



**SUPREME COURT OF CANADA**

**CITATION:** Barer v. Knight Brothers LLC, 2019 SCC 13    **APPEAL HEARD:** April 24, 2018  
**JUDGMENT RENDERED:** February 22, 2019  
**DOCKET:** 37594

**BETWEEN:**

**David Barer**  
Appellant

and

**Knight Brothers LLC**  
Respondent

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

**REASONS FOR JUDGMENT:** Gascon J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Rowe and Martin JJ. concurring)  
(paras. 1 to 93)

**CONCURRING REASONS:** Brown J.  
(paras. 94 to 174)

**DISSENTING REASONS:** Côté J.  
(paras. 175 to 287)

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BARER v. KNIGHT BROTHERS LLC

**David Barer**

*Appellant*

v.

**Knight Brothers LLC**

*Respondent*

**Indexed as: Barer v. Knight Brothers LLC**

**2019 SCC 13**

File No.: 37594.

2018: April 24; 2019: February 22.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Private international law — Foreign judgments — Recognition — Personal actions of patrimonial nature — Default judgment rendered by Utah court against Quebec resident sued personally in contractual dispute between corporations — Quebec resident not party to contract but associated with dispute as officer of corporate defendants — Plaintiff seeking to have judgment recognized in Quebec and*

*declared enforceable against Quebec resident — Whether Utah court had jurisdiction over Quebec resident under Quebec rules on indirect international jurisdiction in personal actions of patrimonial nature — Whether burden of proof for establishing jurisdiction rests on party seeking recognition of foreign judgment — Whether Quebec resident submitted to Utah court's jurisdiction — Whether dispute substantially connected to Utah — Civil Code of Québec, arts. 3155(1), 3164, 3168(3), (4), (6).*

B, a Quebec resident, was sued personally in the state of Utah together with two companies he allegedly controlled, CBC and BEC. The suit was brought by Knight, a Utah-based company, which claimed that BEC had a balance owing under a contract between them. Knight argued that B had fraudulently misrepresented that the defendants would pay a certain amount, that the corporate veil of the two companies should be lifted, and that the defendants had been unjustly enriched. B brought a motion to have the claim against him dismissed on a preliminary basis, raising that: (1) Knight's claim for fraudulent misrepresentation was barred at law; (2) the Utah court did not have jurisdiction over him personally; and (3) Knight had failed to show that the corporate veil should be lifted. The Utah court dismissed B's motion and a default judgment was eventually rendered against all three defendants. Knight then sought to have that decision recognized in Quebec and declared enforceable against B. The Superior Court ruled that the Utah court's jurisdiction could be recognized on three possible grounds. Two of them related to the contract between Knight and BEC and the promise to pay allegedly made by B. However, the main ground for

recognizing the Utah decision was the fact that B had submitted to the Utah court's jurisdiction. The Court of Appeal dismissed B's appeal.

*Held* (Côté J. dissenting): The appeal should be dismissed.

*Per* Wagner C.J. and Abella, Moldaver, Karakatsanis, **Gascon**, Rowe and Martin JJ.: The Utah decision should be recognized and enforced against B in Quebec. B submitted to the Utah court's jurisdiction in accordance with art. 3168(6) of the *Civil Code of Québec* ("C.C.Q.") by presenting substantive arguments in his motion to dismiss that, if accepted, would have resolved all or part of the dispute. This submission suffices to recognize the jurisdiction of the Utah court under the Quebec rules of indirect international jurisdiction. Given that the dispute has a substantial connection with Utah in light of B's submission to the jurisdiction, art. 3164 C.C.Q. does not bar the recognition of the Utah court's judgment against him.

In accordance with the aim of facilitating the free flow of international trade, art. 3155 C.C.Q. establishes the principle that a decision rendered outside Quebec will generally be recognized and declared enforceable in the province. This provision lists six exceptions that allow Quebec courts to depart from that general principle and refuse to recognize a foreign decision, the first being where a judgment is rendered by an authority that had no jurisdiction over the dispute under the C.C.Q.

With respect to this first exception, Title Four of Book Ten of the *C.C.Q.* specifies the circumstances in which Quebec courts will recognize foreign jurisdiction. The purpose of these rules is to determine whether it is appropriate to integrate specific decisions rendered outside Quebec into the province's legal system. Such recognition of a foreign authority's jurisdiction by local courts in accordance with the rules prescribed by local law has been referred to as the indirect international jurisdiction of the foreign authority. In personal actions of a patrimonial nature, art. 3168 *C.C.Q.* lists six situations where Quebec courts may find that a foreign authority has indirect international jurisdiction. The use of the word "only" in the opening sentence of art. 3168 *C.C.Q.* signals that the grounds enumerated are exhaustive, and the presence of a single ground will suffice to recognize jurisdiction.

Quebec courts must ascertain that the foreign authority had jurisdiction over the matter under the rules of the *C.C.Q.* This requires them to make a positive finding of jurisdiction; they cannot limit themselves to determining whether the party opposing recognition has satisfactorily proved lack of jurisdiction. An application for recognition and enforcement is a judicial demand giving rise to an adversarial relationship to which the general rules of civil procedure apply. In this context, parties are not exempted from the requirement imposed by art. 2803 *C.C.Q.* of proving the facts on which the right to recognition and enforcement is based. The foreign authority's jurisdiction is one such fact, and the onus is on the party seeking recognition to establish that fact and thus, to prove the facts upon which the foreign authority's indirect international jurisdiction is based.

The jurisdiction of the Utah court in the instant case cannot be established under art. 3168(3) or (4) *C.C.Q.* Article 3168(3) *C.C.Q.* provides that the jurisdiction of a foreign authority is recognized in Quebec if both the injury and the fault that gave rise to the injury occurred in the State where the decision was rendered. For its part, art. 3168(4) *C.C.Q.* states that a foreign authority's jurisdiction is recognized where its decision concerns obligations arising from a contract that were to be performed in that State. In this case, the exhibits filed by Knight before the Superior Court were essentially limited to documents reflecting the progress of the proceedings in Utah. Knight could not rely on the allegations in its own proceedings before the Utah court in order to establish that court's jurisdiction over B according to the rules of the *C.C.Q.* It had to adduce evidence before the Quebec enforcing court to meet its burden of establishing the grounds for recognition upon which it was relying. Knight failed to provide any evidence with regard to either art. 3168(3) or (4) insofar as B was personally concerned. Accordingly, the Superior Court could not, on this record, recognize the Utah court's jurisdiction under either of those subparagraphs.

However, the lower courts were justified to conclude that the ground for recognition under art. 3168(6) *C.C.Q.*, submission to jurisdiction, was met in this case. Contrary to the grounds under art. 3168(3) and (4), the procedural facts underlying the claim under art. 3168(6) *C.C.Q.* are all supported by the exhibits filed. Submission has long been recognized in Quebec case law as a basis for a court's jurisdiction, and is now expressly provided for in art. 3168(6). The question of whether the defendant has submitted to the jurisdiction of the foreign authority is

assessed in light of the rules of indirect international jurisdiction set out in the *C.C.Q.* Under Quebec law, submission to jurisdiction can be either explicit or implicit, but it must be clear. After having submitted to the jurisdiction of an authority, a defendant cannot withdraw its consent. The orderly administration of justice requires that, once jurisdiction has been validly established, the case proceed in the same forum regardless of the changing whims of the parties. Submission to jurisdiction is a question of mixed fact and law, as it involves applying a legal standard to a set of facts, weighing these facts and drawing inferences. Such a determination is not to be overturned absent palpable and overriding error, provided no extricable legal questions have been identified.

A defendant submits to jurisdiction when it presents substantive arguments which, if accepted, would resolve the dispute — or part of the dispute — on its merits. Parties who choose to advance substantive arguments to further their positions in a forum consent to the jurisdiction of that authority. The “save your skin” approach to submission to jurisdiction, whereby a defendant who presents a defence on the merits at the same time as its jurisdictional arguments will not be taken to have submitted to jurisdiction, should be rejected. In this case, B presented at least one argument pertaining to the merits of the action against him in his motion to dismiss, which, if accepted, would have led to a final conclusion in his favour. The argument that Knight’s fraudulent misrepresentation claim was barred at law could have led the Utah court to conclusively dismiss that claim. Such a ruling would have attracted the authority of *res judicata* and precluded Knight from asserting that claim in another

jurisdiction. B's argument was thus akin to a defence on the merits for the purposes of submitting to the Utah court's jurisdiction. B has also failed to establish that, as a result of Utah procedural law, he had to proceed as he did and present all of his preliminary exceptions together. None of the evidence he adduced before the Superior Court supports that claim, and thus the latter made no palpable and overriding error in determining that submission to jurisdiction was established on the record.

B's submission to jurisdiction under art. 3168(6) *C.C.Q.* clearly establishes a substantial connection between the dispute and the Utah court. The substantial connection test is set out in art. 3164 *C.C.Q.* and establishes the general principle for recognition of foreign authorities' jurisdiction. It is not necessary to resolve in this case the issue of whether the establishment of a ground for recognition of the foreign authority's jurisdiction under art. 3168 *C.C.Q.* always satisfies the requirement for a substantial connection between the dispute and the forum under art. 3164 *C.C.Q.* Here, the fact that B participated in the legal proceedings in Utah to the extent of submitting to the Utah court's jurisdiction suffices amply and raises no question as to whether the dispute is substantially connected with Utah and the Utah court.

*Per* **Brown J.**: There is agreement with the majority that the appeal should be dismissed, but for different reasons. B has not submitted to the jurisdiction of the Utah court within the meaning of art. 3168(6) of the *C.C.Q.*; rather, the



jurisdiction of the Utah court has been established under arts. 3168(4), 3164 and 3139 *C.C.Q.*

When deciding whether to recognize a foreign decision, Quebec courts must review the evidence submitted to ensure that the foreign authority had jurisdiction under the rules of the *C.C.Q.* The record placed in the instant case is sufficient to decide whether art. 3168(4) *C.C.Q.* can support a finding of the Utah court's jurisdiction. The causes of action asserted by Knight against the three defendants are all so closely connected that they represent different aspects of a single contractual dispute over which the Utah court had jurisdiction pursuant to art. 3168(4) *C.C.Q.* Article 3168(4) *C.C.Q.* deals with jurisdiction based on connections with the subject-matter of the dispute, and not with jurisdiction based on connections with the defendant. All co-defendants are connected to the subject-matter of the dispute, which is contractual by nature, and which falls squarely within the jurisdiction of the Utah court under art. 3168(4) *C.C.Q.*

The fact that B is not a party to the contract does not preclude art. 3168(4) *C.C.Q.*'s application, insofar as other provisions of the *C.C.Q.*, such as arts. 3164 and 3139, confirm that the Utah court had jurisdiction against B personally. Restricting the application of art. 3168(4) *C.C.Q.* in such a way would have the impermissible effect of imposing upon a plaintiff the burden of proving, before a Quebec court, its allegations of alter ego or fraud in order to justify the lifting of the corporate veil pursuant to art. 317 *C.C.Q.* This is impermissible because the question

of whether to lift the corporate veil is a substantive legal issue, not a jurisdictional one. Quebec courts cannot review the merits of a case or retry parts thereof under Quebec's recognition procedure (art. 3158 *C.C.Q.*). Thus, a defendant should not be able to resist recognition and enforcement on the ground that the foreign authority should not have lifted the corporate veil. Further, such a narrow interpretation of art. 3168(4) is incompatible with the recent decision of *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30, [2016] 1 S.C.R. 851, in which the Court stated that a connection between a claim and a contract does not necessarily require that a defendant be a party to the contract. In support of this conclusion, the Court referred by analogy to art. 3139 *C.C.Q.*, the provision granting jurisdiction to Quebec courts for reasons of administrative convenience. Article 3139 *C.C.Q.* provides that if a Quebec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand.

Courts must interpret Quebec's private international law rules as a coherent whole, in accordance with the general principles of interpretation of the *C.C.Q.* and the principles of comity, order and fairness which inspire the interpretation of these rules. Answering the question of whether and on what conditions art. 3139 *C.C.Q.* can be invoked to establish the jurisdiction of a foreign authority against a particular co-defendant requires interpreting art. 3164 *C.C.Q.* The scope of these provisions, and their relationship with art. 3168(4), cannot be determined in isolation. According to art. 3164 *C.C.Q.*, the recognized grounds for

establishing the jurisdiction of a foreign authority are essentially those available to Quebec courts as listed under Title Three. This is referred to as the principle of jurisdictional reciprocity, or the mirror principle. Title Three is divided into two Chapters: Chapter I (“General Provisions”) and Chapter II (“Special Provisions”). The jurisdiction of a foreign court should be assessed by looking to both Chapters.

By referring generally to Title Three, art. 3164 *C.C.Q.* authorizes a Quebec court to recognize the jurisdiction of a foreign authority on the basis of one of the “General Provisions” situated in Chapter I of that Title, such as the provision granting jurisdiction for reasons of administrative convenience (art. 3139 *C.C.Q.*). Consequently, in personal actions of a patrimonial nature, satisfying the jurisdictional requirement of article 3168 *C.C.Q.* may not always be necessary for the purposes of recognition under Quebec law. Though the exclusive language of art. 3168 *C.C.Q.* may appear to suggest otherwise, it should not be overstated. Absent the use of the word “only” under art. 3168 *C.C.Q.*, the mirror effect of art. 3164 *C.C.Q.* would direct Quebec courts to decide the jurisdiction of a foreign authority by applying one of the subparagraphs of art. 3148 para. 1 *C.C.Q.* The exclusive language in art. 3168 *C.C.Q.* indicates that, notwithstanding the mirror principle, art. 3148 *C.C.Q.* cannot be relied upon to determine the jurisdiction of the foreign authority in such circumstances. Therefore, art. 3168 *C.C.Q.* does not preclude a Quebec court from recognizing the jurisdiction of a foreign authority on the basis of one of the “General Provisions” situated in Chapter I of Title Three.

However, art. 3164 *C.C.Q.* does not authorize a Quebec court to apply the requirement of a substantial connection between the dispute and the foreign authority so as to reject a foreign court's exercise of jurisdiction even where one of art. 3168's jurisdictional criteria is satisfied. Book Ten of the *C.C.Q.*, stating as it does the private international law of Quebec, encapsulates the requirement of a real and substantial connection. Thus, a real and substantial connection does not operate as an additional condition to those contained in art. 3168 *C.C.Q.*; it is rather given expression by the scheme contained within Book Ten. The view that art. 3164 *C.C.Q.* requires a substantial connection between the dispute and the forum, even where one of the conditions for jurisdiction of a foreign authority is established under art. 3168 *C.C.Q.*, finds no support and is inconsistent with the text of art. 3164 *C.C.Q.* Any concern for a substantial connection under this provision arises only where the jurisdiction of a foreign authority is established on the provisions of Title Three. Furthermore, art. 3168 *C.C.Q.* is more restrictive than the mirror provision of art. 3148 *C.C.Q.* precisely in order to ensure the existence of a substantial connection. However, Quebec courts must still conduct an independent inquiry into the existence of a substantial connection between the dispute and the foreign authority where the court bases its finding of jurisdiction on one of the "General Provisions" in Chapter I of Title Three.

Article 3139 *C.C.Q.* is a jurisdiction-granting provision that ensures the efficient use of judicial resources and efficiency in the administration of justice by fostering the joinder of proceedings. The term "incidental demand" in art. 3139

*C.C.Q.* should be read as including a related or connected claim. Thus, in personal actions of a patrimonial nature, the jurisdiction of a foreign authority over a particular co-defendant can be established in accordance with art. 3139 *C.C.Q.*, even where that co-defendant is not a party to the contract upon which the foreign authority's jurisdiction is grounded, if (a) that foreign authority has jurisdiction over the main contractual dispute pursuant to art. 3168(4) *C.C.Q.*; (b) the claim against the co-defendant is connected to the contract; and (c) there is a substantial connection between the dispute and the foreign authority's State pursuant to art. 3164 *C.C.Q.* In this case, the Utah court had jurisdiction over the main contractual dispute between Knight and BEC under art. 3168(4) *C.C.Q.*, and the claims of alter ego and fraud made against B personally were clearly connected to the contract. B participated in the legal proceedings in Utah and admitted to having had a key role in dealing with Knight for the performance of a contract to be executed in Utah. Furthermore, the alter ego claim made against B personally is governed by Utah law. Accordingly, there is a substantial connection between Utah and both the object of the dispute and the parties for the purposes of satisfying art. 3164 *C.C.Q.* It is in the interests of justice to have connected claims decided together by one forum. The Utah court chose to assert its jurisdiction over all aspects of the case. This choice was open to it, and should be respected in light of the principle of international comity.

*Per Côté J. (dissenting):* The appeal should be allowed. The Utah court's jurisdiction cannot be established under art. 3168 *C.C.Q.* and the dispute is not

substantially connected with Utah as required by art. 3164 *C.C.Q.* As a result, the decision cannot be recognized against B.

There is agreement with the majority's conclusion that Knight did not meet its burden of establishing the Utah court's jurisdiction over B insofar as arts. 3168(3) and (4) are concerned. Contrary to cases where a Quebec court is considering its own jurisdiction, in an application to recognize a foreign decision, the general rules of evidence apply, meaning that the allegations will not be accepted as averred and a *prima facie* showing will not be sufficient. Along with its application, Knight filed documentary evidence that essentially consisted of the pleadings and decisions from the proceedings before the Utah court. None of the documents submitted offered any evidence with regard to a fault committed by B in Utah or a contractual obligation to be performed by him in that State. The alleged promise to pay and the alter ego allegations against B have yet to be proven in court. B expressly denied those allegations, and no evidence of the alleged promise to pay, its content or its acceptance was adduced at any other time in the Utah proceedings. The decisions of the Utah court filed as evidence are default judgments and contain no findings of fact that may be relied on in the Quebec proceedings to conclude that the foreign authority had jurisdiction.

Given that B is not himself a party to the contract at issue, Knight could not rely on art. 3168(4) *C.C.Q.* absent evidence that would have allowed the corporate veil to be pierced under Quebec law. Article 3168(4) *C.C.Q.* cannot be

relied on to establish jurisdiction against anyone remotely associated with a contract regardless of whether they are a party to that contract. This provision requires a connection not only with the object of the dispute (i.e. the contract), but also with the defendant (i.e. the person liable for the contractual obligations). Holding otherwise would render this connecting factor indeterminate and diffuse, such that it would become difficult for litigants to predict with reasonable certainty whether a foreign decision rendered against them may be recognized in Quebec. Thus, where the defendant is not a party to the contract at issue, the plaintiff cannot rely on art. 3168(4) *C.C.Q.* unless it is shown that the defendant is otherwise personally responsible for the contractual obligations under Quebec law. In practice, it would be insufficient to show that BEC was B's alter ego. Knight would have also had to present evidence establishing that B invoked BEC's juridical personality "so as to dissemble fraud, abuse of right or contravention of a rule of public order" within the meaning of art. 317 *C.C.Q.* The nature and scope of a connecting factor codified in the *C.C.Q.* such as the obligations arising from a contract must be determined according to the law of Quebec. In this case, there is no evidence that would justify piercing the corporate veil for jurisdictional purposes. Requiring such evidence does not amount to an impermissible review of the merits of the case, but rather serves to verify whether the requirements for recognition are met.

The Superior Court erred in law in finding that B submitted to the Utah court's jurisdiction pursuant to art. 3168(6) simply by raising substantive arguments in his motion to dismiss. The test set out by the majority is too strict. It ignores the

fact that the defendant's subjective intent must be taken into account. A more flexible approach should be adopted, one that allows a defendant wishing to contest the jurisdiction of a foreign authority to argue why the authority lacks jurisdiction without risking being found to have submitted to that jurisdiction. A defendant must be permitted to raise arguments and considerations capable of convincing a foreign authority that it should not assume jurisdiction, and it is unreasonable to suggest that any defendant who does so necessarily submits to the foreign authority's jurisdiction. This would leave defendants in a "catch-22" situation. If they attempt to challenge the jurisdiction of a foreign authority, they risk being found by a Quebec court to have submitted to that jurisdiction. If they do not, they will likely be faced with a foreign default judgment which could seriously limit their ability to conduct business (or any other activities) in the foreign jurisdiction. The practical implications are real and serious.

On the facts of this case, there is little support for the inference that B submitted to the jurisdiction of the Utah court. While B did make some substantive arguments, they were presented alongside jurisdictional arguments. Submission to jurisdiction can be either explicit or implicit, but it must be clear. In alleging that the Utah court had jurisdiction over B, Knight bore the burden of proving that B had a choice under Utah procedural law not to proceed as he did when he presented substantive arguments in his motion to dismiss. This is consistent with the well-established principle that in Quebec, the plaintiff bears the burden of proving the facts upon which the court's jurisdiction is based. Knight has not met its burden in this



regard. There is no evidence in the record to indicate that B had the procedural choice not to raise certain substantive arguments at the stage of objecting to jurisdiction.

As none of the connecting factors under art. 3168 *C.C.Q.* is present, there is no need to consider whether the dispute is substantially connected with the foreign State under art. 3164 *C.C.Q.* The wording of art. 3168 *C.C.Q.* makes clear that in personal actions of a patrimonial nature, the jurisdiction of foreign authorities is recognized only where one of the listed factors is present. However, had it been found that B submitted to the Utah court's jurisdiction, there would still be no substantial connection between the dispute and Utah under art. 3164 *C.C.Q.*

There will be exceptional circumstances in which a substantial connection will need to be demonstrated under art. 3164 *C.C.Q.* even where one of the connecting factors in art. 3168 *C.C.Q.* has been met. Evidence of one of the factors in art. 3168 *C.C.Q.* being present will generally be sufficient to demonstrate a substantial connection and thus to establish jurisdiction. Nevertheless, this will not always be the case. Requiring that a substantial connection between the dispute and the foreign State be demonstrated even where art. 3168 *C.C.Q.* is engaged is consistent with the language, context and purpose of art. 3164 *C.C.Q.*, as well as with the principle of comity and the values of order and fairness underlying the rules of private international law.

Article 3164 *C.C.Q.* is the first article and key provision of the chapter of the *C.C.Q.* that sets out the rules applicable to the jurisdiction of foreign authorities. It

establishes the general principle of reciprocity, or mirror principle, whereby the jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Quebec authorities under Title Three. To that general principle of reciprocity, art. 3164 *C.C.Q.* adds the further requirement that a dispute be substantially connected with the foreign State whose authority is seized of the matter. The reference to Title Three is not meant to limit the application of that fundamental requirement, but simply to express the reciprocity principle which serves as the foundation for Title Four. As such, the subsequent provisions of Title Four, which include art. 3168 *C.C.Q.*, do not displace, or entirely subsume, the requirement of a substantial connection. The substantial connection requirement is meant to prevent Quebec courts from recognizing a foreign decision where the connection is so weak that recognition would be inappropriate.

This is one of the exceptional cases in which a separate substantial connection analysis would have been warranted. Specifically, where a defendant is found to have submitted to the jurisdiction of a foreign authority pursuant to art. 3168(6) *C.C.Q.*, further evidence may be required to establish a substantial connection between the dispute and the forum. This will be the case where submission has been reluctant and largely involuntary, and where the defendant has not presented a defence on the merits but has merely challenged the foreign authority's jurisdiction. Submission does not in itself establish an actual connection between the underlying dispute and the foreign State, as it is more properly understood as a distinct ground for jurisdiction. Unless there is extensive participation

in foreign proceedings, other factors should be considered to determine whether a substantial connection exists. In the present case, the mere fact that B made substantive arguments in his motion to dismiss does not establish a substantial connection between the dispute and Utah. Nor does B's involvement as President of BEC, or the fact that Utah law may have applied to certain claims made against him personally. Further, a substantial connection cannot be presumed on the mere basis that it appears more convenient to recognize a foreign decision in a given situation, for instance by having a single forum decide related claims. Convenience is not an independent ground for jurisdiction.

Finally, and even if we are to assume that art. 3139 *C.C.Q.* may be relied upon to recognize a foreign decision through the mirror effect of art. 3164 *C.C.Q.*, it could not be applied in the instant case. The action against B is a principal demand, not an incidental demand. Additionally, art. 3139 *C.C.Q.* cannot be relied upon to extend jurisdiction over any related claim. Such a broad interpretation would be inconsistent with the text of the provision. Furthermore, it would allow B to do indirectly what cannot be done directly. B does not fall within the ambit of art. 3168(4) *C.C.Q.* because he is not himself a party to the contract. Article 3139 *C.C.Q.* cannot be used to circumvent the requirement of adducing evidence justifying the piercing of the corporate veil in order for art. 3168(4) *C.C.Q.* to apply.

### **Cases Cited**

By Gascon J.

**Considered:** *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205; **referred to:** *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, [2010] 2 S.C.R. 571; *Zimmermann inc. v. Barer*, 2016 QCCA 260; *Cortas Canning and Refrigerating Co. v. Suidan Bros. inc./Suidan Frères inc.*, [1999] R.J.Q. 1227; *Yousuf v. Jannesar*, 2014 QCCA 2096; *The Mutual Trust Co. v. St-Cyr*, [1996] R.D.J. 623; *Goldberg v. Think Glass Le verre repensé inc.*, 2016 QCCS 6456; *Jules Jordan Video inc. v. 144942 Canada inc.*, 2014 QCCS 3343; *Abel Skiver Farm Corp. v. Town of Sainte-Foy*, [1983] 1 S.C.R. 403; *Lavallée v. Imhof*, 2018 QCCS 2031; *Worthington Corp. v. Atlas Turner inc.*, [2004] R.J.Q. 2376; *Iraq (State of) v. Heerema Zwijsdrecht, b.v.*, 2013 QCCA 1112; *Hocking v. Haziza*, 2008 QCCA 800; *Transax Technologies inc. v. Red Baron Corp. Ltd.*, 2017 QCCA 626; *Shamji v. Tajdin*, 2006 QCCA 314; *Bank of Montreal v. Hydro Aluminum Wells Inc.*, 2002 CanLII 3111; *Baird v. Matol Botanical International Ltd.*, [1994] R.D.J. 282; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416; *Society of Lloyd's v. Alper*, 2006 QCCS 1203; *Vaughan v. Campbell* (1855), 5 L.C. Rep. 431; *Natha v. Cook*, 2016 ABCA 100, 616 A.R. 276; *Ward v. Nackawic Mechanical Ltd.*, 2015 NBCA 1, 429 N.B.R. (2d) 228; *Fleckenstein v. Hutchison*, 2009 ABCA 320, 460 A.R. 386; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 23; *St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491; *Alimport (Empresa Cubana Importadora de Alimentos) v. Victoria Transport Ltd.*, [1977] 2 S.C.R. 858; *Bombardier Transportation v. SMC Pneumatics (UK) Ltd.*, 2009 QCCA 861; *International Image Services Inc. v. Ellipse Fiction/Ellipse Programme*, 1995 CanLII 10253; *Forest Fibers Inc. v. CSAV Norasia*

*Container Lines Ltd.*, 2007 QCCS 4794; *171486 Canada Inc. v. Rogers Cantel Inc.*, [1995] R.D.J. 91; *Conserviera S.p.A. v. Paesana Import-Export Inc.*, 2001 CanLII 24802; *LVH Corporation (Las Vegas Hilton) v. Lalonde*, 2003 CanLII 27646; *Kadar v. Reichman (Succession)*, 2014 QCCA 1180, 1 E.T.R. (4th) 9; *Lagassé v. McElligott*, [1993] R.D.J. 323; *D'Alessandro v. Mastrocola*, 2007 QCCS 4164; *Canadian Logistics Systems Limited v. 129726 Canada inc.*, 1997 CanLII 6840; *Zimmermann inc. v. Barer*, 2014 QCCS 3404; *Labs of Virginia Inc. v. Clintrials Bioresearch Ltd.*, [2003] R.J.Q. 1876; *Richter et Associés v. Coopers et Lybrand*, 2013 QCCS 1945; *The Education Resources Institute Inc. (Teri) v. Chitaroni*, 2003 CanLII 21712; *MFI Export Finance inc. v. Rother International S.A. de C.V. inc.*, 2004 CanLII 16200; *Canada (Procureur général) v. St-Julien*, 2010 QCCS 2723; *Canfield Technologies inc. v. Servi-Metals Canada inc.*, 1999 CanLII 10839; *G. Van Den Brink B.V. v. Heringer*, 1994 CarswellQue 2235; *Dorais v. Saudi Arabian General Investment Authority*, 2013 QCCS 4498; *Ortega Figueroa v. Jenckel*, 2015 QCCA 1393; *R. v. 1275729 Ontario Inc. (2005)*, 203 C.C.C. 501; *Birch Hill Equity Partners Management Inc. v. Rogers Communications Inc.*, 2015 ONSC 7189, 128 O.R. (3d) 1; *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720; *Armoyan v. Armoyan*, 2013 NSCA 99, 334 N.S.R. (2d) 204; *Canada (Canadian Environmental Assessment Agency) v. Taseko Mines Limited*, 2018 BCSC 1034; *Bégin v. Bilodeau*, [1951] S.C.R. 699; *Québecor World inc. v. Gravel*, 2003 CanLII 36991; *Marcoux v. Banque Laurentienne du Canada*, 2011 QCCA 2034; *Bil'In (Village Council) v. Green Park International Inc.*, 2009 QCCS 4151, [2009] R.J.Q. 2579; *Transcore Linklogistics v. Mike's Transport and Auto Haul Inc.*,

2014 QCCA 776; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30, [2016] 1 S.C.R. 851; *Insta Holding Limited v. 9247-5334 Québec inc.*, 2017 QCCS 432.

By Brown J.

**Applied:** *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30, [2016] 1 S.C.R. 851; **considered:** *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205; *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549; **referred to:** *Iraq (State of) v. Heerema Zwijsdrecht, b. v.*, 2013 QCCA 1112; *Zimmermann inc. v. Barer*, 2016 QCCA 260; *Cortas Canning and Refrigerating Co. v. Suidan Bros. inc./Suidan Frères inc.*, [1999] R.J.Q. 1227; *Pomini, Inc. v. Empco-Fab Ltd.*, [1998] O.J. No. 3960, aff'd by (1999), 124 O.C.A. 294; *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Brunette v. Legault Joly Thiffault, s.e.n.c.r.l.*, 2018 SCC 55; *Salomon v. Salomon & Co.*, [1897] A.C. 22; *Marble Point Energy Ltd. v. Stonecroft Resources Inc.*, 2009 QCCS 3478, aff'd 2011 QCCA 141; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; *Ortega Figueroa v. Jenckel*, 2015 QCCA 1393; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Morguard Investments Ltd. v. De*

*Savoie*, [1990] 3 S.C.R. 1077; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600; *Hocking v. Haziza*, 2008 QCCA 800; *Labs of Virginia Inc. v. Clintrials Bioresearch Ltd.*, [2003] R.J.Q. 1876; *McKinnon v. Polisuk*, 2009 QCCS 5778; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416; *Droit de la famille — 131294*, 2013 QCCA 883; *Bourdages v. Québec (Gouvernement du) (Ministère des Transports)*, 2016 QCCS 5066; *Fonds d'assurance responsabilité professionnelle du Barreau du Québec v. Gariépy*, 2005 QCCA 60; *Constructions Alcana ltée v. Cégep régional de Lanaudière*, 2006 QCCA 1494; *Allard v. Mozart ltée*, [1981] C.A. 612; *CGU v. Wawanesa, compagnie mutuelle d'assurances*, 2005 QCCA 320, [2005] R.R.A. 312; *Kingsway General Insurance Co. v. Duvernay Plomberie et chauffage inc.*, 2009 QCCA 926, [2009] R.J.Q. 1237; *Insta Holding Limited v. 9247-5334 Québec inc.*, 2017 QCCS 432; *Trower & Sons ltd. v. Ripstein*, [1944] A.C. 254; *Cornwall Chrysler Plymouth Ltd. v. Lapolla*, [1974] C.A. 490; *Municipalité du village de St-Victor v. Allianz du Canada*, [1996] R.D.J. 123; *A S G Industries Inc. v. Corporation Superseal*, [1983] 1 S.C.R. 781; *E. Hofmann Plastics Inc. v. Tribec Metals Ltd.*, 2013 QCCA 2112; *Poppy Industries Canada Inc. v. Diva Delights Ltd.*, 2018 QCCA 163; *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *CIMA Plastics Corp. v. Sandid Enterprises Ltd.*, 2011 ONCA 589, 341 D.L.R. (4th) 442; *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679; *O'Brien v. Canada (Attorney General)*, [2002] N.S.J. No. 57; *Duncan (Litigation guardian of) v. Neptunia Corp.* (2001), 53 O.R. (3d) 754; *Van Breda v. Village Resorts Limited*, 2010 ONCA 84, 98 O.R. (3d) 721; *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636; *Breeden v. Black*,

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APPEAL from a judgment of the Court of Appeal of Quebec (Vézina, Mainville JJ.A. and Jacques J. (*ad hoc*)), 2017 QCCA 597, [2017] Q.J. No. 3606 (QL), 2017 CarswellQue 2806 (WL. Can.), SOQUIJ AZ-51381819, affirming a decision of Blanchard J., 2016 QCCS 3471, [2016] Q.J. No 8724 (QL), 2016 CarswellQue 6725 (WL Can.), SOQUIJ-AZ51308250. Appeal dismissed, Côté J. dissenting.

*Leon J. Greenberg and Frédéric Vachon*, for the appellant.

*Jonathan Franklin and Lazar Sarna*, for the respondent.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Rowe and Martin JJ. was delivered by

GASCON J. —

## I. Overview

[1] This appeal considers the circumstances under which, in an application to recognize and enforce a foreign judgment rendered by default against a person

residing in Quebec, that person can be found to have submitted to the foreign authority's jurisdiction.

[2] The facts of this case illustrate a dilemma that persons doing business outside of their home jurisdiction sometimes face when they are sued abroad before a court that they believe has no jurisdiction over the dispute. They must decide whether to defend themselves against the foreign lawsuit and try to secure a favourable decision, or whether to abstain from doing so. One motivation for the latter is to avoid being found to have submitted to the foreign jurisdiction by a court of their home jurisdiction that is asked to recognize and enforce an unfavourable foreign decision. This choice no doubt involves an assessment of the comparative risks and benefits of protecting the assets located in each jurisdiction. Ultimately, it is up to each defendant to determine the best way to approach this conundrum, and each must bear the consequences of the strategy chosen.

[3] The appellant, Mr. Barer, a Quebec resident, was sued personally together with two companies he allegedly controlled — Central Bearing Corporation Ltd. (“CBC”) and Barer Engineering Company of America (“BEC”) — before the United States District Court, Central Division for the District of Utah (“Utah Court”). The suit was brought by the respondent, Knight Brothers LLC (“Knight”), which claimed that BEC had a balance owing under a contract between them. Knight argued that Mr. Barer had fraudulently misrepresented that the defendants would pay a certain

amount, that the corporate veil of the two companies should be lifted, and that all the defendants had been unjustly enriched.

[4] CBC abstained from presenting any defence, while BEC defended itself on the merits and filed a counterclaim. Mr. Barer took a third approach and presented preliminary arguments in a motion to dismiss. He argued that (1) Knight's claim for fraudulent misrepresentation was barred at law; (2) the Utah Court did not have jurisdiction over him personally; and (3) Knight had failed to show that the corporate veil should be lifted. A Utah judge dismissed Mr. Barer's motion.

[5] A default judgment was eventually rendered by the Utah Court against all three defendants ("Utah Decision"). Knight then sought to have that decision recognized in Quebec and declared enforceable against Mr. Barer. The Superior Court ruled that the Utah Court's jurisdiction could be recognized on three possible grounds. Two of them related to the contract between Knight and BEC and the promise to pay allegedly made by Mr. Barer. However, the main ground for recognizing the Utah Decision was the fact that Mr. Barer had submitted to the Utah Court's jurisdiction. The Court of Appeal dismissed Mr. Barer's appeal.

[6] I agree with the courts below that the jurisdiction of the Utah Court must be recognized, and I would dismiss the appeal. By presenting substantive arguments in his motion to dismiss, Mr. Barer submitted to the Utah Court's jurisdiction in accordance with art. 3168(6) of the *Civil Code of Québec* ("C.C.Q." or "*Civil Code*").

This is sufficient in this case to establish any substantial connection that may be required by art. 3164 C.C.Q.

## II. Background

### A. *The Dispute*

[7] Mr. Barer is a resident of Quebec. He is the President and Secretary of CBC, which is based in Montréal, and acting President and Secretary of BEC, which is based in Vermont. In 2007, BEC was awarded a contract to install machinery at a military base located in Utah. In 2008, it subcontracted part of the work to Knight, whose head office is in that state. Knight's responsibilities included installing a new foundation. The work was carried out at the military base in 2008 and 2009.

[8] In 2009, a dispute arose as to the amount owed to Knight for the work related to the foundation: a first amount had been specified in the original contract, but Knight had demanded a higher sum in a subsequent purchase order. While BEC argued that it was liable only for the initial amount, Knight alleged that BEC had provided it with incomplete information and was liable for the excess costs. Knight further contended that, at some point, Mr. Barer had verbally promised to pay the increased price and that it had performed its obligations under the contract relying on that promise. According to Knight, the total revised price for the work performed was US\$619,805.



B. *The Legal Proceedings in Utah*

[9] Knight initiated proceedings before the Utah Court against BEC, CBC and Mr. Barer personally for a balance allegedly owing of US\$431,160 under the contract between itself and BEC. Knight asserted five causes of action. It claimed that (1) BEC and CBC had breached the contract; (2) the defendants had been unjustly enriched; (3) BEC was the alter ego of CBC; (4) BEC and CBC were the alter egos of Mr. Barer; and (5) Mr. Barer had fraudulently misrepresented that the defendants would pay the increased price for the foundation work.

[10] The three defendants accepted service of Knight's complaint and entered their appearance before the Utah Court in April 2010. They all filed a notice of non-opposition when Knight sought to amend its complaint, and they were required to respond by mid-July. From that point on, each defendant pursued a different course of action.

[11] BEC, the party to the contract with Knight, filed an answer, defence and counterclaim. Its written answer and defence did not raise the issue of jurisdiction but denied the facts underlying Knight's claim. Its counterclaim alleged that Knight had unlawfully interfered with its property. For its part, CBC presented a motion to allow its counsel to withdraw on the ground that it did not recognize the Utah Court's jurisdiction and would not participate in the proceedings. As it did not defend itself, it was found in default by a court clerk. Lastly, Mr. Barer brought a motion to have the

claim asserted against him personally dismissed on a preliminary basis before it was heard on its merits.

[12] Mr. Barer raised three arguments in support of his motion: (1) Knight had failed to state sufficient facts to establish that BEC and CBC were his alter egos; (2) the fraudulent misrepresentation claim was barred by the pure economic loss rule; and (3) the Utah Court did not have personal jurisdiction over him. The Utah Court dismissed the motion and allowed the case to proceed to trial.

[13] On the question of jurisdiction, the Utah Court found that Knight had supported its alter ego claim with “several exhibits”: (1) “copies of payments made to [Knight] from the common account in [CBC]’s name”; (2) “a certified copy from the Montreal, Canada, Registrar of Companies which show[s] that [CBC] is registered as doing business under the names of [BEC] and [another entity]”; and (3) “an affidavit stating that [Knight]’s information supporting its alter ego and instrumentality claims initially came from an unnamed confidential source — a former employee of the Barer entities” (A.R., vol. II, at pp. 100-101). The Utah Court stressed that the allegations attributed to that employee and reflected in Knight’s complaint “must be accepted as true for purposes of this motion” (A.R., vol. II, at p. 102). It concluded that Knight had made a *prima facie* showing of jurisdiction. Since Mr. Barer had not established considerations that “would render jurisdiction unreasonable” (A.R., vol. II, at p. 101), his first argument was rejected. In the view of the Utah Court, having

the entire dispute, including the related alter ego claims, heard in one action furthered the interest of the international justice system.

[14] On the alter ego issue, the Utah Court, building on its conclusions regarding jurisdiction, found that Knight's allegations — which had to be assumed to be true on a motion to dismiss — “state a claim for an *alter ego* claim” (A.R., vol. II, at pp. 103-5). Finally, the Utah Court rejected Mr. Barer's third argument, namely that Knight had no cause of action because its claim for fraudulent misrepresentation was barred by the pure economic loss rule. It reasoned that though this argument could be raised to bar a purely contractual claim, Knight's claim was also based on the law of quasi-contracts and unjust enrichment, which are not subject to the rule against recovery for pure economic loss.

[15] After the dismissal of Mr. Barer's motion in January 2011, all three defendants were ordered to participate in a settlement conference. In February 2011, Mr. Barer was also granted an extension to file an answer and defence, but he ultimately never did. His failure to file such a response was noted by a court clerk. The settlement conference was held in November 2011. Mr. Barer attended, but his lawyer indicated that he was present to comply with the court order and that this was not a waiver of contestation of jurisdiction. As for BEC, it participated in some of the proceedings until, in the summer of 2012, the Utah Court granted Knight's motion for a default judgment, which was entered by a court clerk against all three defendants

for US\$431,160, plus interest. That judgment did not provide reasons in support of the order. It was later amended to make the defendants jointly and severally liable.

### III. Judicial History

[16] Knight filed an originating application before the Superior Court to have the Utah Decision recognized and declared enforceable in Quebec against Mr. Barer and CBC. Both jointly filed a defence, which was followed by Knight's answer to plea and ultimately by an amended defence. Knight filed 18 exhibits, Mr. Barer and CBC, 4. The exhibits included only one affidavit — that of the lawyer who represented the defendants in Utah. As these various steps show, an application for recognition and enforcement is an adversarial judicial proceeding to which the general rules of civil procedure apply, even though the judge hearing such an application should not delve into the merits of the case (*Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, [2010] 2 S.C.R. 571, at para. 20).

#### A. *Superior Court of Quebec*

[17] In brief reasons delivered orally, the Superior Court granted Knight's application in recognition and enforcement of a judgment rendered outside Quebec. Since Knight had decided against seeking to have the Utah Decision declared enforceable against CBC, the trial judge was concerned only with Mr. Barer. The judge recognized the Utah Decision, declared it enforceable in Quebec, and ordered Mr. Barer to pay Knight a total of CAN\$1,238,283.

[18] The judge concluded that Mr. Barer had submitted to the Utah Court's jurisdiction in accordance with art. 3168(6) *C.C.Q.* by raising substantive arguments in his motion to dismiss. He found that the evidence presented by Knight in challenging Mr. Barer's motion to dismiss also supported this conclusion; it constituted "sufficient proof under Quebec law that the requirements to grant jurisdiction to the Utah Court over [Mr.] Barer" were satisfied (2016 QCCS 3471, at para. 17 (CanLII) ("Sup. Ct. reasons")). The judge noted that similar evidence had not been presented before either the Quebec or the foreign courts in the other cases upon which Mr. Barer relied in his submissions, that is, *Zimmermann inc. v. Barer*, 2016 QCCA 260, and *Cortas Canning and Refrigerating Co. v. Suidan Bros. inc./Suidan Frères inc.*, [1999] R.J.Q. 1227 (Sup. Ct.). For this reason, he found that these cases did not assist Mr. Barer.

[19] The trial judge ended his remarks by stating that art. 3168(3) and (4) *C.C.Q.* could also have served as a basis for the jurisdiction of the Utah Court, "in as much as the acceptance of the *alleged* promise to pay by [Mr.] Barer was received in Utah and that same was to be performed in that state" (para. 20 (emphasis added)).

#### B. *Court of Appeal of Quebec*

[20] Mr. Barer appealed the Superior Court's judgment to the Court of Appeal. Knight responded with an application for the summary dismissal of the appeal or, alternatively, for the provision of a suretyship. A first panel unanimously dismissed the application, simply stating that "[t]he appellant may have a viable appeal" (2016

QCCA 1400, at para. 2 (CanLII) (“C.A. reasons (2016)”). The panel nevertheless stressed that it was “perhaps *dubitante*” in dismissing the application and observed that, “as the trial judge noted, the appellant does appear to have consented to the jurisdiction of the US District Court for the District of Utah as his motion to dismiss raised jurisdictional but also non-jurisdictional grounds” (paras. 2-3). It therefore ordered Mr. Barer to deposit CAN\$25,000 to guarantee the payment of the appeal costs and the judgment amount should his appeal be unsuccessful.

[21] On the merits of the appeal, a second panel of the Court of Appeal dismissed Mr. Barer’s appeal in a two-sentence judgment delivered orally, which stated: “Without endorsing all the reasons of the judge of first instance, we are nevertheless all of the view that there were sufficient elements to allow to conclude as he did. For these reasons, the appeal is dismissed with costs” (2017 QCCA 597, at paras. 1-2 (CanLII)). The reasons were silent as to which segments of the judgment below were endorsed and which were not.

#### IV. Issue

[22] The question to resolve in this appeal is whether the lower courts properly recognized the Utah Court’s jurisdiction over the dispute between Knight and Mr. Barer personally. To answer this question, I will consider the general principles governing the recognition of foreign decisions under the *Civil Code*, including the applicable burden of proof, before turning to the application of arts. 3168(3),

3168(4), 3168(6) and 3164 C.C.Q. relied upon as potential grounds for the Utah Court's jurisdiction.

V. Analysis

A. *General Principles for the Recognition of Foreign Decisions Under the C.C.Q. and Applicable Burden of Proof*

[23] In accordance with the aim of facilitating the free flow of international trade, art. 3155 C.C.Q. establishes the principle that a decision rendered outside Quebec will generally be recognized and declared enforceable in the province (G. Goldstein, *Compétence internationale des autorités québécoises et effets des décisions étrangères (Art. 3134 à 3168 C.c.Q.)* (2012), at para. 3155 550; H. Kélada, *Reconnaissance et exécution des jugements étrangers* (2013), at p. 41; *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, at para. 22;). Article 3155 C.C.Q. then lists six exceptions that allow Quebec courts to depart from that general principle and refuse to recognize a foreign decision. The first of these exceptions concerns decisions rendered by an authority that had no jurisdiction over the dispute under the *Civil Code*:

**3155.** A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases:

- (1) the authority of the State where the decision was rendered had no jurisdiction under the provisions of this Title;

- (2) the decision, at the place where it was rendered, is subject to an ordinary remedy or is not final or enforceable;
- (3) the decision was rendered in contravention of the fundamental principles of procedure;
- (4) a dispute between the same parties, based on the same facts and having the same subject has given rise to a decision rendered in Québec, whether or not it has become final, is pending before a Québec authority, first seized of the dispute, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Québec;
- (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
- (6) the decision enforces obligations arising from the taxation laws of a foreign State.

[24] The framework established by art. 3155 *C.C.Q.* has been described as creating a presumption of validity in favour of the foreign decision, a presumption that is rebutted when a Quebec court holds that one of the listed exceptions applies (Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. II, *Le Code civil du Québec — Un mouvement de société* (1993), at p. 2015; H. P. Glenn, “Recognition of Foreign Judgments in Quebec” (1997), 28 *Can. Bus. L.J.* 404, at p. 406; *Yousuf v. Jannesar*, 2014 QCCA 2096, at paras. 18-20 (CanLII); *The Mutual Trust Co. v. St-Cyr*, [1996] R.D.J. 623, at pp. 632-33 (C.A.)). One would expect the onus to be on the party opposing recognition to displace this presumption of validity of the foreign decision and to establish one of the grounds for denying recognition or enforcement (J. A. Talpis with the collaboration of S. L. Kath, “*If I am from Grand-Mère, Why Am I Being Sued in Texas?*”: *Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001), at p. 161; *Goldberg v. Think*



*Glass Le verre repensé inc.*, 2016 QCCS 6456, at para. 23 (CanLII); *Jules Jordan Video inc. v. 144942 Canada inc.*, 2014 QCCS 3343, at para. 51 (CanLII)). Under the general rule governing the allocation of the burden of proof between parties found in art. 2803 *C.C.Q.*, “a person seeking to assert a right shall prove the facts on which the claim is based”, while a person who argues that a right is null, modified or extinguished bears the burden of proving the facts underlying that position. The burden of proving that an exception applies thus normally falls on the party seeking to rely on the exception (L. Ducharme, *Précis de la preuve* (6th ed. 2005), at Nos. 122-23; *Abel Skiver Farm Corp. v. Town of Sainte-Foy*, [1983] 1 S.C.R. 403, at p. 421; *Lavallée v. Imhof*, 2018 QCCS 2031, at para. 32 (CanLII)).

[25] Still, some legislative provisions impose that onus of proof on the party seeking recognition of a foreign decision. One example is art. 786 para. 1 of the former *Code of Civil Procedure*, CQLR, c. C-25 (“former *C.C.P.*”) (now art. 508 para. 1 of the current *Code of Civil Procedure*, CQLR, c. C-25.01 (“new *C.C.P.*”). It requires the party seeking recognition to attach to the application “an attestation emanating from a competent foreign public officer stating that the decision is no longer, in the State in which it was rendered, subject to ordinary remedy and that it is final or enforceable.” The party seeking recognition thus bears the burden of establishing — in the manner prescribed — that the foreign decision is final or enforceable, and therefore, that the second exception found in art. 3155 *C.C.Q.* does not apply. Similarly, where a foreign decision is rendered by default, art. 3156 *C.C.Q.* requires the party seeking recognition to establish that the third exception in art. 3155

*C.C.Q.* does not apply (see *Yousuf*, at paras. 20-23, and art. 786 para. 2 of the former *C.C.P.* (now art. 508 para. 2 of the new *C.C.P.*)).

[26] With respect to the first exception in art. 3155 *C.C.Q.*, Title Four of Book Ten of the *Civil Code* specifies the circumstances in which Quebec courts will recognize foreign jurisdiction. The purpose of these rules is not to teach lessons to foreign authorities about the outer limits of their own jurisdiction, but rather to determine whether it is appropriate to integrate specific decisions rendered outside Quebec into the province's legal system. Such recognition of a foreign authority's jurisdiction by local courts in accordance with the rules prescribed by local law has been referred to by many authors as the [TRANSLATION] "indirect international jurisdiction" ("*compétence internationale indirecte*") or "indirect jurisdiction" ("*compétence indirecte*") of the foreign authority (G. Goldstein, "Compétence internationale indirecte du tribunal étranger" in *JurisClasseur Québec — Droit international privé* (loose-leaf), by P.-C. Lafond, ed., fasc. 11, at para. 2; H. P. Glenn, "Droit international privé", in *La Réforme du Code civil* (1993) vol. 3, at para. 125; Talpis and Castel, "Interpreting the rules of private international law", in *Reform of the Civil Code* (1993) vol. 5B, at No. 485; see also *Mutual Trust*, at p. 633).

[27] In personal actions of a patrimonial nature like the one in the instant case, art. 3168 *C.C.Q.* lists six situations where Quebec courts will find that a foreign authority has indirect international jurisdiction:

**3168.** In personal actions of a patrimonial nature, the jurisdiction of foreign authorities is recognized only in the following cases:

- (1) the defendant was domiciled in the State where the decision was rendered;
- (2) the defendant possessed an establishment in the State where the decision was rendered and the dispute relates to its activities in that State;
- (3) injury was suffered in the State where the decision was rendered and it resulted from a fault which was committed in that State or from an injurious act or omission which occurred there;
- (4) the obligations arising from a contract were to be performed in that State;
- (5) the parties have submitted to the foreign authorities the present or future disputes between themselves arising out of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;
- (6) the defendant has submitted to the jurisdiction of the foreign authorities.

This exhaustive enumeration of grounds and the use of the word “only” signal that the recognition of a foreign authority’s indirect international jurisdiction requires the party seeking recognition to establish the existence of one of the enumerated grounds.

[28] Because of the manner in which they are both structured, arts. 3155(1) and 3168 *C.C.Q.* may seem to give contradictory indications as to which party bears the burden of establishing the existence — or absence — of a ground for recognizing jurisdiction. Here, Mr. Barer argues that Knight, the party seeking recognition of a foreign decision in Quebec, must prove the facts that justify the recognition of the

Utah Court's jurisdiction under art. 3168 *C.C.Q.* For its part, Knight contends that it is incumbent on Mr. Barer, the party opposing recognition, to establish the absence of any grounds for recognition. It stresses that lack of jurisdiction is an exception to the general principle that foreign decisions should be recognized.

[29] In my view, Mr. Barer's approach is the correct one. Any tension between arts. 3155 and 3168 *C.C.Q.* dissipates when one considers that the foreign authority's jurisdiction is one of the facts on which an applicant's claim is based. Indeed, a party seeking recognition of a foreign decision has no right arising from that decision in Quebec unless the foreign authority had jurisdiction pursuant to the rules of the *Civil Code*.

[30] The indirect international jurisdiction of a foreign authority is therefore best conceptualized as a precondition to the recognition of its decision. A finding of foreign jurisdiction logically precedes a finding that a foreign judgment is enforceable in Quebec. As Professor Emanuelli puts it: [TRANSLATION] “[f]or a foreign decision to be recognized in Quebec and to be capable of being declared enforceable in the province, it must have been rendered by an authority that had jurisdiction under the Quebec rules on the international jurisdiction of foreign authorities. This is what emerges, *a contrario*, from article 3155(1) *C.C.Q.*” (C. Emanuelli, *Droit international privé québécois* (3rd ed. 2011), at No. 279 (emphasis added; footnote omitted); see also Kélada, at p. 43). In *Worthington Corp. v. Atlas Turner inc.*, [2004] R.J.Q. 2376, the Quebec Court of Appeal also opined that [TRANSLATION] “[f]oreign judgments are

recognized in Quebec if they were rendered by a court that had jurisdiction under the Civil Code's provisions on private international law. Articles 3155 and 3164 state this expressly" (para. 16 (emphasis added)).

[31] Legislative history further supports this view. Initially, the legislature had contemplated using express language that would place the onus on the defendant in what is now art. 3155 ("unless the defendant proves that"; see draft art. 3133). However, the National Assembly did not adopt this wording, but rather changed it to the current "except in the following cases" in order to [TRANSLATION] "enable Quebec authorities to verify, of their own motion, whether the foreign decision meets the conditions set out in the article" (Sous-commissions des institutions, "Étude détaillée du projet de loi 125 — Code civil du Québec", *Journal des débats*, vol. 31, No. 28, 1st Sess., 34th Leg., December 3, 1991, at p. 1141 (emphasis deleted)).

[32] In fact, in performing its role under art. 3158 *C.C.Q.* of "verifying whether the decision with respect to which recognition or enforcement is sought meets the requirements prescribed in this Title", the Quebec enforcing court must ascertain that the foreign authority had jurisdiction over the matter under the rules of the *Civil Code* (*Lépine*, at para. 24; *Zimmermann*, at para. 13 (CanLII); *Iraq (State of) v. Heerema Zwijsdrecht, b.v.*, 2013 QCCA 1112, at para. 15 (CanLII); *Hocking v. Haziza*, 2008 QCCA 800, at para. 39 (CanLII)). Again, this is an indication that a finding of jurisdiction precedes a finding of recognition. In this regard, the Quebec court must make a positive finding of jurisdiction; it cannot limit itself to determining

whether the party opposing recognition has satisfactorily proved lack of jurisdiction. Nor can the Quebec court rely on the presumption of normality (see C. Piché, *La preuve civile* (5th ed. 2016), at Nos. 156 et seq.) to find that the foreign authority had jurisdiction: that authority did not consider the Quebec rules governing indirect international jurisdiction when it rendered its decision. It follows that, in law, the indirect international jurisdiction requirements imposed by the *Civil Code* for the recognition of a foreign authority's jurisdiction over a matter are not satisfied simply because the opposing party has failed to prove lack of jurisdiction.

[33] The party seeking recognition of a foreign decision thus bears the burden of proving the facts upon which the foreign authority's indirect international jurisdiction is based. This allocation of the burden of proof is in line with the well-established rule that the plaintiff in an action before a Quebec court bears the burden of proving the facts upon which the court's jurisdiction is based when it is challenged by the defendant (Piché, at No. 161; *Transax Technologies inc. v. Red Baron Corp. Ltd.*, 2017 QCCA 626, at para. 13 (CanLII); *Shamji v. Tajdin*, 2006 QCCA 314, at para. 16 (CanLII); *Bank of Montreal v. Hydro Aluminum Wells Inc.*, 2002 CanLII 3111, at para. 12 (Que. C.A.); *Baird v. Matol Botanical International Ltd.*, [1994] R.D.J. 282, at p. 283 (C.A.)).

[34] I add that it would hardly be reasonable to require the parties opposing recognition to bear the burden of establishing the foreign authority's lack of indirect international jurisdiction. Article 3168 *C.C.Q.* lists six alternative grounds for

recognizing jurisdiction in personal actions of a patrimonial nature, but a single one suffices to recognize the jurisdiction of the foreign authority (Emanuelli (2011), at No. 290; *Hocking*, at para. 187). If defendants were required to prove a lack of indirect international jurisdiction, they would have to disprove each of the six possibilities listed in art. 3168 *C.C.Q.* That would place them in the awkward position of having to prove a series of negatives.

[35] In this case, Knight relies on three grounds to establish the jurisdiction of the Utah Court under art. 3168 *C.C.Q.*, namely the grounds set out in the third, fourth and sixth subparagraphs of that article. I will briefly discuss the first two grounds before turning to the third and main one.

B. *Article 3168(3) and (4) C.C.Q.*

[36] Article 3168(3) *C.C.Q.* provides that the jurisdiction of a foreign authority is recognized in Quebec if both the injury and the fault that gave rise to the injury occurred in the State where the decision was rendered. For its part, art. 3168(4) *C.C.Q.* states that a foreign authority's jurisdiction is recognized where its decision concerns "obligations arising from a contract [that] were to be performed in that State".

[37] In a short *obiter*, the Superior Court found that these two subparagraphs "could" justify the recognition of the Utah Court's jurisdiction because "the acceptance of the alleged promise to pay by [Mr.] Barer was received in Utah and that

same was to be performed in that state” (Sup. Ct. reasons, at para. 20 (emphasis added)). It is unclear whether the Court of Appeal agreed with this aspect of the trial judgment. In my view, Knight did not meet its burden of proof in this regard, and this suffices to conclude that it cannot rely on these two grounds here.

[38] In support of its position, Knight argues mainly that in view of art. 3158 *C.C.Q.*, Quebec courts cannot verify whether there was a promise to pay or whether Mr. Barer, under the alter ego doctrine, was personally bound by the contract between Knight and BEC. According to Knight, this was already decided by the Utah Court, and Quebec courts should refrain from questioning the merits of the Utah Decision. This position is flawed for three reasons.

[39] First, Knight relies on the Utah Court’s preliminary decision denying Mr. Barer’s motion to dismiss in order to establish a basis for recognizing the Utah Court’s jurisdiction. However, that decision was not final, and is therefore not recognizable in Quebec pursuant to art. 3155(2) *C.C.Q.* In addition, in this case, Knight seeks recognition of the Utah Decision, namely the final default judgment rendered against Mr. Barer, not the preliminary decision on Mr. Barer’s motion to dismiss. It is only that default judgment that is contemplated by art. 3158 *C.C.Q.*, and no reasons were provided in support of it. It is simply an order to pay a sum of money, nothing more. Finally, the Utah Court’s *prima facie* findings in its judgment dismissing Mr. Barer’s preliminary motion were based on allegations deemed to be



true and were made for the sole purpose of deciding whether to allow the case to proceed to trial.

[40] To be clear, the fact that the Utah Decision was a default judgment is not a reason to refrain from recognizing and enforcing it in Quebec. Foreign default judgments can be recognized in Quebec on the same footing as other decisions, as long as the requirements of arts. 3156 *C.C.Q.* and 786 para. 2 of the former *C.C.P.* (now art. 508 para. 2 of the new *C.C.P.*) are met (*Yousuf*, at paras. 17-19; see also, under the common law, *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, at para. 31). It is also not a requirement *per se* that the foreign decision be supported by reasons (G. Goldstein, “Principes généraux et conditions générales de reconnaissance et d’exécution” in *JurisClasseur Québec — Droit international privé* (loose-leaf), by P.-C. Lafond, ed., fasc. 10, at para. 71; *Society of Lloyd’s v. Alper*, 2006 QCCS 1203, at paras. 82-87 (CanLII)).

[41] Still, Knight could not merely rely on the allegations in its own proceedings before the Utah Court in order to establish that court’s jurisdiction over Mr. Barer according to the rules of the *Civil Code*. It had to adduce evidence before the Quebec enforcing court to meet its burden of establishing the grounds for recognition of the foreign authority’s jurisdiction listed in art. 3168 *C.C.Q.* upon which it was relying. As previously mentioned, an application for recognition and enforcement “is a judicial demand that gives rise to an adversarial relationship to which the general rules of civil procedure apply” (*Kuwait Airways*, at para. 20). In

this context, the parties are not exempted from the requirement imposed by art. 2803 C.C.Q. The applicant must prove the facts on which its right to recognition and enforcement of the foreign decision is based. It is the role of the Quebec enforcing court to look at that evidence to ensure that the foreign authority had jurisdiction under the rules of the *Civil Code* (*Heerema*, at para. 15; *Zimmermann*, at para. 13; *Mutual Trust*, at p. 633).

[42] In *Zimmermann*, which coincidentally also involved Mr. Barer and his companies, the Quebec Court of Appeal refused to recognize and enforce against Mr. Barer personally a default judgment rendered by the United States District Court for the District of Vermont against him and BEC. As in the present case, the party seeking recognition argued that the foreign authority had accepted that BEC was Mr. Barer's alter ego and that Quebec courts could not re-examine that finding. The Court of Appeal rightly rejected that argument and held that the trial judge had not erred in requiring that evidence be adduced to prove the facts constituting the basis for recognition of the Vermont court's jurisdiction (*Zimmermann*, at para. 20). Because the party seeking recognition had not adduced evidence that justified lifting the corporate veil, the Court of Appeal refused to recognize the Vermont court's jurisdiction over Mr. Barer personally under art. 3168(4) C.C.Q., as only BEC was a party to the contract involved.

[43] The trial judge below distinguished the present case from *Zimmermann* on the basis that "the proof made before the Utah Court for the Motion to dismiss as

referred to in the judgment, Exhibit P-4.5, . . . constitutes sufficient proof under Quebec law that the requirements to grant jurisdiction to the Utah Court over [Mr.] Barer [were] valid” (Sup. Ct. reasons, at para. 17). With respect, I find that there are two problems with this reasoning. First, as explained, the current proceedings are concerned with the final Utah Decision, not the preliminary decision. The trial judge’s analysis was therefore predicated on the wrong decision. Second, the judge gave undue conclusory effects to the *prima facie* findings made by the Utah Court in its decision denying Mr. Barer’s motion. Quebec enforcing courts are required to look at issues that may have been settled in the foreign decision inasmuch as it is necessary to be satisfied that the criteria for recognition and enforcement provided in Title Four are met, notably the grounds for recognition of foreign authorities’ jurisdiction.

[44] Evidence to that effect was therefore required here, and Knight failed to provide any with regard to either art. 3168(3) or art. 3168(4) insofar as Mr. Barer was personally concerned. The exhibits it filed before the Superior Court were essentially limited to documents reflecting the progress of the proceedings in Utah (P-2, P-2.1, P-2.2, P-2.3, P-3, P-4.1, P-4.2, P-4.3, P-4.4, P-4.5, P-5, P-7, P-8, P-9, P-10). The three remaining exhibits were a report of the Enterprise Registrar of Quebec (P-1), a currency converter report (P-6) and a table explaining the calculation of interest (P-11). None of these exhibits support a finding that Quebec courts should recognize the Utah Court’s jurisdiction over Mr. Barer under art. 3168(3) or (4) *C.C.Q.* Accordingly, the Superior Court could not, on this record, recognize the Utah Court’s jurisdiction under either of those subparagraphs.

[45] This brings me to the third ground for recognition relied on by Knight and considered by the trial judge, namely submission to jurisdiction under art. 3168(6) *C.C.Q.* On this ground, though, I consider that the lower courts were justified to conclude as they did. As stated, a single ground suffices to recognize jurisdiction (Emanuelli (2011), at No. 290; *Hocking*, at para. 187).

C. *Article 3168(6) C.C.Q.*

[46] Submission has long been recognized in Quebec case law as a basis for a court's jurisdiction; once a party has submitted to a court's jurisdiction, the party can no longer challenge it (see *Vaughan v. Campbell* (1855), 5 L.C. Rep. 431 (Sup. Ct.; see also G. Goldstein and J. A. Talpis, *L'effet au Québec des jugements étrangers en matière de droits patrimoniaux* (1991), at p. 117; G. Goldstein and E. Groffier, *Droit international privé*, vol. 1, *Théorie générale*, (1998), at No. 183). The *Civil Code* now expressly provides in art. 3168(6) *C.C.Q.* that the jurisdiction of foreign authorities is recognized when "the defendant has submitted to the jurisdiction of the foreign authorities".

[47] The trial judge found that, in accordance with this subparagraph, Mr. Barer had submitted to the Utah Court's jurisdiction by "raising a *substantive* issue" in his motion to dismiss (para. 16 (emphasis added)). Although the Court of Appeal dismissed Mr. Barer's appeal from that decision, we do not know whether the panel hearing the appeal on the merits agreed with this conclusion. I note that the other panel that heard Knight's application for the summary dismissal of Mr. Barer's

appeal articulated the threshold for submission to jurisdiction slightly differently than the trial judge. It opined that Mr. Barer appeared to have consented to the Utah Court's jurisdiction as he had raised "*non-jurisdictional* grounds" to dismiss Knight's complaint (C.A. reasons (2016), at para. 3 (emphasis added)).

[48] Before this Court, Knight argues that Mr. Barer submitted to the Utah Court's jurisdiction as a result of (1) his motion to dismiss; (2) a motion to extend time to answer or otherwise respond to the complaint; and (3) his subsequent participation in a settlement conference. Contrary to the other two grounds, the procedural facts underlying this claim under art. 3168 (6) *C.C.Q.* are all supported by the exhibits filed before the Superior Court. There are therefore no concerns about Knight's burden of proof that arise in this regard.

[49] I add two clarifications. First, submission to jurisdiction is a question of mixed fact and law (*Natha v. Cook*, 2016 ABCA 100, 616 A.R. 276, at para. 11; *Ward v. Nackawic Mechanical Ltd.*, 2015 NBCA 1, 429 N.B.R. (2d) 228, at para. 15; *Fleckenstein v. Hutchison*, 2009 ABCA 320, 460 A.R. 386, at para. 18). Indeed, deciding whether a defendant has submitted to jurisdiction involves applying a legal standard to a set of facts, weighing these facts and drawing inferences (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 26). As such, the determination that a defendant has submitted to a court's jurisdiction is not to be overturned absent palpable and overriding error, provided no extricable legal

questions have been identified (*Housen*, at para. 36; *St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491, at paras. 48-49).

[50] Second, the trial judge applied Quebec law in order to decide whether Mr. Barer had submitted to the Utah Court's jurisdiction because "in the absence of the proof of the Utah law, the Court must presume it is the equivalent of Quebec law and apply same" (para. 13). Mr. Barer contends that the burden was rather on Knight to prove that he had submitted to the Utah Court's jurisdiction under the law of that State. I agree with the trial judge that submission to jurisdiction under art. 3168(6) *C.C.Q.* must be assessed under Quebec law. And this would have been true even if the parties had proven the content of Utah law.

[51] As discussed, the rationale for art. 3168 *C.C.Q.* is not to ensure that the foreign authority properly followed its own procedural rules. The aim is to ensure that giving effect to the foreign decision would not conflict with Quebec law's conceptions of procedural fairness and orderly administration of justice (Goldstein, fasc. 11, at para. 2). The rules of indirect international jurisdiction set out in the *Civil Code* — including art. 3168 — are Quebec rules, and their requirements are therefore assessed in accordance with Quebec law. For the purpose of determining indirect international jurisdiction, enforcing courts are accordingly not bound by the legal characterization of the facts made by foreign authorities (Civil Code Revision Office, *Report on the Québec Civil Code*, Commentaires vol. II (1978), at p. 994; J. A. Talpis and G. Goldstein, "Analyse critique de l'avant-projet de loi du Québec en droit

international privé” (1989), 91 *R. du N.* 606, at pp. 627-28; *Zimmermann*, at paras. 13-20). Quebec courts have to determine whether “the defendant has submitted to the jurisdiction of the foreign authorit[y]” pursuant to art. 3168(6) *C.C.Q.* in light of the meaning that Quebec law gives to these terms.

(1) Submission to Jurisdiction under Quebec Law

[52] Under Quebec law, submission to jurisdiction can be either explicit or implicit (Kélada, at p. 544; F. Sabourin, “Compétence internationale relative aux actions personnelles à caractère patrimonial et effets des décisions étrangères” in *JurisClasseur Québec — Droit international privé* (loose-leaf), by P.-C. Lafond, ed., fasc. 25, at para. 26; *Alimport (Empresa Cubana Importadora de Alimentos) v. Victoria Transport*, [1977] 2 S.C.R. 858, at p. 863; *Bombardier Transportation v. SMC Pneumatics (UK) Ltd.*, 2009 QCCA 861, at para. 50 (CanLII); *International Image Services Inc. v. Ellipse Fiction/Ellipse Programme*, 1995 CanLII 10253, at p. 5 (Que. C.A.); *Forest Fibers Inc. v. CSAV Norasia Container Lines Ltd.*, 2007 QCCS 4794, at para. 44 (CanLII); *171486 Canada Inc. v. Rogers Cantel Inc.*, [1995] R.D.J. 91, at para. 37 (Sup. Ct.)) It must nevertheless be clear (*Rogers Cantel*, at para. 37; *Forest Fibers*, at para. 44; *Conserviera S.p.A. v. Paesana Import-Export Inc.*, 2001 CanLII 24802, at paras. 63-64 (Que. Sup. Ct.)). After having submitted to the jurisdiction of a foreign authority, a defendant cannot withdraw its consent for that authority to decide the dispute. The orderly administration of justice requires that,

once jurisdiction has been validly established, the case proceed in the same forum regardless of the changing whims of the parties.

[53] The laconic art. 3168(6) does not explain the meaning of the terms “submitted to the jurisdiction”, and the question of whether some acts amount to submission has divided authors and judges alike. The authorities agree on one thing, however: there is enduring confusion, notably about the standard applicable in situations where a defendant presents both jurisdictional and non-jurisdictional arguments before a court (Goldstein (2012), at para. 3168 590; Talpis, at p. 113; Goldstein, fasc. 11, at para. 29; Goldstein and Groffier, at No. 183; *Cortas Canning*, at pp. 1241-42). Assessing whether Mr. Barer did in fact submit to the Utah Court’s jurisdiction therefore requires a consideration of the legislative history that led to the adoption of the current wording of art. 3168(6) *C.C.Q.* and an analysis of academic and judicial views regarding whether defences on the merits constitute submission where jurisdiction is also contested.

(a) *Legislative History of Article 3168 C.C.Q.*



[54] Article 3168(6) *C.C.Q.* is the result of a lengthy process of consultation and reflection undertaken by the Quebec legislature. In 1975, the Civil Code Revision Office presented the legislature with a first draft of what would become Book Ten of the *Civil Code* dedicated to private international law. The draft article concerning the recognition of a foreign authority's jurisdiction described in some detail the acts that would amount to submission:

Article 63

The court of origin is considered to have jurisdiction when:

...

6. the defendant has contested on the merits *without challenging the jurisdiction of the court or making reservation thereto*; nevertheless such jurisdiction is not recognized if the defendant has contested on the merits in order to resist the seizure of property or to obtain its release, or if the law of Quebec would in this case give exclusive jurisdiction to its courts;

...

(Civil Code Revision Office, *Report on Private International Law*, Montréal (1975), at pp. 145-47 (emphasis added))

[55] Along the same lines, the draft article dealing with the jurisdiction of Quebec courts provided that “the courts of Quebec have general jurisdiction when . . . the defendant has submitted himself to the jurisdiction of Quebec courts, either expressly or by contesting on the merits without reservation as to jurisdiction” (p. 119). Both draft provisions were modelled on the *1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (*Commentaires du ministre de la Justice*, at pp. 2009 and 2026, in reference to the finalized versions of the draft provisions).

[56] However, the draft book on private international law received “several critiques” and underwent “a large number of amendments — to the point of making it unrecognizable” by the time a draft Civil Code was introduced in the National Assembly in 1990 (Talpis and Castel, at No. 3). The bill did not even contain an article on the recognition of a foreign authority’s jurisdiction in actions of a patrimonial nature. As for the article on Quebec courts’ jurisdiction in such actions, it no longer described which acts amounted to submission; it simply referred to cases where the defendant submits to the jurisdiction of a Quebec court (draft art. 3126). This wording was apparently preferred to the previous one.

[57] In the end, the provision that would become art. 3168 *C.C.Q.* was added to the draft in an amendment proposed by the Minister of Justice. He indicated that subparagraph 6 was meant to mirror the provision on submission to Quebec courts. For that purpose, the Minister suggested using exactly the same expression in French (Sous-commission aux institutions, “Étude détaillée du projet de loi 125 — Code civil du Québec”, *Journal des débats*, vol. 31, No. 32, 1st Sess., 34th leg., December 9, 1991, at pp. 1285-1331).

[58] Two conclusions stem from this legislative history. First, the legislature considered but rejected a draft article that would have required Quebec courts to deny recognition of foreign decisions so long as the defendant had contested jurisdiction before arguing the merits of the dispute. Second, Mr. Barer’s argument that art. 3168(6) *C.C.Q.* should be interpreted more restrictively than art. 3148 para. 1(5)

*C.C.Q.* — the mirror article on the jurisdiction of Quebec courts — must be rejected. Although it is true that some of the grounds for recognizing a foreign authority's jurisdiction under art. 3168 are more limited than those listed in art. 3148 for establishing the jurisdiction of Quebec courts, there is no such asymmetry between art. 3168(6) and art. 3148 para. 1(5). There is no reason to draw a distinction between these two provisions where the legislature chose not to draw one. The criterion for submission set out in art. 3168(6) does not differ from that set out in art. 3148 para. 1(5) *C.C.Q.* (Goldstein and Groffier, at No. 183; Sabourin, at para. 26).

(b) *Academic and Judicial Views Regarding Defences on the Merits Where Jurisdiction Is Contested*

[59] That being said, since 1994, Quebec courts and commentators have fleshed out the key concept of submission to jurisdiction — the linchpin of both art. 3168(6) and art. 3148 para. 1(5) *C.C.Q.*

[60] Some acts are consistently viewed as amounting to submission. Explicitly recognizing that the foreign tribunal had jurisdiction, in a transaction for example (*LVH Corporation (Las Vegas Hilton) v. Lalonde*, 2003 CanLII 27646 (Que. Sup. Ct.) at paras. 24-25), is one such act. Defending the action on its merits without contesting the court's jurisdiction also constitutes submission (*Kadar v. Reichman (Succession)*, 2014 QCCA 1180, 1 E.T.R. (4th) 9, at paras. 40-42; *Lagassé v. McElligott*, [1993] R.D.J. 323, at paras. 14-15 (C.A.); *Mutual Trust*, at p. 633; *D'Alessandro v. Mastrocola*, 2007 QCCS 4164, at para. 8 (CanLII); *Canadian*

*Logistics Systems Limited v. 129726 Canada inc.*, 1997 CanLII 6840, at p. 3 (C.Q.)). In such cases, the defendant's conduct unequivocally signals to the court and the plaintiff that there is acceptance of the forum's jurisdiction. Conversely, it is also uncontentionous that some courses of action are sufficient to indicate that a defendant has not submitted to the plaintiff's choice of forum. Simply refraining from appearing before the court in question is one (*Zimmermann inc. v. Barer*, 2014 QCCS 3404, at para. 71 (CanLII); *Labs of Virginia Inc. v. Clintrials Bioresearch Ltd.*, [2003] R.J.Q. 1876 (Sup. Ct.) at para. 39). Appearing merely to contest jurisdiction in a timely manner is another (Goldstein (2012), at para. 3148 580; Talpis, at p. 113).

[61] I note that Quebec courts have also considered whether certain procedural steps other than filing a defence on the merits can amount to submission. A defendant who participated in proceedings without raising substantive arguments may have never submitted to the court's jurisdiction. This determination will normally depend on whether the procedural acts in question, when assessed objectively, reveal the defendant's implicit decision to have the dispute settled by the forum. In this regard, each case must be assessed on its own facts (Goldstein (2012), at para. 3148 580; *Richter et Associés v. Coopers et Lybrand*, 2013 QCCS 1945, at para. 63 (CanLII)).

[62] For instance, some procedural steps have been found to demonstrate implicitly but clearly, by their very nature, the defendant's consent to have the dispute settled by the forum. These have included presenting a cross demand (*Lagassé*, at pp. 325-26); applying to have the action transferred to another district within the same

jurisdiction (*The Education Resources Institute Inc. (Teri) v. Chitaroni*, 2003 CanLII 21712, at para. 17 (C.Q.); *MFI Export Finance inc. v. Rother International S.A. de C.V. inc.*, 2004 CanLII 16200, at paras. 80-81 (Que. Sup. Ct.)); and calling upon a third party to take up the defendant's defence (*Canada (Procureur général) v. St-Julien*, 2010 QCCS 2723, at paras. 40-41 (CanLII)). Participating in the proceedings to a significant extent without ever contesting jurisdiction may also amount to submitting to jurisdiction (*Alimport*, at p. 863; *Ellipse Fiction/Ellipse Programme*, at para. 26; *Canfield Technologies inc. v. Servi-Metals Canada inc.*, 1999 CanLII 10839, at para. 40 (Que. Sup. Ct.); *Jules Jordan Video*, at paras. 63-70). Courts must indeed protect the plaintiff's legitimate interest in knowing, at some point in the proceedings, whether or not the defendant has submitted to jurisdiction.

[63] On the other hand, some procedural acts do not necessarily indicate that a defendant has submitted to jurisdiction. For instance, bringing an application to quash a seizure before judgment, for security for costs or to replace one's lawyer does not always imply such recognition (*MFI Export*, at paras. 74-76; *G. Van Den Brink B.V. v. Heringer*, 1994 Carswell Que 2235 (WL Can.) (Sup. Ct.)), nor does asking for a postponement (see *Rogers Cantel*) or reaching and producing an agreement with the other party as to the conduct of the proceedings (*Shamji*, at para. 17; *Dorais v. Saudi Arabian General Investment Authority*, 2013 QCCS 4498, at para. 18 (CanLII)). A combination of these steps may also, depending on the circumstances, not be enough to amount to submission (*Forest Fibers*, at paras. 41-44). That said, opinions vary

widely on the legal characterization of some acts that lie between these various examples.

[64] One particularly contentious debate concerns a defendant's choice to present a defence on the merits at the same time as its jurisdictional arguments, when a decision on jurisdiction is pending, or after the jurisdictional arguments have been rejected by the court. The confusion stems in part from the idea, developed by some, that a defendant should not be taken to have submitted to jurisdiction when it was merely attempting to "save its skin". The logic of this approach to submission, as Professors Goldstein and Groffier explained in 1998, is that submission should be concerned with the intention of the defendant (para. 183). If a party presents an argument on the merits not in the belief that the court has jurisdiction, but because this appears to be the best way to avoid the negative consequences that may result from non-participation in the proceedings, this should not be taken to amount to submission (para. 183). Professors Goldstein and Groffier stressed that this approach would benefit the administration of justice, as it would encourage full participation by all parties to the dispute (para. 183). I note, however, that they did not base this approach on existing jurisprudence and authorities, but rather merely expressed their opinion as to what the law should be.

[65] This approach was endorsed in a 1999 Quebec Superior Court decision, *Cortas Canning*, upon which Mr. Barer relied heavily before both this Court and the courts below. In that case, the Superior Court was asked to recognize and enforce a

default judgment rendered by a Texas court. The defendants had taken many procedural steps in Texas after having reserved their right to contest jurisdiction, such as presenting a motion for an extension of time and two motions to dismiss, agreeing to a motion by their counsel to cease representing them, filing a joint status report and attending a settlement conference (pp. 1229-30). They had then ceased participating in the proceedings and a default judgment had been rendered against them. To determine whether these acts constituted submission to jurisdiction, the judge considered the “save your skin” approach discussed by Professors Goldstein and Groffier:

The authors appear to favour the possibility that a defendant be allowed the possibility to “save his skin” in a foreign jurisdiction without submitting to this foreign jurisdiction. . . . This line of reasoning is, in the opinion of the Court, legally sound. [I]t allows a defendant to raise at the begin[n]ing of a trial the question of jurisdiction; it gives a defendant time to evaluate the risk-reward equation that must be made before accepting to submit to a foreign jurisdiction. [p. 1244.]

Adopting this approach, the judge considered that the defendants had not submitted to the Texas court’s jurisdiction (at p. 1244).

[66] Though *Cortas Canning* was never followed on this specific point of law, the idea that the presentation of substantive arguments by a defendant would not amount to implicit submission so long as the defendant raised the jurisdictional issue in a timely manner appeared elsewhere in jurisprudence. For example, the Quebec Court of Appeal in *Bombardier*, at para. 59, and *Ortega Figueroa v. Jenkel*, 2015 QCCA 1393, at paras. 58-59 and 64 (CanLII), briefly referred to this understanding of

submission to jurisdiction in concluding that a party had not submitted to a court's jurisdiction, despite having argued the merits of the case, when that party had contested jurisdiction in a timely manner. This approach was also noted in commentary and textbooks (Sabourin, at para. 35; P. Ferland and G. Laganière, "Le droit international privé", in *Collection de droit de l'École du Barreau du Québec 2017-2018*, vol. 7, *Contrats, sûretés, publicité des droits et droit international privé* (2017), 253, at pp. 304-5). This approach is, however, far from being universally accepted; early on, recognized scholars either pointed out its limitations or simply rejected it: see Talpis, at p. 115; Emanuelli, *Droit international privé québécois* (1st ed. 2001), at No. 276.

[67] With respect, I am of the view that this understanding of submission to a foreign authority hardly serves the administration of justice. It would allow a defendant that has unsuccessfully made full submissions on evidence and law before a court to contest the court's jurisdiction later in enforcement proceedings in other jurisdictions. Absent a ground for recognizing jurisdiction other than the defendant's submission, the plaintiff would then have to retry the matter anew in jurisdictions where the defendant has assets. This would lead to a significant waste of judicial resources and open the door to the possibility of contradictory decisions. Moreover, plaintiffs who invest time and resources in judicial proceedings in a jurisdiction are entitled to some certainty regarding whether or not the defendants have submitted to the court's jurisdiction.



[68] I note that even Professor Goldstein has subsequently qualified the position he adopted in 1998 with Professor Groffier. In a book published in 2012, he noted that allowing the mere fact that lack of jurisdiction was argued to shield defendants from being found to have submitted to jurisdiction could be considered too restrictive a position (Goldstein (2012), at para. 3148 580). I agree that this approach would indeed be too narrow. It would protect more than a defendant's legitimate interest in having the case heard before a competent tribunal; it would also allow the defendant to duplicate proceedings and thereby unfairly obtain multiple chances of securing a favourable decision. Moreover, such an approach would significantly frustrate the general principle that foreign decisions are to be recognized by Quebec courts. Finally, it would go against the legislature's choice not to codify a definition of submission that treats objections to jurisdiction as shields against findings of submission. This "save your skin" approach to submission to jurisdiction, which allows defendants to present substantive arguments without submitting to jurisdiction, should be rejected.

[69] In my view, a defendant submits to jurisdiction when the defendant presents substantive arguments which, if accepted, would resolve the dispute — or part of the dispute — on its merits. It is true, as stressed by Mr. Barer, that Quebec defendants sued abroad sometimes face a difficult strategic choice. Either they defend the foreign lawsuit and try to protect their assets in that jurisdiction, or they refrain from doing so in order to be able to challenge the foreign court's jurisdiction in eventual recognition proceedings in Quebec (see Goldstein and Talpis, at p. 118).

However, if they attempt to take advantage of the proceedings before the foreign court to obtain a judgment that would definitively settle the dispute, they must bear the consequences of their choice. It would be unfair if defendants could have the opportunity of convincing the foreign authority of the merits of their case while at the same time preserving their right to challenge the jurisdiction of that authority later if they are ultimately displeased with its decision. To use a colloquial expression, they would have “two kicks at the can” or, put another way, what amounts to a legal “mulligan”.<sup>1</sup>

[70] In this regard, I agree with Professors Emanuelli and Talpis that parties who choose to advance substantive arguments to further their positions in a forum thereby consent, perhaps begrudgingly, to the jurisdiction of that authority (Emanuelli (2011), at No. 290; Talpis, at p. 113). This, in my view, is the case regardless of whether the jurisdictional argument has been rejected outright, is under consideration by the court, or is simply being raised by the defendant and has yet to be considered. By deciding to present substantive arguments that could, if accepted, definitively resolve the matter on its merits, a defendant submits to jurisdiction. This is what both the Superior Court and the Court of Appeal found was the situation here. I see no reason to interfere with this finding.

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<sup>1</sup> I do not take credit for this expression previously used by others in different contexts: see, for instance, Doherty J.A. in *R. v. 1275729 Ontario Inc.* (2005), 203 C.C.C. (3d) 501, at para. 43 (Ont. C.A.); Dunphy J. in *Birch Hill Equity Partners Management Inc. v. Rogers Communications Inc.*, 2015 ONSC 7189, 128 O.R. (3d) 1, at para. 7, and more recently my colleague Brown J. in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720, at para. 39. See also *Armoyan v. Armoyan*, 2013 NSCA 99, 334 N.S.R. (2d) 204, at para. 287, and *Canada (Canadian Environmental Assessment Agency) v. Taseko Mines Limited*, 2018 BCSC 1034, at para. 54 (CanLII).

(2) Mr. Barer's Submission to the Utah Court's Jurisdiction

[71] Mr. Barer did not submit a defence on the merits before the Utah Court. But in his motion to dismiss, he did present at least one argument pertaining to the merits of the action against him, which, had it been accepted, would have led to a final conclusion in his favour. Mr. Barer's argument that Knight's fraudulent misrepresentation claim was barred at law by the pure economic loss rule could have led the Utah Court to conclusively dismiss that claim. Such a ruling would have attracted the authority of *res judicata* and precluded Knight from asserting that claim in another jurisdiction. Mr. Barer's argument based on the pure economic loss rule was thus akin to a defence on the merits for the purposes of submitting to the Utah Court's jurisdiction. As indicated above, the exhibits filed by Knight before the Superior Court establish the procedural facts underlying its claim under art. 3168(6) *C.C.Q.*

[72] In my view, the same policy considerations which justify denying the "save your skin" exception apply in such a case. Mr. Barer attempted to take advantage of the proceedings initiated by Knight in Utah to resolve part, if not all, of the dispute between them. That being so, Mr. Barer cannot ask Quebec courts to shield him from the consequences of having lost a legal battle that he chose to undertake in Utah. Such a request is unwarranted and contrary to both the principle of comity and the efficient use of international judicial resources. In short, Mr. Barer seized the opportunity to obtain a favourable final decision from the Utah Court.

Pursuant to art. 3168(6) *C.C.Q.*, he is thereby foreclosed from arguing that the Utah Court did not have jurisdiction.

[73] Despite this, Mr. Barer contends that this legal standard of submission should not apply in his particular case, as he had no choice but to present all of his preliminary exceptions together in the course of the Utah proceedings. Put otherwise, he should not be held to have submitted to jurisdiction simply because he abided by the rules of procedure and presented substantive arguments along with his jurisdictional challenge in his motion to dismiss. He relies in this regard on comments such as those of Professor Talpis, who wrote that

. . . there is some merit to [the save your skin] approach in cases where the defendant's acts were done out of necessity — for example, where he could not contest jurisdiction without filing a plea to the merits at the same time (as in Quebec's Simplified Procedure) or where his acts stemmed from some urgency to avoid severe consequences . . . . [p. 115.]

[74] I note that Mr. Barer did not seek to establish the content of Utah procedural law regarding the presentation of preliminary exceptions, but he argues that it must be presumed to be the same as Quebec procedural law. He submits that, in Quebec, parties have to present all of their preliminary exceptions at the same time.

[75] I recognize that in some circumstances, the fact that a party was required to present all of its arguments together could have some bearing on the submission analysis. As Professor Talpis has noted, some defendants may find themselves in a position where they *must* carry out certain acts in order to properly challenge the

court's jurisdiction (Talpis, at p. 115). The world's judicial systems operate in a myriad of different ways and do not necessarily always divide issues of jurisdiction from the merits in the same manner. Still, this is of no assistance to Mr. Barer here. First, he did not establish that, despite this submission to the Utah Court's jurisdiction, he had indeed no choice but to proceed as he did in Utah. Second, in any event, I would reject his argument even if Quebec law was applicable.

[76] It is true that art. 2809 para. 2 *C.C.Q.* provides that if the foreign applicable law has not been pleaded or if its content has not been established, courts will apply Quebec law (Emanuelli (2011), at para. 444; Goldstein and Groffier, at No. 100). This rule is justified by the need to clarify the legal norm to apply to resolve the dispute before the court rather than by the questionable and criticized presumption that existed under the *Civil Code of Lower Canada* to the effect that the foreign law whose content has not been established is deemed identical to Quebec law (see *Bégin v. Bilodeau*, [1951] S.C.R. 699; J.-G. Castel, "La preuve de la loi étrangère et des actes publics étrangers au Québec" (1972), 32 *R. du B.* 338, at pp. 354 et seq.; Emanuelli (2011), at para. 444; Goldstein and Groffier, at No. 99; I. Zajtay, "L'application du droit étranger: science et fictions" (1971), 23 *R.I.D.C.* 49, at pp. 58-59).

[77] In the case at hand, however, Quebec courts are not called upon to apply Utah procedural law. Indeed, Quebec courts never have to apply foreign procedural law, as art. 3132 *C.C.Q.* provides that "[p]rocedure is governed by the law of the

court seized of the matter”. When considering whether Mr. Barer had to present all of his preliminary exceptions together before the Utah Court in 2010, as he claims, it must rather be determined whether Mr. Barer was, in fact, put in a position where he had no choice but to proceed as he did. The relevant procedural rule has already been applied in 2010 by the Utah Court. What is left for Quebec courts to decide is whether, as a matter of *fact*, Mr. Barer had no choice but to present certain arguments as a result of certain procedural rules. They must then assess whether this fact has some bearing in the submission to jurisdiction analysis. In this context, the rule of subsidiary application of Quebec law under art. 2809 para. 2 *C.C.Q.* does not apply.

[78] In essence, Mr. Barer seeks to avoid the consequences that would normally attach to the steps he undertook abroad and to what otherwise established his submission to jurisdiction. He raises, in effect, an exception, and so bears the burden of proof in this regard (art. 2803 para. 2 *C.C.Q.*). However, he failed to establish that, as a result of Utah procedural law, he had no choice in 2010 but to proceed as he did when he presented substantive arguments in his motion to dismiss before the Utah Court. None of the evidence he adduced before the Superior Court supports that claim. In particular, the affidavit of his Utah counsel does not state this. His argument therefore cannot succeed. The Superior Court made no palpable and overriding error in determining that submission to jurisdiction was established on this record.

[79] In any event, even if Mr. Barer were right that we should presume that the procedural rules applied in 2010 by the Utah Court were the same as the ones that would have been applied in Quebec at that time, his argument would still be rejected. The former *C.C.P.*, in force in 2010, simply provided as follows:

**151.5.** Subject to article 159 and any agreement between the parties, all preliminary exceptions must be raised orally at the time of presentation of the action or application. . . .

...  
**159.** Unless otherwise agreed by the parties in accordance with article 151.1, preliminary exceptions and the conclusions sought must be disclosed in writing to the opposite party before the date of presentation of the action or application, failing which the court may refuse the presentation of preliminary exceptions.

[80] While these articles required that preliminary exceptions be raised at a specific time, they did not require that the exceptions always be presented or pleaded together. Even where the parties could not agree on a timeline, they could disclose their preliminary exceptions in due time and plead some of them after the “presentation of the action” with the court’s permission (art. 151.6(2) of the former *C.C.P.*; *Québecor World inc. v. Gravel*, 2003 CanLII 36991 (C.Q.)). They could, of course, decide to present them separately. And it is recognized that jurisdictional issues must always be decided first (*Marcoux v. Banque Laurentienne du Canada*, 2011 QCCA 2034, at para. 20 (CanLII); *Lagassé*, at para. 15). Therefore, even under Quebec law, the assertion that Mr. Barer would have been required to present all of his preliminary arguments together at the same time, as he did before the Utah Court,

without making any distinctions as to their importance or hierarchy, is not established.

[81] I thus conclude that Mr. Barer submitted to the Utah Court's jurisdiction in accordance with art. 3168(6) *C.C.Q.* by presenting substantive arguments in his motion to dismiss that, if accepted, would have resolved all or part of the dispute. This suffices to justify recognizing and enforcing the Utah Decision against him in Quebec.

[82] This conclusion is supported by the course of action Mr. Barer pursued even after his motion to dismiss was rejected. Following the dismissal, he obtained an extension of time to respond to Knight's complaint and participated in a settlement conference. As previously indicated, such acts are generally not understood as amounting to submission in Quebec law. They do not necessarily betray an implicit understanding that the court is the appropriate forum to resolve the dispute. If these were the only steps relied upon by Knight to support the argument that Mr. Barer submitted to the Utah Court's jurisdiction, they would hardly suffice. In this case, however, these two acts followed the presentation of Mr. Barer's substantive arguments and their ultimate rejection by the Utah Court. They therefore contradict Mr. Barer's assertion that he presented those arguments only because he was required to do so by Utah procedural law. Mr. Barer could have ceased all involvement with the Utah Court once it had rejected his jurisdictional argument. He did not do so. To this extent, I would agree with Knight that these acts reinforce the finding that Mr.



Barer submitted to the Utah Court's jurisdiction by deciding to proceed the way he did and by presenting substantive arguments along with his jurisdictional challenge.

D. *Article 3164 C.C.Q.*

[83] Finally, Mr. Barer contends that the trial judge misread this Court's decision in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, and erred in concluding that the substantial connection test, set out in art. 3164 *C.C.Q.*, is not an additional criterion to be satisfied by the party seeking recognition of a foreign judgment. According to Mr. Barer, the mere fact that he submitted to jurisdiction is not sufficient to entail recognition if Knight cannot also demonstrate that the dispute had a substantial connection with Utah.

[84] This last argument of Mr. Barer must fail as well. Article 3164 sets out the general principle for recognition of foreign authorities' jurisdiction. It reads as follows:

**3164.** The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the State whose authority is seized of the matter.

[85] This Court's decision in *Spar* provides little help on this issue. That decision was concerned with whether Quebec courts had jurisdiction to hear a dispute. It addressed neither the indirect international jurisdiction of foreign courts

nor the recognition of foreign decisions. The passage relied upon by the trial judge at para. 12 of his reasons related not to the “substantial connection” requirement set out in art. 3164 *C.C.Q.*, but rather to the common law doctrine of jurisdiction *simpliciter*, which also requires a substantial connection between the dispute and the forum.

[86] Nevertheless, this Court did subsequently consider the interplay between arts. 3164 and 3168 *C.C.Q.* in *Lépine*. In that decision rendered in 2009, Justice LeBel stated:

Article 3164 *C.C.Q.* provides that a substantial connection between the dispute and the originating court is a fundamental condition for the recognition of a judgment in Quebec. Articles 3165 to 3168 then set out, in more specific terms, connecting factors to be used to determine whether, in certain situations, a sufficient connection exists between the dispute and the foreign authority. The application of specific rules, such as those in art. 3168 respecting personal actions of a patrimonial nature, will generally suffice to determine whether the foreign court had jurisdiction. However, it may be necessary in considering a complex legal situation involving two or more parties located in different parts of the world to apply the general principle in art. 3164 in order to establish jurisdiction and have recourse to, for example, the forum of necessity. [Emphasis added; para. 36.]

This passage from *Lépine* lends itself to two possible readings. On the one hand, it can be read as saying that in some situations, the specific rules in art. 3168 *C.C.Q.* may not uphold the general principle of substantial connection set out in art. 3164 *C.C.Q.* For instance, there may be uncommon or peculiar circumstances in which, despite art. 3168 being satisfied, there is no substantial connection between the dispute and the State where the decision was rendered. This could notably be the case in blatant situations of forum shopping (see Goldstein and Groffier, at No. 175;

Goldstein, fasc. 11, at para. 53; *Cortas Canning*, at pp. 1237-39). When this is the case, a separate analysis could be required under art. 3164 *C.C.Q.* to ensure that there is a substantial connection between the dispute and the foreign court. On the other hand, this passage could also be read as recognizing the availability of art. 3164 *C.C.Q.* as an independent basis for recognizing the jurisdiction of foreign authorities, but not as creating a separate requirement once one of the conditions listed under art. 3168 *C.C.Q.* is met.

[87] I recognize that Professors Emanuelli, Talpis and Castel, along with some court decisions, have put forward the view that art. 3164 *C.C.Q.* requires a substantial connection between the dispute and the forum even where a ground for recognition of the foreign authority's jurisdiction under art. 3168 *C.C.Q.* is established (Emanuelli (2011), at para. 290; Talpis and Castel, at No. 485; *Zimmermann*, at para. 12 (Que. C.A.); *Heerema*, at paras. 23 and 26; *Hocking*, at paras. 181-84; *Jules Jordan Video*, at paras. 54-55; *Bil'In (Village Council) v. Green Park International Inc.*, 2009 QCCS 4151, [2009] R.J.Q. 2579, at paras. 61 and 74-75; *Labs of Virginia Inc.*, at paras. 30 and 40). But as Justice LeBel explained in *Lépine*, the fact remains that arts. 3164 and 3168 *C.C.Q.* will generally overlap and accord entirely. Both provisions enunciate similar principles, with different degrees of precision. Once one of the conditions under art. 3168 *C.C.Q.* is satisfied, the substantial connection requirement in art. 3164 *C.C.Q.* will in most cases be satisfied as well. I note in this regard that the language used by Justice LeBel ("generally suffice") is flexible and not as categorical as that used in some academic writing published before *Lépine*

(such as “always sufficient”) (see G. Saumier, “The Recognition of Foreign Judgments in Quebec — The Mirror Crack’d?” (2002), 81 *Can. Bar. Rev.* 677, at p. 689).

[88] It is not necessary to resolve this issue in the instant case. Regardless of how this passage from *Lépine* is read, the outcome remains the same here. I therefore consider it more advisable for the Court to leave this specific issue for another day, especially given that it has not been thoroughly canvassed and discussed by the parties and the courts below. When a majority of the Court elects to leave an issue for another day, this does not put into question the strength or authority of the appellate courts’ jurisprudence on that issue. The mere fact that concurring or dissenting judges choose to address the point anyway does not change this. In the instant case, it is clear that Mr. Barer’s position is not supported by either of the readings of *Lépine* outlined above. Mr. Barer’s submission to jurisdiction under art. 3168(6) *C.C.Q.* clearly establishes a substantial connection between the dispute and the Utah Court (*Jules Jordan Video*, at para. 55). Even on a reading of *Lépine* that would call for a separate analysis under art. 3164 *C.C.Q.*, such an analysis would be required only in uncommon or peculiar circumstances, as “[t]he application of . . . art. 3168 . . . will generally suffice to determine whether the foreign court had jurisdiction” (*Lépine*, at para. 36). Here, the fact that Mr. Barer participated in the legal proceedings in Utah to the extent of submitting to the Utah Court’s jurisdiction suffices amply and raises no question as to whether the dispute is substantially connected with Utah and the Utah Court. To the contrary, as stressed by the Utah judge in his reasons for dismissing

Mr. Barer's motion to dismiss, it is in the interests of justice that the "entire dispute including the alter ego claims" be decided by one forum (A.R., vol. II, at p. 103).

[89] Relying upon the mirror principle in art. 3164 *C.C.Q.*, my colleague Brown J. opines that the Utah Court's jurisdiction is rooted here in one of the General Provisions of Title Three of the Book on Private International Law in the *C.C.Q.*, namely art. 3139 :

**3139.** Where a Québec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand.

He suggests that relying upon art. 3164 *C.C.Q.* is necessary given that neither art. 3168(6) *C.C.Q.* nor, for that matter, art. 3168(4) *C.C.Q.* is sufficient to establish the Utah Court's indirect international jurisdiction under the *C.C.Q.* Indeed, if either one of these provisions applied, my colleague considers that there would be no need to resort to art. 3164 *C.C.Q.* at all (see Brown J.'s reasons at para. 122).

[90] Because of the conclusion I have reached and the explanations I have already offered, it is not necessary for me to consider whether art. 3164 *C.C.Q.* could, in this case, establish an independent basis for a foreign authority's jurisdiction if none of the conditions in art. 3168 *C.C.Q.* were met. I note, however, that Knight did not raise or rely upon art. 3164 or 3139 *C.C.Q.* to discharge its burden in this respect and to establish jurisdiction in its recognition proceedings. Neither did the courts below. In my view, this makes sense. Without commenting on the entire scope of art.

3139 *C.C.Q.* in the absence of any argument about it, I note that it is highly doubtful that this provision could even apply in the current context. There is a “principal demand” instituted by Knight jointly against three defendants, BEC, CBC and Mr. Barer, but there is no “cross demand”, and nor is Knight’s proceeding against Mr. Barer an “incidental demand” under Quebec civil or procedural law. In Quebec law, “incidental demand” refers to the forced or voluntary intervention of a third party whose presence is necessary to resolve the main dispute (arts. 184 to 190 of the new *C.C.P.*; *Transcore Linklogistics v. Mike’s Transport and Auto Haul Inc.*, 2014 QCCA 776, at para. 29 (referring to arts. 216 and 217 of the former *C.C.P.*) (CanLII); H. Kélada, *Les incidents* (2nd ed. 2003)). Common examples are a recourse in warranty (see e.g. *GreCon Dimter inc. v. J. R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401) or a third party claim (*Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30, [2016] 2 S.C.R. 851, at para. 33). There has also been no consolidation of proceedings pursuant to art. 210 of the new *C.C.P.* Consolidation requires two or more separate proceedings (or actions), not merely one proceeding with multiple defendants. Mr. Barer is not a third party who is being forced into the dispute by way of a proceeding that can be characterized as an “incidental demand”. He is a co-defendant sued directly in a “principal demand”. To the extent that *Insta Holding Limited v. 9247-5334 Québec inc.*, 2017 QCCS 432, relied upon by my colleague suggests otherwise, I respectfully disagree. I note that, in any event, the court in that case found that jurisdiction against the co-defendant sued directly by the plaintiff was grounded in art. 3148 para. 1(3) *C.C.Q.*

[91] What is more, even if art. 3139 *C.C.Q.* could apply in this manner, Knight has not adduced evidence to support the required degree of “connexity” between Mr. Barer and BEC (*GreCon*, para. 31). The mere fact that Mr. Barer played a key role in the negotiations with Knight is not enough. To suggest that this fact alone makes the claim “incidental” is to effectively cast aside limited liability and read art. 3139 *C.C.Q.* as a free pass to pierce the corporate veil, which it is not.

[92] I add this. If the person relying upon art. 3164 *C.C.Q.* cannot first demonstrate that the jurisdiction of the foreign authority is established in accordance with the rules found in Title Three of the Book on Private International Law in the *C.C.Q.*, the substantial connection factor provided for under that provision will remain insufficient in and of itself. Any analysis thereof would thus be pointless.

## VI. Conclusion

[93] To sum up, I agree with the courts below that Mr. Barer submitted to the Utah Court’s jurisdiction in accordance with art. 3168(6) *C.C.Q.* Presenting substantive arguments that could, if accepted by the court, definitively resolve the matter on its merits is inherently incompatible with the position that the court lacks jurisdiction over a dispute. Mr. Barer’s submission to the Utah Court’s jurisdiction suffices to recognize the jurisdiction of that court under the Quebec rules of indirect international jurisdiction. The fact that Knight failed to meet its burden of proof under art. 3168(3) and (4) *C.C.Q.* is not determinative. And given that the dispute has a substantial connection with Utah in light of Mr. Barer’s submission to the

jurisdiction, art. 3164 *C.C.Q.* does not bar the recognition of the Utah Court's default judgment rendered against him. I would therefore dismiss the appeal with costs.

The following are the reasons delivered by

BROWN J. —

I. Introduction

[94] While I share my colleague Gascon J.'s view that the appeal should be dismissed, I arrive at that conclusion by a different path. In my respectful view, and for the reasons given by my colleague Côté J. at paras. 210 to 232 of her reasons, Mr. Barer has not submitted to the jurisdiction of the Utah Court within the meaning of art. 3168(6) of the *Civil Code of Québec* (“*C.C.Q.*”). I am, however, persuaded that the jurisdiction of the Utah Court has been established under arts. 3168(4), 3164 and 3139 *C.C.Q.*, and I write to explain why.

II. Analysis

A. *Article 3168(4) C.C.Q.*

[95] I agree with my colleagues that, when deciding whether to recognize a foreign decision, a Quebec court must review the evidence submitted to ensure that



the foreign authority had jurisdiction under the rules of the *C.C.Q.*: Gascon J.’s reasons, at para. 41; Côté J.’s reasons, at para. 186; *Iraq (State of) v. Heerema Zwijsdrecht, b. v.*, 2013 QCCA 1112, at para. 15 (CanLII); *Zimmermann inc. v. Barer*, 2016 QCCA 260, at para. 13 (CanLII)). Unlike my colleagues, however, I find the record placed before us sufficient to decide this question.

[96] Indeed, the record includes materials filed by Mr. Barer, containing some useful admissions: see arts. 2850 et seq. of the *C.C.Q.*; C. Piché, *La preuve civile* (5th ed. 2016), at Nos. 1043 et seq. On the basis of these admissions, I consider as proven the following facts:

- Mr. Barer resides in Montréal, Quebec (A.R., vol. II, at p. 90);
- In 2007, the Barer Engineering Company of America (“BEC”) was awarded a contract to install machinery at a military base located in Utah (A.R., vol. II, at p. 75);<sup>2</sup>
- In 2008, BEC subcontracted part of the work to Knight Brothers LLC (“Knight”) for a number of tasks, including the installation of a new foundation (A.R., vol. II, at p. 75); and

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<sup>2</sup> See A.R., vol. II, at p. 96: “The parties agree that in 2007, Defendant Barer Engineering Company of America (Barer Engineering) was awarded a contract to install machinery at Hill Air Force Base in Utah. In 2008, Plaintiff and Barer Engineering entered into a contract regarding work that Plaintiff was to perform, including installing a new foundation” (emphasis added); see also p. 107: “The parties agree there was a contract.”

- Mr. Barer has had a “key role” in dealing with Knight, given his status as President of BEC (A.R., vol. II, at pp. 81-82).

[97] I also consider as proven the following facts, admitted in materials filed by BEC:

- BEC is a Vermont corporation and its principal business office is located in Burlington, Vermont (A.R., vol. II, at pp. 123 and 131); and
- Mr. Barer is Secretary and acting President of BEC, as also admitted by Mr. Barer personally (A.R., vol. II, at p. 123).

[98] Knight, “a Utah limited liability company and a licensed contractor with the State of Utah, with its principal place of business located in Salt Lake County, Utah”,<sup>3</sup> initiated proceedings before the Utah Court against BEC, Central Bearing Corporation Ltd. (“CBC”) and Mr. Barer personally for a balance allegedly owing under the contract between itself and BEC. There can be no doubt that the Utah Court had jurisdiction at least over this contractual “dispute” pursuant to art. 3168(4) *C.C.Q.*, which reads as follows:

**3168.** In personal actions of a patrimonial nature, the jurisdiction of foreign authorities is recognized only in the following cases:

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<sup>3</sup> A.R., vol. II, at p. 43. This is also admitted in materials filed by BEC: see A.R., vol. II, at p. 131. See also A.F., at p. 3.

...

(4) the obligations arising from a contract were to be performed in that State;

...

[99] Knight asserted *five* causes of action against *three* co-defendants. It claimed that (1) BEC and CBC breached the contract; (2) the defendants had been unjustly enriched; (3) BEC was the alter ego of CBC; (4) BEC and CBC were the alter egos of Mr. Barer; and (5) Mr. Barer fraudulently misrepresented that the defendants would pay an increased price for the foundation work: Gascon J.’s reasons, at para. 9. Clearly, these five claims are all so closely connected that one might argue — irrespective of the identity of each particular defendant to each particular claim — that they represent merely different *aspects* of a *single* contractual “dispute” over which there can be no doubt that the Utah Court had jurisdiction pursuant to art. 3168(4) *C.C.Q.* It is, in this regard, worth noting that art. 3168 *C.C.Q.* “sets out six specific grounds for assessing the jurisdiction of foreign courts rendering judgments in personal actions of a patrimonial nature” and “deals in turn with jurisdiction based on connections with the defendant and jurisdiction based on connections with the subject of litigation”: G. Saumier, “The Recognition of Foreign Judgments in Quebec — The Mirror Crack’d?” (2002), 81 *Can. Bar. Rev.* 677, at p. 687 (emphasis added); C. Emanuelli, *Droit international privé québécois* (3rd ed. 2011), at No. 397. Article 3168(4) *C.C.Q.* deals with jurisdiction based on connections with the subject-matter of the dispute — *not* with jurisdiction based on

connections with the defendant. In the case at bar, *all* co-defendants seem clearly “connected” to the subject-matter of the dispute, which is contractual by nature, and which falls squarely within the jurisdiction of the Utah Court pursuant to art. 3168(4) *C.C.Q.*

[100] My colleagues nonetheless assume that, in respect of the claims of alter ego and fraud, art. 3168(4) *C.C.Q.* conferred no jurisdiction on the Utah Court *over the co-defendant*, Mr. Barer, personally, because he was not *a party* to the contract. I have two points in response.

[101] First, restricting the application of art. 3168(4) *C.C.Q.* to situations where the defendant is a party to the contract would, at least in some circumstances, have the impermissible effect of imposing upon a plaintiff the burden of proving, before a Quebec court, its allegations of alter ego or fraud in order to justify the lifting of the corporate veil pursuant to art. 317 *C.C.Q.*: see, e.g., *Zimmermann*, at para. 22. I say “impermissible”, because whether to lift the corporate veil is a substantive legal issue (and not a jurisdictional issue) concerning “the status and capacity of a legal person”, and is therefore governed by “the law of the State under which it is constituted, subject, with respect to its activities, to the law of the place where they are carried on”: art. 3083 para. 2 *C.C.Q.*; see P. Martel, *Business Corporations in Canada: Legal and Practical Aspects* (loose-leaf), at p. 1-100. And yet, art. 3158 *C.C.Q.* provides that the Quebec court deciding whether to recognize and enforce a foreign court’s decision must “confine itself to verifying whether the [foreign decision] . . . meets

the requirements prescribed in [Title Four]” — that is, to considering whether the C.C.Q.’s requirements for recognizing the decision have been met. The Quebec court cannot review the merits or retry the case or parts of the case. It follows that normally a defendant should not be able to resist recognition and enforcement on the ground that the foreign authority should not have lifted the corporate veil. As explained by Professor Talpis:

Where a foreign judgment has been obtained against a Quebec parent company resulting from an act, fault, prejudice or obligation caused by its subsidiary in the foreign forum, the critical question is whether the foreign court had jurisdiction over the parent in the eyes of Quebec law. Faced with a motion to enforce the foreign judgment in Quebec, a parent company will not be able to resist recognition and enforcement on the ground that the court of origin should not have pierced the corporate veil of its subsidiary. Even where the foreign court was erroneous, there is no longer any review on the merits (art. 3158 C.C.Q.), nor any defense grounded in the argument that the Foreign court applied a different law from that which would have been applied by the Quebec court, such as the law on *alter ego* status for example (art. 3157 C.C.Q.). Nor is veil-piercing manifestly inconsistent with public order as understood in international relations.

(with the collaboration of S. L. Kath, “*If I am from Grand-Mère, Why Am I Being Sued in Texas?*” *Responding to Inappropriate Foreign Jurisdiction in Quebec — United States Crossborder Litigation* (2001), at p. 117)

See also *Cortas Canning and Refrigerating Co. v. Suidan Bros. inc./Suidan Freres inc.*, [1999] R.J.Q. 1227 (Sup. Ct.), at p. 1233:

Piercing the corporate veil is not against public order as understood in the international context and such a finding by a competent court should be upheld in Quebec.

Piercing of the corporate veil is possible under Quebec law and remains, in many ways, a question of facts to be appreciated by the courts. In the case at bar, it is difficult to argue that such a finding, even in a judgement rendered by default, violates the rules of public order as they are understood in the international context.

[102] In other words, the corporate veil furnishes protection *against liability*, not *against the jurisdiction* of a foreign authority: see art. 309 *C.C.Q.*; *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122, at p. 178; *Brunette v. Legault Joly Thiffault, s.e.n.c.r.l.*, 2018 SCC 55, at para. 27; *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). Again, I say the lifting of the corporate veil is a substantive legal issue which must be determined by the competent authority according to the applicable law. It is not a jurisdictional issue. It follows that a defendant domiciled in the foreign authority's state cannot escape the *jurisdiction* of that foreign authority by invoking the corporate veil — even if he or she can ultimately escape *liability* according to the applicable law: art. 3168(1) *C.C.Q.* Nor, as I will explain below, can a defendant escape the jurisdiction of a foreign authority if a claim made against him is “connected” to a contractual dispute over which that foreign authority has jurisdiction and if that claim or that defendant is “substantially” connected to the foreign authority's state: arts. 3168(4), 3164 and 3139 *C.C.Q.*

[103] For example, in *Marble Point Energy Ltd. v. Stonecroft Resources Inc.*, 2009 QCCS 3478, aff'd 2011 QCCA 141, the Quebec Superior Court recognized the jurisdiction of a foreign authority (the Eastern Caribbean Supreme Court) over two defendants domiciled in Quebec who had been ordered to pay costs in a principal

action instituted therein against corporate entities of which they were shareholders and directors: paras. 2, 4, 47, 53-54 and 57-62 (CanLII). The Superior Court emphasized that the lifting of the corporate veil by the foreign authority was *not* contrary to public order: paras. 62-73. It also emphasized that the order to pay costs was “accessory” to the principal action over which the foreign authority clearly had jurisdiction (at para. 57) and drew on arts. 3164 and 3139 *C.C.Q.* to recognize the jurisdiction of that foreign authority over the two shareholders and directors domiciled in Quebec: paras. 59 and 61. Because the foreign authority had jurisdiction over the principal action, it also had jurisdiction to apply its *own* procedural rules relating to “non-party costs”: para. 58. This follows from art. 3132 *C.C.Q.*, which provides — just as art. 3083 *C.C.Q.* provides that the lifting of the corporate veil is governed by the law of the State where the activities of the legal person are carried on — that procedure is governed by the law of the court seized of the matter. See G. Goldstein and E. Groffier, *Droit international privé*, vol. II, *Règles spécifiques* (2003), at No. 485:

[TRANSLATION] the effects of the judgment, in terms of procedure, depend on the law of the court seized of the matter, including the need for service, the scope of *res judicata*, binding force, remedies (appeal, opposition by a third party), time limits for remedies, incidental demands and costs: all of this relates, not to the nature of the rights at issue, but to the organization of the court and the administration of state justice. [Emphasis added; footnote omitted.]

[104] I therefore find myself in respectful disagreement with my colleague Côté J.’s statement that, where presented with a decision on the merits rendered by a

foreign authority, “a Quebec court would apply *Quebec* law to the foreign authority’s factual findings to determine whether it is appropriate to pierce the corporate veil for the purpose of recognizing the decision on the basis of art. 3168(4) *C.C.Q.*”: para. 208 (emphasis in original). Such a practice would be precluded by art. 3158 *C.C.Q.*, which provides that a Quebec court cannot “consider[r] the merits of the decision”; see also art. 3157 *C.C.Q.*; Talpis, at p. 117. It is also precluded by art. 3083 *C.C.Q.*, which signifies that, in the case at bar, the lifting of the corporate veil is governed by *Utah* law. Effectively, my colleague would deny recognition on the basis that the Utah Court did not apply Quebec law, even though “[n]on-adherence to Quebec law by the foreign court, even where the Quebec law is of a mandatory character, will not justify non-recognition on grounds of public order”: H. P. Glenn, “Recognition of Foreign Judgments in Quebec” (1997), 28 *Can. Bus. L.J.* 404, at p. 407.

[105] My second point in response to my colleagues’ premise that art. 3168(4) *C.C.Q.* can find no application if the defendant is not *a party* to the contract is that such a premise is incompatible with the recent decision of this Court in *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30, [2016] 1 S.C.R. 851. In *Lapointe*, hundreds of GM Canada dealers had launched class proceedings “against GM Canada in Ontario, alleging that [it] had forced them to sign the Wind-Down Agreements in breach of provincial franchise laws”: para. 10. They also alleged that an Ontario law firm had been negligent in the legal advice it gave to them: para. 10. The law firm made third party claims against several Quebec law firms for contribution and indemnity on the basis of their having given the dealers



independent legal advice: para. 15. The issue was “whether the Ontario courts should assume jurisdiction over [the] third party claim[s]”: para. 2.

[106] The Quebec law firms argued that, because they were not domiciled or resident in Ontario and did not carry on business there, there was an insufficient connection between the third party claims and the Ontario courts: para. 16. This Court rejected that argument. Observing that “[t]he nucleus of the claim against [the Ontario law firm], as well as that of [the Ontario law firm]’s third party claim against the [Québec] lawyers [was] . . . a tort claim for professional negligence” (para. 38), the Court framed the issue (at para. 39) as “whether a contract connected with [the] dispute was made in Ontario”, as required by the fourth connecting factor identified in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572. The Court in *Lapointe* answered that question affirmatively, stressing the following (at paras. 32 and 44):

The fourth factor also promotes flexibility and commercial efficiency. As seen in *Van Breda*, all that is required is a connection between the claim and a contract that was made in the province where jurisdiction is sought to be assumed. A “connection” does not necessarily require that an alleged tortfeasor be a party to the contract. To so narrow the fourth presumptive factor would unduly narrow the scope of *Van Breda*, and undermines the flexibility required in private international law.

...

It is worth noting that nothing in *Van Breda* suggests that the fourth factor is unavailable when more than one contract is involved, or that a different inquiry applies in these circumstances. Nor does *Van Breda* limit this factor to situations where the defendant’s liability flows immediately from his or her contractual obligations, or require that the defendant be a party to the contract: *Pixiu Solutions Inc. v. Canadian*

General-Tower Ltd., 2016 ONSC 906, at para. 28 (CanLII). It is sufficient that the dispute be “connected” to a contract made in the province or territory where jurisdiction is proposed to be assumed: *Van Breda*, at para. 117. This merely requires that a defendant’s conduct brings him or her within the scope of the contractual relationship and that the events that give rise to the claim flow from the relationship created by the contract: paras. 116-17. [Emphasis added; italics in original.]

[107] Significantly, in supporting this conclusion the Court referred by analogy to art. 3139 *C.C.Q.* (at para. 33):

Flexibility in applying the fourth factor does not amount to jurisdictional overreach. Conflict rules vary from one jurisdiction to another. In Quebec, for example, under art. 3148 of the *Civil Code of Québec*, Quebec authorities have jurisdiction over an action in extra-contractual liability where a fault was committed in Quebec or the injury was suffered there. Nonetheless, under art. 3139, if a Quebec authority has jurisdiction to rule on the principal demand, it would also have jurisdiction to rule on an incidental demand, which could include a third party claim. In a case like the one before us — and subject to any *forum non conveniens* argument — if the main contract had been made in Quebec and governed by the laws of Quebec, Quebec would have jurisdiction not only over Quebec lawyers sued in the principal demand, but also over any Ontario lawyers sued by the Quebec lawyers in third party claims for any professional fault allegedly committed in Ontario by the Ontario lawyers. [Emphasis added.]

[108] This leads me to consider *whether* and *on what conditions* art. 3139 *C.C.Q.* can be invoked to establish the jurisdiction of a foreign authority *against a particular co-defendant*. As will be explained in further detail below, answering this question requires interpreting art. 3164 *C.C.Q.*, since the scope of art. 3168(4) *C.C.Q.* cannot be determined in isolation. (In that sense, I agree with my colleague Côté J. “that art. 3168(4) *C.C.Q.* is insufficient on its own to establish jurisdiction against Mr. Barer”: para. 209.) But this does not mean that the mere fact that Mr. Barer is not a

party to the contract precludes art. 3168(4) *C.C.Q.*'s application in the circumstances of this case. I say it can apply, and it can support a finding of the Utah Court's jurisdiction over *the whole* dispute — that is, over both *the object* of the dispute and *the parties*: J. A. Talpis and J.-G. Castel, “Interpreting the rules of private international law”, in *Reform of the Civil Code* (1993), vol. 5B, at No. 486; *Van Breda*, at paras. 79 and 99. This is so even if art. 3168(4) *C.C.Q.* deals with jurisdiction based on connections with the subject-matter of the dispute, and not with jurisdiction based on connections with the defendant — so long as other provisions of the *C.C.Q.*, such as arts. 3164 and 3139 *C.C.Q.*, confirm that the Utah Court could assert its jurisdiction *against Mr. Barer, personally*. As this Court explained in *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401 (at para. 19), since the private international law of Quebec has been codified, “the general principles of interpretation of the *Civil Code* apply to the determination of the scope of the relevant provisions”, and “[t]he courts must therefore interpret the rules as a coherent whole”, in light of the principles of comity, order and fairness, which inspire the interpretation of the various private international law rules: see also *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, at para. 23.

B. *Article 3164 C.C.Q.*

[109] I recognize, as I dive deeply into the waters of art. 3164 *C.C.Q.*, that — falling as it does within Title Four of Book Ten of the *C.C.Q.* — it is “closely related”

to Title Three, in that both Titles set out the rules on the international jurisdiction of Quebec authorities and the recognition of foreign judgments: *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, at para. 18.

[110] Article 3164 *C.C.Q.* is the opening provision of Chapter II of Title Four, entitled “Jurisdiction of Foreign Authorities”, and provides:

**3164.** The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the State whose authority is seized of the matter.

[111] The abundant doctrinal commentary on this subject makes plain that two distinct but related interpretational issues arise from the text of art. 3164 *C.C.Q.* First, by referring generally to “the rules on jurisdiction applicable to Québec authorities under Title Three”, does art. 3164 *C.C.Q.* authorize a Quebec court to recognize the jurisdiction of a foreign authority on the basis of one of the “General Provisions” situated in Chapter I of that Title, such as the provision granting jurisdiction for reasons of administrative convenience (that is, “jurisdiction to rule on an incidental demand or a cross demand” where it has “jurisdiction to rule on the principal demand”?: art. 3139 *C.C.Q.*). Secondly, can the requirement of a “substantial connection” between the dispute and the foreign authority’s State be applied by a Quebec court so as to reject a foreign exercise of jurisdiction *despite* one of the jurisdictional criteria provided for in art. 3168 *C.C.Q.* being satisfied?

[112] For the reasons that follow, I would answer the first question affirmatively, particularly where — as here — it cannot be doubted that the Utah Court had jurisdiction over the main contractual “dispute” between Knight and BEC under art. 3168(4) *C.C.Q.*, and where there is a “substantial connection” between the foreign authority’s State *and the co-defendant, Mr. Barer, or the claim made against him.* (Although, and as I will explain below, the claim against the co-defendant must also be “connected” to the contract.) The second question, however, I would answer in the negative.

(1) Does Article 3164 *C.C.Q.* Authorize a Quebec Court to Recognize the Jurisdiction of a Foreign Authority on the Basis of One of the “General Provisions” Situated in Chapter I of Title Three?

[113] The general principle under the *C.C.Q.* is that foreign judgments are entitled to recognition and enforcement by Quebec courts if the foreign court had jurisdiction to render the decision: art. 3155(1) *C.C.Q.* According to art. 3164 *C.C.Q.*, the recognized grounds for such jurisdiction are essentially those available to Quebec courts as listed under Title Three. This is the principle of jurisdictional reciprocity, or the “mirror principle”: *Lépine*, at paras. 24-25; Saumier, at p. 681; G. Goldstein and E. Groffier, *Droit international privé*, vol. I, *Théorie générale* (1998), at No. 175.

[114] Title Three is divided into two Chapters: Chapter I (“General Provisions”) and Chapter II (“Special Provisions”). As explained by Professor Saumier (at p. 690), the jurisdiction of a foreign court should be assessed by looking to *both* Chapters:

When it comes time to assess the jurisdiction of a foreign court, the mirror principle enshrined in article 3164 refers back to Title Three. The reference to Title Three in article 3164 contains n[o] words of limitation. This suggests that the reference to reciprocity applies to the entirety of Title Three, including the general and the specific provisions in that title. In other words, if the foreign court's jurisdiction does not correspond to any specific jurisdictional basis recognized under Chapter II of Title Three, recourse may be had to the general provisions of Chapter I of the same Title.

[115] (I note here, as it becomes significant below, that Chapter I of Title Three consists of seven articles spelling out the “General Provisions” governing the international jurisdiction of Quebec courts. The first provision sets out the general jurisdictional criterion under Quebec private international law: the domicile of the defendant (art. 3134 *C.C.Q.*). Two articles then allow an otherwise competent Quebec court to decide not to exercise its jurisdiction — in the case of *forum non conveniens* (art. 3135 *C.C.Q.*) or *lis alibi pendens* (art. 3137 *C.C.Q.*). The remaining four general provisions each grant an exceptional jurisdiction to a Québec court for reasons of necessity, protection of assets and people, administrative convenience, or emergency: arts. 3136, 3138, 3139 and 3140 *C.C.Q.*, respectively.)

[116] Professor Saumier continues (at p. 691) to conclude that Chapter I of Title Three therefore has two different effects upon the analysis under art. 3164 *C.C.Q.*: first, of allowing a Quebec court to deny recognition on the basis that the foreign authority should have declined to exercise its jurisdiction; and, secondly, of extending the admitted jurisdiction of the foreign authority beyond that provided for

in Title Four. I turn now to consider each of these effects upon the proper interpretation of the general reference to Title Three in art. 3164 *C.C.Q.*

(a) *The Denial of Recognition on the Basis That the Foreign Authority Should Have Declined to Exercise Its Jurisdiction*

[117] In *Lépine*, this Court had to decide whether “the jurisdictional rules in arts. 3164 to 3168 incorporate, by reference to Title Three, the doctrine of *forum non conveniens*”: para. 27. More precisely, the Court had to determine whether “a Quebec court [can] refuse to recognize a judgment rendered outside Quebec because, in its opinion, the foreign court should, pursuant to that doctrine, have declined jurisdiction over the case”: para. 27. The Court decided it could not, notwithstanding “that the application of this doctrine finds support, at first glance, in the very broad wording of the reference to Title Three in art. 3164 *C.C.Q.*”: para. 34. As the Court explained, however (at paras. 34 and 36):

Enforcement by the Quebec court depends on whether the foreign court had jurisdiction, not on how that jurisdiction was exercised, apart from the exceptions provided for in the *Civil Code of Québec*. To apply *forum non conveniens* in this context would be to overlook the basic distinction between the establishment of jurisdiction as such and the exercise of jurisdiction.

...

The Court of Appeal added an irrelevant factor to the analysis of the foreign court’s jurisdiction: the doctrine of *forum non conveniens*. This approach introduces a degree of instability and unpredictability that is inconsistent with the standpoint generally favourable to the recognition of foreign or external judgments that is evident in the provisions of the *Civil Code*. It is hardly consistent with the principles of international comity and the objectives of facilitating international and interprovincial

relations that underlie the *Civil Code*'s provisions on the recognition of foreign judgments. In sum, even when it is applying the general rule in art. 3164, the court hearing the application for recognition cannot rely on a doctrine that is incompatible with the recognition procedure. [Emphasis added.]

(b) *The Extension of the Admitted Jurisdiction of the Foreign Authority Beyond that Provided for in Title Four*

[118] Conversely, the Court expressly left the door open in *Lépine* to extending the foreign authority's admitted jurisdiction on the basis of the general reference to Title Three in art. 3164 *C.C.Q.* (at para. 36):

Article 3164 *C.C.Q.* provides that a substantial connection between the dispute and the originating court is a fundamental condition for the recognition of a judgment in Quebec. Articles 3165 to 3168 then set out, in more specific terms, connecting factors to be used to determine whether, in certain situations, a sufficient connection exists between the dispute and the foreign authority. The application of specific rules, such as those in art. 3168 respecting personal actions of a patrimonial nature, will generally suffice to determine whether the foreign court had jurisdiction. However, it may be necessary in considering a complex legal situation involving two or more parties located in different parts of the world to apply the general principle in art. 3164 in order to establish jurisdiction and have recourse to, for example, the forum of necessity. [Emphasis added.]

[119] My colleague Gascon J. says this passage from *Lépine* could be read to mean that “there may be uncommon or peculiar circumstances in which, despite art. 3168 being satisfied, there is no substantial connection between the dispute and the State that rendered the decision”, so that the jurisdiction of the foreign court could not be recognized: para. 86 (emphasis added). Respectfully, I do not think such a reading



of this passage is sustainable. In my view, it clearly signifies that there may be uncommon or peculiar circumstances which, despite art. 3168 *C.C.Q.* *not* being satisfied, may nevertheless present a “substantial connection” between the dispute and the foreign authority such that the jurisdiction of the foreign court could be recognized through, for example, the “forum of necessity” doctrine codified in art. 3136 *C.C.Q.* This could arise — says the Court in *Lépine* (at para. 36) — in the presence of “a complex legal situation involving two or more parties located in different parts of the world”.

[120] This is amply supported by pertinent doctrine. As Patrick Ferland and Guillaume Laganière explain:

[TRANSLATION] In the absence of a specific provision, reference will therefore have to be made to the rules in Title Three to determine whether the jurisdiction exercised by the foreign authority should be recognized. Some suggest that the rules qualifying the application of the conflict rules relating to the jurisdiction of Quebec authorities (*forum non conveniens*, forum of necessity, *lis pendens*, jurisdiction over incidental demands and cross demands, etc.) might have to be taken into account in the analysis undertaken by the Quebec court. However, others argue that they should not be taken into account. In *Canada Post Corp. v. Lépine*, the Supreme Court of Canada answered this question in the negative for the doctrine of *forum non conveniens*, noting that the wording of article 3155 *C.C.Q.* requires the court hearing the application for recognition to ask whether the foreign authority had jurisdiction, not whether it should have exercised that jurisdiction. However, the [Supreme] Court left the door open to the application of other provisions, such as article 3136 *C.C.Q.* (*forum of necessity*). [Emphasis added; footnotes omitted.]

“Le droit international privé”, in Collection de droit de l’école du Barreau du Québec 2017-2018, vol. 7, *Contrats, sûretés, publicité des droits et droit international privé* (2017), 253, at p. 302)

[121] In a similar vein, Professor Goldstein says:

[TRANSLATION] The Court nonetheless accepted [in *Lépine*] that while, in principle, jurisdiction depends on specific jurisdictional rules — whether express rules, such as art. 3168 C.C.Q., or implicit rules drawn from the Quebec rules on direct jurisdiction, which are made bilateral under art. 3164 C.C.Q. — it remains possible, through the same provision, to make the general rules applicable to Quebec’s direct jurisdiction, such as art. 3136 C.C.Q., bilateral in order, for example, to recognize the jurisdiction of a foreign court as the forum of necessity.

...

This solution is consistent with the internationalist approach taken by the Civil Code of Québec, because it remains true that *only* the bilateral application of the doctrine of *forum non conveniens* [art. 3135 C.C.Q.] through art. 3164 C.C.Q. has the potential to be *unfavourable* to the recognition of foreign judgments. Under art. 3135 C.C.Q., indirect jurisdiction may be taken away from a foreign court even though, in principle, it obtained that jurisdiction in accordance with our rules, whereas all the other general provisions that could be applied through art. 3164 C.C.Q., such as art. 3136 C.C.Q., have the opposite effect of giving the foreign court, on an exceptional basis, indirect jurisdiction that did not arise under the normal specific rules. [Emphasis added; italics in original.]

(*Compétence internationale des autorités québécoises et effets des décisions étrangères (Art. 3134 à 3168 C.c.Q.)* (2012), at pp. 405-6 (footnote omitted.))

[122] I am therefore of the view that art. 3164 C.C.Q. authorizes a Quebec court to recognize the jurisdiction of a foreign authority on the basis of one of the “General Provisions” situated in Chapter I of Title Three (arts. 3136,<sup>4</sup> 3138, 3139 and 3140 C.C.Q.). This is consistent with “the basic principle laid down in art. 3155 C.C.Q. [. . .] that any decision rendered by a foreign authority must be recognized unless an exception applies”: *Lépine*, at para. 22. This is also consistent with the

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<sup>4</sup> A caveat: art. 3136 C.C.Q. may be applied only if one of the parties raises it, as the court cannot apply it of its own motion: *Spar*, at para. 69; *GreCon*, at para. 33.

practice at the Quebec courts: in *Ortega Figueroa v. Jenckel*, 2015 QCCA 1393, the Court of Appeal held that arts. 3138 and 3140 *C.C.Q.* could be used by a Quebec court to recognize the jurisdiction of a foreign authority. It follows “that in personal actions of a patrimonial nature, satisfying the jurisdictional requirement under article 3168 is always sufficient but not necessarily essential for recognition under Québec law”: Saumier, at p. 689.

[123] My colleague Gascon J. notes in this regard that “the language used by Justice LeBel [in *Lépine*] is flexible (“generally suffice”), and not as categorical as some writings that were published before *Lépine* (such as “always sufficient”)”: para. 87. This supports, he says, a “possible” reading of *Lépine* (at para. 36), “requir[ing] a substantial connection between the dispute and the forum even where a ground for recognition of the foreign authority’s jurisdiction under art. 3168 *C.C.Q.* is established”: para. 87; see also Côté J.’s reasons, at para. 260. But, and again respectfully, I do not view this as a “possible” reading of *Lépine*, as it does not account for a critical passage of LeBel J.’s reasons for the Court on this point. It is true that LeBel J. said (at para. 36) that “[t]he application of specific rules, such as those in art. 3168 respecting personal actions of a patrimonial nature, will generally suffice to determine whether the foreign court had jurisdiction”. For LeBel J., however, it follows that “[t]he application of [such] specific rules” will sometimes be insufficient “to determine whether the foreign court had jurisdiction”, so that (*and this is the critical passage*) “it may be necessary . . . to apply the general principle in art. 3164 in order to establish jurisdiction” (emphasis added), and *not* in order *to deny*

jurisdiction despite one of the specific rules (such as those in art. 3168) being satisfied. Hence LeBel J.'s reference, in the same passage, to the forum of necessity as a basis for *establishing* the foreign authority's jurisdiction *via* the mirror principle in circumstances where "[t]he application of specific rules, such as those in art. 3168 respecting personal actions of a patrimonial nature", is insufficient to do so.

[124] My colleague Gascon J. fairly acknowledges that my understanding of this passage from *Lépine* is also "possible": para. 86; see also Côté J.'s reasons, at para. 260. Regrettably, I cannot reciprocate; in my view, what he presents as the other possible meaning is incompatible with a complete reading of this passage.

[125] I acknowledge that art. 3168 *C.C.Q.* provides that "[i]n personal actions of a patrimonial nature, the jurisdiction of foreign authorities is recognized only" if one of the subparagraphs of that article is satisfied. But in my view the significance of this exclusive language of "only" is clear, and should not be overstated. In other words, while art. 3168 *C.C.Q.* derogates from the "mirror principle"'s application, it only does so in a particular circumstance. To explain, recall that the "mirror principle" stated in art. 3164 *C.C.Q.* provides that the jurisdiction of the foreign authority should be decided in accordance with the rules on jurisdiction applicable to Quebec authorities under Title Three. One of Title Three's provisions — art. 3148 *C.C.Q.* — addresses personal actions of a patrimonial nature. And, absent the exclusive language contained in art. 3168 *C.C.Q.*, the text of art. 3164 *C.C.Q.* would direct the Quebec court to decide the jurisdiction of a foreign authority by applying

one of the subparagraphs of art. 3148 para. 1 *C.C.Q.* The exclusive language used in art. 3168 *C.C.Q.*, however, indicates clearly that, notwithstanding the “mirror principle”, art. 3148 *C.C.Q.* *cannot* be applied to determine the jurisdiction of the foreign authority in such circumstances.

[126] What the exclusive language in art. 3168 *C.C.Q.* does *not* do, however, is preclude entirely a Quebec court from recognizing the jurisdiction of a foreign authority on the basis of one of the “General Provisions” situated in Chapter I of Title Three. Indeed, it is the very purpose of “General Provisions” to complement and modify the application of “Special Provisions”, such as art. 3168 *C.C.Q.* As explained by Professor Saumier, “[t]hese four exceptional cases [arts. 3136, 3138, 3139 and 3140 *C.C.Q.*] obviously assume that the Québec courts are not otherwise competent, in the international sense, to hear the claim”: p. 690. I therefore also agree with Professor Goldstein, who writes (at p. 116):

[TRANSLATION] The “general” provisions of Chapter I of Title Three of the Code concerning the international jurisdiction of Quebec courts supplement and modify the solutions offered by the “specific” provisions of Chapter II (art. 3148 *C.C.Q.*) and cover exactly the same area. How else can the application of, for example, arts. 3135, 3136 and 3138 *C.C.Q.* be contemplated? In reality, the situations in which most of the general provisions (arts. 3135 to 3140 *C.C.Q.*) may apply are *more specific* than those that normally arise under the so-called specific provisions (arts. [3141] to 3154 *C.C.Q.*), the only exception being art. 3134 *C.C.Q.* These rules are of general application in the sense that they can apply in any case. Nevertheless, all of these cases are *more specific* than those contemplated by the normal rules on jurisdiction that are characterized as “specific”. In other words, the “general” rules apply on an *exceptional* basis, while the “specific” rules are of *general* application! [Emphasis in original.]

[127] The doctrine on this point is therefore consistent in the view that it is possible for a Quebec court to recognize the jurisdiction of a foreign authority on the basis of one of the “General Provisions” situated in Chapter I of Title Three, including art. 3139 *C.C.Q.* Indeed, and recalling my earlier point (at paras. 20-21) that the jurisdiction of a foreign court should be assessed by looking to *both* Chapters I (“General Provisions”) and II (“Special Provisions”) of Title Three, the doctrine also consistently maintains that Chapter I’s general provisions continue to have application to an analysis under art. 3164 *C.C.Q.*, *even where* a “personal action of a patrimonial nature” is at stake:

[TRANSLATION] For the reasons already stated, the heads of jurisdiction established by article 3168 must be assessed in light of the general provisions of Chapter I of Title Three. Thus . . . the foreign authority’s jurisdiction may be recognized when the Quebec authority would have exercised its jurisdiction in such a situation as the forum of necessity, to order provisional or conservatory measures, to rule on an incidental demand or a cross demand or, in cases of emergency or serious inconvenience, to protect a person or the person’s property.

...

The non-exclusive nature of articles 3165 to 3168 is indicated by the fact that the phrase “In the absence of any special provision” was removed from the wording of what became article 3164. See article 3141 of Bill 125 [*Civil Code of Québec*, Bill 125, 1st Sess., 34th Leg. (Quebec), Éditeur officiel du Québec, 1991]. The mirror principle therefore became the dominant principle, and not merely a supplementary one, for determining foreign jurisdiction. However, the special provisions in articles 3165 to 3168 exclude the heads of jurisdiction applicable to Quebec authorities in the areas indicated by those provisions, in accordance with the principle that special provisions have primacy. [Emphasis added; footnote omitted.]

(H. P. Glenn, “Droit international privé”, in *La Réforme du Code civil* (1993), vol. 3, 669, at pp. 778 and 798 (fn. 250))

[TRANSLATION] In referring to the Quebec rules on jurisdiction, art. 3164 C.C.Q. does not limit them to the specific rules (arts. 3141 to 3154 C.C.Q.) and therefore refers implicitly to arts. 3134 to 3140 C.C.Q. as well. . . . Conversely, the exceptional jurisdiction of the foreign authority might be justified even where there would be no jurisdiction under the normal rules, for example to act as the forum of necessity (art. 3136 C.C.Q.), to hear an incidental demand or a cross demand over which it would not normally have jurisdiction (art. 3139 C.C.Q.), or to take emergency or provisional measures or protect a person and the person's property (art. 3138 or 3140 C.C.Q.). . . . However, the logical consequences of accepting the mirror principle without any precise limits do not end there. We mentioned above that art. 3164 C.C.Q. does not apply *in principle* where specific jurisdictional rules have been expressly adopted for foreign courts (the rules in arts. 3165 to 3168 C.C.Q.). It is in fact not possible to rely on that provision to formulate express rules on foreign jurisdiction in a bilateral fashion, because those rules have already been expressly written and are worded differently from the rules for the Quebec courts. However, just as the specific rules on jurisdiction in Quebec may be modified through the effect of the general rules on jurisdiction in Quebec (arts. 3134 to 3140 C.C.Q.), as a result of art. 3164, it may be thought that the *express* rules on foreign jurisdiction may also be modified on a discretionary basis through arts. 3134 to 3140 C.C.Q.! [Emphasis added; italics in original; footnotes omitted.]

(Goldstein and Groffier (1998), at No. 175)

b. The “Little Mirror” Doctrine

Article 3164 C.C.Q. also allows a court evaluating the jurisdiction of a foreign authority to refer to the general discretionary rules applicable to the exercise of jurisdiction by the Quebec authorities under Title Three (i.e., arts. 3134 to 3140 C.C.Q.). While art. 3164 C.C.Q. authorizes only the application of the “little mirror doctrine” to matters set forth in Title Three, it would seem that if applicable to matters there in set fo[r]th, there is no reason why it should not also apply to personal matters of a patrimonial nature (art. 3168 C.C.Q.). [Footnote omitted.]

(Talpis, at p. 107)

[TRANSLATION] . . . even though art. 3168 C.C.Q. did not give the foreign court jurisdiction in that case, its jurisdiction could still be recognized under art. 3136 C.C.Q. because there was no court before which the plaintiff could be required to institute the proceedings, or as an extension of its principal jurisdiction, recognized by our rules, to a matter for which it had jurisdiction to rule on an incidental demand or a cross demand [art. 3139 C.C.Q.], or on the basis of an emergency [art. 3140 C.C.Q.], or

for the purpose of ordering a conservatory measure [art. 3138 C.C.Q.]. These solutions seem to us to be very reasonable in practice and are consistent with the internationalist perspective underlying Quebec private international law since the enactment of the Civil Code of Québec. [Text in brackets in original.]

(Goldstein, at p. 439)

- (2) Can the Requirement of a “Substantial Connection” Between the Dispute and the Foreign Authority Be Applied by a Quebec Court so as to Reject a Foreign Exercise of Jurisdiction *Despite* One of the Jurisdictional Criteria Provided for in Article 3168 C.C.Q. Being Satisfied?

[128] Let me take stock. Article 3164 C.C.Q., in my view, authorizes recognition by a Quebec court of a foreign authority’s jurisdiction on the basis of one of the “General Provisions” in Title Three, including Chapter I thereof, and including art. 3139 C.C.Q. therein. This brings me to the second interpretational issue that arises from the text of art. 3164, being whether a Quebec court may apply the requirement of a “substantial connection” between the dispute and the State whose authority is seized of the matter, so as to reject a foreign court’s exercise of jurisdiction even where one of art. 3168’s jurisdictional criteria is satisfied.

[129] The “real and substantial connection test” is both a constitutional principle and, at common law, a general organizing principle of private international law: *Van Breda*, at para. 22. Before a court can assume jurisdiction over a claim, a “real and substantial connection” *must* be shown between the circumstances giving rise to the claim and the jurisdiction where the claim is brought: *Lapointe*, at para. 25, referring to *Van Breda*, at paras. 22-24; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004]



2 S.C.R. 427, at para. 60; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1049; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at pp. 325-26 and 328; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1108-10.

[130] In *Van Breda*, the Court responded to “a perceived need for greater direction on how [the real and substantial connection test] applies” (para. 67) by identifying a non-exhaustive list of four *presumptive* connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute: “(a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the tort was committed in the province; and (d) a contract connected with the dispute was made in the province”: para. 90. As the Court described, the presumption as applied to any factor can be rebutted (at para. 81):

The defendant might argue that a given connection is inappropriate in the circumstances of the case. In such a case, the defendant will bear the burden of negating the presumptive effect of the listed or new factor and convincing the court that the proposed assumption of jurisdiction would be inappropriate. If no presumptive connecting factor, either listed or new, applies in the circumstances of a case or if the presumption of jurisdiction resulting from such a factor is properly rebutted, the court will lack jurisdiction on the basis of the common law real and substantial connection test.

[131] This framework is inspired largely by the *Uniform Court Jurisdiction and Proceedings Transfer Act* (“*CJPTA*”), which focuses mainly on the assumption of jurisdiction: Uniform Law Conference of Canada (online). Section 3(e) provides that a court may assume jurisdiction if “there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that

person is based” (text in brackets in original). Section 10 enumerates various circumstances in which such a connection would be *presumed* to exist. In a number of subsequent provincial and territorial statutes, the legislative scheme proposed in the *CJPTA* has been adopted: see, e.g., *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28; *The Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2nd Sess.), c. 2; *Court Jurisdiction and Proceedings Transfer Act*, S.Y. 2000, c. 7; see also *Van Breda*, at para. 41.

[132] The connecting factors identified in *Van Breda* are substantially derived from rule 17.02 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (“Service Outside Ontario Without Leave”): *Van Breda*, at paras. 43, 83 and 87-88. To be clear, these service *ex juris* rules are purely procedural and do not by themselves determine the issue of the jurisdiction of the Ontario courts; the substantive source of jurisdiction is instead the presence of a “real and substantial connection”: *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, at paras. 50-52 (C.A.); Saumier, at p. 712. As Professor Saumier explained (prior to *Van Breda*), “[i]n the Canadian common law provinces, jurisdiction *simpliciter* is established through a combination of compliance with rules of service and the ‘real and substantial connection’ requirement derived from *Morguard*”: p. 693.

[133] So much for the common law. The functional equivalent of jurisdiction *simpliciter* in Quebec law “is found in the relevant provisions on jurisdiction in Title

Three of Book Ten of the Civil Code”: Saumier, at p. 693. “Unlike their common law counterparts, [however,] these rules are not merely procedural, they actually confer jurisdiction on Québec courts”, and “[t]he possibility that the criteria in the Code are to be construed as merely presumptive indicia of jurisdiction” is not supported by the *C.C.Q.*: Saumier, at pp. 693 (fn. 51) and 694 (emphasis added).

[134] In *Spar*, this Court considered whether the threshold of a “real and substantial connection” should be used when determining whether or not a Quebec authority has international jurisdiction under art. 3148 *C.C.Q.* Two of the appellants had argued that Quebec courts could not assume jurisdiction on the basis of either an “injurious act” or “damage” in Quebec under art. 3148 *C.C.Q.*, since (the argument went) this Court had, in *Morguard* and in *Hunt*, imposed the additional condition that there be a “real and substantial connection” between the forum and the action (at para. 45), and that this also bound the courts of Quebec. The Court, however, flatly rejected this argument (at para. 50), adding (at paras. 55-57 and 63):

As mentioned above, Book Ten of the *C.C.Q.* sets out the private international law rules for the Province of Quebec and must be read as a coherent whole and in light of the principles of comity, order and fairness. In my view, it is apparent from the explicit wording of art. 3148, as well as the other provisions of Book Ten, that the system of private international law is designed to ensure that there is a “real and substantial connection” between the action and the province of Quebec and to guard against the improper assertion of jurisdiction.

Looking at the wording of art. 3148 itself, it is arguable that the notion of a “real and substantial connection” is already subsumed under the provisions of art. 3148(3), given that each of the grounds listed (fault, injurious act, damage, contract) seems to be an example of a “real and substantial connection” between the province of Quebec and the

action. Indeed, I am doubtful that a plaintiff who succeeds in proving one of the four grounds for jurisdiction would not be considered to have satisfied the “real and substantial connection” criterion, at least for the purposes of jurisdiction simpliciter.

Next, from my examination of the system of rules found in Book Ten, it seems that the “real and substantial connection” criterion is captured in other provisions, to safeguard against the improper assumption of jurisdiction. In particular, it is my opinion that the doctrine of *forum non conveniens*, as codified at art. 3135, serves as an important counterweight to the broad basis for jurisdiction set out in art. 3148. In this way, it is open to the appellants to demonstrate, pursuant to art. 3135, that although there is a link to the Quebec authorities, another forum is, in the interests of justice, better suited to take jurisdiction.

...

In the case at bar, it seems reasonable to conclude that the requirement for a “real and substantial connection” between the action and the authority asserting jurisdiction is reflected in the overall scheme established by Book Ten. In my view, the appellants have not provided, nor does there seem to be, given the context of this case, any basis for the courts to apply the *Morguard* constitutional principle in order to safeguard against this action being heard in a forum with which it has no real and substantial connection. [Emphasis added.]

See also *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, at para. 45: “Any one of the four individual factors listed in art. 3148(3) would constitute a sufficient connection with the province to ground jurisdiction”.

[135] In sum, Book Ten of the *C.C.Q.*, stating as it does the private international law of Québec, encapsulates within its terms the requirement for a “real and substantial connection” between the action and the foreign authority’s State. In other words, a “real and substantial connection” does not operate as *an additional* condition to those contained in art. 3168 *C.C.Q.*; rather, it is given expression by the

scheme contained within Book Ten, including art. 3168 itself. As this Court later reiterated in *Lépine*, “[a]s a whole, these rules [set out in Title Three] ensure compliance with the basic requirement that there be a real and substantial connection between the Quebec court and the dispute, as this Court noted in *Spar*”: para. 19. In that case, the Court therefore concluded that “the Ontario Superior Court of Justice had jurisdiction pursuant to art. 3168 *C.C.Q.*, since the Corporation, the defendant to the action, had its head office in Ontario”, which “connecting factor in itself justified finding that the Ontario court had jurisdiction”: para. 38 (emphasis added).

[136] Contrary, then, to the opinion expressed by my colleague Côté J. at paras. 260 and 262 of her reasons, it seems to me that *Lépine* does (at least implicitly) reject the necessity of an independent inquiry into the existence of a “substantial connection” when a finding of jurisdiction is based on the express provisions of art. 3168 *C.C.Q.*: see C. Emanuelli, at para. 291.1 ([TRANSLATION] “The general rules on the international jurisdiction of foreign courts (including those set out in article 3168 *C.C.Q.*) are applicable as they stand, and the substantial connection requirement is interpreted strictly [fn. 967: With this solution, it is sufficient that, under article 3168 *C.C.Q.*, the foreign courts have “jurisdiction, in the strict sense, over the dispute”]: *Canada Post Corp. v. Lépine, supra*, at para. 37]. It is not a separate condition, and it does not allow the doctrine of *forum non conveniens* to be applied. Protection for Quebec applicants lies elsewhere: in the rules concerning natural justice. This is the position taken by the Supreme Court in *Lépine*” (emphasis added)). Similarly, Bich J.A. remarked in *Hocking v. Haziza*, 2008 QCCA 800 (at para. 175 (fn. 50) (CanLII))

upon the consistency between the view that a “substantial connection” between the dispute and the foreign authority within the meaning of art. 3164 *C.C.Q.* is *not* a requirement that must be satisfied *in addition to* one of the subparagraphs of art. 3168 *C.C.Q.*, and the approach taken by this Court respecting the interpretation of art. 3148 *C.C.Q.* in *Spar* (and, I would add, in *Lépine*). I also observe that art. 3168 *C.C.Q.* provides that the jurisdiction of a foreign authority “is recognized only” (in French: *n’est reconnue que*) — not “can be recognized only” (in French: *ne peut être reconnue que*) — thereby indicating that the satisfaction of any one of the six grounds enumerated in art. 3168 *C.C.Q.* is *sufficient* to establish the jurisdiction of a foreign authority.

[137] My colleague Côté J. nonetheless concludes that while “there will be exceptional circumstances in which, despite the presence of one of the connecting factors under art. 3168 *C.C.Q.*, further analysis will be required under art. 3164 *C.C.Q.* to determine whether there is a substantial connection between the foreign State and the dispute”: para. 236; see also para. 251 (“there may be exceptional circumstances where there will be no substantial connection between the dispute and the foreign State even though one of the factors in art. 3168 *C.C.Q.* is technically present”). This would, if correct, mean that a Quebec court could disregard its affirmative finding under art. 3168 *C.C.Q.* of the jurisdiction of a foreign authority and conclude, after a subjective assessment of all the circumstances of the case, that there is no “substantial connection” between the dispute and the foreign authority,

such that the foreign authority had no jurisdiction over the dispute. With respect, this seems to me to be in error.

[138] Côté J.'s conclusion rests in part on what I see as a misreading of a passage from this Court's reasons in *Lépine* (para. 36) and I have explained my views as to the true significance of that passage. My colleague, however, also quite fairly points to authority (other than *Lépine*) supporting her interpretation of the relationship between arts. 3164 and 3168 *C.C.Q.*: at para. 238; see, for example, *Hocking*, at paras. 181-87 and 199; *Zimmermann*, at para. 12 (referring to *Hocking*); *Heerema*, at paras. 23 and 26 (albeit *in obiter*, and referring to a decision of an inferior court). In my respectful view, however, these authorities are mistaken and on this point should be rejected.

[139] To begin, the view that art. 3164 *C.C.Q.* requires that there be a substantial connection between the dispute and the forum, even where one of the conditions for jurisdiction of a foreign authority is established under art. 3168 *C.C.Q.* finds no support, and indeed is inconsistent with, the text of art. 3164 *C.C.Q.* itself. For convenience, I repeat that text here:

**3164.** The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the State whose authority is seized of the matter.

[140] As this text makes express, any concern for a “substantial connection” arises only where the jurisdiction of a foreign authority is established on the provisions of Title Three. It follows that, whatever the reference in art. 3164 *C.C.Q.* signifies, it does *not* apply when a finding of jurisdiction is grounded *not* on a provision within Title Three, but rather of Title Four, including arts. 3165 to 3168 *C.C.Q.* I observe in this regard that Professor Talpis acknowledges (at pp. 105-6), while arguing that the “substantial connection” test must be satisfied in addition to one of the subparagraphs of art. 3168 *C.C.Q.*, that in this respect his position is inconsistent with the text of art. 3164 *C.C.Q.*:

**First**, the requirements of art. 3168 *C.C.Q.* for personal actions of a patrimonial nature must be fulfilled. . . .

**Second**, it is necessary to fulfill the “substantial connection” requirement of art. 3164 *C.C.Q.*, . . .

As indicated, it applies to Title III but, in my opinion, may perhaps also apply to the specific rules within Title IV.

. . .

According to art. 3164 *C.C.Q.*, the jurisdiction under evaluation must be one with which the dispute is substantially connected. This qualifier to the recognition of the authority of the foreign court is, according to the text of the provision, limited to use in matters for which no specific rule is provided, although recently it has been used to call into question the jurisdiction of a foreign authority in personal matters of a patrimonial nature (art. 3168 *C.C.Q.*) [Referring to *Cortas Canning*; emphasis added; bold text in original; footnote omitted.]

[141] The reasons of Bich J.A. in *Hocking*, to which Côté J. refers in her reasons, (at para. 244), also contain an admission that such an interpretation of the



relationship between arts. 3164 and 3168 *C.C.Q.* essentially has the effect of rewriting art. 3164 *C.C.Q.* (at para. 183):

[TRANSLATION] In other words, the substantial connection test formulated in art. 3164 *C.C.Q.* applies both to the jurisdiction rules in Title Three *and to those that, as the case may be, replace, clarify or limit these rules, as though the provision stated the following:*

3164. The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Quebec authorities under Title Three of this Book *or according to the rules that follow*, to the extent that the dispute is substantially connected with the country whose authority is seised of the case. [Emphasis added; italics in original.]

To be clear, this is not how the Quebec legislator has chosen to phrase art. 3164 *C.C.Q.* Indeed, by adopting art. 3164 *C.C.Q.*, the Quebec legislator makes plain its intention that the express provisions of art. 3168 *C.C.Q.* would not be subject to the additional criterion of a “substantial connection” which later court decisions, to which Côté J. refers, have imposed. As explained by Professor Goldstein (at p. 437):

[TRANSLATION] . . . when article 3168 *C.C.Q.* was enacted, it did not appear that the substantial connection requirement in article 3164 *C.C.Q.* could also apply to the express rules on indirect jurisdiction so that indirect jurisdiction could be reviewed on a case-by-case basis. It is the courts that have recently interpreted article 3164 *C.C.Q.* in this manner. . . . [Text in brackets omitted]

[142] The better approach, in my view — and the approach that conforms to the Quebec legislator’s intention — is to conclude, as did this Court in *Lépine*, that “[a]rticles 3165 to 3168 . . . set out, in more specific terms, connecting factors to be

used to determine whether, in certain situations, a sufficient connection exists between the dispute and the foreign authority: para. 36. In other words, art. 3168 *C.C.Q.* is not subject to any *additional* requirement of a “substantial connection” because it incarnates *both* the “mirror principle” *and* the requirement of a “substantial connection” enunciated in art. 3164 *C.C.Q.* More precisely, the provisions of art. 3168 *C.C.Q.* (a) mirror those of art. 3148 *C.C.Q.*, to which art. 3164 *C.C.Q.* refers by cross-reference to Title Three, but (b) are also more restrictive than those of art. 3148 *C.C.Q.*, *precisely in order to ensure the existence of a “substantial connection”* between the dispute and the foreign authority:

In commercial matters the mirror principle is weakened, however, by the existence of article 3168, which establishes particular grounds for jurisdiction of foreign authorities “in personal actions of a patrimonial nature”. The provisions of article 3168 are generally more restrictive than those of its mirror equivalent, article 3148, which establishes jurisdictional grounds for Quebec authorities for the same types of cases.

(H. P. Glenn (1997), at p. 408)

See also J. Talpis, at p. 104:

However, in other civil and commercial matters, the grounds for the jurisdiction of foreign courts are far more restrictive than for those of Quebec. This departure from the mirror-image approach was deemed necessary to protect defendants from inappropriately-taken foreign jurisdiction and to further the civil and private international law policy goals of securing legal certainty and foreseeability of law.

[143] Indeed, according to art. 3168(1), recognition of the jurisdiction of a foreign authority rests on the defendant having been *domiciled* in the foreign state, whereas mere *residence* in Quebec will suffice for domestic jurisdiction: art. 3148

para. 1(1). Similarly, while art. 3168(3) requires that *both* the damage *and* the injurious act took place in the foreign jurisdiction, the domestic rule is significantly less stringent, requiring only one or the other, but not both: art. 3148 para. 1(3). In a contractual dispute, foreign jurisdiction is grounded under art. 3168(4) on the place of performance of “the obligations arising from” the contract, while the jurisdiction of Quebec courts is recognized merely on “one of the obligations” being due in the province: art. 3148 para. 1(3). The “overall effect” of art. 3168 is clearly “one of narrowing the reflection of Québec jurisdictional bases when the mirror is turned toward foreign jurisdictions”: Saumier, at p. 688; see also *Labs of Virginia Inc. v. Clintrials Bioresearch Ltd.*, [2003] R.J.Q. 1876 (Sup. Ct.), at paras. 20-30. Adding a further requirement of substantial connection would, Professor Saumier correctly adds (at p. 689 (fn. 42)), “see[m] excessive” (and I would also add, redundant) in light of these already stricter conditions for recognizing foreign jurisdiction. See also J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. (loose-leaf)), at p. 14-24: “In principle, article 3164 is not relevant when special rules of jurisdiction like those found in article 3168 of the *Civil Code* are applicable as the grounds for establishing the jurisdiction of foreign authorities in personal actions of a patrimonial nature are more restrictive than those applicable to the international jurisdiction of Quebec authorities in similar actions” (footnote omitted).

[144] This narrower scope for recognizing a foreign authority’s jurisdiction under art. 3168 *C.C.Q.* stands in contrast to arts. 3166 (dealing with matters of filiation where the child or a parent is domiciled in, or is a national of, a foreign state)

and 3167 *C.C.Q.* (dealing with matters of divorce where certain connections exist with a foreign state), each of which *expands* the scope of jurisdiction of foreign authorities, relative to Quebec courts: Saumier, at p. 682. According to art. 3166 *C.C.Q.*, Quebec courts will recognize foreign jurisdiction in terms of filiation based either on domicile or nationality, whereas Quebec jurisdiction can only flow from domicile. Article 3167 *C.C.Q.* is also more generous in its recognition of foreign divorces than the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 22. This “broadening effect” is explained, however, by “the principle of validation in matters of status that has received general approval in international instruments and modern private international law codifications”: Saumier, at p. 682; see also Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. II, *Le Code civil du Québec — Un mouvement de société* (1993), at pp. 2024-25. To impose an additional criterion of “substantial connection” in these two cases “would contradict the *favor validatis* principle said to underlie these broadening provisions”: Saumier, at p. 683.

[145] I therefore agree with the statement of the Superior Court judge in this case (at para. 12 (CanLII)) that “the real and substantial connection test is not an additional criterion that should be found in Quebec law” and that “the dispositions of Book Ten of the *Civil Code* which includ[e] article 3168 subsum[e] the real and substantial connection test as expressed by the Common Law jurisprudence”.

[146] All this having been said, I stress that the mere fact that the substantial connection test has been subsumed into art. 3168 *C.C.Q.* does not signify that the

existence of such a connection is no longer relevant to deciding whether a party has submitted to the jurisdiction of a foreign authority. The provisions of art. 3168 *C.C.Q.* are intended to *establish* a substantial connection between the dispute or the parties and the foreign authority's state. Where, therefore, a Quebec court is considering whether a defendant has submitted to the jurisdiction of a foreign authority within the meaning of art. 3168(6) *C.C.Q.*, it must look for factors sufficient to establish a substantial connection between the defendant and the foreign authority. This is precisely why I agree with my colleague Côté J. that Mr. Barer has not submitted to the jurisdiction of the Utah Court merely by presenting *one* argument pertaining to the merits of the action in his Motion to Dismiss. This single act does not, in and of itself, suffice to establish a substantial connection between Mr. Barer and the Utah Court and, therefore, does not constitute implicit submission under art. 3168 *C.C.Q.*

[147] My colleague Côté J. adds, however, that “[t]he relevance of a distinct substantial connection requirement is illustrated by the case law”: para. 249. I acknowledge that the case law does *not* show its *irrelevance*. But it certainly does not illustrate the centrality of such a requirement. The result in *Cortas Canning*, a decision relied on by my colleague, was driven principally by the Quebec Superior Court's evident concern — albeit expressed in *obiter dicta* — about recognizing a \$9 million judgment rendered by default on a contract for \$96 worth of merchandise purchased in Texas. Such an award was viewed as so “extremely high in the circumstances” that the outcome of the decision could be considered as “manifestly inconsistent with public order as understood in international relations” within the

meaning of art. 3155(5) *C.C.Q.*: pp. 1239-41; see also *McKinnon v. Polisuk*, 2009 QCCS 5778; Talpis, at pp. 171-72 (“[I]f a disproportionate damage award is accompanied by other questionable circumstances, such as a sizable discrepancy between the harm actually done to the plaintiff and the amount claimed, as was the case in *Cortas Canning*, then it seems that a Quebec court might be willing to employ the public order grounds to refuse to recognize the decision” (footnote omitted); Emanuelli, at No. 299 ([TRANSLATION] “[s]ome Quebec court decisions have suggested that a foreign monetary award that substantially exceeds what would have been awarded by a Quebec court may be contrary to Quebec public order under international law, especially if it corresponds to punitive or exemplary damages. This position . . . seems correct to us” (footnote omitted)); *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, at paras. 71 et seq. and 219 et seq.; *Convention on Choice of Court Agreements* (2005): art. 11. (I should add that I make no comment on whether it is possible to deny recognition under art. 3155(5) *C.C.Q.* on the basis of excessive awards of punitive or compensatory damages.)

[148] Nor does *Hocking*, another decision relied on by my colleague at para. 250 of her reasons, support her statement. In *Hocking*, Bich J.A. concluded that none of the connecting factors of art. 3168 *C.C.Q.* were met with respect to Quebec class members; indeed, Bich J.A. concluded that art. 3168(6) *C.C.Q.* could not *apply* in the context of a class action because the Quebec class members had not *chosen* the Ontario court, thus breaking with “the premise of a choice of forum made by the party instituting the action” on which art. 3168(6) *C.C.Q.* is based: para. 214. I

acknowledge that Bich J.A. added (at para. 220) that [TRANSLATION] “even supposing that art. 3168(6) *C.C.Q.* justified *a priori* the jurisdiction of the Ontario court”, art. 3164 *C.C.Q.* would prevent it, but this does not illustrate an absolute need for a distinct substantial connection requirement in order to deny recognition in such circumstances. Rather, *Hocking* is simply an example of a case in which art. 3168(6) *C.C.Q.* was not satisfied.

[149] All this said, I concede that a Quebec court *must* conduct an independent inquiry into the existence of a “substantial connection” between the dispute and the foreign authority where the court bases its conclusion regarding the foreign authority’s jurisdiction on one of the “General Provisions” in Chapter I of Title Three. This follows from the text of art. 3164 *C.C.Q.*, and its reference to Title Three. The approach taken by the Quebec Court of Appeal in *Ortega* is therefore correct<sup>5</sup> (at paras. 36, 41 and 42 (CanLII)):

[TRANSLATION] Where, as here, none of the specific connecting factors set out in articles 3165 to 3168 *C.C.Q.* is applicable, it must also be shown, in accordance with article 3164 *C.C.Q.*, that the dispute is substantially connected with the State whose authority is seized of the matter. . . .

. . .

The addition of this substantial connection requirement in article 3164 *C.C.Q.* in fact goes back to this idea of a real and substantial connection between the court and the subject matter of the dispute.

This imperative requires the Quebec court inquiring into the jurisdiction of the foreign court (where that jurisdiction does not result

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<sup>5</sup> It therefore seems to me that there is no uniformity among what my colleague presents as “the prevailing jurisprudence of the Court of Appeal”: Côté J.’s reasons, at paras. 235 and 238.

from articles 3166 to 3168 C.C.Q.) to consider and look at all the circumstances connecting the dispute to the foreign authority. This could lead to a finding that the foreign authority, in the absence of such a connection, does not have jurisdiction. [Emphasis added.]

Given this acknowledgement, I reject the criticism that my position “render[s] the express words used by the Quebec legislature largely without effect, at least in the context of personal actions of a patrimonial nature”: see Côté J.’s reasons, at para. 248.

[150] I add, however, that it is unnecessary, in order to determine this appeal, to decide whether a Quebec court must also conduct a similar inquiry where it bases its conclusion regarding the foreign authority’s jurisdiction on one of the “Special Provisions” in Chapter II of Title Three (for example, in matters of nullity of marriage (art. 3144 C.C.Q., to which art. 3164 C.C.Q. refers by cross-reference to Title Three) or in matters of succession (art. 3153 C.C.Q., to which art. 3164 C.C.Q. refers by cross-reference to Title Three)). Support for arguments in each direction can be found in the authorities (contrast, for example, *Spar*, at paras. 55 and 63; *Ortega*, at para. 41, *Talpis and Castel*, at No. 486; and *Goldstein*, at p. 391, with *Spar*, at para. 57, and *Lépine*, at paras. 32-36), and it is not necessary for me to decide it here. Because, however, of the extensive discussion of this subject in the reasons of my colleague Côté J., I feel obliged to state more explicitly some of the arguments that can be found in the authorities in favor of each position.



[151] On one hand, it might be argued that *any* discretionary power “to deny recognition on the basis of the absence of a substantial connection”, as suggested by my colleague Côté J., at para. 261 of her reasons, is incompatible with the decision of this Court in *Lépine*, which held that a Quebec court should *not* have the discretionary power to deny recognition on the basis that the foreign authority should have declined to exercise its jurisdiction under the doctrine of *forum non conveniens*. As fairly acknowledged by my colleague Côté J. at para. 263 of her reasons, an inquiry into the existence of a substantial connection “does introduce a certain degree of discretion”. However, in *Lépine*, at para. 36, this Court made clear that an “approach [which] introduces a degree of instability and unpredictability . . . is inconsistent with the standpoint generally favourable to the recognition of foreign or external judgments that is evident in the provisions of the Civil Code” (emphasis added).

[152] On the other hand, as explained by my colleague, this Court in *Spar*, at para. 57, noted that “the doctrine of *forum non conveniens*, as codified at art. 3135, serves as an important counterweight to the broad basis for jurisdiction set out in art. 3148”. Yet, this Court later held in *Lépine* that the doctrine of *forum non conveniens* does not extend to the recognition of foreign decisions. As my colleague explains (at para. 256 of her reasons), it is therefore possible to argue that “this makes the substantial connection requirement in art. 3164 *C.C.Q.* all the more necessary as a safeguard against inappropriate assumptions of jurisdiction” where a Quebec court bases its conclusion regarding the foreign authority’s jurisdiction on one of the “Special Provisions” in Chapter II of Title Three; see also reasons of Côté J., at para.

262. In my view, however, there is no such necessity where a Quebec court bases its finding of jurisdiction on the express (and already more restrictive) provisions of art. 3168 *C.C.Q.*, as explained by Professor Goldstein (at p. 437):

[TRANSLATION] If the heads of jurisdiction given to the Quebec court by article 3148 *C.C.Q.* . . . are compared with those given to the foreign court by article 3168 *C.C.Q.*, it can be seen not only that the latter provision uses limiting language but also that the mirror principle in article 3164 *C.C.Q.* . . . is not adhered to for personal actions of a patrimonial nature.

This restrictive approach is understandable given that the doctrine of *forum non conveniens*, set out in article 3135 *C.C.Q.* . . . in relation to the jurisdiction of Quebec courts, does not appear in the rules on indirect jurisdiction, which could favour forum shopping abroad. In addition, when article 3168 *C.C.Q.* was enacted, it did not appear that the substantial connection requirement in article 3164 *C.C.Q.* could also apply to the express rules on indirect jurisdiction so that indirect jurisdiction could be reviewed on a case-by-case basis. It is the courts that have recently interpreted article 3164 *C.C.Q.* in this manner. . . . [Emphasis added; text in brackets omitted.]

(3) Application to this Case

[153] For the foregoing reasons, I have concluded that art. 3164 *C.C.Q.* authorizes a Québec court to recognize the jurisdiction of a foreign authority on the basis of one of the “General Provisions” situated in Chapter I of Title Three, including art. 3139 *C.C.Q.*, to the extent that the dispute is substantially connected with the State whose authority is seized of the matter. Article 3139 *C.C.Q.* states:

**3139.** Where a Québec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand.

[154] The purpose of art. 3139 *C.C.Q.* is that of administrative convenience — specifically, “to ensure the efficient use of judicial resources and efficiency in the administration of justice by fostering the joinder of proceedings”: *GreCon*, at para. 30 (emphasis added). In *GreCon*, this Court noted that art. 3139 *C.C.Q.* “establishes an exception to the principle that the jurisdiction of the Quebec court is determined on a case-by-case basis” and “expands considerably the potential scope of the jurisdiction of the Quebec authority”: para. 29. It added that “[t]his expanded scope suggests that art. 3139 *C.C.Q.* must be interpreted narrowly so as not to indirectly enlarge the international jurisdiction of the Quebec authority”: para. 29. Accordingly, art. 3139 *C.C.Q.* cannot supersede a forum selection clause or arbitration clause between the relevant parties, because “the application of art. 3139 *C.C.Q.* is subordinate to the application of art. 3148 para. 1(2) *C.C.Q.*, which gives full effect to a clear intention, expressed in a valid and exclusive choice of forum clause, to submit a dispute to the jurisdiction of foreign authorities”: para. 37.

[155] The Court must nevertheless bear in mind that art. 3139 *C.C.Q.* is a jurisdiction-*granting* provision, and that its operation assumes that, absent this provision, the court would not be competent, in the jurisdictional sense, to hear the incidental demand or cross demand”: Saumier, at p. 690; *Spar*, at para. 22 (“[t]hese rules [in Book Ten of the *C.C.Q.*] cover a broad range of interrelated topics, including: the jurisdiction of the court (art. 3136, 3139 and 3148 *C.C.Q.*)” (emphasis added)). In my view, the term “incidental demand”, as that term appears in art. 3139 *C.C.Q.*, is sufficiently broad to cover voluntary and forced intervention of third

persons in the proceeding, including an incidental demand in warranty, and the consolidation of proceedings, whether or not they involve the same parties, and whether or not they arise from the same source or from related sources: see arts. 184 to 190 and 210 of the new *Code of Civil Procedure*, CQLR, c. C-25.01 (“new *C.C.P.*”); see also Côté J.’s reasons, at paras. 206 and 283 (“there is no doubt that [the precise meaning of ‘incidental demand’] must be defined on the basis of Quebec procedural law”). Indeed, this point finds ample support in the Quebec doctrine. Professor Goldstein explains the following, at pp. 111-12:

[TRANSLATION] . . . the definition of an “incidental” action must depend on Quebec law, [and] reference may [therefore] be made to Title IV of Book II of the Code of Civil Procedure, which deals with “Incidental Proceedings”. That title covers, among other things, the voluntary intervention of a third party (arts. 208 et seq. *C.C.P.*), forced intervention (arts. 216 et seq. *C.C.P.*), including an incidental action in warranty, and the joinder of actions (arts. 270 et seq. *C.C.P.*), whether or not they involve the same parties (art. 271 *C.C.P.*) or originate from the same source or related sources (art. 270 *C.C.P.*). Thus, it is foreseeable that a Quebec court with jurisdiction over an action for separation from bed and board under art. 3146 *C.C.Q.* will assume jurisdiction under art. 3139 *C.C.Q.* over an accessory action for child custody or support. Similarly, in an international situation, it can be imagined that a Quebec court with jurisdiction over an action by a succession under art. 3153 *C.C.Q.* will assume jurisdiction over an action relating to the preliminary issue of whether an adoption is valid. [Emphasis added; footnote omitted.]

Relatedly, arts. 216, 270 and 271 of the old *Code of Civil Procedure*, CCLR, c. C-25 (“old *C.C.P.*”) now correspond, respectively and among others, to arts. 184 and 210 of the new *C.C.P.*: see L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (2nd ed. 2017), at pp. 961 and 1165. Article 210 of the new *C.C.P.* on the “Consolidation and Separation of Proceedings” is

situated under the chapter on “Incidental Proceedings Relating to Pleadings”. It follows, then, that the term “incidental demand” in art. 3139 *C.C.Q.* should be read as including a “related” claim: see, e.g., *Droit de la famille — 131294*, 2013 QCCA 883, at paras. 54-57 (CanLII); Emanuelli, at No. 173 ([TRANSLATION] “[a]rticle 3154(1) *C.C.Q.*, which concerns matrimonial regimes, is a specific application of the general rule in article 3139. The rule should also be followed for the jurisdiction of Quebec authorities over accessory measures in an action for separation or annulment” (emphasis added; footnote omitted)). Of course, and while art. 3139 *C.C.Q.* does not mention this factor expressly, there must nonetheless be “some connexity” between the principal action and the incidental action: *GreCon*, at para. 31. As explained by Professor Talpis (at p. 36): “in some situations the actions may be related in ways that make jurisdiction against co-defendants possible under article 3139 C.C.Q.” (emphasis added).

[156] This kind of “derivative jurisdiction”, I also observe, is hardly uncommon in civil law systems. In French law, see, e.g., P. Mayer and V. Heuzé, *Droit international privé* (11th ed. 2014), at p. 205 :

[TRANSLATION] Also transposed to international jurisdiction are the rules on *derivative jurisdiction*, which extend the jurisdiction of the court seized of a certain demand to other demands related to it. The court therefore has jurisdiction to hear related actions brought against a number of defendants as long as one of them — in respect of whom the demand must be real and serious — is domiciled in France. . . . [Emphasis in original; footnote omitted.]

See also art. 8A of Switzerland’s *Loi fédérale sur le droit international privé*; art. 6(1) of the *Convention on jurisdiction and the enforcement of judgments in civil and commercial matters* (2007) (Lugano Convention); art. 9 of Belgium’s *Loi portant le Code de droit international privé*.

[157] Further, an “incidental demand” is not limited to a recourse in warranty: see, e.g., art. 184 para. 3 of the new *C.C.P.*<sup>6</sup> A *plaintiff* thus has the right to force the intervention of a third person in order to fully resolve the dispute: see *Bourdages v. Québec (Gouvernement du) (Ministère des Transports)*, 2016 QCCS 5066; *Fonds d’assurance responsabilité professionnelle du Barreau du Québec v. Gariépy*, 2005 QCCA 60, at para. 33 ([TRANSLATION] “forced impleading is a procedure that is legally equivalent to adding to the principal action, as instituted, a new defendant who is there to respond to and oppose the conclusions of the principal demand” (footnote omitted)); *Constructions Alcana ltée v. Cégep régional de Lanaudière*, 2006 QCCA 1494; see also *Allard v. Mozart ltée*, [1981] C.A. 612; *CGU v. Wawanesa, compagnie mutuelle d’assurances*, 2005 QCCA 320, [2005] R.R.A. 312; *Kingsway General Insurance Co. v. Duvernay Plomberie et chauffage inc.*, 2009 QCCA 926, [2009] R.J.Q. 1237. In *Insta Holding Limited v. 9247-5334 Québec inc.*, 2017 QCCS 432, at paras. 17-20 (CanLII), for example, the Quebec Superior Court characterized a direct

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<sup>6</sup> Article 184 of the new *C.C.P.* reads as follows:

**184.** Intervention is either voluntary or forced.

...

Intervention is forced when a party impleads a third person so that the dispute may be fully resolved or so that the judgment may be set up against that third person. It is also forced when a party intends to exercise a recourse in warranty against the third person.

claim of a plaintiff against a foreign defendant whose co-defendant was alleged to be his alter ego as a “forced intervention” within the meaning of art. 184 of the new *C.C.P.* and, accordingly, as an “incidental demand” for the purpose of art. 3139 *C.C.Q.*; see also *Marble Point Energy Ltd.*, at paras. 57-59 and 61.

[158] My colleague Gascon J. stresses that Knight’s proceeding against Mr. Barer is not an “incidental demand”, but rather a “principal demand” instituted jointly against BEC and CBC: see para. 90; see also Côté J.’s reasons, at paras. 275 and 281-285. In his view, the fact that Mr. Barer “is a co-defendant sued directly” precludes a finding that he is being sued by way of a proceeding that can be characterized as an “incidental demand” for the purpose of art. 3139 *C.C.Q.*: para. 90. Had Mr. Barer been added as a co-defendant after the institution of a “principal demand” against BEC or CBC *via* forced intervention, or had a separate proceeding against Mr. Barer been joined to a “principal demand” against BEC or CBC *via* consolidation of proceedings, my colleague reasons that the proceeding against Mr. Barer would have become an “incidental demand” for the purpose of art. 3139 *C.C.Q.* In my respectful view, the fact that Mr. Barer has been sued directly as a co-defendant, and not added after the institution of a “principal demand” against BEC or CBC, is a distinction of no legal significance to the jurisdiction of the Utah Court: [TRANSLATION] “[it does not matter whether a person was] brought into the proceeding at the outset [or] could have been brought in through an incidental application in the course of the proceeding. The objective is the same: to allow the dispute to be fully resolved or the judgment to be set up against the person”: *Insta Holding*, at para. 19.

[159] I recognize that Professor Talpis says “art. 3139 C.C.Q. does not permit assertion of jurisdiction over a co-defendant over whom the court lacks jurisdiction by the sole fact that it has jurisdiction over the other defendant”: pp. 37-38 (fn. 43) (emphasis added), citing *Sorel-Tracy Terminal Maritime v. F.S.L. Ltd.*, J.E. 2001-641 (Que. Sup.Ct.); see also, Glenn, “Droit international privé”, at p. 748; Talpis and Castel, at No. 437. In my view, the subsisting authority of this statement is doubtful, based as it is on jurisprudence which held art. 75 of the old *C.C.P.*<sup>7</sup> to be inapplicable in private international law cases, because of its use of the word “district” (which was interpreted as referring to one of the districts of the province of Québec only): *Trower & Sons, Ltd. v. Ripstein*, [1944] A.C. 254 (P.C.); *Cornwall Chrysler Plymouth Ltd. v. Lapolla*, [1974] C.A. 490; H. P. Glenn, “La compétence internationale et le fabricant étranger” (1985), 45 *Can. Bar. Rev.* 567, at pp. 570-71; Emanuelli, at No. 173.

[160] Prior to the adoption of the *C.C.Q.* in 1994, the international jurisdiction of Quebec courts was indeed governed by the old *C.C.P.* The *C.C.Q.* now sets out in Book Ten a code governing private international law, whose rules “subsum[e] or complemen[t] the rules of civil procedure found in the [old *C.C.P.*]”: *Spar*, at para 22. It is therefore “necessary to be circumspect, in considering the cases in which the principles applicable prior to the reform of the *Civil Code* were applied, when it comes to determining the scope of art. 3139 *C.C.Q.*”: *GreCon*, at para. 56. Moreover,

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<sup>7</sup> Article 75 of the old *C.C.P.* reads as follows:

**75.** An action against several defendants domiciled in different districts, if it is a personal or mixed action, may be instituted in the court before which any of them may be summoned; but if it is a real action, it must be instituted in the court of the place where the object of the dispute is situated.



this interpretation of art. 75 of the old *C.C.P.* was not universally shared: see, for example, *Municipalité du village de St-Victor v. Allianz du Canada*, [1996] R.D.J. 123 (C.A.); see also H. Kélada, *Les conflits de compétences et la reconnaissance des jugements étrangers en droit international privé* (2001), at p. 44 (suggesting that art. 75 *C.C.P.* should also apply to defendants not domiciled in Quebec provided that one of the co-defendants resides or is domiciled in the province); D. Ferland and B. Emery, *Précis de procédure civile du Québec* (4th ed. 2003), vol. 1, at p. 180 (interpreting art. 75 of the old *C.C.P.* as including defendants who are domiciled inside or outside of Quebec).

[161] This is not to say that the rules of the old *C.C.P.* have no subsisting influence. For example, the substance of art. 71 of the old *C.C.P.*,<sup>8</sup> which this Court has interpreted as authorizing a Quebec court to exercise its jurisdiction over a foreign defendant in warranty that had no domicile, residence, place of business or property in Quebec (*A S G Industries Inc. v. Corporation Superseal*, [1983] 1 S.C.R. 781), has been “reiterate[d]” by article 3139 *C.C.Q.*: *GreCon*, at para. 55. Similarly, the Quebec Court of Appeal has recently held that “the joinder of causes of action [against a particular defendant] is permitted in the context of international jurisdiction”: *E. Hofmann Plastics Inc. v. Tribec Metals Ltd.*, 2013 QCCA 2112, at para. 12 (CanLII). More precisely, the Quebec Court of Appeal has decided that art. 3148 para. 1(3) *C.C.Q.* “[does] not require that each potential cause of action bear a

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<sup>8</sup> Article 71 of the old *C.C.P.* reads as follows:

**71.** The incidental action in warranty must be taken before the court in which the principal action is pending.

connecting factor to Québec and that one cause of action is enough to grant jurisdiction”: *Poppy Industries Canada Inc. v. Diva Delights Ltd.*, 2018 QCCA 163, at para. 32 (CanLII).

[162] This tends to affirm, and I conclude, that in personal actions of a patrimonial nature, the jurisdiction of a foreign authority over a particular co-defendant can be established in accordance with art. 3139 *C.C.Q.*, even where that co-defendant is not a party to the contract upon which the foreign authority’s jurisdiction is grounded, (a) if that foreign authority has jurisdiction over the main contractual dispute pursuant to art. 3168(4) *C.C.Q.*, (b) if there is “some connexity” between the contract and the claim made against the co-defendant (*GreCon*, at para. 31) or, in other words, if the claim against the co-defendant is “connected” to the contract (*Lapointe*, at paras. 32, 33 and 44), and (c) if there is a “substantial connection” between the dispute (that is, the co-defendant or the claim made against him) and the foreign authority’s State: art. 3164 *C.C.Q.* As this Court explained in *Van Breda* (at para. 99):

I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would

be incompatible with any notion of fairness and efficiency. [Emphasis added.]

[163] It follows that, in this case, the Utah Court had jurisdiction over the main contractual dispute between Knight and BEC under art. 3168(4) *C.C.Q.*, and the claims of alter ego and fraud made against the co-defendant, Mr. Barer, personally, were clearly “connected” to the contract. I also agree with my colleague Gascon J. that there is “no question as to whether the dispute is substantially connected to Utah and the Utah Court” (para. 88), thus satisfying art. 3164 *C.C.Q.* — meaning, in the circumstances of this case, that there was a sufficiently substantial connection between Utah and *both* the object of the dispute *and* the parties.

[164] As for the substantial connection between Utah and the co-defendant, Mr. Barer, it is worth bearing in mind not only that Mr. Barer “participated in the legal proceedings in Utah” (Gascon J.’s reasons, at para. 88), but also that he admits to having had a “key role” (given his status as President of BEC) in dealing with Knight, a Utah corporation, for the performance of a contract that was to be executed in Utah: A.R., vol. II, at pp. 81-82. This is, therefore, *not* a case where the defendant was “remotely associated with a contract”: Côté J.’s reasons, at para. 199. Nor is this a case that “would undermine the certainty and predictability which the specific connecting factors in the *C.C.Q.* are intended to promote” (Côté J.’s reasons, at para. 286), since it would have been entirely predictable that Mr. Barer could be subject to the jurisdiction of the Utah Court in the event of a dispute with Knight. As explained by this Court in *Beals*, at para. 25, referring to *Moran v. Pyle National (Canada) Ltd.*,

[1975] 1 S.C.R. 393, at p. 409, “where individuals carry on business in another . . . jurisdiction, it is reasonable that those individuals be required to defend themselves there when an action is commenced”.

[165] While I am of the view that, in the circumstances of this case, there *is* a sufficiently substantial connection between Utah and the co-defendant, Mr. Barer, I should add that, according to relevant case law, it is not absolutely necessary to prove the existence of a substantial connection between the foreign authority’s state and the defendant, particularly where (as here) such a connection clearly subsists between the foreign authority’s state and the subject-matter of the dispute: see *Beals*, at para. 23 (“A substantial connection with the subject matter of the action will satisfy the real and substantial connection test even in the absence of such a connection with the defendant to the action”); *CIMA Plastics Corp. v. Sandid Enterprises Ltd.*, 2011 ONCA 589, 341 D.L.R. (4th) 442, at paras. 17-18; *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679 (N.S.C.A.); *O’Brien v. Canada (Attorney General)*, [2002] N.S.J. No. 57 (C.A.) (QL); *Duncan (Litigation guardian of) v. Neptunia Corp.* (2001), 53 O.R. (3d) 754 (S.C.J.), at para. 41 (“[I]t is clear that a real and substantial connection between the forum province and the subject matter of the litigation, not necessarily the defendant, is sufficient to meet the test”); *Muscutt*, at para. 74; *Van Breda v. Village Resorts Limited*, 2010 ONCA 84, 98 O.R. (3d) 721, at para. 86 (“I see no reason to depart from what we said in *Muscutt*, at paras. 54-74, in rejecting the argument that assumed jurisdiction should focus solely or primarily upon the nature and extent of the defendant’s contacts with the jurisdiction. We concluded, at para.

74, that “[w]hile the defendant’s contact with the jurisdiction is an important factor, it is not a necessary factor”); G. D. Watson, Q.C., and F. Au, “Constitutional Limits on Service *Ex Juris*: Unanswered Questions from *Morguard*” (2000), 23 *Adv. Q.* 167, at p. 200 (“[i]n complex litigation involving multiple defendants in different jurisdictions, insisting on a substantial connection between each defendant and the forum can lead to a multiplicity of actions and inconsistent findings”).

[166] As for the substantial connection between Utah and the subject-matter of the dispute, it is worth bearing in mind not only that the Utah Court had jurisdiction over the main contractual dispute under art. 3168(4) *C.C.Q.*, but also that the lifting of the corporate veil is governed “by the law of the State under which [the legal person, i.e. BEC] is constituted [i.e., Vermont], subject, with respect to its activities, to the law of the place where they are carried on [i.e., Utah]: art. 3083 *C.C.Q.* Meaning, the alter ego claim made against Mr. Barer personally is governed by Utah law, which represents a further indicator of a substantial connection between Utah and the subject-matter of the *whole* dispute, including the alter ego claim.

[167] My colleague Côté J. stresses that Utah’s *conflict of laws* rules directed the Utah Court to apply Vermont law to the alter ego claim: see A.R., vol. 2, at pp. 95 et seq.; Côté J.’s reasons, at para. 273. But this is of no legal significance to this case. What matters here is that, *under Québec law*, it is the *internal law* of Utah, and therefore the State of Utah itself, which holds the most substantial connection with

the alter ego claim: see art. 3080 *C.C.Q.* As explained by Professor Emanuelli (at No. 398):

[TRANSLATION] To formulate its national conflict rules, the Quebec legislature made a choice among various connecting factors based on the type of legal issues to which each conflict rule was intended to apply. For each type of issue, there are therefore one or more connecting factors and one or more conflict rules. The purpose of this choice is normally to ensure that the competent law is the law most closely connected with the situation in issue. [Emphasis added; footnote omitted.]

[168] My colleague Côté J. suggests that my approach “conflates conflict rules with the requirements for recognizing a foreign decision”: para. 270. But with respect, it is hardly uncommon for courts called upon to resolve jurisdictional issues to consider choice of law rules. For example, the applicable law is a relevant factor to a *forum non conveniens* analysis: *Spar*, at para. 71; *Van Breda*, at para. 105; *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636, at para. 49; *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666, at paras. 23-25 and 32-33; *Lexus maritime inc. v. Oppenheim forfeit GmbH*, 1998 CanLII 13001 (Que. C. A.), at para. 18; S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2010), at p. 126 (“jurisdiction issues usually arise at the very beginning, so they arise much more often than choice of law issues, which mainly arise at trial. However, the role of the applicable law in the *forum non conveniens* . . . requires consideration, at a much earlier stage in the proceedings, of the applicable law, and therefore of the choice of law rules to identify that law.”) As explained by the Quebec Court of Appeal in *Ortega*, at paras. 42 and 46, the “substantial connection” test of art. 3164 *C.C.Q.*

[TRANSLATION] “requires the Quebec court inquiring into the jurisdiction of the foreign court (where that jurisdiction does not result from articles 3166 to 3168 C.C.Q.) to consider and look at all the circumstances connecting the dispute to the foreign authority”, and “a comprehensive analysis requires . . . consideration of each and every circumstance to determine its relevance and then its effect on the degree of connection” (emphasis added). It is, therefore, hardly unorthodox to suggest that art. 3083 C.C.Q. is relevant to ascertaining the strength of the connection between the alter ego claim and the State of Utah. As explained by Walker, at pp. 11-54 and 11-55 (discussing the presumptive real and substantial connections identified by the Uniform Law Conference):

While jurisdiction and choice of law in the conflict of laws are ordinarily understood to be discreet forms of analysis, in this context they may be related.

...

This approach to defining the underlying principle supporting jurisdiction based on a real and substantial connection is consistent with an observation made by the Supreme Court of Canada in *Moran v. Pyle*. Referring to Cheshire, 8th ed., 1970, p. 281, Dickson J. (as he then was) noted, “it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant’s activities or its consequences *and the law of which is likely to have been in the reasonable contemplation of the parties.*” While this observation was made in respect of jurisdiction over claims in tort, it may have broader relevance. As mentioned above, the interest in regulating activities in the forum is, at bottom, justifiable as a result of the close connection between those activities and the legal context that is likely to have been in the reasonable contemplation of the parties. [Emphasis in original; footnote omitted.]

[169] I acknowledge, of course, that “the jurisdiction *simpliciter* and *forum non conveniens* analyses should be based on different factors”: *Haaretz.com v. Goldhar*, 2018 SCC 28, at para. 90; *Van Breda*, at para. 56. But this principle is driven by the distinction between *establishing* jurisdiction and *declining to exercise* jurisdiction (or, as this Court put it in *Van Breda* (at para. 19), between “assuming jurisdiction (jurisdiction *simpliciter*)” and “deciding whether to decline to exercise it (*forum non conveniens*)”). In the context of the recognition of a foreign judgment, however, there is no need to distinguish between the factors relevant to “the jurisdiction *simpliciter* and *forum non conveniens* analyses”, since a Quebec court *cannot* refuse to recognize such a judgment on the basis that the foreign authority should have declined to exercise its jurisdiction pursuant to the *forum non conveniens* doctrine: *Lépine*. If the “substantial connection” test of art. 3164 *C.C.Q.* must be satisfied in order to recognize the foreign authority’s jurisdiction — which is the case if the Quebec court intends to base its finding of jurisdiction on one of the “General Provisions” in Chapter I of Title Three — then the Quebec court must, in my respectful view, consider *all* relevant factors, including the applicable law: *Ortega*, at paras. 42 and 46. I reiterate that the applicable law should be considered under the “substantial connection” test of art. 3164 *C.C.Q.* in order to *extend* the foreign authority’s admitted jurisdiction — not in order to *deny* it by impermissibly applying the *forum non conveniens* doctrine.

[170] Despite our disagreements, my colleagues and I all agree that “it is in the interests of justice that the ‘entire dispute including the alter ego claims’ be decided



by one forum”: Gascon J.’s reasons, at para. 88; see also Côté J.’s reasons, at para. 274. The question is, which forum? Under art. 3148 *C.C.Q.*, the Québec authorities do not have jurisdiction over BEC, which is based in Vermont. According to my colleagues Gascon and Côté JJ., the Utah Court has no jurisdiction over Mr. Barer under arts. 3168(3) or (4) *C.C.Q.*, due to a lack of evidence. But if there is a lack of evidence, it is only because Mr. Barer has chosen *not* to present a defense against the claims of alter ego and fraud, and because the Utah Court cannot otherwise assert jurisdiction over him since he is domiciled in Quebec. In such a “situation involving two or more parties located in different parts of the world” (*Lépine*, at para. 36), however, and where there is a substantial connection between their dispute and Utah, it is in my view not only desirable but necessary in the interests of justice and in light of the “guiding principle” of international comity, which underpins the various private international law rules (*Spar*, at paras. 15 and 17), to recognize the jurisdiction of the Utah Court in respect of the “entire dispute” *and* of all co-defendants. Conversely, to impose upon Knight the additional burden of proving its allegations of alter ego or fraud before a Quebec court seems unnecessary and, quite frankly, excessive, since it is apparent that *only* Utah had an interest in asserting jurisdiction “over all aspects of the case”: *Van Breda*, at para. 99. As the Utah Court said in response to Mr. Barer’s motion to dismiss:

. . . [The] Plaintiff has shown that David Barer has sufficient minimum contacts with the state of Utah to establish personal jurisdiction over him. There was purposeful availment of the privilege of conducting business in Utah in hiring a Utah company in Utah to perform work in Utah. There is nexus between those forum-related contacts and Plaintiff’s causes of action as they all arise out of the work performed. Because the disputes

regarding the other Defendants will be determined in this forum, and there would appear to be little additional burden on David Barer to have his personal liability, which is related to the alter ego claim against another defendant, also determined in this forum. The state of Utah has an interest in providing a forum for resolution of the dispute arising from work contracted in and performed in the state, the Plaintiff has an interest in receiving convenient and effective relief in the same forum where the rest of the dispute will be resolved. It furthers the interest of the interstate, and in this case the international justice system in having the entire dispute including the alter ego claims against two Defendants resolved in one efficient action. Therefore, the Court finds that it is not unreasonable to exercise personal jurisdiction over David Barer.

(A.R., vol. II, at pp. 102-3 (footnote omitted.))

[171] I acknowledge that art. 3139 *C.C.Q.* has not been fully argued in this appeal. Article 3168(4) *C.C.Q.* has, however, and — as I have explained above — its scope cannot be determined in isolation. Article 3164 *C.C.Q.* has also received considerable attention from the parties and each of Gascon and Côté JJ. in their reasons. In my view, it is a mistake to ignore the significance of art. 3164 *C.C.Q.* to the Utah Court’s jurisdiction. Further, and notwithstanding this Court’s observation in *GreCon* (at para. 32) that the text of art. 3139 *C.C.Q.* reveals its “permissive nature”, this provision is not entirely discretionary. As explained by Professor Goldstein (at pp. 113-14):

[TRANSLATION] The provision itself states that the Quebec court “has jurisdiction”, not that it “may assume jurisdiction”. It therefore does not seem to include a discretion not to exercise jurisdiction. However, this wording is not mandatory, unlike that of article 71 C.C.P., which uses the word “must”, as noted in [*GreCon*] by the Supreme Court, which ultimately found this provision to be permissive in nature. [Emphasis added; footnotes omitted.]

[172] I also acknowledge, as this Court noted in *GreCon* (at para. 31), that art. 3139 *C.C.Q.* “confers a discretion on the judge, who may decide to sever the principal action from the action in warranty”. But as this Court also explained in *Lépine* (at para. 34): “[e]nforcement by the Quebec court depends on whether the foreign court had jurisdiction, not on how that jurisdiction was exercised”, and that proper regard must still be given to “the basic distinction between the establishment of jurisdiction as such and the exercise of jurisdiction” (emphasis added). It follows that a Quebec court cannot ignore art. 3139 *C.C.Q.* when deciding whether to recognize a foreign authority’s jurisdiction, even if that provision confers a discretion upon the foreign authority to refrain from exercising its jurisdiction over the “incidental demand”. In this appeal, the Utah Court has chosen to assert its jurisdiction over all aspects of the case, including the alter ego claims. Given art. 3139 *C.C.Q.*, this choice was open to the Utah Court and should be respected by this Court.

[173] Finally, my colleague Gascon J. suggests that Knight has not adduced evidence to establish “the required degree of ‘connexity’ between Mr. Barer and BEC”: para. 91; see also Côté J.’s reasons, at para. 285. There are, of course, different aspects to “the required degree of ‘connexity’” to be considered here: the connection between Mr. Barer and BEC; the connection between Mr. Barer or the claims made against him and the State of Utah; and the connection between the contractual claims made against BEC and the alter ego claims made against Mr. Barer personally. So far as the connection between Mr. Barer and BEC is concerned, I have already recounted evidence in the record showing that Mr. Barer was at the relevant time Secretary and

acting President of BEC, and that he has had a “key role” in dealing with Knight on behalf of BEC. As for the connection between Mr. Barer or the claims made against him and the State of Utah, I agree with my colleague that the record shows a substantial connection (Gascon J.’s reasons, at para. 88), and further say that this satisfies the requirements of art. 3164 *C.C.Q.* And, as for the connection between the contractual claims made against BEC and the alter ego claims made against Mr. Barer personally, there can be no serious doubt that they are “connected” as required by *GreCon*: para. 31. In this regard, I take my colleague’s statement that “it is in the interests of justice that the ‘entire dispute including the alter ego claims’ be decided by one forum” (para. 88) as largely supportive, since it would not be “in the interests of justice” that *unconnected* claims be decided together by one forum.

### III. Conclusion

[174] I would dismiss the appeal with costs.

The following are the reasons delivered by

CÔTÉ J. —

#### I. Introduction

[175] Knight Brothers LLC (hereinafter the “respondent” or “Knight”) asked the Superior Court of Quebec to recognize a judgment rendered by default (hereinafter the “Amended Final Judgment”) by the United States District Court, Central Division for the District of Utah (hereinafter the “Utah Court”) and to declare it enforceable against David Barer (hereinafter the “appellant” or “Mr. Barer”).

[176] The rules governing the recognition and enforcement of foreign decisions are found in Book Ten, Title Four, of the *Civil Code of Québec* (“C.C.Q.”). As a general principle, all foreign decisions will be recognized and, where applicable, declared enforceable unless an exception applies (art. 3155 C.C.Q.; *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, at para. 22; *The Mutual Trust Co. v. St-Cyr*, [1996] R.D.J. 623 (C.A.), at pp. 632-33). Quebec authorities must only ensure that the decision meets the requirements prescribed in the C.C.Q., without considering its merits (art. 3158 C.C.Q.).

[177] While these principles generally favour the recognition of foreign decisions, the Quebec authorities still have an important role to play:

However favourable these principles may be to the recognition of foreign decisions, it must still be found that none of the exceptions provided for in art. 3155 C.C.Q. apply. In particular, as art. 3155(1) provides, the Quebec court must find that the court of the country where the judgment was rendered had jurisdiction over the matter. In this regard, Title Four also contains arts. 3164 to 3168, which set out rules the Quebec court is to apply to determine whether the foreign authority had jurisdiction. [Emphasis added.]

(*Lépine*, at para. 24)

[178] The main issue in this appeal is the applicability of the exception set out in art. 3155(1) *C.C.Q.*:

**3155.** A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases:

(1) the authority of the State where the decision was rendered had no jurisdiction under the provisions of this Title;

[179] The Superior Court of Quebec had to determine whether the Utah Court had jurisdiction to render its decision against the appellant. The process for ascertaining the jurisdiction of a foreign authority is based primarily on the rule enunciated in art. 3164 *C.C.Q.*, that is, jurisdiction is established in accordance with the rules on jurisdiction applicable to Quebec courts, to the extent that the dispute is substantially connected with the foreign State whose authority is seized of the matter.

[180] More specifically, in a personal action of a patrimonial nature, like the action in this case, the jurisdiction of the foreign authority will be recognized only in the following cases (art. 3168 *C.C.Q.*):

(1) the defendant was domiciled in the State where the decision was rendered;

(2) the defendant possessed an establishment in the State where the decision was rendered and the dispute relates to its activities in that State;

(3) injury was suffered in the State where the decision was rendered and it resulted from a fault which was committed in that State or from an injurious act or omission which occurred there;

(4) the obligations arising from a contract were to be performed in that State;

(5) the parties have submitted to the foreign authorities the present or future disputes between themselves arising out of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;

(6) the defendant has submitted to the jurisdiction of the foreign authorities.

[181] Blanchard J. of the Superior Court found that art. 3168(3), (4) and (6) could all serve to establish the Utah Court's jurisdiction (2016 QCCS 3471 ("Sup. Ct. reasons"), at paras. 10, 16 and 20 (CanLII)). As a result, he recognized the foreign decision and declared it enforceable against the appellant in Quebec.

[182] The Quebec Court of Appeal affirmed Blanchard J.'s decision and dismissed the appeal. However, it stated the following:

Without endorsing all the reasons of the judge of first instance, we are nevertheless all of the view that there were sufficient elements to allow to conclude as he did [Emphasis added.]

(2017 QCCA 597, at para. 1 (CanLII))

[183] The Court of Appeal did not specify whether it had identified errors in the Superior Court's decision or which aspects of the reasons it was not endorsing. Its judgment is therefore of little assistance in resolving the issue before this Court.

[184] In my opinion, there are several errors in the Superior Court's decision that warrant the intervention of this Court. First, under the *Civil Code*, a court seized of an application for the recognition and enforcement of a foreign decision must review the evidence submitted and ensure that the foreign authority had jurisdiction over the matter (*Iraq (State of) v. Heerema Zwijndrecht, b.v.*, 2013 QCCA 1112, at para. 15). Here, the Superior Court made a palpable and overriding error by concluding that art. 3168(3) and (4) were satisfied despite the absence of any evidence regarding a fault committed in Utah or a contractual obligation of Mr. Barer to be performed in Utah. Second, the Superior Court erred in law in finding that the appellant had submitted to the Utah Court's jurisdiction pursuant to art. 3168(6) simply by raising substantive arguments in his motion to dismiss. As a result, the Utah Court's jurisdiction over the matter has not been established and the Amended Final Judgment cannot be recognized and declared enforceable against the appellant.

## II. Article 3168(3) and (4) C.C.Q.

[185] I agree with my colleague Gascon J.'s conclusion that Knight did not meet its burden of establishing the Utah Court's jurisdiction over Mr. Barer pursuant to art. 3168(3) and (4) *C.C.Q.* Moreover, I would make the following additional comments.

### A. *Evidence Required for the Recognition of a Foreign Decision*



[186] When considering an application to recognize a foreign decision, a Quebec court must review the evidence submitted and determine whether the authority of the State where the decision was rendered had jurisdiction over the matter:

[TRANSLATION] Moreover, it is up to the court hearing the application for recognition to review the evidence adduced to ensure that the foreign court had jurisdiction over the matter. . . .

(*Heerema*, at para. 15)

[187] It is important to note that in cases where a Quebec court is considering its own jurisdiction under art. 3148 *C.C.Q.*, it will take the alleged facts as averred unless they are specifically contested by the parties (*Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, at paras. 31-33), in which case the court will only require a *prima facie* showing of one of the factors set out in that article. This is a consequence of the procedural context under art. 167 of the new *Code of Civil Procedure*, CQLR, c. C-25.01 (“new *C.C.P.*”):

First, it appears that the procedural context for challenging jurisdiction at a preliminary stage supports the idea that art. 3148 establishes a broad basis for finding jurisdiction. In order to challenge jurisdiction in a preliminary motion, one must bring a declinatory motion to dismiss under art. 163 *C.C.P.* [now art. 167] Case law has established that a judge hearing such a motion is not to consider the merits of the case, but rather, is to take as averred the facts that are alleged by the plaintiff to bring it within the jurisdictional competence of the Quebec courts . . . [References omitted.]

(*Spar*, at para. 31)

[188] However, the procedural context is not the same for an application to recognize a foreign decision. In such a context, the general rules of evidence apply, the allegations will not be accepted as averred and a *prima facie* showing will not be sufficient. The court will therefore analyze the evidence adduced to establish whether the foreign authority had jurisdiction over the matter. For example, if the basis for recognizing the foreign authority's jurisdiction is the defendant's domicile (see art. 3168(1) *C.C.Q.*), the Quebec authority will require proof of that domicile and will not be satisfied by a mere allegation or a *prima facie* showing. The same is true of all the grounds for jurisdiction under art. 3168 *C.C.Q.*

[189] Therefore, under art. 3168(3) and (4) *C.C.Q.*, the Utah Court's jurisdiction should be recognized only if the Quebec authority finds, based on the evidence filed, that

(3) [an] injury was suffered in [Utah] and it resulted from a fault which was committed in that State or from an injurious act or omission which occurred there; [or]

(4) the obligations arising from a contract were to be performed in [Utah.]

[190] According to Blanchard J., art. 3168(3) and (4) *C.C.Q.* could provide a basis for recognizing the Utah Court's jurisdiction "in as much as the acceptance of the alleged promise to pay by [Mr.] Barer was received in Utah and that same was to be performed in that state" (Sup. Ct. reasons, at para. 20 (emphasis added)). The

*alleged* promise to pay to which Blanchard J. referred was described in the Respondent's Second Amended Complaint in Utah in the following terms:

In a telephone conversation, David Barer represented to Mike McKnight, the President of Intermountain Rigging, that the Defendants would pay the increased price for the foundation work provided by Intermountain Rigging on the Project.

At the time David Barer made this representation to Intermountain Rigging, he knew the statement was false.

David Barer made the representation to Intermountain Rigging that the Defendants would pay for the increased foundation work for the express purpose of inducing Intermountain Rigging to continue and complete the remaining work on the Project without payment.

Intermountain Rigging, acting reasonably and in ignorance of the falsity of David Barer's representation, relied upon the representation and was induced to continue providing additional work and services for the Defendants to complete the Project.

As a direct result of David Barer's fraudulent representation, Intermountain Rigging has been damaged in an amount to be determined at trial.

WHEREFORE, Intermountain Rigging demands an award of damages and judgment against Defendant David Barer as hereinafter set forth.

(paras. 64-68; see also paras. 4 and 30-31)

[191] In the Superior Court, the appellant argued that the Utah Court had no jurisdiction to render its judgment against him. Along with its application, the respondent filed documentary evidence that essentially consisted of the pleadings and decisions from the proceedings before the Utah Court. In particular, it filed the Amended Final Judgment, the Second Amended Complaint, the Motion to Dismiss,

the Memorandum of David Barer in Support of the Motion to Dismiss, and the Memorandum of Decision and Order Denying Mr. Barer's Motion to Dismiss.

[192] The respondent argued that these documents afforded sufficient evidence to establish the Utah Court's jurisdiction. I disagree. The respondent did adduce evidence that the appellant had received service of the complaint (Sup. Ct. reasons, at para. 4) and that the foreign decision was final. However, none of the documents submitted offered any evidence with regard to a fault committed by the appellant in Utah or a contractual obligation to be performed by him in that state.

[193] Professor Emanuelli describes the probative force of a foreign decision before the Quebec courts as follows:

[TRANSLATION] 1) The foreign decision is a means of proof. It serves to prove, for example, that a divorce judgment was in fact rendered abroad, ending the parties' union, although it is possible to challenge the validity of the divorce. The judgment was rendered on the basis of certain grounds (adultery, mental cruelty, etc.) found by the foreign judge. The Quebec judge must take account of the foreign judge's findings of fact and may glean some information from them. [Emphasis added; footnotes omitted.]

(C. Emanuelli, *Droit international privé québécois*, (3rd ed. 2011), at para. 327)

[194] With respect, and unlike Blanchard J., I do not find that the Second Amended Complaint, the Memorandum of Decision and Order Denying Mr. Barer's Motion to Dismiss, the Amended Final Judgment, or any other exhibit filed in Quebec offers any evidence that would allow recognition of the Utah Court's

jurisdiction. The alleged promise to pay and the alter ego allegations set out in the Second Amended Complaint have yet to be proven in court. In fact, the appellant expressly denied those allegations, and no evidence of the alleged promise to pay, its content or its acceptance was adduced at any other time in the Utah proceedings. While the decisions of the Utah Court filed as evidence are semi-authentic acts and make proof of their content under art. 2822 *C.C.Q.*, they are default judgments and contain no findings of fact that may be relied on in the Quebec proceedings to conclude that the foreign authority had jurisdiction.

[195] According to Blanchard J., the proof made before the Utah Court in the context of the motion to dismiss constituted “sufficient proof under Quebec law that the requirements to grant jurisdiction to the Utah Court over Barer [were] valid” (Sup. Ct. reasons, at para. 17). However, in the context of the motion to dismiss, the allegations were simply accepted as true. Once again, the decision on that motion does not contain any finding of fact that could support the allegations.

[196] In its factum, the respondent identified the Quebec Court of Appeal’s decision in *Aboud v. Eplus Technology Inc.*, 2005 QCCA 2, as [TRANSLATION] “a good example of applying the connecting factors for a dispute to establish the jurisdiction of a foreign court”. In that case, the Court of Appeal found that the evidence filed in Quebec, which included foreign decisions, was sufficient to recognize the jurisdiction of the United States District Court for the Eastern District of Virginia under art. 3168(3) *C.C.Q.* (*Aboud*, at para. 10). However, the Quebec

authorities were not asked to recognize a default judgment but a judgment on the merits, which had also been affirmed on appeal. In such a context, the Quebec authorities could very well look at the findings of fact in those two decisions in order to recognize jurisdiction based on one of the factors in art. 3168 *C.C.Q.* Furthermore, the petitioner in *Aboud* did not simply file the foreign decisions but also adduced additional evidence, including the testimony of a witness that the contract in issue had been formed in the State of Virginia (*Eplus Technology Inc. v. Aboud*, [2003] AZ-50402261 (Que. Sup. Ct.), at paras. 13-15).

[197] In the instant case, by contrast, there was no evidence that could allow the Superior Court to recognize the Utah Court's jurisdiction under art. 3168(3) or (4) *C.C.Q.* For this reason, I would find that Blanchard J. committed a palpable and overriding error (Sup. Ct. reasons, at para. 20). This is not to say that decisions rendered by default will never be recognized in Quebec or that the Quebec courts should conduct a new trial. However, for a judgment rendered in a personal action of a patrimonial nature to be recognized, the applicant will need to produce sufficient evidence to demonstrate that one of the factors listed in article 3168 *C.C.Q.* existed.

B. *The Corporate Veil under Article 3168(4) C.C.Q.*

[198] I would add that the respondent could not rely on art. 3168(4) *C.C.Q.* — which applies in cases where “the obligations arising from a contract were to be performed in [the State where the decision was rendered]” — absent evidence that would have allowed the corporate veil to be pierced under Quebec law (see

*Zimmermann inc. v. Barer*, 2016 QCCA 260, at para. 22 (CanLII)). This conclusion seems to me inescapable given that Mr. Barer is not himself a party to the contract at issue.

[199] Article 3168(4) *C.C.Q.* cannot be relied on to establish jurisdiction against anyone remotely associated with a contract. The action must be based on “the obligations arising from a contract”, which implies that the plaintiff is suing a contracting party who failed to honour contractual obligations. Accordingly, and contrary to what my colleague Brown J. suggests (at para. 99), art. 3168(4) *C.C.Q.* requires a connection not only with the object of the dispute (i.e. the contract), but also with the defendant (i.e. the person liable for the contractual obligations). Holding otherwise would render this connecting factor indeterminate and diffuse, such that it would become difficult for certain litigants — for instance, the shareholders, directors and employees of a corporation that performs contractual obligations in a foreign state — to predict with reasonable certainty whether a foreign decision rendered against them may be recognized in Quebec. This would undermine the very purpose of having clear connecting factors.

[200] In this regard, I disagree with my colleague Brown J. (at paras. 105-106) that the common law decision in *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30, [2016] 1 S.C.R. 851, is relevant to the interpretation of art. 3168(4) *C.C.Q.* In that case, the majority took the view that, in *tort* claims, a court can assume jurisdiction over a dispute where a “contract

connected with the dispute was made in the province” even if the defendant was not a party to the contract (para. 44). The wording of the *C.C.Q.* is narrower and does not lend itself to such an interpretation. If an action is of an extracontractual nature — the civil law equivalent to a tort claim — the plaintiff must rely on art. 3168(3) *C.C.Q.*, which deals with cases involving an injury resulting from a fault. Any other interpretation would blur the distinction between the two connecting factors.

[201] By way of clarification, where the defendant is not a party to the contract at issue, the plaintiff cannot rely on art. 3168(4) *C.C.Q.* unless it is shown that the defendant is otherwise personally responsible for the contractual obligations under Quebec law. In practice, it would therefore be insufficient to show that Barer Engineering Company of America (“BEC”) was the alter ego of Mr. Barer. The respondent would also have to present evidence establishing that Mr. Barer invoked BEC’s juridical personality “so as to dissemble fraud, abuse of right or contravention of a rule of public order” within the meaning of art. 317 *C.C.Q.* (see e.g. *Domaine de l’Orée des bois La Plaine inc. v. Garon*, 2012 QCCA 269, at para. 9 (CanLII); *Lanoue v. Brasserie Labatt ltée*, 1999 CanLII 13784 (Que. C.A.), at pp. 9-12; *Coutu v. Québec (Commission des droits de la personne)*, 1998 CanLII 13100 (Que. C.A.), at pp. 14-18; P. Martel, *La société par actions au Québec : Les aspects juridiques* (loose-leaf), vol. 1, at paras. 1-289 – 1-290.1).

[202] Requiring such evidence does not amount to an “impermissible” review of the merits of the case (Brown J.’s reasons, at para. 101). The purpose of the inquiry



is not to retry the case, but rather to verify whether the requirements for recognition are met (art. 3158 C.C.Q.). The Quebec Court of Appeal aptly explained the distinction in *Zimmermann*:

The appellants argue that the trial judge erred by re-examining the merits of the case decided in Vermont contrary to art. 3158 C.C.Q. They further argue that she erred in concluding that additional evidence needed to be adduced before her so as to enable her to recognize the jurisdiction of the District Court with regard to the respondent. Finally, they state that she should have concluded that the District Court had jurisdiction over the respondent since it applied the doctrine of alter ego to lift the corporate veil in order to find him personally liable. Therefore, under the mirror principle set out in art. 3164 C.C.Q., they alleged that “[...] if Quebec tribunals can apply the doctrine of alter ego to affirm their jurisdiction over the foreign alter ego of a Quebec corporation, the Quebec courts must equally respect a foreign tribunal’s determination that it holds jurisdiction over the Quebec alter ego of a corporation registered in their jurisdiction”.

...

When commenting on art. 3520 of the draft legislation leading to the revision of the *Civil Code of Quebec* (i.e. the present art. 3158 C.C.Q.), Professors Talpis and Goldstein circumscribed the role of a Quebec authority with regard to its review of a foreign judgment as follows:

[TRANSLATION] Article 3520 states that, in principle, the merits of the foreign judgment are not to be reviewed. However, it should be noted that the Quebec judge reconsiders the merits of the assessments made by the foreign judge when applying certain requirements for recognition or enforcement.

*In fact, it is impossible to eliminate all consideration of the merits of the decision, since certain requirements for recognition cannot be reviewed effectively unless the Quebec judge reconsiders the characterization of the facts by his or her foreign colleague. . . . If a party to the enforcement action in Quebec challenges the Ontario judge’s jurisdiction, the Quebec court cannot rely on the Ontario assessment of domicile but must look at the facts again to determine whether, in its view — according to the rules on Quebec’s indirect jurisdiction — the defendant was indeed domiciled in Ontario. This reassessment of the facts by the Quebec judge is normal,*

because the Ontario judge was not concerned with the rules on the indirect international jurisdiction of Quebec.

The Quebec court cannot be bound in this regard by the foreign application of the facts, for if it were, any review of indirect jurisdiction would become formal.

*Therefore, the fact that there is no review of the merits must not be taken to mean that the merits of the foreign judgment are not assessed. The Quebec court also retains a right to critically examine its foreign counterpart's work with respect to public order, whether procedural or otherwise, as we will see shortly.*

Authors Serge Gaudet and Patrick Ferland share the same view:

[TRANSLATION] Essentially, a court hearing an application for enforcement must therefore take the judgment as it stands and determine, based only on the requirements set out in Title Four, whether it is appropriate to recognize the disposition of the judgment against the defendant. However, the principle of not reviewing the merits of the decision does not have the effect of depriving the Quebec court of the right to verify that the requirements underlying the jurisdiction of the foreign authority that rendered the decision are met (defendant's domicile or occurrence of fault or injury in the jurisdiction, for example).

*The trial judge examined all the situations contemplated by art. 3168 C.C.Q., except par. 3168(3) C.C.Q. since both parties agreed that this provision was not applicable. She determined that there was no evidence in the record that would allow her to conclude that the District Court had jurisdiction over the respondent under art. 3168 C.C.Q. based on the doctrine of alter ego and the piercing of the corporate veil. Taking into account the particular circumstances of this case, the appellants have not convinced us that this conclusion is wrong in law or vitiated by a palpable and overriding error. [Emphasis in original; italics added.]*

(quoting J. A. Talpis and G. Goldstein, "Analyse critique de l'avant-projet de loi du Québec en droit international privé", (1989) 91 *R. du N.*, 606, p. 627-628; S. Gaudet and P. Ferland, "Le droit international privé", in Collection de droit de l'École du Barreau du Québec 2015-2016, vol. 6, *Contrats, sûretés, publicité des droits et droit international privé* (2015); see also *Mutual Trust*, at p. 633)

[203] Likewise, in the instant case, the respondent was required to adduce evidence sufficient to pierce the corporate veil. Otherwise, Mr. Barer had no “obligations arising from a contract” to perform in Utah, and jurisdiction could not be asserted over him on the basis of art. 3168(4) *C.C.Q.* In the present circumstances, this is a jurisdictional issue, not a substantive one.

[204] I reiterate that, for *jurisdictional* purposes, the law applicable to the piercing of the corporate veil is that of Quebec, not Utah. Contrary to what my colleague Brown J. asserts (at para. 101), it is of no import that the alter ego claim might have been governed by Utah law had Mr. Barer been sued in Quebec. The issue here is not what law is applicable on the merits, but whether the foreign judgment rendered against Mr. Barer can be recognized on the basis of art. 3168(4) *C.C.Q.*

[205] The nature and scope of a connecting factor codified in the *Civil Code* must be determined according to the law of Quebec. They do not vary depending on the foreign authority concerned. As P. Ferland and G. Laganière explain in the context of conflict rules:

[TRANSLATION] But there is no reason why the interpretation of foreign conflict rules should influence the interpretation of Quebec conflict rules: if a Quebec court is considering a private international law issue, it is for that court to delineate the scope of the relevant Quebec conflict rules (and therefore to interpret those rules) using concepts from Quebec law.

“Le droit international privé”, in Collection de droit de l’École du Barreau du Québec 2017-2018, vol. 7, *Contrats, sûretés, publicité des droits et droit international privé* (2017), at p. 257)

[206] For instance, there is little doubt that the notion of “domicile” under art. 3168(1) *C.C.Q.* must be understood in light of Quebec civil law (arts. 75 and 307 *C.C.Q.*). As Professor Goldstein puts it, [TRANSLATION] “the actual *definition* of domicile under article 3168 *C.C.Q.* can only come from Quebec law, since it is a matter of interpreting Quebec provisions” (*Compétence internationale des autorités québécoises et effets des décisions étrangères (Art. 3134 à 3168 C.c.Q.)* (2012), at p. 441; see also Ferland and Laganière, at p. 304; G. Goldstein and E. Groffier, *Droit international privé*, vol. 1, *Théorie générale* (1998), at p. 428; Emanuelli, at p. 166). Similarly, what constitutes submission under art. 3168(6) *C.C.Q.* is determined according to Quebec law (J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. (loose-leaf)), at p. 14-24), as is the definition of an incidental demand under art. 3139 *C.C.Q.* (G. Goldstein, “Compétence internationale indirecte du tribunal étranger”, in *JurisClasseur Québec — Droit international privé* (loose-leaf), by P.-C. Lafond, ed., fasc. 11, at para. 41). In my view, the same goes for the other connecting factors, including the obligations arising from a contract under art. 3168(4) *C.C.Q.* If, for example, the very existence of the contract were at issue, we would rely, for jurisdictional purposes, on Quebec contractual rules. The present situation is no different.

[207] In any event, even if we were to assume that a court must look at the law applicable on the merits to determine whether jurisdiction may be asserted over an alter ego claim under art. 3168(4) *C.C.Q.*, the present case would nonetheless be governed by Quebec law. Under Quebec rules of evidence, where the foreign law has

not been pleaded or its content has not been established, the court applies the law in force in Quebec (art. 2809 *C.C.Q.*). As the law of Utah pertaining to alter ego claims has been neither pleaded nor proven, art. 317 *C.C.Q.* would apply by default — irrespective of conflict of laws rules.

[208] In practice, if the decision had been rendered on the merits and not by default, a Quebec court would apply *Quebec* law to the foreign authority's factual findings to determine whether it is appropriate to pierce the corporate veil for the purpose of recognizing the decision on the basis of art. 3168(4) *C.C.Q.* In the case of a default judgment, however, no factual findings are made, and a Quebec court will inevitably require actual evidence that would justify piercing the corporate veil for jurisdictional purposes.

[209] As I have already noted, in the present case, the alter ego allegations are just that, allegations that have not been proven in court. Most saliently, there is simply no allegation, let alone evidence, that Mr. Barer used BEC's juridical personality "so as to dissemble fraud, abuse of right or contravention of a rule of public order" within the meaning of art. 317 *C.C.Q.* Therefore, it has not been proven that Mr. Barer was responsible for "the obligations arising from a contract", and the foreign judgment cannot be recognized on the basis of art. 3168(4) *C.C.Q.* Though my colleague Brown J. criticizes the interpretation I adopt, I would point out that he acknowledges that art. 3168(4) *C.C.Q.* is insufficient on its own to establish jurisdiction against Mr. Barer, given that he would ultimately rely on art. 3139

*C.C.Q.* — which applies to incidental demands — to recognize the Utah judgment. I will comment on his approach at the end of my reasons.

III. Article 3168(6) C.C.Q.

[210] On the question of submission to a foreign authority pursuant to art. 3168(6) *C.C.Q.*, I disagree with the test set out by Gascon J. and would find in this case that Mr. Barer did not submit to the jurisdiction of the Utah Court. The application judge erred in law in finding that an individual who raises a substantive issue necessarily submits to a foreign authority’s jurisdiction (Sup. Ct. reasons, at para. 16) and in reversing the burden of proof such that Mr. Barer had to disprove submission (Sup. Ct. reasons, at para. 15).

[211] My colleague Gascon J. finds that a defendant submits to the jurisdiction of a foreign authority “when the defendant presents substantive arguments which, if accepted, would resolve the dispute — or part of the dispute — on its merits” (para. 69). This rigid approach is intended to prevent a defendant from making full submissions on the evidence and law before a court only to contest the court’s jurisdiction later and require the plaintiff to retry the matter, thus imposing a burden on judicial resources (para. 67).

[212] Respectfully, I find this test to be too strict. It ignores the fact that “the test of whether there is sufficient participation to constitute submission is subjective”, meaning that it must take into account the defendant’s subjective intent (J. A. Talpis

with the collaboration of S. L. Kath, “*If I am from Grand-Mère, Why Am I Being Sued in Texas?*” *Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001), at p. 114).

[213] I would adopt a more flexible approach in determining whether a defendant has submitted to a foreign authority’s jurisdiction. A defendant that wishes to contest the jurisdiction of a foreign authority should be able to argue *why* the authority lacks jurisdiction without risking being found to have submitted to that jurisdiction. Further, in jurisdictions where procedure requires that arguments on the merits be made simultaneously with objections based on jurisdiction, a defendant should not be prejudiced by raising substantive arguments at that stage.

[214] The justifications for such an approach were summarized in *Cortas Canning and Refrigerating Co. v. Suidan Bros. inc./Suidan Frères inc.*, [1999] R.J.Q. 1227 (Sup. Ct.), at p. 1244:

The authors appear to favour the possibility that a defendant be allowed the possibility to “save his skin” in a foreign jurisdiction without submitting to this foreign jurisdiction. It could also permit a defendant to defend himself in cases of foreign shopping where a plaintiff could be seeking a more favourable environment in terms of quantum or of substantive law but with no substantial connection to the foreign jurisdiction. This line of reasoning is, in the opinion of the Court, legally sound. [I]t allows a defendant to raise at the begin[n]ing of a trial the question of jurisdiction; it gives a defendant time to evaluate the risk-reward equation that must be made before accepting to submit to a foreign jurisdiction. [Emphasis added.]

[215] Ultimately, submission is concerned with the defendant's intent (Goldstein and Groffier, at p. 430), and the intent to submit must be clear (*171486 Canada Inc. v. Rogers Cantel Inc.*, [1995] R.D.J. 91, at p. 98; *Forest Fibers Inc. v. CSAV Norasia Container Lines Ltd.*, 2007 QCCS 4794, at para. 44 (CanLII); *Conserviera S.p.A. v. Paesana Import-Export Inc.*, 2001 CanLII 24802 (Que. Sup. Ct.), at paras. 63-64). In determining whether a defendant has submitted to a foreign authority's jurisdiction, Quebec courts should ask whether such an intention is proven by the defendant's actions.

[216] A defendant must be permitted to raise arguments and considerations capable of convincing a foreign authority that it should not assume jurisdiction. It is unreasonable to suggest that any defendant who does so necessarily submits to the foreign authority's jurisdiction. This would leave defendants in a "catch-22" situation. If they attempt to challenge the jurisdiction of a foreign authority, they risk being found by a Quebec court to have submitted to that jurisdiction, thus exposing their personal assets in Quebec. If they do not, they will likely be faced with a foreign default judgment which could seriously limit their ability to conduct business (or any other activities) in the foreign jurisdiction. The practical implications are real and serious.

[217] I turn now to the facts of this case. Blanchard J. found that the appellant had submitted to the Utah Court's jurisdiction by raising the following issues in his motion to dismiss:



1. Plaintiff has failed to state a claim for fraud, as the claim as asserted is barred by the economic-loss rule;

2. Plaintiff has failed to allege sufficient facts to state an alter ego claim against Mr. Barer; and

3. Plaintiff has failed to allege sufficient facts to assert personal jurisdiction against Mr. Barer.

(see also Sup. Ct. reasons, at para. 6)

[218] My colleague Gascon J. concedes that Mr. Barer did not present a defence on the merits. Rather, he focuses on the first of the arguments raised by Mr. Barer in the motion to dismiss, finding that because Mr. Barer argued that Knight's fraudulent misrepresentation claim was barred at law by the pure economic loss rule, he necessarily submitted to the jurisdiction of the Utah Court (para. 71). I would disagree with this conclusion for the following reasons.

[219] The decision on the motion to dismiss presented in Utah establishes that “[t]o defeat a prima facie showing of jurisdiction, the defendant must demonstrate that the presence of some other considerations would render jurisdiction unreasonable” and that “the jurisdictional inquiry in Utah diversity cases is reduced to a single question: did the defendants have sufficient “minimum contacts” with the state of Utah to establish personal jurisdiction over them?”. In light of this statement of the law, a broad range of arguments may convince a Utah court that it lacks jurisdiction over a matter. A defendant must be allowed to present these arguments. Thus, submitting an argument that can convince the court that assuming jurisdiction

would be unreasonable cannot be considered to be recognition of the court's jurisdiction.

[220] As my colleague Gascon J. points out at para. 49, the question of whether an individual has submitted to the jurisdiction of a foreign authority is “a question of mixed fact and law”. On the facts of this case, I find little support for the inference that the appellant submitted to the jurisdiction of the Utah Court. While Mr. Barer did make some substantive arguments relating to the economic loss rule and the alter ego claim, they were presented alongside jurisdictional arguments to support his position that the Utah Court lacked jurisdiction. While submission to jurisdiction can be either explicit or implicit, it must, as my colleague states, be clear (Gascon J.'s reasons, at para. 52; *Rogers Cantel*, at p. 98).

[221] My colleague rejects the appellant's argument that he had no choice but to present all of his preliminary exceptions together in the Utah proceedings, finding that the appellant bore the burden of proof in this regard (Gascon J.'s reasons, at paras. 73 and 78). Respectfully, this passage seems to contradict my colleague's earlier conclusion that “[t]he party seeking recognition of a foreign decision thus bears the burden of proving the facts upon which the foreign authority's indirect international jurisdiction is based” (para. 33).

[222] It is my position that the respondent, in alleging that the Utah Court had jurisdiction over the appellant, bore the burden of proving that the appellant did in fact have a choice under Utah procedural law not to proceed as he did when he

presented his arguments in his motion to dismiss. This is consistent with the well-established principle that in Quebec, the plaintiff bears the burden of proving the facts upon which the court's jurisdiction is based (*Transax Technologies inc. v. Red Baron Corp. Ltd.*, 2017 QCCA 626, at para. 13 (CanLII); *Shamji v. Tajdin*, 2006 QCCA 314, at para. 16 (CanLII); *Bank of Montreal v. Hydro Aluminum Wells Inc.*, 2002 CanLII 3111 (Que. Sup. Ct.), at para. 12).

[223] The question, therefore, is whether the respondent has demonstrated that under Utah procedural law, Mr. Barer was required to raise his substantive arguments alongside his jurisdictional objections. The following passage from Professor Talpis is instructive:

. . . there is some merit to [the save your skin] approach in cases where the defendant's acts were done out of necessity – for example, where he could not contest jurisdiction without filing a plea to the merits at the same time (as in Quebec's Simplified Procedure) or where his acts stemmed from some urgency to avoid severe consequences . . .

(Talpis, at p. 115)

[224] In my view, the respondent has not met its burden in this regard. There is no evidence in the record to indicate that Mr. Barer had the procedural choice not to raise arguments relating to the economic loss rule and the alter ego cause of action at the stage of objecting to jurisdiction. I would therefore find that Mr. Barer did not submit to the jurisdiction of the Utah Court on this basis.

[225] As my colleague Gascon J. finds that the appellant submitted to the jurisdiction of the Utah Court based on the first of the three arguments raised in the motion to dismiss, he does not address the other two arguments made by Mr. Barer in his motion. For the following reasons, I would conclude that these arguments pertain directly to the Utah Court's jurisdiction and that raising them therefore cannot amount to submission.

[226] In its Second Amended Complaint, the respondent alleged that the corporations based in the United States acted as the alter egos of the appellant. According to the respondent, this made the appellant personally liable for the obligations of those corporations, and he should therefore be held responsible for the damages they had caused.<sup>9</sup> This was one of the bases for personal jurisdiction against Mr. Barer, and it was therefore natural that an argument on jurisdiction would include arguments on this point. This is evidenced by the fact that the Utah Court itself expressly considered the alter ego arguments when deciding whether it had jurisdiction over the appellant personally. The fact that the appellant simultaneously used the same arguments against the alter ego theory to challenge the claim on the merits was to be expected. His attempt to kill two birds with one stone does not reveal a clear intent to submit to the Utah Court's jurisdiction.

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<sup>9</sup> Talpis, at pp. 82-83:

One way for a plaintiff to avoid the constitutional requirements of minimum contacts is to assert that the presence of a subsidiary in the forum provides personal jurisdiction over the foreign defendant. Although jurisdiction over the subsidiary does not, of itself, give a State jurisdiction over a foreign parent, an *alter ego* or agency status of the subsidiary might do so. The fact is, in spite of a presumption of corporate separateness federal courts in the United States have sometimes pierced the corporate veil of a U.S. subsidiary and asserted personal jurisdiction over the foreign parent based on an *alter ego* or agency relationship between the parent and the subsidiary. [Footnote omitted.]

[227] The only other basis for jurisdiction against Mr. Barer personally was the alleged fraudulent misrepresentation. In Mr. Barer's motion to dismiss, he argued that the respondent had failed to allege that he had personally promised to pay and that in fact the respondent's claim was that BEC was responsible for paying the increased price.

[228] If Mr. Barer's arguments relating to alter ego and misrepresentation had been accepted, there would have been no basis to assert jurisdiction over him personally. These arguments both served to meet the burden enunciated by the Utah Court: "the defendant must demonstrate that the presence of some other considerations would render jurisdiction unreasonable". As such, even if they were not exclusively jurisdictional, these arguments were connected to the claim that the Utah Court did not have jurisdiction. The appellant's lawyer could not simply claim that the court lacked jurisdiction. He had to explain why and present convincing arguments to support that claim, arguments that were inevitably intertwined with arguments on the merits.

[229] In my opinion, one of the objectives underlying art. 3168(6) is to ensure that jurisdiction is determined early in the process. A defendant should not be allowed to take part in the trial and plead on the merits in a foreign jurisdiction only to contest jurisdiction later in Quebec and ask that another trial take place. However, this is not what happened here.

[230] My colleague Gascon J. also relies on the appellant's conduct after his motion to dismiss was denied as further justification for the conclusion that he had submitted to the Utah Court's jurisdiction (para. 82). However, acts like those undertaken by the appellant are generally not understood as amounting to submission to jurisdiction, as my colleague observes at para. 63. The appellant sought an extension of time and attended a settlement conference that he and the corporate defendants had been ordered by the Utah Court to attend (A.F., at para. 47; Gascon J.'s reasons, at para. 15). These actions do not, in my view, indicate an intent on the part of the appellant to have the dispute resolved by the Utah Court (Gascon J.'s reasons, at para. 61; see also *Cortas Canning*, at pp. 1241 and 1243-44).

[231] In fact, I would draw the opposite inference from the appellant's conduct. The fact that he did not further engage in the action beyond requesting an extension of time and participating in a court-ordered settlement conference communicated a clear intention not to submit to the Utah Court's jurisdiction.

[232] As a result, I find that Blanchard J. erred in concluding that the appellant had submitted to the Utah Court's jurisdiction in accordance with art. 3168(6) *C.C.Q.* (Sup. Ct. reasons, at para. 16).

#### IV. Article 3164 C.C.Q.

[233] As none of the connecting factors under art. 3168 *C.C.Q.* is present, there is no need to consider whether the dispute is "substantially connected" with the

foreign State under art. 3164 *C.C.Q.* As the wording of art. 3168 *C.C.Q.* makes clear, in personal actions of a patrimonial nature, the jurisdiction of foreign authorities is recognized *only* where one of the listed factors is present. This is not the case here.

[234] However, even if I were to agree with my colleague Gascon J. that Mr. Barer submitted to the Utah Court's jurisdiction, I would take the view that there is no substantial connection between the dispute and Utah under art. 3164 *C.C.Q.* and that recognition should therefore be denied.

[235] Though not essential to resolve the dispute before us, it is nevertheless desirable to confirm that a substantial connection may need to be demonstrated under art. 3164 *C.C.Q.* even where one of the connecting factors in art. 3168 *C.C.Q.* has already been met. This is the prevailing approach of the Court of Appeal, and affirming its jurisprudence on this point would enhance the clarity and certainty of the law. It is all the more appropriate to do so given that the application judge addressed the issue (without considering, it should be noted, the Court of Appeal's relevant jurisprudence) and that both parties made quite extensive submissions on the matter.

A. *The Substantial Connection Requirement*

[236] In my view, there will be exceptional circumstances in which, despite the presence of one of the connecting factors under art. 3168 *C.C.Q.*, further analysis will be required under art. 3164 *C.C.Q.* to determine whether there is a substantial connection between the foreign State and the dispute. A connection to the dispute

means a connection to both the object of the litigation *and* the parties (J.A. Talpis and J.-G. Castel, “Interpreting the Rules of Private International Law”, in *Reform of the Civil Code*, vol. 5B, *Private International Law* (1993), at para. 486; see also *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at paras. 79 and 99; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1108).

[237] Evidence that one of the factors in art. 3168 *C.C.Q.* is present will generally be sufficient to demonstrate a substantial connection and thus to establish jurisdiction, but this will not *always* be the case. I would add that, in practice, where one such factor is proven, a Quebec court should refrain from assessing the sufficiency of the connection under art. 3164 *C.C.Q.* unless it is specifically contested (see by analogy *Spar*, at para. 32).

[238] This approach accords with the prevailing jurisprudence of the Court of Appeal, and I believe it to be the correct one (see *Zimmermann*, at para. 12; *Heerema*, at paras. 23 and 26; *Hocking v. Haziza*, 2008 QCCA 800, at paras. 181-87 and 199 (CanLII); see also *Jules Jordan Video inc. v. 144942 Canada inc.*, 2014 QCCS 3343, at paras. 54-55; *Cortas Canning*, at pp. 1233-34 and 1236-37; Emanuelli, at para. 290).

[239] Requiring that a substantial connection between the dispute and the foreign State be demonstrated even where art. 3168 *C.C.Q.* is engaged is consistent with the language, context and purpose of art. 3164 *C.C.Q.*, as well as with the principle of comity and the values of order and fairness underlying the rules of private



international law (see *Spar*, at paras. 20-23; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 19). It also builds on this Court's decisions in *Spar* and *Lépine*. Further, and contrary to what my colleague Brown J. seems to suggest (at para. 152), the approach I would follow is not a recent jurisprudential creation but an interpretation stated at the time the new *C.C.Q.* was enacted (see *Talpis and Castel*, at para. 485).

(1) Language, Context and Purpose of Article 3164 C.C.Q.

[240] At the outset, it is worth recalling that art. 3164 *C.C.Q.* is the first article, and the key provision, of the chapter of the *C.C.Q.* that sets out the rules applicable to the jurisdiction of foreign authorities. It establishes the general principle of reciprocity, or “mirror” principle, whereby the jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Quebec authorities under Title Three (*Lépine*, at para. 25).

[241] To that general principle of reciprocity, art. 3164 *C.C.Q.* adds a further requirement (*Lépine*, at para. 25; *Spar*, at para. 62). The dispute must be “substantially connected” with the foreign State whose authority is seized of the matter:

The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the State whose authority is seized of the matter.

(art. 3164 C.C.Q.)

[242] The next few articles of the chapter, arts. 3165 to 3168 C.C.Q., then supplement or qualify the general principle of reciprocity, either by broadening or limiting the grounds for recognizing foreign decisions. As Professor Glenn explains, [TRANSLATION] “the mirror principle is adjusted, but not necessarily discarded” (“Droit international privé”, in *La réforme du Code civil* (1993), vol. 3, 669, at p. 770). With respect to personal actions of a patrimonial nature, for instance, art. 3168 C.C.Q. largely reproduces the rules applicable to Quebec courts under art. 3148 C.C.Q., while narrowing the scope of certain connecting factors.

[243] I disagree with my colleague Brown J. that the language of art. 3164 C.C.Q. makes clear that a substantial connection must be established *only* where jurisdiction is based upon the provisions of Title Three (and possibly only upon the “General Provisions” of that Title). In my view, the reference to Title Three is not meant to limit the application of that fundamental requirement, but simply to express the reciprocity principle which serves as the foundation for Title Four. As such, the subsequent provisions of Title Four do not displace, or entirely subsume, the requirement of a substantial connection.

[244] Further, and contrary to what my colleague suggests (at para. 141), reading the wording of art. 3164 C.C.Q. in context is not akin to “rewriting” the provision. In *Hocking*, Bich J.A. aptly explained the rationale for the foregoing interpretation:

[TRANSLATION] Article 3164 C.C.Q. is presented as a general principle with a double aspect: the jurisdiction of foreign courts is, first, determined according to the rules in Title Three but, second, only “to the extent that the dispute is substantially connected with the country whose authority is seized of the case”. The second aspect reflects the requirements — now constitutional and, as it were, categorical — recognized in *Morguard, supra*. As for the first aspect, it may be supplemented or replaced exceptionally or for clarification or restriction by arts. 3165 to 3168 C.C.Q., but without affecting the application of the second aspect. Thus, the fact that the first aspect is changed does not prevent or affect the application of the second. That means that the substantial connection test, an invariable component of the structuring principle expressed in art. 3164 C.C.Q., applies equally when the provisions of Title Three are applied as when the provisions clarifying, limiting, or standing in the stead of the rules of Title Three (such as arts. 3166 or 3168 C.C.Q.) are applied. [Emphasis added; para. 182.]

[245] This interpretation is supported by the purpose of art. 3164 C.C.Q. The substantial connection requirement is meant to prevent Quebec courts from recognizing a foreign decision where the connection is so weak, in the specific circumstances of the case, that recognition would be inappropriate (see e.g. Goldstein, fasc. 11, at para. 12; see also, by analogy, *Van Breda*, at paras. 81 and 95). This would be the case, for instance, in blatant cases of forum shopping (Goldstein (2012), at para. 3164-575; Emanuelli, at para. 282). Put another way, a separate requirement of a substantial connection ensures that fairness is not sacrificed on the altar of order and predictability — the values that justify relying on specific, well-defined connecting factors (see *Van Breda*, at para. 66).

[246] In my view, this requirement serves as a safeguard in the exceptional cases where the codified connecting factors fail to establish a substantial connection.

This very purpose is reflected in the commentaries on art. 3164 *C.C.Q.* published by the Minister of Justice at the time of the reform of the *C.C.Q.*:

[TRANSLATION] This article, which is new law, sets out the general rule concerning the jurisdiction of foreign authorities. In the absence of specific legislative provisions dealing with this matter, the jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Quebec authorities under Title Three. Indeed, these rules, which were devised to govern situations with a foreign element, appeared conversely to be valid for determining the jurisdiction of foreign authorities. The article also leaves Quebec authorities some latitude to assess the jurisdiction of foreign authorities.

...

. . . [T]he jurisdiction of foreign authorities could be based on the same criteria as the jurisdiction of Quebec authorities and the dispute might nevertheless not be substantially connected with the State whose authority was seized of the matter. In such cases, the foreign authority's jurisdiction might not be recognized. [Emphasis added.]

(Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. II, *Le Code civil du Québec — Un mouvement de société* (1993), at p. 2022.)

[247] This safeguard remains relevant where the specific rules set out under Title Four are applicable. I acknowledge that the risk of inappropriately recognizing a foreign decision is diminished by the fact that art. 3168 *C.C.Q.* is more restrictive than the corresponding provision of Title Three, art. 3148 *C.C.Q.* But it does not follow that the substantial connection requirement is “excessive” or “redundant” (see Brown J.’s reasons, at para. 143):

[TRANSLATION] In Quebec law, doubt about the appropriateness of the foreign court’s jurisdiction arises from the rigid civilian formulation of the rule on indirect jurisdiction, which selects one or more factors considered to be significant, such as a child’s domicile (art. 3143 *C.C.Q.*,

made bilateral by art. 3164 C.C.Q.), the place where the obligations arising from a contract were to be performed (art. 3168(4) C.C.Q.) or the occurrence of an injurious act or omission and the suffering of injury in the jurisdiction of the foreign court (art. 3168(3) C.C.Q.), to trigger indirect jurisdiction. Despite the presence of the triggering factor, the head of jurisdiction, the situation may not actually have much connection with the court seized of the matter. In the interests of the proper administration of justice and procedural fairness, as La Forest J. explained in *Morguard*, it seems necessary to have a tool for reviewing this determination in certain cases. [Emphasis added.]

(Goldstein, fasc. 11, at para. 11)

[248] Accordingly, I cannot accept that the substantial connection requirement is merely “encapsulate[d]” within the specific rules set out in art. 3168 C.C.Q. (see Brown J.’s reasons, at para. 135), thereby serving little or no independent purpose in that context. This would render the express words used by the Quebec legislature largely without effect, at least in the context of personal actions of a patrimonial nature. Most saliently, it might force Quebec courts to recognize a foreign decision even where the dispute has only a weak connection with the jurisdiction. Such an interpretation would ignore legitimate concerns about fairness to Quebec residents engaged in litigation abroad.

[249] The relevance of a distinct substantial connection requirement is illustrated by the case law. For instance, in *Cortas Canning*, a \$9 million judgment based on unfair competition had been rendered by default in Texas. In a nutshell, the plaintiffs alleged that the defendants had packaged and labelled foods in a confusing manner. The Quebec Superior Court was asked to recognize the judgment under art. 3168(3) C.C.Q. (fault and damage) — among other grounds — on the basis that \$96

worth of the defendants' products had been sold in Texas. The court rejected the application. It was certainly arguable, in such a case, that the sale did *not* in itself establish a substantial connection.

[250] Likewise, in *Hocking*, the Quebec Court of Appeal upheld a Superior Court judgment denying recognition of an Ontario decision that had approved a settlement agreement in the context of a national class action. Writing for the majority, Bich J.A. took the view that none of the connecting factors in art. 3168 C.C.Q. existed for the Quebec class members. She added that, in any event, the defendant's submission to the jurisdiction of the Ontario court could not make up, in itself, for the lack of a substantial connection between the Quebec class members and the Ontario forum:

[TRANSLATION] That said, even supposing that art. 3168(6) C.C.Q. justified *a priori* the jurisdiction of the Ontario court, I conclude that, in the circumstances of this case, that justification does not make up for the absence of a substantial connection, *i.e.*, a real and significant link, between the dispute from the standpoint of the Quebec plaintiffs and the Ontario forum. At the risk of repeating myself, I will point out again that the Quebec plaintiffs covered by the class action of the appellant Hocking contracted, in Quebec with Quebec branches of HSBC with regard to HSBC's activities on Quebec territory, hypothec loans for properties located in Quebec, with the obligations of the loans to be met in that province. None of those elements connect the dispute to the Ontario forum as far as the Quebec plaintiffs are concerned.

In summary, in the circumstances, the consent of the defendant alone cannot make up for the court's lack of jurisdiction over people who themselves did not express (even implicitly) their wish to participate in the class action instituted before a foreign forum in a dispute that, from their perspective, has no real and substantial connection with the forum in question. [Emphasis added; paras. 220-21.]

[251] The above cases show that there may be exceptional circumstances where there will be no substantial connection between the dispute and the foreign State even though one of the factors in art. 3168 *C.C.Q.* is technically present, and where it would thus offend basic fairness to Quebec litigants to recognize the foreign decision.

(2) *Spar and Lépine*

[252] Nothing in the approach I would follow is inconsistent with *Spar* and *Lépine* — quite the contrary. In *Spar*, the Court found that the principle articulated in *Morguard* that there must be a “real and substantial connection”, which is a constitutional requirement for the assumption of jurisdiction, does not introduce an additional criterion where a *Quebec* court is determining whether it has jurisdiction to hear a dispute. Rather, the constitutional requirement is “reflected in the overall scheme established by Book Ten” (*Spar*, at para. 63). However, the Court was careful to note that its decision did *not* concern the recognition of foreign decisions and, more specifically, the substantial connection requirement under art. 3164 *C.C.Q.* (para. 64). Indeed, while the criterion set out in art. 3164 *C.C.Q.* should certainly be interpreted in harmony with the *constitutional* notion of a “real and substantial connection”, the two concepts nevertheless remain distinct.

[253] In any event, insofar as *Spar* is relevant to the present debate, I would take the view that the excerpts on which my colleague Brown J. relies tend to support the approach I would follow:

Looking at the wording of art. 3148 itself, it is arguable that the notion of a “real and substantial connection” is already subsumed under the provisions of art. 3148(3), given that each of the grounds listed (fault, injurious act, damage, contract) seems to be an example of a “real and substantial connection” between the province of Quebec and the action. Indeed, I am doubtful that a plaintiff who succeeds in proving one of the four grounds for jurisdiction would not be considered to have satisfied the “real and substantial connection” criterion, at least for the purposes of jurisdiction *simpliciter*.

Next, from my examination of the system of rules found in Book Ten, it seems that the “real and substantial connection” criterion is captured in other provisions, to safeguard against the improper assumption of jurisdiction. In particular, it is my opinion that the doctrine of *forum non conveniens*, as codified at art. 3135, serves as an important counterweight to the broad basis for jurisdiction set out in art. 3148. In this way, it is open to the appellants to demonstrate, pursuant to art. 3135, that although there is a link to the Quebec authorities, another forum is, in the interests of justice, better suited to take jurisdiction. [Emphasis added; paras. 56-57.]

[254] First, I note that the Court did not entirely reject the possibility that the listed connecting factors (fault, injurious act, damage and contract) might, in exceptional circumstances, be insufficient to establish a substantial connection. It merely stated that it was “doubtful”. Again, I acknowledge that, in most situations, evidence of such factors will be sufficient. This is especially so where art. 3168(3) *C.C.Q.* is satisfied given that, in such cases, fault and damage must be combined. However, assuming that it will *always* be sufficient strikes me as imprudent, as illustrated by the *Cortas Canning* decision, which I discussed above.

[255] Second, when the Court referred to the grounds under which the real and substantial connection might be subsumed, it referred *only* to those listed in art. 3148 para. 1(3) *C.C.Q.* (fault, injurious act, damage and contract). The Court refrained



from mentioning any other connecting factors, including *submission*. In my view, this omission is telling. In this regard, it should be recalled that, at common law, submission does *not* establish a real and substantial connection but rather constitutes a *distinct* ground for assuming jurisdiction (see *Morguard*, at pp. 1103-4; *Van Breda*, at para. 79; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, at paras. 34 and 37; Castel and Walker, at p. 14-20.4). Submission, in itself, does not connect the underlying dispute with the foreign State. Where the defendant submits to a foreign forum, jurisdiction is instead based on the implicit consent of the parties (*Hocking*, at paras. 214-15).

[256] Third, the above excerpts from *Spar* make clear that the Court was alive to the risk of an “improper assumption of jurisdiction”. This is why it emphasized that the doctrine of *forum non conveniens* is an “important counterweight” to the inflexible, codified connecting factors. Yet as the Court later found in *Lépine*, the application of that doctrine does not extend to the recognition of foreign decisions. In my opinion, this makes the substantial connection requirement in art. 3164 *C.C.Q.* all the more necessary as a safeguard against inappropriate assumptions of jurisdiction (see Goldstein, fasc 11, at paras. 11 and 18).

[257] Overall, *Spar* does not support the proposition that *each* of the codified connecting factors — including submission — is always sufficient, in *any* circumstances, to meet the substantial connection requirement in art. 3164 *C.C.Q.* On

the contrary, it clearly recognizes the need for mechanisms to safeguard against an “improper assumption of jurisdiction”:

In addition, it is important to bear in mind that other private international law rules set out under Book Ten of the C.C.Q. also appear to ensure that the “real and substantial connection” criterion is respected. For example, a substantial connection requirement is also a prerequisite for the recognition of the jurisdiction of foreign courts under art. 3164 C.C.Q. Also, in matters of choice of law, art. 3126 C.C.Q. calls for an application of the principle of *lex loci delicti*, the law of the jurisdiction where the tort or wrong is considered to have occurred; see: H. Reid, *Dictionnaire de droit québécois et canadien* (2nd ed. 2001), at p. 333. Article 3082 C.C.Q. serves as an exception to this rule in circumstances where it is clear that the matter is only remotely connected with the legal system prescribed by art. 3126 and is much more closely connected with the law of another country. Therefore, by giving effect to the proximity principle, it seems that art. 3082 operates in the context of choice of law in a manner similar to which art. 3135 (*forum non conveniens*) functions in the context of choice of jurisdiction. [Emphasis added; para. 62.]

[258] The approach I favour is also consistent with *Lépine*. To be clear, I am not suggesting that the Court made any definitive statement in that decision as to the scope and effect of art. 3164 C.C.Q. On this point, the decision was essentially concerned with the applicability of the *forum non conveniens* doctrine where a Quebec court is determining whether to recognize a foreign decision. Moreover, I acknowledge that the Court found in *Lépine* that the foreign authority had jurisdiction on the basis of art. 3168 C.C.Q., without conducting a separate analysis under 3164 C.C.Q. It was unnecessary to do so given that, in the circumstances of the case, the presence of the defendant’s head office in Ontario undoubtedly established a substantial connection (para. 38).

[259] *Lépine* nevertheless lends support to the view that the substantial connection requirement may, in exceptional circumstances, constitute a bar to recognition even where one of the connecting factors in art. 3168 *C.C.Q.* is present. At the very least, the following passage leaves that door open:

Article 3164 *C.C.Q.* provides that a substantial connection between the dispute and the originating court is a fundamental condition for the recognition of a judgment in Quebec. Articles 3165 to 3168 then set out, in more specific terms, connecting factors to be used to determine whether, in certain situations, a sufficient connection exists between the dispute and the foreign authority. The application of specific rules, such as those in art. 3168 respecting personal actions of a patrimonial nature, will generally suffice to determine whether the foreign court had jurisdiction. However, it may be necessary in considering a complex legal situation involving two or more parties located in different parts of the world to apply the general principle in art. 3164 in order to establish jurisdiction and have recourse to, for example, the forum of necessity. The Court of Appeal added an irrelevant factor to the analysis of the foreign court's jurisdiction: the doctrine of *forum non conveniens*. This approach introduces a degree of instability and unpredictability that is inconsistent with the standpoint generally favourable to the recognition of foreign or external judgments that is evident in the provisions of the *Civil Code*. It is hardly consistent with the principles of international comity and the objectives of facilitating international and interprovincial relations that underlie the *Civil Code*'s provisions on the recognition of foreign judgments. In sum, even when it is applying the general rule in art. 3164, the court hearing the application for recognition cannot rely on a doctrine that is incompatible with the recognition procedure. [Emphasis added; para. 36.]

[260] I agree with my colleague Gascon J. that the above paragraph can be read in two ways (para. 86). On one reading, it suggests that there will be exceptional circumstances where the fundamental requirement of a substantial connection will not be met despite art. 3168 *C.C.Q.* being satisfied. On the other, it stands for the proposition that the reciprocity principle in art. 3164 *C.C.Q.* authorizes a Quebec

court to rely on the general provisions of Title Three, such as the forum of necessity principle (art. 3136 *C.C.Q.*), to recognize a foreign decision even where none of the factors in art. 3168 *C.C.Q.* has been proven.

[261] In my view, we do not have to choose between those two readings. Indeed, they are not in any way contradictory. In this regard, it should be recalled that the forum of necessity principle allows jurisdiction to be assumed on an exceptional basis where proceedings in any competent forum abroad prove impossible or cannot reasonably be required — so that there is no alternative that can prevent a miscarriage of justice (see Goldstein (2012), at para. 3168-550; *Lamborghini (Canada) inc. v. Automobili Lamborghini S.P.A.*, [1997] R.J.Q. 58 (C.A.), at p. 68). While the Court’s reference to the forum of necessity principle illustrates the fact that art. 3164 *C.C.Q.* can be used to expand the grounds for recognizing foreign decisions, this does not imply that the same provision cannot be relied upon to deny recognition on the basis of the absence of a substantial connection. Indeed, the scenario mentioned by the Court, namely “a complex legal situation involving two or more parties located in different parts of the world”, strongly suggests that multiple potential forums would technically satisfy at least one of the connecting factors set out in art. 3168 *C.C.Q.* but would nonetheless fail to satisfy the requirement of a substantial connection under art. 3164 *C.C.Q.*

[262] In any event, *Lépine* is also noteworthy for what it does not say. While the Court explicitly stated that the *forum non conveniens* doctrine is an “irrelevant

factor” in the analysis of a foreign authority’s jurisdiction, it refrained from making any such assertion as regards the substantial connection requirement. Indeed, one might argue that the *forum non conveniens* doctrine is irrelevant precisely because the “fundamental condition” of a substantial connection already offers a counterweight to rigid connecting factors. This would be consistent with the concerns expressed in *Spar* regarding the risk of inappropriate assumptions of jurisdiction.

[263] In concluding on this point, I would add that requiring a substantial connection in the context of the recognition of foreign decisions does not run counter to the principle of international comity. Unlike the *forum non conveniens* doctrine, which pertains to the *exercise* of jurisdiction by the foreign authority (*Lépine*, at para. 34), the substantial connection requirement is concerned with the *establishment* of jurisdiction in the strict sense. Further, while it does introduce a certain degree of discretion, such a requirement does not translate into the highly subjective exercise of “choosing between two *otherwise appropriate* jurisdictions” (see G. Saumier, “The Recognition of Foreign Judgments in Quebec — The Mirror Crack’d?” (2002), 81 *Can. Bar. Rev.* 677, at p. 694 (emphasis in original); quoted in *Hocking*, at para. 180). Finally, requiring a substantial connection can hardly offend comity given that it largely accords with the approach adopted in common law jurisdictions.

[264] All in all, I would emphatically endorse the following comments by Professor Talpis:

The substantial connection test serves perfectly well the desired purpose of preventing parties from being haled into the court of an inappropriate foreign jurisdiction without further restricting recognition of foreign judgments.

(p. 110)

Put another way, the combination of clear, well-defined connecting factors and a distinct substantial connection requirement allows Quebec courts to strike a proper balance between order and predictability, on the one hand, and fairness and flexibility, on the other.

B. *Application to the Present Case*

[265] Turning to the facts of the case, I would reiterate that, in most cases where art. 3168 *C.C.Q.* is satisfied, it will be unnecessary to conduct a separate analysis under art. 3164 *C.C.Q.* For example, had Knight been successful in establishing jurisdiction under art. 3168(3) or (4) *C.C.Q.*, this would in all likelihood have demonstrated a substantial connection pursuant to art. 3164 *C.C.Q.* Such would be the case if it had been found that the fault and resulting injury occurred in Utah (art. 3168(3) *C.C.Q.*) or that the Utah Court's decision concerned contractual obligations of Mr. Barer that were to be performed in Utah (art. 3168(4) *C.C.Q.*). But my colleague Gascon J. has found that neither of these situations is present here, and I would reach the same conclusion. If mere allegations are insufficient to prove jurisdiction pursuant to one or more of the factors under art. 3168 *C.C.Q.*, they are also insufficient to establish a substantial connection.

[266] It is in the application of art. 3168(6) *C.C.Q.* that my colleague Gascon J. attempts to find a substantial connection. However, even if I were to accept his finding that the appellant did submit to the Utah Court’s jurisdiction, I disagree that this would in itself satisfy art. 3164 *C.C.Q.* This is one of the exceptional cases in which a separate analysis is warranted.

[267] More specifically, where a defendant is found to have submitted to the jurisdiction of a foreign authority pursuant to art. 3168(6) *C.C.Q.*, further evidence may be required to establish a substantial connection between the dispute and the forum (see *Hocking*, at para. 220; *Talpis and Castel*, at para. 501). This is certainly the case where “submission” has been, at best, reluctant and largely involuntary, and where the defendant has not presented a defence on the merits but has merely challenged the foreign authority’s jurisdiction. In this regard, and as I explained above, submission does not in itself establish an actual connection between the underlying dispute and the foreign State. It is more properly understood as a distinct ground for jurisdiction. It follows that, unless there is extensive participation in the proceedings, such as presenting a defence on the merits — in which case, I would agree that submission is sufficient to satisfy art. 3164 *C.C.Q.* — other factors should be considered to determine whether a substantial connection exists.

[268] In the present case, the mere fact that the appellant made substantive arguments relating to the economic loss rule and the alter ego cause of action in his motion to dismiss, for the primary purpose of challenging the foreign authority’s

jurisdiction, does not establish a sufficient substantial connection between the dispute and Utah.

[269] Although my colleague Brown J. agrees that Mr. Barer did not submit to the jurisdiction of the Utah Court (at paras. 94 and 146), he would rely on Mr. Barer's "key role" in the negotiations between BEC and Knight to establish a substantial connection between him personally and Utah (para. 164). Yet Mr. Barer's involvement as President of BEC does not demonstrate such a connection, as he was not acting in his personal capacity. Holding otherwise would amount to piercing the corporate veil for jurisdictional purposes whenever a director or executive (and perhaps any employee or mandatary) negotiates a contract on behalf of a corporation in a foreign jurisdiction. With respect, this cannot be the case. It is not enough to show a connection with the object of the dispute (i.e. the contract). A sufficient connection with the parties themselves, including with Mr. Barer in the instant case, must also be established (Talpis and Castel, at para. 486; see also *Van Breda*, at paras. 79 and 99). No such personal connection has been proven here.

[270] My colleague Brown J. also relies on the law applicable under the conflict of laws rules in the *C.C.Q.* In his opinion, a finding of substantial connection is buttressed by the fact that Utah law would have applied to the alter ego claim against Mr. Barer under art. 3083 *C.C.Q.*, which provides that the status and capacity of a legal person are governed, with respect to its activities, by the law of the place where they are carried on (para. 166). This is not a persuasive indicator of a substantial



connection. First, I would note that the parties have not made submissions as to the law that would have applied before the Quebec courts. As such, I would not take for granted that Utah law would have governed this matter. But more fundamentally, my colleague's approach conflates conflict rules with the requirements for recognizing a foreign decision, which the Quebec legislature has clearly distinguished. While there may be some overlap between the two, it cannot be assumed that any conflict rule whose purpose is to determine the law applicable on the merits will also indicate a substantial connection between the foreign State and both the parties and the object of the dispute. If we were to follow my colleague's logic and rely on art. 3083 *C.C.Q.* as he does, any shareholder of a corporation might have a substantial connection with the foreign jurisdictions in which the corporation's activities happen to be carried on. This threshold for finding a substantial connection is plainly too low.

[271] Indeed, my colleague recognizes that the conflict rule in art. 3083 *C.C.Q.* does not point towards an actual connection with Mr. Barer personally, but represents, at most, "a further indicator of a substantial connection between Utah and the subject-matter of the *whole* dispute, including the alter ego claim" (para. 166 (emphasis added; italics in original)). In my view, this confirms that art. 3083 *C.C.Q.* adds little to the discussion. In the present case, it is largely redundant in light of the connecting factor in art. 3168(4) *C.C.Q.* given that BEC's activities in Utah overlap with the contractual obligations at issue. It should thus be afforded little weight, if any. In short, article 3168(4) is insufficient to establish jurisdiction against Mr. Barer, and art. 3083 cannot make up for this insufficiency.

[272] Beyond the conflict rule invoked by my colleague, I would add that, in itself, the law that might have applied had the action been brought in Quebec appears irrelevant to the assessment of a foreign authority's assumption of jurisdiction. It is true, as my colleague notes (at para. 168), that a Quebec court seized of the same dispute might consider the applicable law in deciding whether to decline jurisdiction under the *forum non conveniens* doctrine (art. 3135 *C.C.Q.*; *Spar*, at paras. 67-71). However, that doctrine is concerned with the *exercise*, not the *establishment*, of jurisdiction (*Lépine*, at para. 34), and it therefore relies on different factors (*Haaretz.com v. Goldhar*, 2018 SCC 28, at para. 43). In a *forum non conveniens* analysis, for instance, the fact that a Quebec court would be applying foreign law might militate — for reasons of efficiency — in favour of declining jurisdiction. The issue here, however, is not one of convenience; it is whether Utah had a sufficient connection with Mr. Barer to establish jurisdiction against him. The law that a Quebec court might apply to the alter ego claim does not tell us anything, in itself, about that connection.

[273] In any event, insofar as the law applicable on the merits has any relevance, I would point out that the law that actually governed the action does not support a finding of a substantial connection between the dispute and Utah. In the present case, we know from the Memorandum Decision and Order Denying Mr. Barer's Motion to Dismiss that the Utah Court applied *Vermont* law to the alter ego claim, not Utah law. Accordingly, I fail to see how this factor favours recognition.

[274] Finally, I would add that a substantial connection cannot be presumed on the mere basis that it appears more convenient to recognize a foreign decision in a given situation. Both my colleagues insist that it is preferable that the actions against BEC and Mr. Barer be heard together in a single forum (Gascon J.'s reasons, at para. 88; Brown J.'s reasons, at para. 170). This may be so, but convenience is not an independent ground for jurisdiction, nor does it allow Quebec courts to disregard the rights of Quebec residents involved in litigation abroad. In the instant case, there is simply no way to circumvent the absence of actual evidence that would justify recognizing the Utah Court's judgment.

V. Article 3139 C.C.Q.

[275] Some final comments must be made regarding the approach adopted by Brown J. In short, my colleague would invoke art. 3139 *C.C.Q.*, through the mirror effect of art. 3164 *C.C.Q.*, to extend the application of art. 3168(4) *C.C.Q.* — which concerns obligations arising from a contract — to Mr. Barer, who is not a party to the contract with Knight. With respect, I cannot accept that proposition.

[276] Even if I were to assume that art. 3139 *C.C.Q.* may be relied upon to recognize a foreign decision, it could not be applied in the instant case. Article 3139 states that “[w]here a Québec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand”. As the Utah Court had jurisdiction over the principal demand against BEC on the basis of art. 3168(4) *C.C.Q.*, so the argument goes, it would also have jurisdiction

against Mr. Barer. Yet in the instant case, there is no way around the fact that the action against Mr. Barer is plainly a *principal* demand, not an *incidental* demand. On this point, I am in complete agreement with my colleague Gascon J. (para. 90).

[277] Before going any further, I would note that Knight has never relied upon art. 3139 *C.C.Q.* as a ground for recognizing the Utah judgment. This, in itself, should give us pause. The onus of demonstrating that the Utah Court had jurisdiction is on Knight and no one else. With respect, international comity does not require Quebec courts — or this Court for that matter — to volunteer a legal rationale for recognizing the jurisdiction of a foreign authority, to the potential detriment of Quebec residents.

[278] The fact that Knight did not invoke this provision also means that the parties have made no submissions on this point. In this context, I would refrain from making any definitive statement on the scope of art. 3139 *C.C.Q.*, including whether it can be relied upon as an independent basis for recognizing a foreign decision.

[279] However, I would note that, in *GreCon*, the Court cautioned that art. 3139 *C.C.Q.* must be “interpreted narrowly so as not to indirectly enlarge the international jurisdiction of the Quebec authority contrary to the specific provisions relating to the definition of its jurisdiction and the general principles that underlie that jurisdiction” (para. 29). The Court also added that art. 3139 *C.C.Q.* is merely a “permissive provision that is procedural in nature” (para. 37). Although my colleague Brown J. quotes *GreCon*, his proposed interpretation is anything but narrow.

[280] Yet as he acknowledges (at para. 159), there is ample academic authority to the effect that, where there are multiple co-defendants, jurisdiction over any one of them does not in itself confer jurisdiction over all the others (Talpis, at pp. 36-39; Talpis and Castel, at para. 437; Glenn, at para. 77; Ferland and Laganière, at p. 298; see also *Sorel Tracy Terminal Maritime v. FSL Limited*, 2001 CanLII 24746 (Que. Sup. Ct.), at para. 15).

[281] In this respect, I would point out that the Quebec legislature has chosen *not* to include a provision stating that an “action against several defendants . . . may be instituted in the court before which any of them may be summoned” (to borrow, by analogy, the language of art. 75 of the former *Code of Civil Procedure*, CQLR, c. C-25). Other civil law jurisdictions have enacted broad provisions of this type which apply insofar as the claims have a certain degree of connexity (see e.g. art. 8a of Switzerland’s *Loi fédérale sur le droit international privé*; see also art. 9 of Belgium’s *Loi portant le Code de droit international privé*). But this is not the case of Quebec, and it seems to me that this legislative choice must be respected. The scope of art. 3139 *C.C.Q.* should not be distorted so as to read in such a provision.

[282] Accordingly, I cannot accept that art. 3139 *C.C.Q.* may be relied on to extend jurisdiction over any “related” claim irrespective of whether the action can properly be characterized as an “incidental demand” (see Brown J.’s reasons, at para. 155). Such a broad interpretation is clearly inconsistent with the wording of the provision, which distinguishes between “principal” and “incidental” demands.

[283] While I take no position on the precise meaning of “incidental demand” under art. 3139 *C.C.Q.*, there is no doubt that it must be defined on the basis of Quebec procedural law (see e.g. Goldstein, fasc. 11, at para. 41; Goldstein (2012), at para. 3139-555). In Quebec, the rules pertaining to “incidental proceedings” are set out under Title II of Book II of the new *C.C.P.* For instance, “incidental proceedings” may refer to the voluntary or forced intervention of third persons, including recourses in warranty (arts. 184-90 of the new *C.C.P.*). As my colleagues note, Title II also deals with the “consolidation of proceedings” (art. 210 of the new *C.C.P.*), where two or more distinct proceedings are brought together to be tried at the same time. However, it is doubtful that the “proceedings” referred to in this provision may properly be characterized as a “principal demand” and an “incidental demand”. Rather, it seems to me that consolidation involves two or more *principal* demands.

[284] In the present case, my colleague Brown J. seems to concede the obvious, namely that Mr. Barer was sued directly as a co-defendant in a *principal* demand directed against him, BEC and Central Bearing Corporation, Ltd. (“CBC”) (para. 158). As I understand it, his proposition is that the demand against Mr. Barer was nonetheless “incidental” for the purposes of art. 3139 *C.C.Q.* because he *could* instead have been added as a co-defendant *after* the institution of a “principal demand” against BEC or CBC through the forced intervention of a third person (under arts. 184 and 188-89 of the new *C.C.P.*). Whether this is true or not is of no import. *This is simply not what happened.* In effect, my colleague’s interpretation would erase the distinction between “principal demand” and “incidental demand”

which is central to art. 3139 *C.C.Q.* Yet the legislature did not use those words for no reason.

[285] Finally, even if I were to accept Brown J.'s broad interpretation of art. 3139 *C.C.Q.*, I would reject this basis for recognizing the foreign decision, as it would require that a substantial connection be proven under art. 3164 *C.C.Q.* (Brown J.'s reasons, at para. 149). No such connection exists in the present case. Further, my colleague recognizes that, to the extent that art. 3139 *C.C.Q.* could be relied upon, a certain degree of connexity would be required between Mr. Barer and the contract between Knight and BEC (see *GreCon*, at para. 31). In the present case, the mere fact that Mr. Barer negotiated on behalf of BEC — a distinct legal person — does not “connect” him sufficiently to the contract and should not be enough to justify an assumption of jurisdiction against him.

[286] The contrary view amounts to doing indirectly what cannot be done directly. As I have explained above, Mr. Barer cannot fall within the ambit of art. 3168(4) *C.C.Q.* unless he is shown to be responsible for the “obligations arising from [the] contract”. Because he is not himself a party to the contract, it would be necessary to adduce evidence to justify piercing the corporate veil under art. 317 *C.C.Q.* I highly doubt that art. 3139 *C.C.Q.* can be used to circumvent that specific requirement (see *GreCon*, at para. 29), as this would undermine the certainty and predictability which the specific connecting factors in the *C.C.Q.* are intended to promote (see *Spar*, at para. 81).

VI. Conclusion

[287] I conclude that the Utah Court's jurisdiction cannot be established under art. 3168 *C.C.Q.* and that the dispute is not substantially connected with Utah as required by art. 3164 *C.C.Q.* As a result, the decision cannot be recognized against the appellant. I would allow the appeal.

*Appeal dismissed with costs, CÔTÉ J. dissenting.*

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