Civil Procedure
Winter Term 2023

LECTURE NOTES NO. 3

II. JURISDICTION

In which jurisdiction will the proceedings be held? Such a simple question; such a complicated answer.

Consider that the precipitating event to the dispute may have occurred in one place, the parties reside in another, the thing subject of a dispute is somewhere else, and the people who will be witnesses yet somewhere else again.

Club Resorts Ltd. v. Van Breda
2012 SCC 17 (S.C.C.)

This is the leading case. Where there is a foreign element, an Ontario court will have jurisdiction over a dispute when there is **a *real and substantial connection* between the dispute and Ontario**. In the *Van Breda* litigation, the 'real and substantial connection' principle was refined in the context of a tort action. Rather than a direct test, there are now two stages of basic inquiry:

> First, **the plaintiff must establish that a 'presumptive connecting factor' connects the litigation to the jurisdiction**. Such factors include whether the defendant is domiciled or resident in the province; the defendant carries on business in the province; if a tort case, whether the tort was committed in the province; and, if a contract case, the contract connected with the dispute was made in the province. The fact that the plaintiff is resident in the jurisdiction is not itself sufficient.
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> Second, **if a 'presumptive connecting factor' is established, the onus shifts to the defendant who may rebut by establishing presumed jurisdiction by showing that the connection is insufficient to establish a real and substantial connection.** Here the real question will usually become whether another jurisdiction will be more convenient for the litigation.

This is a new framework for jurisdiction (sometimes called "territorial competence") and the courts are adding detail to that framework as cases are decided.

LeBel J.:

[14] These appeals raise broad issues about the fundamental principles of the conflict of laws, as this branch of the law has traditionally been known in the common law, or "private international law" as it is often called now (A. Briggs, *The Conflict of Laws* (2nd ed. 2008), at pp. 2-3; Manitoba Law Reform Commission, *Private International Law*, Report #119 (2009), at p. 2; J.-G. Castel, "The Uncertainty Factor in Canadian Private International Law" (2007), 52 *McGill L.J.* 555).

[15] Although both appeals raise issues concerning both the determination of whether a court has jurisdiction (the test of jurisdiction *simpliciter*) and the principles governing a court's decision to decline to exercise its jurisdiction (the doctrine of *forum non conveniens*), those issues may have an impact on the development of other areas of private international law. Private international law is in essence domestic law, and it is designed to resolve conflicts between different jurisdictions, the legal systems or rules of different jurisdictions and decisions of courts of different jurisdictions. It consists of legal principles that apply in situations in which more than one court might claim jurisdiction, to which the law of more than one jurisdiction might apply or in which a court must determine whether it will recognize and enforce a foreign judgment or, in Canada, a judgment from another province (S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2010), at p. 1).

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

…

[69] When a court considers issues related to jurisdiction, its analysis must deal first with those concerning the assumption of jurisdiction itself. That analysis must be grounded in a proper

understanding of the real and substantial connection test, which has evolved into an important constitutional test or principle that imposes limits on the reach of a province's laws and courts. As I mentioned above, this constitutional test reflects the limited territorial scope of provincial authority under the *Constitution Act, 1867*. At the same time, the Constitution acknowledges that international or interprovincial situations may have effects within a province. Provinces may address such effects in order to resolve issues related to conflicts with their own internal legal systems without overstepping the limits of their constitutional authority (see *Castillo*).

[70] The real and substantial connection test does not mean that problems of assumption of jurisdiction or other matters, such as the choice of the proper law applicable to a situation or the recognition of extraprovincial judgments, must be dealt with on a case-by-case basis by discretionary decisions of courts, which would determine, on the facts of each case, whether a sufficient connection with the forum has been established. Judicial discretion has an honourable history, and the proper operation of our legal system often depends on its being exercised wisely. Nevertheless, to rely completely on it to flesh out the real and substantial connection test in such a way that the test itself becomes a conflicts rule would be incompatible with certain key objectives of a private international law system.

[71] The development of an appropriate framework for the assumption of jurisdiction requires a clear understanding of the general objectives of private international law. But the existence of these objectives does not mean that the framework for achieving them must be uniform across Canada. Because the provinces have been assigned constitutional jurisdiction over such matters, they are free to develop different solutions and approaches, provided that they abide by the territorial limits of the authority of their legislatures and their courts.

[72] What would be an appropriate framework? How should it be developed in the case of the assumption and exercise of jurisdiction by a court? A particular challenge in this respect lies in the fact that court decisions dealing with the assumption and the exercise of jurisdiction are usually interlocutory decisions made at the preliminary stages of litigation. These issues are typically raised before the trial begins. As a result, even though such decisions can often be of critical importance to the parties and to the further conduct of the litigation, they must be made on the basis of the pleadings, the affidavits of the parties and the documents in the record before the judge, which might include expert reports or opinions about the state of foreign law and the

organization of and procedure in foreign courts. Issues of fact relevant to jurisdiction must be settled in this context, often on a *prima facie* basis. These constraints underline the delicate role of the motion judges who must consider these issues.

[73] Given the nature of the relationships governed by private international law, 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 — however laudable the objective of individual fairness may be. As La Forest J. wrote in *Morguard*, there must be order in the system, and it must permit the development of a just and fair approach to resolving conflicts. Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court. Parties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect. The need for certainty and predictability may conflict with the objective of fairness. An unfair set of rules could hardly be considered an efficient and just legal regime. The challenge is to reconcile fairness with the need for security, stability and efficiency in the design and implementation of a conflict of laws system.

[90] To recap, in a case concerning a tort, the following factors are 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; and
(d) a contract connected with the dispute was made in the province.

(b) *Identifying New Presumptive Connecting Factors*

[91] As I mentioned above, the list of presumptive connecting factors is not closed. Over time, courts may identify new factors which also presumptively entitle a court to assume jurisdiction. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed 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.

[92] 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. All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order and fairness.

[93] If, however, no recognized presumptive connecting factor — whether listed or new — applies, the effect of the common law real and substantial connection test is that the court should not assume jurisdiction. In particular, a court should not assume jurisdiction on the basis of the combined effect of a number of non-presumptive connecting factors. That would open the door to assumptions of jurisdiction based largely on the case-by-case exercise of discretion and would undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system.

[94] Where, on the other hand, a recognized presumptive connecting factor does apply, the court should assume that it is properly seized of the subject matter of the litigation and that the defendant has been properly brought before it. In such circumstances, the court need not exercise its discretion in order to assume jurisdiction. It will have jurisdiction unless the party challenging the assumption of jurisdiction rebuts the presumption resulting from the connecting factor. I will now turn to this issue.

(c) *Rebutting the Presumption of Jurisdiction*

[95] The presumption of jurisdiction that arises where a recognized connecting factor — whether listed or new — applies

is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must establish facts which demonstrate 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.

[96] Some examples drawn from the list of presumptive connecting factors applicable in tort matters can assist in illustrating how the presumption of jurisdiction can be rebutted. For instance, 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. And where the presumptive connecting factor is the fact that the defendant is carrying on business in the province, the presumption can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province. On the other hand, where the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province.

[97] In each of the above examples, it is arguable that the presumptive connecting factor points to a weak relationship between the forum and the subject matter of the litigation and that it would accordingly not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction. In such circumstances, the real and substantial connection test would not be satisfied and the court would lack jurisdiction to hear the dispute.

[98] However, where the party resisting jurisdiction has failed to rebut the presumption that results from a presumptive connecting factor — listed or new — the court must acknowledge that it has jurisdiction and hold that the action is properly before it. At this point, it does not exercise its discretion to determine whether it has jurisdiction, but only to decide whether to decline to exercise its jurisdiction should *forum non conveniens* be raised by one of the parties.

[99] I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be

directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.

[100] To recap, to meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. In these reasons, I have listed some presumptive connecting factors for tort claims. This list is not exhaustive, however, and courts may, over time, identify additional presumptive factors. The presumption of jurisdiction that arises where a recognized presumptive connecting factor — whether listed or new — exists is not irrebuttable. The burden of rebutting it rests on the party challenging the assumption of jurisdiction. 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. If jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*. I will now turn to that issue.

…

[105] A party applying for a stay on the basis of *forum non conveniens* may raise diverse facts, considerations and concerns. Despite some legislative attempts to draw up exhaustive lists, I doubt that it will ever be possible to do so. In essence, the doctrine focusses on the contexts of individual cases, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient. For example, s. 11(1) of the *CJPTA* provides that a court may decline to exercise its jurisdiction if, "[a]fter considering the interests of the parties to a proceeding and the ends of justice", it finds that a court of another state is a more appropriate forum to hear the case. Section 11(2) then provides that the court must consider the "circumstances relevant to the proceeding". To illustrate those circumstances, it contains a non-exhaustive list of factors:

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;

(b) the law to be applied to issues in the proceeding;

(c) the desirability of avoiding multiplicity of legal proceedings;

(d) the desirability of avoiding conflicting decisions in different courts;

(e) the enforcement of an eventual judgment; and

(f) the fair and efficient working of the Canadian legal system as a whole. [s. 11(2)]

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Vale Canada Limited v. Royal & Sun Alliance Insurance Co. of Canada
2022 ONCA 862 (Ont. C.A.)

At first instance, 2022 ONSC 12 (Ont. S.C.J.), F.L. Myers J. provided a summary of the proceedings:

[1] There are three actions before the court. In the first, Vale Canada Limited, previously known as Inco Limited, and certain of its subsidiaries, sue their many insurers for reimbursement of environmental expenses they have incurred. The bulk of the claimed expenditures relate to six Ontario lawsuits in which Inco was alleged to have damaged the natural environment in Ontario in violation of Ontario law.

[2] Royal & Sun Alliance Insurance Company of Canada ("RSA") is one of the two insurers that provided the primary layer of coverage to Inco for its Canadian liabilities. It has commenced a separate lawsuit against all of Inco's insurers seeking interpretation of the respective degrees of responsibility of each of the numerous insurers as among themselves. This involves not only insurers of liabilities that arose in Ontario. Some of the insurers insured Inco and/or its subsidiaries for expenditures incurred globally so that the determination of their positions vis-a-vis Ontario expenditures may also involve interpretations of the relationships between and among the various insurers in other "towers" of insurance coverage (i.e. the multiple layers of insurance coverage put in place for Inco's environmental liabilities in Japan, Indonesia, UK, and US.

> [3] There is a third claim by Vale Canada and others against Travelers Insurance Company of Canada under Court File No. CV-21-664805. This was the first claim that Vale Canada commenced quickly to respond to an action commenced by Travelers in New York. This first action is or will be subsumed in the more comprehensive claim advanced by Vale Canada discussed in para. [1] above.
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> [4] Ten of the 22 excess insurers sued by Vale Canada and RSA have attorned to the jurisdiction of this court. Nine of the 22 excess insurers submit that this court lacks jurisdiction over them in these actions. Alternatively, they ask the court to stay these actions based on the doctrine of forum non conveniens in favour of Traveler's New York action. The remaining three. Lloyds, Firemans' Fund, and General Re, concede this court's jurisdiction over them, but join in the request for a stay of these actions in favour of the New York action.
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> [5] Finally, Zurich Insurance plc (U.K. Branch) and Riverstone Insurance (U.K.) Limited, submit that the claims against them should be stayed pending an arbitration in the UK under the terms of their insurance policies.

Basically, the context for the dispute was that an insurance company had contracted with other insurers in respect of its agreement to insure an Ontario company with respect to environmental damages arising from mining operations internationally (the vast majority being in Canada, and a number of properties in Ontario). Most of the defendants accepted Ontario as the proper jurisdiction; nine defendants preferred New York State as the proper venue and moved to stay the Ontario proceedings.

To make matters easier for humanity, the Court of Appeal summarized its decision as follows:

> [6] Our ultimate holding can be stated briefly. **A comprehensive general liability insurer, underwriting primary or excess insurance coverage for Ontario risks, connects itself to Ontario for jurisdictional purposes and thus commits itself to defending, in Ontario, claims arising out of those risks. No other outcome is commercially reasonable in the operation of the international insurance market and consistent with the principles of comity. There is no place that enjoys universal jurisdiction.**
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> [7] The common law principles of comity underpin the doctrines of jurisdiction simpliciter and forum non conveniens and stand against forum shopping and the notion that the race should go to the swiftest, for good reason, as we will explain. These principles ensure that Vale, an Ontario-based international miner, can sue its primary,

> comprehensive general liability insurer RSA, an Ontario-based insurer, in respect of environmental liabilities largely incurred by Vale for polluting Ontario properties, in Ontario's Superior Court of Justice. These principles also entail the conclusion that Vale and RSA can sue the insurers who provided additional or excess insurance, largely follow-form, for the same type of risks, significantly but not exclusively tied to Ontario, in the same court.
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> [8] Vale is the natural plaintiff in its action against RSA as the claimant under its primary comprehensive general liability policy, and RSA is the natural defendant having the alleged primary obligation to defend and indemnify Vale. Vale is also the natural plaintiff in its claims under its insurance contracts with the excess insurers. In RSA's action, RSA is the natural plaintiff as the primary insurer and Vale's excess and other insurers are the natural defendants. And all of the claims and defences are tied, to a significant degree, to Ontario risks.
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> [9] We observe that in an ordinary and simple action the insured plaintiff would receive a claim and tender it on its insurer for defence and indemnity. If there were a coverage issue, the insurer would defend the insured's liability claim on a non-waiver basis, leaving the coverage issue to be determined later, and any excess insurer would be engaged as circumstantially required. Or the insured could undertake its own defence, again leaving the coverage issue to be determined later. In the coverage litigation, the insurer's defence would be rooted in the pertinent factual details of the insured's liability, the conduct of the insured and the language of the insurance policy. This rootedness of the insurance dispute in the factual circumstances of the insured's liability is crucial to determining jurisdiction.
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> [10] Although the scenario presented in these appeals is factually more complex, the insurance issues arise out of an ordinary litigation structure in which Vale is the natural plaintiff and its insurers are the natural defendants. This structure cannot be justly or adequately replaced by a suit in which Travelers is the artificial plaintiff and Vale is the artificial defendant in the litigation reconstruction exercise Travelers has undertaken in New York.

The Court then went on to discuss the core legal principles (comity, jurisdiction, and *forum non conveniens*) as follows:

Comity:

[The comity principle means, in essence, that sovereign nations will respect each other's legal processes and defer to the jurisdiction of foreign courts where there is no principled reason not do so.]

[22] As a starting point, we comment on international comity – a set of guiding principles underpinning the private international legal order. Based on the customs of mutual deference and respect between nations, "comity attenuates the principle of territoriality": *Spar Aerospace Ltd v. American Mobile Satellite Corp.,* 2002 SCC 78, [2002] 4 S.C.R. 205, at para. 15. The Supreme Court has observed that international comity is at the root of the doctrines of both jurisdiction *simpliciter* and *forum non conveniens*: *Spar Aerospace*, at para. 21.

[23] In *Morguard Investments Ltd. v. De Savoye*, 1990 CanLII 29 (SCC), [1990] 3 S.C.R. 1077, at para. 31, p. 1096, La Forest J. writing for the court, accepted the meaning of "comity" articulated by the Supreme Court of the United States. in *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-164:

"Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws ...

[24] La Forest J. also reiterated the Supreme Court's approval in *Zingre v. The Queen*, 1981 CanLII 32 (SCC), [1981] 2 S.C.R. 392, of Chief Justice Marshall's statement in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), at para. 31, p. 1097:

"[C]ommon interest impels sovereigns to mutual intercourse" between sovereign states. In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.

[25] La Forest J. went on to note that "[t]he ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted", citing Arthur T. von Mehren and Donald T. Trautman, "Recognition of Foreign Adjudications: A Survey and A Suggested Approach" (1968) 81 Harv. L. Rev. 1601, at p. 1603. In *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. (Gagnon)*, 1994 CanLII 44 (SCC), [1994] 3 S.C.R. 1022, at para. 40, p. 1049, La Forest J. added an important note: "To prevent overreaching, however, courts have developed rules governing and restricting the exercise of jurisdiction over extraterritorial and transnational transactions".

[26] Comity rests on the assumption of reciprocity and can be refused where reciprocity is not forthcoming: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, 1993 CanLII 124 (SCC), [1993] 1 S.C.R. 897, at para. 56, p. 934. These principles remain in force. In *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69, the court repeated an earlier observation that "ideas of 'comity' are not an end in themselves, but are grounded in notions of order and fairness to participants in litigation with connections to multiple jurisdictions": at para. 52.

[27] It is a truism that more than one place may have jurisdiction *simpliciter* over a dispute. And comity has sometimes led Canadian courts to defer (that is, to decline to exercise their own jurisdiction) when a foreign court has accepted jurisdiction.

[28] Two decisions of this court provide a useful example. In *Kaynes v. BP*, *plc*, 2014 ONCA 580, 122 O.R. (3d) 162, leave to appeal refused, [2014] S.C.C.A. No. 452, this court stayed an Ontario class action in favour of a pending class action in the U.S. based on very similar allegations, covering substantially the same period, and embracing the claims of all the BP shareholders. However, when the American class action was dismissed on a procedural motion unrelated to jurisdiction, this court reinstated the Ontario class action: *Kaynes v. BP*, *plc*, 2016 ONCA 601, 133 O.R. (3d) 29.

[29] But comity does not entail that a Canadian court will always defer to a foreign court's decision to take jurisdiction: *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321, at para. 23.

[30] *Teck Cominco* is in some ways a mirror reflection of this case. Teck Cominco was a Canadian mining company whose operations in British Columbia caused environmental damage in the United States. The environmental damage led to an American class action against Teck Cominco. The company sued its insurers in Washington State after they refused to defend it there. The insurers started a parallel proceeding in British Columbia seeking to clarify their obligations. The American court asserted jurisdiction first and refused the insurers' motion to stay the proceedings in favour of the British Columbia court. The Canadian courts also refused to stay the proceedings. The matter was appealed to the British Columbia Court of Appeal and then to the Supreme Court. Both courts agreed that an American court's assertion of jurisdiction was not determinative of a Canadian court's decision to stay. We understand that the proceedings in both jurisdictions settled shortly before duplicate trials were to start.

[31] The result in *Teck Cominco* was not ideal because the parties were compelled to litigate in two jurisdictions. However, this outcome is not inconsistent with comity in the Canadian understanding of the concept. We return to *Teck Cominco* in the *forum non conveniens* analysis.

Jurisdiction:

[33] The Supreme Court of Canada explained and described the "real and substantial connection" test, which is the basis on which a Canadian court determines whether to assume jurisdiction over a claim involving foreign parties, in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572.

[34] Before the court were two separate tort claims brought in Ontario by two Canadian residents who suffered injuries while vacationing in Cuba. One of the defendants was Club Resorts Ltd., a company incorporated in the Cayman Islands that managed the two hotels where the accidents occurred.

[35] In the *Van Breda* claim, Ms. Van Breda and her spouse, Mr. Berg, stayed at a resort managed by Club Resorts in Cuba. The stay was based on a contractual arrangement whereby Mr. Berg would provide two hours of tennis lessons per day in exchange for a free stay for two people. On the first day of their stay, Ms. Van Breda suffered catastrophic injuries when a metal structure on the beach collapsed on her.

[36] In the *Charron* claim, Dr. Charron and his spouse purchased an all-inclusive vacation package through a local travel agent that included scuba diving. The package was offered by a hotel managed by Club Resorts. On the fourth day of their stay, Dr. Charron drowned while scuba diving.

[37] To determine whether the Ontario courts were correct to assume jurisdiction over the actions and the foreign defendants in each of the two actions, the court established a new analytical framework for applying the real and substantial connection test that had been developed in case law over a number of years. The Supreme Court affirmed the lower court's conclusion that the Ontario court had jurisdiction *simpliciter* over the two actions.

[38] Courts applying the real and substantial connection test are tasked with identifying a link between the forum and the subject matter of the litigation or between the forum and the defendant or both. It is that link that gives the court of the forum jurisdiction over the litigation. Because the court is assuming jurisdiction over a foreign defendant for an event that might not

have happened in the forum, the fact that the plaintiff is present in the jurisdiction or suffered damage in the jurisdiction are not in themselves sufficient connecting factors to establish a presumptive real and substantial connection.

[39] The test is informed by the principles of order, fairness and comity among nations. However, those principles are not to be applied on an *ad hoc* basis to the facts of a particular case. The purpose of the new analytical framework was to provide stability and predictability by setting out an objective list of presumptive connecting factors to apply in each case. If one of those factors is present, then, unless it is rebutted by the defendant, the court will assume jurisdiction, subject to the application of the doctrine of *forum non conveniens*.

[40] The Supreme Court also held that where there are multiple claims in tort or contract and tort, once there is a real and substantial connection for one of the claims, the court must assume jurisdiction over "all aspects of the case": *Van Breda*, at para. 99.

[41] The Supreme Court set out four presumptive connecting factors that apply to tort claims and, *prima facie*, entitle a court to assume jurisdiction over a dispute:

1) **The defendant is domiciled or resident in the province;**

2) **The defendant carries on business in the province;**

3) **The tort was committed in the province; and**

4) **A contract connected with the dispute was made in the province.**

[42] The Supreme Court also explained that the list is not closed and provided guidance for identifying new presumptive factors for tort and other claims to be based on "connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors": *Van Breda*, at para. 91. Relevant considerations the court identified are:

1) Similarity of the connecting factor with the recognized presumptive connecting factors;

2) Treatment of the connecting factor in the case law;

3) Treatment of the connecting factor in statute law; and

> 4) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

[43] Finally, the court explained that this basis for the assumption of jurisdiction is justified because it is consistent with the principles of order, fairness and comity, at para. 92:

> All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order a

[Jurisdiction, the, is about the propriety of allowing litigation in Ontario where there is a real and substantial connection to the province based on context-specific factors.]

forum non conveniens:

[the forum non conveniens doctrine allows the court, in its discretion, to decline jurisdiction in favour of another jurisdiction based on efficiency.]

> [147] Even if the court finds it has jurisdiction *simpliciter*, under the *forum non conveniens* doctrine it may decline to take up an action on the basis that there is another "clearly more appropriate" forum. Jurisdiction *simpliciter* and *forum non conveniens* are both rooted in the principles of comity, but they require distinct analyses: *Van Breda*, at para. 101.
>
> **The *forum non conveniens* test**
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> [148] The *forum non conveniens* test was prescribed in *Amchem*. In *Amchem*, Sopinka J. made several pertinent observations. The court must "determine whether the domestic forum is the natural forum, that is the forum that on the basis of relevant factors has the closest connection with the action and the parties": at para. 53, pp. 931-932. He then prescribed the *forum non conveniens* test: "Under this test the court must determine whether there is another forum that is clearly more appropriate" (emphasis added). The implication is that "where there is

no one forum that is the most appropriate, the domestic forum wins out by default … provided it is an appropriate forum." Where there is a contest, "the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction." Comity demands the following:

> If, applying the principles relating to *forum non conveniens* outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions. In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles.

[149] *Amchem* concerned two actions about asbestos liability, one brought in Texas and the other in British Columbia. In the result, the Supreme Court found on the basis of comity that Texas was an appropriate forum.

[150] The *forum non conveniens* test prescribed in *Amchem* has been consistently applied in the jurisprudence ever since, as recently as *Haaretz.com v. Goldhar*, 2018 SCC 28, [2018] 2 S.C.R. 3, at paras. 3, 27, and elsewhere. In that case, the court found that Israel was the clearly more appropriate forum for a defamation action.

The *forum non conveniens* burden of proof

[151] The burden of proof is on the party raising the *forum non conveniens* argument to show that the proposed forum is "clearly more appropriate": *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666, at paras. 23, 37; *Van Breda*, at paras. 103, 109.

Factors relevant in assessing *forum non conveniens*

[152] Experience has established a number of factors that courts consider in assessing *forum non conveniens*. In *Haaretz.com v. Goldhar*, at para. 116, the court adopted the "centre of gravity of the dispute" as a useful metaphor. In our view that metaphor is serviceable in the broader context including this case.

[153] In *Van Breda*, LeBel J. approved the list of factors relevant to assessing *forum non* conveniens from the Uniform Law Commission of Canada's draft *Uniform Court Jurisdiction and Proceedings Transfer Act* ("CJPTA"): at para. 105. The Act has been enacted in

several provinces, but not in Ontario. Nonetheless, LeBel J. noted that s. 11(2) of the Act was a good effort to codify the common law in a non-exhaustive way. The factors include:

a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
b) the law to be applied to issues in the proceeding;
c) the desirability of avoiding multiplicity of legal proceedings;
d) the desirability of avoiding conflicting decisions in different courts;
e) the enforcement of an eventual judgment; and
f) the fair and efficient working of the Canadian legal system as a whole.

[154] In *Breeden v. Black* the court added, as another factor, "fairness to the parties" which is broader than factor (f) of the Act, "the fair and efficient working of the Canadian legal system as a whole": at para. 35. The appellants moved to dismiss the respondent's defamation actions in Ontario on the ground that there was no real and substantial connection between the actions and Ontario, or, alternatively, on the basis that a New York or Illinois court was the more appropriate forum: at para. 7. The Supreme Court found that "it would be unfair to prevent Lord Black from suing in the community in which his reputation was established" and not unfair to the appellants because "it would have been reasonably foreseeable to them that posting the impugned statements on the internet and targeting the Canadian media would cause damage to Lord Black's reputation in Ontario": at para. 36.

[155] Several cases have raised as a factor the concept of "juridical advantage". In *Breeden v. Black,* the court noted, at para. 27:

> Juridical advantage not only is problematic as a matter of comity, but also as a practical matter, may not add very much to the jurisdictional analysis. As this Court emphasized in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, 1993 CanLII 124 (SCC), [1993] 1 S.C.R. 897, "[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" (p. 933). Juridical advantage therefore should not weigh too heavily in the *forum non conveniens* analysis. [Emphasis added.]

> [156] Finally, forum shopping, while understandable, is unprincipled and is not to be encouraged: *Amchem*, at para. 21, p. 912; *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636, at paras. 36, 49. The Supreme Court noted that "[f]orum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them": *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 36

[Thus, as the Court noted in its summary, Ontario was the proper place for the action to be tried – "In our view, no other outcome is commercially reasonable in the operation of the international insurance market and consistent with the principles of comity. There is no place that enjoys universal jurisdiction."]