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GOVERNING LAW CLAUSES AND THE NEW LEGAL FRAMEWORK FOR

DETERMINING THE JURISDICTION OF THE ONTARIO COURT

2012 UPDATE

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I. INTRODUCTION

So, you have your contract negotiated and drafted and you may even have a jurisdiction clause, choice of law clause or both; but what will happen if disputes arise down the road? Will the court really hold the parties to their agreement?

In the past few years the conflict of laws case law has been evolving and the tests have not been consistently applied. In its 2010 decision in *Van Breda*[1] the Ontario Court of Appeal tried to simplify the analysis, but its attempt at simplification led to further questions. In its 2012 decision in the *Van Breda* appeal[2] the Supreme Court of Canada further simplified the test and arguably changed the legal framework for analysis of jurisdiction *simpliciter*.

This paper, originally presented at the 2010 CCLA Solicitors Conference[3], reviewed particular factors that drafters must consider when including forum clauses in contracts as well as the tests the courts have used when jurisdiction has been disputed and how they had been changed by the Ontario Court of Appeal in the *Van Breda*[4] decision. In so doing, we indicated where the tests and applications of the test remain unclear.

The paper was updated in 2011 to address two significant decisions by the Ontario Court of Appeal in *Expedition*[5] and *Momentous*[6] which elaborated the factors constituting "strong cause" not to enforce a foreign jurisdiction clause. The *Momentous*[7] decision also determined that following a finding of jurisdiction *simpliciter* there are two different classes of cases in which the court is asked to exercise its discretion to take jurisdiction: one arises on a *forum non conveniens* motion; the other where the parties have agreed to a forum to resolve their disputes. The Ontario Court of Appeal found that each class of case has its own onus, test and rationale.

In 2012 the Supreme Court of Canada released decisions dismissing the *Van Breda* and *Momentous*[8] appeals and has clarified most (but not all) of the confusion surrounding the international private law of jurisdiction in Ontario. In *Van Breda* the Supreme Court clearly states the doctrine of *forum non conveniens*, simplifies the real and substantial connection test for determining jurisdiction *simpliciter* and

[1] *Van Breda v. Village Resorts Limited*, 2010 ONCA 84 (Can LII)
[2] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (CanLII) [*Van Breda*]
[3] The original paper was co-authored by Leanna Olsen when she was an articling student at FMC. The 2011 and 2012 Updates are the author's sole responsibility.
[4] *Supra* note 1.
[5] *Expedition Helicopters Inc .v. Honeywell Inc.*, 2010 ONCA 351 (CanLII) [*Expedition*]l, application for leave to appeal to the Supreme Court of Canada dismissed 2010 Can LII 69209 (SCC).
[6] *Momentous.ca Corporation v. Canadian American Association of Professional Baseball Ltd.*, 2010 ONCA 722 (CanLII)
[7] *Ibid*.
[8] *Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd.*, 2012 SCC 9 (CanLII) {*Momentous*]

in so doing seems to have blurred the traditional distinction between presence-based, consent-based and assumed jurisdiction *simpliciter*: "ostensibly conflating presence and consent under the rubric of assumed jurisdiction."[9]

In *Momentous* the SCC found that a defendant who delivers a statement of defence in which it explicitly seeks to enforce a foreign forum selection clause does not amount to consent that Ontario assume jurisdiction and that, absent strong cause, a foreign forum selection clause will deprive the Ontario court of jurisdiction even where jurisdiction *simpliciter* has been conceded.

While the *Van Breda* decision of the Supreme Court provides clear guidance on the real and substantial connection test and the doctrine of *forum non conveniens* the *Momentous* decision is somewhat confusing and contradictory and leaves questions about what constitutes submission and it effects unanswered.

II. GOVERNING LAW CLAUSE CONSIDERATIONS

Boilerplate clauses may need to be amended in certain circumstances. Before accepting a choice of law or forum clause parties should consider the purpose, meaning and suitability of the clause.

Why have a governing law clause?

As a starting point, courts have been instructed by the Supreme Court to hold parties to their contracted terms. Parties should consider having a forum clause in their contract because this will lead to increased certainty and predictability in interpreting the contract in the future. Where there is a forum clause the burden will then be on the party trying to resolve the dispute in a forum not stipulated in the contract to show strong cause why the court should not uphold the forum clause.

When should I have a governing law clause?

When the parties are negotiating a contract they should first consider whether it is necessary to have a forum selection clause. In the event that parties do not choose to have a forum selection clause, the court will look for a real and substantial connection to Ontario so that the courts may take jurisdiction and then determine whether there is another more appropriate forum.

However, it is preferable to have a forum selection clause in a contract when one of the following occurs:

- When parties are in different jurisdictions;
- When transactions occur in different jurisdictions;
- When a problem will be more effectively dealt with in one jurisdiction over another; and

[9] Antonin I. Pribetic, "The Supreme Court of Canada Conflict of Laws Trilogy: Part 1" http://thetrialwarrior.com/2012/04/19/the-supreme-court-of-canada-conflict-of-laws-trilogy-part-i/

- When there is a jurisdiction that would be more convenient for the parties.

How should I draft a governing law clause?

Parties may word their forum selection clause in a number of different ways when drafting a contract. Various wording will be interpreted differently and should be understood before selecting an appropriate clause.

Different Types of Clauses

The first distinction that must be made is between choices of law and choice of forum clause.

Choice of Law

A choice of law clause indicates the law under which the parties have chosen to interpret their potential dispute. The choice of law does not indicate that the parties have chosen to have their disputes heard in the same place as the chosen law. If, for example, the parties choose the law of England and the dispute is before the Ontario Courts, the Ontario Court may take jurisdiction and the parties would need to prove the law in England as a matter of fact to the trial Judge.[10] Elderkin and Shin Doi recommend that the choice of law clause should provide "that the agreement is to be both 'constituted' and 'interpreted' in accordance with the choice of law"[11] so that the rules of construction and the meaning of words and phrases are determined according to the chosen law.

Choice of Forum

A choice of forum clause, on the other hand, indicates in which jurisdiction or jurisdictions the parties agree to have the dispute heard. Depending on the wording of the clause, the parties may give exclusive, non-exclusive or concurrent jurisdiction to a particular forum.

Exclusive jurisdiction: The best way to indicate that the parties would like to resolve disputes in one and only one jurisdiction is to indicate that they choose to give 'exclusive' jurisdiction to a particular forum. For example, the parties could agree that "all disputes arising in connection with the Agreement shall be determined *exclusively* by courts in Ontario."

Some courts have found that indicators, other than using the word 'exclusive,' such as using mandatory language and indicating that the parties choose a specific forum and "no other courts,"[12] indicates exclusivity of forum. However, in order to maintain certainty, including the word 'exclusive' ensures that the intention of the parties is clear.

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[10] *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, [1993] S.C.J. No. 125 para. 27 (QL) online: <http://canlii.org/en/ca/scc/doc/1993/1993canlii43/1993canlii43.html>.

[11] Cynthia L. Elderkin & Julia S. Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements*, 2d ed. (Toronto: Thomson Carswell, 2005) at 82 [*Behind and Beyond Boilerplate*].

[12] *Can-Am Produce and Trading Ltd. v. "Senator" The* (1996), 112 F.T.R. 255, [1996] F.C.J. No. 550 (QL).

Non-exclusive jurisdiction: Parties may also want to agree to one forum but not to the exclusion of others. The following clause is an example of where the Court held that Ontario Courts were not given exclusive jurisdiction and a Newfoundland Court, therefore, could have concurrent jurisdiction:[13]

> The parties hereto agree that this contract is made in the Province of Ontario and the Courts of the Province of Ontario shall have jurisdiction in reference to any matters herein, and in particular in reference to the injunction referred to in the previous paragraph.[14]

However, in order to strive for certainty, it is preferable to include whether the jurisdiction specified in the contract gives exclusive or non-exclusive jurisdiction to a particular forum.

Concurrent jurisdiction: as a subset of a non-exclusive jurisdiction clause, parties may want to allow disputes to be heard in more than one forum. The Ontario High Court of Justice found that the following clause made a choice of law and provided for concurrent jurisdiction:

> This Instrument of Charge shall be construed and its interpretation governed in all respects by the laws of Dubai and each of the parties hereto hereby submits to the jurisdiction of the Civil Court of Dubai.[15]

The Court said "this paragraph grants concurrent jurisdiction to any other court in which the matter is otherwise properly brought. Therefore, this case is properly before this court."[16]

Again, in order to strive for certainty, it is preferable to indicate clearly whether the parties would like to give jurisdiction to one or more fora in the contract from the outset as opposed to waiting for the Court to interpret the forum clause.

Exceptions

It is important to note that the ability of a Court to take jurisdiction may be limited in some circumstances. For example, matters relating to real and personal property within the jurisdiction is a matter for the courts in which the property is located.[17] In addition, statutes may also affect the ability of the court to take jurisdiction.[18]

Examples

Behind and Beyond the Boilerplate

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[13] *Westcott v. Alsco Products of Canada Ltd.*, [1960] N.J. No. 3, 26 D.L.R. (2d) 281 para. 9 (QL) "In order to oust the jurisdiction of the Newfoundland Courts it would have been necessary to have said so in express terms in the contract. This could have been done very simply by merely adding the word "exclusive" before "jurisdiction" in the clause. This has not been done, and it may well be that the parties deliberately refrained from doing anything more than giving a concurrent jurisdiction to the Ontario Courts."

[14] *Ibid*, para. 2.

[15] *Khalij Commercial Bank Ltd. v. Woods* (1985) 50 O.R. (2d) 446, [1985] O.J. No. 2500, para. 20 (QL).

[16] *Ibid*,. para. 11.

[17] For example, *Ontario Rules of Civil Procedure*, R.O. 1990 Reg. 194. Rule 17(1)(a).

[18] For example *Bills of Exchange Act*, R.S.C. 1985, c. B-4 and the *Carriage by Air Act*, R.S.C. 1985, c. C-26.

Authors Elderkin and Shin Doi provide the following examples of governing law clauses in their book:

1. This Agreement is governed by the laws of the Province of Ontario and the laws of Canada applicable therein.

2. This Agreement and each of the documents contemplated by or delivered under or in connection with this Agreement are governed by and are to be construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein and treated in all respects as an Ontario contract. The parties to this Agreement hereby irrevocably and unconditionally attorn to the [exclusive or non-exclusive] jurisdiction of the courts of the Province of Ontario and all courts competent to hear appeals therefrom.

3. This Agreement is conclusively deemed to be a contract made under the laws of the Province of Ontario, and for all purposes is to be construed in accordance with the laws of the Province of Ontario, without regard to principles of conflicts of law.[19]

Pompey

The following clause was upheld by the Supreme Court of Canada in *Pompey*:

> The contract evidenced by or contained in this Bill of Lading is governed by the law of Belgium, and any claim of dispute arising hereunder or in connection herewith shall be determined by the courts in Antwerp and no other Courts.[20]

National Iranian Oil Co.

After doing a strong cause analysis the Ontario Court of Appeal upheld the following clauses:

> 52. SETTLEMENT OF DISPUTES
>
> If any dispute ... or difference of any kind shall arise between the Company and the Contractor in connection with or arising out of the Contract or the carrying out of the Works ... and is not resolved through correspondence or negotiations ... the case, as per the Laws of the Islamic Republic of Iran, shall be resolved by referring it to the Competent Iranian Court in Iran.
>
> 53. RELEVANT LAW
>
> The Law governing the Contract shall be the laws of the Islamic Republic of Iran and relevant Iranian courts shall have complete competence and jurisdiction in all cases.[21]

[19] *Behind and Beyond Boilerplate*, at 79.
[20] *Pompey* para. 4 [emphasis added].
[21] *Crown Resources Corp. S.A. v. National Iranian Oil Co.*, [2006] O.J. No. 3345, 273 D.L.R. (4th) 65 paras. 15 and 41, leave to appeal by the S.C.C. refused, 31684 (October 23, 2006).

Red Seal Tours Inc.

The Ontario Court of Appeal upheld the following jurisdiction clause:

> Each party hereto irrevocably agrees to refer over the jurisdiction of the Aruba courts any matters arising this agreement [sic], where each party irrevocably waives any applicable law.[22]

Justice Sharpe said:

> It is well-established that the law strongly favours the enforcement of choice of forum clauses and that special deference is owed to forum selection clauses found in international agreements involving sophisticated parties. I do not accept the submission that there is "strong cause" to displace the forum chosen by the parties or that Ontario jurisdiction should be assumed on the basis that Aruba is not *the forum conveniens*.[23]

GreCon Dimter Inc.

The Supreme Court of Canada upheld the following clauses:

> Choice of Forum
>
> It is agreed, by and between the seller and buyer, that all disputes and matters whatsoever arising under, in connection with, or instant to this contract (whether arising under contract, tort, other legal theories, or specific statutes) shall be litigated, if at all, in and before a court located in Alfeld (Leine), Germany to the exclusion of the courts of any other state or country.
>
> Choice of Law
>
> This agreement is governed by and construed under the laws of Germany to the exclusion of all other laws of any other state or country (without regard to the principles of conflicts of law).[24]

Expedition Helicopters Inc.

The Court of Appeal reversed a finding of strong cause by the Ontario Superior Court and enforced the following jurisdiction clause:

> CHOICE OF LAW. THIS AGREEMENT SHALL BE GOVERNED, CONTROLLED AND INTERPRETED UNDER THE LAW OF THE STATE OF ARIZONA, EXCLUDING ITS CONFLICT OR CHOICE OF LAW PROVISIONS. The parties (i) agree that any state or federal court located in Phoenix, Arizona shall have exclusive jurisdiction to hear any suit, action or proceeding arising out of or in connection with this Agreement, and consent and submit to the exclusive jurisdiction of any such court in any such suit, action or proceeding and (ii)

[22] *Red Seal Tours Inc. v. Occidental Hotels Management B.V.*, 2007 ONCA 620 (CanLII) para. 4, online: <http://canlii.org/en/on/onca/doc/2007/2007onca620/2007onca620.html>.

[23] *Ibid*. para. 13.

[24] *GreCon Dimter inc. v. J. R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, para. 4, online:<http://canlii.org/en/ca/scc/doc/2005/2005scc46/2005scc46.html>.

> hereby <u>waive, and agree not to assert</u>, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding to the extent permitted by the applicable law, that the suit, action or proceeding is brought <u>in an inconvenient forum</u>, that the venue of the suit, action or proceeding is improper, or that this Agreement or any of the transactions contemplated hereby may not be enforced in or by such courts.[25]

Justice Jurianz commented:

> In this case, there is no reason to depart from the presumption that *Expedition* should be held to the bargain that it made. A departure is only justified in "exceptional circumstances", as Bastarache J. stressed in *Pompey*. There is nothing exceptional about this case. As discussed above, the analysis of whether there is "strong cause" to decline to enforce a forum selection clause is not an analysis of *the forum conveniens* in the conventional sense. In this case *Expedition* may have established that it will experience some inconvenience in the conventional sense in having to assert its claim in Arizona. That inconvenience does not justify permitting it to resile from its agreement in this commercial contract to tolerate that inconvenience.[26]

III. JURISDICTION ANALYSIS

The Supreme Court in *Van Breda* sets out the manner in which a court should determine whether it should take jurisdiction when jurisdiction is disputed in tort cases. The Supreme Court has set out "an analytical framework for assuming jurisdiction (jurisdiction *simpliciter*) and for deciding whether to decline to exercise it (*forum non conveniens*)."[27]

Before the Supreme Court's decision in *Van Breda* a court would consider whether it had presence or consent based jurisdiction *simpliciter*. If neither was applicable the court would then determine whether or not it could assume jurisdiction based on a "real and substantial connection" to the province of Ontario. If the parties had an agreement which provided for a forum other than Ontario, the court would not assume jurisdiction unless the plaintiff could demonstrate strong cause not to give effect to the chosen forum. If the court found that it did not have jurisdiction *simpliciter* or was not persuaded that there was strong cause not to give effect to the agreed foreign forum it would not assume jurisdiction and would stay the action. If, on the other hand, the court believed it had presence-based, consent-based or assumed jurisdiction, it could still exercise its discretion to decline jurisdiction if the defendant demonstrated that there was a more appropriate forum and that Ontario was the *forum non conveniens*. The burden at this stage was on the defendant to show that there is another clearly more appropriate forum.

[25] *Expedition*, para. 5.
[26] *Ibid*, para. 23.
[27] *Van Breda*, para 19.

In *Van Breda* the Supreme Court simplified the real and substantial connection test for determining jurisdiction *simpliciter* and identified four rebuttable presumptions: (a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the tort was committed in the province; and (d) a contract connected with the dispute was made in the province. Although Lebel J. writes: "…jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private law bases for court jurisdiction."[28] The first two of the four rebuttable presumptions, however, relate to the defendant's presence within the jurisdiction and the fourth relates to contract which is consent-based. The simplification of the real and substantial connection test may have blurred the traditional distinction between presence-based, consent-based and assumed jurisdiction *simpliciter*.

In *Momentous* the Supreme Court found that a defendant who delivers a statement of defence in which it explicitly seeks to enforce a foreign forum selection clause does not amount to giving its consent that Ontario assume jurisdiction and that, absent strong cause, a foreign forum selection clause will deprive the Ontario court of jurisdiction even where jurisdiction *simpliciter* has been conceded.

Following the recent decisions, of the Supreme Court in *Van Breda*, the decisions of the Supreme Court and the Ontario Court of Appeal in *Momentous* and the decision of the Ontario Court of Appeal in *Expedition*, an Ontario court faced with a challenge to its jurisdiction would likely follow this legal framework of analysis:

Step 1: The Ontario Court will determine whether it has jurisdiction *simpliciter* on the following bases:

- the defendant is present in Ontario
- defendant has consented to the jurisdiction of the Ontario court
- there is a real and substantial connection to Ontario

If the plaintiff and defendant have agreed to a foreign forum and the defendant seeks to enforce that agreement before delivering a defence the Ontario court may determine that it does not have jurisdiction *simpliciter* absent "strong cause".

If the Ontario court does not have jurisdiction *simpliciter* or there is an enforceable foreign forum selection clause the proceeding is stayed.

If the Ontario court has jurisdiction *simpliciter* and the defendant does not raise further objections the litigation proceeds in Ontario.

Step 2: If the Ontario Court has jurisdiction *simpliciter* and a defendant still objects the Ontario Court will determine whether if should exercise its discretion to decline jurisdiction on the following bases:

[28] *Ibid*, para 79.

- the plaintiff and defendant have agreed to a foreign forum absent "strong cause"; or
- there is clearly a more appropriate forum and Ontario is the *forum non conveniens*.

If there is an enforceable foreign forum selection clause the proceeding is stayed or dismissed.

If the Ontario court is clearly *forum non conveniens* the proceeding is stayed or dismissed.

Otherwise the litigation proceeds in Ontario.

This two step legal framework is elaborated in detail below.

Step 1: Whether Ontario court has jurisdiction *simpliciter*

When parties dispute jurisdiction at the outset, a Court may take jurisdiction *simpliciter* in three circumstances, where there is:

1) Presence in the jurisdiction;
2) Consent to the jurisdiction; or
3) Assumed jurisdiction.

Presence or consent based jurisdiction

The Supreme Court said in *Morguard Investments*:

> As discussed, fair process is not an issue within the Canadian federation. The question that remains, then, is when has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of some ground traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments - in the case of judgments in *personam* where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.[29]

The Ontario Court of Appeal in *Muscutt* elaborated:

> Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or by prior agreement to submit disputes to the

[29] *Morguard Investments ltd. v. De savoye*, [1990] 3 S.C.R. 1077, online:<http://www.canlii.org/en/ca/scc/doc/1990/1990canlii29/1990canlii29.html>.

> jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extra-provincial judgments.
>
> …Assumed jurisdiction is initiated by service of the court's process out of the jurisdiction pursuant to Rule 17.02.[30]

As noted above the Supreme Court recently confirmed presence and consent bases for jurisdiction in *Van Breda*:

> …jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction if they are established. The real and substantial connection test does not oust the traditional private law bases for court jurisdiction.[31]

If one of the above bases for taking jurisdiction *simpliciter* is found the Ontario court has jurisdiction. The Court may proceed to determine whether to exercise its discretion to decline jurisdiction in face of (a) a foreign forum selection agreement, absent strong cause, or, (b) if it finds upon determination of the motion of a party that there is a more appropriate forum and Ontario is the *forum non conveniens*. If the court cannot determine presence or consent based jurisdiction *simpliciter* it will look at the presumptive connective factors identified by the Supreme Court to determine if there is a real and substantial connection to Ontario which require that the Ontario court assume jurisdiction. Following the Supreme Court's *Van Breda* decision it may come to pass that an Ontario court will always apply the real and substantial connection test as prescribed by Lebel J. to determine jurisdiction *simpliciter*

Assumed jurisdiction - Real and Substantial Connection Test

Following an exhaustive survey of the nature and scope of private international law in Canada the Supreme Court has simplified the real and substantial connection test identified by the Ontario Court of Appeal decisions in *Muscutt* and *Van Breda* and outlines a new framework for the test based on the concept of "presumptive connective factors".

A party arguing that the court should assume jurisdiction has the onus of identifying a presumptive connective factor that links the subject matter of the litigation to the jurisdiction i.e. showing a real and substantial connection. If the party is successful the opposing party must demonstrate that the connection is not sufficient to establish a real relationship between the subject matter and the litigation to the jurisdiction or points only to a weak relationship between them i.e. show that there is not a real and substantial connection.

As outlined above the Supreme Court identified four presumptive connecting factors in the context of tort claims that, *prima facie*, entitle a court to assume jurisdiction over a dispute:

(a) the defendant is domiciled or resident in the province;

[30] *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, 2002 CanLII 44957 (C.A.) paras. 19-20 [*Muscutt*].
[31] *Van Breda*, para. 79.

(b) the defendant carries on business in the province[32];

(c) the tort was committed in the province; and

(d) a contract connected with the dispute was made in the province.

The Supreme Court says that the list of presumptive connecting factors is not closed and that courts may identify new factors but makes it clear that the identification of such new factors must be consistent with the values of order, fairness and comity and that relevant considerations include:

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

(b) treatment of the connecting factor in the case law;

(c) treatment of the connecting factor in statute; and

(d) treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

However "the presumption of jurisdiction that arises where a recognized connecting factor…applies is not irrebuttable. The burden…rests, of course, on the party challenging the assumption of jurisdiction. The party must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them."[33] The Supreme Court cites an example where the presumptive connecting factor is a contract made within the jurisdiction. In such a case the presumption can be rebutted by showing that the contract does not relate to the subject matter of the litigation. The Supreme Court also explained that even if a defendant carries on business in a province, the presumption can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province.[34]

If the defendant successfully rebuts the presumption of jurisdiction, the court must decline to determine the matter because it does not have jurisdiction *simpliciter*. If the defendant is not successful in rebutting the presumption of jurisdiction it can still argue the *forum non conveniens* doctrine and try to persuade the court that it should decline to exercise that jurisdiction in favour of another province or country which is clearly the more appropriate forum in which to the litigate the dispute.

In addition to *Van Breda* the Supreme Court recently released two defamation decisions: *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18 ("*Banro*") and *Breeden v. Black*, 2012 SCC 19. ("*Black*") – the three cases are being dubbed the 2012 Conflict of Law Trilogy.

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[32] For the purposes of the real and substantial connection test, the Supreme Court explained that a business must have "some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction". *Van Breda*, para. 87.

[33] *Ibid*, para 95

[34] *Ibid*, para. 96.

> Those hoping that the *Black* and *Banro* decisions would clarify the test for assuming jurisdiction in multi-state defamation actions, particularly, those which give rise to internet defamation, will be [disappointed]…In *Black*, the "New" *Van Breda* test as applied to defamation actions merely establishes the presumptive jurisdictional factor of the republication of the alleged libel in Ontario. Publication occurs when the impugned statements are read, downloaded and republished in Ontario. Unlike the American single publication rule, in Canada, repetition or republication of a defamatory statement constitutes a new publication…In both the *Black* and *Banro* decisions, the Supreme Court demers in adopting a new choice of law rule for defamation actions….On the issue of *forum non conveniens*, LeBel J. reinforces the holding in *Van Breda* that the onus remains with the defendant to demonstrate that the another jurisdiction is a "clearly more appropriate forum..[35]

Step 2: When the Ontario court has jurisdiction *simpliciter* whether it should exercise its discretion to decline jurisdiction.

The *Momentous* decision of the Court of Appeal determined that following a finding of jurisdiction *simpliciter* there are two different classes of cases in which the court is asked to exercise its discretion to take jurisdiction: one arises on a *forum non conveniens* motion; the other where the parties have agreed to a forum to resolve their disputes. Each class of case has its own onus, test and rationale. Since the Supreme Court did not comment directly on this aspect of the Court of Appeal's decision it is now the law of Ontario.

Foreign forum clause = no jurisdiction unless strong cause

In the circumstances of a foreign forum selection clause if the defendant has not defended it may bring a motion under Rule 17.06 of the Ontario Rules of Civil Procedure and the Court will not take jurisdiction *simpliciter* absent strong cause. If the court has jurisdiction *simpliciter* because a statement of defence has been delivered the defendant can bring a motion under Rule 21.03(a) and the court will decline jurisdiction absent strong cause.

In *Momentous* the Supreme Court says:

> In *Pompey*, this Court confirmed that, in the absence of specific legislation, the proper test in determining whether to enforce a forum selection clause is discretionary in nature. It provides that unless there is "strong cause" as to why a domestic court should exercise jurisdiction, order and fairness are better achieved if the parties are held to their bargains.[36]

In *Pompey* the Supreme Court stressed that, "[i]t is essential that the courts give full weight to the desirability of holding contracting parties to their agreements…the starting point is that the parties should be held to their bargain" and "that the

[35] Antonin Pribetic, "The Supreme Court of Canada Contlict of Laws Trilogy: Part II", http://thetrialwarrior.com/2012/04/23/the-supreme-court-of-canada-conflict-of-laws-trilogy-part-ii/
[36] *Momentous*, para 9.

parties' agreement is given effect in all but exceptional circumstances."[37] The strong cause test imposes a "burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause."[38] Lower Courts have made additional comments that "the court should honour terms of that sort and give effect to them unless the balance of convenience massively favours an opposite conclusion"[39] and in cases were there is an exclusive jurisdiction clause "[a] jurisdiction clause casts a heavy onus on the party seeking to resort to a court of another jurisdiction to establish that the latter is a more appropriate forum."[40]

The Supreme Court in *Pompey* affirmed that "[i]n exercising its discretion the Court should take into account all the circumstances of the particular case" and without prejudice to this generality, Courts will look at the following factors to determine whether there is a strong cause to depart from the forum selection clause in the contract:

(a) In what country the *evidence* on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the Canadian and foreign Courts.

(b) Whether the *law* of the foreign Court applies and, if so, whether it differs from Canadian law in any material respects.

(c) With what *country* either *party is connected*, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be *prejudiced* by having to sue in the foreign Court because they would

  (i) be deprived of security for that claim;

  (ii) be unable to enforce any judgment obtained;

  (iii) be faced with a time-bar not applicable in Canada; or

  (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.[41]

The Court will weigh these factors according to the facts of each case to determine whether they will depart from the forum indicated in the contract. If the Court finds the plaintiff has shown a strong cause why the forum selection clause should not be enforced and the court should take jurisdiction, then the considerations under Step 2 may be considered to determine whether there is another more appropriate

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[37] *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 [*Pompey*] paras. 20 and 21 [emphasis added] online:<http://www.canlii.org/en/ca/scc/doc/2003/2003scc27/2003scc27.html>.
[38] *Ibid*. para. 20.
[39] *Volkswagen Canada Inc. v. Auto Haus Frohlich*, 1985 CanLII 134 (AB C.A.) [emphasis added], online:<http://www.canlii.org/en/ab/abca/doc/1985/1985canlii134/1985canlii134.html>.
[40] *Maritime Telegraph & Telephone Co. v. Pre Print Inc.*, 1996 CarswellNS 12 (NS C.A.), paras. 37 and 38,; *International Time Recorder Co. v. Lavie Computers Ltd.*, 2000 CarswellOnt 853 (ON S.C.J.), para. 26.
[41] *Pompey*, para. 19.

forum.[42] If the court finds that the plaintiff has not shown a strong cause why the forum selection clause should not be enforced it will stay the action.

The Ontario Court of Appeal has recently elaborated on the strong cause test in its decisions in *Expedition* and *Momentous* as follows:

> A forum selection clause in a commercial contract should be given effect. The factors that may justify departure from that general principle are few. The few factors that might be considered include the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy. Apart from circumstances such as these, a forum selection clause in a commercial contract should be enforced.[43]
>
> To this list, I would add a case in which the defendant has inordinately delayed in bringing its jurisdiction motion. An example of this kind of case is *Mobile Mini Inc. v. Centreline Equipment Rentals Ltd.* 2004 CanLII 22309 (ON C.A.), (2004), 190 O.A.C. 149 (C.A.). In that case, the parties had agreed to litigate disputes in Arizona. However, the plaintiff sued in Ontario. The defendant waited over three years and until the case was set to be scheduled for trial before moving to challenge the jurisdiction of the Ontario court. In the meantime, it had taken several steps to defend the Ontario action, including delivering a defence and counter-claim and participating in production and discovery. The court held that the delay and the defendant's conduct justified refusing to enforce the choice of forum clause. To the same effect, see *Sault College of Applied Arts and Technology v. Agresso Corp.*, 2007 ONCA 525 (CanLII), 2007 ONCA 525.[44]

Analysis of jurisdiction by the Court of Appeal in *Momentous*

In *Momentous* the Court of Appeal says that questions about the jurisdiction of an Ontario court over a claim raises two separate issues: (i) whether an Ontario court has or can assume jurisdiction; and (ii) if the Ontario court has or can assume jurisdiction whether it should take jurisdiction.

An Ontario court has jurisdiction if the defendant consents to its jurisdiction or is present in Ontario, and can assume jurisdiction on being satisfied of "a real and substantial connection" to Ontario: see *Muscutt v. Courcelles* 2002 CanLII 44957

[42] See for example *Straus v. Decaire*, 2007 CanLII 14347 (ON S.C.) para. 37, online: <http://canlii.org/en/on/onsc/doc/2007/2007canlii14347/2007canlii14347.html> aff'd 2007 ONCA 854 (CanLII).
[43] *Expedition*, para. 24.
[44] *Supra*, note 6, para. 42.

(ON C.A.), (2002), 60 O.R. (3d) 20 (C.A.), at para. 19. One of the ways that a defendant consents to the jurisdiction of an Ontario court is by attornment – for example, as in this case, by delivering a statement of defence responding to the merits of the plaintiffs' claim: see *Clinton v. Ford* (1982), 37 O.R. (2d) 448 (C.A.). Therefore, as the non-Ontario defendants attorned to the jurisdiction of the Ontario court and the Ontario defendants are present in the province, an Ontario court has jurisdiction over the plaintiffs' claim. But that does not end the matter.

When an Ontario court has, or can assume jurisdiction, a second issue arises: whether an Ontario court should take jurisdiction. Decisions on whether a court should take jurisdiction are discretionary.

The case law recognizes two different classes of cases in which the court is asked to exercise its discretion. One arises on a *forum non conveniens* motion; the other where the parties have agreed to a forum to resolve their disputes. Each class of case has its own onus, test and rationale.

On the more usual *forum non conveniens* motion, a court must determine whether there is another more convenient forum to try the claim. The defendant has the onus of showing a more convenient forum. The test invites the application of a now well-recognized list of considerations, which assess the connections to the two competing forums. And the court's discretion is guided by the twin rationales of efficiency and fairness: see, for example, *Young v. Tyco International of Canada Ltd.* 2008 ONCA 709 (CanLII), (2008), 92 O.R. (3d) 161 (C.A.).

In the other class of case, of which the present appeal is an example, the parties have agreed to a forum to resolve their disputes. In this class of case, the onus is reversed. The plaintiff must show why Ontario should displace the forum chosen by the parties. The test is "strong cause" – the plaintiff must show strong cause why the choice of forum clause should not prevail. And in exercising its discretion, the court is guided by the rationale that ordinarily parties should be held to the bargain they have made. In the present context, if a team wants to play in a league, it must adhere to the league's rules: see *Pompey*.[45]

Supreme Court decision in *Momentous*

While the Supreme Court declined to address whether or not the defendants attorned to the jurisdction *simpliciter* of the Ontario Court[46] it made it clear that "a statement of defence that specifically pleads a foreign forum selection clause does not amount to consent that Ontario assume jurisdiction so as to preclude consideration of the merits of whether to enforce the clause."[47]

The Supreme Court did not accept the appellants' position that the strong cause test could not applied where the Ontario Court had jurisdiction *simpliciter* and reaffirmed that "unless there is a "strong cause" as to why a domestic court should exercise jurisdiction, order and fairness are better achieved when parties are held to

[45] *Ibid*, paras. 35 – 39.
[46] *Momentous*, para. 2.
[47] *Ibid*, para 8.

their bargains."[48] Although not explicit the Supreme Court seems to endorse the distinction made by the Court of Appeal that discretionary decisions are to be analysed differently depending on whether the challenge to jurisdiction is based on *forum non conveniens* or the enforcement of a forum selection clause.

Finally the Supreme Court makes it very clear that a party challenging the jurisdiction of an Ontario Court on the basis of a foreign forum selection clause need not rely on Rule 17.06 and may use Rule 21.01(3)(a) which unlike Rule 17.06 can be used after the delivery of a defence.

forum non conveniens

As noted above where an Ontario court finds that it has jurisdiction over the case it may on the motion of party undertake an analysis to determine whether there is another clearly more appropriate forum in order to determine whether it is the *forum non conveniens*.

In *Van Breda* the Supreme Court has made it clear that once an Ontario court determines that is has jurisdiction *simpliciter* unless the defendant invokes *forum non conveniens* the litigation will proceed in Ontario and the decision to raise the doctrine rests with the parties not with the court seized of the claim.

> …a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper application of the doctrine of *forum non conveniens*. Forum non conveniens comes into play when jurisdiction is established. It has no relevance to the jurisdictional analysis itself.
>
> Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.[49]

The Supreme Court dismisses legislative efforts to draw up exhaustive lists of factors to considered in determining a clearly more appropriate forum. It says that factors a court may consider may vary depending on the context and might include the following:

(a) location of parties and witnesses;

(b) cost of transferring the case to another jurisdiction or of declining the stay;

(c) impact of the transfer on the conduct of the litigation or on related or parallel proceedings;

[48] *Ibid*, para. 9.
[49] *Van Brda*, paras 101, 102.

(d) possibility of conflicting judgments;

(e) problems related to the recognition and enforcement of judgments;

(f) relative strengths of the connections of the two parties; and

(g) loss of juridical advantage.

> …the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties.[50]

> …loss of juridical advantage is a difficulty that could arise should the action be stayed in favour of the court of another province or territory…[51]

> …A further issue that does not arise in these appeals is whether it is legitimate to use this factor of loss of juridical advantage within the Canadian federation. To use it too extensively in the *forum non conveniens* analysis 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. Differences should not be viewed instinctively as signs of disadvantage or inferiority.[52]

Declining jurisdiction in favour of a more convenient forum is not a matter of flipping a coin, the Supreme Court says that to exercise its discretion to decline jurisdiction the Ontario court must determine the other forum is not merely comparatively convenient but is clearly and exceptionally more appropriate.

> If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the

[50] *Ibid*, para 110.
[51] *Ibid*, para 111.
[52] *Ibid*, para 112.

existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.[53]

…Regarding the burden imposed on a party asking for a stay on the basis of *forum non conveniens*, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. It was used in *Spiliada* and *Amchem*. On the other hand, it has not always been used consistently and does not appear in the *CJPTA* or any of the statutes based on the *CJPTA*, which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere. Nor is this expression found in art.3135 of the *Civil Code of Quebec*, which refers instead to the exceptional nature of the power conferred on a Quebec authority to decline jurisdiction: ". . . it may exceptionally and on an application by a party, decline jurisdiction . . .".[54]

…The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the

[53] *Ibid*, para 103.
[54] *Ibid*, para 108.

litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.[55]

IV. CONCLUSION

There is no question that our understanding of the legal framework governing the jurisdiction of Ontario courts has changed with the decisions of the Ontario Court of Appeal and Supreme Court in *Momentous* and the Supreme Court in *Van Breda*. As noted above, while the *Van Breda* decision of the Supreme Court provides clear guidance on the real and substantial connection test and the doctrine of *forum non conveniens*, the *Momentous* decision is somewhat confusing and contradictory and leaves questions about what constitutes submission and it effects unanswered. Notwithstanding, the legal framework in 2012 is clearer and there are fewer outstanding questions than there were when we drafted the first version of this paper in 2010 or the second version in 2011.

[55] *Ibid*, para 109.