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THE NIGHTMARE OF LITIGATING IN MULTIPLE FORA

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Article abstract

In his text Christopher Richter describes how Quebec courts determine their jurisdiction over commercial disputes. The author notes that while the rules and concepts found in the *Civil Code of Quebec*, *the Code of Civil Procedure*, international agreements, and Quebec jurisprudence appear at first glance to be straightforward, their application in combination often creates uncertainty.

He explores concepts affecting jurisdiction, like connexity or domicile, and how the practical application of these concepts becomes difficult when the conflicting and evolving jurisprudence and legislation are considered. The author provides, however, more than a basic definitional analysis of the aspects influencing jurisdiction; he creatively posits how the conflicting rules, if manipulated carefully, can work flexibly to achieve a desired jurisdiction. To this end Christopher Richter considers several Quebec cases where the courts reached varying conclusions on the appropriateness of their jurisdiction based upon analyses of the alternating narrow and broad legislative rules (for example as between real and personal actions).

THE NIGHTMARE OF LITIGATING IN MULTIPLE FORA

By Christopher Richter[*]

Dans son texte, Christopher Richter décrit les mécanismes utilisés par les cours québécoises afin de déterminer leur compétence relativement à des litiges commerciaux. L'auteur note que, bien que les règles et concepts trouvés dans le *Code civil du Québec*, le *Code de procédure civile*, les conventions internationales et la jurisprudence québécoise paraissent clairs à première vue, leur mise en oeuvre combinée est souvent génératrice d'incertitude.
Il explore des concepts affectant la compétence, tels la connexité ou le domicile, et comment l'application pratique de ces concepts devient difficile lorsque l'on tient compte d'une jurisprudence en développement et contradictoire ainsi que de la législation. Toutefois, l'auteur fait plus qu'analyser la définition des éléments influençant la compétence. Il examine de façon créative comment ces règles contradictoires, si elles sont manipulées avec précaution, peuvent fonctionner avec flexibilité de manière à obtenir la compétence recherchée. À cette fin, Christopher Richter étudie plusieurs arrêts québécois dans lesquels les cours sont parvenues à des conclusions différentes relativement au caractère opportun de leur compétence, en se basant sur l'analyse de règles législatives tantôt restrictives tantôt libérales (par exemple entre des actions réelles et personnelles).

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This presentation will seek to address some of the preliminary issues that an attorney must address when contemplating the commencement of an action in Quebec in the context of a commercial dispute which does not clearly come within the exclusive jurisdiction of the Quebec courts. This may occur, for example, where some or all of the parties to the dispute are not residing in Quebec, where the cause of action did not arise entirely in Quebec or where the assets which are the subject of the action are located in different jurisdictions. In these situations, there will often be competing interests as to the choice of the appropriate forum to hear and decide the dispute.

Seizing jurisdiction in Quebec over all of the issues in dispute will often simplify the position of one of the parties. On the other side, strategy may dictate that the Quebec courts be avoided for some or all of the questions at issue. Before the commencement of an action, an attorney needs to consider which parties to the dispute should be brought before the Court, as well as which legal conclusions to seek against those parties. The decisions made at this early stage of the action will determine the arguments that may be used with respect to establishing or challenging jurisdiction both at home and abroad.

The onus is on every plaintiff to allege the facts which establish the territorial jurisdiction of the Court, and to prove these facts where they are contested by way of a preliminary exception.[1] The three elements of parties, facts and object considered for the purposes of the doctrine of *lis alibi pendens* work as a guide for the attorney preparing an action in which Quebec's jurisdiction is likely to be contested.

I. Jurisdictional issues

A. Parallel proceedings, connexity and *lis alibi pendens* (art. 3137 C.C.Q.)

It is worth underlining at the outset the importance of being first to commence an action in the desired forum. The doctrine of *lis alibi pendens* (art. 3137 C.C.Q.) provides that a Quebec court may stay an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority. Thus, the litigant who commences action in Quebec after the adversary has already commenced an action abroad, is likely to see the dispute settled abroad.[2] Similarly, art. 3155(4) C.C.Q. provides that a foreign judgement will not be recognised in Quebec where the courts of Quebec have already rendered a decision, or where the courts of Quebec were first seized of the dispute and a decision is pending. Thus, the litigant who commences an action abroad after

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[1] *Baird* v. *Matol Botanical International*, [1994] R.D.J. 282 (C.A.).

[2] It is the date of filing which determines when an action is begun, regardless of the date upon which the proceedings were served upon the defendant : *Les Équipements Eustache Lamontagne* v. *Les Équipements Belarus du Canada*, [1994] R.D.J. 599 (C.S.); *Tomaz-Young* v. *Miller*, [1992] R.D.J. 434 (C.A.).

the adversary has already commenced an action in Quebec, will find he cannot execute the foreign judgement in Quebec.

The three factors of parties, facts and object set out in art. 3137 C.C.Q. appear straightforward in comparison to the long list of factors which a trial judge may consider before exercising his discretion under the doctrine of *forum non conveniens* (art. 3135 C.C.Q.). However, applying the doctrine of *lis alibi pendens* to situations where the adversaries are racing to establish jurisdiction in competing fora is not straightforward. The plaintiffs in the competing jurisdictions may not choose to name the same litigants as parties, or to include the same claims in their actions.

In particular, adverse parties will not, by definition, advance claims that have the exact same object. The plaintiff in Quebec will advance a claim in the nature of a cross-claim to the claim advanced abroad by his adversary. In these situations, the Court of Appeal held in *La Garantie, Compagnie d'assurance de l'Amérique du Nord* v. *Gordon Capital Corp.* that an action commenced in Quebec may be stayed or dismissed under art. 3135 C.C.Q. (the doctrine of *forum non conveniens*) where there is a sufficient connexity between the two actions such that common sense requires one to be suspended pending judgement on the other.[3]

This is in keeping with art. 3139 C.C.Q. which extends the jurisdiction of the courts to include incidental or cross-demands, where they already have jurisdiction to rule on the principle demand. Does the notion of connexity advanced in *Gordon Capital* mean the same thing as the test of connexity under art. 172 C.C.P.? If so, a plaintiff commencing an action in Quebec after the defendant had already commenced proceedings outside Quebec could see his action stayed whenever his claim is such that it could have been made by way of cross-claim in the foreign proceedings. This could conceivably include claims creating no likelihood of contradictory judgements, but which could be commenced by way of cross-claim in the foreign jurisdiction, such as claims for compensation on a competing debt. Conversely, a party who has already commenced proceedings in Quebec could argue that any later foreign proceedings should have been commenced by way of cross-claim in Quebec.

Such an interpretation of "connexity" may initially appear attractive because it would lead to a drastic reduction in the number of "parallel proceedings" (related actions proceeding simultaneously before the courts of more than one jurisdiction). Particularly in the context of parallel proceedings before two courts within the Canadian federation, this would seem a logical and desirable result.[4]

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[3] *La Garantie, Compagnie d'assurance de l'Amérique du Nord* v. *Gordon Capital Corp.*, [1995] R.D.J. 537 (C.A.) [hereinafter *Gordon Capital*]; *York-Hannover Developments* v. *Commonwealth Insurance Company*, [1992] R.D.J. 374 (C.A.). See also *2493136 Canada Inc.* v. *Sunburst Products*, (15 april 1996), Bedofrd 460-05-000299-953 J.E. 96-1062 (C.S.).

[4] This would accord with the Supreme Court's approach to jurisdictional conflicts between Canadian provinces, as expressed in *De Savoye* v. *Morguard Investments*, [1990] 3 S.C.R. 1077 [hereinafter *Morguard Investments*].

Another possible, perhaps better, analogy is between the "connexity" discussed in *Gordon Capital* and the test for joinder of actions under art. 270 C.C.P.[5] Actions may be joined for trial "if it appears expedient to the court to hear them together." This has been interpreted as applying to situations where the questions at issue in the two actions are substantially the same.[6] Compared to the test of connexity under art. 172 C.C.P., joinder of actions would appear to require a closer examination of the various elements of fact and law at issue in the two actions and a greater degree of similitude between them, while leaving more to the discretion of the Court hearing the application for joinder.

This test seems closer to the "common sense" exercise of the Court of Appeal in *Gordon Capital*, that is, balancing the factors of attachment relevant to the doctrine of *forum non conveniens*. However, the decision to be taken under the doctrine of *forum non conveniens* remains essentially different than that under either arts. 172 or 270 C.C.P. where the Court must ask what connection is there between the two legal proceedings. Under art. 3135 C.C.Q., the Court considers a range of factors of attachment between the case before it and the competing territorial jurisdictions. The existence of another action pending in another jurisdiction is just one of those factors, albeit one which may have considerable persuasive effect in situations such as that confronting the Court of Appeal in the *Gordon Capital* case. That being said, the *Gordon Capital* case is far from providing a solution to the difficulty of parallel proceedings. This should not be surprising : the fact that an action could have been made by way of cross demand in the context of proceedings already started between the parties in another jurisdiction does not mean that there is no "real and substantial connection"[7] to the local forum. That this policy makes parallel proceedings more likely is inevitable, but parallel proceedings seem to have been accepted by the Supreme Court as a normal result of the doctrine of *forum non conveniens*.[8]

Indeed, in cases where art. 3137 C.C.Q. is considered apart from the doctrine of *forum non conveniens*, the courts do not seem to have widened their application of *lis alibi pendens* to include cases of connexity. For example, in *La Société Toon Boom Technologies* v. *La Société 2001 S.A.* the Superior Court applied the rule of *lis alibi pendens* strictly, holding that an action to enforce a contract did not have the same cause as an action based upon non-execution of the contract.[9] However, it is not clear that the former notion of "cause" should be applied under art. 3137 C.C.Q., which speaks of "facts" and not "cause". This textual difference in the new Civil Code would seem to allow for a wider interpretation of the doctrine of *lis alibi pendens*.

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5 *Supra* note 4.

6 *Ivanhoe Corporation* v. *Beaufort Realties (1964)* (1976), 3 R.&F. 415 (C.A.).

7 *Morguard Investments, supra* note 4 at 1104.

8 *Amchem Products* v. *British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 [hereinafter *Amchem Products*] at 914.

9 *La Société Toon Boom Technologies* v. *La Société 2001 S.A.* (2 February 1996), Montreal 500-05-013809-965 J.E. 96-630 (C.S.).

With this in mind, the plaintiff commencing an action with the intention of seizing jurisdiction in Quebec over the entire dispute will want to include all of the parties, facts and issues in dispute which he anticipates may form the basis of competing proceedings which may be brought by the defendant in a foreign court. This will allow his client to plead *lis alibi pendens*, or at least *forum non conveniens*, before any foreign court later seized of the matter. The plaintiff commencing an action in Quebec where an action is already pending in another jurisdiction will want to join new parties, to distinguish as much as possible the underlying facts of the action, and to seek conclusions in law which are different than those in the action pending before the foreign tribunal. This later action can thereby be defended as being a justifiable parallel proceeding with a real and substantial connection to Quebec.

B. Incidental proceedings

The plaintiff commencing an action in Quebec must also anticipate the other claims which art. 3139 C.C.Q. may bring within the jurisdiction of the Quebec courts once the first proceeding is under way. The initiation of proceedings in Quebec by the plaintiff will give the defendant an opportunity to submit issues to the Quebec courts by way of cross-claim which may not otherwise have come within their jurisdiction. Similarly, actions in warranty may be brought within the jurisdiction of the Quebec courts where the principle claim is within Quebec jurisdiction.[10] This may be so even in the face of a contractual choice of law clause.[11] Voluntary interventions in an action already before the Quebec courts would presumably be accepted on the same basis as being within the court's jurisdiction.

A simple seizure by the owner of moveable property, for example, may lead to a cross-claim for money owing to the defendant who was in possession of the property. The entire relationship between the parties and any necessary or interested third parties could then be brought within the scope of the action by way of forced or voluntary intervention. The initial claim may therefore lead to the widening of jurisdiction by the inclusion of any cross-claims, actions in warranty and interventions connected to the initial claim.

Initiating litigation in one jurisdiction may also lead the defendant to attorn to the jurisdiction by producing a defence, in which case the jurisdiction of the Quebec courts is established under art. 3148(5) C.C.Q., the defendant having waived his right to contest jurisdiction.[12] Hence the importance of seizing jurisdiction by commencing proceedings in the preferred jurisdiction before the opposing party commences connected proceedings elsewhere.

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[10] *Stageline Mobile Stage Inc.* v. *In Any Event Inc.*, REJB 98-08891 (C.S.).

[11] *Intergaz Inc.* v. *Atlas Copco Canada*, (14 November 1997), Montreal 500-05-016103-960 J.E. 98-52 (C.S.), REJB 97-03842 (C.S.).

[12] Waiver of the right to arbitration is, however, governed by art. 940.1 C.C.P. in the case of the defendant. In general, a plaintiff waives the right to arbitration once the defendant has filed his defence: see *Dominion Bridge* v. *Knai*, [1998] R.J.Q. 321 (C.A.).

On the other hand, of course, one must also contest any efforts to assert jurisdiction in other jurisdictions. The doctrine of *lis alibi pendens* may be invoked to obtain a stay where an action has already been commenced in the preferred jurisdiction. This motion is most often brought in conjunction with a motion for dismissal of the action under the doctrine of *forum non conveniens* which is the topic of some of the other contributions at today's conference. As a more aggressive alternative, the second branch of the doctrine of *forum non conveniens* allows a party to seek an order enjoining the respondents from pursuing litigation before any foreign tribunal.[13] These methods of contesting jurisdiction are available under the common law of England and the United States, where they are applied in a similar fashion as in Quebec.

Prior consideration should therefore be given to the parties, facts and object of the action with a view to influencing both attempts to establish jurisdiction in Quebec and attempts to dispute the jurisdiction of other tribunals. As the choice of facts to be alleged in a proceeding will usually be determined by the choice of parties and of object, we will leave that aside to consider certain questions arising from the choice of parties and the choice of the object of an action.

II. Choice of parties to the action

A. Identifying possible defendants

International commerce often implies the existence of multiple corporate entities doing business in a co-ordinated fashion, with subsidiaries of a parent company each being responsible for a geographic area of the overall business or for particular parts of the business. In certain cases, subsidiaries may be established to hold assets for the parent company. This presents potential problems where the objective is to bring the overall dispute with the parent company and associated foreign corporations before the Quebec courts.

In cases of fraud, the corporate veil will be lifted.[14] However, the facts do not always allow for allegations of fraud. Consideration should therefore be given to whether the real contractual relationship was with the subsidiary or with the parent company. In cases where the subsidiary was merely a *prête-nom* incorporated to hold local assets, it will often be realistic to allege facts showing that the contract was actually with the parent company. Alternatively, the subsidiary may have been acting as the mandatary of the parent company, in which case the parent is responsible as mandator.[15] Obviously, care must be taken in these situations not to give up the

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[13] The leading case on anti-suit injunctions is *Amchem Products*, *supra* note 8. This remedy seems to have recently gained in popularity in Quebec, although it had been applied here prior to *Amchem Products*. For a recent trial judgement in Quebec, see *Opron Inc.* v. *Aero System Engineering*, [1999] R.J.Q. 757 (C.S.); J.E. 99-623 (C.S.).

[14] 317 C.C.Q.

[15] 2160 C.C.Q.

recourse against the subsidiary in favour of a questionable action against the parent company.

This problem can be solved where a separate right of action can be asserted against the parent company either on the basis of a contractual or extra-contractual liability. Consideration should therefore be given to what rights of action the plaintiff can assert against the parent company and foreign subsidiaries, as well as against third parties who also may be necessary parties to the dispute because, for example, they possess disputed assets. These considerations are particularly important when the choice of parties is made in anticipation of a contestation of jurisdiction under the doctrines of *lis pendens* or *forum non conveniens.*

B. Domicile of the defendant

Where jurisdiction is disputed, the domicile of the parties often takes on great symbolic importance because of the underlying jurisdictional rule that "in the absence of any special provision, the Québec authorities have jurisdiction where the defendant is domiciled in Québec."[16] However, domicile is of much less consequence under the new Code because the special provisions at art. 3141 C.C.Q. ss. cover most situations and, under the doctrine of *forum non conveniens*, domicile is only one of many factors to be considered.

Where the domicile of a corporation is an important consideration, it is not necessarily the head office as indicated in the minute book of the company that should be taken into account. Some flexibility exists to argue that where the head office as indicated in the minute book exists only on paper, and the affairs of the corporation are actually run from another location, it is this latter location, the real head office, which determines domicile. In *Crowbec Developments Ltd.* v. *The Waskaganish Band*, it was held in the context of a motion for security for costs that a fictional head office (existing only in the minute books of the corporation) could not be set up against third parties.[17] This argument could be raised against a foreign-registered company whose real head office is in Quebec, in order to establish jurisdiction in Quebec. It could also be raised as an argument against the jurisdiction in which the foreign company is registered, where the real head office is in a third country.

In personal actions of a patrimonial nature, the courts of Quebec have authority where the defendant is domiciled or resident in Quebec (art. 3148(1) C.C.Q.), or where the defendant is a legal person having an establishment in Quebec and the dispute relates to its activities in Quebec (art. 3148(2) C.C.Q.). It has been held, again in the context of an application for security for costs, that "residence" means "establishment" in the case of a legal person.[18] However, to apply this conclusion to art. 3148(1) C.C.Q. would render useless the second condition in art.

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[16] 3134 C.C.Q.

[17] [1989] R.J.Q. 727 (C.S.) [hereinafter *Crowbec Developments*].

[18] *Dunn* v. *Wightman*, [1995] R.J.Q. 2210 (C.S.).

3148(2) C.C.Q. It would seem that art. 3148(1) C.C.Q. only applies to physical persons domiciled or resident in Quebec and to legal persons domiciled in Quebec, but that legal persons "resident" in Quebec are governed by art. 3148(2) C.C.Q.

An argument based upon the *Crowbec Developments* case, such as suggested above, could therefore be used when the defendant has a "real" head office in Quebec (although registered elsewhere) and the dispute does not relate to its activities in Quebec. Arguably, the Quebec courts should have jurisdiction under art. 3148(1) C.C.Q.

C. Service abroad of judicial and extrajudicial documents

The practical difficulty of commencing an action against foreign corporations will often be effecting valid service, but this should not be a barrier to asserting jurisdiction over foreign defendants where jurisdiction otherwise exists. Unlike the Ontario *Rules of Civil Procedure*,[19] the Code of Civil Procedure of Quebec contains no provision with respect to service of proceedings outside of Canada.[20] Where a foreign company has been registered in Quebec under the *Act respecting legal publicity*,[21] service should be made according to the terms of art. 130 C.C.P. upon a senior officer or the registered attorney (*fondé de pouvoir*) of the company, failing which it will not be valid.[22]

Where the defendant has no presence in Quebec and is not registered, the easiest method of effecting service abroad most often will be to mail a copy of the proceeding by registered or certified mail with leave of the judge or clerk under arts. 138 and 140 C.C.P. Service by registered or certified mail is recognised by the *Hague Convention on Service of Process* of which Canada is a signatory.[23] The *Hague Convention* sets up a system of international service by which documents are served in each signatory State by a Central Authority in the State of destination. This can be a long and cumbersome process; however, the *Hague Convention* allows certain exceptions to this rule.

Article 10 of the *Hague Convention* provides as follows :

> Provided the State of destination does not object, the present Convention shall not interfere with -
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly

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[19] R.R.O. 1990, Reg. 194, Rule 17.05. See also *Federal Court Rules, 1998*, SOR/98-106, Rule 137.

[20] Service upon a party domiciled or resident in another Canadian province may be made by any person of the age of majority, who must make a certificate of service: art. 137 C.C.P.

[21] R.S.Q., c. P-45.

[22] *Plourde* v. *Entreprises A. Polidori*, [1975] C.S. 1227.

[23] *Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters* signed at The Hague on February 26, 1969, U.N. Registration No. 9432.

> through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Valid service can therefore be made by mail under art. 140 C.C.P. or by a competent person of the State of destination who makes an affidavit of service so long as the State of destination does not object. Where the State of destination objects, service is possible through the Central Authority of the State of destination.[24]

Where the State of destination is not a signatory to the *Hague Convention*, or any bilateral conventions with Canada, service under art. 140 C.C.P. or by a competent person of the State of destination who makes an affidavit of service should be considered valid by the Quebec courts. Where the State of destination is a signatory to the *Hague Convention*, consideration should be given to its terms.

However, Quebec has not explicitly made the *Hague Convention* part of provincial law with respect to validating service effected in a signatory State. On the other hand, Quebec has adopted the *Hague Convention* to the extent that it has made provision for the service in Quebec of documents emanating from a signatory State.[25] It thus seems debatable whether or not the *Hague Convention* must be obeyed in order for service abroad to be considered valid in Quebec.

If Quebec has not adopted the terms of the *Hague Convention* as a condition of effecting service abroad, raising the terms of the *Hague Convention* or any other treaty as an objection to the manner of service (where, for example, the State of destination is a signatory and has objected to the manner of service used under art. 10 of the *Hague Convention*) would be ineffective because the *Hague Convention* does not apply in Quebec under the federal division of powers. In effect, treaties signed by the federal government in areas of provincial jurisdiction do not have the force of law unless passed into law by the provincial legislature.[26]

Quebec does have agreements in force with Belgium[27] and France[28] which include provisions with respect to international service of judicial documents. The terms of these agreements should be respected where they apply. The *Entente* with France applies "notwithstanding any provision of any general law or special act or of any regulation thereunder."[29] Article 6 of the *Entente* provides an exception similar to art. 10 of the *Hague Convention*, to the effect that service remains valid where

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[24] Information regarding the law of the State of destination can normally be obtained through the consular officials of that State.

[25] See art. 136 C.C.P. and *Tariff of fees of bailiffs*, R.R.Q., c. H-4, r. 3, s. 7.1.

[26] *A.G. Canada* v. *A.G. Ontario (Labour Conventions)*, [1937] A.C. 326.

[27] *Order in Council respecting the application to Québec of a Convention between Belgium and the United Kingdom concerning legal proceedings in civil and commercial matters*, R.R.Q., c. C-25, r. 1.

[28] *An Act to secure the carrying out of the Entente between France and Québec respecting mutual aid in judicial matters*, R.S.Q., c. A-20.1.

[29] *Ibid.*, s. 1.

effected by mail or directly through the judicial officers, officials or other competent persons of the State of destination.[30]

D. Choice of the object of the action : real vs. personal actions

Where it is possible to frame the action as a personal action, rather than a real action, care should be given to which characterisation will lead to the desired jurisdiction being seized of the matter. In general, jurisdiction over personal actions is wider than jurisdiction over real actions, the latter being limited to actions concerning the ownership of property situated within the jurisdiction.

Characterisation of an action is made according to the law of the forum seized of the matter, taking into account foreign law only where the legal issues raised are unknown to the *lex fori*.[31] It is therefore important to consider how the action will be characterised both according to Quebec law and according to the law of any other competing jurisdiction which may be asked to consider the matter.

In Quebec, jurisdiction over personal actions of a patrimonial nature is governed by art. 3148 C.C.Q. This article has been given a wide interpretation in order to facilitate the hearing of the entire dispute in a single courtroom, rather than in several jurisdictions.[32] In particular, art. 3148(3) C.C.Q. grants jurisdiction to the courts of Quebec where (a) a fault was committed in Quebec, (b) damage was suffered in Quebec, (c) an injurious act occurred in Quebec, or (d) one of the obligations arising from a contract was to be performed in Quebec. To give only one example of the breadth of this jurisdiction, it has been held that the debit of a plaintiff's bank account in Quebec is damage suffered in Quebec sufficient to bring the plaintiff's claim within the jurisdiction of the Quebec courts.[33]

On the other hand, art. 3152 C.C.Q. provides that Quebec authorities have jurisdiction over a real action where the moveable or immoveable property in dispute is situated in Quebec. With the only connecting factor being the location of the property, art. 3152 C.C.Q. provides much less room for imagination than art. 3148 C.C.Q. Where the property is located in Quebec, then it is in the plaintiff's interest to frame the action as a real action in order to gain the benefit of art. 3152 C.C.Q.

Where the property is located elsewhere, it will often be possible to allege facts which will support a personal action of a patrimonial nature. A dispute over the ownership of property will often take place in circumstances which may be characterised as part of a contractual relationship such as a debtor-creditor relationship or a relationship between a mandator and his mandatary. Extra-

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[30] *Ibid.*, schedule, art. 6.

[31] Art. 3078 C.C.Q. and J.-G. Castel, *Canadian Conflict of Laws*, 3d ed. (Toronto: Butterworths, 1994) para. 22 at pp. 61-67.

[32] *Chatigny-Bitton* v. *Margo Movers International*, (22 June 1995), Montreal 500-05-003999-958 J.E. 95-1662 (C.S.), aff'd [1996] R.D.J. 14 (C.A.).

[33] *Transport McGill* v. *N.T.S. Inc.*, (13 November 1995), Montreal 500-02-018173-950 J.E. 96-166 (C.Q.).

contractual liability may also be a possible alternative to a real action such as the alleging of unjust enrichment or fraudulent misappropriation. However, the personal action should not be merely a disguised claim of ownership. The personal action should rest upon its own facts, rather than being conditional upon the recognition of the plaintiff's ownership of the property.

An excellent example of this problem is the case of *Bern* v. *Bern*.[34] Samuel Bern founded Elfe Juvenile Products Inc. ("Elfe") in 1984, causing one third of the common shares of the company to be registered in the name of each of his three children, Ivan, Sheldon and Roslyn. The head office of Elfe was in Cornwall, Ontario. In 1992, Ivan and Sheldon commenced an action in the Superior Court under the oppression remedy at ss. 241 ff C.B.C.A.

In 1994, Roslyn Bern commenced another action in the Superior Court alleging that she had been excluded as owner and director and manager of Elfe by her brothers. In the conclusions to her action, Roslyn claimed the right to dissent with respect to the capital reorganisation of Elfe and its continuance as an Ontario corporation, a declaration that she remained owner of one third of the shares of Elfe, and other relief under the C.B.C.A. Ivan and Sheldon presented a declinatory exception challenging the jurisdiction of the courts of Quebec. The Honourable Jacques Chamberland for the Court of Appeal found that "the primary subject of Respondent's claim against Appellants is the ownership of 1/3 of the issued common shares of Elfe."[35] Because shares are real property deemed to be located at the head office of the company where the share transfer register is located, the Court held that the courts of Quebec had no jurisdiction under art. 3152 C.C.Q. The action was therefore dismissed, the plaintiff being free to continue the proceedings already under way in Ontario.

In a related action, Samuel Bern commenced an action in Quebec to revoke his donation of the shares to Ivan and Sheldon on the basis of ingratitude. The acts of ingratitude were alleged to have occurred in Quebec. The Superior Court held that this was a personal action of a patrimonial nature, rather than a real action, because the ownership of the actions was not part of the fundamental question at issue, the defendants' ingratitude.[36] The plaintiff's request to have the shares transferred to his own name was held to be complementary to the revocation of the donation. The Court therefore asserted its own jurisdiction under art. 3148(3) C.C.Q. This issue was settled out of court on appeal.

These two related and somewhat contradictory cases show that an action must be framed carefully to show that the "primary" or "fundamental" claim is either a real action or a personal action. The limited jurisprudence on art. 3152 C.C.Q. however does not provide any indication of what result may be expected in a more complex situation.

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[34] *Bern* v. *Bern*, [1995] R.D.J. 510 (C.A.).

[35] *Ibid.* at 515.

[36] *Bern* v. *Bern*, J.E. 95-957 (C.S.), appeal settled out of court.

For example, would the Court assert jurisdiction over an action claiming ownership of various assets located in several different jurisdictions, including Quebec, where a single dispute between the plaintiff and the defendant involved all of the assets. Such situations regularly arise in liquidation or bankruptcy proceedings, but may also occur where a complex commercial relationship founders. Would the plaintiff be forced to bring a real action in each jurisdiction in which the disputed assets were found? Or, could the plaintiff assert Quebec jurisdiction over the entire dispute? One solution is for the plaintiff to abandon the proprietary claim for a claim in damages which would fall within the Court's jurisdiction under art. 3148(3) C.C.Q.

Another solution would be to rely upon art. 3136 C.C.Q., which provides :

> Even though a Quebec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Quebec, where proceedings cannot possibly be instituted outside Quebec or where the institution of such proceedings outside Quebec cannot reasonable be required.

However, no Court is likely to accept jurisdiction in a real action unless it is reasonably convinced that an eventual judgement will be enforceable. This problem may be solved by asserting the Court's personal jurisdiction over the defendant by way of injunction. An order to the defendant to transfer shares to the plaintiff could be enforceable against a defendant present in Quebec, even where the shares are registered outside Quebec. This would operate in much the same way as an anti-suit injunction, where the defendants are enjoined from pursuing activity outside of Quebec.[37] The only sanction for such an injunction, contempt of court, relies upon the personal jurisdiction of the Quebec courts over the defendant.

Whether or not the Court would accept such a solution, it seems clear that it would be preferable for all parties to have such a dispute heard in a single forum, rather than forcing the parties to litigate in each of the jurisdictions in which assets may be located.

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Before drafting a declaration in an action in which jurisdiction may be contested, the various possible combinations of parties, facts and conclusions in law should all be examined with a view to either consolidating or limiting the jurisdiction of the forum, and with a view to any contestation of that jurisdiction which may be heard by another tribunal. Consideration must be given to all of the parties who may be interested in the action, even those the plaintiff does not wish to make parties, because of the possibility that these other potential parties may intervene or be called

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[37] See *Johns-Manville Corp.* v. *Dominion of Canada General Insurance*, [1991] R.D.J. 616 (C.A.), 40 Q.A.C. 124.

in warranty. The object of the claim should be clearly identifiable as either a real or personal action and the facts supporting this characterisation should be clearly alleged. To the extent that the attorney is successful in foreseeing all of these possibilities at the moment an action is commenced, challenging jurisdiction may be made difficult or impossible for the defendant.