

# Developments in Private International Law: The 2011-2012 Term — The Unfinished Project of the *Van Breda* Trilogy

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## I. INTRODUCTION

The tension between certainty and flexibility has been a central theme of the Supreme Court of Canada's conflict of laws jurisprudence since a ground-breaking triumvirate of cases delivered by La Forest J. in the early 1990s. In *Morguard Investments Ltd. v. De Savoye*,<sup>1</sup> the Court established that the superior courts are subject to territorial limits when asserting jurisdiction *simpliciter* and for the purpose of the recognition and enforcement of foreign judgments.<sup>2</sup> Subsequently, in *Hunt v. T&N plc*,<sup>3</sup> the Court held that these limits are constitutional imperatives and apply to the provincial legislatures as well as the superior courts. However, La Forest J.'s judgments in *Morguard* and *Hunt* regarding the outer reaches of these limits — as a matter of both common law and constitutional principle — were ambiguous.<sup>4</sup> Indeed, the cases, and in particular the “real and substantial connection” test for jurisdiction *simpliciter* from

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<sup>1</sup> [1990] S.C.J. No. 135, [1990] 3 S.C.R. 1077 (S.C.C.) [hereinafter “*Morguard*”].

<sup>2</sup> *Id.*, at 1099.

<sup>3</sup> [1993] S.C.J. No. 125, [1993] 4 S.C.R. 289 (S.C.C.) [hereinafter “*Hunt*”].

<sup>4</sup> For instance, La Forest J. stated that provincial superior courts had to exercise jurisdiction “properly, or appropriately”, and that there needed to be “some limits to the exercise of jurisdiction against persons outside the province”. See *Morguard*, *supra*, note 1, at 1102 and 1104. He also introduced the requirement of a “real and substantial connection” for the assumption of jurisdiction, although he offered virtually no guidance on the meaning of this so-called “test”. Rather, La Forest J. approached the principle on the basis that it was to be guided by abstract and competing principles of “order” and “fairness”. See *Hunt*, *id.*, at 313 and 324-25.

*Morguard*,<sup>5</sup> were criticized as being “rife with uncertainty”.<sup>6</sup> Ironically, just four years later, La Forest J. rehabilitated a different area of private international law which had been historically been characterized by flexible rules. Citing the goals of certainty, predictability and ease of application, he laid down a single fixed test for determining choice of law in tort, the *lex loci delicti*.<sup>7</sup>

In light of the Supreme Court’s rulings in *Morguard*, *Hunt* and *Tolofson*, it is not surprising that lower courts subsequently struggled to find an appropriate balance between certainty and order on the one hand, and flexibility and fairness on the other. In its 2002 decision in *Muscutt v. Courcelles*,<sup>8</sup> the Ontario Court of Appeal acknowledged that “it is not possible to reduce the real and substantial connection test to a fixed formula” and that a “considerable measure of judgment is required in assessing whether the ... test has been met”.<sup>9</sup> However, the Court set out a list of eight factors to consider in an effort to bring greater “clarity and certainty” to the law.<sup>10</sup> While rigorously applied by Ontario courts for several years, the *Muscutt* framework attracted both academic<sup>11</sup> and

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<sup>5</sup> The concept of a “real and substantial connection” adopted in *Morguard* was inspired in part by Dickson J.’s judgment in *Moran v. Pyle National (Canada) Ltd.*, [1973] S.C.J. No. 149, [1975] 1 S.C.R. 393 (S.C.C.) [hereinafter “*Moran*”], a case dealing with the *situs* of the tort of negligent manufacture for the purposes of the service *ex juris* rules in Manitoba. Justice Dickson rejected a strict “place of acting” determination in favour of a “flexible, qualitative and quantitative test” that asked whether it was “inherently reasonable” for the action to be brought in a particular jurisdiction, or, to adopt another expression, where there was a “real and substantial connection” between the jurisdiction and the wrongdoing. See *Moran*, at 407-409. Applying this concept in *Morguard*, La Forest J. variously referred to a real and substantial connection as a connection “between the subject-matter of the action and the territory where the action is brought”, “between the jurisdiction and the wrongdoing”, “between the damages suffered and the jurisdiction”, “between the defendant and the forum province”, “with the transaction or the parties” and “with the action”. See *Morguard*, *supra*, note 1, at 1104-1109.

<sup>6</sup> Joost Blom, Q.C., & Elizabeth Edinger, “The Chimera of the Real and Substantial Connection Test” (2005) 38 U.B.C. L. Rev. 373, at 380 [hereinafter “Blom & Edinger”]. In *Hunt*, the Court expressly declined to answer the call for further certainty, stating that “[t]he exact limits of what constitutes a reasonable assumption of jurisdiction were not defined [in *Morguard*], and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these.” See *Hunt*, *supra*, note 3, at 325.

<sup>7</sup> *Tolofson v. Jensen*, [1994] S.C.J. No. 110, [1994] 3 S.C.R. 1022 (S.C.C.) [hereinafter “*Tolofson*”].

<sup>8</sup> [2002] O.J. No. 2128, 60 O.R. (3d) 20 (Ont. C.A.) [hereinafter “*Muscutt*”].

<sup>9</sup> *Id.*, at para. 75.

<sup>10</sup> *Id.*, at para. 76.

<sup>11</sup> Janet Walker, “Beyond Real and Substantial Connection: The *Muscutt* Quintet” [hereinafter “Walker”] in Todd L. Archibald & Michael G. Cochrane, eds. (2002) *Ann. Rev. Civ. Lit.* 61; Elizabeth E. Edinger, “*Spar Aerospace*: A Reconciliation of *Morguard* with the Traditional Framework for Determining Jurisdiction” (2003) 61 *The Advocate* 511; Blom & Edinger, *supra*, note 6; 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” (2006) 85 *Can. Bar Rev.*

judicial<sup>12</sup> criticism, in part because its multifactorial approach was said to engender uncertainty.<sup>13</sup> Outside Ontario, the *Muscutt* approach was gradually overtaken by a renewed focus upon codified rules for jurisdiction found in provincial rules of court,<sup>14</sup> and model legislation introduced by the Uniform Law Conference of Canada.<sup>15</sup>

In 2010, the Ontario Court of Appeal released a unanimous decision<sup>16</sup> from a five-member panel revisiting *Muscutt*. Inspired by the Uniform Law Conference of Canada's model legislation, the Court sought to articulate a more objective or "presumptive" approach to jurisdiction based on whether the claim fell within one or more of the rules for service *ex juris* in Ontario.<sup>17</sup> However, the Court of Appeal's approach to jurisdiction was short-lived and reigned for just over two years. On April 18, 2012, the Supreme Court of Canada released the *Van Breda* Trilogy, authored by LeBel J., marking the Court's first comprehensive reassessment of private international law rules since La Forest J.'s decisions approximately two decades earlier.<sup>18</sup>

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61 [hereinafter "Pitel & Dusten"]; Jean-Gabriel Castel, "The Uncertainty Factor in Canadian Private International Law" (2007) 52 McGill L.J. 555 [hereinafter "Castel"]; and Tanya J. Monestier, "Real and Substantial Mess: The Law of Jurisdiction in Canada" (2007) 33 Queen's L.J. 179 [hereinafter "Monestier, 'Real and Substantial'"].

<sup>12</sup> See *Succession de feu André Gauthier v. Coutu*, [2006] N.B.J. No. 38, 296 N.B.R. (2d) 34 (N.B.C.A.) [hereinafter "Coutu"].

<sup>13</sup> See, e.g., Monestier, "Real and Substantial", *supra*, note 11, at 187-89; Castel, *supra*, note 11, at 560.

<sup>14</sup> See *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] S.C.J. No. 51, [2002] 4 S.C.R. 205 (S.C.C.) [hereinafter "*Spar Aerospace*"], in which LeBel J. suggested that compliance with the provisions for jurisdiction under the *Civil Code*, S.Q. 1991, c. 64 (similar to the rules for service *ex juris* in the common law provinces) would satisfy the real and substantial connection test for jurisdiction *simpliciter*. Cf. *Kennedy v. Hughes*, [2006] O.J. No. 3870, 31 C.P.C. (6th) 314, at para. 85 (Ont. S.C.J.) and *Benquesus v. Proskauer, Rose, LLP*, [2004] O.J. No. 692, [2004] O.T.C. 184, at para. 35 (Ont. S.C.J.), *affd* [2005] O.J. No. 43 (Ont. C.A.). Justice LeBel's further suggestion that the doctrine of *forum non conveniens* could act as a "counterweight" for the improper assumption of jurisdiction was questioned: see Blom & Edinger, *supra*, note 6, at 397 and 399 and Pitel & Dusten, *supra*, note 11, at 85.

<sup>15</sup> *Uniform Court Jurisdiction and Proceedings Transfer Act* [hereinafter "CJPTA"], online: ULCC <<http://www.ulcc.ca/en/us>>. Several provinces, including British Columbia, Saskatchewan and Nova Scotia, have enacted statutes based on the model legislation.

<sup>16</sup> *Van Breda v. Village Resorts Ltd.*, [2010] O.J. No. 402, 98 O.R. (3d) 721 (Ont. C.A.) [hereinafter "*Van Breda (C.A.)*"]. The decision was authored by Sharpe J.A., the author of *Muscutt*.

<sup>17</sup> The degree to which the Ontario Court of Appeal's judgment represented an improvement over the *Muscutt* test was examined in Tanya Monestier, "A 'Real and Substantial' Improvement? Van Breda Reformulates the Law of Jurisdiction in Ontario" (2010) *Ann. Rev. Civil Lit.* 185.

<sup>18</sup> While the *Van Breda* Trilogy is technically a quartet, since the *Van Breda* decision itself, *infra*, note 18, involved two separate appeals, the Court issued only one set of reasons in *Van Breda*, and we therefore refer to *Van Breda* along with *Éditions Écosociété, infra*, note 20 and *Black, infra*, note 21, as a "trilogy". We also say here that the *Van Breda* Trilogy "comprehensively" reassessed private international law rules for the first time since *Morguard, Hunt* and *Tolofson*, because in the

The Court's judgments in the *Van Breda* Trilogy once again highlight the tension between certainty and flexibility, or "order and fairness". In *Van Breda v. Village Resorts Ltd.*,<sup>19</sup> the Court laid down a new framework that builds upon, but also materially departs from, the Ontario Court of Appeal's presumptive approach to jurisdiction *simpliciter*. The *Van Breda* judgment represents a clear attempt to swing the pendulum towards certainty in the law of jurisdiction. At the same time, the Court's judgments in *Banro Corp. v. Éditions Écosociété Inc.*<sup>20</sup> and *Black v. Breeden*<sup>21</sup> introduce potential uncertainty in the area of choice of law. In lengthy *obiter dicta*, the Court introduced a "possible" new choice of law rule in tort for the first time since *Tolofson*. Finally, despite a laudable attempt to resolve the confusion from *Morguard* and *Hunt* concerning the relationship between the constitutional and common law aspects of the "real and substantial connection" test, LeBel J.'s constitutional analysis in *Van Breda* creates more questions than it answers.

In this paper, we review the implications of the *Van Breda* Trilogy for jurisdiction *simpliciter*, *forum non conveniens*, choice of law and the intersection between common law conflicts rules and constitutional principles. We conclude that despite the Supreme Court's focus on certainty in *Van Breda*, the judgments are unclear in several important respects, and in some instances are difficult if not impossible to reconcile with the Court's prior jurisprudence.

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intervening period, the Supreme Court issued several important judgments dealing with conflicts rules as well as the extraterritorial reach of the provincial superior courts and legislatures. See, e.g.: *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] S.C.J. No. 23, [2003] 1 S.C.R. 450 (S.C.C.) (enforceability of forum selection clauses); *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] S.C.J. No. 39, [2003] 2 S.C.R. 63 (S.C.C.) [hereinafter "*Unifund*"] (constitutional applicability of provincial legislation having extra-territorial effect); *Beals v. Saldanha*, [2003] S.C.J. No. 77, [2003] 3 S.C.R. 416 (S.C.C.) [hereinafter "*Beals*"] (recognition and enforcement of judgments emanating from foreign countries); *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, [2005] 2 S.C.R. 473 (S.C.C.) (constitutional validity of provincial legislation having extra-territorial effect); and *Pro-Swing Inc. v. Elta Golf Inc.*, [2006] S.C.J. No. 52, [2006] 2 S.C.R. 612 (S.C.C.) [hereinafter "*Pro-Swing*"] (recognition and enforcement of non-monetary judgments).

<sup>19</sup> [2012] S.C.J. No. 17, 2012 SCC 17 (S.C.C.) [hereinafter "*Van Breda*"].

<sup>20</sup> [2012] S.C.J. No. 18, 2012 SCC 18 (S.C.C.) [hereinafter "*Éditions Écosociété*"].

<sup>21</sup> [2012] S.C.J. No. 19, 2012 SCC 19 (S.C.C.) [hereinafter "*Black*"].

## II. JURISDICTION *SIMPLICITER*

### 1. Background

The Trilogy's primary judgment on jurisdiction *simpliciter* is *Van Breda*. The appeal arose in relation to two motions decisions — *Van Breda* and *Charron*<sup>22</sup> — dismissing applications by foreign defendants to stay Ontario actions. Both cases dealt with Ontario tourists injured abroad.

In *Van Breda*, racket sport professional Viktor Berg and his spouse, Morgan Van Breda, took a trip to Cuba. The couple stayed at the Super-Club's Breezes Jibacoa resort, which was managed by Club Resorts, a Cayman Islands company. Berg provided two hours of tennis lessons per day at the resort in exchange for accommodation and resort amenities for Van Breda and himself. This arrangement was made through Sport au Soleil, a business operated by an Ottawa-based travel agent, René Denis. On the first day of the trip, Van Breda tried to do some exercises on a soccer goal on the beach, which collapsed. Van Breda became a paraplegic. She spent a few days in a Cuban hospital and then returned to Calgary, where her family lived. Berg and Van Breda subsequently moved to British Columbia. The two never returned to Ontario on account of Van Breda's injuries. Berg, Van Breda and her family members commenced an action framed in tort and contract in Ontario against Denis, Club Resorts and companies associated with Club Resorts.

In *Charron*, Dr. Charron and his wife booked a vacation package through a travel agent, Bel Air Travel Group Ltd. The package was offered by Hola Sun Holidays Ltd., which sold packages offered by SuperClubs. Charron and his wife bought an all-inclusive package at the Breezes Costa Verde hotel in Cuba. The hotel was owned by a Cuban corporation but managed by Club Resorts. On the fourth day of his trip, Dr. Charron went scuba diving and drowned. Mrs. Charron and her children sued Bel Air, Hola Sun and foreign defendants, including Club Resorts, for breach of contract and negligence.

In both actions, the foreign defendants moved for a stay on the basis that the Ontario Superior Court lacked jurisdiction or, alternatively, that there was a more convenient forum for the dispute. The motion judges

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<sup>22</sup> The motion judges' decisions are reported at: *Van Breda v. Village Resorts Ltd.*, [2008] O.J. No. 2624, 60 C.P.C. (6th) 186 (Ont. S.C.J.) and *Charron Estate v. Bel Air Travel Group Ltd.*, [2008] O.J. No. 4078, 92 O.R. (3d) 608 (Ont. S.C.J.).

dismissed the motions on the basis of the eight-factor *Muscutt* test. The Ontario Court of Appeal upheld the motion judges' decisions, and laid down a new framework for assumed jurisdiction.

The Court of Appeal's decision adopted a presumptive approach in which a real and substantial connection could be presumed to exist in certain circumstances. Specifically, the presumption would apply if the claim fell within one of the enumerated grounds for service *ex juris* under rule 17.02 of the Ontario *Rules of Civil Procedure*<sup>23</sup> (except rules 17.02(h) (damages sustained in Ontario) and 17.02(o) (necessary or proper party)). If the claim did not fall within any of these grounds, then the plaintiff could still attempt to demonstrate that the real and substantial connection had been made out "in the particular circumstances of the case". Furthermore, the defendant could rebut the presumption of jurisdiction arising from the application of a rule 17.02 ground by demonstrating that the real and substantial connection was not made out. The Court emphasized that the focus of the real and substantial connection test was on connecting factors between the jurisdiction, the claim and the defendant. The other *Muscutt* factors, such as fairness, were not "free-standing factor[s] capable of trumping weak connections" but rather served as "analytic tools to assist the court in assessing the significance of the connections between the forum, the claim and the defendant".<sup>24</sup>

Although *Muscutt* had advocated a distinction between jurisdiction *simpliciter* and *forum non conveniens*,<sup>25</sup> the *Muscutt* framework was criticized for leading to the conflation of the two tests.<sup>26</sup> The Ontario Court of Appeal in *Van Breda* sought to more sharply contrast jurisdiction *simpliciter* and *forum non conveniens*. The Court reiterated that jurisdiction *simpliciter* is a question of law that focuses on the strength of the connections between the jurisdiction, the claim and the defendant. *Forum non conveniens* is a matter of judicial discretion; it concerns whether there is another clearly more appropriate forum for the action based on individual case-by-case considerations, such as the location of witnesses and evidence, the governing law and various other discretionary factors.<sup>27</sup>

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<sup>23</sup> R.R.O. 1990, Reg. 194.

<sup>24</sup> *Van Breda (C.A.)*, *supra*, note 16, at paras. 84, 98 and 109.

<sup>25</sup> *Muscutt*, *supra*, note 8, at para. 43, citing Elizabeth Edinger, "Morguard v. De Savoye: Subsequent Developments" (1993) 22 Can. Bus. L.J. 29, at 33.

<sup>26</sup> Walker, *supra*, note 11, at 18-20; Monestier, "Real and Substantial", *supra*, note 11, at 192; Castel, *supra*, note 11, at 561; Coutu, *supra*, note 12, at paras. 67-68.

<sup>27</sup> *Van Breda (C.A.)*, *supra*, note 16, at paras. 81-82.

The Court of Appeal's decision to dismiss the stay motions was affirmed by the Supreme Court in *Van Breda*. The Supreme Court re-emphasized the need for a presumptive approach, but one that went further than the Court of Appeal by its emphasis on certainty in the test for jurisdiction *simpliciter*. Justice LeBel held that the legal framework governing 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".<sup>28</sup> While justice and fairness are "essential", they:

... cannot be attained without a system of principles and rules that ensures security and predictability in the law. ... 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. ... 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.<sup>29</sup>

Justice LeBel went on to observe that comity itself depends on "order, which requires a degree of stability and predictability" in the rules governing cross-border relationships.<sup>30</sup>

In order to address these concerns, LeBel J. proposed a new test that builds upon the same presumptive logic and structure of the Court of Appeal's judgment, but also imposes greater restrictions upon plaintiffs. According to LeBel J., a party arguing in favour of jurisdiction *simpliciter* bears the burden of identifying a "presumptive connecting factor" between the subject matter of the litigation and the forum. In the absence of such a presumptive connecting factor, LeBel J. was not prepared to find that the court could assert jurisdiction, in contrast to the Ontario Court of Appeal (a point discussed in more detail below). In this regard, LeBel J. eschewed the Court of Appeal's reliance upon the rule 17.02 grounds of service, and recognized only four presumptive connecting factors in relation to "tort claims" or "tort matters":

- (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

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<sup>28</sup> *Van Breda, supra*, note 19, at para. 73.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, at para. 74.

(d) a contract connected with the dispute was made in the province.<sup>31</sup>

Although LeBel J. limited the above presumptive connecting factors to tort claims and declined to lay down “an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law”,<sup>32</sup> it seems likely that they will be extended to other claims as well.<sup>33</sup>

If one of the four “presumptive” factors is present, the defendant remains free to argue that on the particular facts of the case, the presumption should be rebutted. In order to discharge this onus, the defendant must demonstrate that the relationship suggested by the factor is not sufficient for the court to assume jurisdiction. As to what constitutes a sufficient connection for this purpose, LeBel J. offered little guidance. He stated that the connection must be a “real” one and “cannot be weak or hypothetical”.<sup>34</sup> Justice LeBel suggested, for example, that a contract made in the province that “has little or nothing to do” with the subject matter of a tort dispute may permit the presumption of jurisdiction to be rebutted.<sup>35</sup> He also referred to the possible rebuttal of the presumption in a case “involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province”.<sup>36</sup>

Finally, as noted above, LeBel J.’s judgment makes clear that plaintiffs will need to rely on a presumptive factor to establish jurisdiction, even if the facts would nonetheless appear to support a real and substantial connection between the claim and the province. In the absence of an existing or new presumptive connecting factor, “the court will lack jurisdiction on the basis of the common law real and substantial connection test”.<sup>37</sup> Justice LeBel stated that the absence of a presumptive connecting factor cannot be overcome merely by a laundry list of other

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<sup>31</sup> *Id.*, at para. 90.

<sup>32</sup> *Id.*, at para. 85.

<sup>33</sup> See, e.g., *Wang v. Lin*, [2012] O.J. No. 2599, 2012 ONSC 3374 (Ont. S.C.J.) and *de Sommer v. Martin*, [2012] O.J. No. 3761, 2012 ONCA 535 (Ont. C.A.) (applying the *Van Breda* framework to family law disputes); *Aldo Group Inc. v. Moneris Solutions Corp.*, [2012] O.J. No. 1931, 2012 ONSC 2581 (Ont. S.C.J.); *Avanti Management and Consulting Ltd. v. Argex Mining Inc.*, [2012] O.J. No. 3665, 2012 ONSC 4395 (Ont. S.C.J.); and *Nagra v. Malhotra*, [2012] O.J. No. 3688, 2012 ONSC 4497 (Ont. S.C.J.) (applying *Van Breda* to breach of contract claims); and *United States of America v. Yemec*, [2012] O.J. No. 3956, 2012 ONSC 4207 (Ont. S.C.J.) (applying *Van Breda* to claims for unjust enrichment, contribution, indemnity and related declaratory remedies).

<sup>34</sup> *Van Breda*, *supra*, note 19, at paras. 32 and 96.

<sup>35</sup> *Id.*, at para. 96.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*, at para. 81.

factors suggesting a connection, if all of these other factors are non-presumptive:

In particular, a court should not assume jurisdiction on the basis of a combined effect of a number of non-presumptive connecting factors. This 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.<sup>38</sup>

This is a significant departure from the Court of Appeal's approach, which permitted plaintiffs to demonstrate that jurisdiction should be assumed "in the particular circumstances of the case".<sup>39</sup> Pursuant to Supreme Court's judgment in *Van Breda*, a party seeking to establish jurisdiction *simpliciter* in the absence of a recognized presumptive connecting factor must not simply convince the court that it would be appropriate to do so on the specific facts of the case; it must also convince the court that it would be appropriate to recognize a new presumptive connecting factor that would apply in all cases.

While the list of four presumptive connecting factors is not closed, LeBel J.'s judgment suggests that courts should be cautious in recognizing new categories. In determining whether to recognize a new factor, courts are directed to consider the similarity of the proposed factor with currently recognized factors, the treatment of the factor in statute law or case law, and its treatment in the jurisdictional approach taken by other legal systems with shared values.<sup>40</sup> This suggests that lower courts may be reluctant to readily find new presumptive connecting factors.<sup>41</sup>

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<sup>38</sup> *Id.*, at para. 93.

<sup>39</sup> *Van Breda (C.A.)*, *supra*, note 16, at paras. 72 and 109.

<sup>40</sup> *Van Breda*, *supra*, note 19, at para. 91. This willingness to examine the conflicts jurisprudence of other legal systems for guidance is not new. See, e.g., *British South Africa Co. v. Companhia de Moçambique*, [1893] A.C. 602, at 624 (H.L.), *per* Lord Herschell L.C.: "But in considering what jurisdiction our Courts possess, and have claimed to exercise in relation to matters arising out of the country, the principles which have found general acceptance amongst civilised nations as defining the limits of jurisdiction are of great weight."

<sup>41</sup> For instance, in *Cugalj v. Wick*, [2012] O.J. No. 1719, 2012 ONSC 2407 (Ont. S.C.J.), the first case to apply the Supreme Court's *Van Breda* approach to jurisdiction *simpliciter*, the Court rejected the plaintiff's argument that an Ontario insurer responding to the claim on behalf of an out-of-province defendant should qualify as a new presumptive connecting factor. Similarly, in *Export Packers Co. v. SPI International Transportation*, [2012] O.J. No. 3126, 2012 ONCA 481 (Ont. C.A.), the Ontario Court of Appeal held that the potential efficiencies resulting from allowing a party to proceed with a third party claim in Ontario did not constitute a sufficient basis to create a new presumptive category.

## 2. Implications

Whether or not *Van Breda* will actually bring increased certainty and predictability to the law of jurisdiction *simpliciter* remains to be seen. Only time will tell whether courts will be inclined to expand the list of presumptive categories. If they are not cautious, then the move away from the multi-factorial *Muscutt* test to a more focused inquiry may ultimately have little effect on outcomes. For plaintiffs, however, the requirement to fit one's case into the confines of a presumptive connecting factor — existing or new — appears to create an additional hurdle.

Much will also turn upon how courts interpret the existing categories laid out by LeBel J. The second presumptive connection — that a defendant “carries on business” in the province — is likely to remain fertile ground for litigation, as has historically been the case under Ontario's service rules 16.02(1)(e) and 17.02(p).<sup>42</sup> Justice LeBel did state that for the purposes of jurisdiction, the mere fact of having intra-provincial business activities may be insufficient where the dispute is unrelated to those particular activities.<sup>43</sup> He also urged courts to take care not to create “what would amount to forms of universal jurisdiction” based on limited commercial activity,<sup>44</sup> and specifically suggested that “carrying on business” depends on “some form of actual, not only virtual, presence in the jurisdiction”.<sup>45</sup> Thus, LeBel J. suggested that the fact of advertising in a jurisdiction would not, on its own, be sufficient.<sup>46</sup>

The third presumptive connecting factor will also require clarification and refinement. The *situs* or location of a tort may itself be so uncertain that it can often be said not to qualify as a presumption at all. On this point, the Court offers little guidance beyond a general reference to “relatively minor” elements of the tort.<sup>47</sup> The accidents giving rise to the claims in *Van Breda* and *Charron* occurred abroad; however, arguably the damages were suffered (at least in the case of *Charron*) in Ontario. Justice LeBel expressly refused to recognize damages sustained in the province as a

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<sup>42</sup> See, e.g., *Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce*, [1974] O.J. No. 1839, 3 O.R. (2d) 70 (Ont. C.A.); *Overland Custom Coach Inc. v. Thor Industries Inc.*, [1999] O.J. No. 5285, 46 O.R. (3d) 788 (Ont. S.C.J.); *Applied Processes Inc. v. Crane Co.*, [1993] O.J. No. 1964, 15 O.R. (3d) 166 (Ont. Gen. Div.). See also J. Blom, “New Ground Rules for Jurisdictional Disputes: The *Van Breda* Quartet” (2012) 53 Can. Bus. L.J. 1, at 27 [hereinafter “Blom”].

<sup>43</sup> *Van Breda*, *supra*, note 19, at para. 96.

<sup>44</sup> *Id.*, at para. 87.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, at para. 114.

<sup>47</sup> *Id.*, at para. 96.

presumptive connecting factor on the policy ground that its recognition would risk “sweeping into that jurisdiction claims that have only a limited relationship with the forum”.<sup>48</sup> However, LeBel J. then distinguished torts “such as defamation”, where “sustaining damage completes the commission of the tort and often tends to locate the tort in the jurisdiction where the damage is sustained”.<sup>49</sup>

In the companion Trilogy cases involving defamation actions, the Court used the presumptive factor of the tort having been committed in the province to find jurisdiction. In *Éditions Écosociété*, the Court found that the fact that 15 copies of the allegedly libelous book were in Ontario libraries (one copy having been checked out) was sufficient, noting that the defendant had also adduced evidence that it had a reputation in Ontario that was of some value.<sup>50</sup> In *Black*, the Court noted that publication occurred in Ontario when the impugned statements were read, downloaded and republished.<sup>51</sup> The Court did not comment on the circumstances that would support a rebuttal of the presumption of jurisdiction in these types of cases, which could suggest that Ontario may have jurisdiction over defamation disputes even on very limited publication (despite the admonition in *Van Breda* against “sweeping in” all claims where damages have been suffered in the province).<sup>52</sup>

Accordingly, while a categorical approach may appear on the surface to provide considerable certainty and predictability, there will be ample room for the creativity of parties and their counsel to debate whether a given claim falls within a presumptive connecting factor. Assuming that the claim falls within a presumed connecting factor, it will remain open to the defendant to argue that the connection is insufficient on the facts. If the claim does not fall within a presumptive connecting factor, plaintiffs can still attempt to demonstrate that a new factor should be given presumptive effect. In this regard, it is questionable whether requiring plaintiffs to establish the existence of a new factor, as opposed only to the appropriateness of assuming jurisdiction on the particular facts of the case, will actually impose any greater restrictions upon the courts than the test proposed by the *Van Breda* Court of Appeal.

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<sup>48</sup> *Id.*, at para. 89.

<sup>49</sup> *Id.*

<sup>50</sup> *Éditions Écosociété*, *supra*, note 20, at paras. 37-40.

<sup>51</sup> *Black*, *supra*, note 21, at para. 20.

<sup>52</sup> However, the facts of the cases were somewhat unique in that there was evidence that the damage to the plaintiffs’ reputation was strongly tied to Ontario. In particular, in *Black*, LeBel J. noted that Lord Black had “undertaken not to bring any libel action in any other jurisdiction, and has limited his claim to damages to his reputation in Ontario”. See *Black*, *supra*, note 21, at para. 33.

*Van Breda* also leaves several other less obvious questions unanswered. For instance, LeBel J.'s four categories are expressly framed as appropriate for claims "in tort and issues associated with such claims",<sup>53</sup> but he also stated that it would be a violation of the principles of fairness and efficiency to require plaintiffs to split their case; the test must address whether or not there is a real and substantial connection among the entirety of the dispute, the forum and the defendant.<sup>54</sup> Given that such motions generally arise at the pleadings stage, however, the "essence" of the claim will generally be very difficult for motion judges to assess.

The judgment also leaves unanswered questions about the place of the traditional private international law tests for jurisdiction in the contemporary "real and substantial connection" analysis. Justice LeBel stated that the judgment does not purport to replace traditional grounds on which jurisdiction can be established, "like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction".<sup>55</sup> Yet the Court did not seek to formally reconcile presence-based and consent-based jurisdiction with the new categorical approach to assumed jurisdiction, nor did it explain why these traditional approaches to establishing jurisdiction should continue to apply. It is not clear, for instance, whether the defendant's mere presence within the forum, including a fleeting presence for the purpose of service, is a genuinely "real" connection as opposed to a "weak" connection such that jurisdiction should be assumed. Such a transitory presence may not be sufficient to satisfy the constitutional requirement of a real and substantial connection to the province, as discussed further below. It is also significant that the *Van Breda* Court included the residence of the defendant within the province

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<sup>53</sup> *Van Breda*, *supra*, note 19, at para. 85.

<sup>54</sup> *Id.*, at para. 99.

<sup>55</sup> *Id.*, at para. 79. It is notable in this respect that, in *Rubin v. Eurofinance SA*, [2012] UKSC 46, at paras. 109-113 [hereinafter "Rubin"], the U.K. Supreme Court found that there was no English precedent for adopting the Canadian "real and substantial connection" test for recognition and enforcement of foreign judgments, at least outside the family law context. The Court instead chose to affirm only the traditional "presence" and "consent" bases for recognition and enforcement, in a case involving foreign avoidance orders in the insolvency context (though interestingly, the Court cited *Morguard* and *Beals* as representative of the Canadian position, and did not refer to the *Van Breda* Trilogy itself). For an informative discussion of how the real and substantial connection test has largely been rejected by courts outside Canada, see J.P. Brown, "The Perils of Certifying International Class Actions in Canada" in D. Fairgrieve & E. Lein, eds., *Extraterritoriality and Collective Redress* (Oxford: Oxford University Press, 2012), ch. 16. Brown's paper also underscores the degree to which the framework proposed in the *Van Breda* Trilogy is unequipped to deal with complex cross-border litigation, such as class actions. This point has also been noted by other commentators: see, e.g., T. Monestier, "(Still) A 'Real and Substantial' Mess? The Law of Jurisdiction in Canada (forthcoming), at note 99 [hereinafter "Monestier, '(Still)']".

among the list of *rebuttable* presumptive connecting factors, thus suggesting that presence alone may not be sufficient in all cases to establish jurisdiction. Accordingly, lower courts will continue to grapple with the notion of “presence” and its appropriate place in the *Van Breda* framework for jurisdiction.

Finally, LeBel J. stated (no fewer than three times) that the Court was not pronouncing on the doctrine of forum of necessity, which was not at issue on the appeals.<sup>56</sup> At the Court of Appeal, Sharpe J.A. had expressly found that the forum of necessity operated as an exception to the real and substantial connection “where there is no other forum in which the plaintiff could reasonably seek relief”.<sup>57</sup> The doctrine would apply where an “inadequate connection” to the jurisdiction is overwhelmed by an “overriding concern for access to justice”.<sup>58</sup> It remains to be seen whether Sharpe J.A.’s reasoning will be adopted in future cases.

In conclusion, LeBel J.’s suggestion that the *Van Breda* test will enable parties to predict whether a court will assume jurisdiction in a case with an international or interprovincial aspect “with reasonable confidence” seems unduly optimistic. It is doubtful that *Van Breda* will instantly bring added certainty to the law of jurisdiction *simpliciter*. The test leaves considerable room for litigants to attempt to prove or disprove jurisdiction in any given case. However, *Van Breda* does provide a structured framework for courts to apply in relation to assumed jurisdiction. The categorical approach may bring a measure of added analytical certainty and facilitate more consistent appellate review of motion decisions.

As Blom and Edinger have observed, the Supreme Court of Canada’s jurisprudence on the “real and substantial connection” prior to *Van Breda* could be both compared and contrasted with its approach in other areas of the law, such as negligence.<sup>59</sup> The authors argue that the “real and substantial connection” concept lacked sufficient precision to qualify as a legal principle and served more as a descriptive phrase to define situations in which jurisdiction would be assumed. In this way, the concept is similar to proximity in tort, which lacks fixed content and is, in essence, a “collective expression for a set of principles, the actual rules of decision”.<sup>60</sup>

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<sup>56</sup> *Id.*, at paras. 59, 82 and 100.

<sup>57</sup> *Van Breda (C.A.)*, *supra*, note 16, at para. 54.

<sup>58</sup> *Id.*, at para. 100.

<sup>59</sup> Blom & Edinger, *supra*, note 6, at 416-19.

<sup>60</sup> *Id.*, at 419.

The Supreme Court's presumptive structure for jurisdiction *simpliciter* in *Van Breda* mirrors the Court's structure for analyzing duty of care claims in tort.<sup>61</sup> In tort claims, the Court first considers whether the claim has been previously recognized as giving rise to a duty of care. If the claim does not fall into a recognized category, then the Court goes on to examine whether a new duty should be imposed. In recognizing new duties of care, the Court is directed to take guidance from established categories. While the concepts that describe the situations in which new duties are imposed — foreseeability and proximity — lack precision, there is an analytical structure that mandates incremental development of the law through the application of precedent.

In the same way, the Court's new approach to jurisdiction in *Van Breda* attempts to impose a more coherent structure upon the concept of "real and substantial connection". While the judgment leaves several questions unanswered and is unlikely to generate the certainty it promises for lower courts and litigants, it does establish the beginnings of a framework to give more defined shape to the vague concept of a "real and substantial connection" articulated in *Morguard*. It also signals that courts should exercise restraint with a view to incremental development in the law of jurisdiction.

### III. *FORUM NON CONVENIENS*

#### 1. Background

In many ways, the Supreme Court's judgments in *Van Breda*, *Éditions Écosociété* and *Black* simply affirm the existing law on *forum non conveniens*. Justice LeBel reiterated that *forum non conveniens* is distinct from jurisdiction *simpliciter* and that the two tests must not be conflated, an admonition that had been repeated (though not always rigorously followed) since at least *Muscutt*.<sup>62</sup> As before, the burden remains on the party resisting jurisdiction to demonstrate that there is a clearly more appropriate forum. Justice LeBel stated that the factors relevant to the *forum non conveniens* inquiry can never be exhaustively listed and vary

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<sup>61</sup> See *Cooper v. Hobart*, [2001] S.C.J. No. 76, [2001] 3 S.C.R. 537 (S.C.C.).

<sup>62</sup> *Supra*, note 8, at para. 43.

depending on context. Citing past case law<sup>63</sup> and recent statutory codifications of the doctrine,<sup>64</sup> he reaffirmed many of the factors that had historically been applied, including 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; the relative strengths of the connections of the parties; and other factors.<sup>65</sup> He also noted that there is no particular list of factors, but that the analysis is always contextual.<sup>66</sup>

## 2. Implications

The Court's application of the *forum non conveniens* test in the *Van Breda* Trilogy is noteworthy for at least two reasons. First, LeBel J.'s assessment of questions of choice of law considers only the law determined by the choice of law rules of the domestic court, and ignores an analysis of the law that would apply if the action were stayed in favour of the foreign court. Second, LeBel J. suggests that the traditional concern for juridical advantage and disadvantage may be a less important factor in the *forum* analysis, not only within Canada but also in foreign jurisdictions if they have a similar legal system and values.

In each of the Trilogy cases, LeBel J. relies heavily upon the idea that Ontario law would apply to the disputes in upholding the lower courts' findings that the alternate *fora* failed to meet the "clearly more appropriate" threshold. This inclusion of choice of law considerations in *forum non conveniens* itself is nothing new; the governing substantive law has long been recognized as a relevant factor in the test.<sup>67</sup> In many cases it will be relatively simple to determine the applicable law, such as where a contract has a governing law clause.<sup>68</sup> However, with other types

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<sup>63</sup> *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460 (H.L.) [hereinafter "*Spiliada*"] and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] S.C.J. No. 34, [1993] 1 S.C.R. 897 (S.C.C.) [hereinafter "*Amchem*"].

<sup>64</sup> See CJPTA, *supra*, note 15, s. 11(1).

<sup>65</sup> *Van Breda*, *supra*, note 19, at para. 110.

<sup>66</sup> *Id.*, at para. 112.

<sup>67</sup> See, e.g., *Spiliada*, *supra*, note 63, at 478; *Amchem*, *supra*, note 63, at 917; *Spar Aerospace*, *supra*, note 14, at para. 71.

<sup>68</sup> See, e.g., *Westec Aerospace Inc. v. Raytheon Aircraft Co.*, [1999] B.C.J. No. 871, 67 B.C.L.R. (3d) 278, at para. 35 (B.C.C.A.), *affd* without reasons [2001] S.C.J. No. 23, [2001] 1 S.C.R. iv (S.C.C.) [hereinafter "*Westec*"].

of claims, the applicable law may itself depend upon the forum, which LeBel J.'s analysis in the Trilogy fails to consider.

In *Éditions Écosociété* and *Black*, LeBel J. stated that Ontario law would apply to defamation actions because that was the place of the *lex loci delicti* (or because of a potentially new Canadian choice of law rule for defamation, based on the fact that the most substantial harm to the plaintiff's reputation occurred in Ontario). However, 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.

This failure to consider the foreign court's choice of law rule is significant. In many cases, Canadian choice of law rules are different from those in foreign jurisdictions. For instance, American courts often apply a "most significant contacts" rule to determine the applicable law in defamation claims.<sup>69</sup> In the case of defamation actions with connections to multiple states, Illinois courts have held that the state whose law should be applied is the state where the person allegedly defamed was domiciled at the time, on the basis that it will tend to have the most significant connection to the damage to the plaintiff's reputation.<sup>70</sup> That said, on the particular facts of *Black* — in which the defendants sought to stay the Ontario action in favour of the Illinois courts — the outcome on the *forum non conveniens* analysis might not have been different if Illinois choice of law rules had been considered. Although Lord Black was incarcerated in Florida on charges of mail fraud at the time, he was (at least previously) domiciled in Ontario and led considerable evidence that the harm to his reputation was closely connected to Ontario. Furthermore, he limited his claim to damages in Ontario and undertook not to commence any other libel actions abroad. Arguably, an Illinois court would have still applied Ontario law to the dispute.<sup>71</sup>

The situation was different in *Éditions Écosociété*. There, the defendants argued that Ontario should have declined jurisdiction on the basis that Quebec was the place of the "most substantial publication". Justice LeBel rejected this argument, noting that the "defamation law of Canada

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<sup>69</sup> See *Velle Transcendental Research Ass'n, Inc. v. Esquire, Inc.*, 354 N.E.2d 622 (Ill. App. Ct. 1st Dist. 1976).

<sup>70</sup> See *Snead v. Forbes, Inc.*, 275 N.E.2d 746 (Ill. App. Ct. 1st Dist. 1971).

<sup>71</sup> It is therefore ironic that Lord Black argued that "the lack of an actual malice requirement in Canadian defamation law affords him a legitimate juridical advantage" over litigating in Illinois. See *Black, supra*, note 21, at para. 35.

has not adopted the substantial publication standard”.<sup>72</sup> He held that the existing Canadian choice of law rule in defamation provided that the tort crystallized in the jurisdiction(s) where publication (including a single publication or republication) to a third party occurs. However, a Quebec court may well have concluded that the proper law of the tort was Quebec law; after all, publication (and arguably the most substantial publication) occurred in Quebec. Accordingly, it is not clear that the applicable law was “that of Ontario and not Quebec”; Ontario law would only apply if the action proceeded in Ontario. Contrary to LeBel J.’s conclusion, therefore, the applicable law did not favour Ontario in the *forum non conveniens* analysis and was, at best, a neutral factor. Indeed, immediately after concluding that the applicable law “is that of Ontario and not Quebec”, LeBel J. in the next paragraph of his judgment suggests that the applicable law in Quebec might be disputed.<sup>73</sup>

Thus, LeBel J.’s analysis of the choice of law issues in *Éditions Écosociété* and *Black* appears contrary to his own statements in *Van Breda*, where he held:

In considering the question of juridical advantage, a court may be too quick to assume that the proper law naturally flows from the assumption of jurisdiction. However, the governing law of the tort is not necessarily the domestic law of the forum. This may be so in many cases, but not always.<sup>74</sup>

In *Éditions Écosociété* and *Black*, LeBel J. seems to have fallen into his own trap. In many cases, including multi-jurisdiction defamation actions, different choice of law rules in each forum may well lead to different jurisdictions applying different substantive law. If the applicable law to the dispute is going to be used as a factor in the *forum non conveniens* analysis, then these different choice of law rules should be considered in order to properly determine whether in fact they can be said to favour one forum over the other.

A second noteworthy feature of the Trilogy’s approach to *forum non conveniens* is the suggestion by the Court that a party’s loss of juridical advantage should be afforded limited weight in the *forum non conveniens* analysis. The Court appears to suggest that this is the case whether the alternative forum is across provincial or national boundaries, assuming in the latter case that the alternative forum is one that shares “basic val-

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<sup>72</sup> *Éditions Écosociété*, *supra*, note 20, at para. 55.

<sup>73</sup> *Id.*, at paras. 62-63.

<sup>74</sup> *Van Breda*, *supra*, note 19, at para. 111.

ues”.<sup>75</sup> This might be read as suggesting that the question of juridical advantage should only be given weight when the nature of the advantage or disadvantage raises issues of fairness or natural justice.

In interprovincial claims, LeBel J. suggested that the extensive use of juridical advantage “might be inconsistent with the spirit and intent of *Morguard* and *Hunt*, as the Court sought in those cases to establish comity and a strong attitude of respect in relations between the different provinces, courts and legal systems of Canada”.<sup>76</sup> Justice LeBel stated that “[d]ifferences should not be viewed instinctively as signs of disadvantage or inferiority.”<sup>77</sup> Where the alternative forum is across a national border, LeBel J. stated that loss of juridical advantage “becomes more relevant”, but went on to caution that:

... even then, comity and an attitude of respect for the courts and legal systems of other countries, many of which have the same basic values as us, may be in order. In the end, the court must engage in a contextual analysis, but refrain from leaning too instinctively in favour of its own jurisdiction.<sup>78</sup>

On its face, LeBel J.’s treatment of juridical advantage seems to suggest that courts should be careful not to interpret differences in foreign legal systems as an imposition of an unfair disadvantage. It is not clear what “contextual analysis” the courts should engage in, but LeBel J.’s language suggests that the starting point of the analysis should be an attitude of comity and respect for other courts. He also cautions that an advantage to one party may be a disadvantage to the other, and that motion judges should perhaps be more concerned with fundamental fairness rather than “advantage” and “disadvantage”. Notably, in *Black*, LeBel J. cited Sopinka J.’s comments in *Amchem* that “[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”.<sup>79</sup> Accordingly, LeBel J. held that this factor “should not weigh too heavily in the *forum non conveniens* analysis”.<sup>80</sup>

Importantly, these comments in *Black* arose in the context of LeBel J.’s identification of a significant difference in the law of defamation in

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<sup>75</sup> *Id.*, at para. 112.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Black*, *supra*, note 21, at para. 27, citing *Amchem*, *supra*, note 63, at 933.

<sup>80</sup> *Black*, *id.*

Canada and the United States. He noted that the American requirement for actual malice in defamation:

... reflects a deeply rooted and distinctive legal tradition that this Court has declined to adopt ... but which comity requires we respect in foreign jurisdictions. 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.<sup>81</sup>

The Court's application of the *forum non conveniens* test in the Trilogy cases suggests that its guidance may be hard to follow. Despite LeBel J.'s admonition not to overstate the significance of interprovincial differences, in *Éditions Écosociété* he nevertheless considers the differences between the law of Ontario and Quebec. He noted, for example, that Ontario would deprive the Quebec defendants of the anti-SLAPP provisions in the Quebec *Code of Civil Procedure*<sup>82</sup> that provide enhanced protection for freedom of expression, and that the defendants would also be better off in Quebec with a shorter limitation period which might bar the claim (presumably, only if the substantive law applicable to the claim was that of Quebec). These factors are both relied on to suggest that "the balance of fairness" would favour the plaintiff's claim being advanced in Ontario.<sup>83</sup> This weighing exercise seems out of place given LeBel J.'s comments on the importance of comity, particularly within Canada, as well as his comments in *Black* about respecting differences in the substantive law among different jurisdictions.

Similarly, in *Van Breda*, LeBel J. adopted the casual approach of the lower courts by applying the *forum non conveniens* analysis in a manner that tends to favour the domestic jurisdiction on the basis of little evidence. Although noting that "the evidence is far from clear and satisfactory" that the plaintiffs would "suffer a loss of juridical advantage" in *Van Breda*, LeBel J. cited some rather speculative reasons for declining to stay the action in favour of Cuba:

[O]ther issues related to fairness to the parties and to the efficient disposition of the claim must be considered. A trial held in Cuba would

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<sup>81</sup> *Id.*, at para. 35. Justice LeBel's comments seem to suggest an evolution in his views since the time of his dissenting judgment in *Beals*, *supra*, note 18, where he advocated the modification of the real and substantial connection test in the context of the enforcement of foreign judgments as opposed to those from within Canadian jurisdictions. In *Beals*, his reasoning emphasized the importance of distinguishing between interprovincial and international contexts.

<sup>82</sup> R.S.Q. c. C-25.

<sup>83</sup> *Éditions Écosociété*, *supra*, note 20, at para. 63.

present serious challenges to the parties. There may be problems with witnesses, concerns about the application of local procedures, and expenses linked to litigating there. All things considered, the burden on the plaintiffs clearly would be far heavier if they were required to bring their action in Cuba. They would face substantial additional expenses and would be at a clear disadvantage relative to the defendants. They might also suffer a loss of juridical advantage.<sup>84</sup>

These comments seem at odds with the relatively unbroken chain of Canadian jurisprudence emphasizing the importance of comity among nations,<sup>85</sup> and the replacement of “judicial chauvinism” with “judicial comity”.<sup>86</sup> It has been more than a quarter century since the House of Lords held in *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.* that it was generally inappropriate for English judges to embark upon a comparison of the quality of justice obtainable in foreign proceedings.<sup>87</sup> In *The Abidin Daver*,<sup>88</sup> Lord Diplock observed an “essential change in the attitude of the English courts to pending or prospective litigation in foreign jurisdictions”, and held that:

... a plaintiff in an English action, if he wishes to resist a stay upon the ground that even-handed justice may not be done to him in that particular foreign jurisdiction, must assert this candidly and support his allegations with *positive and cogent evidence*.<sup>89</sup>

Lord Diplock’s speech was approved in *Spiliada*,<sup>90</sup> a decision relied upon heavily by the Supreme Court in *Amchem*,<sup>91</sup> and it was applied by the British Columbia Court of Appeal in *Westec*.<sup>92</sup> Interestingly, LeBel J. did not refer to any of these cases in his reasons.

In many respects, the Court’s approach to *forum non conveniens* in the *Van Breda* Trilogy is contradictory. While the Court in several

<sup>84</sup> *Van Breda*, *supra*, note 19, at para. 118.

<sup>85</sup> See *Morguard*, *supra*, note 1; *Amchem*, *supra*, note 63; *Spar Aerospace*, *supra*, note 14; *Beals*, *supra*, note 18; and *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] S.C.J. No. 44, [2004] 2 S.C.R. 427 (S.C.C.) [hereinafter “SOCAN”].

<sup>86</sup> *The Abidin Daver*, [1984] A.C. 398, at 411 (H.L.) [hereinafter “*The Abidin Daver*”].

<sup>87</sup> [1984] A.C. 50 (H.L.).

<sup>88</sup> *Supra*, note 86.

<sup>89</sup> *Id.*, at 411 (emphasis added).

<sup>90</sup> *Supra*, note 63.

<sup>91</sup> *Supra*, note 63.

<sup>92</sup> *Supra*, note 68, at para. 51; *Somji v. Somji*, [2001] A.J. No. 1043, 292 A.R. 337 (Alta. Q.B.); *Norex Petroleum v. Chubb Insurance Co. of Canada*, [2008] A.J. No. 799, 444 A.R. 102 (Alta. Q.B.); *Cherney v. Deripaska*, [2008] EWHC 1530, at paras. 237-251 (Comm.); *889457 Alberta Inc. v. Katanga Mining Ltd.*, [2008] EWHC 2679, at para. 34 (Comm.).

passages implores motion judges to show greater respect for courts in other jurisdictions — even where there are differences in substantive law — the Court’s approach to choice of law and to the nature of the defendant’s burden on the motion seems to suggest a natural predilection for the plaintiff’s choice of forum.

#### IV. CHOICE OF LAW

##### 1. Background

At the Supreme Court of Canada, choice of law has often been the poor cousin of private international law. While the Court has shown a relatively robust interest in jurisdiction *simpliciter*, *forum non conveniens* and the recognition and enforcement of foreign judgments, it has until now issued but a single judgment, *Tolofson*,<sup>93</sup> that substantively addresses choice of law in the modern era. The comments of American scholar Laurence Tribe, cited by the Supreme Court of Canada in *Unifund*, describe the traditional situation well:

There is much to be said for the view that the current state of the Supreme Court’s personal jurisdiction and choice-of-law doctrines is precisely backwards. It is easy for a state to apply its law (which is by definition outcome-determinative) to a case, but relatively difficult for it to obtain jurisdiction over a dispute, even though jurisdiction is never directly outcome-determinative. Jurisdictional issues are unpredictable and endlessly litigated; choice-of-law matters are largely unregulated.<sup>94</sup>

Despite *Van Breda*’s promise of greater certainty and predictability in the law of assumed jurisdiction, LeBel J.’s equivocal treatment of the choice of law rule for defamation in two of the Trilogy’s cases continues the trend identified by Professor Tribe, and may very well increase the uncertainty in this branch of conflicts jurisprudence.

The principal discussion of choice of law principles in the *Van Breda* Trilogy is found in *Éditions Écosociété*. The Court considered the matter while assessing whether Ontario was *forum non conveniens* for a defamation claim by an Ontario corporation that was brought against the Quebec-based publisher, authors, researchers and editors of a book that commented adversely upon the plaintiff’s gold-mining activities in

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<sup>93</sup> *Supra*, note 7.

<sup>94</sup> *Unifund*, *supra*, note 18, at para. 74, citing L.H. Tribe, *American Constitutional Law*, 3d ed. (New York: Foundation Press, 2000), vol. 1, at 1292.

Africa. To support their argument that Quebec was the more convenient forum for the claim, the defendants argued that Ontario's choice of law rules pointed towards Quebec as the governing law of the tort. They argued that the Court should abandon the *lex loci delicti* choice of law rule for tort from *Tolofson* — *i.e.*, the law of “the place where the tort occurred” — in favour of a special choice of law rule for defamation that focused exclusively upon the “place of the most substantial publication”.

Justice LeBel began by observing that the rationale for the *lex loci delicti* rule is that “in the case of most torts, the occurrence of the wrong constituting the tort is its most substantial or characteristic element”.<sup>95</sup> He then rejected the new choice of law rule proposed by the defendants. According to LeBel J., the “most substantial publication” rule “provides both courts and litigants with little guidance”, since it is easy to imagine a book “being substantially published in more than one jurisdiction, in which case, the problem of forum shopping and the multiplicity of jurisdictions would remain”.<sup>96</sup> Further, LeBel J. observed that Canadian tort law only requires there to be a single instance of publication to establish defamation, so “[t]o adopt the standard of substantial publication in the context of private international law would amount to a significant change in the substantive tort.”<sup>97</sup>

However, LeBel J. did not stop there. Rather than simply holding that Ontario law applied pursuant to the *lex loci delicti* rule — as he concluded was the case<sup>98</sup> — LeBel J. offered a lengthy *obiter dictum* about whether an alternative choice of law rule to the *lex loci delicti*, based upon the “place of most substantial harm to reputation” applied in defamation cases. In the end, while LeBel J. suggested that this alternative choice of law rule had several desirable features (*e.g.*, it was likely to reduce forum shopping), he concluded that it was unnecessary to decide the issue on the facts of *Éditions Écosociété*, stating:

In the case at bar, whether we apply the *lex loci delicti* rule or consider the location of the most substantial harm to reputation, the applicable law is that of Ontario and not Quebec. As a result, whichever approach is adopted, this factor favours Ontario in the *forum non conveniens* analysis. In this case, nothing turns on the question of whether *lex loci delicti* ought to be abandoned as the choice of law rule in multijurisdictional defamation

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<sup>95</sup> *Éditions Écosociété*, *supra*, note 20, at para. 50.

<sup>96</sup> *Id.*, at para. 54.

<sup>97</sup> *Id.*, at para. 55.

<sup>98</sup> *Id.*, at paras. 56 and 62.

cases. For this reason, I believe it prudent to leave this issue for another day.<sup>99</sup>

Justice LeBel also left open whether such an alternative choice of law rule for defamation applied in the other Trilogy case of *Black*, even though he acknowledged that, as in *Éditions Écosociété*, it was unnecessary to resolve or even raise the issue on the facts of the case.<sup>100</sup>

## 2. Implications

The Court's treatment of choice of law in *Éditions Écosociété* and *Black* is a good example of why common law courts should limit their reasons to the issues that are necessary to decide the case before them.<sup>101</sup> 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. Three aspects of the Court's decisions are particularly problematic.

First, as noted, *Van Breda* creates a possibility that the *lex loci delicti* is no longer the sole choice of law rule for claims in tort. While *Tolofson* itself left open this possibility "where the wrong directly arises out of some transnational or interprovincial activity",<sup>102</sup> the Court's reasons in *Tolofson* suggested that any exception to the *lex loci delicti* would operate at the margins of Canadian conflict of laws principles. Indeed, the *Tolofson* Court elsewhere refused to recognize any exception to the *lex loci delicti* rule at all where the tort claim involved interprovincial as opposed to international conflicts.<sup>103</sup> The *Van Breda* Trilogy, by contrast, suggests that such an exception may exist in any case involving the tort of defamation, which would represent a significant evolution in the state of the law. Further, the *Van Breda* Court had no difficulty suggesting this exception in both *Éditions Écosociété* and *Black*, even though the facts in *Éditions Écosociété* involved a merely interprovincial situation (On-

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<sup>99</sup> *Id.*, at para. 62.

<sup>100</sup> *Black*, *supra*, note 21, at para. 32.

<sup>101</sup> See *Coulson v. Citigroup Global Markets Canada Inc.*, [2012] O.J. No. 717, 2012 ONCA 108, at para. 29 (Ont. C.A.). Justice LeBel's lengthy *obiter dicta* in *Éditions Écosociété* is to be contrasted with his refusal in *Van Breda* to opine on the existence of the forum of necessity doctrine. See note 56 above, and surrounding text.

<sup>102</sup> *Tolofson*, *supra*, note 7, at 1050.

<sup>103</sup> *Id.*, at 1055-63.

tario/Quebec) as opposed to an international conflicts situation, as in *Black* (Ontario/Illinois). Strangely, the Court did not even consider whether the proposed alternative choice of law rule for defamation merited any differential treatment as between *Éditions Écosociété* and *Black* in light of the international dimensions in *Black*.

These loose threads from the *Van Breda* Trilogy will leave parties wondering not only how the choice of law rules will apply to their claims, but what choice of law rule will apply in the first place. The *lex loci delicti* rule from *Tolofson* was already notoriously difficult to apply; what did it mean, for instance, to speak of the place where the “tort occurred” in a case where the different elements of the tort were consummated in multiple jurisdictions? Yet far from providing concrete guidance on these unanswered questions from *Tolofson*, the *Van Breda* Trilogy compounds them by failing to even decide what the relevant choice of law rule is. Such an approach hardly contributes to the “security of transactions with justice” sought in *Van Breda*.<sup>104</sup> Further, it was not necessary for the Court to introduce this uncertainty, since as LeBel J. noted in both *Éditions Écosociété* and *Black*, the entire issue was *obiter*. It is unclear why, nearly 18 years after *Tolofson*, the Supreme Court raised this issue in *obiter* once again, only to leave it open.

Second, LeBel J.’s reasons create the possibility that choice of law rules may vary depending upon the tort in question, something which *Tolofson* itself had suggested may be the case for libel.<sup>105</sup> Thus, whereas the tort of negligence at issue in *Tolofson* is subject to the *lex loci delicti*, the choice of law rule for the tort of defamation is the “place of most substantial harm to reputation”. If this is indeed what the Court was suggesting, then it is an approach that has much to commend it. As some tort scholars have observed, it is nonsensical to speak of a common, monolithic law of “tort”.<sup>106</sup> The reality is that there exists a law of “torts”, in which the applicable principles vary widely depending upon the nature, aims and policy constraints of the relevant tort involved. Some torts require proof of injury (abuse of public office) or even special damages (injurious falsehood), while others are actionable without it (trespass to land). Certain torts require proof of intentional misconduct (inducing breach of contract) or malice (malicious prosecution), while others require only a lack of reasonable care (negligence) or give rise to

<sup>104</sup> *Van Breda*, *supra*, note 19, at para. 74.

<sup>105</sup> *Tolofson*, *supra*, note 7, at 1042.

<sup>106</sup> See R.F.V. Heuston & R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 19th ed. (London: Sweet & Maxwell, 1987), at 18-21.

strict liability (the *Rylands v. Fletcher*<sup>107</sup> action). Still other torts are designed to protect rights of property (conversion), in contrast to those designed to protect rights of physical autonomy (battery), reputation (slander) or privacy (intrusion upon seclusion). Part of the problem with *Tolofson* is that it purported to articulate a choice of law rule for “tort”, when in fact there is no such uniform legal construct. The result was a cumbersome choice of law rule, appropriate perhaps to negligence,<sup>108</sup> but ill suited for more nuanced torts.

If the Court was intent on raising the issue of the wisdom of a uniform *lex loci delicti* rule in tort, it ought to have provided further guidance. Indeed, some of the Court’s comments — for instance, that the *lex loci delicti* was selected as the choice of law rule for “tort” because “in the case of most torts, the occurrence of the wrong constituting the tort is its most substantial or characteristic element”<sup>109</sup> — hint at the existence of an underlying principle for identifying new choice of law rules in tort. The Court could have developed this principle, perhaps by exploring whether it captures the minimum constitutional requirements of choice of law rules for torts recognized in *Tolofson*, in a manner similar to the “real and substantial connection” principle in *Van Breda*. If a “most substantial or characteristic element” test (or some other underlying principle) were to be applied in assessing the choice of law rule appropriate to each tort, then it would permit choice of law rules to be developed in a rational way that is both sensitive to the unique features of the torts involved and in compliance with the Canadian Constitution. Indeed, that was the very goal the Court sought to achieve for jurisdiction *simpliciter* through its use of the constitutional “real and substantial connection” principle in *Van Breda*.

Third, the Court’s reliance on “forum shopping” as a factor in selecting the appropriate choice of law rule for defamation is curious. Justice LeBel’s reasons in *Éditions Écosociété* seem to suggest that concerns about forum shopping militate in favour of the choice of law rule that is most likely to require the application of a single jurisdiction’s substantive law, regardless of the forum in which the claim is heard. As he observes:

... Restricting the available choice of laws might be a way to curb forum shopping. Indeed, there would be little strategic advantage to

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<sup>107</sup> (1868), L.R. 3 H.L. 330.

<sup>108</sup> In *Tolofson*, La Forest J. noted that the *lex loci delicti* was not only certain but had an “ease of application”. See *Tolofson*, *supra*, note 7, at 1050.

<sup>109</sup> *Éditions Écosociété*, *supra*, note 20, at para. 50.

forum shopping if the conflicts rules were to require application of the same law regardless of where the matter is tried.<sup>110</sup>

However, this analysis fails to take into account the fact that choice of law rules are always specific to the forum. Therefore, regardless of whether the choice of law rule adopted for a particular forum only permits the substantive law of a single jurisdiction to apply, another forum may have a completely different choice of law rule that requires the application of its own substantive law, or even the application of a third jurisdiction's substantive law that is more favourable than either of the other two. The important point here is that forum shopping includes shopping for the forum's choice of law rules themselves, as the forum's choice of law rules will ultimately determine the substantive law that applies to the plaintiff's claim. Thus, unless choice of law rules are made uniform throughout the world (which is entirely unlikely in the near future), the fact that a particular jurisdiction such as Ontario adopts a given choice of law rule will have no effect upon whether litigants may forum shop in other jurisdictions with different choice of law rules.

Indeed, the Court in *Éditions Écosociété* seemed to recognize this very fact. Immediately after completing its choice of law analysis, in which it concluded that the law of Ontario would apply to the defamation claim (whether pursuant to the *lex loci delicti*, or the "place of most substantial harm to reputation" rule), LeBel J. turned to the remaining *forum non conveniens* question of whether either party would experience a "juridical advantage" if the claim were heard in Quebec. In that connection, he observed that if the claim were transferred to Quebec, then "[a]rguments about which law would govern the civil liability of Écosociété could also be raised under s. 3126 of the *Civil Code of Québec* and would have to be resolved by the courts of Quebec."<sup>111</sup> Thus, the Ontario choice of law rule applied by the Court in *Éditions Écosociété* would not have prevented the plaintiff from forum shopping in Quebec had it perceived the Quebec choice of law rule to result in the application of a more advantageous substantive law.

It is to be hoped that the next time the Supreme Court addresses choice of law rules in "tort", its analysis will focus less upon concerns with forum shopping, and more upon developing clear rules for individual torts. The Court's analysis of choice of law in the *Van Breda* Trilogy

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<sup>110</sup> *Id.*, at para. 49.

<sup>111</sup> *Id.*, at para. 63.

significantly undermines the call for increased certainty in this important, though largely neglected, area of conflicts jurisprudence.

## V. CONSTITUTIONAL IMPLICATIONS

### 1. Background

The constitutionalization of private international law has been one of the major projects of the Supreme Court of Canada since the decision in *Morguard*.<sup>112</sup> However, the precise relationship between the “real and substantial connection” test as a common law principle and as a constitutional imperative has been unclear since that case was decided. In the *Van Breda* Trilogy, the Supreme Court returned to this issue, and sought to provide private international law with a clearer constitutional foundation. Paradoxically, the result is a new approach to the role of superior courts and provincial legislatures in the Canadian federation, which raises more questions than it answers.

The Court began its analysis in *Van Breda* by indicating that “[c]onflicts rules must fit within Canada’s constitutional structure.”<sup>113</sup> It then drew a distinction between two ways in which the “real and substantial connection” test had been used in the jurisprudence: (1) as a constitutional rule; and (2) as a conflict of laws rule. The basic insight of *Van Breda* is that the constitutional rule explains, but does not exhaust, the conflict of laws rule.

According to the Court, the constitutional rule is designed to ensure that the exercise of jurisdiction respects the territorial limits of provincial power in section 92 of the *Constitution Act, 1867*.<sup>114</sup> Justice LeBel suggested that this is so regardless of whether the jurisdiction being exercised is “adjudicative” jurisdiction (*i.e.*, the jurisdiction of courts to decide extraterritorial disputes) or “legislative” jurisdiction (*i.e.*, the jurisdiction of provincial legislatures to enact laws with extraterritorial effect). In the view of the Court, the territorial limits in section 92 — and the real and substantial connection rule formulated in response to them — place constraints upon both forms of jurisdiction:

Since *Hunt*, the *real and substantial connection test* has been recognized as a constitutional imperative in the application of the

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<sup>112</sup> *Supra*, note 1.

<sup>113</sup> *Van Breda*, *supra*, note 19, at para. 21.

<sup>114</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

conflicts rules. It *reflects the limits of provincial legislative and judicial powers* and has thus become more than a conflicts rule. ...

...

... [W]ith 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. The legitimate exercise of power rests, inter alia, upon the existence of an appropriate relationship or connection between the state and the persons who are brought under its authority. The purpose of constitutionally imposed territorial limits is to ensure the existence of the relationship or connection needed to confer legitimacy.

...

... [T]he real and substantial connection test ... 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*.<sup>115</sup>

The Court went on to note that this “constitutional test aimed at maintaining the constitutional limits on the powers of a province’s legislature and courts” only sets the outer boundaries within which the real and substantial connection test as a conflict of laws rule can be applied. It does not itself determine when a provincial court may assert jurisdiction over a dispute, since that is the role of the conflict of laws rule.<sup>116</sup> As LeBel J. put it:

The constitutionally imposed territorial limits on adjudicative jurisdiction are related to, but distinct from, the real and substantial connection test as expressed in conflicts rules. Conflicts rules include the rules that have been chosen for deciding when jurisdiction can be assumed over a given dispute, what law will govern a dispute or how an adjudicative decision from another jurisdiction will be recognized and enforced. The constitutional territorial limits, on the other hand, 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

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<sup>115</sup> *Van Breda*, *supra*, note 19, at paras. 28, 31 and 69 (emphasis added). See also para. 23.

<sup>116</sup> *Id.*, at para. 34.

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.<sup>117</sup>

Justice LeBel also held that the constitutional rule does not require the provinces to adopt a uniform conflict of laws rule:

To be clear, however, the existence of a constitutional test aimed at maintaining the constitutional limits on the powers of a province's legislature and courts does not mean that the rules of private international law must be uniform across Canada. Legislatures and courts may adopt various solutions to meet the constitutional requirements and the objectives of efficiency and fairness that underlie our private international law system. Nor does this test's existence mean that the connections with the province must be the strongest ones possible or that they must all point in the same direction.<sup>118</sup>

However, LeBel J. did suggest that the conflict of laws rules adopted by the provinces cannot simply track the open-ended "real and substantial connection" test of the constitutional rule. Instead, they should require the existence of one or more objective connecting factors among the province, the litigants and the dispute before permitting the assertion of jurisdiction by the courts. Where such a connecting factor is present, it may be presumed that the constitutional rule has been satisfied:

What rules would satisfy its status as a constitutional imperative? Two approaches are possible. One approach is to view the test not only as a constitutional principle, but also as a conflicts rule in itself. If it is viewed as a conflicts rule, its content would fall to be determined on a case-by-case basis by the courts in decisions in which they would attempt to implement the objectives of order and fairness in the legal system. The other approach is to accept that the test imposes constitutional limits on provincial powers, but to seek to develop a system of connecting factors and principles designed to make the resolution of conflict of laws issues more predictable in order to reduce the scope of judicial discretion exercised in the context of each case. ...

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The development and evolution of the approaches to the assumption of jurisdiction reviewed above suggest that stability and predictability in this branch of the law of conflicts should turn primarily on the

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<sup>117</sup> *Id.*, at para. 33.

<sup>118</sup> *Id.*, at para. 34. See also para. 71.

identification of objective factors that might link a legal situation or the subject matter of litigation to the court that is seized of it. At the same time, the need for fairness and justice to all parties engaged in litigation must be borne in mind in selecting these presumptive connecting factors. But in recent years, the preferred approach in Canada has been to rely on a set of specific factors, which are given presumptive effect, as opposed to a regime based on an exercise of almost pure and individualized judicial discretion.

...

... The plaintiff must establish that one or more of the listed factors exists. If the plaintiff succeeds in establishing this, the court might presume, absent indications to the contrary, that the claim is properly before it under the conflicts rules and that it is acting within the limits of its constitutional jurisdiction ...<sup>119</sup>

## 2. Implications

The Court's treatment of the constitutional issues in *Van Breda* involves several points of departure from its prior jurisprudence, often without any analysis or even discussion of this fact. The failure to engage with these issues in *Van Breda* raises some important questions, and casts doubt upon whether the Court has accurately described the constitutional foundations of the conflicts rules established in *Morguard* and *Hunt*.

First, the Court in *Van Breda* suggests that the territorial limits of superior court jurisdiction are derived from the territorial limits on provincial legislative power in section 92 of the *Constitution Act, 1867*. However, the superior courts are not simply statutory tribunals created by provincial legislation pursuant to section 92, but courts of inherent jurisdiction continued under section 129 of the *Constitution Act, 1867*. Judges of the superior courts are also appointed and paid by the federal government under section 96. As the Supreme Court said in *Canada (Canadian Human Rights Commission) v. Canadian Liberty Net*:

The unique historical feature of provincial superior courts, as opposed to the Federal Court, is that they have traditionally exercised general jurisdiction over all matters of a civil or criminal nature. This general jurisdictional function in the Canadian justice system precedes Confederation, and was expressly continued by s. 129 of the *Constitution Act, 1867*, "as if the Union had not been made". Under s.

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<sup>119</sup> *Id.*, at paras. 30, 75 and 80.

92(14), the provinces exercise authority over the “Administration of Justice in the Province”, including the “Constitution, Maintenance, and Organization” of provincial superior courts. The unique institutional feature of these courts is that *by s. 96 of the Constitution Act, 1867, judges of provincial superior courts are appointed by the Governor General, not by the provinces. Responsibility for s. 96 courts is thus shared between the two levels of government, unlike either inferior provincial courts, or courts created under s. 101.* Estey J., in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at pp. 326-27, explained the unique nature of provincial superior courts in the following way:

The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. *They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14) of the [Constitution Act, 1867] and are presided over by judges appointed and paid by the federal government (sections 96 and 100 of the [Constitution Act, 1867]).*<sup>120</sup>

It therefore seems strange to suggest that the territorial limits of superior court jurisdiction are derived solely or even primarily from section 92. Indeed, it has been clear since at least *Re Residential Tenancies Act, 1979 (Ont.)*<sup>121</sup> that the provincial legislatures lack the constitutional authority to create tribunals whose central functions involve exercising the same judicial powers as those possessed by superior courts at the time of Confederation. Since the provincial legislatures are constitutionally incapable of creating superior courts, the adjudicative jurisdiction of the superior courts should not be limited by section 92 of the *Constitution Act, 1867*.

This is underscored by the fact that responsibility for superior courts is shared by the federal government. Unlike the provinces, the extraterritorial legislative jurisdiction of the federal government under the *Consti-*

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<sup>120</sup> [1998] S.C.J. No. 31, [1998] 1 S.C.R. 626, at para. 26 (S.C.C.) (emphasis added). See also J. Walker, *Castel & Walker: Canadian Conflict of Laws*, 6th ed., looseleaf (Markham, ON: 2005-), at 11-1 and 11-33–11-34, paras. 11.1 and 11.4.

<sup>121</sup> [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714 (S.C.C.).

*tution Act* is unlimited by virtue of the *Statute of Westminster, 1931*.<sup>122</sup> Further, the superior courts often apply federal rather than provincial legislation when resolving disputes, as for instance in the bankruptcy context. In such circumstances, the Supreme Court has held that a superior court sits as a “national court”, which is subject to modified principles of private international law.<sup>123</sup> It is unclear what the result would be in such a case under the *Van Breda* analysis. For instance, how or why would section 92 of the *Constitution Act, 1867* place territorial limits upon a superior court seeking to assert adjudicative jurisdiction over a civil action involving both provincial laws (e.g., claims under consumer protection legislation) and federal laws (e.g., *Competition Act*<sup>124</sup> claims)?

Second, close scrutiny should be applied to the Court’s suggestion that the “real and substantial connection” test simultaneously operates as a constitutional rule for both adjudicative and legislative jurisdiction. While *Van Breda* suggests that the real and substantial connection test “reflects the limits of provincial legislative and judicial powers”, the Supreme Court has previously held that the real and substantial connection test for adjudicative jurisdiction is different from the territorial test for provincial legislative jurisdiction. In *Unifund*, Binnie J. stated:

The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it: J.-G. Castel and J. Walker, *Canadian Conflict of Laws* (5th ed. (loose-leaf)), at p. 2.1. As will be seen, a “real and substantial connection” sufficient to permit the court of a province to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome.

...

The required strength of the relationship varies with the type of jurisdiction being asserted. A relationship that is inadequate to support the application of regulatory legislation may nevertheless provide a sufficient “real and substantial connection” to permit the courts of the forum to take jurisdiction over a dispute. This happens regularly. The courts, having taken jurisdiction, then apply the law of the other

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<sup>122</sup> (U.K.), 1931, 22 Geo. V, c. 26. The *Statute of Westminster, 1931* has been incorporated into the Constitution: see s. 52(2)(b) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K), 1982, c. 11, and item 17 of the Schedule thereto.

<sup>123</sup> See, e.g., *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] S.C.J. No. 90, [2001] 3 S.C.R. 978, at paras. 28 and 71-78 (S.C.C.).

<sup>124</sup> R.S.C. 1985, c. C-34.

province applying rules of conflict resolution governing choice of law issues. Thus, in *Tolofson* itself, there was a sufficient relationship between British Columbia and the parties for the British Columbia courts to hear the case, but it was determined that Saskatchewan law should apply to determine the outcome of the dispute.<sup>125</sup>

The Court made no mention of this distinction in *Van Breda*, despite citing *Unifund* in support of its constitutional analysis.<sup>126</sup>

Third, it is significant that the facts of *Van Breda* involved the assertion of jurisdiction over a defendant situated in another country, as opposed merely to another province. Although the Supreme Court had previously held in *Beals*<sup>127</sup> that the “real and substantial connection” test may apply to international and not simply interprovincial litigation, it has also maintained that “the notion of comity among independent nation States lacks the constitutional status it enjoys among the provinces of the Canadian federation”.<sup>128</sup> Therefore, the constitutional foundations of the real and substantial connection test may well differ as between the international and interprovincial planes. On the interprovincial level, the need for a constitutional “real and substantial connection” rule appears driven not only (if at all) by the territorial limits upon provincial legislative power in section 92 of the *Constitution Act, 1867*, but by the basic demands of federalism and the heightened expectations of reciprocity it creates.<sup>129</sup> Indeed, in *Spar Aerospace*, LeBel J. himself observed that

<sup>125</sup> *Unifund*, *supra*, note 18, at paras. 58 and 80.

<sup>126</sup> Unfortunately, the Court also passed up an opportunity to clarify the constitutional relationship between extraterritorial adjudicative and legislative jurisdiction subsequent to *Van Breda*, when it recently denied leave to appeal from the B.C. Court of Appeal’s decision in *Torudag v. British Columbia (Securities Commission)*, [2011] B.C.J. No. 2150, 343 D.L.R. (4th) 743 (B.C.C.A.), leave to appeal refused [2012] S.C.C.A. No. 21 (S.C.C.). It is hoped that the Court will seize a similar opportunity in the future.

<sup>127</sup> *Supra*, note 18.

<sup>128</sup> *SOCAN*, *supra*, note 85, at para. 55. See also *Rubin*, *supra*, note 55, at para. 128, where in affirming only the traditional presence and consent bases for the recognition and enforcement of foreign judgments, rather than the “real and substantial connection” test, Lord Collins observed that “[t]here is a reason for the limited scope of the *Dicey* Rule and that is that there is no expectation of reciprocity on the part of foreign countries”. It should be noted that the *Van Breda* Trilogy itself does not address how the Court’s new approach to the real and substantial connection test should be applied to cases involving the recognition and enforcement of foreign judgments, particularly where the judgement in question originates in a different country rather than a different Canadian province. For discussion of this issue, see Blom, *supra*, note 42, at 29-30 and Monestier, “(Still)”, *supra*, note 55, at 41-42.

<sup>129</sup> In this respect, it is arguable that the true constitutional foundation of the “real and substantial connection” test as it applies to the adjudicative jurisdiction of superior courts is not the territorial limits upon provincial legislative power in s. 92 of the *Constitution Act, 1867*, but the unwritten constitutional principle of federalism recognized in cases like *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

federalism was the “central concern” underlying the Court’s judgments in *Morguard* and *Hunt*:

In *Hunt*, *supra*, at p. 321, La Forest J. stated that a central idea in *Morguard* was comity. It is apparent from his reasons in both cases, however, that federalism was the central concern underlying both decisions. ... At p. 323 of *Hunt*, La Forest J. drew a clear distinction between the rules pertaining to an international situation and the rules applicable to interprovincial disputes...

*Morguard* and *Hunt* have been cited by this Court in a number of cases which seem to confirm that the “real and substantial connection” was specially crafted to address the challenges posed by multiple jurisdictions within a federation. ... In my view, there is nothing in these cases that supports the appellants’ contention that the constitutional “real and substantial connection” criterion is required in addition to the jurisdiction provisions found in Book Ten of the *C.C.Q.*<sup>130</sup>

Curiously, LeBel J. makes no mention of his comments in *Spar Aerospace* in the *Van Breda* Trilogy.

## VI. CONCLUSION

The Supreme Court’s original trilogy of conflicts decisions in *Morguard*, *Hunt* and *Tolofson* constituted a comprehensive attempt to revise “longstanding doctrine” in private international law “in the light of the perceived imperatives of a new global economic order and long-overlooked (or perhaps newly minted) constitutional considerations”.<sup>131</sup> Those decisions, which emphasized concepts such as “real and substantial connection” and abstract and competing ideas such as “order” and “fairness”, created considerable confusion and uncertainty.

The Court’s decision to revisit Canadian conflicts rules in the *Van Breda* Trilogy was long overdue. Its objective — in particular, with respect to jurisdiction — appears to have been to swing the pendulum towards certainty, order and predictability, even if this meant risking some unfairness. In this respect, the Court’s new presumptive approach to jurisdiction *simpliciter* in “tort matters”, while requiring development and refinement, does succeed in providing some direction concerning the appropriate

<sup>130</sup> *Spar Aerospace*, *supra*, note 14, at paras. 53-54.

<sup>131</sup> Elizabeth Edinger & Vaughan Black, “A New Approach to Extraterritoriality: *Unifund Assurance Co. v. I.C.B.C.*” (2004) 40(2) *Can. Bus. L.J.* 161, at 161.

framework of analysis. However, the Court's treatment of *forum non conveniens* and choice of law is questionable, and may introduce new uncertainties into these areas of the law. Even more problematically, the Court's attempt to delineate the constitutional dimensions of the "real and substantial connection" principle ignores the distinction between adjudicative and legislative jurisdiction, and fails to account for the unique constitutional status of both superior courts and provinces within a federation.

In the end, while the *Van Breda* Trilogy does achieve some modest improvements to private international law, its project of bringing greater order to Canadian courts and litigants remains unfinished. However, this result is not entirely disquieting. It is in the nature of our courts to refine legal doctrine through continuous and incremental adjustments in particular cases, not to articulate a Euclidean system of legal principles for all time. As Baroness Hale said recently in an analogous context:

It is perhaps surprising that questions of such practical and theoretical importance in the law of contract should still be open to debate and development. But that is also the great strength of the common law.<sup>132</sup>

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<sup>132</sup> *Chartbrook Ltd. v. Persimmon Homes Ltd.*, [2009] A.C. 1101, at para. 101 (H.L.).

