SUPREME COURT OF NOVA SCOTIA
Citation: *Brown v. Mar Taino S.A.*, 2015 NSSC 348

Date: 20151202
Docket: Hfx No. 407094
Registry: Halifax

Between:

Arthur Reginald Brown

Plaintiff

v.

Mar Taino S.A., Cadena Mar S.L., Thomas Cook Travel Inc., and Vision 2000 Travel Management Inc.

Defendants

Decision on Jurisdiction

Judge: The Honourable Justice Gerald R. P. Moir

Heard: June 2, 2015, in Halifax, Nova Scotia

Counsel: Brian J. Hebert, for the plaintiff
Arie Odinocki, for the defendants Mar Taino S.A. and Cadena Mar S.L.
Tyana Caplan, for the defendant Thomas Cook Travel Inc.

Moir J.:

[1] *Introduction*. Mr. Brown sued in Nova Scotia for injuries he suffered while staying at a resort in the Dominican Republic during March of 2012. Two of the named defendants, Mar Taino S.A., a Dominican corporation, and Cadena Mar S.L., a Spanish corporation, have some connection with the hotel. The owner is Tureymar S.A., another Dominican corporation. Cadena Mar owns Mar Taino and Tureymar.

[2] Mar Taino and Cadena Mar move for an order dismissing the action for want of territorial jurisdiction or staying the action on the basis of *forum non conveniens*.

[3] *Facts and Allegations*. Mr. Brown's nephew was to be married at the resort. Invited guests were directed to a Vision 2000 Travel Management Inc. website. The statement of claim describes Vision 2000 as a travel agency with offices in Calgary.

[4] Mr. Brown went on the Vision 2000 website using the computer at his home in Lingan, Cape Breton. Satisfied with what he saw, he called a person at Vision

2000, booked a package for him and his wife, and paid for it by giving Vision 2000 credit card information.

[5] Mr. Brown received an airline ticket with the trade name "Sunquest" on it and a voucher for seven nights at the resort. The Browns flew on a Thomas Cook airplane to the Dominican Republic, and a Sunquest representative took them to the resort.

[6] Mr. Brown went for breakfast at a restaurant in the resort. His chair collapsed, he fell backwards, and his neck became sore afterwards. Later, he observed other chairs to be defective, but hotel staff did not remove or replace them.

[7] It is alleged that Mr. Brown now suffers from chronic pain that was caused by the collapse. His statement of claim pleads the Dominican *Civil Code*. His causes are breach of contract by, and negligence of, Mar Taino as owner and operator. The statement of claim asserts that Cadena Mar "is responsible at law for the acts and omissions of [Mar Taino] as a result of the degree of control it exercised".

[8] The statement of claim also alleges contracts with Vision 2000 and Thomas Cook Travel Inc. and that they "had a common law and contractual duty to ensure

that the resorts and hotels to which they send their customers … are safe and free from hazards and are managed properly." Thomas Cook Travel Inc. has a Canadian subsidiary, Thomas Cook Canada, Inc. and it appears that it provided the package Mr. Brown bought from Vision 2000.

[9] Sunquest must be a trade name of Thomas Cook Travel, Thomas Cook Canada, or both. Thomas Cook Canada is not a party yet. Neither is Tureymar, the actual owner of the resort. No one suggested that the absence of apparent privies impedes determination of the issues. Without deciding whether they can be joined now, I am proceeding as if Thomas Cook Canada and Tureymar are bound.

[10] The Sunquest voucher exhibited to Mr. Brown's affidavit is titled "Hotel Voucher/Bon d'hébergement". Under "The Services/Les services", it says

> Majestic Elegance Punta Cana
> Sunquest Elite Jnr Suite w Jacuzzi
> All inclusive – Double Occupancy
> * Dur (7) night(s)/nuit(s)
> * From/Du 18 – Mar – 2012
> * To/Au 25 – Mar – 2012
>
> EBB Final Payment due 31 Oct 2011.

Under the title "Passenger(s)/Passager(s)", are the names of Mr. and Mrs. Brown.

[11] Let us recapitulate the parties and their involvement with the trip. Mr. Brown made a contract speaking over the telephone from Lingan with a person at Vision 2000 in Calgary. He paid Vision 2000 for a package that included lodgings at the resort. Under the trade name "Sunquest", Thomas Cook Travel, or its Canadian subsidiary, provided air and ground transportation and a voucher for a room, amenities, meals, and drinks at the resort. The Browns checked-in and the room, amenities, meals, and drinks were provided by the owner, Tureymar, or one if its related companies, the defendants, Mar Taino or Cadena Mar.

[12] Three other Nova Scotians witnessed the collapse. Nine Nova Scotians observed other unstable chairs. Three physicians treated Mr. Brown back home for his neck pain, and various physiotherapists have assisted him here.

[13] Mr. Ricardo Muňoz provided an affidavit. He is a vice president of the hotel. None of the corporations sued by Mr. Brown, nor Tureymar S.A., carry on business in Nova Scotia, own assets here, have employees here, or offer accommodations directly to the public here. Thomas Cook Travel Inc. promoted vacation packages including some involving the hotel, but the Dominican and Spanish corporations did not.

[14] The hotel offers rooms through tour operators. Mr. Brown was given a room because he bought a vacation package from a travel agent who does business with one of those tour operators, Thomas Cook Canada.

[15] Mr. Muňoz signed a contract on behalf of Tureymar S.A. and another company, Paimilla N.V. of the Dutch Antilles, with Thomas Cook Canada under which Thomas Cook Canada acquired the right to make reservations at the hotel during 2011 and 2012 and promised to pay for them.

[16] The agreement refers to Thomas Cook Canada as "Tour Operator" and Tureymar S.A. is "Owner". The principal office of Thomas Cook Canada named in the contract is 75 Eglinton Avenue East, Toronto.

[17] The agreement is "governed by the internal laws of the province of Ontario and the laws of Canada applicable therein." The parties "attorn to the jurisdiction of the Ontario courts for the purpose of any dispute between them."

[18] The first paragraph of the agreement provides the right to make bookings at the hotel. We need to see it in full:

> The Supplier agrees that Tour Operator is entitled to make bookings at the Hotel on behalf of Customers (hereinafter "Bookings") for rooms, facilities, meals and other services and Accommodations as specified herein and in Attachment B during the periods and at the rates specified therein. Supplier acknowledges that unless expressly otherwise provided in the "Cancellation/No Show Penalties"

> section in Attachment B Tour Operator does not guarantee Bookings and shall only pay for Bookings actually used by its Customers. Bookings for particular Departure Dates (as set forth in Attachment B) that are reserved pursuant to rooming lists or other notifications by the Tour Operator prior to the applicable Release Date (set forth in Attachment B) shall automatically be deemed confirmed by Supplier. Any Arrangements for particular Departure Dates that are not booked by the corresponding Release Dates shall automatically be released back to the Hotel and Tour Operator shall have no further obligations whatsoever with respect to the Accommodations so released.

[19] Although he is not a party to the tour operator's agreement, Mr. Brown relies on various others of its terms in support of his position on jurisdiction. He characterizes those in his written submissions:

> (a) the Resort would be operated and maintained to fully meet the requirements and standards to qualify as at least a 5-star hotel: Attachment A, section 4(i);
>
> (b) the services provided such as promptness of repairs would conform to a 5 star service level: Attachment A, section 4(i);
>
> (c) guests would not be accommodated in annexes or other buildings outside the Resort[']s main property: Attachment A, section 5;
>
> (d) they would provide alternative accommodations if the Resort was unable to accommodate guests in conformity with the Exclusive Booking Contract: Attachment A, section 6;
>
> (e) they would pay damages and compensation that may be due to guests and to reimburse Thomas Cook for all payments made by it to guests to rectify customer complaints alleging inferior standards or services, negligence or breach of the Exclusive Booking Contract: Attachment A, section 7;
>
> (f) they would only charge guests for extra services not included in the vacation packages and not for meals and other services included in vacation packages: Attachment A, section 8;
>
> (g) they would provide normal guests[’] services to guests who booked through Thomas Cook to the same level as all other guests: Attachment A, section 9;

(h) they would secure full insurance for all third party risks including risk of personal injury to guests and Thomas Cook[']s employees, agents and representatives: Attachment A, section 11;

(i) they would allow Thomas Cook[']s health and safety representatives access to the Resort for health and safety inspections: Attachment A, section 13;

(j) they would hold Thomas Cook and the guests who booked through Thomas Cook harmless and indemnity them from any losses arising from the negligence of Resort employees or the Resort owners and managers: Attachment A, section 14; and

(k) Thomas Cook's affiliates, subsidiaries and other tour operators arranged by Thomas Cook could also book accommodations and services at the Resort[.]

The summaries under (e) and (j) require a fuller understanding of the paragraphs involved:

7. The Supplier agrees to pay damages and compensation that may be due to Customers and to promptly reimburse the Tour Operator for all payments it makes with regard [sic, to] rectifying Customer complaints ("Customer Complaints") alleging inferior standards or service at the Hotel, or otherwise due to negligence of Supplier or in any way arising out of or related to a failure by Supplier to fulfill its obligations under this Agreement. In addition, in the event a Customer cancels as a result of any change in accommodation, Tour Operator, is entitled to deduct from any payment to Supplier the monetary compensation to such Customer that the Tour Operator deems appropriate and the full amount of any refund made in connection with such cancellation (including, without limitation, amounts for the air seat, the Travel Agency commission and the cost of any further compensation for which the Tour Operator may be liable).

14. Supplier hereby agrees to hold the Tour Operator, its employees, agents, representatives, customers and all other third parties ("TO Indemnitees") harmless and to indemnify and defend them against any claims, losses, expenses or costs incurred by the TO Indemnitees with regard to any and all claims or allegations arising out of or relating in any manner to: (i) breach of this Agreement; (ii) the negligence or fraud of Supplier, its agents, employees, contractors and/or suppliers; (iii) Customer Complaints; or (iv) any alleged failure on the part of the Supplier or the

> Hotel to comply with applicable regulations or law (including without limitation those referred to in paragraph 12).

[20] *Statutory Territorial Jurisdiction*. There are various ways in which this court may have "territorial competence" under s. 4 of the *Court Jurisdiction and Proceedings Transfer Act*. The only one that can apply on the facts of this case is s. 4(e), "there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based".

[21] The invocation of s. 4(e) brings about the operations of s. 11. Section 11 allows for territorial jurisdiction whenever there is a real and substantial connection, but it also provides a rebuttable presumption of real and substantial connection in any of twelve sets of circumstance.

[22] Paragraph 11(e) provides a rebuttable presumption where the proceeding:

> (e) concerns contractual obligations, and
>
> (i) the contractual obligations, to a substantial extent, were to be performed in the Province,
>
> (ii) by its express terms, the contract is governed by the law of the Province, or
>
> (iii) the contract
>
> (A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
>
> (B) resulted from a solicitation of business in the Province by or on behalf of the seller … .

And, paragraph 11(g) provides a rebuttable presumption where the proceeding "concerns a tort committed in the Province".

[23] I propose to discuss the common law on this subject, and some recent decisions made in similar circumstances, before coming back to the *Court Jurisdiction and Proceedings Transfer Act*.

[24] *Common Law Territorial Jurisdiction*. Since at least *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, a first principle of territorial jurisdiction in Canada depends on there being a real and substantial connection between the province or territory, and the defendant or the subject of the suit. For a time, it seemed the connection was to be determined flexibly through a balancing of many factors, including fairness to the parties.

[25] Writing in *Li v. MacNutt & Dumont*, 2015 NSSC 53 at paras. 26 to 37, Justice Wood discussed the reversal of the flexibility line of thinking by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17. Justice Wood said that " … the Supreme Court wanted to move away from a regime where jurisdiction was decided on a discretionary basis to a set of rules which gave a reasonable degree of predictability of outcome": *Li* at para 31.

[26] Justice Wood's comments and references are there to be read. I do not propose repetition, just my respectful acceptance. I will emphasize the constitutional nature of the first principle and *Van Breda's* contribution being to the common law. I will summarize the common law as settled by *Van Breda*. Then, I will come back to our *Court Jurisdiction and Proceedings Transfer Act* and discuss its relationship with the common law.

[27] Firstly, the principle of real and substantial connection is constitutional. It is among the limits upon "the legitimate exercise of state power, be it legislative or adjudicative": *Van Breda* at para. 31, continuing:

> 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.

A constitutional principle limiting state power must resist flux.

[28] Secondly, *Van Breda* was about common law. Justice LeBel wrote for the Court. He borrowed, to some extent, from those jurisdictions that had legislated on the subject of territorial jurisdiction, but *Van Breda* arose in Ontario and the Court settled the common law. It did not interpret a statute. However, the principle

being constitutional, this aspect of the common law does not necessarily give way to statute.

[29] The common law approach to territorial jurisdiction adopted by the Court in *Van Breda* includes real and substantial connection as one of the first principles. The Court prescribed "presumptive connecting factors for tort cases" (para. 80). The presumptions work this way:

> - 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 … . [para. 80]
> - 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. [also, para. 80]
> - 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. [para. 81]
> - 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. [also, para. 81]

The presumptive factors in tort are set out in para. 90:

> (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.

[30] The fourth of these presumptions is the focus of this decision. About rebutting that presumption, Justice LeBel said at para. 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.

[31] With the basic principles in mind, let us consider some recent and similar cases on territorial jurisdiction at common law. *Van Breda* itself is such.

[32] The Supreme Court decided two appeals in *Van Breda*, both of which were brought by Club Resorts. It managed several resort hotels, including two in Cuba. Ms. Van Breda sued in Ontario after suffering catastrophic injuries when an exercise machine collapsed at a beach belonging to one of the Cuban hotels. The second appeal involved an Ontario suit by the Estate of Claude Charron. Dr. Charron died when scuba diving at the other Cuban hotel.

[33] In Ms. Van Breda's case, a travel agent in Ontario had authority to recruit tennis and squash players to give lessons at Club Resorts hotels in exchange for

accommodations. Through their agent, Club Resorts contracted with Ms. Van Breda's spouse, and the terms included accommodations for him and Ms. Van Breda. The agent, Ms. Van Breda, and her spouse were in Ontario when the contract was made.

[34] At para. 117, Justice LeBel concluded that a presumptive connecting factor applied: "a contract made in Ontario that is connected with the litigation". He observed, "The events that gave rise to the claim flowed from the relationship created by the contract."

[35] Dr. Charron purchased an all-inclusive package for the other Cuban hotel, which featured a scuba diving program. He purchased the package from a travel agent in Ontario, where he and his family lived.

[36] Justice LeBel confirmed, at para. 119, that neither residence in Ontario nor losses suffered on return supported Ontario having territorial jurisdiction:

> 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.

"However, the evidence does support the presumptive connecting factor of carrying on business in the jurisdiction.": para. 120. Club Resorts had "an active commercial presence in Ontario that was not limited to advertising campaigns targeting the Ontario market", and Dr. Charron booked as a result of the "significant commercial activities in Ontario": also, para. 120.

[37] Mr. Brown relies on *Toews v. First Choice Canada Inc.*, 2014 ABQB 784 (Master Schulz). Ms. Toews and her husband, who were residents of Alberta, bought a holiday package from a *Canada Business Corporations Act* company that "provides holiday and travel services in Alberta": para. 5.

[38] The package was for nine days in February, 2009 at the Palladium Hotel, Punta de Mita, Mexico. It was booked and paid for over the internet through the Toews' computer and the holiday service company's websites.

[39] The package was to include a hotel room, food, beverages, entertainment, and air travel. The travel service company in Alberta was able to provide the room and other accommodations at the hotel because it had a booking contract.

[40] The booking contract was not directly with the owner of the hotel. However,

> What is clear from the not-so-clear set of inter [relationships] is that there is a chain of corporate entities that have contracted with each other to provide the accommodations and services that were ultimately contracted for and provided to the Plaintiffs through the Holiday Contract, a contract made in Alberta. [para. 37]

[41] Ms. Toews was severely injured by contaminated drinking water provided to her at the hotel.

[42] Master Schulz took *Levasseur v. Authorité de marchés financiers*, 2012 NBQB 409, leave to appeal dismissed [2013] N.B.J. 32 and *Schram v. Nunavut*, 2013 NBQB 190 as authorities for three propositions:

> a) not all parties to the action must be parties to the contracts involved in the action;
>
> b) the action need not be brought in contract;
>
> c) to establish the rebuttable presumption, a tort claimant is only required to establish that a contract connected with a dispute was made in the jurisdiction--not that a contract upon which the claim is based was made in the jurisdiction.

Toews, para. 38.

[43] Master Schulz recognized that not just any contractual connection with the dispute will support territorial jurisdiction. She said at para. 39 of *Toews*:

> While both *Levasseur* and *Schram* involved inter-provincial parties, there is no reason why these principles should not apply to an international non-party, provided any connection made out is not weak or tenuous such that the Court is not "sweeping into [the] jurisdiction claim[s] that have only a limited relationship with the forum": *Van Breda* at para 89.

[44] The holiday and the booking contracts in *Toews* were made in Alberta and were governed by Alberta law: para. 53. The owner of the hotel, while not a party to either contract was identifiable in the contract as a potential tort defendant: para. 54. Through the contracts, the Toewses "acquired the right to stay at the Palladium Hotel and be provided with food and beverages, which included … water bottles … supplied by the Palladium Hotel" para. 54. Although it was not a party to the booking contract, Master Schulz found the owner of the hotel to be bound by it: para. 55. "Further, it is the chain of contracts, operating together, that led to the [Toewses'] right to stay at the hotel for their vacation and receive the all-inclusive services, including the purported water bottle in the mini-bar" para. 56.

[45] In these circumstances, "there are contracts made in Alberta that are connected with the alleged tort": para. 57.

[46] Mar Taino and Cadena Mar rely on *Export Packers Co. v. SPI International Transportation*, 2012 ONCA 481, a decision recorded by endorsement. Entrepôt du Nord Cold Storage Inc. stored pork ribs in Quebec for an Ontario owner. Three contracts about the ribs were made in Ontario. In one, the owner of the ribs contracted with SPI International for the latter to broker transportation to a Florida

customer. In another, SPI contracted with a shipper. Thirdly, there was a common carrier contract.

[47] A scoundrel pretending to be authorized by SPI took delivery of the ribs from Entrepôt in Quebec and made off with them. The owner sued the broker, SPI. SPI brought third party proceedings against Entrepôt on the ground that it negligently accepted the authenticity of the scoundrel.

[48] The Ontario Superior Court of Justice dismissed the third party claim summarily on the basis that Ontario lacked territorial jurisdiction. SPI appealed.

[49] SPI relied primarily on the fourth presumption. Paragraphs 14 to 16 of the endorsement read as follows:

> 14 The three contracts relied upon by the appellant relate to arrangements between the owner, the broker and the proposed carrier of the cargo. They have no connection to EDN other than they anticipate that the cargo would be picked up at EDN's warehouse in Quebec. The dispute in issue between SPI and EDN relates solely to the alleged negligence of EDN in releasing the cargo. The contracts relied upon do not address the issue of release of the cargo by EDN as storer. That dispute will be resolved according to the laws of Quebec.
>
> 15 Moreover, there is a contract that is, at least somewhat, connected to the dispute between SPI and EDN. EDN entered into a contract with Trahan at the time Trahan stored the cargo at EDN's warehouse. That contract governed EDN's role as a storer of the cargo. It provided that in the event of a dispute, the laws of Quebec would apply. It further provided that Quebec would be the forum for resolving disputes. After purchasing the cargo from Trahan, Export did not do anything to change the basis pursuant to which EDN stored the cargo.

> 16 In these circumstances, we are not satisfied that there is a contract made in Ontario sufficiently connected with the dispute involving EDN so as to raise a presumption of a real and substantial connection to Ontario.

[50] Mar Taino and Cadena Mar also rely on *Haufler v. Hotel Riu Palace Cabo San Lucas*, 2013 ONSC 6044. It, too, involved a Sunquest all-inclusive vacation package put together by Thomas Cook Canada, but the argument in that case was for the carrying on business presumption, not contract.

[51] Ms. Haufler's friend bought a package for the two of them from a travel agent in Ontario. The agent got the package from Thomas Cook Canada. It included a room at a hotel on Cabo San Lucas owned by the defendant. The room came by way of a sale of a large block of rooms by the hotel to a Spanish company and the sale of a fraction of those to Thomas Cook Canada, who put the package together for the travel agent.

[52] Ms. Haufler bought a sightseeing tour from an independent agent who operated at the hotel. It involved driving an ATV. Ms. Haufler was badly injured. She sued in Ontario.

[53] Thomas Cook Canada had no authority to bind the hotel and, therefore, it was not an agent of the hotel: paras. 60 and 61. On the contrary, "… the Hotel has

engaged in an outright sale of rooms to Thomas Cook": para. 62. Thomas Cook was an independent contractor: also, para. 62. It had no authority to bind the hotel: para. 63.

[54] The hotel did not carry on business in Ontario by reason of its relationship with Thomas Cook Canada.

[55] How strong a connection is needed for the presumption based on a contract? The statements made at para. 16 of *Export Packers*, about "sufficiently connected" and para. 39 of *Toews* about "any connection made out is not weak or tenuous" suggest that the strength or weakness of a connection between a contract made in the jurisdiction and a tort suffered abroad is assessed to see if the presumption arises.

[56] However, *Van Breda* discusses weakness of the connection in reference to rebuttal of the presumption (see para. 96). It seems the presumption arises with proof of a contract made in the province connected in some way with the dispute. Then, a weak connection may rebut the presumption. That interpretation of *Van Breda* prevailed in the *Levasseur* case Master Schulz cited in support of her three prepositions.

[57] Mr. Levasseur and more than fifty others brought an action against the Quebec securities regulator and others alleging negligent investigation of a Ponzi scheme instigated by Quebec issuing agents. (A related action was brought against the New Brunswick Securities Commission. See *Levasseur v. New Brunswick Securities Commission*, 2012 NBQB 137.)

[58] The Quebec securities regulator moved to set aside service *ex juris*. Contracts between one of the Quebec issuing agents and most of the plaintiffs were found to have been made in New Brunswick. They were part of the Ponzi scheme.

[59] Justice LaVigne was of the view that proof of a contract made in the province that has any connection with the dispute gives rise to the fourth presumption, and the defendant's burden of rebutting the presumption arises: para. 23. She said that "the court must look not for the strongest possible connection with the forum, but for a minimum connection sufficient to meet the requirement that the matter be linked to the forum": para. 57, by which she means, in Justice Sharp's words, "a minimum connection sufficient to meet the constitutional requirement that the matter be linked to the forum": para. 55.

[60] Justice LaVigne said, "The wording of the contracts will be at the heart of the debate when comes the time to determine if the defendants were negligent, and

also to assess the damages": para. 59. Consequently, "The applicants have failed to rebut the presumption of jurisdiction that arises where the fourth connecting factor applies": para. 61.

[61] What does "contract made in the province" mean? The moving parties argue that the contract between Mr. Brown and the travel agent was made in Alberta, the location at which the agent heard Mr. Brown's acceptance of the agent's offer over the telephone. Mr. Brown argues that the agent provided the acceptance, which he heard in Nova Scotia. So, the contract was made in Nova Scotia.

[62] On the evidence I have, the most probable conclusions are that the travel agent's website provided an invitation to treat, Mr. Brown saw the invitation and obtained terms from the agency, he accepted the agency's offer by providing credit card information, and acceptance was therefore heard by the agency in Alberta. Therefore, the contract was made in Alberta as far as the principles for determining applicable law are concerned.

[63] Some have taken the fourth presumption in *Van Breda* to mean that the connecting contract has to meet the criteria by which applicable law is determined for contracts that are silent on that subject. See, *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2013 ONSC 2289. This leads to criticism that

Van Breda imported rather artificial rules into territorial competence, such as the post box rule or the rule about hearing an acceptance over the telephone.

[64] Two points need to be made. Firstly, there was no controversy in *Van Breda* about the contract having been made in Ontario. The negotiations, the offer, and the acceptance all happened in Ontario. Second, unlike territorial competence, the principles for determining applicable law must result in one place, and one place only. Inflexibility or artificiality may serve that result.

[65] In my opinion, the fourth presumption in *Van Breda* does not restrict "made" to the principles for establishing applicable law. It has a more general meaning in line with ordinary speech. Whether the offer was made or the acceptance was communicated here or elsewhere, the making of the offer or its acceptance in Nova Scotia is enough to say the contract was made in Nova Scotia (and another place).

[66] We return to the statute, but that takes us back to the common law, as will be seen.

[67] *Application of the Statute*. The presumption in s. 11(e) of the *Court Jurisdiction and Proceedings Transfer Act* concerns claims in contract, not tort. Further, the presumption does not concern place of contract. Instead, the principle is place of substantial performance in s. 11(e)(i), with express adoption of Nova

Scotia law and certain contracts for the sales of goods in (ii) and (iii). Whatever the contract between Mr. Brown and the hotel may have been, substantial performance occurred in the Dominican Republic. Subsection 11(e) does not assist Mr. Brown.

[68] The suit does not concern "a tort committed in the Province", s. 11(g). Therefore, Mr. Brown relies on the opening words of s. 11, "Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection", to bring his claim within s. 4(e). That is to say, we are in the same circumstances as in *Bouch v. Penny*, 2009 NSCA 80, which Justice Wood described at para. 26 of *Li v. MacNutt & Dumont*:

> None of the circumstances in s. 4(a) to (d) of *CJPTA* existed nor could the plaintiff establish any of the presumptive circumstances giving rise to a real and substantial connection under s. 11.

[69] The opening words of s. 11 are just a door into the common law of territorial jurisdiction. Otherwise, the statute would invite an expansion of the constitutional limits on judicial power. Before applying the common law to the case at hand, this is a good place to distinguish another decision upon which Mr. Brown relies.

[70] Mr. Brown says that in *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, "the Supreme Court of Canada held that suffering indirect damage

(economic loss) in Quebec was a sufficient connecting factor". The decision came after *Van Breda* and the implication of Mr. Brown's argument is that suffering damage at home has been revived as a connecting factor for jurisdiction of the home court.

[71] Justices LeBel and Wagner wrote jointly for the Court in *Infineon Technologies*. They did not even mention *Van Breda*. That is because the two cases deal with separate subjects.

[72] Article 3148(3) of the *Code civil du Québec* confers territorial jurisdiction in a personal action of a patrimonial nature where "damage was suffered in Québec", among other specified circumstances. The jurisdiction is statutory, and Article 3148(3) is substantive rather than procedural.

[73] The Court recognized the legislative nature of conflicts laws in Quebec at para. 39 of *Van Breda* and contrasted the situation in Ontario at para. 43. Ontario Rule 17.02 about service *ex juris* does refer to damage suffered in the province, but this did not influence the outcome in *Van Breda* because the Rule "is purely procedural in nature and does not by itself establish jurisdiction in a case": para. 43. For the outcome, see para. 89 of *Van Breda*.

[74] Nova Scotia got rid entirely of the need for permission to serve *ex juris* with the 1972 Rules. The current Rules allow for challenges to jurisdiction in Rules 4.07 and 5.14. Our Rules are not necessarily restricted to the purely procedural: *Judicature Act*, s. 47(3A), but they say nothing about what may found jurisdiction.

[75] In conclusion, there is no legislation in Nova Scotia that assists Mr. Brown except the road back to the common law made by the opening words of s. 11 of the C*ourt Jurisdiction and Proceedings Transfer Act*.

[76] *Application of the Common Law*. The only common law presumptive factor that could found territorial jurisdiction in this court for Mr. Brown's claim is "a contract connected with the dispute was made in the province": *Van Breda*, para. 90. There were several contracts that supported his trip to the Dominican Republic. These included the contract between the hotel and Thomas Cook Canada. There must have been a contract between Thomas Cook Canada and the Vision 2000 travel agency. And, there was the contract between Mr. Brown and the agency.

[77] None of these contracts have anything to do with Nova Scotia except Mr. Brown's agreement to purchase a package from the travel agency. Particularly, the contract between Thomas Cook Canada and Tureymar provides no connection to

Nova Scotia. It allows Thomas Cook Canada to make, and pay for, bookings for customers anywhere. It was negotiated in Ontario and the Dominican Republic, it adopted Ontario law, and it attorned to the Ontario courts. The terms relied upon by Mr. Brown are about performance, and they are not enforceable by him as a matter of contract and they are not enforceable in Nova Scotia by the parties to the contract.

[78] So, we ask again, how strong a connection is needed for the presumption about a contract made in the province? I respectfully adopt Justice LaVigne's "the court must look not for the strongest possible connection with the forum, but for a minimum connection sufficient to meet the requirement that the matter be linked to the forum", which she said in the context of Justice Sharp's words "a minimum connection sufficient to meet the constitutional requirement that the matter be linked to the forum". See para. 59 above.

[79] I have emphasized the constitutional nature of the requirement for a link. See para. 27 above. The link needs to be strong enough to justify the judicial intrusion of Nova Scotia into an alleged tort or delict where the facts occurred in, and the applicable law is of, a foreign sovereign nation, the Dominican Republic. In my assessment, the presumption raised by the contract is rebutted by its merely

partial making in Nova Scotia, and its remoteness from the foreign defendants, the site of the injury, and the applicable law.

[80] I respectfully disagree with the concept of a chain of contracts leading to the traveller's right to a room as expressed in the *Toews* case. Mr. Brown did not acquire a right to a room until he was in the Dominican Republic. There is no hint in the evidence of actual or implied agency. Had the hotel refused the voucher, Mr. Brown would not have had recourse against the hotel. His recourse would have been against the only party with whom he had contracted, the travel agency in Alberta. The travel agency's recourse would have been against Thomas Cook Canada, who in turn would have had recourse under its contract with the hotel.

[81] The facts at hand are very close to *Haufler v. Hotel Riu Palace Cabo San Lucas*, where connecting contract was not even considered and the hotel was found not to carry on business in Ontario by virtue of its relationship with Thomas Cook Canada. The facts are also similar to the Charron facts in *Van Breda*. Contrast the contractual connection for Ms. Van Breda and the lack of such a connection through the package purchased in Ontario by Dr. Charron. (Unlike the hotel sued in Ontario by Dr. Charron, the hotel in the case at hand does not carry on business in the jurisdiction.)

[82] I do not accept Mr. Brown's argument that various terms in the booking contract between the hotel and Thomas Cook Canada support the territorial jurisdiction of Nova Scotia. The chain of contracts concept makes it seem as though the contract made by Mr. Brown in Nova Scotia with the travel agent in Alberta resulted directly from the contract between the hotel and the tour operator and the contract between the tour operator and the travel agent. Consumer and commercial contracts seldom work that way. Most are supported by a contractual web, not a contractual lineage.

[83] In the case at hand, our attention is focused on just the three contracts when, in fact, each is supported by numerous other contracts. There would have been contracts with an air carrier, insurers, utility suppliers, food and beverage suppliers, ground transporters, numerous employees, and others. To stray from the contract made in the province into this web of contracts would defeat the constitutional requirement for restraint when the court of one state is invited to insinuate itself into an affair that took place in another sovereign state.

[84] *Van Breda* requires us to focus on a contract made in the province, rather than one of the supporting contracts not made in the province, when deciding whether the connection to Nova Scotia is strong enough to support territorial jurisdiction. Applying Justice LaVigne's approach to strength of connection, the

contract between Mr. Brown in Nova Scotia and the Alberta travel agent is too weakly related to the alleged delict in the Dominican Republic to support territorial jurisdiction of the Nova Scotia court.

[85] *Conclusion*. Any presumption of territorial jurisdiction raised by the contract made by Arthur Brown in Nova Scotia and Vision 2000 Travel Management Inc. in Alberta is rebutted by the fact that contract was made only partly in Nova Scotia coupled with the remoteness of that contract from:

- the facts of the alleged tort or delict, which took place in the Dominican Republic
- the companies allegedly responsible for the delict, who do not do business in Nova Scotia
- the law of the Dominican Republic, which applies to the alleged delict.

No other presumption of territorial jurisdiction assists Mr. Brown.

(Had territorial jurisdiction been established, I would not have stayed the action on the ground of *forum non conveniens*. The suffering of loss in Nova Scotia and the number of Nova Scotia witnesses would have outweighed the considerations in

favour of the Dominican Republic, including the presence there of the hotel's witnesses and the applicability of the Republic's laws.)

[86] Therefore, I will allow the motion of Mar Taino S.A. and Cadena Mar S.L. to dismiss the action as against them. The parties may address costs in writing if necessary.

Moir J.