The Evolution of Canada's Doctrine of *Forum Non Conveniens*: In the Interests of Justice

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Abstract / Résumé

A new legal phenomenon has emerged in recent years, as plaintiffs from developing countries have begun to initiate civil proceedings against multinational corporations in the courts where these companies have their headquarters. These suits have typically claimed damages for personal injuries arising from the multinationals' activities in a developing country. While the doctrine of *forum non conveniens* blocked many of the earlier attempts by plaintiffs to seek justice overseas, courts are increasingly refusing to dismiss these cases to ensure the interests of justice are served. The purpose of this thesis will be to compare the application of *forum non conveniens* to these cases in Canada, with the approaches in the U.K., the U.S. and Australia. The thesis concludes that Canadian courts have the jurisdiction to consider civil claims against a resident for extraterritorial harm and that this jurisdiction can be appropriately exercised where the foreign plaintiff is not likely to receive justice in the alternative forum. Precedents from the U.K., the U.S. and Australia, where courts have already accepted such jurisdiction, will also be examined for their relevance in Canada.

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Un nouveau phénomène légal est apparu dans les dernières années où les citoyens des pays en voie de développement viennent apporter des procès civils contre les compagnies multinationales dans les tribunals où les sièges sociaux de ces compagnies sont situés. Ces actions légales ont généralement demandé compensation pour dommages associés aux activités outre-mer des multinationales. Tandis que plusieurs de ces premières poursuites ont été bloqués par la doctrine de *forum non conveniens,* les tribunaux refusent de plus en plus souvent de décliner leur jurisdiction dans ces procès afin d'assurer que les intérets de justice sont servis. Le but de cette thèse est de comparer l'application de *forum non conveniens* à ces procès en Canada avec les approches au Royaume-Uni, aux États Unis et en Australie. L'étude conclut que les tribunaux Canadiens ont la juridiction d'entendre les plaintes contre les domiciliaires pour les dommages d'outre-mer et qu'il est approprié d'exercer cette juridiction dans les cas où il n'est pas probable que le plaignant sera en mesure de recevoir justice dans un

forum alternatif. Des précédents du Royaume-Uni, des É-U. et de l'Australie, où les tribunaux ont déjà acceptés la juridiction dans des tels procès, seront aussi examinés pour les leçons qu'elles offrent au Canada.

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Introduction

In recent years, there has been a growing number of civil claims filed by plaintiffs from developing countries against multinational corporations in the forums where these companies have their headquarters. These suits have typically claimed damages for personal injuries arising from the multinationals' activities in a developing country. The foreign plaintiffs and their advocates have argued that their claims should be heard against the corporate defendant in its home forum due to the obstacles to justice in the forum where the injuries arose. A major hurdle however, in the attempts of these foreign plaintiffs to seek justice, has been the willingness of courts to stay their proceedings on the basis that it is more appropriate for a foreign court to decide the issues.[1] This discretion by a court, to decline its jurisdiction in a case, is known as the doctrine of *forum non conveniens*.

In Canada, there has been one case where foreign plaintiffs have come to our courts, asking to be compensated for harm caused by one of our companies in a developing country.[2] The defendants responded, in the classic fashion, with a motion to dismiss the proceedings on the grounds of *forum non conveniens*. This motion was granted. Indeed, this author is not aware of any judgment to date, in the Canada, the U.S., the U.K. or Australia, which has held a multinational liable for causing harm to plaintiffs in another country. This may, very well, lead some to question the usefulness of relying on transnational civil litigation for holding corporations accountable for their activities abroad.

Yet, if one looks a little closer at the results of litigation in the U.S., the U.K. and Australia, it becomes apparent that multinationals are increasingly being held accountable for their wrong-doing abroad, through a growing number of out-of-court settlements. Consider the claims brought by Burmese plaintiffs against Unocal in a U.S. court, for human rights abuses they say they suffered during the construction of a pipeline owned in part by Unocal.[3] This landmark case was

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[1] See for e.g. *Delgado v. Shell Oil Co.*, 890 F.Supp. 1324 (S.D. Tex. 1995); and *Re. Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1987) [*Union Carbide*].
[2] See *Recherches Internationales Quebec* v. *Cambior*, [1998] Q.J. No. 2554 (Sup. Ct.) [*Cambior*].
[3] *John Doe I.* v. *Unocal*, QL 548 (9th Cir. 2002) [*Unocal*].

closed just this past spring when Unocal reached an out-of-court settlement with the Burmese plaintiffs for an amount that was sufficient to compensate the victims and to improve their living conditions as well.[4] Recent years have also seen other out-of-court settlements between multinationals in the United States,[5] the United Kingdom[6] and Australia,[7] and foreign plaintiffs. These settlements have typically followed decisions by appellate courts dismissing the defendants' motion to stay the proceedings for *forum non conveniens*. These settlement agreements, incited by the plaintiff's legal victories, have provided important compensation for victims in developing countries. If there is a bad side to these settlement agreements however, it is that they have left other victims and their lawyers without legal precedents. Potential litigants have no reassurance of their prospects for legal success, should they choose to take on the considerable burdens of litigation. Nevertheless, these settlements provide powerful proof that transnational litigation can be a useful last resort for seeking compensation when

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[4] For more information regarding the settlement between the Burmese plaintiffs and Unocal, see the website of EarthRights International, a nongovernmental organization that provided part of the legal team for the plaintiffs, "Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers," online: EarthRights International <http://www.earthrights.org/news/press_unocal_settle.shtml>.

[5] In 1992, for example, Dow Chemical and Shell Oil agreed to an out-of-court settlement, for about $20 million, with 82 Costa Rican banana workers, who had initiated proceedings against them in a Texas Court for the "negligent manufacture" of DBCP, a pesticide used in banana production. "The Price of Bananas," *The Economist* (12 March 1994) at 48; Dow and Shell later settled additional lawsuits by 26,000 new plaintiffs from 11 countries in 1998 for about $41 million. Amy Ling and Martha Olson Jarocki, "Pesticide Justice," online: Multinational Monitor <http://multinationalmonitor.org/mm2003/03jan-feb/jan-feb03front.html>.

[6] For information regarding settlements reached between Thor Chemical Holdings Ltd. and workers of the Cato Ridge factory in South Africa, see the following articles by the claimant's lawyer: Richard Meeran "Liability of Multinational Corporations: A Critical Stage in the UK" in Menno T. Kamminga and Sama Zia-Zarafi, eds. *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) 251 at 256 [Meeran, "Liability of MNCs"]; and Richard Meeran, "Thor Workers Accept Offer of Settlement - Press Release: 12 October 2000," online: LabourNet <http://www.labournet.net/world/0010/thor2.html>; For information regarding compensation paid by 'The Cape Asbestos Company Ltd.' to asbestos miners in South Africa, see Richard Meeran, "Cape Plc: South African Mineworkers'Quest for Justice" at 9, online: Slater & Gordon Lawyers <http://www.slatergordon.com.au/classactions/docs/Cape%20Quest%20for%20Justice.pdf> [Meeran, "Cape Plc"].

[7] An example from Australia, is the compensation paid by BHP, an Australian multinational, to landowners in Papua New Guinea, who were affected by the company's discharge of wastes into a local river. See Peter Prince "Bhopal, Bougainville and OK Tedi: Why Australia's Forum Non Conveniens Approach Is Better" (1998) 47 I.C.L.Q. 573 at 595 [Prince].

other strategies, such as negotiating with the company, political pressure and media campaigns have been unsuccessful in obtaining redress.

The primary purpose of this thesis is to examine the prospects for transnational civil litigation in Canada. I will begin by examining, in section I, the role of litigation in promoting corporate social and environmental responsibility and the policy arguments for and against transnational litigation.

I will then, in section II, examine the character of the *forum non conveniens* doctrine in Canada. The application of this test in the Cambior case will also be reviewed, highlighting the implications of the case for future extraterritorial claims against corporate defendants in Canada.

A comparison of Canada's doctrine to *forum non conveniens* with the approaches of the U.K., the U.S. and Australia will be the subject of Section III. In this section, I will also highlight the factors that have led to findings, within the courts of the U.K., the U.S. and Australia, that it was appropriate to accept jurisdiction over claims that a multinational corporation, incorporated in the forum, had caused damage to the foreign plaintiffs outside the country.

This thesis concludes that Canadian courts have the jurisdiction to consider claims against a resident, for harm arising outside Canada, and that this jurisdiction can be appropriately exercised by our courts under existing Canadian law, where the plaintiff is not likely to receive justice in the alternative forum.

Before beginning, I would like to note that this thesis will be restricted to considering claims for compensation as damages. This is because of the private international rules preventing a Canadian court from providing an injunction against a company in its treatment of property within the territory of another state.[8] These rules represent an important shortcoming of transnational litigation, particularly where foreign plaintiffs would like to alter the ongoing activities of a company, or force the company to clean up the impacts of an environmental spill. Demands for environmental remediation may still be indirectly met in a Canadian

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[8] This comes from the rule that courts do not have jurisdiction to determine "recovery of damages for trespass to a foreign immovable." See J.G. Castel, *Introduction to Conflict of Laws*, 4th ed. (Toronto: Butterworths, 2002) at 75 [Castel, "Intro to PRIL"], citing *Burns* v. *Davidson* (1892), 21 O.R. 547 (C.A.).

court however, by providing plaintiffs with sufficient compensation to take on cleanup themselves.[9]

My last note, before commencing this study, is that the discussion of *forum non conveniens* in this thesis will be restricted to motions brought by the defendant to stay proceedings.[10] While the doctrine of *forum non conveniens* can also arise in other circumstances,[11] this is the only scenario that is relevant when foreign plaintiffs bring an extraterritorial claim against a defendant in their home forum.

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[9] Where there is a settlement, the defendant can specifically set aside money for this purpose. For example, the plaintiffs in the *Lubbe* case were able to seek a clause in their 2003 settlement with Cape plc that several million pounds would be set-aside in a trust fund for environmental remediation. See Meeran, "Cape Plc", *supra* note 6.

[10] In Ontario, for e.g., this jurisdiction to stay a local action on grounds of *forum non conveniens* is pursuant to the *Courts of Justice Act*, R.S.O. 1990, c.C-43, s.106, as am., and the *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R.17.06(1)(b); In British Colombia, the courts have this discretion under the *B.C. Supreme Court Rules,* B.C. Reg. 221/90, s.14.6.

[11] A second scenario arises where an out-of-province defendant brings a motion to set aside service ex juris. The third, and arguably, most aggressive use, arises when the defendant of a foreign proceeding brings a motion for an injunction restraining the proceedings in the foreign jurisdiction. See *Amchem Products Inc.* v. *B.C.* (*W.C.B.*), [1993] 1 S.C.R. 897 at 912-913 [*Amchem*]; and Kathryn N. Feldman & Susan M. Vella, "The Evolution of "*Forum Conveniens*": Its Application to Stays of Proceedings and Service *Ex Juris*" (1989) 10 Advocates' Q. 161 at 176-177 [Feldman & Vella].

I – Is Canadian Litigation the Answer?

Before beginning my analysis of the laws that are used to accept or decline jurisdiction in a case, we will look at the desirability of permitting Canadian courts to be used for transnational civil litigation. We shall see that reliance on local courts for the resolution of disputes involving multinationals has left groups of disgruntled plaintiffs in developing countries without sufficient compensation for the serious injuries they have suffered. This study will also demonstrate, I hope, that our respect for the territorial sovereignty of other states should not prevent Canadian courts from hearing claims that Canadian defendants caused damages abroad, where the refusal to do so would prevent the plaintiffs from achieving justice.

Nature of Claims

Claims by foreign plaintiffs against multinationals in the forum of their corporate headquarters have alleged injury resulting from various types of human rights abuses and environmental degradation. Perhaps the most egregious are the allegations of human rights abuses committed by security forces against local residents for the benefit of multinational corporations.[12] These claims have included, for example, allegations of murder, torture, rape and forcible displacement by forces providing security, or charged with eliminating opposition to a project.[13] In *The Presbyterian Church of Sudan* v. *Talisman Energy*, a claim being brought against a Canadian oil company in U.S. courts, the plaintiffs have argued the company should be held liable for human rights atrocities, such as murder and the burning of villages, because the company permitted its infrastructure to be used by the forces that committed the abuses, even though they knew or should have known of the violence being perpetrated by those forces.[14] In *Doe* v. *Unocal*, there were also allegations that the Burmese Government, a co-owner of the Yadana pipeline with Unocal and others, had

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[12] See for e.g., the following claims that have been brought in U.S. courts: *The Presbyterian Church of Sudan* v. *Talisman Energy*, 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003) [*Talisman*]; *Unocal, supra* note 3; *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) [*Wiwa*]; and *Bowoto* v. *Chevron Texaco Corp.*, 312 F. Supp. 2 1229 (D. Cal. 2004) [*Bowoto*].

[13] For example, these claims were raised in the case of *Unocal, supra* note 3.

[14] *Talisman, supra* note 12 at 320.

relied on forced labour in its construction.[15] Poor working conditions leading to illness and death, have also figured prominently in transnational claims against multinationals.[16] Injury to health and livelihood resulting from environmental pollution is perhaps the other most commonly raised complaint against multinationals in these transnational cases.[17] The chemical leak at the Union Carbide plant in Bhopal, India, which killed thousands in 1984, and which has been held responsible for injuries to over 200,000 victims, is certainly the most notorious example.[18] Complaints have also been raised about the purchase and exploitation of land that is subject to ongoing ownership disputes between indigenous communities and governments.[19] A less direct allegation, perhaps, has been the claim that revenues provided by a company to a state through royalties and other fees paid have served to fuel human rights abuses by despotic leaders and these business people should thus be held partly responsible for the consequences.[20] The final type of complaint has centred on the role of

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[15] *Unocal*, supra note 3.

[16] For example, many of the lawsuits we will be examining from the United Kingdom and Australia involved claims of illness and death caused by unsafe exposure to toxic materials at work. See for e.g. *Ngcobo and others* v. *Thor Chemical Holdings Ltd. and another,* [1995] E.W.J. No. 4312, TLR 579 (C.A.) [*Ngcobo*]; *Sithole and others* v. *Thor Chemical Holdings Ltd. and another,* [1999] E.W.J. No. 306 (C.A.) [*Sithole*]; *Connelly* v. *R.T.Z. Corp.* [1997] 3 W.L.R. 373 (H.L.) [*Connelly*]; *Lubbe* v. *Cape plc.*, [2000] 1 W.L.R. 1545 (H.L.) [*Lubbe*]; and *Dagi and Others* v. *BHP* (22 Sept. 1995) (Vic. S.C.), unrep. [*Ok Tedi*], as cited in *Prince, supra* note 7 at 593-595.

[17] In *Cambior, supra* note 2, the plaintiff's claimed they suffered injuries when they were no longer able to fish or drink water after the company's mine tailings pit spilled into the Essequibo river; In the United States, foreign plaintiffs have filed three analogous cases claiming compensation from U.S. multinationals for environmental damage committed abroad. See *Beanal* v. *Freeport-McMoRan*, 969 F. Supp. 362 (E.D. L.A. 1997); *Jota et al. and Aguinda et. al.* v. *Texaco*, 303 F.3d 470 (2nd Cir. 2002); and *Union Carbide, supra* note 1.

[18] *Union Carbide, supra* note 1.

[19] This type of complaint led to a dispute in Suriname, for example, between two Canadian mining companies, Cambior Inc. and Goldenstar, and the tribal community of Nieuw Koffiecamp. The good offices of the OAS Special Commission to Suriname were eventually employed to help ease tensions and influence the drafting of a Peace Accord. See Fergus MacKay, "Mining in Suriname: Multinationals, the State and the Maroon Community of Nieuw Koffiecamp" in Lyuba Zarsky, ed. *Human Rights & the Environment: Conflicts and Norms in a Globalizing World* (London; Sterling, VA: Earthscan, 2002) at 57-78.

[20] See, for e.g. the plaintiff's claims in the *Talisman case*, supra note 12; A U.N. panel of experts has also expressed concern that the exploitation of resources has fuelled conflicts in Rwanda, Uganda, Zimbabwe and the Congo by funding both armed groups and government armies. See reports from the Panel of Experts on "The Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo", April 12, 2001 (S/2001/357), May 22, 2002 (S/2002/565), October 16, 2002 (S/2002/1146) and October 23, 2003 (S/2003/1027).

multinationals in undermining the democracies of less developed countries, through their illegitimate intervention in the political process.[21]

Obstacles to Local Justice

What motivates foreign plaintiffs to travel all the way to the country where a multinational is headquartered and to initiate proceedings against the company in that far away land? The answer to this question is surely complex. Yet, part of the answer can be found by examining the variety of obstacles that prevent individuals from receiving compensation for their injuries in their local forum. The most frustrating perhaps, are the situations where a local forum is simply unwilling to provide a fair trial. Such a scenario may arise where there is an absence of judicial independence and the state is itself implicated with the wrongdoing,[22] or the state has a strong interest in avoiding any legal outcome that might jeopardize foreign investment. Such concerns can also arise where the judiciary is vulnerable to impartiality or corruption.[23]

In other cases, plaintiffs may be hampered in their efforts to find justice locally due to the inability of the state to enforce a judgment or provide a fair trial. This can be due to the lack of corporate assets held by a subsidiary within the

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[21] A notorious example of this phenomenon surrounds, for example, the involvement of ITT, an American multinational corporation, in overthrowing the elected government of Salvador Allende in Chile in 1972. See 53 UN ESCOR, 1822nd mtg., UN Doc. E/SR/1822 (1972) at 19 and 22; Also see Sarah Joseph, "An Overview of the Human Rights Accountability of Multinational Enterprises" in Menno T. Kamminga and Sama Zia-Zarafi, eds. *Liability of Multinational Corporations under International Law* (The Hague: Klewer Law International, 2000) 75 [Joseph] at 76.

[22] This was the scenario for the claims in *Unocal, supra* note 3.

[23] See *Cambior, supra* note 2.

jurisdiction,[24] the inability to compel the attendance of a defendant or witnesses,[25] or the inability to compel disclosure of corporate documents.[26]

The inadequacy of local laws for ensuring justice is also an important reason motivating foreign plaintiffs to proceed elsewhere. Ironically, the Government of India pleaded in its submissions to a New York court in the *Bhopal* case, that deficiencies in its own legal system made it necessary, for the ends of justice, that the plaintiffs be able to pursue the defendant in the U.S.[27] Less surprising perhaps, was the decision by South Africa to rely on this line of argument in the *Lubbe* case, given the apartheid-origins of many of its laws pertaining to claims by black, mine workers.[28] Plaintiffs may also fear that the local legal system and law enforcement is unable to protect them from the danger of reprisals.[29]

Tools for Improving Corporate Social and Environmental Responsibility

While these facts provide compelling evidence of the need for greater access to justice by those who have been injured by the activities of multinationals in less developed countries, some may question whether they demonstrate the need for our courts to exercise jurisdiction over such extraterritorial harm. After all, a

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[24] In the *Cambior* case, *supra* note 2, the plaintiffs face this difficulty now that their action has been dismissed from Quebec Superior Court and they find that the company has much less assets in Guyana then previously indicated. Telephone conversation with Dermod Travis, a former employee of Greenpeace Quebec, who has worked to support the legal efforts of the Guyanese plaintiffs from *Cambior, supra* note 2 (20 July 2005).

[25] In 2001, a US Court of Appeal rejected part of the claims re-filed in New York court by Indian victims of the Bhopal gas leak, including those against Warren Anderson, the CEO of Union Carbide, despite evidence that Anderson had failed to appear in Indian Court to face a criminal trial and India was unable to compel his attendance. *Bano* v. *Union Carbide Corp*, 273 F.3d 120 (2d Cir. 2001); See also "Bano v. Union Carbide," online: EarthRights International <http://www.earthrights.org/bhopal/index.shtml>.

[26] This difficulty could also arise in relation with the *Cambior* litigation, *supra* note 2, given the existence of a "blocking statute" in Quebec, which prevents Quebec corporations from sending corporate documents outside the province for the purpose of litigation. See *Business Concerns Records Act*, R.S.Q. 1988, c. D-12, ss. 1, 2, 3, and 4. In these circumstances, any stay from a Quebec court should include, at the minimum, an undertaking by the defendant not to use this legislation as a reason not to comply with discovery in the alternative forum.

[27] See Trevor C.W. Farrow, "Globalization, International Human Rights, and Civil Procedure" (2003) 41 Alta. L. Rev. 671 [Farrow] at para. 63, regarding the numerous procedural and substantive difficulties that India identified in its *amicus curiae* submissions to the court.

[28] Peter Muchlinski, "Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases" (2001) 50 I.C.L.Q. 1 at 22, citing "Statement of Case on Behalf of the Republic of South Africa" (26 May 2000) at paras. 5.1-5.6 [Muchlinsky].

[29] Beth Stephens, "Corporate Accountability: International Human Rights Litigation against Corporations in US Courts" in Menno T. Kamminga and Sama Zia-Zarafi, eds. *Liability of Multinational Corporations under International Law* (The Hague: Klewer Law International, 2000) 209 at 225.

variety of tools exist for promoting corporate social and environmental responsibility. Yet, when one examines these tools and their respective strengths and deficiencies, it quickly becomes apparent that they are not enough to ensure corporate accountability for wrongdoing. It also appears that transnational litigation can serve a useful role in pressuring multinationals to provide compensation for damages they caused overseas.

The place one may naturally turn to when considering a problem that extends beyond the borders of any one state is the area of public international law. Unfortunately, there are no international laws imposing direct obligations on multinational corporations to abide by specific environmental standards.[30] This area of the law is regulated entirely by domestic law. The laws holding individual business people accountable for wrongdoing are similarly sparse. Since the adoption of the Rome Statute of the International Criminal law, individual business people can now be held criminally responsible where they have caused, aided or abetted crimes against humanity, war crimes or genocide.[31] While such crimes may apply to circumstances where business people are accused of knowingly benefiting from the commission of severe human rights abuses in other countries, the evidentiary requirements of these crimes will not make them relevant for the majority of scenarios we have envisaged in this research.[32]

Corporate codes of conduct are perhaps the most touted tools for improving CSR. Indeed, these voluntary codes serve an important role in improving standards and preventing tragedies like the type we have been discussing from occurring in the first place. Unfortunately, these codes are not able to prevent all tragedies and when such tragedies do occur, these codes are sorely lacking in their ability to ensure adequate solutions. Corporations are not required to sign on to them. Even when they do, there are no methods for denouncing corporate behaviour or for holding persons financially liable, when their conduct falls below

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[30] There was a move towards the international regulation of multinationals in the 70s, 80s and 90s under the auspices of the United Nations Commission on Transnational Corporations but this was abandoned in 1992 due to irreconcilable differences between countries in the North and South. See Joseph, *supra* note 21 at 84.

[31] Craig Forcese, "Deterring "Militarized Commerce": The Prospect of Liability for "Privatized" Human Rights Abuses" (1999) 31 Ottawa L. Rev. 171 [Forcese].

[32] See Forcese, *supra* note 31.

guidelines and causes harm.[33] Furthermore, the OECD guidelines apply only to corporations operating in developed countries, "when the most acute problems arise in developing countries."[34]

Domestic legislation is increasingly playing an important role in the deterrence of harm. For example, new laws are being passed in legislatures worldwide to create incentives for corporate social responsibility and deter misconduct.[35] In the United States, the *Alien Tort Claims Act* is being used to provide a cause of action to victims of egregious human rights against American multinationals if they are complicit with abuses perpetrated by a foreign state.[36] There has also been an attempt in Australia to pass legislation providing a cause of action for extraterritorial harm by corporate nationals, but as far as this author knows, this has not yet passed.[37] These initiatives do indicate there is growing recognition of the need for regulatory action to ensure multinational corporations are held accountable when they cause harm in less developed countries.

Consumer campaigns led by nongovernmental organizations have certainly served a key role in raising awareness of human rights violations and environmental degradation in other countries, and in putting the pressure on corporations to alter the way they do business.[38] However, one cannot expect to rely on consumer pressure alone to ensure victims of human rights or environmental pollution are adequately compensated. There are simply too many

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[33] See Georgette Gagnon, Audrey Macklin, and Penelope Simons, "Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones – Implications for Human Rights and Canadian Public Policy" Relationships in Transition A Strategic Joint Initiative of the Social Sciences and Humanities Research Council and the Law Commission of Canada, January 2003, online: online: Law Commission of Canada <http://www.lcc.gc.ca/research_project/gr/gbb/rp/gagnon-en.asp> [Macklin et al.]; See also Joseph, *supra* note 21 at 83.

[34] Joseph, *supra* note 21 at 84.

[35] See Macklin et al., *supra* note 33 at 59-61, regarding the legislative initiatives taking place in Europe, the United States and Australia to regulate the extraterritorial impacts of corporate nationals on human rights. These mechanisms would, for example, tie corporate social responsibility to tax deductions and export credits, permit social and environmental labeling, create reporting obligations for companies and expand the duty and liability of corporate directors.

[36] See Macklin et al., *supra* note 33 at 69.

[37] The *Australian Corporate Code of Conduct* Bill sought, for example, to impose environmental, human rights, health and safety and employment standards on "Australian corporations or related corporations which employ more than 100 persons in a foreign country" and provided a cause of action in Australia for 'any' person harmed by contravention of Act. See Macklin et al., supra note 33 at note 167.

[38] See Joseph, *supra* note 21 at 80-82.

injuries and too much at stake in terms of the severity of some of the injuries to rest all one's hopes for compensation on consumer boycotts and pressure alone.

While they represent a good start, this review should demonstrate the existing tools for promoting corporate social and environmental responsibility are inadequate for ensuring that compensation is paid to victims of corporate wrongdoing in the developing world. The effect of these gaps in the law mean that for now, the costs of environmental disasters and human rights abuses are being borne by those same people who have had the misfortune of being injured by this wrongdoing. On the other hand, the people who have profited from the commercial activities, which led to these injuries, are escaping without any responsibility.

Benefits of Litigating in the Forum of a Multinationals' Headquarters

Of the many benefits associated with suing a multinational in its home forum, the greatest is surely the improved prospect for receiving some compensation for one's injuries. Other advantages include: access to the assets of a parent corporation, the opportunity to present one's claims before an impartial judiciary, the greater ability of courts here to compel the cooperation of defendants situated within the forum, increased access to crucial evidence through discovery, the possibility of higher damages, and the possibility of funding legal representation through contingency agreements and class actions. Lord Denning has made the following observation regarding the attractions, which have long drawn litigants to the United States:

> As a moth is drawn to the light, so is a litigant to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side. The lawyers there will conduct the case 'on spec' as we say, or on a 'contingency fee' as they say. The lawyers will charge the litigant nothing for their services but instead take 40 per cent of the damages if they win the case in court, or out of court on a settlement.[39]

Parallels can surely be drawn between Lord Dennings observations and the benefits for foreign plaintiffs proceding in Canada. In sum, the circumstances

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[39] *Smith Kline & French Labs* v. *Bloch*, [1983] W.L.R. 730 at 733-734.

existing in the forum of the defendant can combine to greatly improve the likelihood that a plaintiff will be able to seek redress for the harm they have suffered. Large payouts in the defendant's home forum can also serve an important deterrent effect, by inducing corporations to adopt practices that are more socially and environmentally responsible before the harm occurs so that they cannot just treat paltry fines as the cost of doing business.[40]

Obstacles to Transnational Litigation Against Multinationals

Yet, the decision to bring claims against a multinational in its home forum is not one that can be taken easily, given the tremendous resources, particularly money and time, that will be required to succeed with transnational proceedings. Only those plaintiffs with the most steadfast resolve would dare to mount a legal challenge against wealthy and powerful corporate defendants, especially since the latter will have significantly greater resources to fight the plaintiffs every step of the way. The plaintiffs will also have difficult evidentiary burdens to meet to prove their claims.[41] No doubt, the need to travel to courts far from home will also pose inconvenience and personal stress. With the uncertainty of the law right now in the area of transnational torts, particularly in the area of *forum non conveniens*, it seems fair to assume most victims of wrongdoing by a large, multinational corporation abroad would never contemplate initiating such litigation.

Policy Concerns Associated with Extraterritorial Claims

There are also important policy concerns that must be addressed in the litigation of damages arising in another state. The most important, perhaps, is the concern that the exercise of jurisdiction by our courts over extraterritorial harm,

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[40] Richard L. Herz, " Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment" (2000) 40 Va. J. Int'l L. 545 at 550.

[41] For example, where the claim is against a parent corporation for the acts of a subsidiary, the plaintiffs will need to show that parent had the requisite control over the activities of the subsidiary to justify lifting the "corporate veil" and holding them responsible for the conduct of the latter. *Smith, Stone and Knight Ltd.* v. *Birmingham Corp,* [1939] 4 All E.R. 116 (K.B.) [*Smith*]; See also J. Anthony VanDuzer, *The Law of Partnerships and Corporations*, 2nd ed. (Ottawa: Irwin Law, 2003) [VanDuzer]; The plaintiffs will also need to meet the legal hurdles of proving all the elements of a tort. Where this involves a claim of negligence, for example, this will include proving the duty of care, standard of care, causation/lack of remoteness and damages. See *Anns* v. *Meton London Borough Council*, [1977] 2 All E.R. 492; *Kamloops* v. *Nielsen*, [1984] 2 S.C.R. 2; See also Forcese, *supra* note 31 at paras. 117-124.

represents an 'unacceptable intrusion into the host State's sovereignty'.[42] In *Cambior*, Maughan J. also expressed concern that "it is difficult, if not invidious, to make comparisons between two different systems of justice."[43] The reluctance of courts in the UK to make these comparisons was considerably lessened in the 1970s where cases involved human rights claims.[44] Lord Denning justified this prioritization of human rights with the now famous quote:

> No one who comes to these courts asking for justice should come in vain...This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop, both for the quality of the goods and the speed of service.[45]

Denning's approach was rejected on appeal to the House of Lords with the retort by Lord Reid that the exercise of jurisdiction over extraterritorial torts recalled "the good old days...when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races".[46] Thirty years later, the place of our courts in adjudicating claims of injury abroad remains controversial. Indeed, there are difficulties associated with each of these polar positions. The purpose of this paper, will be to examine how a restrictive interpretation of *forum non conveniens* strikes the appropriate balance between the competing concerns for sovereignty and human rights.

Legitimate concerns can also be raised that the exercise of liability against Canadian multinationals can reduce the competitiveness of our businesses unless there are uniform international standards.[47] However, this seems to provide more of a reason to harmonize our rules on jurisdiction with others, than to accept, wholesale, the lack of accountability for harm inflicted on citizens of developing countries.

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[42] See Joseph, *supra* note 21 at 86 for a discussion of this concern.
[43] *Cambior, supra* note 2 at para. 98.
[44] Feldman & Vella, *supra* note 11.
[45] This passage, by Lord Denning of the Court of Appeal, was quoted by the House of Lords in the same case, *Atlantic Star* v. *Bona Spes*, [1974] A.C. 436 at 453 [*Atlantic Star*].
[46] *Atlantic Star, supra* note 45 at 453.
[47] Joseph, *supra* note 21 at 87.

Transnational cases also, inevitably, raise concerns that a plaintiff is "forum shopping." Meeran writes that the pejorative connotation of "forum shopping" "comes from commercial cases where one commercial party would try to choose a forum which gave it financial advantage and financial disadvantage to other side."[48] This pejorative association is therefore inappropriate Meeran argues, in human rights cases where victims of personal injuries may have no other opportunity for seeking justice.[49] The Supreme Court of the United States has recognized that defendants may themselves be engaging in 'reverse forum-shopping' when they bring a motion for *forum non conveniens*, by attempting to have the litigation heard in a forum that is perceived to be more lax towards corporate wrongdoing.[50] Yet, none of the tests in Canada, the U.K. or the U.S. consider the defendants' motives in bringing a motion for a stay.[51] This omission has caused some to observe that the "doctrine has diverged from its original purpose to protect citizens from being forced to litigate far from home, to a doctrine protecting far-flung corporate enterprises from being held accountable in their home-country."[52]

Another concern associated with allowing claims of extraterritorial harm to be heard in this country is that foreigners will begin to clog our court dockets with proceedings. However, given the difficulties, already discussed, with proceeding in claims against wealthy and powerful multinationals, it seems unlikely that these cases will be clogging our courts anytime soon.

Policy Interests Favouring Jurisdiction Over Extraterritorial Claims

In spite of the difficulties, there are other compelling policy reasons that favour the adjudication by our courts over claims that individuals domiciled in Canada caused personal injuries to others abroad. Foremost among these concerns, is the need for greater corporate accountability. U.N. Secretary-General

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[48] Meeran, "Liability of MNCs", *supra* note 6 at 254.
[49] *Ibid.*
[50] *Piper Aircraft Co.* v. *Reynolds*, 454 U.S. 235 at 252 (U.S. 1981) [*Piper Aircraft*].
[51] Rémi Samson, "Appréciation critique de la doctrine du forum non conveniens en droit québécois: si nous étions partis du bon pied ..." (1999) 13 R.J.E.U.L. 109 at 116 [Samson].
[52] D.J Carney, "Forum Non Conveniens in the United States and Canada" (1996) 3 Buff. J. Int'l L. 117 at 137.

Kofi Annan expressed the need for actions to promote corporate social and environmental responsibility at the 1999 World Economic Forum, as follows:

> Globalization is a fact of life. But I believe we have underestimated its fragility. The problem is this. The spread of markets outpaces the ability of societies and their political systems to adjust to them, let alone to guide the course they take. History teaches us that such an imbalance between the economic, social and political realms can never be sustained for very long....
> Specifically, I call on you... to embrace, support and enact a set of core values in the areas of human rights, labour standards, and environmental practices.[53]

Here in Canada, the Standing Committee on Foreign Affairs and International Trade has just recently adopted a report on Canadian mining, which expresses concern that "mining activities in some developing countries have had adverse effects on local communities."[54] The report notes that this has been a particular problem "where regulations governing the mining sector and its impact on the economic and social well-being of employees and local residents, as well as on the environment, are weak or non-existent, or where they are not enforced."[55] As a consequence, the Standing Committee has called on the Government of Canada to put in place a process to ensure the conduct of Canadian companies is more socially and environmentally responsible. Among the recommendations for action, these Members of Parliament have called on the Government to "(e)stablish clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies."[56] The Committee premises its recommendation on the acknowledgement that "the Government of Canada has a stated commitment to corporate social responsibility standards and international human rights norms, as

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[53] Kofi Annan, "United Nations Secretary-General" "A Compact for the New Century" (The Secretary-General Address to the World Economic Forum, 31 January 1999), online: World Economic Forum <http://www.weforum.org/pdf/AnnualMeeting/kofi_annan_speech_1999AM.pdf>.
[54] Canada, Parliament, Standing Committee on Foreign Affairs and International Trade, "Fourteenth Report" (13 July 2005), online: Parliament f Canada <http://www.parl.gc.ca/committee/CommitteePublication.aspx?COM=8979&SourceId=122762>.
[55] *Ibid.*
[56] *Ibid.* at 3.

shown in its commitment to the OECD Guidelines for Multinational Enterprises and its efforts to promote the guidelines".[57] With the increasing recognition of the harms that unfettered globalization can inflict on vulnerable members of society and ecosystems in the world, and the interest of Canadians in addressing this deficit in corporate accountability, one can only expect Canada's regulation of the extraterritorial activities of its citizens to grow in coming years.

Apart from the more altruistic concerns in promoting access to justice,[58] there are also practical considerations favouring action by our courts in the area of corporate accountability overseas. To begin with, there is strong reason to believe that adjudication in Canada can promote global stability in troubled regions of the world, by deterring corporate conduct that fuels human rights abuses and by providing an effective alternative to violence for the resolution of disputes. Joseph notes that promoting greater respect for civil and political rights in troubled regions can also be good for business in that it creates a more stable environment for multinationals to operate within.[59] Related to this principle is the reality that harmful corporate conduct unfairly tarnishes the reputation of other companies involved in resource extraction. This can have detrimental effects on the value of a company, and it can also lead to greater obstacles to the development of new projects. There are therefore important business interests that will be served if our courts can promote corporate accountability in overseas operations.

Conclusion: There Is a Role for Canadian Courts

The preceding study should indicate that the promotion of corporate social and environmental responsibility is of pressing interest to Canada and our *forum non conveniens* test should not be used to shield corporate defendants from liability. It is also suggested that a more appropriate balance can be sought between our

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[57] *Ibid.* at 1

[58] For an argument supporting the global interest in adjudicating human rights abuses, see Kathryn Lee Boyd, "The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation" (1999) 39 Va. J. Int'l L. 41 [Boyd].

[59] Joseph, *supra* note 21 at 88; See also Chris Avery, "Business and Human Rights in a Time of Change" in Menno T. Kamminga and Sama Zia-Zarafi, eds. *Liability of Multinational Corporations under International Law* (The Hague: Klewer Law International, 2000) 17 at 26.

interests in respecting state sovereignty and in ensuring respect for human rights by elaborating rules that prevent our courts from staying proceedings against Canadian defendants, where plaintiffs are unlikely to receive justice elsewhere.

II – Canada's Doctrine of Forum Non Conveniens

As already discussed, the doctrine of *forum non conveniens* gives a court the discretion to decline jurisdiction in a case if there is another, more appropriate forum. In cases with "international facts," where there is more than one forum with the jurisdiction to adjudicate a dispute, the doctrine can be invoked by the defendant, in an application to stay proceedings, if they object to the plaintiff's choice of forum.

While Canada has inherited its doctrine of *forum non conveniens* from the United Kingdom, we shall examine how Canada has developed its own, unique approach.[60] We will begin by examining the nature of the *forum non conveniens* test in Canada, before comparing the approach of the United Kingdom, Australia and the United States in the next section.

Jurisdiction *Simpliciter*

In order to argue their claims against a multinational in a Canadian court, foreign plaintiffs must first establish that the court they have selected has jurisdiction over the matter. In Quebec, where the provincial laws are based on the civil law tradition, it is clearly expressed within the Civil Code that a court has jurisdiction over a matter concerning a defendant who is regularly domiciled within the province.[61] Of course, this jurisdiction is subject, as with the jurisdiction of any court in Canada, to the constraints of the Constitution and to the international principle of comity.[62]

In the common law provinces, these questions of jurisdiction are generally regulated through provincial rules of civil procedure, particularly those dealing with service.[63] Traditionally, jurisdiction was established if the defendant could be served within the province.[64] These rules of service were later modified so that the

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[60] For a further study of the similarities and differences between *forum non conveniens* in Canada and the test in the United Kingdom, the United States and Australia, see Jeffrey Talpis and Shelley Kath, "The Exceptional as Commonplace in Quebec Forum Non Conveniens Law: Cambior, a Case in Point" (2000) 34 R.J.T. 761 [Talpis & Kath].

[61] Article 3134 of the *Civil Code of Québec*, R.S.Q. 1991, c. 64 reads, "In the absence of any special provision, the Quebec authorities have jurisdiction when the defendant is domiciled in Quebec" [*Civil Code*].

[62] Farrow, *supra* note 27 at paras. 27-28.

[63] *Ibid.* at note 133.

[64] Farrow, *supra* note 27 at note 133.

plaintiffs would no longer have to seek the leave of the court to serve an out-of-province defendant.[65] However, this change resulted in concern that it was unfair to defendants if they were pursued in forums with little or no connection to the subject matter of the action or the parties.[66]

As a result, the Supreme Court ruled in *Morguard Investments* v. *DeSavoye*, that a court's jurisdiction in a matter would be limited to cases where there was a "real an substantial connection."[67] In order to ensure the test remained flexible, the court refrained from providing a precise definition of its meaning. Major J. notes the Court variously described a real and substantial connection as a connection "between the subject-matter of the action and the territory where the action is brought", "between the jurisdiction and the wrongdoing", "between the damages suffered and the jurisdiction", "between the defendant and the forum province", "with the transaction or the parties", and "with the action."[68] Under the real and substantial connection test, a court in Canada will have the jurisdiction to consider claims in a wide range of circumstances.

It has long been a commonly accepted principle that a court has jurisdiction over a defendant ordinarily domiciled within the province.[69] Dickson J. observed in *Moran* v. *Pyle* that an action for a tort has normally been brought where the defendant is living so that the court may exercise physical power over the defendant, if needed.[70] In determining whether a province should recognize the judgement of another province against a defendant who did not reside in that second province, the Supreme Court observed in *Morguard*:

> ...no injustice would arise "in the case of judgments in personam where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement

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[65] *Ibid.*
[66] *Morguard Investments Ltd.* v. *De Savoye,* [1990] 3 S.C.R. 1077 at para. 51 [*Morguard*].
[67] *Ibid.*
[68] *Beals* v. *Saldanha*, [2003] 3 S.C.R. 416 at para. 177, citing *Morguard, supra* note 66 at 1104-09.
[69] Castel, "Intro to PRIL", *supra* note 8 at 82; In *Wong* v. *Wong* (1995), 8 B.C.L.R. (3d) 66 at 69-70, the British Columbia Supreme Court concluded that it had jurisdiction *simpliciter* as "[h]istorically, that would be sufficient reason for this court to take jurisdiction over the parties and their world-wide property."
[70] *Moran* v. *Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 at 398.

> or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement.[71]

This passage is an indication of the continued validity of personal subjection, as a basis of court jurisdiction, following the establishment of the real and substantial connection test in *Morguard.*

The real and substantial connection test may thus, be properly understood as providing an alternative source of court jurisdiction, separate from the competence that is already established when a defendant is ordinarily present in a province.[72] On this basis, Forcese asserts that if "service is in juris to a defendant ordinarily resident in the province, it is unlikely a court would decline jurisdiction on the basis of the real and substantial connection test."[73] Rather, it appears that the real and substantial connection test will only arise to check the jurisdiction of a court where it assumes jurisdiction over an out-of-province defendant.[74] When an action is brought against a Canadian company in the court where the defendant is ordinarily domiciled, the court's jurisdiction in the matters should therefore, be straightforward to establish, even though the claims relate to injuries abroad.

The challenge in these cases has been instead, to convince the court that it should not decline its jurisdiction in favour of another, more convenient forum that also has jurisdiction. As the Ontario Court of Appeal explained in *Muscutt* v. *Courcelles*: "Very often there is more than one forum capable of assuming jurisdiction and it is necessary to determine where the action should be

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[71] *Morguard, supra* note 66 at 1103-4.

[72] The Uniform Law Conference of Canada also suggests that a real and substantial connection provides a separate basis of jurisdiction from a court's jurisdiction over a resident within its model *Court Jurisdiction and Proceedings Transfer Act* at article 3, online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1c4>, which states that a "court has territorial competence in a proceeding that is brought against a person only if:...(d) that person is ordinarily resident in [*enacting province or territory*] at the time of the commencement of the proceeding, or (e)there is a real and substantial connection between [*enacting province or territory*] and the facts on which the proceeding against that person is based" [*Uniform Court Jurisdiction Act*]; In *Duncan* (*Litigation Guardian of*) v. *Neptunia Corp.*, [2001] 53 O.R. (3d) 754 (Sup. Ct.) at 768, the court held that the real and substantial connection test should be interpreted in a flexible manner and that "it is clear that a real and substantial connection between the forum province and the subject matter of the litigation, not necessarily the defendant, is sufficient to meet the test."

[73] Forcese, *supra* note 31 at para. 95.

[74] Forcese, *supra* note 31 at para. 95, argues that the most recent cases dealing with the "real and substantial connection," have all involved service ex juris.

litigated."[75] The distinction between jurisdiction and forum non conveniens was examined in the case of *Lemmex* v. *Bernard*, and cited by the Ontario Court of Appeal in *Muscutt*:[76]

> [T]he question of whether Ontario has jurisdiction to hear these actions is a different question from whether this court should decline to exercise its jurisdiction because another forum is the more convenient forum. Using other terminology, the concept of *jurisdiction simpliciter* is different from that of *forum non conveniens*. The second question of whether Ontario should decline to exercise jurisdiction because another forum is the more convenient forum only needs to be considered once an Ontario court has determined that it has jurisdiction to hear the action.[77]

It can de deduced from this passage, that the circumstances that will give rise to a court's jurisdiction in a claim are much broader than the circumstances which will justify the court's exercise of jurisdiction over a claim. The operation of this doctrine of *forum non conveniens* will be the subject of the next section.

Forum non conveniens

As the facts in transnational tort claims have connections with more than one state, a Canadian court will consider whether it should stay an action on the basis that another forum is more appropriate, if requested to do so by the defendant.[78] Castel explains that "[w]here the stay is refused, the local court is deemed to be *forum conveniens,"* and "[w]here it is granted the local court is deemed to be *forum non conveniens*."[79] The issue here is no longer whether a court has jurisdiction but whether the court should assume or decline jurisdiction based on the facts of the case.[80] Castel notes that the doctrine of *forum non conveniens* was established in common law jurisdictions, as it "enables a court to achieve a just result in the circumstances and to discourage forum shopping."[81] It also reflects

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[75] [2002] 60 O.R. (3d) 20, O.J. No. 2128 [*Muscutt*] at para. 40.
[76] *Muscutt, supra* note 75 at para. 43.
[77] *Lemmex* v. *Bernard* (2000), 51 O.R. (3d) 164 (Div. Ct.) at 172.
[78] See for e.g. *Amchem, supra* note 11 at 912 and *Muscutt, supra* note 75 at para. 40.
[79] Castel, "Intro to PRIL", *supra* note 8 at 96.
[80] Feldman & Vella, *supra* note 11 at 181-182, citing *Ang* v. *Trach* (1986), 33 D.L.R. (4th) 90 at 95.
[81] Castel, "Intro to PRIL", *supra* note 8 at 96.

the "[d]esirability of respecting judicial comity and infringing as little as possible on a foreign court's jurisdiction in matters of competing jurisdiction".[82]

As Quebec follows the civil law tradition, which does not recognize the doctrine of *forum non conveniens*, courts in Quebec never received the inherent discretion to decline their jurisdiction in a matter.[83] While there was some debate in Quebec that the court's discretion to decline jurisdiction could be implied from the language of the *Civil Code*, the Court of Appeal quashed this line of argument with the *Aberman* v. *Solomon* decision in 1986.[84] Maughan J. stated, "[w]ith the greatest respect to those who differ, I have come to the conclusion that, as the law now stands, the doctrine of *forum non conveniens* has no application in the law of Quebec. Article 68 C.P. is clear and does not give rise to the exercise of judicial discretion, however desirable this may be."[85] The decision in *Aberman* did not quash, however, the debate surrounding the desirability of applying *forum non conveniens* in Quebec.

Sufficient criticism was provoked by the *Aberman* decision that, in 1991, the legislature of Quebec reversed the traditional civil approach to jurisdiction and codified the doctrine of *forum non conveniens* within the *Civil Code*.[86] Article 3135 of the Quebec *Civil Code* stipulates that, "[e]ven though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide." Talpis and Kath argue that the language stipulating the exceptional nature of this doctrine is a reflection of the traditional civil law rule allowing proceedings against a defendant in their forum.[87]

The laws of the rest of Canada and the other common law countries on *forum non conveniens* evolved, on the other hand, from the laws of the United

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[82] Feldman & Vella, *supra* note 11 at 182, citing as e.g. *Jannock Corp. Ltd.* v. *R.T. Tamblyn & Partners Ltd.* (1975), 58 D.L.R. (3d) 678 (C.A.).
[83] *Aberman* c. *Solomon*, [1986] R.D.J. 385 (C.A.) at 391 [*Aberman*].
[84] Samson, *supra* note 51 at 119, citing *Aberman, supra* note 83.
[85] *Aberman, supra* note 83 at 391.
[86] *Civil Code, supra* note 61, s. 3135; See also Samson, *supra* note 51 at 119.
[87] Talpis & Kath, *supra* note 60.

Kingdom.[88] While the rule is codified in each of the various provincial rules of civil procedure, Arbour J.A. (as she then was) has stated that, generally, "the law in the area is found in jurisprudence."[89] In the beginning, the doctrine permitted a stay only where the defendant could demonstrate the action was oppressive or vexatious to him, or an abuse of court process.[90] Even where a defendant met this first step, a stay would be denied unless the defendant could also show that a stay would not cause an injustice to the plaintiff.[91] Given the narrow grounds of this test, the doctrine was rarely invoked in Canada until 1976.[92]

In 1976, the Supreme Court articulated a broader test for *forum non conveniens* in *Antares Shipping Corp.* v. *The Ship "Capricorn"*.[93] Speaking for the court, Ritchie J. observed:

> The factors affecting the application of this doctrine [of *forum conveniens*] have been differently described in various cases...and they include the balance of convenience to all the parties concerned, including the plaintiff, the undesirability of trespassing on the jurisdiction of a foreign State, the impropriety and inconvenience of trying a case in one country when the cause of action arose in another where the laws are different, and the cost of assembling foreign witnesses.[94]

As a result of the *Antares* decision, the test for *forum non conveniens* was no longer restricted to cases of oppression, vexation or abuse of court process.[95] Rather, as Ritchie J. explained, "the overriding consideration which must guide

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[88] For further study of the evolution of Canada's doctrine of *forum non* conveniens, see for e.g. Feldman & Vella, *supra* note 11; and Samson, *supra* note 51 at 114.

[89] In *Frymer* v. *Brettschneider* (1994), 19 O.R. (3d) 60 (C.A.) at 84, Arbour, J.A stated that ON Rule 17.06(2)(c) is only of "marginal significance in the appreciation of the scope of *forum non conveniens* in Ontario," and "the law in the area is found in jurisprudence" [*Frymer*].

[90] *St. Pierre v. South American Stores* (*Gath & Chaves*), [1936] 1 K.B. 382 (C.A.) [*St. Pierre*]. The *St. Pierre* test was adopted in Canada by McRuer C.J.H.C. in *Empire Universal Films Ltd.* v. *Rank*, [1947] O.R. 775 (H.C.) at 779; See Feldman & Vella, *supra* note 11 at 182-183.

[91] *Ibid.*

[92] Samson, *supra* note 51 at 112.

[93] *Antares Shipping Corp.* v. *The Ship "Capricorn"* (1976), 65 D.L.R. (3d) 105 [*Antares Shipping*]; Also see Feldman & Vella, *supra* note 11 at 184.

[94] *Antares Shipping, supra* note 93.

[95] However, the *St. Pierre* test, *supra* note 90, was not formally over-ruled in Canada until 1986, when the Ontario Divisional court emphasized that the test for *forum non conveniens* was based on the balance of conveniens and courts should no longer apply the old oppression and vexatious test. See Feldman & Vella, *supra* note 11 at 183, citing *Bonaventure Systems Inc.* v. *Royal Bank of Canada* (1986), 32 D.L.R. (4th) 721 at 729 (Div. Ct.).

the court in exercising its discretion by refusing to grant such an application as this must, however, be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice."[96] Not surprisingly, the doctrine of *forum non conveniens* became more commonly invoked in the English provinces of the country following the loosening of the test in *Antares Shipping*.[97]

Today, *Amchem Products Inc.* v. *B.C. (W.C.B.)*[98] is the leading case in Canada on the doctrine of *forum non conveniens*. *Amchem* involved an application for an anti-suit injunction by Asbestos companies who wanted to enjoin plaintiffs from proceeding against them in a Texas court. The plaintiffs claimed in the Texas litigation, "they suffered injury...due to exposure to asbestos or are dependents of deceased persons affected by asbestos".[99] While this case concerned an anti-suit injunction, it is relevant for a study of *forum non conveniens* as the same test evolved for both, from the *St. Pierre* case.[100] The Supreme Court affirmed in *Amchem* that the test for *forum non conveniens* is whether "there is another forum that is clearly more appropriate than the domestic forum",[101] and that this determination should be reached by weighing various factors against one another.[102]

Arbour J.A. (as she then was) explained in *Frymer* v. *Brettschneider* that "[t]he choice of the appropriate forum is designed to ensure that the action is tried in the jurisdiction that has the closest connection with the action and the parties."[103] Arbour J.A. further elaborated that "[a]ll factors pertaining to making

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[96] *Antares, supra* note 93 at 165.
[97] Samson, *supra* note 51 at 112; Indeed, the doctrine of *forum non conveniens* has become so entrenched within Canada that the *Uniform Court Jurisdiction Act, supra* note 72, has adopted the doctrine. Article 11(1) stipulates that, "[a]fter 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."
[98] *Amchem, supra* note 11.
[99] *Ibid.* at para. 3.
[100] *Ibid.* at para. 36.
[101] *Ibid.* at para. 53.
[102] *Ibid.* at para. 32.
[103] *Frymer, supra* note 89 at 79.

this determination must be considered."[104] In spite of this, no list exists which enumerates the factors a court must consider.

In *Muscutt*, the Ontario Court of Appeal identified a list of several factors that may be considered in determining the most appropriate forum for an action:

- Location of the parties;
- The location of key witnesses and evidence;
- Contractual provisions that specify the applicable law or accord jurisdiction;
- The avoidance of a multiplicity of proceedings;
- The applicable law and its weight in comparison to the factual questions to be decided;
- Geographical factors suggesting the natural forum; and,
- Whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in a domestic court.[105]

The Court in *Muscutt* went on to note that the *forum non conveniens* test is a discretionary test and "[t]he question is whether the forum should assert jurisdiction at the suit of this particular plaintiff against this particular defendant."[106] As so much depends on the particular facts of a case and the parties, Castel argues that it is not possible to catalogue all the factors that will justify the grant or dismissal of a claim.[107] In general terms, it can be said though that the court will consider "all practical problems that make the trial of a case easy, expeditious and inexpensive."[108]

The *Amchem* decision is also significant in that it compressed the Canadian *forum non conveniens* test into a single step. This altered the approach from *St. Pierre*, which as we examined, allowed the court to refuse a motion for a stay where the defendant was unable to meet the second step of showing a stay wouldn't cause an injustice to the plaintiff. As we shall discuss in later sections of

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[104] *Ibid.*
[105] *Muscutt, supra* note 75 at para. 41, citing *Eastern Power Limited* v. *Azienda Comunale Energia and Ambiente,* [1999] O.J. No. 3275 (C.A.) (leave to appeal to SCC denied). These factors were in turn adopted from Ground J. in *Guarantee Co. of North America* v. *Gordon Capital Corp.* (1994), 18 O.R. (3d) 9 (Gen. Div.) (leave to appeal refused).
[106] *Muscutt, supra* note 75 at para. 43, citing J. Blom, "The Enforcement of Foreign Judgments: Morguard Goes Forth into the World" (1997) 28 C.B.L.J. 373 at pp. 377-78.
[107] J.G. Castel, *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworths, 1997) at 257-259 [Castel "Canadian PRIL"].
[108] Castel, "Canadian PRIL", supra note 107 at 257.

this paper, this aspect of *forum non conveniens* differs from the U.K., where the doctrine is still divided into two steps. Sopinka J. explained the test was compressed in Canada because the Court could see "no reason in principle why the loss of juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors that are considered in identifying the appropriate forum.[109] According to Sopinka J., the two-step analysis derived from a time where the first step of the analysis focussed on whether it was oppressive to the defendant to bring the proceeding in the forum. As such, it made sense to focus on the fairness to the plaintiff in the second step. Sopinka J. reasoned that, "[w]hen the first condition moved to an examination of all the factors that are designed to identify the natural forum...any juridical advantages to the plaintiff or defendant should have been considered one of the factors to be taken into account."[110] The obvious implication of this modification to a single step is that loss of juridical advantage is no longer sufficient in itself to prevent a court from granting a stay if the other factors indicate another forum has a closer connection with a case.[111] Indeed, Sopinka J. emphasized that only legitimate juridical advantages would be considered, and this legitimacy would depend on the forum's connection with the matter:

> The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.[112]

This compression of the test into a single step would clearly have negative implications for foreign plaintiffs if the interests of justice were weighed equally

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[109] *Amchem*, *supra* note 11 at para. 32.
[110] *Ibid.* at para. 32.
[111] *Ibid.* at 919-920; See also Samson, *supra* note 51 at 114.
[112] *Amchem*, *supra* note 11 at para. 32.

with other factors, as the balance of convenience tends to weigh in favour of the forum where the injury arose.[113] Fortunately, there are indications from the *Cambior* case,[114] which we shall examine in a later section of this paper, that Canadian courts may still regard juridical advantage as being determinative, by refusing to grant a stay where there is clear and compelling evidence that a plaintiff will not receive justice in the alternative forum.[115]

The other effect of the single-step test now in place in Canada is that the burden remains on the defendant during the entire test for *forum non conveniens*.[116] Defendants already carried the burden for demonstrating, on the standard of proof applicable in civil cases, that there was another "clearly more appropriate forum".[117] The result of this burden in a stay application is that "where no one forum is the most appropriate, the domestic forum wins out by default and refuses a stay, provided it is an appropriate forum."[118] Indeed, the Supreme Court of Canada has affirmed the finding of the House of Lords in *The "Atlantic Star"*, that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[119] But now, the burden for demonstrating that a plaintiff will not be deprived of a legitimate juridical advantage in the case of a stay also falls on the defendant. This is unlike the burden in other common law jurisdictions that have retained the two-step approach for *forum non conveniens*. In those jurisdictions, the onus is transferred to the plaintiff to demonstrate that the interests of justice require a refusal of the stay, after the defendant meets their burden in the first step.

The Supreme Court predicted in *Amchem* that "[t]he burden of proof should not play a significant role in these matters as it only applies in cases in which the

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[113] The manner in which *forum non conveniens* weighs against Canadian courts as the appropriate forum when a foreign plaintiff attempts to sue a Canadian defendant for extraterritorial activities will be the subject of a later section in this paper.
[114] *Cambior, supra* note 2.
[115] While Maughan J. granted the defendant's stay on the grounds of *forum non conveniens*, he suggested that he would have had to dismiss this application had he preferred the plaintiff's evidence that they would not receive a fair trial in Guyana. *Cambior, supra* note 2 at para. 87.
[116] Talpis & Kath, *supra* note 60 at para. 29.
[117] *Amchem, supra* note 11 at 921.
[118] *Ibid.* at para. 53.
[119] *Ibid.* at para. 33.

judge cannot come to a determinate decision on the basis of the material presented by the parties."[120] However, Forcese notes that, "the allocation of this onus has arisen in several cases."[121] Indeed, the burden of proof may have important implications for foreign plaintiffs who choose to initiate actions in Canada out of concern they will not be treated fairly in the forum where they suffered harm. Where there is doubt, for example, about whether a plaintiff will lose a legitimate juridical advantage if they cannot proceed in the local forum, a court should decide against granting a stay on the basis the defendant has failed to discharge their onus. The burden is also significant given the reality, recognized in *Amchem*, that "[f]requently 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".[122]

Application of Canada's Approach: *Cambior*

As we have seen, Canadian laws provide courts with the jurisdiction to hear cases against defendants domiciled in their forum and it is the doctrine of *forum non conveniens* that will provide a more formidable hurdle, when foreign plaintiffs attempt to bring a suit in a Canadian court for harm that occurred in another country. Indeed, it was the doctrine of *forum non conveniens* that resulted in the dismissal of the plaintiffs' claim in *Cambior*, the only case brought to date against a multinational in Canada for environmental harm in a developing country.[123] In the following section, we shall examine how the balancing of factors in the Canadian doctrine of forum of non conveniens tend to weigh in favour of the dismissal of extraterritorial claims by foreign plaintiffs, even though the defendant is a Canadian, unless there is very compelling evidence that the plaintiff will not receive justice in the alternative forum.

In the words of Maughan J., the trial judge who heard the evidence in the case, the claims by the plaintiffs in *Cambior* arose out of "one of the worst

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[120] *Ibid.* at 921.
[121] Forcese, *supra* note 31 at para. 99, citing as e.g., *Frymer, supra* note 89.
[122] *Amchem, supra* note 11 at 912.
[123] *Cambior, supra* note 2.

environmental catastrophes in gold mining history."[124] On August 18th and 19th, 1995, a dam of an effluent treatment plant at the Omai gold mine in Guyana ruptured, releasing "2.3 billion litres of liquid containing cyanide, heavy metals and other pollutants...into two rivers, one of which is Guyana's main waterway, the Essequibo."[125] The 23,000 plaintiffs, who claimed damages as a result of the spill, consequently initiated class action proceedings in Quebec court, the headquarters of Cambior Inc., for $69 million.[126] The damage claimed by the plaintiffs included:

> ...psychological damage associated with the presence of cyanide in the Essequibo River; economic damage due to the effects of the spill on local and international markets for fish, livestock, game and produce harvested from the Essequibo River and its banks; and environmental damage associated with the loss of sensitive and pristine ecosystems."[127]

The plaintiffs claimed that Cambior, a Quebec corporation, was responsible for the damages they had suffered, as it was the 65% owner of the Omai gold mine where the spill had occurred.[128]

While Maughan J. found that the "courts of both Quebec and Guyana have jurisdiction to try the issues,"[129] the action in Quebec was dismissed on the basis that the factors of the *forum non conveniens* test clearly pointed to "Guyana, not Quebec, as the natural and appropriate forum where the case should be tried."[130] The application of the *forum non conveniens* test in the *Cambior* decision will be the subject of analysis in the following section. Particular attention will also be paid to the implications of this decision for other cases where foreign plaintiffs attempt to sue a Canadian defendant for harm suffered in a less developed country.

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[124] *Cambior, supra* note 2 at para. 1.
[125] *Ibid.* at para. 1.
[126] These proceedings were initiated by Recherches Internationales Québec (RIQ), a company formed in Québec to assist the Guyanese victims. See *Ibid.* at paras. 2 and 5.
[127] *Ibid.* at para. 53.
[128] *Ibid.* at para. 2.
[129] *Ibid.* at para. 9.
[130] *Ibid.* at para. 10.

As an introductory remark, the author would like to note that the Cambior decision involved the application of Quebec's test for *forum non conveniens*. While Quebec's doctrine of *forum non conveniens* has a different history from the rest of Canada, as previously discussed, the case is still considered relevant for demonstrating Canada's approach to *forum non conveniens* as the factors considered in each test are similar. Some of the exceptional circumstances that could give rise to a stay for *forum non conveniens* in Quebec are discussed in the Ministry of Justice's comments to article 3135:

> [...] pourraient donner ouverture à ces cas exceptionnels, les considerations suivantes: la disponibilité des témoins, l'absence de familiarité de l'autorité appelée à trancher le litige avec le droit applicable, la faiblesse du rattachement du litige à cette authorité, le litige se trouvant en relation beaucoup plus étroite avec les autorités d'un autre État.[131]

These factors are all included in the list of factors identified by the Ontario Court of Appeal in *Muscutt*. In *Banque Toronto Dominion* v. *Arseneault*, the Superior Court of Quebec identified all the factors that must be considered by a court of the province in determining whether to decline jurisdiction in the "interest of the parties and the interests of justice"[translation by author]:

> 1) le lieu de résidence des parties et des temoins; 2) la situation des éléments de preuve; 3) le lieu de formation et d'exécution du contrat qui donne lieu à la demande; 4) l'existence et le contenu d'une action intentée à l'étranger et le progrès déjà effectué dans la poursuite de cette action; 5) la situation des biens appartenant au défendeur; 6) la loi applicable au litige; 7) l'avantage dont jouit la demanderesse dans le for choisi; 8) l'intérêt de la justice.[132]

As one can see, by comparing this list with the one compiled by the Court in *Muscutt*, this case had the effect of importing the remainder of factors from the common law provinces into Quebec.[133] As with the test in English Canada,[134] the

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[131] Quebec, Ministère de la justice, *Commentaires du ministre de la justice : le code civil du Québec*, vol. 2 (Quebec : Publications du Québec, 1993) at 1999-2000.
[132] *Banque Toronto Dominion* v. *Arseneault,* [1994] R.J.Q. 2253 (S.C.) at para. 10 [*Banque TD*].
[133] Samson, *supra* note 51 at 123.
[134] It was Justice La Forest of the Supreme Court of Canada who stated in *Hunt* v. *T & N PLC* [1993] 4 S.C.R. 289 at 326 that, "[w]hatever approach is used, the assumption of and the

Court held that none of the listed factors was determinative of the *forum non conveniens* test in Quebec.[135]

Location of the parties

The location of the parties was the first factor considered by the Court in *Cambior*. Typical of the kinds of transnational tort claims under consideration in this paper, the defendant, Cambior Inc, had its head offices in Montreal, Quebec – the forum where it was being pursued. While the Court agreed the defendant's domicile in the forum was an important factor to be considered, it emphasized that this was not determinative.[136] Instead, the court felt the inconvenience associated with having 23,000 plaintiffs from Guyana litigate in Quebec far outweighed the inconvenience to Cambior's Board members and executive officers who would be called upon to testify in Guyana.[137] While the presence of all the plaintiffs in Quebec court was not needed for the class proceedings in *Cambior*, it is possible that more plaintiffs would have had to travel to Canada than the number of company executives who would be required to travel to Guyana if proceedings were held there instead. The increase in costs associated with such travel is an important concern for the defendant, as they are typically held responsible for a portion of costs in Canada, if they lose a motion or claim.[138] As such, courts will be reluctant to exercise jurisdiction where it appears that many plaintiffs will have to travel to the court from abroad.

There are some circumstances however, where the location of the plaintiffs should perhaps be given less weight. This concern would seem to have less legitimacy for example, where the defendant has directly or indirectly avoided liability in the alternative forum, by either refusing to submit to the jurisdiction of the court or by making little or no assets available in that jurisdiction to satisfy a judgement. Clearly, this factor should not be important where it can be shown that there is less inconvenience in having the plaintiffs travel to Canada then in having

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discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contact or connections."

[135] *Banque TD, supra* note 132 at 2255.

[136] *Cambior, supra* note 2 at para. 45.

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

[138] For a discussion of the Canadian system of costs, which is based on partial indemnity for the winner, see Lara Friedlander, "Costs and the Public Interest Litigant" (1995) 40 R.D. McGill 55.

the defendants go to the alternative forum, such as where the number of individual defendants outnumbers the representative plaintiffs that will appear in court. Also, it should be noted that the costs of international travel has decreased to such an extent in recent years that this factor may be of less relevance than it used to be. Where there is little chance of a fair trial in the alternative forum, the expense of hearing the claim in Canada should arguably, be given less weight, given the importance of providing all the parties with access to justice. The general rule across Canada, providing for a division of costs on a partial indemnity basis, should also diminish the weight paid to concerns over costs,[139] as the plaintiffs will themselves be responsible for carrying a significant proportion of the costs of their travel, even if they succeed with their action. It is even possible that this cost division provides an effective protection against the initiation of trivial proceedings, given the cost implications for plaintiffs.

The location of key witnesses and evidence

The location of key witnesses and evidence has traditionally posed a significant obstacle to litigation outside the forum where the injury was suffered. As such evidence tends to be located in the place of injury, courts have preferred, for reasons of convenience, to decline jurisdiction in favour of the local forum. In *Cambior* too, "the Court concluded that most, if not all, of these elements were located in Guyana, including the rivers into which the toxic waste spilled, the medical records of victims and other key information."[140] Further, as many key witnesses were based in Guyana, the Court took the view that the location of witnesses favoured Guyana as the appropriate forum.

While it is generally more convenient to access evidence within the forum, this concern may be of less relevance today than it was in the early 19th century, when the doctrine of *forum non conveniens* was first elaborated. In *Dennis* v. *Salvation Army Grace Hospital*,[141] the Nova Scotia Court of Appeal recognized that the evolution of information technologies has made the transmission of paper

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[139] *Ibid.*
[140] Forcese, *supra* note 31 at para. 104.
[141] *Dennis* v. *Salvation Army Grace Hospital* [1997] N.S.J. No. 19 (C.A.) [*Dennis*].

documents from another jurisdiction more straightforward.[142] As this determination is once again, a fact-specific one, the court's decision will depend on the number and location of key witnesses and the number and types of evidence that must be brought from abroad as opposed to those already present within the jurisdiction.

Aside from comparing costs, the court will also consider its ability to compel the attendance of witnesses and the disclosure of evidence. It can be appreciated that there is little value in a court exercising its jurisdiction if it will then be unable to seek the evidence and testimony that is needed to determine the matter, particularly in cases where there are uncooperative parties. This should be less of an issue where the Government of the alternative forum is supportive of proceeding in Canada.[143] It may also be less of an issue in cases where the foreign state is a party to a treaty providing for the exchange of documents and witnesses. Canadian laws also require the recognition and enforcement of foreign orders, including those for discovery, so long as the court had a reasonable basis for exercising its jurisdiction.[144] Generally, however, this factor will weigh against a Canadian court as the appropriate forum, especially if the defendant undertakes to cooperate with discovery in foreign proceedings.

Contractual provisions that specify applicable law or accord jurisdiction

In the kinds of tort claims under examination, there are rarely contracts between the defendants and plaintiffs, let alone any contractual provisions specifying the forum where disputes must be resolved. Forum-selection clauses could be relevant in claims of poor workplace safety, if they are included in job contracts. This seems unlikely however, for most of the poor workers from

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[142] For this reason, the location of medical records in Newfoundland was not considered a relevant factor in determining whether Nova Scotia was the most appropriate forum for the proceedings. *Dennis, supra* note 141 at para. 36.

[143] While it may initially strike one as unlikely that a state would support extra-territorial litigation that limited its sovereignty, foreign governments have supported such litigation in the past. For India's submissions in support of the U.S. as a forum by the Bhopal plaintiffs, see *Union Carbide, supra* note 1 at 847; See also Farrow, *supra* note 27 at note 23; For information regarding South Africa's submissions supporting the UK as a forum for the *Lubbe* case, *supra* note 16, see Muchlinsky, *supra* note 28 at 18 and 22.

[144] *Morguard, supra* note 66 at para. 51, held that a foreign order should be recognized so long as the foreign forum has a "real and substantial connection" with the action.

developed countries who have brought claims against multinationals. But if such a clause were to exist, it would be determinative so long as the contract was a good one. For our purposes, this generally remains a neutral factor.

The avoidance of a multiplicity of proceedings

The courts will generally not consider a matter if it is already being heard elsewhere. This principle, known as *lis pendens*, is designed to avoid the possibility of multiple courts arriving at different results on the same facts, the waste of scarce court resources and the injustice of permitting a plaintiff to re-try the same issue.[145] It should go without saying that this issue will not arise in transnational tort claims where claims under consideration are being brought for the first time.

In *Cambior*, pending litigation was an issue as 900 of the victims had already filed claims in Guyana against Omai.[146] However, this factor was given little weight, as Cambior was not named as a co-defendant in the Guyanese litigation.[147] The court thus concluded there was "little risk of contradictory judgments emanating from the courts of Guyana and Quebec."[148]

This factor may weigh against a Canadian forum where plaintiffs have brought their claim to Canada after already pursuing the matter unsuccessfully in their home forum. Where the first claim was a "fair one", the principle of *res judicata* will prevent the plaintiff from re-litigating the cause of action.[149] If on the other hand, it can be shown that the first judgement was based on a fraud, a denial of justice or a violation of international law, the judgment may be set aside.[150] The courts will likely wish to avoid applying too strict a test here for fear of discouraging foreign plaintiffs from first bringing their claims against Canadian

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[145] *The Dictionary of Canadian law*, 2nd ed., (Toronto: Carswell, 1995) at 686, defines "*lis alibi pendens*" as a "suit pending elsewhere else" and explains that the principle is raised when there is a "plea that an action in one forum should be postponed until litigation begun elsewhere is concluded."

[146] *Cambior, supra* note 2 at para. 63.

[147] *Cambior, supra* note 2 at para. 64.

[148] *Ibid.*

[149] Castel, *supra* note 8 at 108, explains the general common law rule in Canada is that a final judgment by a foreign court is conclusive on the merits and cannot be re-examined if it was rendered by a court of competent jurisdiction and is free from fraud.

[150] *Ibid.* at 109.

multinationals in their local forum before coming to Canada. Rather, it may be in the interests of the Canadian judicial system to ensure that foreign plaintiffs feel confident in initiating their proceedings locally at first, knowing they can always attempt an action in Canada if they are denied a fair trial.

The applicable law and its weight in comparison to the factual questions to be decided

Traditionally, choice of law was included within the *forum non conveniens* test because if the law to be applied was foreign and difficult for the local court to establish, the factor would weigh against Canada as the most appropriate forum for the matter. This is particularly relevant for claims of harm that have been suffered abroad, as the choice of law in most of these cases will be foreign. In *Tolofson* v. *Jensen*, La Forest J. affirmed that the *lex loci delicti* is the applicable principle for determining the choice of law in tort claims:

> From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*.[151]

However, the belief that the application of foreign law requires a stay of proceedings has much less credence today, then it once did. In *Antares*, the Supreme Court of Canada cited the judgement of the UK House Lords in *The "Jupiter" (No. 2)*,[152] where Bankes, L.J., rebutted the approach towards this factor in the early days of the *forum non conveniens* test:

> I think matters have progressed very far since that time, and it is common practice now for these Courts to adjudicate on disputes between foreigners and to ascertain the foreign law as a matter of fact and apply it ...[153]

The Ontario Court of Appeal has also affirmed that "Ontario courts are accustomed in contemporary litigation to the need to review and apply foreign law, where required, and to distinguish among varying legal regimes and rules in

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[151] *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1049-50 [*Tolofson*].
[152] *The "Jupiter" (No. 2)*, [1925] ALL E.R. Rep. 203 at para. 2.
[153] *Ibid.* at 75.

the assessment of liability and damages."[154] Despite the reduced weight that should be given to this factor, defendants and Canadian courts continue to list the inconvenience of proving foreign law among the reasons why actions should be stayed from proceeding in Canada.[155] To the credit of the Superior Court, Maughan J. saw no difficulty with the application of Guyanese law in *Cambior*.[156] Indeed, Maughan J. observed "the very essence of the provisions of the Quebec Civil Code on private international law is that Quebec court will apply foreign law in many varying circumstances."[157] As the parties in the *Cambior* case agreed Guyanese law applied, Maughan J. found that this factor pointed towards Guyana as the more appropriate forum for deciding the issues.[158]

There may be cases however, where a claim by foreign plaintiffs for harm suffered in another country might be determined on the basis of local law. In such cases, the choice of law would weigh in favour of Canada as the most appropriate forum. The application of Canadian law could also benefit foreign plaintiffs by offering them juridical advantages not available in the alternative forum.

Such a scenario could arise where part of the tort occurred in Canada. For example, in *Cambior*, the plaintiffs claimed that part of the negligence, from which they claimed damages, had occurred in Quebec through the design of the mine tailings pond.[159] We will examine in a later section, how allegations of wrongdoing in the forum have led U.K. courts to choose their own laws to resolve claims for personal injuries suffered abroad.[160] In contrast, the decision in

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[154] *Somers et al.* v. *Fournier et al.*, [2002] 60 O.R. (3d) 225 at para. 47.
[155] For e.g., in *Cortese (Next friend of)* v. *Nowsco Well Service Ltd.*, [2000] A.J. No. 481 (C.A.) [*Cortese*] at para. 8, leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 286, the Alberta Court of Appeal held that since the issues would be resolved by Italian law and social issues, an Albertan court "would be an extremely poor place to test such legal issues."
[156] *Cambior, supra* note 2 at para. 70; The applicability of Guyanese law had been already accepted by all the parties. See *Cambior, supra* note 2 at para. 67.
[157] *Ibid.* at para. 70.
[158] *Ibid.* at para. 70.
[159] *Ibid.* at para. 60.
[160] See *Ngcobo and others* v. *Thor Chemical Holdings Ltd. and another,* unrep. (H.C.J.), as cited by Meeran, "Liability of MNCs", *supra* note 6 at 256; and *Sithole and others* v. *Thor Chemical Holdings Ltd. and another,* unrep. (H.C.J.), as cited by Meeran, "Liability of MNCs", *supra* note 6 at 256.

Cambior offered no indication that Canadian law could potentially apply to negligence committed in Quebec. Forcese predicts it is probable that "a transnational tort action involving decisions made in Canada that cause harm overseas would be required to apply foreign law".[161] This difference appears to originate from a more restrictive interpretation of the *lex loci delicti* in Canada as the "place of injury", as compared with the broader interpretation taken in the U.K., which seems to include both the "place of injury" and the "place of wrongdoing."[162]

Nevertheless, the possibility still remains that Canadian laws could be applied to determine claims of injury suffered in another state.[163] The possibility of an exception to the *lex loci delicti* rule was even hinted at by La Forest J. in *Tolofson*, as the general rule was being coined:

> I view the *lex loci delicti* rule as the governing law. However, because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.[164]

This passage by La Forest J. provides a strong indication of the willingness by the Supreme Court of Canada to consider the application of Canadian law to damages that occurred abroad, where this is necessary to avoid injustice. Forcese writes that lower courts have already relied on La Forest's reasoning to permit the application of Canadian law in a few circumstances. Of particular relevance to transnational tort claims may be the interpretation by the Ontario Court of Appeal in *Hanlan et al.* v. *Sernesky*,[165] that *Tolofson* allows "a discretion to apply the *lex fori* in circumstances where the *lex loci delicti* rule would work an injustice."[166]

Holdings Ltd. and another, unrep. (H.C.J.), as cited by Meeran, "Liability of MNCs", *supra* note 6 at 256.

[161] Forcese, *supra* note 31 at para. 113.

[162] The difference in the UK approach will be addressed in a later section of this paper.

[163] See Forcese, *supra* note 31 at paras. 114-116; and Castel, "Canadian PRIL", *supra* note 107 at 686-87.

[164] *Tolofson, supra* note 151 at 1054.

[165] *Hanlan et al.* v. *Sernesky* (1998), 38 O.R. (3d) 479 (C.A.) [*Hanlan*].

[166] *Ibid.* at 479; The *lex fori* refers to the law of the forum court.

Other courts have emphasized that this exception appears to apply strictly to international cases, and not to interprovincial cases.[167]

It remains uncertain what kinds of circumstances are necessary to demonstrate "injustice" that justifies overturning the presumption in favour of the *lex loci delicti*.[168] In *Hanlan*, the Ontario Court of Appeal affirmed a motion court ruling that applying the *lex loci delicti* would result in an injustice, as Minnesotan law did not permit Family Law Act type claims that were allowed in Ontario.[169] The British Colombia Superior Court has followed *Hanlan* in *Gill* (*Guardian ad litem of*) v. *Gill*[170] and in *Wong* v. *Wei*[171] to find that the *lex loci delicti* should not apply to accidents occurring in the United States, as they would deprive the plaintiffs of benefits available under British Colombia law.[172] These cases should not be interpreted however, as meaning that Canadian law will be applied anytime it offers a juridical advantage not available in the *lex loci delicti*. In *Tolofson*, La Forest J. denounced the notion that mere difference would justify the replacement of the lex loci delicti:

> True, it may be unfortunate for a plaintiff that he or she was the victim of a tort in one jurisdiction rather than another and so be unable to claim as much compensation as if it had occurred in another jurisdiction. But such differences are a concomitant of the territoriality principle.[173]

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[167] In *Bezan* v. *Vander Hooft*, [2004] A.J. No. 231 at para. 9, the Alberta Court of Appeal held that "Tolofson permits some flexibility in relation to accidents that occur outside Canada, when application of the law of the host country would result in an injustice".
[168] Forcese, *supra* note 31 at para. 115.
[169] *Hanlan et al.* v. *Sernesky,* [1997] 35 O.R. (3d) 603 at 611 (Gen. Div.), aff'd (1998), 38 O.R. (3d) 479 (C.A.).
[170] *Gill* (*Guardian ad litem of*) v. *Gill,* [2000] B.C.J. No. 1106 (S.C.) [*Gill*].
[171] *Wong* v. *Wei,* [1999] B.C.J. No. 768 [*Wong*].
[172] In *Gill, supra* note 170 at para. 17, the British Colombia Superior Court chose not to apply Indiana law as it precluded gratuitous passengers from recovering from their drivers unless there was wanton or wilful negligence, which was not the allegation in this case. Instead, the court chose to apply British Columbia law, which provided gratuitous passengers with a cause of action against drivers regardless of whether there was negligence; In *Wong, supra* note 171 at para. 18, the British Colombia Superior Court held it would be unjust to apply California law as it imposed a rough upper limit for non-pecuniary damages and would deprive the plaintiffs of damages available in British Colombia.
[173] *Tolofson, supra* note 151 at 1058.

It is clear from this passage by La Forest J. that concern for the territorial sovereignty of other states must be balanced with the court's sympathy for a plaintiff's poorer prospects under foreign law.

The decisions in *Hanlan*, *Gill* and *Wong* can be distinguished from claims that are made in Canada by foreign plaintiffs as they all involved parties from the same province. Such an exception appears to have been anticipated by La Forest J. in *Tolofson*, when he mused, "[t]here might, I suppose, be room for an exception where the parties are nationals or residents of the forum. Objections to an absolute rule of *lex loci delicti* generally arise in such situations."[174] The reasoning behind this exception appears to rest partly on the expectation by the parties that local laws might apply to their accident, as they were all residents of the same province. Also, there is less concern about intruding on the territorial sovereignty of another state, in cases where the parties are all residents of the forum. The interest by foreign states in having their laws applied to these disputes is probably low. Also, La Forest J. has noted, "that in the international context, the Hague Convention on Traffic Accidents allows for an exception where all parties involved in the accident are from the forum".[175] On the other hand, when Canadian multinationals become involved in an accident in a developing country, there is no such expectation that Canadian law will apply. Indeed, it is likely that many companies choose to do business abroad, based precisely on the expectation that foreign law will apply to their operations and they will be less strict. La Forest J. has also suggested it is inappropriate to apply the exception where it interferes with a foreign states' interest in ensuring that their own laws are used to resolve claims by their citizens:

> There may be room for exceptions but they would need to be very carefully defined. It seems to me self evident, for example, that State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country, or for that matter the actions in State B of citizens of State C, and it would lead to unfair and unjust results if it did.[176]

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[174] *Ibid.* at para. 54.
[175] *Ibid.* at para. 60.
[176] *Tolofson, supra* note 151 at 1052.

Interestingly, this passage does not preclude Canada from applying its laws in relation to claims by citizens from State B against its own citizens, even though State B will also have a legitimate interest in disputes against citizens from State A, who are foreign investors.

The second factor, which was key to the determination by the courts in *Hanlan* and *Gill,* that the circumstances warranted the exceptional application of the *lex fori,* was that the insurance premiums paid by the defendants would have provided compensation to the plaintiffs had the injury occurred in the province where the parties all resided.[177] This factor is not likely to be relevant however, in claims by foreign plaintiffs.

Where a legal regime violates commonly accepted notions of justice, the circumstances should warrant the application of local law.[178] In *Davidson Tisdale Ltd.* v. *Pendrick*, the Ontario Divisional Court applied the following test to reach its conclusion that the circumstances did not warrant the replacement of New York law with Ontario law:

> ...[w]e are not dealing here with conduct lawful by the laws of a state run by a despot, but unacceptable in a democratic society that might require the application of Ontario law to prevent injustice.[179]

In *Tolofson*, La Forest J. noted that seminal choice of law cases had found it unjust to apply the *lex loci delicti* where some aspect of the law was "considered contrary to the public policy of the forum, i.e., unfair."[180] In *Britton* v. *O'Callaghan et al.*, the Ontario Court of Appeal concluded that a stringent test had developed in jurisprudence around the exemption of the *lex loci delicti* on the basis of public policy.[181] The Court cited the finding of Carthy J.A. in *Boardwalk*

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[177] See *Hanlan, supra* note 169 at 480; and *Gill, supra* note 170 at paras. 13 and 17.
[178] See Forcese, *supra* note 31 at para. 114-116.
[179] *Davidson Tisdale Ltd.* v. *Pendrick* (1998), 116 O.A.C. 53 (Div. Ct.) at 61.
[180] In *Tolofson, supra* note 151 at 310, La Forest J. cited the following as examples of injustice: "In *McLean*...and *Babcock*...it was Ontario's notorious gratuitous passenger law. In *Chaplain*...it was the unavailability of general damages under Maltese law. In *La Van* v. *Danyluk* ...it was the absence of a contributory negligence statute under Washington law. In *Tolofson*, as between father and son (residents of British Columbia), it is Saskatchewan's guest passenger law and the short limitation period for infants under Saskatchewan law."
[181] *Britton* v. *O'Callaghan et al.*, [2002] 62 O.R. (3d) 95 (C.A.).

Regency Corp. v. *Maalouf* regarding the threshold that must be met for a public policy exception:

> The common ground of all expressed reasons for imposing the doctrine of public policy is essential morality. This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred.[182]

Castel concurs that foreign law will only be refused on public policy grounds if its application would violate "some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the forum".[183] Given this strict standard, it seems *the lex loci delicti* will only be replaced in claims of extraterritorial harm, where they clearly violate basic norms of human rights or justice in Canada. Such a scenario could arise, for example, where foreign laws deny victims a cause of action for their injuries, limit their compensation to a level that is grossly insufficient for their care, or where they are clearly incompatible with providing a fair trial. Where the foreign law violates such norms of justice and human rights, there is arguably also less legitimacy to any expectation by the defendant or the foreign state that the *lex loci delicti* will apply. Returning to the purpose of choice of law in the *forum non conveniens* test, the author would like to note that a decision overturning the applicaton of *lex fori delicti* for reasons of "injustice", would also weigh in favour of Canada as the appropriate forum.

The author would also like to note that the preceding discussion on *lex loci delicti* applies to the substantive law that would be used to decide the merits of a case. In Canadian courts, the *lex fori* is always applied to procedural matters, even if foreign law applies to the substantive issues. This distinction is significant for foreign plaintiffs who are able to proceed with their claims in Canada, as it is a long established principle in Canada that the quantification of damages is a matter of procedure that is decided by the laws of the Canadian forum.[184] This means that

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[182] *Boardwalk Regency Corp.* v. *Maalouf* (1982), 6 O.R. (3d) 737 (C.A.) at 743.
[183] Castel, "Canadian PRIL", *supra* note 107 at 172.
[184] *Boys* v. *Chaplin*, [1969] 2 All E.R.1085 (H.L.), established that the quantification of damages is a matter of procedure; See also Castel, "Intro to PRIL", *supra* note 8 at 213; and *Wong, supra* note

foreign plaintiffs from a developing country may still be awarded higher damages than those available in the alternative forum if they are able to try their claim in a Canadian court. Of course, the flipside to this is that plaintiffs from a jurisdiction with higher awards than Canada will want to reconsider before proceeding in Canada!

Geographical factors suggesting the natural forum

It is highly unlikely that the issue *forum non conveniens* will ever be raised in tort proceedings unless at least part of the tort occurred outside the forum. It is clear that a court will exercise jurisdiction over a tort committed within the forum. Just as clear is the preference for staying proceedings where claims arise strictly from conduct outside the forum. Courts do sometimes accept jurisdiction over a tort that occurred elsewhere, but only if there are other factors demonstrating a strong connection between the matter and the forum. And as we discussed previously, common-law jurisdictions do not regard the defendant's domicile in a forum sufficient proof of a strong connection between the court and a matter. For these reasons, geography will weigh against Canada's acceptance of jurisdiction over extra-territorial claims by foreign plaintiffs.

This factor may provide less of an obstacle to foreign plaintiffs where there is a claim that at least part of the tort was committed in Canada. This was the fact scenario in *Cambior*, where the plaintiffs claimed that some negligence by Cambior had taken place in Quebec through "the various decisions which Cambior made with respect to the design, construction, management and operation of the mine and tailings pond."[185] However, in *Cambior*, Maughan J. did not assign any weight to these claims. While Maughan J. remained open to the possibility that fault had occurred in Quebec, he concluded that the construction, daily management, operation and physical erosion of the mine in Guyana favoured Guyana as the appropriate forum.[186] As we shall examine in a later

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171 at para. 40, where the British Colombia Superior Court noted "it is clear that the weight of current judicial and academic authorities supports the proposition that the quantification or assessment of damages is a matter of procedural law to be decided in accordance with the law of the forum."

[185] *Cambior, supra* note 2 at para. 60.

[186] *Ibid.* at paras. 61-62.

section, U.K. courts have reached the opposite finding in cases where there are claims that negligence took place in the forum. As this factor involves a question of fact, it is difficult to predict how courts will respond to such claims in the future. Nevertheless, the treatment of this factor in claims by foreign plaintiffs may change in the future if our courts adopt the legal precedent from the U.K. that weight should be assigned to credible claims of negligence occurring within the forum.

Location of defendant's assets

The insufficiency of assets in the foreign forum is likely one of the most important factors that motivates foreign plaintiffs to proceed against a multinational in the forum of its headquarters, where companies typically have greater assets available to satisfy a judgment. Indeed, multinationals regularly incorporate subsidiaries to conduct their activities overseas, for the specific purpose of sheltering the shareholders of the parent company from risk.[187] Through this technique, the parent company can reduce losses to their operations by deliberately avoiding the accumulation of assets within the forum of the subsidiary, which could be used to satisfy a judgment.[188] Where attempts are made to bring claims against the parent company for the activities of the subsidiary, the parent is often able to shield itself on the basis of their separate legal identity.[189] Courts have responded to the injustice that arises where a subsidiary is incorporated for the sole purpose of shielding a parent corporation from liability by devising a test that permits a court to "pierce the corporate veil,"[190] and hold a parent company responsible for the conduct of a subsidiary where the parent controls the latter to such an extent, it can be said the subsidiary has no independence and acts as a mere agent for the parent.[191]

As courts recognize the importance of permitting litigation in the forum where a defendant's assets are located for justice to be done, evidence that these assets

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[187] See VanDuzer, *supra* note 41.
[188] See VanDuzer, *supra* note 41.
[189] Separate legal identity is a key feature of incorporation. See *ibid.*
[190] The *Dictionary of Canadian Law*, 2nd ed. (Toronto: Carswell, 1995), defines "pierce corporate veil" as "[t]o find corporate officers or directors liable or responsible for acts where the existence of the corporation would ordinarily shield them from liability of responsibility" at 899.
[191] *Smith, supra* note 41; See also VanDuzer, *supra* note 41.

are not available in the alternative forum will weigh against the dismissal of the action. Rather than assume jurisdiction, some courts however, take a less intrusive approach to the foreign jurisdiction by dismissing the action with the condition that the defendant will provide a security in the alternative forum that can be used to satisfy a possible judgment.[192]

In *Cambior*, Maughan J. found that Cambior had assets in both Quebec and Guyana and accepted the proof submitted by Cambior that its assets in Guyana were "sufficient to satisfy any adverse judgment against Cambior in Guyana."[193] As such, this factor did not weigh in favour of Canada's jurisdiction. According to an employee of a non-governmental organization that worked with the Guyanese plaintiffs in the *Cambior* case, the plaintiffs have since discovered the defendant does not in fact have sufficient assets in Guyana to satisfy a judgment there.[194] These plaintiffs will surely face an uphill battle in amassing the requisite resources, if they wish to mount an appeal of the *Cambior* decision on the grounds that Cambior misled the court with respect to its assets. This case serves an important lesson of the care a court in Canada must take in reaching its decisions on the *forum non conveniens* test. A stay may indeed quash any real hope that foreign plaintiffs will achieve justice.

Whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in a domestic court?

The last factor that is considered by a court in Canada in the *forum non conveniens* test is whether a stay would deprive the plaintiff of a legitimate juridical advantage available in a domestic court. This is perhaps the most important factor for foreign plaintiffs attempting to bring an action against a defendant in Canada for harm that has arisen elsewhere. As we have seen, the other factors considered in the *forum non conveniens* test will tend to weigh in favour of staying such claims. As such, this factor presents the last hope for convincing a Canadian court to accept jurisdiction in their case.

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[192] See Castel, "Canadian PRIL", *supra* note 107 at 257.
[193] *Cambior, supra* note 2 at para. 65.
[194] Telephone conversation with Dermod Travis, a former employee of Greenpeace Quebec who has worked to support the legal efforts of the Guyanese plaintiffs from *Cambior, supra* note 2 (20 July 2005).

While juridical advantage is now considered along with the *forum non conveniens* factors in a single-step test,[195] it appears this factor can still single-handedly lead to a court's assumption of jurisdiction, even though there is another forum that is otherwise more appropriate. Juridical advantage carries this weight as a result of the principle, articulated by Ritchie J. in *Antares*, that courts in Canada must not stay an action in favour of another more "convenient" forum unless it is also likely that the parties will be able to seek justice in the alternative forum. In the view of Ritchie J., "...the overriding consideration which must guide the Court in exercising its discretion by refusing to grant such an application as this must, however, be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice."[196] Ritchie J. also emphasized in *Antares*, the conclusion reached in British jurisprudence that *forum non conveniens* "means not the "convenient" Court, but the "appropriate" Court, or the Court "more suitable for the ends of justice".[197] These passages all serve to emphasize that the "interests of justice" are the primary consideration in a *forum non conveniens* test. This objective, in turn, explains the weight that Canadian courts accord to the plaintiff's loss of a legitimate juridical advantage in determining whether to stay proceedings.[198]

As we have previously discussed, the Supreme Court of Canada's approach to juridical advantage was articulated in *Amchem*:

> The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in

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[195] As discussed in an earlier section of this paper, the Supreme Court of Canada compressed the *forum non conveniens* test from a two-step to single-step test in *Amchem*, *supra* note 11.
[196] *Antares Shipping*, *supra* note 93 at 448.
[197] *Antares*, *supra* note 93, citing *The Atlantic Star*, [1973] 2 W.L.R. 795 [*The Atlantic Star*] at 820; Also see Castel, "Intro to PRIL", *supra* note 8 at 96.
[198] See D.J Carney, "Forum Non Conveniens in the United States and Canada" (1996) 3 Buff. J. Int'l L. 117 at 148, for an analysis of the importance paid to juridical advantage in Canadian courts.

> the event of litigation arising out of the transaction in question, those advantages will be available.[199]

This passage by Sopinka J. clearly asserts that only "legitimate juridical advantages" will be considered in the *forum non conveniens* test, and that the weight accorded to this factor is a function of the proximity of connections between the case and the jurisdiction. In the following discussion, each of these elements will be addressed in turn.

Castel states that it is difficult to provide an exhaustive list of all the legitimate personal and juridical advantages, which will weigh in favour of a court's jurisdiction over a claim, given the very fact-specific nature of this determination.[200] With this proviso out of the way, Castel obligingly provides the following list of personal and juridical advantages that courts in Canada and England have considered potentially legitimate:

> A cheaper or quicker trial; security for the amount of the claim; better pre-trial discovery procedures; higher damages; higher limits of insurance; special legislation for the protection of investors; an award of interest; a more generous limitation period; a local remedy not available in the alternative forum; or a lighter burden of proof; that the court would apply choice of law rules which would result in a summary judgment for the plaintiff; that the substantive law of the forum is more favourable to the plaintiff; that there are exigible local assets; that a defense in the alternative forum is not available locally; that the substance of the transaction took place in the forum; that the local action is more comprehensive; or that there are differences in rights, remedies and procedures in the other forum. The plaintiff may also fear arrest in the alternative forum or may be unable to collect on the judgment in the alternative forum...Legal aid has also been considered to be a juridical advantage.[201]

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[199] *Amchem, supra* note 11 at para. 32.

[200] Castel, "Canadian PRIL", *supra* note 107 at 238.

[201] See Castel, "Canadian PRIL", *supra* note 107 at 258 and 259 for the citations of cases that have considered each of these personal or juridical advantages; See also Farrow, *supra* note 27 at para. 106, for a list of Canadian cases that have considered whether a stay should be denied to provide the plaintiffs with more advantageous access to evidence and witnesses.

Forcese notes that many of these factors require the court to Canadian courts to "weigh the relative advantages and obstacles to a fair trial."[202] The range of personal and juridical advantages considered potentially legitimate by the courts demonstrates that courts in Canada are competent to accept jurisdiction where the evidence suggests that plaintiffs will not receive a fair trial in the alternative forum. Of course, whether they will be willing to make this finding in claims by foreign plaintiffs remains to be seen. Cambior was the first, and only case to date, involving a claim of extraterritorial harm by a plaintiff from a developing country against Canadians. And as we shall discuss shortly, the court rejected that it was necessary to assume jurisdiction in the case, for the interests of justice.

Before continuing, it may be helpful to highlight at this time that courts will not consider whether a stay would deprive the plaintiff of advantages in the forum law if the choice of law is foreign.[203] This means that where a claim alleges harm outside of Canada, the advantages of Canadian tort law over the tort law of the jurisdiction where the harm occurred should not be considered. This restriction derives from the rule, previously discussed, that the law of the place where the tort was committed, the *lex loci delicti,* should govern tort cases.[204]

The courts' interpretation of the principle in *Amchem*, that courts should accord weight to juridical advantage on the basis of a claim's connections to the jurisdiction,[205] also raises some risk that foreign plaintiffs with extraterritorial claims will suffer prejudice. In *Cortese (Next friend of)* v. *Nowsco Well Service Ltd.*, the Alberta Court of Appeal affirmed a trial court decision, which appears to have excluded the plaintiff's loss of juridical advantage from any weight in its examination of *forum non conveniens* because the factors prior to that one leaned towards the foreign forum.[206] This application of *forum non conveniens* is disquieting in that it would necessarily result, if followed, in the dismissal of claims by foreign plaintiffs who suffer harm outside Canada. As previously

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[202] Forcese, *supra* note 31 at para.100.
[203] *Eastern Power Limited* v. *Azienda Comunale Energia and Ambiente*, [1999] O.J. No. 3275 (C.A.) at paras. 45-47.
[204] *Tolofson, supra* note 151 at para. 42.
[205] See *Amchem, supra* note 11 at para. 32.
[206] *Cortese (Next friend of)* v. *Nowsco Well Service Ltd.*, [1999] A.J. No. 600 (Q.B.) at para. 22, aff'd [2000] A.J. No. 481 (C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 286.

discussed, the other factors in the *forum non conveniens* test will tend to weigh against Canada as the appropriate forum in cases of extraterritorial harm. This determination would be made irrespective of the plaintiff's ability to seek justice against the Canadian defendant in the alternative forum. With due respect, this approach appears to pre-determine the issue of juridical advantage: If the forum is the most convenient, then, and only then, will juridical advantage be considered. Juridical advantage ceases to have any separate influence…or importance. Indeed, this approach appears inconsistent with the objective the Supreme Court of Canada has asserted is the key function of the *forum non conveniens* test – to find the forum "more suitable for the ends of justice".[207] After all, the interests of justice may require, in some cases, that a court exercise its discretion to hear a matter, even though the other factors considered in the *forum non conveniens* test suggest another forum would be more convenient.

The Supreme Court of Canada has already recognized that *forum non conveniens* should not be based on a simple balance of convenience if this would not serve the interests of justice. In *Antares*, Ritchie J. cited a passage from the dissenting judgment of Lord Simon of Glaisdale in *The "Atlantic Star"*,[208] regarding the factors that justified placing a higher burden on defendants to demonstrate *forum non conveniens* in admiralty cases.[209] Of particular relevance to transnational tort cases were Lord Simon's observations that:

> (8) ….A large tanker may by negligent navigation cause extensive damage to beaches or to other shipping: she will take very good care to keep out of the ports of the "convenient" forum. If the aggrieved party manages to arrest her elsewhere, it will be said forcibly (as the appellants say here): "The defendant has no sort of connection with the forum except that she was arrested within its jurisdiction." But that will frequently be the only way of securing justice.
> (9) "Forum-shopping" is, indeed, inescapably involved with the concept of maritime lien and the action *in rem*. Every port is automatically an admiralty emporium. This may be very inconvenient to some defendants; but the system has

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[207] *Antares, supra* note 93.
[208] *The "Atlantic Star", supra* note 197.
[209] *Antares Shipping, supra* note 93.

> unquestionably proved itself on the whole as an instrument of justice.[210]

Richie J. relied in part on this passage by Lord Simon to justify the Court's decision to exercise jurisdiction in the issue at hand, as dismissal would have resulted in the loss of security for the plaintiff, which was available in the local forum. As we have explored throughout this paper, Canada is sometimes the only forum where a foreign plaintiff will be able to secure justice against a Canadian multinational. The initiation of such proceedings may be called "forum-shopping" by some, usually the defendants, but if this is the only way the plaintiffs can seek compensation for the injuries they have suffered, Canadian courts should feel confident that their jurisdiction over the claim serves the interests of justice, and know that this approach has been approved by the highest court in this country. Indeed, the issues at stake in claims against Canadian multinationals are not much different from those the House of Lords faced in the *Atlantic Star*, where developments in admiral shipping had permitted large companies to escape accountability by operating beyond state borders.

Talpis and Kath suggest that the risk of injustice to plaintiffs under the current approach, which treats juridical advantage as only one of many factors considered in *forum non conveniens*, can be overcome by treating the adequacy of the alternative forum as a threshold issue considered at the beginning of the inquiry.[211] The Talpis and Kath proposal would ensure that our courts stay true to the purpose of *forum non conveniens* and take jurisdiction over claims where this is necessary for the "interests of justice". At the same time, this test makes clear that claims by foreign plaintiffs against Canadians for extraterritorial harm should be dismissed, if they can be fairly dealt with in another forum that has closer connections to the case.

In *Cambior*, the plaintiffs placed the greatest weight during the *forum non conveniens* inquiry on their argument they would be denied justice if the claim

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[210] *The "Atlantic Star"*, *supra* note 197 at 197-8.
[211] Talpis & Kath, *supra* note 60 at 79-80.

were heard in Guyana.[212] Their main evidence was presented by William Schabas, a Montreal law professor, who testified there were such deficiencies in the Guyanese legal system, the plaintiffs could not expect to receive a fair trial there. Professor Schabas cited, among other things, a comment by Guyanese Prime Minister Janet Jagan, that the country's judiciary was "corrupt", and a 1996 U.S. State Department Country Report on Human Rights for Guyana, that concluded "the inefficiency of the judicial system is so great as to undermine due process".[213] The plaintiffs also submitted that a stay would deprive them of a legitimate juridical advantage, the class action procedure, available in Quebec.[214]

Cambior responded with their own witness, a retired Guyanese judge. In the words of Maughan J., this former judge testified that "the rule of law has always been observed in Guyana. And as a judge for 20 years, he was never under any pressure to decide a case in accordance with the dictates of a political directorate. Nor did any of his colleagues ever make complaints to him in this regard".[215] In short, it was the opinion of Cambior's witness that Guyana was competent to decide the issues fairly between the parties. Cambior also denied the plaintiffs would be denied the advantages of a class action, if they proceeded in Guyana as this latter had a form of representative action.[216]

Before turning to a consideration of the 'interests of justice' and whether they required the acceptance of jurisdiction by the court, the court examined whether a stay would cost the plaintiffs any loss of legitimate juridical advantage. On this matter, Maughan J. accepted the plaintiff's submission that Guyana's representative action would not offer the same flexibility as Quebec's class action, as "a relatively inexpensive means for dealing collectively with claims for compensation."[217] However, Maughan J. judged that the Guyanese residents had "no legitimate claim to the advantages of the Quebec forum and its class action legislation...because the six connecting factors, taken together, and which the

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[212] *Cambior, supra* note 2 at para. 82.
[213] *Ibid.* at para. 84.
[214] *Ibid.* at para. 71.
[215] *Ibid.* at para. 89.
[216] *Ibid.* at para. 77.
[217] *Ibid.* at para. 76.

Court has already discussed above, point to Guyana as being the natural forum for this litigation."[218] In reaching this determination, it appears Maughan J. was following the recommended approach in *Amchem*, to accord weight to juridical advantage on the basis of a claim's connections to the jurisdiction.[219] While this approach can lead to the irrelevance of justice concerns within the *forum non conveniens* test, as discussed earlier, Maughan J. was able to avoid this result by separating the consideration of juridical advantage from the "interests of justice" and affirming the weight that should be paid to the latter.

In considering the 'interests of justice', Maughan J. affirmed the principle that a Canadian court should dismiss a stay on the grounds of *forum non conveniens* where plaintiffs will not receive a fair trial otherwise. Maughan J. even suggested the plaintiffs' claims were the kind of claims that could persuade a court to accept jurisdiction: "[i]f the court were to accept Professor Schabas' evidence at face value, it would have little hesitation in dismissing Cambior's Declinatory Exception."[220]

Confronted with contradictory evidence by the experts, Farrow states that the decision in *Cambior* came down to the trial judge's assessment of the credibility of each witness.[221] And in the end, Maughan J. preferred the testimony of his fellow judge:

> ...the Court is satisfied that the remedy sought by the victims is available to them in Guyana and that the delays for having their case heard in Guyana are reasonable compared to the delays that exist in this jurisdiction.[222]

In some ways, this decision is not too surprising, as Guyana is not known to be particularly anti-democratic. Forcese makes the following obervation:

> Cambior's case would undoubtedly have been much more difficult to make out if the waste spill had occurred in Burma or Sudan rather than Guyana. Similarly, common sense dictates that a company accused of complicity in human rights abuses by state

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[218] *Ibid.* at para. 77.
[219] See *Amchem, supra* note 11 at para. 32.
[220] *Cambior, supra* note 2 at para. 87.
[221] Farrow, *supra* note 27 at para. 80.
[222] *Cambior, supra* note 2 at para. 98.

> actors will have a difficult time contesting a charge that the countries in which such events occur are unwilling or unable to provide a fair trial to the victims.[223]

But while the facts regarding Guyana's judicial system were not as egregious as in some of the other claims brought by foreign plaintiffs against multinationals in the United States and the U.K.,[224] they were sufficient, if true, to raise doubt about the possibility of a fair trial in Guyana. Maughan J. acknowledged this.[225]

The difficulty, in the words of Maughan J., was that "[i]n the present case, RIQ has failed to bring forward any conclusive and objective evidence to substantiate its belief that Guyana is an inadequate forum due to the many deficiencies which plague its system of justice."[226] This conclusion is somewhat surprising. Recall that the plaintiffs had submitted a quote by the country's own Prime Minister, critiquing Guyana's judiciary, as well as a U.S. State Department Country Report on the poor prospects for due process in Guyana. How could the Prime Minister's opinion or the State Department Report not be considered somewhat conclusive?

One possible explanation, which seems quite plausible, is that the Court considered little weight could be accorded to the type of evidence presented by the plaintiff. Such a conclusion would not be entirely inappropriate, as the two pieces of evidence mentioned above clearly amounted to hearsay or 'out of court statements'. Hearsay is excluded as evidence within criminal proceedings in Canada due to the court's inability to question the authors in court and determine the reliability of their opinions. But this is not the case for civil or other kinds of proceedings. Indeed, our Immigration and Refugee Boards in Canada rely quite regularly on U.S. State Department Country Reports on Human Rights to determine whether there is a risk that a refugee protection claimant would be

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[223] Forcese, *supra* note 31 at para. 108.
[224] For example, the claims by plaintiffs in some U.S. cases, such as *Unocal, supra* note 3, and *Talisman, supra* note 12, have alleged the Government's involvement in the commission of gross human rights abuses against the plaintiffs.
[225] *Cambior, supra* note 2 at para. 87.
[226] *Ibid.* at para. 98.

persecuted if sent back to their home country.[227] It is suggested here that U.S. State Department Country Reports provide evidence that is also sufficiently reliable for the 'interests of justice' test.[228] The impact of a report, which turns out to be wrong, is low compared with a criminal trial – No one will be criminally sanctioned as a result. It would just mean that some plaintiffs were able to proceed in Canada when they could have possibly received a fair trial abroad. And if the report is right, it means the court will have the necessary information available to justify their jurisdiction over a claim and the plaintiffs will have greater prospects of receiving justice. There is little negative impact associated with a court's reliance on out-of-court reports regarding the possibility of a fair trial in another country and much to lose if courts adopt an overly strict approach to hearsay in this test.

Summary

Cambior was the first class action in Quebec or Canadian law against a Canadian company for being the majority shareholder of another company that caused damages overseas.[229] This makes the decision an interesting case study in the way Canadian courts can be expected to respond in the future to other claims by foreign plaintiffs that Canadian or Canadian-owned companies caused damage somewhere in the developing world. There is every reason to believe our courts will face more such claims. Canada's mining and oil companies continue to expand their activities across the globe and to select countries for their expansion that are under conflict or without adequate laws and regulations for protecting the health and safety of workers, neighbouring communities or the environment. Accidents and violence happen, particularly under these circumstances. Similar proceedings being initiated against multinationals in the forum of their headquarters, in the U.S., the U.K. and Australia demonstrate that victims in developing countries are increasingly willing to travel to seek compensation for

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[227] Donald Galloway, *Immigration Law* (Toronto: Irwin Law, 1997).

[228] As we shall examine in a later section, the U.S. Court of Appeals has already ruled in *Bridgeway Corp* v. *Citibank,* 201 F 3d 134 (2d Cir 2000) [*Bridgeway*], that courts can rely on US State Department human rights reports to determine whether an alternative forum is too corrupt to be adequate.

[229] Forcese, *supra* note 31 at footnote 164, citing the Quebec Superior Court in subsequent proceedings in *Cambior, supra* note 2.

their injuries. And, as we shall examine in the next section, courts in common law jurisdictions are increasingly accepting that the interests of justice demand their assumption of jurisdiction in these claims.

The Cambior case is also a striking illustration of how a stay on grounds of *forum non conveniens* can result in the denial of justice for poor plaintiffs from developing countries.[230] Following the dismissal of their claim in Quebec Superior Court, the Guyanese plaintiffs attempted to bring their claim in Guyana, the forum that Maughan J. had identified as being the appropriate one. Once again, the plaintiffs were denied the opportunity to make their claims against Cambior. In March 2000, the proceedings were dismissed in Guyanese court on the basis of a defect in service.[231] Talpis and Kath comment that this "is especially interesting in light of the fact that Cambior had indicated, in its arguments before the Superior Court in Quebec that it would accept jurisdiction in Guyana, while maintaining its claim of nonliability."[232] Still hoping the March 2000 decision can be overturned, the claimants are now attempting for a third time to have their claims heard in court. In 2003, they brought a class action in Guyana against the company and others, asking for approximately US $2 billion in compensation.[233] This proceeding is still pending.[234] Meanwhile, an employee of Mining Watch, a Canadian non-governmental organization that has worked with the Guyanese residents, claims that the Omai mine continues to dump toxic substances into the local river and no adequate guarantees have been made to ensure cleanup following the closure of the mine, which is scheduled for the near future.[235] But even if the plaintiffs are eventually successful with their claims in

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[230] For a study of how rarely cases are re-litigated in the alternative forum after dismissal for *forum non conveniens* in a U.S. court, see J. Duval Major, "One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff" (1992) 77 Cornell L. Rev. 650.
[231] Talpis & Kath, *supra* note 60 at 87.
[232] *Ibid.*
[233] See the plaintiffs writ of action on the web page of U.S. lawyer Dennison Smith, who works with the National Committee for Defence Against Omai and acted as co-counsel to the Guyanese plaintiffs in *Cambior, supra* note 2, online: Sax and Kali <http://saxakali.com/omai/May%202003%20Claim.htm>.
[234] Email from Dennison Smith, a U.S. lawyer who acted as co-counsel to the Guyanese plaintiffs in *Cambior, supra* note 2 (30 July 2005).
[235] Telephone conversation with Jamie Kneen of Mining Watch Canada, an organization that has supported the Guyanese plaintiffs in *Cambior, supra* note 2 (July 20 2005).

Guyanese court, they may have to come back to Canada to satisfy their judgment. It has recently been discovered that Cambior does not have sufficient assets to satisfy a Guyanese judgment.[236] Indeed, the plaintiffs allege that Cambior misled Quebec court on this matter. If true, this factor should weigh heavily in favour of Canada as the appropriate forum for the claims, considering the importance this factor played in Maughan J.'s determination that the plaintiffs could receive justice in Guyana and enforce a judgment there. However, it remains unclear at this stage, how the plaintiffs will amass the necessary resources, and whether they even have the will, to return to Canadian courts for years of litigation.

Talpis and Kath state that "[g]iven the realities associated with *forum non conveniens* dismissals...it seems that often *forum non conveniens* is simply another legal fiction with a fancy name to shield alleged wrongdoers, rather than an important tool for the wise and efficient administration of justice."[237] It has also been observed that because "different justice will be dispensed in different jurisdictions, the decision to afford or deny jurisdiction is a threshold decision that ultimately may mean the difference between meaningful justice gained and meaningful justice denied."[238] One hopes that the *Cambior* case will serve as an important reminder to courts of the high stakes involved with the *forum non conveniens* test, and also, the need to restrict stays to cases where the defendant has clearly demonstrated that there is another appropriate forum where the interests of justice will be better served.

In spite of all these hurdles, Forcese is optimistic: "there is reason to conclude that foreign plaintiffs suing a Canadian corporation, served *in juris* in Canada for abuses stemming from overseas militarized commerce might well succeed in persuading a Canadian court that it has jurisdiction *simpliciter* and, owing to circumstances overseas inhospitable to a fair trial, that the *forum non conveniens* analysis favours Canada."[239] I would like to add to this that it is also possible

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[236] Telephone conversation with Dermod Travis, a former employee of Greenpeace Quebec, who has worked to support the legal efforts of the Guyanese plaintiffs from *Cambior, supra* note 2 (20 July 2005).
[237] Talpis & Kath, *supra* note 60 at para. 147.
[238] Farrow, *supra* note 27 at para. 54.
[239] Forcese, *supra* note 31 at para. 109.

foreign plaintiffs will be able to proceed in a Canadian court with tort claims for environmental damage or work-related heath injuries caused overseas, if the defendant is a Canadian resident, and the plaintiff is unlikely to receive a fair trial abroad. Canadian laws may even be applied to determine the substantive issues in these claims if the foreign laws from the place where the injury was suffered are contrary to Canadian public policy.

In anticipation that our courts will be hearing more claims in the future regarding damages caused by Canadians overseas, we will now turn to an examination of the *forum non conveniens* test in the U.K., the U.S. and Australia. In particular, we will examine the factors that have persuaded the courts in these countries that they were the appropriate fora for considering claims that their residents caused damage to foreign plaintiffs in developing countries.

III – Comparing Canada's Application of Forum Non Conveniens

A review of the *forum non conveniens* test in the United Kingdom, the United States and Australia will confirm that the doctrine operates similarly in these other common law countries, by granting courts the discretion to dismiss proceedings where there is another forum that is more appropriate for the action.[240] The application of the doctrine within these countries is also similar in that their courts will decline to stay proceedings, even though the balance of convenience favours another forum, if this would prevent the plaintiff from receiving justice.

The other purpose of the following section will be to examine how the doctrine of *forum non conveniens* has already been applied within courts of the U.K., the U.S. and Australia to justify their acceptance of jurisdiction in cases against multinationals incorporated in their forum, who are accused of causing damage to plaintiffs overseas. Given the similarities between our tests of *forum non conveniens*, the author suggests these precedents are likely to be persuasive to Canadian courts. As such, they also support the prediction that our courts will accept jurisdiction, one day, over claims brought against a Canadian defendant for causing injury to foreign citizens abroad, if there is clear evidence the plaintiffs would not receive justice in their home forum.

The United Kingdom

In the whole of Europe, only the courts in the United Kingdom and Ireland have recognized a judge's discretion to decline jurisdiction in a case on grounds of *forum non conveniens*.[241] Part of this divide, can be explained by the difference in legal traditions followed across Europe. As we have noted before, the civil law tradition followed by many European countries, has never recognized the doctrine of *forum non conveniens*.[242] Furthermore, the *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, which applies throughout Europe, requires courts to accept jurisdiction in claims against

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[240] The similarities between the approaches to *forum non conveniens* in various common law jurisdictions has been previously examined in *Amchem, supra* note 11 at para. 34; *Spiliada Maritime Corp.* v. *Cansulex*, [1986] 3 All E.R. 843 [*Spiliada*]; and by Ellen L. Hayes, "Forum Non Conveniens in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation" (1992) 26 U.B.C. L. Rev. 41 at 63.

[241] Meeran, "Liability of MNCs", *supra* note 6 at 255.

[242] *Aberman, supra* note 83 at 391.

a resident of its forum, if the plaintiff is from a contracting state to the convention.[243] Indeed, the adoption of the *Brussels Convention* in 1968, has already restricted the circumstances where the doctrine of *forum non conveniens* can be applied within the United Kingdom. It has only been in relation to claims against their nationals by plaintiffs from non contracting-states that the courts in the U.K. have continued to recognize their discretion to stay proceedings on *forum non conveniens* grounds.[244] And following a very recent decision by the European Court of Justice, which we shall examine shortly, even this application of the doctrine may be unavailable in the future.[245]

English law on *forum non conveniens* was originally received from Scottish law, which was "designed to ensure that commercial disputes be heard in the country where they could be resolved most cost efficiently."[246] As discussed earlier, the original British test for *forum non conveniens* was very narrow, only permitting a stay of proceedings where the action was oppressive, vexatious or an abuse of process.[247]

Lord Diplock in *Rockware Glass* v. *MacShannon* later modified this rule in a new, two-step test:

> (a) The defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and, (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court. [248]

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[243] *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 27 September 1968, O.J.E.C. 1998 27/01C at art.2, online: The Court of Justice of the European Communities <http://www.curia.eu.int/common/recdoc/convention/en/c-textes/_brux-textes.htm> [*Brussels Convention*]. Article 2 of the *Brussels Convention* states that: "Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State."

[244] See *In re Harrods (Buenos Aires) Ltd.* [1992] Ch. 72, where the Court of Appeal held that the discretion of the court to grant a stay in favour of a non-contracting state was unaffected by the *Brussels Convention*; Also see Richard Fentiman, "Stays and the European Conventions - end-game?" (2001) 60 Cambridge L.J. 10 at 10 [Fentiman]; and Edwin Peel "*Forum Non Conveniens* Revisited" (2001) 117 Law Q. Rev. 187 at 192.

[245] See *Owusu* v. *Jackson and Others*, "Judgement of the European Court of Justice – Grand Chamber," C-281/02 (March 1 2005), online: European Court of Justice <http://www.curia.eu.int/en/content/juris/index_form.htm> [*Owusu*].

[246] Meeran, "Liability of MNCs", *supra* note 6 at 254.

[247] See *St. Pierre, supra* note 90; See also Feldman & Vella, *supra* note 11 at 163.

[248] *Rockware Glass Ltd.* v. *MacShannon*, [1978] A.C. 795 at 812.

With the test in *MacShannon* then, the House of Lords modified the forum non conveniens test from St. Pierre to consider the balance of convenience and justice to the parties, following changes that took place in Canada just a few years before.

Two years later, the law on *forum non conveniens* in English was developed even further by Lord Goff of the House of Lords in *Spiliada Maritime Corp.* v. *Cansulex*.[249] To this day, *Spiliada* remains the leading decision on *forum non conveniens* in the U.K.[250] Lord Goff enunciated the *Spiliada* approach to forum non conveniens, as follows:

> The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.[251]

The test from Spiliada thus emphasized, that a stay would not be granted if it would prevent the plaintiff from seeking justice. This second step of the test has since been qualified to preclude the availability of a stay to cases where "substantive justice" would not be done.[252] The House of Lords also emphasized, in *Spiliada*, the shifting burden of proof in the British *forum non conveniens* test. Once a defendant has met the burden of showing another forum is more appropriate, the burden shifts to the plaintiff to demonstrate a stay should not be granted, as they will not receive justice in the other forum.[253] This is unlike the Canadian test, as previously discussed, where the burden remains on the defendant during the entire enquiry.

While the onus on the plaintiff in the British test is arguably harder for plaintiffs to meet, as any uncertainty in the second step will be resolved in favour of the defendant, the courts in the U.K. have already refused a *forum non conveniens* stay in a few cases, where it appeared the plaintiffs would not receive

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[249] *Spiliada, supra* note 240; See also Talpis & Kath, supra note 60 at para. 20.
[250] Talpis & Kath, *supra* note 60 at para. 25.
[251] *Spiliada, supra* note 240 at 467.
[252] *de Dampierre* v. *de Dampierre*, [1987] 2 All E.R. 1 at 11 and 12.
[253] *Spiliada, supra* note 240 at 854.

substantial justice in the alternative forum. These interpretations of 'injustice' in English court have arguably, been bolder than similar judgments in the U.S. and Australia, in that they haven't depended on evidence of corruption or the unlikelihood of a fair trial in the alternative forum. It has been enough for plaintiffs to show that the practical effect of a stay would mean they were unable to seek justice abroad. By basing its decisions on such practical matters, such as availability of funding, the U.K. courts have found a unique way to justify their refusal to stay proceedings, which also avoids the political embarrassment that could arise from the evaluation of 'fairness' in another country's legal system.

Tortious Conduct in the Home Forum: *Ncgobo* and *Sithole*

The two cases brought against Thor chemical by South African workers in the 1990s, are an example of how foreign plaintiffs have persuaded courts in the U.K. not to dismiss their actions, even though the injuries occurred abroad, by emphasizing the tortious conduct that took place in the defendant's home forum. In *Ngcobo and others* v. *Thor Chemical Holdings Ltd.,* 20 workers brought claims against Thor and its Chairman, Desmond Cowley, in English High Court after three workers at the company's operations in Cato Ridge, South Africa, died in 1992, and many others were allegedly poisoned by mercury.[254] The plaintiffs alleged that Thor Chemical Holdings, the parent company, was liable because of its "negligent design, transfer, set-up, operation, supervision and monitoring of an intrinsically hazardous process", much of which, they alleged had taken place in England.[255] Meeran explains that Thor's attempt to stay the case on *forum non conveniens* grounds was dismissed by Deputy High Court Judge Mr. James Stewart because it was judged that there were significant connections between the claim and England and because of the likelihood that English law would be applied.[256] This decision contrasts with the ruling by the Quebec Superior Court in *Cambior* where Maughan J. rejected the plaintiff's claims that Cambior's negligent conduct in Quebec favoured Quebec as the most appropriate forum for

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[254] *Ngcobo and others* v. *Thor Chemical Holdings Ltd. and another,* unrep. (H.C.J.), as cited by Meeran, "Liability of MNCs", *supra* note 6 at 256.
[255] *Ibid.*
[256] *Ibid.*

hearing claims the company caused damages to the plaintiffs in Guyana. The decision may indicate a broader interpretation of the "place of injury" in the U.K., which encompasses both the "place of injury" and the "place of wrongdoing," instead of only the former, as in Canada.[257] This is difficult to determine, however, on the basis of this case alone, as the decision was from a lower court. The appeal of the case did not provide further consideration of these matters, as the case was struck when it was judged that Thor had acceded to the jurisdiction of the court by serving a statement of defence.[258] Thor settled with the plaintiffs after this decision, in 1997, for 1.3 million pounds.[259]

Following the success of the original plaintiffs in seeking compensation for their injuries, twenty-one new claims were initiated against Thor in 1998.[260] Thor attempted again to stay the new claims on *forum non conveniens* but this was also rejected by a trial court. The Court of Appeal also refused Thor leave to appeal,[261] suggesting that the plaintiffs' approach in *Ncgobo,* to emphasize wrongdoing in England, is indeed persuasive in English courts. Thor settled shortly afterwards with the Sithole plaintiffs for £270,000.[262] Once again, the loss of a *forum non conveniens* motion had acted as the impetus for an offer of compensation.

The Injustice of Inadequate Funding: *Connelly* and *Lubbe*

As we discussed in an earlier section, a plaintiff will only be able to persuade a court in the U.K. to displace a foreign forum that is more 'natural' for the proceedings, if they can establish that substantial justice will not be done in the appropriate forum. In *Connelly* v. *R.T.Z. Corp.*[263] and *Lubbe* v. *Cape plc.,*[264] courts in the UK were confronted with the question of whether lack of funding in the alternative forum represented substantial injustice.

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[257] The difference in the UK approach will be addressed in a later section of this paper.
[258] *Ngcobo, supra* note 16.
[259] Meeran, "Liability of MNCs", *supra* note 6 at 256.
[260] *Sithole and others* v. *Thor Chemical Holdings Ltd. and another,* unrep. (H.C.J.), as cited by Meeran, "Liability of MNCs", *supra* note 6 at 256.
[261] *Sithole,* supra note 16.
[262] Richard Meeran, "Thor Workers Accept Offer of Settlement - Press Release: 12 October 2000," online: LabourNet <http://www.labournet.net/world/0010/thor2.html>.
[263] *Connelly, supra* note 16.
[264] *Lubbe, supra* note 16.

The courts first considered this question in the *Connelly* case.[265] The case involved a claim for compensation by Edward Connelly, a former employee of the Rossing uranium mine in Nambia owned by a subsidiary of RTZ, who now suffered from laryngeal cancer.[266] Connelly alleged his cancer was caused by uranium dust exposure in the mine and the RTZ companies in England were responsible for his injuries due to "key strategic technical and policy decisions they made regarding the Rossing mine," including decisions to increase output from the mine "without ensuring adequate protections were taken to protect workers from the hazards of uranium dust exposure."[267]

Connelly submitted that his action should not be stayed on grounds of *forum non conveniens,* as the lack of financial assistance for litigation in Namibia meant that substantial justice would not be done there.[268] The House of Lords accepted Connelly's argument in a 4-1 majority. Writing for the Court, Lord Goff concluded:

> There is every reason to believe that this case calls for highly professional representation, by both lawyers and scientific experts, for the achievement of substantial justice, and that such representation cannot be achieved in Namibia. In these circumstances, to revert to the underlying principle, the Namibian forum is not one in which the case can be tried more suitably for the interests of all the parties and the ends of justice. [269]

After succeeding in convincing England's highest court to accept this novel interpretation of substantial injustice, Mr. Connelly's claims were struck out in 1998, on the basis that the limitation period for the claim had expired.[270]

Lubbe is another, more recent decision by the House of Lords examining whether lower and less certain financial support in the alternative forum was sufficient to find that substantial justice would not be done.[271] The Court followed

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[265] *Connelly, supra* note 16.
[266] Meeran, "Liability of MNCs", *supra* note 6 at 256.
[267] *Ibid.*
[268] *Ibid.* at 257.
[269] *Connelly, supra* note 16 at para. 32.
[270] See Meeran, "Liability of MNCs", *supra* note 6 at 258.
[271] *Lubbe, supra* note 16.

the decision in *Connelly* and found that it was, overturning the decision of the Court of Appeal to stay the action in favour of South Africa.

The claims in *Lubbe*, described as "tragic" by one observer,[272] were brought by over 3000 plaintiffs from South Africa, mostly "black and of modest means", against the English parent company of the subsidiary where they worked, for significant injuries and death caused by exposure to asbestos. The plaintiffs claimed the defendant was negligent because it had failed to take proper steps to ensure adequate health and safety precautions were followed by its overseas subsidiaries, even though it knew that exposure to asbestos was dangerous to health. It was also suggested the company knew or ought to have known that conditions at the Cape Penge mine would cause adverse health effects for workers, as the levels of asbestos dust in the 1970s were several times higher than the limit permitted in the U.K., at that time.[273] Dr. Gerrit Schepers, a government health inspector, describes the condition of child workers at the mine, as follows:

> Exposures were crude and unchecked. I found young children completely included within large shipping bags, trampling down fluffy amosite asbestos, which all day long came cascading down over their heads. They were kept stepping down lively by a burly supervisor with a hefty whip. I believe these children to have had the ultimate of asbestos exposure. X-ray revealed several to have asbestosis with cor pulmonale before the age of 12.[274]

The House of Lords agreed with the decision of the trial judge and the Court of Appeal at the first stage of the *forum non conveniens* test, that South Africa was clearly the more appropriate forum for the action. The main issue to be decided was whether the U.K. should, nonetheless, refuse to stay the proceedings as the plaintiffs had succeeded in demonstrating that substantial justice would not be done in the more 'natural' South African forum.

The principal argument advanced by the plaintiffs was that the absence of adequate financial support in South Africa made it practically impossible for them

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[272] Farrow, *supra* note 27 at para. 69.
[273] See *Lubbe, supra* note 16 at para. 20 where the Court of Appeal summarizes the plaintiff's claims; See also Meeran, "Liability of MNCs", *supra* note 6 at 258.
[274] Meeran, "Liability of MNCs", *supra* note 6 at 258-259.

to achieve substantial justice in the forum. The House of Lords summarizes the plaintiffs arguments as follows:

> ...legal aid in South Africa had been withdrawn for personal injury claims, that there was no reasonable likelihood of any lawyer or group of lawyers being able or willing to fund proceedings of this weight and complexity under contingency fee arrangements ... and that there was no other available source of funding open to the plaintiffs.[275]

The plaintiffs' ability to enforce an award in South Africa was also less likely as Lubbe had not had assets in the country for twenty years.[276] It can also be surmised that the lower value of damages available to a successful claimant was a third reason why the claimants wished to sue the defendants in England.[277]

The Court applied the principles set out in *Spiliada* to reach the conclusion that substantial justice would not be met if the plaintiffs did not have access to legal funding for proceeding in South Africa:

> Since as the *Spiliada* case makes clear, a stay will not be granted where it is established by cogent evidence that the plaintiff will not obtain justice in the foreign forum, I cannot conceive that the court would grant a stay in any case where adequate funding and legal representation of the plaintiff were clearly judged to be necessary to the doing of justice and these were clearly shown to be unavailable in the foreign forum although available here.[278]

Lord Bingham's determination that a trial was not possible in South Africa without legal support led the court to conclude, in turn, that the plaintiffs could not achieve substantial justice if they had to proceed in the alternative forum. As such, the defendant's motion for a stay had to be denied.

Other factors may have also contributed to the Court's finding. Briggs suggests for example, that the absence of class actions may have contributed to the conclusion that the plaintiffs would be denied justice if their action in England were stayed, as it would have made it unlikely the plaintiffs could seek financial

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[275] *Lubbe, supra* note 16 at para. 24.
[276] Muchlinsky, *supra* note 28 at 18.
[277] Adrian Briggs, "Forum conveniens and the Impecunious Claimant: Lubbe v. Cape plc" (2000) 71 Brit. Y.B. Int'l L.435 at 436 [Briggs].
[278] *Lubbe, supra* note 16 at para. 29.

support for their litigation in the way of a contingency agreement.[279] Any concern that accepting jurisdiction would intrude on South Africa's sovereignty was also alleviated by the Government's submissions in support of the litigants. This response appears to have been motivated by the post-apartheid Government's recognition that the entrenched racism of the applicable South African laws provided substantially less protection and compensation for black workers injured on the job.[280]

Peel notes that the finding in *Lubbe* could be interpreted as being at odds with the principle that loss of procedural advantage is not enough to refuse a stay on grounds of *forum non conveniens*.[281] Indeed, the decision has been criticized by Briggs, in part, because the author fears it may lead to the exercise of jurisdiction by English courts in all cases where the claimant can show that contingency fee arrangements are not available in the natural forum, including cases where the defendant is not domiciled in England.[282] Such a result would seem unlikely in Canada however, as the interests of justice are only considered within the *forum non conveniens* test after the court has already established it has jurisdiction on the basis of the defendant's ordinary residence within the jurisdiction or a real and substantial connection with the subject matter. As this paper does not delve into the test for a real and substantial connection, the focus being cases where jurisdiction is based on the residence of the defendant within the forum, it should suffice to mention here that the test is strict and will not be met unless there are significant connections between a forum and the subject matter of a dispute.[283] The risk then, that foreign plaintiffs could successfully begin using Canadian courts to sue defendants who weren't even Canadian appears rather implausible.

Furthermore, it was acknowledged by the Court in *Lubbe* that, "generally speaking, the plaintiff must take a foreign forum as he finds it, even if it is in

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[279] Briggs, *supra* note 277 at 437.
[280] Muchlinsky, *supra* note 28 at 21, citing "Plaintiffs' Submission" at para. 4.5.
[281] Peel, *supra* note 242 at 190.
[282] Briggs, *supra* note 277 at 438.
[283] The test for a real and substantial connection was elaborated in *Morguard, supra* note 66 at 181.

some respects less advantageous to him than the English forum."[284] Lord Goff even emphasized in *Connelly* that a court should not grant a stay because of lack of funding in the alternative forum, unless there are exceptional circumstances.[285] Peel argues the decision in *Lubbe* is consistent with prior jurisprudence and met the condition of exceptionality as "the level of complexity of the claims [was such] that there was no prospect that they would be heard *at all* in South Africa, without the financial support which the House had found not to be available."[286]

As a result of the decision in *Lubbe*, a case will no longer be stayed in the U.K. where the result is that the claimant will not be able to bring their claim in the alternative forum due to a shortage of funds.[287] Following these cases, the Lord Chancellor's Department became concerned over the prospect of English courts becoming flooded with claims by foreign plaintiffs and the legal aid fund being drawn on too heavily.[288] As a result, legal aid is no longer available for most personal injury claims.[289] Nevertheless, *Connelly* and *Lubbe* still provide a precedent that can be used by foreign plaintiffs to block a *forum non conveniens* stay, if they can show the complexity of their case requires a contingency agreement to financially support their litigation and this is not available in the alternative forum as it is in the home forum. The decision in *Lubbe* also appears to have motivated Cape to reach an out-of-court settlement with the plaintiffs. On March 13, 2003, three settlement agreements were signed that will provide millions in compensation for the plaintiffs in this class action and for environmental remediation efforts.[290]

No Discretion to Decline Cases Against Residents: *Owusu*

In *Lubbe*, Lord Bingham held it was unnecessary to consider whether article two of the *Brussels Convention* prevented the court from granting a stay.[291] As noted earlier, the *Brussels Convention* makes it mandatory for a court to exercise

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[284] *Lubbe, supra* note 16 at para. 17.
[285] *Connelly, supra* note 16 at para. 30.
[286] Peel, *supra* note 242 at 190.
[287] Briggs, *supra* note 277 at 436.
[288] Peel, *supra* note 242 at 191.
[289] *Ibid.* at 191.
[290] Meeran, "Cape plc", *supra* note 6 at 9.
[291] *Lubbe, supra* note 16 at para. 69.

its jurisdiction, including where the jurisdiction is based on the residence of the defendant within the forum.[292] Until recently, it remained unclear however, whether the courts had the discretion to decline jurisdiction where the foreign plaintiff was from a non-contracting state. In *Re Harrods (Buenos Aires) Ltd*, the Court of Appeal held that the *Brussels Convention* did not prohibit courts in the UK from exercising their discretion to stay an action in favour of a forum in a non-contracting state.[293] This case was appealed to the House of Lords, which then referred the matter to the European Court of Justice (ECJ). But before the ECJ could rule on the matter, the case settled out of court.[294] This left uncertainty as to the status of *forum non conveniens*,[295] although the courts in the U.K. generally followed the Court of Appeal decision that they retained the competence to dismiss claims on *forum non conveniens*.[296] This interpretation had been controversial, with Lord Bingham even observing in *Lubbe* that a decision by the ECJ would be helpful.[297] This question may be finally laid to rest, following the recent decision of the European Court of Justice in *Owusu* v. *Jackson*.[298]

The *Owusu* case involved proceedings by a British national against a British defendant and several Jamaican companies for injuries arising out of a diving accident during a holiday in Jamaica. On October 10, 1997, Mr. Owusu became a tetraplegic after hitting his head on a sandbank during a dive into the ocean. Following this accident, Mr. Owusu brought claims against the British defendant who had rented him the apartment villa and the Jamaican companies that owned and occupied the beach. While the defendants sought to dismiss the action on grounds of *forum non conveniens,* by citing the inconvenience of proceeding in England,[299] the plaintiffs submitted that England was required to exercise

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[292] *Brussels Convention, supra* note 243 at art.2; The principle which makes jurisdiction necessary is known as *iudex tenetur impertiri indicium isum*. Alan Reed, *Anglo-American Perspectives on Private International Law* (Lewiston, NY: Edwin Mellen Press, 2003) at 183 [Reed].
[293] *Re Harrods (Buenos Aires) Ltd.*, [1991] 4 All ER 334 (C.A.); Also see Meeran, "Liability of MNCs", *supra* note 6 at 255.
[294] Fentiman, *supra* note 244 at 10.
[295] Fentiman, *supra* note 244 at 10.
[296] *Ibid.*
[297] *Lubbe, supra* note 16 at para. 32.
[298] *Owusu, supra* note 245.
[299] These inconveniences included: The expense of English proceedings; The difficulties in recovering costs if the claimant's action was dismissed; The logistical difficulties resulting from

jurisdiction over the claim, in accordance with article two of the *Brussels Convention.*

The main issue to be decided in the *Owusu* case was whether England retained the discretion under the *Brussels Convention* to decline jurisdiction in favour of a forum that was not a contracting state to the convention. In a judgment delivered March 1st, 2005, that is sure to become a landmark, the European Court of Justice decided, contrary to the *Harrods* decision from the UK Court of Appeal almost fifteen years earlier, that "the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum."[300] The Court also explained that as genuine as the difficulties may have been for the defendants in litigating in the U.K., they did not "call into question the mandatory nature of the Brussels Convention."[301] The Court concluded there was nothing in the language of article two to suggest courts were only bound by the provision so long as all parties were from a contracting state.[302] The Court went on to provide the *forum non conveniens* doctrine was incompatible with the Brussels Convention for a number of different reasons. The Court noted that no exception was provided for the doctrine within the Convention,[303] and such discretion was "liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention."[304] The Court also expressed concern that the *forum non conveniens* test placed the burden on the claimant "to establish that he will not be able to obtain justice before that foreign court or...that the foreign court has in fact no jurisdiction to try the action or that the claimant does not, in practice, have access to effective justice before that court, irrespective of the cost

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geographical distance; The need to assess the merits of the case according to Jamaican standards; and The enforceability in Jamaica of a default judgment and the impossibility of enforcing cross claims against the other defendants. *Owusu, supra* note 245 at para. 44.

[300] *Owusu, supra* note 245 at para. 4; See also Rachel Rothwell, "English Courts Lose Discretion To Pass Cases Outside EU" (2005) L. Soc'y Gaz 102.11(6).

[301] *Owusu, supra* note 245 at paras. 37 and 48.

[302] *Ibid.* at para. 24.

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

[304] *Ibid.* at para. 41.

entailed by the bringing of a fresh action before a court of another State and the prolongation of the procedural time-limits".[305]

The court declined to answer a second question referred to it, namely, whether the application of *forum non conveniens* is ruled out in all circumstances by the *Brussels Convention.* As this was not dealt with, one London law firm believes there is still a possibility that the doctrine of *forum non conveniens* may have application in certain circumstances:

> In particular, where the parties have expressly chosen the jurisdiction of a non-Contracting State, where other proceedings are or have been pending in the other state, or the subject matter of the dispute is such that a Contracting State would, in those circumstances, have taken exclusive jurisdiction, e.g. certain disputes relating to land situated in that country. [306]

If these predictions are correct, a U.K. court may still retain the ability then to decline jurisdiction in tort claims where a claim was already being heard in another forum or where there are claims for the remediation of polluted lands.[307]

As Canada is not a contracting party to the *Brussels Convention* or any other agreement mandating the assumption of jurisdiction by our courts in claims against defendants, the ECJ decision in *Owusu* is not binding on the courts in our country. Our courts remain free to dismiss proceedings against Canadian defendants on the grounds of another more appropriate forum. Nevertheless, the case is interesting for raising the continued relevance of the *forum non conveniens* doctrine in Canada, as countries in the world are increasingly restricting, or even abolishing it, as seen here. The author suggests that Canada may want to consider how the mandatory exercise of jurisdiction would make it easier and more predictable to resolve cross-border disputes arising from increased trade and

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[305] *Ibid.* at para. 42.
[306] "Court has no jurisdiction to stay proceedings in favour of a non-contracting state" at para. 51, online: Herbert Smith <http://www.herbertsmith.com/NR/rdonlyres/7E0897CB-A89E-4DEB-ADE4-4DF602BA941F/923/Litigation_e_bulletin_23_march_05.html>.
[307] The first exception derives from the principle *of lis pendens*, discussed earlier, and the second, from the rule, also discussed previously, that a state has the exclusive jurisdiction to deal with disputes related to their territory.

investment across North America and the Americas in general, once the FTAA comes into place.

The United States

The doctrine of *forum non conveniens* developed at an earlier stage in the United States than Canada, following its elaboration by the U.S. Supreme Court in 1947, in the case of *Gulf Oil Corp.* v. *Gilbert.*[308] *In Gulf Oil*, the Supreme Court established a two-step test for determining whether to dismiss a case on grounds of *forum non conveniens.*[309] In the first step, the defendant must meet the burden of demonstrating that an adequate alternative forum exists. If this burden is met, the court proceeds, in the second step, to consider in which forum the private interests of the litigants and the public interests of the forum in question are best served. The Court defined private and public interests as follows:

> An interest to be considered, and the one most pressed, is the private interest of the litigant. Important considerations are the relative ease of the access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial...
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which tough upon the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, an in law foreign to itself.[310]

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[308] *Gulf Oil* v. *Gilbert*, 330 U.S. 501 (U.S. 1946) [*Gulf Oil*]; See also Reed, *supra* note 292 at 191; and Samson, *supra* note 51 at 114.
[309] Reed, *supra* note 292 at 192.
[310] *Gulf Oil, supra* note 308 at 508-509.

The Supreme Court also emphasized in *Gulf Oil* that there was a presumption in favour of the plaintiff's choice of forum and this choice was only to be disrupted by the courts where the balance of private and public factors clearly favoured the alternative forum.[311]

In 1981, *Piper Aircraft* v. *Reynolds* became the first decision by the Supreme Court to apply *Gulf Oil* to international facts.[312] The case involved an attempt by the estates of five Scottish citizens, who died in an airplane crash in Scotland, to sue the American manufacturer of the airplane in California State court. This attempt was thwarted, when the Supreme Court ruled the action should be dismissed, as Scotland was the more appropriate forum for trying the issues. While the plaintiffs had opposed the stay by arguing they would lose many of the juridical advantages of California, such as the laws on strict liability, capacity to sue and higher damage awards, if they had to proceed in Scotland, the Court gave little weight to these considerations. This decision was significant in that it enunciated the principles that "no single factor of the Gilbert analysis, regarded alone, could be given determinative significance,"[313] and that the "possibility of an unfavourable change of substantive law in the alternative forum would be considered, but would not be dispositive."[314] *Piper* was also important in that it enunciated the shift away from "abuse of process" in the American *forum non conveniens* test, to a focus on determining the "most appropriate forum".[315] Concerned that foreign plaintiffs were forum shopping in the U.S. and placing an inordinate burden on U.S. courts, the Supreme Court also made it simpler to dismiss claims by foreign plaintiffs by requiring foreign plaintiffs to show that the alternative forum was not capable, as opposed to less favourable.[316] With the private and public interest factors considered by U.S. courts tending to weigh

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[311] *Ibid.*
[312] *Piper Aircraft, supra* note 50; See also Samson, *supra* note 51 at 115.
[313] Alexander Reus, "Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany" (1994) 16 Loy. L.A. Int'l. & Comp. L. J. 455 at 466-467.
[314] *Piper Aircraft, supra* note 50 at 467.
[315] See Reed, *supra* note 292 at 196; and Samson, supra note 51 at 116.
[316] *Piper Aircraft, supra* note 50 at 254-255; See also Boyd, *supra* note 58 at 60-62.

towards the forum where injuries were suffered, courts were quite willing to dismiss the early claims by foreign plaintiffs against American corporate defendants in the 1980s and 1990s.[317] Prince states that U.S. court were also very hesitant, in the beginning, to accept jurisdiction on the basis that there was no adequate alternative forum.[318]

Bano v. *Union Carbide* is probably the most notorious of the early U.S. cases involving foreign plaintiffs and American corporate defendants.[319] The litigation arose out of what the court itself called the "worst industrial accident" in modern history.[320] Mendes and Mehmet have also commented that the "Bhopal tragedy is one of several twentieth-century disasters that have shown the power of the global private sector to wreak havoc on the health and safety of neighboring communities."[321] In the words of the trial judge who first heard the case, "[i]n 1984, a highly toxic gas, methyl isocyanate, was released into the air from a chemical manufacturing facility in Bhopal operated by Union Carbide India Limited ("UCIL"), an Indian company that was 50.9%-owned by Union Carbide, killing thousands of people and injuring more than 200,000 others."[322] Faced with various legal and practical obstacles to justice in India, the victims brought a claim against Union Carbide in the United States, where the parent company was incorporated. The deficiencies with the Indian legal system were such that even the Indian Government made submissions to the U.S. court, arguing that the plaintiffs could not seek adequate compensation in India.[323] In a decision, that could be regarded ironic, the District Court held that it would be an affront to comity and the territorial sovereignty of India for the U.S. to accept jurisdiction over the action.[324] The Court also rejected the arguments of the Indian Government, finding that its courts "have the proven capacity to mete out fair and

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[317] See for e.g. *Union Carbide, supra* note 1; *Aquinda* v. *Texaco*, 945 F. Supp. 625 (S.D.N.Y. 1996); and *Jota* v. *Texaco*, 157 F.3d 153 (2d Cir. 1998).
[318] *Supra* note 7 at 577.
[319] *Union Carbide, supra* note 1.
[320] *Ibid.* at 195.
[321] Errol Mendes and Ozay Mehmet, *Global Governance, Economy and Law: Waiting for Justice* (New York: Routledge, 2003) at 123.
[322] *Union Carbide, supra* note 1 at 197.
[323] See Farrow, *supra* note 27 at note 23.
[324] *Union Carbide, supra note* 1 at 867

equal justice."[325] Shortly following this decision, the Indian Government entered into a settlement agreement with Union Carbide that has been widely criticized for providing insufficient compensation to the families of victims who died and to the victims themselves who require healthcare.[326] In response, the plaintiffs have attempted to re-initiate proceedings in the U.S. In a 2004 decision, a US Court of Appeals held that the plaintiffs could litigate claims in the U.S. for property and environmental damage related to the spill, as these damages were not addressed by the settlement.[327]

Following a rough start, foreign plaintiffs have been more successful in recent years at convincing U.S. courts that the inadequacy of alternative forums requires the courts' acceptance of jurisdiction over their claims. We will look at some recent precedents where the courts have dismissed motions for a stay, as there was no other adequate forum available. As a note, the author would like to mention the following cases were chosen from the many dealing with *forum non conveniens* in the U.S., as they deal precisely with the kind of litigation considered in the paper, namely, claims by foreign plaintiffs against corporate defendants for damages arising in developing countries.

No Adequate, Alternative Forum: *Bowoto*

Bowoto v. *ChevronTexaco* is perhaps the first case, against a corporate defendant for causing harm abroad, where a U.S. court has dismissed a motion for a stay on grounds of *forum non conveniens*.[328] The case was filed by Nigerian residents who claimed that Chevron was responsible for human rights abuses

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[325] *Union Carbide, supra note* 1 at 867; Muchlinsky, *supra* note 28 at 18 and 22, states that the *Bhopal* decision can be distinguished from *Lubbe*, *supra* note 16, where the House of Lords accepted the Government's submissions that South African laws were inadequate for justice, as the laws in India were established democratically. In such circumstances, it may have seemed disingenuous for the Government to complain about the plaintiff's poor prospects for justice at home. In *Lubbe*, on the other hand, the circumstances were arguably more sympathetic to the current Government, as the laws that would apply to the claims were formed during the apartheid regime that exploited black workers.

[326] While $500 million is certainly a significant amount of money, critics point out this settlement represented only 1/8th of the original claims and provided no more than $10,000 to each family of a victim who died. See for e.g. Talpis & Kath, *supra* note 60 at paras. 145-46; See also "Bano v. Union Carbide," online: EarthRights International <http://www.earthrights.org/bhopal/index.shtml>.

[327] *Bano* v. *Union Carbide Corp*, 361 F.3d 696 (2nd Cir. 2004).

[328] *Bowoto, supra* note 12.

associated with its oil production activities in Nigeria, including the shooting of peaceful protestors at an offshore platform and the destruction of two villages by soldiers using Chevron helicopters and boats. In the spring of 2000, a District Court rejected Chevron's motion that the action be stayed in favour of Nigeria as the more convenient forum, citing the lack of an adequate alternative forum.[329] The military's alleged responsibility for the human rights violations was likely a key factory that influenced this decision by the Court. In a further victory for the plaintiffs, a federal judge denied ChevronTexaco's motion for a summary judgment, ruling that the company can be held liable under the Alien Tort Claims Act for the conduct of its subsidiary.[330] Judge Illston noted the "extraordinarily close relationship between the parents and subsidiary prior to, during and after the attacks," as well as the evidence of a "cover-up" of the subsidiary's activities by Chevron.[331] The case has now entered the discovery stage.[332]

U.S. Interest In Adjudicating Claims of Torture: *Wiwa*

U.S. courts were again asked to consider claims that an American multinational was responsible for human rights violations in Nigeria in the case of *Wiwa* v. *Royal Dutch Petroleum Co.*[333] In this case, which followed *Bowoto* by a few months, all parties recognized that Nigeria was not an adequate alternative forum for hearing the claims. Instead, the Court of Appeals had to consider whether it was an error of the trial judge to dismiss the proceedings in favour of England, where one of the co-defendants was incorporated. The Court of Appeals held it was, and listed the following as factors that weighed against dismissal:

> ...(1) the substantial deference courts are required to give to the plaintiff's choice of forum, (2) the enormous burden, expense, and difficulty the plaintiffs would suffer if required to begin the litigation anew in England, (3) the policy favoring our court's retention of such suits brought by plaintiffs who are residents of

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[329] *Ibid.*; See also the website of EarthRights International, a non-governmental organization in the United States that is acting as co-counsel to the plaintiffs, "Bowoto v. Chevron," online: Earthrights <http://www.earthrights.org/chevron/index.shtml> [EarthRights "Chevron"].
[330] *Bowoto, supra* note 13; See also EarthRights "Chevron", *supra* note 329.
[331] *Ibid.*
[332] "Docket: Bowoto v. Chevron," online: Centre for Constitutional Rights <http://www.ccr-ny.org/v2/legal/corporate_accountability/corporateArticle.asp?ObjID=4rj5rmLv5U&Content=41>
[333] *Wiwa, supra* note 12.

> the United States, and (4) the policy expressed in the TVPA[334] favoring adjudication of claims of violations of international prohibitions on torture.[335]

The Court of Appeals decision in *Wiwa* serves as an important precedent, not only because it accepted jurisdiction over an extraterritorial claim, but also because it afforded considerable weight to the burden that would be imposed on the plaintiffs if they had to begin new litigation elsewhere and because, it recognized the U.S. interest in adjudicating claims that the international prohibition on torture had been violated. In a more recent decision in the case, a District Court has affirmed it has subject-matter jurisdiction over the claim on the basis of the *Alien Tort Claims Act*.[336] Discovery concluded at the end of May 2004 and the plaintiffs are now waiting their day in court.[337]

Subject-Matter Jurisdiction Over International Law: *Unocal*

In the *Doe* v. *Unocal* case, a U.S. court was able to move beyond the issues of jurisdiction and *forum non conveniens* to actually begin considering the merits of a claim that an American corporation was liable in a U.S. court for extraterritorial conduct that caused harm to foreign plaintiffs.[338] The case was brought by a group of Burmese plaintiffs who claimed that Unocal was responsible for a variety of human rights abuses they suffered at the hands of Burmese soldiers during the construction of the Yadana pipeline project, including forced relocation, forced labor, rape, torture, and murder. The plaintiffs argued that as co-owners of the project, along with Frances Total, and the Burmese state oil company, "Unocal knew or should have known that the military had a record of committing such rights abuses, that it knew or should have known that it did

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[334] The *Torture Victim Protection Act,* 28 U.S.C. § 1350 (1992), allows foreign citizens to sue for violations of the international prohibition against torture [*TVPA*].
[335] *Wiwa, supra* note 12 at 57.
[336] *Wiwa* v. *Royal Dutch Shell*, Lexis 3293 (D. N.Y. 2002); aff'd, 392 F.3d 812 (US CA 2004); The *Alien Tort Claims Act*, 28 U.S.C. § 1350 (1789) [*ATCA*], states that the "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."
[337] For a summary of the steps in the *Wiwa* proceedings, see the Centre for Constitutional Rights, "Docket: Royal Dutch v. Wiwa", online: CCR <http://www.ccr-ny.org/v2/legal/corporate_accountability/corporateArticle.asp?ObjID=sReYTC75tj&Content=46>
[338] *Unocal, supra* note 3.

commit such abuses during the project, and that it benefited from the commission of such abuses, particularly forcible labor and relocation."[339]

The subject-matter jurisdiction of U.S. courts to consider violations of international law under ATCA was first established in 1997, in a ruling by a California District Court.[340] Years of litigation have followed this decision.[341] Yet, the courts have never considered whether the action should be stayed for *forum non conveniens*. This should come as no surprise given the unlikelihood that Burma could be considered an adequate alternative forum, particularly in light of the human rights allegations directed against the military. In another legal victory for the plaintiffs, the United States Court of Appeals ruled in 2002 that it found sufficient evidence that if true, would prove Unocal's joint venture had hired the military, making Unocal vicariously liable for the military's human rights abuses.[342] This was a particularly significant decision in that it affirmed the continued validity of *ATCA*,[343] despite a challenge by the Bush administration that *ATCA* could not be permitted to provide "an untethered grant of authority to the courts to establish and enforce precepts of international law regarding disputes arising in foreign countries."[344]

The case also represented the "first in U.S. history in which a corporation (would) stand trial for human rights abuses committed abroad".[345] However, this day never came. This landmark case was closed in the spring of 2005, after Unocal reached an out-of-court settlement with the Burmese plaintiffs.[346] While the precise details of the settlement are being kept confidential, EarthRights

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[339] EarthRights International, co-counsel for the plaintiffs " Doe v. Unocal," online: EarthRights International <http://www.earthrights.org/unocal/index.shtml> [EarthRights, "*Unocal*"].
[340] *John Doe I.* v. *Unocal,* [1997] 963 F. Supp. 880 at 898.
[341] See for e.g. *John Doe I.* v. *Unocal,* [1997] 963 F. Supp. 880 (considering the issue of subject-matter jurisdiction); *John Doe I.* v. *Unocal,* 67 F. Supp. 2d 1140 (U.S. Dist. 1999) (denying class certification); *John Doe I.* v. *Unocal,* 110 F. Supp. 2d 1294 (U.S. Dist 2000) (granting the defendant's motion for summary judgment); *John Doe I.* v. *Unocal,* 27 F. Supp. 2d 1174 (dismissing claims against Total, a co-defendant, for lack of personal jurisdiction); *John Doe I.* v. *Unocal*, QL 548 (9th Cir. 2002) (denying defendants' motion for summary judgment).
[342] *John Doe I.* v. *Unocal*, QL 548 (9th Cir. 2002)
[343] EarthRights, "*Unocal*", *supra* note 339.
[344] *John Doe I.* v. *Unocal,* QL 548 (9th Cir. 2002), [Brief for the United States of America as *Amicus Curiae*] at 19, online: EarthRights International <http://www.earthrights.org/atca/dojbrief.pdf>.
[345] EarthRights, "*Unocal*", *supra* note 339.
[346] *Ibid.*

International, one of the U.S. non-governmental organizations that represented the foreign plaintiffs in U.S. court, had this to say about the settlement:

> In addition to compensating the villagers, most of whom are destitute and living in hiding from the Burmese regime, the settlement funds will also enable the plaintiffs to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region. These initiatives will provide substantial assistance to people who suffered hardships in the region.[347]

While claims in Canada have been based in domestic law, either foreign or Canadian, instead of international law, the Unocal case is still an important precedent of a court deciding to exercise jurisdiction over a claim of extraterritorial harm by a resident, since no other adequate forum was available. Even more importantly, perhaps, the case provides hope that the initiation of transnational litigation can lead to compensation for victims in developing countries, where other routes to secure damages have been unsuccessful.

Proving Inadequacy of Forum with Human Rights Reports: *Bridgeway*

Canadian courts facing the question of whether an alternative forum is appropriate may also find assistance from the US Court of Appeals decision in *Bridgeway Corp.* v. *Citibank.*[348] In *Bridgeway*, the Court held that U.S. State Department Country Reports on Human Rights were admissible to determine whether an alternative forum was too corrupt be adequate. In judging the reliability of these reports, the Court was reassured by the following factors:

> The Reports are submitted annually, and are therefore investigated in a timely manner. They are prepared by area specialists at the State Department. And nothing in the record or in Bridgeway's briefs indicates any motive for misrepresenting the facts concerning Liberia's civil war or its effect on the judicial system there.[349]

On the basis of *Bridgeway*, it is suggested that U.S. State Department Country Reports on Human Rights can provide "objective" and "conclusive" evidence

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[347] *Ibid.*
[348] *Bridgeway, supra* note 227.
[349] *Bridgeway, supra* note 227 at 144.

regarding the likelihood for a fair trial in an alternative forum, and the necessity of declining a *forum non conveniens* stay to serve the interests of justice.[350]

Australia

As we have discussed in prior sections, the approach to *forum non conveniens* was relatively strict in Canada, the United Kingdom and the U.S. until after the Second World War. The *St. Pierre* test, which was previously followed in many common law countries, including Australia, prevented a court from staying an action unless it would be "oppressive or vexatious" to the defendant, or otherwise amount to an "abuse of process." We have also seen how the courts in Canada, the U.K. and the U.S. modified the *forum non conveniens* test after World War II to the search for the "most appropriate forum", shedding in a significant manner the presumption in favour of the plaintiff's choice of forum. Unlike the others, Australia's High Court rejected in *Oceanic Sun Line* v. *Fay*, the modification of the test to the "most appropriate forum."[351] Instead, the High Court adopted in *Voth* v. *Manildra Flour Mills,* [352] a test that was broader than *St. Pierre* but stricter than that adopted in Canada, the U.K. or the U.S. According to *Voth*, a case could only be dismissed if Australia was a "clearly inappropriate" forum.[353] Deane J. explained the significance of Australia's approach in *Oceanic*:

> It cannot...be seen as a "more appropriate forum" test since the mere fact that a tribunal in some other country would be a more appropriate forum for the particular proceeding does not necessarily mean that the local court is a clearly inappropriate one.[354]

Further explanation was provided in *Voth*, when the High Court stated that the "clearly inappropriate test" permitted courts to avoid an injustice to defendants without causing an injustice to plaintiffs by permitting a stay in situations that didn't quite amount to vexation or oppression or abuse of process in the strict sense. Prince asserts that the Australian approach to *forum non conveniens* is

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[350] See above for a discussion of the low weight that seems to have been accorded to a U.S. State Department Country Report for Guyana, in *Cambior, supra* note 2.
[351] *Oceanic Sun Line* v. *Fay*, (1988) 165 C.L.R. 197 [*Oceanic*].
[352] *Voth* v. *Manildra Flour Mills Pty Ltd.* (1990), 65 A.L.J.R. 83 [*Voth*].
[353] *Ibid.*
[354] *Oceanic, supra* note 351 at 248.

better then the "most appropriate" forum test because it prevents Australian residents, including companies, from escaping Australian jurisdiction unless it amounts to harassment, as this is what is required to show the home forum is "clearly inappropriate".[355] The result, he says, is that Australian companies are encouraged to use the same health and safety in their operations abroad as they are required to abide by domestically.[356]

Clearly Inappropriate Test: *Ok Tedi*

Indeed, the application of Australia's "clearly inappropriate" test within the *Ok Tedi* case does suggest the approach is more likely to hold multinationals accountable for their conduct overseas.[357] In *Dagi and Others* v. *BHP*[358] (Ok Tedi case), the Ok landowners brought a claim against BHP for harm the company had allegedly caused to their land and lifestyles by disposing wastes from their mine in Papua New Guinea into the local river. This claim was brought in Australia only after the plaintiffs had exhausted local avenues for redress.[359] Even though the plaintiffs were foreign, the damage had occurred in another country and much of the necessary evidence was also abroad, the defendants did not argue the court should decline from exercising jurisdiction in the matter.[360] As Prince explains, with Australia's "clearly inappropriate" test, there was little prospect that the defendant would be successful on a motion to stay for *forum non conveniens*.[361]

In the Ok Tedi case, the political context surrounding the dispute was likely also a factor weighing against a finding that Australia was clearly inappropriate. Prince notes that a previous case in Bougainville, involving community anger over similar pollution to a local river from mining waste had led to rebellion and violence.[362] Given the similarities between the cases, Prince suggests the interest in seeing the dispute decided in court was very strong indeed.[363]

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[355] *Supra* note 7 at 574.
[356] *Ibid.*
[357] *Ibid.* at 595.
[358] *Ok Tedi*, supra note 16.
[359] Prince, *supra* note 7 at 593.
[360] Moshinsky, "The Ok Tedi Mine Dispute" (1995) Law Instit. J. 1114, as cited in Prince, *supra* note 7 at 594.
[361] Prince, *supra* note 7 at 594.
[362] *Ibid.*
[363] *Ibid.*

Once this decision was delivered and it became clear that the plaintiff's claim was actionable in Australia, Prince notes that the defendant agreed not only to a negotiated settlement but also to the application of Australian environmental standards to determine the appropriate compensation and remedial action that they owed.[364] Once again, *forum non conveniens* played a pivotal role in securing an out-of-court compensation agreement, this time using Australian courts.

[364] *Ibid.* at 595.

Conclusion

This review should establish that the test for *forum non conveniens* is similar in Canada, the U.K., the U.S. and Australia. Farrow notes that "regardless of which test is applied...the Court must ultimately look at the question of "what justice requires" in a given context in order to balance appropriately the competing factors in a given jurisdictional debate".[365] The study of the *forum non conveniens* test in Canada, and its application in the *Cambior* decision, should also demonstrate it is already possible and appropriate for our courts to exercise jurisdiction over cases brought by foreign plaintiffs against a Canadian defendant for damages arising outside Canada, where this is necessary to serve the interests of justice. In such cases, Canadian courts would generally apply foreign law to determine the cause of action unless such application would run counter to public policy. In all of these cases, Canadian law will apply to determine procedural matters, including the quantification of damages, raising the prospect that some foreign plaintiffs could receive higher damages in Canada than in the alternative forum, if they are successful in proving their claims. While the court chose not to accept jurisdiction in *Cambior*, this decision appears to have rested on an underestimate of the reliability of evidence presented by the plaintiffs, possibly because of an overly strict treatment of out-of-court statements, which we have suggested is not appropriate for the context of an 'interests of justice' test.

We have also examined how courts in the U.K., the U.S., and Australia, have already accepted jurisdiction in claims by foreign plaintiffs, who accuse a resident of the forum of causing injury to them abroad, following the application of the *forum non conveniens* test. It is suggested that these precedents, reached on the basis of tests that are similar to Canada's, should be persuasive to Canadian courts. As such, these precedents can be used to predict the circumstances where a Canadian court might also exercise jurisdiction in a case by foreign plaintiffs where this is required in the 'interests of justice', even though the balance of convenience factors appear to favour another forum. This overview also suggests it is appropriate for our courts to exercise jurisdiction and to apply Canadian law

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[365] Farrow, *supra* note 27 at para. 82.

where cases involve some negligence that occurred in Canada, even in the absence of evidence that a fair trial is not possible in an alternative forum, given the connections between these types of claims with Canada.

The restriction of jurisdiction over claims of extraterritorial harm to cases where this is necessary for the 'interests of justice', in the absence of any international agreement requiring our courts to exercise jurisdiction in claims against residents, should strike an appropriate balance between our respect for the territorial sovereignty of other states, our interest in providing meaningful access to justice to personal injury victims and our responsibility to ensure that nationals are held accountable for wrong-doing. Such an approach to *forum non conveniens* is consistent, as we have seen, with the way the doctrine is also being applied in other common law countries.

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