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SUPREME COURT OF CANADA LIMITS THE RIGHT TO APPEAL COMMERCIAL ARBITRAL DECISIONS: CONTRACTUAL INTERPRETATION IS A QUESTION OF MIXED FACT AND LAW

MARY PATERSON, LINDSAY RAUCCIO, AND CATHERINE GLEASON-MERCIER

On August 1, 2014, the Supreme Court of Canada (the "S.C.C.") changed the landscape of arbitral and appellate advocacy in contractual disputes. In *Sattva Capital Corp. v. Creston Moly Corp.* [*Sattva*],[1] the S.C.C. considered whether leave to appeal from an arbitral decision made pursuant to the British Columbia *Arbitration Act*[2] should have been granted. The S.C.C. overturned the historical approach to contractual interpretation, in which the construction of a contract was treated as a question of law, holding instead that the interpretation of contracts is an exercise that necessarily involves questions of mixed fact and law. The S.C.C. also reaffirmed the contextual approach to contractual interpretation, wherein evidence of the "surrounding circumstances" in which the contract is formed is admissible. The decision has wide-ranging implications regarding obtaining leave to appeal from the decision of an arbitrator, as well as the practice of appellate advocacy in contract disputes. Prospective appellants will now face significant hurdles in obtaining leave to appeal from decisions that interpret a contract, and will also face challenges on the merits of the appeal.

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The Dispute, the Arbitral Award, and the Path to the S.C.C.

As set out in *Sattva*, the parties entered into a finder's fee agreement in relation to a mining property. After a $1.5 million finder's fee in the form of shares became payable to Sattva, the parties disagreed about the date on which the shares should be valued.[3] Sattva wanted to use an earlier date when a share price of $0.15 would net it 11,460,000 shares; Creston (the counterparty) wanted to use a later date when a share price of $0.70 would require transfer of only 2,454,000 shares. The parties entered into arbitration under the British Columbia *Arbitration Act*. The arbitrator held that Sattva was correct, and ordered that 11,460,000 shares were owed by Creston to Sattva. Then the appeals started:

- The B.C. Supreme Court denied leave to appeal. Pursuant to the *Arbitration Act*, leave to appeal from an arbitrator's decision is only granted in respect of questions of law. The court held that there was no extricable question of law.
- The B.C. Court of Appeal disagreed and held that leave ought to have been granted. It therefore sent the appeal back to the B.C. Supreme Court for a decision on the merits.
- The B.C. Supreme Court dismissed the appeal, holding that the arbitrator's decision was correct.
- The B.C. Court of Appeal again disagreed, reviewed the arbitrator's decision on the standard of correctness, and allowed the appeal, holding that the arbitrator's decision was not correct.

The S.C.C. granted leave to appeal from both the B.C. Court of Appeal's decision on leave and also its decision on the merits. The S.C.C.'s decision contains important comments about a number of topics, including the following:

- the proper approach to contractual interpretation, and in particular, the role of the factual matrix (interchangeably referred to as the "surrounding circumstances")

- contractual interpretation as a question of mixed fact and law (rather than a pure question of law), which reduces the scope for appellate intervention
- the standard of review applicable to an arbitrator's decision on a question of the proper interpretation of a contract. The court held that the appropriate standard should be reasonableness (not correctness) except in respect of constitutional questions or questions of central importance to the legal system as a whole.

As is further discussed below, the decision in *Sattva* will change the way that parties approach the drafting of arbitration agreements, the selection of their arbitrator, the evidence presented in arbitrations and civil actions dealing with issues of contractual interpretation, and the scope for appellate intervention in the event that the arbitrator errs in his or her interpretation of the contract.

The Contextual Approach to Contractual Interpretation

Before *Sattva*, there was some uncertainty about when it was appropriate to refer to the circumstances surrounding contract formation in the interpretive exercise.

The S.C.C. confirmed the contextual approach to contractual interpretation, stating that the principal goal of contractual interpretation is to give effect to the intentions of the parties and the scope of their understanding at the time of contracting.[4] As such, the contract must be read as a whole, and the words in the contract must be given their plain and ordinary meaning consistent with the surrounding circumstances at the time of contracting.[5] The surrounding circumstances—the genesis of the transaction, the background, the context, and the market in which the parties operate—combine to aid a decision maker in ascertaining intention, because words do not have an immutable or absolute meaning.[6]

The S.C.C. also clarified that although the surrounding circumstances regarding the formation of a contract are important, these circumstances "must never be allowed to overwhelm the words of that agreement".[7] Rather, evidence of the surrounding circumstances serves to deepen an understanding of the mutual and objective intentions of the parties, as expressed in the words of the contract.

Furthermore, the S.C.C. noted that while the evidence that forms part of the factual matrix will vary from case to case, it must always be limited to the *objective* evidence of the background facts existing at the time the contract was formed (*i.e.*, the factual matrix is limited to such knowledge that was or reasonably ought to have been within the common knowledge of the parties prior to or at the time of contracting).[8] Given that evidence of the surrounding circumstances is objective, contextual, and is used to determine the meaning of the written words chosen by the parties, it does not offend the parole evidence rule.[9]

By confirming that courts and arbitrators should consider the factual matrix, *Sattva* has resolved conflicting decisions of the S.C.C. and provincial appellate courts regarding whether (1) reference to the surrounding circumstances is appropriate only where ambiguity as to the interpretation of a contract exists,[10] or (2) evidence of the surrounding circumstances is always admissible.[11]

As a practical result of the S.C.C.'s reasons in *Sattva*, parties will need to ensure that the arbitrator or trial judge is presented with all necessary facts so that he or she arrives at the correct interpretation of the agreement. Indeed, *Sattva* suggests that the decision maker will need to place itself in the positions of the parties at the time of contracting in order to properly interpret the contract.

Fewer Appeals of Arbitral Awards: Contractual Interpretation Involves Questions of Mixed Fact and Law

The decision in *Sattva* also impacts a party's ability to appeal from an arbitral decision, because it definitively affirmed the notion that contractual interpretation is a question of mixed fact and law.

Under the British Columbia *Arbitration Act*, which was the applicable arbitration statute in *Sattva*,

leave to appeal to the courts from arbitral awards can be granted only on questions of law. The courts below were divided on whether the dispute in *Sattva* posed a question of mixed fact and law or of pure law. The S.C.C. noted that while historically the determination of the legal rights and obligations of parties under a written contract was considered to be a question of law, some Canadian courts had already abandoned this approach and had instead approached the interpretation of contracts as a question of mixed fact and law.

Because the contextual approach to contractual interpretation requires the decision maker to consider the surrounding circumstances when ascertaining the objective intent of the parties, the S.C.C. concluded that interpreting a contract is a fact-specific exercise:

> [T]he historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in the light of the factual matrix.[12]

The S.C.C. noted that considering contractual interpretation as a question of mixed fact and law is more consistent with the definition of "mixed fact and law" enunciated in *Housen v. Nikolaisen*[13] and *Canada (Director of Investigation and Research) v. Southam Inc.*[14]—namely, applying a legal standard to a set of facts. Indeed, the goal of contractual interpretation is to ascertain the objective intent of the parties at the time of the formation of the contract.[15]

The S.C.C. noted that while it is possible to identify extricable questions of law—such as the application of an incorrect principle, the failure to consider an element of a legal test, or the failure to consider a relevant factor—such pure questions of law are rare, and courts should exercise caution when attempting to isolate a question of law in a dispute over the proper interpretation of a contract.[16]

Practically, the S.C.C.'s decision in *Sattva* is likely to result in fewer parties being granted leave to appeal from arbitral decisions, particularly where the arbitral statute—or the arbitration agreement—limits appeals to questions of law.

The S.C.C. explained in *Sattva* that appellate intervention on issues of contractual interpretation should be limited to those rare instances where the results can be expected to have an impact beyond the parties arguing the case (*i.e.*, cases that have precedential value). Without foreclosing the possibility of such a case, the S.C.C. noted that such instances will be exceedingly rare, given that the interpretation of a contract is rarely of interest beyond the ambit of the parties involved in the dispute.[17]

Harder Appeals: Appealing Arbitral Decisions and the Standard of Review

As a result of *Sattva*, it appears that decision makers, either trial judges or arbitrators, will be owed greater deference in their interpretation of contracts. Decision makers with expertise or who are deciding questions of fact are generally shown deference by appellate courts. With the advent of *Sattva*, however, arbitrators now get the benefit of both deference to fact finding and also deference to expertise. Historically, courts have been less deferential to an arbitrator's findings on the meaning of a particular agreement and have held that the interpretation of a contract is a question of law "in which an arbitrator has no particular expertise over that of courts; the appropriate standard of review is therefore one of correctness. In other words, the arbitrator's award (and in particular, his interpretation of the contract) is required to be 'correct' for it to be upheld in this Court."[18]

The S.C.C. in *Sattva* noted that appeals of commercial arbitral decisions take place under "tightly defined regimes specifically tailored to the objectives of commercial arbitrations".[19] Parties often opt for arbitration, because they have the option to select the individual (or panel of individuals) who will be presiding over the dispute, and arbitrators are selected by the parties for their particular expertise. Furthermore, though distinct from the judicial review regime, the S.C.C. noted that judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial decision maker with particular expertise

tailored to the dispute at hand. For these reasons, aspects of the *Dunsmuir* standard of review framework were determined to be helpful in ascertaining the appropriate standard of review to apply in the case of commercial arbitration awards.[20]

Applying the *Dunsmuir* framework,[21] the standard of review for arbitral decisions—even on questions of contractual interpretation—will be reasonableness unless the question is one that would attract the correctness standard, such as a constitutional question or a question of central importance to the legal system as a whole.[22] When the question is one of mixed fact and law—such as the interpretation of the contract—deference should be accorded to the finder of fact.

Moreover, it appears that trial judges will also be accorded greater appellate deference, given that questions of contractual interpretation are to be considered questions of mixed fact and law. As an example, the Ontario Court of Appeal recently applied *Sattva* to a trial judge's interpretation of a contract. In *Martenfeld v. Collins Barrow Toronto LLP*,[23] the Ontario Court of Appeal found that the quantification of liquidated damages owed under a contract and the relevance of certain schedules, group statements, and the parties' discussions leading up to the formation of the contract were findings of fact or mixed fact and law. As a result, "they attract significant deference from this court. Absent palpable and overriding error, appellate intervention with these findings is precluded".[24]

Lessons Learned: Choose Your Language and Your Arbitrator Carefully

In the wake of the S.C.C.'s decision, parties seeking to challenge an arbitral decision will face an uphill battle in obtaining leave to appeal from questions of contractual interpretation. Parties seeking to preserve their appeal rights should carefully consider their arbitral agreements, including whether to stipulate express language providing for a right of appeal on questions of fact, mixed fact and law, or law, depending on the legislation governing their arbitration agreement. Unlike the B.C. legislation, the Ontario *Arbitration Act* specifically allows parties to appeal questions of fact or mixed fact and law if so provided in their arbitration agreement.[25] While parties may draft a broad appeal clause in order to preserve the ability to appeal an arbitrator's decision in an attempt to "contract out" of *Sattva*, it is possible that courts will review these clauses in light of the S.C.C.'s findings in *Sattva*, which may result in broad appeal clauses being read down or limited in light of the court's jurisdiction to hear the appeal.

Despite the possibility for including a right to appeal questions of mixed fact and law in the arbitration agreement, it seems that arbitrators are more likely to have the final say in contractual disputes based on the more deferential standard of review. Choosing the right arbitrator—and establishing a procedure in the arbitration agreement so that the right arbitrator is chosen—have become more important than ever.

[*Editor's note*: **Mary Paterson**, **Lindsay Rauccio**, and **Catherine Gleason-Mercier** are members of Osler's litigation department, with experience in resolving contractual disputes in court and before arbitrators.]

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1 *Sattva*, [2014] S.C.J. No. 53, 2014 SCC 53.
2 R.S.B.C. 1996, c. 55.
3 *Sattva*, *supra* note 1, para. 7.
4 *Ibid*., para. 47.
5 *Ibid*.
6 *Ibid*.
7 *Ibid*., para. 57.
8 *Ibid*., para. 58.
9 *Ibid*., paras. 60–61.
10 See *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] S.C.J. No. 59, [1998] 2 SCR 129.
11 See *Hi-Tech Group Inc. v. Sears Canada Inc.*, [2001] O.J. No. 33, 52 O.R. (3d) 97 (Ont. C.A.) and *Dumbrell v. Regional Group of Cos.*, [2007] O.J. No. 298, 2007 ONCA 59, para. 54: "A consideration of the context in which the written agreement was made is an integral part of the interpretative process and is not something that is resorted to only where the words viewed in isolation suggest some ambiguity".
12 *Sattva*, *supra* note 1, para. 50.
13 [2002] S.C.J. No. 31, 2002 SCC 33.
14 [1996] S.C.J. No. 116, [1997] 1 SCR 748.
15 *Sattva*, *supra* note 1, para. 49.

[16] *Ibid.*, para. 54.
[17] *Ibid*., paras. 53–55.
[18] *AWS Engineers & Planners Corp. v. Deep River (Town)*, [2005] O.J. No. 68, 249 D.L.R. (4th) 478 (Ont. S.C.), para. 107.
[19] *Sattva, supra* note 1, para. 104.
[20] *Ibid*., para. 105.
[21] *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9.
[22] *Sattva*, *supra* note 1, para. 106.
[23] [2014] O.J. No. 4195, 2014 ONCA 625.
[24] *Ibid*., para. 42.
[25] *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 45(3).

CONTRACTS AND JURISDICTION AFTER *VAN BREDA*

PAMELA SIDEY AND GUY WHITE
NORTON ROSE FULBRIGHT CANADA LLP

In *Van Breda v. Village Resorts Ltd.* [*Van Breda*],[1] the Supreme Court of Canada called for predictability, stability, and fairness in transnational and interprovincial litigation. *Van Breda* set down a test for jurisdiction, based on the presence of specified presumptive connecting factors, and signalled a move away from "an *ad hoc* system made up on the fly on a case-by-case basis".[2]

Presumptive connecting factors are indicators that a jurisdiction has a "real and substantial connection"[3] to the dispute before the court. They should be readily identifiable to enable potential litigants to know where they may bring claims and where they may be required to defend themselves.

Contractual issues present a challenge for predictability, because a contract can create a link between a party and a distant jurisdiction without regard to where the events at issue took place. Courts have recently considered both when a contract to which a defendant is not a party can be a connecting factor and what the presumptive factors ought to be for claims based solely in contract. In addressing these issues, courts continue to grapple with how *Van Breda* applies to both tort disputes involving contracts and purely contractual claims.

In particular, in two recent decisions, the Court of Appeal for Ontario has clarified when the presence of a contract can create jurisdiction over a tort claim, consistent with the principles laid down in *Van Breda*.

The *Van Breda* framework, though set out in the context of a tort case, should be applied in equivalent fashion to the jurisdiction analysis for contract claims; however, Canadian superior courts have not always done so. Jurisdiction should require at least one presumptive connecting factor connecting the contract to the forum, and the presence of multiple non-presumptive connecting factors should not be relevant. Non-presumptive connecting factors should be considered only when the court decides whether to decline jurisdiction in favour of a more appropriate forum (*i.e.*, the *forum non conveniens* analysis) after the court has determined that it has jurisdiction to hear the claim.

"Contract Connected" Presumptive Connecting Factor

One of the presumptive connecting factors identified in *Van Breda* with respect to tort claims is where a "contract connected with the dispute"[4] was entered into in the jurisdiction. In two recent decisions, the Court of Appeal for Ontario has clarified that while the foreign defendant does not need to be a party to the contract, there must be a nexus between the foreign defendant and the contract before jurisdiction will be accepted.

No Nexus between the Defendant and the Ontario Contract: *Tamminga v. Tamminga*

In *Tamminga v. Tamminga* [*Tamminga*],[5] the plaintiff suffered a motor vehicle–related injury in the province of Alberta. The plaintiff was a resident of the province of Ontario, and she commenced an action in Ontario including both (1) tort claims against the vehicle owner and his company, both located in Alberta; and (2) contract claims against her own insurance company, located in Ontario,

based on her uninsured and underinsured motorist coverage.

The question before the Ontario courts was whether the plaintiff's contract claims against her insurer, which arose from the same accident, created a basis for the court to assume jurisdiction over the tort claims against the non-resident alleged tortfeasors.

The Court of Appeal found that there was nothing connecting the insurance contract to the foreign defendants—they were not parties or beneficiaries to the contract, and while an insurance policy contemplates an accident generally, it does not identify a tortfeasor in advance. The connection between the policy and the dispute arose only in the aftermath of the tort. The lack of any nexus between the Ontario contract and the foreign defendants was fatal to the assertion of Ontario jurisdiction over the defendants.

Ontario Contract Connected to the Tort Claim: *Trillium Motor World v. GMC*

In *Trillium Motor World v. General Motors of Canada Ltd.*,[6] the law firm Cassels Brock & Blackwell LLP was hired by the Canadian Automobile Dealers Association to advise members on whether or not they should accept wind-down agreements offered by General Motors Canada Ltd. ("GMC"), where GMC had decided to terminate certain dealerships as a result of the 2008 economic downturn and the bailout of the auto industry.

Several dealers commenced a class action in Ontario, alleging that Cassels Brock's advice had been negligent and that the firm had acted in a conflict of interest, including a conflict in relation to advice provided to the federal government on the GMC bailout. Cassels Brock, in turn, brought third-party claims in negligence for contribution and indemnity against 150 law firms and sole practitioners across Canada who had provided independent legal advice to the terminated dealers. (In order to accept the wind-down agreement, each dealer was required to obtain and attach a certificate of independent legal advice from a local solicitor.) The wind-down agreements were expressly governed by Ontario law, and the court found that the contracts were formed in Ontario.

The third-party solicitors located outside of Ontario brought a motion to challenge the jurisdiction of the Ontario courts over the third-party claims as against them, which was dismissed by the motion judge. The third-party lawyers located in the province of Quebec appealed. The Court of Appeal for Ontario dismissed the appeal, approving the motion judge's finding of jurisdiction on the basis that although the third-party solicitors were not parties to the wind-down agreements, there was a nexus between them and the agreements:

- The third- party lawyers were brought within the scope of the contractual relationship by the very terms of the wind-down agreements, which required that they review the agreement and sign the certificate of independent legal advice (which became a schedule to the agreement).
- The dispute between Cassels Brock and the third-party solicitors concerned the propriety of the legal advice provided by the latter, and this advice concerned the contractual relationship created by the wind-down agreement and the requirements of the certificate of independent legal advice.
- It was reasonable for out-of-province lawyers to be called on to defend Ontario proceedings challenging their advice, where the advice was given in respect of a contract the terms of which provided that it was governed by Ontario law and that all disputes relating to it would be litigated in Ontario.

The Court of Appeal approved the motion judge's holistic approach to the proceedings, which considered the third-party claims in the context of their relationship to the main action and his assessment of the character of the actual work undertaken by the third-party solicitors. The Court of Appeal held that even though Cassels Brock's claims were based, in part, on the contracts for professional services between the Quebec-resident class members and their Quebec-based local lawyers, the advice given under those Quebec contracts was deeply

connected to the Ontario wind-down agreements. This connection to an Ontario contract was sufficient to establish the jurisdiction of the Ontario court over the third-party claims.

The distinction between the facts in *Tamminga* and *Trillium* is plain when considered from the perspective of the foreign defendant, and the decisions support the rationales of fairness and predictability set out in *Van Breda*.

Where a defendant has no connection to a foreign contract, it is impossible for the defendant to predict that it may be subject to proceedings in a foreign jurisdiction. By contrast, where a defendant has performed services with respect to a foreign contract—or has entered into a contract specifically conferring benefits on a foreign person, as was the case in *Van Breda* itself—the defendant might reasonably expect that litigation arising from the contract may occur in the foreign jurisdiction, and it is fair to require the defendant to participate in those foreign proceedings.

Presumptive Connecting Factors in Contract Claims

Van Breda was a tort case, but the Supreme Court's guidance is relevant to the assumption of jurisdiction in contract claims as well. Canadian superior courts have generally applied the *Van Breda* framework to contract claims but have taken differing approaches to the applicable presumptive connecting factors in this area.

In the recent decision of *Bansal v. Ferrara Pan Candy* [*Ferrara Pan Candy*],[7] Justice Veit of Alberta's Court of Queen's Bench disagreed with two decisions of Ontario's Superior Court of Justice, which seemed to introduce uncertainty with respect to the connecting factors that establish jurisdiction over a contract dispute. Her Ladyship concluded that a broad range of connecting factors was not consistent with the Supreme Court's direction in *Van Breda* to focus on predictability and fairness. She looked to the Alberta Rules of Court[8] for guidance, and found four presumptive connecting factors applicable to a claim in contract:

- The defendant is resident in the forum.
- The defendant carries on business in the forum.
- The contract or alleged contract was made, performed, or breached in the forum.
- A tort connected with the contract was committed in the forum.

This list mirrors the four factors described in *Van Breda* for tort claims.[9]

The court in *Ferrara Pan Candy* concluded that it had jurisdiction over the dispute because the contract had been made in Alberta but went on to conclude that Alberta was *forum non conveniens* and that either Ontario or Illinois were clearly more appropriate forums for the litigation of the dispute. In the *forum non conveniens* analysis, as expected, the court considered factors such as (1) what other courts might have original jurisdiction, (2) where agreements between the parties were negotiated and concluded, (3) where the majority of witnesses and records were located, (4) where acts committed in pursuance of an alleged conspiracy related to the contract would have occurred, (5) the potential loss of any juridical advantage for the plaintiffs, and (6) any difficulties the plaintiffs might have with having a foreign judgment recognized in Alberta.[10]

The two Ontario decisions Veit J. declined to follow were *Leone v. Scaffidi* [*Leone*][11] and *Patterson v. EM Technologies* [*EM Technologies*].[12]

In *Leone*, the Ontario Superior Court of Justice considered the validity of a contract relating to division of certain properties in Italy, and the transfer of a property in Ottawa, which was alleged to have invalidated the contract. The court defined the subject matter of the action as "primarily a matter of contract involving the transfer of the Ottawa Property and the enforceability of the Agreement [regarding the division of real property located in Italy]".[13] The characterization of the subject matter of a contract dispute is critical to the determination of whether there is a real and substantial connection between the jurisdiction, the defendant, and the subject matter of the claim.

The court concluded that a real and substantial connection to Ontario was made out, which was appropriate, given that at least one established presumptive connecting factor was clearly present on the facts of the case: the defendants resided in Ottawa, Ontario.[14]

However, Justice Ratushny went on to list a variety of other factors, including that (1) some parties to the action signed the contract in Ontario, (2) the transfer of the Ottawa property took place in Ontario, (3) the alleged breach of the agreement, inducement to breach, and waiver each occurred in Ontario, (4) the parties all lived in Ontario, and (5) most of the witnesses lived in Ontario.[15] While some of these may be presumptive connecting factors for contract disputes, others are likely only non-presumptive connecting factors; so, by stating that "all of these are presumptive connecting factors that, *prima facie*, entitle this Court to assume jurisdiction over the dispute", the judge wandered from the path set by the Supreme Court in *Van Breda* when it prescribed that "courts must rely on a basic list of factors".[16] The court's enumeration of this variety of factors occurred without consideration of the required analysis set out in *Van Breda* for the recognition of new presumptive connecting factors.[17]

A second Ontario case, *EM Technologies*, considered jurisdiction over breach of contract and wrongful dismissal claims. The Superior Court of Justice concluded that jurisdiction was made out both because the defendants were present in Ontario and because they had a real and substantial connection to Ontario. The defendants' real and substantial connection to Ontario was clearly made out based on their carrying on business in Ontario, but the court also canvassed several other factors in its discussion of real and substantial connection, citing *Leone*. These factors included (1) where the employment agreement was entered into, (2) where the plaintiff performed his employment duties, (3) where any breach of the contract occurred, (4) the location of the witnesses, (5) the applicable law, and (6) necessary and proper parties.

In this case, as in *Leone*, some of these factors may be presumptive connecting factors, and others may be determined to be presumptive connecting factors as the jurisprudence develops, but Master Abrams did not reflect on the four considerations set out by the Supreme Court, which indicate a new connecting factor should have presumptive effect:

> (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.[18]

The purpose of having a basic defined set of presumptive connecting factors is to avoid confusion as litigants try to determine where they should bring claims and where they should reasonably expect to be called to answer legal proceedings in an increasingly globalised and complex economic environment. With that goal in mind, the Supreme Court noted, in particular, that a court should not assume jurisdiction on the basis of "the combined effect of a number of non-presumptive connecting factors", which it said 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".[19] While the list of connecting factors described in both *Leone* and *EM Technologies* was set out in *obiter*, the decisions appear to be moving towards allowing non-presumptive connecting factors to impact the *jurisdiction simpliciter* analysis. This creates unnecessary ambiguity with respect to what factors may ground jurisdiction for contract disputes in Ontario.

Conclusion

The Supreme Court in *Van Breda* left open the creation of new presumptive connecting factors, but the court provided clear direction as to the principles that allow the development of new factors:

order, fairness, and comity.[20] Clarity, consistency, and predictability, in particular, promote fairness and efficiency.

The cases discussed in this article demonstrate tension between *Van Breda's* establishment of a short, clear list of defined factors that create consistent and predictable results and the apparent desire of some courts to keep the former practice of taking into account all factors that may be relevant to a litigant seeking to prove or disprove jurisdiction in an individual case. Several factors listed as connecting factors in *Leone* and *EM Technologies*, such as the location of witnesses and the applicable law, are factors relevant to the *forum non conveniens* analysis. In the *forum non conveniens* analysis, the court, after having determined it has jurisdiction, considers whether it should exercise discretion to stay the action because another forum would be clearly more convenient to adjudicate the dispute between the parties. Including these factors in the discussion of *jurisdiction simpliciter* fosters confusion as to the applicable bases for jurisdiction notwithstanding that the court reached a supportable outcome in both cases.

This confusion should be avoided. Uncertainty in this area of the law is expensive and unfair for litigants on both sides. Ambiguity with respect to whether jurisdiction exists on a particular set of facts generates unnecessary motions when jurisdiction is unsuccessfully challenged, and it wastes the time and money of both the litigants and the court system when actions are mistakenly commenced in the wrong forum.

The presumptive connecting factors for contract claims should begin from analogy to the factors for tort claims described in *Van Breda*, as was done in *Ferrara Pan Candy*. Where new presumptive connecting factors must be created, this should be done deliberately and with precision. It is hoped that the development of the law in this area remains guided by the principles of order and predictability set out by the Supreme Court.

Order and Fairness

In *Van Breda*, Justice LeBel held, "Parties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect".[21]

For the sake of fairness and efficiency, the assumption of jurisdiction should be based on clear, consistent connecting factors that the foreign defendant is able to identify in advance. Jurisdiction should not be based on factors that are, from the defendant's perspective, unknown, arbitrary, and impossible to predict.

The decisions of the Court of Appeal for Ontario in *Tamminga* and *Trillium* demonstrate the application of these principles by requiring a nexus between the foreign defendant and the Ontario contract before the contract could create jurisdiction over the defendant. The decisions in *Ferrara Pan Candy*, *EM Technologies*, and *Leone* demonstrate that there remains uncertainty in the interpretation of the Supreme Court's *Van Breda* directive with respect to pure contract claims. The courts must continue to apply a disciplined list of specified presumptive connecting factors to meet the objectives of *Van Breda* when assessing their jurisdiction in contract disputes.

[*Editor's note*: **Pamela Sidey** and **Guy White** practise corporate and commercial litigation in the Toronto office of Norton Rose Fulbright Canada LLP. Ms. Sidey's practice focuses on complex contractual disputes, transnational litigation, and class actions. Mr. White represents clients in a variety of matters, including shareholder litigation, contract and intellectual property disputes, and product liability cases. He is a member of Norton Rose Fulbright Canada's Transnational Litigation team and acted for the non-resident defendants in *Tamminga v Tamminga*.]

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1 *Van Breda*, [2012] S.C.J. No. 17, 2012 SCC 17.
2 *Ibid*., "Court Summary".
3 *Ibid*., "Court Summary" and paras. 1–125 *passim*.
4 *Ibid*., "Court Summary" and para. 90.
5 *Tamminga*, [2014] O.J. No. 2915, 2014 ONCA 478.
6 *Trillium*, [2014] O.J. No. 3096, 2014 ONCA 497.

[7] *Ferrara Pan Candy Co.*, [2014] A.J. No. 679, 2014 ABQB 384.
[8] Alta. Reg. 124/2010.
[9] *Van Breda*, *supra* note 1, para. 90. The four presumptive connecting factors for a tort claim are: "(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".
[10] *Ferrara Pan Candy*, paras. 33–39.
[11] *Leone*, [2013] O.J. No. 1428, 2013 ONSC 1849.
[12] *EM Technologies Inc.*, [2013] O.J. No. 4249, 2013 ONSC 5849.
[13] *Leone*, *supra* note 11, paras. 12, 43.
[14] *Ibid.*, para. 52.
[15] *Ibid.*, paras. 48–49.
[16] *Van Breda*, *supra* note 1, para. 82.
[17] *Ibid.*, paras. 91–93.
[18] *Ibid.*, para. 91.
[19] *Ibid.*, para. 93.
[20] *Ibid.*, paras. 91–92.
[21] *Ibid.*, para. 73.

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