, 411; Gérald GOLDSTEIN and Jeffrey TALPIS, "Les perspectives en droit civil québécois de la Réforme des règles relatives à l'effet des décisions étrangères au Canada", (1995) 74 *Can. Bar Rev.* 641, 664 and (1996) 75 *Can. Bar Rev.* 115, 145; Gérald GOLDSTEIN and Éthel GROFFIER, *Droit international privé québécois, théorie générale*, T. 1, Cowansville, Éditions Yvon Blais, 1998, 573; see also: art. 3164 and 3135 C.c.Q. Additionally, application of the doctrine of *forum non conveniens* to the recognition of foreign judgments was the basis for refusing to recognize the jurisdiction of a Texas court in *Cortas Canning, supra*, note 117, 1237-1239.

should have been a mere trickle of cases has turned into a torrential downpour since 1994 when article 3135 C.c.Q. came into effect. Furthermore, while the Quebec rule in article 3135 C.c.Q. is still faithfully cited in most of these cases, the rule's focus on exceptionality has been largely overtaken by *ad hoc* judicial rulemaking and the influence of practices in other jurisdictions.

A review of the vast majority of the *forum non conveniens* decisions in Quebec reveals a rather unwieldy number of approaches to the interpretation of article 3135 C.c.Q., none of which truly addresses the issue of exceptionality. In the subsections below, we offer a classification of these approaches into seven, basic categories:

1. "Exceptional" is found in the *Minister's Commentaries*.
2. "Exceptional" is found through weighing various criteria.
3. "Exceptional" means what one chooses it to mean.
4. "Exceptional" means that the alternative court is better suited to decide.
5. "Exceptional" means that the interests of justice require dismissal".
6. "Exceptional" means that the other forum is "clearly more appropriate".
7. "Exceptional" means respecting Quebec as the default forum, especially when the criteria used to weigh the nexus to the alternative forum are questionable.

Before illustrating how each of these approaches has been utilized in the Quebec jurisprudence on *forum non conveniens*, a few preliminary remarks are in order. First, while some Quebec cases rely on only one of these seven approaches, more commonly, cases rely on some combination of them. Even the use of multiple approaches, however, generally fails in communicating successfully what makes a case "exceptional". Second, as will be seen in the analysis which follows, the approaches toward the end of the list come closer to following the Quebec rule than the approaches at the beginning. Nonetheless, even they do not create sufficient guidance for the identification of "exceptional" cases, worthy of dismissal under article 3135 C.c.Q.

### 1. Approach 1: "Exceptional" Is Found in the *Minister's Commentaries*

One approach frequently taken in Quebec is for the Court to announce that article 3135 C.c.Q. may be used only exceptionally, and then to quote parts of the *Minister's Commentaries on the Civil Code of Quebec*[121] as if they contained the definition of "exceptional". This approach can be seen, for example, in *N.M.* v. *S.S. (Droit de la famille - 2577)*[122], *Stageline Mobile Stage Inc.* v. *Fireman's Fund Insurance Co.*[123], *N.S. Inter Inc.* v. *Pellemon International Inc.*[124] and the recent case, *Opron Inc.* v. *Aero System Engineering Inc.*[125]. It is also seen in the *Cambior*[126] decision. Additionally, the *Minister's Commentaries* are also often quoted in cases which make no mention at all of the "exceptional" requirement in article 3135 C.c.Q. The Minister provides the following view on article 3135 C.c.Q.:

> *Cet article, de droit nouveau, codifie l'exception du forum non conveniens, fréquemment utilisée dans les systèmes de common law. L'exception fait l'objet de controverses doctrinale et jurisprudentielle en droit québécois, relativement à sa recevabilité en l'absence de disposition législative permettant au tribunal de décliner sa compétence.*
>
> *Le forum non conveniens permet, en effet, à un tribunal de décliner sa compétence quand il juge que les intérêts de la justice seraient mieux servis si l'affaire dont il est saisi était instruite par un autre tribunal.*
>
> *Étant donné les avantages que peut présenter, en droit international privé, le* forum non conveniens*, notamment quant à l'efficacité des jugements à rendre, l'article 3135 étend également son application à toutes les autorités du Québec visées par ce titre troisième. L'article devrait faciliter l'administration de la justice en tenant compte de l'intérêt bien compris des parties.* ***Son application est cependant limitée à des cas exceptionnels****.*
>
> ***Pourraient donner ouverture à ces cas exceptionnels, les considérations suivantes*** *: la disponibilité des témoins, l'absence de familiarité de l'autorité appelée à trancher le litige avec le droit applicable,*

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121 GOUVERNEMENT DU QUÉBEC, *Commentaires du ministre de la Justice, le Code civil du Québec*, t. 2, Québec, Publications du Québec, 1993, p. 1999 and 2000 (hereinafter *Minister's Commentaries*).

122 *Droit de la famille – 2577*, *supra*, note 119.

123 J.E. 98-910 (Sup. Ct.) (hereinafter *Stageline*).

124 J.E. 96-1532 (Sup. Ct.) (hereinafter *Pellemon*).

125 [1999] R.J.Q. 757 (Sup. Ct.) (hereinafter *Opron*).

126 *Supra*, note 11.

*la faiblesse du rattachement du litige à cette autorité, le litige se trouvant en relation beaucoup plus étroite avec les autorités d'un autre État.*[127]

A number of *forum non conveniens* decisions in Quebec have treated the last paragraph as containing the key to what the Legislator meant by the word "exceptional". There are, however, several reasons why this paragraph does not suffice as a definition, or even working explanation, of "exceptional" for purposes of interpreting article 3135 C.c.Q. First, all that is provided in the last paragraph is a short list of factors which could be considered, and a list, of course, is not a definition. Second, the Minister's use of the term *could* ("pourraient") in front of the list of criteria implies the discretion to use or not use the criteria in the list, and this creates uncertainty that further detracts from the idea that the list provides a workable explanation for "exceptional". Third, and perhaps most importantly, the list simply contains factors that *can* be used in making the decision to dismiss: each item on its own is obviously not meant to trigger a dismissal every time, but beyond this necessary assumption, there is no indication as to how they *should* be used.

The jurisprudence, borrowing from the common law, has generally assumed that the criteria are to be considered together, in a "global manner"[128], but the text of the *Minister's Commentaries* says nothing about conducting a global analysis. In short, the list of factors by itself does not help identify what instances should be considered "exceptional". Guillemard, Prujiner and Sabourin make a similar point when they observe that rather than representing exceptional cases, the first two criteria mentioned – availability of witnesses and lack of familiarity with foreign law – are simply illustrations of cases where the authority of another state might be better placed to decide the case[129].

Another point to consider in assessing the import of the last paragraph in the *Minister's Commentaries* is the issue of whether the list of criteria was intended to be open or closed. The language of the text is somewhat ambiguous on this point. While a reasonable interpretation is that it is a closed list, the last two "criteria"

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127 *Op. cit.*, note 121 (emphasis added).

128 See e.g.: *Boulton*, *supra*, note 119; *Lexus Maritime (C.A.), supra*, note 119; *Encaissement de chèque Montréal ltée* v. *Softwise inc.*, Sup. Ct. Montreal 500-05-044589-981, January 19 1999 (hereinafter *Softwise*).

129 *Loc. cit.*, note 1, 950.

mentioned – "la faiblesse du rattachement du litige à cette autorité, le litige se trouvent en relation beaucoup plus étroite avec les autorités d'un autre État"[130] – are so general that on their own they could conceivably open the door to the use of a number of more specific factors. In fact, most of the Quebec cases which cite the *Minister's Commentaries* utilize specific criteria that are not mentioned by name in the last paragraph and perhaps it is through this door that they are intended to enter. The problem here is that, while the clause is perhaps not completely open – it really only refers to points of contact – it is open enough that it has the effect of making the list *itself* open-ended, and an open-ended list is even less able to serve as a guide to what is "exceptional" than a closed list, since a list is not a definition.

Another persuasive observation made by Guillemard, Prujiner and Sabourin on the last clause of the Minister's list is that they observe that the phrase "la faiblesse du rattachement du litige à cette autorité" in the *Minister's Commentaries*[131] is not really a criterion at all, but rather a *raison d'être* for making the dismissal decision[132]. Further, they warn that instead of providing guidance as to what is exceptional, the clause actually has the opposite effect because it opens the door to limitless derogation from the established conflict rules[133]. In other words, the use of the concept, "closer attachment to the foreign jurisdiction"[134] as an established criterion for dismissal almost forges the exception into the rule.

There is one other feature of the *Minister's Commentaries* which we feel is particularly important and yet which has been largely ignored: the important role of the "interests of justice", in the second paragraph. Very often, the Quebec cases simply attach the "interests of justice" to the end of the long list of criteria which have been chosen for consideration in the weighing process. Clearly, had the Minister intended to convey that this should be done, he would have included "interests of justice" in the list of criteria in the last paragraph. But he did not. We believe that by stating, as he does in the second paragraph, that: "[l]e *forum non conveniens* permet, en effet, à un tribunal de décliner sa compétence quand il juge que

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130 *Op. cit.*, note 121. See par. 4 of the *Minister's Commentaries* on art. 3135 C.c.Q., reproduced above on p. 799 et 800.

131 *Id.*, p. 2000.

132 *Loc. cit.*, note 1, 948.

133 *Id.*

134 *Id.*, 949.

les intérêts de la justice seraient mieux servis si l'affaire dont il est saisie était instruite par un autre tribunal"[135], he intended to convey that factors relating to the interests of justice should be given an important role, prior to and above consideration of the connecting factors and other specific criteria. As we will argue later, the characteristics of the situation which are often placed under the heading of "interests of justice" are more properly considered as part of a determination of whether the alternative forum is sufficiently competent to warrant further consideration under the *forum non conveniens* analysis.

### 2. Approach 2: "Exceptional" Is Found in the Weighing of Criteria

This approach is also quite common in the jurisprudence. Essentially, the argument goes that, in order to determine whether or not a case is exceptional, one must analyze different criteria, such as the location of the parties, witnesses, evidence, etc. If the criteria point of dismissal, then the case is exceptional. The tautological quality of this approach makes it less than satisfying. The approach can be seen in cases such as *Transport Perez*[136], and in *Lexus Maritime (C.A.)*[137], in which Pidgeon J.A. states that "[l]e juge saisi d'un moyen déclinatoire doit considérer plusieurs facteurs afin de déterminer s'il est en présence d'une situation exceptionnelle"[138].

### 3. Approach 3: "Exceptional" Means What One Chooses It to Mean

Some decisions simply conclude that the criteria themselves, which have been identified and weighed, are the "exceptional circumstances" that demand dismissal on *forum non conveniens* grounds. Obviously, this *ad hoc* approach does not help to define what "exceptional" means. This is tantamount to Humpty Dumpty's assertion that, "When I use a word, it means just what I choose it to mean – neither more nor less." Examples of this approach can

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135 *Op. cit.*, note 121.
136 *Supra*, note 119.
137 *Supra*, note 119.
138 *Id.*, 6. "The judge faced with a declinatory motion must consider many factors in determining if there are exceptional circumstances that warrant declining jurisdiction." (Our translation.)

be seen in cases such as *N.M.* v. *S.S.*[139], *Al-Kishtaini* v. *Yesrasien Investments, Inc.*[140] and *Droit de la famille – 2555*[141]. *Cambior* also makes reference to "exceptional circumstances", but does not define what they are: the decision refers simply to the *Minister's Commentaries*[142].

### 4. Approach 4: "Exceptional" Means That the Alternative Court Is Better Suited to Decide

Cases using this type of approach typically make statements such as: "The court can only "exceptionally" decline when the other court is in a better position to decide." The flaw in this reasoning is obvious: it says that whenever the court considers the alternative forum better suited to decide the case, *that* constitutes "exceptional". Tautological approaches such as this are clearly not helpful in narrowing the field of cases to which the *forum non conveniens* test might apply. Examples of this approach are present in *Zurich*[143], *Société Toon Boom Technologies* v. *Société 2001 S.A.*[144] and in *Amiel Distributions Ltd.* v. *Amana Company L.P.*[145].

### 5. Approach 5: "Exceptional" Means That the Interests of Justice Require Dismissal

This approach is somewhat similar to the previous approach in that it is backward- rather than forward-looking and is, therefore, of little help in identifying exceptional cases prior to the conclusion of the *forum non conveniens* analysis. Thus, in *Defosses et Plante inc.* v. *Distribution Desilets inc.*, the Superior Court took the position that only if the interests of justice would be better served by sending the case away should Quebec decline to exercise jurisdiction[146]. As in Approach 4, this method performs the *forum non conveniens* analysis without reference to exceptionality, then

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139 Sup. Ct. Montreal 500-05-014008-948, March 6 1995.

140 B.E. 98BE-349 (Sup. Ct.).

141 [1997] R.D.F. 1 (C.A.).

142 *Cambior*, *supra*, note 11, 15.

143 *Supra*, note 119.

144 J.E. 96-630 (Sup. Ct.) (hereinafter *Société Toon Boom (S.C.)*), reversed by the Court of Appeal on Feb. 19, 1996.

145 *Supra*, note 119, par. 59. The court (Larouche J.) declares : "Ce cas nous apparaît exceptionnel en ce sens que nous estimons que les autorités américaines sont mieux à même de trancher le litige".

146 B.E. 99BE-53 (Sup. Ct.).

labels as "exceptional" those cases which result in acceptance of the motion and dismissal of the case. Other cases taking this approach include and *Société Toon Boom Technologies (C.A.)*[147], *Transport Perez*[148] and *Rosdev Investments Inc.* v. *Allstate Insurance Co. of Canada*[149].

On the positive side, however, this approach seems to pull the "interests of justice" up out of the chaos of other factors that are considered during the global weighing of criteria, and places it in a more important light. As we mentioned earlier, it is our contention that the "interests of justice" should play a very strong role, especially where the term is being used to discuss things which make the alternative forum an adequate forum for litigating a particular case. It is useful to note that in a 1994 case cited regularly in *forum non conveniens* cases, *Arsenault*[150], Grenier J. remarks that article 3135 C.c.Q., as an exceptional rule of private international law, has as its sole objective the good administration of justice. We believe that this *must necessarily* include the interests of justice.

### 6. Approach 6: "Exceptional" Means the Other Forum Is "Clearly More Appropriate"

This approach borrows directly from the threshold for dismissal found in the *forum non conveniens* formulation used in common law Canada and the U.K., which puts the burden of proof upon the moving party, who is almost always the defendant. As was described earlier, the leading Supreme Court of Canada case *Amchem Products*[151] recommends dismissal only where the alternative forum has been shown by the moving party to be "clearly more appropriate" than the domestic forum. This approach has been used in a number of Quebec cases such as *Czajka* v. *Life Investors Insurance Co. of America*[152], *Cameron Billard* v. *2779340 Canada Inc.*[153], *Lexus*

147 *Supra*, note 119.
148 *Supra*, note 119.
149 *Rosdev Investments Inc.* v. *Allstate Insurance Co. of Canada*, [1994] R.J.Q. 2966, 2969 (Sup. Ct.) (hereinafter *Rosdev Investments*).
150 *Supra*, note 119.
151 *Supra*, note 34, 921.
152 *Supra*, note 119.
153 REJB 97-4876 (Sup. Ct.), aff. in appeal REJB 97-2552 (hereinafter *Cameron Billard*).

*Maritime (C.A.)*[154], *Opron*[155], *Droit de la famille – 2451*[156], *Stageline*[157] and *Entreprises Exulon inc.* v. *1220103 Ontario Ltd.*[158].

The language of this approach may be seen in the Court of Appeal case *Lexus Maritime (C.A.)*[159] and, more recently, in *Opron*, in which Kennedy J. stated that "[s]'il ne se dégage pas une impression nette tendant vers un seul et même forum étranger, le tribunal devrait [...] refuser [...] de décliner juridiction"[160]. Similarly, in *Cameron Billard*, the Superior Court explained that because of the exceptional nature of article 3135 C.c.Q., the various criteria that are weighed when evaluating the alternative forum must, together, "*tendre véritablement, de façon concordante, vers une solution nette à l'effet que le tribunal d'un autre état est mieux à même de trancher le litige, que c'est également le ressort nettement logique*"[161].

What is both interesting and ironic about this importation of the common law *forum non conveniens* threshold for dismissal is that in a great number of common law cases, the standard is actually used in a very restrictive manner, that is, to deny dismissal. Most of the federal *forum non conveniens* cases, for example, take this approach[162]. It is interesting that they are able to accomplish this because, on its face, the phrase "clearly more appropriate" does not ensure that only exceptional cases will be dismissed. Still, given the narrow way in which the standard is being applied in many of the common law provinces and in the federal courts, it could be argued that this approach provides at least some support for the notion of "exceptional". In our view, "exceptional" is an even more restrictive qualifier than "clearly more appropriate." The "better suited to decide" phrase in article 3135 C.c.Q. goes to the

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154 *Supra*, note 119.
155 *Supra*, note 125.
156 [1996] R.D.F. 509 (Sup. Ct.).
157 *Supra*, note 123.
158 B.E. 98BE-627 (C.Q.) (hereinafter *Entreprises Exulon*).
159 *Supra*, note 119, 7.
160 *Supra*, note 125, 776 and 777. "If after the weighing of factors it does not become clear that there is a clear impression tending toward the alternative forum, this court must refuse to decline jurisdiction." (Our translation.)
161 *Supra*, note 153.
162 See e.g.: *Underwriters at Lloyd's* v. *Mauran*, *supra*, note 46; *Donohue Inc.* v. *Ocean Link*, *supra*, note 46; *Cytoven*, *supra*, note 46.

mechanism of decision, not to the frequency with which the decision to dismiss is to be applied.

Finally, it is important to recall that in the Supreme Court's decision in *Amchem Products*, a case cited frequently in Quebec *forum non conveniens* cases, Sopinka J. stated that, "often there is no one forum that is clearly more appropriate than others"[163]. This point was picked up, in fact, by the Quebec Superior Court case, *2493136 Canada inc.* v. *Sunburst*[164]. We suggest that, if this is true, then we should see dismissals only rarely.

### 7. Approach 7: "Exceptional" Means Respecting Quebec as the Default Forum

This approach is often used in conjunction with the approach above, and may well represent a movement on the part of the courts toward a somewhat more restrictive application of *forum non conveniens*, in that the domestic forum, which typically represents the plaintiff's choice of forum, is given somewhat renewed importance. Additionally, as in the previous approach, the burden of proof is placed squarely on the defendant to establish that the alternative forum is in a better position to decide the case. In *Lexus Maritime (C.A.)*[165], the Court of Appeal emphasized that if the Quebec authority is properly seized of a case, then it should remain so except in exceptional circumstances, particularly when the criteria used to evaluate the nexus to the alternative forum are questionable.

This implies that the default forum is Quebec, except under exceptional circumstances. This approach is also seen in several other cases, notably, *Pellemon*[166], *Opron*[167] and *Softwise*[168]. The concept of default forum is also used very frequently in common law *forum non conveniens* cases. For example, in *Amchem Products*, Sopinka J., speaking on the topic of *forum non conveniens*, stated that "where there is no one forum that is the most appropriate, *the*

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163 *Supra*, note 34, 912.
164 J.E. 96-1062 (Sup. Ct.) (hereinafter *Sunburst*).
165 *Supra*, note 119, 7.
166 *Supra*, note 124.
167 *Supra*, note 125.
168 *Supra*, note 128.

*domestic forum wins out by default* and refuses a stay, provided it is an appropriate forum"[169].

As with the use of the "clearly more appropriate" standard, this approach limits the declining of jurisdiction to cases that are truly "exceptional". The use of this type of approach as a limitation on *forum non conveniens* is supported by the fact that some of the common law cases using this approach turn the standard into a fairly narrow threshold through which not many cases escape[170]. As mentioned earlier, however, even this standard is inadequate since it merely establishes a necessary condition for *forum non conveniens* dismissal that underlies the rationale for exceptional application of article 3135 C.c.Q., without actually providing guidance for its application.

### C. Other Observations on the Treatment of "Exceptional" in Quebec Jurisprudence

Clearly, several of the approaches to the interpretation of article 3135 C.c.Q. currently in use today in Quebec seem to contain some support for the notion of "exceptional", and Quebec jurisprudence contains examples of specific situations in which the court is not predisposed to allow dismissal. Several cases, for example, have denied the use of *forum non conveniens* where bankruptcy legislation was involved[171] or where a Quebec law of immediate application had to be applied[172]. The Superior Court has also, in somewhat similar fashion, held that, since according to Quebec law, competence for custody is *exclusive*, a court is not at liberty to let *forum non conveniens* interfere with Quebec's jurisdiction[173]. Specifically, the Court found that it could not dismiss a custody case in which the return of the child had been ordered following a successful application under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*[174].

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169 *Supra*, note 34, 931 (emphasis added).

170 For Canadian cases, see: *supra*, note 45 and *supra*, note 46; for U.K. cases, see: *supra*, note 47.

171 See *e.g.*: *Reklitis (Syndic de)*, [1996] R.J.Q. 3035 (Sup. Ct.) (hereinafter *Reklitis*).

172 See e.g.: *3141705 Canada inc. v. Brueckner Group*, J.E. 97-2002 (Sup. Ct.) (hereinafter *Brueckner*).

173 *Droit de la famille – 2739*, [1997] R.D.F. 581 (Sup. Ct.).

174 *Id.*

Despite these signs that "exceptional" may still be alive in Quebec law, there persist various dynamics in the jurisprudence which tend to detract from the "exceptional" nature of *forum non conveniens* in Quebec. For example, the application of article 3135 C.c.Q. to actions instituted prior to January 1, 1994, did not respect the spirit of the "exceptional" requirement. Furthermore, the granting of a stay or conditional dismissal – as opposed to outright dismissal, which is the only order authorized under article 3135 C.c.Q. – expands the use of *forum non conveniens* and consequently erodes further the idea that it should be used only exceptionally. Quebec courts granted stays in cases such as *Arsenault*[175], *Czajka*[176], *Droit de la famille – 2032*[177] and *United Color*[178]. Finally, the courts of Quebec essentially disregard the "exceptional" requirement when they allow *forum non conveniens* applications to be made outside of the delays prescribed in arts. 161, 165 C.C.P. This occurred, for example, in *Simcoe* v. *Arthur Andersen Inc.*[179].

### D. The Criteria Currently used in Quebec *Forum Non Conveniens* Decisions

As with all formulations of the doctrine of *forum non conveniens*, the Quebec version involves the weighing of a number of various factors as part of the test for determining whether the alternative forum would be better placed to decide the matter under litigation. The weighing of factors has been the primary focus of the test in many Quebec decisions on *forum non conveniens* and this, in our view, is unfortunate. As we will make clear shortly, the global consideration of factors should be made only *after* it has been found that the alternative forum is truly adequate.

That said, it is important to acknowledge the various factors, or "criteria" as they are commonly called, generally seen in the Quebec jurisprudence. In the sub-sections below, we will identify and discuss the criteria most commonly used in Quebec[180]. It must

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175 *Supra*, note 119.
176 *Supra*, note 119.
177 *Supra*, note 119.
178 *Supra*, note 119.
179 [1995] R.J.Q. 2222 (Sup. Ct.) (hereinafter *Simcoe*); see, for a thorough study of the problem: Geneviève SAUMIER, "Les objections à la compétence internationale des tribunaux québécois: nature et procédure", (1998) 58 *R. du B.* 145.
180 This survey of criteria relies upon and extends that in S. GUILLEMARD, A. PRUJINER and F. SABOURIN, *loc. cit.*, note 1, 935-947.

be emphasized at the outset, however, that rarely are all of the criteria discussed in any one case. In some cases, criteria are not discussed because they simply are not relevant, while in others, the selection of criteria is influenced by the particular factors raised by the parties in their pleadings, and/or which criteria the Court views as significant for a particular set of circumstances. It is also important to recognize that the actual weight accorded to most of the criteria identified here has varied widely in the case law. Perhaps some of this variation is due to the unique character of certain cases, but we fear that some is due to a simple lack of consensus on the proper weight given to particular criteria as well as to the fact that trial judges have great discretion in these matters[181].

Perhaps the most important thing to note in surveying the use of criteria in the jurisprudence, however, is that sometimes a particular criterion used to support dismissal in one case is used in another case to deny dismissal. This points up one of the major problems with relying too heavily on the "weighing of factors" phase of the *forum non conveniens* test: the criteria are not applied in a consistent fashion across cases. We will identify several of the more important instances where this occurs, but generally, our objective here is to provide an overview of the criteria used. It should also be noted that the cases mentioned in conjunction with each category of criteria are illustrative only, and are not meant to represent the full list of cases which have utilized each criterion.

The criteria most commonly used in the Quebec jurisprudence on *forum non conveniens* include: 1) residence and domicile of the defendant, 2) location of the natural forum, 3) place of residence of the witnesses, 4) place of formation and execution of the contract, 5) existence of another action pending in another jurisdiction, and the stage of such proceeding, 6) the law applicable to dispute, 7) juridical advantages for the plaintiff, and 8) the interests of justice. Next, we will review briefly these eight criteria as they are represented in the Quebec's *forum non conveniens* jurisprudence, and follow with an overview of other notable but less frequently used criteria.

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[181] See, e.g.: *Lexus Maritime (C.A.), supra*, note 119, 5; *Entreprises Exulon, supra*, note 158, 3.

### 1. Residence and Domicile of the Defendant

The domicile of the defendant is given little or no importance in cases such as *Boulton*[182], *Gordon Capital (C.A.)*[183], *Stageline*[184], *Lexus Maritime inc* v. *Oppenheim Forfait GmbH*[185] and *Société Toon Boom (C.A.)*[186]. As will be discussed in more detail later[187], this is a fundamental error. Domicile of the defendant was, and still is, very much the natural forum in civil law jurisdictions generally: *actor sequitur forum rei*. This rule is codified in article 3134 C.c.Q., the general provision relating to international jurisdiction of Quebec authorities. It also may be seen in articles 3141 through 3147, 3148(1), 3149 and 3153 C.c.Q., which demonstrate, in various ways, the important role that domicile plays in determining jurisdiction under Quebec conflict rules.

### 2. Natural Forum

While the notion of the natural forum was rejected in Boulton, it was admitted in the more recent case, *Entreprises Exulo*n[188]. In that case, it was held that *forum non conveniens* does not apply if Quebec is found to be the natural forum. Again, this kind of inconsistency runs rampant throughout the Quebec jurisprudence on *forum non conveniens* and makes the process of weighing criteria simply unreliable[189].

### 3. Place of Residence of Witnesses

The jurisdiction in which the witnesses reside is often considered both with respect to the convenience of witnesses in travelling to the court seized of the case and with respect to the potential problems

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182 *Supra*, note 119.
183 *Supra*, note 119.
184 *Supra*, note 123.
185 B.E. 98BE-350 (Sup. Ct.), rev'd J.E. 98-1592 (C.A.) (hereinafter *Lexus Maritime (S.C.)*).
186 *Supra*, note 119.
187 See Section V, D, 1, b, below.
188 *Supra*, note 158.
189 See: *Zurich, supra*, note 119; *Tribute Carpets* v. *Perfection Rug, supra*, note 119.

associated with compelling attendance of witnesses[190]. Additionally, the location of various of elements of proof may be an issue. Numerous cases refer to these elements when deciding upon whether or not to dismiss on grounds of *forum non conveniens*[191]. In some cases, the court will not dismiss even though witnesses and elements of proof are situated outside Quebec[192]. Furthermore, in some cases the court simply states that the travel situation or ability to compel witnesses is a problem that is equally serious from both jurisdictions, and hence not a determinative factor[193].

### 4. Place of Formation and Execution of Contract

These two criteria, place of formation of the contract and execution of the contract, are self-explanatory. Examples of their application in Quebec may be seen in *Boulton*[194], *Simcoe*[195], *United Color*[196] and *Czajka*[197].

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190 See e.g.: *Colida* v. *Motorola Inc.*, *supra*, note 119; *Droit de la famille – 2577*, *supra*, note 119; *Droit de la famille – 3064*, *supra*, note 119; *Lexus Maritime (C.A.)*, *supra*, note 119; *Unifirst Federal Savings Bank* v. *Lagarde*, *supra*, note 119; *Pellemon*, *supra*, note 124; *Société Toon Boom (S.C.)*, *supra*, note 144; *Sunburst*, *supra*, note 164; *Red Falcon Holdings Ltd.* v. *Yellow Mining Inc.*, J.E. 99-975 (Sup. Ct.).

191 See e.g.: *Boulton*, *supra*, note 119 (witnesses in B.C.); *Carrier*, *supra*, note 119 (all in Florida); *Droit de la famille – 2032*, *supra*, note 119 (Belgium); *United Color*, *supra*, note 119; *Lumbermen's Mutual*, *supra*, note 119; *Société Toon Boom (S.C.)*, *supra*, note 144; *Cameron Billard*, *supra*, note 153; *Protection de la jeunesse – 925*, [1998] R.J.Q. 1656 (C.Q.); *Droit de la famille – 3064*, *supra*, note 119; *Droit de la famille – 2378*, *supra*, note 119.

192 See e.g.: *Rosdev Investments*, *supra*, note 149; *Simcoe*, *supra*, note 179; *A.V.S. Technologies Inc.* v. *Goldstar Co.*, J.E. 95-2048 (Sup. Ct.) (hereinafter *A.V.S. Technologies*); *Malden Mills Industries Inc.* v. *Huntingdon Mills Canada Ltd.*, [1994] R.J.Q. 2227 (Sup. Ct.) (hereinafter *Malden Mills*); *Droit de la famille – 2223*, [1995] R.J.Q. 1792 (Sup. Ct.).

193 See e.g.: *Lexus Maritime (S.C.)*, *supra*, note 185.

194 *Supra*, note 119.

195 *Supra*, note 179.

196 *Supra*, note 119.

197 *Supra*, note 119; see also: *A.V.S. Technologies*, *supra*, note 192.

### 5. Existence and Progress of an Action Pending Elsewhere

As with other criteria, the existence and the stage of another action pending elsewhere has been used both to dismiss cases on the basis of *forum non conveniens*[198], as well as to retain them[199]. The court's concern in relying on this criterion is generally the same as the rationale behind *lis pendens*, the avoidance of the possibility of contradictory judgments[200]. Another criterion sometimes held by the court to be important is whether an action has already been taken in an alternative court. This concern was articulated by the court in *Droit de la famille – 2094*[201].

### 6. Law Applicable to the Dispute

This factor is considered in many Quebec cases, as well as in the *Minister's Commentaries*[202] on article 3135 C.c.Q. The principle idea underlying this criterion is that the lack of familiarity with foreign law is a problem for the administration of justice. Some recent examples of cases utilizing this criterion include *Amiouny* v. *Avalon Beverage Co.*[203], *Lexus Maritime (S.C.)*[204], *Barre* v. *J.J. Mackay Canadian ltée*[205], *Zurich*[206], *Société Toon Boom (S.C.)*[207] and *Leonard* v. *Québec (Ministre des Transports)*[208]. It must be emphasized, that these represent but a fraction of the Quebec cases in which this criterion appears.

The problem with the frequency of this criterion is, as Guillemard, Prujiner and Sabourin have argued[209], that treating the

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198 See e.g.: *Arsenault*, *supra*, note 119; *Droit de la famille – 2032*, *supra*, note 119; *Gordon Capital (C.A.)*, *supra*, note 119; *United Color*, *supra*, note 119.

199 See e.g.: *Banque de Toronto-Dominion* v. *Cloutier*, [1994] R.J.Q. 386 (Sup. Ct.) (hereinafter *Cloutier*); *Malden Mills*, *supra*, note 192; *Simcoe*, *supra*, note 179; *Droit de la famille – 2094*, [1996] R.J.Q. 276 (C.A.); *Opron*, *supra*, note 125.

200 See e.g.: *Société Toon Boom (C.A.)*, *supra*, note 119.

201 *Supra*, note 199.

202 *Op. cit.*, note 121.

203 J.E. 97-2181 (Sup. Ct.) (hereinafter *Amiouny*).

204 *Supra*, note 185.

205 J.E. 99-27 (Sup. Ct.) (hereinafter *Barre*).

206 *Supra*, note 119.

207 *Supra*, note 144.

208 (2000) J.Q. 25. Since, in this case, the applicable law remained to be determined, no importance could be attributed to it as a *forum non conveniens* criterion.

209 *Loc. cit.*, note 1, 949.

applicable law as an important criterion in the decision whether to accept or reject *forum non conveniens* in a particular case is destructive of private international law. Occasionally, however, there are signs in the jurisprudence that the importance of applicable law is on the decline in Quebec. In *Contant* v. *Robben Industries Ltd.*[210], for example, the Superior Court emphasized that the fact that a contract is to be interpreted according to the laws of Ontario does not, itself, warrant the application of article 3135 C.c.Q. In *J.S. Finance Canada Inc.* v *J.S. Holding S.A.*, the Appeal Court was of the view that the fact that the contract in question was governed by the laws of Switzerland was not significant to justify a dismissal under *forum non conveniens*[211].

### 7. Juridical Advantages for the Plaintiff in Proceeding Before the Chosen Forum

Another criterion commonly seen in Quebec cases is the presence of distinct juridical advantages for the plaintiff in taking the action in the chosen forum[212]. For instance, in *Gordon Capital Corp.* v. *Garantie (La), compagnie d'assurances de l'Amérique du Nord*[213], the Court rejected the defendant's motion to have the action stayed pending resolution of proceedings in Ontario. The Court accepted the plaintiff's argument that the Quebec proceedings should continue because they potentially offered him juridical advantage[214]. Other more recent cases in which juridical advantage was invoked include *Stageline*[215], *Sunburst*[216] and *Habberfield Estate* v. *Propair Inc.*[217].

### 8. Interests of Justice

This term refers to the notion that, where more than one competent forum exists, the decision as to which forum should hear the case should take into account which better serves "the interests

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210 *Contant* v. *Robben Industries Ltd.*, B.E. 98BE-319 (Sup. Ct.),

211 J.E. 99-1067 (C.A.).

212 *Boulton*, *supra*, note 119; *Czajka*, *supra*, note 119; *Arsenault, supra*, note 119; *Simcoe supra*, note 179; *Lexus Maritime (C.A.), supra*, note 119.

213 J.E. 94-110 (Sup. Ct.).

214 The result in this case was reversed by the Court of Appeal in *Gordon Capital (C.A.), supra*, note 119.

215 S*upra*, note 123.

216 S*upra*, note 164.

217 2000 Q.J., No. 5955; J.E. 2001-47 (Sup. Ct.) (hereinafter *Habberfield Estate*).

of justice". This idea is expressed by Quebec courts in *Arsenault*[218], *Simcoe*[219], *Rosdev Investments*[220] and *Habberfield Estate*[221]. It is addressed in detail below[222].

### 9. Other Criteria

In addition to the criteria mentioned above, which have been utilized in numerous cases since the doctrine of *forum non conveniens* came into force in Quebec, there are several other criteria which have been used less frequently but which deserve brief mention. First, several cases have considered the **residence of legal counsel** as a valid criterion, among them *Czajka*[223], *Malden Mills*[224] and *Protection de la jeunesse – 925*[225]. The Court in these cases appeared to utilize this criterion as a way of helping to keep cases in Quebec which involved plaintiffs from outside Quebec who had chosen to bring actions in Quebec.

Second, the notion of the **"sufficient link"** has been used as a criterion in Quebec jurisprudence. A relatively recent example of the use of this criterion is seen in *Droit de la famille – 2847*[226].

Third, the criterion of the **"abusive character"** of the litigation is sometimes used. The notion that *forum non conveniens* could be triggered by a finding that the plaintiff's choice of forum was abusive is one which has a substantial history in other jurisdictions, particularly the U.K. and common law Canada[227]. In Quebec, this

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218 *Supra*, note 119.
219 *Supra*, note 179.
220 *Supra*, note 149; see also: *Transport Perez, supra*, note 119; *Droit de la famille – 3146, supra*, note 119; *Arsenault, supra*, note 119; *Droit de la famille – 2032, supra*, note 119; *Gordon Capital (C.A.), supra*, note 119; *United Color, supra*, note 119; *Cloutier, supra*, note 199; *Malden Mills, supra*, note 192; *Simcoe, supra*, note 179; *Société Toon Boom (C.A.), supra*, note 119; *Droit de la famille – 2094*, *supra*, note 199.
221 *Supra*, note 217.
222 See Section VI, B, 3, c, below.
223 *Supra*, note 119.
224 *Supra*, note 192.
225 *Supra*, note 191.
226 *Droit de la famille – 2847*, B.E. 97BE-1050 (Sup. Ct.).
227 The primary cases are discussed in S. GUILLEMARD, A. PRUJINER and F. SABOURIN, *loc. cit.*, note 1, 923.

criterion was relied upon by the court in *United Color*[228]. More recently, it was also relied upon in *Sunburst*[229].

Fourth, the **best interests of the children** has been considered a valid criterion. In *Droit de la famille – 2223*[230], for example, it was held that where children are involved, removal of the case to an alternative jurisdiction is acceptable where it is in the best interest of the children to do so. More recently, this issue has been addressed in *Droit de la famille – 2739*[231] and in *L.Y.* v. *M.D.*[232].

Fifth, the involvement of a **law of immediate application** has sometimes been relied upon as a powerful criterion in favour of keeping cases in Quebec. In both *Reklitis*[233] and *Eagle River International Ltd. (Syndic de)*[234], the Superior Court has indicated that article 3135 C.c.Q. cannot apply in bankruptcy cases: Quebec's interest in having the law on bankruptcy respected takes precedence over the defendant's ability to rely on the jurisdictional argument of *forum non conveniens*. The Court used a similar approach in *Brueckner*[235], where it refused to decline jurisdiction on grounds of *forum non conveniens* because it was in the public interest to do so in order to respect the *Loi sur la concurrence* (*Competition Law*).

Sixth, the **inability to renounce jurisdiction in certain labour and consumer cases** has been used as a criterion in applying *forum non conveniens.* The notion that where a jurisdiction cannot be renounced by workmen or consumers, *forum non conveniens* may be restricted is seen in *Barre*[236].

Seventh, the assertion of jurisdiction over an **incidental or related dispute** has been used in a *forum non conveniens* analysis both to send the incidental demand to an alternative court, as the court did in *Stageline Mobile Stage Inc.* v. *In Any Event*[237], as well as to refuse to do so, as decided in *Crestar*[238]. However, a recent

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228 *Supra*, note 119.
229 *Supra*, note 164.
230 *Supra*, note 192.
231 *Supra*, note 173.
232 *Supra*, note 119.
233 *Supra*, note 171.
234 [1999] R.J.Q. 1497 (Sup. Ct.), aff'd [2000] R.J.Q. 392 (C.A.).
235 *Supra*, note 172.
236 *Supra*, note 205.
237 B.E. 98BE-1265 (Sup. Ct.), rev'd (*sub nom. Birdsall*), *supra*, note 115.
238 *Crestar*, *supra*, note 115.

ruling by the Quebec Court of Appeal suggests curiously that convenience is an element to be considered in the right to assert jurisdiction over a related matter[239].

### E. Conclusion: the Application of Article 3135 C.c.Q. in Quebec

The ways in which *forum non conveniens* is being employed in Quebec through the application of article 3135 C.c.Q. may be summarized by three observations. First, the Quebec version of *forum non conveniens* is not being followed by the Quebec courts. Common law approaches, which at times deviate significantly from the legislated approach in Quebec, are referred to approvingly in many Quebec cases, as well as in doctrine[240]. In particular, the Court stated in *Boulton* said it was acceptable to retain the criteria applied in *Amchem Products*[241]. Referring to the common law origins of the rule in article 3135 C.c.Q., the court states: "il a été retenu suivant la formulation employée à l'article, les règles d'application des pays du common law." As Profs. Gérald Goldstein and Éthel Groffier suggest however, a preferable approach is to "s'inspirer intelligemment (critiques)"[242]. Unfortunately, this advice was not heeded by the court in *Cambior*, which seemed to follow both *Piper* and *Union Carbide* unquestionably[243]. Furthermore, the courts in Quebec have sometimes followed the modern American view that the power to sue the defendant at its domicile is not absolute[244].

Second, the reasoning in the decisions represents, at best, a "crazy-quilt of *ad hoc*, capricious and inconsistent"[245] approaches, without sufficient explanation of the combination and weight of factors which will – or will not – lead to dismissal. In other words,

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239 In *Birdsall*, *supra*, note 115, the Court of Appeal stated what appears to be a new rule on incidental actions. It indicated that in private international law cases, the rule that an incidental action, such as an action in warranty, must be disposed of with the principal action (art. 222 C.c.p.) can sometimes be disregarded, and that art. 3139 C.c.Q. affords the Court this flexibility. *Id.*, 1353.

240 See e.g.: *Johns-Mansfield Corp.* v. *The Dominion of Canada General Insurance Company*, [1991] R.D.J. 616 (C.A.).

241 *Boulton*, *supra*, note 119, 220; *Amchem Products, supra*, note 34.

242 *Op. cit.*, note 120, p. 313.

243 In fact, both cases were cited in the decision: *supra*, note 11, 17.

244 See e.g.: *Boulton*, *supra*, note 119; *Arsenault*, *supra*, note 119.

245 This phrase was used by A.R. Stein to describe a similar problem with American *forum non conveniens* cases: A.R. STEIN, *loc. cit.*, note 13, 785.

the Quebec courts have not yet clearly explained why the same points of contact may compel dismissal in one case, but not in another. The Quebec courts have introduced essentially all of the *forum non conveniens* criteria utilized in the common law, without describing the importance to be given to one criteria or another. Furthermore, the list of criteria used in the common law cases is so lengthy and indeterminate that it provides virtually no guidance at all. Thus, *forum non conveniens* in Quebec has become not a doctrine, but rather a state of habitual practices and attitudes. Furthermore, such uncertainty and inconsistency in *forum non conveniens* decisions can, if unchecked, result in a use of discretion that is capable of unwarranted interventions into jurisdictional rules. An American commentator, A. R. Stein, made the following observation about how inconsistent *forum non conveniens* rules can "undo" what has supposedly been "done" earlier when a court considers personal jurisdiction:

> *The net of effect is that policies advanced under a jurisdictional doctrine can be nullified by a subsequent forum non conveniens ruling.*
>
> [...]
>
> *In short, the very qualities presumably considered under jurisdictional rules are again considered under forum non conveniens because the jurisdictional rules were underinclusive: the rules were not effective in selecting those cases that were appropriate or inappropriate for resolution in the forum. In other words, someone has cut a hole in the jurisdictional filter.* [246]

Finally, one last comment on Quebec *forum non conveniens* jurisprudence concerns the style of the decisions: they are often only a few pages in length, with many consisting primarily of a reproduction of the *Minister's Commentaries*[247], which as will be recalled, simply elucidate certain of the criteria to be considered[248].

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246 *Loc. cit.*, note 13, 794 and 795.

247 *Op. cit.*, note 121.

248 *See e.g.*: *Arsenault, supra*, note 119; *Droit de la famille – 2032*, *supra*, note 119; *Malden Mills*, *supra*, note 192; *Cloutier, supra*, note 199; *Rosdev Investments*, *supra*, note 149; *Simcoe*, *supra*, note 179; *A.V.S. Technologies, supra*, note 192; *Droit de la famille – 2223*, *supra*, note 192; *Droit de la famille – 2094*, *supra*, note 199.

## III. A Typical Example: *Cambior* v. *Recherches internationales Québec*

For purposes of analyzing and critiquing *forum non conveniens* in Quebec, the C*ambior* decision provides a very useful case in point for four reasons. First, it is illustrative of the approach frequently taken by Quebec courts, in that it fails to define correctly the term "exceptional" in article 3135 C.c.Q., thereby ignoring the Quebec version of *forum non conveniens*. Second, it is a case which, by its result, illustrates some level of discrimination against foreign plaintiffs who have suffered damage outside of Quebec for acts occurring outside Quebec. Third, it deals squarely with a policy of accountability of a Canadian multinational corporation who, acting through one of its many subsidiaries, creates an environmental disaster abroad. Fourth, it is one of the few, if not the first, cases appearing before the Quebec courts dealing with a class action in an international context.

### A. The Facts

In August of 1995, one of the worst environmental catastrophes in gold mining history occurred in Guyana[249]. A dam holding back the tailings (liquid mine waste) of a gold mine broke and consequently released "2.3 billion litres of liquid containing cyanide, heavy metals and other pollutants"[250] into two rivers, one of which, the Essequibo River, serves as both Guyana's primary transportation route to the interior of the country and a primary source of fresh water. The gold mine is operated by Omai Gold Mines Limited (hereinafter "O.G.M.L."), a Guyanese corporation which is 65% owned by Cambior, a corporation formed under the laws of Quebec. Cambior closely controlled many aspects of O.G.M.L.'s management and operation from its headquarters in Quebec.

The disaster resulted in the institution of a class action in Quebec, when some of the 23,000 victims of the spill called upon Recherches internationales Québec (RIQ), a Quebec organization, to act on their behalf and sue Cambior in its "home" jurisdiction for $69 million in damages. As a result of the spill, the river was contaminated with cyanide and heavy metals, some of which persist

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249 These are the words chosen by Maughan J. to describe the spill: *Cambior, supra*, note 11, 2.

250 *Id.*

over long periods of time and this contamination was alleged to be the source of numerous harms suffered by the residents. A Commission set up by the Guyanese government found that the cause of the spill from the mine was due to the faulty placement of the rockfill from which the dam was built[251]. The Commission also found O.G.M.L. responsible for the loss since it was the party responsible for bringing the cyanide on-site[252].

The plaintiffs brought their action in Superior Court, and Cambior contested, by way of a declinatory exception, the jurisdiction of the Quebec court to hear the case. It also requested, in the alternative, that the Quebec Superior Court decline to exercise its jurisdiction on the basis of the *forum non conveniens* relief available in article 3135 C.c.Q.

### B. Summary of the Court's Findings and Decision

The decision in *Cambior* was rendered by Judge G.B. Maughan in the Montreal district of Quebec Superior Court in August 1998.

Maughan J. found that both courts, those of Guyana and those of Quebec, had jurisdiction to try the issues[253]. In the end, however, he concluded that neither the victims nor their action had any real connection with Quebec because the mine was located in Guyana, the victims resided in Guyana, the damage was suffered in Guyana, the law that would determine the rights and obligations of the parties was that of Guyana, and the elements of proof upon which the court would base its judgment were in Guyana[254]. Accordingly, Maughan J. held that these factors pointed to Guyana, not Quebec, as the natural and appropriate forum for disposition of the case[255].

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251 *Report of Commission of Inquiry into Discharge of Cyanide and Other Noxious Substances into the Omai and Essequibo Rivers*, 5 January 1996, p. 55, written and published by the Commission of Inquiry.

252 *Id.*

253 *Cambior*, *supra*, note 11, 4. Interestingly, the Court largely ignored the issue of whether, in a class action in which the class members are non-residents, the same jurisdictional rules apply. *Cambior* seems to stand for the proposition that the residence of the members of the class is irrelevant for the purpose of deciding jurisdiction. This conforms to the opinion of Winkler J. in the Ontario case, *Carom* v. *Bre-X Minerals*, (1999) 43 O.R. 441. See, for a discussion of transnational class actions: H. Patrick GLENN, "The Bre-X Affair and Cross Border Class Actions", (2000) 79 *R.B.C.* 989.

254 *Cambior*, *supra*, note 11, 4 and 5.

255 *Id.*, 5.

He also found that the victims would not be denied justice if the Court chose to decline jurisdiction, which it could otherwise exercise[256]. He observed that while they clearly would lose the benefit of a class action, they nonetheless had access to what is called a "representative action" in Guyana[257]. A representative action would not provide the plaintiffs with the same procedural and evidentiary advantages as a class action, but it would allow them to sue Cambior collectively, though with some burdensome restraints. Additionally, Maughan J. noted that the victims could also proceed by way of individual actions if they so chose.

The Court was also of the opinion that Guyana's judicial system would provide the victims with a fair and impartial hearing[258]. It thus rejected RIQ's proof that the administration of justice was in such a state of array that to force the plaintiffs to litigate there would constitute an injustice to the victims to have their case litigated in Guyana.

In following the jurisprudence in Quebec and in other jurisdictions, and deciding that the Quebec court was *forum non conveniens,* the Court in *Cambior* did several things which are at odds with the Quebec version encapsulated in article 3135 C.c.Q.

First, it failed to recognize that there is a Quebec version of *forum non conveniens*. Rather, it emphasized that it was the well-established common law doctrine of *forum non conveniens* which was incorporated in article 3135 C.c.Q.[259]. This approach, in turn, led the Court to: (1) accept common law precedents as a useful guide in interpreting article 3135 C.c.Q., thereby denying the existence of a truly Quebec version[260]; (2) disregard or lessen the importance of the codal rule on burden of proof[261]; and (3) cite the U.S. Supreme Court ruling of *Piper*[262] approvingly, with its express diminishment of plaintiff's choice of forum where the plaintiff is foreign[263].

Second, in determining whether exceptional circumstances existed which would permit a Quebec court to decline to exercise

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256 *Id.*
257 *Id.*
258 *Id.*, 6.
259 *Id.*, 14.
260 *Id.*, 15.
261 *Id.*
262 *Supra*, note 53.
263 *Cambior, supra*, note 11, 17 and 18.

its statutory jurisdiction, the Court reproduced the *Minister's Commentaries*[264] which, as we demonstrated earlier, do not provide sufficient guidance as to how to select exceptional cases in the application of article 3135 C.c.Q.

Third, the Court evaluated the factors which a court should consider in determining whether it should keep or decline jurisdiction set forth by Grenier J. in *Arsenault*[265] and reproduced subsequently in other cases[266]. We will now turn to how the Court in *Cambior* viewed each of these criteria.

With respect to the role of the **residence of the parties**, the Court lifted the corporate veil of R.I.Q., a Quebec corporation representing the plaintiffs, and focuses upon the fact that the plaintiffs reside in Guyana. By contrast, the Court gave little weight to the fact that the defendant, Cambior, is domiciled in Quebec[267]. To substantiate its view on the role of defendant's domicile, the Court, citing Rochon J. in *Boulton*, asserted that the natural forum is not defined by the domicile of the defendant[268]. In his concluding comments on this issue, however, Maughan J. went well beyond the stance in *Boulton* and stated simply that the Court does not "consider that the location of Cambior's domicile in Quebec is a factor of significant importance"[269] in determining the appropriate forum. With respect to the location of witnesses, the Court clearly favoured Guyana as the appropriate forum[270]. With respect to the **location of the elements of proof**, the Court found that most, if not all, of the elements of proof were located in Guyana[271].

The Court also considered the **place where the fault occurred** an important criterion, and its view that the fault occurred in Guyana clearly worked toward favouring Guyana as the appropriate forum[272]. The Court found that the fact that the dam was built, managed and operated on a daily basis in Guyana was more

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264 *Id.*, 15. The text of the *Minister's Commentaries* are reproduced above in Section II, B, 1.
265 *Arsenault*, *supra*, note 119, 2255.
266 See e.g.: *Droit de la famille – 2577*, *supra*, note 119, 10; *Boulton*, *supra*, note 119, 221; *Simcoe*, *supra*, note 179, 2228; *Amiouny*, *supra*, note 203, 9.
267 *Cambior*, *supra*, note 11, 21 and 22.
268 *Id.*
269 *Id.*, 22.
270 *Id.*, 26.
271 *Id.*, 26 and 27.
272 *Id.*, 27 and 28.

important than the fact that it was designed elsewhere[273]. With respect to the issue of **pending litigation**, the Court gave little weight to the fact that there was pending litigation on this matter in Guyana, as the Guyana litigation named O.G.M.L. as defendant, not Cambior[274].

On the issue of the **location of the defendant's assets**, the Court attributed little importance to fact that Cambior had assets in Montreal, observing that the company also had assets in Guyana[275]. In considering the **law applicable to the dispute**, the Court found that the Guyanese court was in a better position to apply Guyana's law, which would apply to the question of liability by virtue of article 3126 C.c.Q.[276].

Finally, with respect to **advantages to the plaintiff** of suing in the chosen forum, the Court observed that, due to the availability of the class action procedure in Quebec, it was more advantageous to the plaintiffs to sue in Quebec than to take a representative action in Guyana. It also observed that class actions are particularly useful in cases of environmental damages. Despite these advantages, however, the Court ruled that the availability of the class action procedure in Quebec could not form an overriding consideration in the *forum non conveniens* analysis[277].

The Court in *Cambior* also considered "**the interests of justice**" in its analysis. It rejected RIQ's claim that the victims would be denied justice if the case were heard in Guyana. Specifically, Maughan J. rejected the report of expert witness Prof. William Schabas, which concluded that the Guyanese justice system was both substantially lacking in impartiality[278] and inefficient, with cases remaining unresolved for as long as 5 years[279]. Maughan J. stated that if the Court were to accept Prof. Schabas' report, it would have to dismiss Cambior's *forum non conveniens* motion, since the victims in a corrupt and inefficient justice system would be largely

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273 *Id.*
274 *Id.*, 28.
275 *Id.*, 28 and 29.
276 *Id.*, 31.
277 *Id.*, 33 and 34.
278 Affidavit of William A. Schabas, dated 18 October 1997, par. 30.
279 *Id.* par. 31.

unable to receive justice[280]. The Court, however, dismissed the report[281], finding fault with its reliance on what were viewed as "secondary sources"[282], and preferred instead the testimony of former Guyana Justice Mr. Kenneth George, who had served as a Judge in Guyana for 29 years. Mr. George portrayed Guyana's judicial system as one of integrity and downplayed, to Maughan J.'s satisfaction, the role of political influence and corruption in Guyana's judicial system[283]. The Court thus concluded that Guyana was clearly the appropriate forum in which to decide the issue[284].

## IV. A Plea for Redefining "Exceptional" in the Application of Article 3135 C.c.Q.

### A. Overview

Our survey of the jurisprudence generally, and the *Cambior* decision in particular, has shown that the courts have clearly misunderstood the *exceptional* use which was intended for *forum non conveniens* by the Legislator in 1994. In our opinion, this must be rectified. The rationale for reforming the way in which Quebec courts treat *forum non conveniens* is twofold. First, reform is necessary in order to ensure a more predictable regime of access to Quebec court by reducing the uncertainty which tend to encourage expansive inquiries on *forum non conveniens*. Second, reform is critical for ensuring the proper operation of Book Ten, "Private International Law" (hereinafter "Book Ten") of the *Civil Code of Quebec*. The jurisdiction of Quebec courts must not be limited to the situation where Quebec law is applicable. In general, the Courts must redefine "*exceptional*" in accordance with the text of the Code and the legislative policy underlying it.

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280 *Cambior*, *supra*, note 11, 37.
281 *Id.*, 38-40.
282 *Id.*, 38. It needs to be recognized that, with all due respect to Maughan J., these "secondary sources" were generally of very high caliber. See discussion below, p. 854 et 855.
283 *Cambior*, *supra*, note 11, 38.
284 *Id.*, 43.

## B. Justification

### 1. The Historical Evolution and Specificity of the Quebec Version

*Forum non conveniens* was rejected by the Quebec Court of Appeal in 1985, in the context of *Aberman* v. *Solomon*[285]. In Quebec, as in most civil law jurisdictions, judicial discretion, particularly in the exercise of jurisdictional powers, is of questionable value and is commonly limited to those situations expressly authorizing its use. Given this context, it follows naturally that, in introducing a *forum non conveniens* doctrine into Quebec law, the Legislator clearly intended that the use of this discretionary mechanism be rare. That is, the Legislator sought to implement a very specific version of *forum non conveniens* in Quebec.

### 2. The Liberal Use of *Forum Non Conveniens* Is Not Warranted in Quebec

There are a number of reasons why *forum non conveniens* should not enjoy liberal use by the courts of Quebec. First, unlike common law jurisdictions where the defendant may view *forum non conveniens* as an antidote to wide bases of jurisdiction[286], Quebec employs more limited bases for determining jurisdiction. Hence, the use of the doctrine for countering the use of "long-arm" jurisdictional mechanisms is not appropriate in Quebec. Unlike in common law jurisdictions, the service of proceedings does not constitute a basis for jurisdiction. Furthermore, with the exception of article 3148 (3) C.c.Q., the rules stipulating acceptable bases for jurisdiction *already* require a real and substantial connection of the dispute or the parties (especially the defendant) to Quebec.

Second, the notion that *forum non conveniens* is simply an answer to forum shopping, a claim popular in common law jurisdictions, cannot enjoy great credibility in Quebec. The "attractive" procedural amenities which may sometimes draw

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285 [1986] R.D.J. 385 (C.A.), [1987] 1 Q.A.C. 40. For a recent discussion of this case, see the Court of Appeal decision in *Lamborghini (Canada) Inc.* v. *Automobili Lamborghini S.P.A*, J.E. 95-718 (Sup. Ct.); [1997] R.J.Q. 58 (C.A.).

286 For a recent source on this point, see e.g.: M.S. GILL, "Turbulent Times or Clear Skies Ahead?: Conflict of Laws in Aviation Delict and Tort", 64 *J. Air L. & Com.* 195, 237 and 238 (1998).

plaintiffs to the courts of the U.S., such as liberal discovery rules, availability of jury trials, use of contingency fees and high damage awards, are simply not customary or part of accepted law in Quebec. Plaintiffs do *not* flock to Quebec to find advantageous procedural mechanisms or practices. Rather, parties *typically* take action in Quebec because assets or persons are situated here, or because they have no choice (*e.g.* they are precluded from suing in their own country due to rules on prescription, exclusive competency, etc.). Further, application of foreign law in Quebec courts is often dictated by the codal rules on private international law, making it much less likely that foreign plaintiffs will come to Quebec in search of more favourable substantive laws.

Third, while *forum non conveniens* is often viewed as something which increases flexibility in judicial decision-making, thanks to its largely discretionary character[287], this benefit is offset by the fact that the mere possibility of dismissal by *forum non conveniens* creates insecurity and lack of predictability. Even the U.S. Supreme Court has acknowledged this point:

> *But to tell the truth,* forum non conveniens *cannot really be relied upon in making decisions about secondary conduct – in deciding, for example, where to sue or where one is subject to being sued. The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application* [...] *make uniformity and predictability of outcome almost impossible.*[288]

Indeed, parties may feel the need to take procedures in different fora in order to protect their rights. As a result, the use of *forum non conveniens* may actually multiply the number of proceedings taken, delay debate on the merits[289] and increase costs. In the words of one observer:

> *As parallel proceedings continue to increase in frequency with no immediate relief inview, theoretical bases for analysis proliferate leaving the litigant with little certainty about what course to take and which litigation to pursue. Indeed, the myriad of approaches would induce many a litigant to file parallel proceedings to increase the cost to an opponent as well as to increase the likelihood of subsequent enforceability of a judgment.*[290]

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287 It is conceded that such flexibility may be quite useful in truly exceptional situations.

288 *American Dredging* v. *Miller, loc. cit.*, note 77, 448.

289 S. GUILLEMARD, A. PRUJINER and F. SABOURIN, *loc. cit.*, note 1, 948.

290 L.E. TEITZ, *loc. cit.*, note 88, 229.

The seminal U.S. case of *Lacey* v. *Cessna Aircraft Co.*[291] illustrates the consequences of the flexible and subjective nature of the doctrine: due largely to *forum non conveniens* motions, the litigation arising from the crash resulted in *seven* published opinions from various courts in the U.S., and did not end until 10 years later (1994), when the Court decided that the case would *not* be dismissed on grounds of *forum non conveniens*[292].

Fourth, to the extent that *forum non conveniens* is sometimes relied upon to help ease congestion of courts, its use for this purpose is not warranted in Quebec. Since there are few private international law cases in Quebec relative to domestic cases, it cannot be convincingly argued that international litigation results in the delay of domestic trials. Even in the U.S., where many international law cases are heard, is has been argued that *forum non conveniens* does not clear court dockets, because of the length of the hearings on these motions[293]. Again, there is no need, nor is it an efficient use of judicial resources, to prevent a flood where the likelihood of flooding is remote.

Fifth, while *forum non conveniens* could be useful in solving the problems which arise from shopping in an inconvenient foreign forum by second-guessing the foreign court's discretion on the basis of Quebec's version of *forum non conveniens* (as provided for in Quebec law[294]), a better strategy would be: (a) to use the substantial connection qualifier on the foreign court's jurisdiction in article 3164 C.c.Q.; (b) to strengthen Quebec's provision on *lis pendens* (art. 3137 C.c.Q.), e.g. by applying it where the defendant has taken a declaratory judgment of nonliability in the foreign jurisdiction; and (c) to liberalize the use of anti-suit injunctions[295].

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291 *Supra*, note 92.
292 *Id.*
293 J. DUVAL-MAJOR, *loc. cit.*, note 9, 676.
294 *Supra*, note 117.
295 See: Jeffrey TALPIS, "If Iam from Grand'Mère, Why Am I Being Sued in Texas? Responding to Inappropriate Foreign Jurisdiction in Quebec U.S. Crossborder Litigation", to be published in 2001/04/27.

### 3. The Legislator Intended to Make Quebec a Centre for Resolution of International Disputes

Beginning with the introduction of legislation on international arbitration in Quebec in 1986[296], the Legislator demonstrated an intent to make Quebec a centre for resolution of international disputes. The Legislator clearly viewed Quebec as a "good place to shop"[297], especially in light of Quebec's mixed civil law/common law heritage. Recognizing that in a globalized world, opportunities for private litigants should be equally globalized, the Legislator, in introducing *forum non conveniens* to Quebec, wanted to extend to the judicial sphere the philosophy it had chosen as the guiding policy for arbitration.

### 4. There Is No Consistent View on the Acceptability of Forum Shopping and Levels of Tolerance by the Courts

As something inherent and, indeed, prevalent in private international law, it seems clear that forum shopping, seen objectively, is a benign and neutral practice. Despite the fact that "forum shopping" has often been painted as a problem to be eradicated or controlled[298], we assert that it can also be viewed as something that provides important remedies to parties, and which even encourages reform of substantive laws. On the former point, there would seem to be some merit in Lord Simon's argument in *The Atlantic Star* that:

> *"Forum-shopping" is a dirty word; but it is only a pejorative way of saying that if you offer a plaintiff a choice of jurisdictions, he will naturally choose*

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296 S.Q. 1986, c. 73, s. 2.

297 In the English Court of Appeal case, *The Atlantic Star*, [1972] 3 All E.R. 705, 709 (C.A.), Lord Denning, M.R. provided his now famous comment on England serving as a "good place to shop": "No one who comes to these courts asking for justice should come in vain [...] This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of the service."

298 A leading critic of the doctrine of *forum non conveniens* even lamented that sanitizing the term "forum shopping" "is a forlorn hope": D.W. ROBERTSON, *loc. cit.*, note 9, 357.

> *the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor indignation.* [299]

Similarly, Prof. Castel who has described forum shopping as a "perfectly legitimate tactic"[300], has stated that:

> *In Canada, forum shopping is used by any lawyer familiar with the conflict of laws and the jurisdiction rules of the various states or provinces that have some connection with the action or the parties, in order to gain a definite substantive or procedural advantage for the plaintiff which he or she represents.* [301]

Perhaps a more important reason, however, to view forum shopping by plaintiffs as a legitimate activity is that plaintiffs have a perfectly good right to "shop" in those fora in which the action has a real and substantial connection[302]. In *Amchem Products*, Sopinka J. recognized the legitimate side of forum selection by observing that:

> *If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.*[303]

While we do not agree that the term "forum shopping" should be limited to those instances of *illegitimate* forum choices, we do agree with the view that parties with a legitimate claim to a forum should be afforded every opportunity to pursue their case in that forum.

### 5. Limiting *Forum Non Conveniens* Would Not Compromise Principles of Judicial Comity

It is our contention that comity would not be substantially affected by a reform which limited Quebec's application of *forum non conveniens.* Obviously, the lack of a formally-recognized *forum non*

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299 *Supra*, note 13, 471.
300 J.-G. CASTEL, *op. cit.*, note 37, p. 242.
301 *Id.*, p. 241 and 242.
302 This point is discussed further in Section V, C, below.
303 *Supra*, note 34, 920.

*conveniens* doctrine in the civil law countries of France and Germany[304] does not render those countries hostile to comity, nor does the omission of the doctrine from the *1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*[305] leave comity in tatters for the nations adhering to that Convention. Hence, the simple restriction of the doctrine in Quebec could not be prohibited on grounds that it would destroy or damage respect for comity in Quebec. Similarly, it cannot seriously be suggested that a Quebec court's refusal to dismiss a case in which the act took place outside of Quebec but the defendant's domicile was Quebec would hinder foreign relations. Likewise, it seems unlikely that a Quebec court would offend the sovereignty of another country if it refused to decline a case because "there is a local interest in having localized controversies decided at home"[306], an approach taken in some U.S. cases.

In fact, some argue that forum shopping can be entirely appropriate:

> *If comity requires respect for diversity, it follows that one should accept any tendency of plaintiffs to gravitate towards a forum that offers particular advantages of expertise. In spite of Lord Reid's evident embarrassment at Lord Denning's dicta on forum-shopping in the* Atlantic Star *case, which are at best insular and at worst jingoistic, there is a sense in which Lord Denning was right that forum-shopping is an acceptable consequence of specialisation. English courts have considerable experience with many aspects of commercial litigation and arbitration, particularly as they concern shipping and maritime insurance (which is why foreign parties often choose English law as the law of their contracts, and base their insurance policies on Lloyd's); Belgian and South African courts are presumably well versed in disputes involving the diamond trade, given than Antwerp and Johannesburg are the global centres of this trade; the courts of New York, Hong Kong and Japan have special expertise in securities law; German, Swiss, Luxembourg and Bermuda courts in banking law; Canadian courts in mining law.*[307]

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304 For a discussion of "civilian hostility" to *forum non conveniens* in both law and doctrine, see: W. KENNETT, *loc. cit.*, note 83,. 552, 554-556, 570 and 571. For further information on the approach to *forum non conveniens* in Germany, including evidence of some softening of the original position, see A. REUS, *loc. cit.*, note 78, 490-511.

305 The *Convention*, as amended by the *1978 Accession Convention*, is reprinted in 18 I.L.M. 20 (1979).

306 *Gulf Oil, supra*, note 52, 509.

307 Neil GUTHRIE, "'A Good Place to Shop': Choice of Forum and the Conflict of Laws", (1995) 27 *Ottawa L. Rev.* 201, 224 (footnotes omitted).

Of course, it is possible that in certain contexts, especially where there are tight links between the government of the foreign jurisdiction and a multinational corporation ("hereinafter "MNC") whose actions in that country are the subject of the litigation, refusal to dismiss may be viewed as problematic for comity. Still, it must be recognized that refusals to dismiss in cases such as *Cambior*[308], or the well-known Bhopal disaster case, *Union Carbide*[309], could do more to force MNCs to do things such as upgrade plants, supervise maintenance, or tighten safety measures than could government regulations, at least in those countries in which governmental action is constrained by the politics of hosting large, revenue-producing corporations from affluent countries. It must be remembered that many of the jurisdictions from which actions by foreign plaintiffs emanate tend to attract MNCs who seek to take advantage of lower costs of doing business, and thus reap higher returns on their investments. In fact, some commentators have expressly argued that the role of comity be limited and *forum non conveniens* dismissals restricted in those areas of law in which corporate industries commonly seek the jurisdictions of countries in which weaker regulatory systems are found[310].

### 6. *Forum Non Conveniens* Inquiries Are Inefficient, Wasteful and Time Consuming for Both the Parties and the Courts

It can be argued that the inquiry courts must undertake when faced with *forum non conveniens* motions is wholly inefficient. Litigating in order to determine where to litigate does not serve the ends of justice, especially where justice is greatly delayed or made prohibitively expensive by virtue of the enormous preparation typically required by both the party advocating and the party fighting a *forum non conveniens* motion. The very presence of the doctrine can invite "reverse forum shopping" by defendants who choose to use the doctrine as a sword rather than a shield. In fact, some common law decisions and doctrine have utilized the term "reverse forum shopping" or have identified in other words the

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308 *Supra*, note 11.

309 *Supra*, note 7.

310 See e.g.: J.R. PAUL, *loc. cit.*, note 9; see also *Alfaro*, *supra*, note 5, 688, Doggett J., concurring. In any event, a comity-based approach to jurisdiction is not and never was part of Quebec civil law.

practice it represents[311]. F.K. Juenger, for example, has observed that where less deference is paid to foreign plaintiffs, as in the *Piper*[312] approach to *forum non conveniens*, there are inevitably greater opportunities for defendants to engage in reverse forum shopping[313]. Likewise, some critics of the doctrine have observed that *forum non conveniens* has become nothing more than a procedural ploy designed to elicit the discomfort of plaintiffs rather than an instrument for the furtherance of justice[314].

### 7. *Forum Non Conveniens* Is Often Outcome-Determinative, Which Is Contrary to its Original Intent

When a corporate defendant moves to dismiss a case brought in its own jurisdiction on the grounds of *forum non conveniens*, it may simply be trying to evade responsibility rather than promote the convenience of the parties[315]. Unfortunately for resource-strapped plaintiffs, a ruling in favour of dismissal is often tantamount to a finding in favour of such defendants. This tendency for *forum non conveniens* cases to be "outcome-determinative"[316] has

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311 For a British example, see: *Lubbe, supra*, note 28, 15; for a U.S. example, see: *Pain* v. *United Technologies Corp.*, 637 R.2d 775, 793 and 794 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981); for a Canadian example, see: *472900 B.C. Ltd.* v. *Thrifty Canada Ltd.*, [1997] B.C.J. No. 1229, Lexis (C.A.) in which the B.C. Court of Appeal characterized the defendant's "race to the courthouse" in order to make a motion for dismissal on grounds of *forum non conveniens* as a case of forum shopping in "bad faith". See also: C. SPEER, *loc. cit.*, note 9, 855; D.W. ROBERTSON, *loc. cit.*, note 9, 364; A.M. KEARSE, *loc. cit.*, note 9, 1311.

312 *Supra*, note 53.

313 F.K. JUENGER, "Forum Shopping, Domestic and International", 63 *Tul. L. Rev.* 553, 563 (1989). It should be noted that in making this comment, Juenger cites *Piper*, *supra*, note 53, 252, note 19, in which the U.S. Supreme Court states that "[w]e recognize, of course that Piper and Hartzell [the defendants] may be engaged in reverse forum-shopping."

314 *Manu Int'l, S.A.* v. *Avon Prods., Inc.,* 641 F.2d 62, 68 (2d Cir. 1981), quoted in A.M. KEARSE, *loc. cit.*, note 9, 1311, note 74.

315 See e.g.: V.C. ARTHAUD, *loc. cit.*, note 9; B. CLAGETT, *loc. cit.*, note 9; J. DUVAL-MAJOR, *loc. cit.*, note 9; A.M. KEARSE, *loc. cit.*, note 9; J.R. PAUL, *loc. cit.*, note 9; D.W. ROBERTSON, *loc. cit.*, note 9, 362-366; D. SOLEN, *loc. cit.*, note 6; C. SPEER, *loc. cit.*, note 9; M.M. WHITE, *loc. cit.*, note 9. For a good summary of the opposing position, see e.g.: D.J. DORWARD, *loc. cit.*, note 9.

316 That dismissals for *forum non conveniens* can be "outcome-determinative" is a point emphasized by several authors; see especially: M.M.WHITE, *loc. cit.*, note 9, 518 and 519.

been demonstrated in a number of lawsuits involving MNC defendants[317].

MNC defendants often work hard to see that a case is dismissed because they know that, once dismissed, the litigation will likely be discontinued. A perfect illustration of this occurred in *Piper*[318], a case representing the typical scenario in which plaintiffs not residing in the U.S. seek hearing in U.S. courts in order to gain access to various plaintiff-friendly remedies and procedural devices not available in their own jurisdictions, such as contingency fees and extensive discovery. The defendant in *Piper* preferred to see the case brought in a jurisdiction without such options, as well as one in which settlement might be easier. While the plane crash giving rise to the suit occurred in Scotland and the pilot and all of the decedents' heirs and next of kin were Scottish, the defendant manufacturer carried on business and manufactured the plane in Pennsylvania[319]. The *Piper* case involved a juridical journey so long and complex that it is safe to assume that the resources of the plaintiff were significantly, if not severely, taxed. The case, originally brought in a California state court by the representative of the estates of several Scottish persons killed in the crash, was removed first to a Federal District court in California, then to a federal trial court in Pennsylvania, which granted the motion to dismiss; ultimately, the plaintiff's successful appeal to the federal appeal court of the Third Circuit was reversed by the U.S. Supreme Court[320], which reinstated the federal trial court's ruling in favour of a Scottish forum. Each of these removals no doubt increased the chances for settlement as the plaintiff's resources dwindled.

Cases such as this which involve many changes in jurisdiction may also have less conspicuous but equally damaging impacts on

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317 Paula C. JOHNSON, "Regulation, Remedy, and Exported Tobacco Products: The Need for a Response from the United States Government", 25 *Suffolk U.L. Rev.* 1, 52 (1991) (quoted in A.M. KEARSE, *loc. cit.*, note 9, 1311, note 73).

318 *Supra*, note 53.

319 There were a number of links to other locations as well: the company that manufactured the propellers did so in Ohio, the plane was registered in and operated by companies in the U.K. and the representative of the estates of several citizens and residents of Scotland who were killed was located in California: *supra*, note 53, 238-241.

320 *Id.*, 235, 238.

the outcome when lawyers in the forum in which the case originates have to share the work with lawyers elsewhere and must split fees and suffer the timing and other practical risks inherent in working cooperatively at long distances. In *Piper*, the lawyer who filed the original action and the personal representative of the estates of those deceased (the lawyer's legal secretary, appointed representative by a California probate court) were located in California[321], but as seen from the description of the lawsuit's evolution above, much of the litigation occurred elsewhere in the U.S. By the time the case was sent away from U.S. courts in favour of the Scottish forum, the plaintiff had lost the ability to sue under the favourable California tort law, had lost the right to a jury trial, had lost the opportunity to avail itself of contingency fee arrangements, and had lost the right to discovery. This undoubtedly hurt the settlement value immensely. Furthermore, outside of the parties' interests, it is plain to see how enormous the drain on judicial efficiency and resources can be when resort is made to *forum non conveniens*. Cases like *Piper*, certainly give one pause in the face of arguments that *forum non conveniens* helps to ease the burden on strained court systems.

Another example of a case in which foreign plaintiffs are ultimately blocked from litigating the merits of their action in the courts of the defendant's jurisdiction, and one which bears certain similarities to *Cambior*, is *Union Carbide*[322]. This case arose in response to the 1984 lethal gas leak disaster at the Union Carbide plant in Bhopal, India, which killed over 2,000 people and injured more than 200,000. It stands as both a striking and typical example of how *Piper* is used in American courts to weaken greatly or eliminate any deference to the foreign plaintiff's choice of forum[323]. Union Carbide's motion to dismiss on grounds of *forum non conveniens* was granted by the federal trial court in the Southern District of New York[324] on several conditions, all of which centred on the requirement that the claims be heard in India. The

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321 *Id.*, 239.

322 *Supra*, note 7.

323 See discussion of *Piper's* harsher *forum non conveniens* approach for foreign plaintiffs, in Section D, 1, b, above.

324 *Union Carbide, supra*, note 7, 867.

federal Court of Appeal (Second Circuit) upheld the dismissal on the basis of *Piper* and even reversed two of the conditions imposed by the lower court[325]. During the proceedings, a great irony occurred when the Indian government, acting on behalf of the victims, came to the American court arguing the incompetence of their own courts and the superiority of the U.S. courts, while at the same time, Union Carbide was arguing the contrary[326].

While the plaintiffs in the Bhopal litigation *did* seek and receive hearing of their case in the courts of India[327], many cases dismissed on grounds of *forum non conveniens* are never heard in the forum adjudged by the original court to be "more appropriate". In a study of 180 cases dismissed on grounds of *forum non conveniens* from 1947 to 1984 in the U.S., it was reported that only three were litigated in the alternative forum (none of which resulted in rulings for the plaintiff), and that settlements were rarely more than 10% of the estimated value of the claims[328]. *Union Carbide* is a stunning example of the latter point. The final result was settlement at a level far lower than the estimated damages: while the Union of India originally sought $3.3 billion dollars (U.S.) from the defendant in the Indian courts, the final settlement was for $470 million, less than 1/7th of the original claim[329]. The individual plaintiffs, however, have largely felt the settlement deal to be inadequate and on November 15, 1999, just prior to the 15th anniversary of the disaster, they filed a fresh lawsuit in the U.S. District Court for the

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325 *Id.* For a thorough discussion of the trial and appeal cases relating to the Bhopal disaster, see e.g.: Jamie CASSELS, *The Uncertain Promise of Law: Lessons from Bhopal*, Toronto, University of Toronto, Press, 1993, c. 6.

326 See e.g.: J. CASSELS, *op. cit.*, note 325, p. 128 and 129.

327 See: *Union Carbide* v. *Union of India*, [1989] 3 S.C.R. 128 (India Sup. Ct.). For details on the litigation in India, see e.g.: J. CASSELS, *op. cit.*, note 325, c. 7.

328 D.W. ROBERTSON, "*Forum Non Conveniens* in America and England: 'A Rather Fantastic Fiction'", (1987) 103 L.Q. Rev. 398, 418-420; see also: D.W. ROBERTSON, *loc. cit.*, note 9, 363 and 364.

329 See e.g.: D.W. ROBERTSON, *loc. cit.*, note 9, 375; J. CASSELS, *op. cit.*, note 325, p. 163.

Southern District of New York charging Union Carbide Corp. with fraud and civil contempt in an effort to seek further damages[330].

Given the realities associated with *forum non conveniens* dismissals, then, it seems that often *forum non conveniens* is simply another legal fiction with a fancy name to shield alleged wrongdoers, rather than an important tool for the wise and efficient administration of justice. Clearly the tendency for *forum non conveniens* inquiries to be outcome-determinative adds another strong rationale for the reform of the current, liberal approach in Quebec.

### 8. The Arguments Favouring Rare Use of *Forum Non Conveniens*: a Summary

In this section, we have introduced a number of arguments as to why Quebec courts should invoke the doctrine of *forum non conveniens* only rarely. Before continuing with a more in-depth critique and proposal, it is useful to review these arguments briefly. First, it must be recognized that while *forum non conveniens* emanates from the common law, it was imported into Quebec's civil law system and the civil law context naturally provides its own restraints: clearly the Legislator desired only to make a narrow exception when he decided to reverse years and years of juridical history in Quebec during which the doctrine was simply not tolerated. Second, the liberal use of *forum non conveniens* is not warranted in Quebec because concerns about countering long-arm jurisdiction and attracting large numbers of forum shopping plaintiffs are not realistic: again, Quebec does not employ a lot of the features in its judicial system that attract forum shopping plaintiffs. Third, the introduction of the provision occurred in an historical context in which the Legislator was interested in making Quebec a centre for international dispute resolution. Fourth, there

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330 "Bhopal Gas Disaster Victims File Class Action Suit Against Union Carbide", November 15, 1999, web site: [http://news.excite.com:80/news/pr/99115/hy-bhopal-union-carbd]. The victims met again with disappointment, however, when the Federal Court dismissed their case in September 2000. See: "Gas Victims Protest U.S. Court Decision", September 3, 2000, The Times of India News Service; web site: [http://www.timesofindia.com/03indi32.htm].

is no clear, consistent consensus on the desirability or undesirability of judicial tolerance of forum shopping. Fifth, limiting *forum non conveniens* would not likely compromise principles of judicial comity. Sixth, the inquiries necessary when *forum non conveniens* motions are presented are inefficient, wasteful and time-consuming for the parties as well as for the courts. Seventh, and last, dismissals based on a determination that an alternative court is "more appropriate" often do not result in the case actually being heard in that forum.

## V. A Proposal for Interpreting "Exceptional" in Article 3135 C.c.Q.

### A. The Proposal

At the centre of our proposal for a redefined approach to article 3135 C.c.Q. is the idea that "exceptional" means just that – exceptional. This implies prohibiting *forum non conveniens* inquiries altogether in some cases, and greatly restricting its application in others. This general approach translates into **three specific recommendations** aimed at different stages of the process by which a Court considers an application for dismissal on grounds of *forum non conveniens*:

> **First**, certain cases should be excluded from *forum non conveniens* considerations altogether, on the basis of policies or provisions currently found in the *Civil Code of Quebec* or elsewhere in the laws applicable in Quebec.
>
> **Second**, for those cases not excluded, a determination must be made whether a competent alternative court actually exists, and if one does not, no further inquiry or consideration of connecting factors should be made, and the request for dismissal or stay should be denied.
>
> **Third**, where a *forum non conveniens* analysis is appropriate and an analysis of criteria is undertaken, certain criteria should be eliminated from consideration altogether, while others may be included, but only according to certain guidelines and restrictions.

Before considering each of these recommendations in depth, some preliminary comments must be made on the textual

justification for our general proposition which, stated as briefly as possible, is that "exceptional" should mean eliminating certain kinds of cases from the reach of *forum non conveniens* altogether, and for the remainder, limiting the consideration of certain criteria during the analysis.

### B. Textual Justification

The codal text itself justifies this proposition, and this becomes evident when article 3135 C.c.Q. is considered, as it should be of course, in the context of related codal provisions. In the general provisions of Title III ("International Jurisdiction of Quebec Authorities") of Book Ten, there are several provisions other than article 3135 C.c.Q. which grant the court discretionary power to decline or accept jurisdiction in certain cases. In each of these provisions – article 3136 C.c.Q. on forum of necessity, article 3137 C.c.Q. on *lis pendens*, and article 3140 C.c.Q. on emergency measures –, the word "may" appears with no qualification. Looking at article 3137 C.c.Q., the court, for example "*may* stay its ruling on an action brought before it" under certain circumstances. Only in the rule on *forum non conveniens* in article 3135 C.c.Q. does the qualifier "exceptional" appear together with "may": specifically, the provision states that a Quebec authority having jurisdiction to hear a dispute "may exceptionally and on an application by a party, decline jurisdiction"[331]. According to generally accepted rules of statutory interpretation, this indicates that "exceptional" is imbued with special significance.

It is also important to recognize that Book Ten, encompassing all the essential rules of private international law in Quebec, operates, as a code-within-a-code, and that the general principles of interpretation used in conjunction with the code generally, apply equally to the provisions found within Book Ten. As such, the maxim *exception est strictissimae interpretationi* (an exception is to be construed restrictively) must be respected.

Another contextual consideration involves article 3082 C.c.Q., which *does* contain the word "exceptionally". This provision constitutes an "escape" clause which, by its very nature, is designed to be used only sparingly for the purpose of effecting a derogation

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[331] The full text of art. 3135 C.c.Q. may be found above, on p. 794.

from general conflict rules and which can allow the court, where it sees fit to do so, to apply the law of a more closely connected country. By placing the word "exceptionally" at the beginning of the provision, the Legislator has signalled that its application is to be strictly limited. In one of the few, if not only, reported cases in which Quebec courts had occasion to use the "exceptional" escape clause to derogate from the law otherwise applicable, the court refused to do so even though it was a situation where such a derogation seemed to be warranted[332]. It stands to reason that since the term "exceptionally" clearly implies that article 3082 C.c.Q. is to be applied very sparingly, the term should be given the same interpretation in other provisions of Book Ten, namely article 3135 C.c.Q.

### C. Impact of the Constitution of Canada

Support for an "exceptional" application of the doctrine in Canada is also found in the constitutional guidelines relating to the principles of "order and fairness" which were articulated in *Hunt*[333] and *Morguard Investments Ltd.* v. *De Savoye*[334]. It was advanced in *Hunt*, for example, that if there is a "real and substantial connection" between a particular provincial jurisdiction and the action or parties before it in a particular case, the plaintiff should be allowed to pursue his action before the courts of that province[335]. It would seem to follow that an interpretation of *forum non conveniens* which would result in forcing the plaintiff to sue elsewhere compromises these principles, even though there may, in fact, be some merit in having the case removed. To the extent that this premise is valid, then the notion that there should rarely be a dismissal for *forum non conveniens* where a real and substantial connection to the court

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332 *Droit de la famille – 2210*, [1995] R.J.Q. 1513 (Sup. Ct.).
333 *Supra*, note 32.
334 *Morguard Investments Ltd.* v. *De Savoye, supra*, note 32.
335 *Supra*, note 32, 325.

exists, even in those cases where another court might be "more appropriate", is both reasonable and credible.

## D. Restrictions and Conditions for the Application of *Forum Non Conveniens*

With these preliminary comments made, it is now possible to look more closely at the three fundamental recommendations we have made for reforming and refining the "exceptional" requirement in article 3135 C.c.Q.

### 1. *Forum Non Conveniens* Should Be Prohibited in Certain Cases

A critical step in ensuring that *forum non conveniens* is applied only "exceptionally" in Quebec is to "screen" each case for features that should disqualify it from further analysis under the doctrine. Toward this end, it is recommended that cases having any one or more of the following features should be removed from consideration for a dismissal based on *forum non conveniens* and that, further, courts presented with such cases deny the motion to decline jurisdiction based on article 3135 C.c.Q.:

- where a judgment by an alternative court would not be enforceable in Quebec;
- when the defendant is domiciled in Quebec *and* there exists real and substantial connections between the subject matter of the action and Quebec;
- where the parties have selected a Quebec court to hear any dispute arising out of their contract;
- where the jurisdiction of a Quebec court is established to protect a certain class of persons, or to accommodate an urgent matter.

Furthermore, the Quebec court should not invoke the *forum non conveniens* doctrine to evaluate the jurisdiction of a foreign court for purposes of recognition and enforcement of a foreign

judgment. The rationale for each of these recommended restrictions will be addressed in turn.

#### a. Where a Judgment by an Alternative Court Would Not Be Enforceable in Quebec

*Forum non conveniens* should not apply where a judgment by an alternative court would not be enforceable in Quebec. This rule involves prospective recognition of judgment, and would bring article 3135 C.c.Q. in line with the rule currently contained in Quebec's codal provision on *lis pendens*, article 3137 C.c.Q. According to this provision, a Quebec court may stay its ruling on the theory of *lis pendens* "provided that the [...] action can result in a decision which may be recognized in Quebec"[336]. Thus, if the judgment would not be enforceable in Quebec, the Court could not stay the action.

#### b. When the Defendant Is Domiciled in Quebec *and* There Exists Real and Substantial Connections with the Dispute and Quebec

The rejection of the importance of the "domicile" of the defendant as a natural forum was first advanced in *Arsenault*[337] and then reaffirmed in *Boulton*[338]. With respect, such a stance totally disregards an important part of Quebec's civil law heritage. In *Boulton*, Rochon J. offers several rationales for discounting the importance of the defendant's domicile, but each of them is problematic. The first of these arguments – that since there is no particular codal exception making *forum non conveniens* inapplicable where the domicile of the defendant is Quebec, then no special consideration needs be given to this factor – is fundamentally flawed because it ignores the larger, civil law context within which article 3135 C.c.Q. necessarily operates. Specifically, it ignores the presence of the word "exceptional" in the provision itself, which, by its very nature, necessitates that there be no disregard of traditional features of the civil law, such as domicile of the defendant.

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336 See art. 3137 C.c.Q.: "On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority."

337 *Arsenault*, *supra*, note 119.

338 *Boulton*, *supra*, note 119.

The second rationale offered by Rochon J. is that the new code changed the traditional, almost universal rule, acknowledging the acceptance of the domicile as the natural forum under pre-code law. There is simply no justification for this claim. There is no evidence that the Legislator intended, by the introduction of article 3135 C.c.Q., to effect a wholesale rejection of the traditional rule, *actor forum rei sequitur*. Once again, the word "exceptional" in the provision works strongly against the validity of such an extreme conclusion. To put this issue to rest, we need only acknowledge that article 3135 C.c.Q. follows closely on the heels of article 3134 C.c.Q. (the provision which opens the chapter on General Provisions under Title Three, "International Jurisdiction of Quebec Authorities"), which specifically states that: "In the absence of any special provision, the Quebec authorities have jurisdiction when the defendant is domiciled in Quebec." By including this provision in the new code, the Legislator clearly intended to send a message that the defendant's domicile maintains a place of primacy in Quebec's civil law. The opposite conclusion is simply not tenable in light of this fact.

One last comment on the downgrading of the role of defendant's domicile in some of the *forum non conveniens* jurisprudence is that this kind of approach could, potentially, lead to a situation in which foreign enterprises become discouraged from purchasing Canadian products because of the risk of being unable to sue the manufacturer in Quebec. Such a development, of course, would work against efforts to make Canadian firms and products more competitive internationally. In fact, one Canadian commentator on *forum non conveniens*, in the context of arguing that not all forum shopping is negative and that forum shopping may produce greater uniformity and higher quality of substantive laws, has stated:

> *It is my contention that competition amongst jurisdictions, including tolerance of forum-shopping by litigants, promotes harmonization of laws from jurisdiction to jurisdiction and higher, rather than lower standards.*[339]

Having made the above criticisms, we are not recommending that cases be excluded from the reach of *forum non conveniens* on the sole basis of defendant's domicile where the nexus with Quebec is otherwise weak or tenuous, even though, in our view, it *could* be argued that domicile alone constitutes a "real and substantial

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339 N. GUTHRIE, *loc. cit.*, note 307.

connection". Rather, we advocate a threshold that can be described most simply as the defendant's domicile plus "something more". To clarify, by "something more" we refer to a minimal level of factual connections to Quebec *beyond* the defendant's domicile. They need not be, by themselves, substantial.

### c. Where the Parties Have Chosen Quebec Courts Through a Forum Selection Clause

*Forum non conveniens* should not apply where the parties have chosen the Quebec court by means of a valid, freely negotiated forum selection clause[340]. This is clearly justified by the policy of predictability in transactional business dealings. It also is a logical interpretation given the clear respect for mutual choice of a foreign forum which is mandated by article 3148 (2) C.c.Q. Prohibiting *forum non conveniens* in the presence of forum selection clauses would also parallel the exclusion of the discretionary power under the escape clause, article 3082 C.c.Q., where the parties have designated the applicable law in a juridical act.

Furthermore, in the presence of a valid arbitration clause, a *forum non conveniens* inquiry should not be allowed. Rather, the court should simply proceed as it normally would, with an order compelling the parties to arbitrate in Quebec or in any other forum provided for in their agreement[341].

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340 Generally speaking, Quebec courts give effect to forum selection clauses: see *Lamborghini*, *supra*, note 285; *2736349 Canada Inc.* v. *Rogers Cantel*, REJB 98-6854, J.E. 98-1178 (Sup. Ct.); *2617-3138 Quebec Inc.* v. *Rogers Cantel Inc.*, REJB 98-5699 (Sup. Ct.); see however: *Crestar*, *supra*, note 115, and *J.S. Finance Canada Inc.*, *supra*, note 119, where jurisdiction was asserted by Quebec courts in spite of a foreign forum selection clause. In any event, courts unfortunately engage in a *forum non conveniens* enquiry in order to determine whether the forum previously chosen, with the inconvenience factor presumably having been considered, is now, at the time of litigation, convenient.

341 See e.g.: art. 3148 (2) C.c.Q.; *UNCITRAL Model Law on International Commercial Arbitration*, June 21, 1985, Vienna, U.N. Doc. A/40/17; *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 330 U.N.T.S. 38 (commonly known as the "New York Convention"); *contra: Guns N Roses Missouri Storm* v. *Productions musicales Donald K Donald*, [1994] R.J.Q. 113 (C.A.)

### d. Where the Jurisdiction of a Quebec Court Is Established to Protect a Certain Party or for an Urgent Matter

*Forum non conveniens* should not apply where the basis of the jurisdictional rule is to protect certain weaker parties such as consumers in claims relating to consumer contracts or employees in claims relating to contracts of employment (art. 3149 C.c.Q.). In fact, the Superior Court took this stance recently in *Barre*[342], a case involving unlawful dismissal of a person residing and working in Quebec. *Forum non conveniens* should also not apply in a custody action upon a successful enforcement of a Hague proceeding ordering a child returned to Quebec.

As well, *forum non conveniens* should not apply where the court is seized with a matter of urgency, a policy clearly supported by article 3140 C.c.Q., which stipulates that "[i]n cases of emergency or serious inconvenience, Quebec authorities may also take such measures as they consider necessary for the protection of the person or property of a person present in Quebec." In fact, in *Droit de la famille – 2573,*[343] Senecal J. ruled in favour of keeping the action in Quebec because the child involved suffered from serious asthma, even though the *forum non conveniens* analysis pointed to the courts of Vermont.

### e. The Quebec Court Should Not Second Guess the Exercise of the Jurisdiction of a Foreign Court by Using Its Own *Forum Non Conveniens* Doctrine

We have previously mentioned the rule in Quebec law allowing the reviewing Quebec court to reevaluate the convenience of the jurisdiction of the foreign court in the context of recognition of foreign judgments. In spite of the advantages of deterring forum shopping in inappropriate foreign jurisdictions, this is not a desirable solution even though there is a literal codal interpretation justifying it, supporting case law, and supporting doctrine[344]. To deny recognition of a judgment for failure to do something that is only discretionary in the first court – namely, to accept a motion for *forum non conveniens* – would seem to contradict the exceptionality requirement in Quebec's *forum non conveniens* law.

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342 *Supra*, note 205.

343 J.E. 97-207 (Sup. Ct.).

344 See cases cited, *supra*, note 117 and H.P. GLENN, *loc. cit.*, note 120, 170, par. 117; H.P. GLENN, *loc. cit.*, note 120, 411.

### 2. The Alternative Forum Must, at a Minimum, Be Adequate and Competent in its Capacity to Litigate the Dispute

Since article 3135 C.c.Q. expressly mentions that in order for *forum non conveniens* to be considered, the alternative forum must be "in a better position to decide", it must be that this alternative forum is – at a minimum – competent and adequate in respect of the matter to be litigated. Given this, the will of the Legislator would be better respected by requiring a much more demanding test for adequacy of the alternative forum than merely that there be no major procedural barriers or prescription problems, which is the common practice now. The word "exceptional" suggests that the inquiry into the adequacy of the alternative forum should be made at the outset, rather than during the weighing of the connecting factors which is conducted at the later stage of the *forum non conveniens* analysis. Seen this way, dismissal on grounds of *forum non conveniens* should be excluded *a priori* where proof has been made that there will be extreme delay in getting to trial, that the alternative court could not hear the kind of claim being pursued and that no adequate alternate remedy exists, or that the plaintiff cannot be represented by attorney.

We propose that, since the text of article 3135 C.c.Q. affords a prominent place to the identification of an alternative forum, then the test used to apply the provision should also give primacy to the question of the existence of an adequate alternative forum. This question should be addressed at the front of the process, rather than being relegated to the status of just one of the numerous criteria typically considered in the "global analysis" undertaken in most *forum non conveniens* inquiries.

### 3. Certain Exclusions and Limitations Must Apply in the Consideration of Criteria

Even for situations within the reach of *forum non conveniens*, certain criteria should be excluded, and others should be given reduced weight during the phase of the *forum non conveniens* inquiry in which the court weighs criteria to assess the strength of the links with the alternative forum. First, we will present those criteria which we believe should be excluded from the analysis, then we will present those criteria which we believe may be included in the analysis, but only within certain, specific limitations.

### a. Criteria Which Must Be Excluded

In determining the appropriateness of the forum, the court should *not* consider either the law applicable to the merits or the nationality of the plaintiff. The reasons for these exclusions will now be addressed briefly.

#### *i) The Law Applicable to the Merits*

The primary argument in favour of taking applicable law into account in a *forum non conveniens* analysis is that if the foreign law will be applied by the chosen court, the foreign court must surely be in a better place to apply it and understand all the subtleties. We disagree, and adhere to the position of Guillemard, Prujiner and Sabourin in their 1995 study of *forum non conveniens* in Quebec that, in general, taking the law applicable to the merits into account is not appropriate[345]. The only possible place for consideration of the applicable law at this stage might be in those situations where it is necessary to consider the applicable law in order to interpret one of the bases for jurisdiction in the codal rules, especially article 3148 C.c.Q.

The primary reason for our contention is that, if application of foreign law justifies dismissal, then Book Ten is meaningless, because the implication is that Quebec Courts are only competent and appropriate to apply Quebec law. Thus, taking the law applicable to the merits into consideration during the *forum non conveniens* analysis runs counter to the very rationale underlying Quebec's private international law rules. Quebec courts are required to and do apply foreign law on a regular basis. In fact, article 2809 C.c.Q. was intended to facilitate proof of foreign law, and indeed does make such proof easier now. Finally, taking the applicable law into consideration presumes that it is an easy task to determine which law or laws apply, and it may be the case that the foreign law will apply, to only part of the issue in dispute. In any event, in all but the simplest cases, such an inquiry creates unnecessary delays and opens up a discussion on the applicable law which is best left for consideration later, prior to a hearing on the merits. A number of common law cases now take the view that the applicable

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345 S. GUILLEMARD, A. PRUJINER and F. SABOURIN, *loc. cit.*, note 1.

law should not be considered during *forum non conveniens* analysis, or, at most, that it should be given very little weight[346].

#### *ii. Nationality of the Plaintiff*

Treating aliens differently is likely to be in violation of Quebec's *Charter of human rights and freedoms*[347], unconstitutional, and is, in any case, not wise in today's world. It is possible that a similar prohibition should be extended to the residence or domicile of the plaintiff. More will be said on this, below, where we reconsider *Cambior* in light of our proposal.

### b. Criteria Which May Be Applied But With Certain Restrictions and Qualifications

In determining the appropriateness of the forum, the court may consider a variety of other factors, but within the following limitations and guidelines.

#### *i. Location of Witnesses and Evidence*

In our opinion, the location of the witnesses should not be accorded more than minimal weight. Given modern technology – overnight delivery of documents, facsimiles, email and other internet utilizations, along with world-wide economy air travel – many of the problems associated with distant witnesses are easily overcome. No forum is as inconvenient today as it was in the past. In fact, modern technology has rendered some of the private factors invoked in cases like *Boulton*[348], *Arsenault*[349] and *Cambior*[350] virtually obsolete.

#### *ii. Overriding Public Interests of the State*

An overriding public interest of the state, whether narrowly or liberally construed, should outweigh convenience. For example, the need to retain jurisdiction to ensure the protection and compliance with important social and economic policies, such as competition legislation, securities regulation and other laws that

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346 See e.g.: *Cytoven, supra*, note 46; *Discreet Logic, supra*, note 46; *Sydney Steel Corp., supra*, note 45; similarly, see in Quebec: *J.S. Finance Canada Inc.*, *supra*, note 119.

347 R.S.Q., c. C-12.

348 *Boulton*, *supra*, note 119.

349 *Arsenault*, *supra*, note 119.

350 *Supra*, note 11.

qualify as laws of immediate application should override convenience[351]. Many of these laws involve transnational regulation, where the basic issue is not jurisdiction to adjudicate, but jurisdiction to prescribe law. Where the latter exists, how can the doctrine of *forum non conveniens* be invoked, "when there is no other forum in which the case can be heard but the defendant argues that jurisdiction to prescribe does not exist"[352]?

Another matter where the overriding public interests of the state is concerned is in the matter of human rights cases. It is our contention that *forum non conveniens* is not appropriate in human rights cases, a point which has been argued forcefully in a recent article by Kathryn Lee Boyd in the *Virginia Journal of International Law*[353], since it seems obvious that fundamental human rights should supersede convenience of either the parties or the forum. Furthermore, the *Universal Declaration of Human Rights*[354] is essentially now binding on all U.N. member states, and Canada is also a party to a number of U.N. Conventions, Protocols and covenants relating to human rights, including the *International Convention on the Elimination of All Forms of Racial Discrimination*[355], the *International Covenant on Economic, Social and Cultural Rights*[356], the *International Covenant on Civil and Political Rights*[357], the *Optional Protocol* to that Covenant[358], the *Convention on Rights of the Child*[359] and a number of others[360]. While we are unaware of any cases in Quebec in which a *forum non conveniens* dismissal has been raised in the context of a human rights case, the principle enunciated here should be observed if the opportunity arises in the future. Finally, we would encourage a similar approach with

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351 *Brueckner, supra*, note 172.

352 See: Jean-Gabriel CASTEL, *Extra-territoriality in International Trade*, Toronto, Butterworth's, 1988, p. 265 ff.

353 *Supra*, note 9.

354 (1948) UN Doc A/810.

355 (1969) 660 U.N.T.S. 195.

356 (1966) 993 U.N.T.S. 3, 1976 Can. T.S. No. 46.

357 (1966) 999 U.N.T.S. 171, 1976 Can. T.S. No. 47.

358 (1966), 999 U.N.T.S. 302, 1976 Can. T.S. No. 47.

359 (1989) UNGA Doc A/RES/44/25.

360 See e.g.: Hugh M. KINDRED (ed.), *International Law, Chiefly as Interpreted and Applied in Canada*, 5th ed., Toronto, Emond Montgomery Publications Ltd., 1993, p. 599-602.

respect to Canada's international commitments on environmental protection[361], which could also be treated as overriding public interests of the state.

### *iii. Legitimate Expectations of the Parties*

The legitimate expectations of the parties with respect to the place of litigation is a factor which, in our opinion, could be properly considered during the *forum non conveniens* analysis. It would seem, for example, that in most circumstances a defendant could reasonably expect to be sued in the jurisdiction within which he resides, or in the case of a corporate defendant, in the jurisdiction in which corporate headquarters are located.

### *iv. Related or Incidental Actions*

The involvement of third parties and incidental or related disputes should be given a great deal of weight when a court considers a *forum non conveniens* motion. In most such cases, such concerns should lead to denial of a request for dismissal. This follows from the fact that article 3139 C.c.Q. allows the Quebec courts to take jurisdiction over parties in incidental or related actions, so as to avoid litigating such matters in different fora. However, in some cases it is clearly inappropriate to exercise jurisdiction over the related matter, as in *Birdsall Inc.* v. *In any Event*[362].

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361 See e.g.: *Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES)* (3 March 1973), 993 UNTS 243, 27 UST 1087, TIAS 8249, UKTS No. 101 (1976), Cmnd 6647; *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (22 March 1989), U.N. Doc. UNEP/WG.190/4, UNEP/IG.80/3 (1989); *Vienna Convention for the Protection of the Ozone Layer* (22 March 1985), 26 I.L.M. 1529 (1987); *Montreal Protocol on Substances that Deplete the Ozone Layer* (16 September 1987), 26 I.L.M. 1550 (1987); *United Nations Framework Convention on Climate Change* (29 May 1992), 31 I.L.M. 849 (1992).

362 *Supra*, note 115.

## E. General Principles for Deciding Cases in Which *Forum Non Conveniens* Is Allowed

### 1. Where No Forum Is Clearly More Convenient or Appropriate, the Case Must Stay in Quebec

Where the convenience or inconvenience of the Quebec court and foreign court are equal and no forum is "clearly more appropriate", the court should *not* dismiss on the grounds of *forum non conveniens*. The case should remain in the chosen forum. This is critical since it is really the only reasonable interpretation of the word "exceptional" in article 3135 C.c.Q. Fortunately, this approach already seems to have taken root in our jurisprudence since it forms the basis of decisions in several cases, such as *Sunburst*[363], *Droit de la famille – 2546*[364], *Stageline*[365] and *Cameron Billard*[366].

This proposition should also extend to any controversy on one of the criteria. If it is an important element in the case which could swing the result to one side or the other, then the courts should dismiss a motion for *forum non conveniens* and keep the case in the domestic forum.

### 2. Dismissal Should Be Allowed Only if the Quebec Court Is Clearly Inappropriate

Even if the foreign court is clearly *more* appropriate, the court should only dismiss if the Quebec court is clearly *in*appropriate (an approach similar to Australia's version of *forum non conveniens*[367]). In other words, if the global consideration of criteria in the *forum non conveniens* inquiry leads the court to conclude that the balance tips only slightly in favour of declining jurisdiction, then the motion to dismiss should be denied *unless* the Quebec court is shown to be clearly *inappropriate*. While this view does not appear to have yet

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363 *Supra*, note 164.
364 J.E. 96-2263 (C.A.)
365 *Supra*, note 123.
366 *Supra*, note 153.
367 See Section I, C, above.

taken hold in Quebec jurisprudence, it has been followed in certain common law jurisdictions[368]. Again, the presence of any "real and substantial connection", liberally construed (as the court in *Hunt*[369] intended), should take precedence over a conclusion reached through a balancing exercise alone.

### 3. Where *Forum Non Conveniens* Has Been Asserted, the Burden of Proof Should Stay with the Moving Party

The burden of proof in evaluating whether a more appropriate alternative forum exists should remain on the moving party and should not shift automatically to the plaintiff once the defendant states a *prima facie* case[370]. The two-step approach of the English courts, under *The Spiliada*[371], is not authorized under the view of the Supreme Court of Canada in *Amchem Products*[372], and clearly article 3135 C.c.Q. authorises no such shift[373].

### 4. In Declining Exercise of Jurisdiction, the Quebec Court Should Dismiss, Rather Than Stay, the Action

In general, where the court has decided to grant a motion for *forum non conveniens*, we believe that the court should respect the text of the Quebec version in article 3135 C.c.Q. and "decline" jurisdiction altogether, rather than stay the action. If the Legislator had intended to allow a stay rather than dismissal, he likely would have specified a stay, as he did in article 3137 C.c.Q. in the provision on *lis pendens*[374]. That said, it may be useful in some circumstances to employ a somewhat more liberal interpretation of article 3135 C.c.Q. and allow for the possibility of conditional

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368 See e.g.: *Ontario New Home Warranty Program* v. *General Electric Company*, *supra*, note 45. A dramatic statement of this approach is seen in the U.S. Court of Appeals case, *Lacey* v. *Cessna Aircraft Co*, 932 F.2d 170, 180 (3d Cir. 1991), where it was suggested that even if the private and public interest factors "lean only slightly toward dismissal [on grounds of *forum non conveniens*], the motion to dismiss must be denied." See also A.M. KEARSE, *loc. cit.*, note 9, 1313.

369 *Supra*, note 32.

370 Some support for this stance is evident in the Quebec jurisprudence. See e.g.: *Lorenzetti* v. *McLachlan*, [1996] R.J.Q. 1311, 1314 (Sup. Ct.); *Rosdev Investments*, *supra*, note 149, 2969.

371 *Supra*, note 13, 854 and 856.

372 *Supra*, note 34, 919-921.

373 For the text of art. 3135 C.c.Q., see p. 794.

374 See, *supra*, note 336 for the full text of article 3137 C.c.Q.

dismissals in *forum non conveniens* cases. If dismissals are conditioned upon such things as the plaintiff's ability to gain access to the foreign court, this may help to alleviate some, but not all, of the problems we have identified thus far.

#### 5. *Forum Non Conveniens* Motions Must Follow the Delays for Contesting Jurisdiction

Application for dismissals on the basis of *forum non conveniens* should be made at an early stage of the proceedings, specifically, within the delays available to those who wish to contest jurisdiction. Any derogation from this rule is against the goal of administrative efficiency that the rule presumably is intended to respect.

## VI. Revisiting *Cambior*

### A. General Comments

*Cambior*[375] is part of a trend in the Quebec jurisprudence that could ultimately lead to the unravelling of the rule of law in international *forum non conveniens* cases. We chose this case not only for the purpose of focusing our criticisms on the doctrine of *forum non conveniens* as it stands today in Quebec, but also to demonstrate how the expansive notion of *forum non conveniens* that has taken hold of Quebec's courts can have ramifications that reach well beyond Quebec's borders. The late Honourable Judge Maughan, in rendering the well-written and thoroughly considered *Cambior* decision, committed no greater sin than have other distinguished judges of the Superior Court and Court of Appeal who have likewise ignored the Quebec version of the doctrine, which clearly requires only an "exceptional" use of *forum non conveniens*.

### B. *Cambior* Applied Common Law *Forum Non Conveniens* Rather Than Quebec's Version

Instead of utilizing the definition of the Quebec doctrine of *forum non conveniens* provided in article 3135 C.c.Q., the court in *Cambior* refers expressly and implicitly to the common law versions of the doctrine[376] used in the other provinces as well as

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375 *Supra*, note 11.
376 *Id.*, 14.

in the U.K. and U.S. In doing so, the Court adopts a test with a hopelessly low threshold for accepting the existence of a competent alternative court – a threshold that is not acceptable in light of the restrictive language of article 3135 C.c.Q. Further, the court gives weight to certain factors which should *not* be considered, and refuses to attribute importance to other factors which *should* have been considered. Lastly, the court seems to adopt the U.K.'s method of shifting the burden of proof to the plaintiff; yet there is nothing in article 3135 C.c.Q. to suggest that requiring the plaintiff to justify the connections of the case to the forum is remotely appropriate. In fact, considering that article 3135 C.c.Q. follows a provision which proclaims that "[i]n the absence of any special provision, the Quebec authorities have jurisdiction when the defendant is domiciled in Quebec"[377], it seems reasonable to assume that the burden of proof in article 3135 C.c.Q. would rest squarely on the defendant.

As suggested in the proposal outlined earlier, "exceptional" requires, first, that a *forum non conveniens* analysis should not even be undertaken in certain cases, second, that there be an analysis of whether a competent alternative court indeed exists, and third, that there be a limited use in all other situations. We will now consider how the *Cambior* decision[378] fares in light of this approach.

### 1. The Role of Domicile of the Defendant

The Court gave no particular weight to the domicile of Cambior in Quebec, and thus essentially dismissed the traditional view in Quebec civil law that the court of the domicile of the defendant is the natural forum. As we suggested earlier, the "exceptional" doctrine should require the courts to refuse to dismiss where the defendant is domiciled in Quebec so long as the action has some real and substantial connection to Quebec, although it may be argued that domicile, standing on its own, constitutes a real and substantial connection. At this point in the inquiry, the court should simply ensure that there are significant links to Quebec, including the domicile. If there are, this should be sufficient to retain

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377 Art. 3134 C.c.Q. It should be noted that this provision serves as the introductory provision to Book Ten, Title III, International Jurisdiction of Québec Authorities, c. I, General Provisions.

378 *Supra*, note 11.

jurisdiction. In *Cambior*[379], the domicile of the defendant was considered just one element among many others[380]. We must take the Court in *Cambior* and cases such as *Boulton*[381] to task for this. Such an approach is totally repugnant to the Roman-civilian tradition in Quebec in most civil law jurisdictions.

In this context, if our theory and proposition were to have been applied, there should not have been any dismissal since there was a real and substantial connection to Quebec even beyond the domicile of the defendant. Some decisions concerning the mine's construction were made in Quebec. Quebec was also the residency and domicile of Cambior's directors. Quebec is truly the centre of gravity for Cambior, and, by extension, O.G.M.L. How can the domicile of the defendant be an inconvenient or inappropriate forum?

### 2. Adequacy of the Alternative Court

In *Cambior*, the court failed to consider the identification of an adequate, alternative forum at the beginning of the analysis, and instead addressed the question of adequacy only at the end of its inquiry. As we stated above[382], this is problematic because article 3135 C.c.Q. requires, as a threshold condition, that the alternative court must be competent. While we concede that the requirement is implied rather than express, any other interpretation would be perplexing in that part of being "in a better position to decide" would necessarily require competence of the forum considered.

Specifically, Maughan J. viewed the impartiality of the courts, the delays, the level of judicial integrity, the ability to hear a technical class action suit, and the adequacy of the remedy as nothing more than subordinate factors to be considered under the heading of "interests of justice", which in turn was just one of a number of other factors considered in the evaluation of whether Guyana was the more appropriate forum. After undertaking the laborious process of considering and weighing a number of factors, the last of which were considered under the heading, "Interests of Justice", Maughan J. remarked that if he had been swayed by the

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379 *Id.*
380 *Id.*, 21.
381 *Supra*, note 119, 231 and 232.
382 See : Section V, D, 2 above.

plaintiff's evidence on the problems with the Guyanese justice system, he would have dismissed Cambior's request that the Court decline jurisdiction "without hesitation".

This illustrates, and indeed supports the argument that the question of adequacy of the alternative forum should be dealt with at the beginning of the *forum non conveniens* analysis rather than at the end. Efficiency of judicial process – so often considered an important factor in *forum non conveniens* analysis – would demand nothing less. Another reason for undertaking an evaluation of the adequacy of the foreign court *prior* to the consideration and weighing of criteria is that the question of adequacy simply should not be on an equal footing with the other criteria: it should be treated as a threshold issue and not as one of numerous interest factors to be considered.

Maughan J. found the court in Guyana to be an adequate alternative court, despite the presence of substantial evidence in the file to the contrary. An expert report of Prof. Schabas called into question the impartiality and integrity of the courts and attested to the existence of unreasonable delays, the inability to hear a class action, and the inadequacy of the alternate remedy available (representative action). Based on various written sources of information, as well as on a one-week fact-finding mission, Prof. Schabas found the Guyanese judicial system to be far from reliable, fair or impartial[383]. The Court rejected Prof. Schabas' analysis on the basis of the counter-testimony of a retired judge from Guyana[384]. While it may be true that, as witnesses, judges are likely to be accorded more credibility than the average person, this should not prevent a court from questioning the usefulness of a judge's testimony where the appearance of bias or similar problems arise.

Of course, there might also be political ramifications if a Canadian court were to conclude that the Guyanese court was not an adequate alternative forum, and this may well have been in the mind of the Court in *Cambior*. However, it is important to note that Prof. Schabas' report was based in large part on sources of very high calibre. For example, he relied on the U.S. State Department 1996

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383 *Supra*, note 278.

384 *Supra*, note 11, 38-40. The Judge's testimony was supported by that of two other Guyanese jurists, as well as that of a retired justice of the Quebec Court of Appeal: *id.*, 40-42.

*Country Report* on Guyana, which stated that "[t]he inefficiency of the judicial system is so great as to undermine due process"[385], but this evidence was given short shrift by Maughan J. Prof. Schabas also referred to a memo written at the request of then-President Cheddi Jagan to Guyana's Attorney General in 1994 by six of Guyana's most senior lawyers, which stated, *inter alia*, that "[t]he administration of law in Guyana has reached a state of collapse"[386], but again, Maughan J. gave the evidence minimal weight. By contrast, a U.S. federal trial court in the 1997 case, *Eastman Kodak Company* v. *Kavlin*, relied on very similar sources (e.g. State Department Reports, World Bank Reports, evidence from a Bolivian attorney of high calibre and a Bolivian newspaper article quoting the Bolivian Minister of Justice criticising his own judicial system) in arriving at the conclusion that corruption in the Bolivian justice system precluded dismissal of action from the U.S. court on grounds of *forum non conveniens*[387].

Indeed, there are serious questions as to whether the plaintiffs could, in fact, achieve the result they sought in the courts of Guyana. It should not be overlooked, for example, that Cambior, along with its subsidiary O.G.M.L., had been allowed to conduct its operations in Guyana by invitation of and cooperation with the Guyanese government. Furthermore, it is not insignificant that revenues from the Omai mine are extremely important to the Government of Guyana, which holds a 5% share in the mine[388].

In addition to the integrity of the justice system, however, an equally important issue in assessing the adequacy of the alternative forum is whether that forum affords the plaintiff the remedy he has come to court to obtain. With respect to the *Cambior* case, there are obvious and important differences between the procedures used by the courts of Guyana compared to the courts of Quebec. First, Guyanese law does not currently recognize the specific type of action taken in *Cambior*, the "class action". Instead, the Guyanese system provides for a "representative action", which is quite different than the class action in several important respects. For example,

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385 *Supra*, note 278, par. 14.
386 *Id.*
387 *Supra*, note 88, 1085 and 1086.
388 *Op. cit.*, note 251, p. 3.

Guyana's rule on representative actions, modelled closely on the British rule[389], requires that all the applicants share "the same" interest in the litigation[390], whereas the Quebec class action allows "similar or related" interests among members of the class[391]. This is an important distinction, since British case law, which frequently serves as a source of law for Guyanese jurists, has taken a very strict approach to this distinction, essentially rejecting representative actions in which there was no exact identity of interest among the plaintiffs[392]. Further, the Guyanese representative action requires each plaintiff to prove the damages caused by the defendant[393]: damages may not be awarded to a representative plaintiff on behalf of members of the class[394].

Many of these distinctions were expressly recognized by the Court in *Cambior*, which responded to Cambior's claim that the representative action was essentially the same as a class action by

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389 R.S.C., Order 15, Rule 12. The British rule also does not provide for a class action procedure, though it is currently under consideration. See e.g.: J. BURNETT-HITCHCOCK and S. BURN, "Class Action – A Radically Different Approach to Handling Multi-party Actions is Outlined in a New Law Society Report", (1995) 92 *Law Society's Guardian Gazette* 16.

390 Order 14, Rule 8 of the *Rules of the High Court of Guyana*. Maughan J. also discusses this distinction, *supra*, note 11, 31.

391 Art. 1003(a) *Code of Civil Procedure* of Quebec, R.S.Q., c. C-25.

392 See e.g.: *Markt & Co.*, v. *Knight Steamship Company*, (1910) 2 K.B. 1021; *Consorzio del Prociuto di Parma* v. *Marks & Spencer PLC*, (1991) R.P.C. 351 (C.A. Civil Div.). Maughan J. dismissed this concern by observing that "No proof was made whether the High Court of Guyana would interpret Order 14, Rule 8 liberally or restrictively." He also, however, observed that very little case law exists in Guyana on this point: *supra*, note 11, 32. This would seem to point toward an even greater likelihood that the British cases would inform the interpretation of the Guyanese rule.

393 *Id.*

394 This point is among those addressed by British authors in an article lamenting the fact that the U.K. allows representative actions but not class actions. The authors also argued that: "The representative of the class may settle the action to the possible detriment of the members represented as there is no provision for the supervision necessary to make the representative truly accountable. The procedure does not therefore provide the necessary access to the courts for large numbers of potential litigants." R. CAMPBELL and W. MORRISON, "Class Actions" (1987) 84 *Law Society's Guardian Gazette* 2583-2585.

stating that, "the Court is not satisfied on the proof that this is so"[395]. Despite this recognition, however, the Court took a position closely resembling that of the U.S. District Court in *Union Carbide*[396], and consequently attached very little importance to this fact. The Court stated: "If the door to the representative action is closed to some or all [of the plaintiffs], they still have the right to institute individual actions against Cambior before the High Court of Guyana and make whatever proof is required by the laws of Guyana to establish Cambior's fault, their damages and causality"[397]. This, however, is cold comfort, at best, to many of the plaintiffs, who are poor and whose residence in remote parts of the Guyanese jungle make these tasks extremely burdensome[398]. Further, this pronouncement establishes an extremely low threshold for "justice", one which we believe is much less preferable than the requirement of "*substantial* justice", above and beyond a *de minimus* level, currently used in the U.K.[399]. In our view, then, the Court paid insufficient attention to the important implications stemming from the unavailability of the class action in Guyana, especially in light of the special context of the capacities of the plaintiffs. We submit that the alternative forum contemplated in article 3135 C.c.Q. *must*, among other things, be a forum which has authority and capability to hear the *specific* type of action introduced by the plaintiff.

With respect to the Court's analysis of the adequacy of the alternative court, then, we believe that the Superior Court should have taken up the question of its adequacy at the outset of the *forum non conveniens* inquiry, and that it could have, and should have, stopped its analysis at that point by concluding that there *was* no adequate alternative court available.

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395 *Supra*, note 11, 31.

396 *Supra*, note 7, 851. The Court in Union Carbide essentially took the view that unless the deficiency in the remedy available in the alternative forum amounts to "no remedy", then the difference between the two remedies should not be determinative.

397 *Supra*, note 11, 33.

398 The claimants have not been successful in trying to launch a representative action in Guyana due to more fundamental problems of procedure. See Section IV, C, below.

399 See e.g.: *Connelly* v. *RTZ Corp.*, *supra*, note 24, 346; *de Dampierre* v. *de Dampierre*, *supra*, note 25, 11 and 12.

### 3. The Importance the Court Attributed to Certain Interest Factors

As previously suggested, in any *forum non conveniens* inquiry undertaken according to the theory of "exceptionality" proposed above, certain factors should be given little or no value, in most cases. In our opinion, the court in *Cambior*[400] erred in the importance it attributed to a number of these factors.

#### a. Characteristics of the Parties, Location of Witnesses and Location of the Evidence

We have already commented disapprovingly of the lack of importance given by the courts generally, to the domicile of the defendant, thus we will not repeat here the arguments made above[401]. Rather, we will focus here on *Cambior*'s approach to the nationality of the plaintiff and the residence of the witnesses.

With respect to the **treatment of plaintiff's nationality**, it seems clear that while the Court refrained from any express reference to the Guyanese citizenship of the plaintiffs represented, it obviously gave the factor important consideration. In fact, the Court without saying as much, followed the well-known U.S. *forum non conveniens* case, *Piper*[402], very closely and in fact, cited *Piper* for this purpose[403]. It will be recalled that *Piper* discriminates against foreign plaintiffs, who wish to use the U.S. courts to redress injuries suffered abroad, by imposing a heavy burden on them to convince U.S. courts that they are the most appropriate fora.

In our opinion, the court in *Cambior* did what many American courts have done since *Piper*: it looked to "residency" abroad as an indication of perceived inconvenience. The message of *Piper* and *Cambior* is that American and Canadian Courts are for Americans and Canadians, respectively[404]. This type of approach is clearly in contradiction to the Quebec version, in that the Quebec's *forum non*

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400 *Supra*, note 11.
401 *Supra*, Section V, D, 1, b.
402 *Supra*, note 53.
403 *Supra*, note 11, 17 and 18.
404 For a discussion of potential problems in U.S. constitutional and federal law with respect to treating foreign plaintiffs differently in *forum non conveniens* cases, see e.g.: W.R. REYNOLDS, "The Proper Forum for a Suit: Transnational *Forum Non Conveniens* and Counter-Suit Injunctions in the Federal Courts", 70 *Tex. L. Rev.* 1663, 1691-1696 (1992).

*conveniens* provision is located in a section of the Code which essentially prohibits such discrimination. It was clearly in the mind of the Legislator, in formulating the provisions of Book Ten, in which article 3135 C.c.Q. is found, to avoid anything which could be construed as discriminatory, and many of the rules therein reflect this intention either directly or indirectly[405]. These considerations justify our conclusion that, under Quebec law, the weight given to nationality as a factor in the *forum non conveniens* analysis should be very slight. Indeed, it may be questioned whether any weight should be given to it at all. Non-residents in this globalized world should not be forced to choose their forum on the basis of any transnational allocation of responsibility.

With respect to the **residence of the witnesses and location of evidence**, these elements were, as noted earlier, more important in the 1950's, before modern technology gave us faxes, videocassettes, and economic air travel. For purposes of a trial proceeding in *Cambior*, the physical presence in Quebec of all of the witnesses would not have been necessary. In fact, one of the primary purposes of a class action is to avoid bringing in all the victims. In terms of evidence, it is true that the location of the mine in Guyana was significant. Much of the evidence with respect to the design flaws in the dam, however, was in the form of letters, papers and reports, all things easily transportable through one of the modern methods mentioned earlier. As in the case of the residence of the witnesses, the weight given to the location of evidence generally should be minimal.

Another issue which was important to the *forum non conveniens* analysis, and which involves the characteristics of the parties, is the question of whether Cambior had effective control over O.G.M.L. with respect to the design, building, maintenance and operation of the dam at the mine in Guyana. If the plaintiff, R.I.Q., was correct in its pretensions that Cambior did, in fact, exercise effective control over O.G.M.L. and that some of the decisions leading to the damage of the dam were made in Quebec, then this contributes to the argument that the defendant is located in Quebec and thus, under traditional civil law rules, should be vulnerable to suit in his own domicile. While it is not appropriate here to examine the details of the arguments in this particular case[406], it is important to recognize

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405 See e.g.: J. TALPIS and J.-G. CASTEL, *op. cit.*, note 120, 816, par. 30.

406 *Cambior* made proof to the contrary: see *supra*, note 11, 27.

that the relationship between parent corporations and their subsidiaries is one that is frequently raised in *forum non conveniens* cases[407], and hence deserves further examination.

**b. The Law Applicable to the Dispute**

In *Cambior*, the court argued that if foreign law is applicable, then the foreign court is more convenient than the Quebec court otherwise having jurisdiction. We must take Maughan J., and other honourable members of the Quebec courts who have viewed choice of law as important, to task for this assertion. Applied as generally as it has been, this line of thinking has the potential to weaken the whole system of private international law. The Quebec courts *do* apply foreign law with some regularity, and under article 2809 C.c.Q., proof of foreign law can now be made very easily. While it goes without saying that any court will find it easier to apply its own law, private international law cannot allow rules which place "what is easy" over what is required by the conflict rules or other principles. The conflict rules in the Code define many situations where Quebec courts must apply foreign law. Only very rarely should a court, applying an exception like *forum non conveniens*, second-guess or derogate from this determination.

**c. Overriding Public Interest of the State**

Just as with Canadian international commitments on human rights, Canadian international commitments on environmental protection should also be treated as overriding public interests of the state. Thus in our view, the Court could have considered, as within its analysis of the "interests of justice" criterion, a public interest in deterring Canadian corporations from engaging in harmful conduct abroad, and in furthering protection of the international environment. Again, this approach would be possible even though the text of article 3135 C.c.Q. implicitly speaks to "private" interests, because the jurisprudence in Quebec clearly supports consideration of "the interests of justice", which can easily be seen as including the respecting of international agreements.

Such an approach has already been applied by the Supreme Court of Canada, which reaffirmed the importance of making Canadians accountable for environmental violations in other

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407 See e.g.: *Union Carbide*, *supra*, note 7; *Sithole*, *supra*, note 28.

countries when it refused to hear an appeal of a case from the Ontario Court of Appeal, *United States of America* v. *Ivey*[408], which had upheld a U.S. judgment ordering Canadian defendants to pay the cost of cleaning up a hazardous waste site in Michigan.

The forum's overriding public interest may also be defined more broadly, since countries share a global interest in the enforcement of laws which protect the global environment. Again, as a U.N. member, Canada operates under the influence of a number of multilateral instruments on the environment, including the *Stockholm Declaration on the Human Environment*[409], which has been described as the "basic charter laying down the foundation" of international environmental law[410]. Principle 21 of the *Declaration*, considered by many to represent an existing rule of customary international law, could perhaps serve as the basis for an argument that states do indeed have environmental obligations outside their own territory, at least to the extent that they exercise control over environmentally injurious conduct[411]. Principle 21 states:

> *States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction* ***or control*** *do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.*[412]

Similarly, Article 2 of the *Rio Declaration on Environment and Development*[413], signed by 130 countries at the Earth Summit, including Canada, provides that: "*States have* [...] *the responsibility to ensure that authorities under their* [...] *control do not cause damage to the environment of other states.*" This statement supports Quebec's interest in denying dismissal of a motion for *forum non*

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408 (1996) 30 O.R. (3d) 370 (C.A.); Lv. to appeal ref'd, May 29, 1997, S.C.C. Bulletin, 1997, p. 687.

409 U.N. Doc. A/CONF. 48/14/Rev. 1 (1973); (1972) 11 Int. Leg. Mat. 1416.

410 H.M. KINDRED (ed.), *op. cit.*, note 361, p. 759.

411 *Id.*, p. 17 and 18.

412 *Supra*, note 409, emphasis added.

413 Agenda, Item 9, 1, U.N. Doc. A, conf. 15/5/Dec. 1992.

*conveniens* in order to remedy environmental damage caused by an entity within the control of Quebec courts.

It could also be argued that Canadians surely have a strong interest in remedying harms suffered by indigenous peoples. In Guyana, many of the plaintiffs who suffered various harms – physical, economic and even social and psychological – as a result of the damage to the Essequibo River were indigenous people. The damage done may well affect their health and way of life for years to come. It is our contention that the Court in *Cambior* could have looked at the case from the larger context of impacts on the well-being of indigenous peoples. It chose, however, not to do so.

### 4. The Burden of Proof and Who Bears It

With respect to the burden of proof and the question of who bears it, Maughan J. clearly was influenced by the way in which the burden of proof is shifted to the plaintiff in the English formulation of *forum non conveniens*. This was wholly inappropriate for two reasons. First, the Quebec version encapsulated in article 3135 C.c.Q. contains nothing which could be construed as an instruction to shift the burden to the plaintiff in the case where the defendant has demonstrated *prima facie* that a more appropriate forum is available. This is the test according to the English case, *The Spiliada*[414]. Second, Maughan J. neglected to observe that in articulating the proper test in Canada for *forum non conveniens*, Sopinka J., in *Amchem Products*[415], expressly rejected the two-step formulation in *The Spiliada* and adopted instead a single-step global analysis of factors in which the burden of proof is generally borne by the moving party and there is no shifting of the burden to the plaintiff later in the analysis[416].

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414 *Supra*, note 13.

415 *Supra*, note 34.

416 A more detailed discussion of these points is presented above, on p. 779 and 780.

### C. Conclusion on *Cambior*

We believe that the *Cambior* decision[417], like numerous other Quebec decisions which misapply article 3135 C.c.Q., contains a number of flaws that demonstrate how the Quebec version of *forum non conveniens* has been ignored. First, the lack of importance given to the domicile of the defendant is, as we emphasized earlier, simply not in keeping with the civil law tradition of giving domicile a central role in matters of jurisdiction. The Court in *Cambior* did not acknowledge the importance of the defendant's domicile in Quebec and, in fact, downplayed its importance greatly. In so doing, the Court turned its back on a fundamental principle in civilian jurisdictions: *actor sequitur forum rei.*

Under the theory we proposed earlier, the fact of the defendant's domicile in Quebec, plus "something more" should lead a court to refuse to displace the plaintiff's choice of forum. In our view, there was clearly "something more" in *Cambior* because, in addition to the fact that the defendant company's principal officers resided in Quebec, there were acts carried out and decisions made in Quebec which very likely influenced O.G.M.L.'s activities in Guyana, specifically, the construction, management and use of the dam which failed and led to the spill of mining wastes. Furthermore, the plaintiffs' lawyers, who took the case *pro bono*, were located in Quebec. Thus, in our view there were plenty of factors that militated towards refusal of the defendant's motion for dismissal. Furthermore, the possibility of an overriding state interest, interpreted narrowly *or* broadly, was not even entertained. Had it been considered, this could have provided further support for refusing to transfer the litigation to the jurisdiction of a foreign court.

The *Cambior* decision, then, like many others before it, treated the codal provision on *forum non conveniens* as if the word "exceptional" were not even there. One wonders exactly whether judgments such as this would look any different if they had been based on article 3135 C.c.Q. *without* the "exceptional" requirement.

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417 *Supra*, note 11.

As a postscript on this case, it is interesting to note that the case seems to be following the fate of many *forum non conveniens* cases which are ultimately sent to foreign jurisdictions. The case, which had been picked up by Guyanese lawyers and brought before the courts of Guyana never "made it out of the starting gate", with respect to a hearing on the merits. Unfortunately for the plaintiffs, the case was dismissed in March 2000 on the basis of a defect of service for which no cure was allowed (leave to serve writ outside of Guyana, upon Cambior, had not been obtained). This is especially interesting in light of the fact that Cambior had indicated, in its arguments before the Quebec Court, that it would accept jurisdiction in Guyana, while maintaining its claim of nonliability. In fact, Maughan J.'s decision to dismiss the case was greatly influenced by this concession and the dismissal granted was nearly tantamount to a conditional dismissal. Furthermore, Maughan J. made his judgment granting the declinatory exception conditional upon Cambior's undertaking that it would not, in a Guyanese court, invoke any ground based on *forum non conveniens*.

Interestingly enough, in the two months between the hearing of the *Cambior* case – a hearing which lasted twelve days – and the delivery of Maughan, J.'s decision, the Court of Appeal in England rendered a decision in the opposite direction, made on the basis of very similar facts. In *Lubbe*[418], the Court of Appeal referred to this kind of situation as "forum shopping in reverse" and allowed an appeal of a judgment staying proceedings on the grounds of *forum non conveniens*[419].

Additionally, in February 1999, the English Court of Appeal rendered a similar judgment in favour of foreign plaintiffs in *Sithole*[420]. As in *Lubbe*[421], this situation involved a plant operated in South Africa by a wholly owned subsidiary of an English corporation.

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418 *Supra*, note 28. The facts in *Lubbe* are described above on p. 792.
419 *Id.*, 10.
420 *Supra*, note 28. The facts in *Sithole* are described above on p. 792.
421 *Supra*, note 28.

## VII. A New International Model for *Forum Non Conveniens* in the *Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*

As anticipated, there really was no choice but to include a *forum non conveniens* doctrine in the new *Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*[422] (hereinafter *Draft Convention*) of the Hague Conference, adopted on 30 October, 1999. The *Draft Convention*, which was developed to facilitate global uniformity in jurisdiction and foreign judgments, sets forth its own version of *forum non conveniens* in Article 22, styling it "Exceptional circumstances for declining jurisdiction", and adopting an autonomous concept to avoid identification with a particular system of law[423]. While this version should probably be satisfactory to the common law jurisdictions and while it conforms to that which is currently applied by the Quebec Courts, the question remains: is it better than the Quebec version as intended by the Legislator in 1994, and, if not, is it an acceptable compromise? The article provides:

> *Article 22 Exceptional circumstances for declining jurisdiction*
>
> 1. *In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 13, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at time of the first defence on the merits.*
>
> 2. *The court shall take into account, in particular-*
>
>  a) *any inconvenience to the parties in view of their habitual residence;*
>
>  b) *the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;*
>
>  c) *applicable limitation or prescription periods;*

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422 Web site: [http://www.hcch.net/e/conventions/draft36e.html].

423 See: G. SAUMIER, *loc. cit.*, note 1.

*d) the possibility of obtaining recognition and enforcement of any decision on the merits.*

*3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.*

*4. If the court decides to suspend its proceedings, under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, itshall make such an order if the other court has jurisdiction only under Article 19, unless the defendant establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced.*

*5. When the court has suspended its proceedings under paragraph 1,*

*a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or*

*b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.*

In our view, although the *Draft Convention* version does not go far enough to eliminate the evils of *forum non conveniens* (e.g., uncertainty as to where the battle will be fought, litigating where to litigate, etc.), it is a good beginning. Hopefully, a more restrictive version will be negotiated at the Diplomatic Conference, scheduled to begin in June 2001.

Although we approve of the "exceptional circumstances" qualifier in Article 22, par. 1, which is somewhat similar to the Quebec version, as well as the elimination of any inquiry as to the appropriateness or convenience of the Court in the case of a choice of court (art. 4), consumer contract (art. 7), individual employment contract (art. 8), and in specific cases of exclusive jurisdiction, we would have preferred to see an elimination of such inquiry also in those situations where the defendant's domicile is in the State of the court seized (perhaps with the qualification that, as we have suggested above, some minimal connection beyond domicile is also required). A similar proposal was put forward in Working Document No. 240 of the Drafting Committee, and Proposal No. 248 of France and Germany.

Where a *forum non conveniens* inquiry is not precluded, we also approve of the language in Article 22 whereby, for a *forum*

*non conveniens* motion to succeed, the Court seized must be "clearly inappropriate", and the alternative Court must be "clearly more appropriate". Together, with the requirement that the application be made at an early stage, and the mechanisms included in paragraphs 4 and 5 of Article 22 seeking to limit recourse to the doctrine, this language should reinforce the Draft's "exceptional circumstances" guideline and discourage defendants from challenging what is otherwise a legitimate jurisdiction established under the convention.

However, even with such a guideline and the restrictive language of "clearly inappropriate" and "clearly more appropriate", in those cases where no exclusion takes place and a *forum non conveniens* inquiry *does* go forward, the open-ended list of factors that a court might take into account shifts the restrictive version of the draft back to the liberal *forum non conveniens* doctrine of the common law jurisdiction. This becomes all the more serious when one examines the rather broad jurisdictional bases set forth in the *Draft Convention*. One would have expected that the civil law jurisdictions would at least have been able to negotiate a list of criteria which the courts would *not* be able to consider (perhaps together with an exhaustive positive list), as we have proposed.

As a final observation, we approve of Article 27, par. 3 of the *Draft Convention*[424] which differs from Quebec law which, as mentioned earlier, allows a Quebec Court faced with a request to enforce a foreign judgment to evaluate the appropriateness and convenience of the authority of the foreign court through application of articles 3164 and 3168.

> *27 (3). Recognition or enforcement of a judgment may not be refused on the ground that the court addressed considers that the court of origin should have declined jurisdiction in accordance with Article 22.*

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[424] *Op. cit.*, note 422.

In our view, in the context of an international convention in which the bases for jurisdiction are not tenuous, the *Draft Convention*'s rule on *forum non conveniens* makes good sense.

## Conclusion: Reformulating *Forum Non Conveniens* in Quebec

We argued earlier that the Quebec jurisprudence on *forum non conveniens* has strayed far from the Legislator's original intention in introducing article 3135 C.c.Q. into Quebec law. Beyond undertaking the kind of substantial reformulation of *forum non conveniens* analysis in judicial practice that we have suggested in this paper, there are three legislative options that might be considered: repeal of article 3135 C.c.Q., reformulation of the jurisdictional rules in Book Ten of the C.c.Q., or integration of the rules which will eventually be adopted at the Hague Conference.

The first option – to repeal article 3135 C.c.Q. completely – is obviously an extreme solution to the problem we have identified. Repeal seems an unlikely and perhaps counter-productive idea, given the fact that in some limited, truly "exceptional" circumstances, the availability of *forum non conveniens* could prove quite valuable.

The second legislative option – reformulating Quebec's rules on jurisdiction – is oriented toward one of the chief concerns underlying the current use of *forum non conveniens*, forum shopping by foreign plaintiffs. Specifically, if Quebec believes that it is undesirable to allow foreign plaintiffs to sue Quebec domiciliaries for acts done or damage suffered abroad, the Legislator could provide for such a prohibition through a reformulated jurisdictional rule. To do so, however, would require establishing very detailed rules. While this would make the law more predictable, the use of highly detailed rules may well run contrary to the spirit of Quebec's civil law tradition. Furthermore, the decisions of Quebec courts may well, in the long run, provide such rules.

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425 It should be recognized that domestic rules will exist in parallel with the *Convention*'s rules.

The third option is to follow the rules developed at the Hague Conference. To date, the discussions of *forum non conveniens* have pointed toward the adoption of a *limited* rule. While it is always possible, of course, to employ domestic rules in those situations in which the proposed *Convention* does not apply[425], it may well be generally preferable, for reasons described in the preceding section, for Quebec to reformulate its *forum non conveniens* rule to follow more closely the version presented in the *Draft Convention*[426].

In the interim, however, we suggest that the courts of Quebec endeavour to redefine article 3135 C.c.Q. in the jurisprudence so that its threshold characteristic – exceptionality – is clearly respected and understood[427]. This implies prohibiting *forum non conveniens* inquiries by the courts altogether in some cases, and greatly restricting its application in others. By taking such steps now, perhaps we will be able to avoid asking the question a few years from now, "[E]xactly *what* is exceptional about the exceptionality requirement in article 3135 C.c.Q.?" It is our hope that by reigning in the use of the *forum non conveniens* recourse made available in article 3135 C.c.Q., the courts will help push the pendulum back so that the provision can take its place in Quebec's civil law as the *exceptional* rule that it was meant to be.

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426 *Op. cit.*, note 422.

427 This is not imply that all judges are not interpreting the article pursuant to the legislator's intent. We totally endorse the approach taken by Nicole Duval-Hessler, J. in the case of *Spar Aerospace Ltd.* v. *American Mobile Satellite Corp.*, (1999) Q.J. 4580, J.E. 99-0973, reversed on appeal on other grounds (2000) J.Q. 1717, J.E. 00-1597; leave for appeal to Supreme Court was Granted on April 19, 2001.