COMITY AND THE ANTI-SUIT INJUNCTION: DEVELOPMENTS SINCE *AMCHEM*

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I. INTRODUCTION

The anti-suit injunction is a controversial form of relief.[1] The House of Lords has described it as an "important and valuable" remedy that promotes the objectives of commercial arbitration.[2] The Supreme Court of Canada has described it as an "aggressive remedy" that "raises serious issues of comity".[3] Consonant with its remarks, the Supreme Court of Canada created a high bar to obtain an anti-suit injunction in *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)* ("*Amchem*"). The Supreme Court's cautionary approach is apposite where a claimant seeks anti-suit injunctive relief on the basis that they are being vexed or oppressed by legal proceedings commenced in a foreign forum. The Alberta Court of Appeal's recent decision in *Pe Ben Oilfield Services (2006) Ltd v Arlint* ("*Pe Ben*") reinforces that view.[4] However, neither *Amchem* nor *Pe Ben* were concerned with the enforcement of arbitration agreements.

A line of authority is emerging in the Canadian jurisprudence which distinguishes *Amchem* where the claimant seeks specific

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* Of the Alberta and Ontario bars.

[1] Thomas Raphael, *The Anti-Suit Injunction*, 2nd ed (Oxford: OUP, 2019) at para 1.01.

[2] *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA & Ors*, [2007] UKHL 4 at para 19, per Lord Hoffmann. See also at paras 29—30, per Lord Mance; *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* (Rev1), [2020] UKSC 38 at paras 175—176 [*Enka Insaat*].

[3] *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)*, 1993 CanLII 124 (SCC), [1993] 1 SCR 897 at 912—913 [*Amchem* cited to SCR].

[4] *Pe Ben Oilfield Services (2006) Ltd v Arlint*, 2019 ABCA 400 [*Pe Ben*].

relief to enforce a contractual right not to be sued in a particular forum. The jurisprudence originates with motions for anti-suit relief to enforce arbitration agreements and forum selection clauses,[5] as well as from stay motions to enforce arbitration agreements and forum selection clauses.[6] This article aims to show that developments in the jurisprudence since *Amchem*, including decisions of the Supreme Court itself, undermine the authority of *Amchem* in the commercial arbitration context such that a different test is required.

Where the anti-suit injunction is sought in aid of an arbitration agreement, the order, which only operates *in personam* in any event, merely serves to hold the parties to their bargain. Comity does not "justify exceptional diffidence where the injunction is based on a breach of contract".[7] If the claimant demonstrates that proceedings have been commenced in another forum contrary to the terms of a valid and applicable arbitration agreement, the court should normally exercise its discretion to grant an anti-suit injunction, unless the responding party demonstrates a "strong cause" to not grant the relief.[8] The court retains a discretion to decline relief because the anti-suit injunction is equitable in nature and must be granted in accordance with equitable principles.[9]

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[5] *Lincoln General Insurance Co v Insurance Corp of British Columbia*, [*Lincoln General*]; *Li v Rao*, 2019 BCCA 264 [*Li*]. In this article, "forum selection clauses" refers to an agreement between contracting parties to bring their disputes in the courts of a particular national or subnational jurisdiction on an exclusive basis. Non-exclusive forum selection clauses are not covered in this article.

[6] *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27 [*ZI Pompey*]; *TELUS Communications Inc v Wellman*, 2019 SCC 19 [*Wellman*].

[7] *Li*, *supra* note 5 at para 73, paraphrasing Lord Millet in *Aggeliki Charis Compania Maritima SA v Pagnan SpA*, [1995] 1 Lloyd's Rep 87 at 96.

[8] *ZI Pompey*, *supra* note 6 at paras 19—21; *Li*, *supra* note 5 at para 59.

[9] Michael Douglas, "Anti-Suit Injunctions in Australia" (2017) 41:1 Melb U L Rev 66 at 78; Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford: OUP, 2008) at paras 6.58—6.63.

Part II of this article provides a brief background discussion on the anti-suit injunction and its relationship to the comity principle. Part III introduces the taxonomy deployed in the article's analysis of the Canadian jurisprudence. In short, the article proceeds by classifying the case law into two branches: the equitable rights branch and the contractual rights branch. The objective of this taxonomy is to provide a principled basis for understanding why it is that courts apply different standards in cases that address the same relief. Part IV proceeds with an analysis of the cases, beginning with the equitable rights branch before moving to the contractual rights branch. The main takeaways are that the comity principle speaks with its greatest force under the equitable rights branch and that it carries less importance under the contractual rights branch. Part V concludes the article.

II. THE ANTI-SUIT INJUNCTION AND THE ROLE OF COMITY

The anti-suit injunction is an equitable remedy. It is a form of injunction. More specifically, it is an order requiring the enjoined party not to commence, to cease to pursue, or to terminate court proceedings in a foreign jurisdiction.[10] The anti-suit injunction grew out of the Court of Chancery's practice of enjoining a party from commencing or continuing proceedings in the common law courts of England.[11] Equity acts *in personam* and, from its earliest equitable origins, the anti-suit injunction has always been directed at the party sought to be enjoined, rather than the court in which proceedings have been commenced.[12]

The anti-suit injunction is seen as being in tension with the comity principle. Comity is the "the deference and respect due by other states to the actions of a state legitimately taken within

[10] Raphael, *supra* note 1 at para 1.05.

[11] Dr. Andrew S Bell & Justice Gleeson, "The Anti-Suit Injunction" (1997) 71 Aust LJ 955 at 956; Douglas, *supra* note 9 at 70.

[12] *Ibid* at 956—957.

its territory".[13] Comity is not a positive legal rule or obligation.[14] It is, rather, a principle guiding the development of private international law jurisprudence.[15] The anti-suit injunction is said to be in conflict with the comity principle because, although the injunction operates *in personam*, it has the indirect effect of deciding a jurisdictional issue on behalf of a foreign court.[16]

III. TAXONOMY OF THE ANTI-SUIT INJUNCTION JURISPRUDENCE

Taxonomy is an important exercise for preserving and promoting the rationality of law.[17] Authors in this field have not, however, adopted a uniform way of categorizing the anti-suit injunction jurisprudence. One author divides the jurisprudence between "contractual" injunctions and "alternative forum" injunctions.[18] These labels overlap, however. The "alternative forum" label describes the existence of another forum in which the enjoined foreign proceeding could, and ought to be, pursued.[19] But, so-called "contractual injunction" cases typically also involve an alternative forum that is provided for by an arbitration agreement or forum selection clause. The "alternative forum" category could, therefore, encompass what is supposed to constitute a separate category for "contractual injunctions".

Other authors prefer to categorize the jurisprudence according to the nature of the equitable jurisdiction exercised by the court granting the remedy, being equity's auxiliary

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[13] *Morguard Investments Ltd v De Savoye*, 1990 CanLII 29 (SCC), [1990] 3 SCR 1077 at 1095.

[14] *Ibid* at 1096.

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

[16] *Amchem*, *supra* note 3 at 913.

[17] Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26:1 UW Aust L Rev 1 at 3—6.

[18] Raphael, *supra* note 1 at para 1.09.

[19] *Ibid*.

jurisdiction and equity's exclusive jurisdiction.[20] However, categorizing anti-suit injunctions according to the equitable jurisdictions historically exercised by the Court of Chancery obscures more than it clarifies. In Canada, the superior courts of the common law provinces have all of the subject-matter jurisdiction historically exercised by the Court of Chancery in England such that jurisdiction is not a significant consideration in the jurisprudence. In short, a taxonomy focused on jurisdiction directs the mind to the wrong issue.

But, the effect of categorizing the jurisprudence according to the Chancery's historical bases for jurisdiction is to categorize the jurisprudence according to the nature of the right protected by the anti-suit injunction. Equitable intervention in the auxiliary jurisdiction protects a claimant's legal rights where the ordinary remedy at common law (i.e. damages) is inadequate.[21] Equitable intervention in the exclusive jurisdiction protects a claimant's equitable right not to be vexed or oppressed by the respondent's unconscientious use of its legal rights.[22] Thus, the real difference between the categories lies in the distinct rights vindicated by the remedy, rather than the nature of the equitable jurisdiction exercised by the court or the presence of an alternative forum in which to pursue the claim.

This article categorizes the jurisprudence according to the distinct rights protected by the remedy. The first branch is referred to as the "anti-suit injunction in aid of equitable rights" or the "equitable rights branch". The equitable rights branch is concerned with the protection of a purely equitable right not to be vexed or oppressed by proceedings commenced in another forum.[23] The second branch is referred to as the "anti-suit

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[20] Bell & Gleeson, *supra* note 11 at 958.

[21] Bell & Gleeson, *supra* note 11 at 963; JD Heydon, MJ Leeming, PG Turner, *Meagher, Gummow & Lehane*'s *Equity: Doctrine & Remedies*, 5th ed. (Victoria: Butterworths, 2015) at paras 1—100.

[22] *Ibid* note 11 at 959.

[23] Briggs, *supra* note 9 at paras 6.23—6.26.

injunction in aid of contractual rights" or the "contractual rights branch". Arbitration agreements and forum selection clauses are the primary kind of contractual right contemplated under the contractual rights branch. It is hoped that this taxonomy provides clarity while also maintaining the traditionally distinct but related roles of rights and remedies in private law.[24]

As discussed below, a major difference between the contractual rights branch and the equitable rights branch is the weight that judicial comity commands in the analysis of whether an anti-suit injunction should be granted in a given case.

IV. THE ANTI-SUIT INJUNCTION IN AID OF EQUITABLE RIGHTS

Although commonly granted in aid of legal rights, an injunction may be granted to protect a purely equitable right.[25] This branch of the anti-suit injunction jurisprudence follows the classic equitable form of a right that has as its subject the right of another party.[26] That is, the equitable right protected by the anti-suit injunction has as its subject the unconscientious use of another party's right to commence legal proceedings in another forum.[27] Thus, the right at stake has as its subject a legal right granted by a foreign legal system. The case law demonstrates that comity has a very significant role in the analysis where the remedy is sought in aid of equitable rights.

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[24] See *Day v Brownrigg* (1878), 10 Ch D 294 at 304, per Jessel MR; Robert Stevens, *Torts and Rights* (Oxford: OUP, 2007) at 57—62; Ernest J Wenrib, *Corrective Justice* (Oxford: OUP, 2012) at 81—116.

[25] Paul S Davies, *"Injunction" in Snell's Equity*, 34th ed., JA McGhee and S Elliot eds (London: Thomson Reuters, 2020) at paras 18—01; Heydon et al, *supra* note 21 at paras 21—015.

[26] See Ben McFarlane & Robert Stevens, "What's Special about Equity? Rights about Rights" in *Philosophical Foundations of the Law of Equity*, Dennis Klimchuk, Irit Samet, and Henry E Smith eds (Oxford: OUP, 2020) at 191—209.

[27] Bell & Gleeson, *supra* note 11 at 959.

In *Amchem*, a group of American companies involved in the manufacture, sale, and supply of Asbestos (the "Asbestos Companies") sought an anti-suit injunction to enjoin a group of 194 persons comprised mostly of residents of British Columbia, from pursuing an action against the Asbestos Companies in Texas for asbestos-related harms.[28] The Asbestos Companies were successful at first instance and at the Court of Appeal. However, in a unanimous decision, the Supreme Court allowed the appeal, reversed the lower courts, and made wide ranging comments on the nature of the anti-suit injunction.

The Court framed the issue in broad terms by asking "on what principles should a court exercise its discretion to grant an anti-suit injunction".[29] It described the anti-suit injunction as an "aggressive remedy" that "raises serious issues of comity", because it has the effect of enjoining a foreign court from hearing a case.[30] In articulating the test to grant an anti-suit injunction, the Court stated that it is "preferable" that the foreign court not be interfered with until the applicant for the injunction in the domestic court has sought a stay of the proceeding from the foreign court.[31] According to the Court, comity "demands" no less than that Canadian courts refrain from granting an anti-suit injunction when a foreign court assumes jurisdiction on a basis that generally conforms to the Canadian doctrine of *forum non conveniens*.[32]

Amchem has been criticized for elevating comity—a principle of interpretation—to that of a binding rule or obligation, particularly by requiring that the claimant first seek a stay in the foreign jurisdiction.[33] The merits or demerits of the

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[28] *Amchem*, *supra* note 3 at 905.

[29] *Ibid* at 911.

[30] *Ibid* at 913.

[31] *Ibid* at 931.

[32] *Ibid* at 934.

[33] Bell & Gleeson, *supra* note 11 at 969.

Supreme Court's approach need not be resolved in this article. For present purposes, it is sufficient to observe that *Amchem* was not a case concerned with the enforcement of an arbitration agreement or forum selection clause. The injunction was not sought in aid of contractual rights. The high bar for relief established because of the comity principle should not, therefore, be read as applicable without qualification or modification to the contractual rights branch of the anti-suit injunction jurisprudence.

The Alberta Court of Appeal's decision in *Pe Ben Oilfield Services (2006) Ltd v Arlint* should dispel any doubts about comity's significant role under the equitable rights branch.[34] Pe Ben Oilfield Services ("Pe Ben") sought an anti-suit injunction in Alberta to restrain a worker, Ms. Arlint, from pursuing a personal injury action against it in British Columbia.[35] Ms. Arlint had been injured in British Columbia by an employee of Pe Ben and she received compensation for her injury from the Workers' Compensation Board of Alberta (the "Board").[36] Ms. Arlint was precluded by an Alberta statute from pursuing any causes of action she may have had against Pe Ben or its employee in Alberta as a result of her acceptance of the compensation from the Board.[37] She then commenced an action in British Columbia (the "BC Action") against Pen Ben alleging that Pe Ben's employee had negligently caused her injuries. Pe Ben was unsuccessful in seeking an anti-suit injunction at first instance and on appeal.

The Alberta Court of Appeal strongly emphasized the role of comity, elevating it to a rule of direct application above all other considerations. After finding that the British Columbia courts had jurisdiction *simpliciter* over the BC action, the Court offered

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[34] *Pe Ben*, *supra* note 4.

[35] *Ibid*.

[36] *Ibid* at paras 3—5.

[37] *Ibid* at para 6.

no further analysis of the grounds on which an anti-suit injunction may be awarded other than to conduct what it styled as "a comity analysis".[38] The Court also held that Pe Ben was required to first seek a stay in British Columbia before seeking an anti-suit injunction in Alberta, because proceeding otherwise would be "contrary to the principles of private international law, conflict of laws, and comity".[39]

If the Supreme Court sought to set a high bar for obtaining relief in *Amchem*, the Court of Appeal's decision in *Pe Ben Oilfield Services* has followed that trajectory - and then some - by setting an almost insurmountable bar to obtaining an anti-suit injunction under the equitable rights branch. However, there are good reasons to read *Pe Ben Oilfield Services* narrowly. The Court appears to have been especially concerned for comity between provincial jurisdictions within the Canadian federation.[40] Further, as there was no arbitration clause or forum selection clause at issue, *Pe Ben Oilfield Services* has no application under the contractual rights branch.

V. THE ANTI-SUIT INJUNCTION IN AID OF CONTRACTUAL RIGHTS

The Supreme Court's failure to distinguish between the equitable rights branch and the contractual rights branch in *Amchem* has caused some confusion in the jurisprudence. After *Amchem*, it was unclear whether the *forum non conveniens* test should be applied even when the claimant seeking the anti-suit injunction had a contractual right not to be sued in the foreign forum.[41] A different test is warranted, however, because there are distinct rights at stake. Under the contractual rights branch, equity intervenes to hold the parties to their bargain. Arbitration agreements and forum selection clauses entail a

[38] *Pe Ben*, *supra* note 4at paras 18—23.

[39] *Ibid* at para 8.

[40] *Ibid* at paras 10, 20, 24.

[41] See Janet Walker, "A Tale of Two Fora: Fresh Challenges in Defending Multijurisdictional Claims" (1995) 33 Osgoode Hall LJ 549 at 555.

negative covenant not to litigate in other fora.[42] The Court of Chancery would restrain a breach of a negative covenant almost as of right because the parties to a contract have a right to expect its performance.[43] Hence, the gradual emergence of a distinct contractual rights branch in the anti-suit injunction jurisprudence.

The confusion caused by *Amchem* was evident in *Lincoln General Insurance Co v Insurance Corp of British Columbia* ("*Lincoln General*"). Lincoln General Insurance Co. ("Lincoln") and Insurance Corp. of British Columbia ("ICBC") agreed to arbitrate a coverage dispute in Ontario.[44] Subsequently, ICBC commenced an application in British Columbia for a declaration on the same subject-matter.[45] The Superior Court granted Lincoln an anti-suit injunction restraining ICBC from proceeding in British Columbia.[46] For the Court, the presence of an arbitration clause was sufficient to reduce the *Amchem* test to a simple question "of the enforcement of arbitration provisions".[47] However, the Court proceeded to apply *forum non conveniens* principles out of an abundance of caution.[48] Despite the understandable lack of clarity, the Court's acknowledgement that allowing a court proceeding on the same matter in a foreign jurisdiction "would render [Lincoln's] rights to arbitration

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[42] *Ust -Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP*, [2013] UKSC 35 at para 1; *Enka Insaat*, *supra* note 2 at para 174; Raphael, *supra* note 1 at para 7.02.

[43] *Doherty v Allman* (1878) 3 App Cas 709 at 720, per Lord Cairns LC; Davies, *supra* note 25 at paras 18—035; Heydon et al, *supra* note 21 at paras 21—195.

[44] *Lincoln General*, *supra* note 5 at para 38.

[45] *Ibid* at para 11.

[46] *Ibid* at para 84.

[47] *Lincoln General*, *supra* note 5 at para 74.

[48] *Ibid* at paras 75—81.

nugatory" provides the seed for further development of a distinct contractual rights branch of the jurisprudence.[49]

The seed planted in *Lincoln General* grew to fruition in *Li v Rao* ("*Li*").[50] The BC Court of Appeal clarified that *forum non conveniens* principles do not apply under the contractual rights branch and that comity has a lesser role to play in this branch of the jurisprudence. The dispute arose out of the breakdown of Li and Rao's marriage and concerned the disentangling of their financial and business affairs. Rao commenced an action in British Columbia seeking the return of investment capital.[51] Li applied for summary judgment against Rao in this action. After the summary judgment application was filed, Rao initiated arbitration proceedings in China for the same relief.[52] Subsequently, Rao agreed not to take any further steps in the arbitration until the courts of British Columbia decided on Li's summary judgment application (the "Standstill Agreement").[53] Rao, nonetheless, proceeded with the arbitration and attempted to discontinue the civil action he had commenced in British Columbia.[54] Li sought, and obtained, an anti-suit injunction (or "anti-arbitration injunction" as it were) in British Columbia to restrain Rao from proceeding with the arbitration.[55] The BC Court of Appeal affirmed the lower court's order granting the anti-suit injunction.

The Court distinguished the case before it from *Amchem* on the basis that the Standstill Agreement constituted a forum

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[49] *Lincoln General*, *supra* note 5 at paras 74, 78.

[50] *Li*, *supra* note 5.

[51] *Ibid* at para 12.

[52] *Ibid* at paras 7—8, 15.

[53] *Ibid* at para 17.

[54] *Ibid* at paras 18—20.

[55] *Ibid* at para 42.

selection clause in favour of British Columbia.[56] Drawing on English jurisprudence, the Court adopted a "strong cause test" and held that "there is no reason for this Court not to…grant anti-suit injunctions on a contractual basis in appropriate circumstances".[57] The Court observed that comity concerns arising from the grant of an anti-suit injunction are less significant where the ground for imposing the injunction is contractual, because in that circumstance the court "is not deciding that the domestic forum is the more appropriate forum" rather "it is enforcing the parties' contractual agreement not to proceed in the domestic forum".[58] The Court did not require Li to obtain a stay from the arbitral tribunal because "neither comity nor the objectives of arbitration justify exceptional diffidence where the injunction is based on a breach of contract".[59] Thus, it is the agreement of the parties not to sue in the foreign forum that calls for a different test than that laid down in *Amchem*. As there was no "strong cause" not to grant the anti-suit injunction, the appeal was dismissed.[60]

The holding in *Li* dovetails with related Supreme Court jurisprudence subsequent to *Amchem*. In *ZI Pompey Industrie v ECU-Line NV* ("*ZI Pompey*"), the Supreme Court held that *forum non conveniens* principles are abrogated in favour of a "strong cause" test in the case of applications for a stay of domestic Canadian proceedings based on a forum selection clause.[61] The strong cause test reverses the onus by requiring the party resisting enforcement of a valid and applicable forum selection clause to show a strong cause why it should not be enforced with

[56] *Li*, *supra* note 5at para 59.

[57] *Ibid* at para 56.

[58] *Ibid* at para 57.

[59] *Ibid* at para 73.

[60] *Ibid* at para 60.

[61] *ZI Pompey, supra* note 6 at para 21.

a stay.[62] The Court explained that the "presence of a forum selection clause is…sufficiently important to warrant a different test, one where the starting point is that parties should be held to their bargain".[63] As there is substantial overlap in the standards courts apply when claimants seek a stay of proceedings or an injunction,[64] *ZI Pompey* serves as persuasive authority favouring the existence of a distinct contractual rights branch with different comity considerations from those articulated in *Amchem*.

Moreover, *ZI Pompey* and *Li* are applicable to anti-suit injunctive relief in aid of arbitration agreements, notwithstanding that the contractual rights at issue in those cases were forum selection clauses. The Supreme Court has, on other occasions, affirmed the importance of party autonomy and the need to give effect to arbitration agreements.[65] In *TELUS Communications Inc v Wellman* ("*Wellman*"), the Court observed that "the jurisprudence…has consistently reaffirmed that courts must show due respect for arbitration agreements and arbitration more broadly, particularly in the commercial setting."[66] The Court also identified a guiding principle underpinning modern arbitration legislation, which is that the "parties to a valid arbitration agreement should abide by their agreement".[67] The reasoning in *ZI Pompey* and *Li* were based on the existence of a contractual right not to be sued in the foreign forum and the importance of holding the parties to their bargain. Thus, *ZI Pompey* and *Li* should apply with equal force

[62] *ZI Pompey, supra* note 6.

[63] *Ibid*.

[64] Briggs, *supra* note 9 at para 6.26. The standard for a stay under modern arbitration legislation is a deviation from the common law in this respect because the stay motion is governed by statute.

[65] *Wellman*, *supra* note 6 at paras 48—57.

[66] *Ibid* at para 54.

[67] *Ibid* at paras 50—52, 55.

when an anti-suit injunction is sought in aid of an arbitration agreement.

VI. CONCLUSION

Amchem remains the leading authority on the anti-suit injunction in Canada. The strong role for comity envisioned in *Amchem* has been maintained in the subsequent jurisprudence under the equitable rights branch.[68] However, the emerging Canadian jurisprudence also suggests that *Amchem* must be qualified in the context of commercial arbitration. *Amchem* must be read in light of *Lincoln General*, *ZI Pompey*, *Li*, and *Wellman*. Where an anti-suit injunction is sought to enforce a contractual right, the comity principle speaks with less force because the parties have themselves agreed not to pursue litigation in the foreign forum. The Court will give effect to the parties' bargain and issue anti-suit injunctive relief, unless the party resisting enforcement can demonstrate a "strong cause" as to why the Court should not grant the relief.[69]

[68] *Pe Ben*, *supra* note 4.

[69] *Li*, *supra* note 5 at para 56; *ZI Pompey*, *supra* note 6 at para 21.