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COMITY AND PARALLEL FOREIGN PROCEEDINGS: A REPLY TO BLACK AND SWAN. LLOYD'S UNDERWRITERS V. COMINCO LTD.

Austen L. Parrish*

I. INTRODUCTION

As the number of transnational lawsuits increases, protecting Canadian legal culture and traditions from foreign overreaching is a growing concern. Given that concern, Canadian courts may well wish to revisit the circumstances under which they recognize and enforce foreign judgments. For this point, Vaughan Black and John Swan's comment in June 2008's issue is a welcome contribution to the literature on judgment recognition and enforcement in Canada.1

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Black and Swan also wisely underscore the importance of *Lloyd’s Underwriters v. Cominco* and the related *Pakootas v. Teck Cominco Metals Ltd.* as seminal cases.

Black and Swan’s essay, however, speaks to more than simply judgment enforcement in the face of duplicative proceedings. Their essay is written in the context of a case where judgment enforcement is not yet an issue. They invite the Supreme Court of Canada to affirm the lower courts’ decisions and continue the proceedings, even though the same case was filed first elsewhere. In this broader prescription, Black and Swan’s argument has a nationalistic bent. For them, staying duplicative litigation in Canada runs the risk of “subordinating local values.”

Although Black and Swan have important insights into judgment enforcement when competing, inconsistent decisions exist, their willingness to skip over the first-to-file issue is problematic. Their essay underestimates the costs of reactive litigation, misconstrues comity’s central purpose, and conflates the statutory *forum non conveniens* analysis with the separate, albeit closely related, parallel proceedings issue. Canadian courts should embrace comity and respect a nuanced version of the first-to-file rule not out of some abstract respect for foreign courts. Rather, Canadian courts should

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7. Black and Swan, *supra*, footnote 2, at p. 295 (“In our view, the Supreme Court of Canada should affirm the B.C. courts’ decisions”).
8. *Ibid.*, at p. 295. (“[N]othing in the notion of comity entails such a subordination of local values as to require Canadian courts to decline to entertain a claim that is — at least from a Canadian perspective — far more connected with this country”).
9. I use the term consistent with Professor Vestal’s classic formulation: “[T]he defendant in the first action may choose to bring an independent action based upon the same factual controversy against the original plaintiff. The same parties will be involved in the second suit, although reversed in position.” Allan D. Vestal, “Reactive Litigation” (1961), 47 Iowa L. Rev. 11.
usually stay proceedings, when the same parties are already litigating the identical action elsewhere, because avoiding the costs of duplicative, reactive litigation is in Canada’s best interests. This interest is often greater, not less, when the parallel proceeding is pending in a foreign forum.

The aims of this short reply are three-fold. First, it underscores the problems that parallel proceedings create — problems that the British Columbia courts downplayed. Second, it explains why the British Columbia courts erred when they failed to stay the Lloyd’s litigation. The lower courts applied the statutory forum non conveniens analysis without accounting for the common law doctrine of lis albis pendens, and by doing so effectively gave no weight to comity considerations. Lastly, it argues that Canadian courts should treat the issues of parallel proceedings and judgment enforcement symmetrically. Once a Canadian court finds that the same case has already been filed in a court of appropriate adjudicatory jurisdiction (consistent with Canadian jurisdictional principles), it should stay its proceedings unless the party opposing the stay can demonstrate that a clear injustice would occur. A stay is appropriate even if the Canadian court, as in the Lloyd’s case, believes that a Canadian province has greater connections with the dispute. The need to avoid the wastes inherent in duplicative, reactive litigation and the demands of comity, as embodied in the long-standing common law, call for this approach, regardless of the more general statutory forum non conveniens analysis that applies in the absence of active foreign proceedings. It would be unfortunate then if the Supreme Court of Canada took up Black and Swan on their invitation. The lower court’s decision should be reversed, not affirmed.10

II. THE COSTS OF PARALLEL PROCEEDINGS

Parallel proceedings raise a host of problems. As one commentator explains: “there is almost nothing in principle to support the

10. This reply relies on both Canadian and non-Canadian sources. The reliance is deliberate. Little has been written in Canada about parallel proceedings. Black and Swan, supra, footnote 2, at p. 297, n. 17 (noting that “[t]here is surprisingly little Canadian authority on the general problem of parallel proceedings”). The Canadian Supreme Court may well look elsewhere, then, when deciding this matter. Gérard V. La Forest, “The Use of American Precedents in Canadian Courts” (1994), 46 Me. L. Rev. 211; see also C.L. Ostberg et al., “Attitudes, Precedents and Cultural Change: Explaining the Citations of Foreign Precedents by the Supreme Court of Canada” (2001), 34 Canadian J. Pol. Sci. 377; Peter McCormick, “The Supreme Court of Canada and American Citations 1945-1994: A Statistical Overview” (1997), 8 Sup. Ct. L. Rev. 527.
maintenance of concurrent, parallel proceedings in the courts of different countries.”

2. Duplicative litigation is patently wasteful. It imposes a heavy financial burden on the parties by forcing them to litigate the same case simultaneously in two places, and sometimes in piecemeal fashion. It also needlessly consumes scarce court resources, as two judges work on the same legal problem. The waste is magnified if the ultimate judgment in one action renders the other action meaningless.

3. The concern for conserving scarce resources is further heightened by the fact that concurrent international proceedings engender a waste because the commencement of a second proceeding on the same matters in a different forum almost inevitably represents some form of abuse; Vestal, supra, footnote 9, at p. 15 (“The policy of law generally seems to be that all facets of a controversy should be tried in a single action”).


5. Calamita, supra, footnote 11, at p. 609; see also Kathryn E. Vertigan, Note, “Foreign Antisuit Injunctions: Taking a Lesson from the Act of State Doctrine” (2007), 76 Geo. Wash. L. Rev. 155 at p. 158 (“Although fears of a race to judgment are one concern that parallel litigation raises, there are others. These other concerns include increased expense and inconvenience to litigants, a waste of scarce judicial resources, and the risk of inconsistent judgments arising from the two different fora”).


7. Note, “Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation” (1950), 59 Yale L.J. 978 at p. 983 (“One tribunal’s expenditure of time and effort will prove wasted since the first decision will be res judicata in the other suit”); see also Seattle Totems Hockey Club, Inc. v. Nat’l Hockey League, 652 F.2d 852 at p. 856 (9th Cir. 1981) (explaining how permitting
judicial resources should not be taken lightly: the backlog of cases in Canada and the length of time to complete those cases is a significant problem. 16

Issues of cost and efficiency are not the only concern. Parallel proceedings are also problematic because they "smack of indefensible gamesmanship, jeopardizing public faith in the judicial system." 17 A litigant may file parallel proceedings solely as a means to vex or harass the opposing party. 18 At the very least, the ability to file a concurrent, parallel proceeding invites tactics designed to delay the suit from proceeding in the forum not of the plaintiff's choice. 19 This is the race to judgment problem 20 that Black and Swan squarely recognize. 21 Concurrent proceedings can also lead to inconsistent judgments and subject the parties to incompatible obligations. 22 In
some cases, a settlement strategy motivates the filing of a reactive suit, as the costs of litigating on two fronts are prohibitive for many plaintiffs.\(^\text{23}\)

A final problem exists beyond cost, efficiency and gamesmanship. Continuing a case, when the same case between the same parties was already filed in a foreign forum, can implicate foreign relations and breed resentment. In this way, Black and Swan are correct when they note that international and interprovincial concurrent proceedings should be treated as distinct.\(^\text{24}\) Not only are "foreign relations apt to be more fragile" than sister-province relations, "but they are also more apt to be disturbed — specifically by the apparent interference of one state’s courts in the judicial business of another’s."\(^\text{25}\) In high-profile suits, duplicative litigation can potentially interfere with the executive’s management of foreign affairs.\(^\text{26}\) And when duplicative litigation proceeds simultaneously in two countries, courts are aware of the key role they play. "One court may be asked to accelerate (or delay) its adjudication to thwart (or enhance) the potentially preclusive effect of a result in the other court, a strategy that squarely pits docket against docket, if not court against court."\(^\text{27}\) For these reasons, near universal agreement exists that duplicative litigation should be avoided.

To the extent these problems have always existed, they have become more prominent recently. The number of transnational actions and the potential for parallel proceedings, including those between American and Canadian citizens,\(^\text{28}\) are on the rise.\(^\text{29}\) This

\(^{23}\) Furutu, supra, footnote 18, at p. 5 (describing how the defendant may “intend[] to place the burden on the plaintiff in anticipation of a favorable settlement of the dispute”). For a classic example in the United States, see *Bethell v. Peace*, 441 F.2d 495 (5th Cir. 1971) (anti-suit injunction granted based on vexatious nature of foreign litigation).

\(^{24}\) Black and Swan, supra, footnote 2, at p. 302.

\(^{25}\) George A. Bermann, "The Use of Anti-Suit Injunctions in International Litigation" (1990), 28 Colum. J. Transnat’l L. 589 at p. 606.

\(^{26}\) This can be particularly true if parties seek anti-suit injunctions in either court. See generally Trevor C. Hartley, "Comity and the Use of Antisuit Injunctions in International Litigation" (1987), 35 Am. J. Comp. L. 487.

\(^{27}\) Rehnquist, supra, footnote 17, at p. 1065; cf. *LaDuke v. Burlington N.R.R.*, 879 F.2d 1556 at p. 1560 (7th Cir. 1989) (describing the danger when two suits are allowed to proceed simultaneously, that “a party may try to accelerate or stall proceedings in one of the forums in order to ensure that the court most likely to rule in its favor will decide a particular issue first”).

increase is attributable not just to globalization, but to the relaxation of jurisdictional rules, and a growing embrace of American-style litigation. As H. Patrick Glenn has described the trend:

Litigation today is increasingly transnational. Potential fora have multiplied as domestic territorial jurisdiction has increased, while multi-jurisdictional law firms provide more acute advice on the most advantageous place to sue. There are correspondingly more disputes on threshold jurisdictional issues and the effects of parallel proceedings.

Certainly, with the substantial trade and tremendous interdependence between the United States and Canada, cross-border disputes are inevitable. The growth of transnational

29. Emil Petrossian, “Developments in the Law — Transnational Litigation — In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England” (2007), 40 Loy. L.A. L. Rev. 1257 at p. 1258; see also Teitz, supra, footnote 1, at pp. 2-3 (describing the increase in international parallel proceedings); Treviño de Coale, supra, footnote 1, at p. 80 (describing the increase in international parallel proceedings); Louise Ellen Teitz, “Parallel Proceedings: Treading Carefully” (1998), 32 Int’l L. 223 at p. 229 (noting that “parallel proceedings continue to increase in frequency with no immediate relief in view”).


33. Glenn, supra, footnote 30, at p. 195.

34. United States Department of State, Canada-United States Relations (2005), online: <http://www.usembassaycanada.gov> (explaining that Canada and the U.S. have the world’s largest trading relationship and that Canada is the leading export market for 39 of the 50 U.S. states); Robert Hage, “The New Reality in Canada/U.S. Relations: Reconciling Security and Economic Interests and the ‘Smart Border Declaration’” (2003), 29 Can-U.S. L.J. 21 at p. 24 (explaining that trade in goods and services exceed CND $2 billion daily).
litigation has been so great that it is now recognized as a field unto its own.\textsuperscript{35}

**III. INTERNATIONAL COMITY AND \textit{FORUM NON CONVENIENS}**

As Black and Swan acknowledge, but then quickly discard,\textsuperscript{36} a solution has long existed to prevent the problems that parallel litigation creates: the first-to-file rule. The first-to-file rule, embodied in the \textit{lis alibi pendens} doctrine (or, simply, \textit{lis pendens}) is a common law rule that instructs a second court to suspend proceedings before it until the first-filed action is completed, unless the first court is an inappropriate forum. Although \textit{lis pendens} is most prevalently used in civil law countries,\textsuperscript{37} common law courts have often applied versions of the rule to prevent duplicative proceedings, to conserve judicial resources, and to prevent unnecessary party expense.\textsuperscript{38}

The first-to-file rule, of the kind applied by common law courts, is not a rule of administrative convenience — it embodies the principle of international comity. In the context of parallel proceedings, comity requires that courts of different countries, when reasonably exercising jurisdiction, be viewed as adjudicatory coequals in those areas where their jurisdictions overlap. In its classic definition,


\textsuperscript{36} Black and Swan, \textit{supra}, footnote 2, at pp. 305-306 (explaining that “it would be possible to accord considerable weight to being first to file” and that “it is not unknown to go further and have an absolute first-to-file rule”).

\textsuperscript{37} See \textit{e.g.} EC Council Regulation 44/2001/EC of December 22, 2000, as regards Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, [2001] O.J.L. 12/1, art. 27. See generally Martine Stiuckelberg, "Lis Pendens and Forum Non Conveniens at the Hague Conference" (2001), 26 Brook. J. Int'l L. 949 at p. 950 (explaining how the doctrine of \textit{lis pendens} is used in many civil law countries); Gregoire Andrieux, "Declining Jurisdiction in a Future International Convention on Jurisdiction and Judgments — How Can We Benefit from Past Experiences in Conciliating the Two Doctrines of \textit{Forum Non Conveniens} and \textit{Lis Pendens}?" (2005), Loy. L.A. Int'l & Comp. L. Rev. 323 (describing the different doctrines and their civil and common law origins).

\textsuperscript{38} Treviño de Coale, \textit{supra}, footnote 1, at p. 90; see also \textit{Landis v. North Am. Co.}, 299 U.S. 248 at pp. 254-55 (1936). \textit{Lis pendens} has long been used in common law countries. See \textit{e.g.} \textit{Smith v. McIver}, 22 U.S. (9 Wheat) 532 at p. 535 (1824) (C.J. Marshall) (“In all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it”). For a comprehensive examination of how different countries approach \textit{forum non conveniens} and \textit{lis pendens}, see J.J. Fawcett, \textit{Declining Jurisdiction in Private International Law} (New York, Oxford University Press, 1995).
comity is "the respect that sovereign nations . . . owe each other" and "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."39

But the classic definition is misleading in two ways. First, although comity is discretionary, it is so only in the sense that no constitutional, statutory or international rule requires it.40 Comity is a principle from which courts should be reluctant to part. In this way, international comity is discretionary in the same way that following stare decisis is discretionary, but rarely ignored.41

And this leads to the second misleading aspect of comity's classic definition. Countries embrace comity for self-interested reasons, not out of some abstract respect or unquantifiable deference to foreign sovereigns. Comity embodies the concepts of mutuality and reciprocity, similar to how those concepts are embodied in other international principles,42 such as good neighborliness,43 the no-harm principle,44 the duty to warn,45 and the duty to cooperate.46 States agree to impose restraints on unilateral sovereign action because by so agreeing other states will do the same, thus better


40. See generally Born and Rutledge, supra, footnote 1, at p. 523 (explaining that "lis pendens is a common law rule not based upon any statutory or constitutional provision . . . ."); Calamita, supra, footnote 11, at p. 619 (noting that under international law "no state could demand the application of comity from another as a matter of right"); see also Joseph Story, Commentaries on the Conflict of Laws § 33 (2nd ed. 1841) ("Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions, on which its exercise may be justly demanded").


42. U.S. ex rel. Saroop v. Garcia, 109 F.3d 165 at p. 169 (3d Cir. 1997) (noting that deference to foreign judicial proceedings "fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations").

43. Günther Handl, "Territorial Sovereignty and the Problem of Transnational Pollution" (1975), 69 Am. J. Int'l L. 521 (describing the notion of good neighborliness in international law).


preserving overall sovereignty. Said differently, comity is a way that
nation-states surrender a small degree of sovereignty in the short term
to restore control lost to external forces over the long term. One can
criticize comity and reciprocity, but they are cornerstones of the
international system: ones that Canada and its courts have long
upheld and promoted.

The British Columbia courts, while acknowledging comity and
reciprocity, ultimately ignored those concepts in the Lloyd's case.
They did so by focusing on the forum non conveniens factors divorced
from the parallel proceedings context. Under the traditional forum
non conveniens doctrine, a Canadian court may choose to decline to
exercise jurisdiction only if a clearly and distinctly more appropriate
jurisdiction exists in which the case should be tried. The standard is
a high one: a court should exercise its discretion to decline to hear a
case — and displace the plaintiff's selected forum — only under
exceptional circumstances. The doctrine is designed to ensure that
an action is tried in the jurisdiction that has the closest connection
with the action and the parties, and to not have Canadian courts
c Decide cases more appropriately decided abroad. The traditional
 common law forum non conveniens analysis is now codified in

47. Louise Weinberg, "Against Comity" (1991), 80 Geo. L.J. 53; Michael D. Ramsey,
"Escaping 'International Comity'" (1998), 83 Iowa L. Rev. 893; see also Jack
Goldsmith and Eric Posner, The Limits of International Law (New York, Oxford
University Press, 2005).

48. For cases where the Supreme Court of Canada has emphasized the importance of
comity and reciprocity, see Moran v. Pyle National (Canada) Ltd., [1975] 1
S.C.R. 393, 43 D.L.R. (3d) 239; Morguard supra, footnote 39; Amchem Products
189; and most recently, Pro Swing Inc. v. ELTA Golf Inc. (2006), 273 D.L.R. (4th)

49. Amchem Products Inc., supra, footnote 39; cf. Piper Aircraft Co. v. Reyno, 445
L. Hayes, "Forum Non Conveniens in England, Australia, and Japan: the
Allocation of Jurisdiction in Transnational Litigation" (1992), 26 U.B.C. L. Rev.
41. Extensive literature exists on the doctrine of forum non conveniens in the
United States. For classic treatments, see Albert A. Ehrenzweig, A Treatise on the
Conflict of Laws (St. Paul, Minn., West Publishing Co., 1962), pp. 103-37; Russell
J. Weintraub, Commentary on the Conflict of Laws, 3rd ed. (Mineola, NY,
Foundation Press, Inc., 1986), pp. 213-20. For a more recent exploration, see
Michael Karayanni, Forum Non Conveniens in the Modern Age (New York,


(C.A.).

52. The classic doctrine is believed to have originated in Scotland and was
understood to reflect a court's discretion to hear a particular action even when
no question exists as to the competence of the court to hear the case, or the
British Columbia in s. 11 of the Court Jurisdiction and Proceedings Transfer Act.\(^5\)

As a doctrine designed to find the most appropriate forum and to prevent opening Canadian courts to the world’s disputes, however, *forum non conveniens* is ill-suited and was never intended to address directly the problems of earlier-filed foreign actions. *Forum non conveniens*, as traditionally understood, applies to cases where the parallel action is only prospective.\(^5\)^ When an earlier-filed foreign action already exists, Canadian courts should assess instead whether the foreign court is an appropriate forum (i.e., one with real and substantial connections to the dispute). This approach—deferring to the first-filed court, so long as it has adjudicatory jurisdiction and a decision there would not result in some extreme injustice—is what comity demands.

The *Lloyd’s* case illustrates the problem of ignoring the *lis pendens* doctrine. The lower courts did not assess whether the foreign court was a competent forum, with a real and substantial connection to the dispute.\(^5\)^ Instead, the court asked whether British Columbia was comparatively more connected than Washington, and whether the *forum non conveniens* factors favored litigation in British Columbia over Washington.\(^5\)

Under this approach, comity is rendered


\(^{53}\) S.B.C. 2003, c. 28 (CJTA).

\(^{54}\) Calamita, *supra*, footnote 11 (describing how comity in *forum non conveniens* is different from the *lis alibi pendens* rules); Born and Rutledge, *supra*, footnote 1, at p. 532 (explaining that “the *forum non conveniens* doctrine applies even in the absence of any pending foreign proceeding”).

\(^{55}\) *Amchem Products Inc.*, *supra*, footnote 39 (“On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that the forum provides”).

\(^{56}\) *Lloyd’s Underwriter’s v. Cominco Ltd.*, Court of Appeal, *supra*, footnote 4 (“I find there was ample evidence to support the Chambers judge’s conclusion that British Columbia was the more appropriate forum and that the connections of the parties and the litigation to Washington were weak in comparison”); *Lloyd’s Underwriter’s v. Cominco Ltd.*, [2006] 12 W.W.R. 486 at para. 217, 60 B.C.L.R. (4th) 261, 24 C.E.L.R. (3d) 1 (S.C.) (*Lloyd’s* trial) (Cominco “has engaged in inappropriate forum shopping in an attempt to avoid adjudication of the subject matter of these disputes in British Columbia which is the forum most closely connected with [Cominco] and the Policies . . .”) (emphasis added); at para. 189 (“[Cominco] must establish that the [U.S.] District Court is not only an appropriate forum but also the more appropriate forum for the determination of the issues in this litigation”).
meaningless. If the analysis is whether the forum court is the most appropriate forum, a court will never grant a stay in the context of duplicative reactive litigation. If a court decides that it is the most appropriate forum the stay will be denied. On the other hand, if a Canadian court determines that the foreign forum is clearly and distinctly more appropriate, it will be required to dismiss the action. In both instances, the problems of parallel proceedings are not accounted for at all.

That comity is purportedly weighed as one factor in the statutory forum non conveniens analysis is insufficient to remedy this concern. Courts have not provided clear guidance as to how the comity factor is to be weighted in any particular case (and how could they?). Accounting for comity this way renders the concept a toothless abstraction because balancing comity and the costs of parallel proceedings on the one hand, with connections and party convenience on the other, is impossible to do in any principled way. The results are ad hoc decisions, with significant cost to certainty and doctrinal predictability. Under the lower courts’ approach, if a Canadian court has greater connections to a dispute, the existence of a foreign action will almost never change the outcome and the number of parallel proceedings and their attendant costs will increase. Ironically, although the lower court was concerned that its American counterpart had not accorded sufficient weight to comity as Canadian law required, the British Columbia courts in practical terms jettisoned comity (and any consideration as to the cost of duplicative proceedings) from the analysis.

This all-or-nothing approach, which follows from attempting to ascertain which one forum in the world is the best, also leads to perverse results. As an initial matter, it would mean that Canadian courts will be more respectful of comity when no foreign action exists and the offense to foreign sovereigns is at best speculative, than when a foreign court has already asserted jurisdiction and the likelihood of offense is real. Surely comity does not become impotent the very moment it is needed most. More importantly, if the Supreme Court follows the lower courts’ lead, Canadian courts will give less deference to foreign parallel proceedings than to judgments of foreign courts. When recognizing a judgment, a Canadian court does not ask whether the foreign forum was the most appropriate place to try the case, but asks if the foreign court had jurisdiction to

57. Pitel, supra, footnote 3, at pp. 197-98 (explaining that the Supreme Court has rejected retreating from Morguard and has not adopted a “most real and substantial connection” test).
pronounce a judgment in personam according to Canadian principles.\textsuperscript{58} In addition to other bases, a foreign judgment is generally entitled to recognition if the foreign forum had a real and substantial connection with the dispute.\textsuperscript{59} This disconnect between judgment enforcement and parallel proceedings would be odd indeed. Since Morguard, Canadian courts have been more solicitous of foreign actions, not less.\textsuperscript{60} And the threat to "local values" is much greater when recognizing a judgment than simply staying the court's hand until foreign proceedings have concluded.

To their credit, Black and Swan appreciate that a correlation should exist between parallel proceedings and judgment enforcement, although perhaps in a way different than they suggest.\textsuperscript{61} If parallel proceedings exist in Canada and a foreign country and the foreign proceedings conclude first, resulting in a judgment that would otherwise be enforceable, Black and Swan ask, "must the judgment be enforced?"\textsuperscript{62} This problem exists, however, only if the lower court ignores comity. If the foreign judgment will likely be recognized — because the foreign court had adjudicatory jurisdiction consistent with Canadian jurisdictional standards — Canada's interests are sufficiently protected in the foreign proceeding and no reason to continue duplicative reactive litigation exists. The real and substantial connections test assures that the foreign forum is at least a reasonable one. If, in contrast, the judgment is unenforceable because the first-filed foreign forum has insufficient contacts to the dispute, the defendant has no reason to go forward with the reactive, declaratory relief action. The defendant will be protected at the judgment enforcement stage. The logical time when parallel proceedings should occur is when a natural plaintiff has been sued in a foreign forum that does not have jurisdiction (under Canadian jurisdictional standards). In those situations, the foreign action is not technically duplicative, as it will have no effect in Canada.


\textsuperscript{59} Morguard, supra, footnote 39; Beals, supra, footnote 48; Pro Swing Inc., supra, footnote 48.

\textsuperscript{60} Morguard, supra, footnote 39; Beals, supra, footnote 48. See also Allison M. Sears, "Beals v. Saldhana: The International Implications of Morguard Made Clear" (2005), 68 Sask. L. Rev. 223; Pitel, supra, footnote 3.

\textsuperscript{61} Black and Swan, supra, footnote 2.

\textsuperscript{62} Ibid., at p. 307.
IV. COMITY AND LIS PENDENS APPLIED IN LLOYD'S

Before applying these principles to the case at hand, a preliminary point is necessary. The above analysis does not suggest—as Cominco appeared to have argued in the lower courts—that the mere "assertion of jurisdiction by the District Court precludes a finding that Washington State is not an appropriate forum or that [Cominco] has engaged in forum shopping." Nor does it suggest an absolute first-to-file rule. Applying a bright-line rule of absolute deference to foreign courts would be unwise. In the context of first-filed, foreign parallel proceedings, Canadian courts must satisfy themselves that the foreign court is a reasonable and fair forum. It does this by asking: (1) does the foreign forum have a real and substantial connection to the dispute; and (2) is there some personal or juridical advantage that would be available to the plaintiff in a Canadian court that is of such importance that it would cause injustice not to proceed in Canada. This is not then an overly formalistic application of the first-to-file rule, but instead a presumption against parallel, duplicative proceedings.

Applying this test, the British Columbia action should have been stayed. While the British Columbia courts may have plausibly concluded that British Columbia has the closest connections to the dispute, Washington has real and substantial connections. Cominco's lawsuit arises from the refusal of its insurers to defend or indemnify it in a lawsuit brought against Cominco in Washington State, involving an environmental site in Washington State, and under insurance contracts that specifically insure Cominco's Washington operations. Cominco's decision to file in Washington is understandable: litigating against its insurers in Washington appears to reduce the likelihood of piecemeal and inconsistent resolution of the environmental and the coverage action. No evidence exists that the defendants have been inconvenienced or are suffering any hardship from having to travel from British Columbia to the Washington state forum. Regardless of whether a suit could also have been brought in British Columbia then, Cominco's lawsuit in Washington appears reasonable—all that modern public international law requires.

The benefits to staying an action when the first-filed case is before a court of appropriate jurisdiction are manifest. First, Canada will avoid the costs that duplicative concurrent actions engender. Following a modified first-to-file rule would reduce the number of

transnational lawsuits proceeding concurrently, thereby eliminating the potential for conflicting decisions and discouraging what Black and Swan correctly characterize as an invidious race to judgment. Second, respecting a presumptive *lis pendens* rule would provide greater structure and guidance to the lower courts on what comity entails, while curbing the potential for *ad hoc* decisions and the attendant costs created by uncertainty. Finally, it would discourage the filing of unnecessary reactive litigation in the future, and the corresponding increase in expense and inconvenience to the parties and courts.

Playing out the *Lloyd's* case also demonstrates why the first-to-file rule can lead to a just result. If Cominco loses in the Washington court (*i.e.*, coverage is denied), then there will be no judgment for Cominco to enforce and the case will be over. The Canadian court should hold Cominco to its choice of forum and find that the foreign case is *res judicata* precluding Cominco from re-filing in Canada. The stay can be lifted and the case dismissed as moot. If Cominco wins the coverage dispute, then the battle will be fought at the judgment recognition and enforcement stage. Unless the American judgment is antithetical to Canadian public policy as a result of what occurred in the foreign proceedings, the decision should be recognized in Canada. If the American judgment violates public policy, Cominco's gamble of filing in the United States will have failed, and it will be forced to start again in British Columbia if it wishes to recover against the defendant's Canadian assets. In all three scenarios, the waste and unnecessary expense of parallel litigation will be avoided, while Canada's and the parties' interests are protected.

Three final points. First, Black and Swan may be correct that the Supreme Court of Canada should consider more rigorous criteria for enforcement of foreign judgments, and the scope of the "real and substantial connection" test. That debate, however, should be had in a case where enforcement of a foreign judgment is raised directly.

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64. Black and Swan, supra, footnote 2, at p. 305.
65. 472900 B.C. Ltd. v. Thrifty Canada Ltd. (1998), 168 D.L.R. (4th) 602, [1999] 6 W.W.R. 416 (B.C.C.A.) ("Parallel actions dealing with the same subject matter must now be avoided unless the party resisting the application to stay can demonstrate possible loss of juridical advantage. . . . A primary purpose of the present rule is to avoid having two actions proceeding in different jurisdictions with the attendant risk of conflicting decisions"); see also Ingenium Technologies Corp. v. McGraw-Hill Companies (2005), 49 B.C.L.R. (4th) 120, 255 D.L.R. (4th) 499 (C.A.) (explaining how parallel proceedings must be avoided).
66. Joost Blom and Elizabeth Edinger, "The Chimera of the Real and Substantial Connection Test" (2005), 38 U.B.C. L. Rev. 373 (describing how the "real and substantial connection" test has been used).
That is not this case. Competing, inconsistent decisions do yet exist. Second, even though questions of parallel proceedings can raise, at times, thorny questions, this case does not. Cominco, the natural plaintiff, filed a coverage action in a forum where the lawsuit giving rise to the coverage claim was pending. The case does not implicate a pre-emptive strike by a defendant, who seeks to forum shop or otherwise vex the opposing party, nor does it involve a plaintiff filing a case in a forum with little connection to the dispute or the parties. Under the circumstances, applying a presumptive first-to-file rule seems reasonable.

Third, it may be that the lower courts' decisions in the Lloyd's case can be understood, in part, as a reaction to perceived American overreaching in the underlying environmental case (i.e., Pakootas). Black and Swan suggest as much. Canada rightfully is concerned that the United States did not respect comity when it applied its domestic environmental laws extraterritorially. But a tit-for-tat strategy is a poor one. And Canada should not undermine its now long-held respect for comity in response to one U.S. case.

V. CONCLUSION

Ultimately, Black and Swan — similar to the British Columbia courts — give too short shrift to the need to avoid the costs and wastes inherent in parallel proceedings. They do so by applying the statutory forum non conveniens doctrine and assessing whether British Columbia had the greatest connections to the dispute. But as explained above, forum non conveniens is designed to give effect to comity by preventing Canadian courts from litigating foreign cases that have little connection to Canada. Statutory forum non conveniens was never intended to displace the concepts of international comity that apply when a lawsuit is first-filed elsewhere. In those situations, the better rule is to defer to the foreign court so long as it has substantial and real connections to the dispute. In this way, symmetry will exist between the parallel proceedings question and the respect given to foreign judgments. Moreover, the needless costs of duplicative, reactive litigation will be avoided. With luck, the Supreme Court will agree.

68. Ibid., at p. 298.