

**WITH GREAT ADVANTAGE SHOULD COME RESPONSIBILITY:
HOW THE TERRITORIALIST APPROACH IN PRIVATE INTERNATIONAL
LAW MAY BE OVERCOME TO ENSURE JUSTICE IS DONE FOR THOSE
LEFT IN THE WAKE OF CANADIAN BUSINESS ABROAD**

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Abstract

Conflict of laws rules in Canada bias toward taking jurisdiction over matters involving human rights or environmental abuse inflicted abroad, particularly when inflicted by Canadian corporations. Contrary to enumerated tests for jurisdiction, many Canadian courts have instead preferred a regressive state-centric/hyper-comity anchor in applying such tests to putative foreign plaintiffs. This Thesis argues this preference can be effectively understood using the lens and language of Pierre Bourdieu's field theory as representing a *habitus* of the Canadian judiciary. In light of the *habitus* of the Canadian judicial field, and in order to encourage an interpretation of conflict of laws rules in Canada that prefers an uptake of such claims, practitioners ought to introduce issues of jurisdiction to Canadian courts framed with respect to fairness, notably whether it is fair to provide Canadian corporations significant benefit when operating abroad and, through failure to take jurisdiction, allow such corporations to avoid civil prosecution.

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Introduction

The world's climate is changing, likely in large part because of human/corporate behaviour.¹ The impacts of such change, though largely still to come, are most endured by the world's poorest citizens.² In a growing trend, affected groups are turning to international and domestic law to assign blame to major players and to seek compensation in order to assist with the mitigation of the effects of climate change. As of March 2017, the United Nations (UN) Environment Programme had counted nearly 1000 civil cases related to climate change filed worldwide against governments, 654 of those cases being filed in the United States (US) alone.³ Such cases seek to hold governments accountable for legislative and policy commitments, link government actions to greenhouse gas emissions, or establish liability for failures to adapt to climate change. In Canada, while there have been some domestic attempts at tying responsibility for climate change to the Canadian federal and provincial governments — through constitutional challenges and judicial reviews⁴ — there has yet to be a successful claim against any level of government, nor any of Canada's multinational corporations, for their role in climate change.⁵

Such challenges —whether against governments or corporations — bring with them a scale and complexity that dwarfs the average civil case given the myriad logistical, causational, and procedural difficulties.⁶ However, before having any case heard, putative plaintiffs will need to convince a Canadian court that it has jurisdiction over the matter. Where affected plaintiffs are foreign citizens, such jurisdiction to hear the case, let alone determine it on its merits, is far from

¹ IPCC, “2018: Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty” World Meteorological Organization, Geneva, Switzerland.

² O Hoegh-Guldberg et al, “2018: Impacts of 1.5°C Global Warming on Natural and Human Systems. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty” (2018) IPCC.

³ UNEP, “The Status of Climate Change Litigation: A Global Review” (May 2017) at 10-11.

⁴ See for example, the now abandoned judicial review by Ecojustice against the Province of Ontario with respect to a decision to approve additional air pollutant releases in Sarnia as impeding the applicants' right to life, liberty, and security of the person per s 7 of the *Canadian Charter of Rights and Freedoms: Ronald Plain v Director, Ministry of the Environment, Her Majesty the Queen in Right of Ontario, as represented by the Minister of the Environment, the Attorney General of Ontario and Suncor Energy Products Inc*, Court File No. 528/10 (ON SCJ).

⁵ Meinhard Doelle, Dennis Mahony & Alex Smith, “Canada” in Richard Lord et al, eds, *Climate Change Liability: Transnational Law and Practice* (Cambridge: Cambridge University Press, 2012) at 525.

⁶ Daniel Augenstein, “Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy” (2018) H R L Rev 593 [Augenstein 2018] at 595.

assured. Foreign plaintiffs in Canada are subject to Canadian conflict of laws/private international law rules and the application of such rules has failed to keep pace with the internationalization of the global marketplace and the reality of earth sciences.

Though *climate change* litigation has been slow to develop in Canada (especially compared to the United States), we may look to project-specific transnational tort litigation outside the field of climate change dimensions – some for environment-related harms and some for harms associated with more classical human rights violations – to predict the role jurisdiction will play in such climate change cases and thus to minimize the risk of failure and subsequent determinations of *res judicata*. Such tort cases, already ongoing, are likely the best avenue with which to create precedent and pave the way for the larger climate change actions. There are several reasons for this. The defendants, though whose involvement is frequently complicated by veiled corporate relationships, are generally few and easy to identify; similarly, though plaintiffs may be numerous, they are often aligned in a representative or class action; last, the tortious conduct is generally tied to a single or ongoing identifiable event at a single location or project. In such cases, the parties and damages are much easier to identify, thus preventing any clouding of judicial judgment by novelty and scale and providing an observer with a cleaner test of jurisdiction.

Unfortunately, Canadian extraction abroad provides a rich source for such cases. Between 2000 and 2015, at least 44 people died, and 403 people were injured as a result of violence surrounding Canadian-owned mines in Latin America alone.⁷ Those most heavily affected were those opposed to mining projects and their family members as well as women, children, and union and indigenous leaders. Such numbers were described by the Justice and Corporate Accountability Project (JCAP) as “the tip of the iceberg.”⁸ Indeed, the figures are limited to the Latin American region and reflect only data that was available. While many of the incidents JCAP outlined went unpunished, some plaintiffs have come forward to seek redress. In a (perhaps ironic) reflection of the tendency of the transnational corporation to seek financial gain through doing business in a developing country — and thus passing off environmental

⁷ Duncan Hood, “Mining Disaster,” *Globe and Mail Report on Business* 35:6 (March 2019) citing Shin Imai, Leah Gardner & Sarah Weinberger, “The ‘Canada Brand:’ Violence and Canadian Mining Companies in Latin America,” Report (2016) Justice and Corporate Accountability Project online (pdf): <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2886584> [JCAP Report].

⁸ JCAP Report, *supra* note 7 at 5.

burdens to those who cannot or will not resist by exporting waste and polluting enterprises⁹ — plaintiffs then, fairly, seek beneficial recourse in choosing the multinational corporation's home country as a preferred forum for action.¹⁰

But in analyzing judicial treatment of such cases we are presented with a complicated story. While the tests for asserting and keeping jurisdiction in Canadian fora vary, they favour the assertion of jurisdiction, particularly in cases involving human rights abuses. However, using the simultaneously ephemeral and historic notion of comity, Canadian courts have diverged in the application of the black letter law. Such divergence leads to unpredictability in access to justice (not to say, unfairness) for foreign plaintiffs and the source of such divergence will require attendance before any larger climate change-related litigation can expect success in Canada.

Rather than taking a doctrinal view of Canadian transnational tort cases to try to make sense of and identify differences between such cases on technical rules, by pursuing an analysis of such decisions from a sociological or behavioural perspective — one that shifts focus from the decision itself to the decision-maker — we are able to make more sense of the judicial tendency to resort to traditional state-based analyses. This thesis argues, thus, that it is not the black letter law that is creating difficulty for foreign-based plaintiffs in transnational human rights and environmental tort litigation in Canada, but the tendencies of the Canadian judiciary to lean into traditional understandings of the international space as well as to draw on cautious dispositions related to the political economy of corporate accountability.

These tendencies, comforting though they may be to some, lead to the inevitability that plaintiffs, particularly those from the developing world, may never see justice done. It is often difficult if not impossible for plaintiffs to seek redress from their home government institutions when the entity responsible for their misfortune provides significant economic incentive to a plaintiff's national leaders and power elites. Beyond national governance, and as noted by Beth Stephens, corporations are multinational while the rules to govern them remain national, creating a disconnect between such international corporate structures and the law;¹¹ this lack of

⁹ Janet Dine, *The Governance of Corporate Groups* (Cambridge: Cambridge University Press, 2000) at 161.

¹⁰ Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2004) [Joseph 2004] at 150.

¹¹ Beth Stephens, "The Amoralty of Profit: Transnational Corporations and Human Rights" (2002) 20 Berkeley J

supranational authority — grounded in international law — creates further regulatory gaps in which problems arise that are under-regulated.¹² In many of these cases, a corporate entity's home country becomes the sole option for seeking redress.

In recognizing territorialist judicial tendencies and the reality of corporate/plaintiff power dynamics, the question remains: how then can plaintiffs advance modern approaches to private international law in project-specific transnational tort cases, which may pave the way for access to Canadian courts for future and larger more complicated – i.e. notably, climate change – files?

One solution may be to encourage those in the Canadian judiciary, who already tend heavily towards traditional legal interpretations (notably, as will be detailed, classical territorialist understandings of both the world and law), to embrace other traditional concepts (namely, fairness and equality of treatment) rather than seeking to persuade judges to approach private international law from more modern frames of reference (such as ideas of membership in a global community or ideas of transnational law). In a more traditional judicial mindset, it may be possible to appeal to a sense of fairness that is willing to attach *national responsibility* to legal entities where such entities are provided extensive *national benefit*. The modern reality is that Canadian corporations are provided extensive benefit by virtue of being based in Canada; that benefit leads to a parallel responsibility in this country. Such an argument may find favour with even traditionally-minded judges.

It is important to explain, before embarking on the above-noted argument in the main body of this thesis, that the question of transnational and global justice is a broad and widely studied topic. In order to narrow and focus the research contained herein, and to provide what is hoped to be a new frame of understanding, I have chosen and made a number of assumptions. Most notably, I assume, using a legalist frame,¹³ that civil litigation is a desirable and effective tool for individuals and communities impacted by harmful corporate conduct. Second, I have addressed only the application of current Canadian state law, rather than the existence and

Int'l L 45 at 54.

¹² Craig Scott & Robert Wai, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation" in Christian Joerges et al, eds, *Transnational Governance and Constitutionalism* (Portland: Hart Publishing, 2004) 287 [Scott & Wai 2004] at 288.

¹³ Robert Wai, "The Commercial Activity Exception to Sovereign Immunity and the Boundaries of Contemporary International Legalism" in Craig Scott, ed, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001) 213 [Wai 2001a] at 240.

possible application of Indigenous law to such questions.¹⁴ Third, unless otherwise specified, I have limited my analysis to the Canadian domestic (rather than international) legal context. This third assumption was made given the current Canadian judicial hesitance in engaging with customary or treaty-based international law. While many scholars have argued both for a liberal domestic application of customary international law and for a re-imagining of transnational law¹⁵ — as a concept distinct from, while mutually imbricated with, international or domestic law — for the sake of and hope for immediate application I preferred in this thesis to present an analysis and future direction based in practices that are already palatable to the Canadian judiciary.

Finally, few Canadian project-specific transnational cases involve environmental torts and most involve, instead, human rights abuses. However, for our purposes I will use both kinds of cases as examples of “bad behaviour.” I assume that both kinds of cases may serve equally well as test cases for the assumption of Canadian jurisdiction over foreign actions; whether human rights cases serve perfectly to predict the way in which a Canadian court may treat a climate change case where the damage is inherently more challenging to identify than physical damage is to a person, may be available for further inquiry.¹⁶

The paper unfolds over three main chapters, apart from the present introduction and the conclusion. In the first chapter, I introduce private international law in Canada, and specifically the way in which courts assert and retain jurisdiction. Given the diversity in approaches taken by Canadian provincial fora, this analysis is done using representative provinces: British Columbia (BC), Ontario, and Québec. This section explains the tests for jurisdiction *simpliciter*, *forum non conveniens*, and forum of necessity before introducing and explaining the way in which the concept of comity of nations is applied by Canadian courts in the context of private international

¹⁴ See for instance the discussion in Franzki, Hannah & Johan Horst, “On the Critical Potential of Law — and its limits” in Kerstin Blome et al, eds, *Contested Regime Collisions* (Cambridge: Cambridge University Press, 2016) 347 [Franzki & Horst 2016] at 360.

¹⁵ See for instance Craig Scott, “Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms,” in Craig Scott, ed, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001) [Scott 2001a] at 45; Augenstein 2018, *supra* note 6.

¹⁶ It may, in some cases, be easier for a Canadian court to ground their jurisdiction over climate change impacts caused by a Canadian corporation as the damage caused by climate change — its impact on the global commons — could be easily said to occur in Canada, the victims of such damage being Canadian citizens (along with others).

law. In this chapter I use several Canadian transnational tort cases as examples of how Canadian private international law has been successfully applied in a principled and modern manner.

In the second chapter I analyze why, in the context of the black letter law, some courts have found it difficult to apply a modern lens to private international law, one that is based in the reality of globalism. To assist in this analysis, I use the conceptual framework introduced by French political philosopher Pierre Bourdieu. I use Bourdieu's field theory to demonstrate how varied structural and historical norms have created a tendency within the judicial field towards a (highly) territorialist understanding of the state and the actions of its citizens. Equipped with Bourdieu's field theory — as it relates to the Canadian judicial field — I then demonstrate how we may observe these tendencies at play through select Canadian legal actions. Such examples make clear that despite the forward-looking approach taken in some cases — reviewed in the second chapter — the tendencies of the courts, including the Supreme Court of Canada, toward territorialism remain strong.

The third chapter seeks a way forward for private international law practitioners in Canada. Given the tendencies of the Canadian judiciary, I suggest using a conservative (conservative, synonymous to traditional or old-fashioned, rather than in its political meaning) and historical grounding in the concept of fairness to offset the conservative tendency of territorialism. For the purposes of establishing jurisdiction, by focusing instead on the concept of equal treatment (borrowing in part from political philosopher John Rawls) in both benefit and responsibility as it relates to the corporation itself, we are able to sidestep moral (and hotly debated) arguments of what duty may or may not be owed by the Canadian judiciary to the global public or the corporation to vastly unequal plaintiffs. Instead, the judiciary may focus instead only on the rights and responsibilities of the corporation within and to the *Canadian* system. And as it turns out, Canadian corporations operating abroad — notably those that actively avoid facing their accusers in Canadian courts — are provided significant financial, expert, regulatory, and reputational benefits by virtue of being Canadian. I argue that such entities cannot at once benefit from our legal system and also avoid being subject to it.

The conclusion draws out certain implications of the analysis and argues that in highlighting a CanCorp's exploitation of the Canadian system, litigators may be able to steer an

otherwise traditionalist-minded judiciary towards the ultimate goal of a liberal and globalized interpretation of the tests for jurisdiction.

Chapter I: Canadian courts are legally entitled to take jurisdiction over transnational environmental and human rights tort litigation.

In state-positivist thinking about public and private international law, the competence of a state to assert jurisdiction — to make, apply, and enforce laws — was based solely on the territorial jurisdiction of the state. Indeed, in the *Island of Palmas Case (Netherlands v United States of America)*, the arbiter Max Huber famously noted the “principle of the exclusive components of the state in regard to its own territory” is the “point of departure in settling most questions that concern international relations.”¹⁷ As states were forced to deal with increasing cross-border trade, relationships (business and familial), and criminal behaviour, the conception of the “state’s” legitimate reach has expanded somewhat such that various bodies of the state may take jurisdiction to make, apply, and enforce rules “extra-territorially.” For instance, a state’s *legislative* jurisdiction — to make laws that will bind those otherwise beyond the state’s territorial border — now reasonably extends beyond territoriality and may be anchored in: an accused’s or defendant’s nationality (nationality principle); in certain acts committed abroad that are prejudicial to a state’s security (protective principle); in certain criminal acts that are deemed so offensive to the international community at large that a state requires no connection to prosecute (universal principle); and perhaps, in some contexts, to acts that injure a state’s nationals regardless of where the harm occurred (passive personality principle).¹⁸

The above noted principles related to *legislative* jurisdiction have been considered, at the international level, as instantiations of a more general “*bona fide* connection” test between the subject matter and the source of jurisdiction.¹⁹ That international test is, today, reflected in Canada’s approaches — in both codified and common law — to private international law (alternatively referred to as conflicts/conflict of laws) in both contract and tort matters. As will be demonstrated, where a defendant is a Canadian national in circumstances involving human rights abuses, the conflicts structure in Canada militates towards a Canadian court finding and

¹⁷ *Island of Palmas Case, United States v Netherlands*, (1928) II RIAA 829 at 838.

¹⁸ Steve Coughlan et al, *Law Beyond Borders: Extraterritorial Jurisdiction in an Age of Globalization* (Toronto: Irwin Law Inc, 2014) [Coughlan 2014] at 37.

¹⁹ *Ibid* at 39.

retaining jurisdiction to hear the case on both the inherent bases of the nationality and territoriality principles.

In this section, I will first review the conflicts context in Canada, outlining how a transnational environmental/human rights tort claim is assessed at the jurisdiction stage and the various thresholds such a case encounters upon first being introduced to a Canadian court. Next, I will demonstrate that the traditional concept of “comity,” often raised by Canadian courts in such contexts, proves to be inapplicable or limited in such cases. Last, I will demonstrate how, in applying a thoughtful analysis of the jurisdictional legal framework, a modern interpretation of comity, and a “reality frame” with respect to context, some Canadian courts have managed to accept and retain jurisdiction over such claims.

A: The conflicts context in Canada

When plaintiffs try to bring transnational tort claims in Canada, they generally face immediate motions by the defending party/parties to dismiss the action on the basis of lack of jurisdiction, or motions to strike on the basis of no reasonable cause of action.²⁰ It is this first barrier, the motion to stay, that must be overcome before a plaintiff may move to have his or her case heard on its merits. While the applicable law of tort claims may be (1) legislated rules, (2) the common law, (3) creative arguments involving the domestic application of customary international law, or a combination of all three, it is jurisdiction that acts as a threshold determinative issue, without which no claim proceeds. As a determinative factor, the way in which Canadian courts approach this test of private international law is key.

Assuming a court has subject-matter jurisdiction, a question of transnational tort litigation necessarily begins with *whether* a chosen state will assert jurisdiction. In Canada, determining whether a superior court will assert jurisdiction is actually three questions: whether a forum *can* assert jurisdiction (jurisdiction *simpliciter*), whether it will *keep* jurisdiction in the event it is found, and where no jurisdiction is initially found, whether the court *will take* jurisdiction out of

²⁰ Defendants frequently argue a claim has no reasonable cause of action where the tort complained of was committed by a subsidiary or contracted corporation of the defending corporation to which the defending corporation alleges it is not the *respondeat superior*. Additionally, such defences are argued where the cause of action involves standards set by international law: See *Araya v Nevsun Resources Ltd*, 2017 BCCA 401 leave to appeal to SCC granted, 2018 CarswellBC 1552 [Nevsun].

necessity.²¹ The particular approaches vary as between Québec and its Civil Code, jurisdictions that have implemented statutory schemes such as BC, and those that rely entirely on the common law, such as Ontario. As such, a review of the approaches taken by representative fora BC, Québec, and Ontario in this regard is useful.²² What follows does not purport to be a comprehensive review of the current state of conflict of laws in Canada, but merely a sufficiently thorough review to demonstrate that, rather than an impassible barrier, the legal constructs that inform the assertion of jurisdiction at the onset of litigation lean heavily, in cases of human rights abuses, towards Canadian courts doing so.

Jurisdiction simpliciter

At common law, jurisdiction *simpliciter* is traditionally established *in personam*²³ through presence or consent. The fundamental basis of jurisdiction through presence is territorial power. While it is easier to establish jurisdiction *simpliciter* through a defendant's residence or domicile in the forum, it is not necessary. Historically, a defendant's temporary presence was sufficient to establish jurisdiction.²⁴ While scholars have generally considered the establishing of jurisdiction solely through presence to be fading in application — because it may be temporary — the recent SCC decision in *Chevron Corp v Yaiguaje*, confirmed its continued existence as a primary basis upon which to found jurisdiction.²⁵

In terms of presence, while corporations may be subjected to jurisdiction by virtue of having incorporated in a particular forum (reflective of “residency”), a corporation may also be subjected to that jurisdiction by “doing business” in a particular forum.²⁶ A determination of whether a corporation is carrying on business requires “some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction.”²⁷ In provinces where it is required, the requirement of a foreign

²¹ *Jordan v Schatz* (2000), 77 BCLR (3d) 134 at para 21; *Club Resorts Ltd v Van Breda*, 2012 SCC 17 [Van Breda] at para 101; *Tolofson v Jensen*, [1994] 3 SCR 1022 [Tolofson] at 1049.

²² Ontario, BC, and Québec are also Canada's three largest jurisdictions, which also makes them useful representative fora.

²³ As opposed to *in rem* as is often seen in admiralty law.

²⁴ See *Maharane of Baroda v Wildenstein*, [1972] 2 All ER 689 (HL).

²⁵ *Chevron Corp v Yaiguaje*, 2015 SCC 42 [Chevron] at paras 89-91.

²⁶ *Ibid* at para 85.

²⁷ *Van Breda*, *supra* note 21 at para 87.

corporation having to obtain a licence to do business will provide evidence to support a corporation's presence.²⁸

In Québec, the Civil Code provides the court with jurisdiction where the defendant is “domiciled” in Québec.²⁹ In Canada, while the term “domicile” is traditionally imbued with a 19th century English interpretation allowing for inclusion of “domicile of origin” — in other words, the jurisdiction from which the defendant originally came — the Civil Code provides an interpretation of “domicile” more akin to “residence.”³⁰

A defendant may also *consent* to a court's jurisdiction, either through attornment (participating in the legal process, other than to take steps to challenge jurisdiction),³¹ or by agreement (through contract). The various rules of civil procedure generally allow for a defendant to seek a stay of proceedings and/or an order setting aside service and not be deemed to have attorned to that jurisdiction.³²

Where a defendant is not present or has not consented to the jurisdiction, the court may nonetheless establish jurisdiction where there is a real and substantial connection between the forum and the dispute. This “real and substantial connection” test was adopted by the SCC in *Morguard Investments Ltd v De Savoye*³³ with reference to an approach taken in England in *Indyka v Indyka*.³⁴ Writing for the Court, La Forest J explained the real and substantial connection approach was born of the dual principles of order and fairness to support a modern system of private international law.³⁵ Though La Forest J was interested in the broader constitutional issues associated with trans-provincial enforcement of judgments raised by scholars at the time, he was limited in his analysis by the facts and argument before him. However, three years later, the *Morguard* principle was transformed in *Hunt v T & N Plc*³⁶ from

²⁸ For instance, corporations incorporated internationally must obtain a licence to operate in Ontario pursuant to the *Extra-Provincial Corporations Act*, RSO 1990, c E 27. Section 1(2) defines, for the purpose of the statute, what constitutes carrying on business in the province.

²⁹ CCQ at Art 3134.

³⁰ CCQ at Arts 75, 76, 307.

³¹ *Fraser v 4358376 Canada Inc (cob Itravel 2000 and Travelzest PLC)*, 2014 ONCA 553.

³² *Supreme Court Civil Rules*, BC Reg 168/2009 [*Supreme Court Civil Rules*], R 21-8; *Rules of Civil Procedure*, RRO 1990, Reg 194 [*Rules of Civil Procedure*], R 17.06.

³³ *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 [*Morguard*].

³⁴ *Indyka v Indyka*, [1969] 1 AC 33.

³⁵ *Morguard*, *supra* note 33 at 1097.

³⁶ *Hunt v T & N Plc*, [1993] 4 SCR 289 [*Hunt*].

a common law test to a constitutional principle meant to inform and protect against provincial overreach in the assertion of jurisdiction.³⁷ Though responsible for penning the overarching test, and continuing to promote its relevance in the more recent case of *Club Resorts Ltd v Van Breda*,³⁸ the SCC at the time did not outline any specific factors it deemed necessary to consult in applying it. That job was initially taken up by the Ontario Court of Appeal in *Muscutt v Courcelles*.³⁹

In *Muscutt*, the Court outlined eight factors to consider in the application of the real and substantial connection test. The factors, as explained by Sharpe JA, were to be considered together, no one factor to be determinative. This holistic approach allowed for jurisdiction to be made out on the basis of several more tenuous connections whose additive effect could result in a stronger link. It is important to note that, while some courts took up the eight *Muscutt* factors, other courts — including those of British Columbia — continued to apply the real and substantial connection test in a more general way.⁴⁰

In 2012, the SCC reconsidered the real and substantial connection test in the seminal case of *Club Resorts Ltd v Van Breda*. The Court noted that, while the *Morguard* test was a constitutional principle that operated to impose limits on provincial powers, the test of whether or not a forum may “assume jurisdiction” ought to involve a system of “connecting factors” informed by “principles for applying them.”⁴¹ This approach, wrote the Court, provided more certainty to parties in being able to predict whether a court would assume jurisdiction.⁴² Thus, the *Van Breda* test reformulated the *Muscutt* factors; where any one of the presumptive connecting factors applies, a court will assume jurisdiction unless the defendants can rebut by demonstrating the absence of a real and substantial connection.⁴³ The defendant may rebut the presumption of jurisdiction by establishing facts that demonstrate the connecting factor does not

³⁷ *Van Breda*, *supra* note 21 at para 23.

³⁸ *Van Breda*, *supra* note 21 at para 29.

³⁹ *Muscutt v Courcelles* (2002), 60 OR (3d) 20 (CA) [Muscutt].

⁴⁰ *British Columbia v Imperial Tobacco Canada Ltd*, 2006 BCCA 398.

⁴¹ *Van Breda*, *supra* note 21 at para 35.

⁴² The Court noted it had been “suggested” that the *Muscutt* factors gave trial judges too much latitude and that each case being decided on its facts provided for few reliable precedents: *Van Breda*, *supra* note 21 at paras 51, 75.

⁴³ *Van Breda*, *supra* note 21 at para 64.

actually point to “any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.”⁴⁴

The short list of presumptive connecting factors provided by the Court — the defendant being domiciled in the forum, the defendant carrying on business in the forum, the tort being committed in the forum, and a contract connected with the dispute being made in the forum⁴⁵ — applied only to tort cases. The Court expected lower courts to define new factors over time, with the guidance that those new factors should be similar to the enumerated factors and should be considered in light of that factor’s treatment in the case law, treatment by statute, and treatment in the private international law of other legal systems.⁴⁶ In a major shift from the *Muscutt* approach, where no connecting factors (new or previously enumerated) were found that could stand alone, a court should not assume jurisdiction – i.e. the holistic approach was terminated.⁴⁷

Most recently, in *Chevron*, the SCC reaffirmed the *Morguard* principle and underlined the structural rationales regarding how and, notably, *why* courts in Canada take jurisdiction. In that case, the court differentiated the *recognition and enforcement* of judgments from asserting jurisdiction *in the first place*. Both mechanisms look to the real and substantial connection test in reference to courts of the first instance, whether it be ensuring a foreign court had jurisdiction when it decided on an outcome now sought to be enforced in Canada, or whether it be a Canadian court taking jurisdiction over a claim not yet adjudicated. However, the Court noted, the locus of the real and substantial connection results in a much lower standard for a Canadian court to take jurisdiction over enforcement in that a real and substantial connection is not required between the defendant and a *Canadian* jurisdiction.

⁴⁴ *Van Breda*, *supra* note 21 at para 95; Note also that the Court held that, where a factual connection exists between the jurisdiction and only one of several torts, the principles of fairness and efficiency prescribe that the court take jurisdiction over the entire action: para 99.

⁴⁵ In 2005 the Hague Conference on Private International Law opened for signatures the *Hague Convention on Choice of Court Agreements*, 44 ILM 1294 (2005), which seeks to standardize and make more predictable where contracts between companies would be adjudicated if the need arises. While Canada is a member of the Hague Conference and assisted with the drafting of the Convention, it is not yet a signatory to the Convention. In any event, in 2017, Ontario, anticipating Canada’s ratification of the Convention, passed the *International Choice of Court Agreements Convention Act*, 2017, SO 2017, c 2, s 4, which will come into force when Canada ratifies the Convention.

⁴⁶ *Van Breda*, *supra* note 21 at para 91.

⁴⁷ *Van Breda*, *supra* note 21 at para 93.

There was some debate as to whether the real and substantial connection test overrides the traditional presence and consent-based jurisdiction. However, in *Chevron*, the SCC suggested that where jurisdiction is established based on presence — in that case, having a place of business in the jurisdiction — there is no need to also apply the real and substantial connection test.⁴⁸ The same has been found in respect of consent in Ontario.⁴⁹

In rejecting *Chevron*'s claim, the Court explained the differences in policy and international relations rationales for its approach to different jurisdiction-finding mechanisms. A Canadian court enforcing an order is acting as a “facilitator”⁵⁰ limited by its territorial jurisdiction; in other words, in enforcement actions, a court only has power where the defendant's assets are in Canada. A court's enforcement power has “no coercive force outside its jurisdiction.”⁵¹ This, explained the Court, supports Canada's commitment to international comity in assisting other states in upholding their laws.⁵² Throughout the judgment the Court consistently referred to the “modern” approach to conflict of laws based on the principle of comity, which “calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity.”⁵³ This, remarked Gascon J, is true “of all areas of private international law.”⁵⁴ Inherent in this analysis are perhaps competing themes: on one hand, traditional themes of deference and stability of international order, but, on another, the Court's emphasis on fairness (although it is not clear to whom fairness is due) and modernization. The *Morguard/Van Breda* test remains the leading common law.

Today, following the 1994 recommendation of the Uniform Law Conference of Canada,⁵⁵ three provinces have diverged slightly from the common law and enacted legislation designed to set standards related to determining jurisdiction.⁵⁶ Such standards, for the most part

⁴⁸ *Chevron*, *supra* note 25 at paras 87, 89.

⁴⁹ *Shekhdar v K & M Engineering & Consulting Corp*, [2006] OJ No 2120 (CA).

⁵⁰ *Chevron*, *supra* note 25 at para 44.

⁵¹ *Ibid* at para 46.

⁵² *Ibid* at paras 51-52.

⁵³ *Ibid* at para 52.

⁵⁴ *Ibid*.

⁵⁵ Uniform Law Conference of Canada, *Proceedings of the 1994 Charlottetown PE Annual Meeting: Court Jurisdiction and Proceedings Transfer Act* (Charlottetown, 1994).

⁵⁶ British Columbia: *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 [CJPTA]; Saskatchewan: *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-411; Nova Scotia: *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2nd Sess), c 2.

but not entirely, are consistent with the principles underlying the common law rules regarding presence, consent, and the *Morguard-Van Breda* real and substantial connection test. For instance, provisions of the British Columbia *Court Jurisdiction and Proceedings Transfer Act* (CJPTA), incorporate presence and consent-based jurisdiction in sections 3, 7, 8, and 9. Notably, presence is determined by “ordinary residence,” thereby rejecting any common law “transitory” presence exception, most recently upheld in the common law context in *Chevron*. Additionally, whether a corporation is carrying on business in a province is incorporated in the CJPTA at section 7, which defines presence only in enumerated scenarios, thereby ousting the flexibility of the common law.

The real and substantial connection test is adopted in the CJPTA at section 10. The test outlines a number of “connecting factors” similar to those enumerated by the SCC in *Van Breda*. However, contrary to *Van Breda*, the CJPTA *does* allow a court to take jurisdiction under the real and substantial connection test even where no single section 10 connecting factor is made out, which thus allows the kind of cumulative holistic approach to the connecting factors last seen in *Muscutt*.

While there is movement towards codifying the CJPTA in other provinces, for the time being, in common law provinces that have not yet adopted similar legislation – such as Ontario – the traditional common law test remains active.

While litigation regarding the real and substantial connection test is ongoing, for the purposes of this analysis, we are concerned with corporations incorporated and/or headquartered in Canada, particularly in Québec, BC, and Ontario. Pursuant to Québec’s Civil Code, BC’s CJPTA, and the common law in Ontario, a corporation headquartered or constituted in Canada (CanCorp) would be hard pressed to argue the superior courts of their incorporating jurisdictions do not have jurisdiction *simpliciter*. How jurisdiction *simpliciter* is applied to internationally-incorporated companies is beyond the focus of this thesis, but its continued research is an important related analysis to be undertaken in the future. As provincial or national incorporation paired with local offices provides *prima facie* jurisdiction *simpliciter*, I will proceed on the assumption that jurisdiction *simpliciter* is made out. I, therefore, turn to the test employed to determine whether a court should *retain* jurisdiction of a matter: *forum non conveniens*.

Forum non conveniens

As to whether a court will decide not to retain jurisdiction, notwithstanding its right to do so, the Canadian approaches evolved from the Scottish and, then later, English approaches to jurisdiction.⁵⁷ The principle was referred to as *forum non conveniens*, literally “not the convenient forum,”⁵⁸ but understood to mean “not the appropriate forum.” The adoption of *forum non conveniens* was confirmed by the SCC in *Amchem Products Inc v British Columbia (Workers’ Compensation Board)*.⁵⁹ Unlike the British test that divided the analysis into two “limbs,”⁶⁰ the SCC rejected this analytical approach and held the test was simply a single question: whether another *identified* forum is *clearly* the more appropriate forum for resolution of the dispute. In doing so, the Canadian approach identified an onerous standard (“clearly” more appropriate) and shifted the burden of proof entirely to the defendant. In *Amchem*, the Court held that, where there is no one forum that is clearly the most appropriate, the domestic forum prevails by default and the Canadian court will not grant a stay.⁶¹

The CJPTA adopted, in part, the test in *Amchem*, but notably dropped the requirement that another forum is “clearly” the more appropriate one, simply asking whether the court of another state “is a more appropriate forum.”⁶² In contrast, in *Van Breda*, released after the CJPTA received royal assent, the SCC retained the qualifier “clearly” from *Amchem*, thus further reaffirming this difference between provincial statutory and common law. That said, the qualifier “clearly” was relied on extensively by the BC Court of Appeal in determining the forum

⁵⁷ *MacShannon v Rockware Glass Ltd*, [1978] AC 795 (HL).

⁵⁸ While the literal translation is “not convenient forum” it is clear courts have found the better interpretation is whether the court at issue is the more “suitable” or “appropriate” of the relevant jurisdictions, rather than approaching the issue as a matter of “mere practical convenience”: *Spiliada Maritime Corp v Cansulex*, [1987] AC 460 (HL) [Spiliada].

⁵⁹ *Amchem Products Incorporated v British Columbia (Workers’ Compensation Board)*, [1993] 1 SCR 897 [Amchem].

⁶⁰ Under the first “limb” the defendant bears the burden to demonstrate there is another forum of competent jurisdiction. Only if this is made out, may the court turn to the second “limb,” under which the court must determine whether circumstances exist that require a stay not be granted and the court to take jurisdiction. The second limb requires a balancing of factors, including whether the plaintiff will obtain justice in the other jurisdiction, although this is not decisive: *Spiliada*, *supra* note 58.

⁶¹ *Amchem*, *supra* note 59 at 931. Note: this approach also differs from those of the United States and Australia. The United States example of *Gulf Oil Corp v Gilbert*, 330 US 501 (1947), which is described by Wyatt Pickett as “inward looking,” asks whether the forum chosen by the plaintiff is convenient for the defendant: Wyatt Pickett, *Cross-Border Torts: Canadian-US Litigation Strategies* (Markham, Ontario: LexisNexis Canada Inc, 2013) at 4.404. In Australia, the court asks whether the Australian court is “clearly inappropriate” focusing more on the action’s connection to Australia as appropriate rather than engaging in a comparative exercise with other courts.

⁶² CJPTA, *supra* note 56 at s 11.

conveniens under the CJPTA in the recent case of *Garcia v Tahoe Resources Inc*,⁶³ discussed below. Thus, although the qualifier is not explicitly present in the statute,⁶⁴ the BC Court of Appeal appears to be reading it into the test. Similarly, the CJPTA is unhelpfully silent with respect to which party bears the burden to prove another forum is clearly more appropriate.⁶⁵ However, as with the qualifier “clearly” the Court of Appeal in *Tahoe*, with reference to *Van Breda*, upheld the trial judge’s finding that the onus fell to Tahoe (the defendant) on the *forum non conveniens* motion.⁶⁶ This suggests, despite the wording of the statute, that the common law and CJPTA approaches have re-converged with respect to both the standard and burden of proof.

While, unlike the British two-pronged test, common law courts, in applying the *Van Breda* test, take into consideration a range of factors, sometimes with reference to the legislated CJPTA framework or the model as it was first presented by the Uniform Law Conference of Canada. In both the common law test and the CJPTA, the list of enumerated factors is open-ended; a court may consider factors not yet listed that suit the particular facts before it. The SCC-enumerated common law factors include: physical connection to the forum, the applicable law,⁶⁷ a forum’s specialized expertise,⁶⁸ jurisdiction clauses,⁶⁹ conflicts with proceedings elsewhere,⁷⁰ and juridical advantage.⁷¹

While the CJPTA was designed as a comprehensive regime,⁷² section 11 of the statute lists criteria courts *must* consider but includes no language suggesting the list is exhaustive.⁷³ Such framing left open the possibility of courts adding further similar factors. Indeed, the BC Court of Appeal has since expanded the list of criteria under the CJPTA available for analysis. In

⁶³ *Garcia v Tahoe Resources Inc*, 2017 BCCA 39 [Tahoe].

⁶⁴ The qualifier doesn’t appear in the BC CPJTA, nor that enacted by Saskatchewan or Nova Scotia.

⁶⁵ Stephen GA Pitel, “The Canadian Codification of *Forum Non Conveniens*” (2015) 7:2 J P Int’l L 251 at 255.

⁶⁶ *Tahoe*, *supra* note 63 at para 54.

⁶⁷ *Molson Coors Brewing Co v Miller Brewing Co (2006)*, 83 OR (3d) 331.

⁶⁸ See for example, *Spiliada*, *supra* note 58.

⁶⁹ *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27 [ZI Pompey].

⁷⁰ *Westec Aerospace Inc v Raytheon Aircraft Co (1999)*, 67 BCLR (3d) 278 (CA) [Westec Aerospace]; *Teck Cominco Metals Ltd v Lloyd’s Underwriters*, 2009 SCC 11 [Teck].

⁷¹ *Connelly v RTZ Corp Plc (No 2)*, [1997] ILPr 643 (HL) [Connelly CA].

⁷² *Teck*, *supra* note 70 at para 21.

⁷³ Per section 11 of the CJPTA, *supra* note 56, the court *must* consider: (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum, (b) the law to be applied to issues in the proceeding, (c) the desirability of avoiding multiplicity of legal proceedings, (d) the desirability of avoiding conflicting decisions in different courts, (e) the enforcement of an eventual judgment, and (f) the fair and efficient working of the Canadian legal system as a whole.

2015, the Court of Appeal confirmed courts in BC may now consider (in addition to the mandatory section 11 factors):

- a) where each party resides;
- b) where each party carries on business;
- c) where the cause of action arose;
- d) where the loss or damage occurred;
- e) any juridical advantage to the plaintiff in this jurisdiction;
- f) any juridical disadvantage to the defendant in this jurisdiction;
- g) the convenience or inconvenience to potential witnesses;
- h) the cost of conducting the proceeding in this jurisdiction;
- i) the applicable substantive law;
- j) the difficulty and cost of providing foreign law, if necessary; and
- k) whether there are parallel proceedings in any other jurisdiction.⁷⁴

Québec is the only civil jurisdiction that has codified the *forum non conveniens* test;⁷⁵ to my knowledge, all other civil jurisdictions other than civil/common hybrids like Scotland and Louisiana, once assuming jurisdiction *simpliciter*, have no option but to keep it. While the Civil Code notes that jurisdiction should be declined only in “exceptional circumstances,” Justice LeBel in *Van Breda* equated this use of “exceptional” with the common law requirement that another jurisdiction must “clearly” be the more appropriate. In doing so, it appears he was bringing the Canadian common and civil law systems in line,⁷⁶ likely in an attempt to force consistency among the provinces.

Arguably, the availability of *forum non conveniens* provides courts with a number of advantages. Its availability discourages plaintiff “forum shopping” to choose courts likely more favourable to them; it encourages international (or inter-provincial) comity by respecting another forum’s territorial jurisdiction;⁷⁷ it holds parties to contractual agreements by, among other

⁷⁴ *JTG Management Services Ltd v Bank of Nanjing Co Ltd*, 2015 BCCA 200.

⁷⁵ CCQ at Art 3135.

⁷⁶ Vaughan Black, “Simplifying Court Jurisdiction in Canada” (2012) 8:3 J P Int’l L 411 [Black 2012] at 433; whether Justice LeBel was lowering the standard enumerated in the Civil Code “exceptional” to that of “clearly” or whether he interpreted the words to be effectively synonymous is mostly irrelevant for our purposes as what remains is a test that burdens the defendant with *proving* more than simply the fact there is another adequate or equally positioned forum. It could also be argued that the fact Québec is the only civil law jurisdiction – or, if not the only, one of the very few – to allow for *forum non conveniens*, a contextual reading in line with Québec’s civil law compatriots (which must keep jurisdiction once it is found they have jurisdiction *simpliciter*) may suggest the “exceptional” standard is even higher than in Québec’s sister provinces.

⁷⁷ I will return to this idea of comity below.

things, making damages for breach of contract predictable;⁷⁸ and it prevents the “rush to judgment” that may come where parallel proceedings have commenced in multiple jurisdictions.⁷⁹ Such factors also informed the policy considerations regarding the inclusion of *forum non conveniens* in the CJPTA.

When the CJPTA was introduced by the BC legislature in 2003, then Attorney General, the Honourable Geoff Plant, made clear the new Act was born of both the Uniform Law Conference CJPTA and the decisions of the SCC in *Morguard* and *Amchem*.⁸⁰ In doing so, however, he emphasized only one kind of litigation. The Attorney General noted the purpose of the new Act was to increase harmonization of *commercial* law across Canada and with Canada’s international partners, and provide consistency such that disputes (referred to as “commercial disputes”) could be dealt with efficiently, fairly, and effectively.⁸¹ Following BC’s adoption of the CJPTA, there is general movement to codify the test;⁸² it appears here to stay.

However, despite its lofty goals of modernizing commercial litigation and improving comity across fora, the *forum non conveniens* test remains somewhat vague and open ended, still not having been endowed with clear judicial guidance either by or for the judiciary. Further challenges come with the timing of its application. Applications to stay proceedings on the basis of *forum non conveniens* are generally made at the onset of litigation which can make responding to arguments regarding forum appropriateness, challenging for the plaintiffs where the necessary evidence tying a defendant or its actions to a desired forum has not yet come to light. Thus, in cases of human rights and environmental torts, a conservative application of the test for *forum non conveniens* can end in unjust results. For instance, despite being the only civil law system to adopt the provision (all the while using the language “exceptionally” to describe the situation in

⁷⁸ Where courts are, for instance, more likely to uphold a forum selection clause in a contract as part of the *forum non conveniens* analysis, there is more predictability for the parties to the contract regarding where any issues may be adjudicated.

⁷⁹ Where parties have an opportunity to commence legal proceedings in multiple fora, none of which will abandon jurisdiction once it is found, there may be wasted resources spent on rushing through proceedings in one forum — thereby conducting a sloppy action — in order that one judgment may be released before another. This haste may not benefit parties whose interests lie in a thoughtful and careful engagement with the litigation process.

⁸⁰ British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 37th Parl, 4th Sess, Vol 14, No 4 (8 April 2003) at 6446-7 (Hon Geoff Plant) [Plant, April 2003].

⁸¹ *Ibid* at 6447.

⁸² At the time of writing five Canadian jurisdictions had passed a version of the CJPTA, with some variations: Saskatchewan, Prince Edward Island, Yukon, British Columbia, and Nova Scotia, although it has only come into force in three jurisdictions.

which it may apply), the Québec courts have not been shy in exercising *forum non conveniens* and extricating themselves from especially challenging transnational human rights tort claims in a way that has not been faithful to the idea of an “exceptional” declining of jurisdiction.⁸³

The test for *forum non conveniens* ought to attract a purposive reading given both the exceptional nature of the test (a challenging onus to be met by the defendant)⁸⁴ and the fact-specific and discretionary approach mandated by the common law and CJPTA. Indeed, recall the CJPTA in British Columbia was affirmed on the basis of that government’s pursuit of standardizing *commercial* law. In introducing then-Bill 31, Attorney General Plant also noted the new Act would contribute to the modernization of British Columbia law in a way “*consistent with access to justice* and building a strong economy.”⁸⁵ While the CJPTA is applied to all manner of actions, I suggest the initial purpose of the CJPTA, being aimed at the commercial context, may leave open a modified reading in the human rights or environmental contexts — both necessarily extra-commercial in nature (even as commercial imperatives may be causally connected to why violations occur) — particularly where the Act comes into conflict with access to justice issues. Certainly, access to justice formed the heart of the recent decision in *Chevron* in which the SCC found that the international context of digitalized currency meant access to a defendant’s assets may be very difficult for a successful plaintiff. There, it is notable how the Court fused a traditional conflicts analysis with a justice/equity analysis in the context of collection of damages. The Court ruled for the first time that it would take jurisdiction even if a defendant’s assets were not already in the jurisdiction; to not do so, they said, “would be to turn a blind eye to the current economic reality.”⁸⁶

⁸³ Discussed in Chapter 2: *Recherches internationales Québec v Cambior inc*, 1998 CarswellQue 4511 (SC) [Cambior]; *Bil’In (Village Council) v Green Park International Inc*, 2010 QCCA 1455 leave to appeal to SCC refused, 2011 CarswellQue 1082 [Green Park CA]; *Anvil Mining Ltd c Association canadienne contre l’impunité*, 2012 QCCA 117 [Anvil Mining].

⁸⁴ See use of “clearly” and the court’s reference to “exceptional,” above. As well, while an argument on *forum non conveniens* is generally available to a defendant, once a defendant has attorned to a jurisdiction, at common law they are barred from making such an argument. In BC, the courts have found, pursuant to the CJPTA, a defendant may not seek to limit a court’s jurisdiction where they have attorned to it. Such an approach recognizes the logical inconsistency of a defendant, at once demonstrating it believes the court has jurisdiction and will act accordingly, and a suggestion from the same defendant that the court ought not to proceed: *O’Brian v Simard*, 2006 BCCA 410 at para 9; *Nordmark v Frykman*, 2018 BCSC 2219 at para 40; *Andrew Peller Ltd v Mori Essex Nurseries Inc*, 2017 BCSC 203 at paras 11-28.

⁸⁵ Plant, April 2003, *supra* note 80 at 6124 [Emphasis added].

⁸⁶ *Chevron*, *supra* note 25 at para 57.

Such attention to economic reality is echoed in the exceptional allowance of jurisdiction granted in the notion of a forum of necessity, the third question a court may ask in assessing whether to take jurisdiction of a matter. While I do not purport to analyze in great detail this fledgling concept, the coming into being of forum of necessity in Canada offers both support for the purposive interpretation of *forum non conveniens* and a useful contrast in defining the latter's threshold.

Forum of necessity

Acting as an exception to jurisdiction *simpliciter* is the forum of necessity doctrine. This doctrine was derived from Art 3 of the Swiss Federal Code on Private international Law⁸⁷ and first incorporated in Art 3136 of the Civil Code of Québec (coming into force in 1994). The Québec provision states:

3136. Even though a Québec authority has no jurisdiction to hear a dispute, it may nevertheless hear it provided the dispute has a sufficient connection with Québec, if proceedings abroad prove impossible or the institution of proceedings abroad cannot reasonably be required.

The necessity doctrine was later incorporated into section 6 of the CJPTA upon its enactment. Section 6 provides that a court that lacks territorial competence may take jurisdiction where:

- a) there is no court outside British Columbia in which the plaintiff can commence the proceeding; or
- b) the commencement of the proceeding in a court outside British Columbia cannot reasonably be required.

Unlike Art 3136 of the Civil Code, section 6 of the CJPTA does not require the dispute have a “sufficient connection” to the jurisdiction before the doctrine can be invoked.⁸⁸

⁸⁷ *Federal Code on Private International Law (Switzerland)* at Art 3; Also found at Council of Europe, *European Convention on Human Rights and Fundamental Freedoms*, as amended by Protocols Nos 11 and 14, ETS 5, 1950 at Art 6.

⁸⁸ As contrasted with a “real and substantial connection” it would otherwise need to exceed the threshold for jurisdiction *simpliciter*.

With respect to common law jurisdictions, for the first time, in *Van Breda*, the Ontario Court of Appeal suggested in *obiter* that the elements of forum of necessity should be read into the common law in order to meet access to justice needs.⁸⁹ In that case, in response to arguments related to whether “fairness to the plaintiff” ought to be an independent factor capable of determining the real and substantial connection test, the Court referred to the emergence of the forum of necessity doctrine which it said “recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction.” Justice Sharpe for the Court of Appeal clarified that forum of necessity did not modify the real and substantial test but operated as an exception to it; a court reserves residual discretion to assume jurisdiction. While the forum of necessity doctrine was not applied in *Van Breda*, the court noted the preferred path was one in which an overarching fairness veto is not read into real and substantial connection, but that where fairness is of such serious concern that the court takes jurisdiction under that doctrine instead.⁹⁰ On appeal, the SCC chose not to opine, although it left the door open to its possibility.⁹¹

While the overarching goal of the forum of necessity mechanism appears to be to provide a reasonable remedy for those otherwise excluded from a Canadian forum, in practice it does so only rarely. The lower courts that have addressed the forum of necessity provisions have made clear the test is high. As the Ontario Court of Appeal noted in *West Van Inc v Daisley*, all jurisdictions that have adopted the test have imposed a threshold of reasonableness.⁹² Courts in Ontario have held that factors such as the expiry of a limitation period and the difficulty in obtaining counsel in a foreign jurisdiction would be unlikely to meet the test.⁹³ Today, only in one case in Ontario and one in British Columbia has the court accepted they were the forum of necessity and taken jurisdiction. They did so on the basis, respectively, that (1) the claimants could not reasonably be expected to bring an action in the forum in which they had been tortured (Iran),⁹⁴ and (2) in a complicated case where the claimant and the defendant both agreed on British Columbia as the appropriate forum because their home state (Idaho) had mostly abolished

⁸⁹ *Van Breda*, *supra* note 21 at para 100.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *West Van Inc v Daisley*, 2014 ONCA 232 [West Van] at para 20.

⁹³ *Ibid.*

⁹⁴ *Bouzari v Bahremani*, [2011] OJ No 5009 (Ont SCJ) [Bouzari].

all provisions for joint and several liability and non-patient suits.⁹⁵ Many other cases brought in Ontario and British Columbia have been denied, thus reinforcing the high bar posed by the test.⁹⁶ A number of those courts do so citing the first example, *Bouzari v Bahremani*, as the exemplar in considering whether cases before them meet the exceptional test for the necessity doctrine.⁹⁷

In *Bouzari*, Mr. Bouzari and his wife and children brought an action against Hashemi Bahremani alleging Mr. Bahremani compelled the abduction, imprisonment, and torture of Mr. Bouzari in Iran between June 1993 and January 1994. Shortly after he was released by the government of Iran, Mr. Bouzari and his family fled to Canada. In 2005 Low J of the Ontario Superior Court took jurisdiction as a forum of necessity because there was no reasonable basis upon which Mr. Bouzari could be required to commence the action in Iran, the state where the torture took place.⁹⁸ Not surprisingly, few cases have reached the threshold of serious danger that Mr. Bouzari likely faced were he to have returned to Iran.

Similarly, under the Civil Code, the forum of necessity doctrine is only applied in “exceptional circumstances,”⁹⁹ the same verbal formula used in Québec in consideration of *forum non conveniens*. Decided under Art 3136 of the Civil Code, the decision in *Lamborghini (Canada) Inc v Automobili Lamborghini SPA*,¹⁰⁰ has set the standard for that Court’s approach to forum of necessity. In *Lamborghini*, LeBel JA, as he then was, noted the exception is narrow, to be used in exceptional circumstances “when the foreign forum that would normally have jurisdiction is unavailable for exceptional reasons such as a nearly absolute legal or practical impossibility.”¹⁰¹ Justice LeBel provided, for further clarity, some examples: the breakdown of diplomatic or commercial relations with a foreign State, the need to protect a political refugee (like Mr. Bouzari), or the existence of a serious physical threat if the case were to be undertaken by a foreign court. Later, in *Anvil Mining*, a transnational tort case, the Québec Court of Appeal

⁹⁵ *Josephson v Balfour*, 2010 BCSC 603.

⁹⁶ *Van Kessel v Orsulak*, 2010 ONSC 6919; *Elfarnawani v International Olympic Committee*, 2011 ONSC 6784; *Mitchell v Jeckovich*, 2013 ONSC 7494; *Lailey v International Student Volunteers, Inc*, 2008 BCSC 1344; *Sooparayachetty v Fox*, 2010 BCSC 185; and *Aleong v Aleong*, 2013 BCSC 1428.

⁹⁷ For example: *Goodings v Lublin*, 2018 ONSC 176; *Arsenault v Nunavut*, 2015 ONSC 4302.

⁹⁸ This was Mr. Bouzari’s second attempt to seek damages for the violence he suffered in Iran. In *Bouzari v Iran (Islamic Republic)* (2004), 71 OR (3d) 675 (CA) leave ref’d, [2004] SCCR No 410 [Bouzari 2004], Mr. Bouzari’s action against the state of Iran was dismissed pursuant to state immunity, see discussion below.

⁹⁹ *Van Breda*, *supra* note 21 at para 100; *West Van*, *supra* note 92 at para 40.

¹⁰⁰ *Lamborghini (Canada) Inc v Automobili Lamborghini SPA*, [1997] RJQ 58 (CA) [Lamborghini].

¹⁰¹ *Ibid* at para 45.

reiterated the “practical impossibility” threshold. There, the proposed representative plaintiff in a class action relied on the necessity doctrine in arguing it was not able to find counsel in Australia to represent the class. The Québec Court of Appeal held the plaintiff had not shown it was “impossible to gain access to a foreign court and [had not] established that the dispute has a sufficient connection with Québec.”¹⁰²

The forum of necessity test is considered where there is no case to be made for jurisdiction *simpliciter*; it is used by a court to *assert* territorial competence where it otherwise has none. The creation of such a mechanism supports, along with a purposive reading of *forum non conveniens*, a general movement towards equity in the realm of jurisdiction, a desire on the part of the legislature and the courts to allow for a more global perspective on fairness. Additionally, the rarity of necessity acts as a foil, highlighting and contrasting the exceptional nature expected of courts *giving up* jurisdiction under *forum non conveniens*. In other words, where necessity is only to be used in “exceptional circumstances” — and a review of the case law makes clear it is rarely used — then the “exceptional circumstances” (even if understood as synonymous with “clear”) standard associated with *forum non conveniens* should theoretically similarly limit *its* usage.

The recent birth of forum of necessity and the high bar of *forum non conveniens* reflect the changing reality of transnational relationships, movement of peoples, and commerce. Their application to transnational human rights and environmental tort litigation should support Canadian courts taking jurisdiction where it is sought. However, seemingly balanced against this movement towards internationalism is the concept of comity that was once associated only with public international law. Comity is now often cited in Canadian private international law as shorthand for “respect for traditional norms of territoriality and sovereign exclusivity.” It is the concept courts frequently lean on when shying away from taking jurisdiction and legitimizing a restrictive approach to the application of the jurisdiction tests reviewed above. Why courts may

¹⁰² *Anvil supra* note 83 at para 103. The “practical impossibility” of obtaining counsel may be increasingly more common as multinational corporations have been known to employ a tactic of engaging all, or most, key litigators in a jurisdiction on retainer to thwart a plaintiff’s attempt at representation before the court. For an example, see Enron’s approach in India following the public interest petition launched by the Center for Indian Trade Unions related to Enron’s dealing with the Government of Maharashtra for Enron’s Dabhol Power Project. Enron allegedly placed all lawyers in Delhi and Bombay on retainer so the petitioners could not find representation: Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights* (New York: Human Rights Watch, 1999) at 32.

do this is the subject of the next section, but first it is necessary to review what this traditional concept actually is and the bounds of its current form. In so doing, it will become clear, through decisions of Canada's highest courts, that rather than comity being available as the trump card played to evade responsibility, comity's proper application to transnational human rights tort litigation is more restrained.

B: The public international law concept of comity infuses conflicts

In the realm of everyday language, comity, from the Latin *comitas* meaning “courteous,” refers to the courtesy and friendship of nations in mutual recognition of the laws and customs of others.¹⁰³ In international law, it is variously described as “informal acts performed out of politeness, convenience and goodwill,”¹⁰⁴ the way in which a sovereign state “respects the independence and dignity of other sovereign states,”¹⁰⁵ and a form of “mutual deference and respect.”¹⁰⁶ It is a concept that is intimately tied to the traditional pillars of *public* international law: the sovereignty and the equality of states. In order to position comity within private international law, it is important to briefly review the emergence of comity within, or at least in proximity to,¹⁰⁷ public international law.

Comity in public international law

The emergence of modern notions of state sovereignty birthed the concept of comity; where states recognize each other as possessing exclusive control over their own territories, some understanding between states with respect to cross-border activity was required. However, the modern concept of state sovereignty is relatively new. Before the 16th century, the theocratic foundation of medieval Europe required less focus on state territoriality as the centre of political power lay with the Catholic Church in Rome. With the rise of the secular state, political power

¹⁰³ The Oxford English Dictionary, 3rd ed, *sub verbo* “comity.”

¹⁰⁴ Robert Jennings & Arthur Watts KCMG QC, eds, *Oppenheim's International Law*, 9th ed. (Oxford: Oxford University Press, 2008) at 50-51.

¹⁰⁵ *R v Hape*, 2007 SCC 26 at para 47 [Hape].

¹⁰⁶ *Schooner Exchange v M'Fadden et al* (1812), 7 Cranch's Reports 116 (US) at 136-7; see also Joel R Paul, “The Transformation of International Comity” (2008) 71 L & Contemp Probs 19 [Paul 2008] at 19.

¹⁰⁷ I say “in proximity to” because one of the questions concerning the original and evolving status of comity is the extent to which comity is a legal doctrine in public international law or a non-legal doctrine that is analogous to the difference between constitutional law and constitutional convention.

gained traction and the modern territorialized concept of sovereignty emerged, and along with it, the concept of comity.

One of the first wholly conceptualized frameworks of state sovereignty was explored by Jean Bodin in his *Six Livres de la Republique*.¹⁰⁸ Bodin conceptualized sovereignty as amounting to the absolute and perpetual power of the republic, over which no other body had supervisory power. Over 70 years later, the Peace of Westphalia in 1648 formally established the principles of territorial delineation of state authority/self-determination and its twinned principle of non-intervention.¹⁰⁹ Over the next few centuries, first Thomas Hobbes (1651) and then John Locke (1700s) reimagined state sovereignty as no longer unconditionally held by the sovereign but as increasingly framed as a contract between the people and the sovereign.¹¹⁰

In parallel with the developing philosophy of the sovereign as inward-looking — i.e. the sovereign's authority as either experienced by or viewed by its ruled people — the 16th and 17th centuries also found increasingly powerful states looking for a way to strike a balance between their own domestic interests and their interests in being part of a community of other such states;¹¹¹ the strict boundaries of state sovereignty had not accommodated the reality of transnational trade and movement of peoples. The foundation of such a balance was equity but it remained unclear what equity required in the context of state relations.¹¹² It was then that comity began to take shape in Dutch scholarship. Hugo Grotius, a pioneer of modern public international law, delineated law in a proper and strict sense from expectations in social behaviour, which he discussed as comity.¹¹³ In public international law, comity allowed flexibility in the hardened

¹⁰⁸ Jean Bodin, *On Sovereignty*, ed & trans Julian H Franklin (Cambridge: Cambridge University Press, 1992).

¹⁰⁹ Treaty of Westphalia (1648), 1 Parry 271; Thomas Schultz & Jason Mitchenson, “Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts” (2016) 12:2 J of Private IL 344 [Schultz & Mitchenson 2016] at 346; L Gross, “The Peace of Westphalia” (1949) 42 AJIL 20.

¹¹⁰ See for instance, Thomas Hobbes, *The Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil, Leviathan* (Oxford: Oxford University Press, 2009); John Locke, *Two Treatises of Government*, ed Peter Laslett (Cambridge: Cambridge University Press, 1988).

¹¹¹ Danielle Ireland-Piper, *Accountability in Extraterritoriality: A Comparative and International Law Perspective* (Cheltenham, UK: Edward Elgar Publishing, 2017) [Ireland-Piper 2017] at 40; Before comity, states and their courts relied on the “statuist” doctrine developed by Medieval Italian jurists in which a person or thing’s legal status could be determined as static and belonging to a certain place. This system broke down under competing state systems and the challenge of dealing with transnational movements of peoples: Paul 2008, *supra* note 106 at 22.

¹¹² Hessel E Yntema, “The Comity Doctrine” (1966) 65 Mich L Rev 9 [Yntema 1966] at 12.

¹¹³ *Ibid* at 20; The work of Grotius was followed by decades of commentary by Dutch jurists – Christian Rodenburg, Paulus Voet, Johannes Voet, Ulrik Huber – regarding how law could apply beyond the territorial bounds of a state. While their views differed, providing “different accents” to the interpretation of comity, they were all in agreement that territorial sovereignty was the cardinal rule: *Ibid* at 22, 27, 28; Harold G Maier, “Extraterritorial Jurisdiction at a

concepts of territoriality and sovereignty. However, rather than being considered a legal solution, the concept of comity was political, to be exercised by rulers and politicians, rather than judges.¹¹⁴ As a political concept, comity was normative but not also legally binding.¹¹⁵ While the concepts related to territorialized state sovereignty and are now enshrined as the first principles of Article 2 of the UN Charter,¹¹⁶ even today a breach of comity at the state level does not allow, under public international law, any legal recourse by one state against another. Instead, it may lead to a similar retort through unfriendly or unneighbourly action, referred to as “retorsion.”¹¹⁷

Comity’s bleed into private international law

Despite the idea of comity having its beginning in public international law — as a norm of politeness between states — early in Britain’s judicial history of handling cases involving conflicts of law, we see the British judiciary referencing concepts of “statehood” and comity as normative concepts to assist decision making, first in criminal law and then in the private international law context. While comity served as a discretionary doctrine that empowered courts to decide when to defer to foreign law out of respect for the sovereignty of another state,¹¹⁸ later it branched out, coming to inform a wider range of cases providing justification for judicial decision making in all sorts of conflicts scenarios.¹¹⁹

In the 1981 case of *R v Zingre*,¹²⁰ we begin to see the concepts of public international law – relationships between states – begin to seep into Canadian domestic law. In that case, a Swiss national was involved in crimes related to business dealings in Manitoba. The accused was living in Switzerland, a state that did not allow extradition to Canada. Manitoba — through the Canadian federal government — asked the Swiss government for its assistance to prosecute the accused in Switzerland pursuant to Canada and Switzerland’s mutual legal assistance treaty. The issue in the case was whether the subsequently appointed Swiss investigators could be permitted

Crossroads: An Intersection between Public and Private International Law” (1982) 76 AJIL 280 [Maier 1982] at 282.

¹¹⁴ Ireland-Piper 2017, *supra* note 111 at 19.

¹¹⁵ Maier 1982, *supra* note 113 at 281.

¹¹⁶ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.

¹¹⁷ Thomas Giegerich, “Retorsion” in *Max Planck Encyclopedia of Public International Law* (March 2011).

¹¹⁸ Paul 2008, *supra* note 106 at 20.

¹¹⁹ *Ibid.*

¹²⁰ *R v Zingre*, [1981] 2 SCR 392 [Zingre].

to interview witnesses in Canada despite the accused’s reliance on certain sections of the *Canada Evidence Act*.¹²¹ While the case rests entirely on the interpretation of the treaty provisions, the SCC — to which the case was appealed — held that one jurisdiction should give effect to the laws of another jurisdiction “not out of mutual obligation but of deference and respect” unless it is contrary to the public policy of the jurisdiction to which it is requested.¹²² In that case, involving multiple state actors in the mutual legal assistance realm, the Court suggested comity is a fundamental concept in not only state relations but in the realm of *domestic* criminal law.¹²³

Shortly after the criminal-procedure context of *Zingre*, comity came to the fore in the criminal-jurisdiction context in *Libman v The Queen*.¹²⁴ In that case, Justice La Forest for the SCC engaged in a thoughtful review of the 19th century history of comity as it applied to transnational criminal cases. In *Libman*, the accused was committed to trial for fraud resulting from telephone sales solicitation made from Canada in which he misrepresented business opportunities to potential American investors. Mr. Libman sought to have his committal for trial quashed on the basis the crimes did not occur in Canada and that the *Criminal Code*¹²⁵ is limited to territorial crimes unless a provision expressly provides otherwise. Justice La Forest began his account by emphasizing the primary basis of criminal jurisdiction is territorial and that states in public international law are hesitant to incur the “displeasure” of other states by indiscriminate attempts to control the activities that take place wholly within the territorial bounds of another state.¹²⁶ Justice La Forest then engaged in a review of the the English cases to trace issues of territoriality through the jurisprudence. He explained that in the 19th century, most common law crimes were territorially confined (such as theft), and given the insular nature of Britain’s geography, its understanding of transnational law remained similarly insular. Comity, it seemed, was originally interpreted to support the isolation of crimes into defined territorial enclaves. It was the advent of marketing fraud, first through mail and then through telephone, that the question of *where* a crime took place when it was transnational in nature, became of chief

¹²¹ *Canada Evidence Act*, RSC 1985, c C-5.

¹²² *Zingre*, *supra* note 120 at 401.

¹²³ *Zingre*, *supra* note 120 at 401.

¹²⁴ *Libman v The Queen*, [1985] 2 SCR 178 [Libman].

¹²⁵ *Criminal Code*, RSC 1985, c C-46.

¹²⁶ *Libman*, *supra* note 124 at 183.

concern.¹²⁷ Throughout the 20th century, courts applied varying theories of the locus of crime: some involving a “continuum,” others involving focus on where the crime began or ended.

In a series of cases in the 1970s,¹²⁸ the English courts held that comity did not prevent parliament from prohibiting conduct in England that had consequences abroad. In *Treacy v Director of Public Prosecutions*, Lord Diplock concluded that where “prohibited acts are of a kind calculated to cause harm to private individuals it would savour of chauvinism rather than comity to treat them as excusable merely on the ground the victim was not in the United Kingdom (UK) but in some other state.”¹²⁹ He went on,

Comity gives no right to a state to insist that any person may with impunity do physical acts in its own territory which have harmful consequences to persons within the territory of another state. It may be under no obligation in comity to punish those acts itself, but it has no ground for complaint in international law if the state in which the harmful consequences had their effects punishes, when they do enter its territories, persons who did such acts.¹³⁰

In *Director of Public Prosecutions v Doot*, a case involving conspiracy to import drugs into England, the technique of the continuing offence was again employed when the court stated it did not accord with international comity that the courts of the UK should treat defendants with any leniency just because the consequences of their actions harm those outside of the territorial confines of the home nation.¹³¹ In applying comity to conflict of laws (in the widest sense, and not limited to ‘private’ law matters), the court went on to explain that the concept of international comity is not static and that modern nations are not “nearly as sensitive about exclusive jurisdiction” as they once were.¹³² The fact patterns presented by transnational criminal cases provided the UK courts with opportunities to appreciate the often unreasonable outcomes created by a strict territorialist approach to state sovereignty and to employ more thoughtful analyses that were reflective of the sometimes transnational nature of crime. This less-siloed approach was subsequently employed in transnational civil actions.

¹²⁷ *Libman*, *supra* note 124 at 185.

¹²⁸ *Treacy v Director of Public Prosecutions*, [1971] AC 537 [Treacy]; *Director of Public Prosecutions v Doot*, [1973] AC 807 [Doot].

¹²⁹ *Treacy*, *supra* note 128 at 561.

¹³⁰ *Treacy*, *supra* note 128 at 561-2.

¹³¹ *Doot*, *supra* note 128 at 831.

¹³² *Doot*, *supra* note 128 at 834.

The Canadian approach differed slightly from that taken in the UK. In the early years after confederation, the approach to territoriality taken by Canadian courts was narrow, likely reflective of Canada's dependent status.¹³³ However, just as in the UK, as time went on, this narrow construction began to give way to a more liberal interpretation with respect to the criminal realm. The Canadian courts had begun to realize that such a strict approach involved a "large measure of unreality."¹³⁴ For instance, the modern approach taken in Canada to criminal offences landed on a test to determine whether there is a "real and substantial link" between Canada and the offence. This approach, held Justice La Forest in *Libman* (with reference to *Treacy and Doot*), accorded with the modern and evolving notion of comity, which in his words "means no more nor less than kindly and considerate behaviour towards others."¹³⁵ Justice La Forest ended his discussion in *Libman* promoting a balanced interpretation of international comity in which, as global citizens, we look not only to the traditional notions of sovereignty and exclusivity, but at the protection of the public in other states. In a "shrinking world", he says, "we are all our brother's keepers."¹³⁶

Five years later, and in relation to an inter-provincial civil case, Justice La Forest had a second opportunity to take on the changing face of comity, this time in a civil conflicts case. In the seminal case of *Morguard* (whose impact on jurisdiction *simpliciter* is explained above), a case about enforcement and recognition of an Alberta judgment in BC, he again explained the historic basis for the territorial anchor in private international law and the enforcement of judgments. However, he quickly goes on to find that modern states cannot live in "splendid isolation" and do have to frequently give effect to judgments given in other countries in defined circumstances.¹³⁷ Comity, which he importantly says for the first time is the *informing principle* of private international law, is the deference and respect due other states to the actions of a state legitimately taken within its territory. Justice La Forest accepts and applies the formulation of comity from the Supreme Court of the United States in *Hilton v Guyot*, 159 US 113 (1895) at 163 and more recently cited by Estey J in *Spencer v R*, [1985] 2 SCR 278 at 283:

¹³³ *Libman*, *supra* note 124 at 206.

¹³⁴ *Libman*, *supra* note 124 at 208.

¹³⁵ *Libman*, *supra* note 124 at 214.

¹³⁶ *Libman*, *supra* note 124 at 214.

¹³⁷ *Morguard*, *supra* note 33 at 1095.

‘Comity’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one national allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.¹³⁸

In other words, comity requires a balancing of state interests in private international law, both in the maintenance of good relations with the global community as defined by statehood and within a state’s own boundaries and interests. As well, it is addressed in the “legal sense” and embraced as a legal principle to inform private international law rules compared to the earlier public international law origins of comity as an extra-legal (or at least extra-judicial) normative concept.

This balancing re-appeared in *Muscutt* where the Ontario Court of Appeal, in interpreting *Morguard*, first laid out the test for determining whether there was a real and substantial connection. The last factor in that Court’s test was comity. While the *Muscutt* factors were eventually discarded in support of the *Van Breda* “connecting factors” approach — of which comity was not one — the importance of comity as buttressing private international law was most recently reiterated in *Chevron*. In that case, Justice Gascon for the SCC reiterated the point made by Justice LeBel in *Van Breda*, that “the goal of modern conflicts systems rests on the principle of comity, which, although a flexible concept, calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity.”¹³⁹ Though comity has come to be used as shorthand for the twin principles of private international law, “order and fairness”, the SCC has been clear such principles are not of equal weight. As Justice La Forest said in *Tolofson v Jensen* (to which I will return), that as order is a precondition to justice — as though fairness is not — “order comes first.”¹⁴⁰

Notably comity's bleed into private international law has occurred more in common law states compared with civil law states whose civil codes exhaustively define circumstances in

¹³⁸ *Morguard*, *supra* note 33 at 1096.

¹³⁹ *Chevron*, *supra* note 25 at para 52.

¹⁴⁰ *Tolofson*, *supra* note 21 at 1058.

which courts take or refuse jurisdiction.¹⁴¹ It is only in common law countries, particularly those that grapple with judicially-created tests of *forum non conveniens*, recognition and enforcement of judgments, and forum of necessity, that judges have reached for such normative directives.¹⁴² Indeed, in the development of private international law in Canada, comity swiftly coloured the discussion and has left an indelible imprint. Courts now reference comity as if by necessity or reflex.¹⁴³

Limits on comity

While comity now appears to be a permanent fixture in the premises of private international law in Canada, both a technical and purposive reading of Canadian jurisprudence demonstrates that comity, despite its presence, is limited in its reach and application. In the following section, I make four arguments to demonstrate this limitation. First, while comity is a legal principle, it is not a concrete substantive rule and is further limited in its application by the judiciary by its parallel political nature. Second, Canadian courts have recognized comity should be and is limited to the extent that it interferes with certain basic standards of international and national human rights requirements. Canadian courts have found they should not blindly bend to neighbourliness when it would fly in the face of fundamental human rights norms. Third, Canadian judicial application seems to have effectively tailored the application of comity to situations in which the juridical acts of a foreign state are squarely at issue, rather than the application of comity to situations involving no direct state interference. Lastly, comity is widely regarded as an inherently flexible concept, due to keep up with, notably, changing international business practices; judicial fairness dictates this not be done to benefit the strong while resiling the weak to traditional and rigid concepts of territoriality.

¹⁴¹ Ireland-Piper 2017, *supra* note 111 at 41.

¹⁴² In the United States, old territorialist notions of comity are even spun and presented with a more modern touch as aligned with game theory and comparative benefit: Louise Weinberg, “Against Comity” (1991) 80 Geo LJ 53 at 54-58.

¹⁴³ Maier 1982, *supra* note 113 at 281 (with reference to the American application of comity: “the label ‘comity’ in modern times has sometimes come to serve as a substitute for analysis.”)

Comity is not a legal rule

Comity serves as a structural principle of interpretation for the entire field of private international law; it is a high-level framing principle rather than a concrete rule of law. Indeed, Canadian courts, while quick to cite comity, are also quick to note that comity does not specifically bind them in their decision making. In other words, comity is not a legal *rule* to which courts must adhere and oblige. As may be clear from the definitions included above, this international concept of “neighbourliness” does not provide much in the way of clarity. The SCC has acknowledged this challenge in interpretation in noting comity is a “very flexible concept” and that it “cannot be understood as a set of well-defined rules, but rather as an attitude of respect for and deference to other states.”¹⁴⁴ Comity’s structure as an interpretive tool comes not from its objective definition—we know that it is a relatively loose concept—but from the order imbued within it through its use in defining Canadian private international law standards (for example, the real and substantial connection test). On comity itself, Upendra Baxi declares the concept a “highly pliant, problematic, and fuzzy trope;”¹⁴⁵ Harold Maier similarly described comity as “an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith.”¹⁴⁶ It is perhaps due to this inherent “fuzziness” that comity is interpreted differently in different jurisdictions or by different judges in the same jurisdiction;¹⁴⁷ the Court noted in *Amchem*, for example, that the interpretation of private international law recognizes the fact that comity is “not universally respected.”¹⁴⁸

Further, it is suggested that not only is comity too general to provide for specific outcomes, it may, when used by courts to consider international and political issues, not even be an appropriate consideration for courts; comity, as a principle to be used in expectations related to state-state interaction, is inherently a political, not a legal concept.¹⁴⁹ Addressing comity and its use in the American context, David Gerber notes, “comity balancing” does not provide an

¹⁴⁴ *Van Breda*, *supra* note 21 at para 74; see also Paul 2008, *supra* note 106 at 20.

¹⁴⁵ Upendra Baxi, “Geographies of Injustice: Human Rights at the Altar of Convenience” in Craig Scott, ed, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001) at 205.

¹⁴⁶ Maier 1982, *supra* note 113 at 281.

¹⁴⁷ See Joel Paul’s commentary regarding the varied definitions on the nature of comity: Joel R Paul, “Comity in International Law” (1991) 32 *Harv Int’l LJ* 1 [Paul 1991] at 3-4.

¹⁴⁸ *Amchem*, *supra* note 59 at 914.

¹⁴⁹ Ireland-Piper 2017, *supra* note 111 at 19; Paul 1991 at 41, citing Cheshire & P North, *Private International Law* 17, 11th ed (Oxford: Butterworth-Heinemann, 1987) at 4.

effective solution to issues of extraterritorial jurisdiction. Given the separation of powers between the executive and the judiciary in Canada, Gerber's argument is instructive. Fundamentally, the traditional public international law concept of comity is political in context (and arguably in status) and is now generally considered little more than an undefined "neighbourliness." It is important, then, to distinguish that, when brought into domestic law as a high-level principle by Canadian courts, its operation in the extraterritorial jurisdiction-finding framework is simply to add a very general reason for courts to favourably consider interests of foreign states. However, a determination of whether to make a decision solely in light of the "interest of a foreign state" and an associated imperative not to injure foreign relations is unusual given that the notion a judge should be making such a political decision is generally considered inappropriate.¹⁵⁰

The SCC has held that an "appropriate and just remedy is also one that must employ means that are legitimate within the framework of our constitutional democracy."¹⁵¹ Specifically, the executive branch of government, by reason of its prerogative power, is responsible for international relations, to be conducted within a range of constitutional options.¹⁵² Courts rarely have access to the breadth of institutional and situational knowledge held by the national government related to state relations. The government must have flexibility to determine how to exercise its duties at the international level, taking into account "complex and ever-changing circumstances...[and] Canada's broader national interest."¹⁵³ This constitutional separation of powers leads to the inevitable conclusion that, in approaching state comity, courts ought to, at the very least, tread very carefully.

This is not to suggest courts must not look to inter-state comity, but perhaps that their consideration of comity ought to be limited to the evidence before them, such as often presented in international and domestic reports written by trustworthy bodies. In contrast, any liberal taking of real or effective judicial notice of the state of affairs as between Canada and another state is to be avoided.

¹⁵⁰ David Gerber, "Beyond balancing: International Law Restraints on the Reach of National Laws" (1984) 10 Yale J of IL 185 at 205.

¹⁵¹ *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 56.

¹⁵² *Canada (Prime Minister) v Khadr*, 2010 SCC 3 [Khadr 2010] at para 33.

¹⁵³ *Ibid* at para 39.

Comity constrained by justice

Not only is a territorialist view of comity weakened by comity's fuzzy and flexible nature, Canadian courts have gone further to limit its consideration in circumstances in which Canadian and international core human rights values are at risk.

While this thesis is focused substantially on the jurisdictional test for asserting or giving up jurisdiction, the seminal choice of law decision in *Tolofson* offers a useful first example of the way in which a Canadian court's reliance on comity may be limited where the human rights values are at stake. In *Tolofson*, the parties were involved in a motor vehicle accident in Saskatchewan. The plaintiff lived in BC and brought an action in the BC Supreme Court for damages. The defendant brought a motion to stay the proceedings on the basis of *forum non conveniens* and, alternatively, a motion to choose the law of Saskatchewan as the applicable law were the action to go ahead in BC courts. The case was eventually appealed to the SCC. Justice La Forest traced the history of choice of law through British cases and its application in Canadian jurisdictions. Lamenting the varied and unprincipled approaches of the past, Justice La Forest wrote:

What strikes me about the Anglo-Canadian choice of law rules...is that they appear to have been applied with insufficient reference to the underlying reality in which they operate and to general principles that should apply in responding to that reality. Often the rules are mechanistically applied. At other times, they seem to be based on the expectations of the parties, a somewhat fictional concept, or a sense of "fairness" about the specific case, a reaction that is not subjected to analysis, but which seems to be born of a disapproval of the rule adopted by a particular jurisdiction.¹⁵⁴

Thus, in order to structure a new Canadian approach to choice of law, Justice La Forest turned to concepts in the international legal order.¹⁵⁵ He found that a court would follow its own rules of procedure, but that, when it came to substantive law, the principles of international comity — that states should respect the exercise of jurisdiction of another state within that other state's own territory — support an approach that the law of the place where the tort took place should apply: *lex loci delicti* (the law of the place of the delict).¹⁵⁶ Justice La Forest explained

¹⁵⁴ *Tolofson*, *supra* note 21 at 1046.

¹⁵⁵ *Ibid* at 1048.

¹⁵⁶ Note the CCQ Art 3126 defines the choice of law rules for cases brought in Québec. This rule was in place before

that this approach allows for some predictability and ease of application, that it was “fair” in that ordinarily people expect their activities to be covered by the law of the place where they happen to be, that it discouraged plaintiffs from shopping for fora that have more generous substantive law, and that it was an approach supported by other countries.¹⁵⁷

However, although he created a starting presumption that the law of the place of the tort would apply to transnational and trans-provincial cases, Justice La Forest left the door open to judicial discretion for courts to apply the law of the *forum (lex fori)* in circumstances where applying the law of the place would lead to injustice: “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.”¹⁵⁸ He recognized that such injustices were unlikely to appear in trans-provincial cases but that the exception may be of assistance in the international realm. While there is some debate regarding the extent to which the “exception” is applied trans-provincially,¹⁵⁹ the exception remains available in transnational cases. Indeed, the justice exception aligns the Canadian approach closer to that of Australia and the UK where the *lex fori* is applied under the “public policy doctrine” where fundamental or universal notions of justice and morality are at risk.¹⁶⁰ The exception, limited as it appears to be to transnational cases, indicates an awareness on the part of the court that Canada’s neighborliness has bounds.

In the context of issues of enforcement of a foreign state’s non-monetary order in *Pro Swing Inc v Elta Gold Inc*,¹⁶¹ Justice Deschamps for the majority of the SCC wrote that in considering whether to assist the US in enforcing its court order, a Canadian court will look to a number of factors, including comity. However, stipulating that comity is not some unbounded concept, she noted that comity is concerned not just with the nature of a foreign state’s acts, but

Tolofson and remained in place after. The rule focuses on the “injurious act,” which is closer in meaning to the “tort” but has a built-in exception to account for cases where the injury “appeared” in another country than the one in which the “injurious act” occurred. See also discussion of the differences between the CCQ approach and that under *Tolofson* in Stephen GA Pitel & Jesse R Harper, “Choice of Law for Tort in Canada: Reasons for Change” (2013) 9:2 J P Int’l L 289 [Pitel 2013] at 294.

¹⁵⁷ *Tolofson*, *supra* note 21 at 1050-1052.

¹⁵⁸ *Ibid* at 1054.

¹⁵⁹ See for example Pitel 2013, *supra* note 156; Janet Walker, “‘Are We There Yet?’ Towards a New Rule for Choice of Law in Tort” (2000) 38 Osgoode Hall LJ 331.

¹⁶⁰ Ben Chen, “Historical Foundations of Choice of law in Fiduciary Obligations” (2014) 10:2 J P Int’l L 171 at 171.

¹⁶¹ *Pro Swing Inc v Elta Gold Inc*, 2006 SCC 52 at para 30 [Pro Swing].

also the protection of a domestic nation's citizens and domestic values.¹⁶² Indeed, despite noting that the defendant had not raised a public policy defence to the enforcement of the order, she went on to write that Canadian courts are the “guardians of Canadian constitutional values,”¹⁶³ such that there are sometimes issues that the court must raise of its own volition, such as those related to public policy. As an example, she cites the SCC's decision in *United States of America v Burns*,¹⁶⁴ in which the Court looked both to Canada's international commitments and to its constitutional values in crafting its direction to the Minister that the surrender of an accused person to American custody for criminal trial would not be imposed without assurance the death penalty would not be imposed on him. Courts, she held, should be mindful of the values that merit constitutional or *quasi-constitutional* protection.¹⁶⁵ In this discussion, Justice Deschamps outlined where principles of comity may be limited and where Canada must turn inward to consider its own values aside from those contained within theories of reciprocity.

Despite being continuously touted by international law traditionalists and Canadian courts as a seminal and leading case supporting strict territoriality in public international law,¹⁶⁶ Justice LeBel in *R v Hape* can actually also be seen to take small steps towards limiting the impact of comity. In that case, the RCMP conducted investigations in Turks and Caicos related to a money laundering scheme run by a Canadian national. The investigation was conducted under supervision of the local authorities. Through the investigation, the RCMP collected damning evidence of the scheme from the office of the accused; they did so without a warrant. Upon coming to trial in Canada, the accused sought exclusion of the evidence collected sans warrant claiming his rights pursuant to section 8 of the *Charter of Rights and Freedoms*¹⁶⁷ (Charter) were breached. In finding the *Charter* did not apply to the investigation in Turks and Caicos, Justice LeBel left the door open for two circumstances in which the *Charter* may apply

¹⁶² *Ibid* at para 40. By “domestic” Justice Deschamps was referring to the local jurisdiction that is considering whether to enforce a foreign judgment, Canada in this instance.

¹⁶³ *Pro Swing*, *supra* note 161 at para 59.

¹⁶⁴ *United States of America v Burns*, 2001 SCC 7 [Burns].

¹⁶⁵ *Pro Swing*, *supra* note 161 at para 60.

¹⁶⁶ See, for example, commentary of the Federal Court of Appeal in *Amnesty International Canada v Canada (Chief of the Defence Staff)*, 2008 FCA 401 [Afghan Detainees FCA] at paras 18-21.

¹⁶⁷ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

to Canadian investigators outside of Canada. The first is where the host country consents to the application of Canadian law in its jurisdiction.

The second touches on issues of comity. Justice LeBel noted Canadian authorities can participate in investigations abroad but must do so under the laws of the foreign state. This permissive rule, he stated, is derived from principles of comity. Citing earlier decisions of Justice La Forest in *United States of America v Cotroni*,¹⁶⁸ Justice LeBel noted the importance of state cooperation in investigating and prosecuting transnational crime as otherwise cases would fall through the cracks. However, comity may be limited, he said, “where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights.”¹⁶⁹ The Court went on to note that individuals can reasonably expect that “certain basic standards will be adhered to in all free and democratic societies,” and that to rely on evidence gathered in a way that would undermine such standards would be “unfair.”¹⁷⁰ In coming to this conclusion, it is clear that while Justice LeBel remained grounded in a traditional notion of territoriality as the basis of jurisdiction in that case, he saw the need for adaptation of the law to the changing world.

That comity may be limited was further explored by the SCC in the cases related to Omar Khadr. In 2008, the SCC determined that Mr. Khadr’s section 7 *Charter* rights had been breached and that he was entitled to (somewhat) limited *Stinchcombe* disclosure¹⁷¹ related to interviews conducted by the Canadian Security and Intelligence Service (CSIS). Mr. Khadr had been held since 2002 by US authorities at Guantanamo Bay for allegedly killing an American soldier in Afghanistan when he was 15. The interviews were conducted by CSIS agents in Guantanamo Bay and the results of the interviews were shared with US authorities to assist with building their criminal case against Mr. Khadr in the US. While the Court held that generally the *Charter* does not apply abroad, it noted that Justice LeBel in *Hape* had stated an important exception to comity: that comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada’s international obligations. Canada’s

¹⁶⁸ *United States of America v Cotroni*, [1989] 1 SCR 1469.

¹⁶⁹ *Hape*, *supra* note 105 at para 101.

¹⁷⁰ *Ibid* at para 111.

¹⁷¹ *R v Stinchcombe*, [1995] 1 SCR 754.

deference to foreign states, they repeated, ends where clear violations of international law and fundamental human rights begin.¹⁷²

In that case, the US Supreme Court had already found the process and actions taken at Guantanamo Bay, in the time Mr. Khadr was an inmate, were unjust and violated American law through, among other things, breaches of the Geneva Conventions.¹⁷³ Given Canada is and was a party to the Geneva Conventions, it was unnecessary for the SCC to determine whether the CSIS agents were participating in activities that are contrary to Canada's obligations. Thus, the SCC was able to avoid overruling comity in contradiction to a foreign state's law, and instead relied on that foreign state's own judicial pronouncements. It is important to note that the Court did not hold that such a fortuitous situation was a requirement in future cases; in other words, the Court has not held that Canadian courts may not independently find international human rights or humanitarian law values are offended by something that a foreign state may treat as fully legal.

Two years later, Mr. Khadr returned to the SCC to challenge the then Canadian government's decision not to ask the US for his repatriation, which he had continually requested. In that decision, the SCC again noted that, in general, international customary law and the comity of nations prevent the *Charter* from applying to the actions of Canadian officials operating outside Canada. However, an exception exists where there is Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations and fundamental human rights norms.¹⁷⁴ In that case, Canadian Department of Foreign Affairs agents had questioned Mr. Khadr at Guantanamo Bay knowing he had been subjected to a three-week sleep deprivation program called the "frequent flyer program," a program clearly contrary to Canada's fundamental human rights obligations not to engage in or be complicit in torture.

While the SCC did not have to decide whether the mistreatment of inmates at Guantanamo Bay, and specifically the treatment of Mr. Khadr, clearly met the threshold for a breach of "fundamental human rights norms," (as that work had already been done by the United States Supreme Court and relied on by the SCC in *Khadr* 2008) it is likely they would have independently found — like the US Supreme Court did — that the breach of the Geneva

¹⁷² *Canada (Justice) v Khadr*, 2008 SCC 28 [Khadr 2008] at para 18.

¹⁷³ *Rahul v Bush*, 542 US 466 (2004).

¹⁷⁴ *Khadr* 2010, *supra* note 152 at para 14.

Conventions (relied on in *Khadr 2008*) would have sufficed to demonstrate a breach of international law.¹⁷⁵

The idea of relying on fundamental human rights norms was not new for the Supreme Court in these cases. In *Baker v Canada (Minister of Citizenship and Immigration)*, the SCC was charged with determining the reasonableness of a decision maker's consideration of the rights of the child pursuant to the then *Immigration Act*.¹⁷⁶ Justice L'Hereux-Dubé for the majority, noted that an indicator of the importance of consideration of the rights of the child was Canada's ratification of the Convention of the Rights of the Child (CRC) and Canada's recognition of the rights of the child through the ratification of other similar international instruments — notwithstanding Canada had not incorporated such treaties through domestic statute.¹⁷⁷ Citing Ruth Sullivan's, *Driedger on the Construction of Statutes* (3rd ed 1994), L'Hereux-Dubé J explained that the legislature is presumed to respect the values and principles enshrined in international law; even though some international obligations may not have direct application in Canadian law, the values reflected in international human rights law can nonetheless be used to inform the contextual approach to statutory interpretation and judicial review.¹⁷⁸ Canada's commitments in the international realm make up part of the context in which legislation is enacted in Canada. Thus, interpretations of such legislation that further or reflect such commitments should be preferred over those that do not.

In interpreting whether the decision at issue was a reasonable exercise of the Minister's power to grant an exemption to deportation for humanitarian and compassionate grounds (s 114(2) of the *Immigration Act*), L'Hereux-Dubé J did not limit herself with an analysis of the CRC but also specifically looked to the preamble of the Universal Declaration of Human Rights¹⁷⁹ (UDHR) which, she noted, reflects values that are central in determining the issue.¹⁸⁰

¹⁷⁵ The detainees at Guantanamo bay between 2002 and 2004 were denied access to *habeas corpus* in contravention of the Geneva Conventions; they were being held indefinitely without any opportunity to challenge the legality of their status: *Khadr 2008*, *supra* note 172 at paras 21-22; In March 2004, Mr. Khadr was subjected to a sleep deprivation technique meant to make him more pliable in interrogation. Despite knowing Mr. Khadr had been subject to such cruel and abusive treatment, Canadian officials interrogated Mr. Khadr and made the transcript of that interrogation available to US officials: *Khadr 2010*, *supra* note 152 at para 5.

¹⁷⁶ *Immigration Act*, RSC 1985, c I-2.

¹⁷⁷ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [Baker] at para 69.

¹⁷⁸ *Ibid* at para 70.

¹⁷⁹ UNGA, *Universal Declaration of Human Rights*, 1948, 217 A (III) [UDHR].

¹⁸⁰ *Baker*, *supra* note 177 at para 71.

This section of the judgment is of particular import given the dissent, given by Iacobucci and Cory JJ, was made solely on the basis of disagreement with the majority's holdings that unincorporated international treaty law could generate values relevant to the interpretation of the humanitarian and compassionate grounds provision of the *Immigration Act*. The dissenting judges left open the possibility that the matter would have been different if the international human rights values were customary obligations;¹⁸¹ Iacobucci J, for the dissent, failed to acknowledge that while the UDHR is not a treaty and that, as a UN General Assembly resolution, not binding *per se*, it has long been argued to have helped in the crystallization of fundamental general (non-treaty) international law.¹⁸²

In 2005, the SCC reiterated the importance of Canadian courts interpreting domestic law in a manner that accords with the Canada's treaty obligations and with the principles of customary international law.¹⁸³ Beyond these cases dealing with interpreting ordinary law in light of international human rights law, the SCC has many times held that not simply ordinary law but also the *Charter* must be interpreted on the presumption it offers no less protection than Canada's international human rights obligations.¹⁸⁴

In review of the above-noted SCC cases, it seems reasonable to state that, while comity may generally limit the reach of Canadian domestic law, it will not do so where blind adherence to neighbourliness would risk undermining or breaching Canada's commitments to human rights norms or constitutional values.

Comity is variable by genre of application

It is not necessarily clear that the principle of comity applies equally to all conflict of laws scenarios. Upon review of the SCC's treatment of comity, it is clear that the Court itself

¹⁸¹ Citing *Capital Cities Communications Inc v Canadian Radio-Television Commission*, [1978] 2 SCR 141.

¹⁸² That said, Justice L'Hereux-Dubé did not make a distinction in her analysis between the UDHR and treaties like the CRC, and it may have been more helpful for her to do so. From her majority judgment, it remains unclear to what extent the UDHR was an influential text because of its status as customary international law or whether non-treaty instruments may nonetheless provide normative weight and can be used in domestic legal interpretation alongside Canadian-ratified treaties.

¹⁸³ *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 82.

¹⁸⁴ *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 43; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 64-86; *Németh v Canada (Justice)*, 2010 SCC 56 at para 34.

often defines its interpretation of comity in relation to the *actions*, rather than inaction, of other states. Indeed, in *Pro Swing*, the Court held the balancing exercise of comity requires “respectful review of *the relief* offered by the foreign court.”¹⁸⁵ Such focus on the *acts* of foreign states suggests comity serves a more limited function, keeping Canadian courts from acting in a way that may interfere with a foreign state’s sovereignty when the foreign state has demonstrated some interest in adjudication and has done so in a manner that aligns with Canadian private international law norms. This range of treatment is clear when comparing the three most utilized mechanisms in private international law: anti-suit injunctions, recognition and enforcement, and finally, *forum non conveniens*.

A first example lies in *Amchem*, the birth of the *forum non conveniens* test in Canada. In that case the SCC was actually primarily asked to look at the principles that ought to apply to anti-suit injunctions. In that case, the SCC was sitting on appeal of a BC Court of Appeal decision to grant an anti-suit injunction to the defendants in a case launched in Texas to determine damages related to asbestos exposure suffered by a large number of plaintiffs. In order to define the test for injunctions, the SCC had to distinguish between the two remedies available to a defendant: a stay of proceedings — upon which the court defined the new *forum non conveniens* test — and an anti-suit injunction.

In its discussion of anti-suit injunctions, and in reference to the new test for a stay of proceedings, the Court limited the new test for injunctions on the basis of comity; while both a stay of proceedings and an anti-suit injunction had the purpose of identifying where a trial should be held and legally applied *in personam*, the *effect* was that injunctions limited the actions of a *foreign court*.¹⁸⁶ In applying his reading of comity outlined by La Forest J in *Morguard*, Sopinka J for the Court held that an anti-suit injunction would only be considered where a foreign proceeding is pending; it would be unfair to pre-judge the actions of a foreign court. Only where a foreign court has taken jurisdiction may a Canadian court look to that decision to determine whether it did so in a manner inconsistent with the principles of *forum non conveniens*. If so, then a Canadian court, confident the foreign jurisdiction had not observed the rules of comity in

¹⁸⁵ *Pro Swing*, *supra* note 161 at para 30 [Emphasis added].

¹⁸⁶ *Amchem*, *supra* note 59 at 913; see also the discussion in Schultz & Mitchenson 2016, *supra* note 109 at 371 in which the authors discuss the Australian approach to anti-suit injunctions, noting comity in such instances “demands courts proceed very carefully.”

unjustly finding it was the appropriate forum, may issue an injunction against a private party that has the effect of limiting that foreign court's jurisdiction, thereby reaching the limits of its own responsibility to comity. In other words, the Canadian court should not act so as to *restrain* the actions of a foreign court unless it is confident the foreign court acted in such a way as to offend Canadian norms.

In *Amchem*, the court found that there may be a real issue with comity in respect of injunctions because of the *effect* it had on limiting the *actions* already taken by a foreign court.¹⁸⁷ There are two important points to highlight. First, the conclusion that an injunction would offend comity by interfering with a foreign court's jurisdiction is *not* drawn with respect to a stay of proceedings pursuant to application of the *forum non conveniens* test, i.e. a distinction is made between the two mechanisms (the stay and the injunction). Indeed, this distinction followed that made in the UK. The English case,¹⁸⁸ from which the new Canadian test for injunctions was borrowed for *Amchem*, *SNI Aérospatiale v Lee Kui Jak*,¹⁸⁹ followed a decision in 1987 of the Judicial Committee of the Privy Council to de-liberalize the test for anti-suit injunctions,¹⁹⁰ which had then been adapted by the House of Lords to match the liberalization of the stay of proceedings in *Spiliada*.¹⁹¹ This decision was made on the basis that such liberalization in *the case of injunctions* was inconsistent with comity.

With respect to recognition and enforcement proceedings, comity becomes an issue for the court precisely because of the impact it has on an action *already taken* by a foreign court.¹⁹² A clear example of the emphasis on foreign action is seen in the recent decision of the SCC in *Chevron*. As noted above, the issue before the SCC in *Chevron* was whether the Ontario superior court would have jurisdiction to provide the plaintiff with enforcement of an Ecuadorean court

¹⁸⁷ In fact, the impact of an anti-suit injunction is considered by some civil law jurisdictions to be offensive and a breach of their national sovereignty: see for example, *Turner v Grovit*, [2004] ECR I-3565.

¹⁸⁸ *SNI Aérospatiale v Lee Kui Jak*, [1987] 3 All ER 510 (PC).

¹⁸⁹ *Ibid.*

¹⁹⁰ The test for anti-suit injunctions and stays on the basis of *forum non conveniens* were historically identical and based on the judgment in *St Pierre v South American Stores (Gath & Chaves), Ltd.*, [1936] 1 KB 382, that neither an anti-suit injunction nor a stay will be issued by an English court unless it is shown that the foreign proceedings will be oppressive or vexatious. Overtime, the House of Lords, in the context of stays held "oppressive" and "vexatious" should be read liberally. This approach culminated in the seminal case of *Spiliada*, which further loosened and defined the test for stays for *forum non conveniens*. It was unclear whether the test for anti-suit injunctions had evolved in parallel. The Judicial Committee determined it would not.

¹⁹¹ *Amchem*, *supra* note 59 at 924.

¹⁹² *Ibid* at 931.

order. The Court held that international comity and the prevalence of cross-border transactions and movement called for a modernization of private international law in Canada.¹⁹³ In *Chevron*, the Court distinguished between taking jurisdiction of a matter in the first instance and taking jurisdiction in order to recognize or enforce an order already made. In the latter event, the SCC noted that comity, which had consistently underlain recognition and enforcement law, militates in favour of generous enforcement rules,¹⁹⁴ such that the action of a state taken legitimately within its territory ought to be afforded deference.¹⁹⁵ Citing *Tolofson* — the case on choice of law in tort — the Court held that the notion of comity will “in great measure recognize the determination of legal issues in other states.”¹⁹⁶ The need to acknowledge and show respect for the legal *acts* of other states, the Court said, is a core foundation of comity, and that this respect calls for “assistance, not barriers.”¹⁹⁷ Citing *Beals v Saldanha*¹⁹⁸ — another recognition and enforcement case — the court concluded that, as cross-border transactions continue to multiply, comity requires “an increasing willingness on the part of courts to recognize the *acts* of other states.”¹⁹⁹ In other words, to refuse enforcement would be to interfere and effectively neutralize the act of another state.

In *Chevron*, the Court’s language continually returns to the idea of respect for the *acts* of other states, albeit where those acts are done legitimately.²⁰⁰ Twenty-five years earlier, *Morguard* itself — framing the modern approach to the real and substantial connection test — was a recognition and enforcement case: the enforcement of a judgment already entered in Alberta and sought enforced in BC. That Canadian courts should not, without good reason, delve into the legal arenas and judicial acts of other states, was supportable. To do so would be to suggest that Canada must “check the work” of its neighbours. However, the Court, even in the wake of another’s state’s action and determination, may curtail its deference to comity where there is evidence of fraud or violation of natural justice in a foreign court.

¹⁹³ *Chevron*, *supra* note 25 at para 32.

¹⁹⁴ *Chevron*, *supra* note 25 at para 42.

¹⁹⁵ *Ibid* at para 51.

¹⁹⁶ *Ibid* at para 52.

¹⁹⁷ *Ibid* at para 69.

¹⁹⁸ *Beals v Saldanha*, 2003 SCC 72 [Beals].

¹⁹⁹ *Chevron*, *supra* note 25 at para 75 [Emphasis added].

²⁰⁰ For the court relying heavily on the action of another state see also *Westec Aerospace*, *supra* note 70, in which the BC Court of Appeal granted a stay of proceeding on a *forum non conveniens* application relying heavily on the fact that proceedings had already begun between the same parties in relation to the same cause of action in Kansas.

Unlike an application for an anti-suit injunction where action by a Canadian court would serve to restrain the court of another jurisdiction, a Canadian court asserting jurisdiction despite a defendant's suggestion there may be another appropriate forum does not prevent that foreign court from acting. In other words, to keep an action in Canada does not have the same consequences for international comity as an anti-suit injunction. This is clear in cases involving disputes over the *forum conveniens* where the actions of another state will not be impacted by a Canadian court's determination on the matter. As a result, even where there hasn't been evidence of a violation of natural justice, and where there has already been action by another court, the rest of the factors that make up the jurisdiction analysis can outweigh the impact of comity. In *Teck Cominco Metals v Lloyds Underwriters*, the SCC rejected Teck's argument that the action of a foreign state in taking jurisdiction eliminated the need to engage in a *forum non conveniens* analysis — in that case, under the CJPTA — and instead should consider a “comity-based” analysis that respects the foreign court's decision to take jurisdiction.²⁰¹ The court held that considerations of comity are already subsumed within the test for *forum non conveniens* and that the action of a foreign court does not, and should not, act as a factor of “overwhelming significance” to lead inevitably to a Canadian court declining to exercise its jurisdiction.²⁰²

It may be agreed that where foreign states (including their courts) have already acted, a consideration of comity becomes relevant. But what appears to be more relevant is whether a Canadian court's actions related to comity will interfere with the foreign state's exercise of its own jurisdiction. When claims are initiated and where there may be overlapping claims to jurisdiction between states, comity does not act as a trump card favouring the jurisdiction of first-to-file. The other factors considered in, specifically, the *forum non conveniens* analysis must also be weighed. However, in cases where there has been no initiating foreign action, let alone any action completed, consideration of comity must occupy a position of even lesser consideration. Surely aggressive notions of comity do not extend to an insistence that Canada, by rote, “hold the door” for other states that may or may not decide to engage.

²⁰¹ *Teck*, *supra* note 70 at para 17.

²⁰² *Ibid* at paras 19, 29.

Comity should be flexible for all parties

Finally, far from being rigid and in keeping with its amorphous definition, comity and, more generally, the interpretive practice of private international law have long been promoted for their flexibility and ever evolving nature. For example, in relation to the globalization of business and the invention of the internet, courts in Canada have consistently recognized the need of private international law to keep up with the times.

In its search to identify the proper forum in *Amchem*, the Court sourced its struggle in the fact that the business of litigation had become increasingly global and more difficult for courts to identify the proper forum.²⁰³ Similarly, the Court in *Pro Swing* began its judgment by noting modern-day commercial transactions require “prompt reactions and effective remedies.”²⁰⁴ The globalization of commerce and the movement of people across borders, held the Court, make territorial frontiers and national identity less relevant.²⁰⁵ The doctrine of comity, according to the Court in *Beals v Saldanha*, “must be permitted to evolve concomitantly with international business relations, cross-border transactions as well as mobility.”²⁰⁶ And, most recently in *Chevron*, the Court, citing *Beals*, noted that as “cross border transactions continue to multiple, comity requires an increasing willingness on the part of courts to recognize the acts of other states.”²⁰⁷

Perhaps the most engaging discussion of the evolutionary dynamics of comity comes from Justice La Forest’s discussion in *Morguard*. There, he held that principles of “order and fairness, principles that ensure security of transactions with justice” underlie the modern system of private international law.²⁰⁸ The state of interrelatedness and complexity of the modern system calls for coordination and cooperation rather than a state’s unwavering focus on its own parochial interests, lest injustice result.²⁰⁹ Modern means of travel, business, and communication have made many of the 19th century concerns toward territoriality appear out of step. At the international level, he explains, the rules of private international law and comity should be

²⁰³ *Amchem*, *supra* note 59 at 911.

²⁰⁴ *Pro Swing*, *supra* note 161 at para 1.

²⁰⁵ *Ibid* at para 1.

²⁰⁶ *Beals*, *supra* note 198 at para 27.

²⁰⁷ *Chevron*, *supra* note 25 at para 75.

²⁰⁸ *Morguard*, *supra* note 33 at 1097.

²⁰⁹ *Ibid* at 1096.

interpreted in accordance with the reality of the international business community and the continuous decentralization of political and legal power.²¹⁰

That states ought to focus on cooperation rather than adherence to territoriality is reflected in significant shifts in what actions may be considered by the state to be “national” and “territorial” for the purposes of Canada regulating its own citizens abroad. Examples include the criminalization of child sex tourism when conducted by a Canadian — even if the act may not be a crime in the state where it is committed — and section 46 of the *Competition Act*,²¹¹ making corporate conspiracy a crime where it is committed by a Canadian national regardless of where it is done.²¹² Through globalization, states are forced to reconceptualize the “national” and the “territorial” in their creation and application of domestic legislation. With such reconfiguration must come a complementary shift in the concept of comity.

But as private international law rushes to keep abreast of the practices of international business, it cannot be allowed to do so only to the benefit of corporate interest. To do so would create a type of “buffet development” of the common law in which corporate actors (and then judges) pick and choose the elements of comity — for example, the recognition of foreign judgments, recognition of patents and copyright, and recognition of contracts — that benefit the corporation, while leaving behind those that do not, i.e. access to justice for affected peoples in the corporation’s working state. International policy concepts such as comity are flexible enough to be interpreted so as not to assume they operate in one direction or at least not to assume that comity is the only policy at play.²¹³ As private international law and comity are pulled forward into the present, it is equally important that the recognition of “modern day commercial transactions” recognize not only the global network and relationships of equal business partners, but also the globalization of the corporation itself and its expanding influence in, for example, the extraction of resources and exploitation of workers in areas of weak governance. As La Forest J said in *Libman*, “we are all our brother’s keepers.”²¹⁴

²¹⁰ *Ibid* at 1098.

²¹¹ *Competition Act*, RSC 1985, c C-34.

²¹² Coughlan 2014, *supra* note 18 at 18, 50.

²¹³ Wai 2001a, *supra* note 13 at 245.

²¹⁴ See also Ian Binnie, “Legal Redress for Corporate Participation in International Human Rights Abuses — A Progress Report” (2009) 38 Brief 44 online: <<https://www.business-humanrights.org/en/legal-redress-for-corporate-participation-in-international-human-rights-abuses-a-progress-report>> [Binnie 2009] at 8; Ian Binnie, “Speaking Notes: Confronting Corporate Complicity in International Human Rights Abuses” (2010) Canadian Bar Association

While comity has, over time, transitioned from a public international law concept to one informing — or as the SCC has recently expressed “inspiring”²¹⁵ — the application of private international law, its application to the practice of the latter is, in law, internally and judicially limited. Not only is it not strictly enforceable, it is touted as constantly evolving to meet the modern issues of transnational events. Furthermore, it would seem that comity is more reasonably and effectively directed at solving apparent conflicts where the action of a Canadian court would paralyze the action of another state, but even in those situations, care is due where basic tenets of human rights would be violated by a blind deference in the name of sovereign respect. Both the legal tests for *forum non conveniens* and forum of necessity, informed by the principle of comity, are on their face, supportive of a liberal approach, in circumstances of transnational corporate harm, to access to justice in Canadian courts.

C: The legal framework supports a reality-framed approach to conflicts

Some courts in Canada have shown themselves to understand the above-noted principles and have engaged reasonably with the tests for forum of necessity and *forum non conveniens* in contexts involving human rights and environmental abuses, although such well-reasoned judgments are few and far between.

With respect to necessity, although few courts have had the opportunity to deal with it, as was discussed above, the Ontario Superior Court in *Bouzari* took jurisdiction, where it otherwise had none, on the basis of necessity where the plaintiff alleged he had been abducted, incarcerated, and tortured in Iran. The court in that case held that Mr. Bouzari could not be reasonably expected to return to Iran to make his claim in Iranian courts, the state in which the torture took place.²¹⁶ In doing so the court clearly rejected traditional territorial notions of comity and state equality on the basis justice would not otherwise be served.

at 1, 15.

²¹⁵ *Barer v Knight Brothers LLC*, 2019 SCC 13 at para 108.

²¹⁶ Following that decision, the defendant, who had not appeared before the motion judge on the forum of necessity motion brought a motion to set aside the default judgment. Mr. Bouzari consented with terms allowing the defendant to challenge the forum. The defendant did so. In the meantime, the defendant had voluntarily returned (from England where he was living and attending school) to Iran to “clear his name.” Upon arrival he was incarcerated in Iran and then prohibited from leaving Iran. Mr. Bahremani agreed with Mr. Bouzari that the latter’s claim could not be heard in Iran but argued England was the more appropriate forum. Both parties had connection to England and Mr. Bahremani presented evidence he would not be allowed into Canada to defend himself were the proceedings to

Well-reasoned judgments related to *forum non conveniens* in cases involving human rights abuses are similarly sparse. In contrast to such problematic judgments (which will be the focus of Chapter 2), the BC Court of Appeal has proven itself up to the task in recent years when it comes to an accurate reading of the current law on *forum non conveniens*.

In *Tahoe*, the plaintiffs claimed Tahoe’s private security personnel injured seven protesters outside its Escobal mine in Guatemala when security opened the gates and began firing live rounds at the protesters. Tahoe is a reporting BC company²¹⁷ with majority directorship residing in Canada (not in BC alone);²¹⁸ Tahoe manages and controls all significant aspects of the mine. The protesters claimed the attack was planned, ordered, and directed by the head of the security force and that Tahoe expressly or implicitly authorized such use of force by the security personnel or was negligent in failing to prevent it. All parties agreed the superior courts of BC had jurisdiction *simpliciter*, however, Tahoe brought a motion for a stay of proceedings on the basis Guatemala was the more appropriate forum pursuant to the CJPTA. The motions judge allowed Tahoe’s motion and found Guatemala was clearly the more appropriate forum for the action.²¹⁹ That decision was appealed.

Madam Justice Garson, writing for the Court of Appeal, held that the motions judge had misapplied the test for *forum non conveniens*. While the motions judge had correctly noted the onus was on Tahoe to show why the Court should decline to exercise its jurisdiction, that judge had not appropriately considered the evidence as it related to that burden. The Court of Appeal held that neither a stand-alone suit, nor joining the ongoing criminal suit against the head of security in Guatemala,²²⁰ were “clearly more appropriate” than conducting a trial in BC. Justice Garson found the difficulties the plaintiffs would face in accessing Tahoe’s documents in

be heard in Ontario. While the Ontario Superior Court disagreed with Mr. Bahremani, finding Ontario was the more appropriate forum, the Court of Appeal overturned the decision and found England was the more appropriate forum: *Bouzari v Bahremani*, 2015 ONCA 275.

²¹⁷ *Business Corporations Act*, SBC 2002, c 57, s 3.

²¹⁸ Tahoe has no office in BC other than a registered records office necessary to meet its statutory requirements as a reporting BC company. Tahoe holds its annual general meetings in Toronto or Vancouver and its directors meet once or twice per year in Vancouver: *Tahoe*, *supra* note 63 at para 15.

²¹⁹ *Garcia v Tahoe Resources Inc*, 2015 BCSC 2045 [Tahoe SC] at para 106.

²²⁰ Following the incident, the head of security, a Mr. Rotondo, fled the country. He was arrested and criminal prosecution began. In Guatemala, civilians may apply to be joined to a criminal prosecution. However, this option didn’t appear open to the plaintiffs as the plaintiffs adduced evidence that Mr. Rotondo had escaped to Peru (which stated an intention to oppose his extradition) and the criminal prosecution had thus been adjourned indefinitely in Guatemala.

Guatemala and the expiry of the Guatemalan limitation period — with no evidence adduced by Tahoe that it would be waived — were not given sufficient weight by the motions judge. Further, the motions judge had incorrectly isolated the discussion of the risk of unfairness of proceeding with the claim in Guatemala.

The parties in Tahoe agreed the legal test – in making the determination of whether there was a risk of legal unfairness before a foreign judiciary – was whether there was a “real risk of an unfair process in the foreign court.”²²¹ This “real risk” test was borrowed from the English case *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* (2011).²²² While the wording of the test was clear, what was unclear was where the burden lay in proving there was a real risk of unfairness and at what stage in the test such concerns were appropriately raised. Recall, in the UK the *forum non conveniens* test is assessed in two stages. First, a defendant must establish there is a more appropriate alternative forum. If the defendant is able to do so, a stay will be granted unless the plaintiff can establish other circumstances which make the granting of a stay adverse to the interests of justice.²²³ Whether there is a real risk of unfairness is considered at the second stage, a burden borne by the plaintiff. Thus, in her decision, Madam Justice Garson examined whether the “real risk of unfairness” test could operate in Canada where the approach to *forum non conveniens* is unified, i.e. all factors are weighed together in one stage.

The BC Court of Appeal held that the “real risk” of unfairness test was an appropriate standard and that it forms part of the overall *forum non conveniens* analysis, for which the defendant bears the overall burden. The Court further held the weight of any provided evidence of unfairness will be dictated by the quality of that evidence. The motions judge had given insufficient weight to the evidence tendered by the plaintiffs related to systemic corruption in the Guatemalan judiciary and the “context of the dispute,”²²⁴ i.e.: the evidence of weakness in the Guatemalan justice system,²²⁵ the evidence of endemic corruption in the Guatemalan judiciary,²²⁶ and the difficulties the appellants would face in bringing a suit against Tahoe given

²²¹ *Tahoe*, *supra* note 63 at para 115.

²²² *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* (2011), [2012] 1 WLR 1804 at 1828.

²²³ *Tahoe*, *supra* note 63 at para 118, citing *Spiliada*, *supra* note 58 at 478.

²²⁴ *Tahoe*, *supra* note 63 at para 130.

²²⁵ *Ibid* at para 126.

²²⁶ *Ibid* at para 127.

the limited discovery procedures available in Guatemala.²²⁷ The Court allowed the appeal and dismissed Tahoe's application for a stay of the BC proceeding.²²⁸ Tahoe sought leave to appeal to the SCC and was denied.²²⁹

Later the same year, the same court was provided a second chance to comment on the state of *forum non conveniens* in relation to Canadian mining abroad in *Araya v Nevsun Resources Ltd.*²³⁰ In *Nevsun*, the plaintiffs are Eritrean refugees who allege they were forced, through military conscription, to work at the Bisha gold mine in Eritrea owned, in part, indirectly by the defendant. While constructing the mine, the plaintiffs allege they were forced to work in inhuman conditions and under constant threat of physical punishment, torture, and imprisonment, even after they had served their periods of conscription in the military. While all parties acknowledged the BC superior courts had jurisdiction *simpliciter* over the matter, *Nevsun* brought three applications. The first, like in *Tahoe*, was a motion for a stay of proceedings on the basis that Eritrea was the more appropriate forum pursuant to the CJPTA. However, *Nevsun* is a more complicated case than *Tahoe* as the notice of civil claim includes allegations of not only domestic tort violations, but breaches of international law. This prompted the second application: to strike the proceedings for no reasonable cause of action. Further, the plaintiff's allegations include the involvement of the state of Eritrea (through the army conscription process), thus triggering the defendant's third application: to strike the pleadings for no reasonable cause of action on the basis of the act of state doctrine, claimed to follow from the same principles as would, due to the *State Immunity Act* (SIA), protect Eritrea from being directly sued.²³¹

Beginning her judgment by citing Justice Lloyd Jones of the English Court of Appeal in *Belhaj v Straw*,²³² Madam Justice Newbury, for the Court, accepted that "the traditional view of public international law as a system of merely regulating the conduct of states among themselves on the international plane has long been discarded...[C]hanges have been reflected in a growing willingness on the part of courts in [the UK] to address and investigate the conduct of foreign states and issues of public international law when appropriate." She staked the case before her as

²²⁷ *Ibid* at para 128.

²²⁸ *Ibid* at para 132.

²²⁹ 2017 SCCA No 94.

²³⁰ *Nevsun*, *supra* note 20.

²³¹ *State Immunity Act*, RSC 1985, c S-18.

²³² *Belhaj v Straw*, [2014] EWCA Civ 1394 aff'd [2017] UKSC 3.

one that may determine whether Canada was to remain on the traditional path of “judicial abstention” even where foreign conduct consists of peremptory norms of international law.²³³ She concluded Canada ought to adapt.

For our purposes, it is unnecessary to delve deeply into whether international law can ground a cause of action in Canada or whether an act of state doctrine exists and, if it exists, may apply. That said, the Court’s discussion related to the appropriate forum is informative. Despite the hundreds of witnesses located outside of Canada, their lack of ability to speak English, and many similarly complex logistical issues, the Court of Appeal upheld the motion judge’s findings that BC was the more appropriate forum. The Court found there was no real risk of multiplicity of proceedings, nor any usurping of Eritrea’s internal labour tribunals. The Court found there was sufficient cogent evidence that there was a real risk the plaintiff would not receive a fair trial in Eritrea. The judicial system in that country was found — on the basis of significant expert evidence — not to be set up to ensure judicial independence from the government.

Nevsun appealed the BC Court of Appeal’s decision to the SCC on the issues of customary international law and act of state; that appeal was heard January 23, 2019. Perhaps in recognition of the quality of reasoning in the BC Court of Appeal and of the current state of the law on *forum non conveniens*, Nevsun did not seek leave to appeal Madam Justice Newbury’s decision with respect to *forum non conveniens*.

Similarly, in *Piedra v Copper Mesa Mining Corporation*,²³⁴ and *Choc v Hudbay Minerals Inc*,²³⁵ the defendants chose not to move forward with arguments related to jurisdiction *simpliciter* or *forum non conveniens*, perhaps acknowledging the law is now clear that Canada was the appropriate forum in which to face their accusers. In *Copper Mesa*, Ecuadorean plaintiffs alleged they had been victims of repeated harassment, intimidation, and assaults at the hands of the security forces hired by the owner of the proposed mine, a BC-incorporated mining company’s subsidiary. They brought actions in various torts against not only the mining company, but also the TSX (related to the TSX’s decision to list the mining corporations shares on the Toronto Stock Exchange). The defendants moved forward only with a motion to strike on

²³³ *Nevsun*, *supra* note 20 at para 1.

²³⁴ *Piedra v Copper Mesa Mining Corporation*, 2011 ONCA 191 [Copper Mesa].

²³⁵ *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414 [Hudbay].

the basis of no cause of action. In *Hudbay*, the Canadian corporation doing business in Guatemala initially raised a *forum non conveniens* argument in response to claims against it for murder, gang rape, and assault of local indigenous people opposed to its Fenix mine. However, again, the company eventually discontinued the *forum non conveniens* argument, moving forward only with its motions to strike on the basis of no cause of action and limitations.

In *Nevsun* and *Tahoe*, the BC Court of Appeal approached the issue of *forum non conveniens* with not only an eye to the correct burden and with whom it lies — the defendant — but also a thoughtful and broad awareness of the “real risk” for unfairness of litigating in alternative fora. In neither case did comity present any real barrier for the Court of Appeal’s decision making. In an approach reflective of that taken in *Bouzari*, the BC Court of Appeal saw the reality of uneven state-corporate power dynamics in lesser regulated states and the reality of challenged justice systems, whether they be challenged for lack of resources or active political interference. In other words, they used an approach that I refer to as a “reality frame” to evaluate the otherwise highly discretionary tests.

Reality framing as a conceptual touchstone

“Reality framing” can be defined in terms both of what it is not and what it seeks to accomplish. Reality framing is about not defining a problem by the black letter law, whether common or legislated. It is about not blindly tying one’s hands to precedent. Reality framing instead, seeks to understand a legal issue through its context. What is the true source of a legal problem? Who or what is fundamentally responsible for that problem? What are the rationally predicted results of applying the received, black letter law? Does that outcome adequately consider the power dynamics impacting on the legal problem? And, is the legal response likely to result in any real change in a situation about which it is generally accepted that the status quo is seriously untenable?

To consider jurisdiction in a reality frame is to acknowledge the conditions in which foreign (to Canada) plaintiffs find themselves when facing harms caused to them by CanCorps. Indeed, former justice of the SCC, Ian Binnie, had this to say with respect to resistance to regulating multinational enterprises (MNE) in developing states:

The economic influence of transnational companies is often such that states, competing amongst each other for investment opportunities, have little incentive to regulate. Even where the incentive exists, the political influence of transnational companies, particularly in conflict-ridden and economically underdeveloped countries, may be such that a state has little real power to impose its will.²³⁶

Reality framing is already present in the way in which the legislature and the courts have approached the legal tests for *forum non conveniens* and forum of necessity, as well as their application of the test to the facts. As we have seen above, the test for *forum non conveniens* places the burden on the defendant to prove another forum is *clearly* more appropriate, looking to a number of factors including the real risk that justice will not be done in an alternative forum — a seemingly high bar to meet. The existence of a necessity-based jurisdiction, to create jurisdiction where there was none, acknowledges situations in which the reality of the involved-party relationships (and those of third parties) and the nature of the allegations may create situations where justice will not be done absent a Canadian forum’s intervention. The flexibility of these concepts, and some courts’ resistance to strict rules of interpretation, reflect the importance of considering the context of each case on its unique bases. Indeed, the SCC has repeatedly held the assumption of jurisdiction must ultimately be guided by order and fairness, not a “mechanical counting of contacts or connections.”²³⁷

Such framing was clearly at play in the decisions of *Tahoe* and *Nevsun* where the Court of Appeal saw beyond the claims made by the corporate defendants and evaluated the discretionary factors in a way suggesting the Court was alive to context; in doing so the court never lost sight of the reality of the foreign state’s judiciary, the state’s involvement (or lack thereof) in the fair operation of the judiciary, the nature of the allegations and how the same would be treated by the foreign state’s judiciary, and the nature of the relationship between the corporation, the foreign state, and the plaintiffs. In those cases, the Court properly understood its role, the discretionary nature of the tests, and the need to safeguard against artificially limiting its role — through, for example, relying on dated interpretations of comity — in ensuring justice is done.

²³⁶ Binnie 2009, *supra* note 214 at 45.

²³⁷ *Hunt*, *supra* note 36 at 326; see also commentary in Black 2012, *supra* note 76.

Even where courts — seemingly uncomfortable with treading into the territorial jurisdiction of another state — cite the concept of comity, we have seen that comity is itself amorphous and context-specific. Particularly where no action has yet been taken by a foreign state and where human rights are at issue, any dedication to strict territoriality is limited and waning. It appears that, *in law*, neither tests of forum of necessity or *forum non conveniens* nor the character of comity should bind the hands of Canadian judges in taking or retaining jurisdiction in cases involving transnational human rights litigation. Even while overlapping jurisdiction may in theory present comity issues, in practice where there are actual conflicts, they can be fairly and effectively dealt with through the operation of the legal mechanisms and doctrines described above in a manner that is sensitive to contextual reality. In *fact*, one might go so far as to observe that true conflicts rarely appear, particularly with respect to causes of action involving transnational human rights, as transnational corporate activity often occurs in zones of weak governance zones characterized by a lack of effective national oversight.²³⁸ In such cases, there is no conflict between a Canadian court exercising jurisdiction and non-action on the part of the host country.

All that said, while in law there is no real barrier to a foreign plaintiff initiating a cause of action for breaches of human rights or environmental torts in Canada against a CanCorp, what we see *in fact* is that Canadian courts have not all had as broad a horizon as the BC Court of Appeal in the *Tahoe* and *Nevsun* cases. Other courts have been more reticent in moving beyond 19th century frameworks of territoriality and strict, unsupportable interpretations of what comity demands of them. In the next chapter I will examine some of the underlying reasons why too many Canadian courts have maintained a 19th century territorialist bias in interpreting comity and state non-interference and how that has played out through transnational human rights litigation.

²³⁸ Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (London: Routledge, 2014) [Simons & Macklin 2014] at 185.

Chapter 2: Canadian courts are mired in a self-reinforcing territorialist version of comity

Following the release of what Robert Wai terms the “tetralogy” — *Morguard*, *Amchem*, *Hunt*, and *Tolofson* — between 1990 and 1994,²³⁹ there was some thought that the significant changes to Canadian private international law represented a sign of judicial activism in the name of recognizing international norms.²⁴⁰ However, in the following twenty years, it appears some courts in Canada have ignored the spirit of those seminal judgments. An analysis of why courts in Canada appear in many cases to be unable (or unwilling) to break free of territorialist notions of comity could easily remain inwardly focused. Such an analysis *could* seek to smooth over the apparent contradictions between the law on its face (the black-letter tests for jurisdiction) and the way in which it is applied. However, it may be more useful to take a step back and apply what Rahel Jaeggi refers to as an “immanent critique”²⁴¹ in which we may ask whether the “form of life”²⁴² of private international law is equipped to deal with the “problem” of the transnationalization of the corporation and the relative failure of the national juridical arena to catch up such that Canada could ensure corporations may be actually held accountable for their actions when acting abroad. One way to undertake such an analysis, is to consider the juridical system through the lens of Pierre Bourdieu and his field theory. Doing so illuminates some of the forces inherent in Canadian judicial decision making that lead to the conservative application of comity, the effects of which are clearly visible upon review of some recent Canadian human rights case law, and specifically, transnational tort litigation.

In the following section I will first review Bourdieu’s field theory and how his theory applies to judicial decision making. Then, I will review the forces inherent in the Canadian-specific juridical field and some of the factors that inform the tendencies and inherent preferences of Canadian judges. I will end with a review of recent human rights case law — first with respect to a case demonstrating today’s judicial hyper-comity and then using several

²³⁹ Note, three of the tetralogy were written by the same judge — Justice La Forest — and the fourth by Justice Sopinka (with reference to the other three).

²⁴⁰ Robert Wai, “In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law” (2001) 39 Can YB Int’l L 117 [Wai 2001b].

²⁴¹ Rahel Jaeggi, “Towards and Immanent Critique of Forms of Life” (2015) 57 *Raisons politiques* 13 [Jaeggi 2015].

²⁴² According to Jaeggi, “forms of life” are inert bundles of practice whether they be intentional or unintentional actions that can be interpreted, that are regulated by norms, and that are directed at some aim; they are, for example, instances of problem solving: Jaeggi 2015 at 16-17.

transnational tort claims — to demonstrate how judicial *habitus* (roughly translated, tendency) has informed legal decision making and, in those cases, led to injustice.

A: Bourdieu, the field, and *habitus*

Introduction to Bourdieu and his field theory

Pierre Bourdieu was a 20th century French philosopher and sociologist who is best known for his conception of “field theory.”²⁴³ Bourdieu’s approach rejected psychological structuralism — the idea that human actions are born of the human mind — and ideas that behaviour is entirely outwardly-influenced. Instead, Bourdieu conceived of behaviour and the operation of “agents” as fundamentally *relational*. According to Bourdieu, a “field” is a social and political context in which agents operate, compete, and in which they are hierarchically positioned. A field, such as the juridical field he described in an article dedicated to law,²⁴⁴ is never completely autonomous and is informed and defined by fields around it. Notably, fields are influenced by the “meta-field” of power, which is made up of a combination of the economic and political fields.

While the agents within the field are influenced by the *nomos* — the field-specific, largely unspoken, norms that regulate the actions in the field — and the *doxa* — the underlying, normative, and unquestioned beliefs commonly held in a field that are socially constructed as the natural order²⁴⁵ — agents retain some, though still circumscribed, agency. This agency is referred to by Bourdieu as *habitus*. An agent’s *habitus* is a collection of durable and ingrained dispositions which function effectively as perception and assessment, tastes and distastes, sympathies and aversions.²⁴⁶ Such dispositions are acquired throughout life: a “primary *habitus*” developing through socialization by the family, and a “secondary *habitus*” built primarily on forms of education and on an agent’s movement through (for example, occupational) fields in

²⁴³ Pierre Bourdieu, *Outline of a Theory of Practice*, translated by Richard Nice (Cambridge: Cambridge University Press, 1977). [Bourdieu 1977]

²⁴⁴ Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field” (1987) 38 *Hastings LJ* 814 [Bourdieu 1987].

²⁴⁵ Pierre Bourdieu, *The Logic of Practice*, translated by Richard Nice (Stanford: Stanford University Press, 1992) [Bourdieu 1992] at 66, 110.

²⁴⁶ *Ibid* at 53.

adulthood. The structures of conditions experienced early in development produce the structure of the *habitus*, whose structure then acts as the basis of perceiving and appreciating all subsequent experiences.²⁴⁷ In this way, the *habitus* is infinitely evolving — subject to experiences and the *nomos* and *doxa* of the field — but always within the confines of limits set by the historically and socially situated conditions of its initial production (the social, cultural, and economic capital).²⁴⁸

While much of Bourdieu’s work focused on the political and economic fields — and through analogy is easily applied to law — he and others did demonstrate specifically how field theory might apply to the juridical field.²⁴⁹

The juridical field and the *habitus* of judges

In his analysis of the juridical field (the “Field”), Bourdieu resisted the formalist approach — that which asserts the absolute autonomy of the juridical form — and the instrumentalist approach — that which conceives of law as solely a reflection of, or a tool in the service of, a dominant group.²⁵⁰ Bourdieu looked instead *between* such oppositional approaches and concluded the Field is best understood by the social historical conditions that emerge from the struggles within the field of power and the *habitus* of juridical agents; the existence of an entire *social* universe that is otherwise ignored through focus on structure.

The Field is a production of, on the one hand, the power relations which give it structure and which order the struggles between the agents within, and on the other hand, the internal barriers which constrain the range of possible actions and outcomes.²⁵¹ The outcome of such confrontations leads to a social division between those on the “inside” and those on the “outside,” which serves to buttress the juridical normative perspective that the field of law is totally independent of the power relations it, in fact, sustains and legitimizes.²⁵² In his review of

²⁴⁷ *Ibid* at 54.

²⁴⁸ *Ibid* at 55.

²⁴⁹ Bourdieu used the term “juridical” in his observations of the legal field, a broader term than “judicial” meaning relating to judicial proceedings and the administration of the law and justice.

²⁵⁰ Bourdieu 1987, *supra* note 244 at 815.

²⁵¹ *Ibid* at 816.

²⁵² *Ibid* at 817.

the Field, Bourdieu observed and described a number of elements that are informative for this review of the Canadian judiciary's relationship with comity.

First, the agents occupying the Field are homogenous. While the membership of judges in the dominant class is universally understood, class membership more generally in the Field is also relatively uniform; the monopoly of the legal profession allows access only to those with a common heritage and access to cultural, economic, and social "capital."²⁵³ Having acquired the "entry ticket" to the Field, the monopoly of legal education ensures a consistency in the legal sources and materials available, modes of thinking, and expression and action.²⁵⁴ Consistency in thought is further ensured by the agent's implied acceptance — through choice and entry into the Field — of the dominance of the Field and its ability to resolve conflicts according to the laws and conventions of the Field itself.²⁵⁵ The predictability in the law is thus shaped by the consistency of the Field *habitus*. The agreement — or *nomos* — among agents in the Field that the law provides its own foundation for determining conflict reinforces ideas that there is some fundamental or universal norm and, in turn, sustains the historical forms of legal reasoning that created such norms in the first place.²⁵⁶ That said, it is important to note that, within the Field, the struggle between agents is not equal;²⁵⁷ there is variation in the relative power and influence certain agents will have over the creation and maintenance of their version of the law. This version of the law, however, will continue to be strictly limited by the consistency of the legal *habitus*.

Second, the study of a field cannot be done from an "objective" standpoint; observers are, and become part of, the practices they observe in that their shared observations will influence the field. This is true not only of the researcher studying a field, but of the agents who observe a

²⁵³ *Ibid* at 833, 842. Capital is any resource that can produce surplus value for an agent. Bourdieu focused mainly on three "species" of capital: economic, social, and cultural. Economic capital includes money, investments and property. Social capital includes resources made available by virtue of social network. Cultural capital is the cultural knowledge an agent has gathered. Cultural capital may be embodied (accent, posture), objectified (art is particularly important), institutionalized (university degrees, awards, qualifications). Symbolic capital is not a species of capital but the combination of the economic, social, and cultural capital — it is the reputation (or sense of prestige or glory) attached to an agent. Symbolic capital is 'misrecognized' by society as attributable only to the agent while failing to attribute it to an agent's social circumstance. A species of capital — listed above — may be specific capital. Specific capital is a species of capital that is valued in a particular field.

²⁵⁴ *Ibid* at 820; see also Peer Zumbansen's commentary on the "traditional canon" of legal education in Peer Zumbansen, "Transnational Law" (2008) 9 *Comp Research in L & Pol Econ* 738 [Zumbansen 2008] at 749.

²⁵⁵ Bourdieu 1987, *supra* note 244 at 831.

²⁵⁶ *Ibid* at 819, 827.

²⁵⁷ *Ibid* at 822, 827.

field from within. A judge, in reviewing the history of the common law or in describing and analyzing a statute, does not do so from a neutral or objective place; her observations — the language used, the structure of analysis, the presence or absence of acknowledged *doxa* — inform the approach taken by the next observer. As Bourdieu noted, despite judges preferring the role of “lector, or interpreter, who takes refuge behind the appearance of a simple application of the law,” judges, in fact, perform work of judicial creation.²⁵⁸ In granting judgment, judges imbue the action with symbolic weight rendering it “legitimate.”²⁵⁹ The act of legitimizing is intensified through the ritual of written judgment attesting that the decision expressed “not the will or world-view of the judge but the will of the law or the legislature.”²⁶⁰

Third, and related, the Field uses ritual and language to express and re-exert the legitimation of the rule of law and the work of agents within the Field. Agents use a common language of defined terms in arguments and in judgments that further make the Field inaccessible to the lay person. The “omnitemporality” of the rule of law and the use of constative verbs emphasize the expression of the factual — i.e. making what is objectively unknown or unknowable magically defined and known.²⁶¹ The judgment of the court publicly proclaims “objective truth” and creates a vision of the world through “naming.”²⁶² In naming, the court delineates and categorizes, providing actors and agents with identity; in this way, the court is engaged in what Bourdieu termed “worldmaking” through defining social units.²⁶³ The court is only able to do this where its proposed vision aligns with the pre-existing divisions of which the agents of the Field (of which a judge is one) are the products; in this way a “correct” definition of a social unit “ratifies and sanctifies” the doxic view of the already homogenous Field.²⁶⁴

Last, through naming and fact-creation, the court also informs the behaviours of all social agents. By universalizing and authenticating its world view, it normalizes certain behaviours. By normalizing the behaviour that aligns with its interpretation of the “rules” — which already reflect the culture that creates and controls the rules — the court sanctions the effort of the

²⁵⁸ *Ibid* at 823, 826.

²⁵⁹ *Ibid* at 828.

²⁶⁰ *Ibid* at 828, 831.

²⁶¹ *Ibid* at 820.

²⁶² *Ibid* at 838.

²⁶³ *Ibid*.

²⁶⁴ *Ibid*.

dominant group to impose an official representation of its world views, which favours its interests, thus sustaining the dominance of such views.²⁶⁵ Thus ideas are normalized, passing from orthodoxy to *doxa*.²⁶⁶

B: The *habitus* of Canadian courts

Bourdieu's framework, particularly that involving the idea of "field" was used as the foundation in an early 1990s study conducted by Yves Dezalay and Bryant Garth to, for the first time, analyze the mechanisms, the actors, the rules, and the role of international (as in, transnational) commercial arbitration. In doing so, they applied what they described as a framework immediately common and palatable to *practitioners* of law — while foreign and uncomfortable to scholars — in order to examine anew this burgeoning field.²⁶⁷ While this thesis is far more modest than that of Dezalay and Garth, I have looked to judicial commentary, state action, and secondary sources to, hopefully, in similar fashion, introduce Bourdieu's framework to private international law in Canada as it considers questions of *forum non conveniens* and forum of necessity, and to explore the impact of the *habitus* of the Canadian Field in considering such questions.

As noted above, the *habitus* of a field is informed by the structures, *nomos*, and *doxa* of the field. The *habitus* of the Canadian Field is informed by, among other things, (a) the structures of federalism; (b) the *doxa* of the incremental movement of the common law, *stare decisis*, and judicial independence; and (c) the *nomos* of the state sovereignty doctrine through historical reference and norm signaling from the field of power. These "inputs" create a Field *habitus* that tends towards and prefers a non-interventionist, territorialist, and hyper-comity approach. This *habitus* is made visible in a number of tendencies — or "outputs" — of the Field. I will introduce four such tendencies as examples: (a) the reference and deference to democracies, (b) the reference and deference to judicial brethren, (c) the strict delineation and definition of conflicts rules, and (d) the quiet and narrow co-option of transnational law — a law that is designed to regulate the arena between sovereign states — for the benefit of only advancing comity where it

²⁶⁵ *Ibid* at 846.

²⁶⁶ *Ibid* at 848.

²⁶⁷ Yves Dezalay & Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: The University of Chicago Press, 1996) at 4.

serves the interests of the Field, including the meta-field of power. These two elements —the input and output — are the subjects of the sections that follow.

1. Inputs: elements informing *habitus*

a. Federalist structures of *habitus*

The *habitus* of agents in the Field is initially defined, and continuously reshaped, by Canada's federalist foundation. Federalism has led to a varied understanding of state equality as agents are taught to understand state equality not only as between nation states, but also as between provinces. This structure naturally informs the content and further creation of conflicts law in Canada and may, in some cases, blind judges to the unique requirements of comity at the international, rather than inter-provincial, level.

As the western concept of state sovereignty moved from its western European origins to the shores of America, the Hobbesian and Bodinian concepts of state and national sovereignty — featuring one all-powerful secular ruler — were modified to fit the post-Indigenous American context. With the signing of the new American constitution in the late 18th century, state sovereignty — specifically the question of who held the right to make and enforce law — had to be amended to accommodate federalism. James Madison, the American founding father and fourth President, emphasized in *The Federalist Papers* the new national government was one of limited and enumerated powers;²⁶⁸ the notion of limitation took shape not only as separation of powers at a given level of government but also in terms of the nation-state's power being shared in a defined manner with the sovereign governments of the states through whose union the nation-state was created. Although differing in detail in both form and substance, Canada's federalist constitution evinced a similar general conception of split sovereignty, but as between the national and the provincial.

Unlike unitary states whose national governments control both the state's public *and* private international law approaches,²⁶⁹ Canada's *Constitution Act*, 1867, provided most (though

²⁶⁸ Federalist papers No 45.

²⁶⁹ Canada's federalist approach is also unlike other federalist states such as Australia and the USA whose constitutions more specifically set out national sovereign powers to legislate and enforce on civil issues, thus providing constitutional jurisdiction to do the same with respect to private international law: see Joost Blom,

not all) powers of private law to the provinces, while the national government retained control over Canada's international relationships.²⁷⁰ Thus, as Joost Blom recently explained, it becomes “logically impossible” to situate *private international law* in a non-constitutional space.²⁷¹ As a result, Canadian courts deal not only with questions of “private international law” at the level of nation states, they also deal with “private inter-provincial law” as between the provinces; both streams can be dealt with compendiously under the more general denomination, “conflict of laws.” As will become clear, the majority of seminal cases that have set Canada's approach to conflict of laws were indeed determined not on the basis of international but on the basis of inter-provincial legal conflicts.²⁷²

A number of these seminal decisions in the conflict of laws arena have made clear the different approaches to be taken to actions resulting from international events and from those that are inter-provincial. In 1990, Justice La Forest explained in *Morguard* that the underlying principles of private international law and comity must be adapted to the situations in which they were applied. There, he found that such application in the context of a federation implies a “fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation.”²⁷³ The courts in one province, said Justice La Forest, should give “full faith and credit” to the judgments given by a court in another province provided that that other court exercised proper jurisdiction in the action.²⁷⁴ Fundamentally, he found, issues of fair process are not an issue within the Canadian federation.²⁷⁵ In coming to his conclusion in *Morguard* — a recognition and enforcement case — La Forest J cited Justice Dickson who had held for the SCC in *Zingre* that comity is based on the common interest of both the jurisdiction giving judgment and that enforcing it. Indeed, he stated, a recognition of comity is in the interest of the whole country, “an interest recognized in the Constitution itself.”²⁷⁶

“Constitutionalizing Canadian Private International Law - 25 Years since *Morguard*” (2017) 13(2) J P Int'l L 259 [Blom 2017] at 262-3.

²⁷⁰ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [Constitution Act, 1867]; see for instance ss 91(10) (“navigation and shipping”), (21) (“bankruptcy and insolvency”), (22) (“patents of invention and discovery”), (23) (“copyrights”), (26) (“marriage and divorces”), and 91(2) (“the regulation and trade and commerce”).

²⁷¹ Blom 2017, *supra* note 269 at 261; see also *Van Breda* at para 21.

²⁷² *Van Breda*, *supra* note 21 at para 22.

²⁷³ *Morguard*, *supra* note 33 at 1101.

²⁷⁴ *Ibid* at 1102. Note that this term “full faith and credit” is lifted directly from the text of the US Constitution.

²⁷⁵ *Ibid* at 1103.

²⁷⁶ *Ibid* at 1107.

As noted in Chapter 1, the Constitutional status of the real and substantial connection test from *Morguard* was cemented in *Hunt*, in which the SCC found that “litigation engineered against a corporate citizen located in one province by its trading and commercial activities in another province should necessarily be subject to the same rules as those applicable to international commerce.”²⁷⁷ In *Hunt*, the real and substantial connection test was deemed appropriate to prevent provincial overreach and uphold Constitutional division of powers.

However, it was not clear that the test would be applicable beyond Canadian shores. Indeed, in *Spar Aerospace v American Mobile Satellite Corp*, Justice LeBel for the SCC suggested in *obiter* that it may be necessary to afford foreign judgments different treatment than that given to inter-provincial judgments, wherein the latter would be subject only to a connection test and not to wider fairness considerations. In *Spar Aerospace* he stated,

[h]owever, it is important to emphasize that *Morguard* and *Hunt* were decided in the context of interprovincial jurisdiction disputes. In my opinion, the specific findings of these decisions *cannot easily be extended beyond this context*. In particular, the two cases resulted in the enhancing or even broadening of the principles of reciprocity and *speak directly to the context of interprovincial comity within the structure of the Canadian federation...*²⁷⁸

Two years later, in *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, the SCC highlighted the lower status of comity in the international realm as compared to the inter-provincial realm; comity in *federalist* Canada — as opposed to internationally — enjoys “constitutional status.”²⁷⁹ Where the SCC finally did comment in *Beals* on the test’s application to the international realm, the SCC held that the real and substantial connection test could be applied in the international realm so long as *any unfairness* that may arise be taken into account.²⁸⁰

²⁷⁷ *Hunt*, *supra* note 36 at 323.

²⁷⁸ *Spar Aerospace Ltd v American Mobile Satellite Corp*, 2002 SCC 78 [*Spar Aerospace*] at para 51 [Emphasis added].

²⁷⁹ *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 at para 55.

²⁸⁰ *Beals*, *supra* note 198 at para 30. In *Beals*, LeBel J dissented arguing that the real and substantial connection test should be significantly modified when applied to foreign judgments in a way that recognizes the additional hardship imposed on a defendant who is required to litigate in a foreign country. He argued that liberalizing the test while narrowing the defences to enforcement was not a coherent approach: *Beals*, *supra* note 198 at paras 134-135.

Such differentiation was not limited to the real and substantial connection test. In *Tolofson* — the seminal case on choice of law — La Forest J preferred application of the *lex loci delicti* rule because, among other things, the nature of Canada’s constitutional arrangements support a rule that is certain and that ensures an act committed in one part of the country would be given the same legal effect everywhere.²⁸¹ Notably, in leaving open the door to a public policy “exception” to the rule, La Forest J stated that he predicted limited application of such an exception to actions that take place wholly within Canada and that any public policy problems, particularly between provinces, tend to disappear over time.²⁸² In other words, the public policy exception was effectively limited to international actions.

By virtue of the interprovincial trade and movement of Canadian residents, Canadian courts will naturally deal with far more volume of conflict of laws issues in the inter-provincial realm than in the international realm. As a result, the application of the fundamental conflict of laws principles from, for example, *Morguard*, *Hunt*, and *Tolofson* — three seminal cases in the Field — whose findings and discussion centred largely on the relationships between provinces, will be the norm. Through a continuous application of such principles, without thoughtful reference to the context of their creation, courts may begin to lose sight of the differences in the way in which comity and fairness apply as between inter-provincial and international cases.

As was noted by the SCC in *Morguard* and *Hunt*, comity, as between provinces, recognizes the legitimacy and capability of sister provincial courts; generally speaking, the courts of BC can be confident parties will see justice done as equally in Ontario as in BC. For instance, Canadian provinces have similar, if not identical, rules of court, judges in every province in Canada enjoy security of tenure, and by virtue of the proliferation of law schools in Canada and government funding, it is *generally* possible for plaintiffs to find some legal representation.²⁸³ These factors are not necessarily present in the courts of foreign state jurisdictions. A judge in the Canadian Field, frequently engaging in conflict of laws issues

²⁸¹ *Tolofson*, *supra* note 21 at 1063, 1065.

²⁸² *Ibid* at 1054, 1059.

²⁸³ I do not purport to suggest that access to legal representation is not an issue; indeed, there are many plaintiffs who proceed in Canada unrepresented or those that do not proceed at all. However, the point was simply made to illustrate that Canada is home to a number of law schools, legal aid exists for some types of actions (depending on the province), and many lawyers offer *pro bono* services or services on contingency bases. In other words, while the Canadian system needs work, it is functionally operational in a way in which the systems of many countries are not.

between provinces, may not be turning his or her mind to whether justice can be done in another provincial jurisdiction in a way that is required of international questions. Indeed, despite clearly delineating between conflict of laws scenarios in the early 1990s, the SCC and other courts have more recently readily applied the same provincially-situated tests to the international with little account for the difference in context.²⁸⁴

For instance, in *Van Breda*, an *international* conflicts case heard in 2012, the SCC reviewed the constitutional history of the real and substantial connection test and focused almost entirely on the inter-provincial context. Indeed, even the presumptive connecting factors the SCC created to support the real and substantial connection test are phrased in respect of connection to a *province*.²⁸⁵ In the decision, there is no real discussion of how such factors may be modified in the international context. Further, in its application of the law to the facts of the case, there is no reference to the way in which the real and substantial connection test may be modified in the international law context, nor any reference to the “fairness” issue highlighted in *Beals* when considering an international action.²⁸⁶

While the constitutional treatment of comity in Canada — grounded in the equality of provinces — is paralleled in the UN’s Charter regarding the equality of states, the reality is far from the written aspiration. Canadian courts cannot realistically assume the courts of all other states are equipped to see justice done. To assume as much, or, by virtue of habit, to fail to turn attention to issues of fairness and justice, is to be wilfully blind to that fact. It is this reality — the non-equality of states — that informed the decisions of the SCC in the early 1990s and grounded the need to take account of the differences between inter-provincial and international conflict of laws.

Through the frequent interaction of provincial courts with one another — notably, through assessments of jurisdiction — and the continual rote naming of the appropriate tests, the setting that grounded the original tests is lost and the tests designed for the federalist, inter-provincial context is normalized for all areas of conflict of laws. Thus it is through the structure

²⁸⁴ See for instance the application of the public policy exception in *Das v George Weston Limited*, 2017 ONSC 4129 [Das SC], discussed below; the application of real and substantial connection in *Beals*, *supra* note 198; the discussion of the constitutional underpinnings of private international law in Canada in *Van Breda*, *supra* note 21 at para 21.

²⁸⁵ *Van Breda*, *supra* note 21 at para 90.

²⁸⁶ *Ibid* at paras 114-117.

of federalism that the Field *habitus* is biased toward a more conservative, non-interventionist approach to comity and private international law.

b. Field doxa

Three doxa of the Field — unquestioned and effectively non-derogable assumptions — that are either implicitly or explicitly perpetuated by and for the Field contribute to the traditionalist *habitus* of the Field. The first is the *doxa* that the common law is supposed to move forward only incrementally lest it have unintended and radical impacts on the meta-field of power.²⁸⁷ The incremental change in the law is a fact that is so well understood that it almost need not be referenced. That said, the SCC has been quick to remind the Field of this doxic “rule,” particularly in the arena of private international law.²⁸⁸ The result is that we see the Field, unable by its *doxa* to effectively adapt, continuing to cite concepts of 16th century sovereignty and equality of states. Such references perpetuate and continuously remake the norm of territoriality and imbue even modern issues with dated justifications.

A second example, and related to the incremental development of the law, is the *doxa* of *stare decisis*. The common law system requires that lower courts must follow and apply decisions of higher courts in the same jurisdiction, to the extent that the higher court has decided the same or a substantially similar issue. The “traditional view” is the doctrine applies only to the *ratio decidendi*.²⁸⁹ However, while statements made outside the “*ratio*,” deemed “*obiter dicta*,” are not strictly binding on lower courts, in some cases, where they are clearly meant as guidance, they should be accepted as authoritative.²⁹⁰ The approach preferred in Canada when lower courts are presented with differing facts on an issue already decided is to clearly provide commentary and facts that may assist a higher court in reconsidering the law, but not to try to change the law itself.²⁹¹ As recently held by the SCC, “the doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the

²⁸⁷ This focus on incremental movement was recently relied on by the Ontario Court of Appeal in *Das v George Weston Limited*, 2018 ONCA 1053 [Das CA] at paras 137, 144, 192, to which I will return below; also see *Michael Chief Constable of South Wales Police*, [2015] UKSC 2 at para 102.

²⁸⁸ See for example, *Pro Swing*, *supra* note 161 at paras 79, 86; *Van Breda*, *supra* note 21 at para 54; and *Douez v Facebook Inc*, 2017 SCC 33 at para 36.

²⁸⁹ *R v Henry*, 2005 SCC 76 [Henry].

²⁹⁰ *Ibid* at paras 53, 57.

²⁹¹ *Canada v Craig*, 2012 SCC 43 at para 21.

orderly development of the law in incremental steps.”²⁹² To overcome the barrier of *stare decisis*, a lower court must be convinced a new legal issue is raised *and* there is a change in the circumstances or evidence that “fundamentally shifts the parameters of the debate.”²⁹³ *Stare decisis* favours a conservative and incremental approach to the change in the common law, and arguably slows the adaptation of the Field to a changing world order.

A final example is the *doxa* of judicial impartiality and independence. While this example may overlap with the “structure” of the Field, its existence is also socially constructed; judges today are administered and appointed through instruments we consider to have independence at their core – the *Constitution Act*, 1867,²⁹⁴ and the *Judges Act*²⁹⁵ — but this independence actually developed gradually in the Field. In the UK, judicial power was initially concentrated in the hands of the king and his immediate entourage (*Curia Regis*). Over several centuries, the UK saw the emergence of specialized courts and a professional judiciary. By the end of the 15th century, the king’s participation in judicial functions had greatly diminished, though he continued to exert pressure on judges who could be dismissed when they refused to bend to royal prerogative.²⁹⁶ Over time, judicial non-interference became expressed as a “constitutional” principle though the term “constitutional” holds a very different meaning in Britain where, unlike in Canada, there is, generally speaking, no written constitution.²⁹⁷ In Canada, the fundamental components of judicial independence were inspired by the British principles, but actually entrenched in sections 99 and 100 of the *Constitution Act*, 1867.²⁹⁸ The fact of judicial independence in Canada is a shared attribute among Canadian judges, thus furthering ideas that justice may be reasonably expected to be done in every province. This tenet, however true in Canada, is not the case worldwide.

²⁹² *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44.

²⁹³ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 42.

²⁹⁴ *Constitution Act*, 1867, *supra* note 270 at ss 96-101.

²⁹⁵ *Judges Act*, RSC 1985, c J-1.

²⁹⁶ WR Lederman, “The Independence of the Judiciary” (1956) 34 Can Bar Rev 769 and 1139; William Blackstone, *Commentaries on the Laws of England* (4th ed. 1770), Book 1, [Blackstone] at 267.

²⁹⁷ ECS Wade & AW Bradley, *Constitutional and Administrative Law*, 11th ed by AW Bradley & KD Ewing (London: Longman, 1993) at 68-87.

²⁹⁸ *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 at para 311.

c. Nomos of state sovereignty and norm signalling from the field of power

Finally, the *nomos* of the Field — the field-specific, largely unspoken norms — inform the territorialist Field *habitus*. The *nomos* of state sovereignty is born of the significant history of western legal thought and understanding of the role of the state. As canvassed in Chapter 1, Bodin’s conception of the sovereign state, the Grotian addition of comity, and the subsequent centuries of territorial sovereignty playing the cardinal role in both public and private international law have remained steadfast. Such historical roots are perpetuated through the homogeneity and monopoly of Canadian law schools, primary and secondary sources of learning, and legal agents. Students of law are first exposed to a “traditional canon” — thus cementing the structures through which they are able to understand and apply modern concepts — before moving on to more complicated specializations.²⁹⁹ The canonical attachment to territoriality requires the current school of private and public international law agents to perform mental gymnastics to continually define and justify theoretical boundaries to match boundaries drawn in the physical earth (state borders). The effect is that, while international corporations seamlessly move around the globe, conveniently forum shopping to maximize profit, many respected legal scholars and judges are sidetracked and distracted by whether a court may assert private international law jurisdiction and upon what enumerated and normalized basis: extended territorial or extraterritorial, the latter subdividing further to include national, universal, objective, subjective jurisdiction etc. Through its focus on silos of interpretation, the Field self-references in a continuous action of “naming” and categorizing the world of “possible” answers, thus repeatedly defining, identifying, and legitimizing a territorialist approach to conflict of laws.

A second source of territorialist *nomos* comes from the Field’s executive and legislative sisters (field of power). As noted in Chapter 1, Canadian private international law rules err towards asserting jurisdiction where one of many connecting factors is made out (under the real and substantial connection tests).³⁰⁰ As a result, Canadian courts may arguably run the risk of stretching further over the extraterritorial line than their civilian counterparts. Thus, a predictable traditionalist reaction is to employ *forum non conveniens* liberally to demonstrate to the international community that Canada is not one to overstep her bounds. Indeed, whenever a

²⁹⁹ Zumbansen 2008, *supra* note 254 at 749.

³⁰⁰ *Van Breda*, *supra* note 21 at 78.

Canadian decision maker acts extraterritorially, it contributes to international norm setting, making it increasingly more acceptable for other states to do the same, and perhaps to do the same to the detriment of Canada's own sovereignty.³⁰¹ As a result, in some instances, we see the Canadian legislative and executive branches norm signalling to the Field through demonstrations of territorialist action.

It appears that Canada's neighbour to the south is particularly concerning to the Canadian political field. In the 20th century, the US has emerged as an outlier in taking aggressive steps to assert its extraterritorial jurisdiction over, for example, certain forms of crime (including economic conduct that is often regulated by categorizing it as crime) in a manner arguably inconsistent with fundamental international law principles. This was only heightened after the attacks of September 11, 2001, which led to, what Coughlan et al refer to as, "belligerent exertions of extraterritorial executive jurisdiction that were driven by the rhetoric of the 'global war on terror.'"³⁰²

In response, the Canadian political field has resisted. A first example occurred in 1985, when the Canadian legislative branch passed the *Foreign Extraterritorial Measures Act* (FEMA).³⁰³ FEMA responded to a number of United States measures passed to force disclosure of documents from Canadian companies or to issue judgments against same in certain circumstances including a company's restrictive business practices, export controls, securities measures, and bankruptcy and insolvency. The Minister of Justice at the time, the Honourable John Crosbie, explained to Parliament in introducing the bill, that FEMA would give the Canadian government (and presumably Canadian courts), the "muscle" to defend Canadian sovereignty.³⁰⁴ FEMA was further amended in 1996 to respond to the US *Helms-Burton Act*, which penalized non-US businesses for dealing in property that was expropriated from Americans in Cuba.³⁰⁵ The Canadian government responded by adding sections 7.1 and 8.1 to FEMA which, unlike the rest of FEMA, calls out the American government by stating that any judgment made under, *specifically*, the *Helms-Burton Act*, would be unenforceable in Canada.

³⁰¹ Coughlan 2014, *supra* note 18 at 139.

³⁰² *Ibid* at 77.

³⁰³ *Foreign Extraterritorial Measures Act*, RSC 1985, c F-29 at ss 3, 5, 8, 9.

³⁰⁴ Coughlan 2014, *supra* note 18 at 171.

³⁰⁵ *Ibid* at 171.

Even where the US has taken steps that are arguably well within their own jurisdiction, the Canadian political field's response has been aggressively insular. For instance, in 2003 Canada tried to intervene on the part of a Canadian oil and gas company, Talisman Energy Inc, which faced a civil suit in the United States for alleged wrongdoing in the Sudan. Talisman was accused of cooperating with the government of the Sudan through the provision of oil revenue that government relied on to fund its military effort in the Second Sudanese Civil War. More specifically, the government of the Sudan was accused of a number of war crimes and crimes against humanity, for which Talisman was accused of, effectively, aiding and abetting (for example, by providing airfield access for the Sudan's military). The Presbyterian Church of Sudan sued Talisman in the US pursuant to the American *Alien Tort Claims Act* arguing the US had jurisdiction by virtue of Talisman's breach of international law.³⁰⁶ On a motion to dismiss on the basis of *forum non conveniens*, among other motions brought by Talisman, the Canadian government sent the US Court a letter alleging the Court was violating traditional restraints on its exercise of territorial jurisdiction.³⁰⁷

Contrary to Canada's insistence, Judge Schwartz of the District Court for the Southern District of New York found Talisman, as a corporation, was capable of violating the law of nations, the plaintiffs had adequately pled breaches of the law of nations on the part of the government of the Sudan, and a substantial degree of cooperation between Talisman and the Sudan made clear the Sudan was not an adequate alternative forum. While not deciding it — as the plaintiffs had not questioned the adequacy of Canada as an alternative forum — the US Court questioned whether Canada *would* be an adequate forum. First, Canada presumptively applies the law of the place of injury (*lex loci delicti*) — which would not result in increased fairness compared with the trial proceeding in the Sudan — and Canada does not allow a cause of action for violations of the law of nations itself — as differentiated from common law torts of battery, assault, false imprisonment, and so on — which failed to recognize the gravity of the plaintiffs'

³⁰⁶ *Alien Tort Claims Act*, 28 USC s 1350

³⁰⁷ *Presbyterian Church of Sudan v Talisman Energy Inc*, 244 F Supp 2d 289 (SDNY 2003), aff'd 374 F Supp 2d 331 (SDNY 2005).

allegations. Whether or not Canada was an adequate forum, the judge found the US, namely that Southern District of New York located in New York City, to be the *forum conveniens*.³⁰⁸

Canada's sensitivity to the shadow of American legislative and judicial reach is clearly evident in the actions of its legislative and executive bodies. As a result, it is likely this message has seeped into the *nomos* of the Field as a resounding and perpetual chorus: "we do not give them an opening."

The federalist structure; the *doxa* of judicial independence, incremental advancement of the common law, and *stare decisis*; and the *nomos* of state sovereignty through historical reference and modern executive signalling — all of these elements combine to inform, perpetuate, and ground the Field *habitus* of territorialism and non-intervention. This *habitus* and its impact on transnational litigation can be spotted in the language of judicial decisions and the tendencies of Canadian courts in such actions. What follows are some examples of such indicators.

2. Output: evidence of the Field *habitus*

a. Comity towards democracies

As noted above, state sovereignty is supported by the public international law concept of equality of states. This concept was born of Western Europe at a time when "legitimate" nation states — and those to be afforded "equality" — were few and other "uncivilized" regions were under colonized control of the former. At the time, it may have followed that equality of states was a real and manageable concept. Today, with over 200 nation states "recognized" by the United Nations — many of which are former colonies of those early select few — featuring wildly variable geographies, government structures, economic power, and access to military defence, it is charming to suggest the "equality" of states remains more than, at best, aspirational, and more likely, a relic.³⁰⁹

³⁰⁸ The Court eventually granted Talisman summary judgment on the basis the plaintiffs had been unable to establish Talisman's purposeful complicity in the human rights abuses suffered: *Presbyterian Church of Sudan v Talisman Energy Inc*, 453 F Supp 2d 633 (SDNY 2006), aff'd 582 F3d 244 (2d Cir 2009).

³⁰⁹ See Robert H Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1993).

In what appears to be a very mild adaptation to this “reality,” we see the Field adapt territorialist sovereignty concepts through reference to “democracies” or states with “similar values” rather than simply nation states. This modification is clear in *Van Breda*; one of the guiding principles the SCC introduced to use in adding any new presumptive connecting factor for asserting jurisdiction on the basis of real and substantial connection is the treatment of that factor in the private international law of other legal systems “with a shared commitment to order, fairness, and comity.”³¹⁰ Indeed, this approach echoes with what is “internationally recognized” by the International Court of Justice as key sources of international law, namely: “general principles of law recognized by *civilized nations*.”³¹¹ Unfortunately reference to democracies or those states that share similar “commitments” appears to be a low bar — once a nation state is “defined” as a democracy, the Canadian courts appear to revert to traditional notions of non-interference-based comity lest they offend Canada’s “democratic” sisters.

A clear example is provided by the 2008 determination of the Federal Court in the Afghan Detainees case.³¹² The applicants in that case launched a judicial review of the decision of the Canadian Armed Forces (CAF) to transfer Afghan detainees to Afghan government prisons. The fundamental question in that case was whether the *Charter* applied to the actions of the CAF when operating abroad. To solve this issue, the parties agreed to bring a motion to determine that legal question alone. Evidence was presented that when CAF personnel apprehended Afghan citizens, they could temporarily hold them before transferring them to Afghan custody. Before transferring a detainee, the Commander Joint Task Force Afghanistan had to be satisfied there were no substantial grounds for believing that there existed a real risk that the detainee would be in danger of being tortured or suffering other forms of mistreatment at the hands of the Afghan authorities.³¹³ To follow up on detainee transfers, the CAF formed agreements with the Afghan Independent Human Rights Commission which agreed to monitor

³¹⁰ *Van Breda*, *supra* note 21 at para 91.

³¹¹ *Statute of the International Court of Justice as found in the Charter of the UN*, 26 June 1945, Can TS 1945 No 7 at para 1, Art 38 [Emphasis added].

³¹² *Amnesty International Canada v Canada (Chief of the Defence Staff)*, 2008 FC 336 [Afghan Detainees FC].

³¹³ *Ibid* at para 64.

the condition of transferred detainees.³¹⁴ In November 2007, the CAF decided to suspend the transfer of detainees as a result of a credible allegation of mistreatment of detainees.³¹⁵

In determining the *Charter* would not be available to the detainees, the Court reviewed Justice LeBel’s decision in *Hape*, and several foreign judgments — although the Court’s interpretation of *Hape* formed the foundation of the Court’s analysis and ruling. The motions judge thus tried to apply the principles from *Hape* — collectively understood by all parties to be the governing law — to a fact situation that significantly differed from that in *Hape*.

The first evidence of the judge’s territorialist approach to comity is evident in the judge’s treatment of “consent.” Recall, in *Hape*, Justice LeBel noted that the *Charter* would not apply to the actions of Canadian agents operating in a foreign territory absent (1) consent of the foreign territory or (2) some other basis under international law.³¹⁶ It was clear from the numerous bilateral and international agreements signed by the CAF and Afghan government that the Afghan government had not provided clear *written* consent for the application of the *Charter* to its territory. However, the applicants argued the consent test should not be applied strictly in the case of Canada exercising military functions.³¹⁷ In support of their argument, the applicants relied on examples of previous CAF deployment to territories where it would have been unclear whether the host government would be *able* to consent: namely, deployments to Somalia and Yugoslavia. The argument a host government could not consent was deemed a legal exception for “effective military control.” The motions judge first distinguished Somalia and Yugoslavia on the basis the Afghan government was an “internationally recognized, democratically elected government.”³¹⁸ Second, the motions judge analyzed a series of UK and European Court of Human Rights cases³¹⁹ in which courts had determined jurisdiction in the context of military operations. As admitted by the motions judge, the decisions were variable,³²⁰ some extending

³¹⁴ *Ibid* at para 69.

³¹⁵ *Ibid* at para 76. This suspension was eventually lifted while the decision of the Court was under reserve: *Ibid* at para 99.

³¹⁶ *Hape*, *supra* note 105 at para 65.

³¹⁷ *Afghan Detainees FC*, *supra* note 312 at paras 187-203.

³¹⁸ *Ibid* at paras 40, 206.

³¹⁹ *Issa and Others v Turkey*, Application No 31821/96, judgment dated 16 November 2004 (ECHR); *Al-Skeini and others v Secretary of State for Defence*, [2007] UKHL 26; *Bankovic and Others v Belgium and 16 Other Contracting States*, Application No 52207/99, decision dated 12 December 2001 (ECHR (Grand Chamber)); *Case of Öcalan v Turkey*, Application No 46221/99, judgment dated 12 May 2005 (ECHR); and *Hess v United Kingdom*, Application No 6231/73, decision dated 28 May 1975 (ECHR).

³²⁰ *Afghan Detainees FC*, *supra* note 312 at para 332.

jurisdiction of a home nation into the territory of another, and in others taking a more conservative approach. In this variable context, and in applying *Hape* to the fact pattern at bar, the motions judge *chose* to apply the more conservative approach.

In these determinations, the Court took up a blind adherence to territorialist applications of comity and equality of states. First, the Court, through “defining” the government of Afghanistan as an “internationally recognized democracy” secured that nation state among those deserving of “equal status” and thus whose sovereignty is unencroachable but for exceptional circumstances. This was done despite clear evidence that the Afghan government was torturing detainees — a clear breach of *jus cogens* and arguably not a characteristic, or, at least, not an accepted characteristic³²¹ — of “recognized democracies.” Second, the Court’s *novel* interpretation of *Hape*’s “consent” standard errs towards a conservative approach, despite there being room to manoeuvre, i.e. LeBel J’s open reference to exception on international bases.

This territorialist approach is starker given the Court’s conclusory comments. The motions judge concluded by outlining some of the concerns that flow from “the Court’s findings.”³²² Such concerns included: (1) the fact that the content and scope of international human rights are more limited and less likely enforceable than *Charter* rights; (2) the impact of non-enforcement as a reflection of the “serious concerns” raised with respect to the treatment of detainees; and (3) the fact that, while Canada can prosecute its CAF personnel after the fact if they have engaged in mistreatment of detainees, a constitutional instrument (the *Charter*) designed to prevent such abuse will not apply.³²³ Nevertheless, the Court concluded its hands were tied by the narrow reach of *Hape*. In doing so, the Court clearly leaned heavily on its obligation to *stare decisis*. The Court engaged in its own fact-finding that led to a determination that neither the law nor the facts at bar differed enough from those of *Hape* to warrant a departure from the earlier case — notwithstanding that, as noted above, such a finding would not

³²¹ See, however, research highlighting the apparent hypocrisy of powerful states preaching against torture but then engaging in it themselves: Omar Sabry, “Torture of Afghan Detainees: Canada’s Alleged Complicity and the Need for a Public Inquiry” in Canadian Centre for Policy Alternatives (September 2015) online: <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2015/09/Torture_of_Afghan_Detainees.pdf> at 28-43; Ian Cobain, *Cruel Britannia: A Secret History of Torture* (London: Portobello Books, 2012); Mohamedou Ould Slahi, *Guantanamo Diary*, ed by Larry Siems (Boston: Little, Brown and Company, 2015).

³²² *Afghan Detainees FC*, *supra* note 312 at para 336 [Emphasis added]. The judge’s use of the third person — “the Court” — suggests an analysis devoid of personal accountability.

³²³ *Ibid* at paras 336-340.

even have been needed, given the “international bases” exception to the narrow test defined by the *Hape* Court. On a positive note, the motions judge found it was not leaving the detainees in “no-man’s land” because — seemingly unaware of the conclusion in *Bouzari* that a court cannot expect a torture victim to seek redress in the state by which they were tortured — the detainees may still exercise their Afghan constitutional rights and international human rights — those that by this Court’s admission may not be effective — in Afghanistan.³²⁴

Similar deference to democracies by Canadian courts — as used to either reject jurisdiction (forum of necessity) or to choose not to keep jurisdiction (*forum non conveniens*) — are found across a spectrum running from Italy³²⁵ to Israel³²⁶ to Guyana.³²⁷ While not always clear on its face (as with respect to the language used to describe Italy’s “long legal tradition”), the deference to legitimate statehood is clear through the Field’s choice to dismiss clear evidence suggesting otherwise. For instance, in the case of Israel, a Québec court, despite clear evidence to the contrary, suggested not that the state clearly *did* allow elements of the Fourth Geneva Convention to be applied in its courts in relation to harms on the West Bank but that, if it did not Israeli courts *would probably* (if given the chance by the Canadian judge) acknowledge elements of the Fourth Geneva Convention, thus creating no injustice for plaintiffs.³²⁸ In the case of Guyana, the court ignored evidence that that state’s movement toward democracy and rule of law had been slow and halting, and instead chose to contrast the current system with the fact there *had been* a dictatorship — a contrast that makes even the feeblest of democracies look deserving of full respect.³²⁹

It is important to note that in highlighting this democratic-deference some academics are met with arguments that to suggest states are *unequal* and *unequally* able to provide justice to victims of harm — particularly harm caused by multinational corporations — is to take an

³²⁴ *Ibid* at para 343; the applicants appealed to the Federal Court of Appeal and their appeal was denied. That Court found the motions judge had not erred in her interpretation of *Hape* and that the recent release of the SCC’s 2008 decision in *Khadr* had not changed the analysis: *Afghan Detainees FCA*, *supra* note 166. Leave to appeal to the SCC was denied: [2009] SCCA No 63.

³²⁵ “...lorsque l’on connaît la longue tradition juridique de l’Italie et son rôle comme source de bien des éléments des droits occidentaux.” [*since we know Italy’s long legal tradition and its role as the source of many elements of Western law.*]; *Lamborghini*, *supra* note 100 at para 49.

³²⁶ *Bil’In (Village Council) v Green Park International Inc*, 2009 QCCS 4151 [Green Park SC]; *Green Park CA*, *supra* note 83.

³²⁷ *Cambior*, *supra* note 83.

³²⁸ *Green Park CA*, *supra* note 83 at para 79.

³²⁹ *Cambior*, *supra* note 83 at para 73.

imperialist perspective.³³⁰ This corrupted “angel colonizer” argument is favoured among those preferring the conservative approach to comity, resulting in shielding traditional notions of state equality and non-interference from critique. While pretending to promote the “equal rights of decolonized states” the defender of such arguments actually promotes conveyors of harm to be under-penalized for such harms by ignoring the reality of state-state and state-corporate power dynamics. As Sundhya Pahuja describes in *Decolonizing International Law*, the transition from formerly colonized nations to players at the table of the international community was done under the rubric of Western liberalism, human rights, and democracy;³³¹ the emergence of newly formed nations and radical decolonization at the formal level has outpaced the reality of power and of traditional notions of comity.³³² Indeed, while “equality of states” is a foundational principle of public international law, the reality is that “third world” states have never experienced sovereign equality *among* states, let alone environmental or human rights sovereignty *within* their own borders.³³³ While I do not propose to engage in an extensive review of legal legacies of colonization — many others have laudably and effectively taken on this task³³⁴ — one example of the stark application of this “non-imperialist” approach is Judge Keenan’s dismissal of the *Bhopal* action.³³⁵ While it is not a Canadian example, one can see very similar values reflected in the *Afghan Detainees* judgment. In the *Bhopal* case, Judge Keenan determined that to assert jurisdiction — even where the Indian state asked him to do so — would constitute “another form of imperialism.” He even ended his judgment by claiming he was

³³⁰ See for example discussion in Sara L Seck, “Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations” (2011) 3 Trade L & Dev 164 [Seck 2011] at 167, 196.

³³¹ Sundhya Pahuja, *Decolonizing International Law* (Cambridge: Cambridge University Press, 2011) [Pahuja 2011].

³³² Baxi 2001, *supra* note 145 at 203.

³³³ Given the involvement of the “sustainable development” and “anti-poverty” goals of the World Bank and OECD, monetary assistance has been frequently tied to a host country’s acceptance of foreign direct investment in the form of resource extraction and development: Seck 2011, *supra* note 330 at 188.

³³⁴ See for example, Pahuja 2011, *supra* note 331; Baxi 2001, *supra* note 145; Seck 2011, *supra* note 330; Karin Mickelson, “South, North, International Environmental Law, and International Environmental Lawyers” (2000) 11 YB Int’l Env’t L 52; Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003); B.S. Chimni, “An Outline of a Marxist Course on Public International Law” in Susan Marks, ed, *Law on the Left: Re-examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008); B.S. Chimni, “Third World Approaches to International Law: A Manifesto” in A Anghie et al, eds, *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff, 2003); Obiora Chinedu Okafor, “Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective” (2005) 43 Osgoode Hall LJ 171.

³³⁵ Upendra Baxi & Amita Dhanda, *Valiant Victims and Lethal Litigation: The Bhopal Case* (Bombay: NM Tripathi Pvt Ltd, 1990).

giving judges in this sister democracy a chance to “stand tall.”³³⁶ However, as Upendra Baxi effectively argues, those that support such a determination remain wilfully blind to the reality that were the *Bhopal* action to have gone ahead in India — rather than settle, as it did — Union Carbide (the defendant in that case) would have been subject to strict multinational enterprise liability rules — which Judge Keenan was aware of — thus resulting in a decision that likely would not have ever been enforced in the United States against Union Carbide’s assets on the basis that such strict liability law is “against US public policy.”³³⁷ In other words, in refusing to assert jurisdiction — allegedly on the basis of avoiding modern imperialism — the court would then very likely have rejected recognition and enforcement of an Indian judgment on the basis such a judgment was “repugnant,”³³⁸ thus engaging in the very imperialism it sought to “avoid” in the first place.

Modern reference to “democratic” states and the use of imperialist avoidance as a shield³³⁹ promotes traditional notions of non-interference and comity through identifying *de jure* or official norms to which the existence of states and their exercise of jurisdiction is compared at a theoretical, rather than practical, level. In official recognition of the “democracy” of states, through the ceremony of judgment writing, Canadian judges engage in fact-making that doesn’t necessarily align with the reality on the ground. The act of doing so grounds their legal logic, promotes the *doxa* that justice may equally be done in every democracy, and effectively serves to advance/protect the interests of the Field and the interests of the field of power.

³³⁶ *Re Union Carbide Corp Gas Plant Disaster at Bhopal, India in December 1984*, 634 F Supp 842 (SDNY 1986), Mod’d & aff’d 809 F2d 195 (2d Cir 1987), cert den’d 484 US 871 (1987) [Bhopal].

³³⁷ Baxi 2001, *supra* note 145 at 205, 208-209. Also see Karin Mickelson’s description of the south-north re-conceptualized relationship that acknowledges state inequality and favours concepts of “economic debt” and “environmental space.” Using the approach of ecological space in problems of transnational harm, the regulation and adjudication of transnational environmental claims could be seen as contributing to the protection of environmental space for vulnerable communities. This argument, in turn, supports the creation of forums within home states to adjudicate transnational infringements of ecological space as a recognition of a home state’s ecological debt to the host state: Karin Mickelson, “Leading Towards a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories about International Environmental Cooperation” (2005) 43 *Osgoode Hall LJ* 137, thus applied by Seck 2011, *supra* note 330 at 195.

³³⁸ “Repugnancy” of another state’s laws is a basis for non-enforcement of judicial orders under the public policy exception.

³³⁹ Seck 2011, *supra* note 330 at 196.

b. Comity towards judicial brethren and their “legitimate judicial acts”

In her piece, “International Law in a World of Liberal States,” Anne-Marie Slaughter reimagines international law as it would adapt to a world recognizing distinctions among different states based on their domestic political structure and ideology.³⁴⁰ She imagines that in such a construct, courts in liberal states would recognize each other as like units dedicated to the same underpinning of rule of law, impartiality, and independence.³⁴¹ I suggest that today, such assumptions are already made by the Field and that this is clear in the judgments of the Canadian judiciary in human rights conflicts law.

As noted, judges — by virtue of their shared economic, cultural, and social capital — are largely “cut from the same cloth.” While, as described above, Canadian courts can be seen to tailor the traditional notions of state equality to account primarily for states that are “like us” or are “internationally recognized democracies” that are engaged in “legitimate judicial acts”³⁴² — despite what may be true in reality — written judgments make clear that *above all else*, judges will protect their judicial brethren, generally with the result of deferring to such brethren.

Where counsel for plaintiffs have suggested that the judiciary of a foreign state is wanting, either in training or independence, the response from the Field can be informative. A first example is drawn from a judgment related to whether the courts of Guyana could provide justice to plaintiffs alleging harm done by a catastrophic effluent spill caused by the Québec-based Cambior Inc. On the issue of interests of justice, the Court heard expert evidence from William Schabas, a leading professor and expert in international human rights law who was then a professor of law and head of the department of law at the Université du Québec à Montréal.³⁴³ Professor Schabas visited Guyana to conduct interviews and observe the court systems. He provided the Québec Court with adverse conclusions related to the willingness and capacity of the Guyanese judiciary to deliver justice for the plaintiffs. The Court, seemingly finding the intrusion of an international human rights lawyer “presumptuous,”³⁴⁴ reduced and characterized Professor Schabas’ testimony in flagrantly dismissive terms: “Professor Schabas... would have

³⁴⁰ Anne-Marie Slaughter, “International Law in a World of Liberal States” (1995) 6 Eur J Int’l L 503.

³⁴¹ *Ibid* at 524.

³⁴² *Chevron*, *supra* note 25 at para 53.

³⁴³ Scott & Wai 2004, *supra* note 12 at 298.

³⁴⁴ *Ibid* at 300.

the court believe that Guyana is little more than a judicial backwater...³⁴⁵ While the Court recognized the professor's expertise, it dismissed his evidence as being based on "secondary sources" rather than his own experience.³⁴⁶

In contrast, the Court much preferred the testimony of three former Guyanese *judges* and a former judge of the Québec Court of Appeal, all of whom testified to the independence and *integrity* of the Guyanese judiciary. The Court wrote it was "particularly impressed with the quality of [one of the Guyanese judge's] evidence. To say the least, his legal credentials are beyond dispute."³⁴⁷ One of the former Guyanese judges even testified that the judiciary had always been independent, *even under dictatorial rule*.³⁴⁸ It is certainly the prerogative of a trial judge to admit and weigh evidence before her and determine which she prefers. However, in this case, the weight provided to the Québec Court of Appeal justice witness — who had, like Professor Schabas, only briefly visited Guyana and learned about the judiciary second hand — and the weight provided to witness judges whose testimony regarding independence was questionable on its face, suggests the Québec Superior Court justice could not fathom impugning his brethren judges, particularly those of a "sister democracy."³⁴⁹

Similar commentary can be found in the recent decision of the Ontario Superior Court in *Das v George Weston Ltd*, to whose facts I will return below.³⁵⁰ In response to the plaintiffs' suggestion that the judges of Bangladesh could not handle what would be an extremely complicated and significant personal injury case against a multinational corporation, the Court responded, "I need not dignify this argument and the one that follows, which insults the courts and judges of Bangladesh, with an elaborate analysis..."³⁵¹ The Court then engaged several paragraphs vigorously responding to the plaintiff's argument that the tort law of Bangladesh was at a somewhat nascent stage of development, noting the plaintiffs' argument was "patently incorrect," that the "bench and the bar in Bangladesh are well-educated,"³⁵² and that the

³⁴⁵ *Cambior*, *supra* note 83 at para 82.

³⁴⁶ *Ibid* at para 87.

³⁴⁷ *Ibid* at para 82.

³⁴⁸ *Ibid* at para 89.

³⁴⁹ *Scott & Wai 2004*, *supra* note 12 at 301.

³⁵⁰ *Das SC*, *supra* note 284.

³⁵¹ *Ibid* at para 275.

³⁵² *Ibid* at para 284.

plaintiff's argument was "somewhat insulting."³⁵³

This charged response by the Court in *Das* is reflective of the judgment of Judge Keenan in the *Bhopal* decision in the US. While, as noted above, India urged that Court to take jurisdiction over the actions of an American corporate national — whose headquarters lay down the street from the Court — Judge Keenan held he would "defer to the adequacy and ability of the courts of India," that the Indian government insulted its judiciary by taking such a position, and that, as noted in the last section, this was an opportunity for the courts of India to "stand tall before the world and to pass judgment on behalf of its own people."³⁵⁴

In some cases, like in *Tahoe* and *Nevsun* discussed in Chapter 1, where we have seen a Canadian court hold that there was a real likelihood justice *would not* be done, we see paired commentary regarding the poor treatment judges in those countries have undergone, perhaps suggesting in some cases the support of poorly-treated judicial brethren may be a factor for consideration. For instance, in *Nevsun*, evidence was presented — and accepted as persuasive — from a former judge of Eritrea who had been expelled from the judiciary after he was imprisoned. He testified that the government had closed the only law school, the only lawyers being issued a licence were conscripts from a new law department who are assigned by the government to their work placements, and that many judges and lawyers had fled the country.³⁵⁵ In *Tahoe*, the BC Court of Appeal noted judges in Guatemala did not have security of tenure and judges who make unpopular decisions may be subject to disciplinary proceedings and subsequent sanctions.³⁵⁶ In both cases, evidence was presented that the foreign state was extremely supportive of international industry for largely financial reasons. It may, thus, be fair to say that one factor that appears to be persuasive to the Canadian Field is the importance of respect for a foreign judiciary and the support a Canadian court may be able to show such foreign brethren, whether that support is in favour of the foreign court exercising its power or, by punishing —

³⁵³ *Ibid* at para 288.

³⁵⁴ *Bhopal* at 69.

³⁵⁵ *Nevsun*, *supra* note 20 at para 38.

³⁵⁶ *Tahoe*, *supra* note 63 at para 101. It is worth noting the motions judge who initially found Guatemala was the more appropriate forum was resistant to any suggestion the Guatemalan judiciary was corrupt. The court mostly avoided the suggestion but engaged very briefly with the plaintiff's arguments, simply stating the evidence of corruption was not relevant to the application and that while the Guatemalan justice system "may be imperfect" that it "functions in a meaningful way." The motions judge concluded that the Canadian public interest requires that Canadian courts *proceed cautiously* in finding a foreign court is incapable of providing justice: *Tahoe SC*, *supra* note 219 at paras 65, 66, 105 [Emphasis added].

through asserting jurisdiction and thereby potentially impacting the economic incentives multinational companies have to stay in the foreign state — the foreign state actors.

Most commonly, through the use of language, Canadian justices are signalling — norm-making — to the rest of the Field that while they may readily leave plaintiffs without any real remedy, they will be hesitant to entertain any suggestion their judicial brothers are lesser or unable. In doing so, such judges create an awkwardness between their adherence to traditional norms and judicial unity, and the language of the jurisdiction tests *they* created. For instance, rather than focusing inwardly on whether Canada is an inappropriate jurisdiction for the purposes of the *forum non conveniens* test, as Australia and the US do, the test in Canada is outward looking; the test asks whether another jurisdiction is clearly more appropriate taking into account issues such as justice and unfairness. It is structured as a presumption that Canadian courts should keep jurisdiction. By its very nature, the test for *forum non conveniens* forces judges in Canada to fairly evaluate the ability of their judicial brethren.³⁵⁷ The same is true in determining whether a court should take jurisdiction under forum of necessity. It is thus, perhaps for this reason, that in Canada we see a disconnect between what the tests for *forum non conveniens* and forum of necessity actually require in law, and how they are being applied by a number of lower-court judges (*Bil'In (Village Council) v Green Park International Inc, Tahoe, Cambior, and Das*) and supported by courts of appeal in Québec and Ontario (*Green Park, Das, Cambior*) in contrast to BC (*Tahoe*) with excessive comity to perceived equals.

c. Adherence to habitus through further delineation and traditional definition

The adherence to a territorialist and traditional approach to private international law — to further the “logic” of the Field — in a world that no longer reflects that in which such notions were born often requires internal inconsistency in naming/defining, wilful blindness to the global reality of statehood and sovereignty, and strict practice of delineation (or isolating) of traditional norms to re-trench traditional values. Such judicial tendencies are clear in the language of Canadian jurisprudence.

³⁵⁷ Schultz and Mitchenson note that this very issue makes the “inward” focused test less of an issue with respect to international comity as judges in Australia need not comment on a foreign court’s ability to ensure justice is done: Schultz & Mitchenson 2016, *supra* note 109 at 368.

As a first example, we see internal inconsistency in defining thresholds for jurisdiction and identifying the goals of assertion of jurisdiction. For instance, LeBel J inconsistently interpreted the term “exceptional” in the contexts of forum of necessity and *forum non conveniens*. Recall, with respect to the former, he described in *Lamborghini* the term “exceptional” as requiring “near absolute legal or practical impossibility.”³⁵⁸ Meanwhile, when defining the “exceptional circumstances” in which a claim will be stayed for *forum non conveniens*, he describes exceptional as being akin to “clearly” — an obviously lower standard.³⁵⁹ Only in an arena where non-intervention and comity are non-derogable does this kind of distinction make sense; where the presumption is non-intervention (necessity) it is easy for a judge to extend deference and refuse jurisdiction; and where the presumption is intervention, *reversing* the presumption is made easier. A further inconsistency is evident in *Kazemi Estate v Islamic Republic of Iran*³⁶⁰ (reviewed in detail below), in which the Court repeatedly refers to the “purposes” of the subject legislation to support its interpretation, despite there being no purpose section in that legislation and no official legislative purpose from any other source cited by the Court.³⁶¹

A second example of the promotion of traditional definitions demonstrates the arbitrary adherence to comity based on equality and exceptional nature of states. Since the 1700s, the concept of territorial sovereignty and of the state as the ultimate source of power has suffered significant restriction through the rise of international organizations.

First, through membership in various organizations such as the World Trade Organization (WTO), the European Union (EU), and the Organization for Economic Co-operation and Development (OECD), for example, states voluntarily give up bundles of state sovereignty rights, allowing such institutions to prescribe and even enforce legal rules against member states. The same is true with respect to treaties and agreements made between states including mutual legal assistance treaties and trade agreements. While one could argue that in treaty organization contexts the state has always maintained the power to opt in (or out), thus preserving its sovereignty, the existence and enforcement of customary international law and *jus cogens* —

³⁵⁸ *Lamborghini*, *supra* note 100 at para 45.

³⁵⁹ *Van Breda*, *supra* note 21 at paras 108-109.

³⁶⁰ *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 [Kazemi].

³⁶¹ While the Court in that case reviewed the common law history of state immunity, there is no evidence given that the statute was meant to simply codify the common law.

norms whose violations by a state could impact its sovereignty — poses a direct challenge to the Bodian concept of state sovereignty as a cardinal legal principle.

Second, further to the reality of “developed” state sovereignty being progressively infringed, it is arguable that state sovereignty as it applies to the “third world” has never been a reality — or at least not a comparable reality to that of more politically, historically, and economically privileged states.³⁶² As noted above, the aspirational equality of states as imagined by the UN in its originating Constitution has never substantially reflected reality. In post-colonial world governance, while formerly colonized states have a *de jure* “seat at the table,” the reality is far from one of equality.

Finally, rigid adherence to traditional notions of the state as the only source of power ignores the reality that the economic and political power of many multinational corporations far exceeds that of a significant number of states. Equally important is the advancement, in public international law, towards more and more robust recognition of individuals³⁶³ — not just states — as legitimate players, particularly in the realm of human rights.³⁶⁴ Thus to reserve attention only for the actions and the dynamic between states — arguably even if those states were equal, which they are not — while not recognizing the lessening of the role of the state is to be wilfully blind to the burgeoning group of non-state actors at play. This adherence to the domination of states is clear not through the presence of judicial language, but in its absence. While the SCC frequently remarks on the equality of states and state sovereignty, it does not do so in reference to other international non-state players.

³⁶² Seck 2011, *supra* note 330 at 188.

³⁶³ Whether or not those individuals are, between themselves, equal is another matter. It is important to note that even as there has been a steady development in use of international law sources to help *human* individuals make *corporate* individuals accountable for the latter’s harm to the former, corporate actors themselves have traditionally been — and remain — the beneficiaries of rights protections (whether under the traditional law of diplomatic espousal of the rights of nationals; in regional human rights systems — like those of the Council of Europe and EU — that accord rights to property and non-discrimination to corporations; or in the wide network of investment treaties that allow foreign companies extra protection from states while doing nothing to protect human individuals from the harms caused by those corporate individuals): Craig Scott, “Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights,” in A Eide et al, eds, *Economic, Social and Cultural Rights, 2nd ed* (Netherlands: Kluwer Law International, 2001) [Scott 2001b] at 563.

³⁶⁴ See for example, OAS, *American Declaration of the Rights and Duties of Man*, 1948, OEA/SerLV/II82 doc.6 rev.1 at 17; UNGA, *International Covenant on Civil and Political Rights*, 1966, UNTS vol 999, p 171 [ICCPR]; UNGA, *International Covenant on Economic, Social and Cultural Rights*, 1966, UNTS vol 993 p 3; UDHR, *supra* note 179.

A clear example of the mismatch between traditional sovereign equality and the factual reality is clear in the discussion of state sovereignty in *Hape*. While recognizing there has been some incursions into state sovereignty — notably through customary international law — Justice LeBel concludes “the sovereignty principle remains one of the organizing principles of the relationship between independent states.”³⁶⁵ That the Court then acknowledges that not all states are *in fact* equal,³⁶⁶ this fact does not appear to moderate or dissuade the Court’s interest in preserving sovereign equality as a “cornerstone of the international legal system.”³⁶⁷

A third example of defining and delineating traditional norms is evident from those juridical decision makers who hesitantly accept a need for a reality frame of global state-corporate-individual dynamics, comity, and non-interference through the application of international law in/by Canada. There, however, traditional notions are still preserved through the apparent need to delineate between permissive and prohibitive/mandatory rules. While the prohibitive/permissive debate has long been described,³⁶⁸ it may today be understood as two dichotomies: first, with respect to the international application of Canadian domestic law, permissive as non-binding and prohibitive as binding; and second, with respect to the application of international law *in Canada*, permissive as requiring a state to act to provide some good or service and prohibitive as a state preventing negative interference with a protected population. In either case, the reliance on such formalistic delineations provides an “out” for Canadian judges aware of modern international dynamics and the need for a transnational application of the law, but still resistant to interference in or by foreign states.

In the first case — the application of Canadian norms outside of Canada — the traditional understanding is that permissive — “may” — rules are favourable to prohibitive — “must”/“will” — rules, which are odious and have extra-territorial effect only when clearly stated or accepted by a foreign state.³⁶⁹ This dichotomy has appeared influential in cases involving the extra-territorial application of the Canadian *Charter*. As we saw in *Hape* and in

³⁶⁵ *Hape*, *supra* note 105 at para 43.

³⁶⁶ *Ibid* at para 44.

³⁶⁷ *Ibid* at para 45.

³⁶⁸ Seck 2011, *supra* note 330 at 169. Note: I use prohibitive and mandatory interchangeably to reflect the command-like nature of the rule described.

³⁶⁹ Yntema’s description of 14th century concepts of domestic statutes as “permissive” — favourable — and “prohibitive” — odious: Yntema 1966, *supra* note 113 at 14.

Afghan Detainees, the courts looked for clear acceptance of the application of not just Canadian norms but specifically the *Charter*. In those cases, the courts, failing to find such crystal-clear instruction (despite each case involving significant coordination and cooperation between states), held back the application of the *Charter* to the detriment of the vulnerable plaintiffs.³⁷⁰

Where *international norms* are delineated on the permissive/prohibitive dichotomy invoking the action required/action prevented interpretation, and where international rules are customary, courts are significantly more likely to read prohibitive rules (do not commit genocide) as binding or informative to Canadian courts (through adoption) than permissive rules (provide victims of torture with remedies) which require transformation.³⁷¹ With such distinction, it thus becomes important for Canadian courts to properly delineate between which international norms are prohibitive and which are permissive. As an example, Justice LeBel in *Kazemi* held in *obiter* that should an exception to state immunity for acts of torture have become customary international law, such a rule “could likely be *permissive* — and not *mandatory* — thereby, requiring legislative action to become Canadian law.”³⁷² Holding that permissive principles may only be “informative” without transformation — read optional and ignorable³⁷³ — avoids any offence to state sovereignty and are thus preferable. Indeed, while international human rights treaties and conventions saw an increase in “reference” at the turn of the 21st century in Canada,³⁷⁴ such reference was restrained, described as informative or helpful for interpretation, but not used to ground decision-making.³⁷⁵ In other words, international human rights norms are more frequently *defined* as permissive rather than prohibitive; while they may provide some “guidance” for the court – imbuing the court with a modernist veil – such norms will not be defined as prohibitive such that they would form the basis for asserting jurisdiction in a private international law tort claim, lest comity be offended.

³⁷⁰ *Hape*, *supra* note 105 at paras 115-118; *Afghan Detainees FC*, *supra* note 312 at paras 151-184.

³⁷¹ *Hape*, *supra* note 105 at 314; Louis LeBel & Gloria Chao, “The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law” (2002), 16 Sup Ct L Rev: Osgoode’s Annul Const’l Cases Conf 23 [LeBel & Chao 2002] at 34; *Kazemi*, *supra* note 360 at para 61; *R v Finta*, [1994] 1 SCR 701 [Finta] at 729.

³⁷² *Kazemi*, *supra* note 360 at para 61.

³⁷³ Jutta Brunnée & Stephen J Toope, “A Hesitant Embrace: The Application of International Law by Canadian Courts” (2002) 40 Can YB Int’l L 3 [Brunnée & Toope 2002] at 9.

³⁷⁴ See for instance LeBel & Chao 2002, *supra* note 371 in reference to *Finta*, *supra* note 371, *Baker*, *supra* note 177, *Burns*, *supra* note 164, and *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1.

³⁷⁵ Brunnée & Toope 2002, *supra* note 373 at 4-5 (in response to and in partial critique of LeBel & Chao 2002).

In the foregoing examples, we see Canadian courts marching faithfully to the beat of the traditional territoriality drum. They define silos or categories of sovereignty and territoriality narrowly, and sometimes inconsistently. In finding it necessary to delineate between permissive and prohibitive applications of domestic and international norms, Canadian courts ground modern interpretations in traditional views of sovereignty: a state must be allowed to control — to accept or reject — norms before they are applied. In other words, even where the Field can be seen to dabble in international human rights norms, as they impact and interact with Canadian law, the Field still finds a way to restrict such human rights norms. Where some courts have demonstrated some limited flexibility they remaining restrained, the realm of possible options being limited by the *doxa* of the Field.

d. Stunted application of lex mercatoria and jus gentium

Even if we are to accept that an approach to law that is incremental and — sometimes blindly — self-re-enforcing is “desirable” or at the very least, not problematic, what we see is that often only the structures and norms of private international law that support a siloed world for *human* individuals — rather than corporations — are perpetuated. What is ignored, to the detriment of individual human rights, is the significant history of “the law of nations” and “law merchant” that have equally historic claims to legitimacy as does state sovereignty.³⁷⁶

In Blackstone’s *Commentaries*, published in 1769, Sir William Blackstone states:

[a]s it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths, and nations; entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called “the law of ‘nations;’” which, as none of these states will acknowledge a superiority in the other, cannot be dictated by either; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which both communities are equally subject: and therefore the civil law very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium* [that which natural reason has established among all men is called the law of nations].³⁷⁷

³⁷⁶ Wai 2001b, *supra* note 240 at 166-7.

³⁷⁷ Blackstone, *supra* note 296 at 47.

A subset of the law of nations is the law merchant, *lex mercatoria*, a specialized set of norms meant to ease the burdens of inter-state transactions and to benefit international trade.³⁷⁸ This systems of norms, like comity, was a reaction to the delineation of states and the impact such structure had on inherently non-siloed activities. Importantly, *lex mercatoria* incorporated a version of state comity to the extent that comity – here, a nation’s desire to enhance its economic and legal sovereignty – is established and maintained through the promotion of a co-operative legal system that supported the economic interests of participating nation states. In other words, comity is realized not only through territorialist sovereignty, but also through cooperation.

Following World War II, commercial lawyers began a revival of a “borderless, universal trade law of nations.”³⁷⁹ In the 1950s, Philip Jessup, the American jurist and scholar, famously proposed a revisiting of the informal, unofficial *lex mercatoria* of medieval merchants — the law that regulated actions that transcended national frontiers — which he proposed referring to as part of or a core example of “transnational law.”³⁸⁰ Such law would challenge the delineations of private and public international law, bringing to light the vulnerability of “official” and state-state-based law and regulatory governance.³⁸¹ According to Jessup, the problem in applying international law lay not *in fact*, but “in the minds of men,” a problem to be solved through creating better understanding in law students, legal practitioners, and the judiciary.³⁸²

Today, transnational law has, as Peer Zumbansen suggests, “both a destructive and constructive thrust. It is employed to destroy, erode and relativize the view that states alone are relevant actors in border-crossing activity.”³⁸³ Many scholars, concerned with human rights and environmental issues, and who have in their sights multinational corporations, have argued that

³⁷⁸ Defined as: “in mercantile questions, such as bills of exchange and the like...the law merchant, which is a branch of the law of nations, is regularly and consistently adhered to.” Blackstone, *supra* note at 67.

³⁷⁹ Zumbansen 2008, *supra* note 254 at 740; Scott 2001a, *supra* note 15 at 52.

³⁸⁰ Philip C Jessup, *Transnational Law* (New Haven: Yale University Press, 1950) [Jessup 1950] at 3-5; Zumbansen 2008 at 743.

³⁸¹ Zumbansen 2008, *supra* note 254 at 741.

³⁸² Jessup 1950 at 108-9.

³⁸³ Zumbansen 2008, *supra* note 254 at 744.

the reemergence, use, and acceptance of transnational law may be the weapon with which plaintiffs may seek and actually win justice.³⁸⁴

Lex mercatoria — whether understood as part of a wider transnationalism or as a unique law merchant — is alive and active, its shadow visible in international arbitration law³⁸⁵ and the “modernist” approach to comity. It is to be expected that, in trade, intellectual property, and finance, such a liberal and modernist approach to transnational activity is applied. Indeed, where the dominant political, economic, and moral norms promote the liberal internationalization of the economic community, courts will justify a liberal interpretation of comity and inter-state cooperation to further the goals of the Field. However, such historical notions of *lex mercatoria*, a body of law that existed in the “in-between” and meant to reflect the needs of those whose interests spanned national boundaries, today apply only to those whose policy goals are not too controversial or political.³⁸⁶ *Lex mercatoria* has not been imagined to have folded into itself civil liability of corporations for the harms they do in the course of business, but rather remained a transactional, largely contractual sub-field. There is thus a “fragmentation” of transnational law between the commercial and the human as there also is between transnational investment law and transnational human rights law.³⁸⁷

As Scott notes, the further regulation moves away from criminal law and states seek to regulate their nationals — specifically their corporate nationals — with respect to economic interests, the more one sees resistance on the part of the state not to interfere or be seen to interfere with another state’s sovereignty.³⁸⁸ Scott assigns this resistance to the possibility that economic policy belongs in some “intrinsic way” to the very idea of sovereignty — that a state’s

³⁸⁴ See for instance: Scott & Wai 2004, *supra* note 12; Harold Koh, “Transnational Public Litigation” (1991) 100 Yale LJ 2372; Sandra Raponi, “Grounding a Cause of Action for Torture in Transnational Law” in Craig Scott, ed, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001); Daniel Augenstein, “Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy” (2018) 18:3 H R L Rev 593; Franzki & Horst 2016, *supra* note 14.

³⁸⁵ Scott 2001a, *supra* note 15 at 52; Scott & Wai 2004, *supra* note 12 at 292; see also the discussion of how transnational law in international arbitration is at odds with transnational human rights law in being wilfully blind to the impact on an affected third parties (often the victims of human rights abuses) with respect to the *Chevron* Case in Ecuador in Franzki & Horst 2016, *supra* note 14.

³⁸⁶ Scott & Wai 2004, *supra* note 12 at 293.

³⁸⁷ Franzki & Horst 2016, *supra* note 14 at 348.

³⁸⁸ Scott 2001a, *supra* note 15 at 53.

self-determination is thought to include the prerogative to make decisions pertaining to their own economic interests.³⁸⁹

Another way to frame this resistance is that in a field where there are limited “possible” answers, as Bourdieu noted, those that are “correct” are those that align with the *habitus* of power. Thus, where territorialism and *lex mercatoria* are available as oppositional normative avenues, the judiciary may choose an approach of transnationalism where it benefits the economic or political fields — thus supporting the historical notion that *lex mercatoria* existed to support the ease of commercial transactions or that much of admiralty law initially emerged as a complex sub-field imagined as judicially-led transnational common law as a ‘necessary’ adjunct to *lex mercatoria* — but choose a non-interventionist approach to benefit the same group when “outsiders” seek accountability of that group, supporting such a decision by citing traditional notions of comity and non-interference.³⁹⁰ This leads to a buffet-style development of the law where the historical roots of legal structures are either championed or blindly ignored, almost always to the benefit of those hierarchically advantaged in the Field.

What is thus interesting is how the *potentially* awkward existence of a form of law that moves beyond states — *lex mercatoria* — is co-opted and reshaped to the benefit of the economic field and, through arbitration and a modernist approach to comity, is touted as the response to a changing world. In other words, it is not as though a basis in traditional law doesn’t exist to ground transnational tort litigation — the hands of justice are not tied — that basis has simply been shaped to serve a narrower, more economically-interested, purpose.

The Field is self-referential, consistently re-stating and re-legitimizing the *habitus* of state equality and non-intervention through the application of comity.³⁹¹ This mechanism is concerning given the reality of internationalism and resulting violations of human rights, and particularly in reference to the apparent conflict of this Field-wide territorialist *habitus* and the formulation of jurisdiction-asserting thresholds designed by *this same Field*. In any event, the

³⁸⁹ *Ibid* at 54.

³⁹⁰ Several authors have noted that the legal protection of foreign investment through transnational investment law developed in the context of decolonization and served primarily to interest of capital exporting countries, i.e. the developed world: Franzki & Horst 2016, *supra* note 14 at 354; Pahuja 2011, *supra* note 331 at 95; Kate Miles, “International Investment Law: Origins, Imperialism and Conceptualizing the Environment” (2010) 21 *Colo J Int’l Envtl L & Pol’y* 1 at 10.

³⁹¹ Franzki & Horst 2016, *supra* note 14 at 356.

markers or indicators of Field *habitus* — deference to democracies, deference to judicial brethren, commitment to narrow delineation, and the co-opting of *lex mercatoria* — demonstrate a clear tendency — *habitus* — of the Field towards traditionalist territorial notions of state sovereignty, state equality, and the preference for a non-interventionist form of comity. These markers are on clear display in some private international law decisions involving human rights violations allegedly carried out by transnational corporations or foreign states. In the next section, I will explore how the impact of the Field *habitus* on decision making in some cases (some of which have already been discussed in part) has arguably led to injustice.

C: The impact of Field *habitus* on private international law human rights and environmental tort litigation

In this section, I discuss a number of cases decided in Canada through the written judgments of which the judicial territorialist *habitus* can be observed in real time. I begin with a discussion of *Kazemi*, a decision of the SCC related to state immunity. While this case deals with whether a cause of action does or does not exist, and does not engage issues of jurisdiction (real and substantial connection, *forum non conveniens*, forum of necessity), it serves as a useful starting place for this section as it is one of the most territorialist, hyper-comity judgments of recent years. As with the cases that follow — that engage the jurisdictional tests discussed above — it is not the law in *Kazemi* that gets in the way of justice, but its application by a judiciary trapped by its own *habitus*. As will become clear, the Field continuously struggles with its territorialist origins and doxic traditions of slow development in the law and a favourable defining of terms to the benefit of the field of power. In this struggle, agents remain seemingly blind to clear escape hatches (exceptions to jurisdiction tests to advance justice), the reality of state-inequality, and the changing face of sovereignty.

Hyper-comity and the SCC's dated territoriality approach in *Kazemi*

One of the most stunning displays of reliance on a Westphalian, state-absolutist version of comity in recent years is the SCC decision in *Kazemi*. Justice LeBel's decision, and its

acceptance by nearly the entire SCC,³⁹² is reflective of the state-equality and non-interference *habitus* inhabited by the judges at Canada's highest court.

Zahra Kazemi, a Canadian citizen, travelled to Iran in 2003 as a freelance journalist and photographer. In the midst of taking photographs of protesters outside a prison, she was arrested and herself imprisoned in the building she had been photographing. While imprisoned, she was beaten, sexually assaulted, and tortured. She was later brought to a government-controlled hospital displaying massive head trauma; she was deemed "brain dead." Upon arrival at the hospital, the contusions on her body and internal damage revealed the extent of the violence she had endured. Despite requests made by her family to be transferred to a Canadian hospital, staff at the hospital in Tehran took Ms. Kazemi off life support. Ms. Kazemi was then buried in Tehran, again, contrary to the wishes of her family.

Following a state investigation into Ms. Kazemi's death, members of the judiciary and of the office of the prosecutor were identified as perpetrators. Nevertheless, only one man was prosecuted, and he was acquitted. Ms. Kazemi's son — still living in Canada — brought an action in the Québec Superior Court against the Islamic Republic of Iran, its head of state, the chief public prosecutor of Iran, and the deputy chief of intelligence at the prison. The defendants brought a motion to dismiss on the basis of state immunity pursuant to the SIA. The issue was eventually appealed to the SCC.

The 2014 decision of the SCC espouses a dated and strict interpretation of international law, comity, and state sovereignty, while employing an internally inconsistent analysis to arrive at what was clearly the legal result that aligned with the inner "logic" of the Field. While there are numerous examples of contradictory and confusing analysis, four themes emerge that demonstrate the enduring influence of a non-interference form of comity.

The first theme is that the SIA may be interpreted in light of the purposes of state sovereignty, but no other purpose. Throughout the decision, LeBel J refers to the "purposes" of the SIA which he aligns with state sovereignty, and the principles of state equality and non-interference.³⁹³ It is important to note there are no enumerated purposes contained within the SIA

³⁹² Justice Abella provided a thoughtful and progressively-minded dissent, but she did so alone.

³⁹³ *Kazemi*, *supra* note 360 at para 35.

and LeBel J offers no evidence of official legislative purpose from official statements or Hansard debates.³⁹⁴ At no point does LeBel J suggest there may be any other overarching purposes to the SIA or any overarching tenets of fundamental justice in reference to which the SIA may be understood. In fact, at nearly every opportunity, LeBel J rejects any reference to overarching norms of customary international law that include access to justice, particularly for breaches of *jus cogens* norms.

The second theme is that international law can be used as a tool of interpretation, but only when it leads to a conclusion of state non-interference. Justice LeBel begins his analysis by finding that the SIA is a complete code into which no additional exceptions may be read, regardless of whether those exceptions are drawn from customary international law or common law. Justice LeBel asserts that because the SIA is clear in its language, no additional tools of interpretation are needed to determine the extent of Parliamentary-intended exceptions to state immunity.³⁹⁵ This approach — assuming he is correct³⁹⁶ — is an accepted approach with respect to statutory interpretation.

However, in the analysis that follows, LeBel J offers several instances where *he admits* provisions or wording in the SIA *are* ambiguous but then makes subjective (preferential) decisions with respect to the kind of additional information or context he is willing to consider, always to uphold a traditional notion of comity. For example, in determining whether the exception outlined at section 6(a) of the SIA (bodily injury) may be interpreted to include the psychological injury of Ms. Kazemi's son, LeBel J prefers an interpretation that the *act(s)* that *cause* the injury must occur *in* Canada, thereby limiting the reach of the exception. This interpretation is particularly curious given LeBel J was personally familiar and supportive of approaches in the determination of transnational — albeit, criminal — activity that a criminal act

³⁹⁴ At para 44 he does include some citation to government purpose with respect to 2012 amendments to the SIA, but not to the original SIA.

³⁹⁵ *Kazemi*, *supra* note 360 at para 56.

³⁹⁶ LeBel J does admit that there is debate among the academic community regarding whether the SIA is truly exhaustive, but chooses to ignore that debate. For the purposes of this analysis it is unnecessary to engage with this debate as the plaintiff's strongest case arguably lay in the interpretation of the statute as written, rather than reading in additional exceptions. That said, while LeBel J may be correct that s 3(1) of the SIA is unambiguous as a statement of a general rule that only has exceptions as laid down elsewhere in the SIA, he was on less convincing ground when it came to the meaning of "state" within s 3(1)'s "state immunity," given the ambiguity in the definition of state in s 2; it was precisely such definitional ambiguity through which Abella J (in dissent) was able to avoid whether s 3 was exhaustive and instead find that, even if exhaustive, the conduct in question was fundamentally illegal activity that rendered it "unofficial" and thus being "non-state."

may be continuous, reasonably said to occur and to have connection to multiple jurisdictions at once.³⁹⁷ Further, LeBel J prefers an interpretation of section 6(a) that requires any psychological distress to be *based in physical harm*. In doing so, LeBel J rejects an interpretation offered by the appellants and intervenors of where/how acts may occur and be felt using Canadian *Charter* principles³⁹⁸ in favour of US judicial commentary and his own “common sense” — read, *habitus*.

Another example can be seen in LeBel J’s analysis of which actors Parliament intended to capture in its inclusion of the word “government” in the definition of “foreign state.” Justice LeBel again looks to the “purpose” of the SIA — which remains undefined — and to a UN Convention that includes within the definition of “state,” representatives of the state acting in that capacity.³⁹⁹ However, when the appellants argued that “government” must be construed with reference to international norms, including the *jus cogens* norm against torture, such arguments are dismissed. Indeed, the appellants argued a state official cannot be understood to act in their official capacity when such an act constitute breaches of *jus cogens*, citing the American 4th Circuit Court of Appeals case *Yousuf v Samantar*,⁴⁰⁰ that held as such. LeBel J implied the American decision was unpersuasive, not least because it was under appeal; notably, that decision was later upheld by the US Supreme Court.⁴⁰¹ LeBel J concludes, in what appears to be a misreading of the presumption to act in conformity with international obligations — which he cites earlier in the decision — and perhaps forgetting that he sits as a *law-maker* on the highest court in Canada, that the Canadian legislature had given no indication that the courts are to deem torture an “unofficial act.”⁴⁰² To be clear, Canadian legislation is presumed to be written in accordance with Canada’s international commitments unless clearly written to indicate an intention to violate such commitments;⁴⁰³ the lack of specific intent to derogate from

³⁹⁷ See for example *Hape*, *supra* note 105; and see *Libman*, *supra* note 124, as the leading criminal law case that does not see the site of primary injury as a *sine qua non* for which territories a crime may occur in.

³⁹⁸ Psychological distress caused by Canadian government action has long been accepted as a breach of one’s section 7 *Charter* right to be free of interference with security of the person: *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44; *R v Morgentaler*, [1988] 1 SCR 30; *Chaoulli v Québec (Attorney General)*, 2005 SCC 35.

³⁹⁹ *Kazemi*, *supra* note 360 at para 86.

⁴⁰⁰ *Yousuf v Samantar*, 699 F3d 763 (2012).

⁴⁰¹ *Yousuf v Samantar*, 575 US 13-1361 (2015) (Samantar was the former Prime Minister of Somalia who had, by his own admission, ordered the carrying out of war crimes against the civilian population. The court held under the US version of the SIA, that Samantar enjoyed no state immunity as his actions could not be contemplated as having been done in his official capacity.)

⁴⁰² *Kazemi*, *supra* note 360 at para 107.

⁴⁰³ *Hape*, *supra* note 105 at para 53.

international commitments does not serve to limit courts but instead provides courts the flexibility to interpret legislation — to merge statutory interpretation with the common law process — in a manner that supports Canada’s commitments.

A third theme is that a version of the facts may be *chosen* to the detriment of the plaintiff and to further the interests of strict state boundaries. For instance, LeBel J, upon finding, and accepting, the catch-22 that torture is by definition an act of state, and acts of state are immune from civil liability — thereby leading to the conclusion that there will never be redress for torture outside of the state in which it occurred — determined that there may be some rare exception in which the wilful blindness by the state to the activities of private individuals or groups on behalf of the state may meet the definition of torture and may *not* trigger state immunity. Despite this finding, he dismissed that the case before him would fall into such an exception. He does so despite the fact that the case was originally brought on a summary motion, through which the facts as pled by the plaintiff are deemed accurate. Those facts, being presumptively accurate, included evidence the Iranian government had itself initiated an investigation that identified several members of government or those in official positions that were, as LeBel J puts it, linked to the torture and death of Ms. Kazemi. While only one was put forward for prosecution, the fact that that was done suggests the members were acting beyond their official capacities, thus *prima facie* meeting this “exceptional” circumstance LeBel J identifies. Rather than engaging with this possibility, or sending the case back with leave to amend the pleadings, LeBel J simply states “that is not the case before us.”⁴⁰⁴

The final theme is that rules of Canadian *Charter* interpretation — most often referred to as a living tree — should be limited to favour a restrictive view of state norms. While acknowledging that Canada actively barring Ms. Kazemi’s son from redress could result in a breach of his right to security of the person per section 7 of the *Charter* (psychological harm), LeBel J finds that to do so is not in breach of any principle of fundamental justice. To do so, he first rejects any suggestion that Art 14 of the Convention Against Torture — the requirement on the state to provide redress to victims of torture⁴⁰⁵ — is a principle of fundamental justice. In

⁴⁰⁴ *Kazemi*, *supra* note 360 at para 97.

⁴⁰⁵ Article 14: 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which

doing so, he employed a traditionalist state sovereignty-based analysis⁴⁰⁶ and by rejecting any reliance on the interpretation of that article by the UN Committee Against Torture,⁴⁰⁷ and found instead the nature of international law is diverse and every changing⁴⁰⁸ — though apparently not changing to favour victims of torture.

Second, LeBel J addressed the suggestion made by an intervenor that the court could accept as a new principle of fundamental justice the legal maxim that “where there is a right there must be a remedy for its violation.”⁴⁰⁹ It is at this stage we see an unfortunate side-stepping of the clear need to find redress for Ms. Kazemi’s family. Justice LeBel held that while some rights exist, it is not correct to say that there must be a remedy for their violation as remedies are frequently limited by procedural measures. As examples, he cited mechanisms for determining real and substantial connection in international *libel* cases and *limitation periods* in others.⁴¹⁰ First, unlike the procedural barrier presented by the SIA which effectively completely *eliminates* any redress, the examples LeBel J cited merely *limit* remedies that otherwise exist. Further, it is not an exaggeration to suggest that the comparison of seeking a remedy for libel hardly offers an equivalent or meaningful comparison to that of torture, its use as comparator further confirming the lack of any real acknowledgment on the part of the Court of the heinous quality of violence suffered by Ms. Kazemi. But, rather than engage meaningfully with whether an “access to remedy” principle of fundamental justice may achieve justice, it is summarily dismissed on the grounds it is “not a manageable standard.” This dismissal failed to take into account the inherent flexibility and necessarily opaque quality of existing principles of fundamental justice.⁴¹¹

may exist under national law: UNGA, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, 1981, UN Doc A/39/51.

⁴⁰⁶ LeBel J finds the interpretation made by the Committee Against Torture holds no more and, if anything, less weight than the interpretation of the Convention by state courts or by regional human rights courts because the Committee is not a court and holds no binding decisional power and because the Convention was written by states, for states. In this way, LeBel J invoked the interpretations of (majorities of) the European Court of Human Rights and the UK House of Lords, which have largely been contrary to the position taken by the Committee: see *Kazemi*, *supra* note 360 at paras 142-148.

⁴⁰⁷ *Ibid* at para 147.

⁴⁰⁸ *Ibid* at para 150.

⁴⁰⁹ *Ibid* at para 158.

⁴¹⁰ *Ibid* at para 160.

⁴¹¹ See for example the principle of fundamental justice that a law cannot be overbroad. Overbreadth is defined by the equally ambiguous — and subjective/objective — standard of “grossly disproportionate:” *R v Clay*, 2003 SCC 75.

Despite these themes, LeBel J consistently assured Ms. Kazemi’s family that the violence Ms. Kazemi faced was “nothing short of a tragedy,”⁴¹² that Canada does not condone torture,⁴¹³ and that the SIA — actually, his subjective interpretation of the SIA — is:

...not a comment on the evils of torture, but rather an indication of what principles Parliament has chosen to promote given Canada’s role and that of its government in the international community. The SIA cannot be read as suggesting that Canada has abandoned its commitment to the universal prohibition of torture.⁴¹⁴

It is difficult to understand how the aggressively black-letter, state-territorialist interpretation of state immunity that followed does not belie and render such pronouncements hollow. The judges of the SCC are fundamentally law-makers, and they are not bound by *stare decisis*. Nor are they bound by unacceptable interpretations of statute or unconstitutional legislation. To suggest LeBel J and the majority of the SCC’s interpretation of the SIA was anything but subjective and thus steeped in the *habitus* of the participating members and their institution is to ignore the role and responsibilities of Canada’s highest court, and to be blind to the fact that when a majority of that Court wishes to harness law to its vision of justice, it does not hesitate. At every turn the Court made subjective and normative interpretations to the benefit of the field of power (nation state comity for the benefit of Canada-Iran state-relations — whether they be economic or political) while dismissing any interpretation of comity that would serve to uphold any international obligation to protect the global citizenry.

Unfortunately, this hyper-sensitivity to traditional notions of comity is not an exception. In the realm of transnational tort and environmental civil actions, such inclinations have similarly served to undermine justice, leaving particularly those who suffer the negative byproducts of extraction activities without any real recourse.

Hyper-comity informs transnational tort cases

Few cases of project-specific human rights and environmental tort claims have been initiated in Canada and fewer have dealt primarily with the jurisdictional questions of *forum non*

⁴¹² *Kazemi*, *supra* note 360 at para 1.

⁴¹³ *Ibid* at para 53.

⁴¹⁴ *Ibid* at para 46.

conveniens and forum of necessity. However, those that have present a mixed bag regarding what can be expected when Canadian courts are faced with jurisdictional issues involving human rights. We have already seen that in some instances — *Tahoe, Nevsun, Hudbay, Bouzari* — some Canadian courts have engaged thoughtfully with the tests for *forum non conveniens* and forum of necessity while, in other instances, we see the courts struggling and ultimately failing to break free of their traditionalist *habitus*.

To begin, three cases out of Québec have demonstrated the way in which the tests for *forum non conveniens* and forum of necessity are being misinterpreted or conservatively applied, thereby denying plaintiffs justice against CanCorps. By way of preliminary comment, the outcomes in all three cases — favouring a strict interpretation of jurisdiction to the detriment of human rights victims — represent a profound irony given that Québec’s law is the only one that stipulates that *forum non conveniens* stays must be “exceptional” and was the first forum in Canada to recognize a forum of necessity doctrine.

Recherches internationales Québec v Cambior inc.

In 1998, the Québec Superior Court heard a preliminary motion from Cambior Inc, the defendant in a potential class action lawsuit relating to the breach of an effluent treatment plant at a mine in Guyana that sent 2.3 billion litres of liquid containing cyanide, heavy metals and other pollutants flooding into two rivers, including Guyana’s main waterway.⁴¹⁵ The hearings judge found the Court had jurisdiction *simpliciter* over the claim pursuant to Arts 3134 and 3148 of the Civil Code; notably, Cambior was a Québec-domiciled company and the claim was advanced against Cambior as a personal action of a patrimonial nature. Further, Cambior was the majority shareholder of, and was involved in decision making related to, the Guyana-based corporation operating the mine: Omai. In other words, the corporation operating Omai was Cambior’s controlled subsidiary. However, after finding it had jurisdiction, the Court then turned to the determination on *forum non conveniens*.

The Court began by laying out the test and noting its *exceptional* nature. It went on to cite at length Sopinka J’s judgment in *Amchem* and the development of the common law test of *forum*

⁴¹⁵ *Cambior*, *supra* note 83.

non conveniens in Canada. Through this discussion, the judge did not appear to recognize that the Supreme Court of Canada in *Amchem* (1) had not adopted the two-step United Kingdom test and (2) that the Canadian test placed the burden entirely on the defendant. With respect to the residence of the parties, while the Court *appeared* to engage with the plaintiff’s arguments suggesting Québec is the more appropriate forum, it fervently declined any suggestion that the domicile of the defendant is a more important factor than others. Instead it held that Guyana was the preferred forum based on the domicile of the parties; the Court clearly placed increased weight on the domicile of the plaintiffs, having immediately before suggested there was no one determinative factor. In doing so, the judge accepted the fiction of Omai as a truly separate entity from Cambior – otherwise, it made no sense to speak of Guyana as the defendant’s domicile, not just the domicile of the plaintiffs.

Next, despite accepting that, of the witnesses listed by the plaintiff, the preferred forum was Québec due to the reduced cost of hearing witnesses in Québec, the Court then explained that, in effect, it didn’t believe the plaintiff had listed all witnesses. The Court then created its own list of appropriate witnesses — a process of fact-creation — and then found, based on that list, that Guyana was the preferred forum.⁴¹⁶ This action, described by Sara Seck as a “paternalistic twist” revealed the Court purporting to understand the best interests of the plaintiff better than the plaintiff itself.⁴¹⁷

The Court accepted the defendant’s argument that the necessary documentary evidence was in Guyana, the fault occurred in Guyana, and the governing law would be that of Guyana,⁴¹⁸ making Guyana the more appropriate forum. Despite applying a relatively low bar to the preceding factors (often finding Guyana the preferred place on its *own* initiative), the Court stressed the plaintiff had not presented sufficient evidence to demonstrate it would *lose* judicial advantage in the availability of class action in Québec – a complete error of law in that such a second-stage burden is not the law in Canada.⁴¹⁹ While the Court found, contrary to Cambior’s suggestion, the Québec class action process was significantly different and more advantageous to

⁴¹⁶ *Ibid* at para 43-49.

⁴¹⁷ Sara L Seck, “Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law” (1999) 37 Can YB Int’l L 139 [Seck 1999].

⁴¹⁸ *Cambior*; *supra* note 83 at para 60; CCQ at Art 3126.

⁴¹⁹ *Ibid* at para 71.

the plaintiffs, it found this factor should be given limited weight.

In engaging in this fact-finding, as discussed earlier, the Court in *Cambior* preferred the testimony of three Guyanese judges and a former judge of the Québec Court of Appeal, over a Canadian professor and international law expert, despite the fact that at least one of the Guyanese judges stated the courts of Guyana had always been fair and impartial, even under dictatorial rule. In a circumstance weighing progressive human rights values against loyalty to judicial brethren, easily supported through a traditional comity-based territorialist analysis, it is not surprising the court found Guyana to be the “natural forum” for the litigation.⁴²⁰

In so finding, the Court concluded by doing two things that created a chilling effect for such future cases. First, the Court ordered normal (rather than decreased or no) costs against the plaintiff, *Recherches internationales*, despite the plaintiff representing poor foreign victims of corporate misbehavior. Second, despite finding Guyana to be the *forum conveniens* the Court did not even follow Judge Keenan’s lead in *Bhopal* by requiring *Cambior* to *attorn* to the courts of Guyana; the Court simply required *Cambior* not to raise arguments in Guyana related to *forum non conveniens*. The plaintiffs did attempt to carry on with the action in Guyana but their attempts were vigorously defended by *Cambior* and twice struck by the High Court of the Supreme Court of Judicature of Guyana, first in 2002, then in 2006.⁴²¹

In dismissing the plaintiffs in Québec, the Court repeatedly subjectively interpreted elements of the test for *forum non conveniens* to the benefit of only the corporate defendant: it side-stepped the “exceptional” bar required (effectively reading it down); it weighed the plaintiff’s residence more heavily than that of the defendant; it favoured facts — even those that are *prima facie* incredible — when delivered by judicial brethren; and it remained blind to the reality and likelihood of Guyanese justice. Throughout the judgment, the Court stressed no one factor is determinative, but appeared to favour certain factors over others, often suggesting it was the *plaintiff* that had not presented enough evidence — contrary to the burden laying with the defendant — in coming to its conclusion. Finally, in accepting the facts as presented by *Cambior*’s experts, the Court engaged in a form of fact-creation and world-making in which Guyana’s

⁴²⁰ *Ibid* at para 69.

⁴²¹ Business and Human Rights Resource Centre, “*Cambior* lawsuit (re Guyana)” online: <<https://www.business-humanrights.org/fr/node/86220?page=1>>.

justice system was and *was always* entirely up to the task of holding foreign corporate wrongdoers responsible for their actions. While at the time the Québec Court would not yet have notice that Guyana's courts would not favour the plaintiffs, the Québec Court's finding certainly assisted in reinforcing Canada's status both as an industry-friendly nation, one that is keen to support its corporations, and as a nation resistant to exercising jurisdiction over a foreign state. In doing so, the Court's decision-making process remains framed by its *habitus*, rather than the evidence.

Bil'in (Village Council) v Green Park International Inc.

Similar to Cambior, in 2010 the Québec Court of Appeal heard an appeal from a decision to reject jurisdiction on the basis of Art 3135 of the Civil Code: *forum non conveniens*. In *Green Park*,⁴²² a group of individuals representing Bil'in, a village on the West Bank of the River Jordan in the territories that have been occupied by Israel since 1967, sued two corporations in Québec for civil liability for alleged war crimes. Green Park International Ltd and Green Mount International Ltd were Québec-registered corporations with head offices in Montreal. Under contract with the State of Israel, Green Park and Green Mount began constructing residential and other buildings on lands in Bil'in allegedly contrary to Art 49(6) of the Convention (IV) relative to the Protection of Civilian Persons in the Time of War ("Fourth Geneva Convention") dated August 12, 1949.

Despite dismissing many of the defendant's initial motions, one of the main issues before the motions judge was whether Québec was the appropriate forum. In this analysis, the motions judge dismissed the plaintiffs' claims that the matter would not be heard in Israel because Israeli courts had found issues regarding the Fourth Geneva Convention to be non-justiciable; indeed, the Court heard evidence from Israeli scholars that suggested the Israeli High Court of Justice *refused* to hear matters relating to the Fourth Geneva Convention for that reason. In what appears to be another misapplication of the test for *forum non conveniens*, the judge accepted the interpretation of the defendant's expert over that of the plaintiffs to suggest the *plaintiffs* had not proven the courts of Israel would *not* find the claim justiciable, thus overlooking that the burden

⁴²² Though not discussed in the Appeal, the Court had jurisdiction *simpliciter* over the defendant Green Park as the defendant was incorporated in Québec.

fell to the defendant, not the plaintiff, and at the same time making the burden one of proving a negative.

Furthermore, as James Yap — who observed the trial — suggested, it is questionable whether Israel could even have been considered an available forum at all.⁴²³ While the *forum non conveniens* test is grounded in the comparison of the plaintiff’s chosen forum to another, preferred by the defendant, there must *in fact* actually exist an alternative forum,⁴²⁴ the proof of which a court may conclude on the evidence before it. Where the putative alternative forum does not recognize the cause of action as it is brought — here, a claim framed in terms of civil liability for war crimes⁴²⁵ — or arguably has no jurisdiction *simpliciter* over the matter,⁴²⁶ then it is a stretch to suggest that forum does *in fact* exist for the purposes of even initiating a *forum non conveniens* analysis. In any event, the Court clearly preferred to see the courts of the state that allegedly inflicted war crimes on the plaintiffs hear the case rather than keep jurisdiction, and so found the juridical advantage of the Québec courts — as Canada has incorporated the Fourth Geneva Convention through domestic legislation which the Québec Civil Code’s liability provisions piggyback onto — did not weigh heavily enough in the *forum non conveniens* analysis to lead to Québec retaining jurisdiction over the matter.

The plaintiffs appealed to the Québec Court of Appeal and were met with a similarly disconnected panel showing a “complete lack of human rights consciousness.”⁴²⁷ The Court of

⁴²³ James Yap, “Corporate Civil Liability for War Crimes in Canadian Courts” (2010) 8 J of Int Criminal J 631 [Yap 2010] at 637

⁴²⁴ Anne C McConville, “Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdictions’s Relationship to *Ex Juris Service*, *Forum Non Conveniens* and the Presumption of Territoriality” in Craig Scott, ed, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001) at 189.

⁴²⁵ The High Court of Justice had repeatedly held that Article 49(6) was inapplicable, however the trial judge found given the time that had passed between the Israeli Court’s last judgement and the present day, it was open to the plaintiffs to *argue* Article 49(6) had now become customary international law. In so doing, the judge placed a significant and unsupportable burden on the plaintiffs. Further, the judge failed to consider whether Israel’s continued international objection to the Article at issue would deem Israel a persistent objector and thus not bound by that customary international law.

⁴²⁶ No traditional bases were available to ground Israel’s jurisdiction *simpliciter* over the matter: neither the plaintiffs nor the defendants were domiciled in Israel; the events “took place” in the West Bank and not in Israel; no evidence was presented to prove where the two corporate defendants maintained operational (rather than corporate) headquarters; and the Israeli High Court of Justice has no express jurisdiction in civil matters. As James Yap notes, “it is questionable whether it is appropriate for a Québec court to declare itself *forum non conveniens* in favour of a tribunal in whose stead it would not itself assert jurisdiction:” James Yap, “Corporate Civil Liability for War Crimes in Canadian Courts” (2010) 8 JICJ 631 [Yap 2010] at 642.

⁴²⁷ *Ibid* at 646.

Appeal acknowledged that it could not decline to keep jurisdiction except in an *exceptional* case and noted the motions judge could certainly not have declined jurisdiction on the basis of jurisdiction *simpliciter*. And yet, the Court of Appeal erroneously found it was open to the motions judge to look to *the plaintiff* to prove the foreign jurisdiction was not appropriate. The Court found the appellants had not proved the motions judge had erred in such finding using what appeared to be the appellate standard of review on findings of fact “palpable and overriding error” rather than the less deferential standard of “correctness” to apply to misstatements of the law. Similarly, in applying the factors related to *forum non conveniens* outlined with respect to the Civil Code by the SCC in *Spar Aerospace*, the Court held, despite the burden being on the defendant which had not, on the facts, proven it to be so, that it was “in the interest of the parties” to have the case heard before a court in Israel.⁴²⁸ Like *Cambior*, the Court in *Green Park* appeared to look to the plaintiff to defend why the claim should not be heard in Israel, rather than holding the defendant to task on why it shouldn’t be heard in Canada.

The test for *forum non conveniens* is highly fact-specific and engages the heart of judicial decision making: the weighing of facts in a manner aligned with the purpose of the common law mechanism or legislative framework. Courts, especially ones of first instance, are engaged in fact-determination which in turn creates a *legitimized* factual story. In *Green Park*, the motions judge defined and made fact the present and imagined future of the Israeli High Court of Justice; in finding that justice would be done in Israel, the Canadian Court created a fact that, while legitimized in the ceremony of judgment writing, did not translate to the reality on the ground in Israel. If anything, such world-making and subjective interpretation acts only to justify the dismissal of responsibility in favour of an arbitrarily imagined alternative. The approach taken by the Québec courts in *Cambior* and in *Green Park* — fuelled by a habitus of non-intervention — served to later inspire the stunning concluding comments of the Québec Court of Appeal in *Anvil Mining Ltd c Association canadienne contre l’impunité*.⁴²⁹

Anvil Mining Ltd c Association canadienne contre l’impunité

While the conclusion in *Anvil Mining* was determined on jurisdiction *simpliciter* and

⁴²⁸ *Green Park CA*, *supra* note 83 at para 88.

⁴²⁹ Note, the following citations refer to a translation, though not official, which was accepted by all parties.

forum of necessity, the Court's failure to situate the case in a reality of international business — corporate-state power dynamics and the real (and likely) potential of corporate wrongdoers skirting justice through legal gaps/cracks — is consistent with the *forum non conveniens* analyses in *Green Park* and *Cambior*.

In *Anvil Mining*, a Canadian-incorporated mining company operating in the Democratic Republic of Congo (DRC) allegedly assisted the DRC government in subduing a small group of armed individuals who had entered the DRC town of Kilwa and declared liberation of Katanga. In pushing back the small group, the DRC government forces (FARDC) allegedly engaged “in a slaughter by summarily executing people and plundering the property of the inhabitants...about 70 or 80 civilians were killed.”⁴³⁰ After a series of in-country military Courts Martial, in which seven members of the military and three Anvil executives were tried for war crimes, five military members and all accused Anvil executives were cleared of charges.⁴³¹ The Courts Martial concluded the deaths were the accidental result of fighting.⁴³² Of the two members of the military who were convicted, both saw their sentences reduced and were reintegrated into the army.⁴³³ The Office of the UN High Commissioner for Human Rights observed: “[T]he judicial decisions made during the Kilwa case are an illustration of the lack of impartiality and independence within the military justice system...[T]hroughout this case, political interference, a lack of co-operation on the part of the military authorities and many irregularities were observed.”⁴³⁴

The Québec Superior Court judge held it had jurisdiction *simpliciter* over the action and that Anvil had not proved that a foreign jurisdiction was clearly more appropriate than Québec.⁴³⁵ Anvil appealed. The Québec Court of Appeal found the hearings judge had misinterpreted jurisdiction under Art 3148(2) of the Civil Code, finding Québec had no jurisdiction *simpliciter* — despite Anvil having incorporated in Canada (Northwest Territories) and maintaining a small office in Montreal.⁴³⁶ The motions judge had found Anvil's employee was sufficiently connected to the activities of Anvil in the DRC; indeed, the Anvil mine in the

⁴³⁰ *Anvil Mining*, *supra* note 83 at para 25.

⁴³¹ *Ibid* at paras 27-29.

⁴³² *Ibid* at para 30.

⁴³³ *Ibid* at para 31.

⁴³⁴ *Ibid* at para 33.

⁴³⁵ *Association canadienne contre l'impunité c Anvil Mining Ltd*, 2011 QCCS 1996 [Anvil Mining CS].

⁴³⁶ *Anvil Mining*, *supra* note 83 at paras 16-18.

DRC was Anvil's only project. However, rather than apply the appellate test for findings of fact — again, palpable and overriding error — the Court of Appeal simply found, on its own accord, Anvil's activities in Québec had “absolutely nothing to do with ‘complicity’ to commit ‘war crimes’ or ‘crimes against humanity’ while operating a mine.”⁴³⁷ This finding was made despite the Court immediately thereafter acknowledging that the Montreal employee was engaged in events that could be described as “crisis management.”⁴³⁸ Further, in order to overturn the motions judge who had found Anvil had a connection to Québec, the Court of Appeal held that rather than having to find an error of fact (a high bar), it need only find the motions judge made an error in law by not *connecting* the actions of the Montreal office to the events.⁴³⁹ In other words, if the motions judge had applied the wrong test (by not finding the Montreal employee was connected to the actions in the DRC) the Court of Appeal figured it could step in, and apply the facts presented to the motions judge to their properly enumerated test. While this approach may have been open to the Court of Appeal, either way there was clear connection between Montreal and the DRC and such an approach should not have led to their ultimate finding. Earlier in the same judgment, the Court of Appeal cites a translation from the motions judge's ruling wherein that judge stated: “[I]t appears that the role of [Montreal employee] was *necessarily connected* to the Dikulshi mining operation in Congo...[Montreal employee]'s activities were *necessarily connected to the Congolese mining operation in October of 2004* when local employees, whether voluntarily or involuntarily, allegedly provided logistical support to the army to counter the insurrection in Kilwa.”⁴⁴⁰ Such statements clearly demonstrate the *motions judge* had indeed turned his mind to the *connection* between the Montreal office and the actions in the DRC, thus clearly engaging in the “sufficient connection” analysis. The Court of Appeal's decision to ignore the motion judge's written findings demonstrates the mental gymnastics and wilful blindness some courts are willing to entertain in order to maintain a strict interpretation of territoriality; there was clearly no context in which the Court of Appeal was finding it had jurisdiction.

In finding the it did not have jurisdiction *simpliciter* the Court did not have to determine the *forum non conveniens* application. However, notably, the Court did go on to apply Art 3136

⁴³⁷ *Ibid* at para 85.

⁴³⁸ *Ibid* at para 86.

⁴³⁹ *Ibid* at para 91.

⁴⁴⁰ *Ibid* at para 45 citing *Anvil Mining CS*, *supra* note 435 at para 29 [Emphasis added].

of the Civil Code: forum of necessity. Despite having been presented with evidence of the international community's findings regarding the corruption in the DRC judicial system,⁴⁴¹ and despite having had explained how the victims were prevented from moving ahead in Australia,⁴⁴² the court determined it would not be "impossible" to gain access to a foreign court. After purporting to apply the highly discretionary and fact-based tests for jurisdiction (*simpliciter* and necessity), and after claiming sympathy for the plaintiffs, the Court stated: "*the law prevents us from recognizing that Québec has jurisdiction to hear this class action.*"⁴⁴³ While the Court's chosen interpretation of the facts may have led it to that conclusion, it certainly was not the black letter law that prevented it from assisting the plaintiffs. Leave to appeal to the SCC was denied,⁴⁴⁴ thus suggesting the highest court's agreement with the decision.

While the Québec courts have been found wanting, it would be a mistake – however tempting – to chalk these decisions up to either incompetence, to a series of unusually poorly reasoned judgments, or to a combination of the two. Rather, a fixation on comity and non-intervention is pervasive — the *nomos* informing the Field's *habitus*. In these cases, we see the above-noted hallmarks of the Field's non-intervention *habitus* through discomfort in being seen to undermine judicial brethren (*Cambior*), through heightened respect given to democratic allies (*Cambior*, *Green Park*, *Anvil Mining*), and through rigid adherence to traditional definitions of the state and its powers (*Green Park and Anvil Mining*). This *habitus* is strong even where the court ultimately takes jurisdiction. For instance, in *Tahoe*, discussed above, while the BC Court of Appeal held there is some measurable risk that the appellants would encounter difficulty in receiving a fair trial "against a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state,"⁴⁴⁵ the Court chose not conclude whether there *actually was* widespread corruption in the Guatemalan legal system,

⁴⁴¹ *Anvil Mining*, *supra* note 83 at paras 30-33.

⁴⁴² When the case came before the Québec Court of Appeal, the plaintiffs had already exhausted an attempt to sue Anvil in Australia (where Anvil holds its corporate headquarters). In Australia, Anvil petitioned the court to force the plaintiffs' counsel to provide evidence of its mandate, particularly fee arrangements. Counsel for the plaintiffs were unable to make sufficient contact with the plaintiffs due to interference by the DRC government. As a result, the Australian counsel withdrew and the plaintiffs were unable to find alternative counsel: *Ibid* at paras 34-37.

⁴⁴³ *Ibid* at para 104 [Emphasis added].

⁴⁴⁴ *Association canadienne contre l'impunité c Anvil Mining Ltd*, 2012 CarswellQue 11091.

⁴⁴⁵ *Tahoe CA*, *supra* note 63 at para 130.

presumably keen to avoid being seen to comment on its international brethren.⁴⁴⁶

In the Québec cases, the traditional field *doxa* of hesitancy in legal development and reliance on judicial independence (thus informing judicial belief that foreign judges share the same independence) informed judicial logic along with decades of province-centred precedent and state-centred traditions of comity and territoriality.

Perhaps particularly influential in the Québec cases was the *nomos* of field norm-signalling from the field of power. Notably, in none of these cases was a Canadian entity or individual harmed; in fact the Canadian “citizens” involved (CanCorps) — i.e. those that vote (or that employ people who vote) and participate in the Canadian political process — were protected, arguably in a way that supports the Canadian state’s (meta-field of power) interests. While it is certainly not obvious on the face of such cases, nor is it likely to be, it is likely not irrelevant that, for example, Canadian judges chose not to assert jurisdiction and in turn (1) potentially create discomfort in Canada’s relationship with its close political ally, Israel; (2) suggest CanCorps should be made responsible for environmental harms abroad (if at all) thus making them less profitable or less able to compete internationally;⁴⁴⁷ or (3) make findings of fact related to the actions of the FARDC contrary to the position/non-position taken by the then federal government.⁴⁴⁸

This traditionalist approach is mirrored in other ways the Field has handled human rights more broadly. Specifically, in the context of transnational state and corporate action, the Field generally prefers the rights of the corporation and its activities (economic field) to that of those of the individual. This is done on a buffet-approach, the court preferring the bricks and mortar of

⁴⁴⁶ Further, while the Court in *Tahoe* found the defendant had not proven Canada was *forum non conveniens*, the failure of the Court to discuss whether Guatemala could even have been considered an *available* alternative forum is concerning. As noted above, a forum cannot truly be considered alternative if it is not, by reason of corruption, logistical ability, or independence, *in fact* available.

⁴⁴⁷ Guyana’s economic dependency on the Omai mine created significant incentive for the government to keep it operating. The Omai mine was the largest private employer in Guyana and accounted for ¼ of the Guyanese GDP. Soon after the disaster that prompted the Cambior action, the mine was allowed to reopen with a new, much larger tailings dam which prompted accusations that Cambior was threatening the Guyanese government it would leave: Seck 1999, *supra* note 417 at 188.

⁴⁴⁸ On the Canadian government’s position on the FARDC: Government of Canada, “Government Response the Fourth Report of the Standing Committee on Foreign Affairs and International Development Entitled “A Weapon of War: Rape and Sexual Violence Against Women in the Democratic Republic of the Congo - Canada’s Role in Taking Action and Ending Impunity” (16 July 2014) online: <<https://www.ourcommons.ca/DocumentViewer/en/41-2/FAAE/report-4/response-8512-412-71>>.

either comity or of “globalization,” whichever assists the field of power on the particular facts. Two examples are instructive.

State Immunity Act

The first example is the way in which courts in Canada have interpreted exceptions to state immunity as prescribed in the SIA. We have already seen the approach taken by the SCC in *Kazemi*, discussed above, but it is in these additional examples that the hyper-traditionalist approach in *Kazemi* can be understood as reflective, rather than exceptional to its context. I will begin with section 5 of the SIA, the commercial exception.

While foreign states are generally immune from suit in Canadian courts due to the principles of state sovereignty, injured plaintiffs may take advantage of the misleadingly broad commercial exception that allows suits for financial injury resulting from commercial relationships between a private party and a foreign state. In reality, Canadian courts have taken a parochial approach to such suits, defining “commercial” narrowly to the benefit of Canadian corporations rather than private individuals. Indeed, such provisions, as described by Robert Wai, are designed to benefit the home state — Canada — by ensuring its corporations may seek damages when operating abroad and have as their primary beneficiaries private parties from the West who are contracting with sovereign authorities of other states, particularly those of the developing world.⁴⁴⁹ While, as Wai argues, there is no significant or coherent justification to make an exception for commercial enterprise and not tort — other than the lack of obvious commercial or state pecuniary interests at stake⁴⁵⁰ — courts have facilitated the expansion of this once purely common law theory of restrictive, rather than absolute, sovereignty, but only to the benefit of commercial interests.

There appears to be no movement toward recognition of harms felt by private individuals by foreign state actors, even where there are clear commercial elements at stake. Compare, for example, representative cases from the Supreme Court of Canada: the decisions in *Re Canada Labour Code*⁴⁵¹ and *Kuwait Airways Corp v Iraq*.⁴⁵² In the first, the affected party included

⁴⁴⁹ Wai 2001a, *supra* note 13 at 243.

⁴⁵⁰ *Ibid* at 244.

⁴⁵¹ *Re Canada Labour Code*, [1992] 2 SCR 50.

⁴⁵² *Kuwait Airways Corp v Iraq*, 2010 SCC 40.

private Canadian workers while in the second, the affected party was a domestic airline corporation. In the first, the Court held labour relations related to the protection of Canadian workers at a US Navy base in Newfoundland were not “commercial,” a decision that favoured a significant Canadian state ally (US), while dismissing the interests of Canadian citizens. However, in relation to Kuwait Airlines, the Court found the appropriation of the Kuwait Airways fleet by the national Iraq airline was indeed “commercial” in nature, the finding thus benefiting a Canadian *corporation*.⁴⁵³ The operation of the commercial exception in Canada has created preferentialism in the way it facilitates litigation by commercial plaintiffs when compared to individuals; plaintiffs, more likely to suffer *tort* losses at the hands of another state rather than losses associated with *contract*, are defeated by sovereign immunity.⁴⁵⁴ Wai argues that national courts ought to consider carefully why they should refuse to take jurisdiction over individual claims based on “problematic ethics of parochialism and bounded responsibilities.”⁴⁵⁵ In Wai’s construction of restricted immunity, there is a need for a reality frame in which courts look beyond antiquated and stiff constructions of “commercial” and observe the way in which the commercial exception — a significant and constructed tear in the classical state sovereignty formulation — has evolved only to the benefit of, realistically, western-allied corporations exerting their unequal might and bargaining power on states unable to contract free of duress.⁴⁵⁶

The commercial exception, however broadly it is read for the benefit of the corporation, is not some easily ignored anomaly. The same subordination of the rights of the individual is seen in the Field’s interpretation of section 6 of the SIA. Section 6 exempts foreign states from immunity where the action relates to death, personal injury or damage to property that occurred in Canada.⁴⁵⁷ In interpreting this section, the Ontario Court of Appeal in *Bouzari v Iran*⁴⁵⁸ ruled that Mr. Bouzari had not suffered personal injury *in* Canada despite continuing to suffer from his injuries of having been tortured and abused in Iran after returning to Canada, thereby arguably

⁴⁵³ These examples appear to define a hierarchy of preference: CanCorps > Foreign States > Canadian Citizens > Foreign Citizens.

⁴⁵⁴ Wai 2001a, *supra* note 13 at 242.

⁴⁵⁵ *Ibid* at 239.

⁴⁵⁶ *Ibid* at 229.

⁴⁵⁷ This has recently been amplified by the *Justice for Victims of Terrorism Act*, SC 2012, c 1, s 1, which seeks to provide remedies for victims of state acts where Canada deems the foreign state a supporter of terrorism (see the new s 6.1).

⁴⁵⁸ *Bouzari 2004*, *supra* note 98.

unduly restricting the otherwise broad provision. The same narrowing is seen, as discussed above, in the SCC's conclusions related to the harm suffered by Mr. Kazemi's son in *Kazemi*.

As Coughlan et al note, section 6 could be arguably read to include a “continuing” injury where the *effects* of an initial course of abuse abroad are further experienced in Canada. While such an interpretation is arguable, and while there is no guidance made explicit within the SIA, the international human rights law binding on Canada — specifically Canada's commitment to the *International Covenant on Civil and Political Rights* (ICCPR)⁴⁵⁹ — provides “strong contextual support...that would favour the [latter] conclusion and would sustain the court's jurisdiction over the suit.”⁴⁶⁰ Given Canadian courts and lawmakers are presumed to act in accordance with Canada's international obligations unless clearly legislating in conflict with those obligations, where two interpretations exist, as they do here, one could reasonably assume the court would choose that which upholds individual human rights (thus acting in accordance with international obligations) rather than that which leans on a restrictive and clearly statist comity-based approach. In interpreting the SIA, particularly those provisions of the Act that are ambiguous and require interpretation — namely what constitutes “commercial activity” and “harm in Canada” — we see the territorialist *habitus* of the Field restraining purposive, modern, and reality-framed interpretations to benefit the advancement and changing face only of, what Bourdieu calls, the field of power (generally corporate and state interest).

Das v George Weston Limited

The second example of the court's wilful blindness to the reality of international corporate action and economic dynamic is the recent analysis of the legal concept of proximity with respect to the harms suffered by the victims of the Rana Plaza disaster in Bangladesh.

In 2013 Rana Plaza, a poorly constructed commercial building, housing thousands of garment workers, collapsed killing 1130 people and injuring 2520 others. Alongside other legal avenues, a number of individuals launched a proposed class action in Ontario against the group

⁴⁵⁹ ICCPR, *supra* note 364.

⁴⁶⁰ Coughlan 2014, *supra* note 18 at 207. Article 2(3)(a) of the ICCPR states that “any person whose rights or freedoms are herein recognized are violated shall have an effective remedy...” Though the text goes on to outline specific requirements (eg. competence) related to state legal systems in reference to certain articles, nothing in the ICCPR limits Article 2(3)(a) to in-jurisdiction human rights abuses, i.e. it is arguable that the ICCPR requires every state to ensure an effective remedy is available to all persons, not simply their own nationals.

of companies responsible for Joe Fresh apparel (Loblaws) and the group of companies that made up Bureau Veritas Consulting services (Veritas). Loblaws had contracted with a subsidiary, which then further contracted with another company, to make garments for its “Joe Fresh” label. Veritas had been hired by Loblaws to conduct social safety audits on the factories used to manufacture Joe Fresh apparel. The plaintiffs pleaded Loblaws had caused their injuries through negligence, vicarious liability, and breach of fiduciary duty. The plaintiffs pleaded Veritas had caused their injuries through negligence. Loblaws and Veritas filed a motion to strike on the basis that (1) the time limitation under Bangladeshi law had run out and that (2) there was no cause of action.

The motions judge at the Ontario Superior Court of Justice found he had jurisdiction *simpliciter*, but allowed the motions brought by Loblaws and Veritas.⁴⁶¹ His judgment was recently upheld on appeal.⁴⁶² Fundamental to both the judgments of the Superior Court and the Court of Appeal was a limited and traditional interpretation of *control*. While the courts both arguably applied the black letter law on control within a range of reasonable possible outcomes, where that law called for subjective or context-based interpretation or the analysis of global and national policy considerations, the courts leaned into their conservative *habitus*.

The first example of such preference comes from the discussion of whether the law of Canada or the law of Bangladesh would apply. This finding was particularly important as the general limitation period in Bangladesh is one year (excluding minors), thus potentially eliminating most plaintiffs. The Superior Court walked through the analysis laid down in *Tolofson*, which led to a determination that the law of the forum where the injury was *felt* would be appropriate. However, in doing so, the Court dismissed any argument suggesting where the injury was *done* was more nuanced and appropriate. Loblaws had contracted with its subsidiary *in* Canada and the relationship between Loblaws and Veritas — i.e. the decision making with respect to inspections and whether to follow up on breaches in its (Loblaws) corporate social responsibility (CSR) policy — was similarly done *in* Canada. Thus, the plaintiffs argued, there was a reasonable argument to be made that the *Tolofson* test may be read to accommodate a broadened understanding of where an action is “done.”

⁴⁶¹ *Das SC*, *supra* note 284.

⁴⁶² *Das CA*, *supra* note 287.

Further, when it came to assessing whether any of the exceptions to *lex loci delicti* would apply, the motions judge took a restrictive approach — perhaps reflective of the inter-provincial approach taken in *Tolofson* (rather than an international approach arguably more suited to the case at hand) — and came to the defence of his brethren making clear he would not accept any suggestion that applying the tort law of Bangladesh would be unjust due to its nascent stage of development and lack of experience with class actions. He noted he need “not dignify the argument” as it “insults the courts and judges of Bangladesh”⁴⁶³ and is an “insulting proposition.”⁴⁶⁴ The fact that Sharia law would distinguish between men and women in any resulting damage awards was apparently not incompatible with Canadian values because *not that many women* would be affected. The trial court could simply, the judge held, sever the parts of the law that so discriminated.⁴⁶⁵ This finding was upheld by the Court of Appeal. Where the courts had an opportunity to meaningfully assess the locus of harm and the impact to the plaintiffs in relying on discriminatory law, the Court chose instead to honour concepts of state equality — specifically judicial equality — and non-intervention.

The second example concerns the Court’s discussion of whether the plaintiffs had a cause of action. At both levels of court this discussion is lengthy and engages the laws of Bangladesh, the UK, and Canada. However, two points are notable. First, in determining whether Loblaws had sufficient control over its subsidiaries to create the necessary proximity to found a new duty of care, at no point does the Court recognize the reality of the international power dynamics at play between major global brands engaging in one of the most abusive and environmentally destructive industries in the world, and their often-poor host states. The Court instead suggests Loblaws (a retail giant) didn’t have control over its subsidiaries (local companies in Bangladesh) because *contractually* it could not impact the actions of such companies. There is no acknowledgment (reality-frame) that Loblaws has enormous, though perhaps unwritten, power over such manufacturers.

The second point is that where convenient, the Court of Appeal imagines — and effectively dictates — a future in which the Bangladeshi court would *not* entertain any new duty

⁴⁶³ *Das SC*, *supra* note 284 at paras 274-277.

⁴⁶⁴ *Ibid* at para 288.

⁴⁶⁵ *Ibid* at para 297. It is important to recognize that this conclusion is not limited to a future in which a trial judge actually does sever problematic areas of law; it is a conclusion in any event.

of care as defined by the plaintiffs. It does so on the basis that it determined the court in Bangladesh would follow the authorities in the UK rather than the authorities in India despite evidence the Bangladesh court relies equally on both.⁴⁶⁶ This is particularly problematic given recent authority from the Indian Supreme Court which had held India would take a liberal approach to tort law and would not be held back where the UK had not yet moved forward. In particular, in the case cited, the Indian court had held the social costs of conducting hazardous activities should be borne by the profit-maker and not by the community.⁴⁶⁷

Despite engaging in speculation *itself* — indeed, speculation that whispers of modern imperialism even as the same judge castigates the Bangladeshi plaintiffs’ lawyers for themselves being so imperialist as to cast doubt on the Bangladeshi tort law’s preparedness — the Court held that to argue Bangladesh would follow the lead of the Supreme Court of India rather than that of the UK was “pure speculation,” and rejected the argument.⁴⁶⁸ To be clear, the Ontario courts hearing this case (1) first, through a strict construction of *Tolofson*, denied Ontario law would apply in favour of Bangladeshi law, then (2) denied any suggestion — despite evidence to the contrary — that Bangladeshi law would reflect Indian law, (3) instead found novel Bangladeshi law would reflect British law, (4) found British law would not allow recovery and (5) granted the defendants’ motion. This string of logic was accomplished while remaining shrouded by the Courts’ insistence it was rejecting the *plaintiffs’* imperialist logic.

In *Das*, the Court determined Loblaws — a giant multinational company — would not (and should not) be held responsible for the CSR standards it itself had promoted despite: knowing such standards were being breached;⁴⁶⁹ knowing Bangladesh has “an abysmal record of enforcing safety standards,”⁴⁷⁰ and choosing to do business there in any event. The judgment, where it benefits Loblaws (a CanCorp), upholds traditional concepts of state and judicial equality either by rejecting any suggestion the foreign state is unable to deliver justice, or by assuming the foreign state’s judiciary will apply traditional and corporation-favouring, western, black letter conceptions of the law.

⁴⁶⁶ *Das CA*, *supra* note 287 at para 188.

⁴⁶⁷ *Ibid* at para 184.

⁴⁶⁸ *Ibid* at para 192.

⁴⁶⁹ *Das SC*, *supra* note 284 at para 122.

⁴⁷⁰ *Das SC*, *supra* note 284 at para 36.

In being forced to engage with the modern experience of transnational corporate activity, such as modern ideas of control and the impact of CSR standards, the Courts chose to apply traditional and dated territorialist notions of comity, tailored deference, and subjective fact-finding, all to the benefit of the corporate interest. In this case, like many of the others noted above, in the act of naming and defining what is meant by “control” and the impact of CSR standards, the Courts engaged not only in self-referenced fact-finding but also in norm creation for the Field itself. It defined for the agents in the Field and those in interacting fields (economic, political) what will be expected of them. In this case, the Courts legitimized a corporate-power-benefiting interpretation of obligations and control, rather than looking to international human rights obligations (or comparative tort law such as the Indian Supreme Court, for that matter) for normative inspiration, and legitimized the continued use of CSR standards and complicated corporate structures with no resulting responsibility. At the same time, the judge aggressively layers a deference-to-foreign-states rationale onto the reasoning, for good measure.

Territorialist application of comity leads to injustice

Using Bourdieu’s field framework as an interpretive lens, we may understand some of the sociological reasons why Canadian justices are continuously, despite the actual black letter wording of private international law jurisdiction tests, pulled towards state non-intervention in cases of alleged human rights abuses. They include: the comfort and familiarity of the federalist context; frequent judicial reference to historical notions of comity paired with the influence of the field of power over the juridical field; and the *doxa* of incremental development, *stare decisis*, and independence of the judiciary. These “inputs,” or drivers, feed and enhance a hyper-comity, state non-intervention Field *habitus* that colours resulting judicial decisions. This Field *habitus* tends toward the traditional and away from change. Such change would be in the real acceptance by the Field of the modern power disparities existing between states, between corporations and states, and between corporations and individuals. This acceptance would create a reality frame that would further recognize that such power disparities must be “read in” or used to inform the tests for jurisdiction.

In point of fact, the tests available for and created by Canadian courts to determine whether to assert jurisdiction over parties to an action in cases involving human rights or

environmental abuses — particularly where the defendant is a Canadian national — already favour the assertion of jurisdiction through reference to a sort of reality frame (through, for example, analysis of juridical advantage). Additionally, a modern reading of the already-flexible concept of comity assumes some abandonment of non-intervention principles in contexts involving human rights abuses. However, what we have seen is that a territorialist approach to comity and to private international law, informed by the *habitus* of judges, continues to lead to some results which frequently do not align with fundamental concepts of justice. Even in a black-letter interpretation of the law, this ought not be the case. In other words, it is not the *law* that binds the hands of Canadian justices; rather, it is – or may well be – the *habitus* of their Field.

The reality is that some CanCorps operating in developing states are responsible for subjecting locals to human rights and environmental abuses. In 2009 the Canadian Centre for the Study of Resource Conflict completed a report for the Prospectors and Developers Association of Canada, which found Canadian mining companies were the worst offenders of environmental and human rights abuses around the world.⁴⁷¹ CanCorps, detailed the report, were more likely to be engaged in community conflict, environmental abuses, and unlawful or unethical behaviour. Seven years later, in 2016 (as noted above in the introduction) JCAP released a report entitled “The ‘Canada Brand’: Violence and Canadian Mining Companies in Latin America” in which the organization documented 100 incidences of violence associated with Canadian extractive companies operating in Latin-America.⁴⁷² Such incidents involved 28 Canadian companies and involved injury — disappearance, battery, sexual violence, and death — to 403 people. At the time, over 40% of the mining companies present in Latin America were Canadian.⁴⁷³ While mining is certainly not the only sector in which CanCorps have behaved badly, such figures offer some insight into the realities of those subjected to the presence of CanCorps abroad. Were the victims of the above-mentioned abuses domiciled in Canada, they would have the option of claiming against the CanCorp for damages in Canadian courts. However, being nationals of developing nations, often such victims have no redress as the courts of their states can often be

⁴⁷¹ The Canadian Centre for the Study of Resources Conflict. *Corporate Social Responsibility: Movements and Footprints of Canadian Mining and Exploration Firms in the Developing World*. (2009) online: <https://miningwatch.ca/sites/default/files/CSR_Movements_and_Footprints.pdf>.

⁴⁷² JCAP Report, *supra* note 7.

⁴⁷³ *Ibid* at 5.

corrupt, ineffective, or unable to enforce against a CanCorp (for various reasons, including politics and economic incentive created by the CanCorp's presence). It is for this reason Canadian courts become so important an avenue for justice and why it is important for Canadian judges to begin to critically observe their own conditioned assumptions and the way in which their *habitus* as Field agents is standing in the way of justice for vulnerable people. As it stands, however, there appears to be a lack of redress not only in host states but in Canada, which is made clear in cases such as *Anvil Mining*, *Cambior*, *Das*, and *Green Park*.

Even if the disparity between what the law intends for or requires of Canadian justices and the influence of the field *habitus* — thus calling into question the *effective* independence of the Canadian judiciary — is unpersuasive on its own as a call for change, another line of analysis (taken up in the next section) may help make the cumulative case. A careful, even if only preliminary, analysis of the benefits CanCorps receive by virtue of being Canadian nationals may spark greater understanding as to why, as one dimension of fairness, such corporations should be held responsible for their actions in Canada rather than being able to hide at home from their poor or callous decisions. Where the preceding two sections introduced the effective conflict between the law and the way in which it is applied with respect to private international law, the following section introduces a fairness argument as to why self-critical Field agents should — despite their *habitus* — favour a modern and reality-framed interpretation of the law to ensure CanCorps face justice in Canada. As we shall see, one — not even powerful multinational corporations — cannot eat their cake and have it too.

Chapter 3: Fairness dictates Canadian courts take jurisdiction

A: Fairness as a set-off against sovereignty

Framing

As we have seen, in Canadian private international law foreign plaintiffs face barriers at the stage of jurisdiction. As a preliminary stage in civil procedure, jurisdiction has become a gatekeeper in access to meaningful justice.⁴⁷⁴ A cursory read of the cases already decided (and discussed in Chapters 1 and 2) could lead a reviewer to conclude the law in Canada simply is not positioned to handle or adapt to the globalized world. However, when searching for the reasons that the courts in Canada have stumbled, we see a more complicated issue than perhaps initially assumed.

The law itself — the “black letter” that was created both judicially and legislatively — actually favours the taking of jurisdiction in transnational human rights tort cases. Even the current understanding of comity — as explained by the SCC — reveals a shape-shifting, adaptable concept primed for reality-framing. As noted above, in some cases, courts appear to be applying a law of jurisdiction that aligns both with the purposes of private international law — namely the ordered and fair resolution of cross-border disputes — and with Canada’s commitments internationally with respect in particular to human rights. Nevertheless, we still see other courts failing to account for modern principles of interpretation by analyzing jurisdictional questions in a way that reveals a bias towards strict comity and a preoccupation with Canada’s primary role as a state among a community of states in what amounts to a throwback to a late 19th century high-positivist construction of statehood and territoriality.

A way of understanding this bias is to draw on Bourdieu and his field theory to examine why judges continue to be mired in this traditional idea of territoriality. If we understand the problem through this lens, we are left with the following dilemma: while the law is primed for adaptive and modern use, the *habitus* of the Field — shaped by the experience of its agents, by the history and *doxa* of the Field, and by the overarching input of the field of power — prevents

⁴⁷⁴ Trevor C W Farrow, “Globalization, International Human Rights, and Civil Procedure” (2003) 41 *Alta L Rev* 671 at 673 [Farrow 2003].

some agents (judges) from seeing beyond territorialism and statehood. Provided we accept this understanding of the problem, we must also accept that the *habitus* of the Field is not easily shaken, the *doxa*, *nomos*, and structures of the Field being relatively stable. To ignore the *habitus* of the Field, I argue, is to ignore the elephant in the room; no real change can happen without addressing it.

Thus, rather than ignoring the reality of traditionalist notions, we may approach the problem by leaning into them. A practitioner, in presenting her private international law case to a Canadian court, may “reality-frame” or “ground”⁴⁷⁵ an underlying conflict by catering to additional (or, alternative) Field *doxa* whose tradition and longevity are undeniable and even longer lasting than statehood, most notably among them, fairness. Through bringing fairness to the fore, we may shift the Field’s attention to the reality of Canadian civil procedure itself and the reality of international corporate accountability. Such ideas can, I will argue, be used to “set off” (to balance or even outweigh) preferences for territoriality *within* the current Field *habitus*.

Fairness as equality

That the concept of fairness is foundational to justice is generally accepted. However, the makeup or content of fairness is forever at issue. A veteran philosophy of justice sees fairness in like-actors being treated equally – where one understands “equally” in the sense of formal equality only (likes being treated the same). Indeed, from Glaucon’s speeches in Plato’s Republic⁴⁷⁶ and the Melian dialogue,⁴⁷⁷ through Hobbes’ *Leviathan*, justice — a pact between “rational egoists” — as *equality* leads to fairness because of an underlying balance of power.⁴⁷⁸ Justice, in other words, required only that parties with similar power be treated equally, read fairly. John Rawls extended this concept of equality by arguing that actors deprived of knowledge about their current social position (i.e., for our purpose, their place in power

⁴⁷⁵ See Laverne Jacobs’ related argument for a “grounded” impartiality for the review of administrative decision making based on schools of critique of Rawls: Laverne Jacobs, “From Rawls to Habermas: Toward a Theory of Grounded Impartiality in Canadian Administrative Law” (2014) 51 Osgoode Hall L J 543 [Jacobs 2014] at 566-567.

⁴⁷⁶ Plato, *The Republic*, trans by Desmond Lee (New York: Penguin Classics, 2003) at Book 2.

⁴⁷⁷ Thucydides, *The History of the Peloponnesian War*, trans by Richard Crawley (New York: Barnes and Noble Classics, 2006) at 89, 105, and 111 (where actors are not equal, the Athenians argued, the powerful would “do what they can and the weak suffer what they must.”)

⁴⁷⁸ John Rawls, “Justice as Fairness” in Samuel Freeman, ed, *John Rawls: Collected Papers* (Cambridge: Harvard University Press, 1999) [Rawls 1999a] at 56.

constellations) would choose fairly equal distribution of goods and power as the basis of state institutions and decision making as they could not be sure where in society they would fall.⁴⁷⁹ By shielding a decision maker behind what Rawls referred to as a “veil of ignorance” the decision maker is imagined as disembodied; she is no one, and everyone.⁴⁸⁰ This veiled decision-maker, not knowing whether she would benefit from any given set of rules, will act in accordance with a contemporary version of a golden rule (or, Kantian categorical imperative) so as to select rules that reflect certain overarching disinterested principles of justice. In Rawls’ rendering of justice as fairness, political morality was de-coupled from an actor’s corporeal relationships and imagined as a universalist enterprise in which even unequally situated actors could strive to engage.⁴⁸¹ In other words, the Rawlsian approach treats all veiled decision makers as effectively the same, rather than accounting for how the differences in their social contexts may impact their versions of “true impartiality.” Thus, a Rawlsian approach to fairness in private international law would see the *equal* application and development of the law by the Field and would have as a necessary starting point the optimal benefit of the law to all “users” of such law.⁴⁸² For instance, it is difficult to imagine a veiled decision-maker not requiring the integration of the reality of globalism and transnational movement of goods and peoples within private international law in such a way as to benefit of victims of tortious conduct rather than only to the benefit of the corporate tortfeasors.

In the context of private international law, this approach may engender some resistance. For instance, critics of Rawls’ theories may question the provenance of equal treatment or even the act of conceiving the content of equal treatment as such exercises fundamentally ignore a contextualized understanding of Field actors or circumstances.⁴⁸³ In other words, equal treatment

⁴⁷⁹ John Rawls, *Theory of Justice*, rev (Cambridge: Belknap, 1999) [Rawls 1999b].

⁴⁸⁰ Seyla Benhabib, “The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory” in Seyla Benhabib & Drucilla Cornell, eds, *Feminism as Critique: On the Politics of Gender* (Minneapolis: University of Minnesota Press, 1987) 77 at 89.

⁴⁸¹ Rawls is supported in this approach through the concept of the impartial, disinterested and objective, “Herculean” judge imagined by Ronald Dworkin: Ronald Dworkin, *Law’s Empire* (Cambridge: Belknap Press, 1986).

⁴⁸² Those developing the law (judges, counsel bringing cases, the legislature) would recognize that from behind the veil, they could equally profit or be subject to unequal treatment.

⁴⁸³ See for instance the communitarian critique of Michael J Sandel, *Liberalism and the Limits of Justice*, 2nd ed (New York: Cambridge University Press, 1998); the contextual critique of Michael Walzer, *Spheres of Justice: A defence of Pluralism & Equality* (New York: Basic Books, 1983); the discourse theory critique by Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge: MIT Press, 1998); and the discussion of the Marxist critique by Trevor Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) [Farrow 2014] at 38.

ignores the inherent differences between actors before they engage in the veiled choice exercise. This divergence in political theory is certainly important. For instance, in the context of private international law, this divergence leads to arguments grounded in the fundamental power imbalance between CanCorps and plaintiffs (including developing states) as a basis for *equity* in treatment (equality through different treatment) before the courts. This argument — that courts ought to base their decision making (their application of the tests for jurisdiction) with an eye to the reality of the power of the CanCorp over the plaintiff— is frequently made and is, to some, ethically powerful.⁴⁸⁴ Rather than suggesting these positions are without merit — an argument that I would oppose — for the purpose of this analysis, I propose to, instead, evaluate equality (rather than equity) of treatment not between parties, but as between the Canadian treatment of the CanCorp *itself*, comparing the benefits and liabilities experienced by the CanCorp that are embedded in the Field. By doing so, we may conceive of the problem — whether courts ought to take jurisdiction over their own nationals — without reference to agent-relational equality, and may focus solely on equality in the corporation’s relationship with the Field itself. Such a single-agent approach is part of Rawls’ own understanding of one dimension of how justice as fairness works. As Rawls explained in his 1958 paper “Justice as Fairness,” in relation to “fair play,” a societal agent acts unfairly where they take advantage of a system without being responsible to it:

Usually acting unfairly is not so much the breaking of any particular rule, even if the infraction is difficult to detect (cheating), but taking advantage of loopholes or ambiguities in rules, availing oneself of unexpected or special circumstances which make it impossible to enforce them, insisting that rules be enforced to one’s advantage when they should be suspended, and more generally, acting contrary to the intention of a practice. It is for this reason that one speaks of the sense of fair play: acting fairly requires more than simply being able to follow rules; what is fair must often be felt or perceived, one wants to say. It is not, however, an unnatural extension of the duty of fair play to have it include the obligation which participants who have knowingly accepted the benefits of their common practice owe to each other to act in accordance with it when their performance falls due; for it is usually considered unfair if someone accepts the benefits of a practice but refuses to do his part in maintaining it.⁴⁸⁵

⁴⁸⁴ Stephens 2002, *supra* note 11 at 85; Thomas Boudreau & Brittany Foutz, “A Minimalist International Legal Order: Enforcing Jus Cogens Norms through the Fiduciary Jurisdiction of National Courts” (2018) 36 J Juris 111.

⁴⁸⁵ Rawls 1999a, *supra* note 478 at 60-61 [Emphasis added].

Just as some judges in Canada have used the elements of the test for jurisdiction to support a reality frame — one that takes into account the power differential and economic dynamics of transnational corporate activity — one may use a parallel reality frame to focus judicial attention on fairness in the equality of treatment provided to the CanCorp in and by the Canadian state. This analysis is contextual — or grounded, as Laverne Jacobs terms it — to the Canadian Field while avoiding the many challenges of arguing whether fairness within the Field must consider those who are subject to, but not immediate or repeat participants in the Field, namely foreign plaintiffs.

Thus, ideas of fairness as it relates to the conduct of CanCorps within the Field could be grounded in the idea that a corporation should be held responsible for the burdens of accountability wherever it *derives* benefit, i.e. equal treatment in both gain and responsibility. Traditionally the question of benefit is framed to bind the *victims* of tortious (or criminal) corporate behaviour to the benefits that corporations get through operating in developing nations;⁴⁸⁶ an ethical (if not legal) duty arises to ensure benefit for the victims of such abuse.⁴⁸⁷ This way of framing fairness, like the approach used by those critical of John Rawls, calls for embodied decision-makers who take into account the inherent social/economic/political power dynamic between plaintiffs and corporations. However, for our purposes, one can flip this concept to focus instead on benefits corporations derive by virtue of operating *from Canada* as a home state. Such benefits fairly lead to taking responsibility in the same home state for civil actions initiated against the CanCorp.

By contrasting the benefits CanCorps receive by virtue of being Canadian nationals, we are able to encourage the Field to ground and justify purposive interpretations of the tests for jurisdiction in the doxic concept of fairness rather than in the contending doxic concept of territoriality *without* using principles of globalized moral equity (i.e. Canada owing as much by way of equal treatment to foreigners as to Canadians) or straying far beyond the current Field *habitus* (i.e. of Canadian law's treatment of corporations, including Canadian private international law). In such a frame, the first step is to analyze what benefits the CanCorp enjoys;

⁴⁸⁶ Developing nations provide economic benefit and competitive advantage for multinational corporations because they offer low-cost access to markets, labour, and environmental resources.

⁴⁸⁷ Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (Toronto: University of Toronto Press, 1993) at 279; Farrow 2003, *supra* note 474 at 686, 704.

the next section provides core examples of the financial, regulatory, and reputational benefits a CanCorp receives through their Canadian nationality.

B: Corporations as Canadian nationals: the benefits

CanCorps receive a number of advantages by virtue of being “Canadian,” whether incorporated nationally or provincially. As an example, this section will explore some of the benefits enjoyed, as a representative example, by Canadian mining companies operating abroad accrued through their status as Canadian “nationals.” Such benefits include financial benefits — tax benefits, increased access to capital, increased access to intellectual capital, access to credit insurance, subjection to less aggressive securities regimes, access to Canada’s international trade agreements — and non-financial benefits⁴⁸⁸ — weaker criminal law, lessened regulatory oversight, and finally, the benefit of the “Canada brand” to a CanCorp’s reputation.

1. Financial benefits

Tax perks

Taxation of Canadian companies (as with individuals) begins with a taxable event occurring in a corporation’s taxation year. Determination of how much a corporation actually “owes” is based on a determination of that corporation’s “taxable income.”⁴⁸⁹ Thus, it is only once “taxable income” is calculated that the corporate income tax rate, both federal and provincial, is attached. For reference, the federal corporate tax rate is 15%. This rate is added to the variable provincial tax rates that range from 11.5% (Ontario, Northwest Territories) to 16% (Nova Scotia, Prince Edward Island). While Canada’s corporate tax rate is relatively moderate among developed nations,⁴⁹⁰ Canada’s corporate tax rate has dropped significantly from (using Ontario as an example) 36.6% to 26.5% since 2003. Corporations based in Canada but operating

⁴⁸⁸ This is not to say that non-financial benefits that are immediately non-financial do not have resulting financial benefits for a CanCorp through, for example, increased competitiveness.

⁴⁸⁹ *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA].

⁴⁹⁰ Compare, for example: Denmark (22%), Finland (20%), France (33%), Germany (30%), Japan (30.86%), New Zealand (28%), Norway (23%), UK (19%), EU Average (19.48), USA (27%): KPMG, “Corporate tax rates table”, (23 February 2018), online: <<https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html>>.

abroad are provided many of the same tax benefits given to Canadian corporations, and indeed some benefits that are not. What follows does not purport to be an extensive review of the benefits CanCorps get through the *Income Tax Act* (ITA), but an overview of some of those benefits provided by some of the most basic corporate structures.

Taxable income of, for example, Canadian mining companies operating abroad depends mostly on whether the CanCorp is conducting mining directly, or whether it is doing so through subsidiaries.⁴⁹¹ Either way, the CanCorp benefits by being in Canada.

Where the CanCorp is doing business *directly* in the foreign jurisdiction, expenditures for the mining operation will be deducted from the CanCorp's income as "foreign exploration and development expenses" (FEDEs).⁴⁹² FEDEs include prospecting, surveys, drilling, trenching, the cost of (non-depreciable) property, or any annual payment to preserve the foreign resource.⁴⁹³ In this way, FEDEs operate like Canadian exploration (CEE) and development expenses (CDE) per section 66(1) of the ITA. However, unlike CEEs and CDEs, FEDEs are calculated on a country-by-country basis⁴⁹⁴ and can be between 10% to 30% of gross income. By deducting FEDEs, a CanCorp can reduce its taxable income thus resulting in less tax owing.

Additionally, the CanCorp may claim capital cost allowances (CCA) for any depreciable property. Most capital assets acquired by mining and oil and gas companies qualify for a depreciation rate of 25% of a declining balance. Currently, some companies qualify for accelerated capital cost allowances which can provide up to 100% depreciation of the asset cost.⁴⁹⁵ These CCAs, like FEDEs, allows CanCorps to further reduce their taxable income. That a CanCorp may deduct expenses such as FEDEs and CCAs is not unusual; indeed, Canadian corporations operating in Canada are eligible for similar deductions. The interesting part, though, is that deductions for operating costs and land devaluation, for example, for a Canadian-operating corporation involve Canadian land and an interaction with the Canadian economy through local workers, local suppliers etc. While the corporation is saved some money in the

⁴⁹¹ Specific taxation of mining companies operating abroad is dealt with in the ITA and through the general corporate taxation rates in provincial income tax acts. While the provinces each have versions of legislation that specifically deal with mining, that legislation is limited to mining conducted in their jurisdictions (rather than mining conducted by a corporation headquartered in their jurisdiction but operating a mine internationally).

⁴⁹² ITA, *supra* note 489 at s 66.1(4).

⁴⁹³ *Ibid* at s 66(15).

⁴⁹⁴ *Ibid* at s 66.1(4.1).

⁴⁹⁵ Though this accelerated allowance is being phased out.

calculation of its taxable income, it has otherwise directly contributed to the Canadian economy. The same cannot generally be said of a CanCorp operating abroad.

Where the CanCorp must eventually pay tax in Canada on its foreign-sourced income (income minus the FEDEs and CCAs), it may be further granted a “foreign tax credit”⁴⁹⁶ which reduces the amount of tax otherwise payable by the CanCorp to Canada so that the total of tax paid to the foreign state and to Canada does not exceed the tax the CanCorp would pay if only paying in Canada. Where the foreign taxation rate in the operating country is higher or the same as in Canada, this may mean reducing the tax payable to the Canadian government by the CanCorp to zero. For example, if the CanCorp’s tax bill in the foreign state is \$1 million and the calculated taxes due in Canada are \$1.5 million (after having taken into account FEDEs and CCAs), the CanCorp will get “credit” for the \$1 million paid in the foreign state and only be responsible to pay \$500,000 to the Canada Revenue Agency (CRA). If, as in the last example, the tax bill in the foreign state is \$1 million and it is the same in Canada, the CanCorp will owe no taxes in Canada. The key here in this example is that a CanCorp is granted tax deductions and credits (on non-Canadian property and trade), thus decreasing its contribution to Canadian coffers, but having contributed far less to the Canadian economy than a Canadian-operating corporation. While this allowance seems of little consequence, the impact of a CanCorp offering little to the Canadian economy will be revealed in the review (below) of the extensive public loans, grants, and insurance provided to CanCorps operating abroad.

Many CanCorps choose to do business abroad through either shell companies or subsidiaries — the CanCorp being the majority or only shareholder of the foreign company’s shares. These foreign companies are referred to in the ITA as “foreign affiliates.”⁴⁹⁷ Where a CanCorp carries on mining through a foreign affiliate, the CanCorp is subject to the “foreign affiliate” rules under the ITA.⁴⁹⁸ Under the ITA, income generated for the CanCorp shareholder of a foreign affiliate is taxed on two general bases: the foreign accrual property income (FAPI) system and the surplus system. The FAPI system generally attaches to income derived from *passive* investing sources (investment property, capital gains, non-active business, rents,

⁴⁹⁶ ITA, *supra* note 489 at s 126.

⁴⁹⁷ Foreign affiliates must be non-resident corporations in which the CanCorp holds a requisite equity percentage. For requirements of foreign affiliates see ITA, *supra* note 489 at ss 250, 95(1), 95(2.01-2.02), 95(4), 251, 94.2(2).

⁴⁹⁸ *Ibid* at ss 90-96.

royalties, interest etc.) while the surplus system attaches to income generated from *active earnings*. This distinction is important because, while the FAPI system is taxation *without* credits or deferrals, the surplus system allows for significant if not complete deduction based on where the affiliate is located and on how the CanCorp categorizes its foreign affiliate's earnings.

Under the FAPI system, a CanCorp may deduct losses on property, certain allowable capital losses and foreign taxes paid (or *deemed* paid) on the income.⁴⁹⁹ Tax is paid on a current basis, i.e. taxed in the year it is earned. The surplus system, however, is more lucrative. For policy reasons, the Canadian government has structured international tax instruments so that if a CanCorp is conducting *active* business in a *treaty* country — say, Ecuador — Canada wants to ensure the CanCorp competes with companies headquartered in other states on a level playing field. So, for instance, the CanCorp subsidiary would pay its corporate taxes in Ecuador. Then, the CanCorp subsidiary, out of its “exempt surplus” — which includes net earnings in a designated treaty country and certain business activity — would pay dividends to the CanCorp. While dividends are generally taxable income in Canada,⁵⁰⁰ under the surplus system, the CanCorp can repatriate its dividends without paying *any* Canadian tax. Thus, even though the tax rate in Ecuador is lower than the total corporate income tax payable in some Canadian provinces, the CanCorp's subsidiary will pay the Ecuadorean rate, and the Canadian tax rate will never be applied. In other words, where the subsidiary is operating in a tax treaty state, and where *dividends* are paid to the CanCorp out of the foreign affiliates' exempt surplus, the CanCorp pays *no tax* in Canada on those foreign earnings.⁵⁰¹

As for any corporate concerns about the risk of future amendments to the ITA to increase taxation, CanCorps are assured that the Canadian government has their best interests in mind. Natural Resources Canada states Canada's mining taxation regimes are “flexible enough to keep

⁴⁹⁹ A deduction for taxes paid is calculated by multiplying the taxes paid in the foreign state (Foreign Accrual Tax) x the CanCorp's relevant tax factor (RTF) which reflects Canadian tax rates. If a corporation's tax rate in Canada is 25%, then its RTF is $1/0.25 = 4$. This amount is subtracted from the gross FAPI income and then declared as income to be taxed in Canada.

⁵⁰⁰ ITA, *supra* note 489 at s 90(1).

⁵⁰¹ See *Ibid* at s 113(1) and for definitions of “exempt surplus,” “hybrid surplus,” and “taxable surplus,” see Regulation 5907; also see www.fin.gc.ca for list of Tax Treaties and Tax Information Exchange Agreement countries.

pace with industry trends” and that “changes are implemented transparently and are based on industry consultation” so companies can make informed decisions about investment.⁵⁰²

On its face, assuming corporations act within the spirit of the law, the Canadian tax framework — including a beneficial tax rate, operating deductions, and the exempt surplus rule — is highly attractive to extraction companies. CanCorps are provided with tax incentives and credits without having to contribute directly to the Canadian economy.⁵⁰³ The scenarios I have reviewed above assume all deductions made by the CanCorp are legitimate (that they happened and they were valued accurately), and that the CanCorp actually paid taxes in the foreign state. However, these scenarios do not yet account for more creative tax-minimization schemes. One such example is strategic base erosion and profit sharing (BEPS),⁵⁰⁴ a process by which companies shift profits from higher-tax jurisdictions to lower-tax jurisdictions (tax havens such as the Cayman Islands or Barbados) to avoid paying taxes *either* in the operating state or in Canada, a CanCorp’s home state.

BEPS is a major issue in Canada,⁵⁰⁵ both with respect to CanCorps operating in Canada and those operating abroad. With the release of the “Panama Papers”⁵⁰⁶ and the subsequent “Paradise Papers,”⁵⁰⁷ Canadians have been made significantly more aware of Canada’s lax taxation framework and the so-called “snow washing”⁵⁰⁸ of billions of dollars in potential tax revenue. Canadians for Tax Fairness, a Canadian non-profit organization, estimates the annual

⁵⁰² Natural Resources Canada, “Mining Taxation in Canada” online at: <<https://www.nrcan.gc.ca/mining-materials/taxation/8876>>.

⁵⁰³ Compare requirements for CanCorps to, for instance, the requirement that Canadian-operating corporations hire Canadian workers and the resulting limitations placed on hiring foreign temporary workers in Canada: *Immigration and Refugee Protection Regulations*, SOR/2002-227.

⁵⁰⁴ See for example the OECD, *Inclusive Framework on BEPS*, 2016, to which Canada is a participating country.

⁵⁰⁵ For an example of BEPS in action, see the recent report of the Dutch not-for-profit “SOMO”, on Canadian mining company Turquoise Hill Resources (subsidiary to Rio Tinto) which operates a copper mine in Mongolia. According to the SOMO report, Turquoise Hill has avoided paying \$470 million in Canadian taxes through favourable tax-avoidance schemes: Vincent Kiezebrink, Rhodante Ahlers & Sukhgerel Dugersuren, *Mining Taxes: The Case of Oyu Tolgoi and profitable tax avoidance by Rio Tinto in Mongolia* (Netherlands: SOMO, 2018).

⁵⁰⁶ See for example, Robert Cribb, “How offshore banking is costing Canada billions of dollars a year,” *The Toronto Star* (4 April 2016), online: <<https://www.thestar.com/news/world/2016/04/04/how-offshore-tax-havens-are-costing-canada-billions-of-dollars-a-year.html>>.

⁵⁰⁷ See International Consortium for Investigative Journalists and reporting on Paradise Papers. Specifically, see: Will Fitzgibbon, “Tax wars, follow-up investigations and who was actually in the Paradise Papers?” *ICIJ* (5 November 2018), online: <<https://www.icij.org/investigations/paradise-papers/tax-wars-follow-up-investigations-and-who-was-actually-in-the-paradise-papers/>>.

⁵⁰⁸ Robert Cribb & Marco Chown Oved, “Snow Washing: Canada is the world’s newest tax haven,” *The Toronto Star* (25 January 2017), online: <<http://projects.thestar.com/panama-papers/canada-is-the-worlds-newest-tax-haven/>> [Cribb & Chown Oved 2017].

tax income lost to the Canadian government per year as a result of BEPS is between \$10-\$15 billion.⁵⁰⁹ While not all corporate tax-minimizing structures are illegal (i.e. they involve lawful avoidance of tax versus unlawful evasion of tax), legality is not the essential point; such tax minimization, made possible by the ITA, creates a highly advantageous situation for Canadian corporations. As Peter Dent, a forensic accountant and past chair of the a non-governmental, anti-corruption organization, Transparency International Canada, observes: “Canada is one of the most opaque jurisdictions, globally, in terms of identifying corporate ownership...Canada is increasingly becoming an attractive jurisdiction for individuals who want to hide their money or their assets.”⁵¹⁰ Following the release of the Panama and Paradise Papers, the CRA has initiated audits into many of the corporations and individuals therein named. However, this action may be for naught. In the recent decision of *Cameco Corp v the Queen*,⁵¹¹ the Tax Court of Canada upheld as legal Cameco’s transfer pricing scheme to move profits from a uranium mine out of Canada thereby denying Canada \$8.4 billion between 2003 and 2017. Without a major overhaul of Canada’s ITA, moral incentive alone will not be enough to rein in technical readings of ITA requirements, which continue to be possible under the flexibility of the current law (as interpreted by our current courts). This flexibility is not lost on CanCorps.

Each ITA provision allowing for tax advantage to a CanCorp creates benefit. However, the real benefit comes from the combination of such provisions along with organizational and operating structures designed to take advantage of the differences and interaction of tax rules amongst different state jurisdictions. Such tax planning allows an overall diminution of tax paid not just to Canada but across the board – even as that corporation may still be receiving a wide range of financial benefits from the Canadian legal system, whether through tax law deductions and credits or through other forms of financial support.

⁵⁰⁹ Canadians for Tax Fairness, “Tackle the Tax Havens,” online: <<https://www.taxfairness.ca/en/campaign/tackle-tax-havens>>.

⁵¹⁰ Cribb & Chown Oved 2017, *supra* note 508.

⁵¹¹ *Cameco Corporation v The Queen*, 2018 TCC 195; Note on October 25, 2018, the Crown filed a notice to appeal the Tax Court decision to the Federal Court of Appeal. It is interesting to note Cameco is no stranger to international human rights and environmental torts. In 1998, 2000 people were injured, and thousands of fish died when a truck carrying mine waste from the Kumtor mine in Kyrgyzstan rolled into the Barksuan River. The Kumtor mine was one-third owned by Cameco (and two thirds by the government of Kyrgyzstan): Seck 1999, *supra* note 417 at 140.

Access to capital

Beyond taxation, one of the most important reasons to headquarter a mining company in Canada is the access to investment and to institutional knowledge available in the Canadian market.

Export Development Canada (EDC), Canada's export credit agency, is the most significant source of funding for a CanCorp.⁵¹² EDC is a crown corporation that reports to Parliament through the Minister of International Trade.⁵¹³ Despite being generally self-funded, since 1944, EDC has been advanced over \$1 billion in taxpayer dollars to assist in the expansion of its insurance and lending operations. Through various funding programs, in 2017 alone, EDC facilitated nearly \$14 billion in mining business worldwide.⁵¹⁴ EDC, in assets at \$69.4 billion is more than twice the size of the Export-Import Bank of the United States. In January 2018, EDC opened a wholly owned subsidiary, called "Development Finance Institute Canada" (FinDev). FinDev is guided by a development-focused mandate — as compared to EDC's export-focused mandate — and seeks to support CanCorps doing business in developing countries (Latin America, the Caribbean, Sub-Saharan Africa) specifically in "green growth" (renewable energy, energy infrastructure, energy efficiency, water supply, water management, waste management, waste water management, bio-refinery products, green industrial production), agribusiness, or financial services.⁵¹⁵ FinDev was capitalized in 2017 with \$300 million.

EDC works with several other crown corporations and crown departments to support CanCorps doing business abroad. Such examples include: The Trade Commissioner Service (TCS),⁵¹⁶ Canadian Commercial Corporation (CCC),⁵¹⁷ Sustainable Development Technology

⁵¹² Total assets in 2017 were \$60 Billion: EDC, "Annual Report 2017" (2017) online: <<https://ar2017ra.edc.ca/highlights/>>.

⁵¹³ Pursuant to the *Export Development Act*, RSC 1985, c E-20 [EDA] at s 22, EDC pays no income tax, making it significantly more competitive when compared to private financial institutions either in Canada or other countries.

⁵¹⁴ EDC, "Coming of Age: The Canada Brand as Exporting Advantage," (26 April 2017), online: <<https://edc.trade/canada-brand-exporting-advantage/>> [Canada Brand].

⁵¹⁵ Development Finance Institute Canada, "Homepage," online: <<https://www.findevcanada.ca/en/homepage>>.

⁵¹⁶ The TCS forms part of Global Affairs Canada and helps CanCorps operate successfully on a global scale. The TCS has offices in 161 countries around the world providing CanCorps with on-the-ground intelligence, contacts, partnership opportunities and advice on foreign markets: TCS, "About the Trade Commissioner Service," online: <https://tradecommissioner.gc.ca/trade_commissioners-delegues_commerciaux/about-a_propos.aspx?lang=eng>.

⁵¹⁷ The CCC is a crown corporation established in 1946 accountable to the Minister of International Trade. The CCC assists CanCorps in procuring foreign government contracts, thereby increasing access to foreign markets, speeding up sales, gaining a competitive advantage, and minimizing political and business risk: Canadian Commercial

Canada (SDTC),⁵¹⁸ and the Business Development Bank of Canada (BDC).⁵¹⁹ As with the EDC, each partner organization is similarly endowed and keen to provide significant funding and assistance opportunities to CanCorps. For instance, as of 2018, the Export Diversification Strategy will invest \$1.1 billion over six years to help CanCorps access new markets, and in doing so triple the Canadian TCS CanExport program.⁵²⁰ If a CanCorp is able to market its mine as one focused on research and development, then a number of additional funding sources become available, such as the Strategic Innovation Fund,⁵²¹ or the \$155 million Clean Growth Program.⁵²² Similarly, in 2017, the EDC launched two “green bonds,” one CAD\$500 million and one for US\$500 million, and provided \$1.5 billion in support for clean tech companies.⁵²³ The EDC does not define what is meant by “clean tech,” making it difficult to discern whether clean tech will include more controversial “sustainability” options like “clean coal.”

Canadian embassies in host states may provide additional assistance to CanCorps in facilitating negotiations and contracts. For instance, according to MiningWatch Canada, which obtained documents through access to information requests, the Canadian Embassy in Mexico assisted Toronto-based Excellon Resources in their efforts to avoid addressing violations of its land-use contract with the local agricultural community on whose land it operates its La Platosa mine by lobbying Mexican officials, failing to encourage peaceful dialogue with the local

Corporation, “Homepage,” online: <<https://www.ccc.ca/en/canadian-exporters>>.

⁵¹⁸ SDTC is a foundation created by the Government of Canada to support CanCorps working towards clean technology. The foundation was provided \$400 million in 2017 over 5 years to re-capitalize the “Sustainable Development Tech Fund.” Since 2001 the Government of Canada has committed \$1.364 billion to SDTC: Sustainable Development Technology Canada, “Homepage,” online: <<https://www.sdte.ca/en/>>.

⁵¹⁹ The BDC is an agency of the Federal Crown whose purpose is to support Canadian entrepreneurship by providing financial and management services to CanCorps: *Business Development Bank of Canada Act*, SC 1995, c 28; with respect to mining, the BDC offers financing and advisory services to fund growth and boost performance, respectively. For new businesses, BDC offers loans to purchase a business, loans to start a business, and BDC small business loans. In addition, the BDC offers expert business advice.

⁵²⁰ Minister of Finance, “Investing in Middle Class Jobs: Fall Economic Statement 2018,” online: <www.fin.gc.ca> at 67.

⁵²¹ A fund of the Ministry of Innovation, Science and Economic Development, as of fall 2018, the Canadian government proposed adding an additional \$800 million over five years to the Strategic Innovation Fund to support innovation across all sectors of Canadian industry. The Fund lists as one of its goals to “accelerate areas of economic strength and strengthen and expand the role of Canadian Firms in Regional and global supply chains.”

⁵²² The Clean Growth Program is funded through Natural Resources Canada. Note, the Clean Growth Program semi-finalists in 2017 included Barrick Gold and GoldCorp Canada: Natural Resources Canada, “Congratulations to the Clean Growth Program semi-finalists!” (27 June 2018), online: <<https://www.nrcan.gc.ca/cleangrowth/21182>>.

⁵²³ EDC, “2017 Corporate Social Responsibility Report: Doing Business Better,” (2017) online: <<http://www1.edc.ca/publications/2018/2017csr/en/>> [EDC 2017 CSR Report].

protesters, and sharing information gathered from locals with the company without the consent of such locals.⁵²⁴

Many of the above-noted programs have instituted requirements that CanCorps seeking funding demonstrate they have identified and planned for any social and environmental impacts that may be caused by a proposed project. Despite these goals, the *de facto* impact of such policies is less certain. The EDC provides a prominent example.

For a CanCorp to be provided with general corporate support from EDC — such as insurance and financing for day-to-day operations — the CanCorp must submit declarations that it is “not aware of any significant environmental consequences of their transactions and/or business.” Upon receipt of an application for such funding, an EDC financial officer conducts an initial screening to look for activities that might be high risk to the local peoples or the environment. If activities are flagged as high risk, the CanCorp is forwarded to the environmental advisory services team (EAS) for further assessment. As an example, the EDC stated that in 2017, 170 projects underwent “human rights screening” which reflects “human rights flags from business pre-screening that were assessed, not only those completed.”⁵²⁵ It is not made clear how many funding requests were granted despite having been flagged for human rights risks.

CanCorps seeking EDC funding for large infrastructure projects must follow further requirements outlined in the EDC Environmental and Social Review Directive and provide quarterly status reports to the EDC board of directors. For a project to be considered for support, it must meet international standards which include International Finance Corporation’s Performance Standards on Environmental and Social Sustainability and the OECD’s Common Approaches and the Equator Principles. Projects must also be subject to an environmental and social impact assessment; such assessments are conducted by the CanCorp. For the largest projects, the EAS team visits project sites and works with independent reviewers.

The EDC publishes a list of projects that have received financing approval, divided among projects that have potential significant adverse environmental or social effects (Category

⁵²⁴ Jen Moore, “Unearthing Canadian Complicity: Excellon Resources, the Canadian Embassy and the Violation of Land and Labour Rights in Durango, Mexico” (25 February 2015) MiningWatch Canada Report.

⁵²⁵ EDC 2017 CSR Report, *supra* note 523.

A), those with less impact (Category B), and those with no impact (Category C). EDC provides some information regarding the basis of expected compliance such as “host country standards” or “IFC Performance Standards” and, in recent cases, provides a short project review summary.⁵²⁶ Pursuant to the EDC’s policy, the EDC states that it monitors projects over the long-term and will suspend disbursements or funds or stop them entirely if it is unsatisfied the terms of the agreement are being met.⁵²⁷ However, managing environmental and social risk, according to the EDC, is the responsibility of the EDC client. While the EDC monitors funded projects, it outlines no clear process for non-compliance; the EDC does not publish decisions related to non-compliance with environmental or social standards and when/how the EDC has suspended such funds and upon what basis. Indeed, the EDC’s disclosure policy does not require EDC to disclose such information. Disclosure with respect to CSR standards is limited to approval stage, and even then, is limited in its depth.⁵²⁸

The latest EDC report available at the time of writing, the 2017 Report, was prepared with reference to the Global Reporting Initiative (GRI) standards⁵²⁹ and promoted “great progress in both environmental and social realms.” The Report features a “3-Year Scorecard” in which the EDC provided the values associated with total export and investment (\$29.9 billion) as well as projects assessed under the Equator Principles and “other guidelines” (nine and nine, respectively). The EDC heard 42 “CSR-related public inquiries.” Five project sites were visited by the EAS team to meet with EDC customers, civil society organizations, government organization and other lenders. With respect to none of the assessments it conducted — on the

⁵²⁶ Pursuant to section 68 of the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52 (CEAA 2012), a federal authority must not provide financial assistance to any person for the purpose of enabling a project to be carried on outside Canada unless the project is not likely to cause significant adverse environmental effects or, if so, those effects are justified in the circumstances. Projects likely to cause significant adverse environmental effects are subject to the *Projects Outside Canada Environmental Assessment Regulations* (SOR/96-491). The Canadian Environmental Assessment Agency does not list a single out-of-country project in its project registry, despite there being a number of Category A projects currently funded. This is likely because section 24.1 of the EDA notes section 68 of CEAA 2012 does not apply “when the Minister or the Minister of Finance exercises a power or performs a duty or function under this Act or any regulation made under it, or exercises a power of authorization or approval with respect to the Corporation under any other Act of Parliament or any regulation made under it.”

⁵²⁷ EDC, “Understanding EDC’s Project Review Process,” online: <<https://www.edc.ca/content/dam/edc/en/non-premium/project-review-booklet.pdf>>.

⁵²⁸ EDC, “Disclosure Policy,” online: <<https://www.edc.ca/content/dam/edc/en/non-premium/disclosure-policy.pdf>>.

⁵²⁹ The GRI is a voluntary multi-stakeholder framework for environmental and social governance which has emerged as a benchmark for CSR reporting: Cynthia A Williams, “Corporate Social Responsibility and Corporate Governance” in Jeff Gordon & Wolf-Georg Ringe, eds, *Oxford Handbook of Corporate Law and Governance* (Oxford: Oxford University Press, 2018) [Williams 2018].

Equator Principles, the CSR inquiries, or the site visits — does the EDC release its findings or any corrective action it may have taken. While the trappings of environmental and social sustainability have been adopted, follow-through and effective monitoring is less certain by virtue of a near-total lack of real transparency.⁵³⁰

This lack of transparency was recently highlighted in a 2018-2019 investigation done by the *Globe and Mail* which, after studying the practices of the EDC over a one-year period, found the EDC continues to do business with and provide significant financial loans to CanCorps and foreign corporations that are embroiled in human rights and financial scandals.⁵³¹ For instance, EDC approved a loan guarantee to the Royal Bank of Canada to finance the sale of a CanCorp's (Netsweeper Inc) technology to the Bahraini government, which has been accused of using the technology to censor political opposition movements, human rights groups, gay and lesbian advocacy groups and news organizations such as Al Jazeera.⁵³² On numerous occasions, EDC has continued to support its clients despite banks and international organizations such as the World Bank halting any such support. For instance, while the World Bank stopped any further loans to Canada's SNC-Lavalin (SNC) following widespread allegations of bribery, EDC continued its support of the company to the tune of between \$50-\$100 million. EDC eventually distanced itself from SNC in 2014 only to re-partner with the company in 2017, providing the company with three more loans with a maximum possible value of \$1.25 billion. This, despite criminal charges laid in Canada against the company for bribing Libyan dictator Muammar Gaddafi (discussed in further detail below). Today, following allegations CanCorp Bombardier engaged in significant bribery involving South Africa's notorious Gupta brothers, EDC is facing scrutiny for having helped Bombardier win a \$1.2 billion portion of a locomotive contract and thereafter maintaining its relationship with the company, which is also its biggest client.⁵³³

While Canadians are investors in EDC and are the beneficiaries of EDC's profits (whether those profits are "clean" or not), neither ordinary citizens nor most government officials have access to EDC's files. According to the *Globe and Mail*, EDC treats its investigations and loan conclusions "as confidential information belonging to its customers." In 2014, following

⁵³⁰ Simons & Macklin 2014, *supra* note 238 at 198-9.

⁵³¹ Matthew McClearn & Geoffrey York, "See No Evil" *Globe and Mail* (1 June 2019) [McClearn & York 2019].

⁵³² *Ibid.*

⁵³³ *Ibid.* Bombardier has received more than 230 loans from EDC between 2001 and 2018 with a combined value of between \$20 billion and \$46 billion.

orders from the Minister of International Trade, EDC hired a consultant to review its risk management practices. The consultant provided a 58-page final report, though EDC refused to make this report public, thereby shielding its shortcomings and any further response from public scrutiny. Further, in June 2019, a federal review was conducted of EDC which found serious shortcomings related to disclosure practices and a lack of legal obligation to consider social or environmental impacts of proposed projects.⁵³⁴ Notably, EDC's disclosure practices were found to be inferior to those of other credit export agencies, such as in the US or at the World Bank. The report was tabled in Parliament on June 20, 2019, and will be submitted to a parliamentary committee. The report was met with immediate backlash from the Canadian Chamber of Commerce and the Business Council of Canada, among others, who stressed in open letters to the federal Trade Minister that no changes resulting in the scaling back of export support – particularly to developing countries – should be considered.⁵³⁵

Despite the depth of crown/crown-corp funding, funding from government sources is not the only way CanCorps access capital. While domiciled in Canada, CanCorps have access to preferential commercial loans from one of Canada's big five banks, all of which are ranked among the world's largest 100 banks and remain, even after the 2008 financial crash, some of the most highly rated banks in the world.

Additionally, investment is not limited to banking or project-specific loans. It extends to the personal savings of taxpayers. It is not legally necessary that Canadian public pension plans break down the companies in which funds are held. Thus, unless that information is made public, it can be difficult to determine how much CanCorp stock is held by Canadian pensioners. However, two examples are illuminating. In 2018, the Canada Pension Plan Investment Board, one of the largest pension plans in Canada investing the funds of over 20 million Canadians — managing \$356.1 billion in public funds⁵³⁶ — held \$100 million invested with Teck Resources, \$77 million with Goldcorp Inc, and \$94 million with Barrick Gold.⁵³⁷ As of March 31, 2018, BC's Investment Management Corporation, which invests \$145.6 billion of BC's public sector

⁵³⁴ Matthew McClearn, "EDC disclosure practices fall short, federal review finds" *Globe and Mail* (2 July 2019).

⁵³⁵ *Ibid.*

⁵³⁶ Canada Pension Plan Investment Board, "F2018 Annual Report" (2018) online: <<http://www.cppib.com/en/ar2018>>.

⁵³⁷ Canada Pension Plan Investment Board, "Canadian Public Disclosure," (31 March 2018) online: <http://www.cppib.com/documents/1804/cdn_publicequityholdings_Mar2018_en.htm>.

pensions, had the following invested: \$56.5 million with Barrick Gold, \$68.5 million with Goldcorp Inc, \$5.5 million with Tahoe Resources (recently acquired by Pan-American Silver, also a BC-based extraction company), and \$2.7 million with Nevsun Resources.⁵³⁸ Recall, two of these companies are currently resisting the jurisdiction of BC courts.

Beyond access to financial capital, a CanCorp headquartered in Canada also has access to knowledge capital: significant expertise in mining in, for instance, Toronto or Vancouver. First, the CanCorp can be locally listed on the Toronto Stock Exchange (TSX), along with 57% of the world's public mining companies,⁵³⁹ which can provide certain benefits. For instance, listing on the TSX means the issues are “eligible to be included in the S&P/TSX Composite Index as well as assignment to S&P/TSX sector indices.”⁵⁴⁰ Such inclusion provides listed companies with increased access to investment funds through large-scale institutional investment (from, for example, pension funds) in such index funds.⁵⁴¹ In 2018, the TSX and TSV venture exchange were responsible for 49% of mining investment in the world.⁵⁴² Further, CanCorps in Toronto or Vancouver will have access to accountants, lawyers, and myriad corporate entities who, by virtue of Canada's significant global presence in mining,⁵⁴³ have the necessary expertise to assist the CanCorp in its corporate structuring, politicking, and expansion.⁵⁴⁴

Last, locating the CanCorp in Canada provides access to various private associations that support a mining corporation. Examples include the Prospectors & Developers Association of

⁵³⁸ BCI, “Investment Inventory List: As at March 31, 2018 (unaudited)” online: <<http://bcimc-ar.uberflip.com/i/1043396-2018-investment-inventory>>.

⁵³⁹ The TSX and the TSX-Venture Exchanges together account for 40% of the equity capital raised globally for mining in 2016: The Mining Association of Canada, “Facts and Figures 2017,” online: <<http://mining.ca/sites/default/files/documents/Facts-and-Figures-2017.pdf>> [Mining Facts and Figures].

⁵⁴⁰ “Why list on the TSX” *The Canadian Business Journal* (11 February 2019) online: <http://www.cbj.ca/the_advantages_of_resource-based_exchanges_the_tsx_and_tsx-ventu/>.

⁵⁴¹ Institutional investors are some of the largest investors in stock exchange index funds. An index fund is meant to capture a particular “market” and often does so by grouping the top x% of companies within a particular exchange. For a company to be included in an index means investors do not have to invest individually in that particular company, but can invest generally while still investing in that company: James Chen, “Index Fund” *Investopedia* (19 April 2019) online: <<https://www.investopedia.com/terms/i/indexfund.asp>>.

⁵⁴² Paul Christopher Webster, “A Long Road,” *Globe and Mail Report on Business* (February 2019) 20.

⁵⁴³ Canada is home to approximately half of the world's publicly listed mining and exploration firms and Canada's mining companies were present in 101 foreign countries in 2016. Canadian mining assets held abroad accounted for two thirds of total Canadian mining assets, suggesting Canadian companies are doing more business abroad than in Canada: Natural Resources Canada, “Canadian Mining Assets”, (31 January 2017), online: <<https://www.nrcan.gc.ca/mining-materials/publications/19323>>.

⁵⁴⁴ Sara L Seck, “Home State Responsibility and Local Communities: The Case of Global Mining” (2008) 11 *Yale Hum Rts & Dev LJ* 177 at 191.

Canada, the Mining Association of Canada, various provincial mining associations, and the Canadian Institute of Mining, Metallurgy and Petroleum. Such associations employ registered lobbyists to lobby every level of government on behalf of mining CanCorps. As but one example of the scale of lobbying activity, the nine in-house lobbyists for the Mining Association of Canada (there are five external firms that also lobby on behalf of the Mining Association) were involved in 319 communications with federal government employees on the subject of mining in the 12 months between April 17, 2018 and April 17, 2019. These lobbying efforts do not include the efforts of other lobbyists on behalf of the Mining association, nor lobbyists hired by the other entities and those hired by individual companies. For instance, Goldcorp Inc itself has five active lobbyists registered with the Federal government; Barrick Gold pays three.⁵⁴⁵

Insurance

Beyond capital, the EDC also offers CanCorps credit insurance at up to 90% of losses. Coverage under EDC Portfolio Credit Insurance includes the risks of customers (foreign states or corporations) failing to pay due to bankruptcy, termination of contract, or hostilities in a particular market that prevent the customer from paying. The EDC also offers “Political Risk Insurance” and “Performance Security Insurance” that protect CanCorps from losses resulting from expropriation, political violence, war and related disturbance, conversion, transfer repossession, non-payment by government, and acts of God. In other words, where a CanCorp’s mining project is at risk because of, say, local indigenous opposition, EDC insurance will protect the CanCorp’s investment. While the EDC is “self-funded,” its insurance policies are underwritten by the Government of Canada (tax payers), who, through the *Export Development Act* — the legislation that created the EDC — allows EDC to take on liability up to \$45 billion.⁵⁴⁶

For clarity, the EDC provides a mining CanCorp with funding to do business abroad — and under FinDev, specifically to do so in developing nations — and then insures the CanCorp at up to 90% of losses — underwritten by taxpayers — should that CanCorp face “hostilities” from locals who jeopardize their profit margins, thereby shielding the CanCorp from most risk.

⁵⁴⁵ Office of the Commissioner of Lobbying in Canada, “12-month lobbying Activity,” online: <www.lobbycanada.gc.ca>.

⁵⁴⁶ EDA, *supra* note 513 at s 10(3).

Securities

Publicly traded companies in Canada are subject to the provincial securities regimes, which require regular reporting in the form of (1) annual reports, (2) management discussion and analysis statements, and (3) annual information forms.⁵⁴⁷ Mining companies are also required to report information pertaining to their mining projects that may result in a change to the market value of their shares. As of 2015, the previous 15 years had seen 23 countries enact legislation to require public companies to issue reports including social/environmental information.⁵⁴⁸ In parallel, seven stock exchanges have required social/environmental reporting. Neither Canada nor the TSX are included in these groups.⁵⁴⁹

While provincial securities requirements arguably require reporting of environmental, social, and political issues that may *materially* impact a company's financial position, some studies have found disclosure such information wanting. In 2008, the Ontario Securities Commission assessed the financial statements of 35 reporting issuers and found that many had simply used boilerplate description of environmental liabilities;⁵⁵⁰ the same deficiencies were found in Alberta one year earlier.⁵⁵¹ Such issues remained nearly 10 years later.

⁵⁴⁷ Management Discussion and Analysis reports does not specifically require the issuer to report on social or human rights issues but requires reporting on "significant factors that cause changes in net sales." Annual information forms require disclosure of risk factors related to business, however there is no legal obligation to disclose such forms to shareholders: Simons & Macklin 2014, *supra* note 238 at 218.

⁵⁴⁸ Though "social" responsibility is a relatively vague concept, the ISO 26000, the International Standards Organization's standard for corporate responsibility released in 2010 offers some guidance. The ISO 26000 was developed with representation from 90 countries and 40 organizations representing consumer, government, industry, labor, NGO, and academic representatives. While (ironically) access to the principles must be purchased, an outline is available. Pursuant to the standards the principle of "social" includes accountability, transparency, ethical behaviour, respect for stakeholder interest, respect for the rule of law, respect for international norms, and respect for human rights. The standards then lay out guidance for specific practices, including: organizational governance, human rights, labour, fair operating, environment, consumer issues and community involvement. From this list, it can be deduced that "social" as distinct from "environmental" includes at the very least labour, human rights, and stakeholder engagement issues: Williams 2018, *supra* note 529; International Standards Organization, "ISO 26,000-Social Responsibility," online: <<https://www.iso.org/iso-26000-social-responsibility.html>>.

⁵⁴⁹ Williams 2018, *supra* note 529. Stock exchanges that have participated include: Australia's ASX, Brazil's Bovespa, India's Securities and Exchange Board, the Bursa Malasia, Oslo's Børs, the Johannesburg Stock Exchange, and the London Stock Exchange.

⁵⁵⁰ See for example the discussion of the Ontario Securities Commission and Alberta Securities Commission studies in 2008 and 2007, respectively, regarding simplified, boilerplate, and non-reporting of social factors: Aaron A Dhir, "Shadows and Light: Addressing Information Asymmetries through Enhanced Social Disclosure in Canadian Securities Law" (2008) 47 Can Bus LJ 435 at 448.

⁵⁵¹ *Ibid* at 450.

In a 2016 report conducted by JCAP, a review of disclosure made by CanCorps in a five-year period on the SEDAR filing system of the Canadian Securities Administrators found Canadian company disclosure rates of incidents that meet legislated definitions to be only 24%.⁵⁵² Additionally, the quality of disclosure was poor and, often, misleading.⁵⁵³ For instance, some companies reported the number of incidents rather than the number of victims, or reported an event such as a protest while failing to note the violence associated with the protest.⁵⁵⁴ Such findings suggest Canada's securities systems lack robust requirements and enforcement mechanisms beyond those associated with pure financial data. Further, by tying disclosure to events that may impact market share, the burden to do so is felt unequally between companies; bigger companies with many operation sites are less likely to see a dip in market share resulting from an event at one site, even one involving violence, whereas the same is not necessarily true with respect to companies that operate one mine.⁵⁵⁵

While the rate of compliance in continual reporting with respect to environmental and social issues remains questionable, it further appears CanCorps may also benefit from cost discrepancies between Canada and, for example, the United States — a fact some companies discuss openly. In Tahoe Resources's Short Form Prospectus in 2015, it stated: "The regulatory and compliance costs to us under U.S. securities laws as a U.S. domestic issuer will be significantly more than the costs incurred as a Canadian foreign private issuer."⁵⁵⁶

The self-reporting requirement of Canada's provincial securities regimes appear to favour self-bias and underreporting to the benefit of CanCorps. While securities standards could arguably be said to require disclosure of environmental, social, and political issues lest a securities reporter face commission sanctions — an obvious deterrent to Canadian incorporation — relaxed monitoring of such requirements allows public corporations to gain benefits as listed above without facing real risk of punishment for downplaying their actions abroad. It is important to remember, however, that such oversight — effective or not — applies only to

⁵⁵² JCAP Report, *supra* note 7 at 24.

⁵⁵³ *Ibid* at 24-25.

⁵⁵⁴ *Ibid* at 24.

⁵⁵⁵ *Ibid* at 26.

⁵⁵⁶ Tahoe Resources Inc, *Short Form Prospectus* (2015) at 27.

publicly listed corporations; there is no need for a private CanCorp to report on its non-monetary business dealings, thus leaving the public generally veiled from its operations.⁵⁵⁷

International agreements

Canada's various international agreements provide CanCorps with attractive tax benefits, trade options, and investment security. Further to the tax benefits that flow from tax treaty states (explained above regarding the foreign surplus rule), Canada boasts free trade agreements with more than 40 countries, providing CanCorps with preferential market access around the world. The Canadian Mining Association lists specifically the North American Free Trade Agreement (NAFTA), the Comprehensive Economic and Trade Agreement with the European Union (CETA), and the Trans Pacific Partnership (TPP) as enabling strong economic growth for mining companies by eliminating tariffs, specifically those related to aluminum, nickel, non-ferrous metal, and iron and steel.⁵⁵⁸ Furthermore, Canada maintains dozens of bilateral trade accords with foreign states for the protection and promotion of Canadian investments. Such accords often require host states to encourage favourable investment conditions for Canadian corporate investors, to withhold from expropriation, and to compensate for losses suffered as a result of civil strife, armed conflict, or natural disasters.⁵⁵⁹

Tax benefits, loans, grants, insurance, favourable securities regimes, and international connection provide a confluence of financial benefit for CanCorps. Interestingly, that the economic benefits CanCorps receive are numerous is a sensitive fact for mining companies. In 2010, Vancouver-based Talonbooks published *Imperial Canada Inc: Legal Haven of Choice for*

⁵⁵⁷ Pursuant to the *Extractive Sectors Transparency Measures Act*, SC 2014, c 39, s 376, and for the purpose of fighting corruption, listed or unlisted Canadian extractive companies of a certain size must report payments greater or equal to \$100,000 made to access extraction activities including through taxes, royalties, dividends, bonuses, fees, and infrastructure improvements. Non-monetary activities need not be reported.

⁵⁵⁸ Mining Facts and Figures, *supra* note 539 at 73.

⁵⁵⁹ See for example: the *Agreement Between Canada and Mongolia for the Promotion and Protection of Investments*, (24 February 2017) Treaty No E105484; *Agreement between the Government of Canada and the Government of the Republic of Côte d'Ivoire for the Promotion and Protection of Investments*, (14 December 2015) Treaty Series No 2015/19; *Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments*, (9 December 2013) Treaty No E105391; *Agreement Between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments*, (6 June 1997) Treaty No E101522-CTS 1997 No 25.

the World's Mining Industries written by Québec academic researchers Alain Denault and William Sacher. The book examines the economic and political factors that contribute to why Canada was then home to 70% of the world's mining companies. Before publication, Barrick Gold demanded copies of the manuscript and proceeded to launch a multi-million dollar defamation action against the publishers, postponing the translation of the book into English.⁵⁶⁰ The action postponed the publishing of the book for two years, though it was eventually released.

Though important, financial benefits are not the only benefits provided a CanCorp; limited regulatory oversight also makes for a welcome home base.

2. Beneficial regulatory oversight

Weakened criminal sanctions

On June 21, 2018, the federal government budget omnibus Bill C-74 entitled “An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures,”⁵⁶¹ received royal assent. At Division 20 of that Bill, the government amended the *Criminal Code* to include provision for “remediation agreements” (at new sections 715.3-715.43) for certain offences.⁵⁶² Remediation agreements, also known as deferred prosecution agreements (DPAs), provide prosecutors the power to suspend charges and negotiate sanctions against an organization allowing an organization to avoid a public criminal prosecution. The purpose of the provisions is allegedly to “hold an organization accountable” and “denounce wrongdoing” while, among other things, reducing negative consequences of the wrongdoing for “persons — employees, customers, pensioners and others — who did not engage in the wrongdoing.”⁵⁶³

⁵⁶⁰ “Barrick Gold moves to block mining book” CBC News (12 May 2010); “Imperial Canada Inc.: ‘two major Canadian mining corporations have been trying to prevent Canadians from ever seeing this book,’” Talonbooks online news (18 July 2013) online: <www.talonbooks.com>.

⁵⁶¹ Bill C-74, *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 1st Sess, 42nd Parl, 2018 (as passed by the House of Commons June 21, 2018).

⁵⁶² Offences listed in Schedule to Part XXII.1 of the *Criminal Code* *supra* note 125, includes *Criminal Code* violations, among others: fraud (s 380), frauds on government (s 121), bribery of officers (ss 119/120) and bribery of a foreign public official (s 3 of *Corruption of Foreign Public Officials Act*).

⁵⁶³ *Criminal Code*, *supra* note 125 at s 715.31. Note, this is only one purpose among others. The list of purposes is: (a) to denounce an organization's wrongdoing and the harm that the wrongdoing has caused to victims or to the community; (b) to hold the organization accountable for its wrongdoing through effective, proportionate and dissuasive penalties; (c) to contribute to respect for the law by imposing an obligation on the organization to put in place corrective measures and promote a compliance culture; (d) to encourage voluntary disclosure of the

While DPAs may arguably lead to greater enforcement of and compliance with anti-corruption laws, without meaningful consequences for the corporations involved, a good case can be made that DPAs simply transform criminal sanctions into the “cost of doing business.”⁵⁶⁴

Though there is arguably a trend towards DPA schemes among some developed states,⁵⁶⁵ few schemes are operational. The notes provided by the federal government explaining the DPA amendments cited the existence of the American DPA provisions introduced in the 1990s,⁵⁶⁶ and the UK provisions introduced in 2013.⁵⁶⁷ Unfortunately, some examples from the American and UK experience have been less than promising.

In the UK, the 2017 DPA negotiated for Rolls-Royce, and judicially approved by the Right Honourable Sir Brian Leveson,⁵⁶⁸ was received with mixed opinion. Following a four-year investigation by the UK’s Serious Fraud Office (SFO) into systemic corruption at Rolls-Royce that spanned a quarter-century, seven countries, and 30 million documents, Rolls-Royce’s size and economic clout appear to have played a significant part in its DPA;⁵⁶⁹ indeed the collateral damage of serious threats to the viability of the company that would result from prosecution would have been too far-reaching. The Rolls-Royce DPA included disgorgement and penalties of

wrongdoing; (e) to provide reparations for harm done to victims or to the community; and (f) to reduce the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing. It is important to note that the purpose of avoiding negative consequences for “innocent” people is expressly not considered at s 715.32(2), the factors to consider in entering into a negotiation for a DPA. It is only in the “umbrella” subsection of s 715.32(2)(i) — any other factor the prosecutor considers relevant — that the “innocent persons” purpose may be considered.

⁵⁶⁴ Transparency International, “Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada” (July 2017) online: <http://www.transparencycanada.ca/wp-content/uploads/2017/07/DPA-Report-Final.pdf> [Transparency 2017].

⁵⁶⁵ While the US has used DPAs since the 1990s, recent players have included Japan (2018), France (2018), UK (2013), Singapore (2018), Australia (pending): Rahman Ravelli, “The international rise of deferred prosecution agreements - and how to obtain one,” *Lexology* (15 August 2018).

⁵⁶⁶ Canada, Parliament, Economics, Resources and International Affairs Division and Legal and Social Affairs Division, *Legislative Summary of Bill C-74: An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 42nd Parl, 1st Sess (20 April 2018); DPAs in the United States are not grounded in any specific legal framework but are based on policies issued by the Department of Justice and guidelines set out in memos issued by the Deputy Attorney General. As such, American DPAs are subject to the discretion of prosecutors and thus vary a great deal from case to case: Transparency 2017, *supra* note 564 at 10.

⁵⁶⁷ *Crime and Courts Act (UK) 2013*, c 22, Schedule 17 [Crime and Courts Act].

⁵⁶⁸ *Serious Fraud Office v Rolls Royce plc*, [2017] No U20170036 (QB) [Rolls-Royce].

⁵⁶⁹ Jennifer Wells, “The U.K.’s deferred prosecution agreements are instructive for the SNC-Lavalin drama” *The Toronto Star* (15 February 2019).

more than £670 million and independent monitoring of an ongoing compliance program.⁵⁷⁰ Transparency International responded to the DPA by noting that Rolls-Royce got off lightly and that the fine was relatively painless for such a powerful company, particularly given no individual actors were prosecuted. There is yet no evidence with respect to the effectiveness of the negotiated compliance program in terms of reducing corruption within Rolls-Royce.

In the US, scholars note that American judicial scrutiny over the terms of DPAs has been non-existent.⁵⁷¹ In the recent decision of *United States v Fokker Services BV*,⁵⁷² the DC Circuit curtailed recent efforts of reviewing judges who had tried to declare that an “Article III judge” is not a “potted plant”⁵⁷³ or “rubber stamp”⁵⁷⁴ when reviewing DPAs. The appellate court held that a court is *not* authorized to reject a DPA based on finding the charging decisions and the conditions agreed to are inadequate; to do so would be to interfere with the “Executive’s long-settled primacy over charging.”⁵⁷⁵ In 2010, Fokker — a Dutch company that sells products to the aerospace industry — approached the US government to self-report that it may have violated US sanctions and export laws by selling product in Iran, Sudan, and Burma. Following a four-year investigation, American authorities discovered Fokker had unlawfully earned \$21 million from 1147 transactions. The DPA arranged with Fokker required it to pay fines and penalties totalling \$21 million — effectively to pay back the income it had unlawfully generated and no more — and to implement new compliance policies.⁵⁷⁶ Indeed, the District Court judge found the DPA was too lenient and criticized the Department of Justice for prosecuting “so anemically” a company that had assisted some of the nation’s “worst enemies.”⁵⁷⁷ Specifically, like in *Rolls-Royce*, the DPA failed to require prosecution of individual actors. The “unnecessary broad conclusion” of the appellate court that the “Judiciary’s lack of competence to review the prosecution’s initiation and dismissal of charges equally applies to review of ... the choices reflected in the [DPA]’s terms” has worried some American criminal justice scholars.⁵⁷⁸

⁵⁷⁰ *Rolls-Royce*, *supra* note 568 at Appendix B.

⁵⁷¹ Mike Koehler, “Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement,” (2015) 49 UC Davis L R 497 at 505.

⁵⁷² *United States v Fokker Services BV*, 818 F3d 733 (DC Cir 2016) [Fokker].

⁵⁷³ *United States v HSBC Bank USA, NA*, No 12-CR-763, 2013 WL 3306161 (EDNY July 1, 2013) at 5.

⁵⁷⁴ *United States v Fokker Services BV*, 79 F Supp 3d 160, 164 (DDC 2015) [Fokker DC].

⁵⁷⁵ *Fokker*, *supra* note 567 at 743.

⁵⁷⁶ *Ibid* at 739.

⁵⁷⁷ *Fokker DC*, *supra* note 574 at 167.

⁵⁷⁸ “Criminal Law - Separation of Powers - D.C. Circuit Holds That Courts May Not Reject Deferred Prosecution

Despite such examples, the Canadian government incorporated a significantly similar system in Canada. Of particular import are the provisions related to publication of information. For instance, the new Canadian model, following that of the UK requires judicial oversight for acceptance of an agreement. However, like the UK, further monitoring is not circumscribed. Critics have argued independent monitoring should be required of DPA schemes and that monitor reports should be made public. In the United States, monitor reports are *not* publicized and the Department of Justice has repeatedly objected to public review of such reports, which has resulted in little public oversight of the effectiveness of DPA agreements on the subsequent operation of affected corporations.⁵⁷⁹ Similarly, while the public release of monitor reports is not addressed in the UK's Schedule 17, the UK's DPA Code of Practice notes that monitor reports are deemed confidential.⁵⁸⁰ Not only has the new Canadian scheme not addressed the disclosure of monitor reports, like the UK scheme, the assignment of independent monitors is not required.

Additionally, publication of an approved DPA is not *always* mandatory. In the UK, while there is requirement to publish a positive decision,⁵⁸¹ a judge may order postponement of publication, where it is "necessary to avoid substantial risk of prejudice to the administration of justice in any legal proceedings."⁵⁸² The Canadian model similarly provides the court with the discretion not to publish the DPA, but on a less rigorous standard: "if it is satisfied that the non-publication is necessary for the proper administration of justice."⁵⁸³ Notably, the Canadian Senate's Standing Committee on Legal and Constitutional Affairs expressed concern, noting a court's decision not to publish a remediation agreement may mean victims and other members of the public may never be informed of outcomes. The Standing Committee recommended remediation agreements "always be published at the earliest opportunity;"⁵⁸⁴ this change was not made to Bill C-74.

Agreements Based on the Inadequacy of Charging Decisions or Agreement Conditions," (2017) 130 Harv L Rev 1048 at 1051 and see footnote 42.

⁵⁷⁹ Transparency 2017, *supra* note 564 at 30-31.

⁵⁸⁰ *Ibid* at 30.

⁵⁸¹ The prosecutor must publish the DPA, the declaration of the court and its preliminary reasoning per section 8, *Crime and Courts Act*, *supra* note 567.

⁵⁸² *Ibid* at s 12.

⁵⁸³ *Criminal Code*, *supra* note 125 at s 715.42(2). Pursuant to subsection 3, the court must consider factors in making this decision, though some arguably support the corporation's interests ((e) the salutary and deleterious effects of making the decision).

⁵⁸⁴ Canada, Parliament, Senate Standing Committee on Legal and Constitutional Affairs, *Twenty Fifth Report: The subject matter of those elements contained in Divisions 15 and 20 of Part 6 of Bill C-74, An Act to implement certain*

As the content of the Canadian scheme has received criticism, the timing of its implementation has been similarly questioned given that it was brought about amid a significant looming criminal prosecution against one of Canada's biggest developers, SNC-Lavalin. Further criticism has addressed SNC's involvement in the drafting of the scheme.⁵⁸⁵

The SNC affair has already cast the future effectiveness of the DPA scheme in doubt.

Before the scheme's implementation, Transparency International Canada recommended that a DPA be a discretionary tool with only the prosecutor permitted to invite the defendant to enter into negotiations; the accused should have no right to demand that DPA negotiations commence.⁵⁸⁶ Notably, nothing in the language of the new DPA scheme suggests otherwise. However, following the Director of Public Prosecution's decision not to engaged in DPA negotiations with SNC, SNC — being advised by former justice of the SCC, Frank Iacobucci — applied for a judicial review of the prosecutor's discretionary decision.⁵⁸⁷ In doing so, it appears it had the support of at least some members of the governing party. Liberal MP Steven MacKinnon went so far as to explain to the CBC that SNC was “entitled to a deferred prosecution agreement.”⁵⁸⁸ Such legal challenge was not surprising given the extended media campaign SNC launched in Québec to raise support in its push for a DPA. In one advertisement it stated, “The Government of Canada passed legislation in 2018 to allow companies to settle charges via a remediation agreement, and yet the new law is not being made available to SNC-Lavalin for unknown reasons.”⁵⁸⁹ SNC's sense of entitlement is particularly noteworthy given that it is questionable whether its alleged criminal wrongdoing could ever be subject to a DPA. In Canada, as in the USA and the UK, DPAs are available for monetary crimes, but not those that involve bodily harm or death. SNC is charged with bribing Libyan dictator Muammar Gaddafi with more than \$50 million in exchange for billions of dollars in contracts — including

provisions of the budget tabled in Parliament on February 27, 2018 and other measures, 42nd Parl, 1st Sess (27 February 2018); note, the Senate Standing Committee also expressed their concern regarding a lack of information provided by the Minister of Justice, the fact that the changes were introduced through a budget omnibus bill, and an apparent lack of consultation by government with victims of corporate harm in designing the new scheme (the last observation was proposed by a minority of Senators).

⁵⁸⁵ Paul Wells, “Canada, the show,” *Maclean's* (12 February 2019) [Wells 2019].

⁵⁸⁶ Transparency 2017, *supra* note 564.

⁵⁸⁷ Counsel for the Public Prosecution Service brought a motion to strike for no cause of action and were successful: *SNC-Lavalin Group Inc v Canada (Public Prosecution Service)*, 2019 FC 282.

⁵⁸⁸ Catharine Tunney, “Liberal MP says SNC-Lavalin ‘entitled’ to agreement to avoid criminal trial,” *CBC News* (4 March 2019).

⁵⁸⁹ Paul Wells, “SNC-Lavalin needed what Jody Wilson-Raybould wouldn't give it,” *Maclean's* (8 February 2019).

infrastructure contracts to build prisons — over the course of 16 years. SNC did so while almost certainly aware of the reality of Gaddafi’s direction of and role in widespread human rights abuses including torture, murder, abductions, and rape.⁵⁹⁰ For instance, SNC helped finance Gaddafi’s son’s soccer team after his bodyguards opened fire on fans — resulting in the killing of between 20-50 people — for booing a referee seen to favour the son.⁵⁹¹

The timing of the DPA amendments and support of SNC’s position by Canada’s governing party⁵⁹² suggests the new DPA scheme was indeed meant to save precisely this kind of company from prosecution, despite any link between the company’s actions and subsequent human rights abuses. Such support potentially foreshadows the way in which such agreements may be interpreted in the future, possibly by a more corporate-friendly public prosecutor. Even at their best, DPAs represent a collective “giving up” in the serious investigation and prosecution of corporations; they are the admission on the part of government that some companies are simply too big, too powerful, too complicated, and too involved in politics and the community to be treated like everyone else. This, despite the government’s own role in *allowing* such companies to self-complicate, to grow unwieldy, and to amass such power. The recent boom in DPA schemes, including that in Canada, will provide an “option C” for CanCorps that engage in illegal practices: pay the price to do business, and move on.

The advent of DPAs as a corporate-friendly oversight tool is unsurprising given the general lack of legislated corporate oversight in Canada.

Legislated corporate oversight

No legislation has been implemented in Canada — either federally or in any province or territory — to ensure victims of extractive harms abroad have access to damages in Canada, nor to prosecute CanCorps for poor behaviour abroad. This reality is not for lack of opportunity.

⁵⁹⁰ Sandy Garossino, “The hidden key to the SNC-Lavalin scandal,” *National Observer* (8 March 2019).

⁵⁹¹ *Ibid.*

⁵⁹² I have not touched on the parallel controversy respecting the Prime Minister’s alleged interference with the Attorney General and her subsequent demotion following her refusal to pressure the Director of Public Prosecutions into offering SNC a DPA. However, the controversy has clearly shown the current leadership’s continued support of SNC. See the following pieces for a review of that issue: Craig Scott, “If the Liberals succeed in normalizing their behaviour in the SNC-Lavalin affair, it will have a lasting negative impact on our institutions,” *Policy Options* (5 March 2019); Wells 2019, *supra* note 585.

In 2005, following hearings on the abusive activities of the mining company TVI Pacific Inc in the Philippines, the House of Commons Standing Committee on Foreign Affairs and International Trade (SCFAIT) presented Parliament with the Fourteenth Report of the 38th Parliament: “Mining in Developing Countries - Corporate Social Responsibility.”⁵⁹³ The SCFAIT had established a subcommittee tasked with the responsibility of inquiring “into matters relating to the promotion of respect for international human rights and the achievement of sustainable human development.” The Report made eight general recommendations including “establish[ing] 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.” The government committed to further examining some issues, but ultimately rejected any recommendations that would require binding commitments by government or corporations.⁵⁹⁴

In an attempt to revive the concerns raised by the SCFAIT, in 2007 NDP MP Peter Julian introduced a private members bill that would allow foreign plaintiffs to sue in Canada for claims based on violations of international law or treaties to which Canada is a party.⁵⁹⁵ The Bill proposed adding a provision to the *Federal Courts Act*⁵⁹⁶ providing the Federal Courts with original jurisdiction in civil cases in which “the claim for relief or remedy arises from a violation of international law or a treaty to which Canada is a party and commenced by a person who is not a Canadian citizen...” Among acts over which the Federal Court would have jurisdiction were breaches of customary and treaty-based international law such as genocide, slavery, torture, and war crimes. The Bill further proposed to limit the flexibility of the common law test for *forum non conveniens* in such cases by requiring the court not stay a proceeding unless the defendant could establish, not only that another forum was available and appropriate but, that that other forum would “fairly and effectively provide a final and binding decision,” that the other forum would do so “in a timely and efficient manner,” that the interests of justice

⁵⁹³ House of Commons, Standing Committee on Foreign Affairs & International Trade, *Fourteenth Report: Mining in Developing Countries*, 1st Sess, 38th Parl (2005).

⁵⁹⁴ Department of Foreign Affairs & International Trade, *Mining in Developing Countries - Corporate Social Responsibility: The Government's Response to the Report of the Standing Committee on Foreign Affairs and International Trade* (2005) online: <<http://www.ourcommons.ca/DocumentViewer/en/38-1/FAAE/report-14/response-8512-381-179>>.

⁵⁹⁵ Bill C-492, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 2nd Sess, 39th Parl, 2007.

⁵⁹⁶ *Federal Courts Act*, RSC 1985, c F-7.

“adamantly” require that a stay be granted and — notably adding the Australian and American inwardly-focused approach — “that *Canada* is not a suitable forum in which to decide the case.” The Bill has not progressed past its first reading in any of its iterations from Parliament to Parliament.

In 2009 the Liberal MP, John McKay, introduced Bill C-300, “An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries.”⁵⁹⁷ The purpose of the proposed act was “to ensure that corporations engaged in mining, oil or gas activities and receiving support from the Government of Canada act in a manner consistent with international environmental best practices and with Canada’s commitments to international human rights standards.”⁵⁹⁸ The Bill would create reporting requirements for Ministers and the ability to receive complaints and then, through amendments to the *Canada Pension Plan Investment Board Act*,⁵⁹⁹ the *Special Economic Measures Act*,⁶⁰⁰ the *Export Development Act*,⁶⁰¹ and the *Department of Foreign Affairs and International Trade Act*,⁶⁰² would create Ministerial power to limit federal support of CanCorps. The Bill passed a first and second reading and was referred to SCFAIT. In June 2010, SCFAIT returned the Bill without amendment. However, following a significant lobbying effort by CanCorps and mining associations,⁶⁰³ the Bill was defeated at the reporting stage by six votes.⁶⁰⁴ The failure of this bill — the clear opposition to the Minister’s proposed ability to cut funding to a corporation — further calls into question the effectiveness of, for instance, EDC’s environmental and social responsibility mechanisms. Notably, the EDC joined opponents of the bill in lobbying against it.⁶⁰⁵

Today, two federal government bodies are responsible for “monitoring” corporate social responsibility in Canada: (1) the office of the Extractive Corporate Social Responsibility Counsellor (CSR Counsellor) and (2) the National Contact Point (NCP) under the OECD

⁵⁹⁷ Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, 3rd Sess, 40th Parl, 2010 [Bill C-300].

⁵⁹⁸ *Ibid* at s 3.

⁵⁹⁹ *Canada Pension Plan Investment Board Act*, SC 1997, c 40.

⁶⁰⁰ *Special Economic Measures Act*, SC 1992, c 17.

⁶⁰¹ *EDA*, *supra* note 513.

⁶⁰² *Department of Foreign Affairs and International Trade Act*, RSC 1985, c E-22.

⁶⁰³ Opponents of the bill — mining companies — argued it would kill Canadian mining and those companies that remained would move elsewhere: Simons & Macklin 2014, *supra* note 238 at 264.

⁶⁰⁴ Canada, Parliament, *House of Common Debates (Hansard)*, 40th Parl, 3rd Sess, No 88, Vol 145 (27 October 2010) at 1840.

⁶⁰⁵ Simons & Macklin 2014, *supra* note 238 at 264.

Guidelines for Multinational Enterprises.⁶⁰⁶ Neither office has the power to conduct investigations, sanction companies directly, or compensate victims.

The office of the CSR Counsellor was established in 2009 following the release of the federal policy called “Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector,” with the power to receive complaints and *invite* CanCorps to participate in a mediation with complainants, though the corporations may refuse or withdraw at any stage of the process for any reason. The CSR Counsellor cannot act unless there has been a complaint, cannot investigate complaints, and cannot issue binding decisions to the corporations.⁶⁰⁷ Since its inception, the CSR Counsellor has not developed a process for withdrawing support or withholding funding from companies engaged in nefarious practices and as of the end of 2017, the office of the CSR Counsellor had not indicated it had acted with the Canadian Government or Canadian embassies to withhold funding or assistance from any company.⁶⁰⁸ In its 10 years of operation, the office has reported only six requests for review. One of the more recent examples, a complaint against Silver Standard (a CanCorp) operating in Argentina, concluded when Silver Standard withdrew from the voluntary process. Similarly, Excellon Resources, operating in Mexico, withdrew from the mediation process prior to commencement, noting: “it did not consider the dialogue process facilitated by the office to provide value to the company or the company’s shareholders.”⁶⁰⁹

⁶⁰⁶ OECD, *OECD Guidelines for Multinational Enterprises*, 2000 [OECD Guidelines].

⁶⁰⁷ Shin Imai et al, “Access to Justice and Corporate Accountability: A Legal Case Study of HudBay in Guatemala” (2014) 35:2 Can J of Dev Stud 286 [Imai et al 2014].

⁶⁰⁸ On its website the CSR Counsellor references Canada’s CSR strategy for the extractive sector, “Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad,” as establishing “consequences” for companies that do not embody CSR best practices or refuse to engage in good faith with the CSR Counsellor’s dialogue facilitation process: Global Affairs Canada, “Reviewing Corporate Social Responsibility Practices,” online: <https://www.international.gc.ca/csr_counsellor-conseiller_rse/Reviewing_CSR_Practices-Examen_Pratiques_RSE.aspx?lang=eng>. The CSR Strategy states “Companies are expected to align with widely recognized CSR-related guidance and will be recognized by the CSR Counsellor’s Office as eligible for enhanced Government of Canada economic diplomacy. Companies will also face withdrawal of TCS and other Government of Canada advocacy support abroad for non-participation in the dialogue facilitation processes of Canada’s NCP and Office of the Extractive Sector CSR Counsellor...Canadian companies found not to be embodying CSR best practices and who refuse to participate in dispute resolution processes contained in the CSR Strategy, will no longer benefit from economic diplomacy of this nature:” Global Affairs Canada, “Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad” online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf> at 12.

⁶⁰⁹ Simons & Macklin 2014, *supra* note 238 at 261.

In 2018, the federal government created the new position of “Canadian Ombudsperson for Responsible Enterprise” (CORE) to replace the CSR Counsellor; in May 2019, the CSR Counsellor’s position will be folded into the ombudsperson’s role. The CORE’s mandate will include addressing complaints related to allegations of human rights abuses arising from a CanCorps activity abroad, making recommendations, monitoring implementation of those recommendations, and reporting publicly.⁶¹⁰ The CORE is not yet operational and is set to be in place “as soon as possible.”⁶¹¹ The government indicated this position will differ from that of the CSR Counsellor in that it will have the ability to investigate independently and that it will monitor more sectors of Canadian business, beyond extractive companies. It remains unclear whether the CORE will have any real ability to sanction or limit the activities of CanCorps abroad, beyond making recommendations to government.⁶¹²

The OECD NCP is similarly limited. In 1976, the OECD released its Guidelines for Multinational Enterprises (OECD Guidelines),⁶¹³ voluntary principles and standards for responsible business conduct. The OECD Guidelines encourage enterprises to follow a number of positive steps, including for our purposes, to: respect the human rights of those affected by their activities;⁶¹⁴ develop systems that foster relationships of confidence and mutual trust between enterprises and the societies in which they operate;⁶¹⁵ respect trade unions;⁶¹⁶ contribute to the elimination of all forms of forced or compulsory labour;⁶¹⁷ and maintain plans to prevent serious environmental and health damage from their operations.⁶¹⁸ The OECD Guidelines are the only international guidelines that recommend risk-based due diligence⁶¹⁹ and provide tailored

⁶¹⁰ Global Affairs Canada, “Responsible business conduct abroad – Questions and answers”, online: <<https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng>> [Responsible Conduct Abroad].

⁶¹¹ On April 8, 2019, Global Affairs Canada announced the appointment of Sheri Meyerhoffer as the first Canadian Ombudsperson for Responsible Enterprise: Global Affairs Canada, News Release, “Minister Carr announces appointment of first Canadian Ombudsperson for Responsible Enterprise” (8 April 2019) online: <<https://www.canada.ca/en/global-affairs/news/2019/04/minister-carr-announces-appointment-of-first-canadian-ombudsperson-for-responsible-enterprise.html>>.

⁶¹² As yet, the new Ombudsperson’s powers remain undefined: “New corporate-ethics embed named but powers remain unclear,” *The Canadian Press* (8 April 2019).

⁶¹³ OECD Guidelines, *supra* note 606; Canada as a member of the OECD is an “adhering government.”

⁶¹⁴ *Ibid* at II(2).

⁶¹⁵ *Ibid* at II (7).

⁶¹⁶ *Ibid* at IV(1)(a).

⁶¹⁷ *Ibid* at IV(1)(c).

⁶¹⁸ *Ibid* at V(5).

⁶¹⁹ OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018.

sector-specific guidance for multinational enterprises.⁶²⁰ As recently as May 30, 2018, Canada and other OECD countries agreed to step up responsibility and commitment to the OECD Guidelines through their support and monitoring of the implementation of the new OECD Due Diligence Guidance for responsible business conduct at the OECD's annual meeting.⁶²¹ While the OECD Guidelines are voluntary, Canada promotes its support of the OECD Guidelines through its NCP.⁶²²

However, similar to the CSR Counsellor, the NCP is limited in its jurisdiction;⁶²³ any resolution between parties is non-enforceable and the NCP has no power to award compensation.⁶²⁴ Since 2001 (17 years), only 19 “specific instances” (read, complaints) were forwarded to the NCP. In June 2017, the UN Working Group on Business and Human Rights noted in its end-of-visit statement that the Canadian NCP was ill-equipped to deal with human rights concerns and that it ought to be made more independent, vested with adequate resources, and be made more transparent in its process.⁶²⁵ In January 2018, MiningWatch, in partnership with OECD Watch, filed a statement outlining specific concerns with the way in which the NCP had handled complaints raised against the Sakti Group (a CanCorp) alleging the NCP failed to follow enumerated OECD processes and provided no clear basis for failing to do so.⁶²⁶ Specifically, although finding allegations made regarding Sakti's alleged involvement in laundering the proceeds of corruption from Malaysia were “material” and “substantiated,” five

⁶²⁰ The OECD has developed sector-specific due diligence guidance and good practice documents for several sectors including minerals and extractive sectors: *Ibid*; Also see OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, 2017, which is supposed to provide companies with a practical framework for identifying and managing risks with regard to stakeholder engagement activities to ensure companies play a role in avoiding and addressing adverse impacts as defined in OECD Guidelines, *supra* note 606.

⁶²¹ OECD, “Countries commit to step up efforts to drive more responsible business conduct through new OECD instrument,” (30 May 2018) online: <<http://www.oecd.org/investment/mne/countries-commit-to-step-up-efforts-to-drive-more-responsible-business-conduct-through-new-oecd-instrument.htm>>.

⁶²² The role of the NCP is to promote awareness of the OECD Guidelines; dialogue is a voluntary, non-judicial grievance mechanism aimed at working towards mutual agreement.

⁶²³ Canada's NCP is a committee formed by seven member departments and chaired by Global Affairs Canada with Natural Resources Canada as the vice-chair: Global Affairs Canada, “Canada's National Contact Point for the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises,” online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1&menu=R>.

⁶²⁴ Imai et al 2014, *supra* note 607 at 16.

⁶²⁵ OHCHR, “Statement at the end of visit to Canada by the United Nations Working Group on Business and Human Rights” (June 2017) online: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21680&LangID=E>>.

⁶²⁶ See: MiningWatch Canada & OECD Watch, “Statement from OECD Watch and MiningWatch Canada regarding the Canadian NCP's improper handling of the OECD Guidelines specific instance Bruno Manser Fonds vs Sakti Group” (2018) online: <<https://miningwatch.ca>>.

months later, the NCP dismissed the case without providing clarification for its reversal in position. MiningWatch highlighted that, later that year, the NCP issued an eight-page final statement⁶²⁷ in which it revealed it had experienced significant pressure from a member of parliament and from Sakto's legal counsel challenging the NCP's legal jurisdiction and findings. This "final statement" was later retracted and replaced with a new final statement, removing all mention of concerns regarding Sakto's conduct and instead suggesting Bruno Manser Fonds (the not-for-profit representing the complainants) was at fault and would have to demonstrate its commitment to "good faith" should it request any further review in the future.⁶²⁸

I am aware of no official change to the NCP's role or powers since the UN Working Group or MiningWatch's complaints were made public. Indeed, over the last 15 years, rather than legislating power to monitor and punish CanCorps in Canada, the federal government has preferred the creation of non-binding policy and monitoring schemes. The federal government published guidelines available to CanCorps entitled "Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders" in which the government explains that CanCorps are "encouraged to operate lawfully, transparently and in consultation with host governments and local communities and to conduct their activities in a socially and environmentally responsible manner."⁶²⁹

Similarly, in 2009, Global Affairs Canada launched Canada's official policy on corporate social responsibility called "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad."⁶³⁰ The policy relies on education and promotion of "effective" (not binding) CSR, and specifically notes the policy builds on Canada's "steadfast engagement" with Canada's commitments under the UN Guiding

⁶²⁷ No longer available online.

⁶²⁸ Canada's National Contact Point, "Canada's National Contact Point - Final Statement Bruno Manser Fonds (BMF) and Sakto Corporation et. al. (Sakto)" (11 July 2017) online: <https://miningwatch.ca/sites/default/files/canada_ncp_final_statement_on_sakto.pdf>.

⁶²⁹ Global Affairs Canada, "Voices at risk: Canada's Guidelines on Supporting Human Rights Defenders," online: <https://international.gc.ca/world-monde/issues_developpement-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng#a4> at s 4.2.

⁶³⁰ Responsible Conduct Abroad, *supra* note 610.

Principles on Business and Human Rights (UNGP)⁶³¹ and the OECD Guidelines (read, reliance on the NCP).

CanCorps derive not only significant financial benefit from incorporation or doing business in Canada, they are also able to do so in an environment where official monitoring of their behaviour is limited and there are no effective means by which the government can or will choose to limit their profitability or access to such financial benefit. By choice, the federal government has not provided itself with the tools with which it could control or aggressively guide the behaviour of CanCorps operating abroad. This limitation results in a safe and financially comfortable home base for CanCorps. From this home base, CanCorps can further their profitability through the promotion of its reputation, borrowed from its national host.

3. Canada's reputation as a shroud of human rights support

It is increasingly common for a corporation to adopt CSR policies to assist with the promotion of its corporate reputation,⁶³² and respond to “issues beyond the...economic, technical, and legal requirements of the firm to accomplish social benefits along with the traditional economic gains which the firm seeks.”⁶³³ In developing CSR policies, MNEs often cite adherence to voluntary international instruments. For instance, Barrick Gold promotes its commitment to “working constructively” with governments and other partners to meet the UN

⁶³¹ UNGA, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 2011, HR/PUB/11/04 [UNGP].

⁶³² While traditional CSR saw corporations donating to causes unrelated to their business activities, modern CSR sees corporations addressing ways in which to adapt current business practices or to engage in measures to offset current business practice. One of the most common types of CSR is the “information-based approach,” also known as reporting: Graeme Auld et al, “The New Corporate Social Responsibility” (2008) 33 *Annu Rev Environ Res* 413 [Auld et al 2008] at 415; The most comprehensive source of data on environmental and social governance (ESG) reporting is done by KPMG in the Netherlands. In 1993 ESG reporting of the top 100 companies in OECD countries was 12%, in 2013 that percentage rose to 76%. Of the largest 250 companies worldwide, the percentage that engage in ESG reporting is 93%: Williams 2018, *supra* note 529.

⁶³³ Keith Davis, “The Case For and Against Business Assumption of Social Responsibilities,” (1973) 16 *Am Mngmt J* 312 at 312. While reporting may be one of the most preferred CSR approaches, the Business and Human Rights Centre, an NGO supported by the UK and German governments, found reporting does not necessarily lead to changes in the field. For instance, despite Barrick Gold’s 100% reporting rate on the UN Compact, Barrick’s operations at its Porgera mine in Papua New Guinea have come under fire for the “mine’s impact on the local community found 920 alleged violations including rape, sexual assault, drownings and shootings”: Business and Human Rights Resource Centre, “Papua New Guinea: Report highlights abuses at Porgera gold mine; urges co. to address harm & strengthen remedy mechanism” (6 February 2019) online: <<https://www.business-humanrights.org/en/papua-new-guinea-report-highlights-abuses-at-porgera-gold-mine-urges-co-to-address-harm-strengthen-remedy-mechanism>>.

Sustainable Development Goals by 2030,⁶³⁴ while Goldcorp promotes its implementation of the UN Declaration of Human Rights and the UN Guiding Principles on Business and Human Rights.⁶³⁵ Some MNEs further promote their CSR initiatives through engagement in NGO partnerships, borrowing the goodwill associated with, for instance, the World Wildlife Fund, to sell the company's commitment to CSR.⁶³⁶ However, an MNE's opportunity to engage with or merely cite international CSR standards or partner with NGOs can be done from anywhere. In contrast, the ability for MNEs to borrow a *home country's* reputation is tied to nationality and cannot be underestimated. Indeed, a CanCorp is marked by Canada's reputation when operating abroad.

And, while the reality of its *actual* commitment is hotly debated, Canada certainly promotes itself as a guardian and promoter of human rights, at home and abroad. Since its participation and promotion of the UDHR in 1948,⁶³⁷ Canada has since committed to and voiced support for a large number of human rights instruments —the provisions of which have direct reference to the activities of CanCorps — such as: the codification in 1966 of the UDHR rights in the International Covenant on Civil and Political Rights⁶³⁸ and the International Covenant on Economic, Social and Cultural Rights;⁶³⁹ the 1976 OECD Guidelines;⁶⁴⁰ the 1977 International Labour Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy;⁶⁴¹ the 1999 UN Declaration on Human Rights Defenders;⁶⁴² the UN Guiding Principles on Business and Human Rights (UNGP),⁶⁴³ and the more recent 2015 UN Sustainable

⁶³⁴ Barrick, "U.N. Sustainable Development Goals," online: <<https://www.barrick.com/English/sustainability/approach/UN-sustainable-development-goals/default.aspx>>.

⁶³⁵ Goldcorp, "2017 Sustainability Report: Human Rights," (2017) online: <<http://csr.goldcorp.com/2017/communities/human-rights>>.

⁶³⁶ See World Wildlife Fund's partnership with Unilever and Domtar: Auld et al 2008, *supra* note 627 at 420.

⁶³⁷ UDHR, *supra* note 179.

⁶³⁸ ICCPR, *supra* note 364.

⁶³⁹ ICESCR, *supra* note 364.

⁶⁴⁰ OECD Guidelines, *supra* note 601. The guidelines encourage multinational enterprises to respect the human rights of those affected by their activities including the prevention of serious health and environmental damage and the promotion of trade unions: see Arts II(2), II(7), IV(1)(a), V(5).

⁶⁴¹ ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* 5th Ed, 204th Sess (1977). Unlike other such declarations, the ILO declaration specifically applies not only to states but also to multinational enterprises (Art 6).

⁶⁴² UNGA, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, A/RES/53/144, 1999.

⁶⁴³ UNGP, *supra* note 626. The Guiding Principles were established in 2011 by the United Nations General Assembly. After a stalemate at the UN Human Rights Commission following an attempt at drafting the *Norms on the Responsibilities of Transnational Corporation and Other Business Enterprises* in 2004, American scholar John Ruggie was appointed Special Representative of the Secretary General with a mandate to identify standards of

Development Goals⁶⁴⁴ and its follow-up, the UN Global Compact.⁶⁴⁵ Notably, after years of resistance,⁶⁴⁶ in May 2016 the Canadian federal government declared its “full support”⁶⁴⁷ for the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP).⁶⁴⁸

Despite Canada’s relatively small population size, Canada has consistently participated in the governance of world affairs. For instance, since 1976 it has been a member of the Group of Seven (G7) Industrialized Nations — described as the “steering group for the West”⁶⁴⁹ — and has served as a non-permanent member on the United Nations Security Council for six terms, thus ranking in the top 10 of non-permanent members. Further, despite ranking as 38th in population size, Canada’s GDP as measured by the World Bank ranks 10th in the world.⁶⁵⁰ The Reputation Institute — an American corporate consulting agency which has listed the most reputable countries since 2005 — has ranked Canada (as measured by the reputation of Canadian

corporate responsibility, to focus on human rights impact assessments and comprise best practices of states and corporations, and provide concrete guidance regarding the obligations and responsibilities of states and businesses, among other things. In 2008, Ruggie presented the “Protect, Respect and Remedy Framework.” After further study, in 2011 Ruggie concluded his work by issuing the Guiding Principles, a set of 31 recommendations containing operational principles to support the initial Framework. The principles call on states to protect human rights and ensure remedies are provided for victims of human rights abuses. Additionally, the framework calls on multinational enterprises to respect human rights by resisting interference with such rights. Notably, Ruggie concluded the state’s duty to protect human rights extraterritorially, while encouraged, is not mandated: see Radu Mares, “Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress,” in Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights* (Leiden: Martinus Nijhoff Publishers, 2012) at 3. John Knox, “The Ruggie Rules: Applying Human Rights Law to Corporations,” in Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights* (Leiden: Martinus Nijhoff Publishers, 2012) at 79.

⁶⁴⁴ UNGA, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁶⁴⁵ UNGC, *UN Global Compact: The Ten Principles*, 2015.

⁶⁴⁶ While the Conservative Government of Stephen Harper removed Canada’s permanent objector status in 2010, that government nonetheless dismissed UNDRIP as merely aspirational and non-binding: Indigenous and Northern Affairs Canada, News Release “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (12 November 2010) online: <<https://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>>.

⁶⁴⁷ Tim Fontaine, “Canada officially adopts UN declaration on rights of Indigenous Peoples” CBC (10 May 2016); On April 21, 2016, NDP MP Romeo Saganash introduced Bill C-262: Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016. The Bill would require: “The Government of Canada, in consultation and cooperation with indigenous peoples in Canada, must take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples”: Section 4. With a vote of 206-79, the Bill was sent to the Senate. At the time of writing, the Bill, having not been passed before the end of June 2019 when the Senate stood down, died on the Senate floor. The Liberal government has, however, stated it would re-introduce the bill should it be re-elected in fall 2019: John Paul Tasker, “Rona Ambrose’s sex assault bill is dead – and so is the UNDRIP bill” *CBC* (21 June 2019).

⁶⁴⁸ UNGA, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295.

⁶⁴⁹ Council on Foreign Relations, “The Group of Eight (G8) Industrialized Nations” (3 March 2014) online: <<https://www.cfr.org/background/group-eight-g8-industrialized-nations>>.

⁶⁵⁰ World Bank, “GDP (current US\$): World Development Indicators” (2018) online: <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?year_high_desc=true>.

companies) in the top seven countries since at least 2011.⁶⁵¹ By such measures, Canada appears to be punching above its weight as an influential leader, one that promotes and supports human rights globally.

Not surprisingly, the federal government and associated crown corporations have promoted this reputation. In selling Canada as a place to headquarter business, the EDC boasts that “Canadian companies are increasingly commanding respect on the global stage, for reasons ranging from our Canadian values to our capabilities and expertise in various industry sectors...The Canada brand is incredibly hip — and right now, it’s the envy of the world.”⁶⁵² In concert, the TCS advertises that Canada ranks among the top countries in 2017 for business, as being one of the easiest places to start a business, and first in the G7 for overall living conditions, quality of life, democracy, economic freedom, social progress and, importantly, overall reputation.⁶⁵³

It is clear global mining companies agree Canada is a favourable state in which to headquarter their businesses. Mining CanCorps represent nearly half of publicly held global mining businesses, and while they control \$88.3 billion in assets at home in Canada, this only accounts for one third of the value of assets held abroad by mining CanCorps: \$170.8 billion.⁶⁵⁴ A significant location of these foreign assets are in South America (\$53.4 billion) and Africa (\$31.3 billion), while Asia experienced the greatest gain in Canadian investment (up 18.2%, \$11.1 billion in 2015); in other words, much of the *business of mining* is done in Canada and the majority of *mining* is done abroad from the comfort of “home.” Canada’s reputation abroad provides CanCorps with the means to effectively and unfairly “bait and switch;” such corporations presenting themselves cloaked in the social and environmental “values” of the Canadian state only to flee liability – and, in turn, the critical ethical values-driven juridical gaze – in that same state.

Canada is a stable democracy in which a CanCorp may have access to significant financial and expert capital, insurance, international access, and tax breaks, much of which

⁶⁵¹ Reputation Institute, “The World’s Most Reputable Countries” (2018) online: <<https://www.reputationinstitute.com/sites/default/files/pdfs/2018-Country-RepTrak.pdf>>.

⁶⁵² Canada Brand, *supra* note 514.

⁶⁵³ Canadian Trade Commission Service, “Invest in Canada,” (Winter 2018) online: <<https://www.international.gc.ca/investors-investisseurs/assets/pdfs/download/Infographics.pdf>>.

⁶⁵⁴ Mining Facts and Figures, *supra* note 539 at 70.

comes at the expense of the Canadian taxpayer. The financial and human capital benefits of headquartering a corporation in Canada lead to significant advantages for a CanCorp. Such advantages are supported by a strong national reputation with which a CanCorp can promote itself abroad while being subject to a consistently non-interventionist regulatory system.

However, the necessary consequence of being domiciled in a stable developed state with an (arguably) strong democracy is the existence of a strong judiciary. Fairness — in its operation as between the Field and the CanCorp — dictates that the multitude of benefits reaped by a CanCorp ought to be met by real responsibility before the same country's judiciary. As John Dewey explained, the corporation is a right-and-duty-bearing unit;⁶⁵⁵ it is now a matter of determining whether society will impose fairness, or an equality as between rights (benefits) and duties, to its corporate nationals. This basic duty of democratic fairness — that all Canadians are subject to the law and to Canada's courts — begs for a reality frame in the judicial examination of a CanCorp's impacts abroad. As Trevor Farrow noted, Canada's acceptance of a capitalist-style economic and trade development means it should also incorporate responsibilities that attend to those policy decisions; to the extent the "fruit" of our domestic policy choices — such as financial and regulatory support for CanCorps — leads to serious human rights violations, our courts need to be made available as a resource for remedies.⁶⁵⁶

⁶⁵⁵ John Dewey, "The Historic Background of Corporate Legal Personality" (1926) 35 Yale LJ 655.

⁶⁵⁶ Farrow 2003, *supra* note 474 at 704.

Conclusion

At the front end of transnational tort litigation, it is jurisdiction that must be overcome by putative foreign plaintiffs. However, over the last 30 years, the development of conflict of laws legislation, common law, and Civil Code provisions has created a legal framework that, *in theory* (and sometimes in practice), supports the assertion of jurisdiction, specifically in cases involving breaches of human rights by Canadian persons. Even the traditional international norm of state comity, in its flexibility and modern adaptation, supports such an assertive approach to jurisdiction.

In other words, it is not the tests for *forum non conveniens* and forum of necessity that require change to see transnational cases heard in Canada. The tests already allow for plaintiffs to choose their preferred forum, are imbued with a plaintiff-friendly burden (even an “exceptional” burden in Québec), and require Canadian courts to consider justice in their balancing of factors. In fact, even imagining further liberalization of the test for jurisdiction may not make any difference to the tendency of the judiciary to avoid assertion of jurisdiction in the first place. This is so as it is not the test itself but the *habitus* of judges as agents of the judicial Field that impresses a state-centred traditionalist approach and leads to Canadian judges shunting foreign plaintiffs away from Canadian jurisdictions and back to foreign jurisdictions that are unlikely to provide justice.

While some in the Field appear to be able to shake their traditionalist *habitus* — at least in some cases — the ongoing tendency of the Field (from the superior courts to the SCC) to rely on traditional norms of sovereignty and territorialist comity leads to the conclusion that a shift in framing is required. To force the Field to see the forest for the trees, or to frame transnational actions in a reality of global corporate power dynamics, may be impossible (or at least very challenging) in the light of the current Field *habitus*. Thus, I have argued that one approach to ignite a shift towards a global justice reality frame is for practitioners to lean into traditional Field *doxa* – or tenets – whose reference may help to steer the Field *habitus* towards a more liberal — arguably, accurate — interpretation of the tests for jurisdiction. The *doxa* that I argue may be most effective is that of fairness.

In the transnational tort arena, many commentators rely on fairness to argue that, for instance, corporations must not be able to profit while taking no responsibility for their having taken advantage of vulnerable populations. In other words, it is unfair for giants to take advantage of the little guy. This conception of fairness pits two or more different parties against each other and argues that fairness must be understood in a grounded manner, aware of the potential inequality of treating differently positioned parties equally (read, the same). While this argument is attractive and can be morally effective in some contexts, it requires Canadian Field agents (judges) to accept they have a duty to foreign parties, an already challenging task to those grounded in territoriality. Thus, in order to steer even the most traditional Field agents towards a liberal interpretation of jurisdiction, I argue that a traditional, equality-based conception of fairness may be effective when used in relation to treatment of a single actor. Rather than comparing a corporate party to a vulnerable group of foreign plaintiffs, it is more effective to apply a Rawls-based fairness approach to that Canadian corporate party alone. In this way, we may avoid having to rely on globalized (liberal and uncomfortable) interpretations of justice in the construction of our doxic fairness lens.

In providing Canadian courts with this lens, one that asks whether the corporate party is being treated *equally* by the Canadian state in benefit and burden, the question of whether fairness dictates an assertion of jurisdiction is answered by the extent to which Canadian corporations take benefit from Canada while avoiding responsibility. As demonstrated in Chapter 3, in Canada it is clear that CanCorps doing business abroad, particularly those in mining, receive considerable benefit while avoiding burdens. CanCorps receive significant financial benefits through government funding, public investment, tax avoidance, and insurance. They do so while under no obligation to provide business opportunity, jobs, or benefit back to the state. In exchange, the Canadian government has repeatedly avoided instituting any effective corporate oversight mechanism and has instead preferred the creation of a scheme to assist large corporations avoid prosecution. In further benefit, CanCorps borrow the reputation and goodwill of the Canadian state while operating abroad. In doing so CanCorps revel in the benefits of Canadian “citizenship” while avoiding any accountability burdens associated with such citizenship; in other words when CanCorps actively avoid being held liable in a Canadian jurisdiction for their wrongdoing, knowing that many Field agents will allow them to do so, they are taking advantage of the Canadian state.

In bringing to light this version of unfairness, it may be possible to lead — by an alternative route — traditionalist Field agents to the primary goal: a modern and justice-based interpretation (or reality frame) and approach to the tests for jurisdiction. Not only does this approach address La Forest’s push for “fairness” in *Tolofson*, but also his desire for “order” in private international law. Indeed, “order” in the common law is created, in part, through predictability. As has been explained, a source of the confusion around private international law in Canada is the disconnect between the wording of the jurisdiction tests and the way in which they are applied. To actively and predictably hold CanCorp’s to account for human rights and environmental torts committed abroad – i.e. by acknowledging and promoting the actual wording/burdens of the jurisdictional tests – creates no more disorder in Canadian law than to hold CanCorps accountable for domestic torts committed in Canada; I don’t believe anyone suggests there is unacceptable uncertainty in domestic civil litigation. Order, in this case, is created through certainty of being held to account.

For further support, Field agents may be comforted to know that a more aggressive approach to asserting jurisdiction aligns with the approaches increasingly taken by Canada’s international brethren (including the US and the UK),⁶⁵⁷ and with retaliatory legislation enacted by developing states designed to force developed common law states to assert jurisdiction.⁶⁵⁸ Further, such an approach aligns with the commitments Canada has long made on the international stage through, for instance, Canada’s endorsement of an injured party’s right to an effective legal remedy as outlined in the “international bill of rights.”⁶⁵⁹

Without addressing barriers to jurisdiction, along with other procedural barriers, foreign plaintiffs will continue to struggle to achieve justice in cases involving human rights and environmental abuse. Further, beyond such project-specific cases, a failure to shift the Field’s approach to jurisdiction within Canada will more than likely mean that larger climate change-related litigation brought from the international sphere will see no success in this country,

⁶⁵⁷ See discussion of three American cases, *Jota v Texaco, Inc, Along v Freeport-McMoran Inc*, and *Unocal No 1*: Scott (MNE) 2001 at 590; see also *Alvarez v Johns Hopkins University*, US District Court, District of Maryland, No 15-00950, from the US where recently a Federal Court ruled the University and two associated corporations must face an action over a 1940’s experiment in Guatemala that infected hundreds of locals with syphilis; see also *Lungowe v Vedanta*, [2017] EWCA Civ 1528, in UK where the Court of Appeal upheld a High Court ruling allowing a case brought by Zambian villagers against the UK mining company Vedanta to continue to be heard in UK courts.

⁶⁵⁸ Joseph 2004, *supra* note 10 at 96.

⁶⁵⁹ UDHR, *supra* note 179 at Art 8; ICCPR, *supra* note 365 at Art 2(3); Farrow 2003, *supra* note 474 at 679-680.

forever susceptible to being dismissed on preliminary grounds. The Canadian judiciary (Field) and litigation practitioners are on the front lines of this issue and may have a dramatic effect on the development of Canadian law to the potential benefit of international plaintiffs. Through a simple yet fundamental shift in framing, potentially achieved by practitioners introducing evidence of the benefits enjoyed by a particular defendant corporation, such practitioners may be able to create the right environment within the courtroom to encourage logical, modern, reality-based, appropriately weighted, and thoughtful decisions on jurisdiction, thus reserving hope for the next step in climate change action. Indeed, where the tests for jurisdiction attain greater predictability through a more globalized application – consistent with their current frameworks – actions in liability launched by non-Canadian parties against CanCorps may have the opportunity to be considered on their merits, rather than dismissed on procedural grounds. And hopefully, the ever-increasing risk that CanCorps (particularly in oil and gas) that share in the responsibility of climate change may *actually* be held responsible by a strong judiciary will lead to a sharp change in business direction and practice, to a global benefit.

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