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(Still) A "Real and Substantial" Mess: The Law of Jurisdiction in Canada

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(STILL) A "REAL AND SUBSTANTIAL" MESS: THE LAW OF JURISDICTION IN CANADA

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INTRODUCTION

In the much-awaited *Club Resorts v. Van Breda*[1] ("Van Breda") decision, the Supreme Court of Canada has finally clarified the test for assumed jurisdiction in Ontario—and by extension, Canada in general. To be sure, the decision, which straddles the boundaries of civil procedure and the conflict of laws, is not quite as high-profile or "sexy" as others released this term.[2] However, it will have profound implications for foreign defendants sued in Canada. "Foreign" in this context refers to both defendants from outside the forum province and defendants from outside the country.

The Supreme Court in *Van Breda* crafted a seemingly simplistic approach to jurisdiction simpliciter which relies on four presumptive factors. However, as they say, "the devil is in the details"—and courts should expect years of protracted battles aimed at defining the precise contours of the four presumptive factors. While the long-term effect of *Van Breda* might be increased predictability for litigants, the short-term effect will be increased litigation designed to untangle the *Van Breda* factors. Not only do the presumptive factors themselves

1. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572 (Can.). The Supreme Court's decision in *Van Breda* dealt with the appeals raised by both *Van Breda* and Charron Estate v. Village Resorts Ltd., 2010 ONCA 84 (Can. Ont. C.A.). Coincidentally, the appealing defendant in each lawsuit was the same operator of Cuban resorts, Club Resorts Limited. At the time the Court released *Van Breda*, it also released two other decisions dealing with jurisdiction in defamation cases, Breeden v. Black, [2012] 1 S.C.R. 666 (Can.) and Éditions Écosociété Inc. v. Banro Corp., [2012] 1 S.C.R. 636 (Can.).

2. *See, e.g.*, R. v. Tse, [2012] 1 S.C.R. 531 (Can.) (declaring unconstitutional the emergency wiretap provision of the *Criminal Code*); S.L. v. Commission scolaire des Chênes, [2012] 1 S.C.R. 235 (Can.) (upholding school board's decision not to exempt appellant's children from an ethics and religious culture course on the basis that it infringed freedom of conscience and religion); Canada (Att'y Gen.) v. PHS Cmty. Servs. Soc'y, [2011] 3 S.C.R. 134 (Can.) (ordering Minister of Health to grant an exemption under Canada's drug laws to a safe-injection drug clinic).

need untangling, the Court left many jurisdictional questions up in the air: How does the real and substantial connection test work in non-tort cases? How do the traditional jurisdictional bases of consent and presence fit into the jurisdictional mix? Is forum of necessity an appropriate basis for jurisdiction in light of the constitutional dimension of the real and substantial connection test? How does the test apply to the enforcement of foreign judgments? The Court provided no guidance on these critical issues.

The purpose of this Article is to examine the new *Van Breda* approach to personal jurisdiction in Canada and to expose its shortcomings. While the Court is to be commended on focusing the real and substantial connection test on the factual connections that exist between the forum and the litigation, the manner in which it chose to implement this test is less than ideal. In particular, the Supreme Court of Canada in *Van Breda* may have too quickly discounted "fairness" in its valiant effort to achieve "order." In Part II of this Article, I chronicle the journey from *Morguard* to *Muscutt* to *Van Breda* in terms of the evolving understanding of the real and substantial connection test. In Part III, I outline the Supreme Court of Canada's new approach to personal jurisdiction articulated in the *Van Breda* case. The remainder of the Article serves as an opportunity to discuss and deconstruct various aspects of the *Van Breda* decision. In Part IV, I look at the new presumptive factors approach to jurisdiction. In Part V, I examine the Supreme Court's discussion of the forum non conveniens doctrine. In Part VI, I probe some of the unanswered questions from *Van Breda*—in particular, the relationship between the real and substantial connection test and presence and consent as a basis of jurisdiction; the forum of necessity doctrine; the implications of the new jurisdictional test for enforcement; and the intersection between the new presumptive factors framework and the *Court Jurisdiction and Proceedings Act* ("CJPTA"). In Part VII, I briefly analyze the Supreme Court's decisions in *Black* and *Banro* and what these decisions might mean for libel tourism in Canada. Finally, in Part VIII, I offer some concluding thoughts on the future of personal jurisdiction in Canada.

I. *ON THE ROAD TO VAN BREDA*

One cannot fully appreciate the Supreme Court's decision in *Van Breda* without a rudimentary understanding of how the issue of jurisdiction simpliciter came to occupy center stage at the nation's highest court. In 1990, the Supreme Court of Canada decided *Morguard Investments v. De Savoye*,[3] arguably the most important conflict of laws case in Canadian history. *Morguard* was fundamentally a case about inter-provincial judgment enforcement, raising a seemingly discrete issue: under what circumstances is a judgment rendered by one province enforceable in another? Under then-existing standards, a judgment issued by a court in one province was enforceable in the courts of another only where the defendant had either submitted to the jurisdiction of the originating forum or been served with process there. In short, Canadian courts only recognized "presence" and "consent" as legitimate juridical bases of jurisdiction for enforcement purposes. The Supreme Court in *Morguard* saw this approach as outmoded and ill-suited to the realities of a modern Canadian federation. Accordingly, it held that a court in one province should enforce a judgment issued in another province in cases where there is a "real and substantial connection" between the dispute and the provincial forum. The real and substantial connection test was intended to strike "a reasonable balance between the rights of the parties" and to "afford[] some protection [to a defendant] against being pursued in jurisdictions having little or no connection with the transaction or the parties."[4]

The holding in *Morguard*, however, extended far beyond the judgment enforcement context. It has long been recognized in the conflict of laws that jurisdiction for enforcement purposes and personal jurisdiction are correlated. In the words of Justice La Forest in *Morguard*, "the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives."[5] In setting out the real and substantial connection test for judgment enforcement purposes, the Court in *Morguard* also set out the test for the assertion of in personam jurisdiction

3. Morguard Invs. Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 (Can.).
4. *Id.* at 1080.
5. *Id.* at 1079.

over a defendant. Otherwise stated, jurisdiction on the "front-end" is the same as jurisdiction on the "back-end." Thus, the test for personal jurisdiction over ex juris defendants would be the same as that which governed jurisdiction for enforcement purposes—i.e., the real and substantial connection test.[6]

While the Supreme Court had created a useful moniker—the real and substantial connection test—it had failed to delineate the contours of the test. It emphasized what the test *was not* (i.e., a mechanical counting of contacts or connections),[7] but it refrained from elaborating upon what the test *was*. In *Hunt v. T&N plc*, the Supreme Court pronounced the real and substantial connection test to be a "constitutional imperative[]."[8] However, courts were no closer to understanding the content of the test than they had been after *Morguard*. For the next decade, courts struggled to give structure to the ill-defined real and substantial connection test. For the most part, courts used provincial service ex juris statutes as a guide to the sorts of connections that were "real" and "substantial" enough to support the assumption of jurisdiction.[9]

Approximately a decade after *Morguard* was decided, the Ontario Court of Appeal thought it fitting to define more precisely the scope of the real and substantial connection test. In *Muscutt v. Courcelles*, the Court of Appeal articulated a non-exhaustive eight-part test that would govern the assumption of jurisdiction over an ex juris defendant:

> 1) The connection between the forum and the plaintiff's claim;
>
> 2) The connection between the forum and the defendant;

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6. Muscutt v. Courcelles (2002), 213 D.L.R. (4th) 577, para. 38 (Can. Ont. C.A.) ("Although *Morguard* dealt with the proper exercise of jurisdiction from the perspective of recognition and enforcement, La Forest J. made it clear that precisely the same real and substantial connection test applies to the assumption of jurisdiction against an out-of-province defendant."). Note that *Muscutt* was decided with four companion cases. *See* Leufkens v. Alba Tours Int'l Inc. (2002), 213 D.L.R. (4th) 614 (Can. Ont. C.A.); Lemmex v. Bernard (2002), 213 D.L.R. (4th) 627 (Can. Ont. C.A.); Sinclair v. Cracker Barrel Old Country Store, Inc. (2002), 213 D.L.R. (4th) 643 (Can. Ont. C.A.); Gajraj v. DeBernardo (2002), 213 D.L.R. (4th) 651 (Can. Ont. C.A.).

7. Hunt v. T&N plc, [1993] 4 S.C.R. 289, 326 (Can.).

8. *Id.* at 324.

9. *See, e.g.*, Duncan (Litig. Guardian) v. Neptunia (2001), 199 D.L.R. (4th) 354 (Can. Ont. Sup. Ct. J.).

> 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. [10]

The *Muscutt* factors began to dominate jurisdictional determinations both inside Ontario and out. Courts finally had something concrete to hang their jurisdictional hats on, rather than some seemingly nebulous sense of what constituted a real and substantial connection.

However, in attempting to give flesh to the real and substantial connection test, it seems that the Court of Appeal in *Muscutt* overshot the mark. By 2007, strong critiques of the *Muscutt* approach to jurisdiction began to emerge.[11] These critiques related to the conceptual underpinnings of the test, the propriety of analyzing certain of the individual *Muscutt* factors, as well as the implications of this particular jurisdictional test for the administration of justice. The critiques were cogently summarized by the Court of Appeal in its later decision in *Van Breda v. Village Resorts Ltd.*:

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

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10. Muscutt v. Courcelles (2002), 213 D.L.R. (4th) 577, paras. 76–102 (Can. Ont. C.A.). Additionally, the Court of Appeal in *Muscutt* confirmed that provincial service *ex juris* rules were "procedural in nature" and needed to be "read in the light of the constitutional principles of 'order and fairness' and 'real and substantial connection.'" *See id.* paras. 48–49. As such, simply fitting within an enumerated ground for service *ex juris* was not conclusive of the existence of a real and substantial connection.

11. *See generally* Jean-Gabriel Castel, *The Uncertainty Factor in Canadian Private International Law*, 52 MCGILL L.J. 555 (2007); Tanya J. Monestier, *A "Real and Substantial" Mess: The Law of Jurisdiction in Canada*, 33 QUEEN'S L.J. 179 (2007); Joost Blom, Q.C. & Elizabeth Edinger, *The Chimera of the Real and Substantial Connection Test*, 38 U.B.C. L. REV. 373 (2005). Note, however, that some commentators were supportive of the *Muscutt* decision. *See, e.g.*, Vaughan Black & Mat Brechtel, *Revising* Muscutt*: The Ontario Court of Appeal Takes Another Look*, 36 ADVOC. Q. 35 (2009).

> 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 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.[12]

The Ontario Court of Appeal took the *Van Breda* case (and its companion case, *Charron*) as an opportunity to re-visit and re-configure the *Muscutt* test. *Van Breda* and *Charron* presented a similar factual matrix to *Muscutt*: claims for damages in Ontario as a result of personal injuries sustained abroad.[13] At trial, the motions judge in *Van Breda* had found that Ontario should assume jurisdiction over the out-of-province defendants under the eight-pronged *Muscutt* test. On appeal, and without the defendants raising the issue, the Court of Appeal sua sponte directed that a five judge panel would reconsider the *Muscutt* test. And reconsider the *Muscutt* test they did. In *Van Breda*, the Court of Appeal changed both the framework for, and the content of, the real and substantial connection test.

The Court of Appeal divided the jurisdictional inquiry into a two-step (or arguably, three-step) analysis. First, the Court of Appeal in *Van Breda* created a category-based presumption of a real and substantial connection where the case fell under any of

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12. Van Breda v. Village Resorts Ltd., 2010 ONCA 84, para. 56 (Can. Ont. C.A.).

13. The main distinction is that in *Muscutt*, the personal injury claim arose in a different province (Alberta), while in *Van Breda* and *Charron*, the claim arose in a foreign country (Cuba).

the subsections of Rule 17.02 of the Ontario Rules of Civil Procedure,[14] with the exception of Rule 17.02(h) ("damages sustained in Ontario") and Rule 17.02(o) ("necessary or proper party"). The presumption, however, would not prevent a plaintiff from establishing a real and substantial connection in other circumstances. Nor would the presumption preclude a defendant from demonstrating that, notwithstanding that the case falls within a presumptive category, the real and substantial connection test is not satisfied. The second step of the Court of Appeal's framework involved applying a newly formulated real and substantial connection test in light of the presumption in Step 1. According to the Court of Appeal, "the connection that the plaintiff's claim has to the forum and the connection of the defendant to the forum, respectively" would now constitute the core of the real and substantial connection test.[15] In other words, the real and substantial connection test was to focus on the factual connections between the dispute and the forum (*Muscutt* factors 1 and 2). The remaining *Muscutt* factors (factors 3–8) would not be treated as independent factors in the real and substantial connection analysis, but rather would serve as "analytic tools" to assist the court in assessing the significance of the connections between the forum, the claim and the defendant.[16]

The Court of Appeal in *Van Breda* emphasized that there may be exceptional circumstances where the real and substantial connection test is not satisfied, but where the assumption of jurisdiction is nonetheless warranted. Consequently, the Court of Appeal created an exception to the real and substantial connection test whereby a plaintiff may nonetheless be able to bring his claim against an ex juris defendant in Ontario despite the forum's lack of connection to the dispute. Specifically, where there is no other forum in which the plaintiff can reasonably seek relief, Ontario may act as a "forum of necessity" or "forum of last resort."[17]

Very shortly after the Ontario Court of Appeal rendered the *Van Breda* decision, the Supreme Court of Canada granted

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14. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 17.02 (Can.).
15. Van Breda v. Village Resorts Ltd., 2010 ONCA 84, para. 84 (Can. Ont. C.A.).
16. *Id.*
17. *Id.* para. 100.

leave to appeal the decision. Litigators across Canada waited with anticipation for the Supreme Court's definitive pronouncement on jurisdiction simpliciter.[18] The decision would determine how easy, or how difficult, it would be for plaintiffs to sue foreign defendants in Ontario (and by extension, Canada). The decision was finally released in April 2012—and it was met not with a bang, but a whimper. In the aftermath of the Supreme Court of Canada's decision in *Van Breda*, there was comparatively little academic and industry commentary on the decision. Perhaps this is because nobody knew quite what to make of the decision.[19] This Article is designed to comprehensively tackle the Supreme Court of Canada's decision in *Van Breda* with a view to answering the following question: Is the law of jurisdiction in Canada post-*Van Breda* still a "real and substantial" mess?[20]

II. *THE SUPREME COURT'S DECISION IN VAN BREDA*

While the Supreme Court's decision in *Van Breda* focused primarily on the legal issues involved in establishing jurisdiction simpliciter, it is important to understand the facts that gave rise to the dispute. This is particularly so because the Supreme Court's application of the law to the facts raises some serious questions about the exact scope of the framework crafted by the Court.

Van Breda and *Charron* both involved tragic facts. In *Van Breda*, the plaintiff, Ms. Van Breda, and her partner, Mr. Berg, booked a one-week vacation to the SuperClubs Breezes Jibacoa

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18. *See* Jeff Gray, *Spine Broken on Vacation, Woman's Lawsuit Tests Courts*, GLOBE & MAIL (Aug. 24, 2012), http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/spine-broken-on-vacation-womans-lawsuit-tests-courts/article2008800 (noting that at least one major securities class action against American International Group ("AIG") had been put on hold pending the Supreme Court's determination of pivotal issue of jurisdiction in *Van Breda*).

19. Several articles have recently been published on the *Van Breda* decision. *See* Vaughan Black, *Simplifying Court Jurisdiction in Canada*, 8 J. PRIVATE INT'L L. 411 (2012); Joost Blom, *New Ground Rules for Jurisdictional Disputes: The* Van Breda *Quartet*, 53 CAN. BUS. L. J. 1 (2012); Brandon Kain, Elder C. Marques, & Byron Shaw, *Developments in Private International Law: The 2011–2012 Term—The Unfinished Project of the* Van Breda *Trilogy* (2012), 59 S.C.L.R. (2d) 277.

20. In my 2007 article, *A "Real and Substantial" Mess*, I argued that the Court of Appeal in *Muscutt* had muddied the law of jurisdiction *simpliciter* in Canada to the point where it was in a state of disarray. *See* Monestier, *supra* note 11.

resort in Cuba. Mr. Berg, a professional squash player, had arranged the trip through Rene Denis, who operated a web-based business in Ontario under the name Sport au Soleil. Mr. Denis arranged bookings for squash, tennis, and aerobics instructors who agreed to instruct guests at certain Caribbean resorts for a few hours each day in exchange for accommodation at the resorts. Mr. Denis had an arrangement with the defendant Club Resorts to find instructors for resorts managed by Club Resorts. In early June 2003, Ms. Van Breda and Mr. Berg travelled from Toronto for a one-week stay at the SuperClubs Breezes resort in Cuba. Shortly after arriving, the pair went to the beach where Mr. Berg did some chin-ups using a tubular metal apparatus. When Ms. Van Breda attempted to do chin-ups, the apparatus collapsed, sending her to the ground and collapsing on top of her. Ms. Van Breda was rendered a paraplegic as a result of the accident. Because of her injury, Ms. Van Breda and Mr. Berg did not return to Ontario as they had intended; rather, they moved to British Columbia to be closer to family.

The *Charron* case involved a similarly tragic event. Mr. and Mrs. Charron planned an all-inclusive vacation to a Cuban resort, Breezes Costa Verde, also managed by the defendant Club Resorts. The couple booked the trip in Ontario through a travel agency (Bel Air Travel Group Ltd.) that had recommended a fixed-price vacation package from the tour operator Hola Sun Holidays Ltd. The package at Breezes Costa Verde that the Charrons had purchased through the travel agency included scuba diving at the resort. The Charrons arrived at the resort on February 8, 2002. Four days later, on February 12, Mr. Charron died during a scuba dive organized by the resort. The plaintiffs in both *Van Breda* and *Charron* initiated suit against various defendants in Ontario. At issue in the appeal, however, was jurisdiction over one particular defendant—Club Resorts.

After a brief recitation of the facts of *Van Breda* and *Charron*, Justice LeBel, writing for the unanimous court,[21] proceeded with the legal analysis of the relevant issues. He

21. Seven justices signed on to the judgments, though nine originally heard the appeals. Justice Charron retired while the decisions were under reserve; Justice Binnie did not participate in the judgments.

began with a section on the "Nature and Scope of Private International Law" where he went to great lengths to clarify the interplay between the constitutional dimension of the real and substantial connection test and the conflict of laws/private international law dimension of the test. In particular, he clarified that the real and substantial connection test which imposed territorial limits on adjudicative jurisdiction was distinct from the real and substantial connection test as expressed in conflicts rules. Justice LeBel elaborated:

> From a constitutional standpoint, the Court has, by developing tests such as the real and substantial connection test, sought to limit the reach of provincial conflicts rules or the assumption of jurisdiction by a province's courts. However, this test does not dictate the content of conflicts rules, which may vary from province to province. Nor does it transform the whole field of private international law into an area of constitutional law. 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. It also requires that all Canadian courts recognize and enforce decisions rendered by courts of the other Canadian provinces on the basis of a proper assumption of jurisdiction. But it does not establish the actual content of rules and principles of private international law, nor does it require that those rules and principles be uniform.[22]

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22. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 23 (Can.). Justice LeBel also indicated that the source of a court's authority to adjudicate derives from section 92 of the Constitution Act. *See id.* para. 31 ("With respect to the constitutional principle, the territorial limits on provincial legislative competence and on the authority of the courts of the provinces derive from the text of s. 92 of the *Constitution Act, 1867*. These limits are, in essence, concerned with the legitimate exercise of state power, be it legislative or adjudicative."). It is not clear whether this is correct. *See* JANET WALKER & JEAN-GABRIEL CASTEL, CANADIAN CONFLICT OF LAWS § 8.5, (6th ed. 2005) ("The preamble to the Canadian Constitution explains that at the time of Confederation, it was expedient to provide for 'the Constitution of the Legislative Authority in the Dominion' and to declare 'the Nature of the Executive Government.' There is no mention in the preamble of a similar need to provide for the judiciary. Section 129 confirms that it was the intention of the founders that 'Except as otherwise provided by this Act . . . all Courts of Civil . . . Jurisdiction . . . existing therein at the Union . . . [would] continue . . . as if the Union had not been made; subject nevertheless' to authorized and applicable legislation. Accordingly, it seems unlikely, despite the suggestions of some courts and commentators, that the adjudicatory authority of Canada's superior courts can properly be said to be defined by the

The Court stressed that it was necessary to remain mindful of the distinction between the real and substantial connection test as a constitutional principle and the same test as the organizing principle of the conflict of laws. The *Van Breda* decision involved the latter, i.e., the "elaboration of the 'real and substantial' connection test as an appropriate common law conflicts rule for the assumption of jurisdiction."[23]

The Court then proceeded to the heart of the judgment—how to define the real and substantial connection test, for conflict of laws purposes, in the tort context. Justice LeBel noted the tension that existed between "a search for flexibility, which is closely connected with concerns about fairness to individuals engaged in litigation, and a desire to ensure greater predictability and consistency in the institutional process for resolution of conflict of laws issues related to the assumption and exercise of jurisdiction."[24] He ultimately concluded that, to the extent that there is a conflict between "justice and fairness," on the one hand, and "certainty and predictability," on the other, the former must yield to the latter.[25]

The Court then established a new framework for the assumption of personal jurisdiction in tort cases in common law Canada. First, a plaintiff must fit himself within one of four presumptive connecting factors:

> (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. [26]

This list of presumptive factors, however, is not closed. According to the Court, "[o]ver time, courts may identify new factors which also presumptively entitle a court to assume

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territorial limits on provincial *legislative* authority found in section 92 of the Constitution because the Constitution does not *grant* the judicial authority of the superior courts, as it does the legislative and executive authority exercised by the federal and provincial governments, but merely continues it.").

23. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 34 (Can.).

24. *Id.* para. 66.

25. *Id.* para. 73.

26. *Id.* para. 90.

jurisdiction."[27] In formulating new connecting factors, courts should look for connections that give rise to relationships that are similar to the four presumptive connecting factors. Relevant considerations include:

> (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.[28]

The Court emphasized that 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 number of non-presumptive connecting factors."[29] This would open the door to case-by-case determinations of jurisdiction, which would undermine the order and predictability that the new test is designed to foster.

Once a plaintiff has established that a presumptive factor applies, the onus shifts to the defendant to rebut the presumption of a real and substantial connection. The defendant can rebut the presumption by showing that the "presumptive factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them."[30] If a defendant is able to rebut the presumption, then jurisdiction simpliciter has not been established and a court may not hear the case.

Where a real and substantial connection has been established, a court may then consider a defendant's application to stay a proceeding on the basis of forum non conveniens. A clear distinction, however, must be drawn between jurisdiction simpliciter and forum non conveniens; the latter comes into play only after jurisdiction is established. The Court emphasized

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27. *Id.* para. 91.
28. *Id.*
29. *Id.* para. 93.
30. *Id.* para. 95.

that the forum non conveniens doctrine requires the defendant to establish that the alternative forum proposed is *clearly* more appropriate than the domestic forum. Where another forum is only marginally more appropriate, a motion for a stay of proceedings should be denied. In this regard, Justice LeBel stated, "[i]t is not a matter of flipping a coin."[31] Relevant factors in the forum non conveniens inquiry might include "the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties."[32] The Court expressed concern about reliance on a loss of juridical advantage in the forum non conveniens inquiry; the Court noted that to use this factor too extensively (at least in the interprovincial context) might undermine the spirit of *Morguard* and *Hunt*. The Court stated that differences between laws should not be "viewed instinctively as signs of disadvantage or inferiority" and thus, a court should "refrain from leaning too instinctively in favour of its own jurisdiction."[33]

After laying out the new framework for the assumption of jurisdiction, the Court then proceeded to apply the law to the facts of both *Van Breda* and *Charron*. The Court concluded that *Van Breda* could be resolved on the basis that a contract related to the tort action was entered into in Ontario. The Court stated that "[t]he events that gave rise to the claim flowed from the relationship created by the contract."[34] It further noted that Club Resorts had not rebutted the presumption of jurisdiction that arises from the application of this presumptive factor, nor had it shown that there was another forum that was clearly more appropriate than Ontario for the resolution of the action. With respect to *Charron*, the Court held that the facts supported the conclusion that Club Resorts was "carrying on business" in Ontario, a presumptive connecting factor. It pointed to the fact that Club Resorts' commercial activities in Ontario went beyond

31. *Id.* para. 109.
32. *Id.* para. 110.
33. *Id.* para. 112.
34. *Id.* para. 117.

simply promoting a brand and advertising. Rather, Club Resorts' representatives were in the province regularly and Club Resorts benefitted from the physical presence of an office in Ontario. The Supreme Court held that Club Resorts had not rebutted the presumption of jurisdiction that arises from the "carrying on business" connecting factor and that it failed to show that a Cuban court would be a clearly more appropriate forum than the domestic forum in the circumstances of this case.

III. *THE PRESUMPTIVE FACTORS FRAMEWORK FOR JURISDICTION*

I have previously argued that the real and substantial connection test, properly understood, should focus on objective connections between the litigation and the parties. As such, I critiqued both the Court of Appeal's decision in *Muscutt* and its decision in *Van Breda* as being too subjective, inconsistent in application, and divorced from the core of the "connections" that should be at the heart of the jurisdictional inquiry. In this regard, the Supreme Court of Canada's decision in *Van Breda* is an improvement over its predecessors.

The Supreme Court in *Van Breda* accepted the premise that, to the extent that "fairness" and "order" cannot be reconciled, the latter must prevail.[35] Justice LeBel noted that although fairness and justice are essential aspects of a sound system of private international law, they cannot be attained without a system of rules that ensures security and predictability. As such, the "framework for the assumption of jurisdiction cannot be an unstable, ad hoc system made up 'on the fly' on a case-by-case basis."[36] This is undoubtedly true. Past Supreme Court precedent suggested that the real and substantial connection test was not intended to be an all-encompassing fairness inquiry. Rather, the test was intended to provide objective limits on a court's adjudicative power, such that the assumption of jurisdiction over ex juris defendants would be fair and reasonable. Fairness was thus the goal of the real and substantial connection test; it was not intended to define (in part) the content of the real and substantial connection test.

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35. *Id.* paras. 73–74.
36. *Id.* para. 73.

Accordingly, the Court in *Van Breda* appropriately re-oriented the real and substantial connection test toward the "connections" that exist between the forum and the parties. This point is made repeatedly in the judgment. For instance, Justice LeBel posited that in order to foster stability and predictability in private international law, the inquiry "should turn primarily on the identification of objective factors that might link a legal situation or the subject matter of the litigation to the court that is seized of it."[37] He further stated that the focus should be on the "factors or factual situations that link the subject matter of the litigation and the defendant to the forum."[38] Justice LeBel repeated that "[j]urisdiction must ... be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum."[39] He also clarified that the general principles of "fairness, efficiency or comity"—while important systemic values—should not be confused with the objective factual connections that are necessary to ground jurisdiction.[40]

It is clear that the Supreme Court has recalibrated the real and substantial connection test so as to focus on the objective factual connections between the forum and the subject matter of the litigation. It is a positive development that the objective connections that link a dispute to the forum are now the touchstone of the jurisdictional inquiry. In theory, this should result in increased predictability for litigants, who will no longer be forced to re-litigate jurisdictional determinations from first principles.[41] Under the approach that prevailed under *Muscutt*

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37. *Id.* para. 75.

38. *Id.* para. 79. The formulation here is slightly different, in that it looks at the connection of both the subject matter of the litigation *and* the defendant to the forum. This is reminiscent of debates post-*Morguard* as to whether the requisite connection was between the forum and the *defendant* or the forum and the *subject matter* of the litigation. *See generally* Garry Watson & Frank Au, *Constitutional Limits on Service Ex Juris: Unanswered Questions from* Morguard, 23 ADVOC. Q. 167 (2000).

39. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 82 (Can.).

40. *Id.* para. 84.

41. Counsel for the defendant in *Van Breda* submits, "The *Van Breda* decision is a marked departure from the *Muscutt* test and represents a significant step forward in providing predictability in this area of the law. It removes a large element of discretion that motion judges had under the rubric of unfairness to the litigants under the *Muscutt* test. The *Van Breda* test should provide greater certainty and predictability for litigants in the future." John Olah & Roman Myndiuk, *Unlocking the Mysteries of Jurisdiction: The* Van Breda *Case,* BEARD WINTER LLP (June 15, 2012), *available at*

(and, to a lesser extent, the approach endorsed by the Court of Appeal in *Van Breda*), litigants engaged in jurisdictional battles as though this were the first time that a case like this had ever been heard. Since subjective considerations unique to the parties were part of the jurisdictional test (e.g., financial resources, personal hardship, travel considerations, etc.), no two cases were ever sufficiently alike to make jurisdictional determinations predictable. Under the Supreme Court of Canada's approach, the focus on objective connections should provide some measure of stability and certainty in jurisdictional determinations—at least in comparison to a fluid, fairness/comity/efficiency based test.

With that said, the manner in which the Supreme Court chose to implement the new connection-based test leaves much to be desired. The Court created a rigid presumptive factors approach whereby a court can only assume jurisdiction if the plaintiff can fit himself within one of the four pre-determined factors. In this respect, the Supreme Court has arguably still not found the right balance between "order" and "fairness." Whereas the Court of Appeal in *Muscutt* seemed to sacrifice order at the altar of fairness, the Supreme Court in *Van Breda* has done the opposite.

In this section, I examine more closely the four presumptive factors and identify what is problematic about each one. I also argue that while the Court emphasized that these are rebuttable presumptions, the reality is that defendants will rarely, if ever, be able to rebut the presumptions. As such, plaintiffs who can fit themselves within one of the presumptive factors will almost certainly be able to establish a real and substantial connection between the forum and the dispute. Further, I comment on the Court's invitation for courts to create new presumptive factors and its warning not to aggregate non-presumptive factors for the purposes of establishing a real and substantial connection. Finally, I critique the presumptive factors framework as being too tort-focused and providing no direction on how to deal with jurisdictional disputes that arise in non-tort cases.

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http://www.beardwinter.com/wp-content/files_mf/1339764383JAOspeechUnlockingtheMysteriesofJurisdictionTheVanBredaCase.pdf.

A. *The Four Presumptive Factors*

As described, the Supreme Court reoriented the jurisdictional test to focus on the objective factors which link the forum to the subject matter of the dispute. It thought the best way to do this was to rely "on a basic list of factors that is drawn at first from past experience in the conflict of laws system and is then updated as the needs for the system evolve."[42] Accordingly, the Court identified the following as presumptive connecting factors that prima facie entitle a court to assume jurisdiction over a dispute: a) the defendant is domiciled or resident in the province; b) the defendant carries on business in the province; c) the tort was committed in the province; d) a contract connected with the dispute was made in the province. At first blush, these appear to be fairly straightforward objective factors linking the forum with the dispute. Upon closer analysis, however, most of these factors leave a fair degree of interpretive gaps and wiggle-room. Each of these factors will be discussed in turn.

1. Defendant is Domiciled or Resident in the Province

The Court stated that "a defendant may always be sued in a court of the jurisdiction in which he or she is domiciled or resident (in the case of a legal person, the location of its head office)."[43] This is hardly controversial. Indeed, most countries regard the domicile or residence of the defendant as a ground for general jurisdiction. What is surprising is the Court's throwaway statement in parentheticals—i.e., "in the case of a legal person, the location of its head office."[44] Apparently, the Court was saying that the domicile of a corporation for jurisdictional purposes is the location of its head office (as opposed to, say, its place of incorporation).[45]

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42. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 82 (Can.).

43. *Id.* para. 86.

44. *Id.*

45. Black discusses the issue of domicile at some length stating, "However, although residence of the defendant is not a surprising factor to see in such a list, domicile is. Those familiar with the Brussels/Lugano regimes, where the defendant's domicile in the forum is a general ground of jurisdiction, will not find it so. In Europe, however, domicile is established in a commonsense fashion, closely akin to residence. In common law Canada, however, domicile remains afflicted by the interpretation

However, the presumptive factor enunciated by the Court referred to *either* the defendant's domicile *or* the defendant's place of residence. These may be, but are not necessarily, co-extensive. It is possible that a corporation may be resident in multiple forums. Indeed, the CJPTA[46] specifically has a section on "Ordinary residence—corporations" where there are four different permutations of where a corporation can be ordinarily resident.[47] Similarly, Article 3148 of the Québec Civil Code contemplates a distinction between domicile and residence.[48] It would have been helpful for the Court to clarify in a little more detail when a legal person falls within the purview of this presumptive factor. The Court's reasoning would seem to imply that it is only when the entity's head office is located in the forum. However, given that the presumption involves

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accorded to it in a series of nineteenth-century English decisions. . . . LeBel J's statement that domicile should now play a role in personal jurisdiction is the first new use of that once ubiquitous connecting factor in decades." Black, *supra* note 19, at 422–23.

46. The *Court Jurisdiction and Proceedings Transfer Act* ("CJPTA") is a Uniform Act promulgated by the Uniform Law Conference of Canada. The Act, or a variation thereof, has been adopted in several provinces. *See generally* Uniform Court Jurisdiction and Proceedings Transfer Act, UNIF. L. CONF. OF CANADA, *available at* http://www.ulcc.ca/en/uniform-acts-en-gb-1/183-court-jurisdiction-and-proceedings-transfer-act. For province specific verisions see Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 (Can. B.C.); S.S. 1997, c. C-41.1 (Can. Sask.); S.N.S. 2003 (2nd Sess.), c. 2 (Can. N.S.).

47. Uniform Court Jurisdiction and Proceedings Transfer Act, § 7, UNIF. L. CONF. OF CANADA, *available at* http://www.ulcc.ca/en/uniform-acts-en-gb-1/183-court-jurisdiction-and-proceedings-transfer-act. Section 7 of the CJPTA provides:

Ordinary residence - corporations

7. A corporation is ordinarily resident in [enacting province or territory], for the purposes of this Part, only if:

(a) the corporation has or is required by law to have a registered office in [enacting province of territory];

(b) pursuant to law, it:

(i) has registered an address in [enacting province or territory] at which process may be served generally; or

(ii) has nominated an agent in [enacting province or territory] upon whom process may be served generally;

(c) it has a place of business in [enacting province or territory]; or

(d) its central management is exercised in [enacting province or territory].

48. *See* Civil Code of Québec, S.Q. 1991, c. 64, s. 3148 (Can. Que.). Under section 3148 of the Québec Civil Code, a defendant may always be sued where it is domiciled; however, it may only be sued where it is resident (where it has "an establishment in Québec") provided the "dispute relates to its activities in Québec."

"residence" as well, the Court's reasoning on this point is not entirely clear.[49]

The Court also noted that, by contrast, the presence of the plaintiff in the jurisdiction does not create a presumptive relationship between the forum and either the subject matter of the litigation or the defendant. The Court here was trying to do away with the "damage sustained in the forum" ground for jurisdiction which is characteristic of many of the service ex juris statutes.[50] Some ambiguity arises, however, from the Court's particular language in this respect. Justice LeBel stated:

> The presence of the plaintiff in the jurisdiction is not, *on its own*, a sufficient connecting factor. (I will not discuss its relevance or importance in the context of the forum of necessity doctrine, which is not at issue in these appeals.) *Absent other considerations*, the presence of the plaintiff in the jurisdiction will not create a presumptive relationship between the forum and either the subject matter of the litigation or the defendant.[51]

The expressions "on its own" and "absent other considerations" suggest that there may be some role for the residence of the plaintiff within the jurisdictional inquiry. However, this would be at odds with the Court's insistence that non-presumptive factors (of which residence of the plaintiff would be one) cannot be aggregated to create jurisdiction.[52] Perhaps the Court simply used the qualified language to carve out room for the forum of necessity doctrine, which it references in the same paragraph. In any event, while the choice of wording may not have been ideal, the point does seem clear—courts are no longer to consider the residence of the plaintiff in the jurisdictional inquiry.

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49. *See also* Blom, *supra* note 19, at 12 ("The reference to *head* office seems to suggest that there is general jurisdiction, meaning jurisdiction irrespective of the nature of the claim, over a corporation with a head office in the province, but maybe only specific jurisdiction—that is, jurisdiction restricted to claims otherwise connected with the province—as against a corporation that has a branch office or an agent for service in the province but has its head office elsewhere.").

50. *See, e.g.*, Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 17.02(h) (Can.).

51. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 86 (Can.) (emphasis added).

52. *Id.* para. 93.

2. Defendant Carries on Business in the Province

The Court also determined that "carrying on business" in the jurisdiction should be considered a presumptive connecting factor. It recognized, however, that the problem lies not in the statement of the rule, but in its application. The Court was particularly wary about creating a rule of "universal jurisdiction" in respect of tort claims.[53] In this regard, the Court emphasized that active advertising in the jurisdiction, without more, would not suffice to establish that the defendant was carrying on business in the jurisdiction. Thus, this factor requires that there be some sort of actual (and not just virtual) presence in the jurisdiction, such as "maintaining an office there or regularly visiting the territory of the particular jurisdiction."[54]

Notably, to establish the presumptive factor of "carrying on business," the plaintiff need not initially show that the plaintiff's cause of action is related to the business that is actually carried on in the forum. Instead, as long as the defendant is generally carrying on some business—regardless of whether that business relates to the alleged tort—the presumptive factor is satisfied. The onus then falls on the defendant to rebut the presumption by arguing that the subject matter of the litigation is not related to the defendant's business activities in the forum.[55] This seems to have the matter backward.[56] If the plaintiff is seeking to sue in

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53. *Id.* para. 87.

54. *Id.*; *see also id.* para. 114 ("Moreover, I do not accept that evidence of advertising in Ontario would be enough to establish a connection. Advertising is often international, if not global. It is ubiquitous, crossing borders with ease. It does not, on its own, establish a connection between the claim and the forum. If advertising sufficed to create a connection with a forum, commercial organizations of a certain size could be sued in courts everywhere and anywhere in the world. The courts of a victim's place of residence would possess an almost universal jurisdiction over diverse and vast classes of consumer claims.").

55. *See id.* para. 96. This appears to be a not insignificant hurdle: "In such a case, the defendant will bear the burden of negating the presumptive effect of the listed or new factor and convincing the court that the proposed assumption of jurisdiction would be inappropriate." *Id.* para. 81.

56. Blom argues, "In fact, so fundamental is this aspect that one wonders why it was not expressly built into the connecting factor, rather than being left as something to be raised by way of rebuttal." Blom, *supra* note 19, at 14. Similarly, Black contends that "it is striking that *Club Resorts* did not seek to limit the carrying-on-business PCF [presumptive connecting factor] in a similar fashion [i.e., to situations where the subject matter of the litigation arose from the business that the defendant was carrying on in the forum]." Black, *supra* note 19, at 423.

tort and is relying on the "carrying on business" presumptive factor, the onus should be on the plaintiff to establish that the business activities relate to the underlying cause of action. Otherwise, this ground of jurisdiction turns into a surrogate for domicile or residence-based jurisdiction which does, in fact, create universal jurisdiction over the defendant.

The confusion regarding this factor stems from the fact that it is a cross-over between general jurisdiction and specific jurisdiction. In the parlance of US law, "general jurisdiction" exists when an out-of-forum defendant has extensive, systematic and continuous dealings with the forum, such that the court has personal jurisdiction in *any* dispute involving the defendant. In other words, with general jurisdiction, the defendant is essentially "at home" in the forum and thus is subject generally to the jurisdiction of that forum's courts. By contrast, "specific jurisdiction" arises when the defendant does not have systematic and continuous dealings with the forum, such that the forum only has jurisdiction over the defendant in respect of that defendant's activities in the forum.[57] Canadian courts have generally eschewed the labels of "general" and "specific" jurisdiction, but it is clear that the four presumptive factors articulated in *Van Breda* do fall into one of the two categories. The domicile ground of jurisdiction is the classic example of general jurisdiction. By contrast, the "tort committed in the jurisdiction" and "contract connected with the dispute made in the jurisdiction" are examples of specific jurisdiction because they rely on contacts with the forum related to the particular dispute at hand. The "carries on business" ground of jurisdiction looks like a hybrid of general and specific jurisdiction.[58] However, it does not appear that the Supreme

57. *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787–90 (2011) (discussing the differences between general and specific jurisdiction); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011); *see also* Civil Code of Québec, S.Q. 1991, c. 64, s. 3148 (Can. Que.).

58. In the United States, "doing business" in the forum is a ground of general jurisdiction. Mary Twitchell, *Why We Keep Doing Business with "Doing Business" Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 172–73 (2001) ("Courts seem to have articulated a fairly straightforward standard for doing-business jurisdiction: states have general jurisdiction over corporations doing continuous and systematic business in the forum."). Despite the similarity in names, "doing-business" (in the United States) and "carrying on business" (in Canada) are two very different grounds of jurisdiction. In the United States, once the plaintiff establishes that the defendant is doing business in

Court intended "carries on business" to be a ground of general jurisdiction, as it stressed its concern that this factor should not turn into a form of universal jurisdiction. Moreover, it emphasized that the presumption could be rebutted by showing that the business carried on in the forum had little or nothing to do with the dispute at hand. Accordingly, it is clear that the Supreme Court intended for "carries on business" to be a ground of specific jurisdiction which is only applicable where the business carried on relates to the underlying tort. However, the court framed this presumptive factor awkwardly in that the plaintiff must simply show that the defendant was carrying on business generally in the forum in order to presumptively ground jurisdiction (i.e., general jurisdiction), and then the defendant is entitled to rebut that presumption by showing that the business conducted in the forum was not related to the underlying cause of action (i.e., specific jurisdiction). For conceptual clarity, it would have been much more helpful for the Court to have identified the presumptive factor as something to the effect, "The defendant carries on business related to the underlying tort in the forum province." That way, the burden would not be on the defendant to rebut the presumption of jurisdiction after the plaintiff had shown that the defendant was carrying on some sort of business in the forum. The burden of establishing this ground of jurisdiction would be where it properly belongs—on the plaintiff seeking to fit itself within this presumptive factor.

The Supreme Court's analysis of the "carrying on business" ground of jurisdiction from *Charron* shows just how expansively it is prepared to interpret the term. The Supreme Court repeated the findings of the courts below that the defendant had "an active commercial presence in Ontario" and "engaged in significant commercial activities in Ontario, especially though

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the forum, the court has jurisdiction over *any claim* involving the defendant—even if the claim is wholly unrelated to its business activities. *Id.* By contrast, in Canada, after the plaintiff establishes that the defendant is carrying on business, the defendant has the opportunity to rebut the presumption of jurisdiction by showing a lack of connection between the underlying tort and the defendant's business activities in the forum. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 96 (Can.). Because of the similarity in nomenclature, however, courts may confuse the "carrying on business" ground of jurisdiction in Canada and believe that it similar to "doing-business" jurisdiction in the United States.

the office of the SuperClubs group."[59] It then listed the factual connections that the Court of Appeal relied on in coming to the conclusion that there existed a real and substantial connection between the defendant and the forum. In light of all this, the Court expressed the view that "deference must be shown" to the courts below, as they were in a position to make findings about the content and significance of the evidence.[60] What is most notable in this respect is that the Court of Appeal had found that the evidence "[fell] short of establishing that [the defendant] was carrying on business in Ontario."[61] In other words, the Court of Appeal held that while the defendant was engaged in significant commercial activities in Ontario, it was not "carrying on business" in Ontario. And yet, the Supreme Court ignored the Court of Appeal's conclusion in this respect and re-weighed the evidence to conclude that the defendant was, in fact, carrying on business in Ontario.

The list of factors the Supreme Court focused on as supporting the conclusion that the defendant in *Charron* was "carrying on business" in Ontario almost exclusively center around the defendant's marketing, promotional or advertising activities in Ontario.[62] However, the Supreme Court stated that "active advertising in the jurisdiction . . . [does] *not* suffice to establish that the defendant is carrying on business there."[63] So, which is it? Does active advertising in the jurisdiction support the conclusion that a defendant is carrying on business in Ontario or not?[64] Based on the Court's factual analysis in *Charron*, it is likely safe to assume that extensive advertising in Ontario, particularly through an Ontario-based intermediary,

59. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 120 (Can.).

60. *Id.* para. 121.

61. Van Breda v. Village Resorts Ltd., 2010 ONCA 84, para. 116 (Can. Ont. C.A.).

62. *See* Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 120 (Can.).

63. *Id.* para. 87 (emphasis added).

64. Perhaps the Supreme Court's conclusion in this respect can be explained by the fact that advertising in the jurisdiction was effectuated through some form of physical presence in the jurisdiction. The Court seemed to indicate that "virtual" presence alone would not suffice to establish that the defendant is carrying on business, but that "actual" presence (through regularly visiting the forum) might suffice to establish that the defendant is carrying on business there. *See id.* If this is the case, then defendants would be wise to structure their affairs so as to only establish a virtual presence in Ontario (e.g., through email, phone conversations, internet postings).

will support the conclusion that the defendant is carrying on business in Ontario.

After determining that the defendant was "carrying on business" in Ontario within the meaning of the new jurisdictional rule, the Court then concluded that the defendant had not rebutted the presumption of jurisdiction that arises from this connecting factor.[65] The Court stated that the defendant's "business activities in Ontario were specifically directed at attracting residents of the province, including the Charron family, to stay as paying guests at the resort in Cuba where the accident occurred. It cannot be said that the claim here is unrelated to Club Resorts' business activities in the province."[66] In a very broad sense, the defendant's business activities are related to the plaintiff's tort cause of action. Had Club Resorts not promoted its business to Hola Sun and had Hola Sun not offered packages to Bel-Air Travel, the plaintiffs might not have purchased this vacation package. Had the plaintiffs not purchased this vacation package, Mr. Charron would not have gone scuba diving at this resort and the tort action would not have ensued. Thus packaged, the plaintiff's claims are "related" to the defendant's business activities. However, it is unclear whether this is how the concept of "related" in respect of "carrying on business" jurisdiction should be interpreted, particularly if the Court is concerned about creating a near-universal form of jurisdiction.

If, for instance, the defendant actively represented in its literature and to agents in Ontario that its resorts were peanut-free, a plaintiff purchased a package based on this representation because he was severely allergic to peanuts, and the representation turned out to be false, then clearly the defendant's "business activities" (i.e., its advertising) would be related to the underlying cause of action. Here, the connection is much more tenuous. The Court seems to accept that where a defendant engages in advertising and promotion through an agent or intermediary, and a plaintiff purchases that product or

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65. *Id.* para. 123. Of course the defendant had not rebutted the presumption. The presumption is one that was just created by the Supreme Court. How could the defendant have rebutted a presumption that it did not yet know existed?

66. *Id.*

service, any tort claims that arise from that product or service are "related to" the defendant's business in Ontario.

The confusion in *Charron* likely arises from the fact that the defendant Club Resorts was actually acting in two separate capacities: first, it advertised and marketed the SuperBreezes brand in Ontario, and second, it operated and managed the Cuban resort where Mr. Charron was tragically killed. The cause of action advanced by the plaintiffs relates to the latter role assumed by Club Resorts. In other words, the gravamen of the cause of action in *Charron* is that Club Resorts was negligent in failing to ensure, as manager and operator of the resort, that proper safety procedures were in place for diving expeditions. This is apparent from the allegations in the *Charron* Statement of Claim; all of the allegations center around Club Resorts' *management* of the resort and not its marketing activities in Ontario.[67] In fact, the Statement of Claim does not even refer to Club Resorts as carrying on business in Ontario; instead it notes that "this Defendant was at all material times the manager and operator of a resort property known as 'SuperClubs Breezes Costa Verde.' The defendant was also at all material times the operator and manager of the said resort's activities and excursions."[68] What is clear is that the plaintiffs in *Charron* sought to sue Club Resorts *not* in respect of its promotional

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67. That the tort claim advanced against Club Resorts is based on its *management* role (rather than its *promotional/marketing* role) is apparent from the *Charron* Amended Statement of Claim. At para. 26, the Plaintiffs claim negligence against, *inter alia*, Club Resorts based on the following:

They failed to ensure that the proper safety procedures were in place when conducting diving excursions;

They failed to ensure that they had hired competent staff to train, supervise and participate in the diving expedition, specifically the dive master and boat captain;

They failed to ensure that the divers participating in the diving expedition had appropriate experience;

They failed to warn the divers of the potential risks involved in participating in the diving excursion;

They supplied diving equipment to the divers when they knew or ought to have known that the equipment did not meet the required safety standards;

They supplied diving equipment when they knew or ought to have known that such equipment was not in proper working order;

They failed to ensure that the diving boat was properly equipped and ready for possible emergencies that could arise out of such a diving accident.

Amended Statement of Claim para. 26, Charron v. Bel Air Travel Group Ltd., 2008 CarswellOnt 7770 (ONSC), No. 03-B5506.

68. *Id.* para. 9.

activities in Ontario (i.e., the business that it carried out in Ontario), but rather in respect of its operational and management activities in Cuba.

Jurisdiction should not be assumed on the basis of the "carrying on business" presumptive factor when the business that is the subject-matter of the tort claim is not the business that is carried out in Ontario. In other words, plaintiffs should not be able to bootstrap claims that are unrelated to defendants' business activities in Ontario. Otherwise, as discussed above, this risks turning the "carrying on business" ground of jurisdiction into the domicile/residence ground of jurisdiction. Unfortunately, this is exactly what the Supreme Court of Canada has done in *Charron*.

3. Tort Committed in the Province

The Supreme Court in *Van Breda* determined that the situs of a tort should be a presumptive connecting factor for jurisdictional purposes, noting that "[t]he difficulty lies in locating the situs, not in acknowledging the validity of this factor once the situs has been identified."[69] The Court's endorsement of the situs of the tort as a presumptive connecting factor is likely to engender much litigation in the future regarding *where* exactly certain multi-jurisdictional torts are deemed to occur for the purpose of the new presumptive factor.[70] Plaintiffs will undoubtedly argue that the tort occurs where the injury is suffered, as the injury "completes" the tort.[71] The Court foreshadowed this argument with respect to defamation when it stated, "[f]or torts like defamation, sustaining damage completes the commission of the tort and often tends to locate

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69. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 88 (Can.).

70. *See, e.g.*, Central Sun Mining Inc. v. Vector Engineering Inc., [2012] ONSC 7331 (Can. Ont. Sup. Ct. J.) (alleging that the torts of negligence *simpliciter* and negligent misrepresentation in respect of engineering and consultation work performed by non-Ontario entities were committed in Ontario within the meaning of the new presumptive factor). As certain commentators note, "[t]he *situs* or location of a tort is itself so uncertain that it can hardly be said to qualify as a presumption at all, except perhaps in the most obvious cases." Brandon Kain, Elder C. Marques, & Byron Shaw, *Order in the Court? The* Van Breda *Trilogy—Part II—A New Test for Jurisdiction Simpliciter*, CANADIAN APPEALS MONITOR (Apr. 26, 2012), http://www.canadianappeals.com/2012/04/26/orderin-in-the-court-the-van-breda-trilogy-part-ii-a-new-test-for-jurisdiction-simpliciter.

71. This would enable many plaintiffs to sue in their home forum.

the tort in the jurisdiction where the damage is sustained."[72] However, as some commentators argue, "[i]t is unclear why the location of damages in defamation claims should be more significant than in cases of personal injury."[73]

One issue which will undoubtedly emerge in coming years is whether the inquiry into the situs of the tort is the same for jurisdictional purposes, on the one hand, and choice of law purposes, on the other. As indicated in *Moran v. Pyle*, "[t]he rules for determining situs for jurisdictional purposes need not be those which are used to identify the legal system under which the rights and liabilities of the parties fall to be determined."[74] In the absence of guidance on this issue, it is likely that courts will (rightly or wrongly) rely on choice of law precedent on identifying the place where the tort occurred in making jurisdictional determinations.

More fundamentally, locating the situs of the tort seems to be an overly formalistic approach to jurisdiction. Since *Moran*, Canadian courts have moved away from locating the situs of the tort in jurisdictional determinations. Indeed, Justice Dickson in *Moran* discussed the difficulty of ascribing to the tort one single situs:

> Logically, it would seem that if a tort is to be divided and one part occurs in state A and another in state B, the tort could reasonably for jurisdictional purposes be said to have occurred in both states or, on a more restrictive approach, in neither state. It is difficult to understand how it can properly be said to have occurred only in state A.[75]

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72. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 89 (Can.).

73. *See* Kain et al., *supra* note 70.

74. Moran v. Pyle National (Can.) Ltd., [1975] 1 S.C.R. 393, 397 (Can.).

75. *Id.* at 398. Accordingly, the Court rejected both the "place of acting" and the "place of injury" approaches advocated by the parties, and instead endorsed the following rule: "where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant . . . . By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.

In *Morguard,* Justice La Forest cited the decision in *Moran* for the proposition that "it is simply anachronistic to uphold a power theory or a single situs for torts or contracts for the proper exercise of jurisdiction."[76] And yet, decades later, the Supreme Court has inexplicably returned to the rigid approach of locating the situs of the tort in determining judicial jurisdiction. The consequence of elevating the situs of the tort to one of four presumptive factors will most certainly be years of litigation seeking to define where exactly certain multi-jurisdictional torts are deemed to take place.

4. Contract Connected with the Dispute Was Made in the Province

Finally, the Supreme Court determined that, prima facie, a court is entitled to assume jurisdiction over a dispute where a "contract connected with the dispute" was made in the forum province.[77] The Court did not expound on this presumptive factor, other than to say "[c]laims related to contracts made in Ontario would also be properly brought in the Ontario courts (rule 17.02(f)(i))."[78] To the extent that the Court intended to derive authority for this presumptive factor from Ontario's service *ex juris* rules, this cannot be squared with a plain reading of Rule 17.02(f)(i). That section provides:

> A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims, . . . (f) in respect of a contract where, (i) the contract was made in Ontario.[79]

Thus, it is clear that service out of the jurisdiction is permitted "in respect of a contract" where the contract was

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This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce." *Id.* at 409.

76. Morguard Invs. Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 1109 (Can.).

77. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 90 (Can.). This should not be confused with consent-based jurisdiction. Consent-based jurisdiction arises where a party signs a jurisdiction clause/agreement conferring jurisdiction on the forum court. Here, the Court is referring to contracts that do not contain jurisdiction clauses in favor of the forum court (or there would be no need to resort to the real and substantial connection test).

78. *Id.* para. 88.

79. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 17.02 (Can.).

made in Ontario.[80] That is, if a party is advancing a cause of action in contract, then an action may be brought in Ontario where the underlying contract was made in Ontario. This rule does not speak to whether a tort claim can be maintained where there exists a contract "connected with the dispute" that was made in the forum.[81]

What does it mean for a contract to be "connected with the dispute" for the purposes of assuming jurisdiction over a defendant in a tort case?[82] There are at least two ways in which

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80. The rule is similar to Section 10 of the *Court Jurisdiction and Proceedings Transfer Act*:

> 10 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [enacting province or territory] and the facts on which a proceeding is based, a real and substantial connection between [enacting province or territory] and those facts is presumed to exist if the proceeding
>
> (c) concerns contractual obligations, and
>
> (i) the contractual obligations, to a substantial extent, were to be performed in [enacting province or territory],
>
> (ii) by its express terms, the contract is governed by the law of [enacting province or territory], or
>
> (iii) the contract
>
> (A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
>
> (B) resulted from a solicitation of business in [enacting province or territory] by or on behalf of the seller . . . .

Uniform Court Jurisdiction and Proceedings Transfer Act, § 10, UNIF. L. CONF. OF CANADA, *available at* http://www.ulcc.ca/en/uniform-acts-en-gb-1/183-court-jurisdiction-and-proceedings-transfer-act.

81. According to the Court of Appeal, the plaintiff's claim in *Van Breda* was framed in both tort and contract. However, in endorsing presumptive factor (d), the Court does not make jurisdiction contingent upon a concurrent claim in contract. Instead, the Court sets out a "contract connected with the dispute" being made in Ontario as providing a basis for jurisdiction in tort. Van Breda v. Village Resorts Ltd., 2010 ONCA 84, para. 135 (Can. Ont. C.A.).

82. This sentiment is echoed by Olah and Myndiuk, *supra* note 41 ("Does it mean that any factual pattern involving a contractual chain having its genesis in Ontario will now be the subject to Ontario courts' jurisdiction? Surely this is not what the Supreme Court of Canada intended."). In *Export Packers Co. Ltd. v. SPI Int'l Transp.*, 2012 ONCA 481, paras. 13–16 (Can. Ont. C.A.), the plaintiff tried arguing that there were three contracts "connected" with the dispute so as to ground jurisdiction in Ontario. The Court of Appeal rejected this argument, stating, "The three contracts relied upon by the appellant relate to arrangements between the owner, the broker and the proposed carrier of the cargo. They have no connection to [the defendant] other than they anticipate that the cargo would be picked up at [the defendant's] warehouse in Quebec. The dispute in issue between [the plaintiff] and [the defendant] relates solely to the alleged negligence of [the defendant] in releasing the cargo. The contracts relied upon do not address the issue of release of the cargo by [the defendant] as

the "contract connected with a dispute" ground of jurisdiction is unclear. First, in cases where the defendant is a party to a contract with the plaintiff, how closely must that contract relate to the underlying cause of action? Second, in cases where the defendant is not a party to a contract with the plaintiff but there is nonetheless a contract between the plaintiff and some third party, can this ground jurisdiction in tort if the subject-matter of the contract is related to the tort claim?

To illustrate the latter scenario, consider the facts of *Charron*. In that case, the plaintiffs entered into a contract with Hola Sun for a one-week vacation that included scuba diving at the Cuban resort. The Statement of Claim alleged "that it was a term of the contract, express or implied, that the late Claude Charron be provided with safe scuba diving instruction and equipment, and that the Defendants by their conduct, have breached the said contract."[83] However, the Court of Appeal found that although the defendant, Club Resorts, "was implicated in the promotion and execution of the contract," it was not a party to the contract.[84] Would the contract between the plaintiffs and Hola Sun and/or Bel-Air Travel have sufficed to ground jurisdiction over Club Resorts in respect of a tort claim that is "connected with the contract"?[85] It is not clear how

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storer." *Id.* para. 14. Accordingly, even though there were, broadly speaking, contracts "connected" with the dispute involved, the Court of Appeal saw these contracts as too attenuated to support jurisdiction over a tort claim.

83. Van Breda v. Village Resorts Ltd., 2010 ONCA 84, para. 111 (Can. Ont. C.A.).

84. *Id.* para. 113. Thus, the contract did not fall under Rule 17.02(f).

85. In Colavecchia v. The Berkeley Hotel, 2012 ONSC 4747 (Can. Ont. Sup. Ct. J.), the court suggested that the answer to this question was "no." In that case, the plaintiff wife booked a hotel stay at a UK hotel through her TD Visa card while she was in Ontario. At the hotel, the plaintiff husband slipped and fell in the bathroom of the hotel room. The court did not believe that presumptive factor (d) applied because it could not locate a contract between the hotel and the plaintiffs that was made in Ontario. It readily acknowledged, however, that there was a contract between TD Visa and the plaintiffs that was made in Ontario. What the court did not consider—and what it should have considered under *Van Breda*—is whether this contract between TD Visa and the plaintiffs constituted a "contract connected with the dispute" within the meaning of presumptive factor (d). The *Colavecchia* court also seemed to misunderstand how the contract between the plaintiffs and the hotel could ground liability under the *Van Breda* framework. The court in this respect indicated, "Even if there was a contract that was entered into between the Hotel and the Plaintiffs in Ontario, it was merely for accommodations. The contract has nothing to do with the dispute between the parties, which is a classic action for negligence." *Id.* para. 23. This statement seems to directly undercut the Supreme Court's ruling in *Van Breda* itself. In

the Court intended for related contracts to fit into the jurisdictional analysis when the plaintiff seeks to establish a court's jurisdiction over a tort claim.

Like the inquiry into the situs of the tort, this presumptive factor requires courts to determine *where* the contract was made.[86] In the *Van Breda* case, the answer was straightforward: since all the parties were physically located in Ontario, the contract was deemed to be made in Ontario.[87] However, in cases involving cross-border or transnational contracts, the answer might not be quite as straightforward. Assume, for instance, that a Club Resorts representative from Cuba had contracted directly with Mr. Berg (plaintiff Van Breda's travel partner) and that the two exchanged a series of emails and phone calls. Ultimately, this culminated in both parties signing a contract prepared by Club Resorts. Where was the contract made—in Ontario or in Cuba? Certainly courts have confronted this issue before, both with respect to the service ex juris rules and the choice of law

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Van Breda, the court found that the contract between Mr. Berg and Club Resorts (though the agent of Mr. Denis) was sufficient to ground jurisdiction over Ms. Van Breda's tort claim in negligence. *See* Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 23 (Can.) ("I find no reviewable error in the findings that Mr. Denis had the authority to represent Club Resorts and that a contract existed under which Mr. Berg was to provide services to Club Resorts. The benefit of this contract, accommodation at the resort, was extended to Ms. Van Breda, who was injured while there in the context of Mr. Berg's performance of his contractual obligation. Deference is owed to the motion judge's findings. No palpable and overriding error has been established. A contract was entered into in Ontario and a relationship was thus created in Ontario between Mr. Berg, Club Resorts and Ms. Van Breda, who was brought within the scope of this relationship by the terms of the contract."). If the contract between Mr. Berg and Club Resorts, which included accommodations, was sufficient to ground jurisdiction over Mr. Berg's travelling companion's claim for negligence, it is hard to see why the *Colavecchia* plaintiff's contract with TD Visa (which provided for accommodations at the defendant's hotel) would also not be sufficient to ground jurisdiction. Courts should expect many claims to be brought and argued under factor (d) since the Supreme Court's ruling was so nebulous on this point.

86. Black argues that "even if *some* connection between the alleged tort and some contract justifies tort jurisdiction, the affiliation required here between the contract and the forum is a debatable one. Had the PCF [presumptive connecting factor] been articulated as "a contract that was connected to the tort was to have been *substantially performed* in the jurisdiction," then this PCF would then have rested on a widely recognised connecting factor for contracts: substantial performance. This ground is acknowledged in the CJPTA. Place of making, however, is not. . . ." Black, *supra* note 19, at 426.

87. The Court accepted that Mr. Denis was an agent for Club Resorts and Mr. Denis was located in Ontario. *See* Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, paras. 115–16 (Can.).

rules in contract. However, elevating this factor to one of only four presumptive factors for establishing jurisdiction in tort cases means that determining where a contract is formed takes on a whole new significance. Much like the search for the situs of the tort, jurisdiction may now rise and fall on where a court determines the contract was made.[88]

These four presumptive factors have essentially become the "be all and end all" of jurisdictional determinations in Canada. Given the significance of these four factors, the demarcation of their boundary lines becomes all the more important: Where did the tort occur? Does the defendant's conduct amount to "carrying on business?" Is there a contract that is "connected" to the dispute that can be used to ground jurisdiction? These will be the questions at the epicenter of jurisdictional debates in the years to come.

B. *(Irrebuttable) Rebuttable Presumptions*

The Supreme Court explained that each of the four presumptions is rebuttable and that the burden of rebutting the presumption rests on the party challenging the assumption of jurisdiction. That party must establish facts which show that the "presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them."[89] Upon closer analysis, however, it appears that only one of the presumptions (carrying on business in the jurisdiction) is actually rebuttable.

It is hard to see how the first presumptive factor (defendant domiciled in the jurisdiction) could ever be rebutted. The very nature of this presumptive factor is that it creates a universal form of jurisdiction based on the defendant's very real and substantial connection to the forum. Where the defendant is

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88. Blom argues that this presumptive factor "is vulnerable to the charge of too much technicality." Blom, *supra* note 19, at 18. Pointing to the Court's analysis in *Van Breda*, Blom argues that "it seems rather artificial to select the precise manner in which the plaintiff's stay was originally booked as the critical jurisdictional element in a lawsuit about an injury on a beach in Cuba." *Id.* Similarly, Black argues that "it is far from obvious why, in a torts suit, *any* affiliations with a contract that is in some way connected with the tort should be pertinent." Black, *supra* note 19, at 425.

89. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 95 (Can.).

domiciled in the forum—i.e., the forum is, in effect, his "home"—it is difficult to imagine how the presumption can be rebutted. In fact, the Court stated that "a defendant may *always* be sued in a court of the jurisdiction in which he or she is domiciled or resident."[90] More importantly, courts should not permit the presumption of domicile to be rebutted, as this would undermine probably the most legitimate and universally-recognized basis of jurisdiction simpliciter.[91]

With respect to a tort committed in the jurisdiction, it is difficult to envisage circumstances where the presumption could be rebutted. The Court outright acknowledged this when it stated "where the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult ...."[92] The Court then went on say that it may nonetheless be possible to rebut the presumption "in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province."[93] This does not make sense. In order to fall within the new presumption, the plaintiff must establish that "the tort was committed in the province"—not that an *element* of the tort was committed in the province. If a court is prepared to find that the forum is the situs of the tort, how could it turn around and say that only a "relatively minor element" of the tort was committed in the forum? Presumably, if only a minor element of the tort was committed in the forum, then the tort itself would not be deemed to have been committed in the forum.

Similarly, it is unclear how the presumption concerning a "contract connected with the dispute" can be rebutted. The Court stated that "where the presumptive connecting factor is a contract made in the province, the presumption can be rebutted by showing that the contract has little or nothing to do with the subject matter of the litigation."[94] The Court fails to appreciate that the presumptive factor it articulated is not simply "a

90. *Id.* para. 86 (emphasis added).

91. Certainly, a defendant can argue under the forum non conveniens doctrine that jurisdiction should be declined in favor of another clearly more appropriate forum.

92. *Id.* para. 96.

93. *Id.*

94. *Id.*

contract was made in province" but rather "a contract *connected with the dispute* was made in the province." As such, in order to fall within the presumption, the contract must be connected with the dispute in some (presumably) significant way. Given this fact, one cannot rebut the presumption by showing that the contract has "little or nothing" to do with the dispute; if this were the case, the presumption would not even apply. Accordingly, it is difficult to conceive how this factor could be rebutted.[95]

The only presumption that can be rebutted is that related to the defendant carrying on business in the forum. In such circumstances, it is open to the defendant to argue that the subject matter of the litigation is unrelated to the defendant's business activities in the province. As a practical matter, once a court finds that the defendant is carrying on business in the forum, and some conceivable link can be made between the cause of action and those activities, the defendant will have a very difficult time rebutting the presumption.[96]

In short, the "rebuttable" presumptions identified by the Court are, in effect, irrebuttable presumptions.[97] This is evident when one examines just how quickly the Court concluded that the presumptions had not been rebutted in the four cases

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95. In applying this presumption to the facts of *Van Breda*, the Court summarily concluded without any discussion, "Club Resorts has failed to rebut the presumption of jurisdiction that arises where this factor applies." *Id.* para. 117.

96. *See, e.g.*, Avanti v. Argex, 2012 ONSC 4395, para. 11 (Can. Ont. Sup. Ct. J.) (after listing reasons why the defendant was carrying on business in Ontario, court stated "[i]t would be open to [defendant] to rebut the presumption of jurisdiction, but I find that the evidence is not sufficient for it to do so."). As argued above, the onus should be on the plaintiff to establish that the cause of action relates to the business that is carried on in Ontario. The burden should not be on the defendant to show that the cause of action has little or nothing to do with the business that is carried on in Ontario.

97. One author has already expressed concern (albeit in the context of the Court of Appeal's decision in *Van Breda*) about courts too readily relying on the presumptions. *See* Stephen Pitel, *Reformulating a Real and Substantial Connection*, 60 U.N.B. L.J. 177, 181 (2010) ("In the future, in cases where the defendant seeks to rebut the presumption it would be unfortunate if courts used the presumption as an express basis for their decisions. The courts should refrain from merely concluding that the factors identified by the defendant are insufficient to rebut the presumed real and substantial connection."). This is precisely what the Supreme Court of Canada did in *Van Breda/Charron*, *Black*, and *Banro*. Black notes that in the context of the CJPTA, "there has yet to be a reported case where a presumption of R&SC [real and substantial connection], once established, has been rebutted." Black, *supra* note 19, at 424.

before it. In each case, the Court disposed of the rebuttable presumptions in a mere sentence or two, without any meaningful analysis of potential counter-arguments.[98] Accordingly, it is crucial for defendants to contest vigorously the application of the presumptive connecting factor, as they are unlikely have any success displacing the presumption of jurisdiction that arises once a plaintiff fits himself within one of the four enumerated factors.

C. *Locating New Presumptive Factors and Aggregating Non-Presumptive Factors*

The Court emphasized that the list of presumptive connecting factors is not closed.[99] Over time, courts may identify other connecting factors which should presumptively entitle a court to assume jurisdiction over a dispute. In deciding whether a new presumptive factor should be created, courts should look for connections that are similar to the four already-identified presumptions. The Court stated that relevant considerations included:

> (a) Similarity of the connecting factor with the recognized presumptive connecting factors;

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98. *See* Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 117 (Can.) ("The existence of a contract made in Ontario that is connected with the litigation is a presumptive connecting factor that, on its face, entitles the courts of Ontario to assume jurisdiction in this case. The events that gave rise to the claim flowed from the relationship created by the contract. Club Resorts has failed to rebut the presumption of jurisdiction that arises from the relationship created by this contract."); *see also id.* para. 123 ("Club Resorts has not rebutted the presumption of jurisdiction that arises from this presumptive connecting factor. Its business activities in Ontario were specifically directed at attracting residents of the province, including the Charron family, to stay as paying guests at the resort in Cuba where the accident occurred. It cannot be said that the claim here is unrelated to Club Resorts' business activities in the province."); Breeden v. Black, [2012] 1 S.C.R. 666, para. 20 (Can.) ("[T]he republication in three newspapers of statements contained in press releases issued by the appellants clearly falls within the scope of this rule. In the circumstances, the appellants have not displaced the presumption of jurisdiction that results from this connecting factor."); Éditions Écosociété Inc. v. Banro Corp., [2012] 1 S.C.R. 636, para. 39 (Can.) ("As discussed in *Club Resorts*, the commission of a tort in Ontario is a recognized presumptive connecting factor that *prima facie* entitles the Ontario court to assume jurisdiction over this dispute. For the reasons discussed above, the defendants have not shown that only a minor element of the tort of defamation occurred in Ontario. As a result, they have not displaced the presumption of jurisdiction that arises in this case.").

99. *See* Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 91 (Can.).

(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.[100]

It is hard to imagine that any new presumptive factors will ever "make the list." Presumably, in selecting and rejecting the factors it did, the Supreme Court already canvassed connecting factors from case law and statute law.[101] In other words, the Court's decision in *Van Breda* not to put certain things on the presumptive factors list must be taken as deliberate.[102] As such, litigants would be safe to assume that the presumptive factors are, for all intents and purposes, closed.

The Court also emphasized that courts are not permitted to aggregate various non-presumptive factors in order to assume jurisdiction.[103] The Court believed that this would "open the

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100. *Id.* The Court further noted, "When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new." *Id.* para. 92.

101. In Central Sun Mining Inc. v. Vector Engineering Inc., [2012] ONSC 7331 (Can. Ont. Sup. Ct. J.), the court refused to create a new "breach of contract committed in the jurisdiction" presumptive factor, emphasizing that "[t]he omission by the Supreme Court in *Van Breda* of breach of contract committed in Ontario as a presumptive factor, suggests it should not be accorded presumptive status under the jurisdiction *simpliciter* analysis." *Id.* para. 87.

102. In Cugalj v. Wick, 2012 ONSC 2407, para. 17 (Can. Ont. Sup. Ct. J.), the plaintiff tried arguing that a new presumptive factor should be created because the insurance company that was defending the action on behalf of the defendant was an Ontario corporation. The Court rejected this argument on various grounds and ultimately concluded that the "new presumptive factor urged upon me by counsel for the plaintiffs runs contrary to spirit and stated intention of the Supreme Court of Canada in its formulation of the new jurisdiction test." *Id.* para. 18. *See also* Galaxy Dragon Ltd. v. Top Water Exclusive Fund IV LLC, 2012 ONCA 382, paras. 1–2 (Can. Ont. C.A.) ("[Plaintiff] relies on three factors as presumptive or [sic.] assumption of jurisdiction by Ontario. One recognized in *Van Breda* and the other two proposed by the appellant as new presumptive factors. In our view, none of the three are established here, assuming that the latter two could be considered presumptive in the right case."). Black suggests that courts will "think twice" about creating new presumptive factors because they know that once created, these factors will be available in all future cases. *See* Black, *supra* note 19, at 420.

103. *See* Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 103 (Can.). In the first Ontario Court of Appeal decision to refer to this aspect of the *Van Breda* decision, Export Packers Co. Ltd. v. SPI Int'l Transp., 2012 ONCA 481, para. 24 (Can.

door to assumptions of jurisdictions based largely on the case-by-case exercise of discretion and would undermine the objectives of order, certainty and predictability."[104] This statement is consistent with the presumptive factors approach, but it may result in courts refusing to hear claims that do have objective factual connections with the jurisdiction. Since the real and substantial connection operates as both a constitutional limit and a conflict of laws principle (through the new presumptions), it is possible for a case to have significant connections with the jurisdiction so as to satisfy the constitutional test, but not satisfy the newly-developed conflicts rule. In other words, there will be cases that operate in the gap between the constitutional limit of the real and substantial connection test and the new presumptive rules.

One factor that did not make the Supreme Court's presumptive factors list in *Van Breda* derives from Rule 17.02(o), jurisdiction over "necessary and proper parties."[105] The Court of Appeal in *Van Breda* had approached this ground of jurisdiction with trepidation. It relegated Rule 17.02(o) to a non-presumptive factor, but allowed plaintiffs to argue that on the facts of a particular case, jurisdiction should be assumed.[106] Under the Supreme Court of Canada's approach, "necessary and proper parties" is not a presumptive factor.[107] This may result in either the splintering of litigation or the deliberate (and unwelcome) manipulation of the presumptive factors.

Closely related to the "necessary and proper parties" ground of jurisdiction is Rule 17.02(q), which permits service out of the jurisdiction in respect of claims that are "properly the

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Ont. C.A.), the court appeared skeptical of the Supreme Court's holding. The Court of Appeal stated, "In *Van Breda*, the Supreme Court of Canada appears to have held that if there are no presumptive connecting factors, courts should not assume jurisdiction (paras. 93 and 100). *Whether that is the case or not*, we agree with the motion judge that in this case there is not a sufficient real and substantial connection between EDN and Ontario or between the cause of action asserted against EDN and Ontario to warrant Ontario accepting jurisdiction." (emphasis added). It is unclear what the Court of Appeal meant by the expression "[w]hether that is the case or not."

104. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 93 (Can.).

105. Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194 (Can.).

106. Van Breda v. Village Resorts Ltd., 2010 ONCA 84, paras. 77–79 (Can. Ont. C.A.).

107. It stands to reason that it will not be a new connecting factor either, since the Supreme Court was already aware of this factor and chose not to include it on the list.

subject matter of a counterclaim, cross-claim or third or subsequent party claim."[108] In *Export Packers Company Limited v. SPI International Transportation,* the Ontario Court of Appeal had occasion to consider whether to extend the Supreme Court's presumptive four factors to encompass third party claims.[109] The Court of Appeal refused to do so, stating that:

> In *Van Breda,* the Supreme Court of Canada said that recognition of new presumptive categories should be focussed primarily on the objective factors that connect the legal situation or the subject matter of the litigation with the forum. As the motion judge pointed out, Rule 29 provides a broad scope for advancing third party claims. The fact that a foreign party qualifies as a proper subject of a third party claim is not, by itself, a reliable indicator that there is a real and substantial connection to support the assertion of jurisdiction over that foreign party. The test for adding a party as a third party defendant is not dependent on there being a factual connection to Ontario.[110]

The Court of Appeal recognized that there may be some inefficiencies precipitated by its holding. However, it emphasized that "potential efficiency should not, in itself, be a sufficient reason to create a new presumptive category."[111] Ultimately, the Court of Appeal took to heart that "[t]here must be some factual connection to Ontario" to justify the creation of a new presumptive factor.[112] Thus, it appears that Ontario courts will be very reluctant to deviate from the Supreme Court of Canada's four presumptive factors. In particular, necessary and proper parties (to include third party defendants) will not be

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108. *See* Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194 (Can.); Export Packers Co. Ltd. v. SPI Int'l Transp., 2011 ONSC 5907, para. 15 (Can. Ont. Sup. Ct. J.) ("Rule 17.02(q) permits service out of Ontario as of right where the claim is properly the subject matter of a third party claim under the rules. This is another way of saying that a third party is a necessary or proper party to the litigation, albeit not as a defendant but as a third party. Just as Rule 5 provides a 'very generous scope' for the joinder of parties (as the Court of Appeal noted in *Van Breda* para. 79), Rule 29 provides a very generous scope for the advancement of third party claims.").

109. Export Packers Co. Ltd. v. SPI Int'l Transportation, 2012 ONCA 481 (Can. Ont. C.A.).

110. *Id.* para. 20.

111. *Id.* para. 22.

112. *Id.*

subject to jurisdiction in Canada absent the application of some other presumptive factor.

D. *Jurisdiction in Non-Tort Cases*

One of the major shortfalls of the Supreme Court's decision in *Van Breda* is that it is uniquely focused on tort claims. In fact, the Court acknowledged this when it stated that the list of presumptive factors "does not purport to be an inventory of connecting factors covering conditions for the assumption of jurisdiction over all claims known to the law."[113] So how are those jurisdictional claims to be decided?[114] Unfortunately, the Court endorsed a framework that was so tort-specific that parties and courts will be left guessing on how to approach a non-tort case. Are courts simply to use the service *ex juris* rules as presumptive factors for claims involving property, contracts, restitution, and the like? Or, are courts supposed to craft presumptive factors in other subject areas (such as contract) and leave open the possibility for new presumptive factors, as the Court did in *Van Breda*? Or, do courts simply analyze the factual connections between the forum and the subject matter of the litigation devoid of presumptions? That the Court ignored all the other "claims known to the law" in its jurisdictional analysis is perhaps the most regrettable part of the *Van Breda* decision. The decision is so tort-specific that it fails to provide any

113. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 85 (Can.).

114. For instance, the AIG case was stayed pending the Supreme Court's decision in *Van Breda*. *See* Gray, *supra* note 18. In that case, a class of plaintiffs sought to sue an American defendant in respect of trades of shares that occurred on a foreign exchange under the Ontario *Securities Act*. Province of Ontario Securities Act, R.S.O. 1990, c. S.5 (Can.). The Act provides that a responsible issuer includes "any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded." *See id.* § 138.1. The *Van Breda* decision provides little guidance on how to interpret the real and substantial connection in the class context, other than to emphasize that the analysis should focus on the underlying factual connections with the dispute (not abstract notions of comity, fairness or efficiency). *See generally* Andrea Laing & Eric Morgan, *Some Reflections on the "Responsible Issuer" Definition and Jurisdictional Aspects of Securities Class Actions*, 8 CAN. CLASS ACTION REV. 100 (2012) (discussing the implications of the Supreme Court's decision in *Van Breda* on multi-jurisdictional securities class actions); Sonia Bjorkquist & Mary Paterson, *Multi-Jurisdictional Classes: Does* Van Breda *Change Anything?* 3 ONTARIO BAR ASSOC. 1, (Dec. 2012) (discussing applicability of *Van Breda* framework to out-of-province class members).

guidance—much less, meaningful guidance—to courts in the myriad of cases that do not involve tort claims.[115]

In the post-*Van Breda* era, it is apparent that courts are not faring well analytically in applying the *Van Breda* factors in contexts outside of tort. In *Wang v. Lin*,[116] for instance, the court considered the real and substantial connection test in the context of the plaintiff's claim for corollary relief under the *Family Law Act*.[117] The court indicated that the applicable test is the real and substantial connection test, and proceeded to outline the four non-exhaustive *Van Breda* factors for tort cases. The Court then indicated that "[t]he facts of this case do not support the existence of a presumptive connecting factor that would entitle this court to presume jurisdiction."[118] The court continued by outlining the "relevant" facts:

> (a) The Husband does not live in Ontario or carry on business in Ontario. It is acknowledged by the Wife that the Husband's business is based entirely in China.
>
> (b) The parties were not married in Toronto. The children were not born in Ontario.
>
> (c) The parties have not lived together as a married couple in Ontario since at least August, 2010 and the children have not ordinarily resided in Ontario since August, 2010 based on the following facts: [listing facts].[119]

The *Wang* court claims to apply *Van Breda,* but in reality makes a decision based on the absence of objective factual connections to Ontario. This is because the *Van Breda* factors are not geared towards, nor particularly helpful in, resolving family law claims. The *Van Breda* framework must be modified in the family law context for the test to make any sense. Relevant factors might be: Where were the parties married? Where was the parties' marital domicile? Where were the children born? These are the inquiries that would presumably be relevant to claims under provincial family law statutes. However, the

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115. *See, e.g.*, Obfgi Chemicals LLC v. Kilani, 2011 ONSC 1636 (Can. Ont. Sup. Ct. J.). It is unclear how a case like *Obfgi* involving an order in aid of foreign proceedings would be decided under the new real and substantial connection test.

116. Wang v. Lin, 2012 ONSC 3374 (Can. Ont. Sup. Ct. J.).

117. *See generally* Family Law Act, R.S.O. 1990, c. F.3.

118. *Id.* para. 13.

119. *Id.*

court—while it does consider these factors—says instead that it is applying the *Van Breda* tort factors.

Similarly, in *Yemec and Rapp v. Atlantic Lottery Corporation*,[120] the court applied the *Van Breda* factors, without modification, to a claim in restitution. The court recognized in a footnote that *Van Breda* established presumptive connective factors for cases involving torts, but indicated that "this motion proceeded on the basis that the *Van Breda* factors also apply to cases involving claims for restitution."[121] The court did not consider the thorny issue of whether, or how, any of the four presumptive factors would need to be modified in light of the cause of action advanced by the plaintiff. For instance, the "tort committed in the province" factor would be inapplicable in the restitution context; instead, a court would likely consider something to the effect of "whether the defendant was unjustly enriched in the province" or "whether a benefit was conferred in the province." It is not clear that the ultimate outcome in *Yemec* would have been any different even if the court had altered the *Van Breda* framework. The point, however, is that courts appear to be blindly applying the *Van Breda* factors in scenarios where it does not have, or should not have, wholesale applicability.

Further, in *Sears Canada Inc. v. C & S Interior Designs Ltd.*,[122] the court purported to extend the *Van Breda* framework to claims sounding in contract, stating "[w]hile the Supreme Court did not expressly extend this reasoning to contractual disputes, there appears to be no reason that they cannot be applied more generally."[123] The court in *Sears*, however, did not specify *how* the framework should apply to contracts. In particular, it did not indicate how factors (c) ("The tort was committed in the province") and (d) ("A contract connected with the dispute was made in the province") would need to be modified where the plaintiff alleges breach of contract. In fact, the court's analysis of the *Van Breda* factors was wholly perfunctory: "The defendants, for the most part, are domiciled in Alberta and carry on their business there. The alleged wrongs occurred in Alberta. The licensing agreements were concluded in Alberta. These

120. Yemec & Rapp v. Atl. Lottery Corp., 2012 ONSC 4207 (Can. Ont. Sup. Ct. J.).
121. *Id.* n.4.
122. 2012 ABQB 573.
123. *Id.* para. 14.

presumptive connecting factors were not rebutted by C&S."[124] At some point, courts are going to have to actually grapple with the problem of how to modify the *Van Breda* factors so that they actually make sense in the particular context in which they are being applied.

In the meantime, one might question whether plaintiffs who fail to fit themselves within a presumptive factor in tort might pursue additional or different categories of recovery (contract, restitution, etc.) in order to move the jurisdictional analysis away from tort to an area where there might be more jurisdictional flexibility. That is, given that the *Van Breda* framework applies only to tort, plaintiffs might have more success framing the cause of action as something other than tort. Once a court assumes jurisdiction on a different basis, the tort claims can be swept into the claim. In this respect, the Court stressed that if a connection exists between the defendant and the action, a court must assume jurisdiction over all aspects of the case. To require a plaintiff, for instance, to "litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia" would be incompatible with any notion of fairness and efficiency.[125] One might expect, then, that plaintiffs will attempt to frame the cause of action in something other than tort in order to avoid the presumptive factors framework. If jurisdiction can be established through pure factual connections to the dispute, then any related tort claims can and will be adjudicated by the court as well.

E. *Concluding Thoughts on the Presumptive Factors Framework*

Van Breda will most certainly make it harder for plaintiffs to sue foreign defendants in Canada. One can test out the theory that it will be more difficult to establish jurisdiction over foreign defendants by examining some cases that were recently decided under the Court of Appeal's reasoning in *Muscutt* and/or *Van Breda*. In *Young v. The Home Depot*,[126] the Canadian plaintiffs sued Home Depot U.S.A. in Ontario in respect of a slip and fall accident that took place in upstate New York. The trial judge

124. *Id.* para. 18.
125. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 99 (Can.).
126. 2012 ONSC 1971 (Can. Ont. Sup. Ct. J.).

applied the Court of Appeal's decision in *Van Breda* to conclude that Ontario had jurisdiction simpliciter and was the most appropriate forum for the resolution of the action. If the case had been decided under the Supreme Court of Canada's new framework for jurisdiction, the result would probably be different. The case likely does not fit within any of the four presumptive factors. The only way to conceivably fit the case within one of the factors would be to argue that Home Depot (as an organization) carries on business in Canada.[127] The problem is that Home Depot Canada and Home Depot U.S.A. are separately incorporated and it is an uphill battle for a plaintiff to argue that that Home Depot U.S.A., the defendant in the case, carries on business in Canada. Accordingly, it seems that an Ontario court would not have jurisdiction on the facts of *Young*.

Similarly, in *Cardinali v. Strait*,[128] the Ontario plaintiff sued a Michigan defendant in Ontario concerning a car accident that took place in Michigan. The trial judge found that Ontario had jurisdiction simpliciter over the action and was the forum conveniens for the resolution of the dispute. The trial judge held that the plaintiff had a significant connection to the forum since she resides in Ontario and received medical treatment in Ontario; in addition, there would likely be unfairness, in the form of financial hardship, if the plaintiff were required to litigate in Michigan. While the court found that the individual defendants did not have a significant connection to Ontario, they were somewhat connected to Ontario through their insurer, a large multi-national corporation. Accordingly, the court found jurisdiction to be appropriate. Similar to the *Young* case, it is unlikely that an Ontario court would have assumed jurisdiction if the case had been decided under the new *Van Breda* framework, as none of the presumptive factors (even arguably) apply. There was no tort committed in Ontario; there

127. "The plaintiff argues that that store is part of an international organization which indeed, by way of the internet in the very least, pursues cross-border shoppers from Ontario. The plaintiff argues that the court should apply the principle of flexibility, which would be defeated by a narrow, legalistic interpretation of Home Depot as only a specific corporation that carries on the operation of stores only within the USA, in isolation from its worldwide operation, including its Ontario stores." *Id.* para. 16.

128. 2010 ONSC 2503 (Can. Ont. Sup. Ct. J.).

was no contract connected with the dispute entered into in Ontario; the American defendants were not carrying on business in Ontario; and the defendants were not domiciled or resident in Ontario. Cases like *Cardinali* and *Young* will almost certainly be foreclosed from proceeding in Ontario in the aftermath of *Van Breda.*

IV. *CLARIFYING FORUM NON CONVENIENS*

The Supreme Court took *Van Breda* as an opportunity to make some important pronouncements about the doctrine of forum non conveniens. First, the court emphasized that a clear distinction must be drawn between forum non conveniens and jurisdiction simpliciter. Forum non conveniens is relevant only when jurisdiction is established; it has no relevance to the jurisdictional inquiry itself.[129] Courts had been confusing this issue to some extent in the aftermath of *Muscutt.* But given the new focus on objective connections, the doctrine should now have a more well-defined role.

Second, the Supreme Court briefly traced the historical antecedents of the doctrine to conclude that it was intended to apply only in cases where there is a "clearly" more appropriate forum somewhere else. [130] In this respect, the Court stated:

> The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. . . . The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin.[131]

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129. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 101 (Can.). The Court also confirmed that the doctrine is one which the court cannot raise sua sponte. *See id.* para. 102 ("Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes forum non conveniens. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.").

130. *Id.* para. 108.

131. *Id.* para. 109.

The Court suggested that applying the doctrine of forum non conveniens in circumstances where the alternative forum is simply "more appropriate" but not "clearly more appropriate" would be contrary to the principles of fairness, efficiency and predictability.[132] As a doctrinal matter, the Supreme Court is likely correct that a forum non conveniens doctrine with the qualifier "clearly" is a preferable rule. It ensures that the forum selected by the plaintiff, which otherwise possesses jurisdiction over the defendant, is not displaced simply because another forum is marginally better suited to hear the dispute. In this respect, the "clearly" rule seems to better accord with access to justice for the plaintiff. The rule also accords with one of the underlying goals of private international law—to provide a certain and predicable framework for resolving disputes.[133]

The Court also noted that the word "clearly" does not appear in the CJPTA.[134] Rather, the CJPTA provides "[a]fter considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding."[135] Justice LeBel's reasoning regarding the "clearly more appropriate forum" standard implies that courts interpreting the CJPTA provisions should, or must, graft the word "clearly" onto the section.[136] While that interpretation may

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132. *Id.*

133. In reality, it is likely that Canadian courts are already using a "clearly" more appropriate forum standard, even if they do not explicitly say so. It is a fairly rare case where a Canadian court declines jurisdiction on forum non conveniens grounds. *See, e.g.*, Mynerich v. Hampton Inns Inc., 2009 ONCA 281, para. 8 (Can. Ont. C.A.) (court dismissing personal injury action on forum non conveniens grounds because "[w]hen all relevant factors are considered, none favour Ontario, two are neutral–the location of key witnesses and evidence and loss of juridical advantage, and the other four all favour Québec").

134. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 108 (Can.).

135. Uniform Court Jurisdiction and Proceedings Transfer Act, § 11(1), UNIF. L. CONF. OF CANADA, *available at* http://www.ulcc.ca/en/uniform-acts-en-gb-1/183-court-jurisdiction-and-proceedings-transfer-act.

136. Indeed, in the first CJPTA case post-*Van Breda* to consider this issue, the court applied a "clearly more appropriate" standard. *See* JM Food Services Ltd. v. Canada Businet Co., 2012 BCSC 862, para. 23 (Can. B.C.) ("It is not disputed that the burden is on the applicants to show that this court should decline to exercise its jurisdiction because Ontario is the forum to be preferred. As explained in [*Van Breda*], the applicants must show that Ontario is clearly the more appropriate forum.").

be preferable, why are legislatures not permitted to adopt a different iteration of the forum non conveniens test? After all, Justice LeBel did say that all of his comments about the "development of the common law principles of the law of conflicts are subject to provisions of specific statutes and rules of procedure."[137] There does not appear to be a constitutional reason why the forum non conveniens inquiry needs to be identical from province to province. We must presume that those jurisdictions that enacted the CJPTA were aware of the *Spiliada* and *Amchem* decisions that initially articulated the "clearly more appropriate" standard and chose a test that relied on a slightly different burden of proof.[138] Though *Van Breda* can be read as suggesting that all provinces must adopt the same view of the forum non conveniens doctrine, this is not a constitutional mandate.

Third, the Court clarified that the forum non conveniens analysis should begin with the defendant identifying "another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action."[139] This entails the defendant showing, "using the same analytical approach the court followed with respect to the existence of a real and substantial connection with the local forum" an alternative forum that could and should adjudicate the action.[140] This adds a new element to the forum non conveniens inquiry that Canadian courts did not previously require. In essence, in order to be able to assert that the foreign forum is clearly more appropriate, that forum must have jurisdiction over the defendant under *Canadian* standards of jurisdiction. As a practical matter, this may not be difficult to satisfy, as it is likely that a court that is alleged to be "clearly more appropriate" than the domestic forum would likely have some sort of significant connection to the dispute. However, it is not impossible to envisage a scenario where the foreign court which is said to be a clearly more appropriate forum has jurisdiction under its rules,

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137. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 68 (Can.).

138. Spiliada Maritime Corp. v. Cansulex Ltd., [1987] 1 A.C. 460 (H.L.) (U.K.); Amchem Products Inc. v. British Columbia (Workers' Comp. Bd.), [1993] 1 S.C.R. 897 (Can.). Both *Spiliada* and *Amchem* were cited by the Supreme Court in *Van Breda.*

139. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 103 (Can.).

140. *Id.*

but not under Canadian rules. For instance, under Article 14 of the Civil Code, courts in France are permitted to assume jurisdiction in cases where the plaintiff is domiciled or resident in France.[141] An assertion of jurisdiction on the basis of the domicile or residence of the plaintiff would not be considered appropriate by a Canadian court.[142] So it appears that where a French court asserts jurisdiction on a basis recognized in France (but not in Canada), such that it has the capacity under its rules to adjudicate the claim, a Canadian court would not even consider France as a potentially more appropriate forum. It should not matter whether the foreign court has jurisdiction under Canadian rules—what should matter is whether the foreign court has the capacity under its rules to adjudicate the claim and whether the alternative forum is clearly more appropriate. As indicated, this particular issue is not likely to arise often; however, it is a subtle shift in the law of forum non conveniens for no readily discernible reason.

Finally, a reading of *Van Breda* alongside *Breeden v. Black*, indicates that there is no longer a meaningful role for "loss of juridical advantage" in the forum non conveniens analysis.[143] Justice LeBel describes loss of juridical advantage as "a difficulty that could arise should the action be stayed in favour of a court of another province or country."[144] Most commonly, loss of juridical advantage implicates differences in the governing substantive law, though it could involve differences in procedural law.[145] Justice LeBel was of the view that the loss of juridical advantage inquiry may not add a great deal to the

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141. CODE CIVIL [C. CIV.] art. 14 (Fr.). *See generally* Kevin M. Clermont & John R.B. Palmer I, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474 (2006).

142. *See* Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 86 (Can.).

143. Notably, the expression "juridical advantage" is absent from the CJPTA and from the recent formulations of forum non conveniens (*see, e.g.*, Muscutt v. Courcelles (2002), 213 D.L.R. (4th) 577 (Can. Ont. C.A.); Van Breda v. Village Resorts Ltd., 2010 ONCA 84 (Can. Ont. C.A.)). The concept of juridical advantage does appear to be encapsulated in the *Oppenheim* factors, approved by the Québec Court of Appeal ("the advantage conferred on the plaintiff by its choice of forum"). *See* Breeden v. Black, [2012] 1 S.C.R. 666, para. 25 (Can.).

144. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 111 (Can.).

145. For instance, in *Black*, the plaintiff sought to litigate his defamation claim in Ontario in order to benefit from a lower standard of proof, compared to the "actual malice" standard he would have to prove in the United States.

jurisdictional analysis.[146] In this respect, he quoted the Supreme Court's decision in *Amchem*: "[a]ny loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if any, to the defendant in the foreign jurisdiction if the action is tried there rather than in the domestic forum."[147] This statement appears to undercut the very notion of loss of juridical advantage by suggesting that the analysis is a comparative one—i.e., what juridical advantages does the plaintiff lose in the foreign forum? vs. what juridical advantages does the defendant lose in the domestic forum?[148] If loss of juridical advantage is a comparative notion, then the concept loses all meaning, as the juridical advantage to the plaintiff always implies a corresponding juridical disadvantage to the defendant.

Leaving this issue aside, the Court stated that the concept of juridical advantage is "inconsistent with the principles of comity" because a focus on juridical advantage "may put too strong an emphasis on issues that may reflect only differences in legal tradition which are deserving of respect."[149] The Court further noted that "[d]ifferences should not be viewed instinctively as signs of disadvantage or inferiority."[150] The Court implies that factoring juridical advantages into the forum non conveniens equation connotes some degree of disrespect for, or judgment of, foreign legal systems. This seems to carry the notion of comity a bit too far. By considering the loss of juridical advantage to the plaintiff, the court is not casting aspersions on the foreign court. It is simply recognizing that, *for this plaintiff*

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146. Note that there was no reference in the case to "personal" advantage, a concept that was often addressed alongside juridical advantage. *See, e.g.*, Amchem Products Inc. v. British Columbia (Workers' Comp. Bd.), [1993] 1 S.C.R. 897, para. 60 (Can.).

147. *Id.* para. 55. The quote from *Amchem* is inapposite as it was made in reference to whether a Canadian court should grant an anti-suit injunction in restraint of foreign proceedings. Thus situated, the quote underscores that the juridical advantage that the Court is concerned with is that of the plaintiff in the domestic proceeding (i.e., the defendant in the foreign proceeding).

148. That this is the view that the Court endorsed is supported by its analysis in *Black*: "Moreover, even if this advantage to Lord Black were taken into account, it would have to be balanced against the corresponding and very significant juridical disadvantage that the appellants would face if the trial were to proceed in Ontario." Breeden v. Black, [2012] 1 S.C.R. 666, para. 35 (Can.).

149. *Id.* para. 26.

150. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 112 (Can.).

and *in this case*, the chosen forum provides the plaintiff with a benefit that does not exist in the foreign forum. If the Court's position is that the plaintiff should not be "denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules,"[151] it would be best to acknowledge that the juridical advantage that a forum provides is part and parcel of the plaintiff's forum selection.

The Court in *Van Breda* further stated that, to the extent that juridical advantage continues to be relevant in the forum non conveniens analysis, it must be viewed with particular caution inter-provincially.[152] In the words of Justice LeBel, "[t]o use it too extensively . . . might be inconsistent with the spirit and intent of *Morguard* and *Hunt*."[153] Thus, one might wonder whether the loss of juridical advantage is all but a dead letter in the inter-provincial context.[154] In reality, it is unlikely that the Court's remarks in this respect changed existing law. It is hard to envision many scenarios where the plaintiff could point to an element of a provincial forum's rules or law that would actually amount to a juridical advantage. So it is likely that the *Van Breda* Court's statements to this effect do not mark a particularly significant shift in Canadian law.

The combination of the *Van Breda* formulation for jurisdiction and its formulation of forum non conveniens means that it will be harder for plaintiffs to establish jurisdiction in Ontario; but once jurisdiction is established, it will be harder for defendants to persuade a court to decline to exercise that jurisdiction on the basis of forum non conveniens. Indeed, just as it will be difficult to rebut the four presumptive factors, so too will it be difficult to convince a court that has jurisdiction simpliciter that there is a clearly more appropriate forum somewhere else.

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151. *Id.* para. 109.

152. *Id.* para. 112.

153. *Id.*

154. *But see* JM Food Servs. Ltd. v. Canada Businet Co. Ltd., 2012 BCSC 862, para. 59 (Can. B.C.) ("I conclude that, in the circumstances of this case, the juridical advantage afforded the applicants under the *Wishart Act* is the determining factor persuading me that Ontario is the appropriate forum for this proceeding.").

V. *UNANSWERED QUESTIONS: VAN BREDA LEAVES US HANGING*

One would expect that in a judgment that was under reserve for over a year, ultimately spanned 125 paragraphs, and was decided alongside two companion cases, the Court would have clarified how all the pieces of the jurisdictional puzzle fit together. Unfortunately, the Supreme Court left many pivotal questions unanswered: How can presence and consent be reconciled with the real and substantial connection test? Is the forum of necessity doctrine part of Canadian law? How does the new framework for jurisdiction apply to enforcement of foreign judgments? What does the Court's judgment mean, if anything, for those provinces that have adopted the CJPTA? While these questions were not squarely raised on the facts of the four cases before the Court, it would have been preferable for the Court to present a unified and coherent framework for personal jurisdiction in Canada.[155]

A. *Presence and Consent as Independent Bases of Judicial Jurisdiction*

The Supreme Court confirmed that presence and consent remain viable bases for adjudicative jurisdiction, independent of the real and substantial connection test. After discussing the new connection-based focus of the real and substantial connection test, Justice LeBel indicated:

> However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.[156]

Consequently, if a defendant is served with process in the jurisdiction ("presence") or the defendant consents to being sued in the jurisdiction through agreement or

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155. This is especially true when one considers the lengths that Justice LeBel went to in order to delineate between the constitutional and private international law dimensions of the real and substantial connection test (an issue that was also not raised on the facts of these cases).

156. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 79 (Can.); *see also* Breeden v. Black, [2012] 1 S.C.R. 666, para. 19 (Can.).

attornment/submission ("consent"), jurisdiction is considered proper.[157] This should answer the debate in some of the scholarship about whether the real and substantial connection test was intended to subsume the traditional bases of jurisdiction or whether those traditional bases continue to exist alongside the real and substantial connection test. [158]

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157. Muscutt v. Courcelles (2002), 213 D.L.R. (4th) 577, para. 19 (Can. Ont. C.A.) ("There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extraprovincial judgments.").

158. There had been some confusion on this point post-*Morguard*. The Court in *Morguard* suggested that there were three independent grounds upon which a provincial court could assume jurisdiction over a defendant, such that its judgment would be enforceable across Canada: a) presence: the defendant was served with an originating process in the relevant jurisdiction; b) consent: the defendant had submitted to the jurisdiction of the court; and c) real and substantial connection: there was some significant nexus between the forum and the action. Morguard Invs. Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 (Can.). However, in Beals v. Saldanha, [2003] 3 S.C.R. 416, para. 37 (Can.), Justice Major declared that "[a] real and substantial connection is the overriding factor in the determination of jurisdiction" and that "[t]he presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties." *See also* Pro Swing Inc. v. Elta Golf Inc., [2006] 2 S.C.R. 612, para. 21 (Can.) (referring to "the passage, for the purpose of establishing jurisdiction over a defendant, from the service or attornment of the defendant requirement to the real and substantial connection test"). Consequently, there was some doubt whether presence and consent are independent bases for jurisdiction, or simply subsumed within the real and substantial connection inquiry. *See* Shekhdar v. K&M Eng'g & Consulting Corp., 2006 CarswellOnt 3216 (Can. Ont. C.A.) (WL) (overruling trial judge's holding that consent could not serve as the basis of jurisdiction in the absence of a real and substantial connection). *See also* Morgan v. Guimond Boats Ltd., [2006] F.C. 370, para. 14 (Can. Fed. Ct.) ("More significant still is the recent adoption of the 'real and substantial connection' test detailed above. Its effect on the rules relating to attornment . . . remains to be determined"); Ioannides v. Calvalley Petroleum Inc. [2006] O.J. No. 2995, paras. 11–12 (Can. Ont. Sup. Ct. J.) ("The plaintiff argues that service was [e]ffected on [the defendant] . . . in Ontario . . . and that therefore the plaintiff has a *prima facie* right to proceed. . . . The fact that service was properly made in Ontario . . . is not dispositive of, or even relevant to, the jurisdictional matter."). At least one court post-*Van Breda*, however, thought it necessary to consider whether it had jurisdiction, even though the defendant, an Ontario resident, did not challenge jurisdiction. *See* Nagra v. Malhotra, 2012 ONSC 4497 (Can. Ont. Sup. Ct. J.) (proceeding to employ *Van Breda* framework where defendant sought a stay on the basis that Vermont was the more appropriate forum).

Conceptually, however, it is difficult to reconcile the traditional bases of jurisdiction with the real and substantial connection as a constitutional imperative. As discussed, Justice LeBel in *Van Breda* demarcated between the constitutional dimension of the real and substantial connection test and the conflict of laws dimension of the test. He remarked:

> 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.[159]

Otherwise stated, "[t]he purpose of the constitutionally imposed limits [of the real and substantial connection test] is to ensure the existence of the relationship or connection needed to confer legitimacy."[160] Thus, at the constitutional level, the real and substantial connection test provides an outer limit to courts' authority such that the exercise of jurisdiction over a defendant is considered legitimate.

In cases where the defendant agrees to suit in a particular forum (e.g., by signing a jurisdiction agreement or appearing and arguing the merits of the case), can we say that this falls within the outer constitutional limit of the real and substantial connection test? In other words, does consent provide the requisite degree of connection so as not to run afoul of the constitutional facet of the real and substantial connection test? Consider the following hypothetical: A British Columbia seller and a New York buyer are transacting business. They enter into a contract which includes a jurisdiction clause that names Ontario as the exclusive forum for dispute resolution. Neither party has any connection to Ontario; they have selected Ontario because it is considered by both parties to be a neutral forum. In such a case, would consent to the jurisdiction of the Ontario courts be an appropriate basis for jurisdiction? The Supreme Court of Canada in *Van Breda* says "yes."[161] However, where does the

159. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 33 (Can.).
160. *Id.* para. 31.
161. *See id.* para. 79.

connection that is required to satisfy the constitutional dimension of the real and substantial connection test come from? As Justice LeBel stated, "[the constitutional test] suggests that the connection between a state and a dispute cannot be weak or hypothetical. A weak or hypothetical connection would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute."[162] In the example above, there is no connection between the parties/dispute and Ontario, much less "a weak or hypothetical connection." It may be that by agreeing to confer jurisdiction on an Ontario court, the parties are thereby creating the connection needed to satisfy the constitutional dimension of the real and substantial connection test. That is, the parties are connecting themselves to Ontario by virtue of their agreement or submission to the courts of Ontario.

Ultimately, however, this issue may not matter a great deal with respect to consent as a basis of jurisdiction. Justice LeBel emphasized that the constitutional dimension of the real and substantial connection test was designed to ensure "the legitimacy of the exercise of state power over the persons affected by a dispute."[163] In this respect, the real and substantial connection can be seen as a means through which to ensure that courts do not extend their reach beyond constitutionally-prescribed limits. It would seem that, where the parties consent to having their disputes heard in a certain forum, one would be hard-pressed to say that the exercise of state power over such individuals is not legitimate.

The real problem appears to arise with respect to presence as the basis of jurisdiction. Presence-based jurisdiction refers to the idea that if a party is properly served with process while in the forum, then it is appropriate for the courts of that forum to assume jurisdiction over him.[164] Courts and commentators have noted, quite rightly, that this could mean that jurisdiction is asserted over a defendant who only has a very transient or temporary presence in the jurisdiction. Indeed, this phenomenon is sometimes referred to as "tag jurisdiction" because it allows a plaintiff to "tag" a defendant who is only

162. *Id.* para. 32.
163. *Id.*
164. Subject, of course, to the doctrine of forum non conveniens.

temporarily passing through a forum and thereby subject him to judicial process in that jurisdiction.[165] In reality, Canadian courts have not concerned themselves too much with the potential unfairness of presence-based jurisdiction—probably because the doctrine of forum non conveniens is available as a remedy to mitigate any such unfairness.[166] However, the doctrine of forum non conveniens is only applicable if the defendant raises the issue. One would surmise that in at least some cases of tag jurisdiction, the judgment is rendered in the defendant's absence (i.e., as a default judgment). In these cases, the question of whether the forum court has the authority to render judgment is a critical one. That, of course, raises the ultimate question: Is pure presence-based jurisdiction consistent with the constitutional dimension of the real and substantial connection test? Justice LeBel ducked this issue in *Van Breda*, simply affirming the continued viability of the traditional basis of presence as a ground for jurisdiction. Interestingly, this conclusion is wholly at odds with Justice LeBel's dissenting judgment in *Beals v. Saldanha*, where he stated:

> Under the traditional rules, for example, jurisdiction could be acquired by serving a defendant who was present in the jurisdiction, even if her presence was only fleeting and was completely unconnected to the action, and in the absence of any other factor supporting jurisdiction. . . . Circumstances such as these may not amount to a real and substantial connection, and in my view they should not continue to be recognized as bases for jurisdiction just because they were under the traditional rules.[167]

As Justice LeBel's statement from *Beals* intimates, if the real and substantial connection (as a constitutional stricture) is intended to provide an outermost limit to a provincial court's adjudicative power, then it is difficult to understand how presence can be retained as a basis of jurisdiction. Where one's connection to the forum is simply that one is temporarily

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165. JANET WALKER & JEAN-GABRIEL CASTEL, CANADIAN CONFLICT OF LAWS § 8.5 11–25 (6th ed. 2005). The most famous English case involving tag jurisdiction is Maharanee of Baroda v. Wildenstein, [1972] 2 All ER 689 (U.K.), where the French defendant was served with process while temporarily in England watching the horse races at Ascot.

166. It should be noted that cases of this nature probably do not arise very often.

167. Beals v. Saldanha, [2003] 3 S.C.R. 416, para. 209 (Can.).

present there, this appears to be the sort of "weak or hypothetical" connection that Justice LeBel was referring to in *Van Breda* as "cast[ing] doubt upon the legitimacy of the exercise of state power over the [defendant]."[168]

Presence, however, has a longstanding history in the common law of jurisdiction. Indeed, the creation of more modern categories of jurisdiction, such as the real and substantial connection test and the minimum contacts test, were developed by analogy to presence-based jurisdiction.[169] Stephen Pitel outlines four reasons that support jurisdiction based on the presence of the defendant:

> First, it flows from the nature of territorial sovereignty. Those present within a jurisdiction owe allegiance to the laws and institutions of that country. For that allegiance to be properly enforced, those present must be subject to being sued in the country's courts. Second, it accords with basic notions of fairness. The defendant's presence is a meaningful connection between the defendant and the jurisdiction. The defendant has deliberately chosen to be in the jurisdiction, and it is not out of line with reasonable expectations for the court to take jurisdiction based on presence. Presence is a reliable indicator of the defendant's ability to defend against claims in that place. Third, it promotes certainty. Under our law there should be established circumstances in which the parties to litigation know that jurisdiction is not in issue. . . . Fourth, jurisdiction based on presence is subject to the court's discretion to stay proceedings in favour of a more appropriate forum. We therefore have a procedural mechanism to guard against the limited number of problems that rigid assertion of presence-based jurisdiction might cause.[170]

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168. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 32 (Can.).

169. Burnham v. Super Ct. of Cal., Cnty. of Marin, 495 U.S. 604, 619 (1990) ("The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.' That standard was developed by *analogy* to 'physical presence,' and it would be perverse to say it could now be turned against that touchstone of jurisdiction.").

170. Stephen G. A. Pitel & Cheryl D. Dusten, *Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction*, 85 CAN. BAR REV. 61, 69 (2006).

Pitel acknowledges, however, that presence-based jurisdiction does have "one potential weakness: its treatment of temporary presence."[171] He notes that these same arguments for retaining presence-based jurisdiction still apply to temporary presence, albeit to a lesser extent.

The issue still remains, though: how can temporary presence be reconciled with the constitutional dimension of the real and substantial connection test as outlined by the Supreme Court in *Van Breda*? While the doctrine may have a long-standing history, Justice LeBel's new framework for conceptualizing jurisdiction wherein the real and substantial connection test operates as an outermost limit for the assumption of jurisdiction does not comfortably accommodate the notion of temporary presence.

The purpose of this section is not to provide a full exposition of the issues related to presence and consent-based jurisdiction and how they relate to the constitutional facet of the real and substantial connection test. However, the Court did make a clear pronouncement—that "[t]he real and substantial connection test does not oust the traditional private international law bases for court jurisdiction"—without providing any basis for reconciling that pronouncement with its newly-described worldview of the real and substantial connection test. Given a statement this important, one would have expected some effort at reconciling how presence and consent can be squared with the real and substantial connection test as an outer limit on a court's adjudicative jurisdiction.

B. *Forum of Necessity: Part of Canadian Law or Not?*

One of the most significant aspects of the Ontario Court of Appeal's decision in *Van Breda* was its recognition of the doctrine of forum of necessity to which a plaintiff may be able to resort in the event that jurisdiction cannot be established under the connection-based real and substantial connection test. The Court of Appeal noted that forum of necessity has emerged as a significant jurisdictional doctrine since the *Muscutt* case was decided, and that support for the doctrine could be found in

171. *Id.*

both Canadian and international law.[172] Under the doctrine, courts enjoy a residual discretion to assume jurisdiction in circumstances where there is no other forum in which the plaintiff can reasonably seek relief. The forum of necessity doctrine accepts that there will be exceptional cases where the real and substantial connection test is not satisfied, but that concerns for access to justice nonetheless justify the assumption of jurisdiction. The Court of Appeal stressed that the doctrine should be explicitly acknowledged as an exception to the real and substantial connection test. The jurisdictional test, in other words, should not be distorted to accommodate fairness or access to justice concerns.

The Supreme Court of Canada's decision in *Van Breda* deliberately avoided commenting[173] on whether the forum of necessity doctrine is part of Canadian law, and if so, how that doctrine should be interpreted. By emphasizing that the issue was not raised on the facts of these particular cases, the Court intimated that the doctrine did exist in Canadian jurisprudence, but that this was not the appropriate time to flesh it out.[174] In any event, in the absence of Supreme Court of Canada guidance on this topic, the Court of Appeal's judgment concerning the application of the common law forum of necessity doctrine applies as precedent, at least in Ontario. Moreover, the doctrine

172. Van Breda v. Village Resorts Ltd., 2010 ONCA 84, para. 54 (Can. Ont. C.A.).

173. *See* Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 59 (Can.) ("I add that the forum of necessity issue is not before this Court in these appeals, and I will not need to address it here."); *id.* para. 82 ("Jurisdiction must — irrespective of the question of forum of necessity, which I will not discuss here — be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum."); *id.* para. 86 ("The presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor. (I will not discuss its relevance or importance in the context of the forum of necessity doctrine, which is not at issue in these appeals.)); *id.* para. 100 ("If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors exist or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, subject to the possible application of the forum of necessity doctrine, which I need not address in these reasons.").

174. This is particularly problematic because it is likely that plaintiffs who are unable to bring themselves within one of the four presumptions will increasingly resort to the forum of necessity doctrine.

seems to remain intact in most provinces that have adopted the CJPTA.[175]

If the doctrine continues to exist in Canadian law then one might wonder whether, given the Court's rigid new presumptive factors, there will be increased pressure on the forum of necessity doctrine.[176] To date, courts have been very restrained in their application of the forum of necessity doctrine, taking heed of the Court of Appeal's guidance that the doctrine is intended to apply only in "exceptional circumstances."[177] However, now that courts are much more constrained in their jurisdictional determinations (through the four presumptive factors, the inability to aggregate non-presumptive factors, the difficulty of rebutting the presumptions, and the unlikelihood of new factors being added to the list), courts might feel compelled to resort to the forum of necessity doctrine to mete out what they see as a just and fair result in jurisdictional determinations.

It is unfortunate that the Supreme Court did not take this opportunity to explain how all the pieces of the jurisdictional puzzle fit together. As argued above, it is unclear how to reconcile the traditional bases of jurisdiction (presence and consent) with the real and substantial connection test as a

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175. British Columbia, Saskatchewan, and Nova Scotia have adopted the CJPTA (or a version thereof). *See* Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 (Can. B.C.); S.S. 1997, c. C-41.1 (Can. Sask.); S.N.S. 2003 (2nd Sess.), c. 2 (Can. N.S.). Note that the Saskatchewan CJPTA does not contain a forum of necessity provision. It is unclear whether this was deliberate or simply an oversight.

176. Bruce Broomhall, *Extraterritorial Civil Jurisdiction: Obstacles and Openings in Canada*, BLOG OF THE EUR. J. OF INT'L L. (May 1, 2012), http://www.ejiltalk.org/extraterritorial-civil-jurisdiction-obstacles-and-openings-in-canada/#more-4915 ("One effect of *Van Breda*'s exclusive reliance on the listed criteria (and any new ones) will be to shift efforts to development [sic.] Canada's extraterritorial human rights litigation into the area of 'forum of necessity.'").

177. *See, e.g.*, Van Kessel v. Orsulak, 2010 ONSC 6919 (Can. Ont. Sup. Ct. J.) (court refused to apply the doctrine for a plaintiff whose cause of action in Pennsylvania would expire within two weeks, who had yet to secure legal counsel in Pennsylvania, and who would have incurred higher costs litigating in Pennsylvania); Elfarnawani v. International Olympic Committee, 2011 ONSC 6784 (Can. Ont. Sup. Ct. J.) (court refused to exercise jurisdiction under a forum of necessity theory where there were practical difficulties associated with the plaintiff litigating in Switzerland, such as increased costs of litigation and personal health issues); Jafarzadehahmadsargoorabi v. Sabet, 2011 ONSC 5827, para. 73 (Can. Ont. Sup. Ct. J.) (court refused to utilize the forum of necessity doctrine for an Iranian plaintiff who wished to litigate in Ontario rather than Québec, noting that "[t]he plaintiff here is not without recourse and can instigate a counterclaim in the Québec action commenced by the defendant.").

constitutional principle. It is equally unclear how to reconcile the doctrine of forum of necessity with the real and substantial connection test as a constitutional principle. The very nature of the forum of necessity doctrine is that it only applies when there is no real and substantial connection with the forum. While no one would dispute that the underlying purpose of the doctrine is salutary—i.e., to provide access to justice for claimants who do not have a forum in which to vindicate their rights—this does not mean that it can be harmonized with the constitutional imperatives described by the Supreme Court in *Van Breda*.[178] Since the real and substantial connection test acts as a constitutional constraint on the assumption of jurisdiction, it may be impossible for a court to assume jurisdiction (and for other provincial courts to enforce a resultant judgment) absent the requisite territorial connection. By refusing to comment on the forum of necessity doctrine in *Van Breda*, the Court avoided some difficult, but nonetheless critical, questions. If courts simply do not have the authority to hear matters in which there is no real and substantial connection to the forum, then the forum of necessity doctrine is unconstitutional. The Supreme Court should not have simply left the question for another day; the issue is part and parcel of the law of personal jurisdiction in Canada.

C. *Judgment Enforcement: The Flipside of the Jurisdictional Coin*

Another question raised by *Van Breda* is what the decision means for cases involving the enforcement of foreign judgments. It is a well-established principle in Canadian private international law that the same real and substantial connection test that applies for jurisdiction purposes also applies for

178. *See* Elizabeth Edinger, *New British Columbia Legislation: The Court Jurisdiction and Proceedings Transfer Act; The Enforcement of Canadian Judgments and Decrees Act*, 39 U.B.C. L. REV. 407, 417 (2006) (discussing the constitutional fragility of the forum of necessity provision in the British Columbia CJPTA: "The fragility arises from the fact that territorial competence has been defined so as to satisfy constitutional principles. How can a British Columbia court validly assume jurisdiction under section 6 of the *Court Jurisdiction Act*, where the constitutional principle has not been satisfied? And when jurisdiction is assumed pursuant to section 6, will British Columbia judgments be recognized by other Canadian courts that are not subject to the *Enforcement Act* and which, therefore, still require there to have been a real and substantial connection between the action and British Columbia?").

enforcement purposes.[179] That is, when a Canadian court is deciding whether to enforce a judgment rendered by, say, a New York court, it must decide whether the New York court had jurisdiction under Canadian rules of jurisdiction. Despite the recognition of the principle, most courts have not conceptually aligned jurisdiction simpliciter with jurisdiction for enforcement purposes. So for the past decade, courts would apply the Ontario Court of Appeal's *Muscutt* and/or *Van Breda* test to determine whether they had jurisdiction over a foreign defendant and would apply a *different* real and substantial connection test to determine whether to enforce a foreign judgment.[180] In short, there has been a disconnect between the jurisdiction rules and the enforcement rules in Canadian private international law.

To be sure, part of the reason for this disconnect likely stemmed from the difficulty of applying the *Muscutt* or *Van Breda* decisions in assessing whether a foreign court appropriately assumed jurisdiction.[181] However, the Supreme

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179. As Justice LeBel stated in *Van Breda*, "the framework established for the purpose of determining whether a court has jurisdiction may have an impact on . . . the recognition of judgments, and vice versa." Justice LeBel also stated that the framework established for jurisdiction may impact choice of law, though it is less clear how this is so. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 16 (Can.).

180. For instance, both CIMA Plastics Corp. v. Sandid Enterp. Ltd., 2011 ONCA 589 (Can. Ont. C.A.) and Monte Cristo Invs. v. Hydroslotter Corp, 2011 ONSC 6011 (Can. Ont. Sup. Ct. J.) were decided after the Court of Appeal's decision in *Van Breda*. Nonetheless, neither court directly applied the *Van Breda* approach to jurisdiction (i.e., looking at Rule 17 presumptions, then examining evidence which would tend to rebut the presumption) to the enforcement inquiry. *See* CIMA Plastics Corp. v. Sandid Enterp. Ltd., 2011 ONCA 589, para. 15 (Can. Ont. C.A.) (finding a real and substantial connection where "[t]he 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."); Monte Cristo Inv. v. Hydroslotter Corp., 2011 ONSC 6011, para. 23 (Can. Ont. Sup. Ct. J.) ("I have no doubt that there is a real and substantial connection between California and the cause of action in this matter. The evidence clearly establishes this connection. First, the gas and oil wells that were the subject matter of the agreements between the parties in this case are physically located in California. The $500,000 investment that was made by the plaintiff was in respect of the operation of these very wells. Second, the two written agreements between the parties, outlining the terms of the investment, essentially prescribed that disputes between the parties would be resolved by resort to the courts and laws of California.").

181. *Muscutt* was bound up in fairness, comity, efficiency while *Van Breda* (Court of Appeal) was bound up in procedural rules.

Court of Canada's decision in *Van Breda* should be fairly straightforward to apply in enforcing a foreign tort judgment. That is, an enforcing court would need to decide whether the foreign court assumed jurisdiction either on the basis of presence, consent, or a real and substantial connection (as defined by the presumptive factors). The only wrinkle is the rebuttable presumption.[182] Presumably, the party resisting enforcement of the judgment on the basis that the foreign court does not have jurisdiction has the opportunity (much like a defendant) to argue that the presumption should be rebutted.

If history is to be any predictor, however, courts will continue to develop two separate strands of case law on the real and substantial connection test—one for jurisdiction and one for enforcement. This is particularly likely given that the Court was lamentably silent on how the real and substantial connection test applied outside the tort context.[183] In the enforcement context, courts will continue to rely on the amalgam of factual connections that the Court in *Van Breda* said could not be aggregated for the purposes of assuming jurisdiction over a defendant. If this prediction is correct, then

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182. Again, I emphasize that except for "carrying on business" the other factors would appear to be irrebuttable.

183. In the first judgment enforcement decision to be released after the Supreme Court's decision in *Van Breda*, the Ontario Court of Appeal did not directly engage in how to apply the new real and substantial connection test. *See* Sincies Chiementin S.p.A. v. King, 2012 ONCA 653 (Can. Ont. C.A.). Instead, the Court of Appeal was of the view that "[a]lthough parts of the eight-pronged test from *Muscutt* were jettisoned, there is really very little difference between this court's analysis in *Charron Estate* and the Supreme Court of Canada's decision in *Van Breda* with respect to the core factors to be considered." *Id.* para. 7. The court then proceeded to conclude that a real and substantial connection existed between the foreign forum (Italy) and the defendant on the basis that the tort of professional negligence was committed in Italy. The most troubling aspect of the Court of Appeal's decision was its deference to the Italian court on *where* the tort was committed. The Court stated, "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." *Id.* paras. 9–10. It is trite law that for judgment enforcement purposes, a Canadian court must determine whether the foreign court had jurisdiction under *Canadian* rules of jurisdiction; this includes assessing whether, *under Canadian law*, a tort was committed in the foreign jurisdiction.

Canadian courts will be more liberal in enforcing foreign judgments than they will be in asserting jurisdiction over foreign defendants. While some degree of inconsistency may be inevitable,[184] it appears odd to have two strands of case law for the same correlated jurisdictional test.[185]

D. *The Intersection Between Common Law and the CJPTA*

The Court indicated that all of its comments regarding the development of the real and substantial connection test were "subject to provisions of specific statutes and rules of procedure."[186] It further stated that provinces 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."[187] Presumably, these statements mean that the Court's presumptive factors framework does not apply in those jurisdictions that have enacted the CJPTA and that those jurisdictions can continue to craft their own common law version of the real and substantial connection test, consistent with the broad contours of the Supreme Court's decision in *Van Breda.*

The difference between the Supreme Court's new *Van Breda* approach to jurisdiction and the CJPTA is notable in at least one way: the CJPTA does not foreclose the ability of the plaintiff to argue the existence of a real and substantial connection notwithstanding his inability to fall within one of the

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184. For instance, where a Canadian court has jurisdiction on the basis of the defendant's presence in the forum, the defendant is able to argue that the court should decline to exercise that jurisdiction under the doctrine of forum non conveniens. However, where a Canadian court is called upon to enforce a foreign judgment where the underlying basis of jurisdiction was the defendant's (perhaps fleeting) presence in the jurisdiction, it is not permitted to apply the doctrine of forum non conveniens. As such, it must enforce the foreign judgment based on presence.

185. *See* Morguard Invs. Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, para. 42 (Can.). Technically, there is no constitutional reason why the real and substantial connection test, as a conflicts rule for the assertion of jurisdiction, need be the same as the corresponding rule for the enforcement of foreign judgments, so long as both tests fall within constitutional limits. In other words, one could have a more generous test for enforcement than for jurisdiction simpliciter purposes. The point, however, is that it does not appear that courts are deliberately electing to follow a different test for judgment enforcement; rather, they are not recognizing that the real and substantial connection jurisdictional test is intended to be correlative.

186. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 68 (Can.).

187. *Id.* para. 71.

enumerated presumptions. Consequently, a plaintiff under the CJPTA can aggregate several non-presumptive factors in order to show the existence of a real and substantial connection between the forum and the subject matter of the dispute. This is not permitted under the new *Van Breda* test for jurisdiction.[188] This will likely mean that courts in a CJPTA jurisdiction will assume jurisdiction over a wider range of cases than their common law counterparts.[189] This may also encourage forum shopping by plaintiffs who know that they cannot fit within one of the four presumptions, but may be able to combine various non-presumptive factors to establish jurisdiction in a court subject to the CJPTA.[190]

With that said, the difference between a common law and a CJPTA jurisdiction will likely not be overly significant. Even if a court in a CJPTA jurisdiction were to combine various non-presumptive factors to ground jurisdiction, it would have to do so in a manner consistent with the Court's underlying message in *Van Breda*: only objective factual connections are to be considered in the real and substantial connection inquiry.[191] Thus, the jurisdictional results between common law and CJPTA provinces should be generally similar, with courts in CJPTA provinces perhaps assuming jurisdiction in a slightly broader range of cases.

VI. *OPEN SEASON FOR LIBEL TOURISTS*

This Article would not be complete without a brief discussion of what *Van Breda* and its companion cases mean for cases involving defamation. In *Breeden v. Black*, well-known

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188. *Id.* para. 93.

189. Bruce Broomhall, *Extraterritorial Civil Jurisdiction: Obstacles and Openings in Canada*, EJIL: TALK! (May 1, 2012), http://www.ejiltalk.org/extraterritorial-civil-jurisdiction-obstacles-and-openings-in-canada ("A second way to evade the *Van Breda* test would be through broader provincial laws, although these (like additional presumptive criteria beyond the '*Van Breda* four') would have to survive scrutiny under the constitutional wing of the 'real and substantial connection' test.").

190. Black observes that "*Club Resorts* appears to give rise to a state of affairs where the provinces with the CJPTA's statutory approach to jurisdiction have a more open-ended, policy-driven methodology than exists in the newly structured and rigidified common law." *See* Black, *supra* note 19, at 421.

191. *Id.* (predicting that is likely that the *Van Breda* decision will have "some effect" on judicial interpretation of the CJPTA).

business mogul Conrad Black sued various defendants for defamation stemming from the publication of certain allegedly false statements on a website that was accessible from anywhere in the world. The defendants were resident primarily in the United States.[192] After reviewing the judicial history and position of the parties, the Supreme Court conducted a very perfunctory jurisdictional analysis. It noted that the case was "easily resolved" on the basis of a presumptive factor—the alleged commission of a tort in Ontario. It elaborated:

> It is well-established in Canadian law that the tort of defamation occurs upon publication of a defamatory statement to a third party. In this case, publication occurred when the impugned statements were read, downloaded and republished in Ontario by three newspapers. It is also well established that every repetition or republication of a defamatory statement constitutes a new publication. The original author of the statement may be held liable for the republication where it was authorized by the author or where the republication is the natural and probable result of the original publication.[193]

With no discussion of the issue, the Court cursorily concluded that the defendants had not displaced the presumption that results from the application of this connecting factor.

The Supreme Court's analysis of the defamation claim in *Éditions Écosociété Inc. v. Banro Corp.* was equally simplistic:

> Here, the alleged tort of defamation occurred in Ontario. *Noir Canada* was distributed in Ontario. At this stage of the proceedings, the plaintiff need not show evidence of harm or that the book was read. The plaintiff need only allege publication . . . As discussed in *Club Resorts*, the commission of a tort in Ontario is a recognized presumptive connecting factor that prima facie entitles the Ontario court to assume jurisdiction over this dispute.[194]

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192. One defendant was resident in Ontario. *See* Breeden v. Black, [2012] 1 S.C.R. 666, para. 8 (Can.).

193. *Id.* para. 20.

194. Éditions Écosociété Inc. v. Banro Corp., [2012] 1. S.C.R. 636, para. 38 (Can.).

Not surprisingly, the Court then summarily concluded that the defendants had not rebutted the presumption of jurisdiction.[195]

Thus, for the purposes of jurisdiction simpliciter, it is fairly easy for plaintiffs to assert a defamation claim in Canada.[196] So long as the plaintiff alleges that a publication occurred in Ontario, jurisdiction is established.[197] Certainly, the defendant has the right to rebut this presumptive factor and show that, on the facts of a particular case, there is no real and substantial connection. However, for reasons discussed above, this will be difficult to do when the underlying basis of jurisdiction is a tort committed in the province. Indeed, the Court in both *Black* and *Banro* did not even entertain arguments that the presumption should be displaced.

Instead, the Supreme Court relegated any arguments about forum shopping—or "libel tourism" as it has become known—to the doctrine of forum non conveniens.[198] And, under the heightened version of forum non conveniens that it adopted, the Court concluded that neither of the alternative forums was clearly more appropriate. If neither Illinois nor Québec rose to the level of being clearly more appropriate, it is hard to envision any forum ever being clearly more appropriate in a defamation action. In *Banro,* for instance, the book in dispute was written (in French) by Québec authors, published by a Québec company, and distributed overwhelmingly in Québec. Of the nearly 5000 copies of the book printed, only ninety-three were sold in Ontario (which amounts to less than two percent of the total number of books printed). Likewise, in *Black*, the overwhelming majority of the defendants resided in the United

195. The Court also stated, "*For the reasons discussed above*, the defendants have not shown that only a minor element of the tort of defamation occurred in Ontario. As a result, they have not displaced the presumption of jurisdiction that arises in this case." *Id.* para. 39 (emphasis added). The reasons the Court appears to be referring to were simply the reasons why the tort was deemed to be committed in Ontario; they were not reasons explaining why the presumption was not rebutted.

196. The Supreme Court dealt with the issue of jurisdiction *simpliciter* in three paragraphs in *Black* and four paragraphs in *Banro.*

197. *Banro*, 1 S.C.R. para. 3 ("At common law, the tort of defamation crystallizes upon publication of the libellous material, and publication of the libellous material is presumed when it is printed in a book. The tort of defamation will thus crystallize in all jurisdictions where the book is available.").

198. *See, e.g., id.* para. 36.

States, the witnesses were located in the United States, the publication concerned matters that arose in the United States, there was parallel litigation in the United States, and the plaintiff was incarcerated in the United States. It is hard to believe that the United States (in particular, Illinois) would not be a clearly more appropriate forum.

The Court in both cases seemed to rely heavily on the choice of law analysis as supporting the conclusion that an Ontario forum was clearly more appropriate. The Court concluded that whether one used a traditional lex loci delicti approach to choice of law, or a rule which applied the law of the forum where the plaintiff suffered the "most substantial harm to reputation," either would militate in favor of an Ontario court assuming jurisdiction.[199] However, it should be noted that both of these methods of ascertaining the governing law are plaintiff-focused, which unsurprisingly leads to the conclusion that forum law applies. The conclusion that forum law applies is then bootstrapped into supporting the conclusion that Ontario is the most appropriate forum.[200] So it would seem that in any case where Ontario law applies (under either the lex loci or the "most substantial harm to reputation" approach to choice of law), it would follow that Ontario is the most appropriate forum. If this is the case, then Canadian courts will assume jurisdiction on very tenuous facts (i.e., based on the conclusion that the tort was committed in Ontario because the material was "published" there) and then keep the action in Ontario under the doctrine of forum non conveniens because the choice of law inquiry points in that direction.

In short, the decisions in *Black* and *Banro* are a huge win for plaintiffs alleging defamation claims. So long as the publication occurred in Ontario—which is very easily established—it is likely

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199. Kain et al. are critical of the Court's decision to raise the possibility of an alternate choice of law test for defamation claims, without resolving the issue: "At the very least, if the nation's highest Court decides to raise an issue of whether there should be a new legal rule, then it ought to resolve it. By reinvigorating the *possibility* that another choice of law rule in tort exists beyond the *lex loci delicti*, the Supreme Court has needlessly introduced the risk of confusion into the Canadian choice of law paradigm." *See* Kain et al., *supra* note 19, at 299.

200. Kain et al. point out that "LeBel J.'s judgments fail to consider the possibility that the foreign jurisdiction would apply its *own* choice of law rules in determining which substantive law applies to the claim." *Id.* at 292.

that the Ontario court will have jurisdiction and decide to retain jurisdiction if faced with a forum non conveniens challenge.

CONCLUSION

Van Breda is the most important Canadian decision on personal jurisdiction in over twenty years. Unfortunately, the decision provides more questions than answers. Among the outstanding questions: How is each of the four presumptive factors to be interpreted? Are the presumptions truly rebuttable? Will new presumptive factors ever make the list? How does the real and substantial connection test work in non-tort cases? What is the status of the forum of necessity doctrine? How can the traditional bases of jurisdiction—presence and consent—be reconciled with the real and substantial connection test? How does this new jurisdictional test impact the enforcement of foreign judgments? Is the approach to jurisdiction different under the CJPTA? These are but a few of the questions raised by the Supreme Court of Canada's decision in *Van Breda*. Lower courts will be tasked with the important job of trying to answer some of these questions in the months and years to come.

The one question that the Supreme Court in *Van Breda* did answer was the following: When can a foreign defendant be subject to suit in Ontario in respect of a tort claim? The answer was deceptively simple. A foreign defendant can be subject to suit in Ontario where: (a) the defendant is domiciled or resident in Ontario; (b) the defendant carries on business in Ontario; (c) the tort was committed in Ontario; or (d) there is a contract connected with the dispute that was entered into in Ontario. As long as a plaintiff can check one of those boxes, an Ontario court will have jurisdiction over the dispute—subject to the defendant rebutting the presumption. In circumstances that fall outside of these factors, an Ontario court will simply not have jurisdiction unless a plaintiff can persuade a court to add a new presumptive factor to the list. Two things are clear from the Court's new formulation of the jurisdictional test. First, there is incredible pressure on the four presumptive factors. Plaintiffs and courts will be tempted to distort and manipulate the factors to reach a just result, as arguably the Supreme Court itself did in both *Van Breda* and *Charron*. Second, there will be scenarios where a compelling argument can be made that there is a

legitimate connection between the dispute and Ontario, but none of the presumptive factors is engaged. In these scenarios, Canadian courts simply do not have the power under the new jurisdictional test to assume jurisdiction—subject, perhaps, to the forum of necessity doctrine. Maybe this is simply the price that litigants must pay for a jurisdictional test that is—at least on its face—certain and predictable. Or maybe the Supreme Court, in its zeal to simplify jurisdictional determinations, went a little too far in sacrificing fairness for predictability. Only time will tell.