

A TALE OF TWO FORA: FRESH CHALLENGES IN DEFENDING MULTIJURISDICTIONAL CLAIMS[©]

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This article analyzes recent developments in the Canadian common law of *forum non conveniens* as it is invoked in applications for stays and injunctions. It reviews the findings of the Supreme Court of Canada in *Amchem* and the Court of Appeal for Ontario in *Frymer* as they relate to the onus in stay applications, the significance of the plaintiff's loss of advantage and the special considerations applying to injunctions. The possibility of rationalizing the interprovincial application of the doctrine brought about by the Supreme Court's recent choice of law ruling in *Tolofson* is considered as are specific examples of the combined effect these decisions may have in reshaping the approach to jurisdictional challenges in Canada.

Cet article analyse des développements récents dans la common law au Canada en ce qui concerne la règle du *forum non conveniens* et son application aux requêtes visant à obtenir une suspension ou une injonction. L'article considère les conclusions de la Cour suprême du Canada dans *Amchem* et de la Cour d'appel de l'Ontario dans *Frymer* quant à l'allocation du fardeau de preuve dans les requêtes visant à obtenir une suspension, l'importance de la perte d'avantage de la partie demanderesse, et les questions particulières protant sur les injonctions. En vue de la décision récente de la Cour suprême du Canada dans *Tolofson*, une décision portant sur la «règle du choix de la loi applicable», l'article vise à trouver une explication logique à l'application interprovinciale de la règle. De plus, des exemples spécifiques sont considérés pour démontrer l'effet global que ces décisions pourraient avoir dans l'examen des questions de compétence au Canada.

| | |
|---|-----|
| I. INTRODUCTION | 551 |
| II. <i>AMCHEM</i> THE SUPREME COURT SETS THE THEME | 552 |
| A. <i>The Claims and the Courts Below</i> | 553 |
| B. <i>The Findings of the Supreme Court</i> | 554 |
| 1. Who has the burden on a stay application? | 555 |
| 2. What significance should be given to the plaintiff's loss of advantage in granting a stay? | 556 |
| 3. What special considerations apply to the granting of an injunction? | 557 |
| C. <i>Summary of the Law of forum non conveniens in Canada following Amchem</i> | 560 |

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| | |
|---|-----|
| 1. Stays | 560 |
| 2. Injunctions | 561 |
| D. <i>Comparative Observations</i> | 561 |
| E. <i>Issues Outstanding: Parallel Proceedings and Interprovincial Comity</i> | 563 |
| III. <i>FRYMER THE PLOT THICKENS</i> | 564 |
| A. <i>The Claim and the Decision Below</i> | 564 |
| B. <i>The Findings of the Majority: Who has the Burden?</i> | 565 |
| C. <i>The Findings of the Minority: Who has the Burden?</i> | 567 |
| D. <i>Summary of the Law of forum non conveniens in Ontario Following Frymer</i> | 569 |
| E. <i>Issues Outstanding: Interprovincial Comity and the Burden and Standard</i> | 570 |
| IV. <i>TOLOFSON AND LUCAS: A NEW CHAPTER?</i> | 570 |
| A. <i>The Claims and their Disposition</i> | 571 |
| B. <i>Distinguishing Tort Choice of Law and forum non conveniens Issues</i> | 571 |
| C. <i>Two Kinds of Real and Substantial Connections</i> | 575 |
| D. <i>An Additional Application for forum non conveniens in Choosing the Applicable Law</i> | 576 |
| V. <i>RECENT DECISIONS: THE DÉNOUEMENT</i> | 578 |
| A. <i>Tomlinson v. Turner: Maintaining the Distinction between Jurisdiction and Choice of Law</i> | 578 |
| B. <i>MacDonald v. Lasnier: Influencing the Exercise of Discretion</i> | 579 |
| C. <i>Guarantee v. Gordon Capital: The Problem of Parallel Proceedings</i> | 580 |
| VI. <i>CONCLUSION</i> | 582 |

I. INTRODUCTION

Whatever welcome benefits the *Morguard* revolution has brought to the pursuit of multijurisdictional claims, the cautionary message for counsel retained by defendants has been clear: resolve jurisdictional questions in the forum where the action has been commenced ... or else! Not only has the *Morguard*-based liberalization of recognition and enforcement rules dramatically reduced the ability to contest jurisdiction at the recognition and enforcement stage of proceedings, it has also made jurisdictional contests before or during a trial more likely to arise by reassuring plaintiffs that a choice of forum other than that of the defendant's residence will not be fatal to enforcing an award. Greater freedom of choice is likely to result in more choices being subject to challenge. It is inevitable, then, that the practice of challenging jurisdiction in motions to stay domestic actions and to enjoin plaintiffs from pursuing foreign actions would find its way into the jurisprudential limelight and that the details of principal doctrine involved, that of *forum non conveniens* would come to be of keen interest to litigators.

This paper takes a practical look at key developments in the use of the doctrine of *forum non conveniens* in Canada, and particularly in Ontario, to challenge plaintiffs' choices of jurisdiction. It proceeds from

¹ *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077 [hereinafter *Morguard*]. In that case, the Supreme Court of Canada recognized an implicit full faith and credit obligation in the Canadian Constitution that made enforceable a default judgment rendered in Alberta against a British Columbia resident who had not attorned to the jurisdiction of the Alberta court. The Alberta court was viewed as having the necessary "real and substantial connection" to the matter which concerned the shortfall from a sale of Alberta land mortgaged in Alberta by the defendant. The decision has marked the beginning of a period of increased interest by the Supreme Court, generally in conflict of laws issues, and particularly in the possible influence of the Constitution on the determination of those issues: see V. Black, "The Other Side of *Morguard* New Limits on Judicial Jurisdiction" (1993) 22 Can. Bus. L.J. 4; V. Black & J. Swan, "New Rules for the Enforcement of Foreign Judgments: *Morguard Investments Ltd. v. De Savoye*" (1991) 12 Advocates' Q. 489; J. Blom, "Conflict of Laws—Enforcement of Extraprovincial Default Judgment—Real and Substantial Connection: *Morguard Investments Ltd. v. De Savoye*" (1991) 70 Can. Bar Rev. 733; J.-G. Castel, "Recognition and Enforcement of a Sister-Province Default Money Judgment: Jurisdiction Based on Real and Substantial Connection" (1991) 7 B.F.L.R. 111; E. Edinger, "*Morguard v. De Savoye* Subsequent Developments" (1993) 22 Can. Bus. L.J. 29; P. Finkle & C. Labrecque, "Low-Cost Legal Remedies and Market Efficiency: Looking Beyond *Morguard*" (1993) 22 Can. Bus. L.J. 58; P. Finkle & S. Coakeley, "Morguard Investments Limited: Reforming Federalism from the Top" (1991) 14 Dalhousie L.J. 340; H.P. Glenn, "Foreign Judgments, the Common Law and the Constitution: *De Savoye v. Morguard Investments Ltd.*" (1992) 37 McGill L.J. 537; J. Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985) 63 Can. Bar Rev. 271; and J.A. Woods, "Recognition and Enforcement of Judgments Between Provinces: The Constitutional Dimensions of *Morguard Investments Ltd.*" (1993) 22 Can. Bus. L.J. 104.

the premise that counsel on both sides in motions based on *forum non conveniens* face the significant challenge of litigation in an area characterized by rapid doctrinal changes and certain unresolved issues in its underlying rationale. Grasping the tenor of the current case law and considering these underlying issues can assist in fashioning an argument that is sound both in precedent and in principle.

This paper has four parts. The first part summarizes the law set down by the Supreme Court in its 1993 decision in *Amchem Products Inc. v. B.C. (WCB)*² and identifies some remaining issues that have since come to prominence. The second part reviews the majority and concurring judgments of the 1994 decision of the Court of Appeal for Ontario in *Frymer v. Brettschneider*³ and offers a few respectful remarks about the approaches taken. The third part considers the possible influence of the Supreme Court's recent decision in *Tolofson v. Jensen*⁴ on challenges to jurisdiction. The fourth part tests these possibilities against some recent Ontario decisions in the field and suggests ways to dispel the confusion which, in some cases, is obvious and, in others, more profound.

II. *AMCHEM* THE SUPREME COURT SETS THE THEME

As with its decisions in *Morguard*, and more recently in *Tolofson*, the Supreme Court of Canada sought in *Amchem* to remedy decades of neglect of an important aspect of the conflict of laws. Despite the flurry of jurisprudence on the subject of *forum non conveniens* and attendant academic commentary in a variety of common law countries,⁵ the Supreme Court had not considered the question since its 1976 decision

² [1993] 1 S.C.R. 897 [hereinafter *Amchem*]; discussed in E. Edinger, "Conflict of Laws—Discretionary Principles—Forum non conveniens—Anti-Suit Injunctions: *Amchem Products Inc. v. British Columbia (Workers Compensation Board)* (1993) 72 Can. Bar Rev. 366.

³ (1994), 19 O.R. (3d) 60 [hereinafter *Frymer*].

⁴ [1994] 3 S.C.R. 1022, decided together with *Lucas v. Gagnon* [hereinafter *Tolofson* and *Lucas*].

⁵ See, for example, *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460 (H.L.) [hereinafter *Spiliada*]; *SNI Aérospatiale v. Lee Kui Jak* [1987] A.C. 871 (P.C.) [hereinafter *SNI*]; *Laker Airways v. Sabena, Belgian World Airlines* 731 F.2d 909 (D.C. Cir. 1984); *Voth v. Manildra Flour Mills Proprietary Limited* (1990), 171 Comm. L.R. 538 (Aust. H.C.) [hereinafter *Voth*]; *Club Méditerranée NZ v. Wendell* [1989] 1 N.Z.L.R. 216 (C.A.). See also E.L. Hayes "Forum non conveniens in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation" (1992) 26 U.B.C. L. Rev. 41; and E. Edinger, "Recent Developments in the English Law of Conflicts: The *Spiliada* and *Aérospatiale*" (1989) 23 U.B.C. L. Rev. 373.

in *Antares Shipping Corpv. The Ship "Capricorn."*⁶ In a single judgment, on behalf of a unanimous court, Sopinka J. undertook to clarify the law in Canada and align it with the current law in other jurisdictions.

A. *The Claims and the Courts Below*

The British Columbia Workers' Compensation Board commenced actions in Texas with other plaintiffs based on its subrogated interest in claims for asbestos-related injuries against American manufacturers. Although there were multiple plaintiffs and defendants with connections to several jurisdictions and a variety of subsidiary and ancillary proceedings, a summary of the proceedings is sufficient to introduce the issues. The claims alleged tortious conduct in the United States in connection with decisions made in the manufacture of asbestos products, the lack of warning of the dangers of exposure to asbestos, and a conspiracy to suppress knowledge of those dangers. There was no concentration of manufacturers or manufacturing in any one state but most of the companies carried on business in Texas, thereby securing the jurisdiction of that state's courts under American conflict of laws rules.

Many of the defendant asbestos companies moved to stay the proceedings on the basis that Texas was a *forum non conveniens* but the doctrine was viewed as having been abolished by statute there.⁷ The Texas court dismissed the motion without reasons. Various forms of review were sought until the opportunities in Texas to gain a stay had been exhausted.

The defendants turned to the courts of British Columbia seeking an injunction to prevent the plaintiffs from continuing the Texas action. In a decision upheld on appeal,⁸ Esson C.J.S.C. granted the injunction on the basis that British Columbia was a more natural forum for the action. He regarded the inability of the Texas court to grant a stay on

⁶ [1977] 2 S.C.R. 422 [hereinafter *Antares Shipping*].

⁷ See Tex. Civ. Prac. & Rem. Code § 71.031. The Code has since been amended to enable motions against actions commenced by those not resident in the United States: 1993 Tex. Gen. Laws 42; and see J.P. McEvoy, "International Litigation: Canada, Forum non conveniens and the Anti-suit Injunction" (1995) 17 *Advocates' Q.* 1 at 2-3.

⁸ *Amchem Products Inc. v. B.C. (WCB)* (1989), 65 D.L.R. (4th) 567 (B.C.S.C.); aff'd (1989), 75 D.L.R. (4th) 1 (B.C.C.A.); see E. Edinger, "Conflict of Laws—Jurisdiction—British Columbia Residents Bringing Action for Damages in Texas Against Non British Columbia Resident Defendants— Defendants Seeking Anti-Suit Injunction in British Columbia: *Amchem Products v. Workers' Compensation Board*" (1992) 71 *Can. Bar Rev.* 117.

the basis of *forum non conveniens* as a factor weighing in favour of a finding of oppression and a reason not to defer to its exercise of jurisdiction. The decision of Esson C.J.S.C. prompted the plaintiffs in the action who were not resident in British Columbia to obtain an anti-suit injunction from the Texas court to ensure that their actions would remain unaffected by a British Columbia injunction. The granting of this relief by the Texas court was cited by the British Columbia Court of Appeal as an additional factor in favour of the anti-suit injunction.

B. *The Findings of the Supreme Court*

On behalf of a unanimous court, Sopinka J. allowed the appeal and removed the injunction thereby permitting the plaintiffs to pursue their action against the American asbestos manufacturers in Texas. In his judgment, Sopinka J. conducted a detailed review of the current appreciation of the doctrine of *forum non conveniens* in a number of jurisdictions and established the framework for its operation in Canada.

Sopinka J. noted the differences between the function of the doctrine of *forum non conveniens* in applications for stays and for injunctions. Both forms of relief are occasioned by challenges to the plaintiff's choice of forum. However, they differ in that a stay is sought by the defendant in the court where the action has been commenced, the argument being that the action ought to be litigated in another jurisdiction; an injunction is sought in the court where, according to the defendant, the action should have been commenced, the argument being that the plaintiffs should be ordered not to pursue their action where it has been commenced. A review of the current appreciation of the law surrounding the granting of a stay confirmed that the "overriding consideration" as enunciated in the *Antares* decision remained whether there was "some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice."⁹ Nevertheless, two main issues required clarification: who bears the burden of persuading the court that there is or is not a clearly more appropriate forum and what significance should be accorded to the loss of a juridical advantage in granting a stay or an injunction?

⁹ *Supra* note 6 at 448, Ritchie J.; and cited in *Amchem*, *supra* note 2 at 919.

1. Who has the burden on a stay application?

The question whether the burden to show the availability of a clearly more appropriate forum is on the moving defendant or the responding plaintiff in a motion for a stay first arose in the English jurisprudence. The invariable obligation in the English rules to obtain leave to serve a defendant *ex juris* has influenced the judicial approach to the granting of a stay. Where a plaintiff has served a defendant within the jurisdiction or “as of right,” the English court is presumed to be an appropriate forum and the onus is on the defendant seeking the stay to show otherwise. Where, however, a plaintiff has served a defendant *ex juris*, he or she, as respondent, has the onus of showing that the English court is the natural forum and that, therefore, the service of the writ should not be set aside.¹⁰ Sopinka J. observed that this “special treatment” for foreign defendants was based on the dictates of the English rules. As a result, Sopinka J. concluded:

Whether the burden of proof should be on the defendant in *ex juris* cases will depend on the rule that permits service out of the jurisdiction. If it requires that service out of the jurisdiction be justified by the plaintiff, whether on an application for an order or in defending service *ex juris* where no order is required, then the rule must govern.¹¹

Following this ruling, the determination of who bears the onus in an application for a stay based on *forum non conveniens* would seem to be a simple matter of consulting the rules. Moving defendants served within the jurisdiction have the burden, as do those whom the plaintiff was entitled to serve outside the jurisdiction without leave. Respondent plaintiffs have the burden only in cases in which leave is required or in which they are required to justify their entitlement to serve *ex juris* if challenged.

The onus is placed generally on the moving defendant not only because the moving party bears the onus of demonstrating the basis for the relief sought but also because of the nature of the standard of proof for a motion for a stay based on *forum non conveniens*. Sopinka J. commented on the standard of proof saying that it was that applicable in civil cases but “the existence of a more appropriate forum must be *clearly* established to displace the forum selected by the plaintiff.”¹² Thus, even in the exceptional situations contemplated by Sopinka J.’s ruling, when

¹⁰ *Rules of the Supreme Court* (U.K.), R.S.C. Order 12, r. 8.

¹¹ *Anchem*, *supra* note 2 at 921.

¹² *Ibid.*

the onus is on the plaintiff, he or she will be limited to showing that the defendant's proposed forum is not clearly more appropriate and the defendant will continue to feel obliged to argue vigorously in favour of the proposed alternative forum.

2. What significance should be given to the plaintiff's loss of advantage in granting a stay?

The second main issue concerning applications for stays based on *forum non conveniens* clarified by Sopinka J. in *Amchem* was the significance that should be given to the loss of a personal or juridical advantage by the plaintiff caused by granting a stay. Once again, Sopinka J. noted that the special consideration given to this factor derived from the historical development of the English rule "which started with two branches at a time when oppression to the defendant and injustice to the plaintiff were the dual bases for granting or refusing a stay."¹³ As he explained, when the English rule for determining whether a defendant is being oppressed evolved so as to require a global assessment of all factors relevant to determining the natural forum, any juridical advantages to the plaintiff or defendant should have been considered as one of the factors to be taken into account. On this basis, he ruled that "there is no reason in principle why the loss of a juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identifying the appropriate forum."¹⁴

This ruling dispelled any suggestions in the recent jurisprudence that Canadian courts should adopt the English approach of a two-step test and a shifting burden. It clarified that all the factors relevant to determining whether there exists a clearly more appropriate forum should be considered together. This will include factors affecting convenience and expense with respect to the location of the witnesses, the evidence, and the parties, the law governing the relevant transaction, and the juridical advantages and disadvantages to the respective parties of litigating in the current or the proposed forum. Coupled with a

¹³ *Ibid.* at 920.

¹⁴ *Ibid.* at 919. In making this ruling, Sopinka J. suggested that juridical advantage was a neutral factor: if a plaintiff gained it by litigating in the natural forum it was legitimate and it should not lightly be denied, but if it was the main reason for choosing a particular jurisdiction, the choice of forum would rightly be condemned as "forum shopping" and the advantage should not be accorded much weight in the decision whether to grant a stay.

relatively high standard, this simplified procedure could reduce the need to litigate about where to litigate and, in cases where it is necessary to do so, it could reduce confusion and expense.¹⁵

3. What special considerations apply to the granting of an injunction?

Having considered the mechanics of the “more conventional device,” the stay of proceedings, Sopinka J. turned to the motion under appeal for an anti-suit injunction, “a more aggressive remedy.”¹⁶ The significant differences between the function of the doctrine of *forum non conveniens* in applications for stays and for injunctions had been noted at the outset of the analysis of the issue before the court. While both remedies are methods of forum control, the anti-suit injunction “raises serious issues of comity” because “in the case of a stay, the domestic court determines for itself whether in the circumstances it should take jurisdiction whereas, in the case of the injunction, it in effect determines the matter for the foreign court.”¹⁷ Accordingly, the court hearing an application based on *forum non conveniens* will always need to consider whether it is the natural forum. However, the effect of confirming this will vary depending on whether the relief sought is a stay or an injunction. In a stay application the finding that the court is the natural forum may suffice to dismiss the application but in an injunction application it will suffice only to justify, in part, the court’s entitlement to hear the application.

Part of the concern arises from the fact that determining the natural forum or the forum with a “real and substantial connection” is not an exact science and there may be more than one appropriate jurisdiction for the trial of the action. This does not cause significant problems in a stay application because the test is whether there is another clearly more appropriate forum. If the alternative forum proposed by the defendant is not clearly more appropriate, the plaintiff’s choice of forum is not disturbed and the application is denied; if the alternative forum is clearly more appropriate, the court stays its own proceedings as it is inherently empowered to do.¹⁸ However, in

¹⁵ See A.G. Slater, “Forum non conveniens: A View from the Shop Floor” (1988) 104 L.Q. Rev. 554.

¹⁶ *Anchem*, *supra* note 2 at 912.

¹⁷ *Ibid.* at 913.

¹⁸ In Australia, the standard is even higher in that the moving defendant must show that the local forum is clearly inappropriate: see *Voth*, *supra* note 5 at 589.

applications for anti-suit injunctions, the finding that the local forum is clearly more appropriate than that chosen by the plaintiff leads to the sensitive question of the appropriateness of the foreign court's decision to take jurisdiction. As Sopinka J. suggested, the very existence of the remedy of an anti-suit injunction reflects the recognition that comity is not universally respected and that the principles of *forum non conveniens* are not consistently applied.¹⁹

In view of the "serious issues of comity" that could arise in the course of granting an anti-suit injunction, Sopinka J. held that an application should be subject to a number of procedural safeguards, including a two-step analysis and three prerequisites. These prerequisites are that there must be a foreign proceeding pending, the applicant must have been unable to obtain relief in the foreign jurisdiction, and the domestic forum must be alleged to be the most appropriate forum and it must be potentially an appropriate forum. The first two of these prerequisites are necessary to avoid pre-empting the decision of a foreign court regarding its own jurisdiction. Nevertheless, in meeting them, the court hearing the application will unavoidably place itself in the delicate position of reviewing a foreign court's determination of its own jurisdiction. This gives rise to the third prerequisite. The local court should undertake to review the foreign court's determination that it has jurisdiction only if the local court is alleged to be the most appropriate forum and is potentially an appropriate forum for the action.

Once the court has determined that the three prerequisites have been met, it may embark on the first step of the test involving a modified *forum non conveniens* analysis. Thus, even though the local court has determined that it is a potentially appropriate forum, it cannot proceed directly to consider whether it is a clearly more appropriate forum and to grant an injunction on that basis. Rather, in a manner resembling judicial review, it must ask whether the foreign court could reasonably have concluded that there was not a more clearly appropriate forum. If the foreign court could reasonably have concluded that there was not a more clearly appropriate forum then the injunction should be denied.

Only if the court concludes that the foreign court took jurisdiction on some basis inconsistent with the principles relating to *forum non conveniens* and could not have done so had it applied those principles, may the local court proceed to the second step in which it considers the justice of granting a stay. In this step, the court must determine whether it is unjust to deprive the plaintiff of a juridical or

¹⁹ *Anchem*, *supra* note 2 at 914.

personal advantage to which it would be entitled if the choice of forum was considered appropriate. This must be weighed against the justice of depriving the defendant of any advantages that would be enjoyed in the court hearing the application.

Applying this analysis to the case before him, Sopinka J. allowed the appeal on the basis that the courts below had erred in both steps of the test. With regard to the first step, the absence of a doctrine of *forum non conveniens per se*, was not dispositive of whether the Texas court had taken jurisdiction on the principles underlying the doctrine. Having found that both Texas and British Columbia were natural fora, the plaintiff's choice of forum should not have been disturbed. With regard to the second step, the defendant asbestos manufacturers had not established that continuation of the Texas proceedings would result in the unjust loss of a juridical advantage. In addition, the absence of a doctrine of *forum non conveniens* in the law of Texas and the granting of an anti-anti-suit injunction by the Texas court did not of themselves render the foreign proceedings oppressive.

As one commentator has noted, the second step, in which the justice of granting a stay *vis-à-vis* each other is considered, is likely to add nothing to the analysis.²⁰ Since the two steps operate sequentially, the question will not arise if the foreign court has exercised jurisdiction improperly; and a plaintiff is not likely to be permitted to retain the benefits of litigating in a forum that could not have exercised jurisdiction upon application of the principles of *forum non conveniens*. This would be tantamount to endorsing forum shopping and is unlikely to be viewed as required by the ends of justice. This method of analysis has the curious effect of causing the concern for comity to overshadow the concern for doing justice to the parties. Thus, the keen attention to questions such as whether the defendant was served *ex juris* in the foreign proceeding, and who should bear the onus appear to have given way to an interest in respecting the sensibilities of the foreign court.

While this concentration on comity may be appropriate for claims in tort, where the parties have not assumed obligations to one another regarding the choice of forum, it may be less so in matters of contract where they have agreed on a forum. Accordingly, in *The Angelic Grace*,²¹ the English Court of Appeal expressed a different view of comity when it considered the proper forum for resolving a charter-party dispute involving a collision at sea. Despite an exclusive

²⁰ See McEvoy, *supra* note 7.

²¹ *Aggeliki Charis Compania Maritima S.A. v. Pagnan S.p.A. (The "Angelic Grace")* [1995] 1 Lloyd's Rep. 87 [hereinafter *The Angelic Grace*].

arbitration agreement favouring arbitration in London, the charterers commenced a separate action in Venice for negligence on the basis that it was distinct from the contractual issues to be determined by arbitration. The Court of Appeal upheld the Queen's Bench decision to grant an injunction. Leggatt L.J. commented that "[c]ontrary to Mr. Bumble's view, the law is not normally 'an ass' and comity does not require it to behave like one;"²² and Millett L.J. added, "there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them."²³ It remains to be seen whether the *Amchem* test for determining injunctions will be refined for cases in contract in which the parties' obligations to one another concerning forum selection are a factor.

C. *Summary of the Law of forum non conveniens in Canada following Amchem*

The use of the doctrine of *forum non conveniens* to challenge a plaintiff's choice of jurisdiction, following *Amchem*, may be summarized as follows:

1. Stays

- (a) Defendants may obtain a stay of a proceeding commenced in a Canadian court where there is another clearly more appropriate forum for the pursuit of the action and for securing the ends of justice.
- (b) Defendants bear the onus of persuading the court on a civil standard that there is a clearly more appropriate forum elsewhere unless the action is one in which, according to the rules of court, the plaintiff is required to obtain leave or to justify the exercise of jurisdiction when challenged. In that case, the plaintiff bears the onus of showing that the court hearing the motion is the appropriate forum.
- (c) In determining whether to grant the application, the court will consider all relevant connections including factors affecting convenience or expense with respect to the location of the

²² *Ibid.* at 96.

²³ *Ibid.*

witnesses, the evidence and the parties, the law governing the relevant transaction, and the juridical advantages and disadvantages to the respective parties of litigating in the current or the proposed forum.

2. Injunctions

- (a) Defendants may seek an injunction to restrain plaintiffs from pursuing actions in foreign jurisdictions if:
 - (i) an action has been commenced;
 - (ii) the defendant has been unable to obtain relief in the foreign court; and
 - (iii) the court hearing the application is alleged to be the most appropriate forum and is potentially an appropriate forum.
- (b) Once these prerequisites have been met, the court will determine whether the foreign court could reasonably have concluded that there was not a clearly more appropriate forum.
- (c) If the foreign court took jurisdiction on some basis inconsistent with the principles relating to *forum non conveniens* and could not have done so had it applied those principles, then the local court will consider whether it is unjust to deprive the plaintiff of a juridical or personal advantage enjoyed in the foreign jurisdiction and it will weigh this against the justice of depriving the defendant of any advantages that would be enjoyed in the local forum.

D. Comparative Observations

In view of the particular concerns of comity that can arise in the determination of a challenge to a plaintiff's choice of jurisdiction, it is worth making a few observations about the ways in which the rules summarized above comport with the current doctrines elsewhere.

Having accepted Goff L.J.'s view in *Spiliada*, that the common law with respect to the granting of stays is remarkably uniform, Sopinka J. made two significant adjustments to the Canadian law in *Amchem*.²⁴ He established the general practice of placing the onus on the defendant and he merged the two steps of the test. By placing the onus on the defendant and merging the factors under consideration into one

²⁴ *Supra* note 2 at 915.

analysis, the Supreme Court has succeeded both in setting stringent requirements for obtaining a stay and in providing courts of first instance with a broader basis on which to appraise the circumstances of each case. As Edinger observes, this sets Canadian law apart from that of England and Australia.²⁵ However, in light of the common standard of “a clearly more appropriate forum,” the differences in the test may be justifiable. As compared with the English Admiralty Court, famed for its expertise,²⁶ and the civil juries of certain American jurisdictions, famed for the quantum of their injury awards,²⁷ Canadian courts tend not to be inundated with actions commenced on questionable claims to jurisdiction. Moreover, the lack of a particular feature which would attract litigants regardless of the connection between the matter and the Canadian forum makes the occasions in which an action should be stayed more varied and less easily subsumed under rigid rules. In this way, it may be suggested that the Canadian test for granting a stay is appropriately characterized by a relatively high standard for displacing the jurisdiction of the court combined with the flexibility to weigh all the considerations together.

With respect to the rules for granting anti-suit injunctions, Sopinka J. explicitly took the House of Lords decision in *SNI*²⁸ as his starting point, adding three prerequisites and altering the method of appraisal from an independent determination to a review of the foreign court’s determination. In so doing, he established a degree of deference to foreign courts that is highly reminiscent of the oppression standard recently revived in English jurisprudence.²⁹ This very high standard for anti-suit injunctions is, arguably, appropriate both because there is generally little interest in policing forum shopping abroad and because Canadian courts tend to be highly conscious of the concerns of comity and extremely deferential to foreign courts. However, this approach has the potential, when combined with liberal recognition and enforcement rules, to encourage foreign forum shopping and discourage risk-averse enterprises from locating assets in Canada. Moreover, it remains to be seen whether this test will be subject to variation in cases involving choice of forum clauses. For example, in such cases, where the

²⁵ *Supra* note 2 at 376.

²⁶ See *Atlantic Starv. Bona Spes*, [1974] A.C. 436 at 456 (H.L.).

²⁷ See *Castanho v. Brown & Root (U.K.) Ltd.*, [1981] A.C. 557 (H.L.).

²⁸ *Supra* note 5.

²⁹ See *Rockware Glass Ltd. v. MacShannon*, [1978] A.C. 795, (*sub. nom. MacShannon v. Rockware Glass Ltd.*) [1978] 1 All E.R. 625 (H.L.); and *SNI*, *ibid.*

injunction is necessitated by the plaintiff's breach of a choice of court clause, it may be argued that comity requires the injunction to be "sought promptly and before the foreign proceedings are too far advanced."³⁰

E. *Issues Outstanding: Parallel Proceedings and Interprovincial Comity*

Two related issues, one narrow and one broad, do not appear to have been resolved in the judgment in *Amchem*. The first is the question of the degree to which parallel proceedings should be tolerated. In addressing the unfortunate necessity for anti-suit injunctions, Sopinka J. commented that the consequences of two courts refusing to decline jurisdiction would not be disastrous in a world where comity was universally respected because each court would be willing to be bound by the other should that court reach judgment first. However, it may be suggested that the refusal of both courts to decline jurisdiction may generally be sufficient, in itself, to cast doubt on the likelihood that one court would defer to the judgment of the other. Put another way, a court's willingness to be bound by the decision of another court in the same proceeding, if rendered first, would indicate that the court recognized that its proceedings were very likely redundant. Reason would dictate that this would encourage the court to take action to rationalize the proceedings by issuing either a stay or an injunction. Following *Amchem*, though, it remains to be resolved whether Canadian courts should be troubled by the existence of parallel proceedings abroad and whether a court should take action by granting either a stay or an injunction.

The relatively narrow point relating to the multiplicity of proceedings takes on much greater proportions when viewed in the context of the jurisprudence following *Morguard*. On the one hand, the difficulties of enforcing foreign judgments cannot be relied on in multiple interprovincial proceedings to rationalize forum choices and promote settlement. On the other hand, the expansive approach to the jurisdiction of other provinces recommended in *Morguard* would appear to curtail the availability of anti-suit injunctions. Thus, the enhanced risk, within Canada, of waste of litigation expenses and judicial resources in parallel proceedings does not seem easily resolved by unilateral action. It will be interesting to see whether the resolution takes the form

³⁰ *The Angelic Grace* *supra* note 21 at 96.

of fixed or flexible rules regarding the obligation to stay proceedings or special rules regarding interprovincial anti-suit injunctions.

III. *FRYMER* THE PLOT THICKENS

In 1994, the Court of Appeal for Ontario released its first post-*Amchem* decision considering the doctrine of *forum non conveniens* in *Frymer*,³¹ in which it undertook a detailed, if *obiter*, review of the issue of who has the burden in an application for a stay.

A. *The Claim and the Decision Below*

The dispute in *Frymer* concerned the validity of two trust agreements. Frymer was a residuary beneficiary of a trust set up by her father in Florida where he lived with his second wife, Schechtman. Under the trust, Frymer's father was the beneficiary during his lifetime and there was no provision for Schechtman. The trust was to be construed and governed by Florida law. When he died, the issue of the Schechtman's succession rights under Florida law arose. Within days, the matter was resolved by way of two further trust agreements prepared in Florida, governed by Florida law and executed in Montreal where Schechtman lived. Schechtman gave up her succession rights for assets and income from this trust. The trustee, Brettschneider, was a Calgary resident. He had managed the *inter vivos* and testamentary trusts for the family in Calgary from 1987 onward and he had made loans to Frymer and her sister from the *inter vivos* trust assets which were secured by collateral mortgages on their homes in Ontario.

Frymer commenced an action in Ontario to have the trust agreements entered into after her father's death set aside on the basis of undue influence and lack of independent legal advice, and to have Brettschneider removed as trustee for breach of fiduciary duty. She served Brettschneider in Calgary and Schechtman in Montreal. The defendants moved in the Ontario Court (General Division) under Rule 17.06 for a stay on the grounds of *forum non conveniens*. Adams J. found that Florida was a clearly more appropriate forum based on a number of factors, including: the witnesses, *i.e.*, the lawyers who drafted the agreements in dispute, were in Florida and the agreements were drafted there and were governed by Florida law; the agreements were not

³¹ *Supra* note 3.

executed in Ontario; the mortgages on the Ontario properties were not really investments but simply collateral mortgages to secure monies already advanced; the trusts were not administered in Ontario; the trustee, who controlled the whereabouts of the trust's intangible assets, undertook to abide by a decision of the Florida courts; and independent representation for the children of the beneficiaries was also available in Florida. On these grounds, he granted the motion.

The Court of Appeal was unanimous in upholding this conclusion and in asserting that the result would have been the same regardless of who had the burden in a motion for a stay on the basis of *forum non conveniens* although their opinions differed on that issue. The judgments at first instance and in the majority and minority on appeal warrant comment.

B. *The Findings of the Majority: Who has the Burden?*

The decision of Adams J., delivered before the release of *Amchem*, adopted the English distinction between jurisdiction based on service "as of right" and that based on "service *ex juris*" which was upheld in the leading English case of *Spiliada*.³² He cited the explanation of Diplock L.J. in *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.*³³ that English courts will recognize or enforce the judgment of a foreign court against a corporate defendant only if jurisdiction over the corporation was based on the fact that it had a place of business in that country.³⁴ In this way, the taking of jurisdiction by English courts on other bases is an exercise of exorbitant jurisdiction and, in the absence of a treaty altering this situation, it must be subject to the discretion of the court. Thus, in a challenge to jurisdiction alleging that the English court is a *forum non conveniens*, the burden varies according to whether service was made as of right or with leave. Defendants properly served in England have the onus of showing that there is another clearly more appropriate forum for the trial of the action and for securing the ends of justice while plaintiffs who have been

³² *Supra* note 5.

³³ [1984] A.C. 50 (H.L.).

³⁴ For individual defendants, the requirement is residence or presence. Submission by agreement or appearance will also suffice for natural or corporate defendants, but nothing else: see P.M. North & J.J. Fawcett, *Cheshire & North's Private International Law* 12th ed. (London: Butterworths, 1992) at 359.

granted leave to “serve out” must show that England is clearly or distinctly the most appropriate forum.

For the majority, Arbour J.A. agreed with this reasoning. In accord with *Amchem*, she upheld Adams J.’s rejection of the burden-shifting approach which gave independent importance to the plaintiff’s loss of a juridical advantage in granting a stay. However, turning to the issue of who is to bear the burden of showing that Ontario was or was not the appropriate forum on a motion for a stay based on the doctrine of *forum non conveniens* she reconsidered Sopinka J.’s ruling that the burden in cases of service *ex juris* will depend on whether it requires the plaintiff to justify jurisdiction either in obtaining leave or in defending it if challenged.³⁵

The significance of the issue was acknowledged to be minimal in that it is the moving defendant who must take the initiative and the outcome of such a motion would rarely be affected by the question of burden of proof. Nevertheless, upon a careful examination of the evolution of the rules regarding service *ex juris*, Arbour J.A. observed that a motion for a stay based on *forum non conveniens* could be brought in cases of service in the jurisdiction as well as those of service outside the jurisdiction and that, therefore, the “Ontario law relating to *forum non conveniens* is not found in rule 17.06, but in the jurisprudence which has, over the years, elaborated on the rationale for the doctrine and the principles which should govern its application.”³⁶ She concluded that the law of Ontario was “essentially in line with” the reasoning of the Alberta Court of Appeal in *United Oilseed Products v. Royal Bank of Canada*,³⁷ which had adopted the English approach. In her view, the motions judge had been correct in finding that the burden of proof lay with the defendant in a case of service in the jurisdiction and with the plaintiff in a case of service *ex juris*. This, she said “accords with the principles of comity upon which the doctrine of *forum non conveniens* rests.”³⁸

This ruling appears inconsistent with that of the Supreme Court in *Amchem*. The finding that the Ontario law relating to *forum non conveniens* is not contained in the rule does not explain the finding that service *ex juris* inevitably warrants shifting the burden. Rather, the passage in *Amchem* that stipulates the rule that will determine the

³⁵ *Amchem*, *supra* note 2 at 921.

³⁶ *Supra* note 3 at 84.

³⁷ (1988), 60 Alta. L.R. (2d) 73.

³⁸ *Frymer*, *supra* note 3 at 85.

burden does not refer to the rule governing *forum non conveniens* that was the focus of the majority of the Court of Appeal's analysis, but to the rule governing service *ex juris*. Accordingly, regardless of whether the Ontario law relating to *forum non conveniens* is governed entirely by Rule 17, service *ex juris* is governed by Rule 17. Rule 17.02 provides for service without leave in certain circumstances and Rule 17.03 provides for service with leave in others. Following Sopinka J.'s findings in *Amchem*, then, defendants bringing a motion for a stay on the grounds that the Ontario court was a *forum non conveniens* would bear the burden if properly served³⁹ under one of the enumerated grounds of Rule 17.02, but those served with leave under Rule 17.03 would need only to raise the issue, leaving it to the plaintiff to show that the Ontario court was the clearly more appropriate forum. In formulating the rule as he did, Sopinka J. was able to accommodate the variations in the provinces' regulation of service *ex juris*. Had he intended simply to require that the burden be borne by local defendants and not by foreign defendants, he could easily have said so directly.

Whether this divergence of opinion between the Court of Appeal for Ontario and the Supreme Court of Canada is rooted in more profound questions, such as the court's inherent power to determine its own jurisdiction and what relationship that determination should have to the rules of service, is not clear. These questions, as well as those regarding which approach will ultimately prevail, await further guidance.

C. *The Findings of the Minority: Who has the Burden?*

In her judgment, Weiler J.A. echoed the majority support for the conclusion that Florida was a clearly more appropriate forum and agreed that the burden of proof would not have affected the outcome of the appeal in this case. However, she disagreed with the court below and the majority on appeal that the onus rested on all local defendants and on no foreign defendants. This method of deciding who had the onus, she said, was based on the restrictive approach in English law to the recognition of foreign judgments which, in turn, counselled caution in the exercise of jurisdiction lest it result in taking jurisdiction in a way that runs afoul of the requirements of comity.

Observing that "[r]ecent Canadian developments in the law have rejected the narrow approach of England with respect to jurisdiction,"

³⁹ Defendants may, of course, move to set aside service on the grounds that the plaintiff was not entitled to serve as claimed.

Weiler J.A. cited the comments of La Forest J. in the Supreme Court decision in *Hunt v. T&N plc*⁴⁰ in which he recommended rejecting the rules “rooted in an outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness” in favour of those reflecting “greater comity.” She noted two decisions in the General Division in which the court found that the onus in a motion to stay an action in which jurisdiction was based on Rule 17.02 was to be borne by the defendant,⁴¹ and she noted the fact that both Supreme Court judgments on the subject⁴² stressed the differences between Canadian and English law. In view of this, Weiler J.A. concluded that the onus is properly borne by defendants served under Rule 17.02.

Concerning the merits of the approach recommended by Weiler J.A., Borins J. had noted in *Upper Lakes Shipping* that “the moving party has the burden of persuading the court to grant the relief requested in its notice of motion.”⁴³ While it may appeal to logic to distinguish between foreign and local defendants, counsel representing foreign defendants in jurisdictional challenges would not feel free to put their argument any less persuasively if they did not have the onus. Moreover, the combined onus and standard, which requires a moving defendant to persuade the court to grant a stay in favour of a clearly more appropriate forum, relieves the court in cases having real and substantial connections to more than one forum from having to make unfavourable comparisons with other jurisdictions. A court may find without unfavourable comment that the standard of “clearly more appropriate” has not been met. A different formulation of the test could require findings critical of the foreign court.

Extensive debate over the burden of proof may be misplaced in light of the more flexible and substantive approach recommended in the recent jurisprudence of the Supreme Court of Canada. Simply put, Rule 17.02 provides for situations in which plaintiffs have a *prima facie* entitlement to commence a claim in Ontario and Rule 17.06 provides defendants with the opportunity to show either that the claim against them does not fall within that Rule or, if it does, that the Court should exercise its discretion to stay the action in favour of a clearly more

⁴⁰ [1993] 4 S.C.R. 289 at 321-22 [hereinafter *Hunt*].

⁴¹ *Upper Lakes Shipping Ltd. v. Foster Yeoman Ltd.* (1993), 14 O.R. (3d) 548 (Gen. Div.) [hereinafter *Upper Lakes Shipping*]; and *Applied Processes Inc. v. Crane Co.* (1993), 15 O.R. (3d) 166 (Gen. Div.).

⁴² *Antares Shipping* *supra* note 6; and *Amchem*, *supra* note 2.

⁴³ *Supra* note 41 at 558.

appropriate forum. Similarly, defendants served with leave have the opportunity pursuant to Rule 17.06 to show that, in view of the existence of a clearly more appropriate forum, discretion should not have been exercised in favour of service and that a stay should be granted.

A more radical solution to the problem of placing the burden on foreign defendants which would be suitable within Canada, though it would need to be nationally legislated, would be to allow defendants served in other provinces to bring motions in their own provinces to challenge jurisdiction. Although such a facility would require refinement for consumer actions, such as that in *Moran v. Pyle National (Canada) Ltd.*,⁴⁴ it would have the advantages, first, of a degree of flexibility not found in systems that require an action to be brought in the defendant's jurisdiction and, second, of mitigating the real prejudice to the defendant, which is having to travel to dispute jurisdiction.

D. *Summary of the Law of forum non conveniens in Ontario following Frymer*

The law regarding the granting of a stay based on *forum non conveniens* in Ontario following the Court of Appeal for Ontario decision in *Frymeris* as follows:

- (a) Defendants may obtain a stay of a proceeding commenced in an Ontario court where there is another clearly more appropriate forum for the pursuit of the action and for securing the ends of justice.
- (b) In a motion to stay on the grounds that the court is a *forum non conveniens*, the onus will be on the defendant if served in the jurisdiction and on the plaintiff if the defendant has been served *ex juris*.

It remains to be seen how the apparent inconsistency between the approach taken by the majority in the Court of Appeal for Ontario decision in *Frymer* and that taken by Sopinka J. in *Amchem* will be reconciled.

⁴⁴ [1975] 1 S.C.R. 393.

E. *Issues Outstanding: Interprovincial Comity and the Burden and Standard*

As with *Amchem*, the effect of the enhanced obligations of interprovincial comity remain to be addressed. In her minority judgment, Weiler J.A. relied on the “new approach” fostered in *Morguard* to the recognition of Canadian judgments, and on the recent extensions of that approach to foreign judgments, to find that service *ex juris* was not exorbitant and thus, that the defendant should bear the onus of showing that jurisdiction should be declined. However, this reasoning was not entirely necessary on the facts of the case. Here the defendants served *ex juris* were served in Canada—not in a foreign country. Had they not challenged jurisdiction they would have been required to defend the matter. Had they not defended, a default judgment would have been enforceable against them pursuant to the decision in *Morguard*. Accordingly, unlike foreign defendants served *ex juris* for an action over which the local court’s jurisdiction is exorbitant, they would not have the luxury of ignoring the proceeding and resisting the enforcement of an award.

Whether the distinction between the enforceability in other provinces and the enforceability abroad will affect issues of burden and standard has yet to be clarified. Perhaps more significant, though, is the question whether this distinction should affect the factors to be considered in determining whether there is another clearly more appropriate forum; in particular, whether the factors considered in determining whether the court of another province is clearly a more appropriate forum should be the same as those considered in determining whether the court of another country is clearly a more appropriate forum. Critical to this question is the recent decision of the Supreme Court of Canada in the companion cases *Tolofson* and *Lucas*.

IV. *TOLOFSON AND LUCAS: A NEW CHAPTER?*

The revolution begun by the judgment in *Morguard* has given rise to a new approach to the principles underlying the doctrines in a number of areas of the conflict of laws. Moreover, changes in one area of the conflict of laws tend to produce effects in other areas. The potential impact of the enhanced recognition of judgments on the doctrine of *forum non conveniens* has been considered. Now, the potential impact of the recent Supreme Court decision in *Tolofson* and *Lucas*, and the

resulting change in the law relating to choice of law in tort on the appropriate method for determining jurisdiction will be examined.

A. *The Claims and their Disposition*

The companion cases *Tolofson* and *Lucas*⁴⁵ arose from car accidents in which the plaintiff passengers were injured in provinces other than those of their residence. In *Tolofson*, a young man sued his father and the driver of the other car in the province of his residence, not where the accident occurred, because he thought the limitation period had run in the province where the accident occurred and because his father would be liable under the law of that province only if he had engaged in willful or wanton misconduct. In *Lucas*, a woman sued her husband and the driver of the other car on behalf of her children and herself in the province of her residence, not where the accident occurred, because the no-fault automobile insurance scheme in the province where the accident occurred prohibited civil suits. Although the courts below had generally upheld the actions, the Supreme Court unanimously allowed the appeals and dismissed the actions.

B. *Distinguishing Tort Choice of Law and forum non conveniens Issues*

On behalf of the majority, La Forest J. found that the law of the place where the accident occurred should apply regardless of where the action was tried. Detailed review of his reasons for doing so is not necessary for considering the effect of such a ruling on the function of the doctrine of *forum non conveniens*⁴⁶ As it happened, the defendants in *Tolofson* argued at first instance that the court was a *forum non conveniens*⁴⁷ They did so in the belief that the court taking jurisdiction would apply its own law: *i.e.*, if the British Columbia court heard the case, it would apply the British Columbia limitation period and if it declined jurisdiction in favour of the Saskatchewan court, the Saskatchewan limitation period would apply.

With the change in the law brought about by the ruling of the Supreme Court in *Tolofson* and *Lucas*, it is clear that, in circumstances

⁴⁵ *Supra* note 4.

⁴⁶ See J.-G. Castel, "Back to the Future! Is the 'New' Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?" (1995) 33 Osgoode Hall L.J. 35.

⁴⁷ *Tolofson v. Jensen* (1989), 40 B.C.L.R. (2d) 90 (S.C.).

such as those in the *Tolofson* and *Lucas* cases, this assumption will no longer hamper the choice of an appropriate forum. Plaintiffs will generally be able to choose a jurisdiction that provides the greatest convenience and in doing so will not generally be able to alter the law that will apply. Similarly, defendants will be able to challenge the choice of jurisdiction on the basis that it does not facilitate the litigation and the determination should remain largely unaffected by the possibility that different fora would apply different laws to resolve the dispute.

The *Tolofson* and *Lucas* decision provides a good example of why these issues should be distinguished in tort cases having elements involving more than one province. In those cases the actions were commenced in the courts of the province in which the majority of the litigants resided. This factor goes a long way to ensuring that those courts will be appropriate for the resolution of the dispute. Unless it is clear that key witnesses or evidence are available only in some other jurisdiction, the forum that provides the greatest convenience to the litigants is generally the appropriate forum and an action commenced in it should not be stayed. However, taking this approach to determining jurisdiction can serve the ends of justice only where there exists a uniform, or at least a rational, approach to the choice of law. In this way, the Supreme Court decision in *Tolofson* and *Lucas* took the first step in establishing among the Canadian provinces the kind of rational choice of law system in tort that will enable courts to determine challenges to jurisdiction on the basis of convenience to litigants and witnesses.

A fair rejoinder to this approach is that the questions of jurisdiction and choice of law can never be entirely independent because the forum will always apply its own procedural law. It is acknowledged that this will always remain a factor and there will always be the possibility that the outcome of a dispute will turn on a narrow procedural point thereby rendering the resolution vulnerable to the manipulation of forum shopping. However, the decision in *Tolofson* and *Lucas* marks an important step in the right direction by clarifying that limitation periods are to be characterized as substantive and, therefore, part of the applicable law. In addition, La Forest J. indicated his general approval of curtailing the categorization of laws as procedural by citing Cook's comment that the distinction between substance and procedure should be based on the extent to which the court can apply the foreign law without unduly hindering or inconveniencing itself⁴⁸ and by citing

⁴⁸ W. Cook, *The Logical and Legal Bases of the Conflict of Law* (Cambridge, Mass.: Harvard University Printing Office, 1942) at 16.

the British Columbia Court of Appeal's finding that "legislation should be categorized as procedural only if the question is beyond any doubt."⁴⁹ Thus, there is hope that the use of this distinction to avoid the obligation to apply the law of another province will gradually disappear and the occasions in which it will genuinely affect the choice of forum will become rare.

Clearly, a rational approach to choice of law in tort cannot readily be secured on an international scale at this time. Accordingly, it is inevitable that the nature of international comity will differ from that of interprovincial comity. However, the rationalization of choice of law rules in Canada could generally reduce the considerations underlying *forum non conveniens* principles to the simple question of whether a party will be so inconvenienced as to suffer a juridical disadvantage. While this may, following *Tolofson* and *Lucas*-based jurisprudence, come to be the state of the law in Canada, it will not soon be seen internationally and, therefore, the application of the doctrine of *forum non conveniens* to international cases must continue to encompass questions of whether the law of the forum taking jurisdiction would be applied and whether the relative advantages or disadvantages of that law would constitute an injustice in the particular case.

That the potential for litigation inconvenience amounting to juridical disadvantage is of sufficient importance to warrant a remedy through a stay based on *forum non conveniens* confirmed by the tenor of recent Supreme Court decisions. For example, in its 1993 decision in *Hunt*,⁵⁰ the Court was called upon to determine the applicability to a British Columbia proceeding of a Quebec blocking statute enacted to protect Quebec businesses against American anti-trust actions. The statute in issue, the *Quebec Business Concerns Records Act*⁵¹ impeded discovery by providing for the issuance of court orders preventing business records from being taken or sent out of Quebec. In *Hunt*, an action arising from injuries sustained in British Columbia through exposure to asbestos products made and sold by Quebec companies, the defendants had obtained orders thwarting discovery and the plaintiffs objected that the legislation which provided for the orders was *ultra vires*. The British Columbia courts hesitated to pass judgment on the constitutionality of the legislation of another province but, on behalf of a

⁴⁹ *Block Bros. Realty Ltd. v. Mollard* (1981), 27 B.C.L.R. 17; see also J.-G. Castel, *Canadian Conflict of Laws*, 3d ed. (Toronto: Butterworths, 1994) at 121.

⁵⁰ *Supra* note 40 at 315.

⁵¹ R.S.Q. 1977, c. D-12.

unanimous court, La Forest J. found without hesitation that the constitutionality of a rule relating to the relationship between provincial legal systems could be raised and determined in the course of ordinary private litigation. One of the driving forces in his judgment seemed to be the view that “[a]bove all, it is simply not just to place the onus on the party affected to undertake costly constitutional litigation in another jurisdiction.”⁵² Without delving into the controversial question of general constitutional imperatives, it may safely be said that the Supreme Court believed that potential for litigation inconvenience caused by Canada’s geographical constitution should not be ignored.

Similarly, in *Amchem*, Sopinka J. noted that “most of the authorities involve loss of juridical advantage rather than personal advantage”⁵³ and this is because most of the authorities contemplate situations in which foreign courts will apply their own law. Canadian courts must continue to follow this analysis in international cases. However, in interprovincial cases, as a rational system of choice of laws develops, it will be possible to focus on “personal” advantages for, as Sopinka J. points out, “loss of personal advantage might amount to an injustice if, for example, an individual party is required to litigate in a distant forum with which he or she has no connection.”⁵⁴ The decision in *Shewan v. Canada (Attorney General)*⁵⁵ provides a good illustration. The claim in *Shewan* apparently involved allegations of a breach by the Yukon Department of Tourism of the plaintiff’s proprietary rights to a song. The Attorney General challenged the jurisdiction of the Ontario court on various bases including that it was a *forum non conveniens*. Uncontested evidence of the plaintiff’s impecuniousness and her son’s requirement for medical care led the master to conclude that “[i]f the plaintiff is not allowed to bring this action in Ontario it is quite likely that she will not be able to bring the action at all.”⁵⁶ The motion was dismissed.

In sum, then, the recent Supreme Court decision in *Tolofson* and *Lucas* marks another stage in the continuing revolution in interprovincial conflict of laws begun with its decision in *Morguard*, and it can now be hoped that questions of choice of law in tort will properly be distinguished from those of jurisdiction as a result of the

⁵² *Hunt*, *supra* note 40 at 315.

⁵³ *Supra* note 2 at 933.

⁵⁴ *Ibid.* at 933-34.

⁵⁵ (1994), 27 C.P.C. (3d) 244 (Ont. Ct. (Gen. Div.)) [hereinafter *Shewan*].

⁵⁶ *Ibid.* at 256.

rationalization of choice of law rules. This, in turn, will permit courts considering challenges to their jurisdiction to do so on the basis of personal or juridical advantages other than those arising from the substance of the law to be applied.

C. *Two Kinds of Real and Substantial Connections*

By recognizing a clear distinction between issues of the applicable law and issues of the appropriate forum, it will also be possible to clarify the often confusing question of what counts as a real and substantial connection and what weight should be accorded to various connections. Some connecting factors that comprise a real and substantial connection are relevant to the issue of which law should be applied and others are relevant to which court should try the action. As a rule of thumb, it may be suggested that factors connecting a cause of action in tort to a particular jurisdiction will be relevant to which law should be applied and those connecting the litigants, witnesses, or evidence to a particular jurisdiction will be relevant to which forum is appropriate.

Many conflict of laws disputes do not require the weighing of connecting factors relating both to the cause of action and to the litigation for the simple reason that many conflict of laws disputes relate only to the applicable law or to the appropriate forum and not to both. The *Tolofson* and *Lucas* case is a good example both of the confusion that can be produced by mixing together different connecting factors and of the sensible result that can be achieved by distinguishing them. In *Tolofson* and *Lucas*, the connecting factors relating to choice of law (where the accident occurred) indicated that the law of one province was applicable while the connecting factors relating to the appropriate forum for the litigation (the residence of most of the litigants) indicated that a different province was the appropriate forum. The significant achievement of the Supreme Court in its judgment was to distinguish between the two. Thus, while the case had been argued at first instance to be a question of *forum non conveniens* the plaintiffs' chosen fora were clearly appropriate. Accordingly, at the Supreme Court, the matter was argued as an issue of choice of law and it was determined that the relevant "real and substantial connection" was that of the location of the accident.

Briefly revisiting the Court of Appeal for Ontario decision in *Frymer* with this principle in mind, it may be suggested that the result might be different in a case of this sort arising in the future. It will be

recalled that the dispute concerned a trust agreement governed by Florida law and it is possible, on that basis, that Florida law would apply. However, aside from the fact that the evidence of certain key witnesses, *i.e.*, the Florida lawyers who drafted the agreements in question, would have to be obtained by commission, it is not clear that a court, following *Tolofson* and *Lucas*, would find this sufficient to warrant sending parties from three Canadian jurisdictions (Alberta, Ontario, and Quebec) to a foreign court to resolve their dispute.

*D. An Additional Application for forum non conveniens in
Choosing the Applicable Law*

In addition to the implications of the recent developments in choice of law in tort for the doctrine of *forum non conveniens* it should be noted that La Forest J. suggested in *Tolofson* and *Lucas* that the doctrine of *forum non conveniens* could play a role in resolving choice of law disputes. In finding that the law of the place where a traffic accident occurred should govern the disposition of a claim arising from that jurisdiction wherever the claim is litigated, La Forest J. needed to consider situations in which the law of the forum did not recognize the kind of claim made or appreciate the nature of the rights asserted by the plaintiff or the proper extent of the defendant's liability.⁵⁷

When faced with a claim that should be governed by another law but is appropriately tried in the forum, a court that feels unable to apply that law must choose between applying its own law or staying the action. Historically, this problem has given rise to a number of "escape devices,"⁵⁸ including characterizing the law as procedural and invoking public policy, which have produced uncertainty in the law and encouraged forum shopping. Determined to limit the instances in which this occurs, La Forest J. encouraged courts to give priority to the application of the right law over litigation convenience by recommending that they stay their proceedings to resolve this dilemma rather than apply their own law. As he explained, "[t]he fact that a wrong would not be actionable within the territorial jurisdiction of the forum if committed there might be a factor better weighed in considering the issues of *forum non conveniens*"⁵⁹ While the ability of

⁵⁷ This author has dubbed this the problem of the *lex non conveniens* see J. Walker, "Choice of Law in Tort: The Supreme Court of Canada Enters the Fray" (1995) 111 L.Q. Rev. 397.

⁵⁸ See Castel, *supra* note 46 at 41 and 68ff.

⁵⁹ *Tolofson* and *Lucas*, *supra* note 4 at 1054.

courts to apply a foreign law can permit parties to litigate in a place other than the place of the governing law, where this is not possible they should be required to litigate in a place that can apply the governing law.

It is difficult to imagine this occurring in Canadian disputes litigated within Canada. The laws of the provinces are not so dissimilar from one another that a court would readily find itself troubled at the prospect of applying the law of another province. However, in *Phrantzes v. Argent*⁶⁰ an English court was required to consider a woman's claim against her father for a dowry in favour of her husband. Greek law, the law of the parties' domicile, provided for such a right, but the English court dismissed the claim because there was no remedy known to English law to vindicate such a right and an English court possessed inadequate means for assessing the quantum of the dowry. The differences between the laws of the various Canadian jurisdictions are not so striking but, as La Forest J. noted, difficulties could arise in disputes involving the application of Quebec's *Civil Code* in a suit in another province or the application of the common law in a Quebec court. These matters, he felt, could properly be handled by "a sensitive application of the doctrine of *forum non conveniens*"⁶¹ Thus, where the court of the appropriate forum regards the applicable law too inconvenient to apply, it should decline to hear the action in favour of a court better equipped to apply the right law. The condition that there must exist a clearly more appropriate forum will respond to concerns regarding the granting of a stay in favour of a court that itself could be unable to take jurisdiction.

A recent example of the use of a stay in such circumstances occurred in *Bank Van Parijs en de Nederlanden Belgie N.W. Cabri*.⁶² A Belgian bank made a loan, secured by diamonds, to Belgian residents. When the security was realized, the bank sued in Belgium for the shortfall. The defendants moved to Ontario and the default judgment became void a year later when they had not been served with it. The bank commenced an action in Ontario and the defendants moved successfully for a stay on *forum non conveniens* grounds arguing that the contracts were written in Flemish and governed by Belgian law, that the cause of action had arisen there, the witnesses were there, and that the dealings were subject to unique Belgian trade customs. In this way, the doctrine of *forum non conveniens* although properly restricted to the

⁶⁰ (1958), [1960] 2 Q.B. 19.

⁶¹ *Tolofson and Lucas*, *supra* note 4 at 1064.

⁶² (1993), 19 C.P.C. (3d) 362 (Ont. Ct. (Gen. Div.)).

task of forum control, may occasionally assist in the resolution of issues created by intractable choice of law problems.

V. RECENT DECISIONS: THE DÉNOUEMENT

Cumulatively, the recent developments in the jurisprudence of the Supreme Court in conflict of laws have the potential to simplify and enhance the fairness of determinations of appropriate forum and applicable law. It remains to be seen whether the implications of the rulings in each area for determinations made in others will be recognized and applied to this end. It is not possible to anticipate the issues that will arise in future cases but it is possible to review some of the decisions released in the period between *Amchem* and *Tolofson* and *Lucas* to consider what effects the reasoning in *Tolofson* and *Lucas* could have on the resolution of such disputes if heard today.

A. *Tomlinson v. Turner: Maintaining the Distinction between Jurisdiction and Choice of Law*

The first of these cases, *Tomlinson v. Turner*⁶³ is the kind of case that would most obviously benefit from the reasoning in *Tolofson* and *Lucas* in that it too concerned a car accident involving elements from several provinces. The plaintiff, a Nova Scotia resident, was on his way to Manitoba. In Quebec, his car collided with a car driven by a Prince Edward Island resident. He took up residence in Manitoba and he and his parents, who lived in Saskatchewan, sued the defendant in Prince Edward Island. The defendant argued that the court should decline jurisdiction on *forum non conveniens* grounds in favour of the courts of Saskatchewan or Manitoba which were said to be equal or better fora. The chambers judge stayed the action upon finding that Quebec was the appropriate forum. The Court of Appeal allowed the appeal on the grounds that the defendants had not asked for that declaration and that the motion should not have been granted because “it would be difficult to establish that the Province of Quebec is clearly the more appropriate forum when it is impossible for the appellants to even commence an action in a court of law in that Province.”⁶⁴

⁶³ (1993), 108 Nfld. & P.E.I.R. 347 (P.E.I. C.A.) [hereinafter *Tomlinson*].

⁶⁴ *Ibid.* at 350.

The decision of the Supreme Court in *Tolofson* and *Lucas* clarified that a dispute like that in *Tomlinson* should be treated as a matter of the applicable law and not of the appropriate forum. The plaintiffs put themselves to great inconvenience to sue thousands of miles away in the jurisdiction of the defendant's residence to ensure both that the court they chose would have jurisdiction over the defendant and that the law of Quebec would not be applied to prevent their civil action. Although their choice of jurisdiction could be challenged as an attempt to manipulate the applicable law by forum shopping, there could be no genuine complaint about the appropriateness of the forum. Following *Tolofson* and *Lucas*, the chambers judge's laudable attempt to secure the application of Quebec law by finding Quebec to be a clearly more appropriate forum would be unnecessary. Moreover, if a civil suit were permitted by Quebec law, a trial there might be inconvenient in view of language factors and differences in procedure under the civil law. Since *Tolofson* and *Lucas*, where the applicable law is a significant factor, it may be more effective to make a pre-trial motion to determine which law the court would apply. In cases such as *Tolofson* and *Lucas* and *Tomlinson*, this would result in dismissing the action on the basis that the applicable law prohibited a civil suit.

B. *MacDonald v. Lasnier: Influencing the Exercise of Discretion*

No matter how clear and detailed the rules on jurisdiction, determinations of motions to stay on the grounds of *forum non conveniens* will always involve an element of discretion and, to some extent, will always be fact specific. In this way, the court in *MacDonald v. Lasnier*⁶⁵ carefully weighed of all the relevant factors and granted a stay in a case of medical malpractice. The plaintiff, an Ontario resident, was injured in a car accident in Quebec and alleged damages as a result of the failure of the treating physicians there to diagnose a spinal fracture. While service *ex juris* was upheld on the basis that he had suffered injuries in Ontario, the court regarded this as insufficient to rule that there was a real and substantial connection to Ontario. Moreover, since the assessment of damages in this case was likely to be less significant than the assessment of liability and it would be easier for the plaintiff to travel to Quebec than for all the Quebec witnesses and records to be moved to Ontario, the balance favoured the courts of Quebec over those of Ontario. Whether the ruling in *Tolofson* and

⁶⁵ (1994), 21 O.R. (3d) 177 (Gen. Div.).

Lucas, requiring the application of Quebec law regardless of the forum, would have affected the court's determination is not clear. Despite the fact that the court made little of the plaintiff's loss of access to legal aid, saying that contingency fee arrangements in Quebec were an adequate substitute, it was clear that it believed Quebec was a more convenient forum and that this was sufficient for the granting of a stay.

C. *Guarantee v. Gordon Capital: The Problem of Parallel Proceedings*

The challenging issue of parallel proceedings arose recently in *Guarantee Company of North America v. Gordon Capital Corp.*⁶⁶ Guarantee issued an insurance bond in Ontario which was governed by Ontario law. When Gordon delivered proof of loss occurring in Ontario, Guarantee advised Gordon that it was rescinding the bond because Gordon had made misrepresentations in applying for it. Further meetings occurred in Ontario but when the parties could not resolve the matter Gordon commenced litigation in Quebec. The courts of Quebec took jurisdiction on the basis that both companies had head offices there. Gordon sued there for payment partly because it hoped that a Quebec court would apply the Quebec three-year period for prescription rather than the two-year limitation specified in the bond which was governed by Ontario law. After seeking unsuccessfully to have the matter stayed in Quebec,⁶⁷ Guarantee commenced its own action in Ontario for various declarations, including that the bond was rescinded and void *ab initio* and that the limitation period had run. Gordon moved to have the action dismissed on the grounds of *forum non conveniens* arguing that it created a multiplicity of actions.

Based on all the factors, Ground J. found that Ontario was the clearly more appropriate forum and he dismissed the motion. Significantly, although both parties had sought stays in the fora in which they were defendants, neither appears to have countered with a motion for an injunction against suit in the other forum. Ground J. regarded the principal issue as that of whether multiplicity of actions were to be tolerated. He found that there was "no authority for the proposition that an Ontario court ought to grant a stay of an Ontario proceeding

⁶⁶ (1994), 18 O.R. (3d) 9 (Gen. Div.) [hereinafter *Guarantee*]; leave to appeal to the Divisional Court dismissed (1994), 18 O.R. (3d) 26; leave to appeal to the Supreme Court of Canada refused 29 C.P.C. (3d) 148.

⁶⁷ *Gordon Capital Corp. v. La Garantie, compagnie d'assurances de l'Amérique du Nord* [1994] J.E. 94-110 (C.S.).

simply because the courts in another jurisdiction have assumed jurisdiction over the matter.”⁶⁸ In his view, the issue before him related only to whether the Ontario action should be allowed to proceed and this was distinct from the question of whether the Quebec action should be allowed to proceed.

Following *Amchem*, the question of whether the Quebec court had appropriately assumed jurisdiction is relevant to whether an Ontario court should enjoin the plaintiffs from pursuing their action, but it has yet to be clarified whether the question is relevant to determining whether an Ontario action should be stayed. On the unusual facts of this case, where the plaintiff in an action pending in another province has sought to stay the local action, Ground J.’s implicit distinction between the two is, perhaps, too fine. The findings required to dismiss the stay and to uphold the jurisdiction of the Ontario court necessarily implied disapproval of the Quebec court’s determination that it had jurisdiction and its refusal to stay the action before it. Following the finding in *Morguard* of an implicit constitutional obligation of full faith and credit, parallel proceedings that are not resolved before trial are inevitably duplicative and wasteful, and potentially inconsistent. However, the delicate question, not unlike the question posed in the *Hunt*⁶⁹ case, is whether, upon a finding that a court of another province has improperly exercised jurisdiction, a Canadian court may issue an injunction to prevent the plaintiffs from pursuing the action. Although Ground J. managed to avoid the question, it is ultimately inevitable.

Apart from the issues of multiplicity and the applicable law, the choice of jurisdiction was unlikely to have much effect on the facilitation of the litigation in that the potential for inconvenience posed by having to litigate either in Montreal or Toronto would be unlikely warrant a lengthy battle over the appropriate forum. This point was made clear by the Saskatchewan Court of Queen’s Bench in dismissing a challenge to jurisdiction in a corporate contract dispute in *Dairy Producers Cooperative Ltd.v. Agrifoods International Cooperative Ltd.* when the court commented that “it is not clear why it is easier for Dairy Producers’ witnesses to travel to Edmonton or Calgary than it would be for Agrifood’s witnesses to travel to Regina.”⁷¹

⁶⁸ *Supra* note 66 at 19.

⁶⁹ *Supra* note 40.

⁷⁰ [1994] 7 W.W.R. 596.

⁷¹ *Ibid.* at 604.

Once again, the key dispute in *Guarantee* seems to have been related to the applicable law, and the concern that a Quebec court would apply its own longer period for prescription rather than the limitation period provided for by the contract in similar cases in the future may have been dispelled by the decision in *Tolofson* and *Lucas*. Nevertheless, if heard today, a plaintiff in *Guarantee*'s position may wish to include in its motion to stay the action in the other province the question of which law and which limitation period would be applied if the stay were denied and the matter were tried there. In more general terms, it would seem that the interprovincial full faith and credit requirements of *Morguard* would, contrary to the ruling in *Guarantee*, render the prevention of multiple actions an important consideration in the determination of a stay based on the doctrine of *forum non conveniens*.

VI. CONCLUSION

The recent Supreme of Canada jurisprudence has made significant advances in the task of updating and rationalizing the principles underlying the major doctrines in the conflict of laws. Not the least of the advances has been in the opportunities for some measure of forum control available to defence counsel through the application of the doctrine of *forum non conveniens*. It will be some time before the interdependence and mutual influence of the recent decisions in the areas of jurisdiction and choice of laws are realized, but careful analysis of the effects of the decisions in *Morguard*, *Amchem*, *Hunt*, and *Tolofson* and *Lucas* promises to assist in the making of persuasive argument and sensible rulings.