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Tanya Monestier
Roger Williams University School of Law

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JURISDICTION AND THE ENFORCEMENT OF FOREIGN JUDGMENTS

*Tanya J. Monestier**

1. Introduction

In April 2012, the Supreme Court of Canada released its decision in what has become the pivotal case on personal jurisdiction in Canada, *Van Breda v. Club Resorts Ltd.*[1] In *Van Breda*, the Court laid out a new framework for, and defined more precisely the content of, the "real and substantial connection" test that governs the assertion of jurisdiction over *ex juris* defendants. Specifically, the Court created four presumptive connecting factors that courts are to use in jurisdictional determinations. The presumptive connecting factors approach to jurisdiction was intended to increase certainty and predictability in jurisdictional determinations.

One issue that was alluded to, but ultimately left unanswered, by the Supreme Court in *Van Breda* was what effect the new presumptive factors framework for the real and substantial connection test had on the enforcement of judgments. Since the Supreme Court's seminal decision in *Morguard Investments Ltd. v. De Savoye*[2] in 1990, it is well-established law that the real and substantial connection test for jurisdiction *simpliciter* is intended to be "correlated"[3] with the real and substantial connection test used as a predicate for enforcing foreign judgments. Does this mean that courts are now supposed to use the new *Van Breda* framework for jurisdiction *simpliciter* in the judgment enforcement context? Some commentators believe so. For instance, Professor Blom argues:[4]

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* Associate Professor, Roger Williams University School of Law, Bristol, Rhode Island. The author would like to thank Nicole Manzo for her very helpful research assistance in the preparation of this article.

1. 2012 SCC 17, [2012] 1 S.C.R. 572, 343 D.L.R. (4th) 577 (S.C.C.) ("*Van Breda*").
2. [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 46 C.P.C. (2d) 1 (S.C.C.) ("*Morguard*").
3. *Ibid.* at 1103. ("the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlative")
4. Joost Blom, "New Ground Rules for Jurisdictional Disputes: The *Van Breda* Quartet" (2012), 53 C.B.L.J. 1 at 29.

> A broader question is whether the new approach to jurisdiction *simpliciter* [from *Van Breda*] will work its way into the recognition of foreign judgments . . . After *Van Breda*, if the issue is the jurisdiction of a Canadian court, the judge must use presumptive connecting factors. There is much to be said for employing a similar method to assess the jurisdiction of foreign courts when called on to enforce undefended foreign judgments. Predictability is equally desirable in that area.

This article argues the opposite: that the real and substantial connection framework established by the Court in *Van Breda* for jurisdiction *simpliciter* should not be exported outside of the particular context in which it was developed. The *Van Breda* approach to jurisdiction *simpliciter*, although seemingly straightforward, is actually a blunt tool for assessing jurisdiction – and any concerns with its application would only be magnified if applied to the enforcement of foreign judgments.

This article proceeds as follows: in Part 2, I discuss the background of the real and substantial connection test in both the jurisdiction *simpliciter* and judgment enforcement context. I then discuss in Part 3 how courts in Canada have approached the real and substantial connection test for judgment enforcement in the 20 plus years since the Supreme Court of Canada's landmark decision in *Morguard*. Next, in Part 4, I advance the argument that courts should not use the *Van Breda* version of the real and substantial connection test in assessing jurisdiction for judgment enforcement purposes. I argue that Justice LeBel's discussion of the two faces of the real and substantial connection test clarifies that what is intended to be jurisdictionally "correlated" is the constitutional dimension of the real and substantial connection test, not the common law/conflict of laws dimension of the real and substantial connection test. I further argue that the *Van Breda* test is unduly complicated and uncertain when applied to its original context – jurisdiction *simpliciter* – and that its complexity would only be magnified when applied to the enforcement of foreign judgments. Finally, I discuss the need for certainty and predictability in jurisdictional determinations and argue that this need is less compelling for judgment enforcement than it is for jurisdiction *simpliciter*. In Part 5, I address the argument that the application of a real and substantial connection test based on objective connections in the judgment enforcement analysis means that foreign plaintiffs (seeking judgment enforcement) will fare better than Canadian plaintiffs (seeking to sue in Canada). I respond to this critique by distinguishing between the inter-provincial and the international context and arguing that the latter would benefit from wholesale revision in a way that reflects fundamental policy choices

about the circumstances in which foreign judgments are to be enforced. In Part 6, I offer some concluding remarks.

2. The Real and Substantial Connection Test and the Enforcement of Foreign Judgments

The modern law of judgment enforcement in Canada can be traced to the Supreme Court's decision in *Morguard Investments Ltd. v. De Savoye*.[5] Prior to *Morguard*, the Canadian rules for the enforcement of foreign judgments paralleled those of England. In particular, a foreign court would only be regarded as jurisdictionally competent for enforcement purposes if the defendant was served in the foreign jurisdiction or if the defendant consented to personal jurisdiction in the foreign court.[6] Thus, only "presence" and "consent" were regarded as legitimate bases of judicial jurisdiction for the purposes of enforcing a foreign judgment. If the foreign court assumed jurisdiction on a basis other than presence or consent (say, on the basis that a tort was committed in the jurisdiction or a contract was to be performed in the jurisdiction), the foreign court would not be regarded as jurisdictionally competent when it came to a Canadian court enforcing its judgment.[7]

The Supreme Court in *Morguard*, however, acknowledged that the English rules were outmoded and ill-suited to the realities of a modern Canadian federation. *Morguard* involved an action in British Columbia to enforce a default judgment rendered by an Alberta court in respect of a mortgage deficiency proceeding in Alberta. There was no doubt that the dispute had a significant connection to Alberta and that the Alberta court had properly assumed jurisdiction (the land in question was in Alberta and the mortgage was taken out in Alberta). However, under the judgment enforcement rules prevailing

5. *Supra* note 2.
6. Establishing that the foreign court had jurisdiction over the dispute under Canadian standards of jurisdiction is only one of several prerequisites to enforcing a foreign judgment. Other prerequisites include establishing that the judgment is final and that the judgment would not amount to the enforcement of a foreign public law. Additionally, the defendant resisting enforcement of the judgment may raise various impeachment defences, such as fraud, natural justice, or public policy, to argue that the judgment should not be enforced. Thus, the real and substantial connection test as a jurisdictional prerequisite is only part of the enforcement picture.
7. Importantly, under Canadian law (both then and now), a judgment from a sister province is considered "foreign" in the same way as a judgment from another country. Thus, the law related to the enforcement of "foreign judgments" applies equally to the judgments of sister provinces and foreign countries.

at the time, the judgment was not enforceable in British Columbia, where the defendant had since moved, because the defendant had not been served with process in Alberta, nor had it consented to the jurisdiction of the Alberta courts. The Supreme Court saw this result as illogical – if Alberta was an appropriate forum for the resolution of the dispute (indeed, the most appropriate forum), why should a judgment rendered by an Alberta court not be enforceable in other Canadian provinces? The Supreme Court agreed. It held that that so long as the judgment forum had a "real and substantial connection" with the dispute, the judgment should be readily enforceable across provincial lines. Accordingly, the Supreme Court added "real and substantial connection" to the list of appropriate jurisdictional bases for enforcement.

Morguard, however, left some unanswered questions in its wake. In particular, it was unclear whether the framework for enforcement jurisdiction applied merely to out-of-province defendants (*i.e.*, defendants from other provinces in Canada), or also applied to out-of-country defendants. The question was answered in *Beals v. Saldanha*,[8] a case involving the enforcement in Ontario of a sizeable Florida judgment. In *Beals*, the Supreme Court asked for specific submissions from the parties on the issue of whether the real and substantial connection test developed in *Morguard* applied to "truly foreign" judgments – *i.e.*, judgments from outside of Canada. Ultimately, the Court in *Beals* held that the real and substantial connection test articulated in *Morguard* did indeed apply equally to out-of-country defendants, noting that "[w]hile there are compelling reasons to expand the [real and substantial connection] test's application, there does not appear to be any principled reason not to do so."[9]

Thus, the judgment enforcement inquiry appeared to be seemingly straightforward. Prior to enforcing a foreign judgment (including, of course, judgments from sister provinces), a provincial court needed to be satisfied that either: a) the defendant was served with process in the foreign jurisdiction ("presence"); b) the defendant consented to the jurisdiction of the foreign court, either through express agreement or attornment ("consent"); or c) there was some meaningful connection between the foreign forum and the action ("real and substantial connection"). Even though the real and substantial connection test originated in the judgment enforcement context, it also became the touchstone for jurisdiction over *ex juris* defendants in general. In other words, the real and substantial connection test that was

8. 2003 SCC 72, [2003] 3 S.C.R. 416, 234 D.L.R. (4th) 1 (S.C.C.) ("*Beals*").
9. *Ibid.* at para. 19.

developed to expand the potential grounds of jurisdiction for enforcement purposes soon became the litmus test for "regular" jurisdictional analysis as well. The complementarity of the jurisdictional test was telegraphed in *Morguard* itself when Justice La Forest stated that "the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives."[10]

Given the correlative nature of the jurisdictional test (*i.e.*, the idea that judicial jurisdiction is the same on the "front end" as on the "back end"), it became increasingly important for courts to be mindful of how developments in the law of jurisdiction on the front end would impact the law of jurisdiction on the back end and vice versa. Unfortunately, courts have not always consistently or coherently treated the real and substantial connection test and, over the years, disparate strands of case law on the real and substantial connection test seemed to develop depending on whether one was dealing with jurisdiction *simpliciter* (the front end) or jurisdiction for enforcement purposes (the back end).

Most of the attention in the 23 years since *Morguard* was decided has been focused on the real and substantial connection test in the context of *ex ante* (or front end) jurisdictional determinations. Accordingly, we have witnessed key decisions such as the Ontario Court of Appeal's decisions in *Muscutt v. Courcelles*[11] in 2002 and *Van Breda v. Village Resorts Ltd.*[12] in 2010 which sought to define more precisely the content of the real and substantial connection test as applied to *ex juris* defendants.[13] Very little attention has been spent

10. *Supra* note 2 at 1103.
11. (2002), 213 D.L.R. (4th) 577, 13 C.C.L.T. (3d) 161, 26 C.P.C. (5th) 206 (Ont. C.A.), additional reasons (2002), 213 D.L.R. (4th) 661, 13 C.C.L.T. (3d) 238, 26 C.P.C. (5th) 203 (Ont. C.A.) ("*Muscutt*"). *Muscutt* was decided with four companion cases. See *Leufkens v. Alba Tours International Inc.* (2002), 213 D.L.R. (4th) 614, 13 C.C.L.T. (3d) 217, 26 C.P.C. (5th) 247 (Ont. C.A.), additional reasons (2002), 213 D.L.R. (4th) 661, 13 C.C.L.T. (3d) 238, 26 C.P.C. (5th) 203 (Ont. C.A.); *Lemmex v. Bernard* (2002), 213 D.L.R. (4th) 627, 13 C.C.L.T. (3d) 203, 26 C.P.C. (5th) 259 (Ont. C.A.), additional reasons (2002), 213 D.L.R. (4th) 661, 13 C.C.L.T. (3d) 238, 26 C.P.C. (5th) 203 (Ont. C.A.); *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 213 D.L.R. (4th) 643, 13 C.C.L.T. (3d) 230, 26 C.P.C. (5th) 239 (Ont. C.A.), additional reasons (2002), 213 D.L.R. (4th) 661, 13 C.C.L.T. (3d) 238, 26 C.P.C. (5th) 203 (Ont. C.A.); and *Gajraj v. DeBernardo* (2002), 213 D.L.R. (4th) 651, 13 C.C.L.T. (3d) 194, 24 C.P.C. (5th) 258 (Ont. C.A.), additional reasons (2002), 213 D.L.R. (4th) 661, 13 C.C.L.T. (3d) 238, 26 C.P.C. (5th) 203 (Ont. C.A.).
12. 2010 ONCA 84, (2010), 316 D.L.R. (4th) 201, 71 C.C.L.T. (3d) 161 (Ont. C.A.) ("*Van Breda* Court of Appeal Decision").
13. Each of these decisions is discussed in more detail, *infra* at Part 3.

on defining or conceptualizing the real and substantial connection test for judgment enforcement purposes (the back end). Accordingly, it was not – and is still not – entirely clear whether the principles developed in the jurisdiction *simpliciter* context apply equally to the enforcement context.

In early 2012, the Supreme Court released its decision in *Van Breda v. Club Resorts Ltd.*, where the Court adopted an entirely new framework for the assertion of personal jurisdiction over out-of-province defendants. Responding to continued critiques that the real and substantial connection test was too nebulous and uncertain in application to guide jurisdictional determinations, the Court decided to more precisely define the concept of a real and substantial connection as applied to *ex juris* defendants. It stressed that the real and substantial connection test should focus on objective factual connections between the forum and the dispute, and not amorphous concepts like fairness, efficiency or comity. The Court held that in order to establish jurisdiction, a plaintiff must fit himself within one of the following four presumptive connecting factors:[14]

(a) the defendant is domiciled or resident in the province;
(b) the defendant carries on business in the province;
(c) the tort was committed in the province;
(d) a contract connected with the dispute was made in the province.

The Court noted, however, that this list of presumptive connecting factors is not closed and that "[o]ver time, courts may identify new factors which also presumptively entitle a court to assume jurisdiction."[15] In formulating new connecting factors, the Supreme Court urged that courts look for connections that give rise to relationships that are similar to the four presumptive connecting factors. Potential relevant considerations include:[16]

(a) Similarity of the connecting factor with the recognized presumptive connecting factors;
(b) Treatment of the connecting factor in the case law;
(c) Treatment of the connecting factor in statute law; and
(d) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

Importantly, where no presumptive factor (whether listed or new) applies, a court should not assume jurisdiction. Specifically, "a court should not assume jurisdiction on the basis of the combined effect of a

14. *Van Breda*, *supra* note 1 at para. 90.
15. *Ibid.* at para. 91.
16. *Ibid.*

number of non-presumptive connecting factors."[17] The Court was concerned that this would open the door to case-by-case determinations of jurisdiction, which would undermine the order and predictability that the new test was designed to promote.

Courts have begun the difficult process of wading through various aspects of the *Van Breda* decision.[18] One issue that will soon surface is what the *Van Breda* decision means, if anything, for the enforcement of foreign judgments. Must the real and substantial connection test for judgment enforcement purposes parallel that established in *Van Breda* for jurisdiction *simpliciter*? Should it?

Justice LeBel expressly recognized that the *Van Breda* decision could have broader implications for judgment enforcement and choice of law. In Justice LeBel's words:[19]

17. *Ibid.* at para. 93.
18. For instance, in *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2013 ONSC 2289, 228 A.C.W.S. (3d) 971, 2013 CarswellOnt 6666 (Ont. S.C.J.), Justice Belobaba was required to sort out what the *Van Breda* presumptive factor "a contract connected with the dispute was made in the province" meant in the context of a class action dispute related to the termination of certain General Motors franchise agreements. Justice Belobaba expressed concern with the lack of clarity associated with this presumptive connecting factor:

    > The Supreme Court made clear in *Van Breda* that a court can assume jurisdiction in tort cases if "a contract connected with the dispute was made in the province." What the Court did not make clear is what this means.
    >
    > Consider the following scenario: Jim, who lives in Ontario, and Fred, who lives in B.C. are vacationing at a resort in Cuba. They meet in the hotel bar and begin a heated discussion about a recent hockey trade between the Toronto Maple Leafs and the Ottawa Senators. The discussion degenerates into a fist fight. Jim is badly beaten. After recovering from his injuries and returning to his home in Ontario, he sues Fred in tort for damages. Can the Ontario court assume jurisdiction because "a contract connected with the dispute [i.e. the hockey trade agreement] was made in the province?"
    >
    > Of course not.
    >
    > Just because the bar fight in Cuba was caused by a disagreement about a sports contract made in Ontario does not mean that an Ontario court is entitled to assume jurisdiction over the dispute. More is needed. But what and how much?
    >
    > The question is made all the more difficult because the Court in *Van Breda* did not really explain how it came up with this fourth presumptive connecting factor. All it said was that "[c]laims related to contracts made in Ontario would also be properly brought in the Ontario courts (rule 17.02(f)(i))."

    Ibid. at paras. 1-5 [internal citations omitted].
19. *Van Breda*, *supra* note 1 at para. 16.

> Three categories of issues – jurisdiction, *forum non conveniens* and the recognition of foreign judgments – are intertwined in this branch of the law. *Thus, the framework established for the purpose of determining whether a court has jurisdiction may have an impact on the choice of law and on the recognition of judgments, and vice versa.* Judicial decisions on choice of law and the recognition of judgments have played a central role in the evolution of the rules related to jurisdiction. None of the divisions of private international law can be safely analysed and applied in isolation from the others. [Emphasis added.]

Thus, it appears that the Supreme Court itself potentially sees its judgment in *Van Breda* having implications beyond its immediate context – and in particular, in the areas of judgment enforcement and choice of law.

Academic commentators make similar observations. For instance, Professor Black maintains that:[20]

> . . . the impact of *Club Resorts* [will not] be restricted to the law of judicial jurisdiction. As noted above, the R&SC [real and substantial connection test] has come to function in a number of areas, including providing the jurisdictional standard for determining the enforceability of foreign judgments. This is because *Morguard* said that direct and indirect jurisdiction should correlate. This means that the holding and methodology set out in *Club Resorts* will have an effect on cross-border enforcement in Canada, both interprovincially and internationally.

Similarly, Professor Blom notes that "[a] broader question is whether the new approach to jurisdiction *simpliciter* will work its way into the recognition of foreign judgments."[21] I have also previously noted that "[a] question raised by *Van Breda* is what the decision means for cases involving the enforcement of foreign judgments."[22]

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20. Vaughan Black, "Simplifying Court Jurisdiction in Canada" (2012), 8:3 J. P. Int'l L. 411 at 439-40.
21. Blom, *op. cit.* note 4 at 29.
22. See Tanya Monestier, "(Still) A 'Real and Substantial' Mess" (2013), 36 Fordham Int'l L.J. 396 at 456. In that piece, I made several preliminary observations that are expounded on, and clarified, in this article. For instance, I commented that "*Van Breda* should be fairly straightforward to apply in enforcing a foreign tort judgment." *Ibid.* at 458. While this may be true in run-of-the mill tort cases where the situs of the tort can easily be identified, the statement does not account for the myriad of causes of action that may be brought in the foreign court. Nor does it account for the complexity in categorizing a case in some instances. All these issues are discussed in more detail, *infra* at Part 4. Further, in "(Still) A 'Real and Substantial' Mess," I was leaning towards the view that courts should apply the same real and substantial connection test both on the front and back end and I stated that "it appears odd to have two strands of case law for the same correlated jurisdictional test." *Ibid.* at 459. While it may be confusing or, in my previous words "odd," to have disparate strands of case law for jurisdiction *simpliciter* and jurisdiction for enforcement purposes, I have

To date, there have been only a handful of judgment enforcement decisions post-*Van Breda*. Most of these involved scenarios easily resolved on the basis of the traditional grounds of jurisdiction: presence and consent.[23] The only case to directly discuss the applicability of the *Van Breda* framework for jurisdiction to the enforcement context is the Ontario Court of Appeal's decision in *Sincies Chiementin S.p.A. v. King*.[24] In *King*, the Ontario Court of Appeal seemed to accept, without question, that the *Van Breda* presumptive connecting factors approach for assessing jurisdiction applied to the enforcement of foreign judgments. The Ontario court in *King* was called upon to enforce a judgment for over $600,000 issued by an Italian court. The court noted that "[i]n *Van Breda*, Lebel J. fashioned a list of four specific connecting factors that lead to a presumption that a court has jurisdiction. The third factor is that a tort was committed in the court's territorial jurisdiction."[25] The Ontario Court of Appeal eventually concluded that "[o]nce it is determined that a tort has been committed in the foreign jurisdiction, it brings the case within the third connecting factor from *Van Breda*,

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come to believe, for the reasons discussed herein, that it is doctrinally preferable to refrain from importing *Van Breda* into the judgment enforcement framework.

23. For instance, in *Blizzard Entertainment Inc. v. Simpson* 2012 ONSC 4312, 221 A.C.W.S. (3d) 81, 2012 CarswellOnt 9944 (Ont. S.C.J.), at para. 9, jurisdiction was established on the basis of the defendant's "consent," a basis that the Supreme Court in *Van Breda* affirmed as having continued jurisdictional legitimacy. See *Van Breda*, *supra* note 1 at para. 79.

24. 2012 ONCA 653, 221 A.C.W.S. (3d) 553, 2012 CarswellOnt 12074 (Ont. C.A.), leave to appeal refused 2013 CarswellOnt 3405, 2013 CarswellOnt 3404 (S.C.C.) ("*King*"). In a recent case, *Amtim Capital Inc. v. Appliance Recycling Centers of America*, 2013 ONSC 4867, 116 O.R. (3d) 379, 2013 CarswellOnt 10150 (Ont. S.C.J.), the Ontario Superior Court of Justice was asked to enforce a declaratory judgment from Minnesota. In assessing whether Minnesota had a real and substantial connection with the dispute so as to ground jurisdiction for enforcement purposes, the court made no mention of the *Van Breda* framework. Instead, the court applied a traditional fact-based approach to the real and substantial connection test, stating:

> Amtim has never had any genuine contact with the State of Minnesota, has never conducted any form of business in that state. All the of services where compensation is sought were provided in Ontario and elsewhere in Canada and the agreements between the parties especially provide that they are not only to be governed by Ontario law but are also to be "enforced" by Ontario law.

Ibid. at para. 36. *Amtim* cited *Beals* as being the operative test for the real and substantial connection test in the judgment enforcement setting. *Ibid.* at para. 29.

25. *King*, *supra* note 24 at para. 8.

and a real and substantial connection is presumptively established."[26] Oddly, however, the Ontario Court of Appeal deferred to the Italian court on whether a tort had been committed in Italy, stating:[27]

> In this case, the Civil Court of Rome carefully considered, on its own accord because King did not attorn to the jurisdiction, the question of whether a tort had been committed in Italy. The court concluded that, with regard to "extra-contractual action" (i.e. the tort claim), the tort was committed, and damage resulted, in Italy.
>
> In our view, a Canadian court should be very cautious in its scrutiny of the decision of a foreign court in determining whether a tort has been committed in its jurisdiction. In short, the Civil Court of Rome is better placed than us to determine its own laws.

It is black-letter law that in considering whether the foreign court was jurisdictionally competent for enforcement purposes, Canadian courts are to apply Canadian standards of jurisdiction – to include a Canadian determination of whether a tort was committed in the foreign jurisdiction. It does not matter whether an Italian court believed, under Italian law, that a tort was committed in Italy. The deference given to the Italian court on this matter was plainly wrong as a matter of law. In practice, however, it is likely that the result would have been the same even if the Ontario court had applied a Canadian analysis of where the tort was committed.

For our purposes, though, the crucial point is that the Ontario Court of Appeal endorsed the *Van Breda* framework in the judgment enforcement context (albeit applying it in an incorrect manner).[28]

26. *Ibid.* at para. 11.
27. *Ibid.* at paras. 9-10.
28. The court also proceeded to discuss issues that were unnecessary to the analysis:

> Here, the motion judge properly concluded that since there was a real and substantial connection between the subject matter of the action and the Italian court, the Italian judgment should be recognized and enforced in Ontario. Under *Beals*, at paras. 28-29, the principles of comity and reciprocity inform a Canadian judge's determination of whether a foreign judgment should be enforced. The motion judge, at para. 189, was keenly aware of this:
>
> > Were the situation reversed, so that Sincies was a Canadian corporation with head offices in Ontario and all of the other facts discussed applying, and King as an Italian lawyer who assumed the same role he had in fact assumed in our case, I have no doubt that an Ontario court would have readily assumed jurisdiction . . . I see no reason why principles of comity and reciprocity should not be recognized in the circumstances of this particular case and foreign judgment.

Was the court correct to do so? Are there any good reasons for not applying the *Van Breda* framework for jurisdiction to the enforcement of foreign judgments? This article suggests that there are and that courts should not apply the *Van Breda* real and substantial connection test in the judgment enforcement context.

3. Post-Morguard Case Law on the Real and Substantial Connection Test for Judgment Enforcement Purposes

Prior to examining what the *Van Breda* decision means for judgment enforcement, however, it is important to have a sense of how courts have been treating the real and substantial connection inquiry in the specific context of judgment enforcement in the post-*Morguard* era. Accordingly, I briefly examine the treatment of the judgment enforcement case law related to the real and substantial connection test between the time of *Morguard* through to the present day.

In the 1990s, courts applied the same real and substantial connection test to the issue of jurisdiction and the enforcement of judgments. This real and substantial connection test focused on objective connections between the judgment forum and the cause of action.[29] During this time period, there were many open questions

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Further, the motion judge was cognizant of the principles of order and fairness that underlie the modern concept of private international law, and concluded, at para. 186:

> It is not unfair that a professional who operates on a worldwide basis should be subject to foreign jurisdictions. [King] voluntarily entered into a solicitor/client relationship with a company he knew to be based in Italy, to whom he expected to give advice and from which he knew he would receive instructions, whatever dealings and transactions might occur as a result and wherever they might occur.

We agree with this analysis. The appellant knew that his advice would be received and acted on in Italy, as the evidence indicates it was. He is a sophisticated party who should have expected to be called to account in Italy.

Ibid. at paras. 12-13 [internal citations omitted]. It is unclear what the additional foray into fairness and comity added to the jurisdictional analysis. Indeed, the Court in *Van Breda* emphasized that these were not freestanding considerations, but rather that comity is satisfied, and fairness results, through a system of rules which is certain and predictable.

29. For instance, in *Moses v. Shore Boat Builders Ltd.*, [1992] 5 W.W.R. 282, 68 B.C.L.R. (2d) 394, 1992 CarswellBC 187 (B.C. S.C.), affirmed (1993), 106 D.L.R. (4th) 654, 19 C.P.C. (3d) 219, [1994] 1 W.W.R. 112 (B.C. C.A.), leave to appeal refused (1994), 109 D.L.R. (4th) vii (note), 23 C.P.C. (3d) 294 (note), [1994] 2 W.W.R. lxv (note) (S.C.C.), the trial court concluded that there was a sufficient connection between the foreign forum (Alaska) and the

concerning jurisdiction: Does the real and substantial connection test require a connection to the defendant or simply to the cause of action? Does the real and substantial connection test apply only to the enforcement of interprovincial judgments or does it extend to international judgments? What is the role of the service *ex juris* categories in relation to the real and substantial connection test? These questions would ultimately come to be answered in subsequent case law. However, it is clear that in this era the approach to, and content of, the real and substantial connection test was the same at both the jurisdiction *simpliciter* stage of the analysis and the judgment enforcement stage of the analysis.

In the 2002 case of *Muscutt v. Courcelles*,[30] the Ontario Court of Appeal sought to give more substance to the amorphous real and substantial connection test by enumerating several factors that a court should consider in determining whether it had jurisdiction *simpliciter* over an out-of-province defendant. This list of non-exhaustive factors (the "*Muscutt* factors") included:[31]

1) the connection between the forum and the plaintiff's claim;
2) the connection between the forum and the defendant;
3) unfairness to the defendant in assuming jurisdiction;
4) unfairness to the plaintiff in not assuming jurisdiction;
5) the involvement of other parties to the suit;
6) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
7) whether the case is interprovincial or international in nature; and
8) comity and standards of jurisdiction, recognition and enforcement prevailing elsewhere.

For the next decade, courts in Ontario (and indeed, throughout much of Canada) applied the *Muscutt* factors in making the

action to ground jurisdiction for enforcement purposes. The trial court articulated those connections as follows:

> Mr. Moses chose to sue in Alaska, where the boat was being used, where the damage was suffered, where the boat was repaired, where he had signed the contract for its construction, where he lived when he signed the contract, and where the boat's purchase was financed. These are significant contacts with Alaska. Indeed, I think they are sufficient to constitute the connection required by the *Morguard* test.
>
> They are sufficiently real and substantial because they establish the kind of connection between Alaska and the contract for the construction of the boat that makes it fair for the defendant to be required to defend the action in the courts of Alaska.

Ibid. at paras. 16-17. The British Columbia Court of Appeal agreed that the connections were sufficiently real and substantial to ground jurisdiction.

30. *Muscutt*, *supra* note 11.
31. *Ibid.* at paras. 76-110.

determination of whether a real and substantial connection between the forum and the cause of action existed so as to ground jurisdiction *simpliciter*. In the enforcement context, however, the *Muscutt* factors were largely ignored, with courts preferring instead to focus simply on objective connections between the foreign court and the cause of action in order to ground jurisdiction.[32]

There were a few cases on the margins, however, that did seem to accept the applicability of the *Muscutt* framework in the judgment enforcement analysis. For instance, in *More & More AG v. P.Y.A. Importer Ltd.*,[33] the court appeared to apply – albeit loosely – the *Muscutt* factors in concluding that there was a real and substantial connection between the dispute and the judgment forum. The court in *More* noted that "[t]he applicant argued persuasively here that a real and substantial connection does exist to the province of Ontario. In this case, four of the *Muscutt* factors are engaged."[34] Although the court did not explain which of the *Muscutt* factors were engaged, or how, it seemed to accept that the *Muscutt* framework, including fairness, was a part of the jurisdictional inquiry for judgment enforcement purposes.

By the late 2000s, criticisms of the *Muscutt* approach to jurisdiction had begun to emerge.[35] Accordingly, the Ontario

32. See, *e.g.*, *Disney Enterprises Inc. v. Click Enterprises Inc.* (2006), 267 D.L.R. (4th) 291, 49 C.P.R. (4th) 87, 2006 CarswellOnt 2045 (Ont. S.C.J.); *Mill Valley Bamboo Associates, LLC v. D.T.I. Diversified Transportation Inc.*, 2006 CarswellOnt 7424 (Ont. S.C.J.); *Skippings Rutley v. Darragh*, 2008 BCSC 159, 2008 CarswellBC 332 (B.C. S.C. [In Chambers]).
33. 2010 ONSC 2250, 2010 CarswellOnt 2474 (Ont. S.C.J.), affirmed 2010 ONCA 771, 2010 CarswellOnt 8621 (Ont. C.A.), leave to appeal refused (2011), 287 O.A.C. 398 (note), 422 N.R. 400 (note), 2011 CarswellOnt 2974 (S.C.C.).
34. *Ibid.* at para. 8.
35. The Ontario Court of Appeal in *Van Breda* summarized these at para. 56 as follows:

    1) the *Muscutt* test is too subjective and confers too much discretion on motion judges;

    2) the eight-part test is too complicated and too flexible and therefore leads to inconsistent application;

    3) there is too much overlap of the test for jurisdiction with the test for *forum conveniens*;

    4) a clearer, more black-letter test should be applied to foster international trade and to avoid the cost and delay of preliminary skirmishing over jurisdiction;

    5) the *Muscutt* test allows ill-defined fairness considerations to trump order in an area of the law where order should prevail;

    6) the *Muscutt* framework, and especially the fairness factor, is susceptible to forum shopping, threatening to cause an influx of litigants to Ontario;

    7) lack of predictability and certainty increases litigation costs and

Court of Appeal in *Van Breda v. Club Resorts Ltd.*[36] revamped the approach to jurisdiction *simpliciter* by creating a "category-based presumption" of a real and substantial connection where the case fell under any of the subsections of Rule 17.02 of the Ontario *Rules of Civil Procedure*, with the exception of Rule 17.02(h) ("damages sustained in Ontario") and Rule 17.02(o) ("necessary or proper party").[37] Under the Court of Appeal's approach in *Van Breda*, the presumption would not preclude a plaintiff from establishing the existence of a real and substantial connection in circumstances not covered by the rules; nor would the presumption preclude a defendant from demonstrating that the real and substantial connection test was not satisfied, even though the case fell within one of the enumerated grounds for service *ex juris*. Moreover, the real and substantial connection test was re-focused such that it was concerned with objective connections between the forum and the parties (what were previously *Muscutt* factors 1-2). The remaining *Muscutt* factors (factors 3-8) would still remain relevant as so-called "analytic tools" which would serve to assist the court in assessing the significance of the connections between the forum, the claim and the defendant.[38]

In the two or so years that elapsed between the release of the Court of Appeal's decision in *Van Breda* and the Supreme Court's decision in *Van Breda*, several judgment enforcement actions were brought where the real and substantial connection test was implicated. Again, the vast majority of courts failed to apply the Ontario Court of Appeal's decision in *Van Breda* to the issue of jurisdiction for enforcement purposes but rather simply analyzed the facts before them to conclude that there was a real and substantial connection between the foreign forum and the cause of action. For instance, in *CIMA Plastics Corp. v. Sandid Enterprises Ltd.*,[39] the court noted that there was a real and substantial connection (albeit not a particularly strong one) between the foreign forum and the defendant and proceeded to lay out all the relevant connections.[40] The only

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jurisdictional motions can be used as dilatory tactics to impede meritorious claims;

8) it is wrong to look to foreign court practice as a model for appropriate assertion of jurisdiction.

Van Breda Court of Appeal Decision, *supra* note 12.

36. *Ibid.*
37. The Ontario Court of Appeal explained at paras. 78-79 that based on the current jurisprudence, Rules 17.02(h) and 17.02(o) needed to be a carved out of the category-based presumptions.
38. *Ibid.* at para. 84.
39. 2011 ONCA 589, 341 D.L.R. (4th) 442, 207 A.C.W.S. (3d) 238 (Ont. C.A.).

reference to *Van Breda* in the judgment came when the court noted in passing that "[t]he core of the real and substantial connection test is the connection that the plaintiff's claim has to the forum and the connection of the defendant to the forum, respectively."[41] The *CIMA Plastics* court did not attempt to apply the *Van Breda* framework for jurisdiction *simpliciter* to jurisdiction for enforcement purposes.[42]

By contrast, in *Sincies Chiementin S.p.A. (Trustee of) v. King*,[43] the Ontario Superior Court of Justice did apply, in a fairly rigorous manner, the jurisdictional real and substantial connection test laid out by the Court of Appeal in *Van Breda*. The court in *King* noted that, had the case been brought in Ontario, it would fall within Rule 17.02(g) and (h) of the Ontario *Rules of Civil Procedure*. The court then noted that "[t]he basis of the claim therefore satisfying Rule 17.02, it is presumed that a real and substantial connection exists, and the first stage of the *Charron Estate* analysis is complete. This presumption then frames the second stage of analysis and the onus falls upon the defendant to demonstrate that a real and substantial connection does not exist."[44] The court ultimately held that the

40. *Ibid.* at para. 15. ("The litigation was brought by an Illinois company seeking redress for interference with the payment of an account receivable purchased from another Illinois company; the account receivable arose from the business carried on at least in part in Illinois; and the damages were suffered in Illinois. The principles of fairness, comity and enforceability all support the real and substantial connection between the forum and the claim.")
41. *Ibid.* at para 9 [internal citations omitted].
42. A similar approach was taken in *Bank of Mongolia v. Taskin*, 2011 ONSC 6083, 285 O.A.C. 263, 2011 CarswellOnt 11725 (Ont. Div. Ct.), affirmed 2012 ONCA 220, 2012 CarswellOnt 3980 (Ont. C.A.), where the plaintiff sought to have a Florida judgment for over $67 million enforced in Ontario. Again, the court barely referenced the decision in *Van Breda*. Instead, the court laid out the underlying facts in the case and then stated in a rather conclusory fashion:

    > In my view, there is sufficient evidence, based on Taskin's own admissions, coupled with the evidence produced by the Bank (even discounting the document that Taskin says is a forgery) to find a real and substantial connection based on his active involvement in transactions he knew to be fraudulent and his connection to his Florida-based co-defendant fraudsters. His connection to the transaction and his Florida co-defendants was not 'fleeting' or 'unimportant'.

    Ibid. at para. 33.
43. 2010 ONSC 6453, 195 A.C.W.S. (3d) 681, 2010 CarswellOnt 8996 (Ont. S.C.J.), affirmed 2012 ONCA 653, 221 A.C.W.S. (3d) 553, 2012 CarswellOnt 12074 (Ont. C.A.), leave to appeal refused 2013 CarswellOnt 3405, 2013 CarswellOnt 3404 (S.C.C.).
44. *Ibid.* at para. 181. The court erred in the application of the Rule 17 categories to the jurisdictional analysis. The Court of Appeal in *Van Breda* expressly excepted Rule 17.02(h) (damage sustained in jurisdiction) as a presumptive

defendant failed to rebut the presumption of jurisdiction that arose from the application of the *Van Breda* presumptive category, noting the various factual connections that existed between the plaintiff and the Italian forum. Finally, the court assessed what were previously known as *Muscutt* factors 3-8 as "analytic tools" in the jurisdiction analysis. The court spent a considerable amount of time discussing "fairness" to the parties in the assumption of jurisdiction, noting that "[i]t is not unfair that a professional who operates on a worldwide basis should be subject to foreign jurisdictions."[45] The court also took into account issues of comity and reciprocity.[46]

Despite the rare case applying the prevailing jurisdiction *simpliciter* framework to the enforcement of judgments, it is clear that courts have, by and large, adopted two different strands of case law for the real and substantial connection test – one for jurisdiction *simpliciter* and the other for jurisdiction at the enforcement stage. Rarely have courts applied the same version of the "correlated" real and substantial connection test. Yet, now, the Supreme Court of Canada has alluded to the fact that the enforcement inquiry may need to take into account the newly formulated real and substantial connection test. Additionally, an appellate court has already applied the *Van Breda* framework to judgment enforcement and declared that the framework should be used in the judgment enforcement analysis. So courts are left with a fundamental question: Should the *Van Breda* approach to jurisdiction *simpliciter* also apply to the enforcement of foreign judgments? It is to that issue that I now turn.

4. At a Crossroads: Should Courts Apply the Van Breda Real and Substantial Connection Test to Judgment Enforcement?

This article argues that courts should not apply the *Van Breda* framework for jurisdiction *simpliciter* in assessing the real and

basis for jurisdiction. However, given that the claim involved a tort committed in the jurisdiction (negligent misrepresentation), the remainder of the analysis would have been the same.

45. *Ibid.* at para. 186.

46. *Ibid.* at para. 189. ("There is no reason to believe that the Italian judicial system is not capable and respected, or that it would not have enforced an extra provincial judgment against an Ontario defendant on the same jurisdictional basis. No complaint was raised in this regard. Roman law is one of the longest established systems in the western justice tradition, and in the modern context it operates within the sophisticated framework of the European Union. I see no reason why principles of comity and reciprocity should not be recognized in the circumstances of this particular case and foreign judgment. No one suggested otherwise.")

substantial connection test for judgment enforcement purposes. First, Justice LeBel's reasoning in *Van Breda* distinguishing between the constitutional dimension of the real and substantial connection test and the conflict of laws dimension of the real and substantial connection test shows why there is no requirement that *Van Breda* apply to the assessment of jurisdiction for judgment enforcement purposes. Second, the complexity of the *Van Breda* analysis in its original domain (that of jurisdiction *simpliciter*) suggests that courts should use caution in applying it to judgment enforcement. Third, there are different goals served by creating a framework for jurisdiction on the front end (jurisdiction *simpliciter*) and jurisdiction on the back end (jurisdiction for judgment enforcement purposes). While certainty and predictability are important in both inquiries, they are more important to litigants at the outset of a case than at the end of a case. Each of these issues is explored in turn.

(1) The Distinction Between the Real and Substantial Connection Test as a Constitutional Principle and as a Conflict of Laws Principle

As indicated above, the Supreme Court had repeatedly emphasized that the real and substantial connection test for jurisdiction *simpliciter* is "correlated" with the real and substantial connection test for judgment enforcement purposes. Prior to the Supreme Court's decision in *Van Breda*, it would have been safe to assume that the correlative nature of the real and substantial connection test meant that the test would have to apply equally to both *ex ante* jurisdiction and jurisdiction for enforcement purposes. In other words, if the real and substantial connection on the front end involved assessing (for instance) fairness, efficiency and comity[47] as a jurisdictional prerequisite, then jurisdiction on the back end would also involve the same considerations. Thus, certain courts – quite understandably – have taken the prevailing framework and content of the real and substantial connection test as applied to *ex juris* defendants and imported it to the judgment enforcement context.[48] However, Justice LeBel's fairly lengthy elucidation of the real and substantial connection test in *Van Breda* reveals why, despite the so-called "correlative" nature of the real and substantial connection test, it is not necessary that the test look the same both on the front end and on the back end.

47. As, for instance, under the *Muscutt* framework. See *supra* note 11.
48. Most notably, *King*, *supra* note 43.

In *Van Breda*, Justice LeBel distinguished between the two senses in which the expression "real and substantial connection test" is used: first, as a constitutional limit on the assumption of jurisdiction and, second as a principle of private international law. In the jurisprudence post-*Morguard*, courts had used the term "real and substantial connection" in both senses, leading to "confusion about both the nature of the test and the constitutional status of the rules and principles of private international law."[49] Accordingly, Justice LeBel emphasized the need for a clearer distinction between the constitutional dimension and private international law dimension of the real and substantial connection test.

With respect to the former, Justice LeBel explained that from a constitutional standpoint, the real and substantial connection test was intended to place limits on both legislative jurisdiction (the power of a court to apply a particular province's law) and adjudicative jurisdiction (the power of a court to hear a dispute), these limits deriving from the text of s. 92 of the *Constitution Act, 1867*.[50] With respect to adjudicative jurisdiction – the live issue in *Van Breda* – Justice LeBel emphasized that the constitutional dimension of the real and substantial connection test is intended to ensure "legitimacy in the exercise of the state's power of adjudication."[51] Accordingly, the connection between the state and a particular dispute could not be weak or hypothetical since a "weak or hypothetical connection would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute."[52]

Justice LeBel stressed that the constitutional dimension of the real and substantial connection test was "related to, but distinct from, the real and substantial connection test as expressed in conflicts rules."[53] Conflicts rules operate within the confines of the constitutional dimension of the real and substantial connection test and serve to provide more concrete rules for the assertion of judicial and legislative jurisdiction. Justice LeBel elaborated:[54]

> [T]he real and substantial connection test . . . does not dictate the content of conflicts rules . . . In its constitutional sense, it places limits on the reach of the jurisdiction of a province's courts and on the application of provincial laws to interprovincial or international situations . . . But it does not establish the actual

49. *Van Breda*, *supra* note 1 at para. 22.
50. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 6, s. 92.
51. *Van Breda*, *supra* note 1 at para. 32.
52. *Ibid.*
53. *Ibid.* at para. 33.
54. *Ibid.* at paras. 23, 33.

> content of rules and principles of private international law, nor does it require that those rules and principles be uniform.
>
> . . . . .
>
> The constitutional territorial limits . . . are concerned with setting the outer boundaries within which a variety of appropriate conflicts rules can be elaborated and applied. The purpose of the constitutional principle is to ensure that specific conflicts rules remain within these boundaries and, as a result, that they authorize the assumption of jurisdiction only in circumstances representing a legitimate exercise of the state's power of adjudication.

The *Van Breda* framework for jurisdiction *simpliciter* deals with the real and substantial connection test in the private international law/conflict of laws sense – not in the constitutional sense.[55] Accordingly, Justice LeBel recognized that there could be a variety of approaches to the real and substantial connection test, including the approach that he ultimately adopted, all of which could fit comfortably within the outer confines of the constitutional test.[56]

It may be helpful to think of the conflict of laws (or private international law) dimension of the real and substantial connection test as being a smaller concentric circle encapsulated within a larger concentric circle. The inner circle (the conflict of laws real and substantial connection test) can take on one of a number of permutations, so long as it remains within the boundaries of the outer circle (the constitutional real and substantial connection test). Indeed, if a province so wished, it could provide for judicial jurisdiction to the maximum extent permitted by the constitutional dimension of the real and substantial connection test such that, in effect, there would be just one circle.[57]

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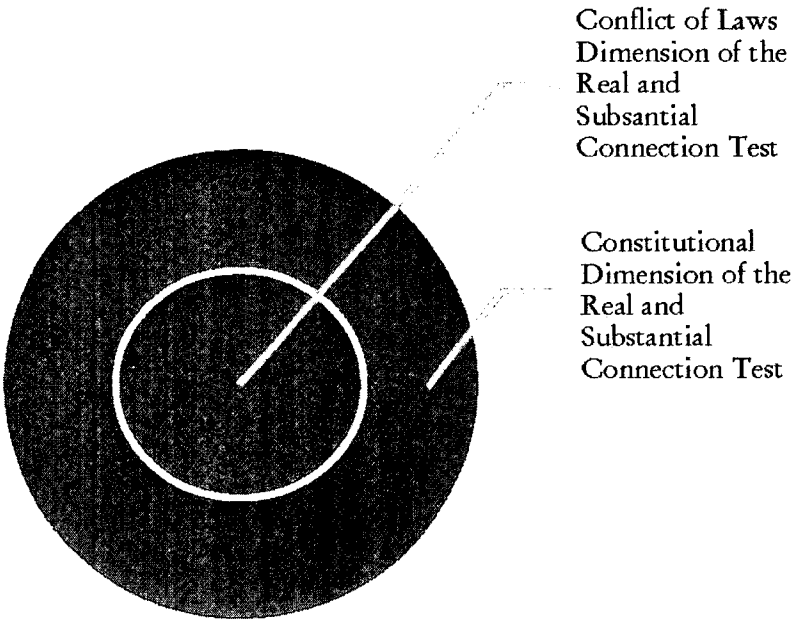
55. Justice LeBel explicitly recognized this, noting "[t]his case concerns the elaboration of the 'real and substantial connection' test as an appropriate common law conflicts rule for the assumption of jurisdiction." *Ibid.* at para. 34.
56. See *ibid.* at para. 34. ("To be clear, however, the existence of a constitutional test aimed at maintaining the constitutional limits on the powers of a province's legislature and courts does not mean that the rules of private international law must be uniform across Canada. Legislatures and courts may adopt various solutions to meet the constitutional requirements and the objectives of efficiency and fairness that underlie our private international law system. Nor does this test's existence mean that the connections with the province must be the strongest ones possible or that they must all point in the same direction.")
57. See, *e.g.*, *ibid.* at para. 30. ("One approach is to view the test not only as a constitutional principle, but also as a conflicts rule in itself. If it is viewed as a conflicts rule, its content would fall to be determined on a case-by-case basis



The real and substantial connection test that the Supreme Court has repeatedly emphasized as being "correlated" (*i.e.*, equally applicable in the jurisdiction *simpliciter* and judgment enforcement context) is the constitutional dimension of the real and substantial connection test. Thus, so long as a provincial court assumes jurisdiction in a constitutionally restrained manner, consistent with the constitutional dimension of the real and substantial connection test, an enforcing court is obligated to give the resultant judgment full faith and credit (to use an expression borrowed from American law).[58] Since it is not the conflict of laws dimension of the real and substantial connection test which is "correlated" for jurisdiction

by the courts in decisions in which they would attempt to implement the objectives of order and fairness in the legal system.")

58. This constitutional imperative only applies inter-provincially. For instance, if a court in Alberta assumes jurisdiction in a manner consistent with the real and substantial connection test and issues a money judgment, a court in Ontario will be obligated to give effect to the resultant judgment. However, there is obviously no constitutional obligation to do so where the judgment emanates from a truly foreign jurisdiction (*e.g.*, the United States), although courts have, as a matter of comity, extended domestic judgment enforcement principles to truly foreign judgments. See generally *Beals*, *supra* note 8.

simpliciter and jurisdiction enforcement purposes, there is no obligation for the real and substantial connection test used in the enforcement context to replicate that used in the *ex ante* jurisdiction context. Otherwise stated, there is no reason why courts would need to apply the new *Van Breda* framework for jurisdiction – presumptive connecting factors and all – to the issue of judgment enforcement. And indeed, there are compelling reasons why courts should not. These reasons are explored in detail below.

(2) The Complexity of the Current Jurisdictional Analysis

Commentators, including myself, have lamented the complexity of the jurisdiction *simpliciter* analysis for many years. In the *Muscutt* era, the critiques tended to focus on the theme that jurisdictional determinations were too subjective and unduly influenced by considerations of fairness; accordingly, it was difficult to predict with certainty whether a court had jurisdiction. Responding to these concerns, the Supreme Court in *Van Breda* re-oriented the jurisdictional test to focus on objective connections between the forum and the cause of action as being the touchstone of the jurisdictional analysis. However, in attempting to give additional structure to this area of law, it may be that the Supreme Court of Canada made jurisdictional determinations a little too structured, leading to a whole new set of problems.

There have been various critiques leveled at the Court's judgment in *Van Breda*: the framework set up in *Van Breda* is too rigid and does not account for cases where there is a legitimate connection between the dispute and the cause of action, but that connection falls short of satisfying a presumptive connecting factor; the framework is too tort-focused; certain presumptive connecting factors leave a fair amount of interpretative wiggle-room; the factor a "contract connected to the dispute was made in [the jurisdiction]" is of dubious provenance and utility; the presumptive connecting factors are, in effect, irrebuttable; the Court made no attempt to reconcile the traditional grounds of jurisdiction with the real and substantial connection test; and the Court failed to explain whether the forum of necessity doctrine was part of Canadian law.[59] As is clear, there is no shortage of critiques aimed at the new *Van Breda* framework for jurisdiction.

59. For a discussion of the *Van Breda* case, including many of these critiques, see Vaughan Black, *op. cit* note 20; Joost Blom, *op. cit.* note 4; Brandon Kain, Elder C. Marques, and Byron Shaw, "Developments in Private International Law: The 2011-2012 Term – The Unfinished Project of the *Van Breda* Trilogy" (2012), 59 Sup. Ct. L. Rev. (2d) 277; Tanya Monestier, *op. cit.* note 22.

Certain of these critiques are magnified in the judgment enforcement context, suggesting that it would be particularly inappropriate to import the *Van Breda* framework to the judgment enforcement inquiry. For instance, one of the most significant shortcomings of *Van Breda* – if not the most significant shortcoming – is that the Court's judgment was so tort-specific that it failed to provide meaningful guidance on how to deal with the myriad of claims that are not tort-based. How are courts to approach cases involving breach of contract? Family law? Property law? Are courts supposed to craft a *Van Breda*-like framework in other substantive areas of law, complete with presumptive connecting factors? Or, are all non-tort cases supposed to use a more traditional fact-based real and substantial connection test? It is clear from the case law post-*Van Breda* that courts are attempting to shoehorn all cases into the *Van Breda* paradigm, even where it is an awkward fit.[60] How does all this uncertainty play out in the judgment enforcement context?

Assume, for instance, that the plaintiff in a foreign action asserted multiple causes of action (including a tort claim). The tort claim, however, was dismissed and the action proceeded to judgment on another basis. How is an enforcing court to characterize that claim for jurisdictional purposes?[61] Does the enforcing court accept that the tort claim was dismissed and therefore not apply the *Van Breda* tort factors? Does the enforcing court apply some variant of *Van Breda*, depending on what claim the foreign court accepted? Or, does the enforcing court pretend the action was not litigated and assess jurisdiction as though it were the judgment court (*e.g.*, based on the pleadings, to include the tort claim)?

Questions also abound when looking at the specific presumptive connecting factors themselves. As mentioned, several of the presumptive connecting factors have a fair bit of flexibility built into them. In particular, "the defendant carries on business in the jurisdiction," "a tort was committed in the jurisdiction" and "a

60. For example, in *Wang v. Lin* 2012 ONSC 3374, 215 A.C.W.S. (3d) 640, 2012 CarswellOnt 7211 (Ont. S.C.J.), reversed in part 2013 ONCA 33, 358 D.L.R. (4th) 452, 29 R.F.L. (7th) 1 (Ont. C.A.), the court indicated that it was applying the *Van Breda* framework to claims arising under the *Family Law Act*, R.S.O. 1990, c. F.3. However, the presumptive factors were an awkward fit and the court ended up focusing instead of matters which were relevant in the family law context (*e.g.*, where the parties were married, where the children were born), all while claiming that it was applying *Van Breda*.

61. Kain *et al.* note the inherent difficulty of characterizing a claim *ex ante*: "Given that such motions generally arise at the pleadings stage, however, the 'essence' of the claim will generally be very difficult for motion judges to assess." *Op. cit.* note 59 at 288.

contract connected with the dispute was made in the jurisdiction" are all subject to interpretation. How exactly does an enforcing court go about assessing this on the back end? When a plaintiff is asking a Canadian court to assume jurisdiction over an *ex juris* defendant, it will introduce evidence on the presumptive factors it believes apply (and the defendant will seek to rebut these factors). In a foreign court, which is assuming jurisdiction under its own (*i.e.*, foreign) rules of jurisdiction, evidence pertaining to carrying on business, related contracts, or where the tort was committed may or may not be introduced. So, how does an enforcing court go about getting the information *ex post* that would validate jurisdiction for enforcement purposes under Canadian rules of jurisdiction? For instance, if the foreign court made no mention of a related contract but there was, in fact, some related contract that was entered into in the foreign jurisdiction, is this something that the enforcing court can consider? The point is that it is unclear how to apply a framework that was designed to be applied *ex ante* to the *ex post* enforcement inquiry.[62]

One might question whether the aforementioned concerns with the application of the revised *Van Breda* approach to jurisdiction are more hypothetical than real. In other words, is the test *really* going to be that difficult to apply? The case of *Hartzog v. McGriskin*[63] illustrates that the answer to this question is yes. In *Hartzog*, the plaintiff sought to enforce a default Tennessee judgment for over $1.7 million (along with certain injunctive relief) in Ontario. *Hartzog* involved a claim by a conservator of the person and property of Eileen McClintock, a resident of Tennessee, against Norah McGriskin, a resident of Ontario. According to the skeletal facts laid out in the judgment, Ms. McClintock and Ms. McGriskin became friends after bonding over a shared hobby; eventually, the health of the former declined and the latter undertook to make arrangements to care for her in Ontario. The conservator for Ms. McClintock transferred over $1 million in funds from her accounts in Tennessee to Ms. McGriskin in Ontario. Ms. McGriskin apparently used the funds for the purchase and renovation of a property in Ontario. The allegation appeared to be that Ms. McGriskin misappropriated the plaintiff's funds and should be liable to remit them to Ms. McClintock, along with attorney's fees, interest, and the like.

62. Additionally, it is unclear how courts would apply a *Van Breda*-infused *Court Jurisdiction and Proceedings Transfer Act* (CJPTA) approach to jurisdiction *simpliciter*. In other words, in those jurisdictions that have adopted the CJPTA (as modified by the Supreme Court in *Van Breda*), how would this framework apply to judgment enforcement?

63. 2010 ONSC 5618, 16 C.P.C. (7th) 299, 195 A.C.W.S. (3d) 992 (Ont. S.C.J.).

How would the *Van Breda* framework apply in this case? First, is this even a tort action? It appears to involve claims for restitution ("[a] constructive trust for the benefit of Eileen B. McClintock over any and all ill-gotten gains")[64] and injunctive relief. How does a court even go about categorizing the case? Is a court to look at the underlying pleadings? The issues that were ultimately resolved in the plaintiff's favor? It is clear that the *Van Breda* framework – which is focused on traditional torts such as negligence and defamation – is an awkward fit with the multitude of cases that straddle the boundaries of a variety of different areas of law. This is particularly so considering that the inquiry involves an enforcing court categorizing a case that has been brought and already decided in another court.

Hartzog also illustrates that the application of the *Van Breda* framework for jurisdiction to judgment enforcement will result in fewer judgments actually being enforced in Canada. Assuming that the *Van Breda* framework could somehow apply in *Hartzog*, it is not clear that the foreign court had jurisdiction under this framework. The court summed up the reasons why it believed that there was a real and substantial connection between the foreign forum and the action:[65]

> Ms. McClintock has resided in Tennessee since August 2007. She gave a power of attorney to Mr. Hogan, a wealth advisor in Tennessee. Mr. Hogan transferred Ms. McClintock's funds to Ms. McGriskin from three financial institutions located in Tennessee. Finally, Ms. McClintock has suffered damages in Tennessee in that her assets that were in Tennessee financial institutions have been misappropriated. In my view, the Tennessee court has a real and substantial connection with the subject matter of the Tennessee action.

All of these appear to be irrelevant considerations under the *Van Breda* framework. The fact that the plaintiff resided in Tennessee or suffered damage in Tennessee is irrelevant as Justice LeBel emphasized that "[t]he use of damage sustained as a connecting factor may raise difficult issues . . . As a result, presumptive effect cannot be accorded to this connecting factor."[66] The fact that Ms. McClintock gave a power of attorney to her conservator in Tennessee or that the money was transferred from banks in Tennessee is equally irrelevant under the prevailing approach. One would be hard-pressed to find any presumptive connecting factors based on the facts outlined in the judgment. The defendant was not domiciled or

64. *Ibid.* at para. 2.
65. *Ibid.* at para. 25.
66. *Van Breda, supra* note 1 at para. 89.

resident in Tennessee; she did not carry on business there; and there was no contract connected to the dispute that was entered into in Tennessee. The only presumptive factor that could conceivably apply is that a tort was committed in Tennessee. Provided that the action could properly be characterized as a tort action, a court would need to determine where the tort was committed – where the funds were initially located, or where the funds were transferred. It is likely that the tort in this scenario (some species of fraud, conversion or misappropriation) would be deemed to have occurred where the funds were converted to the defendant's own use (*i.e.*, Ontario). It is likely, under what is known about the facts of *Hartzog*, that there would not be a real and substantial connection under the *Van Breda* framework for jurisdiction.

The point here is twofold: first, to illustrate that applying the *Van Breda* framework for jurisdiction to the enforcement of judgments is a complicated endeavour, particularly as it concerns the categorization of a dispute that was already heard in a different forum; and second, to demonstrate that the selection of the jurisdictional test is not just a matter of semantics, but can have a very real impact in real cases.

The simplest and most straightforward approach is not to import *Van Breda* into the judgment enforcement framework, but rather to rely on a fact-based real and substantial connection test, while heeding the Supreme Court's guidance that the emphasis needs to be on objective factual connections between the dispute and the cause of action. Many courts have already been doing this – including the court in *Hartzog* itself. The only caveat is that these courts need to implement the test in a way that accords with the general principles laid out in *Van Breda* regarding the constitutional underpinnings of the real and substantial connection test.

(3) The Different Goals Served By Jurisdiction Simpliciter and Jurisdiction for Enforcement Purposes

In *Van Breda*, Justice LeBel emphasized the need to craft conflicts rules for jurisdiction that were clear, definitive and predictable. That way, litigants knew where they stood going into the litigation. In this respect, he stated:[67]

> Parties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect. The need for certainty and predictability may conflict with the objective of fairness.

67. *Ibid.* at para. 73.

> An unfair set of rules could hardly be considered an efficient and just legal regime. The challenge is to reconcile fairness with the need for security, stability and efficiency in the design and implementation of a conflict of laws system.

The Supreme Court responded to this challenge of reconciling order and fairness by crafting a set of connecting factors – based on objective facts – which would presumptively entitle a court to assume jurisdiction, while at the same time allow for a defendant to rebut the presumption. To the extent that order and fairness conflicted, the Court in *Van Breda* expressed a preference for order, noting that while "[f]airness and justice are necessary characteristics of a legal system . . . they cannot be divorced from the requirements of predictability and stability which assure order in the conflicts system."[68]

The Supreme Court in *Van Breda* was correct in emphasizing the importance of predictability and certainty in the area of jurisdiction. Parties should be able to predict at the outset of a case, with some degree of certainty, whether a given court will have jurisdiction over a dispute. Under the approach which prevailed under *Muscutt* (and to a lesser extent, the Court of Appeal's decision in *Van Breda*), there was no way to predict what the jurisdictional result would be. Since courts considered purely subjective factors which were entirely unique to the litigation (such as the resources of the parties before the court, and the approach to jurisdiction and enforcement of judgments prevailing in the defendant's home state), there was little ability to "read the tea leaves" and make an informed decision on jurisdiction. This meant that many years and many dollars were wasted in skirmishes related to jurisdiction. The *Van Breda* case itself is a perfect illustration of this: a total of nine years elapsed before a final decision was made on whether the Ontario court had jurisdiction. Where there are clear and well-defined rules of the game, all parties can order their affairs accordingly.

There is less of a need, however, for certain and predictable rules related to jurisdiction for enforcement purposes. In other words, it is not as important that the real and substantial connection test on the back end be as well-defined and precise as the real and substantial connection test on the front end. As stated by Professor Black, "[a]rguably the value of simplicity, so central to *Club Resort*'s mission to reduce pre-trial motions on jurisdiction, is less salient when it comes to enforcement of foreign judgments."[69]

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68. *Ibid.* at para. 74.
69. Black, *op. cit.* note 20 at 440.

It is important to consider the context in which the real and substantial connection test is likely to be a factor in the enforcement analysis. In cases where the defendant attorned to the jurisdiction of the foreign court or was served with process while present in the foreign jurisdiction, there is no need to resort to the real and substantial connection test. In these contexts, "presence" and "consent" suffice to form the basis for the foreign court's jurisdiction. It is only where the defendant has not participated in the foreign proceedings – and the judgment has proceeded by default – that the real and substantial connection test is relevant. In such cases, the defendant has already taken a serious risk that the foreign court might render a judgment that is enforceable somewhere else, wherever the defendant's assets happen to be located at the time of the judgment. Granted, if the rules for jurisdiction on the back end were structured in a *Van Breda*-like manner (*i.e.*, with presumptive connecting factors), it might be marginally easier for the defendant to determine whether or not a given Canadian court would regard the foreign court as jurisdictionally competent. This may have some effect on a defendant's decision to litigate or not litigate the claim in the foreign jurisdiction. However, it would not eliminate the uncertainty altogether. Given the amenability of some of the presumptive connecting factors to creative argumentation (*e.g.*, where the tort occurred; whether there is a contract connected with the dispute that was entered into in the foreign forum), a Canadian court might still find that a foreign court has jurisdiction by finessing and manipulating the factors. Or, a court might create new presumptive connecting factors. Or, a court might characterize the case as something other than tort and apply a wholly different framework to the jurisdiction inquiry. The point is that a defendant resisting enforcement under the *Van Breda* framework would benefit from some additional certainty – but only marginally so.[70]

The situation is similar for a plaintiff bringing suit in a foreign jurisdiction, but eventually seeking execution against the defendant's assets elsewhere. By bringing an action in a jurisdiction where the defendant does not have assets and where the defendant has chosen not to defend, the plaintiff already bears a risk that it will be left with

70. Importantly, the plaintiff seeking enforcement in Canada may face other obstacles aside from jurisdiction. The defendant may raise one of a number of impeachment defences (fraud, natural justice, public policy) or other arguments (*e.g.*, lack of finality) to argue that the judgment should not be enforced. Thus, even if the real and substantial connection test were incredibly predictable, judgment creditors are still facing several unknowns at the judgment enforcement stage of the analysis.

nothing but a paper judgment. The plaintiff does not know exactly where the defendant's assets will be after the litigation has run its course (though it may have some sense based on where the defendant is resident or domiciled). It cannot be assured that the defendant will not move all its assets to a jurisdiction where they are out of the reach of the plaintiff. Accordingly, at best, the plaintiff can make the calculus at the outset of litigation in the foreign court that if there is a judgment in its favour, the judgment will likely be enforceable where the plaintiff believes the defendant's assets will eventually be located. Again, the *Van Breda* framework (as opposed to a pure objective-based real and substantial connection test) makes the analysis only marginally more predictable – and likely not enough to influence the decision to pursue litigation in the first place.

There is certainly benefit to litigants in having jurisdictional rules which are well-defined, precise, certain and predictable at the enforcement stage of the inquiry. These rules could help litigants determine whether to pursue a claim in the first place, or whether to defend a claim in a foreign jurisdiction. However, the new *Van Breda* framework for jurisdiction will likely not produce sufficient benefits to overcome its shortcomings when it is applied to jurisdiction for enforcement purposes – and in particular, its clunkiness as a tool for assessing whether a foreign court that has issued a judgment had jurisdiction over a defendant.

5. What Should the Jurisdictional Inquiry at the Enforcement Stage Look Like?

Above, I argued that there is no obligation that courts apply the framework adopted by the Supreme Court of Canada in *Van Breda* to the judgment enforcement inquiry, and indeed that it would be unduly complicated to do so. In this section, I address some of the issues raised by not adopting a correlative jurisdictional test to the enforcement of foreign judgments.

(1) Restrained Jurisdiction, Expansive Enforcement

The most obvious problem that results from not applying the *Van Breda* jurisdiction approach to the enforcement of foreign judgments is that it causes a strange disconnect between the treatment accorded to Canadian plaintiffs in domestic actions and that accorded to Canadian defendants in foreign actions. Under the *Van Breda* approach to the real and substantial connection test, jurisdiction *simpliciter* is now more restrained. Plaintiffs must fit themselves

within one of four well-defined categories; if they cannot, then a Canadian court cannot hear the case. This is true even if there are objective factual connections between the dispute and the cause of action. If those connections cannot be translated into a presumptive connecting factor (either listed or new), then those plaintiffs are out of luck. It is thought that the rigidity of the framework for jurisdiction is an acceptable trade-off for the increased certainty that plaintiffs now have going into jurisdictional determinations. But the fact remains that *Van Breda* makes it harder for plaintiffs to convince a Canadian court to hear their case. By contrast, if one were to apply a pure connection-based real and substantial connection test to the judgment enforcement inquiry (rather than the *Van Breda* jurisdictional framework), foreign creditors seeking enforcement against Canadian defendants would benefit from a "better" jurisdictional standard. These foreign creditors could argue that, based on an amalgam of factors, there is a real and substantial connection between the foreign court and the cause of action. And in most judgment enforcement actions, Canadian courts have seemed all too happy to compile connections and conclude that they are "real and substantial." The point is that foreign judgment creditors seeking execution against Canadian debtors can combine various objective connections to get to the requisite "real and substantial connection" required for enforcement, while Canadian plaintiffs seeking to sue foreign defendants cannot. Consider the following examples:

> **Example One**: Canadian plaintiff crosses over the Canada-U.S. border to go shopping at a Big Box store in the United States. Canadian plaintiff slips and falls and subsequently endures pain and suffering in Canada. Canadian plaintiff sues American defendant in Ontario. An Ontario court will not have jurisdiction over the American defendant.
>
> **Example Two**: The situation is reversed. American defendant crosses over the Canada-U.S. border to go shopping at a Big Box store in Canada. American defendant slips and falls and subsequently endures pain and suffering in the United States. American plaintiff sues Canadian defendant in the U.S. It may be that an American court assumes jurisdiction over the dispute (say, because the Canadian store advertised and "purposely availed" itself of the American forum).

In the event that the American court in Example Two issues a money judgment against the Canadian plaintiff: a) the judgment would not be enforceable under the *Van Breda* framework; and b) the judgment may be enforceable under a pure connection-based framework. This would mean that Canadian courts would be more liberal in enforcing judgments against Canadian defendants than they would be in providing a forum for Canadian plaintiffs to seek redress. Intuitively this does not seem fair. Why would we limit the power of Canadian courts to hear disputes (through the adoption of the *Van Breda* framework) and not equally constrain the power of Canadian courts to enforce foreign judgments against domestic defendants? The point is a good one – but I submit that the answer to this problem lies not in importing the *Van Breda* framework and all its attendant complexity to the judgment enforcement arena, but rather in revisiting the degree of connection required to establish the real and substantial connection test in truly foreign cases and by fine-tuning the impeachment defences. Below, I separately address the application of the real and substantial connection test in the inter-provincial context and in the international context.

(2) The Real and Substantial Connection Test Applied to Judgments from Other Canadian Provinces

Canadian courts should not apply the *Van Breda* framework for jurisdiction to the assessment of whether another provincial court properly asserted jurisdiction for the purposes of enforcing a sister province's judgment. *Morguard* held that a province must give full faith and credit to a judgment of another provincial court that assumed jurisdiction on the basis of presence, consent or real and substantial connection. Importantly, Justice LeBel's clarification in *Van Breda* is imperative here – the real and substantial connection that compels enforcement is the *constitutional* real and substantial connection, not the *conflict of laws* real and substantial connection. In other words, so long as a provincial court assumes jurisdiction in a way that does not exceed the outermost limits of the constitutional dimension of the real and substantial connection test (the larger concentric circle in the diagram at Part 4, above), then other provincial courts are obligated to give effect to that judgment.

For instance, assume that a court in British Columbia does not adopt the *Van Breda* approach wholesale (in part because of the existence of the *Court Jurisdiction and Proceedings Transfer Act*[71] in force in that province), which means that it assumes jurisdiction and

71. S.B.C. 2003, c. 28.

renders a judgment based on connections that do not fit within the *Van Breda* presumptive factors. Nonetheless, these factors are collectively significant enough that they do not run afoul of the constitutional dimension of the real and substantial connection test. Conceptually, the British Columbia court has assumed jurisdiction based on facts which operate in the "gap" between the inner concentric circle (the *Van Breda* conflicts rules) and the outer concentric circle (the constitutional dimension of the real and substantial connection test). An Ontario court would be compelled to enforce such a judgment, even though an application of the *Van Breda* test to jurisdiction would suggest otherwise. This is because *Morguard* and its progeny mandate that a provincial court enforce the judgment of a sister province that has appropriately assumed jurisdiction – not that has assumed jurisdiction in the way that the enforcing court would have.[72]

Justice LeBel in *Van Breda* left open the possibility that the conflicts rules would differ from province to province. In fact, he mentioned this on several occasions. At one point in the judgment, he stated:[73]

> To be clear, however, the existence of a constitutional test aimed at maintaining the constitutional limits on the powers of a province's legislature and courts does not mean that the rules of private international law must be uniform across Canada. Legislatures and courts may adopt various solutions to meet the constitutional requirements and the objectives of efficiency and fairness that underlie our private international law system. Nor does this test's existence mean

72. This point is underscored by looking at enforcement legislation. Under the *Uniform Enforcement of Canadian Judgments and Decrees Act* (2005), a model law which is intended to apply to the enforcement of judgments from other provinces, a party may not challenge the jurisdiction of the rendering court at the enforcement stage of the proceedings. See s. 6(3)(a): "Notwithstanding subsection (2), the [superior court of unlimited trial jurisdiction in the enacting province or territory] shall not make an order staying or limiting the enforcement of a registered Canadian judgment solely on the grounds that . . . the judge, court or tribunal that made the judgment lacked jurisdiction over the subject matter of the proceeding that led to the judgment, or over the party against whom enforcement is sought." In the Comments to this section, the Drafters state that "[t]his provision gives specific effect to the full faith and credit policy of UECJDA . . . The proper course of a judgment debtor who alleges that the judgment is flawed is to seek relief in the place where the judgment was made." See Comment, online: Uniform Conference of Canada <www.ulcc.ca/en/uniform-acts-en-gb-1/333-enforcement-of-canadian-judgments-decrees-act/4-enforcement-of-canadian-judgments-and-decrees-act>.

73. *Van Breda, supra* note 1 at para. 34.

> that the connections with the province must be the strongest ones possible or that they must all point in the same direction.

He repeated this idea again later in the judgment:[74]

> Because the provinces have been assigned constitutional jurisdiction over such matters, they are free to develop different solutions and approaches, provided that they abide by the territorial limits of the authority of their legislatures and their courts.

The difference in permissible approaches to jurisdiction *simpliciter* creates the very real possibility that some courts will interpret jurisdiction more expansively than other courts (so long as they respect the constitutional dimension of the real and substantial connection test). These provincial courts are entitled to have their judgments enforced in other Canadian provinces under *Morguard*'s mandate (later constitutionalized in *Hunt v. T & N plc*)[75] that Canadian judgments will be recognized and enforced in sister provinces so long as the originating court had a real and substantial connection with the dispute.

Accordingly, it would be inappropriate to apply a particular provincial framework for the assessment of jurisdiction to a dispute in a way that did not consider the outermost reach of the real and substantial connection test. As long as the judgment court had the minimal level of connection constitutionally required, an enforcing court must enforce the judgment – even if it would not have assumed jurisdiction over the case itself under similar circumstances.

(3) The Real and Substantial Connection Test Applied to Truly Foreign Judgments

Unlike the inter-provincial context, it is obviously not a "constitutional imperative"[76] that Canadian courts give full faith and credit to judgments from outside the country. Indeed, Canadian courts could, if they wished, not enforce any foreign judgments. Or they could, as was the state of affairs pre-*Morguard*, only enforce foreign judgments where the underlying basis of jurisdiction in the judgment forum was presence or consent.[77] For a variety of reasons – not the least of which is comity – Canadian courts have not chosen to adopt such a restrictive view of foreign judgments. That does not mean, however, that Canadian courts must treat foreign judgments in

74. *Ibid.* at para. 71.
75. [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16, 21 C.P.C. (3d) 269 (S.C.C.).
76. *Ibid.* at 324.
77. Indeed, this is the approach that continues to prevail in England to this day.

the exact same way they treat provincial judgments. And indeed, there are compelling reasons not to do so.

I have previously argued (in the context of analyzing the *Beals* decision) that there should be a distinction drawn between enforcing *Canadian* judgments and enforcing *foreign* judgments. I reproduce that argument, in part, below:[78]

> [T]he Supreme Court's uncritical extension of the *Morguard* rules to the international context fails to appreciate that domestic enforcement imperatives differ appreciably from international ones. LeBel J., in his powerful dissenting opinion in *Beals*, underscored the fact that "the considerations informing the application of the test to foreign-country judgments are not identical to those that shape conflict rules within Canada." Indeed, it must be recalled that in *Morguard*, LaForest J. grounded his analysis in uniquely Canadian realities . . . Th[e] federalism stream of reasoning permeating the *Morguard* decision obviously has no application in the international judgment enforcement arena.
>
> The Court in *Morguard* also made reference to the fact that concerns about the quality of justice in the inter-provincial sphere could have "no real foundation" and that "fair process is not an issue within the Canadian federation." We cannot make the same presumptions in the international context. To date, most of the foreign judgments that Canadian courts have been called upon to enforce using the *Morguard* analysis have been issued by American and English courts. If "foreign" is conceived in terms of these jurisdictions (and possibly a few others) the extension of *Morguard* principles to foreign judgments would likely cause little trepidation. However, at the risk of pointing out the obvious, foreign means foreign – the test, in theory, would apply equally and indiscriminately to judgments from the U.S., Ghana, Uzbekistan, Romania and Burkina Faso . . .
>
> Aside from the issue of how fair the foreign legal system may be, the real and substantial connection test ignores the question of how fair it is to require a Canadian defendant to litigate in a foreign forum . . . Once a real and substantial connection with either New York or Nepal has been made out, a Canadian defendant is expected to defend his claim in the foreign jurisdiction – irrespective of where that jurisdiction is, how difficult it is to access, and how unfamiliar the legal terrain may be – or risk the possibility that an enforceable default judgment will be issued against him.

While I am of the view that Canadian courts should not be quite so generous in enforcing foreign judgments, I do not believe the solution lies in applying the *Van Breda* presumptive connecting factors test to assess whether the foreign court properly assumed jurisdiction over the dispute. For the reasons discussed above, the *Van Breda* test is an unwieldy tool to assess whether the judgment court should be

78. Tanya J. Monestier, "Foreign Judgments at Common Law: Rethinking the Enforcement Rules" (2005), 28 Dal. L.J. 163 at 179-81 [internal citations omitted].

recognized as jurisdictionally competent. There are various other ways that this could be accomplished instead. A Canadian court could require a specific connection between the *defendant* and the foreign court as a predicate to recognizing the foreign court's jurisdictional competence. Or, as suggested by Justice LeBel himself in his dissenting opinion in *Beals*, a Canadian court could tailor the real and substantial connection analysis to require "a connection . . . strong enough to make it reasonable for the defendant to be expected to litigate there even though that may entail additional expense, inconvenience and risk."[79] In other words, Canadian courts could adopt a real and substantial connection test "plus" for foreign defendants. Either of these solutions would be preferable to applying the *Van Breda* test, with all its flaws, to the enforcement inquiry.

Moreover, the real and substantial connection test is only part of the enforcement puzzle. If Canadian courts were to adopt a policy of restraint in the enforcement of foreign judgments, they would need to examine principles related to the legitimacy of "presence" as a jurisdictional prerequisite as well as the defences to enforcement. The real and substantial connection test, in other words, is only a piece of a larger framework for the enforcement of foreign judgments. To the extent that the enforcement of foreign judgments is to reflect concerns related to comity, international relations, politics, economics, or the like, the framework should be thought out in a more holistic way. The

79. *Beals*, *supra* note 8 at para. 183, LeBel J., dissenting. The modified test is best explained in Justice LeBel's words in *Beals*, at paras. 182-83:

> The test should ensure that, considering the totality of the connections between the forum and all aspects of the action, it is not unfair to expect the defendant to litigate in that forum. It does not follow that there necessarily has to be a connection between the defendant and the forum. There are situations where, given the other connections between the forum and the proceeding, it is a reasonable place for the action to be heard and the defendant can fairly be expected to go there even though he personally has no link at all to that jurisdiction . . . [W]hen a court is asked to recognize and enforce a foreign judgment, and questions whether the originating court's jurisdiction was properly restrained, it should inquire into the connections between the forum and all aspects of the action, on the one hand, and the hardship that litigation in the foreign forum would impose on the defendant, on the other. *The question is how real and how substantial a connection has to be to support the conclusion that the originating court was a reasonable place for the action to be heard. The answer is that the connection must be strong enough to make it reasonable for the defendant to be expected to litigate there even though that may entail additional expense, inconvenience and risk. If litigating in the foreign jurisdiction is very burdensome to the defendant, a stronger degree of connection would be required before the originating court's assumption of jurisdiction should be recognized as fair and appropriate.* [Emphasis added.]

point of this section is not to definitively endorse the adoption of one particular approach or another to the enforcement of truly foreign judgments, but simply to recognize that any revision in this area of law should be deliberate, comprehensive, and well-reasoned.

6. Conclusion

Courts have only just begun sorting out the contours of the Supreme Court of Canada's new approach to jurisdiction. One issue that courts will soon confront is whether the *Van Breda* framework can or does apply outside of the particular context in which it was developed. Justice LeBel in *Van Breda* itself indicated that the decision could have a ripple effect in other areas of the conflict of laws, and in particular, in the judgment enforcement inquiry. Although seemingly logical to apply the same common law real and substantial connection test both to jurisdiction *simpliciter* and to jurisdiction for enforcement purposes, this article suggests that courts refrain from doing so. Although the real and substantial connection test for jurisdiction *simpliciter* is "correlated" with the real and substantial connection test for assessing a foreign court's jurisdictional competence for judgment enforcement purposes, it is important to recognize that it is the constitutional dimension of the test that is correlated. In other words, there is nothing that mandates applying the same conflict of laws/common law framework for jurisdiction *simpliciter* to the enforcement of foreign judgments.

Moreover, the *Van Breda* framework itself has many kinks to be worked out, including the issue of how the presumptive factors are to be interpreted and how the framework applies in non-tort cases. These concerns become magnified when applied to the issue of assessing a foreign court's jurisdictional competence at the judgment enforcement stage of the inquiry. Further, although there is always a desire for certainty and predictability in this area of law, it is arguably less important that there be definitive jurisdictional rules at the judgment enforcement stage than at the jurisdiction *simpliciter* stage of the analysis. As cogently stated by Professor Black:[80]

> . . . [t]he attendant loss of nuance and subtlety in the R&SC [real and substantial connection] inquiry brought about by [*Van Breda*], while an acceptable cost to pay for the elimination of dilatory pre-trial squabbling on questions of court jurisdiction, may render that standard an overly blunt tool when it comes to addressing some other areas in which it has come to function.

80. Black, *op. cit.* note 20 at 440.

Accordingly, courts should not export the *Van Breda* framework into the judgment enforcement realm. To the extent that it is felt that a connection-based real and substantial connection test is too broad, particularly in comparison to a more restrained jurisdiction *simpliciter* approach, it is suggested that courts – or preferably legislatures – address this issue in a more comprehensive, fulsome way. The solution to a perceived disconnect between the treatment of Canadian plaintiffs and Canadian judgment debtors is not resolved simply by applying the same jurisdictional test on both the front and back end. Rather, the solution lies in closely examining the rules for the enforcement of foreign judgments, including *all* existing jurisdictional bases as well as impeachment defences, and deciding what these rules should look like.