Canadian Yearbook of International Law
Annuaire canadien de droit international
(2024), 1–31 doi:10.1017/cyl.2024.5

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Canadian Cases in Private International Law in 2023

Jurisprudence canadienne en matière de droit international privé en 2023

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1. Jurisdiction / Compétence des tribunaux

A. Common law and federal

i. Jurisdiction in personam

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

Sinclair v Amex Canada Inc, 2023 ONCA 142[1]

The plaintiffs were injured in a water taxi accident while on holiday in Italy. They brought an action in negligence against defendants Amex Canada Incorporated, as the provider of travel-related services, along with three named Italian companies enlisted to provide transport services during the trip. The Italian defendants unsuccessfully challenged the jurisdiction of the Ontario Superior Court of Justice before a motions judge. They were, however, successful on appeal in securing a stay of proceedings.

The sole issue raised on appeal was whether the fourth presumptive connecting factor from *Club Resorts v Van Breda*[2] gave the Ontario Superior Court of Justice jurisdiction over the Italian defendants. Justice Ian Nordheimer, writing for the majority, found that the motions judge failed to properly apply the *Van Breda* test. He noted that, generally, authorities subsequent to *Van Breda* had failed to apply its reasoning with the intended care and rigour. The analysis in *Van Breda* began with the real and substantial connection test. That test was focused on preventing jurisdictional overreach, placing limits on the assumption of jurisdiction by a province's courts. The application of the presumptive connecting factors was to be viewed from the perspective of the defendant disputing jurisdiction. A presumptive connecting

[1]Leave to appeal to SCC requested (2 May 2023).
[2]2012 SCC 17, [2012] 1 SCR 572 [*Van Breda*].

factor for one defendant did not automatically mean that the court could avoid looking at the jurisdiction issue from the perspective of the other defendant disputing jurisdiction. The failure to examine jurisdiction from the position of the Italian appellants constituted an error. While Amex Canada could not contest the jurisdiction, given its connections to Ontario, other defendants with some connection to the subject matter of the claim were not necessarily subject to that same jurisdiction. A presumptive connecting factor had to attach to each individual defendant.

Nordheimer JA dismissed the respondents' claim that the *Van Breda* approach to jurisdiction had been significantly broadened by the subsequent decision in *Lapointe Rosenstein Marchand Melancon LLP v Cassels Brock*.[3] That case was based on different facts. Nothing in the contractual relationships between the respondents and Amex Canada required the Italian appellants' involvement. *Cassels Brock* did not suggest that the Supreme Court intended to expand the fourth presumptive connecting factor to the extent claimed by the respondents. To do so would be inconsistent with the intention of *Van Breda* meant to limit the territorial reach of the Canadian courts. The Italian appellants did not have any contractual obligations, either directly or indirectly, with the respondents. The contractual arrangements that the respondents had with Amex Canada did not contemplate or require the involvement of the appellants. The appellants could not reasonably be swept into the jurisdictional reach of Canadian courts based solely on the contractual relationship between the respondents and Amex Canada.

Irrespective of the error on the presumptive connecting factors, Nordheimer JA also found the appellants would have rebutted the presumption. The motions judge had failed to consider this second aspect of the jurisdictional analysis. The appellants had rebutted the presumption by demonstrating that the contract between the respondents and Amex Canada had little or nothing to do with the subject matter of the litigation. There was nothing that contemplated the involvement of the appellants. It followed that none of the appellants would reasonably be expected to be called to answer legal proceedings in Ontario. They accepted a task to be undertaken in Italy. The companies were Italian. The driver of the water taxi was an Italian national. Nothing connected the events and appellants to Ontario. The fact that the respondents used a credit card company that happened to carry on business in Ontario for their travel arrangements did not establish a relationship between the respondents and appellants to support jurisdiction.

In her concurring decision, Justice Alison Harvison Young would have allowed the appeal solely because the presumptive connecting factor was successfully rebutted. She departed from Nordheimer JA's initial analysis that it was an error for the motions judge to find a presumptive connecting factor to Ontario. She noted that courts have taken an increasingly functional approach to the question of whether there is a contract "connected to" the dispute. There was, however, little case law considering the question of the considerations applicable to the rebuttal of a presumptive connecting factor. The issue is whether, adopting a broader approach, there exists a more relevant presumptive connecting factor at the rebuttal stage. A functional reading of the motions judge's reasons demonstrated that he did not link the plaintiffs' claim against the Italian companies by establishing jurisdiction against a different party. There was an Ontario contract connected to the dispute. For

[3]2016 SCC 30, [2016] 1 SCR 851.

Harvison Young JA, the central issue was the successful rebuttal of this presumptive connecting factor.

Jurisdiction — non-resident defendant — claim for injury to person or damage to property or reputation — jurisdiction declined

778938 Ontario Limited v EllisDon Corporation, 2023 ONCA 182

This appeal concerned the potential overlap of subject matter jurisdiction in Ontario of a proceeding previously commenced by the same parties in Nova Scotia. While the Ontario Court of Appeal agreed with the motions judge's conclusion that Ontario had subject matter jurisdiction, it found Nova Scotia was clearly the more appropriate forum — this time staying the Ontario action on an interim basis to determine the status of the Nova Scotia proceedings.

The action arose out of a condominium construction project in Halifax, Nova Scotia. The appellant, Ontario-based EllisDon Corporation (EllisDon), was contracted to provide construction management services for the project. The respondents were sued in Nova Scotia by a subcontractor alleging mismanagement and delay and commenced a third-party action against EllisDon seeking contribution and indemnity for any damages awarded. EllisDon counterclaimed, alleging the issues were not limited to a single contractor but the entire project. The respondents delivered a defence to the counterclaim but then also commenced an action involving the same Halifax project against EllisDon in Ontario.

Jurisdiction *simpliciter* was clearly made out by the real and substantial connection between the subject matter of the action and the forum — notably, the presence of the parties and a contract signed for the project in Ontario. The alleged breach of contact, and negligent supervision, was asserted to have taken place in Ontario as well as in Halifax. The appeal therefore centred on the *forum non conveniens* analysis. Considering the *Van Breda* factors,[4] the Ontario Court of Appeal recognized that many of the factors equally favoured both jurisdictions. It nonetheless agreed with EllisDon that the determination turned on the inevitable risk of inconsistent findings caused by a clear and unnecessary multiplicity of proceedings. EllisDon's claim went beyond specific unpaid invoices to the respondents' actions and its entire contractual relationship for the Halifax project. The allegations in the respondents' third-party claim in Nova Scotia mirrored those in the Ontario. All principal issues between the respondents and EllisDon in both actions overlapped, leading to a likelihood of inconsistent findings. In the appellate judge's view, it was difficult to agree with the motions judge's conclusion that case management could avoid that risk.

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

Intercap Equity Inc v Aescape Inc, 2023 ONSC 3148

The defendant, Aescape Incorporated, was unsuccessful in a motion contesting Ontario's jurisdiction to hear the plaintiff's claim that it breached an oral agreement

[4] *Van Breda*, *supra* note 2.

providing an option to invest. Based in Ontario, the plaintiff, Intercap Equity Incorporated, provided merchant banking and other investment services. Aescape was a technology start-up that developed robotic massage technology and was incorporated in Delaware, United States.

At issue was whether the contract between them was concluded sufficiently in Ontario to establish the presence of a presumptive connecting factor.[5] Aescape first argued that no contract was formed due to insufficient evidence of consideration. The court concluded that, while there were disputed contractual issues in the case, including whether there was agreement on all material terms, the fact that such issues existed did not mean Intercap had failed to reach the low threshold of a good arguable case that the contract was formed. There was evidence from witnesses and contemporaneous documents to support Intercap's case. Aescape also argued that, even if a contract was formed, it was not formed in Ontario. The court rejected this position, noting that, even if there was some conflict, the evidence was sufficient to reach the low threshold requiring that the offer resulting in the alleged agreement was made in Ontario.

Aescape was also unable to rebut that presumption. The court found that the link to Ontario was not weak. Rather, the entire lawsuit concerned an Alleged Option Agreement with evidence supporting the agreement having been made in Ontario. Intercap was solicited in Ontario, conducted negotiations from Ontario, and management travelled from Ontario to New York to conduct further due diligence on the condition that it was guaranteed an option to purchase in the funding round. Intercap gave evidence that the acceptance of the offer was received in Ontario. This was sufficient to ground a real and substantial connection to Ontario.

Turning to the question of *forum non conveniens*, the court noted that, while the witnesses (three from Ontario and one from New York) favoured Ontario, with the availability of zoom, this factor was not strong in the current context.[6] Since the contract was made in Ontario, however, there was a strong argument to support that Ontario law applied to the Alleged Option Agreement. The fact that the proceedings would ultimately need to be enforced in New York was not a juridical advantage or inefficiency because it was the case in many instances. Testimony could be conducted over zoom. There was nothing more or less significant, efficient, or fair about hearing the matter in either New York or Ontario. For that reason, the proceedings in Ontario could proceed as New York was not clearly the more appropriate forum.

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

Lantronix Canada ULC v Vrije Universiteit Brussel, 2023 BCSC 1218

The defendant, the University of Brussels, entered into an agreement with the plaintiff, Lantronix Canada, for the use of its computer software in exchange for

[5]Per *Van Breda*, *ibid* at para 100.

[6]This analytical approach is consistent with an emerging trend in judicial reasoning in recent case law with the accessibility of zoom making the location of witnesses less significant in the *forum non conveniens* analysis. See, example, discussions in *Kore Meals LLC v Freshii Inc*, 2021 ONSC 2896; *Koslik's Mustard v Acasi Machinery Inc*, 2022 ONSC 2356.

the payment of a licensing fee. The court dismissed the defendant's jurisdictional challenge. The plaintiff's reliance on a forum selection clause was not determinative. Since the University of Brussels challenged the very existence of the agreement that the plaintiff said contained the forum selection clause, the court was not convinced that it should, on a preliminary application and the state of the evidence, address whether the parties' agreement included this clause and then determine its enforceability.[7]

Turning to whether there was a reasonable and substantial connection consistent with the *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*),[8] the court found that the plaintiff had demonstrated a good arguable case that the contractual obligations to be performed under the parties' agreement were to be performed, to a substantial extent, in British Columbia. The plaintiff was based in Vancouver, British Columbia. Whenever the university had questions about the software and its use or otherwise needed assistance, it contacted and liaised with the plaintiff's agents in its Vancouver offices. Any revisions or updating of the software was done from those same Vancouver offices. The delivery of the product and services that the plaintiff was obligated to provide to the university under the agreement all originated from British Columbia. Even though the university used the software at its locations in Belgium, the court was not convinced that this constituted a substantial portion of the parties' obligations under the agreement.

The university also failed to rebut the presumption of a real and substantial connection.[9] While the university's use of the software in Belgium was key to the plaintiff's action, the BC Supreme Court was satisfied that the action principally concerned the plaintiff's business in British Columbia of selling, servicing, and maintaining the software as well as the interpretation of the terms of their agreement for its use. All of the *forum non conveniens* factors were either neutral (including avoiding the multiplicity of proceedings and enforcement) or supported British Columbia as the appropriate forum. Belgium did not enjoy a significant advantage over British Columbia, making it the preferred forum for the prosecution of the plaintiff's claims against the university.

Jurisdiction simpliciter — *non-resident defendant — declining to address arbitration or jurisdiction*

Jordan v Bains, 2023 MBCA 102

The defendants appealed the dismissal of their motions for a stay of proceedings. The motions judge declined to deal with the issues of arbitration and jurisdiction because he was of the view that they should be dealt with "in the broader context of the trial." The appeal was granted, and the matter returned to a trial court for new hearings before a different judge. The Manitoba Court of Appeal reinforced that jurisdiction must be determined before a court has the authority to take any further steps in the matter. It was an error of law for the motions judge to order a trial before determining jurisdiction.

[7]See *Douez v Facebook Inc*, 2017 SCC 33.
[8]SBC 2003, s 39(c) [*CJPTA*, BC].
[9]*Ibid*, s 10.

While the court agreed that in these circumstances it had jurisdiction either to order a new hearing or make the order the motions judge should have, the facts of the case necessitated a new hearing. The determination of whether a court has jurisdiction *simpliciter* to continue a proceeding requires it to make factual findings, to weigh evidence and competing factors and/or to make a discretionary decision on having established jurisdiction. That was not done in this case. Instead, the motions judge failed to make the required findings of fact, discuss or review the principles related to the tests that he was bound to apply, or weigh the factors relevant to the issue of jurisdiction *simpliciter*. The Court was unable to carry out its deferential appellate role in reviewing this exercise of discretion.

ii. Declining jurisdiction *in personam*

Forum selection clause — stay of proceedings

QSL Canada Inc v Cliffs Mining Company, 2023 FC 1429

The plaintiff, QSL Canada Incorporated, provided stevedoring services at the Port of Quebec to both defendants: Cliffs Mining Company and United States Steel Corporation (US Steel). The action arose from a resulting dispute between them. US Steel brought this motion seeking to enforce what it claimed was the applicable forum selection clause requiring any dispute between the parties to be brought before courts in Pennsylvania, United States. Justice Peter Pamel dismissed the motion because he was not convinced that the forum selection clause was binding or that Pennsylvania courts were a more appropriate forum.

In addressing the issue of the forum selection clause, Pamel J noted that US Steel had a long-standing business relationship with QSL, having shipped cargo through its facilities since 2003. US Steel pointed to the forum selection clause in favour of Pennsylvania courts as incorporated by reference in the stevedoring contract. By contrast, the plaintiff disputed that clause, highlighting instead the provision in its standard terms and conditions for courts in Quebec City with Canadian jurisdiction over maritime law. According to the evidence, in Pamel J's assessment, US Steel conducted itself as if the parties were bound by the plaintiff's proposed agreement, and, at no time, did US Steel either object to, reject, or otherwise comment on the terms of the proposed agreement, including the incorporated standard terms and conditions, which included the plaintiff's applicable law and jurisdiction clause. In fact, the plaintiff highlighted a demand letter received from US Steel in late February 2023 threatening legal action in Canada notwithstanding that the US Steel Governing Law clause only provided for an option to sue within Pennsylvania, supporting the claim that US Steel knew it was bound by the plaintiff's applicable law and jurisdiction clause and Canadian jurisdiction. Evidence confirmed that the parties only negotiated and agreed upon commercial terms, and neither representative turned their minds to any other aspect of the stevedoring agreement, especially the other party's forum selection clause.

Pamel J noted that any reasonable assessment of the intention of the parties during the history of their relationship in constituting the terms of their stevedoring agreement and its forum selection clause was merely speculation and conjecture. He was not convinced, on the evidence, that US Steel's governing law clause had been

validly incorporated into the stevedoring contract binding on the parties. The determination of what constituted the terms and conditions of the stevedoring contract binding on the parties — in particular, its governing law and jurisdictional provisions — would have to be determined at a later stage.

Pamel J also dealt with the issue of *forum non conveniens* as pleaded by the parties, despite acknowledging with the applicable forum selection clause still in dispute that the analysis might be rendered academic. Turning to the relevant connecting factors,[10] advantages conferred on the plaintiff with the choice of forum and the interests of justice favoured the court's exercise of jurisdiction. The parties' residence, along with witnesses and experts, was neutral, while US Steel conceded that many of the other factors did not weigh strongly in the analysis. Given the nature of the relief being sought by the plaintiff, US Steel argued that it was the natural plaintiff in the context of the underlying litigation and that allowing the plaintiff to pursue declaratory relief was somehow unnatural. US Steel failed to convince the judge that the circumstances of the case did not permit, at least in principle, the nature of the relief sought by the plaintiff. Pamel J agreed that the nature of the proceedings was a consideration when it came to considering *forum non conveniens* but only where the proceedings were improper, which was not the case in this instance.

Arbitration clause — stay of proceedings

Eurofins Experchem Laboratories, Inc v BevCanna Operating Corp, 2023 ONSC 4015

The court dismissed an application to stay proceedings based on an arbitration clause between BevCanna Operating Corp (BevCanna) and the plaintiff, Eurofins. The plaintiff argued that their arbitration clause contained an exception for an action involving unpaid fees. Eurofins executed an agreement for the supply, analytics, and testing of products for compliance with Health Canada regulations. Eurofins maintained that it was not paid for its services on at least twenty-eight invoices.

At issue was the scope of the arbitration agreement entered into between Eurofins and BevCanna. BevCanna took the position that the language "arising out of or in connection with the Contractual Relationship" should be read generously to include claims under the arbitration clause and prevent Eurofins from pursuing the payment of fees by way of legal action. BevCanna further argued that the plaintiff's action went beyond the scope of the exception and brought the claims under the arbitration clause. While there might be a narrow carve out for purely collection matters, in the interests of justice, for the sake of judicial economy, and in the interests of avoiding unnecessary costs and delay, BevCanna submitted that all claims should be stayed in favour of arbitration.

The Ontario Superior Court of Justice nonetheless concluded that the agreement specifically allowed the plaintiff to elect to proceed by way of an action for unpaid fees. Forcing the plaintiff to arbitration on the issue of unpaid fees in that context would undermine the purpose of that exception. The rationale for staying actions in favour of arbitration is to give effect to the agreement between the parties to arbitrate.

[10]Pamel J relied on factors outlined in *Magic Sportswear Corp v OT Africa Line Ltd*, 2006 FCA 284, [2007] 2 FCR 733 at para 92, and *Spar Aerospace Ltd v American Mobile Satellite Corp*, 2002 SCC 78, [2002] 4 SCR 205 at para 71.

It is not a general preference for arbitration. Rather, it is an acknowledgement that parties should be bound by their agreements. Eurofins retained the ability in the context of unpaid fees to avoid unnecessary legal expenses associated with arbitration for simple collection issues when it negotiated the agreement. The agreement specifically contemplated that BevCanna would be responsible for legal expenses associated with an action for the collection of unpaid fees.

Arbitration clause — stay of proceedings — public policy and unconscionability

Lochan v Binance Holdings Ltd, 2023 ONSC 6714

The defendant, Binance Holdings Limited, was unsuccessful in its motion for a stay of proceedings in favour of arbitration. The plaintiffs had commenced a class action against Binance under the *Ontario Securities Act*[11] after its crypto trading website failed to comply with the regulatory requirements of the Ontario Securities Commission, notably in failing to file a prospectus. Binance sought to rely on an arbitration agreement accepted by investors when using the website that set Hong Kong as the arbitral forum. The plaintiffs argued, however, that this agreement should be found void and inoperable on public policy and unconscionability grounds.[12]

Justice Edward Morgan agreed that the arbitration agreement was contrary to public policy. He dismissed Binance's argument that any question of jurisdiction should be determined by Hong Kong law given the choice-of-law clause contained in the agreement. Rather, he reiterated that a public policy issue is Canadian, expressly addressing that what may be valid in a foreign legal system would not be valid and enforceable within Ontario's jurisdiction. The question could therefore not be resolved under the foreign law allegedly violating Canadian public policy. Turning to relevant public policy considerations from *Uber Technologies Inc v Heller*,[13] he addressed the disproportionate costs of pursuing an arbitration claim that would result in "a potentially large and ultimately unknown financial burden to recover a relatively small investment."[14] There was no guarantee of a virtual hearing to offset some of these costs. The relative bargaining power of the parties[15] was also an issue where investors clicked on a standard form arbitration agreement to invest without the opportunity to negotiate. Binance could not require an expensive and inaccessible arbitration procedure without properly disclosing its difficulties.

Similarly, Morgan J determined that the agreement was unconscionable. He rejected Binance's argument that the contractually stipulated laws of Hong Kong should be given primacy over Ontario's regulatory regime since that approach pitted the policy objectives of arbitration, as a consumer-friendly alternative, against the policy objectives of securities legislation. Addressing the broader societal harm in upholding an unfair contract to a vulnerable party, he emphasized that the plaintiff investors signed an unnegotiable "click" contract that buried the details of the

[11]RSO 1990, c S.5, s 133.

[12]Based on *UNCITRAL Model Law on International Commercial Arbitration*, 1985, 24 ILM 1302 [*UNCITRAL Model Law*].

[13]2020 SCC 16 [*Uber*].

[14]*Lochan v Binance Holdings Ltd*, 2023 ONSC 6714 at para 29.

[15]*Uber, supra* note 13 at paras 134–35.

arbitration clause along with the associated logistical complexity and expense of arbitration. Binance designed the contract and engineered the arrangement to take advantage of the complexity hidden behind the benign appearance of an arbitration clause. The result was an informational deficit and inequality of bargaining power.

Arbitration agreement — stay of proceedings — public policy, unconscionability

Spark Event Rentals Ltd v Google LLC, 2023 BCSC 1115

Spark Event Rentals (Spark) purchased a series of Google ads.[16] Spark alleged that Google conspired with Apple Incorporated and Apple Canada Incorporated (Apple) for the price of those ads to be higher than they otherwise would have been. Google successfully brought this application for a stay in favour of arbitration mandated in their purchase agreement with Spark.[17] Apple was not a party to that same purchase agreement but also applied for a stay, claiming that the matters were so intertwined that it would amount to an abuse of process to allow the action to proceed against Apple contemporaneously with the arbitration against Google.

Since the parties agreed that the dispute was subject to the arbitration agreement, the sole question raised was whether that agreement was void as unconscionable or contrary to public policy. The court noted, however, that an arbitrator should have the first opportunity to determine its own jurisdiction.[18] The plaintiff, Spark, challenged the arbitration process on the grounds that the agreement prohibited the company from initiating arbitration and the nature of the action could not be resolved in arbitration as it was cost prohibitive and could not be brought without a class action procedure. Based on an expert interpretation of the arbitration agreement, the BC Supreme Court was not satisfied that a financial barrier existed such that Spark would not have the ability to initiate arbitration.[19] There was no reason to address the unconscionability or public policy arguments.

Spark was also unsuccessful in arguing that the entire dispute could not be resolved within the arbitration process given the need for class action proceedings not permitted in arbitration. Given the flexibility and discretion delegated to the arbitrators, they were best suited to determine the issue. Spark had the financial ability to initiate the arbitration process. If the arbitrators decided that the entire dispute could not be resolved through arbitration, they could determine whether the arbitration is void on unconscionability or public policy grounds. Google was entitled to a stay so the dispute could proceed to arbitration. Spark was granted leave to discontinue the action against Google but to still proceed with the action against Apple, as requested. Apple's application for a stay was considered moot under the circumstances.

[16]At the time of writing, this decision was subsequently affirmed on appeal in *Spark Event Rentals Ltd v Google LLC*, 2024 BCCA 148.

[17]The application was sought on the basis of the *International Commercial Arbitration Act*, RSBC 1996, c 233, s 8.

[18]Relying on *Siedel v TELUS Communications Inc*, 2011 SCC 15 at paras 4, 28–30.

[19]Applying principles from *Uber*, *supra* note 13 at para 47.

iii. Class actions

Jurisdiction simpliciter *found to exist*

British Columbia v Pro Doc Limitee, 2023 BCSC 662

The applicants, Pro Doc Limited (Pro Doc) and the Jean Coutu Group (Jean Coutu), challenged the jurisdiction of a BC court over proceedings under the *Opioid Damages and Health Care Costs Recovery Act* (*ORA*)[20] and the *Class Proceedings Act*.[21] The representative plaintiff alleged that Pro Doc and Jean Coutu were responsible for a tort committed in British Columbia and for restitutionary obligations arising in British Columbia due to their liability under the *ORA*. As a subsidiary of Quebec-based Jean Coutu, Pro Doc manufactured, marketed, and sold opioids in Canada.

The central jurisdictional question was whether there was a real and substantial connection between British Columbia and the facts of the proceeding consistent with the *CJPTA*.[22] The court found that the plaintiff had not established, on the evidence, that Pro Doc and Jean Coutu had a sufficient business presence in British Columbia. Regardless, there was a presumptive connecting factor of a restitutionary obligation or tort committed in British Columbia. Applying principles from *Moran v Pyle National (Canada)*[23] and *Harrington v Dow Corning Corporation*,[24] it was reasonably foreseeable that opioids distributed by Pro Doc and Jean Coutu would find their way indirectly to consumers in British Columbia or be consumed in British Columbia, even if they were only directly distributed to wholesalers or pharmacies in Quebec.

The court also rejected the applicants' argument that the availability of medical information provided online was insufficient to support jurisdiction. A reputable company publishing purportedly useful medical information online should reasonably expect that persons other than Jean Coutu affiliates would access that information and make important health-related decisions about their use of opioid-related medication. There was a good arguable case that the applicants were party to negligently designed opioids and/or misrepresentations about opioids received or acted upon in British Columbia. The court accepted the plaintiff's position based on the evidence that the applicants were involved in a common design to overcome resistance within the medical community to opioids and, therefore, in furtherance of a joint tort in British Columbia for which they were jointly and severally liable under the *ORA*.

In addition, the applicants failed to rebut the presumption of this real and substantial connection. The court was not persuaded that there was no real relationship, or a weak one, between the subject matter of the litigation and British Columbia. The fact that the applicants did not carry on a business in British Columbia was not in itself sufficient. Neither was the fact that the applicants were relatively minor players in the opioid market in British Columbia. Any argument that the potential quantum of liability was not as large as other defendants might potentially raise a *forum non conveniens* argument, but it would not resolve the threshold jurisdictional question.

[20]SBC 2018, c 35 [*ORA*].
[21]RSBC 1996, c 50 [*CPA*].
[22]*CJPTA*, BC, *supra* note 8, s 10.
[23][1975] 1 SCR 393, 43 DLR (3d) 239 [*Moran*].
[24]2000 BCCA 605.

Jurisdiction found and not declined

Badesha v Cronos Group, Inc, 2023 ONSC 5678

The plaintiff moved for certification of his proposed securities class action, alleging that the defendant, Cronos Group Incorporated (Cronos), had misrepresented the value of its shares. The proposed class action comprised all purchasers of Cronos shares during the relevant class period, regardless of where they resided or on which exchange they traded. Toronto-based Cronos's primary business was in the production of cannabis for medical and recreational use. Cronos brought the *forum non conveniens* application seeking to stay the claims of non-Canadian shareholders who purchased their shares on the NASDAQ exchange because they were US shareholders. Those shareholders were already covered in an American class action against Cronos in the US District Court for the Eastern District of New York — the certification of that action was under reserve at the time.

Justice Edward Morgan dismissed the defendants' motion. He framed the central question as whether the *CPA*[25] required ensuring that members of the proposed class action who could bring, or had brought, a parallel lawsuit in the United States also benefited from access to justice in Ontario. Cronos conceded that the Ontario courts had jurisdiction *simpliciter* over the plaintiff's claims since, in his case as a Canadian shareholder, there was a real and substantial connection along with the typical comparative convenience and expense factors pointing to the Ontario forum. The stay was sought solely for the Ontario claims of US shareholders, allowing the Ontario action involving Toronto Stock Exchange (TSX) purchasers to continue regardless. There was no true competition between two jurisdictions.

Morgan J dealt at length with the role and importance of comity in this context. Sometimes, it supported the enforcement of unilateral enactments by different jurisdictions, and, at others, it favoured the need for cooperation among different jurisdictions. What drove Cronos's argument was the view that only a two-way deference street between Ontario/Canada and the United States, or between an Ontario court and the Eastern District of New York, applied with comity. Several Ontario courts, however, had concluded that the statute applies to extraterritorial purchases as long as some of a defendant's securities were traded on a Canadian stock market. Ontario cases that appeared to exclude share purchasers on a foreign exchange did so for reasons specific to the case. Evidence showed either that the defendant company had stopped trading on a Canadian stock exchange before the end of the class period or that the company had never traded on a Canadian exchange in the first place. Neither of those situations characterized Cronos before or during the class period.

Contrary to Cronos's claim, Morgan J found that there was no international norm of hearing a secondary market securities claim in the place where the securities were traded. To establish that norm, Cronos would have to demonstrate widespread state practice following it. At most, there was an American norm on the place of trade that was not embraced by other jurisdictions. The United States had a tendency towards undue interference adopting the place-of-trade rule for securities class actions involving foreign companies with the aim of reeling its law in. Canadian law, by

[25] *CPA*, *supra* note 21.

contrast, had a tendency towards openness, dialogue, and transnational engagement, adopting a universalist approach to jurisdiction in securities class actions, and it made efforts to reach out. In Morgan J's view, both legal systems embraced comity, either as isolation or as cooperation. This double-sided view of the legal world applied equally in the United States — but where the United States wanted to stop stepping on another nation's toes, Ontario wanted to hold the foreign nation's hand. As Morgan J put it, "American law expresses a need to decolonize and contract, Canadian law exudes a need to expand and embrace."[26] Although the rules on both sides of the border appeared to be asymmetrical, the US and Canadian courts had both invoked their version of comity in interpreting governing legislation.

In Morgan J's view, the *Securities Act*[27] respected state sovereignty and international cooperation by allowing access to justice for class actions that included all shareholders, regardless of where they purchased their shares. The upshot of this was that the US shareholders could remain in the Ontario proceedings, despite the parallel US case. Ontario was not a *forum non conveniens* for the claims of any proposed class members.

Jurisdiction not found

Hershey Company v Leaf, 2023 BCCA 264

The appellant, the Hershey Company, successfully appealed a determination that a BC court had territorial competence over a proceeding for negligent misrepresentation against it as a foreign corporation.[28] The respondent, Scott Leaf, sought to certify a class action against the appellants relating to their activities in manufacturing, marketing, and distributing chocolate confectionary products in Canada.[29] The respondent alleged that the appellants, along with its subsidiary Hershey Canada, made public representations that they opposed the use of child labour and slavery in the cocoa supply chain, despite facilitating and profiting from child labour and slavery. He claimed that he would not have purchased Hershey products if their marketing and advertisements had disclosed these facts. The appellant was unsuccessful with the chambers judge who held that there was a real and substantial connection between British Columbia and the facts of the proceeding.

On appeal, the appellant argued that the judge had erred in finding an alleged tort of negligent misrepresentation occurred in British Columbia in the absence of any jurisdictional facts to show that the affirmative representations made by the appellant were received and relied on in British Columbia. The BC Court of Appeal agreed, finding that the affidavit evidence was insufficient to establish a real and substantial connection to British Columbia based on the commission of a tort.[30] Given the court's conclusion that the respondent failed to establish an arguable case that a tort was committed in British Columbia, or outside of it, it was not necessary to address the issue of whether the judge had erred in finding that the appellant was carrying on

[26] *Badesha v Cronos Group, Inc*, 2023 ONSC 5678 at para 82.
[27] RSO 1990, c S5 [*OSA*].
[28] *CJPTA-BC*, *supra* note 8, s 3.
[29] On the basis of the *CPA*, *supra* note 21.
[30] Consistent with the *CJPTA*, BC, *supra* note 8.

business in British Columbia. The circumstances of the case were unusual in that the respondent failed to plead material facts to support any claim against the appellant. There was a weak to non-existent connection between the defendant's business activities and the claim. No logical connection could be made between the appellant's business activities and any representations made to the respondent. Any presumption, if established, would be successfully rebutted.

iv. Family law

Custody, parenting, and access — habitual residence

BC v DE, 2023 BCCA 251[31]

A father appealed an order finding that the BC courts did not have territorial competence over parenting issues based on the child's habitual residence and that, regardless, Taiwan was the more appropriate forum. The mother moved with the child from British Columbia, where her father lived, to Taiwan. Justice Patrice Abrioux dismissed the appeal despite the incomplete analysis of the judge. The judge's conclusion that the parties were never habitually resident in British Columbia was supported by the evidentiary record and entitled to deference.[32] The father disputed what he claimed were misinterpretations of the evidence by the judge, but this amounted to rearguing the case, taking issue with his preference for a certain version of events as opposed to reviewable errors.

Abrioux JA noted that, since the child in the case was physically present in British Columbia when the notice of family claim was filed, the judge should have considered the applicability of a different provision of the BC *Family Law Act*.[33] In fairness to the judge at first instance, however, the father did not present an alternative argument to him based on that provision. Despite the incomplete analysis, in Abrioux JA's view, had he applied considerations involving a child not habitually resident in British Columbia when the application was filed, he would still have concluded that he lacked jurisdiction to make the requested orders.[34] Considering the last criterion, the judge did consider, on a balance of convenience, that it is appropriate for jurisdiction to be exercised in British Columbia[35] and engaged the same essential test as the *forum non conveniens* framework, which the judge did apply. The judge did not err in concluding that it was inappropriate for British Columbia to exercise jurisdiction.

The father raised several challenges to the judge's finding that Taiwan was the more appropriate forum. Many of these amounted to re-arguing the findings, subject to the deferential standard of review and reiteration of submissions before the judge. In Abrioux JA's view, the judge should have placed little, if any weight, on the child's statements as reported by the psychologist. Several factors raised concerns as to the

[31]The first instance decision of *BC v DE*, 2022 BCSC 1597, was also addressed in Ashley Barnes, "Canadian Cases in Private International Law in 2022" (2022) 60 CYIL 411 at 429 [Barnes, "Canadian Cases in 2022"].

[32]Consistent with the meaning of the *Family Law Act*, SBC 2011, c 25, s 74(2) [*FLA*, BC].

[33]*Ibid*., s 74(2)(b) (applicable when a child is not habitually resident in British Columbia when the application is filed).

[34]Note the judge did consider the application under *ibid*, s 74(2)(a), when a child is habitually resident when the application is filed.

[35]Normally under s 74(2)(b)(iv).

report's reliability. When the judge's reasons on the best interests of the child were examined as a whole, it was clear that many factors influenced his decision. Abrioux JA acknowledged problems with how the child left British Columbia as the father contested the child leaving the jurisdiction. It was nonetheless clear from the judge's analysis that the child's months-long presence in Taiwan and the Taiwanese court's proactive involvement were important factors in his decision to decline any jurisdiction he might have had. The Taiwanese court should decide the impact on the final parenting arrangements, if any, of the manner of the mother's removal of the child from British Columbia or the father's allegations that she deliberately delayed the criminal proceedings for her own tactical advantage.

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

Osaloni v Osaloni, 2023 ABCA 116[36]

The mother was unsuccessful in her appeal of a decision ordering the return of her two children to the United Kingdom under the *Hague Convention on Child Abduction.*[37] The parties were residing together in the United Kingdom when the mother removed their children through the bedroom window and travelled with them to Calgary. The father contacted the UK authorities and later commenced a convention application in the Alberta courts.

The mother argued on appeal that there was no abduction because the father consented to the trip, and the judge erred in finding that the children were habitually resident in the United Kingdom and that the children should not have been returned because they were at grave risk of harm in the United Kingdom in their father's care.[38] The mother focused largely on events occurring since the order under appeal was granted. What had transpired between the parties since the order was granted was largely irrelevant to the appeal, which concerned the judge's decision to return the children to the United Kingdom.

The findings of the judge were entitled to deference, and the mother had failed to identify any palpable and overriding error that allowed the court to intervene. Each of the determinations challenged by the mother were amply supported on the record. The mother suggested that the children were habitually resident in Italy or perhaps Slovakia. The children's only connection to Italy appeared to be their citizenship. Both children did spend some time in Slovakia during her studies. Nevertheless, habitual residence is determined immediately before the removal or retention,[39] and this would have been the United Kingdom. Regardless, there was no suggestion that the children might have been habitually resident in Canada.

The mother had the onus of establishing that returning the children to the United Kingdom would amount to an intolerable situation. She could not use the appeal to

[36]The initial decision on this matter, *Osaloni v Osaloni*, 2022 ABKB 835, was also discussed previously in Barnes, "Canadian Cases in 2022," *supra* note 31 at 427.

[37]*Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can TS 1983 No 35 (entered into force 1 December 1983) [*Hague Convention on Child Abduction*]; *International Child Abduction Act*, RSA 2000, s I-4.

[38]Applying the principles from the recent precedent in *F v N*, 2022 SCC 51, 475 DLR (4th) 387 at paras 78–80.

[39]*Hague Convention on Child Abduction, supra* note 37, art 12.

seek parental custody. Moreover, simply being the primary caregiver did not satisfy the grave risk of harm exception.[40] The judge noted that there were no allegations that the father would ever harm the children or that they would be unsafe in his care. Issues regarding custody and access of the children should be determined in the United Kingdom, considering their best interests.

Child wrongfully retained — Hague Convention on Child Abduction — *consent*

DIH v SIH, 2023 ABKB 146

The father brought this application under the *Hague Convention on Child Abduction* for the return of his four-year-old daughter to Romania. The court found that the child was wrongfully retained and ordered her returned from Alberta.[41] The father and mother lived together while married in Romania. After they separated, they continued to live there until the mother took their daughter on a trip to Canada and did not return. The mother initially asked to travel with the daughter to Edmonton, where her new husband lived, but the father refused consent. A Romanian court, however, permitted the child to visit Canada with her mother for a period of three months. The mother also claimed that the father subsequently consented to the three-month trip and potential immigration to Canada by way of signed declarations.

The father relied solely on the declaration for the trip and launched proceedings for a child protective order. There was no question that the child was habitually resident in Romania up to and on the date of her departure from Romania. The father had rights of custody that were breached when the mother failed to return with the child after three months.[42] The Romanian court only granted the mother the right to keep the child in Canada for three months. Justice Douglas Mah found it more likely than not that the father thought the effect of the documents he was signing was that his daughter would be visiting Canada for only three months, not moving permanently. The father did not consent to his daughter's immigration to Canada and did not acquiesce, given his timely convention application.

Child wrongfully retained — Hague Convention on Child Abduction — *custody rights*

Raposo v Raposo, 2023 ONSC 346

The applicant father and mother lived together in the Azores, Portugal. They separated in 2020 and have a four-year-old daughter. The father sought an order under the *Hague Convention on Child Abduction* for the return of his daughter after the mother kept her in Canada. The court ordered the child's return to Portugal. Since the convention application in this case was commenced less than one year after the removal of the daughter from Portugal, the issue of whether she was settled in her new environment was not relevant.[43] Based on the evidence, the court found it probable that the respondent mother, when she requested

[40] *Ibid*, art 13(1)(b).
[41] Consistent with *ibid*.
[42] Applying *Bacic v Ivakic*, 2017 SKCA 823.
[43] *Hague Convention on Child Abduction*, *supra* note 37, art 12.

permission to go to Canada, did not intend to return. The focal point of the child's life in April 2022 was in the Azores, and there could be no other choice of her habitual residence. From the child's perspective, Canada was then an unknown and, at most, a place to travel to with her mother.

The court found there was consensus that a provision giving a parent a right to consent to relocation or travel was sufficient to give that parent rights of custody that provided that parent with standing to bring an application for return of the child under the convention. The father had a right to jointly determine "matters of particular importance" relating to the child. The father therefore had rights of custody, and the move by the mother was in breach of those rights. No unreasonable delay occurred in launching proceedings that would amount to consent or acquiescence in the child's removal. The court also found that there was no grave risk of harm to the child in returning to Portugal because there was no evidence or opportunity to assess the credibility of allegations of family violence.

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

Bakarat v Andraos, 2023 ONSC 582

The court ordered the return of children to Ontario, their habitual residence, by their mother in Lebanon. The parties were married in a civil ceremony in Ontario and a religious ceremony in Lebanon. They had two children, both born in Canada. The family moved to Kuwait for the father's work and then returned to Ontario. Throughout the relationship, the mother expressed her desire to return to the Middle East, but the father saw better opportunities in Canada, straining their relationship. The mother went with the children to Lebanon on a trip and after a significant fight later confirmed that she would not be returning. The mother pursued the matter in Lebanese courts. The father claimed he was not notified of those proceedings.

The Ontario Superior Court could assume jurisdiction over the matter because the children's habitual residence was Ontario and not Lebanon, given the facts such as the employment of the parents and the children's Canadian passports.[44] The fact that the family regularly spent long periods of time in Lebanon did not affect the analysis. Their normal routine was to vacation in Lebanon because of significant family connections, while always returning to Ontario. Moreover, the evidence did not weigh clearly in favour of Lebanon as a more appropriate forum. Justice Jamie Trimble also found the mother's position requiring her to honour the Lebanese court decision untenable. The father had no notice before the event, including the mother's divorce petition, the hearing date, or that the Lebanese court had made a non-removal order. He had no opportunity to respond and was still in Canada when these events occurred.[45]

[44]Within the framework of the *Children's Law Reform Act*, RSO 1990, c C.12.

[45]Resulting in the operation of *ibid*, s 41(a) and (b).

v. Anti-suit injunction

Restraining litigation in a foreign court — debt — injunction granted

Wang v Fu, 2023 BCCA 247

The appellants successfully appealed the dismissal of an anti-suit injunction restraining the respondent from continuing a lawsuit brought in China. The respondent, Ms Fu, alleged that she loaned $3.56 million to the appellants to finance a real estate project. The appellants denied that the money was a loan and instead claimed it was a real estate investment in a project that failed, causing her to lose that investment. The respondent commenced the BC action in 2021 but also commenced another in China in 2022 to recover the same debt. Her acknowledged intention was to resolve the debt issue in China and then pursue recovery against the appellants' assets owned in British Columbia.

The appellants argued that the respondent brought the Chinese action to take advantage of Chinese law and objected to the Chinese court's jurisdiction, an application that was subsequently dismissed by that court. The appellants proceeded to bring an application for an anti-suit injunction before the BC Supreme Court, which was dismissed because of significant circumstances that favoured the resolution of the issues in the Chinese courts. The Appellate Court found that the judge erred in applying the test for an anti-suit injunction.[46] The central issue on appeal was the judge's conclusion that the Chinese court assumed jurisdiction in a manner consistent with the principles of *forum non conveniens.* In the circumstances, it was clear that, while the parties had a connection to China due to their residency at the time the claim was filed and their language, there was no connection between the facts underlying the claims and China. The Chinese court could not have assumed jurisdiction in a manner consistent with *forum non conveniens* since it failed to properly account for this absence of connection.

This error also manifested itself in the consideration of the relevant factors.[47] The judge found that the law to be applied was a neutral factor, despite the absence of evidence of any mechanism by which Chinese courts would receive and consider BC law. More importantly, the question was not whether Chinese courts could apply BC law but whether the fact that BC law governed that dispute supported a finding that the BC courts are a more appropriate forum. BC law was relevant to substantive and procedural matters, such as the production of documents related to the property development.

In addition, the judge found that comparative convenience favoured China due to the residency of the parties, language issues, and the central document written in Chinese. Yet the judge failed to consider all of the other relevant documents, including from corporate defendants alleged to have received the funds that were located in British Columbia. The judge's focus on residency was also evident in the finding that, while unusual, it was not improper for the respondent to commence proceedings in two jurisdictions.

[46]From *Amchen Products Inc v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897, 102 DLR (4th) 96.

[47]*CJPTA*, BC, *supra* note 8, ss 11(2); *SC International Ent v Consolidated Freightways et al*, 2002 BCSC 767 at para 27.

Another factor that the judge erroneously characterized as neutral was the location of the loss. This failed to account for the fact that the funds were transferred in British Columbia for the purposes of BC real estate projects and that the respondent would have to prove her loss by reference to BC banking and other documents. Finally, contrary to the judge's reasoning, the fair and efficient working of the Canadian legal system was enhanced by resolving legal disputes in the forum most clearly and directly connected to the parties and the facts involved in the dispute, which, in this case, was British Columbia.

B. Québec

Compétence extraterritoriale — articles 3134, 3148, 3136 CcQ

Sharp v Autorité des marchés financiers, 2023 SCC 29

This appeal addressed whether a provincial administrative tribunal, the Financial Markets Administration Tribunal (FMAT) in Quebec, had jurisdiction over defendants residing outside the province — in this case, British Columbia, for securities enforcement proceedings under Quebec law.[48] To do so, the court also had to consider the relationship between the *Civil Code of Quebec* (*CcQ*)[49] and special statutes in Quebec. Four BC residents were alleged to have violated the *Quebec Securities Act* (*QSA*)[50] with a transnational "pump-and-dump" securities manipulation scheme. They acquired the shares of a shell company to inflate its stock price by releasing misleading information and profiting from the sale of their holdings. The FMAT ruled that it had jurisdiction over the defendants. The Superior Court of Quebec dismissed applications for judicial review of that decision. A majority of the Quebec Court of Appeal also affirmed the FMAT's decision.

Chief Justice Richard Wagner and Justice Mahmud Jamal, writing for the majority of the Supreme Court of Canada, concluded that the FMAT had jurisdiction over the appellants under the *QSA* and the *Act Respecting the Autorité des marchés financiers*[51] and dismissed the appeals. While the *CcQ*'s rules on private international law applied, they provided no basis for jurisdiction over the out-of-province defendants.[52] The Quebec legislature nonetheless exercised its prescriptive legislative jurisdiction to enact rules applicable to out-of-province parties with a real and substantial connection to Quebec based on a test that originated in *Unifund Assurance Co of Canada v Insurance Corp of British Columbia*.[53] Those rules were engaged by the circumstances of the case. The appellants were alleged to have used Quebec as the face of their securities manipulation and injured Quebec investors. Applying the Quebec regulatory scheme was fair to the defendants as they did not enter into the Quebec market by accident, it was an integral part of their securities manipulation operation. Applying the Quebec regulatory scheme did not offend the principle of order of

[48]Note that the appellate decision for this case was previously discussed in Ashley Barnes, "Canadian Cases in Private International Law in 2021" (2021) 59 CYIL 584 at 606.

[49]LQ 1991, c 64 [*CcQ*].

[50]CQLR, c V1-1.1 [*QSA*].

[51]RLRQ, c E-6.1.

[52]No provision under *CcQ*, *supra* note 49, arts 3134, 3148, 3136.

[53]2003 SCC 40, 227 DLR (4th) 402.

the related concept of interprovincial comity. Since contemporary securities manipulation and fraud are often transnational and extend across provincial and national border, courts and tribunals must take a flexible and purposive approach when applying the principles of order and fairness in the securities context.

Justice Suzanne Côté, dissenting, would have allowed the appeals. In her view, the limits of the FMAT's jurisdiction must be analyzed based on rules of private international law.[54] The rules of private international law set out in the *CcQ* apply to all proceedings that may be heard by Quebec authorities based on jurisdiction conferred on the province.[55] Under those rules, the FMAT did not have adjudicative jurisdiction over the BC defendants and could not hear the case. For Côté J, the *Unifund* analysis relied on by the majority was essentially to determine whether there is a viable cause of action on the merits. From a private international law perspective, however, the real and substantial connection test goes to the exercise of the state's power of adjudication. The rules of private international law in force in a province are what confer adjudicative jurisdiction on a decision-maker. The appeals were not related to the extraterritorial applicability of the *QSA* but, rather, to the FMAT's territorial jurisdiction under private international law. The *Unifund* test should not have been used to determine the FMAT's adjudicative jurisdiction over the BC defendants in the case.

2. Procedure / Procédure

A. Common law and federal

i. Commencement of proceedings

Manner of service — Hague Service Convention — *non-resident corporate defendants*

TP (Litigation Guardian of) v Bytedance Ltd, 2023 SKKB 65

The plaintiff applied without notice for an order appointing a designated judge to hear a class action certification application. The application could only be considered after the filing of sufficient proof of service of the claim upon each of the defendants.[56] Chief Justice Martel Popescul had to address the service requirements for the various corporate defendants. Bytedance Limited and TikTok Limited, incorporated in the Cayman Islands, were found to have been validly served under the *Hague Service Convention*,[57] as they were both served at their registered head office by an employee of a law firm in the Cayman Islands at the direction of counsel. Service was also effected by leaving a copy of the document with certain specified corporate officials.[58]

For the separate defendant of TikTok Pte Limited, incorporated under the laws of Singapore, Popescul CJ was prepared to validate irregular service. Based on the material filed, particularly given that TikTok Pte was served with a copy of the statement of claim by a process server at its registered office in Singapore, as

[54]*CcQ*, *supra* note 49.

[55]Under the *Constitution Act, 1987 (UK)*, 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

[56]Reference to the *Queen's Bench Rules*, Sask QB Rules 2013.

[57]*Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 15 November 1965, 685 UNTS 163 (entered into force 10 February 1969).

[58]This is permitted under the *Queen's Bench Rules, supra* note 56, rule 12-5(c).

supported by a corporate profile, the judge was satisfied that there was notice of the statement of claim. When it came to service on the remaining defendants, TikTok Technology Canada Incorporated and TikTok LLC and TickTok Incorporated, an American company based in Delaware, the plaintiff had not filed sufficient evidence of service of the statement of claim. As the person served was not purported to be an officer or director of TikTok Technology Canada, service would only have been valid under Saskatchewan law if the office at which the service took place was the registered office of the corporation. No evidence was provided to support the claim of the address for service in Vancouver, British Columbia.

Similarly, for TikTok LLC and TikTok Incorporated, since the positions of the person served were unclear, service could only be valid under Saskatchewan law if the office at which the service took place was the registered office of the corporation. The same evidentiary gap identified in relation to TikTok Technology Canada were present for TikTok LLC and TikTok Incorporated. Corporate profiles had not been filed to establish the proper address for service on either Delaware entirety. The onus to prove a valid manner of service was on the party serving the document, not the court. When assessing whether corporations were properly served in foreign jurisdictions, stricter compliance with the rules was expected to ensure that the parties are given proper notice of a proceeding against them. The application for appointing a designed judge to hear a class action certification application would not be granted at the time as the judge was not satisfied that TikTok Technology Canada, TikTok LLC and TikTok Incorporated were properly served. The plaintiff was nonetheless granted leave to file additional material in support of the application.

ii. Obtaining evidence locally for a foreign proceeding

Letters rogatory — order compelling evidence — enforced

Skymark Properties Corp v 63263101 Canada Inc, 2023 ONCA 861

The applicants sought enforcement of letters rogatory issued in civil criminal enterprise proceedings in the United States by a Michigan court. The defendants, who were brothers, allegedly conspired in an international fraud and money laundering scheme that included violations of the US-Iran trade embargo laws.[59] Justice Paul Perrell of the Ontario Superior Court granted the letters rogatory application.[60] The defendants had contested the applicants' evidence as inadmissible and unreliable and, therefore, without evidentiary foundation to support their request. Skymark was nonetheless found to have satisfied the test for the issuance of letters rogatory.[61] The application had morphed into one where it was readily apparent from the admissible non-hearsay evidence that (1) the defendants were within the court's jurisdiction; (2) they were parties to the proceedings in the Michigan court and they had relevant and necessary evidence in relation to those proceedings; and (3) the requested evidence was not forthcoming or otherwise available.

[59]The US law at issue was the *Iranian Transactions and Sanctions Regulations*, 31 CFR 560.

[60]Also in the current year with *Skymark Properties Corp v 63263101 Canada Inc*, 2023 ONSC 1520.

[61]*Evidence Act*, RSO 1990, c E.23, s 60; *Canada Evidence Act*, RSC 1985, c C-5, s 46; *R v Zingre*, [1981] 2 SCR 392, 127 DLR (3d) 223 [*Zingre*].

According to Perrell J, the order sought was not contrary to public policy, and, from a technical perspective, the documents sought were identified with reasonable specificity. The order was not unduly burdensome, bearing in mind what the witnesses would be required to do and produce if the action was tried. It was unfortunate that, at the outset of the application, the Michigan court was not asked to issue discrete letters rogatory for each of the seven original targets. Instead of the thousand-page evidentiary record, there would have been seven much shorter records. With severed records, the defendants would not have been able to object to the evidentiary record and search for evidence as a part of their resistance to the application for letters rogatory.

At the Ontario Court of Appeal, the judges found that the appellants essentially repeated the arguments rejected by Perell J. There was no error in relying on evidence of what the appellants were alleged to have said for the purpose of determining whether the evidence sought is necessary for and will be adduced at trial.[62] In addition, despite the appellants' claims, Perell J made specific reference to and applied relevant *Friction* factors while considering the application under the *Evidence Act.* Unless contrary to the interests of justice or infringing on Canadian sovereignty, the judges were required to pay deference to the US court, concluding, after a hearing, that the appellants' evidence and documentation was necessary to ensure justice was done in the US proceeding.[63] The fact that the appellants were now parties to the US proceedings and were deposed did not undermine Perrell J's US court finding. The appeal was dismissed.

Letters rogatory — order compelling evidence — not enforced

Hospira Healthcare v Rotsztain, 2023 ONSC 4283

This application arose out of litigation in the Supreme Court of the State of New York in the United States involving an agreement to develop and commercialize generic injectable antibiotics between Apotex Corporation and Hospira. The New York court signed letters rogatory requesting assistance from the Ontario courts in obtaining documentary and oral evidence from the respondents, Mr. Rotsztain and a shell company, to use in the US action. The applicants argued that the testimony and records sought were relevant and necessary for the just determination of issues before the US court and that the letters rogatory were not unduly burdensome. The respondents took the position that the requests covered by the letters rogatory were unprecedented, requiring broad documentary discovery of the lawyer's file and a lengthy deposition.

Justice Audrey Ramsay dismissed the application. The request for documents was so broad and the topics to be covered at the deposition so wide and open-ended that it was, as the respondents suggested, a fishing expedition. The disclosure would not be compelled in Ontario.[64] The letters rogatory were obtained before the counterclaim was issued based on information obtained during the course of the prior proceedings.

[62]Consistent with the factors in *Re Friction Division Products Inc v EI du Pont de Nemours & Co* (1986), 32 DLR (4th) 105, 56 OR (2d) 722 [*Friction*].

[63]*Zingre*, *supra* note 61 at 401.

[64]*Friction*, *supra* note 62.

Rotsztain never acted for Apotex Corporation, the plaintiff in the US action. The respondents were non-parties, which would be governed by specific rules in Ontario.[65] The applicants were unable to establish that the documents sought, or the topics to be considered, were relevant and necessary for trial.[66] Ramsay J was also not satisfied that the evidence was not otherwise obtainable as the respondent had produced non-privileged documents from his file and indicated that he did not have any further information to provide. He had been cross-examined on the affidavit filed for the application and on his undertakings and refusals stemming from the cross-examination.

In public policy concerns, the applicants had not exhausted other routes of obtaining the information sought on the requests. Balancing the justice of the enforcement request with the interests of Canadian nationals who were not parties to the New York action, the breadth of the documentary request would impose an undue burden on the respondents. Granting the order would have infringed on recognized Canadian legal principles of respect for the sanctity of solicitor-client confidentiality and privilege. It would amount to an infringement on Canadian sovereignty to enforce the letters rogatory from a US court that would require a lawyer to produce solicitor-client documents and information under oath. If similar requests were made in Ontario for documentary production from a non-party, the orders would not be granted. Given the breadth of the documents to be produced and the repeated use of the word "all" with each request, the documents requested were not identified with any reasonable specificity and the order would be unduly burdensome.

iii. Interlocutory orders (Mareva injunction)

Setting aside Mareva *injunction — no evidentiary basis — no real risk of dissipation*

Shen v Lou, 2023 BCSC 414

The defendant, Ms. Lou, sought to discharge a *Mareva* injunction that prevented her from selling residential property that she owned in West Vancouver based on a Chinese court judgment secured by the plaintiff. She successfully argued that the *Mareva* order should be set aside for material non-disclosure.[67] Justice Sheila Tucker found that there were reliability issues in play related to the translation of the affidavit, along with the omission of the interpreter's endorsement and the involvement of counsel as opposed to an impartial individual, and that affidavit was the sole evidence in support of an extraordinary remedy. The true state of affairs would have required the issue of admissibility to be considered and determined and would have been a factor in determining whether a *Mareva* injunction should have been granted on the evidence. The result was that there might have been a different outcome on the application, meaning there was a material non-disclosure in the circumstances.

[65] *Rules of Civil Procedure*, RRO 1990, Reg 194, rule 30.10.

[66] The relevant criteria to be addressed was articulated in *Friction*, *supra* note 62, and endorsed in *Presbyterian Church of Sudan v Taylor* (2006), 215 OAC 140 (CA).

[67] *Supreme Court Civil Rules*, BC Reg 168/2009, rule 22.

Also, the plaintiff's argument for the *Mareva* order was centred on his evidence that the defendant disregarded, disobeyed, and actively evaded the Chinese judgment and the enforcement orders. The judge in issuing the injunction had expressly referred to conduct having been taken to evade the payment in granting the application. Had she been aware there was no evidentiary basis for asserting that the defendant knew of the orders against her, the outcome clearly might have been different.

Tucker J then turned to the question of whether a new injunction should be granted on the record or with the filing of further evidence to enforce the Chinese judgment and orders. The plaintiff would have to point to something establishing a real risk of dissipation of assets to avoid paying the judgment. The plaintiff's case in support of a *Mareva* injunction consisted of the fact that the defendant's West Vancouver property was her only significant asset and she was looking to sell it. The defendant had good reasons for selling the property, which was her long-term plan, and it was already for sale when the claim was filed. There was nothing suspicious about the facts or circumstances of the proposed sale. Liquidating an asset was not, in and of itself, evidence of a real risk of dissipation.[68] The plaintiff failed to establish any facts that the defendant was acting with an intention to move assets out of reach of the claim to support a *Mareva* injunction.

Granting Mareva *injunction — foreign proceedings*

United States Securities and Exchange Commission v Sharp, 2023 BCSC 425

The US Securities and Exchange Commission (SEC) sought a *Mareva* injunction to aid civil proceedings in the US District Court in Massachusetts. The SEC filed a complaint against the defendants, alleging they were involved in a fraudulent scheme to circumvent US securities law, notably a pump-and-dump scheme where they raised the share prices of public companies controlled by their affiliates and then sold their shares at an artificially inflated price. The defendants were all residents of British Columbia. The SEC sought a restraining order freezing the defendants' assets in the US proceedings but insisted that it remained under-secured for the claim against the defendants. The existing orders did not cover all assets held by the defendants.

The BC court found it had jurisdiction to issue the injunction sought by the plaintiff in aid of a foreign proceeding, irrespective of whether the causes of action pursued by the SEC in the complaint could be adjudicated in British Columbia.[69] Justice Amy Francis also concluded that the plaintiff demonstrated a strong *prima facie* case, and the balance of convenience favoured the plaintiff. She was willing to consider whether the plaintiff had a good arguable cause in the absence of the expert evidence of US securities law. Given the seriousness of the fraudulent activity alleged to have occurred, it was not necessary to have the assistance of an expert in US securities law to know that, if proven, the alleged activities of the defendants were unlawful. There was a good arguable case that either side might win given the

[68] *Hollinger Inc v Radler*, 2006 BCSC 1712 at para 55.

[69] Applying *Broad Idea International Ltd v Convoy Collateral Ltd*, [2021] UKPC 24; *Friedl v Friedl*, 2009 BCCA 314.

evidence of at least one fraudulent transaction and encrypted communications, meeting the first step of the test for a *Mareva* injunction.

On the second step of whether the balance of convenience favoured granting the injunction, Francis J found the presence of assets in British Columbia, the fact that the current freezing orders in place left the plaintiff under-secured with respect to its disgorgement claim and the risk of dissipation of assets relevant factors. Considering the conduct alleged, the type of assets involved, and the general circumstances, in particular, it was an appropriate case to draw the inference that the alleged fraudulent activities gave rise to a risk of dissipation. The plaintiff alleged, with some evidence to support, that the defendants were engaged in a complex securities fraud scheme that involved shell companies, secret encrypted communications, and a clear pattern of deceptive behaviour. The proposed injunction was drafted to be complimentary, not in conflict, with the existing injunctions and preservation orders. The plaintiffs had avoided overlap between the freezing orders already in place and the order sought on the current application. The injunction was granted.

There was, however, no basis to depart from the usual rule of providing an undertaking as to damages as claimed by the SEC as a government agency under Canadian law. If the SEC was legally incapable of providing an unlimited undertaking, then the plaintiff had leave to appear again, on notice to the defendants, to make submissions on the scope of a limited undertaking as to damages should the parties be unable to agree on undertaking terms.

3. Foreign judgments / Jugements étrangers

A. Common law and federal

i. Defences to recognition or enforcement

Common law recognition or enforcement — natural justice — public policy

Rainard v Tan, 2023 ABKB 50

The plaintiff, Mr. Rainard, successfully sought to enforce a Swiss debt judgment against the defendant, Mr. Tan, before an applications judge. The defendant's appeal of that decision relying on a breach of natural justice, procedural unfairness and public policy was also dismissed. Justice Kim Nixon rejected the defendant's argument that Swiss law regarding proof of advancement of funds offended Canadian principles of morality. The defendant had not provided any affidavit evidence before the applications judge or on appeal that he had not received the loan amount that he acknowledged in the loan agreement or any evidence that he was denied the opportunity in the Swiss court to make that argument. The Swiss judgment referred to the loan agreement that the defendant expressly and in writing recognized the receipt of the loan amount from the plaintiff. Evidence of a third-party witness also confirmed that the plaintiff had lent considerable sums to the defendant in several installments in the relevant time period and witnessed the plaintiff give cash to the defendant. In considering the evidence, including the forensic handwriting expert, the Swiss court concluded that the defendant signed the loan agreement expressly acknowledging the amount of the loan from the plaintiff. The defendant had not met the onus of establishing that Swiss law offended Canadian concepts of justice.

Common law recognition or enforcement — limitation period

Sunlight General Capital LLC v Effisolar Energy Corporation, 2023 ONCA 133

This was an appeal of a motions judge's decision to recognize and enforce a judgment of the Supreme Court of New York in the amount of US $1.6 million. The sole issue on appeal was whether the recognition and enforcement action was statute barred. The motion judge had found that, even though the action to recognize and enforce the New York judgment was outside the ordinary two-year limitation period, it was not statute barred in Ontario due to the suspension of the limitation period for six months during the COVID-19 pandemic. The Ontario Court of Appeal rejected the appellant's argument that the motions judge erred in the dates the limitation period began to run. The appellant was now seeking to abandon the agreement, claiming that the principles of *Independence Plaza 1 Associates LLC v Figliolini*[70] did not apply to determining the limitation period. It was not appropriate on appeal to permit the appellant to change the basis on which the motion was argued below. The panel would not reconsider the recent and considered holding in *Independence Plaza*. There was no error in determining the date the limitation period began to run according to its principles.

Common law recognition or enforcement — defences of natural justice, fraud, and public policy

Roger Vanden Derghe NV v Merinos Carpet Inc, 2023 ONSC 6728

Justice Marie-Andrée Vermette granted an application for the recognition and enforcement in Ontario of a Belgian judgment ordering the respondent, Merinos Carpet, to pay a liquidator for outstanding invoices and interest.[71] The applicant, Roger Vanden Berghe NV, was a Belgian limited liability company that sold rugs and other fabrics prior to its liquidation. Merinos Carpet, an Ontario-based wholesaler and distributor of rugs and carpets, was one of Vanden Berghe's long-time customers. A liquidator for Vanden Berghe sought and obtained a judgment against Merinos Carpet from a Belgian court. Merinos Carpet did not respond to the Belgian proceeding.

Vermette J found that the Belgian court properly assumed jurisdiction, having a real and substantial connection with the subject matter of the dispute.[72] The products were ordered from a Belgian company, the orders were processed in Belgium, the products were shipped from Belgium, the invoices were issued in Belgium, and the parties agreed that Belgian law would govern the orders and that disputes would be referred to Belgian courts. The judge also found that the Belgian judgment was for a definite sum of money. It was a final order for the payment of liquidated damages.

Merinos Carpet also did not discharge its burden to prove the defence of a lack of natural justice.[73] Adequate notice was given of the Belgian proceeding. After it

[70]2017 ONCA 44, 136 OR (3d) 202.

[71]See *Chevron Corp v Yaiguaje*, 2015 SCC 42.

[72]*Ibid.*

[73]The court disputed Merinos Carpet's reliance on the reasoning in *Cortes v Yorkton Securities Inc*, 2007 BCSC 282 at para 71.

commenced, Merinos Carpet ignored the applicant, no matter the address used. The confirmation of delivery to the correct address meant the wrong postal code did not matter. The fact that the Merinos Carpet may not have been given notice of subsequent steps in the Belgian proceeding, including the rescheduling of the hearing to another date, did not constitute a breach of natural justice. Merinos Carpet received adequate notice and ignored it.

The court also rejected Merinos Carpet's position that it was not given an opportunity to defend the claim because the hearing was rescheduled for a time during which travel was not possible due to COVID-19. There was no evidence that Merinos Carpet made any inquiries about attending, even by videoconference, after receiving the writ of summons. Merinos Carpet did not have to attend personally and could have retained a lawyer in Belgium. Vermette J also dismissed Merinos Carpet's other defences of fraud and public policy. On fraud, Merinos Carpet had not demonstrated that the facts sought to be raised in support of the position that the Belgian court was misled could not have been discovered by the exercise of due diligence prior to obtaining the Belgian judgment. In terms of public policy, there was no evidence that Belgian law applied in the case was contrary to a view of basic morality since judgments on unpaid invoices are regularly obtained in Ontario.

Recognition or enforcement of arbitral award — proper notice

Tianjin Dinghui Hongjun Equity Investment Partnership v Du, 2023 ONSC 1808

The applicant, Tianjin Dinghui Hongjun Equity Investment Partnership (Tianjin), sought recognition and enforcement under the *International Commercial Arbitrations Act 2017*[74] of an award of the Shenzhen Court of International Arbitration's arbitral tribunal against the respondents, the Dus, for defaulting on a loan agreement. The respondents opposed claiming they did not receive proper notice of the arbitration proceeding, did not have an opportunity to present a defence, and public policy. The respondents were Canadian citizens with residences in Toronto and China but had chosen not to return to China early in the COVID-19 pandemic.

Justice Jessica Kimmel dismissed the application for recognition and enforcement in Ontario. The Dus demonstrated that they were not given proper notice of the appointment of the arbitral tribunal as notice of the proceedings was not received in a manner to bring it to their attention. The notice and consultative procedures prescribed under the loan agreement were not strictly adhered to in the conduct of the arbitration proceedings in China while they were in Canada during the unprecedented time of the COVID-19 pandemic, travel restrictions, and lockdown. The notice and arbitration materials were sent to the respondents' corporate and residential addresses in China. The applicant attempted to rely on the deemed service of these materials, which although sufficient for certain purposes on set-aside proceedings, was not proper service under the *UNCITRAL Model Law*.[75]

The Dus also proved that they were unable to present their case, having not retained and instructed counsel to present defences for them in their individual capacities separate and apart from the defences presented on behalf of the corporate

[74]SO 2017, c 2; *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38.

[75]*UNCITRAL Model Law*, *supra* note 12, arts 35–36.

arbitration respondents. As a consequence, there was no need to consider public policy grounds. Kimmel J nonetheless agreed with the applicants that the independent ground under the *UNCITRAL Model Law* for refusal on public policy grounds applied to the case. There was no blanket public policy as an exceptional defence against enforcing arbitration awards rendered in China, and this was not the appropriate case in which to engage in that analysis.

ii. Family law

Enforcement of foreign divorce decree

Mehralian v Dunmore, 2023 ONCA 806

The applicant mother appealed an order recognizing the validity of an Omani divorce for the purposes of Ontario law. The respondent father appealed a dismissal of his motion seeking the return of their child from Ontario to Oman and allowing Ontario courts to determine parenting time and decision-making. The parties were married in Japan and later moved to the United Arab Emirates (UAE). They separated briefly but then lived together in Oman. After travelling to Ontario to visit family, they remained due to the COVID-19 pandemic. Though they later returned to Oman, they also came back to Toronto, and, on a vacation, an altercation resulted in their separation. The applicant mother remained in Ontario while the respondent father moved to the UAE and later Oman. The applicant commenced divorce proceedings in Ontario and contested those initiated by the respondent in Omani courts, finding on appeal that it had jurisdiction, the parties validly divorced under Omani law, and primary custody was awarded to the applicant mother. The respondent then proceeded to have the Omani divorce enforced in Ontario.

The applicant's appeal of the recognition order was dismissed. Justice Patrick Monahan upheld the conclusion that the applicant had attorned to the jurisdiction of the Omani courts by finding that, though she initially contested jurisdiction, she subsequently made a voluntary and rational choice to participate fully on the merits. This did not amount to a palpable or overriding error to substitute a factual finding of the recognition judge. This was sufficient to dispose of the appeal.

Monahan J nonetheless similarly found no error in concluding that the applicant could not relitigate issues that she had unsuccessfully raised before the Omani court, including whether she had received valid notice of the Omani divorce and whether the respondent had committed fraud in obtaining it. Although the recognition judge considered whether the Omani divorce should not be recognized in Ontario on public policy grounds, it was unnecessary for him to do so. Consent to the jurisdiction of the foreign court necessarily involved consent to the laws applicable in that jurisdiction. Having consented to the application of Omani law, the applicant could not subsequently argue that the decision of the Omani court should not be recognized in Ontario because it is contrary to Canadian public policy.

The respondent's appeal of the parenting jurisdiction order was similarly dismissed. The judge had credibility concerns with the evidence of both parties. She ultimately preferred the evidence of the applicant on the parties' residence in April and May 2021 because it was more aligned with the documentary evidence and made more narrative sense. The parties therefore moved to Toronto and began residing

there in early April 2021, not merely as temporary visitors, as the respondent claimed. This finding was one of fact entitled to a high degree of deference. There was also no error in finding that recognition of the Omani divorce did not oust the parenting jurisdiction of Ontario courts for the child. The order correctly pointed out that the divorce recognition judge's mandate was to determine the divorce issue only, reserving the determination of parenting jurisdiction.

Enforcement of foreign divorce decree

Dahroug v Hassan, 2023 ONSC 5031

This motion involved the legality of a divorce from the UAE.[76] The respondent relied on a bare talaq divorce, arguing it was sufficient under Islamic family law and should be recognized as a valid foreign divorce in Canada. He failed to prove, however, as a matter of foreign law that the bare talaq divorce in 2010 in the UAE was effective to end the marriage without requiring further steps. There was no foreign divorce decree nor any evidence that the divorce was granted with judicial or official oversight. There was also no expert evidence on the requirements for divorce in the UAE. The applicant took the position that there had never been a valid foreign divorce, they had initially reconciled, and it was only in 2020 that they separated again. The respondent's bare allegation of forgery was contradicted by the applicant's extensive third-party evidence and constituted unfounded and inflammatory attacks against his wife. These claims were even more concerning since the respondent, prior to 2020, represented to Canadian government entities and financial institutions at all times that the applicant was his wife for the purposes of permanent residency and purchasing a house. The court declined to recognize the bare talaq divorce as valid in Canada.

Attornment in recognition of a foreign divorce decree

Hamadanizadeh v Hardarian, 2023 ONSC 4970

This application involved the recognition of an Iranian divorce judgment in Ontario.[77] The wife and husband were born in Iran, but they moved to Ontario where they were married, worked, and had their children. In 2018, they separated, and the applicant wife commenced proceedings in Ontario and took many steps in the litigation. The wife also commenced separate proceedings in Iran to enforce a Mehr or the marriage portion entered into at the time of their marriage under Sharia law. Three years later in 2022, however, the respondent husband commenced divorce proceedings in Iran, and the Iranian courts granted the divorce. The husband sought to enforce that decision along with a dismissal of the Ontario claims made by his wife for relief in property and support.

The respondent husband asserted that his wife attorned to Iranian jurisdiction by instituting the Mehr related proceedings and participating in the Iranian divorce proceedings. He argued that it would be arbitrary to separate the Mehr claims, as a

[76]Consistent with the *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 22.
[77]*Ibid.*

domestic contract relevant to property rights on divorce, from those related to the divorce more generally. The applicant wife insisted that the Mehr was separate and distinct from the question of divorce and corollary relief. Starting those proceedings in Iran was the only way to determine the extent of her husband's property there, as she suspected he was diverting assets to Iran. Considering the expert evidence, there was agreement that the Mehr was a contract existing separately and, therefore, enforceable separately from proceedings on marriage breakdown. The court would not accept the respondent husband's position that his wife attorned to the Iranian divorce proceedings by initiating the Mehr proceedings in Iran.

On whether the wife participated in divorce proceedings in Iran, the court similarly found no attornment. The wife advanced no defence on the merits to the divorce claim. She took no position on property and support, other than to state that she wished the Iranian court to note that these issues were being pursued elsewhere. The husband's argument that the wife waived the claims was also rejected. She was not making a substantive claim but, rather, a jurisdictional argument that Ontario was the proper jurisdiction — the opposite of a conscious intention to waive her rights.

The court also found that the parties did not have a real and substantial connection to Iran to ground jurisdiction of their divorce to Iranian courts. The parties' real home was in Ontario. Neither had lived in Iran for many decades, despite maintaining some links in the form of assets and extended family. Both parties took many active steps in family litigation in Ontario. The husband was not entitled to forum shopping by commencing divorce proceedings in Iran. The court dismissed the husband's motion to recognize and enforce the Iranian divorce.

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

A. Québec

Defamation — applicable law — articles 1457, 3126

AB v Google, 2023 QCCS 1167

This matter arose out a defamatory post spread through Google's search engine claiming the plaintiff, a respected real estate broker with achievements in Canada and the United States, was convicted of a heinous crime. Google eventually removed the hyperlink on the Canadian version, but not the US one. After a separate 2011 Supreme Court of Canada decision on the publication of hyperlinks, *Crookes v Wikimedia Foundation Inc*,[78] however, Google allowed the hyperlink to reappear in Canada. The Quebec Superior Court ultimately found Google liable on the facts of the case since it had already recognized the defamatory post involving the plaintiff as illicit and removed the hyperlink from the Canadian version of the Google search.[79] Justice Hussain Azimuddin found that Google unilaterally restored the hyperlink due to an erroneous interpretation of the 2011 *Crookes* decision involving the law of

[78]2011 SCC 47.

[79]*CcQ*, *supra* note 49, art 1457.

another province. The plaintiff was granted damages for moral injury in the amount of $500,000 and an injunction requiring the removal of the defamatory post on a Google search for users in Quebec.

A preliminary private international law issue was the applicable law in the case.[80] The plaintiff maintained that Quebec law applied to his action.[81] Google argued that US federal law and the relevant state law should apply ensuring the suit was time-barred and Google was immune from the suit under US law as a provider of an interactive computer service.[82] According to Google, the application of Canadian laws should be restricted to the Canada-specific version of the Google search. Quebec's defamation law, in Google's view, could therefore only apply to the Canadian version of the Google search and not apply to the US version or any other country-specific version. Where Quebec law applied, it also had to be interpreted consistently with US law given Canada's obligations under the *Canada-United State-Mexico Agreement* (*CUSMA*).[83]

The court disagreed with Google's reasoning, finding that to harmonize the relevant provisions of *CUSMA* with Quebec law and its IT Framework[84] required recognition of the legal baseline provided for the liability of Internet intermediaries — that they are not liable for the contents of the links to which they provide access through their search engine. While an intermediary cannot be held liable for the behaviour of the content provider and has no positive obligation to monitor all of the content referred by its search engine, it does have a potential liability on "becoming aware that the services are being used for illicit activity."[85] Caution must be exercised before the provision is invoked and interpreted to import into provincial defamation law an immunity provision of US federal law by way of a Canadian federal statute implementing a treaty.

The court agreed with the plaintiff that there was a new act committed by Google when it reversed its own policy regarding the defamatory post after *Crookes*, making the link available again in Quebec and discovered by the plaintiff while living in Quebec in 2015. Google should have foreseen that, when making the link to the post available anew on the Canadian version of Google Search, Quebec law would be applicable to the plaintiff's claim.[86] Quebec law applies on the province's territory, and, therefore, if a user accesses the Google search, whether it is the Canadian version or any other national version of the Google search, Quebec law on defamation applies. Otherwise, it would be too easy for Internet intermediaries to circumvent the law promulgated by legislatures for the territories they govern and applied and enforced by the courts. Intermediaries could continue to make a default version

[80] *Ibid*, art 3078.

[81] Notably *ibid*, art 1457.

[82] Under US law, such matters are governed by the *Communications Decency Act*, 47 USC § 230(c)(1) (1996).

[83] *Protocol Replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States*, 10 December 2019, Can TS 2020 N° 5 (entered into force 1 July 2020) [*CUSMA*]. It was implemented by *Canada-United States-Mexico Agreement Implementation Act*, SC 2020, c 1.

[84] *CUSMA*, *supra* note 83, arts 22–27; *Act to Establish a Legal Framework for Information Technology*, CQLR, c C-1.1.

[85] *Ibid.*

[86] *CcQ*, *supra* note 49, art 3126.

available to users in Quebec in ostensible compliance with local law but then allow for an option to users in Quebec to easily choose another country-specific version and avoid the effect of the jurisdiction's law. Google was at fault for making the link to the defamatory post available anew to users in Quebec after *Crookes*. Google incorrectly interpreted *Crookes* and adopted a link policy inconsistent with Quebec law.

The court also granted the plaintiff's request for an injunction but only in respect of requiring Google to cease displaying search results where the plaintiff's name appears on certain webpages and only in respect of Quebec users. Addressing the plaintiff's request for a worldwide injunction, distinguishing from *Google Inc v Equustek Solutions Inc*,[87] the court found the damages award was based on Quebec law, in connection with a period where the plaintiff was in Quebec and suffered injury. In Azimuddin J's view, the injunction that went along with the damages had to be restricted to Quebec. The combined effect of US state and federal law in the present case was that the defamatory post was available to users of the Google search in the United States — unfortunate for the plaintiff but the result of American legislative policy. Restricting the scope of the injunction to the territory of the province of Quebec struck the right balance between international comity and the jurisdiction of the Superior Court to provide effective relief to plaintiffs.

[87] 2017 SCC 34.

Cite this article: Barnes, Ashley. 2024. "Canadian Cases in Private International Law in 2023." *Canadian Yearbook of International Law/Annuaire canadien de droit international*, 1–31, doi:10.1017/cyl.2024.5