THE PROBLEM OF PARALLEL ACTIONS: THE SOFTER ALTERNATIVE

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Rules which cannot be modified by judicial discretion, even if they are arbitrary rules, are preferred by many because they produce order, in the sense of certainty, but even advocates for rules recognize that their production of fairness may be fortuitous. Even arbitrary rules cannot produce absolute certainty because the application of all rules may be disputed in particular cases.[1] Even arbitrary priority rule for deciding which of two actions commenced in different jurisdictions should be allowed to continue would definitely introduce more certainty, and hence more order, into the problem of parallel actions. Such an arbitrary rule, however, might be abused and lead to unfairness.

The genius of the common law conflicts jurisdictional rules might be said to be their flexibility.[2] Unsurprisingly, Canadian common law courts, including the Supreme Court, have been unwilling to create any arbitrary or 'bright line' rules for dealing with parallel actions.

It is not impossible, however, for the judicial branch to introduce more certainty, and hence more order, into the problem of parallel actions without sacrificing any fairness. The recent failure of the Supreme Court of Canada to do so in either *Teck Cominco Metals Ltd. v. Lloyds Underwriters*[3] or in *Canada Post v. Lepine*[4] should not be read as foreclosing future judicial amelioration of the problem, despite the surprising assertion of Lebel J. in *Lepine,* a case dealing with the very special problem

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1 Even where, as in the EU, the rule is that the first action commenced takes priority over subsequently commenced action/s, it is not always obvious what constitutes commencement in a particular legal system.

2 In *Airbus Industrie GIE v. Patel*, [1999] 1 AC 119 (HL), an anti-suit injunction case, Lord Goff contrasted the common law approach with that of the Brussels Convention which, of course, contains arbitrary rules. Referring to the doctrine of *forum non conveniens*, he stated at para. 12, "...the principle may be regarded as an imperfect weapon; but it is both flexible and practical and, where it is effective, it produces a result which is conducive to practical justice."

3 2009 SCC 11, [2009] 1 S.C.R. 321 [*Teck*]. The author was involved in the *Teck* appeal in an advisory capacity.

4 2009 SCC 16, [2009] 1 S.C.R. 549 [*Lepine*].

of parallel class actions within Canada, that "[i]t is not this Court's role to define the necessary solutions."[5]

This article endorses, discusses, and develops the approach that the British Columbia courts seemed to be moving towards[6] to resolve this problem before the enactment of the *Court Jurisdiction and Transfer of Proceedings Act*.[7] The approach was put to the Supreme Court of Canada in *Teck* [8] and identified by it as the "softer alternative" but, instead of dealing with the argument as put, the Court read it up into an argument for a bright line approach that required blind deference to a foreign court's assertion of jurisdiction which amounted to a first to file rule.[9] The Court rightly rejected such a bright line approach.

A local court using the softer alternative approach would defer to a foreign court's decision to retain and exercise jurisdiction and would, therefore, stay the parallel local action provided that two conditions are satisfied: first, the foreign court's decision must be reasonably consistent with the local doctrine of *forum non conveniens*; and second, the stay of the local action in favour of the parallel foreign action must not work an injustice on the local plaintiff.

The approach proposed can be justified by principles and approaches developed by the Supreme Court in *Morguard Investments v. De Savoye,*[10] *Pro Swing Inc. v. Elta,*[11] *Amchem Products Inc. v. B.C. (W.C.B.),*[12] *Beals v. Saldanha*[13] and *ECU Lines NV v. Pompey Industrie.*[14] The deferential recognition of the foreign court's "positive assertion of jurisdiction"[15] might be said to be required by the principles enunciated in *Morguard, Beals, Pro-Swing* and *Amchem* and the granting of the stay as a matter of discretion to be analogous to the principle confirmed in *Pompey*.

Admittedly, this proposed approach is available in only that portion of the growing volume of parallel actions in which the foreign court has already made a

[5] *Ibid.* at para. 57. Lebel J. tossed the ball to the provincial legislatures.

[6] See *472900 v. Thrifty Canada Ltd.* (1998), 168 D.L.R. (4th) 602 (B.C.C.A.); *Westec Aerospace Inc. v. Raytheon Aircraft Co.*, 1999 BCCA 243, 67 B.C.L.R. (3d) 278; and *Ingenium Technologies Corp. v. McGraw Hill Cos.*, 2005 BCCA 358, 49 B.C.L.R. (4th) 120. The Court in *Teck* did not accept the argument that the cases cited had already developed the approach proposed by the appellants. See paras. 26-28.

[7] S.B.C. 2003 c. 28. [*CJPTA*]

[8] *Teck, supra* note 3 at para. 19.

[9] *Ibid.* at paras. 29-30.

[10] (1990), 76 D.L.R. (4th) 256 (S.C.C.) [*Morguard*].

[11] 2006 SCC 52, [2006] 2 S.C.R. 612 [*Pro Swing*].

[12] (1993), 102 D.L.R. (4th) 96 (S.C.C.) [*Amchem*].

[13] 2003 SCC 72, [2003] 3 S.C.R. 416 [*Beals*].

[14] 2003 SCC 27, [2003] 1 S.C.R. 450 [*Pompey*].

[15] See *Ingenium, supra* note 6 at para. 1.

decision about its own jurisdiction. Significantly, the proposed approach does not require complete deference to the foreign decision if considerations of fairness and justice persuade the local court to let the local action continue. Thus the order introduced into the problem of parallel actions will not satisfy those who prefer absolutely certain rules (assuming such phenomena exist) but it will modify the complete uncertainty resulting from the decisions in *Teck* and *Lepine*.

1. Forum Shopping and Parallel Actions

Before addressing the source and operation of the principles which are the foundation of the proposed approach, a few words need to be said about parallel actions and the spectre of forum shopping which inevitably raises its head in connection with parallel actions. Put very simply, parallel actions are those involving the same parties and the same causes of action and which have been commenced in two or more jurisdictions. The fact that the action has been commenced in more than one jurisdiction engenders accusations of forum shopping.

> 'Forum shopping' is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor indignation.[16]

Undoubtedly, parties will sometimes attempt to gain an unfair advantage by commencing an action in a forum which has no connection with the action but it is far more common for there to be a genuine disagreement, objectively and subjectively, about which forum is more suitable for the action.

> Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives. [17]

No presumption arises automatically, therefore, from the simple existence of parallel actions that one or other of the parties is forum shopping in the pejorative sense in order to gain an unfair advantage.

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[16] *The Atlantic Star*, [1973] 2 All E.R. 175 at 198 per Lord Simon of Glaisdale.

[17] *Amchem*, *supra* note 12 at para. 20.

2. *Foum Non Conveniens* and Parallel Actions

Most common law jurisdictions limit the wide territorial jurisdiction they claim by application of the doctrine of *forum non conveniens*.[18] That doctrine is available both when the defendant is served within the jurisdiction and when the defendant is served outside the jurisdiction.[19] Both the formulation of the principles governing the doctrine and the list of relevant factors for consideration have evolved over the years, especially in connection with use of the doctrine following service within the jurisdiction.

The result of the application of any discretionary principle is difficult to predict and the application of the doctrine of *forum non conveniens* is no different. The situations in which the doctrine of *forum non conveniens* may be invoked by a party seeking a stay of the local action can be sorted into three categories of ascending degrees of difficulty.

First is the situation in which the only jurisdiction in which an action has been commenced is the forum.

The second category consists of a situation in which an action has been commenced in the forum as well as in another jurisdiction, often referred to as a *lis alibi pendens*. This is the parallel action problem. The degree of difficulty for the court in identifying the most appropriate forum for the action is compounded simply by virtue of the additional factor, the foreign *lis*, which must be weighed and considered.

Where, finally, there are parallel actions in existence and the foreign court in which the other action is pending, has reached a decision to retain jurisdiction, the degree of difficulty in the application of the doctrine of *forum non conveniens* increases dramatically. The reason for the quantum leap in difficulty arises from the fact that two sets of rules and principles have overlapped, potentially creating a conflict. Which rules are paramount? Potentially such a positive assertion of jurisdiction by the foreign court requires the importation and application of recognition and enforcement rules and principles into the jurisdictional decision.

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[18] The discretionary doctrine referred to is also known as *forum conveniens*. The presence or absence of the negative, *non*, indicates which party bears the burden of proof on the issue. If the burden rests on the defendant, the defendant will have to persuade the forum that it is *not* the most appropriate forum for the action, i.e., *forum non conveniens*. If the burden rests on the plaintiff, as it does when process is served ex juris, the plaintiff must persuade the court that it *is* the most appropriate forum for the action, i.e., that it is *forum conveniens*. In this article no distinction will be drawn and the doctrine will be referred to as the doctrine of *forum non conveniens*.

[19] *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460 (H.L.); *Amchem*, *supra* note 12.

This overlap and possible conflict between jurisdiction and recognition and enforcement rules and principles is a direct result of the liberalization of Canadian common law rules for recognition and enforcement. So long as the only foreign judgments recognized were pecuniary judgments there were no recognition and enforcement rules to import into the jurisdictional decision, even after the *Morguard* extension of the bases for jurisdiction in the international sense. Once non-pecuniary judgments were open for recognition, foreign jurisdictional decisions were potentially recognizable.

To date, the courts have continued to characterize such cases as jurisdictional cases and have not imported and applied recognition and enforcement rules. In *Teck* and *Lepine,* the Court had a clear opportunity to reconcile the principles governing jurisdictional decisions with the conflicts principles extending recognition to a wider range of foreign decisions and the constitutional principles delineating inter-provincial relationships and yet failed to seize that opportunity.

3. The Principled Foundation for the Proposed Approach

i. The Cases Requiring Recognition of Foreign Judgments

In 1990, *Morguard* sensitized the Canadian legal system to the concept of comity and elevated its status to that of a working principle or value. Comity was hardly a new concept in 1990; the formulation which La Forest J. identified as his preference was taken from the 1895 case of *Hilton v. Guyot.*[20] English cases from the nineteenth century to the present invoke the concept of comity, most frequently, of course, in connection with service *ex juris*, often characterized by English judges as a claim of exorbitant jurisdiction.

Comity, as contemplated in *Morguard*, should operate on both a national and an international basis. The globalization of the modern world was said to require greater deference to other legal systems than the common law had been prepared to give in past centuries. Federalism, at least in Canada, was said to require a very special form of comity. To import a requirement of full faith and credit for judgments emanating from sister provinces, provided only that the originating province assumed jurisdiction properly and appropriately. The new common law recognition rule articulated in *Morguard* requires the courts of one province to recognize and enforce pecuniary judgments originating in sister provinces if the plaintiff establishes the existence of a real and substantial connection between the action and the originating province.

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[20] 159 U.S. 113 (1895).

In 1993, the Supreme Court converted that new common law rule to a constitutional principle in *Hunt v. T&N plc.*[21] Subsequently, in *Beals*, the Court finally confirmed the extension of it (but only as a common law rule) to non-Canadian judgments.[22]

In 2006, in *Pro Swing,* the Court made another radical change to the common law rules of recognition and enforcement of judgments by approving, in principle, the recognition and enforcement of non-pecuniary judgments, both Canadian and non-Canadian. The actual foreign injunction at issue in *Pro-Swing* was not recognized because it was held to be too unclear and uncertain in its terms for the Ontario court to be able to enforce it. *Pro-Swing*, of course, simply took *Hunt* to its logical conclusion, namely that the British Columbia order, which the Court held Quebec obligated to recognize by the newly created unwritten constitutional principle of full faith and credit, was not a pecuniary judgment. The Court held that it was an order for discovery of documents. *Amchem* foreshadowed *Pro-Swing* as well.

Amchem, decided like *Hunt* in 1993, is the linchpin of the softer alternative approach endorsed in this article. *Amchem* will not, therefore, be summarized as succinctly as the other cases.

In *Amchem*, the corporate defendants in an asbestos related tort action commenced in Texas by British Columbia plaintiffs, applied to a British Columbia court for an anti-suit injunction prohibiting the continuation of the Texas action. The British Columbia Supreme Court granted the anti-suit injunction; the British Columbia Court of Appeal upheld the issuance of the anti-suit injunction; the Supreme Court of Canada granted the appeal, lifted the injunction, and permitted the British Columbia plaintiffs to continue the tort action in Texas.

Amchem cannot be said to be a parallel action case because, until the application for an anti-suit injunction by the Texas defendants, no action had been commenced in the province by any party, and certainly not a tort action by the British Columbia plaintiffs. The Texas applicants asserted a cause of action in British Columbia claiming damages for abuse of process, but they apparently did so only because they believed that a stand alone application for an anti-suit injunction was not permissible. That cause of action was not parallel to the cause of action in Texas. Neither can *Amchem* be said to be a recognition and enforcement case because recognition of a Texas judgment was not the relief sought. Nevertheless, the process

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[21] (1993), 109 D.L.R. (4th) 16 (S.C.C.).

[22] Provincial courts had extended the *Morguard* recognition rule to non-Canadian judgments almost immediately. The Supreme Court, asked to decide on the correctness of this application, refused leave to appeal in *Moses v. Shore Boat Builders* (1993), 106 D.L.R. (4th) 654 (B.C.C.A.).

set out in *Amchem* is premised on the potential for the existence of parallel actions and on recognition of a foreign non-pecuniary decision.

Having considered (and modified) the doctrine of *forum non conveniens*,[23] Sopinka J. turned to the common law conflicts principles governing anti-suit injunctions, recently discussed and applied by the Privy Council in *Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak*.[24] Conceding that "the principles outlined in *SNI* should be the foundation for the test applied in our courts," Sopinka J. asserted that those principles should be applied "having due regard for the Canadian approach to private international law" as exemplified in *Morguard* which "stressed the role of comity and the need to adjust its content in light of the changing world order."[25] Whether or not one agrees with the Court's assertion that it has a better grasp of and appreciation for the principle or concept of comity and the current needs of the modern world than the House of Lords and the Privy Council, the directions in *Amchem*, with respect to the Canadian procedure for granting an anti-suit injunction, are binding on all Canadian common law courts.

Amchem held that ordinarily, a Canadian court should not permit an applicant for an anti-suit injunction to make a pre-emptive strike. A foreign action should have been commenced and the foreign court should have made a decision about its own jurisdiction.

> In order to resort to this special remedy [an anti-suit injunction] consonant with the principles of comity, it is preferable that the decision of the foreign court not be pre-empted until a proceeding has been launched in that court and the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the proceedings and failed.[26]

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[23] Sopinka J. held in *Amchem* at para. 32 that the staged analysis used by courts in the United Kingdom was a vestigial remnant of the historical development of the doctrine of *forum conveniens* and should be abandoned in Canada. All factors should be lumped in together and weighed. Furthermore, (and very curiously in light of the Court's elevation of comity to an operating principle), Sopinka J. held, at para. 33, that the allocation of the burden of proof to the plaintiff in service *ex juris* cases was a quirk of the English Rules of Court, Order 11, and that in Canada the burden of proof should be allocated to the defendant, unless, of course, a provincial legislature had decided otherwise.

[24] [1987] 3 All E.R. 510, [1987] 3 W.L.R. 59 (P.C.) [*Aerospatiale*].

[25] *Amchem*, *supra* note 12 at para. 50.

[26] *Ibid.* at para. 51. Cf. *Turner v. Grovit*, [2005] 1 A.C. 101 (E.C.J.) and *West Tankers Inc. v. Allianz Spa*, [2009] 3 W.L.R. 696 (E.C.J.) prohibiting anti-suit injunctions where the action to be enjoined has been commenced in a member state. The member state must be given an opportunity to stay its own action.

Obviously, a stay or other termination of the foreign action will obviate the need for an anti-suit injunction and the application can be dismissed, but a decision by the foreign court to retain and exercise jurisdiction will require the domestic court to continue with consideration of the application for an anti-suit injunction.

It is at this point in *Amchem* that the directions as to procedure become highly relevant to the proposed approach.

Despite the fact that the domestic court will have already decided (by applying the doctrine of *forum non conveniens,* as Canadianized by *Amchem*) that it is the most appropriate forum for the action, Sopinka J. directs that Canadian court to defer to the jurisdictional decision of the foreign court if the foreign court could "reasonably have reached the conclusion" that it was the most appropriate forum for the action. The crucial passage reads as follows:

> In this step of the analysis, *the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction.* If, applying the principles of *forum non conveniens* outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, *the domestic court should respect that decision* and the application [for the anti-suit injunction] should be dismissed. *When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions.* In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles.[27] [Emphasis added.]

Only if the foreign court's decision is not in accordance with domestic *forum non conveniens* principles should the domestic court consider whether continuation of the foreign action would amount to injustice. If continuation of the foreign action results in injustice to a litigant, the domestic court may grant an anti-suit injunction because, "[t]he foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the basis of comity."[28]

At the time of the action, Texas did not have an equivalent to our doctrine of *forum non conveniens* yet the Court found that the Texas court's decision to retain jurisdiction was one to which a Canadian court should defer as a matter of comity. The Court did not perform the analysis which it states a Canadian court should perform when the foreign court has no equivalent doctrine of *forum non conveniens*;

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[27] *Amchem, supra* note 12 at para. 53.

[28] *Ibid.* at para. 56.

it did not "measure the result against our principles."[29] Instead, the Court relied on the proposition that the Due Process clause of the Constitution of the United States guaranteed a connection "consistent with our rules of private international law relating to *forum non conveniens*."[30]

The finding of the Court on this point is very strange. The Due Process clause is the equivalent of Canadian concepts of jurisdiction *simpliciter* or territorial jurisdiction. It is ordinarily similarly qualified by the doctrine of *forum non conveniens*. Furthermore, it is debatable whether the comity principle is better served by second guessing the jurisdictional decision of a foreign court or by pre-empting it. Foreign courts are unlikely to take kindly to being second-guessed. Nevertheless, in the context of endorsement of the softer approach to parallel actions, the significance of *Amchem* is that the Texas court's decision to retain and exercise jurisdiction was recognized and deferred to by the Court in a Canadian jurisdictional proceeding.

*ii. The **Forum non Conveniens** and Party Autonomy Cases*

On a stay application, the logical possibilities of the weight for the court to accord to the factor of an exclusive jurisdiction (or forum selection) clause are no weight, some weight, or conclusive weight. The common law used to give no weight to exclusive jurisdiction clauses, on the grounds that it was contrary to public policy to oust the jurisdiction of the court, but it moved to giving heavy weight to such clauses and requiring the plaintiff who had commenced the action in breach of the exclusive jurisdiction clause to show strong cause why the court should not stay the action.[31] International conventions opt for conclusive weight to be given to exclusive jurisdiction clauses in order to foster and promote the certainty said to be required for commercial convenience.[32]

In *Pompey,* the Court was concerned with an application for a stay of local proceedings commenced in breach of an exclusive jurisdiction clause in a contract.[33] The Federal Court of Appeal had held that the proper test was the tripartite *American Cyanamid*[34] test for interlocutory injunctions and not the common law strong cause test. In a unanimous judgment written by Bastarache J., the Court confirmed and applied the strong cause test and restated it as follows:

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[29] *Ibid.* at para. 60.

[30] *Ibid.*

[31] The leading case was *The "Eleftheria,"* [1969] 1 Lloyd's Rep. 237, [1969] 2 All E.R. 641 (P.D.A.).

[32] For an example, see the *Convention on Choice of Court Agreements*, Hague Conference on Private International Law, 20th Sess., 30 June 2005.

[33] *Supra* note 14.

[34] *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504 (H.L.).

> Once the court is satisfied that a validly concluded bill of lading otherwise binds the parties, the court must grant the stay unless the plaintiff [who has commenced the action in breach of the clause] can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause. In exercising this discretion, the court should take account of all the circumstances of the particular case.[35]

The Court held that such clauses should be encouraged because they "create certainty and security in transactions, derivatives of order and fairness which are critical components of private international law."[36]

On first reading, one paragraph[37] in *Pompey* seems to suggest that the strong cause test is completely separate from the doctrine of *forum non conveniens*, but a closer reading indicates that probably all that Bastarache J. is trying to do is clarify the allocation of the burden of proof and the weight of the contractual factor in the strong cause test. Relying on *Amchem*, he states that the burden of persuading the court that there is another clearly more appropriate forum elsewhere rests on the defendant in the ordinary *forum non conveniens* case and no factor among all the circumstances is necessarily given greater weight than the others. The burden of persuasion, however, rests on the plaintiff under the *Pompey* strong cause test and the exclusive jurisdiction clause must be accorded a heavy weight.

For provinces (like British Columbia) which have enacted a version of the Uniform Law Conference of Canada (ULCC) *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*) the proper explanation of this paragraph of the judgment is of considerable significance. In fact, in light of what the Court said about the *CJPTA* in *Teck*, the proper interpretation of this passage in *Pompey* is critical. If the *Pompey* case does hold that the strong cause test is not a version of *forum non conveniens*, the deference afforded by the common law to exclusive jurisdiction clauses, so recently confirmed in *Pompey*, may have vanished with the enactment of the *CJPTA*.

In *Teck,* the Court stated that s. 11 of the British Columbia version[38] of the *CJPTA* "constitutes a complete codification of the common law test for *forum non conveniens*. It admits of no exceptions."[39] There is no express reference in s. 11 or in any other section of the *CJPTA* to exclusive jurisdiction clauses. The continued application of *Pompey* in *CJPTA* provinces, therefore, depends on it being a particular application of the doctrine of *forum non conveniens.*

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[35] *Pompey*, *supra* note 14, at para. 39.

[36] *bid.* at para. 20.

[37] *Ibid.* at para. 21.

[38] The numbering of sections in the various provincial versions is not identical.

[39] *Teck*, *supra* note 3 at para. 22.

It is inconceivable that the Court could have intended its interpretation of the *CJPTA* in *Teck* to eliminate the strong cause test it had so recently confirmed in *Pompey* from the operation of the *CJPTA*. The approach endorsed in this article assumes and relies on an interpretation and application of s. 11 of the *CJPTA* which accommodates the *Pompey* strong cause test.

4. The *Teck* and *Lepine* cases

Both *Teck*, originating in British Columbia, and *Lepine*, originating in Quebec, are parallel action cases in which the other court had made a positive decision to retain and exercise jurisdiction. In *Teck*, the other jurisdiction was Washington State, a truly foreign jurisdiction. In *Lepine*, the involved jurisdictions were sister provinces, Quebec and Ontario. *Lepine* may, therefore, raise federalism issues not found in *Teck*.

i. Teck

The parallel actions in *Teck* were the consequence of an action for damages commenced in Washington State by Washington State residents against Teck, then a mining and smelting company called Cominco, pursuant to an American federal statute, the *Comprehensive Environmental Response, Compensation and Liability Act* (*CERCLA*).[40] Teck objected to the jurisdiction of the Washington State court in the environmental action. Nevertheless, despite its attempt to avoid being sued in Washington State under *CERCLA*, Teck commenced an action in Washington State against its insurers, seeking a declaration regarding their contractual liability to Teck for such potential environmental damages. The insurance companies, the defendants in the Washington State action, immediately commenced an action in British Columbia seeking declarations of their non-liability under the same policies.

In terms of chronology, the Teck action in Washington State was commenced only a few hours before the insurers' action was commenced in British Columbia. The defendants in each action sought a stay from the respective courts, the insurers in Washington State and Teck in British Columbia. The Washington court was the first court to reach a decision. It applied a *forum non conveniens* test, not identical to the British Columbia version of the doctrine but one which was extremely similar, and decided that it was the most appropriate jurisdiction for the action. The British Columbia Supreme Court subsequently reached the same conclusion about its own appropriateness, pursuant to s. 11 of the *CJPTA,* and it refused to stay the British

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[40] 42 U.S.C. 9601-9675 [*CERCLA*].

Columbia action.[41] The trial judge's refusal to stay was upheld by both the British Columbia Court of Appeal[42] and by the Supreme Court of Canada.[43]

Both the British Columbia Court of Appeal and the Supreme Court of Canada held that, under s. 11 of the *CJPTA,* any decision to stay a British Columbia action is a matter of plenary discretion. Both appellate courts found that the trial judge had not erred in the principles which he had applied in exercising his discretion.

The Supreme Court of Canada acknowledged that Teck, as appellant, had made two alternative arguments: first, that "the usual multi-factored test under s. 11 of the *CJPTA* must give way to a 'comity based' test that respects the foreign court's decision to take jurisdiction;"[44] and, in the alternative, that s.11 is applicable but the foreign decision is a factor of overwhelming significance determinative of the *forum conveniens.*[45] Although it set out both arguments, the Court never really came to grips with the second option which it described as the "softer alternative."

Rejecting the first argument, the Court held that s.11 of the *CJPTA* "creates a comprehensive regime that applies to all cases where a stay of proceedings is sought on the ground that the action should be pursued in a different jurisdiction (*forum non conveniens*)" and, therefore, that "a prior assertion of jurisdiction by a foreign court does not oust the s. 11 inquiry."[46] Section 11 constitutes a "complete codification of the common law test for *forum non conveniens*. It admits of no exceptions."[47] The Court held further that "comity is not necessarily served by an automatic deferral to the first court that asserts jurisdiction."[48]

The softer alternative seems to have been understood by the Court as calling for an interpretation of the multi-factored test in s. 11 which would make one factor determinative: the foreign decision that it was the most appropriate forum would be determinative of the application instead of being, as had been argued, simply one factor in the analysis (albeit a very significant factor). The Court rejected this interpretation of s. 11 on the traditional, statutory interpretation ground that if that is what the legislature intended it would have stated it expressly.[49]

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[41] 2006 BCSC 1276, 60 B.C.L.R. (4th) 261.

[42] 2007 BCCA 249, 67 B.C.L.R. (4th) 101. Discussed by V. Black and J. Swan, "Concurrent Judicial Jurisdiction: A Race to the Court House or to Judgment? *Lloyds Underwriters v. Cominco Ltd.*" (2008) 46 C.B.L.J. 292.

[43] *Teck, supra* note 3.

[44] *Ibid.* at para. 17.

[45] *Ibid.* at para. 19.

[46] *Ibid.* at para. 21.

[47] *Ibid.* at para. 22.

[48] *Ibid.* at para. 23.

[49] *bid.* at para. 25.

The Court went on to find that the British Columbia cases were "against this contention" and that policy considerations did not support "making a foreign court's prior assertion of jurisdiction an overriding and determinative factor in the *forum non conveniens* analysis" because that would "encourage a first-to-file rule."[50] The Court went on to characterize such an approach as amounting to "blind acceptance:"[51]

> A holistic approach, in which the avoidance of a multiplicity of proceedings is one factor among others to be considered, better serves the purpose of fair resolution of the *forum non conveniens* issue with due comity to foreign courts.[52]

The Court declined to comment on the related question of whether the British Columbia court would or should recognize a Washington State judgment if that court issued a judgment before the British Columbia court. The issue had not been developed in the courts below or in the Supreme Court and an answer was not necessary for resolution of the case.[53] The Court dismissed the appeal and both the British Columbia and the Washington State actions are proceeding.

The decision in *Teck* is disappointing from the perspective of the Canadian conflict of laws which has been so heavily influenced by the Court since its 1990 decision in *Morguard*. The disappointment does not lie in the fact that *Teck* leaves the common law and the *CJPTA* courts with plenary discretion in parallel action cases. That was always a legitimate option for the Court. *Teck* disappoints because it fails to engage in a principled discussion of the "softer alternative" and actually misdescribes it throughout the discussion of it. The "softer alternative" argument did not propose either a first to file rule[54] or blind acceptance of a foreign assertion of jurisdiction, nor did it amount to either.

ii. Lepine

In September 2001, the revocation by Canada Post of the lifetime Internet access service package which it had offered the previous year provoked class actions in four provinces. These actions were commenced in the following sequence: Alberta in 2001, Quebec in February, 2002, Ontario in March, 2002, and British Columbia in

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[50] *Ibid.* at para. 29.

[51] *Ibid.* at para. 30.

[52] *Ibid.*

[53] *Ibid.* at para. 40. Black and Swan, *supra* note 42, had urged the Court to answer this question.

[54] The Court was possibly induced into this view by the fact that Teck, the plaintiff in the Washington State insurance action, managed to commence first (at one minute after midnight) by utilizing a little used Washington procedure not available to the insurers in the British Columbia action who had to wait until the Registry opened several hours later. This was a bit of gamesmanship, perhaps, but it was never relied on by Teck.

May, 2002. Canada Post made the same settlement offer in each action. Applicants for certification in Alberta, British Columbia and Ontario accepted the offer. Mr. Lepine rejected the settlement offer in Quebec. The hearing on the *Lepine* Quebec certification application was scheduled for November 2003. Canada Post attempted unsuccessfully to obtain a stay of the Quebec action, apparently in November 2003.

In each of the class actions in Alberta, British Columbia and Quebec, the class consisted only of residents of the forum province. In the Ontario action, the class was a national class. Counsel for Lepine sent the Ontario judge a letter advising him of the Quebec proceedings and asking him to decline jurisdiction over Quebec residents.

On December 22, 2003, the Ontario court certified the class action in that province and approved the settlement for the national class. British Columbia residents were excluded but, despite the letter received from counsel for Lepine, Quebec residents were included.

On December 23, 2003, the Quebec court certified *Lepine* as a class action for Quebec residents.

In June 2004, Canada Post applied in Quebec for an order of recognition and enforcement of the Ontario judgment of December 22, 2003. Both the Quebec Superior Court and the Quebec Court of Appeal refused to recognize the Ontario judgment. Canada Post appealed their refusal to recognize the Ontario class action settlement judgment to the Supreme Court of Canada.

In Quebec, recognition and enforcement of foreign judgments, or "external" judgments as Lebel J. preferred to describe them,[55] depends on articles 3164 and 3168 of the *Civil Code of Quebec (CCQ)*.[56] Thus recognition of the Ontario settlement judgment depended on three issues: does article 3164, which requires that there be a "substantial connection between the dispute and the originating court," require the originating foreign court to have been *forum conveniens*? Did the foreign court process breach any fundamental procedural principles? Lastly, did the application for certification in Quebec and the application for certification in Ontario give rise to a situation of *lis pendens*? A positive answer to any one of the issues would, independently, justify a refusal by Quebec courts to recognize the Ontario judgment.

The Court found that the Ontario court had jurisdiction within the meaning of art. 3164, holding that article 3164 requires the plaintiff to establish a minimal jurisdictional connection between the action and the foreign court but not that the

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[55] *Lepine, supra* note 4 at para.14.

[56] S.Q. 1991, c. 64. [*CCQ*].

foreign court was *forum conveniens*. The Court defined a minimal connection for recognition and enforcement purposes under article 3164 as equivalent to *jurisdiction simpliciter* as defined in *Spar Aerospace v. American Mobile Satellite Corp.*[57] This finding settled a controversial issue of statutory interpretation for Quebec.

Constitutional issues were not raised in *Lepine*, as they had been in *Spar*, but one must assume that the Court would not have interpreted article 3164 as requiring only a minimal connection for recognition and enforcement if *Morguard* required a closer nexus.

Canada Post's hopes for recognition and enforcement of the Ontario judgment foundered on issue two. In a national class action, plaintiffs have to opt-out within a fixed time period. The absence of notice or inadequate notice will render opting-out impossible. Failure to opt out of the national class binds the class members and purports to prevent them from commencing an action in another jurisdiction. It is this aspect of provincially authorized opt-out national classes which raises some constitutional concerns.

The Court agreed that the notification to the Quebec residents of the Ontario action contravened the principles of fundamental justice:

> In sum, the Ontario notice did not properly explain the impact of the judgment certifying the class proceeding on Quebec members of the national class established by the Ontario Superior Court of Justice. It could have led those who read it in Quebec to conclude that it simply did not concern them.[58]

From a constitutional perspective, provinces are free to be as generous as they like in conferring benefits on persons anywhere in the world provided those benefits are located within the geographical confines of the province. If conferring the right to participate in a class action is a benefit, it is constitutionally open to provinces to permit non-residents to opt-in to a local class action. Conferring benefits within the province on the world, and forcing that benefit on the recipients unless those recipients

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[57] 2002 SCC 78, [2002] 4 S.C.R. 205. *Jurisdiction simpliciter* is equivalent also to territorial jurisdiction as defined in the *CJPTA,* at least as that statute is applied in British Columbia, which has definitively rejected the *Muscutt* approach for the *CJPTA*: *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592. In those provinces which have adopted *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577, 60 O.R. (3d) 20 (C.A.), *jurisdiction simpliciter* and territorial jurisdiction require a more substantial connection.

[58] *Lepine*, *supra* note 4 at para. 46. Practitioners and scholars focusing on class actions will want to read Lebel J.'s general discussion of notice requirements very carefully. Significantly, it was the inadequacy of notice which tripped up the recognition process in *Curry v. McDonald's Restaurants of Canada Ltd.* (2005), 250 D.L.R. (4th) 224 (Ont. C.A.).

say no, is certainly more aggressive but is also probably constitutionally permissible. Thus the mandatory inclusion of all potential plaintiffs in a national or global class action in an opt-out province is still conferral of an intra-provincial benefit. The constitutional analysis takes no notice of the need for, or the merits of, such classes and such largesse.

The aspect of the opt-out class action legislation which is constitutionally fragile arises from the consequence of failure to optout. Insofar as the provincial class action legislation can be and is interpreted to make the ultimate judgment binding on involuntary out of province members of the class and so to prevent them from commencing a similar action against the same defendant anywhere in the world, it destroys civil rights (the right of action) extraterritorially and thereby exceeds the legislative jurisdiction of the province under both s. 92(13) and s. 92(14).[59] Involuntary members are non-residents whose potential claims did not arise from any transactions or relationship with the class action defendant arising in the province and who fail to optout because of lack of knowledge about the action. *Lepine*, however, addressed only the application to the facts of the provisions of the *CCQ* in relation to the principles of fundamental justice.

From the perspective of the general approach to recognition and enforcement of foreign judgments, most recently addressed by the Court in *Beals,*[60] the aspect of Lebel J.'s discussion on this issue that is of particular significance is his statement that it is not the procedure set out in the Ontario statute that is in issue but the way the court applied that procedure in all the relevant circumstances.[61] This is the issue on which the Court split in *Beals*. The majority in *Beals* was content to examine the statutory procedure. Binnie J., dissenting, examined the procedures actually utilized in reaching the judgment in Florida and found there had been a breach of natural justice. *Lepine* implicitly suggests that Binnie J. was correct after all. There is no reason in principle to confine *Lepine* to civil law actions for recognition and enforcement or to class action judgments. The defence of breach of fundamental principles or natural justice should depend on the procedure actually used in the action.

Even though the holding on the second issue was determinative of the case, the Court considered the *lis pendens* issue. The *CCQ* provisions in issue and the discussion of them are relevant to the common law problem of parallel actions.

Article 3137 of the *CCQ* grants discretion to the Quebec courts: it authorizes, but does not require, a court to stay a local action if there is a *lis alibi pendens* (a

[59] The current leading cases on the doctrine of extraterritoriality are *Churchill Falls (Labrador) Inc. v. A.G. Newfoundland,* [1984] 1 S.C.R. 297 and *British Columbia v. Imperial Tobacco*, 2005 SCC 49, [2005] 2 S.C.R. 473.

[60] 2003 SCC 72, (2004), 234 D.L.R. (4th) 1.

[61] *Supra* note 4 at para. 42.

parallel action) in another jurisdiction. Article 3155(4) of the *CCQ* contains a definite and absolute rule: a Quebec court must not recognize a foreign judgment if there is a dispute pending in Quebec or a Quebec judgment. The Quebec action must predate the foreign action which is arguably the equivalent of the first-to-file rule rejected by the Court in *Teck*. The Court held that the *Lepine* class action was commenced before the Ontario action even though it had not been certified. Thus, even if the Ontario notice had been adequate, the Ontario settlement judgment would not be recognized.[62]

Finally, the Court declined to consider, in any depth, the problem of parallel class actions. The source of the problem is, of course, the class action legislation in force in Ontario[63] and Manitoba,[64] *inter alia*, which authorizes the creation of national classes on an opt-out basis. Such classes potentially and with increasing frequency actually overlap with other national classes and with provincial classes. If plaintiffs are required to optin, the chances of overlap are minimal because an individual plaintiff is highly unlikely to optin to more than one class. A plaintiff who optedin has voluntarily submitted to the jurisdiction of the court and there is no reason not to hold that plaintiff bound by the decision in other jurisdictions.

The Court agreed, without discussing the distinct ways in which a national class may be created, that "the need to form such national classes does seem to arise occasionally"[65] and recognized that the potential for parallel class actions raises questions about the relationship between equal superior courts in a federal system and sometimes produces friction between courts in different provinces.[66] Stating that "[i]t is not this Court's role to define the necessary solutions,"[67] the Court directed the provincial legislatures to create more effective methods for managing jurisdictional disputes in "the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space."[68]

Thus, even though *Lepine* decides critical issues concerning the proper interpretation and application of the *CCQ* in connection with class actions, issues which are also relevant to common law Canada, like *Teck*, it is ultimately disappointing in its disclaimer of a role for managing relationships among and between the superior courts of the provinces. It was, after all, *Morguard* which held that federalism requires

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[62] Quebec has thus, by legislation, resolved the issue discussed by Black and Swan, *supra* note 42, of whether the forum should recognize a foreign judgment reached in a parallel action if the foreign court issues judgment first. Logically, knowledge of what the forum will do in that event should have an effect on strategic decisions by parties to the actions concerning which action to continue.

[63] S.O. 1992, c.6.

[64] C.C.S.M., c. C130.

[65] *Lepine*, *supra* note 4 at para. 56.

[66] *Ibid.* at para. 57.

[67] *Ibid.*

[68] *Ibid.*

that relationships between provincial superior courts be special and different. Thus, it is curious to find the Court now apparently abandoning the field.

Lepine also does not comment on the lost opportunity to avoid the overlapping class actions in Ontario and Quebec. Application of the reasoning in *Teck* means that the Ontario court did have plenary discretion to include Quebec residents from the Ontario action against Canada Post but, as is argued below, when the parallel actions are located in two Canadian jurisdictions, the result should be different as a matter of federalism.

5. The Proposed Modification: The Softer Alternative

The proposed modification to the doctrine of *forum non conveniens*, advanced by the appellants in *Teck* as an alternative argument and set out earlier, need only be stated to demonstrate that it does not require blind deference to a foreign court's jurisdictional decision and that it does not necessarily reward the plaintiff who manages to commence an action first.[69] The softer alternative provides a principled approach and is not a definite and absolute rule. It retains the traditional common law flexibility, but imports a useful degree of certainty, and hence predictability, into the discretionary component of the jurisdictional decision. An element of certainty benefits both the court and the litigants.

The softer alternative provides that where there are parallel actions, the parallelism being an independent preliminary issue, the forum should ordinarily defer to a decision already made by the foreign court to exercise jurisdiction and should stay the local action. This ordinary deference, however, is contingent on two conditions. First, the foreign court must have employed its discretion using principles similar to the forum version of *forum non conveniens* or, if that doctrine is unknown in the foreign legal system, if the system is one bereft of discretion, the foreign court must be found to have been able reasonably to have come to that conclusion if it had employed the doctrine. Second, the stay of the local action must not work an injustice on the local plaintiff.

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[69] Teck Cominco commenced its action in Washington State a few hours before the insurance companies were able to commence theirs in British Columbia. Teck used a process available in Washington which permitted service on a judge. The judge in question was served at his home at a dinner party by a guest one minute after midnight. The insurance companies had to wait to commence their action in British Columbia until the Registry opened in the morning. Whatever advantage this strategic maneuver achieved was undoubtedly negated by the judicial eyebrows it raised. It must be noted and emphasized, however, that Teck Cominco never relied on a first to commence rule in asking the British Columbia courts to stay the British Columbia action.

The softer alternative might be said to be the child of *Amchem* child and the first cousin of *Pompey*.

Amchem, extending the enhanced *Morguard* comity principle, directed Canadian courts to refrain from deciding whether to issue an anti-suit injunction until the foreign court had made a jurisdictional decision. The softer alternative is even softer than *Amchem*: it does not require the forum to wait for the foreign court to make a jurisdictional decision.[70] *Amchem* directed Canadian courts to defer to such non-pecuniary jurisdictional foreign judgments. *Pro-Swing* simply extended that deference to non-pecuniary foreign judgments generally. *Amchem* provided for the possibility that the foreign court might have no doctrine of *forum non conveniens*. *Amchem* directed the retention of forum flexibility to prevent injustice.

Pompey directs Canadian courts to defer to party autonomy unless that deference produces an injustice. *Pompey* directs Canadian courts to give great, but not determinative, weight to the factor of an exclusive jurisdiction clause in the *forum non conveniens* analysis. The softer alternative directs the forum to give great, but not determinative, weight to the existence of a foreign jurisdictional decision in the *forum non conveniens* analysis. *Pompey* permits the court to evaluate the exclusive jurisdiction clause to determine whether it is indeed valid and exclusive. The softer alternative permits the forum to evaluate the foreign jurisdictional decision or its absence to determine whether the foreign court could reasonable be said to be *forum conveniens*.

Had the courts in British Columbia been using the softer alternative in *Teck*, the British Columbia action would have been stayed unless the insurers, the plaintiffs in the British Columbia action, could have established that the stay of the British Columbia action would work an injustice on them. The list of factors considered by the Washington judge applying the doctrine of *forum non conveniens* was not identical to the working list of factors considered by British Columbia judges but the differences were not significant. Reasonable people, including judges, often disagree on the precise elements of the lists of factors and on the weighting and weighing of those factors in considering the appropriateness of competing forums.

6. Is the Softer Option Foreclosed by the *CJPTA*?

As the Court held in *Teck*, the *CJPTA* has codified the common law, but it is a mistake to equate that codification of the common law with the s. 11(2) list of factors which must be considered for two reasons.

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[70] Canadian courts have not always required a litigant to seek relief in the foreign court first. For example, see *Hudon v. Geos Language Corporation* (1997), 34 O.R. (3d) 14 (Div. Ct.).

First, the statute does not purport to be exhaustive in its listing of factors. Section 11(2) directs the court to look at all the relevant circumstances *including* those listed in subsections (a) to (f). The term *including* is inconsistent with an intent to compile an exhaustive list. Moreover, the subsections are sufficiently broad to encompass virtually all more detailed lists set out by different courts.

Second, to focus on the list in s. 11(2) is to overlook the real codification which is found in s. 11(1), the codification of the common law principle:

> s. 11(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.

This is the codification of the common law principle of *forum non conveniens*, drawn from the Scottish jurisprudence, invoked in the *Atlantic Star*[71] by Robert Goff, finally approved by the House of Lords in the *Spiliada*[72] speaking through Lord Goff, and adopted in Canada in *Amchem*.

The fact that s. 11(2) does not list exclusive jurisdiction clauses as a factor for consideration in the exercise of judicial discretion does not prevent the courts from considering such clauses as directed by *Pompey*.

Similarly, there is nothing in s. 11(2) of the *CJPTA* which prevents a court from considering a foreign jurisdictional decision, weighting it the same heavy way an exclusive jurisdiction clause is weighted and calling on the plaintiff in the local action to show strong cause amounting to injustice.

7. Is the Softer Alternative Constitutionally Required?

Morguard and *Hunt* were both pure recognition and enforcement cases. Together they produced a constitutional principle for Canada equivalent to the American full faith and credit clause. They held that the special version of comity implicit in a federal state demands recognition and enforcement by all other units of judgments rendered in any one unit, provided that the courts in the originating unit properly and appropriately assumed jurisdiction.

An application for a stay of the local action in a parallel action situation belongs at the jurisdictional end of the equation but, when there has been a jurisdictional decision by one of the two courts, an issue of judgments recognition arises.

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[71] [1974] A.C. 436 (H.L.).

[72] *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460 (H.L.).

Where one of the parallel actions is located in a non-Canadian jurisdiction, the softer alternative is truly just an option, albeit one which this article encourages Canadian courts to adopt. The constitutional obligation to accord recognition to a decision does not extend to decisions originating in non-Canadian courts. The softer alternative was truly just an option in *Teck*.

However, where the parallel actions are both in Canadian jurisdictions, the constitutional principle of full faith and credit arguably leaves the courts no option. *Morguard* requires Canadian courts to defer to judgments from other Canadian courts provided that jurisdiction was properly and appropriately assumed and provided that no common law defence is invoked. *Hunt*, *Amchem*, and *Pro-Swing* extend that constitutionally mandated recognition to non-pecuniary judgments. The softer alternative is, therefore, not an option. Constitutional principles require respect and deference, although not blind deference, from courts in sister provinces. *Lepine* was apparently such an inter-provincial case, but it proceeded in a curious manner.

Lepine involved two provincial courts, Ontario and Quebec. A determination of what should have happened using the softer alternative analysis is complicated by the fact that no formal stay application was made in Ontario by counsel for Lepine. Had a stay application been made, the Ontario court should have deferred to the Quebec jurisdictional decision to retain jurisdiction in the class action brought by Quebec residents, in the absence of injustice to the Ontario plaintiffs, because that is what *Morguard* and *Hunt* require. As the case unfolded, however, it was the Quebec court which was asked to recognize the Ontario settlement judgment as a bar to continuation of the Quebec class action. That result seemed to be compelled by *Morguard* by as well. But *Morguard* does not require blind full faith and credit. *Morguard* left all the common law defences intact and those common law defences are reflected in the *CCQ* provisions. Breach of natural justice prevented the recognition which the constitutional principle of full faith and credit would otherwise have required.

The constitutional principle enunciated in *Morguard* ought to compel the softer alternative if the parallel actions are both located in Canada. But the constitutional obligation to respect and give full faith and credit to a decision of a sister province, including a jurisdictional decision, does not require application of any particular statutory regime for recognition and enforcement of Canadian judgments. Thus, application of the new ULCC statutes adopted in some provinces for recognition of Canadian judgments ought to remain inapplicable. Nevertheless, it is interesting

to note how different the result would be if the *Enforcement of Canadian Judgments and Decrees Act*[73] (*ECJDA*) were applied instead of the basic constitutional principle.

Under the *ECJDA* the options for escape from deference are significantly fewer. The *ECJDA* applies to both pecuniary and non-pecuniary judgments.[74] It prohibits the forum from considering whether the originating province properly and appropriately assumed jurisdiction[75] and it eliminates the traditional common law defences of breach of natural justice and fraud.[76]

Applying the *ECJDA*, the British Columbia courts would have been statutorily obligated to recognize the defective Ontario settlement judgment in issue in *Lepine* because the *ECJDA* forbids evaluation of the jurisdiction of the other provincial court and of that court's procedural processes.

It is unlikely, however, that either the constitutional principle of full faith and credit or the *ECJDA* would require the British Columbia courts to stay a local action in deference to a jurisdictional decision in another province in the absence of a formal application for a stay of the British Columbia action. If a formal application were made, however, with respect to the Quebec jurisdictional decision in the *Lepine* class action, and if the British Columbia court were applying the *ECJDA*, the court would be obligated by that *Act* to defer to the Quebec decision without evaluating the reasonableness of the Quebec *forum conveniens* decision. Unless the British Columbia plaintiff could establish that recognition would be contrary to forum public policy, the court would have to stay the British Columbia action.[77] Injustice might be considered contrary to forum public policy.

8. Conclusion

The softer alternative will provide parties with greater predictability in their jurisdictional manoeuvring and, like the *Pompey* approach to exclusive jurisdiction clauses, it will assist the courts in exercising their discretion. Any jurisdictional manoeuvring by one of the parties which creates injustice for the other party can be considered by the forum on the stay application. In addition, the softer alternative accounts for and reconciles the jurisdictional and the recognition principles which

[73] The *Enforcement of Canadian Judgments Act* and the *Enforcement of Canadian Judgments and Decrees Act* [*ECJDA*] are products of the Uniform Law Conference of Canada. The latter, the *ECJDA*, is in force in British Columbia, S.B.C. 2003 c. 29; Saskatchewan, S.S. 1997 c. C-41; and Nova Scotia, S.N.S. 2001 c. 30. References to section numbers will be to the British Columbia version.

[74] *ECJDA*, *Ibid.* s. 1.

[75] *Ibid.*, s. 6(3)(a).

[76] *Ibid.*, s. 6(3)(c). As explained in the commentary on the *ECJDA* on the ULCC website: <http://www.ulcc.ca/en/home/>.

[77] s. 6(2)(c)(iv) does preserve the common law defence of breach of forum public policy.

overlap and may conflict when there is a prior jurisdictional decision in the other concerned forum.

Teck does not preclude courts from taking the softer alternative approach in deciding whether to stay a local action in circumstances in which the other court had already made a decision to let the action continue there. All *Teck* rejected was two possible bright line rules.

If the other court is a Canadian court, and if the overlap between jurisdiction and recognition and enforcement is recognized for what it is, it is arguable that constitutional principles leave the courts no option and the softer approach must be taken.

It is submitted that the softer alternative can and will produce both order and fairness and that it is the approach most likely to avoid conflicting decisions in different courts[78] and so is the approach most likely to save the Court from having to decide the hard recognition of judgments on the merits question posed by Black and Swan.[79]

Whatever one thinks about the merits of the transformation of Canadian private international law triggered by *Morguard*, there is surely consensus about the desirability of rationalizing and reconciling the principles enunciated in the Supreme Court of Canada cases which followed *Morguard*. The softer alternative discussed and endorsed in this paper attempts such reconciliation.

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[78] *CJPTA*, s. 11(2)(d).

[79] *Supra* note 42.