

The Doctrine of *Forum Non Conveniens*: Canada and the United States Compared[†]

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I. INTRODUCTION

Normally, a plaintiff chooses to institute an action in the jurisdiction that he or she assumes to be the most advantageous to his or her interests.¹ This choice, however, may be resisted by the application of the doctrine of *forum non conveniens*. The doctrine of *forum non conveniens* refers to the discretionary power exercised by courts in the common law world to decline jurisdiction over a matter, despite having jurisdiction *simpliciter*, where the court is of the opinion that the matter may be more appropriately tried elsewhere.² Generally speaking, this doctrine arises and is applied in two different but related situations. First, it is commonly employed in an effort to resist or set aside service *ex juris* when the defendant is not a resident within the jurisdiction in which the plaintiff has commenced legal proceed-

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¹ See Joshua C. Borenstein & Bonnie Rabinovitch, *Private International Law: Competence of Tribunal Interjurisdictional Aviation Accidents*, 60 REVUE DU BARREAU 169, 172-73 (2000).

² See BLACK'S LAW DICTIONARY 655 (6th ed. 1990).



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ings.³ Second, where the defendant has been served within the jurisdiction, but he or she disagrees with the propriety of the plaintiff's choice of venue, the doctrine may be employed to stay or dismiss the local proceedings on the basis that another forum is preferred for the resolution of the dispute between the parties.⁴

While the precise origin of the doctrine of *forum non conveniens* is somewhat unclear, its roots have been traced as far back as the sixteenth century and the plea of *forum non competens* in Scottish law.⁵ Its origin has also been linked to several nineteenth and early twentieth century cases decided in the United States in which various courts declined jurisdiction over a matter in favor of other fora.⁶ These streams merged to a degree when Paxton Blair, a New York attorney writing in 1929, borrowed the Scottish terminology and first described the American courts' discretionary dismissal of cases in favor of other fora as the application of *forum non conveniens*.⁷ What has emerged from these sources is what

³ *Integral Energy & Envtl. Eng'g Ltd. v. Schenker of Can. Ltd.* (2001), 293 A.R. 327, ¶ 24 (Can.).

⁴ *See id.*

⁵ John R. Wilson, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659, 673 (2000); *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 (1994).

⁶ *See Am. Dredging Co.*, 510 U.S. at 449-50. *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13 (1981).

⁷ *See Paxton Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Wilson, *supra* note 5, at 673. Blair argued that the doctrine of *forum non conveniens* should be applied broadly as a tool to combat forum shopping and relieve congested court calendars by partially diverting extant litigation elsewhere. Blair, *supra*, at 1, 34; Wilson, *supra* note 5, at 673. As described below, this thesis later proved to be persuasive with the Supreme Court of the United States. Wilson, *supra* note 5, at 673-674 (citing the U.S. Supreme Court's decision in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)).



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some have described as a “remarkably uniform” approach to jurisdiction in the common law world in which courts apply principles designed to identify the most appropriate or convenient forum based on factors that connect the litigation and the parties to competing or alternate fora.⁸ Typically, the application of the doctrine of *forum non conveniens* involves an examination of a variety of factors including: the relative ease of access to sources of proof such as witnesses; costs associated with gathering and tendering such proof; hardship on the defendants; residence of the parties; the existence of parallel proceedings in another jurisdiction; the applicable law; the interests of the parties; and the enforceability of a judgment. As discussed below, this analysis in the United States is generally bifurcated into a consideration of private and public interest factors to determine if the court should decline jurisdiction in favor of an alternate forum.

The purpose of this Article is to give a broad overview of the doctrine of *forum non conveniens* as applied in Canada and the United States while illustrating some of the primary differences in each country’s approach. To this end, this Article is divided into three Parts. Part II explores the doctrine of *forum non conveniens* as developed and applied in Canada’s common law provinces, federal courts, and under the *Civil Code of Québec*. Part III then examines the doctrine of *forum non conveniens* as applied in both the federal and state court systems in the United States while identifying potential variations and gaps in its application within the different courts. Lastly, Part IV attempts to highlight some of the salient differences in the analysis of the *forum non conveniens* doctrine in Canada and the United States.

⁸ See *Spiliada Maritime Corp. v. Cansulex Ltd.*, (1987) A.C. 460, 474-75 (per Lord Goff); *Amchem Products, Inc. v. British Columbia (Workers Comp. Bd.)*, [1993] 1 S.C.R. 897, ¶ 39 (Can.).



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II.

CANADA: THE COMMON LAW PROVINCES, THE FEDERAL COURTS AND QUÉBEC'S CIVIL CODE

A. *The Common Law Provinces*

The doctrine of *forum non conveniens* has been formally adopted by courts in all of Canada's common law provinces.⁹ In the common law provinces, the application and development of the doctrine has been primarily by way of common law jurisprudence with

⁹ See *472900 B.C. Ltd. v. Thrifty Can. Ltd.*, (1998), 57 B.C.L.R. (3d) 332 (Can.); *Banff Transp. & Tours Inc. v. Buchan* (2002), 323 A.R. 234 (Can.); *Saskatchewan Wildlife Fed'n v. Vantage Fin. Services Inc.* (2003), 239 Sask. R. 151 (Can.); *Craig Broad. Sys. v. Frank N. Magid Associates* (1998) 123 Man. R. (2d) 252 (Can.); *Young v. Tyco Int'l of Can. Ltd.* (2008), 92 O.R. (3d) 161 (Can.); *Shannon v. Canadian Med. Protective Ass'n* (2006), 310 N.B.R. (2d) 22 (Can.); *HZPC Americas Corp. v. True N. Seed Potato Co.* (2006), 254 Nfld. & P.E.I.R. 246 (Can.); *Dennis v. Salvation Army Grace Gen. Hosp. Bd.* (1997), 156 N.S.R. (2d) 372 (Can.); *Bradbury Estate v. Manufacturers Life Ins. Co.* (2006), 253 Nfld. & P.E.I.R. 241 (Can.). The doctrine of *forum non conveniens* has also been formally recognized by courts in the Yukon Territory and Northwest Territories. See *Ross River Dena Council v. Can. (Attorney General)* (2007), 55 C.P.C. (6th) 11 (Can.); *Stewart Estate v. Stewart Estate* (1994), N.W.T.R. 276 (Can.). The recently created Nunavut Court of Justice appears to have not yet specifically addressed the matter. Nevertheless, there is little reason to believe that the Nunavut Court of Justice would not adopt the doctrine in the appropriate circumstances.

legislation playing little, if any, role.¹⁰ In this regard, the leading case is undoubtedly the decision of the Supreme Court of Canada in *Amchem Products, Inc. v. British Columbia (Workers Compensation Board)*,¹¹ where the Supreme Court of Canada acknowledged that Canadian law on the subject has evolved from English law as set out by the House of Lords' decision in *Spliada Maritime Corp. v. Cansulex Ltd.*¹²

The Supreme Court of Canada in *Amchem* held that the test for granting a stay based on *forum non conveniens* is whether the defendant has clearly established that there is another forum that is more convenient and appropriate for the pursuit of the action and securing the ends of justice than the forum selected by the plaintiff.¹³ In doing so, the Canadian Court rejected the notion that this analysis was a two-pronged effort as previously set out by the House of Lords in *Rockware Glass Ltd. v. MacShannon*,¹⁴ pursuant to which the moving party was required to establish that there is another forum to which the defendant is amenable in which justice can be done at substantially less inconvenience or expense and that

¹⁰ Nevertheless, it should be pointed out that the Rules of Court in these Provinces often contemplate and allow for applications based on the doctrine of *forum non conveniens*. See, e.g., Supreme Court Rules, B.C. Reg. 221/90, § 14(6.1); Alberta Rules of Court, Alta. Reg. 390/1968, §§ 27, 129; Queen's Bench Rules, Sask. Q.B. Rules, § 99; Court of Queen's Bench Rules, Man. Reg. 553/88, §§ 17.06(2)(c), 21.01(3)(c); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, §§ 17.06(2)(c), 21.01(3)(c); Rules of Court, N.B. Reg. 82-73, § 23.01(2)(d); Rules of Civil Procedure, P.E.I. Rules, § 46.02; Civil Procedure Rules, N.S. Civ. Pro. Rules, §§ 11.05(a), 14.25(1); Rules of the Supreme Court, 1986, S.N.L. 1986, c. 42, Sch. D, § 10.05. Moreover, as discussed in greater detail *infra* Part II.A.1., Saskatchewan, British Columbia, Nova Scotia, Prince Edward Island and the Yukon Territory have recently enacted legislation that relates directly to the application of the doctrine. See *Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1; *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2d session), c. 2; *Court Jurisdiction and Proceedings Transfer Act*, S.P.E.I. 1997, c. 61; *Court Jurisdiction and Proceedings Transfer Act*, S.Y.T. 2000, c. 7.

¹¹ [1993] 1 S.C.R. 897 (Can.).

¹² *Id.*, ¶ 31; *Spliada Maritime Corp.*, (1987) A.C. 460.

¹³ See *Amchem*, [1993] 1 S.C.R. at ¶¶ 38, 58. To this end, Justice Sopinka, speaking for the Canadian Court, adopted the Supreme Court of Canada's previous pronouncement as to the formulation of *forum non conveniens* in *Antares Shipping Corp v. The Ship "Capricorn"*, [1977] 2 S.C.R. 422, 448 (Can.), where Justice Ritchie stated:

In my view the overriding consideration which must guide the Court in exercising its discretion by refusing to grant such an application as this must, however, be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice.

See *Amchem*, [1993] 1 S.C.R. at ¶¶ 31-33. The test as set out in *Amchem* has been subsequently affirmed by the Supreme Court of Canada in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, ¶ 37 (Can.), and *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, ¶ 89 (Can.).

¹⁴ [1978] 2 W.L.R. 362 (H.L.).

the stay would not deprive the plaintiff of a legitimate personal or juridical advantage.¹⁵ The Supreme Court of Canada subsumed these criteria, holding that the question of legitimate personal or juridical advantage was merely one factor to be weighed in addition to all other relevant factors when determining whether a particular forum is clearly more appropriate.¹⁶ Further, the Canadian Court specifically declined the adoption of the *forum non conveniens* test elaborated by the High Court of Australia in *Voth v. Manildra Flour Mills Pty. Ltd.*,¹⁷ which requires the moving party to establish that the forum selected by the plaintiff is clearly “inappropriate” rather than that there is another forum that is clearly more appropriate.

1. *The Factors: Spiliada, Amchem and Others*

Building on the decisions in *Spiliada*, *Amchem* and their antecedents, courts in Canada’s common law provinces tend to consider a wide variety of factors in determining whether they should grant a stay of a proceeding on the basis that another forum is clearly more appropriate. These factors comprise a non-exhaustive list of considerations that includes:

- the jurisdiction in which the factual matters giving rise to the dispute arose;
- the location of each of the parties;
- where the majority of the parties are located;
- the connection of the parties to a particular jurisdiction and the extent of that connection;
- where each party carries on business;
- the location of key evidence and witnesses, including where the same are located or more readily available and its effect on the relative convenience and expense of trial as between the Canadian and foreign courts;
- the location from which the bulk of the evidence is expected to come;
- the jurisdiction in which a corporate party is incorporated;
- the location of a corporate party’s records where the plaintiff seeks an accounting of the same;
- where the cause of action arose;
- where the loss or damage occurred or was suffered;
- the relative convenience or inconvenience to potential witnesses;

¹⁵ See *Amchem*, [1993] 1 S.C.R. at ¶¶ 31-32.

¹⁶ *Id.* See also *HZPC Americas Corp. v. True N. Seed Potato Co.* (2006), 254 Nfld. & P.E.I.R. 246, ¶¶ 49-51 (Can.).

¹⁷ [1990] 171 C.L.R. 538 (Austl.).

- the relative cost of conducting the litigation in the Canadian jurisdiction as opposed to another forum;
- the applicable substantive law and its weight in comparison to the factual questions to be decided;
- the applicable law in tort cases;
- the presence of contractual provisions that specify the applicable law or accord jurisdiction;¹⁸
- the place of contracting in cases involving contractual disputes;
- the difficulty in proving foreign law where necessary and the extent to which foreign law differs materially from applicable Canadian law;
- the avoidance of a multiplicity of proceedings, *lis alibi pendens* and the possibility of inconsistent verdicts;
- geographical factors suggesting the natural forum;
- whether the defendants genuinely desire trial in a foreign jurisdiction or are merely seeking procedural advantages;
- any legitimate juridical advantage available to the plaintiff in Canada and whether declining jurisdiction would deprive the plaintiff of that advantage;¹⁹
- any juridical disadvantage to the defendant in the Canadian jurisdiction;
- whether the plaintiff would be prejudiced by having to sue in the foreign court because the plaintiff would, *inter alia*, be deprived of security for the claim, be unable to enforce any judgment obtained, be faced with a time-bar not applicable in Canada, or for political, racial, religious or other reasons be unlikely to get a fair trial;²⁰

¹⁸ It should be noted, however, that where an exclusive foreign jurisdiction and arbitration clause is in play, a party will be required to meet the much higher burden established by the “strong cause” test set out by Justice Brandon in *The Eleftheria*, (1969) 2 W.L.R. 1073 (P.), and forcefully reiterated in the decision of the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECUline N.V.*, [2003] 1 S.C.R. 450, ¶ 19 (Can.), and *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, ¶¶ 20-33 (Can.).

¹⁹ The concept of “juridical advantage” and the burden of proof associated with its potential loss was recently addressed by the Supreme Court of Canada in *Unifund Assurance Co. v. Ins. Corp. of British Columbia*, [2003] 2 S.C.R. 63 (Can.). In that case, the Supreme Court of Canada held that the moving party need not establish that a loss of a juridical advantage will occur but merely that there is a reasonable expectation or fair opportunity of gaining an advantage by proceeding in a particular jurisdiction. *Id.* at ¶ 138.

²⁰ Regarding an alleged inability to receive a fair trial in another jurisdiction, Canadian courts are clearly reluctant to consider this factor in the absence of clear and cogent evidence. See, in particular, the decision of the British Columbia Court of Appeal in *Westec Aerospace Inc. v. Raytheon Aircraft Co.* (1999), 67 B.C.L.R. (3d) 278, ¶ 52 (Can.).

- the location of the defendant's assets;
- the interests of the parties and justice;
- the need to have the judgment recognized in another jurisdiction; and
- whether the foreign court is able to deal with the issues raised in the matter.²¹

While it is well-established in Canada that the particular weight to be ascribed to these factors is a matter of discretion and varies with the particular circumstances of each case,²² the Supreme Court of Canada in *Amchem* noted that the weight to be given to an alleged juridical advantage was a function of the party's connection to the jurisdiction in question.²³ In this regard, the Supreme Court of Canada held that a real and substantial connection between the party and the jurisdiction legitimizes that party's claim to the advantages that forum may provide, while a tenuous connection between the forum and a party that is simply seeking to gain the juridical advantage may be condemned as forum shopping.²⁴

Unlike the state courts in the United States,²⁵ provincial courts do not deviate substantially in their application of *forum non conveniens* from the standard elaborated in *Amchem* and its progeny, despite some minor differences in the doctrine's application in the province of Québec.²⁶ This consistency is underscored by recently-enacted legislation in Saskatchewan,

²¹ See, e.g., *Spar Aerospace Ltd. v. Am. Mobile Satellite Corp.*, [2002] 4 S.C.R. 205 (Can.); *Antares Shipping Corp. v. The Ship "Capricorn"*, [1977] 2 S.C.R. 422 (Can.); *SVB Underwriting Ltd. v. Fairfax Fin. Holdings Ltd.*, 2007 CarswellOnt 749 (Can.); *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (Can.); *Hill v. Klynveld Peat Marwick Goerdeler* (1997), 156 Sask. R. 244 (Can.); *Keats v. Mundaca Inv. Corp.* (1996), 144 Nfld. & P.E.I.R. 77 (Can.); *Frymer v. Brettschneider* (1994), 19 O.R. (3d) 60 (Can.); *Carroll v. WAG-Aero Inc.* (1994), 137 N.S.R. (2d) 295 (Can.); *Jan Poulsen & Co. v. Seaboard Shipping Co.* (1994), 100 B.C.L.R. (2d) 175 (Can.).

²² See *Formula Contractors Ltd. v. Lafarge Can. Inc.*, 2009 BCSC 105, ¶ 6 (Can.); *Purple Echo Productions Ltd. v. KCTS Television* (2008), 76 B.C.L.R. (4th) 21, ¶ 59 (Can.). Because the application of the doctrine of *forum non conveniens* is a matter of discretion and, unlike the determination of jurisdiction *simpliciter*, not a question of law, some courts have held that the applicable standard of appellate review is not one of correctness, but the lower standard of reasonableness, which, of course, dims the prospects of successful appeals somewhat. See *Phillips v. Phillips* (2006), 384 A.R. 34, ¶ 60 (Can.).

²³ *Amchem Products, Inc. v. British Columbia (Workers Compensation Board)*, [1993] 1 S.C.R. 897, ¶ 35 (Can.).

²⁴ *Id.*

²⁵ See *infra* Part III.B.

²⁶ The need for uniformity of the application of *forum non conveniens* by provincial courts does not appear to have been a salient concern of the Uniform Law Conference of Canada when it drafted its model *Uniform Court Jurisdiction and Proceedings Transfer Act* in 1994. Indeed, the main purposes for the model legislation as identified by the Uniform Law Conference of Canada and the legislation itself, speak primarily of a need to replace differing rules and standards with respect to determining jurisdiction *simpliciter*; and not the doctrine of *forum non conveniens* or its application. See *Uniform Court Jurisdiction and Proceedings Transfer Act* introductory cmt. (Uniform Law Conference of Canada 1994) [hereinafter *Uniform Act*].

British Columbia, Nova Scotia, Prince Edward Island and the Yukon Territory relating to jurisdiction *simpliciter* and the transfer of legal proceedings, which contains provisions on the transfer of proceedings to more appropriate fora specifically modeled after the Supreme Court of Canada's decision in *Amchem*.²⁷

For instance, section 11 of the *Court Jurisdiction and Proceedings Transfer Act*²⁸ codifies the discretion of courts in British Columbia to decline to exercise jurisdiction over a matter on the basis of *forum non conveniens* and sets out a non-exhaustive list of relevant factors for the court's consideration as follows:

- (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
- (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, shall consider the circumstances relevant to the proceeding, including:
 - (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
 - (b) the law to be applied to issues in the proceeding,
 - (c) the desirability of avoiding multiplicity of legal proceedings,
 - (d) the desirability of avoiding conflicting decisions in different courts,
 - (e) the enforcement of an eventual judgment, and
 - (f) the fair and efficient working of the Canadian legal system as a whole.

This provision is replicated in the corresponding legislation of Saskatchewan, Nova Scotia, Prince Edward Island, and the Yukon.²⁹ As noted by the British Columbia Court of Appeal

²⁷ Compare *Uniform Act*, *supra* note 26, and *Penny (Litigation Guardian of) v. Bouch* (2008), 272 N.S.R. (2d) 259, ¶ 15 (Can.). The legislation in that case, as with the legislation passed in other provinces, replicates the *Uniform Act*, which contains specific provisions dealing with the transfer of proceedings that appear to have been based on the *Uniform Transfer of Litigation Act*, which was promulgated in 1991 by the United States National Conference of Commissioners on Uniform State Laws.

²⁸ S.B.C. 2003, c. 28.

²⁹ *Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1, § 10; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2d session), c. 2; *Court Jurisdiction and Proceedings Transfer Act*, S.P.E.I. 1997, c. 61, § 11; *Court Jurisdiction and Proceedings Transfer Act*, S.Y.T. 2000, c. 7, § 11.

in *Lloyd's Underwriters v. Cominco Ltd.*,³⁰ these provisions are not intended to change the common law of *forum non conveniens*, but to codify it by setting out a non-exhaustive list of previously recognized factors relevant to a determination under the doctrine, including those identified in the *Spiliada* and *Amchem* decisions.³¹

This reading of section 11 was confirmed by the Supreme Court of Canada in its recent decision in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*,³² where the Canadian Court held that this provision was not intended to supplement the law relating to *forum non conveniens*, but merely to codify the existing test as set out in *Amchem*.³³ In *Teck Cominco*, the defendant argued that the usual multi-factor test under section 11 of the Court Jurisdiction and Proceedings Transfer Act was not applicable where there had been a prior assertion of jurisdiction by a foreign court and that a “comity-based” test that respects the foreign court’s decision to accept jurisdiction must be applied. In the alternative, the defendant argued that the prior assertion of jurisdiction by a foreign court was an overriding and determinative factor in the application of the usual *forum non conveniens* test as set out in section 11 and that the court was effectively bound to stay parallel actions in British Columbia. The Supreme Court of Canada flatly rejected both arguments.³⁴

³⁰ (2007), 67 B.C.L.R. (4th) 101 (Can.).

³¹ *Id.* ¶¶ 55-58. In a similar vein, the court in *Coulson Aircrane Ltd. v. Pacific Helicopter Tours Inc.* (2006), 57 B.C.L.R. (4th) 226 (Can.), held that while section 11 of the *Court Jurisdiction and Proceedings Transfer Act* is applicable to *forum non conveniens* matters, principles derived from the earlier jurisprudence continue to be relevant as a source of guidance. *Id.*, ¶ 50.

³² 2009 SCC 11 (Can.).

³³ Chief Justice McLachlin, speaking for the Canadian Court, stated

Section 11 of the *CJPTA* was intended to codify the *forum non conveniens* test, not to supplement it. The *CJPTA* is the product of the Uniform Law Conference of Canada. In its introductory comments, the Conference identified the main purposes of the proposed Act, which included bringing “Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye* and *Amchem Products Inc. v. British Columbia (Workers’ Compensation Board)*. Further, the drafters of the model Act confirmed that s. 11 of the *CJPTA* was intended to codify the common law *forum non conveniens* principles in “comments to section 11”:

11.1 Section 11 is meant to codify the doctrine of *forum non conveniens*, which was most recently confirmed by the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia* (1993). The language of subsection 11(1) is taken from *Amchem* and the earlier cases on which it was based. The factors listed in subsection 11(2) as relevant to the court’s discretion are all factors that have been expressly or implicitly considered by courts in the past.

Id. ¶ 22 (citations omitted).

³⁴ *Id.* ¶¶ 21, 24.

As to the first argument, the Canadian Court held that the prior assertion of jurisdiction by a foreign court did not oust the *forum non conveniens* inquiry elaborated in section 11 of the *Court Jurisdiction and Proceedings Transfer Act*, which itself was a comity-based approach.³⁵ With respect to the second argument, the Canadian Court held that, if the legislature had intended such a change to the law of *forum non conveniens*, it would not have expressly stipulated that the existence of foreign proceedings remains only one factor, among many, to be considered in a *forum non conveniens* analysis.³⁶ Ultimately, the Supreme Court of Canada held that, while a court should seek to avoid parallel proceedings, this effort ought not to overshadow the overriding objective of the doctrine of *forum non conveniens*: to ensure that an action is tried in the jurisdiction that has the closest connection with the action and the parties.³⁷

2. *The Burden: Service Ex Juris and Foreign Defendants*

As the New Brunswick Court of Appeal noted in *Coutu v. Gauthier (Succession de)*,³⁸ Canadian common law courts are divided on the question as to which party bears the onus of proof and persuasion with respect to *forum non conveniens* where service has been effected on a foreign defendant.³⁹ Some Canadian courts have taken the position that it is up to the plaintiff to establish that the domestic forum where a foreign defendant has been served is appropriate, while others have take the view that the burden always remains on the defendant, foreign or otherwise, to displace the plaintiff's choice of forum on a *forum non conveniens* theory.⁴⁰

The Courts of Appeal in British Columbia and Ontario have held that the burden rests upon the plaintiff to justify the choice of forum. In this regard, Chief Justice McEachern of the British Columbia Court of Appeal in *Bushell v. T & N plc*⁴¹ held that the onus was on the

³⁵ *Id.* ¶¶ 21-23.

³⁶ *Id.* ¶¶ 24-31.

³⁷ *Id.* ¶¶ 33, 39.

³⁸ (2006), 296 N.B.R. (2d) 35 (Can.).

³⁹ *Id.* ¶¶ 79-80.

⁴⁰ *Id.* ¶ 80.

⁴¹ (1992), 67 B.C.L.R. (2d) 330 (Can.).

plaintiff in cases of service *ex juris* to justify the domestic forum as an appropriate forum and to assuage comity concerns arising from the exercise of jurisdiction by the domestic court.⁴² In similar terms, the majority of the Ontario Court of Appeal in *Frymer v. Brettschneider*⁴³ held that

[e]ssentially, I would include that when the plaintiff chooses a forum in which jurisdiction exists “as of right[,”] in the sense that the defendant is a resident of that jurisdiction, the defendant has the burden of showing that another forum is the convenient one. If the plaintiff chooses to bring a foreigner into the jurisdiction, typically in a case of service *ex juris*, the burden will be on the plaintiff to establish that Ontario is the appropriate forum if the choice of forum is challenged by the defendant. This, in my view, accords with the principles of comity upon which the doctrine of *forum non conveniens* rests.⁴⁴

This approach appears to be mirrored in the civil procedure rules found in Alberta pursuant to which a plaintiff must apply in the first instance for an order permitting service *ex juris* and further justify its choice of jurisdiction when this choice is challenged by a foreign defendant.⁴⁵

⁴² Chief Justice McEachern stated

I believe Mr. Giles has correctly identified the tests which should be applied when a foreign defendant seeks to challenge the extra-territorial jurisdiction of the British Columbia courts. In my judgment that jurisdiction should be carefully scrutinized and exercised with appropriate restraint if we expect our judgments to be respected and enforced in other jurisdictions.

It is not enough to show that the action as pleaded fits into one of the categories enumerated in R. 13(1). That is an intellectual exercise not involving any discretion. Once that threshold has been satisfied, a distinction must be drawn between applications to stay British Columbia actions and challenges to the court’s extra-territorial jurisdiction. In the former, *forum conveniens*, as explained in the cases, is the governing principle and a plaintiff will not lightly be denied its choice of situs. For this reason, the onus of displacing jurisdiction will be on the defendant. In the latter category, the onus is upon the plaintiff not just to satisfy the *forum conveniens* test, but also to persuade the court that a reasonable measure of fairness and justice sufficient to meet the reasonable expectations of the national and international legal communities will be preserved if the court exercises jurisdiction.

Id. ¶¶ 47-48. See also *Marion v. Monarch Co.*, [1998] B.C.J. No. 74, ¶¶ 10-12 (Can.).

⁴³ (1994), 19 O.R. (3d) 60 (Can.).

⁴⁴ *Id.* ¶ 70.

⁴⁵ See, e.g., *Royal & Sun Alliance Ins. Co. of Can. v. Wainoco Oil & Gas Co.* (2004), 364 A.R. 151, ¶¶ 26-28 (Can.); *Sports Corp. v. Svoboda* (2004), 362 A.R. 338, ¶ 23 (Can.); *United Oilseed Prod. Ltd. v. Royal Bank of Can.* (1988), 87 A.R. 337, ¶¶ 30-32 (Can.). See also *Thod Inv. Ltd. v. André-Philippe Gagnon Inc.* (2005), 385 A.R. 199, ¶ 23 (Can.).

Courts in Manitoba, New Brunswick, Nova Scotia and Prince Edward Island have explicitly rejected this approach and have taken the view that the foreign defendant as the moving party always bears the onus of showing that some other forum is clearly more appropriate.⁴⁶ A similar approach now appears to exist in Saskatchewan as a result of consequential amendments to the Queen's Bench Rules arising from the enactment of the *Court Jurisdiction and Proceedings Transfer Act*. The Saskatchewan Court of Appeal has interpreted this Act as subsuming service issues into the substantive question of jurisdiction, which must be challenged in normal course by the defendant.⁴⁷ Recent changes to the civil procedure rules in Newfoundland also appear to give rise to a similar result. As a consequence of these changes, a plaintiff in Newfoundland is no longer required to seek leave of the court to effect service *ex juris* in most circumstances with the ostensible effect that the burden of displacing the choice of jurisdiction on a *forum non conveniens* basis rests with the defendant.⁴⁸

B. Canada's Federal Courts

Roughly stated, the Federal Court of Canada and the Federal Court of Appeal are courts with jurisdiction to adjudicate on federally-regulated matters, include maritime, immigration, and intellectual property matters. The discretion of these courts to grant a stay of proceedings within their jurisdiction pursuant to the doctrine of *forum non conveniens* is specifically set out in section 50 of the *Federal Courts Act*,⁴⁹ which provides that

⁴⁶ See, e.g., *Coutu v. Gauthier (Succession de)* (2006), 296 N.B.R. (2d) 35, ¶ 80 (Can.); *HZPC Americas Corp. v. True N. Seed Potato Co.* (2006), 254 Nfld. & P.E.I.R. 246, ¶¶ 49-51 (Can.); *Caspian Constr. Inc. v. Drake Surveys Ltd.* (2004), 184 Man. R. (2d) 284, ¶ 10 (Can.); *Polar Foods Int'l Inc. v. Jensen Tuna Inc.* (2002), 218 Nfld. & P.E.I.R. 6, ¶ 16 (Can.); *Craig Broad. Sys. Inc. v. Frank N. Magid Associates Inc.* (1998), 123 Man. R. (2d) 252, ¶ 31 (Can.); *679927 Ontario Ltd. v. Wall*, (1997), 156 N.S.R. (2d) 360, ¶ 27 (Can.); *Landmark Sport Group Atl. Ltd. v. Karpov* (1995), 142 N.S.R. (2d) 280, ¶ 14 (Can.); *Tomlinson v. Turner* (1993), 108 Nfld. & P.E.I.R. 346, ¶ 12 (Can.).

⁴⁷ See *Hunter v. Hunter* (2005), 269 Sask. R. 223, ¶ 14 (Can.). Whether the adoption of the Court Jurisdiction and Proceedings Transfer Act in British Columbia has occasioned a change of the law in British Columbia as stated in *Bushell* (1992), 67 B.C.L.R. (2d) 330 (Can.), does not appear to have been addressed as yet and is an open question.

⁴⁸ See Rules of the Supreme Court, S.N.L. 1986, c. 42, Sch. D, §§ 6.07(1), (7); *GRI Simulations Inc. v. Oceaneering Int'l* (2005), 250 Nfld. & P.E.I.R. 204, ¶¶ 21, 73-74 (Can.).

⁴⁹ R.S.C., 1985, c. F-7 (1985) (Can.).

[t]he Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter

- (a) on the ground that the claim is being proceeded with in another court or jurisdiction; or
- (b) where for any other reason it is in the interest of justice that the proceedings be stayed.⁵⁰

Pursuant to this provision, the Federal Court of Canada and Federal Court of Appeal have on numerous occasions exercised their discretion to decline jurisdiction over a matter, despite having jurisdiction *simpliciter*, based on the test set out in *Amchem*.⁵¹ Accordingly, the doctrine of *forum non conveniens* as it has been applied by the Federal Court of Canada does not appear to differ in any material respect from that applied in Canada's common law provinces or the civil law province of Québec. Regarding the burden of proof, it appears that whether or not there has been service *ex juris*, it is the defendant as the moving party that bears the burden of establishing that there is another forum that is clearly more appropriate.⁵²

Recently, a vigorous, albeit unsuccessful, attempt was made to inhibit the ability of the Federal Court to stay proceedings pursuant to the doctrine of *forum non conveniens*. The argument was based on federal legislation relating to the carriage of goods by sea. It was argued in a series of Federal Court cases that legislation permitting the commencement of

⁵⁰ In addition, Rule 208 of the Federal Courts Rules, S.O.R./98-106 (Can.), provides:

A party who has been served with a statement of claim and who brings a motion to object to

- (a) any irregularity in the commencement of the action,
- (b) the service of the statement of claim,
- (c) the Court as not being a convenient forum, or
- (d) the jurisdiction of the Court,

does not thereby atorn to the jurisdiction of the Court.

⁵¹ See, e.g., *Ford Aquitaine Indus. SAS c. "Canmar Pride"*, [2005] F.C. 431, ¶¶ 84-88 (Can.); *Nissho Iwai Co.v. Shanghai Ocean Shipping Co.* (2000), 185 F.T.R. 314, ¶¶ 18-22 (Can.).

⁵² See *Napa v. ABTA Shipping Co.* (1998), 173 F.T.R. 54, ¶ 11 (Can.). Prothonatory Morneau stated that [a]dditionally, in my opinion it is clear that in the case at bar it is for the defendants to submit such clear evidence in favour of Cyprus. Certainly no reference can be made in this Court to service *ex juris* made as a basis for arguing that it is the plaintiffs who have the burden of showing that Canada is clearly the appropriate forum. Service outside of Canada may now be done in this Court without leave.

As noted, this approach appears to be consistent with that taken in Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland.

legal proceedings in Canada arising from disputes involving the carriage of goods by sea, despite the presence of an exclusive forum selection clause favoring other fora, had effectively ousted the Federal Court's discretion to stay proceedings in Canada on a *forum non conveniens* basis.⁵³ More specifically, it was argued that, due to the enactment of section 46 of the *Marine Liability Act*,⁵⁴ courts no longer had any discretion to issue a stay of proceedings under section 50 of the *Federal Courts Act* where the conditions set out in that provision had been satisfied.⁵⁵ In this regard, section 46(1) of the *Marine Liability Act* provides that

[i]f a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where

- (a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;
- (b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or
- (c) the contract was made in Canada.

Ultimately, the Federal Court of Appeal in *Magic Sportswear Corp. v. Mathilde Maersk (The)*⁵⁶ held that the effect of section 46(1) was three-fold.⁵⁷ First, it limits the effect of exclusive forum selection clauses by permitting a proceeding to be commenced in Canada, despite such a clause, where one of the connecting factors set out in the statute exists. Second, it sets out simple statutory bases for jurisdiction *simpliciter*. Third, the statute removes

⁵³ *Magic Sportswear Corp. v. Mathilde Maersk (The)* (2006), 273 D.L.R. (4th) 302, ¶ 15 (Can.); *Incremona-Salerno Marmi Affini Siciliani (I.S.M.A.S.) s.n.c. v. Castor (The)*, 2002 FCA 479, ¶ 13 (Can.).

⁵⁴ 2001 S.C., c. 6 (Can.).

⁵⁵ See *Magic Sportswear*, 273 D.L.R. (4th) at ¶ 13.

⁵⁶ See generally *id.*

⁵⁷ See *id.*, ¶ 36.

the court's discretion to grant a stay solely on the ground that the parties have selected an exclusive forum outside Canada and not the discretion to stay on a *forum non conveniens* basis.⁵⁸

C. *Québec and the Civil Code*⁵⁹

As stated earlier, Scotland, which in many respects is a civil law jurisdiction, appears to be the first jurisdiction to have adopted the doctrine of “inappropriate forum” or *forum non conveniens*.⁶⁰ Interestingly enough, the *forum non conveniens* doctrine is generally rejected in most civil law jurisdictions⁶¹ in favor of the more rigid doctrine of *lis alibi pendens*, which precludes an action from being commenced on the same facts in a second court if an action on these facts is already pending in another court.⁶² In fact, Québec jurisprudence had, prior to the adoption of the doctrine in the new *Civil Code of Québec*,⁶³ and the coming into force of article 3135 thereof on January 1, 1994, rejected the applicability of *forum non conveniens*.⁶⁴

⁵⁸ Considering that it will be a rare case where a party makes a *forum non conveniens* application based solely on an exclusive forum selection clause, the overall effect of section 46 on the application of *forum non conveniens* is arguably minimal. That is not to say, however, that the court will not continue to figure such a clause into its *forum non conveniens* analysis. See *Magic Sportswear Corp.*, 273 D.L.R. (4th) at ¶ 98. As the Federal Court of Appeal's decision in *Mitsui O.S.K. Lines Ltd. v. Mazda Canada Inc.*, 2008 FCA 219 (Can.), the weight to be accorded to this factor is dependent on the parties' links to the jurisdiction favored in the forum selection clause. *Id.*, ¶ 24.

⁵⁹ In 1664, Québec's local authorities adopted the “Coutume de Paris” as the main body of law governing the settlement of Nouvelle France. These customs were complemented by local customs, canon law and royal edicts. The law of Nouvelle France remained a somewhat informal body of customs until the first official codification of its law was adopted in 1866 under the name of the Civil Code of Lower Canada (the “C.c.L.-C.”), which was influenced by the French Napoleonic Code of 1804, the Louisiana Civil Code, and some British common law. The C.c.L.-C. consolidated these different sources and created a body of law that was more suited to the local society. As the C.c.L.-C. evolved over the years, it was modified several times and influenced by various factors, including new social, economic, and political realities in Québec, and globalization. The C.c.L.-C. continues to evolve with the last major modification having been adopted on January 1, 1994 and set out in the new *Québec Civil Code*.

⁶⁰ Arthur Taylor Von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common and Civil-Law Systems, General Course on Private International Law* (1996), in 295 RECUEIL DES COURS/COLLECTED COURSES 400-401 (2002).

⁶¹ Héléne Gaudemet-Tallon, *France*, in DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW: REPORTS TO THE XIVTH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 177 (J.J. Fawcett ed., 1995).

⁶² Ronald A. Brand & Scott R. Jablonski, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 121 (Oxford University Press 2007).

⁶³ S.Q. 1991, c. 64 [hereinafter the “C.C.Q.”].

⁶⁴ See *Johns-Manville Corp. v. Dominion of Can. Gen. Ins. Co.*, [1991] R.J.Q. 616 (Can.); *Aberman v. Solomon*, [1986] R.D.J. 385 (Can.); *S. Pac. Co. v. M. Botner & Sons Inc.*, [1973] R.P. 97 (Can.).

With the greatest respect to those who differ, I have come to the conclusion that, as the law now stands, the doctrine of forum non conveniens has no application in the law of Quebec. Article 68 [of the Quebec Code of Civil Procedure] is clear and does not give rise to the exercise of judicial discretion, however desirable this may be.⁶⁵

Until 1993, the courts maintained this opinion:

It is also true, as [the] appellants suggest, that our Court has held that the doctrine of “forum non conveniens” has no application in Quebec, at least not in purely civil matters. The receiver could not rely, therefore, on that doctrine to defeat civil proceedings taken in Quebec where a court here had jurisdiction to hear those proceedings.⁶⁶

However, with the enactment of article 3135, Québec nullified the effect of such case law and moved ahead with the adoption and codification of a somewhat different form of the doctrine of *forum non conveniens* from that applied in the rest of Canada.

Québec general jurisdiction rules are set forth in the C.C.P.⁶⁷ as well as article 3134 of the C.C.Q., which provides that, “[i]n the absence of any special provision, the Quebec authorities have jurisdiction when the defendant is domiciled in Quebec.”⁶⁸

This last article is relatively new in Québec law. Its underlying principle was borrowed from the 1987 Swiss *Loi fédérale sur le droit international privé*, which adopts the principle of *actor sequitur forum rei* (or “he who acts in justice does so in the defendant’s forum”). This principle flows from the civilian natural justice ideal that the natural forum for a case is the domicile of the defendant.⁶⁹

Article 3135 of the C.C.Q. provides a counterbalance to the otherwise broad basis of Québec’s jurisdictional rules. The new provision sets out the “Québec version” of the doctrine of *forum non conveniens* as follows: “Even though a Quebec authority has jurisdiction to

⁶⁵ *Aberman*, [1986] R.D.J. at ¶ 13 (per Justice Kaufman).

⁶⁶ *Simcoe & Erie General Insurance Co. v. Sutliff*, 1993 CarswellQue 184 at ¶ 37 (internal citations omitted).

⁶⁷ See S.Q. 1980, c. 39, s. 68 (Book I, Title III, Chapter III entitled “Place of Instituting Actions”). This version of article 68 of the C.C.P. was the earlier codification of the principle now found in article 3134. However, once Québec courts had jurisdiction, they had no discretion to decline once domicile was confirmed to be in Québec.

⁶⁸ See C.C.Q., s. 3134. Book X, Title III also sets forth links or contacts that would give the Québec courts jurisdiction. See C.C.Q., s. 3134-3154.

⁶⁹ *H.L. Boulton & Co. SACA c. Banque Royale du Can.*, [1995] R.J.Q. 213, ¶ 50 (Can.); *Malden Mills Indus. Inc. c. Huntingdon Mills (Canada) Ltd.*, [1994] R.J.Q. 2227, ¶ 16 (Can.).

hear a dispute, it may *exceptionally* and on an application by a party, decline jurisdiction if it considers that the authorities of another country are *in a better position to decide*.⁷⁰

In general terms, article 3135 gives the deciding authority the discretion to *exceptionally*⁷¹ decline its jurisdiction to hear a matter once jurisdiction *simpliciter* has been established.⁷² Surprisingly, the article does not itself provide guidelines to assist in determining what circumstances are to be considered “exceptional” or when a foreign authority may be “in a better position to decide.” Nevertheless, it is clear that a Québec court must, prior to declining jurisdiction, ensure that the foreign authority has jurisdiction to decide the case⁷³ and is better suited to do so⁷⁴ on a balance of convenience basis.⁷⁵

The following broad guidelines were provided by the Québec Minister of Justice, when the new C.C.Q. was in the process of being adopted, to assist in determining whether “exceptional” circumstances exist allowing a Québec court to decline its jurisdiction in favor of a foreign authority:⁷⁶

This article of new law codifies the exceptional doctrine of *forum non conveniens*, frequently used in the common law systems.

The *forum non conveniens* doctrine allows a court to decline its jurisdiction when it deems that the interest of justice would be better served if the case at bar would be heard by a court of another jurisdiction.

The following may be considered in determining whether or not the court is in the presence of exceptional circumstances allowing it to decline its jurisdiction: the availability of witnesses; the lack of familiarity of the applicable law by the author-

⁷⁰ S.Q. 1991, c. 39, s. 3135 (emphasis added).

⁷¹ *Gill c. Home Depot Can. Inc.*, [2005] J.E. 2005-789, ¶ 29 (Can.); *Sabre inc. c. Air Can.*, [2003] REJB 2003-39408, ¶ 5 (Can.); *Sorel-Tracy Terminal Maritime c. FSL Ltd.*, [2001] REJB 2001-23640, ¶ 9 (Can.); *Hyprescon Inc. c. Madison Chem. Indus. Inc.*, [2001] REJB 2001-29388, ¶ 39 (Can.); *Lexus Maritime Inc. c. Oppenheim Forfait GmbH*, [1998] REJB 1998-07102, ¶¶ 18-19 (Can.).

⁷² *GreCon Dimter inc. c. J.R. Normand inc.*, [2005] 2 S.C.R. 401, ¶ 48 (Can.).

⁷³ This analysis includes the application of the *forum non conveniens* doctrine to determine how the foreign court should have adopted that very doctrine, thereby creating a “little mirror” or a closed analytical loop. *See Spar Aerospace Ltd. v. Am. Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, ¶¶ 57-59 (Can.) (referring to GÉRALD GOLDSTEIN & ETHEL GROFFIER, *DRIT INTERNATIONAL PRIVÉ, TOME I, THÉORIE GÉNÉRALE* 359 (1998)).

⁷⁴ *Firecash Ltd. c. Republic Bank Ltd.*, [2003] REJB 2003-45143, ¶¶ 31-33 (Can.), *appeal rejected by* [2004] REJB 2004-59992 (Can.).

⁷⁵ *Banque Toronto-Dominion c. Arsenault*, [1994] R.J.Q. 2253, ¶ 11 (Can.).

⁷⁶ QUÉBEC (MINISTÈRE DE LA JUSTICE), *COMMENTAIRES DU MINISTRE DE LA JUSTICE LE CODE CIVIL DU QUÉBEC 1999-2000* (1993).

ity called upon to decide a case; the degree of strength of the case's link with the jurisdictional authority; and whether the case has a narrower link with the authorities of another state. [Translation]

Québec courts, including the Québec Court of Appeal and the Supreme Court of Canada, have since had numerous occasions to consider the applicability of article 3135 of the C.C.Q. and the doctrine of *forum non conveniens* in Québec.⁷⁷ These courts have set out numerous factors which elaborate the terms “exceptionally” and “in a better position to decide.”

Québec courts have adopted the *Amchem* court's criteria to the effect that the existence of a more appropriate forum must be *clearly* established to allow a Québec court to decline its jurisdiction,⁷⁸ thereby discouraging forum shopping in the following terms:

The choice of the appropriate forum is still to be made on the basis of the factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a judicial advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate.⁷⁹

⁷⁷ See generally *Lepine v. Societe Canadienne des postes*, 2009 SCC 16 (Can.); *Spar Aerospace v. American Mobile Satellite*, [2002] 4 S.C.R. 205 (Can.); 2493136 *Can. inc. c. Sunburst Products inc.*, [1996] REJB 1996-29100 (Can.); *Amiel Distributions Inc. c. Amana Co. L.P.*, [2002] REJB 2002-32688 (Can.); *Banque Toronto-Dominion c. Arsenault*, [1994] R.J.Q. 2253 (Can.); *Banque Toronto-Dominion c. Cloutier*, [1994] R.J.Q. 386 (Can.); *Carrier c. Frigon*, [1994] J.E. 95-309 (Can.); *Droit de la famille – 2032*, [1994] R.J.Q. 2218 (Can.); *Droit de la famille – 2577*, [1996] J.E. 97-262 (Can.); *Gentec inc. c. Eecol Elec. Inc.*, [2006] QCCS 2134 (Can.); *Gill c. Home Depot Can. Inc.*, J.E. 2005-789 (Can.); *GreCon Dimter inc. v. J.R. Normand inc.*, [2004] R.J.Q. 88 (Can.); *H.L. Boulton & Co. SACA. v. Banque Royale du Can.*, [1995] R.J.Q. 213 (Can.); *Lamborghini (Can.) Inc. v. Automobili Lamborghini S.P.A.*, [1997] R.J.Q. 58 (Can.); *Legassick c. Can. (Ministère de la Défense nationale)*, [2002] REJB 2002-34708 (Can.); *Malden Mills Indus. Inc. c. Huntingdon Mills (Can.) Ltd.*, [1994] R.J.Q. 2227; *Recherches internationales Québec c. Cambior inc.*, [1998] REJB 1998-08013 (Can.); *Reklitis (Syndic de)*, [1996] R.J.Q. 3035 (Can.); *Seryx inc. c. Mkt. Dev. Group*, [2003] REJB 2003-39955; *Simcoe & Erie Gen. Ins. Co. c. Arthur Enderesen inc.*, [1995] R.J.Q. 2222 (Can.); *Société Toon Boom Technologies c. Société 2001 SA*, No. 500-09-002057-966, 1996 CanLII 6260 (QC C.A., Feb. 19, 1996) (Can.).

⁷⁸ *Droit de la famille – 2577*, 1996 CarswellQue 1135, at ¶¶ 19, 200 and 29 (QC C.A., Dec. 9, 1996) (Can.) (quoting *Amchem Products, Inc. v. British Columbia (Workers Comp. Bd.)*, [1993] 1 S.C.R. 897, ¶ 24 (Can.).

⁷⁹ *Recherches internationales Québec c. Cambior inc.*, 1998 CarswellQue 4511 at ¶ 27 (Can.).

This notion of “closest connection” is based upon the “natural for[u]m” where a case should be tried as the one with which the action has the “most and real substantial connection.”⁸⁰

The Québec Court of Appeal has listed ten relevant, yet non-exhaustive, factors to consider when deciding if a Québec court should keep or decline jurisdiction in favor of an authority that is “in a better position to decide” as follows:

- 1) the parties’ residence, that of witnesses and experts;
- 2) the location of the material evidence;
- 3) the place where the contract was negotiated and executed;
- 4) the existence of proceedings pending between the parties in another jurisdiction;
- 5) the location of Defendant’s assets;
- 6) the applicable law;
- 7) the advantages conferred upon Plaintiff by its choice of forum, if any;
- 8) the interest of justice;
- 9) the interest of the parties;
- 10) the need to have the judgment recognized in another jurisdiction.⁸¹

⁸⁰ See *Spijadi Maritime Corp. v. Cansulex Ltd.*, (1987) A.C. 460 (H.L.); *Anchem Products Inc.*, [1993] 1 S.C.R. 897, ¶ 28 as referred to in *Recherches internationales Québec c. Cambior inc.*, 1998 CarswellQue 4511, at ¶ 28 (Can.). (Note: The word “form” not “forum” is used in the original text of the *Recherches internationales* decision. On the assumption that this is a typographical error, the authors have made the correction set out above). In determining this “most and real substantial connection,” the criteria to be considered includes whether

the effect that the mere loss of a judicial advantage to the plaintiff will not amount to an injustice if the Court is satisfied that substantial justice will be done in the appropriate forum. In this regard, the House of Lords in *Spijadi* says that plaintiffs must establish “objectively by cogent evidence” that they will not obtain justice in the foreign jurisdiction, before a court should give weight to this argument.

See *Recherches internationales Québec c. Cambior inc.*, 1998 CarswellQue 4511 at ¶ 29 (Can.).

⁸¹ See *Lexus Maritime inc. v. Oppenheim Forfait GmbH*, [1998] Q.J. No. 2059 (Can.). *Lexus Maritime* built upon the criteria initially established in *Banque Toronto-Dominion c. Arsenault*, [1994] R.J.Q. 2253 (Can.), and confirmed by *H.L. Boulton & Co. SACA c. Banque Royale du Canada*, [1995] R.J.Q. 213 (Can.), *Simcoe & Erie General Insurance Co. c. Arthur Endersen inc.*, [1995] R.J.Q. 2222, ¶ 48 (Can.), and *Amiouny v. Avalon Beverage Co.*, J.E. 97-2181 (S.C.) at 9.

This enumeration was again cited in the leading case on Québec law relating to *forum non conveniens*, namely the decision of the Supreme Court of Canada in *Spar Aerospace v. American Mobile Satellite Corp.*⁸²

Interestingly enough, the general criteria that assist in determining whether a foreign court is “in a better position to decide a case” are very similar to those enumerated and considered in Canada’s common law provinces. The difference lies in the notion that “exceptional” circumstances must be clearly established before a Québec court will consider using its discretion to decline jurisdiction. To this effect, the court in *Czajka c. The Life Investors Insurance Co. of America* stated that, “[t]he Court assume[s] that the word ‘Exceptionally’ was used by the legislature to require defendant to establish that another jurisdiction is *clearly* the more appropriate forum to hear the action. It was intended that the Quebec Court would decline to exercise its jurisdiction only under exceptional circumstances.”⁸³

The Québec Appeal Court in the *Oppenheim*⁸⁴ held that none of the above-noted factors are individually determinative but rather a global evaluation must be made by taking into account each applicable factor and that this evaluation must clearly designate or favor a particular forum.⁸⁵ Therefore, if after such an evaluation, no clear impression is generated that would lead a Québec court to believe that a specific foreign authority is better suited to decide a particular case, then the Québec court must refuse to decline jurisdiction.

1. *The Burden: Service Ex Juris and Foreign Defendants*

The *Québec Civil Code* clearly states at article 2803 that it is up to the person who alleges a fact to prove it by providing that “[a] person wishing to assert a right shall prove the facts on which his claim is based. A person who alleges the nullity, modification or extinction of a right shall prove the facts on which he bases his allegation.”

In *Eastern Casualty Insurance Co. v. Brodeur*, the Québec Superior Court confirmed the application of this burden in the *forum non conveniens* context:

One finds an application of this principle in the *Birdsall Inc.* case.⁸⁶ The Court of Appeal stated clearly therein that it was up to the party who objects to the Quebec jurisdiction to prove the foreign courts were in a better situation to decide:

⁸² [2002] 4 S.C.R. 205, ¶ 71 (Can.).

⁸³ *Czajka c. Life Investors Ins. Co. of Am.*, [1995] JE 95-765, ¶ 27 (Can.) (emphasis in original).

⁸⁴ *Lexus Maritime Inc. c. Oppenheim Forfait GmbH*, [1998] REJB 1998-07102 (Can.).

⁸⁵ *Id.* ¶ 23.

⁸⁶ *Birdsall Inc. v. In Any Event Inc.*, [1999] R.J.Q. 1344, ¶ 54 (Can.).

Il revenait alors aux appelantes de démontrer que les tribunaux américains étaient mieux placés pour trancher le litige.

In the present case, it is [the] Defendant who alleges [a] lack of Quebec jurisdiction and, subsidiary, the application of *forum non conveniens*. Thus it is up to him to prove the facts on which his claim is based.⁸⁷

Therefore, it is the defendant as the moving party who must prove, on a balance of probabilities, that a “clearly more appropriate” forum exists and that, by virtue of the enumerated criteria, the seized court should decline jurisdiction over the matter.

Notwithstanding the civil law nature of its expression, the application of the common law doctrine of *forum non conveniens* under the C.C.Q. and its practical effects are quite similar to those found in Canadian common law jurisdictions. The province of Québec also espouses the position taken by the Manitoba, New Brunswick, Nova Scotia and Prince Edward Island courts and shares the view that it is the moving party who at all times bears the onus of showing that another forum is clearly more appropriate. The main difference between the approach taken in Québec and that adopted in Canada’s common law provinces relates to the characterization of the discretionary power of the Québec courts to decline their jurisdiction as “exceptional.” Traditionally, courts in Québec have jealously guarded their power to hear a matter and will only exceptionally apply the doctrine of *forum non conveniens* and decline their jurisdiction in favor of another court when it has been clearly demonstrated that a specific foreign court is in a better position to decide the case at bar.

III. THE UNITED STATES

A. *The Federal Courts*

As in Canada, the doctrine of *forum non conveniens*, as applied in the United States, is a flexible doctrine pursuant to which a court considers a multiplicity of factors to determine whether to exercise its discretionary power to decline jurisdiction. Generally speaking, the list of such factors serves as a guideline rather than a “score card” on which such factors are totalled.⁸⁸

⁸⁷ *E. Cas. Ins. Co. v. Brodeur*, No. 500-17-010777-012, 2002 CanLII 28335, ¶¶ 34-35 (QC C.S. Jun. 28, 2002).

⁸⁸ See S. Donald Gonson, *Forum Non Conveniens*, 12.2 REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL 23, 24 (1999); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

The doctrine of *forum non conveniens* first became available in the federal courts of the United States with its express acknowledgement in *Gulf Oil Corp. v. Gilbert*.⁸⁹ This case involved a dispute between a Virginia resident who brought an action in New York federal court against a corporation incorporated in Pennsylvania. The defendant sought a dismissal of the proceeding in New York on the basis that Virginia was a more appropriate place for the trial of the matter. In this decision, the U.S. Supreme Court set out a now well-known two-part *forum non conveniens* test pursuant to which the applicant must first establish the existence of an adequate alternate forum and, secondly, show that a balancing of private interest factors affecting the convenience of the parties and public interest factors affecting the convenience of the forum favor proceeding in another forum.⁹⁰

1. Private Interest Factors

According to the United States Supreme Court in *Gilbert*, private interest factors refer to the interests of each of the parties in having the case heard in a forum that is the most convenient to them.⁹¹ These factors include the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining the attendance of willing witnesses; the possibility of viewing the premises at issue in the litigation where appropriate; questions as to the enforceability of a judgment if one is obtained; and the relative advantages and disadvantages of the available fora, including practical matters relating to expediting the proceeding and the expense and ease thereof, and whether the expense and difficulties associated with the plaintiff's chosen forum are necessary to ensure that the plaintiff's right to pursue a remedy are respected.⁹²

⁸⁹ 330 U.S. 501, 504 (1947). See Andrew R. Klein, *Foreign Plaintiffs, Forum Non Conveniens, and Consistency*, in *SELECTED ESSAYS ON CURRENT LEGAL ISSUES* 195 (Athens Institute for Education and Research 2008); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947). While the U.S. Supreme Court had previously approved the principle of a court's discretionary power to decline jurisdiction in *Douglas v. New York, New Haven & Hartford Railway Co.*, 279 U.S. 377 (1929), and in *Canada Malting Co. v. Paterson Steamship, Ltd.*, 285 U.S. 413 (1932), it appears that the doctrine had not "fully crystallized" until its express acknowledgment in *Gulf Oil*. See *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 1003 (9th Cir. 2002); *Piper Aircraft*, 454 U.S. at 248.

⁹⁰ See Klein, *supra* note 89, at 195; *Gilbert*, 330 U.S. at 508-509; *Piper Aircraft*, 454 U.S. at 242.

⁹¹ See *Gilbert*, 330 U.S. at 508; Jeffrey Talpis & Shelley L. Kath, *The Exceptional as Commonplace in Quebec Forum Non Conveniens Law*, 34 *REVUE JURIDIQUE THEMIS* 761, 784-85 (2000).

⁹² *Gilbert*, 330 U.S. at 508-509. The U.S. Supreme Court further indicated that a "plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting on him expense or trouble not necessary to his own right to pursue his remedy." *Id.* at 508 (citing Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 *COLUM. L. REV.* 1 (1929)). See also William Tetley, Q.C., *Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea*, in *JURISDICTION AND FORUM SELECTION IN INTERNATIONAL MARITIME LAW: ESSAYS IN HONOR OF ROBERT FORCE* 201 (Martin Davies ed., 2005).

2. Public Interest Factors

Public interest factors, on the other hand, involve the consideration of the interests of the court itself in having the case disposed of in an efficient manner as well as a societal interest in having disputes decided in fora that have a meaningful connection to the matter.⁹³ These factors include the avoidance of congested centers of litigation;⁹⁴ the benefit of publicity of the trial in the seat of the conflict; the choice of the proper place to study questions of foreign law; and the avoidance of conflicts of law.⁹⁵ The U.S. Supreme Court's thinking regarding these "public interest" factors appears to have been influenced in no small measure by the article published by Paxton Blair in which he argued that the doctrine of *forum non conveniens* should be applied broadly as a tool to combat forum shopping and relieve congested court calendars by partially diverting extant litigation elsewhere.⁹⁶

The *Gilbert* decision was rendered somewhat ineffectual with the passage of 28 U.S.C. § 1404(a), which permitted a *forum non conveniens*-like change of venue between federal courts on a more liberal basis when the dispute involved only domestic parties.⁹⁷ However, the reasoning in *Gilbert* was subsequently adopted by the U.S. Supreme Court and made applicable to foreign plaintiffs seeking a dismissal on the basis that a foreign court was a more appropriate forum. This decision in *Piper Aircraft Co. v. Reyno*⁹⁸ is now the leading case on the application of the federal doctrine of *forum non conveniens* involving international elements.⁹⁹

⁹³ See *Gilbert*, 330 U.S. at 509; Talpis & Kath, *supra* note 91, at 784-85.

⁹⁴ Justice Jackson, speaking for the U.S. Supreme Court in *Gilbert*, stated that "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. *Gilbert*, 330 U.S. at 509-510. A less mentioned and more delicate factor is the court's budget, which may influence the decision to decline jurisdiction.

⁹⁵ *Id.* at 509-510; Tetley, *supra* note 92, at 202.

⁹⁶ See *Gilbert*, 330 U.S. at 508, n.8; Blair, *supra* note 7, at 1; Wilson, *supra* note 5, at 673-674.

⁹⁷ 28 U.S.C. § 1404(a) stipulates that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." As noted by the U.S. Supreme Court in *Piper*, § 1404(a) was drafted in accordance with the doctrine of *forum non conveniens*, but was intended to revise the doctrine rather than codify it. Pursuant to this revision, courts were given greater discretion to dismiss than they had under the doctrine of *forum non conveniens*. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981). See also Klein, *supra* note 89, at 195 n.10.

⁹⁸ 454 U.S. 235 (1981).

⁹⁹ See Talpis & Kath, *supra* note 91, at 786-87.

3. *The Piper Decision and Foreign Plaintiffs*

In the *Piper* decision, the U.S. Supreme Court not only adopted the test set out in *Gilbert*, but expanded on its reasoning in a way that made it easier for local defendants to resist the decision of foreign plaintiffs to bring suit in U.S. federal courts. This result, whether intended or not, was achieved by virtue of the U.S. Supreme Court's refinement of *Gilbert*'s private and public interest analysis and by the introduction of guidelines for weighing certain factors in cases involving foreign plaintiffs.¹⁰⁰

With respect to the private and public interest factors, the court emphasized that *forum non conveniens* is a flexible doctrine in which no one factor alone can in the abstract be considered determinative and given greater significance over other factors.¹⁰¹ To this end, the U.S. Supreme Court stated that “[i]f central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.”¹⁰² Accordingly, the court held that the public interest criteria of applicable law and the possibility that there may be a change in the applicable substantive law “should not ordinarily be given conclusive or substantial weight in the *forum non conveniens* inquiry.”¹⁰³ This refinement represented a departure from the previous practice in international cases favoring the forum whose substantive law was applicable to the merits of the case.¹⁰⁴

With respect to foreign plaintiffs and the particular weighing of factors, the U.S. Supreme Court held that the presumption that a plaintiff's choice of forum should rarely be disturbed should apply with less force when the plaintiff or real parties in interest are foreign.¹⁰⁵ The reason for this was stated by Justice Marshall as follows:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.¹⁰⁶

¹⁰⁰ *Id.*; Wilson, *supra* note 5, at 679-80; Klein, *supra* note 89, at 196.

¹⁰¹ Talpis & Kath, *supra* note 91, at 786; *Piper Aircraft*, 454 U.S. at 249-250.

¹⁰² *Piper Aircraft*, 454 U.S. at 249-250.

¹⁰³ *Id.* at 247.

¹⁰⁴ Talpis & Kath, *supra* note 91, at 785.

¹⁰⁵ See *Piper Aircraft*, 454 U.S. at 255-256; Talpis & Kath, *supra* note 91, at 786.

¹⁰⁶ See *Piper Aircraft*, 454 U.S. at 255-256.

Further, the U.S. Supreme Court emphasized that a foreign plaintiff may not defeat a *forum non conveniens* motion simply by showing that the substantive law of the alternative forum is less favorable than that of the chosen forum and noted that only in “rare circumstances” is a remedy available in an alternative forum clearly unsatisfactory.¹⁰⁷ Since the U.S. Supreme Court decided *Piper*, federal courts have followed the guidelines set out therein by, *inter alia*, giving less deference to a foreign plaintiff’s choice of forum, determining whether an adequate alternative forum exists, and applying the public and private interest factors set out in *Gilbert*.¹⁰⁸

B. *The State Level: Legislative and Judicial Action*

Unlike the situation in Canada, the application and availability of the doctrine of *forum non conveniens* at the state level in the United States is not without some uncertainty. While most states have adopted the doctrine by either judicial or legislative means (or both), the doctrine’s applicability in three states remains questionable.¹⁰⁹ At least twenty-two states have enacted legislation or civil procedure rules that specifically provide for a court’s discretion to decline jurisdiction on a *forum non conveniens* basis.¹¹⁰ In thirteen of those states, the doctrine had been already recognized by the courts before these legislative enactments.¹¹¹ Including these states, courts in thirty-nine states have specifically recognized or adopted the doctrine of *forum non conveniens*.¹¹²

Three states, Montana, Idaho and Oregon, have yet to specifically endorse or adopt the doctrine of *forum non conveniens*. The Montana Supreme Court in *Rule v. Burlington Northern and Santa Fe Railway Co.*¹¹³ specifically held that it did not recognize the doctrine of *forum non conveniens* in cases involving the *Federal Employers’ Liability Act*.¹¹⁴ With

¹⁰⁷ See *id.* at 247-255, n.22; Talpis & Kath, *supra* note 91, at 786-87; Wilson, *supra* note 5, at 679.

¹⁰⁸ Wilson, *supra* note 5, at 681-82.

¹⁰⁹ In this vein, the availability of the doctrine also appears to be firmly established in the District of Columbia. See D.C. CODE § 13-425 (2001); *Dennis v. Edwards*, 831 A.2d 1006, 1010 (D.C. 2003).

¹¹⁰ These states include Alabama, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Mississippi, Nebraska, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Texas, Virginia, West Virginia and Wisconsin. See *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1180 n.9 (R.I. 2008).

¹¹¹ Specifically, Arkansas, California, Colorado, Florida, Georgia, Illinois, Massachusetts, Mississippi, New York, Oklahoma, Pennsylvania, Texas and West Virginia. See *id.*

¹¹² These states include: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming. See *id.*

¹¹³ 106 P.3d 533 (Mont. 2005).

¹¹⁴ *Id.* at 536.

respect to cases not involving the *Federal Employers' Liability Act*, the court stated that it has "neither accepted nor rejected the application of the doctrine of *forum non conveniens* in non-FELA cases and we have neither denied nor recognized the existence of the doctrine in cases where there is no strong policy favoring plaintiff's forum selection."¹¹⁵ The Supreme Court of Idaho for its part has mentioned the doctrine, but only in passing.¹¹⁶ While appellate courts in Oregon have assumed that the doctrine can be applied by courts in Oregon, the Supreme Court of Oregon has only referred to the doctrine in *dicta* and has not yet ruled definitively on whether defendants may resort to the doctrine.¹¹⁷

While a majority of states have, to varying degrees, adopted the federal *forum non conveniens* standard as set out in *Gilbert and Piper*,¹¹⁸ it is important to note that these decisions are not binding on state courts.¹¹⁹ In this regard, the U.S. Supreme Court in *Chick Kam Choo v. Exxon Corp.*¹²⁰ specifically noted that state courts are not bound by the federal formulation of *forum non conveniens* where state law on the matter is incompatible with the federal doctrine.¹²¹ Consequently, the development of independent and distinct doctrines at the state level has not been precluded.¹²² Among those states adopting an alternative to the federal approach to *forum non conveniens* are Alabama, California, Louisiana, New York, North Dakota, North Carolina and Wisconsin, which employ the version of *forum non conveniens* set out in section 1.05 of the 1962 *Uniform Interstate and International Procedure Act*,¹²³ which states, "When the court finds that in the interest of substantial justice the action

¹¹⁵ See *State ex rel. Burlington N. R.R. Co. v. Dist. Court*, 891 P.2d 493, 498 (Mont. 1995).

¹¹⁶ See *Kedy*, 946 A.2d at 1180 n.9; *Marco Distrib., Inc. v. Biehl*, 555 P.2d 393, 396-97 (Idaho 1976).

¹¹⁷ See *Kedy*, 946 A.2d at 1180 n.9; *State ex rel. Hydraulic Servocontrols Corp. v. Dale*, 657 P.2d 211, 216 & n.5 (Or. 1982); *Maricich v. Lacos*, 129 P.3d 193, 195 (Or. Ct. App. 2006).

¹¹⁸ See Gary Born, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS* 298 (3d ed. 1996).

¹¹⁹ See *Talpis & Kath*, *supra* note 91, at 787.

¹²⁰ 486 U.S. 140 (1988).

¹²¹ *Id.* at 149-50. *Talpis & Kath*, *supra* note 91, at 787.

¹²² As Brand and Jablonksi note, an example of the separation between state and federal law relating to *forum non conveniens* is found in the decision of the Michigan Supreme Court in *Radeljak v. DaimlerChrysler Corp.*, 719 N.W.2d 40 (Mich. 2006), where the court provided its own list of private and public interest factors, which were similar but not identical to those identified in *Gilbert and Piper*, and overruled earlier Michigan decisions requiring the moving party to first prove that the local court is a "seriously inconvenient" forum before moving on to consider private and public interest factors in its *forum non conveniens* analysis. *Id.* at 48-49. See Brand & Jablonski, *supra* note 62, at 72.

¹²³ 11 AM. J. COMP. L. 418 (1962).

should be heard in another forum, the court may dismiss the action in whole or in part on any conditions that may be just.¹²⁴

Pursuant to this version of the doctrine, the court may consider a myriad of factors, including the amenability of the parties to personal jurisdiction, party and witness convenience, conflict of law rules, and “any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.”¹²⁵ Other states have adopted the federal doctrine of *forum non conveniens* only in part, while others have at various times placed restrictions on its use.¹²⁶ Suffice it to say, when an action is commenced in a state court in the United States, it is not a foregone conclusion that the doctrine of *forum non conveniens* can be resorted to and, if available, that the standards will replicate the doctrine as applied by the federal courts.

IV. *FORUM NON CONVENIENS* IN CANADA AND THE UNITED STATES: SOME SALIENT DIFFERENCES AND SIMILARITIES

While the different approaches to *forum non conveniens* found in Canada and the United States are conceptually similar in that they involve a flexible and multi-factored analysis undertaken by a court in determining whether it should decline jurisdiction in favor of an alternate forum, there are some salient differences that bear mentioning.

At the procedural level, courts in the United States need not necessarily wait for an application from one of the parties to dismiss a case on *forum non conveniens* grounds. In

¹²⁴ See Talpis & Kath, *supra* note 91, at 787-88; Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 LOY. L.A. INT'L & COMP. L.J. 455, 463 n. 44-45 (1994); *Commonw. Land Title Ins. Co. v. Pugh*, 555 N.W.2d 576, 579 (N.D. 1996).

¹²⁵ See *Commonw. Land Title Ins. Co.*, 555 N.W.2d at 579. In this respect, the court in *Great Northern Railway Co. v. Superior Court*, 90 Cal. Rptr. 461, 469-71 (Ct. App. 1970), *cert. denied*, 401 U.S. 1013 (1971), identified more than twenty-five factors which could be taken into account in such an analysis. See also Talpis & Kath, *supra* note 91, at 787-88.

¹²⁶ See Talpis & Kath, *supra* note 91, at 787-88; Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 340-41 (1994); Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COMP. L. 31, 54 (2000). Perhaps among the most notable examples of this approach is the decision of the Texas Supreme Court in *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 679-80 (Tex. 1990), which appeared to abolish *forum non conveniens* in a tort action brought by a foreign plaintiff against an American corporation. This decision was ultimately overturned by legislative means. See Klein, *supra* note 89, at 198.

other words, the court may make a *forum non conveniens* ruling *sua sponte*.¹²⁷ Canadian courts do not appear to have the same unilateral power.

As is evident from the foregoing discussion, Canadian *forum non conveniens* analysis does not make a distinction between private and public interest factors and for the most part places primary emphasis on the balance of convenience between the parties.¹²⁸ Relatively little, if any, emphasis is placed in Canadian *forum non conveniens* analysis on judicial economy and such matters as the overuse of judicial resources or the congestion of litigation centers.¹²⁹ In this regard, relatively few Canadian cases identify court congestion as a factor to be considered when applying the doctrine.¹³⁰ Moreover, there does not appear to be a single Canadian case in which this factor has received specific scrutiny or been given any determinative weight.¹³¹

Also, a general presumption exists in many U.S. jurisdictions favoring a local plaintiff's choice of forum (but not foreign plaintiff's) pursuant to the *Piper* decision and its progeny. A similar presumption does not exist in Canada.¹³² While the degree to which this a-national approach is actually followed in Canada might be questioned, Canadian courts do not explicitly favor either domestic or foreign plaintiffs as a matter of course.¹³³ Despite the general rule in U.S. courts, at least one state court has rejected the *Piper* position regarding foreign plaintiffs and adopted an approach similar to the Canadian position. In *Myers v. Boeing Co.*,¹³⁴ the Supreme Court of Washington held that the lesser-deference rule as set out in *Piper* was unnecessary on the basis that the application of the private and public

¹²⁷ See, e.g., *Bongards' Creameries v. AlfaLaval, Inc.*, 339 N.W.2d 561, 562 (Minn. 1983); *Haynes v. Carr*, 379 A.2d 1178, 1180 (D.C. 1977). Courts in other U.S. jurisdictions have, however, held that it is not permissible for a trial court to act in this manner. *VSL Corp. v. Dunes Hotels & Casinos, Inc.*, 519 N.E.2d 617, 617 (N.Y. 1988). See also *Stevens v. Blevins*, 890 P.2d 936, 939 n.11 (Okla. 1995); Talpis & Kath, *supra* note 91, at 788-89.

¹²⁸ See Talpis & Kath, *supra* note 91, at 788-789. Talpis and Kath also note that the "clearly more appropriate" threshold in Canada differs from the "seriously inconvenient" threshold applied in many jurisdictions in the United States. See *id.* at 789. See also Brand & Jablonski, *supra* note 62, at 79-81.

¹²⁹ See Donald J. Carney, *Forum Non Conveniens in the United States and Canada*, 3 BUFF. J. INT'L. L. 117, 131 (1996).

¹³⁰ See, e.g., *Ford Aquitaine Indus. SAS v. The "Canmar Pride"*, 2005 FC 431, ¶ 19 (Can.); *Caspian Constr. Inc. v. Drake Surveys Ltd.* (2003), 174 Man. R. (2d) 263, ¶ 29 (Can.); *Direct Energy Mktg. Ltd. v. Hillson* (1999), 247 A.R. 48, ¶ 34 (Can.).

¹³¹ This may be explained in part by the fact that Canadian judicial systems do not generally face the same burdens posed by numerous proceedings by foreign plaintiffs, which may be due to the fact that judgments in Canada tend to be relatively less generous and, on occasion, significantly less so. See Carney, *supra* note 129, at 137.

¹³² Talpis & Kath, *supra* note 91, at 789.

¹³³ See Carney, *supra* note 129, at 140-145.

¹³⁴ 794 P.2d 1272 (Wash. 1990).

interest factors set out in *Gilbert* ought to on its own lead to “fair and equitable results.” In coming to this conclusion, the court stated:

The [*Piper*] Court purports to be giving lesser deference to the foreign plaintiff’s choice of forum when, in reality, it is giving lesser deference to the *foreign plaintiffs*, based solely on their status as foreigners. More importantly, it is not necessarily less reasonable to assume that a foreign plaintiff’s choice of forum is convenient. Why is it less reasonable to assume that a plaintiff from British Columbia, who brings suit in Washington, has chosen a less convenient forum than a plaintiff from Florida bringing the same suit?¹³⁵

Another pronounced difference relates to the conditions imposed when a court grants a stay or dismissal on *forum non conveniens* basis. While courts in both countries often impose conditions with respect to the waiver by the moving party of time-bar and personal jurisdictional defenses in the alternate forum, courts in the United States have been on occasion willing to go much further in imposing protective conditions relating to how a matter is to proceed in the new forum.¹³⁶ Perhaps the most vivid example of such an approach in a case with significant Canadian elements is found in the decision of *Stewart v. Dow Chemical Co.*¹³⁷ In that case, the United States Court of Appeals for the Sixth Circuit upheld a decision to dismiss certain product liability claims based on a *forum non conveniens* basis on condition that the defendant accept Canadian jurisdiction and service of process; waive any statute of limitations or other time-bar defenses; make all of the witnesses under its control available to testify in Canada; agree to a U.S.-style discovery process; and agree to pay any judgment rendered by a Canadian court, subject to its right of appeal under Canadian law.¹³⁸

¹³⁵ *Myers*, 794 P.2d at 1281; Brand & Jablonski, *supra* note 62, at 72.

¹³⁶ *Carney*, *supra* note 129, at 146. This difference in approach may be put down to the fact that the deprivation of legitimate juridical advantage is a factor that figures specifically in the Canadian approach to *forum non conveniens* such that a plaintiff would not likely be forced to request such conditions. *See id.*

¹³⁷ 865 F.2d 103, 104-105 (6th Cir. 1989). Similar conditions were imposed and later rejected in *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 196, 204-206 (2nd Cir. 1987). *See Carney*, *supra* note 129, at 147-148.

¹³⁸ *Carney*, for one, is critical of such conditions as being inconsistent with judicial comity and that this approach may entice plaintiffs to sue in the United States even if a *forum non conveniens* dismissal is likely. In other words, there is no disincentive to sue in the United States as plaintiffs are able thereby to bring certain advantages gained in the United States with them to the alternate forum. *See Carney*, *supra* note 129, at 148-149.

V.
CONCLUSION

Forum non conveniens is a doctrine with its roots in early Scottish law that describes the discretionary power exercised by common law courts to decline jurisdiction over a matter, despite having jurisdiction *simpliciter*, where the court is of the opinion, after considering a variety of factors, that the matter may be more appropriately or conveniently tried elsewhere. Canadian common law provincial, Québec, and federal courts have all applied this doctrine. Building on the House of Lords' decision in *The Spiliada*, the Supreme Court of Canada in *Amchem* firmly established the test to be whether there is another forum that is clearly more appropriate for the pursuit of the action and securing the ends of justice. This determination usually involves the consideration of a myriad of factors, including where the factual matters giving rise to the dispute arose; the location of each of the parties and the majority of the evidence; the relative convenience and expense of the competing fora; where the cause of action arose; the applicable substantive law; the avoidance of a multiplicity of proceedings; and legitimate juridical advantages and the potential deprivation thereof. The relative weight ascribed to these factors is dependent on the facts of each case and is a matter of the judge's discretion.

Unlike the situation in the United States, provincial doctrines of *forum non conveniens* do not seem to deviate substantially from the standard elaborated in *Amchem*. This consistency is underscored by recently-enacted *Court Jurisdiction and Proceedings Transfer Acts* in Saskatchewan, British Columbia, Nova Scotia, Prince Edward Island, and the Yukon Territory, which all contain provisions relating to the transfer of proceedings to more appropriate fora specifically modeled on the *Amchem* decision. While the majority of Canadian courts, including those in the province of Québec, are of the view that the burden of proof and persuasion under the *forum non conveniens* doctrine rests at all times with the defendant, courts in British Columbia, Ontario and Alberta have taken the view that where service has been effected *ex juris*, the burden rests with the plaintiff to justify its choice of forum.

Pursuant to the test set out by the United States Supreme Court in *Gilbert and Piper*, the federal doctrine of *forum non conveniens* is a flexible doctrine, similar to that in Canada, which allows a court to apply a multiplicity of factors to determine whether to exercise its discretionary power to decline jurisdiction. These decisions set out the now well-known two-part *forum non conveniens* test pursuant to which the applicant must first establish the existence of an adequate alternate forum and, secondly, show that a balancing of private interests factors affecting the convenience of the parties and public interest factors affecting the convenience of the forum favor proceeding in another forum. Private interest factors refer to the interests of each party in having the case heard in a forum that is the most convenient to them, while public interest factors involve the consideration of the court system's interests in having the case disposed of in an efficient manner, as well as society's interest in having disputes decided in fora that have a meaningful connection to the matter.

By virtue of the decision in *Piper*, local defendants in the United States find it easier to resist the decision of foreign plaintiffs to bring suit in U.S. federal courts. In this regard,

the U.S. Supreme Court in *Piper* held the possibility that there may be a change in the applicable substantive law ought not to be given conclusive or substantial weight in the *forum non conveniens* inquiry. This holding represented a departure from the previous practice in international cases favoring the forum whose substantive law was applicable to the merits of the case. The U.S. Supreme Court further held that the presumption that a plaintiff's choice of forum should rarely be disturbed should apply with less force when the plaintiff or real parties in interest are foreign. Accordingly, a foreign plaintiff may not defeat a *forum non conveniens* motion simply by showing that the substantive law of the alternative forum is less favorable than that of the chosen forum.

Unlike the situation in Canada, the doctrine's availability and exact formulation, if available, is far from a foregone conclusion at the state level in the United States. While most states have adopted *forum non conveniens* either judicially or legislatively, three states remain in which the doctrine's availability is questionable. Although most states apply the federal *forum non conveniens* doctrine, a number of states apply independent and distinct versions.

While the *forum non conveniens* doctrines applied in Canada and the United States are conceptually similar, some considerable differences exist between the approaches taken in these two countries. For instance, the ability of some courts in the United States to rule *sua sponte* on *forum non conveniens* issues appears to be unknown in Canada. Canadian courts, in contrast to their counterparts in the U.S., do not consider public interest factors and rarely consider or emphasize matters of judicial economy such as the congestion of the courts. Moreover, the general presumption evident in many U.S. jurisdictions favoring a local plaintiff's choice of forum (but not foreign plaintiffs) does not, at least explicitly, exist in Canada. Another pronounced difference relates to the conditions imposed when a stay or dismissal is granted on a *forum non conveniens* basis. While courts in both countries often make a *forum non conveniens* dismissal or stay conditional on the waiver by the moving party of time-bar and personal jurisdictional defenses, courts in the United States have been on occasion willing to go much further in imposing protective conditions relating to how a matter must proceed in the alternate forum.