



SUPREME COURT OF CANADA

CITATION: R.S. v. P.R., 2019 SCC 49

APPEAL HEARD: January 21, 2019

JUDGMENT RENDERED: October 25, 2019

DOCKET: 37861

BETWEEN:

R.S.
Appellant

and

P.R.
Respondent

- and -

Attorney General of Quebec
Intervener

OFFICIAL ENGLISH TRANSLATION: Reasons of Gascon J. and reasons of Brown J.

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

REASONS FOR JUDGMENT: Gascon J. (Wagner C.J. and Moldaver, Karakatsanis and Martin JJ. concurring)
(paras. 1 to 99)

CONCURRING REASONS: Abella J.
(paras. 100 to 144)

DISSENTING REASONS: Brown J.
(paras. 145 to 189)

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R.S. v. P.R.

R.S.

Appellant

v.

P.R.

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and

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Indexed as: R.S. v. P.R.

2019 SCC 49

File No.: 37861.

2019: January 21; 2019: October 25.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Private international law — Lis pendens — Application for stay of ruling — Condition of susceptibility of recognition of foreign judgment — Burden and degree of proof — Discretion of trial judge — Parallel applications for divorce filed first in Belgium by husband and then in Quebec by wife — Husband applying in Quebec for stay of ruling on wife’s application on basis of international lis pendens — Application dismissed by Superior Court but allowed by Court of Appeal — Whether Court of Appeal erred in attributing burden of proof and in interpreting degree of proof required for condition of susceptibility of recognition of foreign judgment in context of international lis pendens — Whether Court of Appeal was justified in intervening in exercise of trial judge’s discretion — Civil Code of Québec, art. 3137.

R and S married in Belgium in 2004. They moved to Quebec with their children in 2013. In 2014, the couple’s relationship deteriorated, and S told R that she had decided to terminate their union. Two applications for divorce were then brought, one by R in Belgium on August 12, and the other by S in Quebec on August 15. Under Belgian law, R then revoked, in a letter, all the gifts he had given S during their marriage, which were valued at over \$33 million.

R applied to the Superior Court under art. 3137 of the *Civil Code of Québec* (“C.C.Q.”) to stay its ruling on S’s proceedings in Quebec on the basis of international *lis pendens*. That court — which considered that it would not be possible to recognize in Quebec a decision of a Belgian court based on the provision of

Belgium's *Code civil* under which R could revoke the gifts, because that provision is discriminatory — held that S's divorce proceedings in Quebec should not be stayed. The Court of Appeal reversed that judgment, finding that it would be premature to conclude that a Belgian decision with respect to the revocation of the gifts could not be recognized in Quebec. In the Court of Appeal's opinion, the trial judge had also made an error that had caused her analysis concerning the appropriateness of exercising her discretion to order a stay to be unreasonable. It therefore ordered that S's divorce proceedings in Quebec be stayed.

Held (Brown J. dissenting): The appeal should be allowed and the Superior Court's conclusion on dismissing the application for a stay restored.

Per Wagner C.J. and Moldaver, Karakatsanis, **Gascon** and Martin JJ.: The conditions for the application of art. 3137 *C.C.Q.* are met in this case. R has discharged his burden, which is not onerous, of establishing that it is possible that the eventual decision of the Belgian court will be susceptible of recognition in Quebec. However, the Court of Appeal's intervention in the exercise of the trial judge's discretion was unwarranted. It was open to the trial judge to conclude that it was appropriate to decline to order a stay as she did in this case. Her decision on this point must therefore be restored.

Article 3137 *C.C.Q.* establishes the *lis pendens* exception in Quebec private international law. Under it, a court may stay its ruling on an action brought in Quebec if the dispute is already the subject of proceedings before the courts of a

foreign jurisdiction. Although this article is applied regularly, it constitutes an exception in that the Quebec court is departing from the general principle with respect to cases filed with it by staying proceedings that have in fact been validly brought before it. The international *lis pendens* exception is intended to allow the domestic court to stay its ruling in order to eventually give effect to the foreign decision in Quebec for the purpose of avoiding a situation in which parallel proceedings result in inconsistent decisions that could both have effects in Quebec. Under this article, three conditions must be met before a Quebec court may stay its ruling. First, the action must have been filed with the foreign forum first. Second, there must be an identity of parties, of facts and of subject — the condition of three identities — between the two actions that have been brought. Third, it must be possible for the foreign action to result in a decision that will be susceptible of recognition in Quebec. If any one of these conditions is not met, the application for a stay cannot be granted, because there is then not a situation of *lis pendens* under art. 3137 *C.C.Q.*

The court cannot raise the international *lis pendens* exception of its own motion. Article 3137 *C.C.Q.* provides that the Quebec authority may stay its ruling on an action only “[o]n the application of a party”. In accordance with the principles of evidence that apply in civil matters, and as in any other case, it is the party who raises international *lis pendens* and seeks a stay who must show, on a balance of probabilities, that the conditions of that article, including the third one, are met. This is provided for explicitly in art. 2803 para. 1 *C.C.Q.*, which reads “[a] person seeking to assert a right shall prove the facts on which his claim is based”. Article 3155

C.C.Q. changes nothing in this regard. It establishes a presumption that the foreign decision is valid, and this presumption can be rebutted only if one of the six exceptions enumerated in that article applies. While it is true that the condition of susceptibility of recognition under art. 3137 *C.C.Q.* must be considered in light of the exceptions of art. 3155 *C.C.Q.*, the burden is still on the party who seeks to benefit from art. 3137 *C.C.Q.* to show that the three conditions under it are met.

In S's opinion, what is at issue in the analysis of the third condition in this case is whether art. 1096 of the Belgian *Code civil* is inconsistent with public order as understood in international relations, which is one of the exceptions to the recognition of foreign judgments that are provided for in art. 3155 *C.C.Q.* But according to the words setting out this exception, what must be analyzed is the outcome of the foreign decision, not the laws of the foreign jurisdiction. The purpose is not to instruct the foreign authorities in their own law. The Quebec court's role is limited to ensuring that a foreign decision is not enforced if the decision's outcome would be so inconsistent with certain of the underlying values of the Quebec legal system as to be incapable of being incorporated into it. Public order as understood in international relations is thus generally more limited than its domestic law counterpart. The reason for this lies in a desire to apply Quebec rules of conflict that allow for the application of a foreign law under certain conditions even if that law is inconsistent with Quebec law. Thus, a foreign decision will not be recognized if its outcome runs counter to the moral, social, economic or even political conceptions that underpin Quebec's legal order. In this case, the trial judge relied solely on an analysis

of the discriminatory nature of art. 1096 of the Belgian *Code civil* to conclude that there was a “great” risk that a Belgian court’s decision would not be recognized in Quebec. The discriminatory nature of the legislative provision can be a relevant factor for purposes of the analysis. However, an approach as restrictive as the one adopted by the trial judge strays from the requirements of art. 3137 *C.C.Q.*

In the context of art. 3137 *C.C.Q.*, the assessment of the possibility that the foreign decision is inconsistent with international public order must take into account the required degree of proof. The burden of showing that the third condition is met, that is, that it will be possible for the foreign proceedings to result in a decision that is susceptible of recognition in Quebec, is not an onerous one. On the basis of the very words of art. 3137 *C.C.Q.*, the only requirement is that the action pending in the foreign court “can result in a decision which may be recognized in Québec”. Thus, even if the exceptions listed in art. 3155 *C.C.Q.* remain relevant for the purpose of determining whether the Quebec court may order a stay under art. 3137 *C.C.Q.*, the burden applicable to international *lis pendens* differs from the one that applies to the proceeding for recognition and enforcement of the foreign decision. Where the international *lis pendens* exception is at issue, the court does not rule on the question whether the foreign judgment should be incorporated into the Quebec legal order; it merely decides whether the proceedings brought in Quebec should be stayed pending the filing there of an application for exemplification. In such situations, the Quebec court does not always have the benefit of a final foreign decision. The analysis with respect to the condition of susceptibility of recognition

cannot therefore be completed as definitively as in the context of the exemplification proceeding. That is why certain authors describe the burden of proof under art. 3137 *C.C.Q.* in terms of a “prognosis” or a “plausibility” of recognition. The applicant can discharge this burden by showing that it is possible that the foreign decision will eventually be recognized in Quebec. This low threshold can be explained in particular by the underlying purposes of art. 3137 *C.C.Q.*, namely to foster international comity and avert the risk of potentially conflicting judgments.

The trial judge imposed a burden of proof that was more onerous than the one required by art. 3137 *C.C.Q.* R was required to show only that there was a possibility that the eventual Belgian decision would not be manifestly inconsistent with public order as understood in international relations. At this time, the outcome of the eventual Belgian decision is uncertain. There are a number of factors in support of the possibility that that outcome will not involve the revocation of the gifts, and therefore that it will not be manifestly inconsistent with this international public order. This is enough to meet the third condition of art. 3137 *C.C.Q.*

Once the applicant has established that there is in fact a situation of international *lis pendens* for the purposes of art. 3137 *C.C.Q.*, the Quebec court must still exercise its discretion and decide whether it should stay its ruling in the circumstances. The discretion under art. 3137 *C.C.Q.* is grounded in the idea that, even if the dispute was submitted to the foreign court first, and even if none of the exceptions to the recognition of foreign decisions set out in art. 3155 *C.C.Q.* apply, it

is nonetheless possible that the foreign court is not the one that has the closest connections with the dispute. In this regard, the required analysis is related to the one that applies with respect to the discretion under art. 3135 *C.C.Q.*, which codifies the doctrine of *forum non conveniens* in Quebec private international law. Because of this close relationship, the criteria developed by the courts with respect to *forum non conveniens* also apply to international *lis pendens*. The list of criteria is not exhaustive, and the weight to be attached to each of the criteria depends on the circumstances. While the perspective specific to each article differs, there is no reason to distinguish the analysis of the criteria conducted for the purposes of art. 3137 *C.C.Q.* from the one required in the context of art. 3135 *C.C.Q.* solely on the basis of the nature of the application.

The standard for intervention that should be applied to an exercise of the discretion in the context of international *lis pendens* is an exacting one. An appeal court should intervene only if the judge who ruled on the application erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision. A simple difference of opinion will not suffice. In the end, the possible recognition of the Quebec judgment in the other country is the only criterion on which the Court of Appeal relied to substitute its own analysis for that of the trial judge in this case. The Court of Appeal expressed no disagreement with her regarding the other criteria she had discussed. This criterion alone could not justify that court's intervention in the trial judge's exercise of her discretion. The recognition of the Quebec judgment in the other country cannot be a determinative consideration

unless the Quebec judgment would not be effective without being enforced in the other country. There is no doubt in this case that the Quebec judgment would be effective, given that much of the valuable property at issue in the litigation is located in Quebec.

Per Abella J.: There is agreement that the proceedings in Quebec should not be stayed. However, there is disagreement with the majority's application of the legal scheme governing the susceptibility of recognition of foreign decisions. R has not discharged his burden of demonstrating that a Belgian decision rendered under art. 1096 of the Belgian *Civil Code* permitting the unilateral revocation of gifts could be recognized by a Quebec court. As a result, he has not met the test for a stay.

The evidence shows that the Belgian provision is non-discretionary and allows a spouse to unilaterally revoke, without any formalities or justification, gifts bestowed during the marriage. It is an absolute right, even when exercised in bad faith. More significantly, the revocation contemplated under art. 1096 of the Belgian *Civil Code* is valid in Belgium even when its application results in flagrant inequalities between spouses. In this case, the husband is seeking to unilaterally revoke over \$33 million dollars in assets. As the trial judge found, the consequences for the wife will be catastrophic.

The party seeking a stay under art. 3137 of the *C.C.Q.* bears the burden of demonstrating, on a balance of probabilities, that a stay should be granted. This includes the burden to demonstrate that the outcome of the foreign decision will not

be manifestly inconsistent with public order. Because of the uncertainty usually surrounding the effects of a pending decision, the examination simply requires demonstrating a possibility that the decision will be recognized. While it may be desirable in some cases to await the outcome of a pending proceeding to determine whether it will be inconsistent with the public order condition, art. 3137 of the *C.C.Q.* does not require a court to do so.

The Court of Appeal was of the view that the burden was not on the husband who was seeking the stay, but on the wife who opposed it. This reversal of the onus led the Court of Appeal to suggest various hypotheticals showing that it was premature to determine at this stage whether the decision would be manifestly inconsistent with public order. Allowing speculation to drive the analysis, rather than the reality of the revocation for the wife, empties the burden on the husband of any meaning.

A decision, or pending decision, cannot be recognized in Quebec if, contrary to art. 3155 of the *C.C.Q.*, it is “manifestly inconsistent with public order as understood in international relations”. Not every foreign decision that reaches a result different from what it would likely be under Quebec law will be found to violate the fundamental values underlying the international public order. The international public order exception applies only to situations where the application of a foreign law would contradict the moral, social, economic and political conceptions underlying the Quebec legal system to such an extent as to be incapable of combining with it.

The violation of the principle of spousal equality would be manifestly incompatible with public order as understood in international relations. Various international instruments reinforce the view that inequality between spouses in the divorce context is contrary to public order as understood in international relations. As well, the equality of spouses and the protection of a vulnerable one are philosophical underpinnings of the *C.C.Q.* The spousal property regime in Quebec allows the spouses to choose together which regime they wish to apply to their property. It is a regime based both on consensus and equality between the parties. Foreign judgments which contradict those conceptions, such as any decision made under art. 1096 of the Belgian *Civil Code* in this case, will not be recognized in Quebec. Without any evidence that there is even a possibility of a judgment in Belgium that does not infringe these fundamental public order values, the outcome of the decision under art. 1096 of the Belgian *Civil Code* could not be recognized in Quebec.

Per Brown J. (dissenting): The Quebec Court of Appeal was right to intervene in the discretionary decision of the Quebec Superior Court and grant the requested stay. The appeal should be dismissed.

There is agreement with the majority that the Superior Court erred in concluding that none of the threshold conditions of art. 3137 *C.c.Q.* for the exercise of the discretion were met. However, the majority fails to address the Superior Court's error of law with respect to the subject of an action, which directly affected that court's conclusions relating to the condition of first filing with the foreign

authority. These errors had a determinative impact on the Superior Court's decision to decline to stay its ruling.

There is also disagreement with the majority regarding the Superior Court's exercise of its discretion. The discretion conferred on the Quebec authority by art. 3137 *C.C.Q.* has two purposes. First, it is intended to prevent abusive forum shopping, a practice that would on the contrary be encouraged if the Quebec authority systematically deferred to a first filing with a foreign authority. Second, the international *lis pendens* exception is also intended to avoid a multiplicity of proceedings and a risk of conflicting judgments. The Superior Court erred in ruling out this risk when it found that the claims concerning the partition of the family patrimony and the compensatory allowance had been submitted to the Quebec court first and that the Cour d'appel de Bruxelles could also order a stay with respect to the claims that have been submitted to the Belgian court first. The Superior Court should not have disregarded as it did the risk of conflicting judgments being rendered by the Quebec and Belgian courts. That was an error of law. The discretion provided for in art. 3137 *C.C.Q.* cannot be exercised without giving serious consideration to the very purpose of this article, which is to avoid conflicting judgments.

The courts and the authors recommend that the criteria developed in the context of the doctrine of *forum non conveniens* be applied to international *lis pendens* cases. These criteria must be assessed from the specific perspective of art. 3137 *C.C.Q.*, which is not the same as that of art. 3135 *C.C.Q.* The legislature has

provided that the Quebec court's power to decline to exercise its jurisdiction on the basis of *forum non conveniens* is exceptional in nature. In contrast, ordering a stay in a case of international *lis pendens* under art. 3137 *C.C.Q.* is not exceptional; in a spirit of cooperation based on international comity, Quebec courts are in fact quite open to doing so. Accordingly, it is not necessary to establish that the foreign authority is clearly more appropriate, as is the case in the context of *forum non conveniens*. In the context of international *lis pendens*, it is enough to show that the foreign authority is an appropriate forum.

The Superior Court also erred on the issue of the law applicable to the revocation of gifts, that is, on the main issue on which the parties disagree. Contrary to the Superior Court's conclusion, under the Quebec rules of private international law Belgian law is the law applicable to the revocation of the gifts, at least in respect of the gifts that were given while the parties were residing in Belgium.

Finally, the Superior Court did not consider the fact that an eventual Quebec judgment liquidating the parties' matrimonial regime would not be susceptible of recognition in Belgium, where the parties still own numerous assets. Where, as in this case, a foreign authority to which a dispute was submitted first is an appropriate forum, the Quebec authority should be circumspect in exercising its discretion to not stay its ruling. First, if the Quebec authority declines to stay its ruling, it and the foreign authority could render conflicting judgments, and the Quebec proceedings could prove to be pointless in the event that the foreign authority

to which the dispute was submitted first rendered its decision before the Quebec court. Second, if the Quebec authority were to exercise its discretion not to stay its ruling, there might then be a real risk that the Quebec decision would not be susceptible of recognition by the foreign authority to which the dispute was submitted first specifically because of the Quebec authority's violation of the *lis pendens* rule. In this case, the fact that a Quebec decision is not recognized in another country is an important factor, as the parties have numerous assets in Belgium, which means that a Quebec judgment that cannot be recognized in that country could be of no effect in respect of those assets. It makes no sense for a Quebec court to partition the numerous assets located outside Quebec, given that the resulting judgment would not be susceptible of recognition at the place where the assets are located.

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By Brown J. (dissenting)

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Martin Poulin, Myriam Simard and Molly Krishtalka, for the appellant.

Jessica Harding and Julien Hynes-Gagné, for the respondent.

No one appeared for the intervener the Attorney General of Quebec.

English version of the judgment of Wagner C.J. and Moldaver, Karakatsanis, Gascon and Martin JJ. delivered by

GASCON J. —

I. Overview

[1] Three days. That short difference is the reason why the issue of the scope and application of the international *lis pendens* exception in Quebec private international law has come up in this case. This issue arises in the context of divorce proceedings between the parties in Belgium and in Quebec.

[2] The respondent, P.R. (“the husband”), filed for divorce in Belgium, in the court of first instance of Brussels, on August 12, 2014. The appellant, R.S. (“the wife”), filed for divorce in Quebec, in the Superior Court, on August 15, 2014. In the same month, the husband applied to the Superior Court under art. 3137 of the *Civil Code of Québec* (“C.C.Q.”) to stay its ruling on the wife’s proceedings in Quebec. In October 2014, under Belgian law, the husband revoked, in a letter, all the gifts he had given his wife during their marriage. He drew up a non-exhaustive list in which those gifts were valued at over \$33 million.

[3] The Superior Court — which considered that it would not be possible to recognize in Quebec a decision of a Belgian court based on the provision of

Belgium's *Code civil* under which the gifts in question could be revoked, because that provision is discriminatory — held that the wife's divorce proceedings in Quebec should not be stayed. The Court of Appeal reversed that judgment, finding that it would be premature to conclude at that time that a Belgian decision with respect to the revocation of the gifts could not be recognized in Quebec. In the Court of Appeal's opinion, the trial judge had also made an error that had caused her analysis concerning the appropriateness of exercising her discretion to order a stay to be unreasonable. The Court of Appeal therefore ordered that the wife's proceedings in Quebec be stayed with the exception of those on the issue of corollary relief — child custody, support obligations and use of the family residence — which had been submitted only to the Quebec authorities.

[4] In this appeal, this Court must first consider the conditions for the application of art. 3137 *C.C.Q.*, which establishes the exception of international *lis pendens* in Quebec private international law, and in particular the condition of susceptibility of recognition of a foreign decision in Quebec. After that, the Court must turn to the principles for exercising the discretion the Quebec authorities have where that article does apply.

[5] In my opinion, the conditions for the application of art. 3137 *C.C.Q.* are met in this case. The husband has discharged his burden of establishing that it is possible that the eventual decision of the Belgian court will be susceptible of recognition in Quebec. However, I am of the view that the Court of Appeal's

intervention in the exercise of the trial judge's discretion was unwarranted. Although I do not agree with the trial judge's analysis in every respect, I find that it was open to her to conclude that it was appropriate to decline to order a stay as she did in the circumstances of this case. I would therefore allow the wife's appeal and restore the trial judge's conclusion on dismissing the husband's application for a stay.

II. Background

[6] The husband and the wife first met in Paris in the 1990s. The wife was a Moroccan national and the husband, a French national. Two children, born in 1997 and 2002, resulted from their relationship.

[7] The husband and the wife are wealthy individuals who have extensive investments in a number of countries. They left France for tax purposes in 2004, moving to Brussels, Belgium. They married there on December 21, 2004 after signing a marriage contract before a notary on December 13. In that contract, the couple opted for the regime of separation of property.

[8] In 2012, all the members of the family obtained Belgian nationality, and the husband definitively renounced his French nationality. That same year, the parties also took steps to obtain citizenship in St. Kitts and Nevis. In addition, the family had been considering the possibility of immigrating to Quebec since 2008. This led the parties to acquire a luxury property in Quebec in 2013 and to move there with their

children in July of that year. Ultimately, the husband and wife established their family residence there.

[9] In 2014, the couple's relationship deteriorated. On August 3 of that year, when they were on vacation at their secondary residence in Belgium, the wife told the husband that she had decided to terminate their union. Less than two weeks later, two applications for divorce were brought, one by the husband in Belgium on August 12, and the other by the wife in Quebec on August 15.

[10] In his proceedings in the Belgian court, the husband essentially sought a judgment granting a divorce and liquidation of the matrimonial regime. He also asked the court to rule on whether the Belgian courts had jurisdiction over the case as well as on the law applicable to the divorce, to the liquidation of the matrimonial regime, to the revocation of the gifts, and to the compensatory allowance should the wife make such a request in Belgium. As for the wife, aside from a judgment granting a divorce and liquidation of the matrimonial regime, she asked the Quebec court to rule on child custody, on support for her and for the children, on partition of the family patrimony and on the payment of a compensatory allowance. All the wife's claims were made under Quebec law.

[11] On August 20, 2014, the husband countered the proceedings brought by the wife in Quebec by bringing the motion to dismiss and for a stay that is the subject of this appeal. He asked the Superior Court to stay its ruling on the dispute between himself and his wife on the basis of international *lis pendens* under art. 3137 *C.C.Q.*

He also asked the Quebec court to decline jurisdiction on the basis of *forum non conveniens* under art. 3135 *C.C.Q.*

[12] The husband subsequently notified the wife on October 17, 2014, citing art. 1096 of the Belgian *Code civil*, that he was revoking all the gifts he had given her while they were married. Article 1096, which provides that spouses may at their discretion revoke any gifts given in the course of their marriage, reads as follows:

[TRANSLATION]

1096. Any gifts between spouses that are given while they are married otherwise than by marriage contract shall, even if described as gifts *inter vivos*, be revocable at all times.

...

Such gifts may not be revoked by reason of the arrival of children.

[13] In his letter, the husband listed the revoked gifts by categories: cash gifts (CAN\$16.2 million), assignments of claims (CAN\$695,000), stock-exchange securities (CAN\$1.4 million), jewellery and watches (CAN\$6 million), valuable bags (CAN\$2.08 million), collector shawls (CAN\$3.6 million), the car (CAN\$98,000) and a half-share of immovable property (CAN\$3.55 million). In this regard, he said that he was revoking the gift of half the value of the family residence in Quebec, which was valued at CAN\$6.6 million. He also mentioned that the list was not exhaustive and that this was only the first part of the gifts he intended to revoke. As the Superior Court and the Court of Appeal noted, it is because of this revocation that the choice of forum is the main issue of the litigation between the parties.

[14] In parallel with the application for a stay filed by the husband in Quebec, the wife filed a similar application with the Belgian authorities. She submitted, in particular, that the Belgian court should declare that it did not have jurisdiction to rule on the divorce and the liquidation of the matrimonial regime. In the alternative, she asked that court to stay its ruling pending the decision of the Quebec court in the matter, arguing that Quebec law applied to all the claims. Should the Belgian court decide to apply Belgian law to the revocation of the gifts, she intended to apply for a declaration that art. 1096 of that country's *Code civil* is unconstitutional.

[15] The Belgian court of first instance rendered its decision on the issues related to international *lis pendens* on December 16, 2015. It concluded that the parties' applications had the same purpose, a judgment granting a divorce, and that the dispute had been submitted to the Belgian court first, on August 12, 2014. The court therefore declared that the Belgian authorities had jurisdiction to hear the application for a divorce and that it was not appropriate to stay its ruling pending a ruling by the Quebec authorities on the *lis pendens* exception the husband had raised in Quebec. The Belgian court also concluded that Canadian law applied to the judgment granting a divorce and Quebec law to the claim for a compensatory allowance, but that it was Belgian law that applied to the liquidation of the matrimonial regime, to the revocation of the gifts and to the partition of the family patrimony.

[16] The wife appealed the Belgian court's judgment. The Cour d'appel de Bruxelles rendered its decision on September 20, 2018, upholding the trial court's judgment in almost every respect. It began by accepting that the Belgian authorities had jurisdiction to hear the case and that it would not be appropriate to order a stay. It then recognized that Canadian law applied to the application for a divorce and granted the divorce between the spouses immediately. However, it held that it was instead Belgian law that should apply to the issue of the compensatory allowance. Finally, the Cour d'appel de Bruxelles reserved judgment on the law applicable to the partition of the family patrimony and to the revocation of the gifts.

[17] It was in the context of these parallel proceedings in Belgium that the Superior Court and the Court of Appeal ruled in Quebec on the husband's motion to dismiss and for a stay. It should be pointed out, however, that the decision of the Cour d'appel de Bruxelles was rendered after the judgments of the Superior Court and the Court of Appeal that are the subject of this appeal.

III. Judicial History

A. *Quebec Superior Court (2016 QCCS 3357)*

[18] In a judgment dated July 15, 2016, the Superior Court dismissed the husband's application for a stay on the basis of international *lis pendens*. The trial judge began by noting that for a situation of international *lis pendens* to exist, the dispute must have been submitted to the foreign authorities first; in her view, such a

determination must be based on the law of the foreign jurisdiction. Citing the evidence of experts on the applicable Belgian law, she found that the date when the dispute was submitted must be determined on the basis of each of the claims. But, she stated, the husband had, in the proceedings he filed with the Belgian authorities on August 12, 2014, sought only a judgment granting a divorce and the liquidation of the matrimonial regime. It was the wife who had been first to file claims with respect to the partition of the family patrimony, the payment of a compensatory allowance and the revocation of the gifts, and she had done so in the Quebec court. What is more, the issues with respect to child custody and the parties' support obligations had quite simply not been submitted to the Belgian authorities. This led the trial judge to find that art. 3137 *C.C.Q.* could not apply to these claims, because the condition of first filing had not been met. She also expressed the opinion that the Cour d'appel de Bruxelles could either order a stay on or decline jurisdiction over all the issues.

[19] The trial judge nonetheless pursued her analysis regarding the conditions for the application of art. 3137 *C.C.Q.* so as to determine whether it was possible for the Belgian proceedings to result in a decision that would be susceptible of recognition in Quebec under art. 3155 *C.C.Q.* In particular, she considered whether art. 1096 of the Belgian *Code civil* is manifestly inconsistent with public order as understood in international relations, which would, by virtue of art. 3155(5) *C.C.Q.*, preclude the recognition of the foreign judgment in Quebec. In her opinion, [TRANSLATION] "there is a great risk" that a Belgian decision approving the revocation of the gifts would not be recognized in Quebec, because art. 1096 of the

Belgian *Code civil* is discriminatory, and contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*. She added that there is no remedial measure under Belgian law that could offset the impact of the revocations on the wife's financial situation, and she concluded that the effects of enforcing that decision in Quebec would accordingly be disastrous.

[20] That analysis led the trial judge to decline to rule on the constitutional question raised by the wife, that is, whether art. 3167 para. 1 *C.C.Q.* should be declared to be invalid or inoperative on the basis that it unduly adds to the criteria for recognition of a foreign divorce under s. 22(1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). She pointed out that this question would become moot should a Belgian court's decision not be recognized in Quebec for one of the reasons set out in art. 3155 *C.C.Q.*, or should the Belgian Cour d'appel decide to stay the proceedings in Belgium.

[21] The trial judge found that the conditions of first filing, of three identities (that is, identity of facts, of subject and of parties between the parallel proceedings) and of susceptibility of recognition of the foreign decision that are provided for in art. 3137 *C.C.Q.* were therefore not met. Despite these conclusions, she nonetheless considered the question whether it was appropriate to stay the Quebec proceedings. She stressed that, even if all the conditions of art. 3137 *C.C.Q.* are met, the Quebec court always retains the discretion to decline to stay its ruling in favour of a foreign authority to which the same dispute was submitted first. Given that, in her view, the

analysis required by art. 3137 *C.C.Q.* is similar in many ways to the one that applies in the context of the doctrine of *forum non conveniens*, which is now codified in art. 3135 *C.C.Q.*, she considered each of the ten criteria set out in this regard in *Oppenheim Forfait GmbH v. Lexus maritime inc.*, 1998 CanLII 13001 (Que. C.A.). Her analysis with respect to these criteria led her to conclude that ordering a stay was not appropriate in the circumstances of this case.

[22] In light of that conclusion, the trial judge did not rule on the appropriateness of declining jurisdiction on the basis of *forum non conveniens*.

B. *Quebec Court of Appeal (2017 QCCA 1470)*

[23] On September 29, 2017, the Court of Appeal allowed the husband's appeal, dismissed the wife's incidental appeal and reversed the trial judge's decision. It ordered a stay of the Quebec proceedings, with the exception of those concerning child custody, support obligations and use of the family residence, until the Belgian courts had ruled on the issues pending before them.

[24] The Court of Appeal identified the situations in which a Quebec court can stay its ruling under art. 3137 *C.C.Q.* It stated that in a context of international *lis pendens*, the Quebec court does not have the discretion to order a stay if it is clear that the action pending in the foreign forum can result in a decision that is susceptible of recognition in Quebec. Similarly, the Quebec court must decline to order a stay if it is clear that the foreign decision will not be susceptible of recognition in Quebec. The

Court of Appeal noted that it is only when there is a doubt as to the susceptibility of recognition of the foreign judgment in Quebec that the Quebec court can exercise its discretion to rule on the issue of international *lis pendens*.

[25] On the conditions for the application of art. 3137 *C.C.Q.*, the Court of Appeal distanced itself from the trial judge's conclusions on, first, the three identities with respect to the applications and first filing in the foreign court and, second, the susceptibility of recognition of the foreign decision in Quebec.

[26] On the first point, the Court of Appeal stated that the identity of subject and the date of filing in the foreign court are not determined individually for each claim as the trial judge did. It is instead necessary to identify the nature of the action as a whole in order to determine whether there is an identity of subject; once that is done, it is then necessary to determine whether a substantially identical action was filed first in the foreign court. The Court of Appeal found that there was an identity of subject in the proceedings in this case, as they essentially concerned two applications for a divorce to which claims for corollary relief relating to the effects and the dissolution of marriage were attached. The Court of Appeal concluded that because the application for a divorce had been filed in the Belgian court before one was filed in the Quebec court, and because it was common ground that the proceedings were based on the same facts and involved the same parties, the conditions of three identities and of first filing had been met.

[27] On the second point, the Court of Appeal expressed the opinion that art. 3155 *C.C.Q.* establishes a presumption of recognition of foreign decisions and that the application of art. 3137 *C.C.Q.* must be considered in light of that general principle of recognition. Hence, it is the party who objects to the order for a stay who must rebut that presumption and show, by establishing that one of the exceptions listed in art. 3155 *C.C.Q.* applies, that the foreign decision will not be susceptible of recognition.

[28] In this regard, the Court of Appeal stated that the trial judge had erred in finding that there was a [TRANSLATION] “great” risk that the Belgian decision would not be recognized in Quebec solely on the basis that art. 1096 of the Belgian *Code civil* is incompatible with the *Canadian Charter*. In the Court of Appeal’s opinion, this reasoning not only confused domestic public order with public order as understood in international relations, but also did not correspond to the criterion of art. 3155(5) *C.C.Q.*, which requires that the analysis focus not on the consistency of the foreign law, but on the consistency of the outcome of the other forum’s decision. The Court of Appeal also stressed that the risk of the decision not being recognized on the basis of the application of Belgian law to the revocation of the gifts is mitigated by other considerations, including the facts that the constitutionality of art. 1096 of the Belgian *Code civil* may be challenged in that country’s Cour constitutionnelle, that it is unlikely that the husband’s list of revoked gifts will be confirmed as is, and that the calculation of the compensatory allowance may ultimately take the loss resulting from the revocation of the gifts into account, given

that the Belgian court has held that Quebec law will apply to that claim. This led the Court of Appeal to conclude that the condition of susceptibility of recognition was met.

[29] The Court of Appeal also rejected the wife's argument that s. 22(1) of the *Divorce Act* would prevent the foreign judgment from being recognized in Quebec, because the Belgian court of first instance had determined that the judgment granting the divorce would be governed by Canadian law.

[30] Despite its conclusion that all the conditions of art. 3137 *C.C.Q.* were met, and despite its view that the analysis could [TRANSLATION] "end here" because the decision would clearly be susceptible of recognition in Quebec and because the "Quebec court must therefore order a stay in the circumstances" (para. 106), the Court of Appeal nonetheless went on to consider the exercise of the discretion to order a stay in this case.

[31] On this point, the Court of Appeal stated that the trial judge had failed to consider whether it would be possible for the Quebec judgment to be recognized in the other country. On the basis of the expert evidence presented at trial, the court noted that, because the dispute had been submitted to the Belgian authorities first, the Belgian court would not be able to order a stay unless the Cour d'appel de Bruxelles were to reverse the judgment rendered at first instance in Belgium. As well, in the Court of Appeal's view, the trial judge's failure to consider this had tainted her exercise of the discretion and made it unreasonable, and the trial judge should have

concluded that ordering a stay was necessary because it would be impossible for the judgment that would be rendered in Quebec to be recognized in Belgium.

[32] Finally, the Court of Appeal dismissed the wife's incidental appeal, which challenged the constitutionality of para. 1 of art. 3167 *C.C.Q.* on the ground that it is inconsistent with s. 22(1) of the *Divorce Act*. The court considered that constitutional issue to be moot, pointing out that the *Divorce Act* provision in question does not apply in this case given that its scope is limited to divorces granted "pursuant to a law of a country . . . other than Canada".

IV. Issues

[33] Before beginning the analysis, I must make two things clear.

[34] First, in this Court, the parties do not question the Court of Appeal's conclusions regarding the interpretation and application of the first condition of art. 3137 *C.C.Q.*, that of first filing in the foreign forum. That the date of filing is determined on the basis not of each separate claim, but of the principal claim, is not in issue. In this case, the first application for a divorce — which includes on an incidental basis the claims with respect to the effects and the dissolution of marriage — was filed with the Belgian authorities. Nor do the parties question that the second condition, that of three identities, provided for in art. 3137 *C.C.Q.* is met in this case. Lastly, the wife has withdrawn her challenge to the constitutionality of art. 3167 para. 1 *C.C.Q.* The divorce has in fact now been granted by the Cour d'appel de

Bruxelles pursuant to the *Divorce Act*, which means that that provision of the *C.C.Q.* does not apply here. Because these points are no longer at issue, they need not be discussed in these reasons.

[35] Second, it should be noted that, independently of the outcome of this appeal on the issue of international *lis pendens*, the litigation between the husband and wife on the matter of the corollary relief relating to their divorce will be pursued on both sides of the Atlantic. Even if it should prove to be appropriate to grant a stay in Quebec, it is agreed that the issues relating to child custody, support obligations and use of the family residence remain before the Quebec authorities. The Belgian authorities do not have jurisdiction under their laws to consider those claims. Even if these issues are incidental to the application for a divorce, they cannot be the subject of a decision in Belgium, let alone of a decision that would be susceptible of recognition in Quebec. Likewise, if it proved to be inappropriate to order a stay in Quebec, the pending proceedings would be pursued in parallel in Belgium, because the Belgian court assumed jurisdiction and declined to stay its ruling, a conclusion that was upheld by the Cour d'appel de Bruxelles. In short, regardless of the outcome of the appeal, a bifurcation of the divorce proceedings between the parties is inevitable.

[36] These points having been made, the questions this Court must answer are limited to the following:

1. Did the Court of Appeal err in attributing the burden of proof and in interpreting the degree of proof required for the condition of susceptibility of recognition of the foreign judgment under art. 3137 *C.C.Q.*?

2. What are the conditions for exercising the judge's discretion under art. 3137 *C.C.Q.* in relation to international *lis pendens*? Was the Court of Appeal justified in intervening in the trial judge's conclusions in this regard?

V. Analysis

A. *Lis Pendens Exception in Quebec Private International Law*

[37] Article 3137 *C.C.Q.* establishes the *lis pendens* exception in Quebec private international law. Under it, a court may stay its ruling on an action brought in Quebec if the dispute is already the subject of proceedings before the courts of a foreign jurisdiction. Although this article is applied regularly, it constitutes an exception in that the Quebec court is departing from the general principle with respect to cases filed with it by staying proceedings that have in fact been validly brought before it. Article 3137 *C.C.Q.* reads as follows:

3137. On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same subject is pending

before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

[38] Under this article, three conditions must be met before a Quebec court may stay its ruling. First, the action must have been filed with the foreign forum first. Second, there must be an identity of parties, of facts and of subject — the condition of three identities — between the two actions that have been brought. Third, it must be possible for the foreign action to result in a decision that will be susceptible of recognition in Quebec. Only the application of this third condition is at issue in this case.

[39] I wish to be clear that if any one of these conditions is not met, the application for a stay cannot be granted, because there is then not a situation of *lis pendens* under art. 3137 *C.C.Q.* In such a case, the underlying considerations of art. 3137 *C.C.Q.* simply do not apply, and it is as a result not open to the Quebec court to stay its ruling. For example, regarding more specifically the condition of susceptibility of recognition, it will not be met if the foreign authorities do not have jurisdiction (art. 3155(1) *C.C.Q.*; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440, at p. 450; *Droit de la famille — 143160*, 2014 QCCA 2290, at para. 25 (CanLII); *Valois v. Caisse populaire Notre-Dame de la Merci (Montréal)*, [1995] R.D.J. 609 (C.A.), at p. 614). By the same logic, a foreign decision that would be manifestly inconsistent with public order as understood in international relations would not be susceptible of recognition, as the very words of art. 3155(5) *C.C.Q.*

would apply to it. If recognition is not possible, there could not be conflicting judgments, and therefore the question of *lis pendens* quite simply would not arise.

[40] If, however, the conditions of art. 3137 *C.C.Q.* are all met, then there is an international *lis pendens* situation. That is not the end of the matter, though. In such a case, the court must continue with the analysis in order to decide whether the Quebec proceedings should be stayed. It is only where the court has found that it is appropriate to exercise the discretion conferred on it by the legislature in art. 3137 *C.C.Q.* that the application for a stay on the basis of international *lis pendens* can be granted.

(1) Burden and Degree of Proof Applicable to the Condition of Susceptibility of Recognition

[41] The husband does not deny that it was he who had to show that the dispute was submitted to the Belgian tribunal first and that the condition of three identities between the Belgian and Quebec proceedings is met. But he argues that the situation is different where the third condition, that of susceptibility of recognition of the Belgian decision in Quebec, is concerned.

[42] In the husband's opinion, art. 3155 *C.C.Q.* establishes a presumption that the foreign decision is valid, and this presumption can be rebutted only if one of the six exceptions enumerated in that article applies. He submits that the condition of susceptibility of recognition under art. 3137 *C.C.Q.* must be assessed in light of

art. 3155(5) *C.C.Q.*, the effect of which is to indirectly grant him the benefit of that presumption, and that the burden of proving an exception is therefore on the party who seeks to take advantage of it (art. 2803 para. 2 *C.C.Q.*). The husband concludes from this that it is the wife who must establish that, as an exception from this general principle of validity of the foreign decision, the Belgian decision will not be susceptible of recognition in Quebec. The Court of Appeal seems to have agreed with him. It suggested that art. 3137 *C.C.Q.* [TRANSLATION] “reflects essentially the same logic” as the principle of recognition under art. 3155(5) *C.C.Q.* (para. 109).

[43] The wife argues that it is instead the party seeking to benefit from a stay of proceedings under art. 3137 *C.C.Q.* who bears the burden of showing that all the conditions provided for in that article are met. Susceptibility of recognition of the Belgian decision in Quebec is one of those conditions, and it should not be dealt with differently than the other two conditions provided for in the article.

[44] I agree with the wife’s approach. The court cannot raise the international *lis pendens* exception of its own motion (*Birdsall Inc. v. In Any Event Inc.*, [1999] R.J.Q. 1344 (C.A.), at pp. 1351-52; *Samson v. Banque Canadienne Impériale de Commerce*, 2010 QCCA 604, at para. 20 (CanLII); C. Emanuelli, *Droit international privé québécois* (3rd ed. 2011), at No. 171). Article 3137 *C.C.Q.* provides that the Quebec authority may stay its ruling on an action only “[o]n the application of a party”. In accordance with the principles of evidence that apply in civil matters, and as in any other case, it is the party who raises international *lis pendens* and seeks a stay under

art. 3137 *C.C.Q.* who must show, on a balance of probabilities, that the conditions of that article are met. This is provided for explicitly in art. 2803 para. 1 *C.C.Q.*, which reads “[a] person seeking to assert a right shall prove the facts on which his claim is based”. In the case at bar, it is the husband who is asking the Quebec court to stay its ruling on the basis that proceedings are pending in the courts of Belgium. This means that it is he who must prove the facts in support of his claim that the matter was submitted to the Belgian authorities first, that there is an identity of facts, of parties and of subject between the Belgian proceedings and those in Quebec, and that the Belgian proceedings could result in a decision that is susceptible of recognition in Quebec.

[45] Article 3155 *C.C.Q.* changes nothing in this regard. The party who seeks the stay is opposing the other party’s right to pursue proceedings that were validly brought in Quebec. Because the dispute was properly submitted to the Quebec authorities, it is the party who objects to its being heard who must show why they should decline to exercise their jurisdiction and order a stay. The conditions of art. 3137 *C.C.Q.* are intended to, among other things, ensure that Quebec proceedings are not stayed vainly; it is of course pointless to stay a ruling if it is clear that the foreign proceedings cannot result in a decision that is susceptible of recognition in Quebec (G. Goldstein and E. Groffier, *Droit international privé*, vol. 1, *Théorie générale* (1998), at No. 137; Emanuelli, at No. 170). It is therefore the party who raises the right to stay proceedings in Quebec on the ground that the same matter is pending in a foreign court who must show the Quebec court that it will be possible for the foreign proceeding to result in a decision

that is susceptible of recognition in Quebec and that the stay of the Quebec proceedings will not be vain.

[46] Thus, while it is true that the condition of susceptibility of recognition under art. 3137 *C.C.Q.* must be considered in light of the exceptions of art. 3155 *C.C.Q.*, the burden is still on the party who seeks to benefit from art. 3137 *C.C.Q.* to show that the three conditions under it are met. For example, it is the party who raises international *lis pendens* who must prove that the foreign court has jurisdiction (*M.I.B. v. M.-P.L.*, 2005 QCCA 1023, [2005] R.J.Q. 2817, at para. 51). And if the foreign court has no jurisdiction as provided for in art. 3155(1) *C.C.Q.*, it will be impossible for the foreign proceedings to ever result in a decision that is susceptible of recognition in Quebec (*Barer v. Knight Brothers LLC*, 2019 SCC 13, at para. 29). Although the dispute between the parties does not relate to the jurisdiction of the Belgian court, the same logic must apply to showing that the outcome of the foreign decision will not be manifestly inconsistent with public order as understood in international relations (art. 3155(5) *C.C.Q.*). When, for the purposes of art. 3137 *C.C.Q.*, the person who opposes the stay contends, for one of the reasons set out in art. 3155 *C.C.Q.*, that it will be impossible for the foreign decision to be recognized in Quebec, it is the person who seeks to obtain the stay of proceedings who must show that the foreign decision meets this condition. The reason for this conclusion is obvious: if the outcome of the foreign decision will be manifestly inconsistent with public order as understood in international relations, it is inappropriate to stay the Quebec proceedings, because it will be impossible for that decision to be recognized in Quebec. There is therefore no risk of conflicting

judgments in such a case. I note that the international *lis pendens* exception is intended to allow the domestic court to stay its ruling in order to eventually give effect to the foreign decision in Quebec for the specific purpose of avoiding a situation in which parallel proceedings result in inconsistent decisions that could both have effects in Quebec (G. Goldstein, *Droit international privé*, vol. 2, *Compétence internationale des autorités québécoises et effets des décisions étrangères* (Art. 3134 à 3168 C.c.Q.) (2012), at No. 3137 550).

[47] Where, however, the foreign decision will not be susceptible of recognition or enforcement in Quebec, there is no risk of such a situation, which means that the considerations that would justify ordering a stay of proceedings do not come into play. In this regard, there is no doubt that the susceptibility of recognition of the foreign decision is among the facts that support the claim of the person who seeks to obtain the stay of the Quebec proceedings: if there is no possibility that the foreign decision will be recognized, an application for a stay cannot be granted. It is therefore the person who brings such an application who must show, among other things, that the outcome of the eventual decision will not be manifestly inconsistent with public order as understood in international relations.

[48] That being said, the burden of showing that it will be possible for the foreign proceedings to result in a decision that is susceptible of recognition in Quebec is not an onerous one. On the basis of the very words of art. 3137 C.C.Q., the only requirement is that the action pending in the foreign court “can result in a decision

which may be recognized in Québec”. Thus, even if the exceptions listed in art. 3155 *C.C.Q.* remain relevant for the purpose of determining whether the Quebec court must order a stay under art. 3137 *C.C.Q.*, the burden applicable to international *lis pendens* differs from the one that applies to the proceeding for recognition and enforcement of the foreign decision. Where the international *lis pendens* exception is at issue, the court does not rule on the question whether the foreign judgment should be incorporated into the Quebec legal order; it merely decides whether the proceedings brought in Quebec should be stayed pending the filing there of an application for exemplification (Goldstein and Groffier, at Nos. 131.1 and 137; Emanuelli, at No. 297). In such situations, the Quebec court does not always have the benefit of a final foreign decision when an application for a stay is filed with it, and the analysis with respect to the condition of susceptibility of recognition cannot be completed as definitively as in the context of the exemplification proceeding. That is why certain authors describe the burden of proof under art. 3137 *C.C.Q.* in terms of a [TRANSLATION] “prognosis” or a “plausibility” of recognition (Goldstein (2012), at No. 3137 575; Goldstein and Groffier, at No. 137). The applicant can discharge this burden by showing that it is possible that the foreign decision will eventually be recognized in Quebec (Goldstein (2012), at No. 3137 575; Goldstein and Groffier, at No. 137). This low threshold can be explained in particular by the underlying purposes of art. 3137 *C.C.Q.*, namely to foster international comity and avert the risk of potentially conflicting judgments.

[49] In the case at bar, I find that the husband has discharged this burden. I am of the view that the Superior Court erred on this point by taking an overly demanding approach in light of the actual words of the provision.

(2) Condition of Susceptibility of Recognition of the Belgian Decision

[50] In her analysis, the trial judge considered whether it would be possible for the Belgian action to result in a decision that is susceptible of recognition in Quebec. In doing so, she inquired into whether art. 1096 of the Belgian *Code civil* is inconsistent with public order as understood in international relations, one of the exceptions to the recognition of foreign judgments that are provided for in art. 3155 *C.C.Q.* She concluded from this inquiry that the Belgian provision unjustifiably discriminates against married couples in that they are treated as if they are incapable of giving free and informed consent in giving gifts while they are married. She expressed the opinion that the provision is inconsistent not only with the approach to the question taken by the legislature in the *C.C.Q.*, but also with the law of other European countries (Sup. Ct. reasons, at paras. 111-15). In particular, she found that it is contrary to s. 15(1) of the *Canadian Charter*. The trial judge wrote on this basis that there was a [TRANSLATION] “great” risk that a Belgian decision confirming the revocation of the gifts would not be recognized in Quebec. She also expressed the opinion that there is no remedial measure under Belgian law that could offset the impact of this revocation on the wife’s financial situation (paras. 120-24).

[51] I agree with the Court of Appeal that it was not appropriate for the trial judge to rely solely on an analysis of the discriminatory nature of art. 1096 of the Belgian *Code civil* in order to conclude that there was a “great” risk that a Belgian court’s decision would not be recognized in Quebec. It is true that the discriminatory nature of the legislative provision can be a relevant factor for purposes of the analysis. However, an approach as restrictive as the one adopted by the trial judge is inconsistent with the wording of the exception set out in art. 3155(5) *C.C.Q.*, which reads as follows:

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

...

(5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;

[52] It is clear from this provision that what must be analyzed is the outcome of the foreign decision, not the laws of the foreign jurisdiction. And art. 3081 *C.C.Q.* is consistent with this. The purpose is not to instruct the foreign authorities in their own law. The Quebec court’s role is limited to ensuring that a foreign decision is not enforced if the decision’s outcome would be so inconsistent with certain of the underlying values of the Quebec legal system as to be incapable of being incorporated into it (Emanuelli, at No. 299). In my opinion, therefore, it is inappropriate to see art. 3155(5) *C.C.Q.* as requiring that the court consider the merits of the decision or of the foreign law. To conclude otherwise is inconsistent not only with the words of

arts. 3155(5) and 3081 *C.C.Q.*, but also with those of art. 3158 *C.C.Q.*, which expressly bars Quebec authorities from “considering the merits of the decision” at issue in an enforcement proceeding. In sum, the requirement of consistency with public order simply means that the court must ensure that the solution provided by the foreign judgment can be harmoniously incorporated into the legal order of the Quebec forum (Goldstein and Groffier, at No. 166; Emanuelli, at Nos. 299 and 466-69; J. A. Talpis, *L’accommodement raisonnable en droit international privé québécois* (2009), at pp. 7-9; G. Goldstein, *De l’exception d’ordre public aux règles d’application nécessaire: Étude du rattachement substantiel impératif en droit international privé canadien* (1996), at p. 53; *Mutual Trust Co. v. St-Cyr* (1996), 144 D.L.R. (4th) 338 (Que. C.A.), at pp. 344-45; *Auerbach v. Resorts International Hotel Inc.* (1992), 89 D.L.R. (4th) 688 (Que. C.A.); *Marble Point Energy Ltd. v. Stonecroft Resources Inc.*, 2009 QCCS 3478 (“*Stonecroft*, QCCS”), aff’d 2011 QCCA 141; *Droit de la famille — 08689*, 2008 QCCA 549; *Droit de la Famille — 1466*, [1991] R.D.F. 492 (C.A.); *Droit de la Famille — 072464*, 2007 QCCS 4822, [2007] R.D.F. 817, aff’d on this point *Droit de la Famille — 08689*).

[53] This leads me to a second point. Public order as understood in international relations is generally more limited than its domestic law counterpart (Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. II, *Le Code civil du Québec — Un mouvement de société* (1993), at p. 1954; Goldstein (2012), at No. 3155 615; Emanuelli, at No. 298; J.-G. Castel, *Droit international privé québécois* (1980), at p. 90; *Stonecroft*, QCCS; *Droit de la famille — 1466*; *Auerbach*,

at p. 693; *Gauvin v. Rancourt*, [1953] R.L. 517 (B.R.)). The reason for this lies in a desire to apply Quebec rules of conflict that allow for the application of a foreign law under certain conditions even if that law is inconsistent with Quebec law (Emanuelli, at No. 465). But such inconsistencies have limits. Thus, a foreign decision will not be recognized if its outcome runs counter to the moral, social, economic or even political conceptions that underpin Quebec's legal order (*Droit de la famille — 151172*, 2015 QCCS 2308, at paras. 84-86 (CanLII); Goldstein (2012), at No. 3155 615; Goldstein and Groffier, at Nos. 119-20). Such a divergence must be serious, and it must be assessed in concrete terms in order to determine whether the incorporation of the outcome in question into Quebec's legal order does in fact give rise to that conflict of conceptions (G. Goldstein, *Droit international privé*, vol. 1, *Conflits de lois: dispositions générales et spécifiques (Art. 3076 à 3133 C.c.Q.)* (2011), at No. 3081 555; Goldstein and Groffier, at No. 166).

[54] That being said, in the context of an application for a stay on the basis of international *lis pendens* under art. 3137 *C.C.Q.*, any analysis of the possibility that the foreign decision is inconsistent with public order as understood in international relations for the purposes of art. 3155(5) *C.C.Q.* must take into account the required degree of proof, which is particularly low. In such a case, the person who seeks a stay of proceedings brought in Quebec need show only that it is possible that the outcome of the foreign decision will not be manifestly inconsistent with international public order (Goldstein (2012), at No. 3137 575; Goldstein and Groffier, at No. 137). As has already been mentioned, this amounts only to a prognosis, as the analysis will have to

be confirmed later, at the stage of the proceeding for recognition and enforcement of the foreign decision, after a judgment has been rendered by the foreign forum and the Quebec court can determine whether one of the exceptions of art. 3155 *C.C.Q.* applies to the final decision (Goldstein (2012), at No. 3137 575). Thus, it is only where there are clear conflicts with fundamental Quebec values that a court can conclude that it will be impossible for an action pending in another country to result in a decision that is susceptible of recognition in Quebec on the basis that the decision will be manifestly inconsistent with public order as understood in international relations (arts. 3081 and 3155(5) *C.C.Q.*; Goldstein (2011), at No. 3081 560; Emanuelli, at Nos. 299 and 464-66; Goldstein and Groffier, at No. 120).

[55] In the instant case, I agree with the Court of Appeal that the trial judge's analysis on this point was, erroneously, too strict. Likewise, I find, with respect, that the analysis of my colleague Abella J. strays from the requirements of the provision at issue here.

[56] First of all, the analysis should have focused on the outcome of the Belgian court's eventual decision, not on the question whether art. 1096 of the Belgian *Code civil* is consistent with the *Canadian Charter*. Although that question can provide insight into the values that underpin the legal order of Quebec and of Canada, the prognosis of recognition of the foreign decision does not boil down to determining whether and attesting that the applicable foreign law — art. 1096 in this case — is consistent with our domestic law (Goldstein and Groffier, at No. 166;

Emanuelli, at Nos. 299 and 466-69; Talpis (2009), at pp. 7-9; Goldstein (1996), at p. 53). Rather, the issue is whether the outcome of the foreign decision is manifestly inconsistent with public order as understood in international relations. This means that the focus of the analysis must be on the outcome of the eventual decision, not on the foreign law. In the instant case, the trial judge attached too much importance to the question whether the Belgian law is consistent with the *Canadian Charter*, whereas it was instead the outcome of the eventual Belgian decision that should have been examined more extensively. On this question, the Court of Appeal cited *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, in which this Court had confirmed that the differential treatment of *de facto* and married couples in Quebec family law is consistent with the *Canadian Charter*. The Court of Appeal was not wrong to point out that, as a result, a conclusion at this time that there is a great risk that it will not be possible to recognize the Belgian court's eventual judgment in Quebec is, [TRANSLATION] "moreover, open to debate" (para. 112).

[57] Next, to meet this condition of art. 3137 *C.C.Q.*, the husband simply had to show that it was possible that incorporating the outcome of the Belgian decision would not be manifestly inconsistent with international public order. But the trial judge expressed the opinion that [TRANSLATION] "there is a great risk" that a Belgian decision confirming the revocation of the gifts would not be recognized in Quebec. In so doing, she imposed on the husband a more onerous burden of proof than the one he bore under art. 3137 *C.C.Q.* He was not required to show that there was little or no risk that the decision would not be recognized in Quebec; he had to show only that

there was a possibility that it would be recognized. In the context of art. 3155(5) *C.C.Q.*, this means that the husband was required to show only that there was a possibility that the eventual Belgian decision would not be manifestly inconsistent with public order as understood in international relations.

[58] In this regard, it must be borne in mind that, at this time, the outcome of the eventual Belgian decision being considered in the analysis required by art. 3137 *C.C.Q.* is uncertain. As the Court of Appeal noted, there are a number of factors in support of the possibility that that outcome will not involve the pure and simple revocation of gifts worth a total of more than \$33 million, and therefore that it will not be manifestly inconsistent with this international public order.

[59] First, the wife stated that she intended to challenge the constitutionality of art. 1096 of the Belgian *Code civil* in the Belgian Cour constitutionnelle. Unlike, for example, the Italian constitutional court, to which the trial judge referred, the Belgian Cour constitutionnelle has never ruled on the issue (Sup. Ct. reasons, at paras. 112, 113 and 121). Furthermore, as the Court of Appeal pointed out, the expert evidence adduced at trial revealed that Belgian authors disagree on whether that article is constitutional (para. 117). It is therefore far from certain that a Belgian court would in fact decide to apply it. This means that it would be premature at this stage to rule out the possibility that the Belgian court's decision would in fact not cause the type of inconsistency at issue here.

[60] I note that the possibility raised by the Court of Appeal is not a remote one. Its observation was based on the evidence adduced at trial, that is, on an established reality, and on the wife's intentions in this regard, that is, on a procedure that was known and the use of which was foreseen (paras. 115-17). That is neither moot nor speculative. I would add, moreover, that as of this date, the Belgian authorities have not yet decided whether it is Belgian law that will apply to the revocation of the gifts. In fact, the Cour d'appel de Bruxelles deferred argument on this issue to a later date.

[61] Second, in the event that art. 1096 of the Belgian *Code civil* did apply, the trial judge assumed that there is no remedial mechanism under Belgian law — or even under Quebec law — that could mitigate the effect of that revocation. But as the Cour d'appel de Bruxelles pointed out, it is possible that the doctrine of unjust enrichment — which would take the place of the Quebec institution of the compensatory allowance — would temper the effects of the revocation (in Belgium, not in Quebec). In the trial judge's defence, however, it should be noted that she did not, at the time of her judgment, have the benefit of the decision of the Cour d'appel de Bruxelles. As for the comments of the Quebec Court of Appeal on this subject, it should be mentioned that they related to the possible remedy in the Belgian courts, not to the one available in Quebec (paras. 118 and 119).

[62] Lastly, it is in no way certain that the long list of gifts the husband intends to revoke will be approved as is by the Belgian authorities. The Quebec Court of

Appeal rightly pointed out that art. 1096 of the Belgian *Code civil* may well not apply to some of the property on the list. The husband will have to show, among other things, that these were gifts given in consideration of the marriage, and not contributions to the expenses of the marriage or ordinary gifts (C.A. reasons, at paras. 117-18). It does not, in my opinion, amount to inappropriate speculation to raise certain aspects that can be seen simply by reading the husband's list of many pages. The fact that he chose to characterize everything as gifts does not on its own suffice to close all debate concerning the items that can in fact be so characterized.

[63] I wish to be clear that the Court of Appeal's intention in this regard was not to justify the validity of art. 1096 of the Belgian *Code civil* or to legitimate any Belgian court decision in which that article might be applied. The sole purpose of the Court of Appeal's comments on this subject was to support the possibility that the final outcome of the Belgian authorities' eventual decision would not be manifestly inconsistent with international public order. This is an important distinction that cannot be disregarded. Nothing in the Court of Appeal's reasons supports the view that the court was ruling on the merits of the foreign law. Moreover, the Court of Appeal was right to present the scenarios that support the possibility of recognition of the foreign judgment in Quebec, and its doing so was consistent with the requirements of arts. 3137 and 3155(5) *C.C.Q.*

[64] With this in mind, given the low degree of proof required of the husband in this respect, it would in my view be premature to hold that it is impossible that the

Belgian decision will be recognized in Quebec on the basis that the outcome of that decision would be manifestly inconsistent with public order as understood in international relations. I wish to be clear that this conclusion should not be interpreted as ruling out the possibility that the Belgian judgment may ultimately prove to be inconsistent with that international public order. I agree with the Court of Appeal that this possibility continues to exist (para. 120). But the possibility that the decision will be recognized in Quebec cannot be ruled out either. This is enough to meet this condition of art. 3137 *C.C.Q.*

B. *Appropriateness of a Stay Based on International Lis Pendens*

[65] But this does not complete the analysis. Once the applicant has established that there is in fact a situation of international *lis pendens* for the purposes of art. 3137 *C.C.Q.*, the Quebec court must exercise its discretion and decide whether it should stay its ruling in the circumstances of the case before it.

(1) Discretion Provided for in Article 3137 *C.C.Q.*

[66] In its reasons, the Court of Appeal stated that [TRANSLATION] “if it is clear that the action in the foreign forum can result in a decision that may be recognized in Quebec, the Quebec court must order a stay” (para. 94 (emphasis added)). The Court of Appeal held that a Quebec court can exercise its discretion to order a stay only if it remains unclear that it will be possible for the foreign decision to be recognized in Quebec.

[67] With respect, I cannot accept this interpretation, which is in my opinion contrary to the very words of art. 3137 *C.C.Q.* Article 3137 provides that the Quebec court *may*, not *must*, stay its ruling if the conditions are met (Goldstein and Groffier, at No. 137; *Birdsall*, at p. 1351). The stay of proceedings is in no way automatic (*Samson*, at paras. 20-21; *Cormier, Cohen, Davies, Architectes, s.e.n.c. v. Bizzotto*, 2009 QCCA 513, at paras. 17-18 (CanLII); *Bell v. Molson*, 2008 QCCS 992, at paras. 10 and 23 (CanLII); J. A. Talpis and J.-G. Castel, “Interpreting the rules of private international law”, in *Reform of the Civil Code*, vol. 5 B, *Private International Law* (1993), at p. 56; *Melley v. Toyota Canada inc.*, 2011 QCCS 1229, at paras. 29-34 (CanLII); H. P. Glenn, “Droit international privé”, in *La réforme du Code civil*, vol. 3, *Priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires* (1993), at pp. 745-46). Where the Quebec court notes the existence of a situation of international *lis pendens*, which presupposes that the applicant has discharged his or her burden of showing that the eventual decision of the foreign forum may be susceptible of recognition in Quebec, the court then has the discretion conferred on it by art. 3137 *C.C.Q.* to decide whether it is appropriate to stay the proceedings before it in Quebec.

[68] I would reiterate that international *lis pendens* is an exception in that the Quebec court stays its own proceedings even though its jurisdiction has been established. It is therefore normal that the Quebec court retains the possibility of declining to stay its ruling. As LeBel J. stressed in *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, a situation of *lis pendens* involving the application of

art. 3137 *C.C.Q.* “concerns the discretion of a Quebec court to decide whether it will exercise its jurisdiction despite a finding of *lis pendens*” (*Lépine*, at para. 50, citing *Birdsall*, at p. 1351). The Minister of Justice’s commentary on that article is to the same effect: [TRANSLATION] “The purpose of [article 3137 *C.C.Q.*] is to afford Quebec authorities some latitude in deciding whether to grant or deny the *lis pendens* exception in light of the specific case before them” (*Commentaires du ministre de la Justice*, at p. 2001).

[69] And this latitude is entirely justified in light of the purposes of the international *lis pendens* exception, and in particular that of avoiding forum shopping (Goldstein and Groffier, at Nos. 126 and 137; Emanuelli, at No. 170). One of the conditions for establishing that an international *lis pendens* situation exists is that of first filing in a foreign forum. But the fact that a dispute has been submitted to a foreign forum does not guarantee that the foreign forum necessarily has a close connection with the dispute (Goldstein and Groffier, at No. 126). As a result, it is not only appropriate, but is also necessary, for a Quebec court to retain the discretion to stay its ruling even if there seems to be nothing that would prevent the eventual decision of the foreign forum from being recognized in Quebec. This is in fact what the trial judge rightly observed in her reasons: [TRANSLATION] “. . . even if the dispute was submitted to the foreign court first, and even if that court meets, at first glance, the conditions of article 3137 *C.C.Q.*, it remains possible that the foreign court is not the one that is most closely connected with the dispute, and that submitting the dispute to it amounted more to forum shopping in the other country” (para. 156). The

decision not to order a stay must therefore be made in light of this purpose, which is why it is important that a trial judge be able to exercise his or her discretion even if the foreign decision will be susceptible of recognition in Quebec.

[70] It follows that, contrary to what the Court of Appeal held, a finding that the conditions for the international *lis pendens* exception — including susceptibility of recognition — are met cannot on its own be a bar to the discretion conferred by art. 3137 *C.C.Q.* Having established this, I will now turn to the principles applicable to the exercise of this discretion.

(2) Principles Applicable to the Exercise of the Discretion Provided for in Article 3137 *C.C.Q.*

[71] The discretion conferred by art. 3137 *C.C.Q.* is grounded in the idea that, even if the dispute was submitted to the foreign court first, and even if none of the exceptions to the recognition of foreign decisions set out in art. 3155 *C.C.Q.* apply, it is nonetheless possible that the foreign court is not the one that has the closest connections with the dispute. In this regard, the analysis required with respect to the exercise of the discretion provided for in art. 3137 *C.C.Q.* is related to the one that applies with respect to the discretion under art. 3135 *C.C.Q.*, which codifies the doctrine of *forum non conveniens* in Quebec private international law. Because of this close relationship, the authors and the courts consider that the criteria developed by the latter with respect to *forum non conveniens* also apply to international *lis pendens* (Talpis and Castel, at p. 56; J. A. Talpis and S. L. Kath, “The Exceptional as

Commonplace in Quebec *Forum Non Conveniens* Law: *Cambior*, a Case in Point” (2000), 34 *R.J.T.* 761; Goldstein and Groffier, at No. 137; 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. 57; Goldstein (2012), at No. 3137 575. See also *Bell*, at paras. 11-12; *Lebrasseur v. Hoffman-La Roche ltée*, 2011 QCCS 5457, at para. 14 (CanLII); *Bombardier inc. v. Fastwing Investment Holdings Ltd.*, 2010 QCCS 6665, at para. 50 (CanLII), aff’d 2011 QCCA 432 (“*Fastwing*, QCCA”).

[72] The fact that the two articles lead to different results cannot be ignored, however. Unlike art. 3135 *C.C.Q.*, art. 3137 *C.C.Q.* leads not to dismissal of the action, but to a stay of the proceedings that applies until the foreign forum has rendered a final decision. From this perspective, international *lis pendens* can also be distinguished from domestic *lis pendens*, which is a ground for dismissal under art. 168 of the *Code of Civil Procedure*, CQLR, c. C-25.01 (*M.I.B.*, at para. 46). Moreover, whereas the legislature has reserved *forum non conveniens* for exceptional cases given the draconian consequences dismissal of the action can have for the parties, art. 3137 *C.C.Q.* does not require the same reserve (Emanuelli, at No. 167; see also *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279, at paras. 37-38; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, at paras. 77-81; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 33; *Oppenheim*, at pp. 5-7).

[73] Thus, whereas it is not necessary, in a case involving international *lis pendens*, to show that the authorities of another country are in a better position to decide the dispute in order to obtain a stay under art. 3137 *C.C.Q.* (*Bell*, at para. 15), this is by contrast an essential factor in the context of the exercise of the discretion in a case involving *forum non conveniens* according to the very words of art. 3135 *C.C.Q.* (Talpis (2001), at p. 57; Goldstein (2012), at No. 3137 580, footnote 63; *Spar Aerospace*, at paras. 69, 71 and 77; *Oppenheim*, at pp. 5-7; *Rudolf Keller SRL v. Banque Laurentienne du Canada*, 2003 CanLII 34078 (Que. Sup. Ct.), at para. 76). The reason for this is simple: it is possible for the dismissal of an action for *forum non conveniens* to result in a denial of justice, whereas a stay of proceedings for international *lis pendens* entails no comparable risk. A Quebec authority that decides to order a stay under art. 3137 *C.C.Q.* will still be able to resume the proceedings if it is shown that, in the end, the foreign decision is not susceptible of recognition in Quebec (Emanuelli, at No. 171). By contrast, a Quebec court cannot resume proceedings in an action after having declined jurisdiction over it on concluding that the foreign jurisdiction was, in the words of art. 3135 *C.C.Q.*, in a better position to decide the dispute. If the foreign court were to find that it did not have jurisdiction to decide the dispute, the Quebec court's decision to decline jurisdiction would then constitute a denial of justice for the parties (Goldstein and Groffier, at No. 134). In light of these different perspectives, therefore, given that the stay provided for in art. 3137 *C.C.Q.* can avert a multiplicity of proceedings and the risk of conflicting judgments, it is appropriate for the discretion under that article to be applied more

flexibly than its counterpart under art. 3135 C.C.Q. (Goldstein (2012), at No. 3137 570).

[74] This being said, subject to these distinguishing characteristics, there is no reason why the assessment of the appropriateness of ordering a stay in a case of international *lis pendens* cannot be based to a large extent on the one carried out in the context of the *forum non conveniens* exception. In its leading case on that subject, the Quebec Court of Appeal invited the courts to consider the following ten criteria, among others, in this analysis:

[TRANSLATION]

- (1) the place of residence of the parties and of lay and expert witnesses;
- (2) the location of the physical evidence;
- (3) the place of formation and performance of the contract that resulted in the application;
- (4) the existence and subject of an action instituted in another country and the stage already reached in that action;
- (5) the location of the defendant's assets;
- (6) the law applicable to the dispute;
- (7) the advantage the plaintiff would have in the chosen forum;
- (8) the interests of justice;
- (9) the interests of the two parties; and
- (10) the eventual need for an exemplification proceeding in the other country.

(*Oppenheim*, at pp. 7-8)

[75] In *Oppenheim*, after identifying these various criteria, the Court of Appeal specified that none of them are determinative on their own: the weight to be given to any one of them must be assessed globally in the context of the specific case.

The court also stressed that this list is not exhaustive, and that other criteria might be added, depending on the circumstances (F. Sabourin, “Motifs permettant de ne pas exercer la compétence: *forum non conveniens* et litispendance internationale” in *JurisClasseur Québec — Collection droit civil — Droit international privé* (loose-leaf), by P.-C. Lafond, ed., fasc. 9, at para. 15; Goldstein (2012), at No. 3135 580; see also *Rudolf Keller*, at para. 59). It should be noted, however, that these criteria must be considered from an essentially procedural perspective, because what is at issue is which of the two fora is in the best position to hear the case (Goldstein (2012), at No. 3135 580).

[76] In the case at bar, the trial judge applied the criteria from *Oppenheim* to determine whether it was appropriate to stay the wife’s proceedings in the Quebec court. The Court of Appeal endorsed this approach, but stated that these criteria must be [TRANSLATION] “assessed from the specific perspective of article 3137 *C.C.Q.*, which is not the same as that of article 3135 *C.C.Q.*” (para. 124). I agree with the Court of Appeal on this point.

[77] In this regard, the Court of Appeal, while noting that the list of criteria set out in *Oppenheim* is not exhaustive, added that it might be appropriate to adapt the list when applying it in the context of the international *lis pendens* exception. In the Court of Appeal’s view, certain of the criteria [TRANSLATION] “fit better” with the exercise of the discretion provided for in art. 3137 *C.C.Q.*, mentioning the interests of the parties and their children, the law applicable to the dispute, the advanced state of

the action instituted in the other country, the possible recognition of the Quebec decision in the other country, the interests of justice, and abusive forum shopping (para. 126).

[78] I find that, while it is important to stress that the list of criteria is not exhaustive, it would be best to refrain from definitively identifying criteria that would be specific to or should be given more weight in the analysis with respect to the international *lis pendens* exception. The weight to be attached to each of the criteria depends on circumstances specific to the particular case. In this regard, even if the perspective specific to each article differs, there is no reason to distinguish in this manner the analysis of the criteria conducted for the purposes of art. 3137 *C.C.Q.* from the one required in the context of art. 3135 *C.C.Q.* It will be up to the judge hearing an application to determine on the basis of the facts of the case whether it might be appropriate to consider criteria other than the ones listed in *Oppenheim*. Indeed, the criteria advanced by the Court of Appeal as being better suited to the analysis under art. 3137 *C.C.Q.* could be just as relevant in the analysis under art. 3135 *C.C.Q.* When all is said and done, it is not the nature of the criteria to be considered in respect of the exercise of the discretion that distinguishes the international *lis pendens* exception from *forum non conveniens*. Rather, what distinguishes these two exceptions from one another is the extent of what must be shown in order for the Quebec authorities to decline jurisdiction. The criteria to be considered must be identified on the basis of the specific circumstances of the case in question, not on the basis of the nature of the application.

(3) Standard for Intervention Applicable to the Exercise of a Discretion

[79] Before I turn to the exercise of the trial judge's discretion, I should mention that the principle that deference is owed to discretionary decisions applies to the determination of the appropriateness of ordering a stay under art. 3137 *C.C.Q.* This Court has already ruled on the standard for intervention that should be applied to an exercise of the discretion in the context of *forum non conveniens*. Given the similarity between the discretion under art. 3135 *C.C.Q.* and the one under art. 3137 *C.C.Q.*, I am of the view that the same restraint is required in the context of international *lis pendens*. Thus, "an appeal court should intervene only if the motion judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision" (*Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636, at para. 41). A simple difference of opinion will not suffice to justify an appellate court in substituting its own assessment for that of the trial judge.

[80] In the instant case, the Court of Appeal faulted the trial judge for failing to consider, in her analysis with respect to the appropriateness of exercising her discretion, the criterion of [TRANSLATION] "recognition of the Quebec judgment in the other country" (para. 147). This led it to conclude that the trial judge had exercised her discretion unreasonably, which meant that it could substitute its own analysis for hers. In my opinion, it has not been established that the trial judge's analysis was

unreasonable for the reason mentioned by the Court of Appeal. I therefore find that it was not open to the Court of Appeal to substitute its own analysis for hers.

(4) Intervention of the Court of Appeal and the Criterion of “Recognition of the Quebec Judgment in the Other Country”

[81] In beginning its review of the trial judge’s analysis with respect to the application of her discretion, the Court of Appeal correctly observed that [TRANSLATION] “[w]hat is unusual about this appeal is that every argument has a counter-argument. Certain factors weigh in favour of the foreign forum, while others weigh in favour of the Quebec forum. This is a borderline case like few others” (para. 128). In this context, even if the court said that it did not necessarily agree with the trial judge’s findings on all the criteria she had considered, it was of the opinion that only three of them merited particular attention: the law applicable to the dispute, abusive forum shopping and possible recognition of the Quebec decision in the other country. The Court of Appeal expressed no disagreement with the trial judge regarding the other criteria from *Oppenheim* that she had discussed.

[82] On the applicable law criterion, the Court of Appeal qualified the trial judge’s analysis relating to the law that must govern the question of the revocation of gifts. The trial judge had found that Quebec law would apply to this part of the dispute, given that it concerned an effect of marriage. The Court of Appeal tempered this conclusion: Belgian law will apply to gifts given while the parties were resident in Belgium, but those given since the parties began residing in Quebec will be subject

to Quebec law (para. 135). As for the other issues, it agreed with the trial judge that Canadian law will apply to the granting of the divorce, Quebec law will apply to the compensatory allowance and the family patrimony, and Belgian law will apply to the liquidation of the matrimonial regime (paras. 131-32).

[83] On the forum shopping criterion, the Court of Appeal noted that the trial judge had not specifically discussed this point. It therefore asked whether submitting the dispute to the Belgian court could be seen as forum shopping that was intended to place the wife at an undue disadvantage. It concluded on this point that even though the husband had [TRANSLATION] “acted quickly” (para. 141) to file his application for a divorce in Belgium and even though a Quebec court is in principle the most natural forum to hear this case, his choice of the Belgian forum was justified insofar as there is a real and meaningful connection between the parties and Belgium. In this context, the Court of Appeal held that the husband’s choice of the Belgian forum was not abusive (para. 146).

[84] Finally, on the criterion of the possible recognition of the Quebec decision in Belgium, the Court of Appeal considered that this factor had to be taken into account in the assessment of the appropriateness of ordering a stay in the same way as the eventual need for an exemplification proceeding in the other country is taken into account. But in the Court of Appeal’s view, the trial judge had failed to address this question:

[TRANSLATION] It can thus be seen from the expert evidence that the Belgian court, which has jurisdiction under that country's law to hear the parties' divorce proceedings given that they have Belgian nationality, cannot stay the divorce proceedings before it unless the Belgian Cour d'appel allows the respondent's appeal.

The judge's failure to take this factor into account is an overriding error. At the hearing of the application, the judge wondered, during the experts' testimony, about the effect of the fact that the dispute had been submitted to the Belgian court first, but she did not discuss this in her reasons. If she had weighed this important evidence with the other factors she took into account, she would have found that the stay was necessary. A divorce judgment in Quebec that cannot be recognized in Belgium is not worth much, especially given that the Belgian court will grant the divorce in conformity with Canadian law. With respect, in accordance with the standard for intervention an appellate court must apply, the judge exercised her discretion unreasonably. [Emphasis added; paras. 153-54.]

[85] In the end, it is clear that the possible recognition of the Quebec judgment in the other country is the only criterion on which the Court of Appeal relied to intervene in the trial judge's exercise of her discretion and to justify substituting its own analysis for hers. Its comments on the applicable law and on forum shopping do not suggest that the trial judge had, in her analysis on these criteria, erred in principle or misapprehended material evidence or that this had caused her decision to be unreasonable (*Éditions Écosociété*, at para. 41). On the contrary, the Court of Appeal's analysis on them seems to support that of the Superior Court. Quebec law will apply, except as regards the liquidation of the matrimonial regime and the revocation of gifts given while the parties were resident in Belgium. And even though submitting the dispute to the Belgian court cannot be seen as abusive forum shopping, the Court of Appeal recognized that a Quebec court is the most natural forum to hear this case, as the trial judge had found. For the Court of Appeal's intervention in the

exercise of the trial judge's discretion to be justified, therefore, the failure to consider the criterion of possible recognition of the Quebec judgment in the other country must have caused her decision to be unreasonable. With respect, I find that this is not the case. Let me explain.

[86] The Court of Appeal found that the possible recognition of the Quebec judgment in the other country was a crucial factor in the analysis with respect to art. 3137 *C.C.Q.* (para. 126). In its view, this criterion was intended to ensure that the Quebec judgment could be effective in the other country by determining whether that judgment met the conditions for recognition of foreign judgments in the forum at issue. Although I do not deny that this criterion might be relevant in certain circumstances, I cannot agree that it will always be determinative, and I am of the view that it definitely is not in this case.

[87] In Quebec private international law, the *lis pendens* exception is based on the premise that the Quebec authority is not the first to which the dispute was submitted. If the dispute was submitted in Quebec first, the Quebec authority does not have the power to stay the proceedings under art. 3137 *C.C.Q.*, which clearly provides that the Quebec authority may order a stay on the condition that the dispute had already been submitted to a foreign court at the time when the action was brought in Quebec (Goldstein (2012), at No. 3137 560; *Fastwing*, QCCA, at para. 31; *Melley*). Otherwise, a party against whom an action has been brought in Quebec would only have to bring an identical action in another country in order to seek a stay of the

Quebec proceedings, and the effect of this would be precisely to encourage forum shopping (*Lac d'amiante du Québec ltée v. 2858-0702 Québec inc.*, 1997 CanLII 9037 (Que. Sup. Ct.), at para. 29; Goldstein (2012), at No. 3137 560; Goldstein and Groffier, at No. 137). The condition of first filing thus essentially ensures that the parties do not engage in abusive forum shopping.

[88] In these circumstances, a Quebec judgment that is rendered in spite of an international *lis pendens* situation has little chance of eventually being recognized in the foreign forum. The reality is that if a Quebec court inquires into the appropriateness of ordering a stay under art. 3137 *C.C.Q.*, it is necessarily not the court of first filing. Where first filing is also a condition to be met for the *lis pendens* exception in the foreign jurisdiction, as is the case in Belgium (arts. 14 and 25(6) of the *Loi portant le Code de droit international privé*), and where the dispute is submitted to the foreign court first, that court would quite simply not have the power to stay its own proceedings or to recognize the foreign decision if asked to do so.

[89] This being the case, it is hard to endorse the Court of Appeal's insistence on the requirement that the Quebec judgment be susceptible of recognition in the other country in the international *lis pendens* context. If all the weight attached to this criterion by the Court of Appeal were accepted, it would be unreasonable to decline to order a stay whenever the Quebec judgment cannot be recognized under the foreign law. But that would be contrary to the purpose of art. 3137 *C.C.Q.*, as a trial judge would then be required to stay the Quebec proceedings even if his or her

analysis showed that the Quebec court was the only one to have real and substantial connections with the dispute or that submitting the dispute to the foreign court was the result of abusive forum shopping.

[90] I agree that the possibility of having the Quebec judgment recognized or enforced in the other country can be a relevant consideration in a situation in which the Quebec decision would have no effect in Quebec and would be effective only if it could be enforced in the other country. This might be the case, for example, of a dispute that relates exclusively to assets located outside Quebec. I would note, however, that this is the very purpose of the tenth criterion from *Oppenheim*, which concerns the question whether an exemplification proceeding will eventually be needed in the other country. The relevance of that criterion stems from the question whether the Quebec judgment can have effects in Quebec or whether, should the assets at issue be located mostly or entirely in the foreign forum, the Quebec judgment will have an effect only if it is enforced in the other country (*Spar Aerospace*, at para. 73; Goldstein (2012), at No. 3135 550). The criterion invoked by the Court of Appeal in this regard is thus already considered under the criterion of the eventual need for an exemplification proceeding in the other country. The latter criterion makes it possible to determine whether the Quebec judgment will be effective only if it is enforced in the other country, and if that is the case, the possibility that the Quebec judgment will not be recognized in the other forum can be taken into account in concluding that it is appropriate to order a stay.

[91] With this in mind, the criticism levelled against the trial judge by the Court of Appeal is in my view unfounded in this case. It cannot be maintained that a failure to take the possibility that the Quebec judgment will not be recognized in Belgium into consideration caused her analysis to be unreasonable. Indeed, the criterion adopted by the Court of Appeal is not one that is independent of the tenth *Oppenheim* criterion. The demonstration that the effectiveness of the Quebec judgment in Quebec will be very real in fact means that this consideration is not determinative, which is exactly what the trial judge can be understood to have said in reviewing the criterion of the eventual need for an exemplification proceeding in the other country (para. 212). Although it would have been best for the trial judge to elaborate on her thoughts on this criterion, there can be no doubt that the Quebec judgment will have a definite effectiveness in Quebec. One of the main issues in this case relates to the revocation of the gift to the wife of half the value of the family residence in Quebec, which is estimated at over \$6.6 million. Much of the property to which the revocation of the gifts applies is secured in the husband's bank in Quebec or stored at the family residence. Because much of the property of significant value is located in Quebec, it is clear that the Quebec judgment will not have to be enforced in the other country in order to be effective.

[92] I would add that the Court of Appeal did not take into account the question whether the Quebec judgment could be effective in Quebec. The court merely concluded that, if the Quebec judgment could not be recognized in Belgium, it would [TRANSLATION] “not [be] worth much” (para. 154 (emphasis added)). Given

the finding that much of the luxury property to which the claims for partition of the family patrimony and revocation of the gifts apply is located in Quebec, I find that this conclusion is erroneous.

[93] When all is said and done, the reason given by the Court of Appeal — that the trial judge failed to consider the possibility that the Quebec judgment could not be recognized in Belgium — could not on its own justify that court’s intervention in the trial judge’s exercise of her discretion. As I mentioned above, a simple difference of opinion does not suffice to justify an appellate court in substituting its own assessment for that of the trial judge. This is all the more true given that the Court of Appeal recognized that this is a borderline case like few others (para. 128). Moreover, this explains why that court did not find it necessary to review all the criteria considered by the trial judge even if it did not necessarily agree with her conclusions on all of them (para. 129). Given that the Court of Appeal mentioned no other error to justify its intervention, it was in my view not open to it to conclude that the trial judge’s decision not to order a stay was unreasonable. And if the analysis with respect to the criteria for application of the discretion is not unreasonable, deference is in order.

[94] The fact that the trial judge erred in her analysis with respect to the conditions of first filing and susceptibility of recognition of the foreign judgment in no way alters this conclusion. First of all, I would stress that it was not on this basis that the Court of Appeal justified its intervention, as it merely cited the trial judge’s

failure to consider the criterion of recognition of the Quebec judgment in the other country. In the absence of any indication to that effect, it cannot of course be assumed that the Court of Appeal intervened for reasons other than the one it gave. In addition, if the Court of Appeal was of the opinion that the trial judge's initial errors had caused her entire analysis to be unreasonable, it would have had to perform anew the analysis for each criterion on an individual basis, which it did not do. Nor is it this Court's role to substitute a new ground for intervention for the one cited by the Court of Appeal in order to redo this analysis, or to do it in a partial manner without examining each of the criteria from *Oppenheim*.

[95] Next, even if the trial judge did make certain errors, nothing in her analysis suggests that those errors tainted the exercise of her discretion in such a way as to make it unreasonable. Her conclusions on the *Oppenheim* criteria were not linked to her initial findings on first filing or on susceptibility of recognition of the Belgian judgment in Quebec. In her analysis, the trial judge in fact discussed issues relating to the family patrimony, the compensatory allowance and the revocation of the gifts, including the consequences of decision to order a stay in favour of the Belgian courts on those issues, even though she had held in the first part of her reasons that art. 3137 *C.C.Q.* could not apply to those claims.

VI. Conclusion

[96] Before a Quebec court can apply the international *lis pendens* exception provided for in art. 3137 *C.C.Q.* and stay its ruling on proceedings brought in

Quebec, the applicant must show that an action between the same parties, based on the same facts and having the same subject was brought first in the foreign forum and that that action can result in a decision that may be recognized in Quebec. The burden is on the party who seeks to benefit from the stay of proceedings in Quebec to show that each of these conditions is met.

[97] The condition of susceptibility of recognition of the foreign decision in Quebec is no exception to this rule, although the applicant's burden of proof is not an onerous one. A prognosis of recognition will suffice. In light of art. 3155(5) *C.C.Q.*, it will be enough at this stage for the applicant to show that it is possible that the foreign judgment will not be manifestly inconsistent with public order as understood in international relations. In the case at bar, and this does not rule out the possibility that the eventual Belgian judgment will in the end prove to be contrary to that international public order, the husband has discharged this burden.

[98] But the analysis does not end once these conditions are met. A trial judge must then exercise the discretion provided for in art. 3137 *C.C.Q.* to determine whether it is appropriate to order a stay. This discretion rests with the Quebec authority, even if it is clear that the foreign decision may be recognized in Quebec.

[99] In the instant case, the Court of Appeal's intervention in the trial judge's exercise of her discretion was unwarranted. The recognition of the Quebec judgment in the other country cannot be a determinative consideration unless the Quebec judgment would not be effective without being enforced in the other country. There is

no doubt in this case that the Quebec judgment would be effective, given that much of the valuable property at issue in the litigation is located in Quebec. In the absence of other reasons establishing that the Superior Court's exercise of its discretion was unreasonable, deference is owed to the trial judge's decision. I would therefore allow the wife's appeal, set aside the decision of the Court of Appeal and restore the Superior Court's conclusion on dismissing the husband's application for a stay of its ruling, with costs to the wife throughout.

The following are the reasons delivered by

ABELLA J. —

[100] I agree that the proceedings in Quebec should not be stayed. I part company, however, with the majority's application in this case of the legal scheme governing the susceptibility of recognition of foreign decisions. In my respectful view, the pending decision under art. 1096 of the Belgian *Civil Code* could not be recognized in Quebec.

[101] The starting point of the analysis regarding the susceptibility of recognition of a pending foreign decision is art. 3137 of the *Civil Code of Québec* (“C.C.Q.”), which states:

3137. L'autorité québécoise, à la **3137.** On the application of a

demande d'une partie, peut, quand une action est introduite devant elle, surseoir à statuer si une autre action entre les mêmes parties, fondée sur les mêmes faits et ayant le même objet, est déjà pendante devant une autorité étrangère, pourvu qu'elle puisse donner lieu à une décision pouvant être reconnue au Québec, ou si une telle décision a déjà été rendue par une autorité étrangère.

party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

[102] Two scenarios are anticipated by art. 3137: the first is where a decision has not yet been rendered by a foreign authority in a pending action, and the second is where a decision has already been made. In the case before us, no decision has yet been made under art. 1096 of the Belgian *Civil Code* in the pending proceedings in Belgium. This requires us to ask whether it is possible that when a decision is made, it will be one that could be recognized in Quebec.

[103] A decision, or pending decision, cannot be recognized in Quebec if it does not comply with art. 3155 of the *C.C.Q.* A foreign decision is not recognizable if it is “manifestly inconsistent with public order as understood in international relations”, as set out in art. 3155(5) which states:

3155. Toute décision rendue hors du Québec est reconnue et, le cas échéant, déclarée exécutoire par l'autorité du Québec, sauf dans les cas suivants:

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

. . . .
5° Le résultat de la décision étrangère est manifestement incompatible avec l'ordre public tel qu'il est entendu dans les relations internationales;

. . . .
(5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;

[104] What is contrary to domestic public order will not necessarily contravene public order in international relations (Gérald Goldstein, *Droit international privé*, vol. 1, *Conflits de lois: dispositions générales et spécifiques (Art. 3076 à 3133 C.c.Q)* (2011), at p. 58). In other words, not every foreign decision that reaches a result different from what it would likely be under Quebec law will be found to violate international public order.

[105] Public order as understood in international relations is informed by the fundamental values underlying the international legal order. These values are conveyed by various international instruments such as those that [TRANSLATION] “reinforce the view that inequality between spouses in the divorce context is contrary to public order as understood in international relations” (Claude Emanuelli, *Droit international privé québécois* (3rd ed. 2011), at p. 178). The international public order exception is restricted to situations where the application of a foreign law would contradict the moral, social, economic and political conceptions underlying the Quebec legal system [TRANSLATION] “to such an extent as to be incapable of combining with it” (Emanuelli, at p. 288).

[106] The focus of the debate over public order centres in this case on spousal property rights, and the husband's unilateral revocation of property gifted to the wife and valued at over 33 million dollars.

[107] Because of the uncertainty usually surrounding the effects of a pending decision, the examination of a pending decision simply requires a [TRANSLATION] "prognosis" of recognition, that is, demonstrating a possibility that the decision will be recognized (Gérald Goldstein, *Droit international privé*, vol. 2, *Compétence internationale des autorités québécoises et effets des décisions étrangères (Art. 3134 à 3168 C.c.Q.)* (2012), at p. 85; Gérald Goldstein and Ethel Groffier, *Droit international privé*, vol. 1, *Théorie générale* (1998), at pp. 324 and 328). While it may be desirable in some cases to await the outcome of a pending proceeding to determine whether it will be inconsistent with the public order condition, art. 3137 of the *C.C.Q.* does not require us to do so, nor, in the circumstances of this case, is it necessary.

[108] I agree that the party seeking a stay under art. 3137 of the *C.C.Q.* bears the burden of demonstrating, on a balance of probabilities, that a stay should be granted. This includes the burden to demonstrate that the outcome of the foreign decision will not be manifestly inconsistent with public order and may, as a result, be recognized in Quebec. The majority concludes that the husband has discharged this low burden and that we cannot exclude, at this stage, the possibility that the decision

may eventually be recognized in Quebec. In my view, with great respect, this conclusion lacks the necessary evidentiary support.

[109] The trial judge, Hallée J.S.C., heard from four experts in Belgian law, two for each of the parties. They explained that a donor spouse can, at any time, revoke unilaterally and without any formalities, any gift he or she has made during the marriage. A simple letter is enough. No reasons for the revocation are necessary and nothing can derogate from it.

[110] A court in Belgium has no discretion but to accede to a request for revocation. Even if it is made in bad faith, neither the revocation nor its immediate, retroactive effect can be prevented. And the revocation can occur notwithstanding any dramatic financial consequences for the spouse subject to the revocation.

[111] The experts also expressed the view that art. 1096 of the Belgian *Civil Code* appeared to be discriminatory, since it treats spouses differently from other citizens, by rendering them subject to a rule of revocation that does not apply to any other Belgian. They observed that, based on their discriminatory impact, similar laws permitting the unilateral revocation of gifts to spouses have been repealed or ruled unconstitutional in many European countries, including Italy and France.

[112] The trial judge accepted this evidence and, based on it, concluded that the revocation of gifts under art. 1096 of the Belgian *Civil Code* is absolute and unilateral and that there is no judicial discretion to prevent it, regardless of the reason for the

revocation, its *bona fides*, or its consequences. She also concluded that there was no available remedial relief under Belgian law if art. 1096 of the Belgian *Civil Code* is invoked, and that any revocation under art. 1096 occurs automatically without any regard for the effects of the revocation on the economic situation of the spouse whose gifts are being revoked.

[113] The husband's letter of revocation listed gifts with a total value of \$33,679,296, including 16.2 million dollars in cash donations as well as the wife's half of the family residence, valued at 6.6 million dollars. His letter also stated that this was only the first part of a series of revocations he was planning to make.

[114] The trial judge found that the impact of this revocation on the wife would be economically catastrophic.

[115] The Court of Appeal was of the view that when assessing the susceptibility of recognition, the burden was not on the husband who was seeking the stay, but on the wife who opposed it. This reversal of the onus appears to have led the Court of Appeal to suggest various hypotheticals showing that it was premature to determine at this stage whether the decision would be manifestly inconsistent with public order.

[116] The first hypothetical created by the Court of Appeal was that the Constitutional Court of Belgium could, potentially, determine that art. 1096 of the Belgian *Civil Code* is unconstitutional.

[117] While it is true that the Belgian experts noted that there is much academic debate about this provision, they also observed that, so far, this debate has had no effect on the Belgian judiciary. That means that there is no evidence to support the theory that the Constitutional Court of Belgium would find the provision unconstitutional. To suggest that a party seeking a stay under art. 3137 of the *C.C.Q.* can satisfy the public order condition by pointing to the mere existence of debate on the constitutional validity of a foreign provision or, in this case, the wife's attempt to challenge the constitutionality of the provision, seems to me to reduce the burden from low to non-existent. It remains unclear whether the Constitutional Court of Belgium will in fact rule on art. 1096 of the Belgian *Civil Code* since the Brussels Court of Appeal has not yet referred the "*questions préjudicielles*" to it. Nonetheless, in my respectful view, relying on Belgium to set aside its own law in order to manufacture a possibility that the revocation may not occur extinguishes the husband's burden.

[118] In any event, it seems to me that we must treat art. 1096 of the Belgian *Civil Code* as having the legal status it currently enjoys — constitutional — rather than speculate on whether a foreign authority might decide to strike it down.

[119] The second hypothetical created by the Court of Appeal was that there was a possibility that the Belgian decision could limit the scope of the revocation, based on its speculation that some of the assets might not be considered gifts and would therefore not be revoked.

[120] The extent to which the husband seeks to revoke gifts must be taken at face value (*Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440, at p. 465; *Birdsall Inc. v. In Any Event Inc.*, [1999] R.J.Q. 1344 (C.A.), at pp. 1352-1353). As such, not only does applying the hypothetical alleviate the husband's burden, there is simply no evidence to support it.

[121] The final hypothesis raised by the Court of Appeal was that a compensatory allowance could potentially be ordered as a remedy in Quebec. The trial court in Belgium had concluded that Quebec law would apply to the compensatory allowance request, but in the interval between the Court of Appeal's decision and the hearing before this Court, the Brussels Court of Appeal overturned the Belgian trial decision on this point and found that Belgian, not Quebec law, applies to the compensatory allowance claim. Yet, there is no evidence about what remedial mechanisms are available in Belgium or under what circumstances they apply.

[122] As a result, none of the hypotheticals suggested by the Court of Appeal bear in any way on what the husband is actually seeking in Belgium, namely, the revocation of gifts to his wife worth over 33 million dollars.

[123] Pending decisions, by definition, have no fixed outcome. But relying on the posed hypotheticals as being sufficient to create doubt about the outcome in this

case, raises concerns that the “susceptibility of recognition of pending decisions” requirement under art. 3137 of the *C.C.Q.* will be hollowed out.

[124] At its core, this case is about a non-discretionary provision in Belgium that allows a spouse unilaterally to revoke, without any formalities or justification, gifts bestowed during the marriage. It is an absolute right, even when exercised in bad faith. More significantly, the revocation contemplated under art. 1096 of the Belgian *Civil Code* is valid in Belgium even when its application results in flagrant inequalities between spouses. In my respectful view, allowing speculation to drive the analysis, rather than the reality of the revocation for the wife, empties the burden on the husband of any meaning.

[125] There may perhaps be decisions under art. 1096 of the Belgian *Civil Code* that would be recognized in Quebec, but this is not, with respect, one of them. The husband is seeking to unilaterally revoke over 33 million dollars in assets. As the trial judge found, the consequences for the wife will be catastrophic. The unilateral extinguishment of a gift to a spouse of an item of clothing or furniture may not offend public order as understood in international relations under art. 3155 of the *C.C.Q.*, but the inevitability of a spouse’s consequential vulnerability almost certainly would.

[126] In international relations, we find consensus about spousal equality in the context of marriage dissolution in various international instruments, including art. 16(1) of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), which states that:

Article 16

1. À partir de l'âge nubile, l'homme et la femme, sans aucune restriction quant à la race, la nationalité ou la religion, ont le droit de se marier et de fonder une famille. Ils ont des droits égaux au regard du mariage, durant le mariage et lors de sa dissolution.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

[127] *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 1525 U.N.T.S. 195, ratified by Belgium on April 13, 2012, similarly provides that:

Article 5 — Égalité entre époux

Les époux jouissent de l'égalité de droits et de responsabilités de caractère civil entre eux et dans leurs relations avec leurs enfants au regard du mariage, durant le mariage et lors de sa dissolution. Le présent article n'empêche pas les États de prendre les mesures nécessaires dans l'intérêt des enfants.

Article 5 — Equality between spouses

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

[128] *The Convention on the Elimination of All Forms of Discrimination against Women*, Can. T.S. 1982 No. 31, ratified by Belgium on July 10, 1985, also reinforces the fundamental value of spousal equality in marriage dissolution:

Article 16

1. Les États parties prennent toutes les mesures appropriées pour éliminer la discrimination à l'égard des femmes dans toutes les questions découlant du mariage et dans les rapports familiaux et, en particulier, assurent, sur la base de l'égalité de l'homme et de la femme :

...

c) Les mêmes droits et les mêmes responsabilités au cours du mariage et lors de sa dissolution;

...

h) Les mêmes droits à chacun des époux en matière de propriété, d'acquisition, de gestion, d'administration, de jouissance et de disposition des biens, tant à titre gratuit qu'à titre onéreux.

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

...

(c) The same rights and responsibilities during marriage and at its dissolution;

...

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

[129] This means that the violation of the principle of spousal equality would be manifestly incompatible with public order as understood in international relations. Without any evidence that there is even a possibility of a judgment in Belgium in this case that does not infringe these fundamental public order values, I cannot see how

the outcome of the decision under art. 1096 of the Belgian *Civil Code* would be recognized in Quebec.

[130] This is reinforced by the fact that, as previously noted, the foreign judgment will be inconsistent with international public order if its application would contradict the moral, social, economic and political conceptions that underlie Quebec's legal system (Emanuelli, at p. 288).

[131] Those conceptions are well developed in *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, where a majority in this Court recognized the constitutional validity of allowing individuals, through an express consensual choice, to opt for the matrimonial regime of their choice. On this basis, the majority found that it was not discriminatory to exclude *de facto* spouses from the patrimonial and support rights granted to married and civil union spouses.

[132] Of particular importance for this appeal, LeBel J. reviewed the changes in the framework for legal relationships between spouses in Quebec since 1980, emphasizing the pivotal moments where greater equality between married spouses was implemented by the Quebec legislature.

[133] LeBel J. begins by observing that in 1866, the matrimonial regime applied where spouses did not enter into a marriage contract was that of "community of moveables and acquests", which was entirely administered by the husband (*Quebec v. A*, at para. 53). LeBel J. goes on to note that in 1931, in order "to give the

wife some autonomy in relation to her husband, the legislature created the category of ‘reserved property’ of the wife[, which] was the property the wife acquired by working outside the household and over which she had certain powers of administration. . . . [U]pon being dissolved, the community, including the wife’s reserved property, was partitioned equally between the spouses” (para. 53).

[134] The spouses could, alternatively, enter into a marriage contract to establish a regime of separation of property. Under this regime, there is no partition upon dissolution; spouses keep their respective patrimonies. Nonetheless, the consequences of the choice of the regime of separation of property, in a context in which wives were not engaged in remunerative activities outside the matrimonial home, could be devastating in the event of separation or divorce (*Quebec v. A*, at para. 61).

[135] In 1981, the Quebec legislature undertook a major reform of family law, introducing the principle that spouses had equal rights and obligations in marriage. As LeBel J. observes:

This principle of equality was reflected in, among other things, the spouses’ obligation to take in hand the moral and material direction of the family together and to choose the family residence together. Other new measures were adopted to ensure adherence to the principle of joint direction by requiring the consent of both spouses for certain acts, such as alienation of the family residence by the spouse who owned it.

(*Quebec v. A*, at para. 69).

[136] In order to remedy the vulnerability of spouses who had married under the regime of separation of property rather than that of community of property or partnership of acquests during the preceding decades, the legislature also “created [a] compensatory allowance mechanism, which entitled each spouse to claim compensation for his or her contribution, in property or services, to the enrichment of the other spouse’s patrimony” (*Quebec v. A*, at para. 70). The compensatory allowance is currently provided for under art. 427 of the *C.C.Q.*

[137] Since this compensatory allowance did not fully remedy the problems experienced by married spouses, the legislature introduced the concept of family patrimony into the *C.C.Q.* via *An Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses*, S.Q. 1989, c. 55 (*Quebec v. A*, at para. 71).

[138] The family patrimony is of public order and applies regardless of the matrimonial regime chosen by the parties. Its creation “provided a basis for equal partition of the net value of certain property, such as the family’s residences, the household furniture used by the family, the vehicles used by the family and rights under retirement plans, regardless of which spouse had a right of ownership in that property” (*Quebec v. A*, at para. 72).

[139] Articles 391, 392, 414, and 416 of the *C.C.Q.* emphasize the importance of spousal equality in marriage dissolution. Moreover, equality and the protection of

vulnerable spouses underlies art. 585 of the *C.C.Q.* which creates support rights for married or civil union spouses.

[140] As a result of these reforms, marriage in Quebec family law is an “egalitarian economic union with a number of patrimonial consequences” (*Quebec v A*, at para. 78), a “joint endeavour” (*Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 870), and a “socio-economic partnership” (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, at para. 49) — regardless of the chosen matrimonial regime (*Quebec v. A*, at para 80). And despite the differences in Quebec’s matrimonial regimes, the *C.C.Q.* generally recognizes the concept of spousal equality in marriage dissolution in a number of ways, including by providing for the equal division of family patrimony, by creating a compensatory allowance mechanism and by codifying support rights for the economically disadvantaged spouse.

[141] The spousal property regime in Quebec allows the spouses to choose together which regime they wish to apply to their property. It is a regime based both on consensus between the parties and the equality of the spouses. Any decision under art. 1096 of the Belgian *Civil Code* in this case undermines both. Nowhere in Quebec law is there even the slightest suggestion that when a marriage dissolves, a spouse can unilaterally change the disposition of property, let alone to do so with no discretion on the part of the court to prevent it or remediate it.

[142] In my respectful view, foreign judgments which annihilate not only countless international instruments regarding the equality of spouses and the

protection of a vulnerable one, but also the very philosophical underpinnings of the provisions in the *C.C.Q.* contradict those conceptions and will not be recognized in Quebec.

[143] The husband has therefore not discharged his burden of demonstrating that a Belgian decision rendered under art. 1096 of the Belgian *Civil Code* could be recognized by a Quebec court and has not, as a result, met the test for a stay. In light of this conclusion, it is unnecessary to consider whether the trial judge properly exercised her residual discretion.

[144] I would allow the appeal.

English version of the reasons delivered by

BROWN J. —

I. Introduction

[145] Unlike my colleague Gascon J., I am of the view that the Quebec Court of Appeal was right to intervene in the discretionary decision of the Quebec Superior Court (“Quebec court”), which declined to order a stay on the basis of international

lis pendens under art. 3137 of the *Civil Code of Québec* (“*C.C.Q.*”). I would therefore dismiss the appeal with costs.

II. Analysis

[146] The applicable analytical approach can be identified simply by reading art. 3137 *C.C.Q.*: on the application of a party, a Quebec authority may stay its ruling (exercise of the discretion) if another action, between the same parties, based on the same facts and having the same subject (condition of identical dispute) is pending before a foreign authority (condition of first filing with the foreign authority), provided that the latter action can result in a decision which may be recognized in Quebec (condition of susceptibility of recognition of the foreign decision).

[147] An identical dispute, the first filing with the foreign authority and the susceptibility of recognition of the foreign decision are *threshold conditions* for the exercise of the discretion. If any one of these threshold conditions is not met, the Quebec authority may not stay its ruling under art. 3137 *C.C.Q.*

[148] In this case, the Superior Court concluded that *none* of the threshold conditions for the exercise of the discretion were met, which meant that art. 3137 *C.C.Q.* did not apply in this case: reasons of Gascon J., at para. 21; Sup. Ct. reasons, at paras. 103 and 124. My colleague concludes, however, as did the Court of Appeal, that “the conditions for the application of art. 3137 *C.C.Q.* are met”: para. 5. Moreover, he does not question the Court of Appeal’s conclusions regarding the

conditions of identical dispute and of first filing with the foreign authority: para. 34. As a result, he fails to address the Superior Court's error of law with respect to the subject of an action, an error which directly affected that court's conclusions relating to the condition of first filing with the foreign authority. In my view, these errors by the Superior Court had a determinative impact on its decision to decline to stay its ruling, as did its errors regarding the condition of susceptibility of recognition of the foreign decision.

[149] My colleague Gascon J. also does not agree "in every respect" with the Superior Court's analysis on the exercise of its discretion: para. 5. To my mind, the Superior Court did not exercise the discretion conferred on it by art. 3137 *C.C.Q.* and therefore did not seriously consider the risk of conflicting judgments, which constitutes an error in this case. It also erred on the issue of the law applicable to the revocation of gifts, that is, on the main issue on which the parties disagree. Finally, as the Court of Appeal noted, the Superior Court did not consider the fact that an eventual Quebec judgment liquidating the parties' matrimonial regime would not be susceptible of recognition in Belgium, where the parties still own numerous assets.

[150] Because of all these errors, the intervention of an appellate court is clearly justified in this case. As a result, exercising a new discretion in the place of the Superior Court, I arrive at the same conclusion as the Court of Appeal: the requested stay should be granted.

A. *Threshold Conditions for the Exercise of Discretion*

(1) Identical Dispute

[151] On August 12, 2014, the respondent, P.R. (“the husband”), applied to the Tribunal de première instance francophone de Bruxelles, Tribunal de la Famille (“Belgian court”) for the following: (1) a judgment granting a divorce; and (2) the liquidation of the matrimonial regime. Three days later, on August 15, 2014, the appellant, R.S. (“the wife”), applied to a Quebec court for the following: (1) a judgment granting a divorce; (2) liquidation of the matrimonial regime; (3) partition of the family patrimony; (4) a compensatory allowance, which she claimed as compensation for the husband’s revocation of the gifts he had made to her during the marriage; (5) support for herself; (6) custody of the children; and (7) support for the children. It must be determined whether, among these various claims, there is an “identical dispute”, that is, whether there is an identity of parties, of facts and of subject as required by art. 3137 *C.C.Q.* The identities of parties and of facts do not raise any problems here: C.A. reasons, at para. 59. Only the identity of subject is at issue.

[152] In domestic law, the subject of an action is the “immediate legal benefit” the plaintiff is seeking: *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440, at p. 452; see also *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, at pp. 413-17; J.-C. Royer and C. Piché, *La preuve civile* (5th ed. 2016), at para. 1029. For there to be an identity of subject, “[i]t is . . . not necessary for the two actions to have identical conclusions; it will suffice if the [subject] of the second action is implicitly included

in the [subject] of the first”: *Rocois*, at p. 451, quoting A. Nadeau and L. Ducharme, *Traité de Droit civil du Québec*, vol. 9 (1965), at pp. 478-79 (emphasis added). Moreover, the identity of what is claimed in each of the actions “does not have to be absolute for there to be identity of [subject]”: *Rocois*, at p. 452. A *lis pendens* situation may exist [TRANSLATION] “if two subjects are so closely related that the arguments about both of them raise the same question regarding performance of the same obligation, between the same parties”: *Pesant v. Langevin* (1926), 41 B.R. 412, at p. 421 (emphasis added). The courts have generally given a broad interpretation to the concept of “subject”, including in family law matters: see, on this point, Royer and Piché, at para. 1030.

[153] In private international law matters, a particularly flexible conception of the subject of an action should be adopted. Because of the specific characteristics of each of the conflicting legal systems, and of the diversity of substantive law concepts and procedural rules that apply in them, it will often happen that the subjects of actions brought in different fora are not perfectly identical. Accordingly, the identity of subject must be [TRANSLATION] “substantial” in the sense that it is necessary to “consider the essential aspects of the actions and not their secondary or incidental aspects”: G. Goldstein, *Droit international privé*, vol. 2, *Compétence internationale des autorités québécoises et effets des décisions étrangères (Art. 3134 à 3168 C.c.Q.)* (2011), at p. 78. As explained by J. A. Talpis with the collaboration of S. L. Kath in “*If I am from Grand-Mère, Why Am I Being Sued in Texas?*”: *Responding to*

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(2001), at p. 56:

In my opinion, a narrow interpretation of the identity of [subjects] could not be what the legislator intended. It is completely inconsistent with the policy behind art. 3137 C.C.Q. which seeks to avoid multiple proceedings and most importantly, risks of inconsistent judgments . . . [F]rom an international perspective, the broad interpretation of identity of [subject] in 3137 C.C.Q. should prevail. [Emphasis added.]

[154] In this case, there is a clear identity of subject where the granting of the divorce is concerned. As the Court of Appeal pointed out, [TRANSLATION] “the main subject of the two judicial applications, in Quebec as in Belgium, is at first glance identical insofar as a judgment granting a divorce to the parties is being sought in both of them”: para. 66. Another conclusion being sought in both actions is the liquidation of the matrimonial regime, so there is also an identity of subject in this regard. But what of the wife’s claims concerning the partition of the family patrimony and the compensatory allowance? Do they have the same subject as the husband’s claim concerning the liquidation of the matrimonial regime? In other words, does the husband’s claim concerning the liquidation of the matrimonial regime implicitly include the wife’s claims concerning the partition of the family patrimony and the compensatory allowance?

[155] In its judgment, the Court of Appeal characterized the family patrimony and the compensatory allowance as “effects of marriage” — and not in terms of the “matrimonial regime” — for private international law purposes: paras. 131-33. By

virtue of art. 3089 *C.C.Q.*, therefore, the Court of Appeal found that the law applicable to these claims was that of the spouses' domicile at the time the divorce action was instituted, that is to say, Quebec law. In Belgian law, too, the law applicable to the [TRANSLATION] "effects of marriage" is that of the spouses' common habitual residence at the time the divorce action was instituted: art. 48 para. 1 of the *Loi portant le Code de droit international privé* ("*CoDIP*"). However, the institutions of family patrimony and compensatory allowance are unknown in Belgian law: see, for example, the examination of *Sylvia Pfeiff* by Luc Giroux, *A.R.*, vol. III, at p. 165. This explains why the Belgian courts are instead inclined to regard the family patrimony and the compensatory allowance as aspects of the matrimonial regime: examination of *Sylvia Pfeiff* by Sylvain Lussier, *A.R.*, vol. III, at pp. 178-79, and by Luc Giroux, *A.R.*, vol. III, at p. 138; examination of *Arnaud Nuyts* by Luc Giroux, *A.R.*, vol. IV, at pp. 18-22.

[156] In Quebec law, the concepts of family patrimony and compensatory allowance were in fact a response to the inequitable outcome that could flow from the matrimonial regime of separation as to property, the regime chosen by the parties in this case: *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at paras. 70, 71 and 74; *P. (S.) v. R. (M.)*, [1996] 2 S.C.R. 842, at p. 853; *Lacroix v. Valois*, [1990] 2 S.C.R. 1259, at p. 1276; *Droit de la famille — 112606*, 2011 QCCA 1554, at para. 68 (CanLII); J. A. Talpis, "Quelques réflexions sur le champ d'application international de la loi favorisant l'égalité économique des époux", [1989] 2 *C.P. du N.* 135, at para. 67. It is therefore not surprising that some authors

assert that these institutions are attached to the “matrimonial regime” in the broad sense of the term. For example, Baudouin J.A. wrote the following in *Droit de la famille* — 977, [1991] R.J.Q. 904 (C.A.), at p. 908:

[TRANSLATION] . . . [T]he family patrimony is a direct effect of marriage and not a sort of supplemental and basic universal matrimonial regime, although it can eventually be attached, in the broad sense of the word, to the regime for the purposes of application of the rules of private international law. [Emphasis added; footnote omitted.]

[157] In the instant case, whether the family patrimony and the compensatory allowance can, for the purposes of private international law, be characterized as “effects of marriage” or as institutions flowing from the “matrimonial regime” is irrelevant to the determination of whether a *lis pendens* situation exists. The existence of such a situation in private international law does not depend on the precise legal characterization of the facts. This is why an identity of cause of action is not required, as the legislature has substituted the identity of facts for it: *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, at paras. 51-52. All that must be done, therefore, is to determine whether there is an identity of subject between the husband’s claim concerning the liquidation of the matrimonial regime and the wife’s claims concerning the family patrimony and the compensatory allowance. In my view there is, and that subject can be defined as the partition of the patrimonial rights resulting from the marriage.¹

¹ Moreover, the husband’s claim with respect to the liquidation of the matrimonial regime directly concerns the parties’ family residence in Quebec; but according to the wife’s claim concerning the

[158] But support for the wife, custody of the children and support for the children are matters of corollary relief in the divorce context that relate to *extrapatrimonial* relations between the parties. Custody relates to the exercise of parental authority (arts. 394, 513, 514, 521 and 599 et seq. *C.C.Q.*; s. 16 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.); M. Tétrault, *Droit de la famille* (4th ed. 2010), vol. 1, at pp. 133 and 139), whereas support has an *extrapatrimonial* nature in civil law (*Droit de la famille — 10829*, 2010 QCCA 713, [2010] R.D.F. 201, at para. 32). The subject of these claims is thus entirely distinct from that of the husband's claim concerning the liquidation of the matrimonial regime, which relates to *patrimonial* rights resulting from the marriage. Their subject is also entirely distinct from the granting of the divorce. In *Droit de la famille — 2561*, [1997] R.D.F. 3, for example, the Court of Appeal concluded that there was no identity of subject between a divorce action brought in France and claims of an interim and provisional nature for child custody and support that had been introduced in Quebec before the divorce action.

(2) First Filing With the Foreign Authority

[159] The Superior Court held that the Quebec court was the *only* court to which claims relating to support for the wife, custody of the children and support for the children had been submitted: para. 101. Because these claims had *not* been

family patrimony, the family residence would be included in the partition of that patrimony. The family residence is also included in the list of gifts revoked by the husband, and the wife seeks to have part of the compensatory allowance she is claiming paid to her by means of a transfer of the husband's undivided half share in the family residence. There is therefore — at least in part — a substantive identity of subject in these various claims.

submitted to the Belgian court — let alone submitted first — the condition of first filing with the foreign authority was *not* met, and the Superior Court was of the view that it therefore could *not* stay its ruling with respect to these claims under art. 3137 C.C.Q.: para. 102. The Superior Court’s conclusion in this regard contains no errors, nor did the parties take issue with it in the Court of Appeal: C.A. reasons, at para. 35. Moreover, it should be stressed that the Belgian court probably did not have the required jurisdiction to rule on the claims relating to the children, given that they did not reside habitually in Belgium at the time the action was instituted: art. 8 of *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*, Official Journal of the European Union, vol. 46, L 388; A.R., vol. VI, at p. 158. On the jurisdiction requirement in the *lis pendens* context, see *Rocois*, at p. 450.²

[160] However, the Superior Court also concluded that the wife’s claims concerning the family patrimony and the compensatory allowance had been submitted to the Quebec court *first*: para. 101. With respect, this is an overriding error.

[161] It is an error in that these claims by the wife are [TRANSLATION] “so closely related” (*Pesant*, at p. 421) to the husband’s claim concerning the liquidation of the matrimonial regime that they must be considered to be “implicitly included”

² The Belgian court likely has jurisdiction nonetheless, but only incidentally to its jurisdiction over the divorce, over the support claimed for the wife, pursuant to art. 3(c) of *Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*; see, on this point, A.R., vol. VI, at p. 157.

(*Rocois*, at p. 451, quoting Nadeau and Ducharme) in his claim, which was submitted to the Belgian court first. Moreover, this is the conclusion drawn by the Cour d'appel de Bruxelles, which found that there was an [TRANSLATION] “imperfect *lis pendens*” situation involving all of the parties’ claims related to partition of the patrimonial rights resulting from the marriage: p. 16.

[162] It is an *overriding* error because, having found that the condition of first filing with the Belgian court was not met where these claims by the wife were concerned, the Superior Court added that the Quebec court was therefore not required to stay its ruling with respect to these claims: para. 103. The Superior Court also stated that, *whatever the outcome of the exercise of its discretion*, [TRANSLATION] “certain patrimonial effects” of the divorce would “in any event” be decided in Quebec: para. 226; see also para. 225. In other words, the Superior Court’s error on the condition of first filing with the foreign authority was the *direct* cause of its decision not to stay its ruling with respect to the wife’s claims concerning the family patrimony and the compensatory allowance. Frankly, it is hard to imagine a more *overriding* error in this context.

[163] Furthermore, in light of paras. 103, 225 and 226 of the Superior Court’s reasons, it must be understood that that court’s exercise of its discretion to decline to stay its ruling, as described in paras. 151 to 223 of the reasons, relates solely to the only two claims — those concerning the granting of the divorce and the liquidation of the matrimonial regime — that had, in the Superior Court’s opinion, been submitted

to the Belgian court first and thereby met the condition of first filing with the foreign authority. The Court of Appeal was therefore necessarily justified in exercising anew the discretion provided for in art. 3137 *C.C.Q.* with regard to *all* of the wife's claims (including those concerning the family patrimony and the compensatory allowance) that had been submitted to the Belgian court first.

(3) Susceptibility of Recognition of the Foreign Decision

[164] I agree with my colleague's analysis regarding the interpretation and application of, first, the condition of susceptibility of recognition of the foreign decision and, second, the burden and the required degree of proof in this regard: paras. 41-64.

[165] As my colleague points out, the Superior Court "erred", and its analysis on this point was, "erroneously, too strict" (paras. 49 and 55), particularly when it applied the test under s. 15 of the *Canadian Charter of Rights and Freedoms* to art. 1096 of the Belgian *Code civil* (paras. 121-24). Thus, [TRANSLATION] "it is only if the result of the decision — and not the reasoning behind it or the law on which that reasoning is based — is contrary to public order that recognition can be denied": P. Ferland and G. Laganière, "Le droit international privé", in *Collection de droit de l'École du Barreau du Québec 2019-2020*, vol. 7, *Contrats, sûretés, publicité des droits et droit international privé* (2019), 271, at p. 334 (emphasis added; footnote omitted).

[166] The Superior Court also expressed the opinion that a Quebec authority must decline to stay its ruling where [TRANSLATION] “there is a great risk” that the foreign decision will not be susceptible of recognition in Quebec: para. 124. In so doing, as my colleague notes, the Superior Court imposed “on the husband a more onerous burden of proof than the one he bore under art. 3137 *C.C.Q.*”, since the husband only had to show that there was a “possibility” that the foreign decision would be recognized in Quebec: para. 57.

[167] Unlike my colleague, however, I cannot accept that the Superior Court’s errors regarding the susceptibility of recognition condition had no impact on its exercise of discretion. As my colleague explains, “the international *lis pendens* exception is intended to allow the domestic court to stay its ruling in order to eventually give effect to the foreign decision in Quebec for the specific purpose of avoiding a situation in which parallel proceedings result in inconsistent decisions that could both have effects in Quebec” (para. 46 (emphasis added)); yet he also states, “[i]f recognition is not possible, there could not be conflicting judgments” (para. 39), and it would therefore be “pointless to stay a ruling if it is clear that the foreign proceedings cannot result in a decision that is susceptible of recognition in Quebec” (para. 45).

[168] Given the Superior Court’s conclusions on the susceptibility of recognition condition, it cannot be assumed that that court gave the objective of

avoiding the risk of conflicting judgments the consideration it deserves in the exercise of the discretion.

[169] Moreover, it was *no longer* open to the Superior Court to order a stay under art. 3137 *C.C.Q.* after it had found that the condition of susceptibility of recognition of the foreign decision was not met. It therefore cannot be assumed that that court seriously contemplated the possibility of staying its ruling when considering the exercise of its discretion.

B. *Exercise of the Discretion*

(1) Purposes of the Exercise of the Discretion

[170] The discretion conferred on the Quebec authority by art. 3137 *C.C.Q.* has two purposes. First, it is intended to prevent abusive forum shopping, a practice that would on the contrary be encouraged if the Quebec authority systematically deferred to a first filing with a foreign authority: Goldstein, at p. 88. Second, the international *lis pendens* exception is also intended to avoid a multiplicity of proceedings and a risk of conflicting judgments: F. Sabourin, “Motifs permettant de ne pas exercer la compétence: *forum non conveniens* et litispendance internationale”, in *JurisClasseur Québec — Collection droit civil — Droit international privé* (loose-leaf), by P.-C. Lafond, ed., fasc. 9, at para. 1; Goldstein, at p. 69. In fact, the [TRANSLATION] “risk of contradictory judgments” can be regarded as “the foundation of *lis pendens*”: Goldstein, at p. 74; see also *Rocois*, at p. 448 (“[b]oth exceptions [*lis pendens* and *res*

judicata] serve similar mediate purposes, being designed essentially to avoid a multiplicity of court proceedings and the possibility of contradictory judgments”).

[171] These purposes are consistent with the principles of comity, order and fairness, which “serve to guide the determination of the principal private international law issues”: *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, at para. 21. International comity in particular is “[o]ne of the key principles underpinning the various private international law rules”: *Spar*, at para. 15. As my colleague notes, one of the underlying purposes of art. 3137 *C.C.Q.* is in fact “to foster international comity”: para. 48. J. Walker explains that questions of “comity with the courts of other countries [may] militat[e] in favour of granting a stay”: *Canadian Conflict of Laws* (6th ed. (loose-leaf)), vol. 1, at p. 13-25.

[172] In the case at bar, as I have already recounted, the Superior Court did not exercise the discretion conferred on it by art. 3137 *C.C.Q.*, which means that it could not have seriously considered the risk of conflicting judgments. In fact, it ruled out this risk, asserting that the Cour d’appel de Bruxelles, in rendering its judgment, *could* — if the Superior Court has then assumed jurisdiction — purely and simply decline jurisdiction in respect of the claims concerning the partition of the family patrimony and the compensatory allowance pursuant to art. 14 *CoDIP* given that these claims were submitted to the Belgian court second: para. 97.

[173] The Superior Court added that the Cour d’appel de Bruxelles [TRANSLATION] “could also [on the basis of the court’s inherent authority to control

its own process] decide to order a stay on the only two claims that were submitted in Belgium before being submitted in Quebec, namely the claim concerning the divorce and the one concerning the liquidation of the matrimonial regime of separation as to property”: para. 98. This meant, in the Superior Court’s view, that the Cour d’appel de Bruxelles “could order a stay or decline jurisdiction with regard to all the disputes”: para. 100.

[174] These statements by the Superior Court present difficulties.

[175] First, as I pointed out above, the Superior Court erred in finding that the claims concerning the partition of the family patrimony and the compensatory allowance had been submitted to the Quebec court first. On the contrary, these claims were submitted to the Belgian court first.

[176] Second, the Superior Court’s statement that the Cour d’appel de Bruxelles could also order a stay with respect to the claims that it acknowledged to have been submitted to the Belgian court first (the granting of the divorce and the liquidation of the matrimonial regime) is based on the debatable opinion of the appellant’s expert, Arnaud Nuyts, who asserted that the Belgian court has an inherent power to order a stay *even though the conditions of art. 14 CoDIP* (which requires, *inter alia*, that the claims were submitted to the Belgian judge *second*), a provision similar to art. 3137 *C.C.Q.*, *are not met*: examination of Arnaud Nuyts by Luc Giroux, A.R., vol. IV, at pp. 92-99.

[177] In any event, we now know that the Cour d'appel de Bruxelles upheld the Belgian court's judgment and declined to order a stay. Clearly, the Superior Court should not have disregarded as it did the risk of conflicting judgments being rendered by the Quebec and Belgian courts. With respect, that was an error of law. The discretion provided for in art. 3137 *C.C.Q.* cannot be exercised without giving serious consideration to the very purpose of this article, which is to avoid conflicting judgments.

(2) Principles Applicable to the Exercise of the Discretion

[178] As my colleague Gascon J. points out, the courts and the authors recommend that the criteria developed in the context of the doctrine of *forum non conveniens* be applied to international *lis pendens* cases (paras. 71 and 74). In *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, LeBel J. listed the following criteria: “the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties” (para. 110 (emphasis added)). See also *Oppenheim Forfait GmbH v. Lexus maritime inc.*, 1998 CanLII 13001 (Que. C.A.), at pp. 7-8; *Spar*, at para. 71.

[179] Like my colleague, I agree with the Court of Appeal that these criteria must be [TRANSLATION] “assessed from the specific perspective of article 3137

C.C.Q., which is not the same as that of article 3135 *C.C.Q.*” (para. 76, quoting para. 124 of C.A. reasons; see also Talpis (2001), at pp. 57-58). The legislature has provided that the Quebec court’s power to decline to exercise its jurisdiction on the basis of *forum non conveniens* is *exceptional* in nature: art. 3135 *C.C.Q.* (“a Québec authority . . . may, exceptionally and on an application by a party, decline jurisdiction”); C. Emanuelli, *Droit international privé québécois* (3rd ed. 2011), at para. 167; *Spar*, at paras. 77-81; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 33; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279, at para. 37. In contrast, ordering a stay in a case of international *lis pendens* under art. 3137 *C.C.Q.* is *not* exceptional; in a spirit of cooperation based on international comity, Quebec courts are in fact quite open to doing so (Goldstein, at p. 76; *Birdsall Inc. v. In Any Event Inc.*, [1999] R.J.Q. 1344, at p. 1351 ([TRANSLATION] “Article 3137 *C.C.Q.* confers on the court a power to order a stay that, despite its discretionary nature, is nonetheless not at all exceptional”); 2493136 *Canada inc. v. Sunburst Products Inc.*, 1996 CanLII 4459 (Que. Sup. Ct.), at para. 57).

[180] I accordingly do not consider it necessary for the defendant (i.e., the party raising the exception based on international *lis pendens*) to establish that the foreign authority is “clearly more appropriate”, as is the case in the context of *forum non conveniens*: see, e.g., *Lépine*, at paras. 108-9; *Spar*, at para. 70; *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666, at para. 23; *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30, [2016] 1 S.C.R.

851, at para. 52. In *Van Breda*, at paras. 108-9, LeBel J. clearly linked the requirement to show that the other court is “clearly more appropriate” to the exceptional nature of the power of a Quebec authority to decline jurisdiction on the basis of *forum non conveniens*. I am therefore of the opinion that, in the context of international *lis pendens*, it is enough for the defendant to show that the foreign authority is an “appropriate” forum. In other words, the defendant will fail only if the Quebec authority concludes that the foreign authority is “inappropriate”, that is, that it is a *forum non conveniens*: see, for example, G. Goldstein and E. Groffier, *Droit international privé*, vol. I, *Théorie générale* (1998), at p. 328; H. P. Glenn, “Droit international privé” in *La réforme du Code civil*, vol. 3, *Priorités et hypothèques, preuve et prescription, publicité des droits, dispositions transitoires* (1993), 669, at p. 746.

(3) Application of the Law to the Facts of the Case

(a) *Preventing Abusive Forum Shopping*

(i) Existence of Real and Substantial Connections With Belgium

[181] The Court of Appeal found that there were [TRANSLATION] “real and substantial connections” between the husband and Belgium; it added that the husband’s choice of the Belgian court had not resulted from abusive forum shopping (para. 146). In my opinion, the Court of Appeal’s finding on this point is well founded. Moreover, it is consistent with the findings of the Belgian court and the

Cour d'appel de Bruxelles, which also noted the existence of numerous connections with Belgium and rejected the wife's argument regarding alleged abusive forum shopping on the husband's part: A.R., vol. VI, at p. 46; judgment of the Cour d'appel de Bruxelles, at p. 16 ([TRANSLATION] "the parties had been living in Quebec for only 13 months when the proceeding was filed, whereas they had lived for nearly 9 years in Belgium, where they had married, entered into their marriage contract and maintained their secondary residence and numerous assets").

(ii) Does the Husband's Choice of the Belgian Forum Give Him an Unwarranted Advantage?

[182] It should first be mentioned in this regard that — contrary to the Superior Court's conclusion at para. 200 of its reasons — under the Quebec rules of private international law, *Belgian* law is the law applicable to the revocation of the gifts, at least — as the Court of Appeal rightly pointed out at para. 135 of its reasons — in respect of the gifts that were given while the parties were residing in Belgium, that is, between December 21, 2004 and July 4, 2013: see arts. 3111 to 3113 *C.C.Q.* This means that the husband would be able to invoke art. 1096 of the Belgian *Code civil* regardless of whether it was a *Quebec court* or a *Belgian court* that heard the case, which seriously undercuts the argument that the husband gained an unwarranted advantage by choosing the Belgian court.³ Contrary to what my colleague states, I find that the Court of Appeal neither "qualified" nor "tempered" the Superior Court's

³ It should be pointed out, however, that the Cour d'appel de Bruxelles reserved its decision on the law applicable to the revocation of the gifts (and on the related "prejudicial question"); nevertheless, the Belgian court had clearly decided that the revocation issue would be governed by Belgian law.

conclusion regarding the law that must govern the revocation of the gifts; rather, the Court of Appeal *corrected* an error of the Superior Court concerning an important aspect of the exercise of its discretion. As my colleague acknowledges, it is “because of [the] revocation [of the gifts] that the choice of forum is the main issue of the litigation between the parties”: para. 13, referring to C.A. reasons, at para. 50, and Sup. Ct. reasons, at para. 61.

(iii) Is the Effect of the Choice of the Belgian Forum To Unjustly Deprive the Wife of a Juridical Advantage?

[183] It is not clear that the choice of the Belgian forum would unjustly deprive the wife of a juridical advantage. At first instance, the Belgian court accepted that the compensatory allowance should be characterized as a [TRANSLATION] “juridical effect of marriage” and that Quebec law should be applied in accordance with art. 48 para. 1 *CoDIP*: A.R., vol. VI, at p. 49. It is true that the Cour d’appel de Bruxelles reversed the judgment of the Belgian court on this point because, in its view, such an institution was part of the matrimonial regime and should be governed by Belgian law: p. 25. However, the wife appealed the judgment of the Cour d’appel de Bruxelles to Belgium’s Cour de cassation. Furthermore, as my colleague points out, it is possible that, in Belgian law, “the doctrine of unjust enrichment” would “take the place of the Quebec institution of the compensatory allowance”: para. 61. And the Cour d’appel de Bruxelles made the same observation in its judgment, at p. 25. Similarly, whereas the Belgian court considered that the family patrimony was part of the matrimonial regime and should therefore be governed by Belgian law under

arts. 49 and 51 *CoDIP*, the Cour d'appel de Bruxelles instead reserved its decision on the law applicable to the partition of the family patrimony: A.R., vol. VI, at p. 49; judgment of the Cour d'appel de Bruxelles, at p. 24.

(b) *Avoiding a Multiplicity of Proceedings and the Possibility of Conflicting Judgments*

[184] Where, as in this case, a foreign authority to which a dispute was submitted first is an appropriate forum, the Quebec authority should be circumspect in exercising its discretion to not stay its ruling.

[185] First, if the Quebec authority declines to stay its ruling, two undesirable scenarios could arise. The first is that the Quebec authority and the foreign authority could render conflicting judgments. The second is that the Quebec proceedings could prove to be pointless in the event that the foreign authority to which the dispute was submitted first rendered its decision before the Quebec court. It would then be possible for the foreign decision to be recognized in Quebec provided that it meets the requirements of art. 3155 *C.C.Q.*, which would cause the Quebec proceedings then under way to be dismissed on the basis of *res judicata*. It must be noted in this regard that the ground for not recognizing foreign decisions set out in art. 3155(4) *C.C.Q.* in the context of *lis pendens* does not apply where the dispute was not submitted to the Quebec authority first: G. Saumier, "The Recognition of Foreign Judgments in Quebec — The Mirror Crack'd?" (2002), 81 *Can. Bar Rev.* 677, at pp. 696 and 698. It goes without saying that if the foreign proceedings are at an advanced stage or, worse,

if a foreign decision has already been rendered, and if it is *clear* that none of the exceptions set out in art. 3155 *C.C.Q.* apply to such a decision, the Quebec court could have no choice but to stay its ruling, as the Court of Appeal noted at para. 94 of its reasons (although I agree that its choice of words may have been injudicious). In the instant case, the Superior Court judge played down the seriousness of the risk of this second scenario occurring, indicating that a final decision in Belgium may not be rendered for some 10 to 15 years and adding that it was not *clear* that the Belgian judgment would be susceptible of recognition in Quebec: paras. 124 and 174-76.

[186] Second, if the Quebec authority were to exercise its discretion not to stay its ruling, there might then be a real risk that the Quebec decision would not be susceptible of recognition by the foreign authority to which the dispute was submitted first specifically because of the Quebec authority's violation of the *lis pendens* rule: see, e.g., art. 25(6) *CoDIP*. Likewise, if a foreign authority fails to observe this rule and declines to order a stay in favour of a Quebec authority to which the dispute was submitted first, the foreign authority's decision cannot be recognized by the Quebec authority: art. 3155(4) *C.C.Q.*; see, on this point, *Lépine*, at paras. 49-50; Glenn, at pp. 763-64.

[187] As my colleague notes, the fact that a Quebec decision is not recognized in another country may not always be an important — or even a relevant — factor: paras. 88-89. For example, if the dispute was submitted to the foreign forum on the basis of the spouses' common nationality but they had ceased residing in that country

long before and no longer owned any property there, a decision not to recognize the Quebec decision in the other country could be of no practical consequence and would therefore be irrelevant to the analysis. In the case at bar, it is in my view an important factor, however, as the parties have numerous assets in Belgium, which means that a Quebec judgment that cannot be recognized in that country could be of no effect in respect of those assets.

[188] But that is not all. It makes no sense for a Quebec court to partition the numerous assets located *outside Quebec*, given that the resulting judgment would not be susceptible of recognition at the place where the assets are located. The effect of such a situation would be, purely and simply, a waste of invaluable judicial resources. I therefore find that the Court of Appeal was also right to note that the Superior Court had failed to take this factor into consideration.

III. Conclusion

[189] I would dismiss the appeal with costs.

Appeal allowed with costs throughout, BROWN J. dissenting.

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