



SUPREME COURT OF CANADA

CITATION: Club Resorts Ltd. v. Van Breda, 2012 SCC 17

DATE: 20120418

DOCKET: 33692, 33606

BETWEEN:

Club Resorts Ltd.

Appellant

and

**Morgan Van Breda, Viktor Berg, Joan Van Breda, Tony Van Breda, Adam Van
Breda and Tonnille Van Breda**

Respondents

- and -

**Tourism Industry Association of Ontario, Amnesty International, Canadian
Centre for International Justice, Canadian Lawyers for International Human
Rights and Ontario Trial Lawyers Association**

Interveners

AND BETWEEN:

Club Resorts Ltd.

Appellant

and

**Anna Charron, Estate Trustee of the Estate of Claude Charron, deceased, the
said Anna Charron, personally, Jennifer Candace Charron, Stephanie Michelle
Charron, Christopher Michael Charron, Bel Air Travel Group Ltd. and Hola
Sun Holidays Limited**

Respondents

- and -

**Tourism Industry Association of Ontario, Amnesty International, Canadian
Centre for International Justice, Canadian Lawyers for International Human
Rights and Ontario Trial Lawyers Association**

Interveners

CORAM: McLachlin C.J. and Binnie,* LeBel, Deschamps, Fish, Abella, Charron,*
Rothstein and Cromwell JJ.

(* Binnie and Charron JJ. took no part in the judgment.)

REASONS FOR JUDGMENT:
(paras. 1 to 125):

LeBel J. (McLachlin C.J. and Deschamps, Fish, Abella,
Rothstein and Cromwell JJ. concurring)

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CLUB RESORTS LTD. v. VAN BREDA

Club Resorts Ltd.

Appellant

v.

**Morgan Van Breda,
Viktor Berg, Joan Van Breda, Tony Van Breda,
Adam Van Breda and Tonnille Van Breda**

Respondents

and

**Tourism Industry Association of Ontario,
Amnesty International,
Canadian Centre for International Justice,
Canadian Lawyers for International Human Rights and
Ontario Trial Lawyers Association**

Interveners

- and -

Club Resorts Ltd.

Appellant

v.

**Anna Charron, Estate Trustee of the Estate of Claude Charron, deceased,
the said Anna Charron, personally,
Jennifer Candace Charron, Stephanie Michelle Charron,
Christopher Michael Charron,
Bel Air Travel Group Ltd. and
Hola Sun Holidays Limited**

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**Tourism Industry Association of Ontario,
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Indexed as: Club Resorts Ltd. v. Van Breda

2012 SCC 17

File No.: 33692, 33606.

2011: March 21; 2012: April 18.

Present: McLachlin C.J. and Binnie,* LeBel, Deschamps, Fish, Abella, Charron,*
Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Private international law — Choice of forum — Court having jurisdiction
— Forum non conveniens — Respondents injured while vacationing in Cuba —
Actions for damages brought in Ontario — Defendants bringing motion to stay
actions on grounds that Ontario court lacks jurisdiction, or alternatively, should
decline to exercise jurisdiction on the basis of forum non conveniens — Whether the*

* Binnie and Charron JJ. took no part in the judgment.

Ontario court can assume jurisdiction over the actions — If so, whether the Ontario court should decline to exercise its jurisdiction on the ground that the court of another jurisdiction is clearly a more appropriate forum for the hearing of the actions.

In separate cases, two individuals were injured while on vacation outside of Canada. Morgan Van Breda suffered catastrophic injuries on a beach in Cuba. Claude Charron died while scuba diving, also in Cuba. Actions were brought in Ontario against a number of parties, including the appellant, Club Resorts Ltd., a company incorporated in the Cayman Islands that managed the two hotels where the accidents occurred. Club Resorts sought to block those proceedings, arguing that the Ontario courts lacked jurisdiction and, in the alternative, that a Cuban court would be a more appropriate forum on the basis of the doctrine of *forum non conveniens*. In both cases, the motion judges found that the Ontario courts had jurisdiction with respect to the actions against Club Resorts. In considering *forum non conveniens*, it was also held that the Ontario court was clearly a more appropriate forum. The two cases were heard together in the Court of Appeal. The appeals were both dismissed.

Held: The appeals should be dismissed.

This case concerns the elaboration of the “real and substantial connection” test as an appropriate common law conflicts rule for the assumption of jurisdiction. In determining whether a court can assume jurisdiction over a certain claim, 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. Given the nature of the relationships governed by private international law, the framework for the assumption of jurisdiction cannot be an unstable, *ad hoc* system made up on the fly on a case-by-case basis – however laudable the objective of individual fairness may be. There must be order in the system, and it must permit the development of a just and fair approach to resolving conflicts. Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensure security and predictability in the law governing the assumption of jurisdiction by a court. The identification of a set of relevant presumptive connecting factors and the determination of their legal nature and effect will bring greater clarity and predictability to the analysis of the problems of assumption of jurisdiction, while at the same time ensuring consistency with the objectives of fairness and efficiency that underlie this branch of the law. From this perspective, a clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity.

To meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. Jurisdiction must be established primarily on the basis of objective factors

that connect the legal situation or the subject matter of the litigation with the forum. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a “real and substantial” connection for the purposes of the law of conflicts. In a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:

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

Although the factors set out in the list are considered presumptive, this does not mean that the list of recognized factors is complete, as it may be reviewed over time and updated by adding new presumptive connecting factors. When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors. Relevant considerations include:

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

The presumption of jurisdiction that arises where a recognized connecting factor — whether listed or new — applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must negate the presumptive effect of the listed or new factor and convince the court that the proposed assumption of jurisdiction would be inappropriate. This could be accomplished by establishing 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.

If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors — whether listed or new — apply or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, subject to the possible application of the forum of necessity doctrine. If jurisdiction is established, the claim may proceed, subject to the

court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*.

A clear distinction must be drawn between the existence and the exercise of jurisdiction. 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. 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 show that the alternative forum is clearly more appropriate and that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to choose an alternative forum and to deny the plaintiff the benefits of his or her decision to select a forum. When it is invoked, the doctrine of *forum non conveniens* requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. It is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. The court however, 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. On the other hand, a court must refrain from leaning too instinctively in favour of its own jurisdiction. The doctrine focuses on the contexts of individual cases and the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context. Such factors 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. Ultimately, the decision falls within the reasoned discretion of the trial court. This exercise of discretion will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts which takes place at an interlocutory or preliminary stage.

In *Van Breda*, a contract was entered into in Ontario. The existence of a contract made in Ontario that is connected with the litigation is a presumptive connecting factor that, on its face, entitles the courts of Ontario to assume jurisdiction in this case. Club Resorts has failed to rebut the presumption of jurisdiction that arises where this factor applies. Therefore, there was a sufficient connection between the Ontario court and the subject matter of the litigation. Club Resorts has not discharged its burden of showing that a Cuban court would clearly be a more appropriate forum. While a sufficient connection exists between Cuba and the

subject matter of the litigation to support an action there, issues related to the fairness to the parties and to the efficient disposition of the claim must be considered. A trial held in Cuba would present serious challenges to the parties. All things considered, the burden on the plaintiffs clearly would be far heavier if they were required to bring their action in Cuba.

In *Charron*, the facts supported the conclusion that Club Resorts was carrying on a business in Ontario which is a presumptive connecting factor. Club Resorts' commercial activities in Ontario went well beyond promoting a brand and advertising. Its representatives were in the province on a regular basis and it benefitted from the physical presence of an office in Ontario. It therefore follows that it has been established that a presumptive connecting factor applies and that the Ontario court is *prima facie* entitled to assume jurisdiction. Club Resorts has not rebutted the presumption of jurisdiction that arises from this connecting factor and therefore the Ontario court has jurisdiction on the basis of the real and substantial connection test. Furthermore, Club Resorts failed to discharge its burden of showing that a Cuban court would clearly be a more appropriate forum in the circumstances of this case. Considerations of fairness to the parties weigh heavily in favour of the plaintiffs.

Cases Cited

Explained: *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20; **referred to:** *Breeden v. Black*, 2012 SCC 19; *Éditions Écosociété Inc. v. Banro Corp.*, 2012

SCC 18; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63; *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *McLean v. Pettigrew*, [1945] S.C.R. 62; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Lemmex v. Bernard* (2002), 60 O.R. (3d) 54; *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68; *Sinclair v. Cracker Barrel Old Country Store, Inc.* (2002), 60 O.R. (3d) 76; *Leufkens v. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84; *Coutu v. Gauthier Estate*, 2006 NBCA 16, 296 N.B.R. (2d) 34; *Fewer v. Ellis*, 2011 NLCA 17, 305 Nfld. & P.E.I.R. 39; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460; *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321; *Oppenheim forfait GMBH v. Lexus maritime inc.*, 1998 CanLII 13001.

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Court Jurisdiction and Proceedings Transfer Act, S.S. 1997, c. C-41.1.

Court Jurisdiction and Proceedings Transfer Act, S.Y. 2000, c. 7 [not yet in force].

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APPEALS from a judgment of the Ontario Court of Appeal (O’Connor A.C.J.O. and Weiler, MacPherson, Sharpe and Rouleau J.J.A.), 2010 ONCA 84, 98 O.R. (3d) 721, 264 O.A.C. 1, 316 D.L.R. (4th) 201, 71 C.C.L.T. (3d) 161, 77 R.F.L. (6th) 1, 81 C.P.C. (6th) 219, [2010] O.J. No. 402 (QL), 2010 CarswellOnt 549, affirming a decision of Pattillo J., 60 C.P.C. (6th) 186, 2008 CanLII 32309, [2008] O.J. No. 2624 (QL), 2008 CarswellOnt 3867, and affirming a decision of Mulligan J., 92 O.R. (3d) 608, 2008 CanLII 53834, [2008] O.J. No. 4078 (QL), 2008 CarswellOnt 6165 (*sub nom. Charron Estate v. Village Resorts Ltd.*). Appeals dismissed.

John A. Olah, for the appellant (33692).

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Peter J. Pliszka and Robin P. Roddey, for the appellant (33606).

Jerome R. Morse, Lori Stoltz and John J. Adair, for the respondents Anna Charron et al. (33606).

Howard B. Borlack, Lisa La Horey and Sabine Kharabian, for the respondent Bel Air Travel Group Ltd. (33606).

Catherine M. Buie, for the respondent Hola Sun Holidays Limited (33606).

John Terry and Jana Stettner, for the intervener Tourism Industry Association of Ontario (33606 and 33692).

François Larocque, Michael Sobkin, Mark C. Power and Lauren J. Wihak, for the interveners Amnesty International, Canadian Centre for International Justice and Canadian Lawyers for International Human Rights (33606 and 33692).

Allan Rouben, for the intervener Ontario Trial Lawyers Association (33606 and 33692).

The judgment of the Court was delivered by

LEBEL J. —

I. Introduction

[1] Tourism has grown into one of the most personal forms of globalization in the modern world. Canadians look elsewhere for the sun, or to see new sights or seek new experiences. Trips are planned and taken with great expectations. But personal tragedies do happen. Happiness gives way to grief, as in the situations that resulted in these appeals. A young woman, Morgan Van Breda, suffered catastrophic injuries on a beach in Cuba. A family doctor and father, Dr. Claude Charron, died while scuba diving, also in Cuba. Actions were brought in Ontario against a number of parties, including the appellant Club Resorts Ltd. (“Club Resorts”), a company incorporated in the Cayman Islands that managed the two hotels where the accidents occurred. Club Resorts sought to block those proceedings, arguing that the Ontario courts lacked jurisdiction and, in the alternative, that a Cuban court would be a more appropriate forum on the basis of the doctrine of *forum non conveniens*. The same issues have now been raised in this Court. I will begin by summarizing the events that led to the litigation, the conduct of the litigation and the judgments of the courts below. I will then consider the principles that should apply to the assumption of jurisdiction and the doctrine of *forum non conveniens* under the common law conflicts rules of Canadian private international law. Finally, I will apply those principles to determine whether the Ontario courts have jurisdiction and, if so, whether they should decline to exercise it.

II. Background and Facts

A. *Van Breda*

[2] In June 2003, the respondent Viktor Berg and his spouse, Ms. Van Breda, went on a trip to Cuba, where they stayed at the SuperClub's Breezes Jibacoa resort managed by Club Resorts. Mr. Berg, a professional squash player, had made arrangements for a one-week stay for two people at this hotel through René Denis, an Ottawa-based travel agent operating a business known as Sport au Soleil.

[3] Mr. Denis's business involved arranging for racquet sport professionals for, among others, Club Resorts, in exchange for undisclosed compensation. Mr. Denis also received a fee from each professional. Once the arrangements for Mr. Berg were finalized, Mr. Denis sent him a letter on letterhead bearing the words "SuperClubs Cuba — Tennis", which confirmed the details of the agreement with Club Resorts: Mr. Berg was to provide two hours of tennis lessons a day in exchange for bed and board and other services for two people at the hotel.

[4] The accident happened on the first day of their stay. Ms. Van Breda tried to do some exercises on a metal structure on the beach, but the structure collapsed. She suffered catastrophic injuries and, as a result, became paraplegic. After spending a few days in a hospital in Cuba, she returned to Canada, going to Calgary where her family lived. She is now living in British Columbia with Mr. Berg. They never returned to Ontario, which they had planned to do after their holiday.

[5] In May 2006, Ms. Van Breda, her relatives and Mr. Berg sued several defendants, including Mr. Denis, Club Resorts, and some companies associated with Club Resorts in the SuperClubs group, in the Ontario Superior Court of Justice. Their

claim was framed in contract and in tort. They sought damages for personal injury, damages for loss of support, care, guidance and companionship pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3, and punitive damages.

[6] Some of the parties, including those who were served outside Ontario under rule 17.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, moved to dismiss the action for want of jurisdiction. In the alternative, they asked the Superior Court of Justice to decline jurisdiction on the basis of *forum non conveniens*.

B. *Charron*

[7] In January 2002, Dr. Charron and his wife booked a vacation package through a travel agent, Bel Air Travel Group Ltd. (“Bel Air”). This package was offered by Hola Sun Holidays Ltd. (“Hola Sun”), which sold packages offered by, among others, SuperClubs. It was an all-inclusive package — at the Breezes Costa Verde hotel in Cuba — that featured scuba diving. The hotel was owned by Gaviota SA (Ltd.) (“Gaviota”), a Cuban corporation, but was managed by the appellant, Club Resorts. Dr. and Mrs. Charron reached the Breezes Costa Verde on February 8, 2002. Four days later, Dr. Charron drowned during his second scuba dive.

[8] Mrs. Charron and her children sued for breach of contract and negligence. Dr. Charron’s estate sought damages for loss of future income, and the individual plaintiffs also sought damages for loss of love, care, guidance and companionship pursuant to the *Family Law Act*. The statement of claim was served on the Ontario

defendants, Bel Air and Hola Sun. It was also served outside Ontario on several foreign defendants, including Club Resorts, under rule 17.02. The parties served outside Ontario included the diving instructor and the captain of the boat. Club Resorts and an associated company, Village Resorts International Ltd., which owned the SuperClubs trademark, moved to dismiss the action on the ground that the Ontario courts lacked jurisdiction or, in the alternative, to stay the action on the grounds that Ontario was not the most appropriate forum.

C. *Judicial History*

(1) *Van Breda* — Ontario Superior Court of Justice, (2008), 60 C.P.C. (6th) 186

[9] In *Van Breda*, Pattillo J. held that Club Resorts' motion turned on whether there was a real and substantial connection in accordance with the test laid out by the Ontario Court of Appeal in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20. He found that there was a connection between Ontario and Club Resorts by virtue of the activities the company engaged in in Ontario through Mr. Denis. He also found on a *prima facie* basis that the agreement between Mr. Berg and Club Resorts had actually been concluded in Ontario. After reviewing the other factors from *Muscutt*, including unfairness to the defendants in assuming jurisdiction, unfairness to the plaintiffs in not doing so and the involvement of other parties to the suit, he held that there was a sufficient connection between Ontario and the subject matter of the litigation. Pattillo J. then considered the issue of *forum non conveniens*. Although he accepted that Cuba also had jurisdiction, he concluded that it had not been established that a Cuban court would clearly be a more appropriate forum. For these reasons, he

held that the Ontario Superior Court of Justice should entertain the action as against Club Resorts.

(2) Charron — Ontario Superior Court of Justice, (2008), 92 O.R. (3d) 608

[10] In *Charron*, Mulligan J. held against Club Resorts. In his opinion, a contract had been entered into between Dr. Charron and Bel Air. The travel agency had booked an all-inclusive package at the Cuban hotel through Hola Sun, which had an agreement with Club Resorts. These facts weighed in favour of assuming jurisdiction. Mulligan J. also found that there was a connection between Ontario and the defendants. In his view, the resort relied heavily on international travellers to ensure its profitability. Club Resorts marketed the resort in Ontario by way of an agreement with Hola Sun. I note that the record indicated that Club Resorts or one of its associated companies had an office in Richmond Hill, Ontario. After reviewing the other factors from *Muscutt*, Mulligan J. held that the Ontario courts had jurisdiction with respect to Club Resorts. In considering *forum non conveniens*, Mulligan J. weighed several factors. He took into account the fact that more parties and witnesses were located in Ontario than in Cuba, that the damage had been sustained in Ontario and that a liability insurance policy was available to the foreign defendants in Ontario. In addition, Mrs. Charron and her children would lose the benefit of statutory family law remedies if the case were to proceed in Cuba. For these reasons, Mulligan J. held that the Ontario court was clearly a more appropriate forum than a Cuban court.

(3) Ontario Court of Appeal, 2010 ONCA 84, 98 O.R. (3d) 721

[11] The two cases were heard together in the Court of Appeal. After ordering a rehearing, the Court of Appeal, in reasons written by Sharpe J.A., took the opportunity to review and reframe the *Muscutt* test. I will discuss this new framework below in reviewing the evolution of the common law policy relating to conflicts of jurisdiction and conflicts of laws.

[12] Suffice it to say at this stage that, after recasting the *Muscutt* test, the Court of Appeal unanimously held, in both cases, that the Ontario courts had jurisdiction over the claims and the parties. It then decided that the Ontario courts should not decline jurisdiction on the basis of *forum non conveniens* principles, because a Cuban court would not clearly be a more appropriate forum.

[13] The appeals in *Van Breda* and *Charron* were also heard together in this Court. They were heard during the same session as two other appeals involving the issues of jurisdiction and *forum non conveniens*, which concerned actions in damages for defamation (*Breeden v. Black*, 2012 SCC 19, and *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18).

III. Analysis

Issues

(1) Nature and Scope of Private International Law

[14] These appeals raise broad issues about the fundamental principles of the conflict of laws as this branch of the law has traditionally been known in the common law, or “private international law” as it is often called now (A. Briggs, *The Conflict of Laws* (2nd ed. 2008), at pp. 2-3; Manitoba Law Reform Commission, *Private International Law*, Report No. 119 (2009), at p. 2; J.-G. Castel, “The Uncertainty Factor in Canadian Private International Law” (2007) 52 *McGill L.J.* 555).

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

[16] Three categories of issues — jurisdiction, *forum non conveniens* and the recognition of foreign judgments — are intertwined in this branch of the law. Thus, the framework established for the purpose of determining whether a court has

jurisdiction may have an impact on the choice of law and on the recognition of judgments, and vice versa. Judicial decisions on choice of law and the recognition of judgments have played a central role in the evolution of the rules related to jurisdiction. None of the divisions of private international law can be safely analysed and applied in isolation from the others. This said, the central focus of these appeals is on jurisdiction and the appropriate forum.

(2) Issues Related to Jurisdiction: Assumption and Exercise of Jurisdiction

[17] Two issues arise in these appeals. First, were the Ontario courts right to assume jurisdiction over the claims of the respondents Van Breda and Charron and over the appellant, Club Resorts? Second, were they right to exercise that jurisdiction and dismiss an application for a stay based on *forum non conveniens*?

[18] To be able to resolve these issues, I must first discuss the evolution of the rules of jurisdiction *simpliciter* in Canadian private international law. It will be necessary to review the approach the Ontario Court of Appeal adopted in respect of the questions of assumption of jurisdiction and *forum non conveniens* in its judgments in the cases at bar and, in particular, its reconsideration of the principles that it had previously set out in *Muscutt*.

[19] I will then propose an analytical framework and legal principles for assuming jurisdiction (jurisdiction *simpliciter*) and for deciding whether to decline to exercise it (*forum non conveniens*). On that basis, I will review the facts of the cases

at bar to determine whether the Ontario courts made any reviewable errors when they decided to retain jurisdiction over them.

[20] Before turning to these issues, however, it is important to consider the constitutional underpinnings of private international law in Canada. This part of the analysis is necessary in order to explain the origins of the “real and substantial connection test” as it is now known, its nature, and its impact on the development of the principles of private international law.

(3) Constitutional Underpinnings of Private International Law

[21] Conflicts rules must fit within Canada’s constitutional structure. Given the nature of private international law, its application inevitably raises constitutional issues. This branch of the law is concerned with the jurisdiction of courts of the Canadian provinces, with whether that jurisdiction should be exercised, with what law should apply to a dispute, and with whether a court should recognize and enforce a judgment rendered by a court of another province or country. The rules of private international law can be found, in the common law provinces, in the common law and in statute law and, in Quebec, in the *Civil Code of Québec*, S.Q. 1991, c. 64, which contains a well-developed set of rules and principles in this area (see *Civil Code of Québec*, Book Ten, arts. 3076 to 3168). The interplay between provincial jurisdiction and external legal situations takes place within a constitutional framework which limits the external reach of provincial laws and of a province’s courts. The Constitution assigns powers to the provinces. But these powers are subject to the

restriction that they be exercised within the province in question (see P. W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 1, at pp. 364-65 and 376-77; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at p. 569; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at paras. 26-28, *per* Major J.), and they must be exercised in a manner consistent with the territorial restrictions created by the Constitution (see *Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870, at para. 5, *per* Major J.; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63, at para. 51, *per* Binnie J.).

(4) Origins of the Real and Substantial Connection Test

[22] The real and substantial connection test arose out of decisions of this Court that were aimed at establishing broad and flexible principles to govern the exercise of provincial powers and the actions of a province's courts. It was focussed on two issues: (1) the risk of jurisdictional overreach by provinces and (2) the recognition of decisions rendered in other jurisdictions within the Canadian federation and in other countries. In developing the real and substantial connection test, the Court crafted a constitutional principle rather than a simple conflicts rule (see G. Goldstein and E. Groffier, *Droit international privé*, vol. I (1998), at p. 47). However, the test was born as a general organizing principle of the conflict of laws. Its constitutional dimension appeared only later. Courts have used the expression "real and substantial connection" to describe the test in both senses, and often in the same judgment. This has produced confusion about both the nature of the test and the

constitutional status of the rules and principles of private international law. A clearer distinction needs to be drawn between the private international law and constitutional dimensions of this test.

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

[24] The first mention of a "real and substantial connection test" in the Court's modern jurisprudence can be found in the reasons of Dickson J. in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393. That case concerned a tort action with respect to manufacturer's liability. The main issue was whether the courts of Saskatchewan had jurisdiction over the claim and, if so, what substantive law governed it. Dickson J. suggested that the English courts seemed to be moving

towards some form of “real and substantial connection test” (pp. 407-8) to resolve issues related to the assumption of jurisdiction by a province’s courts and the appropriate choice of the law applicable to a tort. The test was formally adopted in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077. As had been the case in *Moran*, the Court’s intention in *Morguard* was to develop an organizing principle of Canadian private international law, albeit with constitutional overtones. The test’s constitutional role in the Canadian federation was confirmed a few years later in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289. Its Janus-like nature — with a private international law face on the one hand and a constitutional face on the other — crystallized in *Hunt* and remained a permanent feature of the subsequent jurisprudence.

[25] In retrospect, it can be seen that in *Morguard*, the Court initiated a major shift in the framework governing the conflict of laws in Canada by accepting the validity of the real and substantial connection test as a principle governing the rules applicable to conflicts. In view of its importance, the case merits closer consideration. At issue in *Morguard* was an application to enforce, in British Columbia, a judgment rendered in Alberta against a resident of British Columbia. The claim related to a debt secured by a mortgage on property in Alberta. The parties were resident in Alberta at the time the loan was made. La Forest J., writing for a unanimous Court, called for a re-evaluation of relationships between the courts of the provinces within the Canadian federation. The creation of the Canadian federation established an internal space within which exchanges should occur more freely than between independent states.

The principle of comity and the principles of fairness and order applicable within a federal space required that the rules of private international law be adjusted (*Morguard*, at pp. 1095-96).

[26] In *Morguard*, the Court held that the courts of a province must recognize and enforce a judgment of a court of another province if a real and substantial connection exists between that court and the subject matter of the litigation. Another purpose of the test was to prevent improper assumptions of jurisdiction by the courts of a province. Thus, the test was designed to ensure that claims are not prosecuted in a jurisdiction that has little or no connection with either the transactions or the parties, and it requires that a judgment rendered by a court which has properly assumed jurisdiction in a given case be recognized and enforced. La Forest J. did not seek to determine the precise content of this real and substantial connection test (*Morguard*, at p. 1108), nor did he elaborate on the strength of the connection. Rather, he held that the connections between the matters or the parties, on the one hand, and the court, on the other, must be of some significance in order to promote order and fairness. They must not be “tenuous” (p. 1110). La Forest J. added that the requirement of a real and substantial connection was consistent with the constitutional imperative that provincial power be exercised “in the province” (p. 1109). Because the appeal had not been argued on constitutional grounds, however, he refrained from determining whether the real and substantial connection test should be considered a constitutional test.

[27] The Court's subsequent judgment in *Hunt* confirmed the constitutional nature of the real and substantial connection test. That case concerned the application of a "blocking" statute enacted by the Quebec legislature that prohibited the transfer to other jurisdictions of certain documents kept by corporations in Quebec, even in the context of court litigation. The Court found that the statute was not applicable to litigation conducted in British Columbia. It held that assumptions of jurisdiction by a province and its courts must be grounded in the principles of order and fairness in the judicial system. The real and substantial connection test from *Morguard* reflected the need for limits on assumptions of jurisdiction by a province's courts (*Hunt*, at p. 325). Any improper assumption of jurisdiction would be negated by the requirement that there be a "real and substantial connection" (p. 328; see C. Emanuelli, *Droit international privé québécois* (3rd ed. 2011), at p. 38).

[28] Since *Hunt*, the real and substantial connection test has been recognized as a constitutional imperative in the application of the conflicts rules. It reflects the limits of provincial legislative and judicial powers and has thus become more than a conflicts rule. Its application was extended to the recognition and enforcement of foreign judgments in *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416.

[29] But, in the common law, the nature of the conflicts rules that would accord with the constitutional imperative has remained largely undeveloped in this Court's jurisprudence. Although the real and substantial connection test has been consistently applied both as a constitutional test and as a principle of private

international law, since *Hunt*, the Court has generally declined to articulate the content of the private international law rules that would satisfy the test's constitutional requirements or to develop a framework for them. The Court has continued to affirm the relevance and importance of the test and has even extended it to foreign judgments, but without attempting to elaborate upon the rules it requires (see *Beals*, at paras. 23 and 28, *per* Major J.).

[30] So the test does exist. But what does it mean? 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. Some academic commentators view the second approach as critical in order to maintain order, efficiency and predictability in this area of the law. Indeed, the real and substantial connection test itself has been criticized as being much too loose and unpredictable to facilitate an orderly resolution of conflicts issues (see Castel; J. Blom and E. Edinger, "The Chimera of the Real and Substantial Connection Test" (2005), 38 *U.B.C. L. Rev.* 373).

[31] Thus, in the course of this review, we should remain mindful of the distinction between the real and substantial connection test as a constitutional principle and the same test as the organizing principle of the law of conflicts. With respect to the constitutional principle, the territorial limits on provincial legislative competence and on the authority of the courts of the provinces derive from the text of s. 92 of the *Constitution Act, 1867*. These limits are, in essence, concerned with the legitimate exercise of state power, be it legislative or adjudicative. 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.

[32] As can be observed from the jurisprudence, in Canadian constitutional law, the real and substantial connection test has given expression to the constitutionally imposed territorial limits that underlie the requirement of legitimacy in the exercise of the state's power of adjudication. This test suggests that the connection between a state and a dispute cannot be weak or hypothetical. A weak or hypothetical connection would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute.

[33] 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 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.

[34] This case concerns the elaboration of the “real and substantial connection” test as an appropriate common law conflicts rule for the assumption of jurisdiction. I leave further elaboration of the content of the constitutional test for adjudicative jurisdiction for a case in which a conflicts rule is challenged on the basis of inconsistency with constitutionally imposed territorial limits. 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.

[35] Turning to the search for appropriate conflicts rules, the trend is towards retaining or establishing a system of connecting factors informed by principles for applying them, as opposed to relying on almost pure judicial discretion to achieve order and fairness. This trend is apparent in the laws passed by certain provincial legislatures and is reflected in a number of judicial decisions. These decisions include the important jurisprudential current that the Ontario Court of Appeal has been developing since *Muscutt*, which is in issue in the cases at bar. The real and substantial connection test should be viewed not in isolation, but rather in the context of its historical roots, contemporary legislative developments, the academic literature and initiatives aimed at developing and modernizing Canada's conflicts rules. The test was not born *ex nihilo*, without any awareness of the methods and techniques that evolved in the field of private international law. In this respect, both the common law and the civil law have relied largely on the selection and use of a number of specific objective factual connections.

[36] In *Hunt*, La Forest J. cautioned against casting aside all the traditional connections. In commenting on the difficulties of framing an appropriate test for a reasonable assumption of jurisdiction and on the development of the real and substantial connection test, he wrote:

The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these. However, though some of these may well require reconsideration in light of *Morguard*, the connections relied on under the traditional rules are a good place to start. [p. 325]

[37] Not long after *Hunt*, the Court rendered its judgment in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, a case concerned mainly with determining what law should apply to a tort. In it, too, the Court's concern was to assure predictability in the application of the law of conflicts to tort claims. The Court established a new conflicts rule in respect of torts, abandoning the rule it had adopted in *McLean v. Pettigrew*, [1945] S.C.R. 62, that favoured the law of the forum (*lex fori*) and holding that, in principle, the law governing the tort should be that of the place where the tort occurred (*lex loci delicti*). The *situs* of the tort would also justify the assumption of jurisdiction by the courts of a province. The Court did not at that time rely solely on the real and substantial connection test as a conflicts rule. In a sense, it held that in this context, the objectives of fairness and efficiency in the conflicts system would be better served by relying on factual connections with the place where the tort occurred.

[38] In La Forest J.'s opinion, *Morguard* prevented courts from overreaching by entering into matters in which they had little or no interest (*Tolofson*, at p. 1049). But he also cautioned against building a system of private international law based solely on the expectations of the parties and concerns of fairness in a specific case, as such a system could hardly be considered rational. A degree of predictability or reliability must be assured:

The truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law. Indeed in the present context it wholly obscures the nature of the problem. In dealing with legal issues having an impact in more than one legal jurisdiction, we are not really

engaged in that kind of interest balancing. We are engaged in a structural problem.

(*Tolofson*, at pp. 1046-47)

To La Forest J. in *Tolofson*, order was needed in the conflicts system, and was even a precondition to justice (p. 1058). Certainty was one of the key purposes being pursued in framing a conflicts rule (p. 1061). With this in mind, the Court crafted what it hoped would be a clear conflicts rule for torts that would bring a degree of certainty to this part of tort law and private international law (pp. 1062-64). Subject to the constitutional requirement established in *Morguard*, this rule would make it possible to identify some connecting factors linking the court or the law to the matter and to the parties. The presence of such factors would not necessarily resolve everything. Specific torts might raise particular difficulties that could require crafting carefully defined exceptions (p. 1050). Such difficulties indeed arise in the companion cases of *Breeden* and *Éditions Écosociété Inc.* Nevertheless, a conflicts rule based on specific connections seemed likely to introduce greater certainty into the interpretation and application of private international law principles in Canada.

[39] Legislative action since *Morguard* and *Hunt* points in the same direction. Without entering into the details of the complex, often flexible and nuanced, system of conflicts rules that became part of the *Civil Code of Québec* in 1994, it is worth mentioning that the *Civil Code* sets out a number of specific conflicts rules that identify connecting factors to be applied in various international or interprovincial situations. This Court has discussed the *Civil Code*'s scheme on a number of

occasions. In particular, in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, it reviewed the scheme applicable to the assumption by Quebec courts of jurisdiction over situations involving delictual or quasi-delictual liability in an international or interprovincial context.

[40] Across Canada, various initiatives have been undertaken to flesh out the real and substantial connection test. For example, the Uniform Law Conference of Canada proposed a uniform Act to govern issues related to jurisdiction and to the doctrine of *forum non conveniens* (see *Uniform Court Jurisdiction and Proceedings Transfer Act* (“*CJPTA*”) (online).

[41] The *CJPTA* focusses mainly on issues related to the assumption of jurisdiction. Section 3(e) provides that a court may assume jurisdiction if “there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based” (text in brackets in original). Section 10 enumerates a variety of circumstances in which such a connection would be presumed to exist. For example, it lists a number of factors that might apply where the purpose of the proceeding is the determination of property rights or rights related to a contract. In the case of tort claims, s. 10(g) provides that the commission of a tort in a province would be a proper basis for the assumption of jurisdiction by that province’s courts. Section 10 states that the list of connecting factors would not be closed and that other circumstances might be proven in order to establish a real and substantial connection. The *CJPTA* also includes specific provisions regarding forum

of necessity (s. 6) and *forum non conveniens* (s. 11). A number of subsequent provincial statutes are clearly based on the *CJPTA* (see, e.g., *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28; *The Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2nd Sess.), c. 2; *Court Jurisdiction and Proceedings Transfer Act*, S.Y. 2000, c. 7 (not yet in force)).

[42] In these statutes, the legislative scheme proposed in the *CJPTA* has been adopted, with some differences in wording, as they include non-exhaustive lists of prescriptive connecting factors which are presumed to establish a real and substantial connection. Unlike with Book Ten of the *Civil Code of Québec*, the legislatures that enacted them did not attempt to codify the entire field of private international law, but attached particular importance to issues related to the assumption and exercise of jurisdiction.

[43] Unlike in these other provinces, the Ontario legislature has not enacted a statute based on the *CJPTA*. However, the province has established its own set of connecting factors for the purposes of service outside Ontario, which are set out in the *Ontario Rules of Civil Procedure*. These factors, which are found in rule 17.02, are similar, in part, to those of the *CJPTA* and of the statutes based on the *CJPTA*. It has been observed, though, that rule 17.02 is purely procedural in nature and does not by itself establish jurisdiction in a case (P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2010), at p. 121).

(5) Understanding the Real and Substantial Connection Test — The Ontario Court of Appeal in *Muscutt*

[44] Given the absence of statutory rules, the Ontario Court of Appeal endeavoured to establish a common law framework for the application of the real and substantial connection test in its important judgment in *Muscutt*. At issue in that case was a claim in tort. An Ontario resident had been injured in a car crash in Alberta. The four defendants lived in Alberta at the time. One of them moved to Ontario after the accident. The plaintiff returned to Ontario and sued all the defendants in Ontario. Two of the Alberta defendants moved to stay the action for want of jurisdiction and, in the alternative, on the basis of *forum non conveniens*. They argued that the action should be stayed for want of jurisdiction. They also challenged the constitutional validity of the provisions of the Ontario rules on service outside the province. In their opinion, those provisions were *ultra vires* the province of Ontario because they had an extraterritorial effect. The Ontario Superior Court of Justice dismissed the constitutional challenge and assumed jurisdiction. The matter was then appealed to the Court of Appeal, which took the opportunity to consider the constitutional issues, although the main focus of its decision was on the content and the application of the real and substantial connection test.

[45] The Court of Appeal quickly disposed of the argument that rule 17.02(h) was unconstitutional. It acknowledged that the real and substantial connection test imposed constitutional limits on the assumption of jurisdiction by a province's courts. But in its opinion, rule 17.02(h) was purely procedural and did not by itself determine

the issue of the jurisdiction of the Ontario courts. The rule applied within the limits of the real and substantial connection test and did not resolve the issue of the assumption of jurisdiction (*Muscutt*, at paras. 50-52).

[46] The Court of Appeal then turned to the central issue in the case: whether it was open to the Superior Court of Justice to assume jurisdiction. Sharpe J.A. first sought to draw a clear distinction between the assumption of jurisdiction itself and *forum non conveniens*, which concerns the court's discretion to decline to exercise its jurisdiction. He cautioned against conflating what he viewed as different analytical stages in a situation in which the assumption of jurisdiction is in issue. A court must determine whether it has jurisdiction by applying the appropriate principles governing the assumption of jurisdiction. If it does have jurisdiction, it might then have to consider whether it should decline to exercise that jurisdiction in favour of a more appropriate forum (*Muscutt*, at paras. 40-42). The critical step in this process consists in determining when a court can properly assume jurisdiction in light of the constitutional limits imposed by the real and substantial connection test.

[47] Sharpe J.A. emphasized the importance of this Court's decisions — from *Morguard* to *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 — in the re-crafting of the traditional approaches to the resolution of conflicts in private international law. The adoption of the real and substantial connection test mandated a flexible approach to the assumption of jurisdiction informed by the underlying requirements of order and fairness. This

approach required a concrete analysis of a number of factors that would allow a court to decide whether a sufficient connection existed between the forum and the subject matter of the litigation rather than with the parties. The court was to look not for the strongest possible connection with the forum, but for a minimum connection sufficient to meet the constitutional requirement that the matter be linked to the forum (para. 44). The Court of Appeal held that a court should consider a variety of factors to determine whether it has jurisdiction. Sharpe J.A. recommended taking a broad approach to jurisdiction. The defendant's relationship with the forum might be an "important" connecting factor, but not a "necessary" one (para. 74) (emphasis deleted).

[48] Although the Court of Appeal acknowledged the importance of flexibility, it stressed that clarity and certainty are also necessary characteristics of the conflicts system. It accordingly developed a list of eight factors to be considered when deciding whether an assumption of jurisdiction is justified:

- (1) the connection between the forum and the plaintiff's claim;
- (2) the connection between the forum and the defendant;
- (3) unfairness to the defendant in assuming jurisdiction;
- (4) unfairness to the plaintiff in not assuming jurisdiction;
- (5) the involvement of other parties to the suit;
- (6) the court's willingness to recognize and enforce an extraprovincial judgment rendered on the same jurisdictional basis;
- (7) whether the case is interprovincial or international in nature; and

- (8) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

[49] In the Court of Appeal's opinion, no single factor should be determinative. In Sharpe J.A.'s words, "all relevant factors should be considered and weighed together" (*Muscutt*, at para. 76). The Court of Appeal held that the Superior Court of Justice could assume jurisdiction in the case before it. It turned briefly to the issue of *forum non conveniens*, but found that an Alberta court would not be a more appropriate forum (para. 115).

[50] At the same time as its decision in *Muscutt*, the Court of Appeal applied this new template to four other cases in which the assumption of jurisdiction and *forum non conveniens* were in issue. In those appeals, it held that the Ontario courts should not assume jurisdiction, because the connections with Ontario were too insignificant to satisfy the real and substantial connection test. All four cases involved Ontario residents who had suffered injuries in accidents outside Canada and filed suits in Ontario courts (*Lemmex v. Bernard* (2002), 60 O.R. (3d) 54; *Gajraj v. DeBenardo* (2002), 60 O.R. (3d) 68; *Sinclair v. Cracker Barrel Old Country Store, Inc.* (2002), 60 O.R. (3d) 76; *Leufkens v. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84). All the actions were dismissed in respect of the foreign defendants. The Court of Appeal found that the facts that the plaintiffs resided in Ontario and had sustained damage in the province did not create a real and substantial connection between the litigation and the Ontario courts. Since the courts lacked jurisdiction,

there was no need for the Court of Appeal to consider the *forum non conveniens* arguments.

(6) Reconsideration of *Muscutt* by the Ontario Court of Appeal

[51] A few years after *Muscutt*, the Court of Appeal decided that, in the cases now before this Court, a review of the existing framework for the assumption of jurisdiction by Ontario courts and of issues related to *forum non conveniens* had become necessary. Since *Muscutt*, Ontario courts had consistently been applying the framework adopted in that case. Outside Ontario, *Muscutt* was considered an influential authority, and its framework was often accepted as an appropriate one for resolving issues related to the assumption of jurisdiction. But as I mentioned above, a number of common law provinces preferred to adopt the framework proposed in the *CJPTA*. On occasion, courts outside Ontario expressed reservations about certain aspects of the *Muscutt* framework (*Coutu v. Gauthier Estate*, 2006 NBCA 16, 296 N.B.R. (2d) 34, at paras. 67-68; *Fewer v. Ellis*, 2011 NLCA 17, 305 Nfld. & P.E.I.R. 39). It was suggested that the *Muscutt* test gave judges too much latitude in exercising their discretion on a case-by-case basis and was thus incompatible with the objectives of order and predictability in the assumption of jurisdiction. The wide parameters of this broad jurisdiction might also lead a court to conflate the jurisdictional analysis and the application of the doctrine of *forum non conveniens* in a search for the better or more appropriate forum in any given case. The analysis under the *Muscutt* test could also generate an instinctive bias in favour of the forum chosen by the plaintiff.

(7) The New *Van Breda-Charron* Approach of the Ontario Court of Appeal

[52] As the Court of Appeal noted, it had heard a variety of opinions and conflicting suggestions regarding the need to reframe the *Muscutt* test and how this should be done. Some of the litigants wanted to retain *Muscutt* as it was; others proposed the adoption of a test based on a list of presumptive connecting factors similar to that of the *CJPTA* (*Van Breda-Charron*, paras. 56-57). The Court of Appeal declined to craft a common law rule that would in substance reproduce the content of the *CJPTA*. Sharpe J.A. expressed the view that the unpredictability of the *Muscutt* test had been exaggerated, as had the degree of certainty and predictability that would result if the *CJPTA* scheme were adopted (para. 68). He proposed what he saw as a middle way. The Court of Appeal would retain the *Muscutt* test, but would modify it by simplifying it and bringing it closer to the *CJPTA* model. Sharpe J.A. stated: “In refining the *Muscutt* test, we can look to *CJPTA* as a worthy attempt to restate and update the Canadian law of jurisdiction . . . and, in so doing, bring Ontario law into line with the emerging national consensus on appropriate jurisdictional standards” (para. 69).

[53] On that basis, the Court of Appeal reframed the *Muscutt* test in part. The first change, as Sharpe J.A. stated, moved the existing framework closer to that of the *CJPTA*. It was the creation of a category-based presumption of jurisdiction modelled on s. 10 of the *CJPTA*. In the absence of statutory connecting factors, the court decided to rely for this purpose on the factors governing service outside Ontario set out in rule 17.02 of the Ontario *Rules of Civil Procedure* (para. 71). Sharpe J.A.

asserted that most of the connecting factors enumerated in rule 17.02, such as the fact that a contract was made in Ontario (rule 17.02(f)) or a tort was committed in the province (rule 17.02(g)), would presumptively confirm the jurisdiction of the Ontario court (para. 72). In other words, whenever one of these factors was established, a real and substantial connection justifying the assumption of jurisdiction by an Ontario court would be presumed to exist.

[54] Sharpe J.A. added that where the presumption applied, it would be rebuttable. It would be open to a party to argue that, even though a presumptive connection existed, the real and substantial connection test had not been met (para. 72). Sharpe J.A. stated that these changes would be consistent with the incremental approach to the development of common law rules. In addition, almost all the post-*Muscutt* cases that he had reviewed seemed to have been resolved by one or another of the factors listed in rule 17.02 (paras. 74-75).

[55] According to this view, the appropriate factors generally operate as reliable markers of jurisdiction at common law. The adoption of these markers would mitigate the complexity and unpredictability of the *Muscutt* test. Sharpe J.A. noted that the jurisprudence on service *ex juris* provides support for the use of these factors as indicators of a real and substantial connection. For example, in *Hunt*, La Forest J. had observed that, even if some of the traditional rules of jurisdiction might have to be recast in light of *Morguard*, the established factors could nevertheless be viewed as “a good place to start” (p. 325; see also *Spar Aerospace*, at paras. 55-56, on the

provisions of the *Civil Code of Québec* applicable to the assumption by Quebec courts of jurisdiction over situations involving delictual and quasi-delictual liability). But Sharpe J.A. declined to give presumptive effect to the factors set out in rules 17.02(h) (damage sustained in Ontario) and 17.02(o) (necessary or proper party). Neither of these factors is included in the *CJPTA*. Nor have they gained broad acceptance as reliable indicators of jurisdiction. Indeed, the Court of Appeal found in *Muscutt* and its companion cases that the factor of “damage sustained in Ontario” was often not reliable and significant enough to justify an assumption of jurisdiction by an Ontario court.

[56] Sharpe J.A. reaffirmed the need to draw a clear distinction between assuming jurisdiction and deciding whether to decline to exercise it on the basis of the *forum non conveniens* doctrine. He cautioned against confusing these two different steps in the resolution of a conflicts issue and emphasized that the factors that would justify a stay in the *forum non conveniens* analysis should not be worked into the jurisdiction *simpliciter* analysis (paras. 81-82 and 101). The conflation of the two analyses may have been the result of an unduly broad interpretation of the fairness factors of the *Muscutt* analysis (para. 81).

[57] Building on this first principle that recognized the list of presumptive connecting factors, Sharpe J.A. re-crafted the *Muscutt* test. He retained part of the *Muscutt* analysis, merged some of its factors and reviewed the roles of other principles governing the assumption of jurisdiction. The defendants’ connection with

the court seized of the action continued to be a valid and important consideration. However, the connection between the plaintiffs' claim and the forum was maintained as a core element of the real and substantial connection test (paras. 87-88). A test based solely on the defendant's contacts with the jurisdiction would be "unduly restrictive" (para. 86).

[58] The Court of Appeal merged the two factors related to fairness to the parties of assuming or declining jurisdiction into a single one. At the same time, it recommended that judges avoid treating the consideration of fairness as a separate inquiry distinct from the core of the test, since fairness cannot compensate for weak connections. Sharpe J.A. understood, however, the need to retain fairness to the plaintiff and to the defendant as an analytical tool in assessing the relevance, quality and strength of the connections with the forum in order to determine whether assuming jurisdiction would accord with the principles of order and fairness (paras. 93, 95-96 and 98).

[59] Sharpe J.A. went on to observe that considerations of fairness would support the view that the forum of necessity doctrine is an exceptional basis for assuming jurisdiction (para. 100). I add that the forum of necessity issue is not before this Court in these appeals, and I will not need to address it here.

[60] According to Sharpe J.A., the involvement of other parties would remain a relevant factor, but its importance would be downgraded. It should not be routinely

considered but would become relevant only if a party raised it as a connecting factor (para. 102).

[61] He accepted that acts or conduct short of residence that take place in the jurisdiction will often support a finding that a real and substantial connection has been established (para. 92).

[62] In the future, Sharpe J.A. stated, whether the courts would be willing to recognize and enforce a foreign judgment should not be treated as a separate factor to be weighed against the other connecting factors in determining jurisdiction. Rather, it is a general and overarching principle that constrains, or “disciplines”, as he wrote, the assumption of jurisdiction against extraprovincial defendants. A court should not assume jurisdiction if it would not be prepared to recognize and enforce a foreign judgment rendered on the same jurisdictional basis (para. 103). Whether the case is international or interprovincial was also removed from the list of factors. This would be treated as a question of law liable to be considered in the real and substantial connection analysis (para. 106). The court adopted the same approach in respect of comity and the standards of jurisdiction and of recognition and enforcement of judgments prevailing elsewhere. These considerations, while remaining relevant to the real and substantial connection analysis, would no longer serve as specific factors (paras. 107-8).

[63] Finally, the Court of Appeal held that considerations related to foreign law remain relevant to the issue of the assumption of jurisdiction. In Sharpe J.A.’s

view, evidence on how foreign courts would treat such cases might be helpful (para. 107). I note in passing, however, that undue emphasis on juridical disadvantage as a factor in the jurisdictional analysis appears to be hardly consonant with the principle of comity that should govern legal relationships between modern democratic states, as this Court held in *Beals*. In particular, such an emphasis would seem hard to reconcile with the principle of comity that should govern relationships between the courts of different provinces within the same federal state, as this Court held in *Morguard* and *Hunt*.

[64] In summary, the *Van Breda-Charron* approach offers a simplified test in which the roles of a number of the factors of the *Muscutt* test have been modified. In short, when one of the presumptive connecting factors applies, the court will assume jurisdiction unless the defendant can demonstrate the absence of a real and substantial connection. If, on the other hand, none of the presumptive connecting factors are found to apply to the claim, the onus rests on the plaintiff to prove that a sufficient relationship exists between the litigation and the forum. In addition to the list of presumptive and non-presumptive factors, parties can rely on other connecting factors informed by the principles that govern the analysis.

[65] I will now turn to the issue of whether the Court of Appeal was right to hold that it was open to the Ontario courts to assume jurisdiction in the two cases now before us. If I conclude that it was open to them to do so, I will then discuss whether

they should have declined to exercise their jurisdiction under the principles of *forum non conveniens*.

(8) Framework for the Assumption of Jurisdiction

[66] In this Court, as in the Court of Appeal, the parties and the interveners have expressed sharply different views about whether and how the law of conflicts should be changed in respect of the assumption of jurisdiction. As might be expected, the disagreements extend to the impact of possible changes on the outcome of these appeals. The conflicting approaches articulated in this Court reflect the tension between a search for flexibility, which is closely connected with concerns about fairness to individuals engaged in litigation, and a desire to ensure greater predictability and consistency in the institutional process for the resolution of conflict of laws issues related to the assumption and exercise of jurisdiction. Indeed, striking a proper balance between flexibility and predictability, or between fairness and order, has been a constant theme in the Canadian jurisprudence and academic literature since this Court's judgments in *Morguard*, *Hunt*, *Amchem* and *Tolofson*.

[67] The real and substantial connection test is now well established. However, it is clear that dissatisfaction with it and uncertainty about its meaning and conditions of application have been growing, and that there is now a perceived need for greater direction on how it applies. I adverted above to the need to draw a distinction between the constitutional test and the rules of private international law — two aspects of the law of conflicts that have sometimes been conflated in previous

cases. At this point, it is necessary to clarify the rules of the conflict of laws in a way that is consistent with the constitutional constraints on the provinces' courts but does not turn every private international law issue into a constitutional one.

[68] The legislatures of several provinces, as well as the Ontario Court of Appeal in *Muscutt* and *Van Breda-Charron*, have responded to these concerns and attempted to provide guidance for the application of the real and substantial connection test. We can build upon these legislative developments and judgments. Indeed, Sharpe J.A. referred in *Van Breda-Charron* to what he described, perhaps with some optimism, as an emerging consensus in Canadian law on how to resolve these issues. On the basis of this perhaps fragile consensus and these developments and judgments, this Court must craft more precisely the rules and principles governing the assumption of jurisdiction by the courts of a province over tort cases in which claimants sue in Ontario, but at least some of the events that gave rise to the claims occurred outside Canada or outside the province. I will also consider how jurisdiction should be exercised or declined under the doctrine of *forum non conveniens*. This said, I remain mindful that the Court is not of course tasked with drafting a complete code of private international law. Principles will be developed as problems arise before the courts. Moreover, all my comments about the development of the common law principles of the law of conflicts are subject to provisions of specific statutes and rules of procedure.

[69] When a court considers issues related to jurisdiction, its analysis must deal first with those concerning the assumption of jurisdiction itself. That analysis must be grounded in a proper understanding of the real and substantial connection test, which has evolved into an important constitutional test or principle that imposes limits on the reach of a province's laws and courts. As I mentioned above, this constitutional test reflects the limited territorial scope of provincial authority under the *Constitution Act, 1867*. At the same time, the Constitution acknowledges that international or interprovincial situations may have effects within a province. Provinces may address such effects in order to resolve issues related to conflicts with their own internal legal systems without overstepping the limits of their constitutional authority (see *Castillo*).

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

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

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

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

[74] The goal of the modern conflicts system is to facilitate exchanges and communications between people in different jurisdictions that have different legal systems. In this sense, it rests on the principle of comity. But comity itself is a very flexible concept. It cannot be understood as a set of well-defined rules, but rather as an attitude of respect for and deference to other states and, in the Canadian context, respect for and deference to other provinces and their courts (*Morguard*, at p. 1095; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 47). Comity cannot subsist in

private international law without order, which requires a degree of stability and predictability in the development and application of the rules governing international or interprovincial relationships. Fairness and justice are necessary characteristics of a legal system, but they cannot be divorced from the requirements of predictability and stability which assure order in the conflicts system. In the words of La Forest J. in *Morguard*, “what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice” (p. 1097; see also H. E. Yntema, “The Objectives of Private International Law” (1957), 35 *Can. Bar Rev.* 721, at p. 741.

[75] 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 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.

[76] For example, the statutes based on the *CJPTA*, and Book Ten of the *Civil Code of Québec* rely on specific facts linking the subject matter of the litigation to the

jurisdiction. These factors are considered in order to determine whether a real and substantial connection exists for the purposes of the conflicts rules.

[77] In the *CJPTA*, in the case of tort claims, s. 10(g) refers to the *situs* of a tort as a specific factor connecting the act with the jurisdiction. The identification of the *situs* of a tort may well lead to further questions, to which the *CJPTA* does not offer immediate answers, such as: Where did the acts that gave rise to the injury occur? Did they happen in more than one place? Where was the damage suffered or where did it become apparent? Other connecting factors might also become relevant, such as the existence of a contractual relationship (s. 10(e)) or a business carried on in the province (s. 10(h)). Jurisdiction can also be presence-based, when the defendant resides in the province (s. 3(d)). Likewise, the *Civil Code of Québec* contains a list of factors that must be considered in order to determine whether a Quebec authority has jurisdiction over a delictual or quasi-delictual action (art. 3148).

[78] Some authors take the view that the true core of the revised *Van Breda-Charron* test consists of a set of objective factual connections. Likewise, the Court of Appeal stated in *Van Breda-Charron* that the issue was essentially about connections: “The core of the real and substantial connection test is the connection that the plaintiff’s claim has to the forum and the connection of the defendant to the forum respectively” (para. 84; T. Monestier, “A ‘Real and Substantial’ Improvement? Van Breda Reformulates the Law of Jurisdiction in Ontario”, in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation*, 2010, (2010) 185, at pp. 204-7).

In my view, identifying a set of relevant presumptive connecting factors and determining their legal nature and effect will bring greater clarity and predictability to the analysis of the problems of assumption of jurisdiction, while at the same time ensuring consistency with the objectives of fairness and efficiency that underlie this branch of the law.

[79] From this perspective, a clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity. These principles and analytical tools will inform their assessment in order to determine whether the real and substantial connection test is met. However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.

[80] Before I go on to consider of a list of presumptive connecting factors for tort cases, I must define the legal nature of the list. It will not be exhaustive. Rather, it will, first of all, be illustrative of the factual situations in which it will typically be open to a court to assume jurisdiction over a matter. These factors therefore warrant presumptive effect, as the Court of Appeal held in *Van Breda-Charron* (para. 109). 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 (J. Walker, “Reforming the Law of Crossborder Litigation: Judicial Jurisdiction”, consultation paper for the Law Commission of Ontario (March 2009), at pp. 19-20). Although the factors set out in the list are considered presumptive, this does not mean that the list of recognized factors is complete, as it may be reviewed over time and updated by adding new presumptive connecting factors.

[81] The presumption with respect to a factor will not be irrebuttable, however. The defendant might argue that a given connection is inappropriate in the circumstances of the case. In such a case, the defendant will bear the burden of negating the presumptive effect of the listed or new factor and convincing the court that the proposed assumption of jurisdiction would be inappropriate. If no presumptive connecting factor, either listed or new, applies in the circumstances of a case or if the presumption of jurisdiction resulting from such a factor is properly rebutted, the court will lack jurisdiction on the basis of the common law real and substantial connection test. I will elaborate on each of these points below.

(a) *List of Presumptive Connecting Factors*

[82] Jurisdiction must — irrespective of the question of forum of necessity, which I will not discuss here — be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the

forum. The Court of Appeal was moving in this direction in the cases at bar. This means that the courts must rely on a basic list of factors that is drawn at first from past experience in the conflict of laws system and is then updated as the needs of the system evolve. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a “real and substantial” connection for the purposes of the law of conflicts.

[83] At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario *Rules of Civil Procedure*. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction. They are generally consistent with the approach taken in the *CJPTA* and with the recommendations of the Law Commission of Ontario, although some of them are more detailed. They thus offer guidance for the development of this area of private international law.

[84] I would not include general principles or objectives of the conflicts system, such as fairness, efficiency or comity, in this list of presumptive connecting factors. These systemic values may influence the selection of factors or the application of the method of resolution of conflicts. Concerns for the objectives of

the conflicts system might rule out reliance on some particular facts as connecting factors. But they should not themselves be confused with the factual connections that will govern the assumption of jurisdiction.

[85] The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law.

[86] The presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor. (I will not discuss its relevance or importance in the context of the forum of necessity doctrine, which is not at issue in these appeals.) Absent other considerations, the presence of the plaintiff in the jurisdiction will not create a presumptive relationship between the forum and either the subject matter of the litigation or the defendant. On the other hand, a defendant may always be sued in a court of the jurisdiction in which he or she is domiciled or resident (in the case of a legal person, the location of its head office).

[87] Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the

jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires 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. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, “carrying on business” within the meaning of rule 17.02(p) may be an appropriate connecting factor.

[88] The *situs* of the tort is clearly an appropriate connecting factor, as can be seen from rule 17.02(g), and from the *CJPTA*, the *Civil Code of Québec* and the jurisprudence of this Court since *Tolofson*. The difficulty lies in locating the *situs*, not in acknowledging the validity of this factor once the *situs* has been identified. Claims related to contracts made in Ontario would also be properly brought in the Ontario courts (rule 17.02(f)(i)).

[89] The use of damage sustained as a connecting factor may raise difficult issues. For torts like defamation, sustaining damage completes the commission of the tort and often tends to locate the tort in the jurisdiction where the damage is sustained. In other cases, the situation is less clear. The problem with accepting unreservedly that if damage is sustained at a particular place, the claim presumptively falls within the jurisdiction of the courts of the place, is that this risks sweeping into that jurisdiction claims that have only a limited relationship with the forum. An injury

may happen in one place, but the pain and inconvenience resulting from it might be felt in another country and later in a third one. As a result, presumptive effect cannot be accorded to this connecting factor.

[90] To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:

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

(b) *Identifying New Presumptive Connecting Factors*

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

- (a) Similarity of the connecting factor with the recognized presumptive connecting factors;
- (b) Treatment of the connecting factor in the case law;

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

[92] When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order and fairness.

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

undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system.

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

(c) *Rebutting the Presumption of Jurisdiction*

[95] The presumption of jurisdiction that arises where a recognized connecting factor — whether listed or new — applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.

[96] Some examples drawn from the list of presumptive connecting factors applicable in tort matters can assist in illustrating how the presumption of jurisdiction can be rebutted. For instance, where the presumptive connecting factor is a contract

made in the province, the presumption can be rebutted by showing that the contract has little or nothing to do with the subject matter of the litigation. And where the presumptive connecting factor is the fact that the defendant is carrying on business in the province, the presumption can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province. On the other hand, where the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province.

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

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

[99] I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.

[100] To recap, to meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. In these reasons, I have listed some presumptive connecting factors for tort claims. This list is not exhaustive, however, and courts may, over time, identify additional presumptive factors. The presumption of jurisdiction that arises where a recognized presumptive connecting factor — whether listed or new — exists is not irrebuttable. The burden of rebutting it rests on the party challenging the assumption of jurisdiction. If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors exist or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or

stay the action, subject to the possible application of the forum of necessity doctrine, which I need not address in these reasons. If jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*. I will now turn to that issue.

(9) Doctrine of *Forum Non Conveniens* and the Exercise of Jurisdiction

[101] As I mentioned above, 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.

[102] Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.

[103] 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 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.

[104] This Court reviewed and structured the method of application of the doctrine of *forum non conveniens* in *Amchem*. It built on the existing jurisprudence, and in particular on the judgment of the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460. The doctrine tempers the consequences of a strict application of the rules governing the assumption of jurisdiction. As those rules are, at their core, based on establishing the existence of objective factual connections, their use by the courts might give rise to concerns about their potential rigidity and lack of consideration for the actual circumstances of the parties. When it is invoked, the doctrine of *forum non conveniens* requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. It is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. The court can stay proceedings brought before it on the basis of the doctrine.

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

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
- (b) the law to be applied to issues in the proceeding;
- (c) the desirability of avoiding multiplicity of legal proceedings;
- (d) the desirability of avoiding conflicting decisions in different courts;
- (e) the enforcement of an eventual judgment; and
- (f) the fair and efficient working of the Canadian legal system as a whole. [s. 11(2)]

[106] British Columbia’s *Court Jurisdiction and Proceedings Transfer Act*, which is based on the *CJPTA*, contains an identical provision — s. 11 — on *forum non conveniens*. In *Teck Cominco Metals Ltd. v. Lloyd’s Underwriters*, 2009 SCC 11,

[2009] 1 S.C.R. 321, at para. 22, this Court stated that s. 11 of the British Columbia statute was intended to “codify” *forum non conveniens*. Article 3135 of the *Civil Code of Québec* provides that *forum non conveniens* forms part of the private international law of Quebec, but it does not contain a description of the factors that are to govern the application of the doctrine in Quebec law. The courts are left with the tasks of developing an approach to applying it and of identifying the relevant considerations.

[107] Quebec’s courts have adopted an approach that, although basically identical to that of the common law courts, is subject to the indication in art. 3135 that *forum non conveniens* is an exceptional recourse. A good example of this can be found in the judgment of the Quebec Court of Appeal in *Oppenheim forfait GMBH v. Lexus maritime inc.*, 1998 CanLII 13001, in which an action brought in Quebec was stayed in favour of a German court on the basis of *forum non conveniens*. Pidgeon J.A. emphasized the wide-ranging and contextual nature of a *forum non conveniens* analysis. The judge might consider such factors as the domicile of the parties, the locations of witnesses and of pieces of evidence, parallel proceedings, juridical advantage, the interests of both parties and the interests of justice (pp. 7-8; see also *Spar Aerospace*, at para. 71; J. A. Talpis, “*If I am from Grand-Mère, Why Am I Being Sued in Texas?*”, *Responding with the collaboration of S. L. Kath, to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001), at pp. 44-45).

[108] 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 Québec*, 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 . . .”.

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

[110] As I mentioned above, 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.

[111] Loss of juridical advantage is a difficulty that could arise should the action be stayed in favour of a court of another province or country. This difficulty is aggravated by the possible conflation of two different issues: the impact of the procedural rules governing the conduct of the trial, and the proper substantive law for the legal situation, that is, in the context of these two appeals, the proper law of the tort. 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. In any event, if parties plead

the foreign law, the court may well need to consider the issue and determine whether it should apply that law once it is proved. Even if the jurisdictional analysis leads to the conclusion that courts in different states might properly entertain an action, the same substantive law may apply, at least in theory, wherever the case is heard.

[112] 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. This factor obviously becomes more relevant where foreign countries are involved, but 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. At this point, the decision falls within the reasoned discretion of the trial court. The exercise of discretion will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts, which, as I emphasized above, takes place at an interlocutory or preliminary stage. I will now consider whether the Ontario courts properly assumed jurisdiction in these cases and, if so, whether they should have declined to exercise it on the basis of *forum non conveniens*.

(10) Application

[113] Before discussing the outcomes in the two appeals, I must note that the evidence was not the same in *Van Breda* and *Charron*, although they did raise similar legal issues and their factual matrices were the same in important aspects. The Court of Appeal rightly observed that the evidence about Club Resorts' activities in Ontario was not identical in the two cases. In particular, the plaintiffs in *Charron*, unlike the plaintiffs in *Van Breda*, asserted that the SuperClubs group of companies, to which the appellant Club Resorts belonged, maintained an office near Toronto and that Club Resorts had availed itself of that office's services. They also relied on the fact that representatives of Club Resorts had travelled to Ontario to promote their business. Moreover, it is important to note that in considering the decisions of the courts below, this Court must show deference to the findings of fact of the judge of the Superior Court of Justice.

(a) *Van Breda*

[114] In *Van Breda*, there is little evidence about the existence of sufficient factual connections. Ms. Van Breda's accident and physical injuries happened in Cuba. Mr. Berg and Ms. Van Breda were living in Ontario at the time of their trip. After the accident, however, they did not return to Ontario, as they moved first to Calgary and later to British Columbia, where they were living when they brought their action. Ms. Van Breda's damage, pain and suffering have happened mostly in British Columbia, like most of the treatments she has received. In addition, the evidence is essentially silent about Club Resorts' activities in Ontario, except on one

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

[115] The motion judge and the Court of Appeal concluded, however, that a sufficient connection between the claim and the province arose out of the contractual relationship created between Mr. Berg and Club Resorts through the defendant Denis. Mr. Denis, who operated a specialized travel agency known as Sport au Soleil, had an agreement with Club Resorts under which he found tennis and squash professionals and sent them to Club Resorts hotels. In exchange for bed and board at a resort, each professional would give a few hours of instruction to guests of the hotel during his or her stay. It appears that Mr. Denis received some form of compensation from Club Resorts.

[116] I find no reviewable error in the findings that Mr. Denis had the authority to represent Club Resorts and that a contract existed under which Mr. Berg was to provide services to Club Resorts. The benefit of this contract, accommodation at the resort, was extended to Ms. Van Breda, who was injured while there in the context of

Mr. Berg's performance of his contractual obligation. Deference is owed to the motion judge's findings. No palpable and overriding error has been established. A contract was entered into in Ontario and a relationship was thus created in Ontario between Mr. Berg, Club Resorts and Ms. Van Breda, who was brought within the scope of this relationship by the terms of the contract.

[117] The existence of a contract made in Ontario that is connected with the litigation is a presumptive connecting factor that, on its face, entitles the courts of Ontario to assume jurisdiction in this case. The events that gave rise to the claim flowed from the relationship created by the contract. Club Resorts has failed to rebut the presumption of jurisdiction that arises where this factor applies. On this basis, I would uphold the Court of Appeal's conclusion that there was a sufficient connection between the Ontario court and the subject matter of the litigation.

[118] Whether the Superior Court of Justice should have declined jurisdiction on the basis of the doctrine of *forum non conveniens* remains to be determined. Club Resorts had the burden of showing that a Cuban court would clearly be a more appropriate forum. I recognize that a sufficient connection exists between Cuba and the subject matter of the litigation to support an action there. The accident happened on a Cuban beach, at a hotel managed by Club Resorts. The initial injury was suffered there. Some of the potential defendants reside in Cuba. However, other issues related to fairness to the parties and to the efficient disposition of the claim must be considered. A trial held in Cuba would 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. But on this point the evidence is far from clear and satisfactory. In the end, the appellant has not shown that a Cuban court would clearly be a more appropriate forum. I agree that the motion judge made no reviewable error in deciding not to decline to exercise his jurisdiction, and I would affirm the Court of Appeal's judgment dismissing the appeal from that decision.

(b) *Charron*

[119] In *Charron*, the existence of a sufficient connection with the Ontario court was hotly disputed. As in *Van Breda*, the accident itself happened in Cuba. On the other hand, Mrs. Charron returned to Ontario after her husband's death and continued to reside in that province. The damage claimed by the respondents was sustained largely in Ontario. But these facts do not constitute presumptive connecting factors and do not support the assumption of jurisdiction on the basis of the real and substantial connection test.

[120] However, the evidence does support the presumptive connecting factor of carrying on business in the jurisdiction. The Superior Court of Justice assumed jurisdiction, and the Court of Appeal upheld its decision, mainly on the basis of an

active commercial presence in Ontario that was not limited to advertising campaigns targeting the Ontario market. In the opinion of the courts below, Club Resorts had an active presence in Ontario even though its corporate head office was not in that province. Its presence was not limited to advertising activities or to contacts with travel package wholesalers or travel agents. The courts below concluded that the appellant had engaged in significant commercial activities in Ontario, especially through the office of the SuperClubs group, before the Charrons booked their holiday. The booking resulted at least in part from those activities in Ontario. After reviewing the evidence, Sharpe J.A. wrote the following for the Court of Appeal in respect of this factor:

The record reveals that CRL [Club Resorts Ltd.] was directly involved in activity in Ontario to solicit business for the resort. Unlike the defendants in *Leufkens*, *Lemmex* and *Sinclair*, CRL did not confine its activities to its home jurisdiction:

- pursuant to its contract with the Cuban hotel owner, CRL was required to and did promote and advertise the resort using the “SuperClubs” brand in Canada;
- CRL relies on maintaining a high profile for the SuperClubs brand in Ontario as residents of Canada and Ontario represent a high proportion of CRL’s target market;
- CRL was licenced to use the “SuperClubs” label and itself “created” the “SuperClubs Cuba” label and used these labels to market the resort in Ontario
- CRL’s witness Abe Moore agreed on cross-examination:
 - “that CRL was in the business of carrying out activities in countries such as Canada to generate paying guests of the resort”;

- that to do so CRL had to “either directly or engage others to undertake the activity of solicitation, promotion and advertising” in Canada;
- that CRL ensured that it had relationships with others to do so in Ontario to satisfy its contractual obligation to promote the resort;
- CRL representatives regularly travel to Ontario to further CRL’s promotional activity;
- CRL arranged for the preparation and distribution of promotional materials in Ontario; and
- as outlined in the following paragraph, CRL benefited from an office in Ontario that provided information and engaged in the promotion of the SuperClubs brand.

...

In my view, one can fairly infer from this body of evidence that although CRL itself maintained no office in Ontario, CRL is implicated in and benefits from the physical presence in Ontario of an office and contact person held out to the public as representing the same “SuperClubs” brand CRL uses to carry on its business of promoting and operating the resort. [paras. 117 and 119]

[121] The Superior Court of Justice considered this evidence at a preliminary stage on the basis of the parties’ pleadings. The nature and weight of this evidence has been challenged in this Court. But the courts below made findings about its content and about what it meant. The appellant has not demonstrated that the motion judge made any reviewable errors, and deference must be shown to his findings of fact.

[122] Although whether this factor applies was a very hard fought issue in these appeals, the motion judge's findings of fact lead to the conclusion that Club Resorts was carrying on business in Ontario. Club Resorts' commercial activities in Ontario went well beyond promoting a brand and advertising. Its representatives were in the province on a regular basis. It benefited from the physical presence of an office in Ontario. Most significantly, on cross-examination Club Resorts' witness admitted that it was in the business of carrying out activities in Canada. Together, these facts support the conclusion that Club Resorts was carrying on business in Ontario. It follows that the respondents have established that a presumptive connecting factor applies and that the Ontario court is *prima facie* entitled to assume jurisdiction.

[123] Club Resorts has not rebutted the presumption of jurisdiction that arises from this presumptive connecting factor. Its business activities in Ontario were specifically directed at attracting residents of the province, including the Charron family, to stay as paying guests at the resort in Cuba where the accident occurred. It cannot be said that the claim here is unrelated to Club Resorts' business activities in the province. Accordingly, I find that the Ontario court has jurisdiction on the basis of the real and substantial connection test.

[124] I also find that the motion judge made no error in declining to stay the proceedings on the basis of *forum non conveniens*. Club Resorts failed to discharge its burden of showing that a Cuban court would clearly be a more appropriate forum in the circumstances of this case. Considerations of fairness to the parties weigh heavily

in the respondents' favour. The inconvenience to the individual plaintiffs of transferring the litigation is greater than the inconvenience to the corporate defendant of not doing so. On the question of juridical advantage, I refer to my comments about *Van Breda*. I would add that keeping the case in the Ontario courts will probably avert a situation in which the proceedings against the various defendants are split.

IV. Conclusion

[125] For these reasons, I would dismiss Club Resorts' appeals with costs to the respondents other than Bel Air Travel Group Ltd. and Hola Sun Holidays Limited.

Appeals dismissed with costs.

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