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Jurisdiction and the Exercise of Discretion by the Court – Forum Conveniens

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JURISDICTION AND THE EXERCISE OF DISCRETION BY THE COURT—FORUM CONVENIENS.— The fact that in an action containing a legally relevant foreign element, the court has jurisdiction over the subject-matter and the parties, does not mean that it always will exercise this jurisdiction. The court may in its discretion decline to take jurisdiction under the doctrine of *forum conveniens*.

It is difficult to catalogue the circumstances that will justify or require either the grant or the denial of remedy. The doctrine of *forum conveniens* leaves much to the discretion of the court to which the plaintiff resorts. The question whether the forum is appropriate is one of degree and the answer will vary from case to case. Unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed. In practice, however, Canadian courts have often been reluctant to allow an action to be brought against a defendant who is outside the jurisdiction.

The court will consider as important the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, and all practical problems that make the trial of a case easy, expeditious and inexpensive. Considerations of public interest in applying the doctrine of *forum conveniens* should include the undesirability of piling up suits in congested centers, the burden of jury duty on people of a community having no relation to the litigation, the local interest in having localized controversies decided at home and the unnecessary injection of problems in conflict of laws. In general, the doctrine of *forum conveniens* seldom justifies refusing jurisdiction based on the residence of either the plaintiff or the defendant.

The court will not exercise jurisdiction if it is a seriously inappropriate forum for the trial of the action so long as an appropriate forum is available to the plaintiff or if he has an adequate remedy abroad. In exercising its discretion the court will also weigh the relative advantages and obstacles to a fair trial. Will the plaintiff be prejudiced by having to sue in the foreign country? The substance of the plaintiff's action must also be considered. To what extent is it connected with the forum? Under the doctrine of *forum conveniens*, the court's assumption of jurisdiction must

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always be clearly justified.

Canadian courts subscribe to the doctrine of *forum conveniens* in connection with the exercise of jurisdiction over actions *in personam* when the defendant has not been served within the jurisdiction. Rules of practice authorize the exercise of jurisdiction *in personam* over absent defendants in certain circumstances. The jurisdiction conferred by these rules is discretionary. It is a jurisdiction that *may*, not which *must*, be exercised. Leave to serve a writ of summons or notice of the writ *ex juris* will be refused if the place where the action is brought is not the *forum conveniens*. If service of a writ of summons or notice of it on a defendant out of the jurisdiction may be effected without order of the court, it is also possible to have the writ set aside on the basis of the *forum conveniens*. Even if the defendant can be served with a writ within the jurisdictions the defendant may still argue that the court is not the *forum conveniens* and ask it to strike out the action. Thus the doctrine of *forum conveniens* also has application *outside* service *ex juris* cases. Finally, it can be invoked in connection with a stay of proceedings when an action is already pending abroad between the same parties. In fact, for practical purposes it does not matter whether the issue of jurisdiction arises in the context of an application for leave (or an application to set aside a writ of summons served outside the jurisdiction) or an alleged abuse of process. The real question is whether considering all the circumstances the center of gravity of the plaintiff's action lies in the forum province or territory. The *forum conveniens* is a universal common law doctrine applying to every case in which a problem of conflict of laws is present.

In England, the common law doctrine "requires the court to be satisfied, as a prerequisite to assuming or taking jurisdiction in a conflict of laws case, that the forum which the plaintiff has chosen is an appropriate one for the determination of the action".¹ Where the plaintiff applies for leave to serve his writ abroad,² he has in fact the burden of establishing, positively, that the forum is appropriate. Where the defendant who has been served with the writ seeks to strike out or to stay the plaintiff's action, he must prove that the forum is not appropriate. Actually, it matters little how the question of *forum conveniens* is raised. The principal point at issue is to determine the type of evidence that will have to be adduced by the plaintiff or the defendant to convince the court that the action ought to be tried locally or abroad. This proof may be more difficult in some cases than in others.

¹ See B. D. Inglis, *Jurisdiction, The Doctrine of Forum Conveniens, and Choice of Law in Conflict of Laws* (1965), 81 L.Q. Rev. 380, at p. 382.

² Under Order 11, rule 1 of the Rules of the Supreme Court.

Pearson J., in *Société Générale de Paris v. Dreyfus Brothers*,³ in the exercise of his discretion gave leave to serve the writ out of the jurisdiction and said:

. . . it becomes a very serious question, and ought always to be considered a very serious question, whether or not . . . it is necessary for the jurisdiction of the court to be invoked, and whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country. . . .

In Canada the doctrine of *forum conveniens* is used in all common law provinces. However, since the Rules of Court of the various provinces are not always the same, it may not be raised at the same time in the proceedings or in the same way as in England. Service abroad may in some instances be made without leave or order. Thus, usually, the burden of proof will be on the defendant to show that the forum is not convenient.

The Rules of Court of the common law provinces specify the only types of case in which service *ex juris* may be effected. These rules indicate as a matter of policy the elements that make the case especially appropriate for trial in the forum and conversely, that the absence of particular elements specified in the Rule may make the forum quite inappropriate.

For instance, in Saskatchewan, Queen's Bench Rule 27 (1) provides that service of a writ of summons on a defendant out of the jurisdiction may be effected *without order* whenever:

(c) Any relief is sought against a person domiciled or ordinarily resident within the jurisdiction:

Rule 27(2) reads as follows:

Save in respect to actions brought under the provisions of order XL, every statement of claim served out of the jurisdiction without leave, shall state specifically upon which of the above grounds it is claimed that service is permitted under this rule.

Rule 31 provides that:

Application may be made by defendant to set aside a writ of summons served outside the jurisdiction without entering an appearance thereto, and if it shall appear to the court that it is clear that such action should not have been commenced under this order, then in such case the court shall set aside the writ and service thereof so far as such defendant is concerned and may order the plaintiff to pay the defendant's cost on a solicitor and client basis.⁴

³ (1885), 29 Ch. D. 239, at p. 242, reversed on appeal (1887), 37 Ch. D. 215; Also *Rosler v. Hilbery*, [1925] Ch. 250.

⁴ Revised Rules of Court of the Province of Saskatchewan 1961; *Mid-western Mutual Automobile Insurance Company v. North African Reinsurance Society and Saskatchewan Insurance Office* (1957), 20 W.W.R. 465, 7 D.L.R. (2d) 235 (Sask. C.A.). For cases where leave is necessary see rule 29. In Manitoba, also, if a plaintiff, by his pleadings, comes within the four corners of any sub-paragraphs of rule 28, he is entitled to service out of Manitoba without any application to the court. See *Beland v. Neumeyer et al.* (1960), 33 W.W.R. 48, 67 Man. R. 141 aff'g *sub nom Selan v. Neumeyer et al.* (1959), 29 W.W.R. 542.

Thus, in this province, in some cases, it is not necessary to obtain an order allowing service *ex juris* before commencement of the action as in Ontario or in some other provinces. However, it is always possible for the defendant to launch a motion to set aside the writ of summons and service thereof *ex juris* on the ground that Saskatchewan is not the *forum conveniens*.

In *Lenko v. Landry*⁵ the court held that:

In my opinion, R. 27 (2), requiring that the statement of claim shall state specifically upon which of the grounds it is claimed that service is permitted out of jurisdiction, is mandatory. It is a condition precedent to the service of the writ of summons without an order. Failure of the plaintiff to comply with the express provisions of the Rules prior to the issue of the writ of summons renders the proceedings void *ab initio*.

Of equal interest is *Midwestern Mutual Automobile Insurance Company v. North African Reinsurance Society and Saskatchewan Government Insurance Office*.⁶ In that case, the contract was made in Montreal and was in respect of a risk in New Jersey. All the witnesses were in Eastern Canada and in the United States of America. The court held that it would be oppressive and unfair to compel the defendant North African Reinsurance Society (which had its head office in Algiers and an office in Montreal) to come to Saskatchewan and establish its defence when no part of the agreement sued on was effected in this province, the defendant had never resided there, and its witnesses were all in the East. Gordon J.A. said:⁷

The main argument before us on behalf of the plaintiff was that the Rules permitted the joinder of the two defendants and these proceedings were correct. With every deference I do not think that in this action that question should be decided and we leave it open. It is abundantly clear to me that it would be oppressive and unfair to compel the defendant the North African Reinsurance Society to come to Saskatchewan and establish its defence when no part of the agreement sued on was effected in this province, the defendant has never resided here, and its witnesses are all in the east.

In *Jenner v. Sun Oil Company Limited*⁸ which involved an application for an order setting aside or rescinding an *ex parte* order whereby leave was given to issue a writ of summons for service out of Ontario on a New Jersey corporation, McRuer C.J.H.C. of the Ontario Supreme Court said: ". . . it is necessary to decide whether, taking all the facts of the case into consideration, the '*forum conveniens*' lies here or abroad. . . . The *forum conveniens* does not itself govern the exercise of the discretion, but it

⁵ (1963), 42 W.W.R. 629 (Sask. D.C.).

⁶ *Supra*, footnote 4, service *ex juris*, rule 27 (1) (g).

⁷ *Ibid.*, at p. 476.

⁸ [1952] 2 D.L.R. 526, [1952] O.R. 240, [1952] O.W.N. 151. Ontario Rules of Practice, r. 25.

is an element to be considered together with all the other facts of the case."⁹

In considering the *forum conveniens* the court should have regard for the interests of the plaintiff as well as those of the defendant. The inconvenience the defendants may be put to in the forum may outweigh the inconvenience the plaintiff would be put to in the foreign jurisdiction. Also, whether the law of the foreign court applies and, if so, whether it differs from forum law in any material respect is an important consideration.

In *Original Blouse Co. Ltd. v. Bruck Mills Ltd.*,¹⁰ the British Columbia Supreme Court in Chambers in an action for damages for fraudulent misrepresentations found that British Columbia was the more convenient forum.¹¹

In *International Power & Engineering Consultants Ltd. v. Clark et al.*,¹² Atkins J. said:

Notwithstanding that a plaintiff's action may qualify under the rule, the order is discretionary and the court should consider which of the two jurisdictions offers the most convenient forum. Counsel for defendants suggested in argument that in this matter there was no difference in convenience between the two forums and that such being the case a foreign defendant should not be forced into this jurisdiction. I am unable to agree with [this] submission.¹³

Usually, the doctrine of *forum conveniens* will exclude actions from the Canadian courts that have no more than a casual technical or coincidental connection with Canada.

In *Anderson et al. v. Thomas*, it was held that the Ontario court had jurisdiction to entertain an action founded on a tort committed within Ontario by parties resident out of the province and that service could be effected out of the jurisdiction.

⁹ The Ontario court relied on *Kroch v. Rossell et al.*, [1937] 1 All E.R. 725, at p. 727.

¹⁰ (1963), 45 W.W.R. 150 (B.C.S.C. in Chambers) (service *ex juris*).

¹¹ See also for instance *Gibbons v. Berliner Gramophone Co.* (1912), 8 D.L.R. 471, rev. (1913), 13 D.L.R. 376 (Ont.) (service *ex juris*); *Brenner v. American Metal Co.* (1920), 57 D.L.R. 743, 48 O.L.R. 525, aff'd (1921), 64 D.L.R. 149, 50 O.L.R. 25 (Ont.) (service *ex juris*); *Denton, Mitchell & Duncan Ltd. v. Jacobs* (1923), 23 O.W.N. 677 (service *ex juris*); *McCutcheon v. McCutcheon* (1930), 38 O.W.N. 90 (service *ex juris*); *Lawrence v. Lawrence*, [1953] O.W.N. 124 (service *ex juris*); *Re O'Connor v. Lemieux* (1926), 60 O.L.R. 365, at p. 368 (service *ex juris*); *Lawson v. Lawson*, [1964] 2 O.R. 321 (service *ex juris*); *Curley v. Clifford*, [1941] O.W.N. 154 (service *ex juris*); *Fowler v. Home Frocks Limited*, [1942] O.W.N. 633 (service *ex juris*); *Aitken v. Gardiner*, [1953] O.W.N. 555 (service *ex juris*); *K. J. Preiswerek Ltd. v. Los Angeles-Seattle Motor Express Inc. et al* (1957), 23 W.W.R. 574 (B.C.) (service *ex juris*); *Colonna v. Healy Motors Ltd.* (1952), 5 W.W.R. (N.S.) 466 (Alta) (service *ex juris*); *Paradis v. King* (1956), 6 D.L.R. (2d) 277 (Man. C.A.) (service *ex juris*); *Can. Brine Ltd. v. Nat. Sand & Material Co.*, [1963] Ex. C.R. 31 (service *ex juris*).

¹² (1963), 41 D.L.R. (2d) 260 (B.C.S.C.) (service *ex juris*).

¹³ In Manitoba see *Selan v. Neumeyer et al.*, *supra*, footnote 4. In that province proceedings are commenced by the issue of a statement of claim which may be served *ex juris*.

Kingstone J. said in part:¹⁴

There can be no doubt that an Ontario Court has jurisdiction to entertain an action founded upon a tort committed within Ontario by parties resident out of the Province and that service may be effected out of the jurisdiction: *Clarkson v. Dupre* (1895), 16 P.R. (Ont.) 521.

The defendant on this motion, however, urges that, having regard to the fact that all the plaintiffs and the defendant reside in Cleveland, the proper forum is a Court in the State of Ohio, and that this action should be stayed pursuant to the provisions of the Judicature Act, R.S.O. 1927, c. 88, s. 15 (f). The Court under this section has jurisdiction to stay any action "so far as may be necessary for the purposes of justice".

In support of this application counsel for the defendant referred to the following cases: *Egbert v. Short*, [1907] 2 Ch. 205; *Logan v. Bk. of Scotland*, [1906] 1 K.B. 141; *Re Norton's Settlement, Norton v. Norton*, [1908] 1 Ch. 471; *Collard v. Beach* (1903), 81 App. Div. N.Y. 582; and counsel for the defendant contended that the discretion of the Court ought to be exercised for the following reasons:

(1) The bringing of the action in Ontario puts the defendant, or those responsible for his defence, to unnecessary expense.

(2) The costs of a jury trial in Welland County ought not to be imposed upon that County.

(3) The provisions of Rule 25 were never intended to give jurisdiction simply because a tort was committed in Ontario where all the parties to the action were domiciled and subject to a foreign jurisdiction.

The English cases quoted show that, where an action is frivolous or vexatious or when another action between the same parties is pending elsewhere, a stay should be granted. There is no reason to doubt that this action is brought *bona fide* in this country. The power to stay proceedings is always a discretionary one, but that discretion should not be exercised in favour of the defendant unless some good reason is advanced to the Court which would indicate that he, the defendant, is being unnecessarily or unfairly harassed or annoyed by reason of the institution of the action.

As the plaintiffs have not instituted proceedings in the country of their domicile, no sufficient reason is advanced for forbidding them access to the Ontario Courts, and the right to choose their own forum should not be lightly interfered with.

The remarks of Lord Camden in *Bayley v. Edwards*, 3 Swans. 703, at p. 711, 36 E.R. 1029, are applicable here:—"As to the inconvenience, considering the difficulties of administering justice between parties occasionally living under the separate jurisdictions; I think the parties ought to be amenable to every Court possible, where they are travelling from country to country".

The defendant urges that the preponderance of convenience and expense should be considered, but here neither of these factors is so unusual or exceptional as to warrant any interference by the Court in permitting the plaintiffs to exercise their right to have the case tried by the Courts of Ontario.

¹⁴[1935] 3 D.L.R. 286 (Ont. H.C.), at p. 287. For cases involving a stay of proceedings where the question of *forum conveniens* was raised see for instance, *Braden v. Monarch Life Assur. Co.* (1923), 24 O.W.N. 244; *Howell v. Jewett* (1876), 7 P.R. 69; *Sittler et al. v. Conwest Exploration Co. Ltd. et al.* (1971), 16 D.L.R. (3d) 726, [1971] 3 W.W.R. 359 (N.W.T.).

In connection with the *forum conveniens* generally, irrespective of service *ex juris*, *Van Vogt v. All-Canadian Group Distributors Limited*, is a very important case.¹⁵

A person who resided in Toronto made a written agreement with the defendant whose head office and records were in Montreal for services on a commission basis to be performed in Ontario. The contract provided that it was to be interpreted in accordance with Quebec law. In Toronto, this person executed an assignment of the contract to the plaintiff who resided in Winnipeg where the defendant also had a branch office. The plaintiff sued for an accounting in Manitoba. On an application to stay the action the court held that the action should be dismissed. The plaintiff could still sue in another jurisdiction. While the plaintiff's *prima facie* right as a Manitoba resident to bring action in Manitoba against a defendant who was doing business there ought not to be lightly interfered with, this was a clear case of deliberate harassment and an abuse of the process of the court, since the plaintiff's object in bringing the action in Manitoba was to make the defence so difficult as to induce a settlement. The defendant was held to have discharged the onus of showing that the relief it asked would do no injustice to the plaintiff. The principle of *forum conveniens* was applied. On appeal, the Court of Appeal agreed with the court below. There was material in the record sufficient to justify the trial judge's exercise of discretion in holding that Manitoba was not *forum conveniens*. Tritschler C.J.Q.B. said:¹⁶

. . . from the beginning to the end of the case there is not a breath of Manitoba atmosphere. . . . The cause of action arose outside Manitoba. The services in question were rendered in Toronto by a person domiciled there. They were rendered to a company whose principal place of business is in Montreal. They were rendered under an agreement made in Toronto and which is to be governed and interpreted in accordance with the laws of Quebec. Grant's resignation and the assignment of his claim took place in Toronto. The accounting, it is clear from the examination-for-discovery, will be long and complex. All the records are in Montreal. The witnesses as to law and facts. (and there will be many) are all out of Manitoba.

Counsel for plaintiff quite rightly submitted that the *prima facie* right of a Manitoba resident to bring action against a defendant doing business here ought not to be lightly interfered with. But this is the strongest possible case for interference and defendant has amply discharged the burden of showing that the relief it asks will do no injustice to plaintiff. Plaintiff's counsel said it will be most inconvenient for plaintiff to retain counsel in a foreign jurisdiction. Plaintiff is not entitled to any sympathy on this score. He went to a "foreign jurisdiction" to acquire the cause of action and brought it, with full knowledge of the risks involved, to this province.

¹⁵ (1967), 61 W.W.R. 704 aff'g (1967), 60 W.W.R. 729 (Man. C.A.). See also *Braden v. Monarch Life Assur. Co.*, *ibid.*

¹⁶ (1967), 60 W.W.R. 729, at p. 737. See also *Egbert v. Short*, [1907] 2 Ch. 205.

The whole of the circumstances point to this, that the object of plaintiff and also of Grant (who has undoubtedly a private understanding with plaintiff) in sending and in bringing the action here was to make the defence so serious and difficult a matter as to induce defendant to make a settlement.

Subsequently in *Van Vogt v. All-Canadian Group Distributors Limited*¹⁷ the court allowed an appeal from an order dismissing an action for an accounting for breach of contract on the ground that Manitoba was *forum non conveniens*. The court below did not find that according to Rule 121 of the Manitoba Court of Queen's Bench, the action was frivolous or vexatious. The plaintiff sued for wrongful dismissal in Manitoba where he lived and had been employed.

The head office of his employer, a Dominion-wide company, and all its records were in Montreal. The contract provided that it was to be governed by Quebec law.

Dickson J.A. started to say that as a basic principle every Canadian has a right to have ready access to the courts of the country. A man should not have to go a thousand miles or more to state his claim and present his case. He then remarked that the inclusion in the contract of a clause making Quebec law applicable would not of itself make Manitoba a *forum non conveniens*. It is one factor, by no means decisive, to be taken into account and given more or less weight depending upon the circumstances of the particular case. The judge also found that the balance of convenience did not point compellingly to Montreal so far as records or witnesses were concerned. Finally he pointed out that substantial legal expenses had been incurred and a lot of time spent in this litigation and good cause would have to be shown before that money and time be regarded as wasted.

More recently, in *Moreno et al. v. Norwich Union Fire Insurance Society Limited*,¹⁸ the defendant applied to have an action

¹⁷ (1969), 71 W.W.R. 535, 9 D.L.R. (3d) 407 (Man. C.A.).

Although, in England, in cases where the defendant has been served within the jurisdiction, "the issue before the court was whether the plaintiff's action should be stayed or struck out in the exercise of the court's inherent jurisdiction to prevent an abuse of its process", in fact, "in all of them the 'abuse' arose purely because of the inappropriateness of the forum, and in all of them the 'abuse' could just as easily have been expressed in terms of the principle of *forum conveniens*". See Inglis, *op. cit.*, footnote 1, at p. 387, who adds at p. 390: "While it can hardly be suggested . . . that there is any fundamental difference in principle between this type of reasoning and that involved in *forum conveniens*, it is plainly much more logical and helpful to say that in all cases, regardless of the exact manner in which the issue is raised, what is really being invoked is the court's inherent power to determine whether it should assume jurisdiction on the basis that it is *forum conveniens*". ". . . it is no longer appropriate to speak of the staying or striking out of an action where service has been effected within the jurisdiction on a possibly transient defendant in terms of frivolous or vexatious procedure, or an abuse of the process of the court." See also *The Eleftheria*. [1969] 2 All E.R. 641 (P.D.A.).

¹⁸ [1970] I.L.R. 1-390, [1971] 1 O.R. 625.

against it stayed or dismissed on the ground that the Ontario court was not *forum conveniens* and that the action, brought by two plaintiffs residents of Illinois, arising out of an automobile accident that took place in England and which involved an insurance policy in a form unusual in Ontario and to be interpreted according to English law, would be unjust and an abuse of the process of the court. The only connection between the parties and Ontario was the fact that the defendant, a fire insurance company with its head office in England, carried on business in Ontario among other places around the world although not in the State of Illinois.

In allowing the application and dismissing the action the court relied on *Van Vogt v. All-Canadian Group Distributors Limited*¹⁹ and pointed out that it is clear from the cases that judges have been influenced by the motives of plaintiffs, apparent or inferred, in deciding whether the proposed forum was inconvenient or the attempt to enter it vexatious. The circumstances indicated an attempt by the plaintiffs to force a settlement by the insurance company in order to avoid the costs or inconvenience of trying this case in an inappropriate jurisdiction. There was an element of frivolity in the case.

The Ontario action would inflict substantial hardship upon the defendant and it would be wrong in principle to discount this hardship simply because the defendant is a long established and a presumably prosperous insurance company. The court's decision was influenced by the fact that the proper law of the contract was English law and that if the action were to proceed in Ontario, the defendant's proof of that law and the facts of the automobile accident would almost certainly require the transportation to and maintenance in Toronto of witnesses who could not be compelled to attend. In this connection, it should be said that proof of foreign law should not be an obstacle to the exercise of jurisdiction. Material witnesses may also be examined abroad. Finally, the court remarked that in these days of swift and economical air travel, even if the plaintiffs attended the trial in person, delay and expense in going to England from Illinois as compared with going from there to Ontario is not the consideration which it might have been at an earlier day.

In *Sittler et al. v. Conwest Exploration Co. Ltd. et al.*²⁰ the plaintiff brought an action in the Northwest Territories for rescission of a contract against two Dominion companies²¹ with head offices in Toronto in respect of certain mining claims in British

¹⁹ *Supra*, footnote 15. The court also relied upon *Logan v. The Bank of Scotland (No. 2)*, [1906] 1 K.B. 141 and *Egbert v. Short*, *supra*, footnote 16 and distinguished *Anderson et al. v. Thomas*, *supra*, footnote 14 on the ground that in that case the applicable law was that of Ontario.

²⁰ *Supra*, footnote 14.

²¹ *Conwest Exploration Co. Ltd.* and *Cassiar*. The latter company was made defendant for purposes of notice only.

Columbia. The only foundation of jurisdiction was the fact that the two defendants had registered offices in the Territories. In permanently staying the action, the Northwest Territories Territorial Court also relied on *Van Vogt v. All-Canadian Group Distributors Limited*²² and paraphrasing Tritschler C.J.Q.B.,²³ said, "from the beginning to the end of the case there is not a breath of 'Northwest Territories' atmosphere".²⁴ The plaintiffs had deliberately chosen the forum of the Northwest Territories Territorial Court for purposes of harassment and oppression. The Yukon Territory "where the misrepresentations are alleged to have taken place and where at least one plaintiff resides, or the Province of British Columbia where the claims are situate and another plaintiff lives, offer a more convenient forum even for the plaintiffs, if not any more convenient for the defendants".²⁵

To conclude, irrespective of the way in which the question of *forum conveniens* arises, the same considerations will be weighed by the court in arriving at a decision. In other words, will the assumption of jurisdiction promote substantial justice in the case?

J.-G. C.

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²² *Supra*, footnote 15.

²³ *Supra*, footnote 16.

²⁴ *Supra*, footnote 14, at p. 730.

²⁵ *Ibid.*, aff'd [1971] 3 W.W.R. 359 (C.A.).

¹ *Yuan et al. v. Farstad et al.* (1967), 66 D.L.R. (2d) 295. (B.C.), noted (1968), 14 McGill L.J. 332.

² *McDonnell v. Kaiser* (1968), 68 D.L.R. (2d) 104 (N.S.); *Dame Lynch v. Grant*, [1966] Qué. C.S. 479; *Anders et al. v. Sim* (1970), 11 D.L.R. (3d) 366 (Alta.).

³ The American case law is also divided. Much of the difficulty stems from the fact that in most states contributory negligence is still a complete bar to recovery. The reluctance to invoke the seat belt defence is less marked in comparative negligence states. A complete list of the three dozen cases appears at (1970), 53 Marquette L. Rev. 226. See especially *Bentzler v. Braun* (1967), 149 N.W. 2d 626, 34 Wis. 2d 362 where a dictum indicates a willingness to invoke the defence in a comparative negligence state. Compare with *Miller v. Miller* (1968), 160 S.E. 2d 65 (N.C.) refusing to invoke it. Five state legislatures have forbidden their courts to rely on the seat belt defence. See Kircher, *The Seat Belt Defense—State of the Law* (1970), 53 Marquette L. Rev. 172, at p. 176. The periodical literature in the United States has mushroomed. See especially Roethé, *Seat*